STATE OF IDAHO)
County of KOOTENAI)ss
FILED Jan. 26, 2021
AT 1:30 O'clock P. M
CLERK, DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

RODNEY CARLTON HARRELL,

Defendant.

Case No. **CR28-20-7596**

MEMORANDUM DECISION AND ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Defendant RODNEY CARLTON HARRELL's Motion to Dismiss is **DENIED**.
Laura McClinton, Dep. Prosecuting Attorney, lawyer for the plaintiff.
Jay Logsdon, Dep. Public Defender, Coeur d'Alene, lawyer for defendant Harrell.

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I. FACTUAL BACKGROUND.

This matter is before the Court on a Motion to Dismiss for Violation of Right to a Speedy Trial filed by defendant, Rodney Carlton Harrell (Harrell), on December 23, 2020.

On May 26, 2020, Harrell was arraigned before Magistrate Judge Dan McGee on charges of Trafficking in Methamphetamine or Amphetamine, Trafficking in Marijuana and Drug Paraphernalia, based on events which allegedly occurred the previous day, May 25, 2020. At all times since Harrell was arrested on May 25, 2020, Harrell has remained in custody at the Kootenai County Jail. Judge McGee established bond at $150,000.00. At that May 26, 2020, hearing, Harrell was appointed an attorney, the Kootenai County Public Defender.

On June 5, 2020, a timely (I.C.R. 5.2(a)) preliminary hearing was held before Magistrate Judge Robert Caldwell, at the conclusion of which Harrell was bound over to District Court to stand trial, and the undersigned was assigned to preside over Harrell's case. On June 9, 2020, this Court sent a Notice of Hearing, scheduling Harrell's arraignment before this Court on June 18, 2020. On June 18, 2020, Harrell was arraigned and he pled not guilty. This Court scheduled a two-day jury trial to begin on August 10, 2020. At the time of the June 18, 2020, arraignment, there was in effect an Order from the Idaho Supreme Court which forbade criminal jury trials from taking place until August 3, 2020. Order April 22, 2020, 1 ¶ 2. At the June 18, 2020, arraignment, neither Harrell nor his attorney made any statement that they wished to enforce Harrell's right to a speedy trial. During this same general time period, on June 8, 2020, counsel for Harrell filed a Motion to Suppress and the next day filed a Notice of Hearing scheduling Harrell's Motion to Suppress for June 18, 2020. On June 15, 2020, counsel for Harrell filed a Motion to Continue the June 18, 2020, hearing on the Motion to Suppress. The Court granted Harrell's Motion to Continue, and Harrell's Motion to Suppress was rescheduled for July 29, 2020. On July 22, 2020, Harrell filed a Second Motion to Continue Hearing, asking that the hearing scheduled for July 29, 2020, be continued at least three weeks from that date to allow Harrell's drug dog expert time to prepare a report. Second Mot. to Continue Hr'g 1. Were such a continuance to have been granted, Harrell's jury trial scheduled for August 10, 2020, could not have taken place as scheduled. On July 28, 2020, this Court held a hearing on Harrell's Second Motion to Continue Hearing, and denied such motion, stating that Harrell's drug dog expert's report had nothing to do with the length of the stop, and that once the report from the drug dog' expert was obtained by Harrell, a motion to suppress based on that ground could be heard at a later time. The July 29, 2020, hearing on Harrell's Motion to Suppress was held, at the conclusion

of which this Court denied the motion. At no time during that lengthy motion to suppress hearing did Harrell or his attorney mention Harrell's desire to enforce his right to a speedy trial. On July 24, 2020, the Idaho Supreme Court issued an Order which extended its prohibition of criminal jury trials until September 14, 2020. Order, July 24, 2020, 1 ¶ 2. On August 5, 2020, this Court held a pretrial conference in Harrell's case. At that hearing, consistent with the Idaho Supreme Court's July 24, 2020, Order, this Court scheduled Harrell's jury trial to begin September 21, 2020, possibly September 28, 2020, with jury selection to occur on either Friday, September 18, 2020, or Friday, September 25, 2020. At no time during that August 5, 2020, pretrial conference did Harrell or his attorney mention Harrell's desire to enforce his right to a speedy trial. On August 19, 2020, this Court held a hearing on the plaintiff's motion to join Harrell's case with co-defendants Paul Stonecypher, Kootenai County case No. CR28-20-7593, and Tabitha Mosca, Kootenai County Case No. CR28-20-7595. At the conclusion of that hearing the Court granted the plaintiff's motion to join only for purposes of trial. Since that time, both Stonecypher and Mosca have pled guilty. At no time during that August 19, 2020, hearing on joinder did Harrell or his attorney mention Harrell's desire to enforce his right to a speedy trial. Two juries were selected on September 18, 2020, and those two jury trials were held during the week beginning September 21, 2020. Those two cases had a higher priority than Harrell's. Due to high infection rates in Kootenai County and the restrictions imposed by the Idaho Supreme Court, the September 28, 2020, trial date in Harrell was vacated the morning of September 25, 2020, just as jury selection was scheduled to begin in Harrell's case. On September 28, 2020, this Court scheduled a pretrial conference in Harrell's case for October 14, 2020. At that October 14, 2020, pretrial conference, the Court addressed plaintiff's Motion to Set for a Bench Trial (which was filed on October 9, 2020), to which counsel for defendant objected verbally at that October 14, 2020,

hearing. Accordingly, the Court denied the plaintiff's Motion to Set for a Bench Trial. The Court then had a discussion on the record as to whether the parties wished to have a jury trial in this case occur in Shoshone County, Idaho. At that time, Shoshone County had infection rates which would have qualified to have a criminal jury trial. Counsel for plaintiff agreed to such arrangement, and counsel for Harrell stated he would have to check with his client. Harrell was present at that hearing via Zoom. Counsel for Harrell never got back to the Court on trying Harrell's jury trial in Shoshone County. At no time during that October 14, 2020, pretrial conference did Harrell or his attorney mention Harrell's desire to enforce his right to a speedy trial. Harrell's trial remained set for October 19, 2020, as a first-priority trial setting. Due to high infection rates in Kootenai County and the restrictions imposed by the Idaho Supreme Court, the October 19, 2020, trial date in Harrell was vacated on October 16, 2020, and was rescheduled for a jury trial beginning November 16, 2020, and a pretrial conference on November 10, 2020. On November 9, 2020, the Idaho Supreme Court issued an Order which prohibited all jury trials until January 4, 2020. Order, November 9, 2020, 2. At the November 10, 2020, pretrial conference, due to the November 9, 2020, Order and due to high infection rates in Kootenai County and the restrictions imposed by the Idaho Supreme Court, this Court re-set Harrell's jury trial for January 19, 2021, and a pretrial conference on January 13, 2021. At no time during that November 10, 2020, pretrial conference did Harrell or his attorney mention Harrell's desire to enforce his right to a speedy trial. On December 16, 2020, Harrell, through his attorney, filed a "Continuing Demand for Speedy Jury Trial" in which Harrell, "hereby reaffirms his demand for a speedy jury trial." Continuing Demand for Speedy Jury Trial 1. In that document, Harrell requested a hearing. *Id.* at 2. However, Harrell never noticed up a hearing on such demand. On December 14, 2020, the Idaho Supreme Court issued its Order, prohibiting all civil and criminal jury trials "until further order

of this Court." Order, December 14, 2020, 2. The Idaho Supreme Court went on to state, "This order shall be reconsidered no later than March 1, 2021." *Id.* As mentioned above, on December 23, 2020, defendant filed his Motion to Dismiss for Violation of Right to a Speedy Trial. At the January 13, 2021, pretrial conference, due to the December 14, 2020, Order, and due to high infection rates in Kootenai County, this Court rescheduled Harrell's trial to begin on March 15, 2021, with a pretrial conference scheduled for March 2, 2021. Harrell's trial has a first priority for the week of March 15, 2021. At no time during that January 13, 2021, pretrial conference did Harrell or his attorney mention Harrell's desire to enforce his right to a speedy trial.

Oral argument on Harrell's Motion to Dismiss for Violation of Right to a Speedy Trial was held on January 25, 2021, at the conclusion of which this Court took the matter under advisement. At oral argument, the Court asked counsel for Harrell when, how and where he had made it clear to the Court that Harrell wished to exercise his right to a speedy trial, the Court noting that Harrell, in his briefing, claimed at three separate occasions that he had asserted his right to a speedy trial on May 28, 2020. Corrected Mot. to Dismiss for Violation of Right to a Speedy Trial, 2, 15, 31. Counsel for Harrell responded that it was in his Notice of Appearance, Request for Timely Preliminary Hearing, Motion for Bail Reduction and Notice of Hearing which was filed on May 28, 2020. The Court finds that nowhere in that document are the words "speedy trial" mentioned. The only pertinent portion of that document that this Court can find is the last paragraph, which reads in part:

> Notice is further given that the Defendant herewith asserts all rights accorded him or her under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and under Article I, § 13 of the Constitution of the State of Idaho and all prophylactic measures imposed upon the State pursuant to said constitutional provisions; including, but not necessarily limited to, the right to remain silent and the right to counsel.

Notice of Appearance, Req. for Timely Prelim. Hr'g, Mot. for Bail Reduction and Notice of Hr'g 2. On the date of hearing (January 25, 2021), this Court in a matter of minutes looked at the case file for all other criminal matters heard that day and to be heard the next day (January 26, 2021), and that language was contained in that document in each case assigned to the office of the Kootenai County Public Defender, not only Harrell's assigned public defender, but five others. In Harrell's Corrected Motion to Dismiss for Violation of Right to a Speedy Trial, he claims, among other things, that his rights under Article I Section 13 of the Idaho Constitution were violated (Corrected Mot. to Dismiss for Violation of Right to a Speedy Trial 17-27), as well as his rights under the Sixth Amendment to the United States Constitution. *Id.* at 27-38.

On December 23, 2020, defendant filed his Motion to Dismiss for Violation of His Right to a Speedy Trial. This included a memorandum of 38 pages. On January 11, 2021, defendant filed his Corrected Motion to Dismiss for Violation of His Right to a Speedy Trial. This included a memorandum of 39 pages. On January 25, 2021, the morning of oral argument on defendant's motion to dismiss, plaintiff filed its Memorandum in Opposition to Motion to Dismiss for Violation of Right to a Speedy Trial. No objection was made by counsel for Harrell as to the timeliness of the plaintiff's memorandum. Accordingly, the Court has read plaintiff's memorandum.

II. STANDARD OF REVIEW.

Whether there was an infringement of a defendant's right to speedy trial presents a mixed question of law and fact. *State v. Davis*, 141 Idaho 828, 835, 118 P.3d 160, 167 (Ct. App. 2005) citing *State v. Clark,* 135 Idaho 255, 257, 16 P.3d 931, 933 (2000). Idaho appellate courts will defer to the trial court's findings of fact if supported by substantial and competent evidence, and will exercise free review of the trial court's conclusions of law. *Id.*

III. ANALYSIS.

This Court will first address the contention by Harrell that I.C.R. 28 is unconstitutional. Next this Court will address the contention by Harrell that his rights to a speedy trial have been violated under the United States Constitution. Finally, this Court will address Harrell's contention that his rights to a speedy trial have been violated under the Idaho Constitution and Idaho Code § 19-3501. Additionally, this Court will discuss what it has found from other jurisdictions.

A. Constitutionality of I.C.R. 28.

Harrell argues that I.C.R. 28 is unconstitutional and his case must be dismissed pursuant to Idaho Code § 19-3501. Corrected Mot. to Dismiss for Violation of Right to a Speedy Trial 4-17. Harrell argues that I.C.R. 28 is unconstitutional because:

> The Idaho Supreme Court lacks the power to interpret LC.§ 19-3501 and or set precedent as to what amounts good cause for delay through a rule change. The Idaho Supreme Court effects a change of law through "[j]usticiable controversies that are real and substantial and that can be concluded through the grant of relief by a court." *State v. Hoyle,* 140 Idaho 679, 682, 99 P.3d 1069, 1072 (2004). Until the Idaho Supreme Court is squarely presented with this issue, the court must determine good cause through case precedent. *Johnson,* 119 Idaho [56] at 58 [803 P.2d 557, 559].

Id. at 4. Harrell goes on to argue that:

> While it is true that in *Clark,* the Idaho Supreme Court held that the *Barker* factors could be considered as part of I.C. § 19-3501, the Court was clear that they were only considerations to the extent that they were relevant to the question of good cause. 135 Idaho [255] at 260 [16 P.3d 931, 936 (2000)]. This transformation of the meaning of good cause and rewriting of the statute is similar to what occurred in *State v. Hoch*, 102 Idaho 351, 630 P.2d 143 (1981) (overruled by *State v. Owens*, 158 Idaho 1 [343 P.3d 30] (2015)), when the Idaho Supreme Court decided the legislature could not have wanted defendants to get credit toward multiple charges they were being held on pretrial. As the Idaho Supreme Court recognized in *Owens*, that determination was not for the Court to make. 158 Idaho at 5 [343 P.3d at 34].

Id. at 5-6.

This Court finds I.C.R. 28 to be a proper and constitutionally valid rule. Harrell appears to argue that the Idaho Supreme Court lacks the power to issue such a rule without a justiciable controversy, and such a rule can only be affected by the Idaho legislature. This Court agrees with the September 18, 2020 (filed September 21, 2020), Memorandum Decision Denying Motion to Dismiss issued by District Judge Jonathan Medema in *State of Idaho v. Joseph Luna* CR01-20-01526 (decision attached). In *Luna*, the court was presented with an indictment on February 4, 2020, by the sitting grand jury accusing the defendant of having raped a woman. Mem. Decision Den. Mot to Dismiss 1. The defendant plead not guilty, "and asserted his right to a speedy trial when his not guilty plea was entered." *Id.* at 14. The defendant in *Luna* raised similar arguments as posed before this Court regarding a motion to dismiss for violation of his rights to a speedy trial. The defendant in *Luna* did not specifically oppose I.C.R. 28, but instead opposed the Idaho Supreme Court's orders to delay trials due to COVID-19 concerns along similar arguments posed by Harrell for why I.C.R. 28 is unconstitutional. *Id.* at 11-12. In regards to the argument that the Idaho Supreme Court's orders barring jury trials were unconstitutional, Judge Medema in *Luna* found that:

> Mr. Luna argues that the Supreme Court's Orders violated the separation between the powers granted in Articles I and III of the United States Constitution by impinging on the legislative branch of government. The separation of powers doctrine recognizes the inherent limitations on the powers of the three branches of the federal government as those powers were granted to them in the federal constitution. *See generally, Mistretta v. U.S.*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988). The federal constitution says nothing about the power of the Idaho Supreme Court versus the Idaho legislature. While the Bill of Rights limits what the Idaho Supreme Court can do in exercising the power the people of Idaho have given it; the Bill of Rights protects the rights of individuals, not another branch of state government. The separation of powers doctrine in Articles I and III of the United States Constitution simply has nothing to do with the Idaho Supreme Court's power to issue Orders such as the one it did on April 22, 2020. Therefore, this court rejects Mr. Luna's argument. Mr. Luna has

not made a similar argument under the state constitution. Therefore, this court declines to reach that issue except to make the following observations.

Mr. Luna argues the Idaho Supreme Court usurped the power of the legislative branch by commanding a delay in his trial. This court disagrees. In so far as the Court's April 22 Order deems the COVID-19 disease to be good cause (or substantial reason rising to legal excuse) to delay every criminal trial in the state, the Supreme Court is simply doing what courts are required by the legislature to do under Section 19-3501—determine whether good cause to delay a trial exists. Thus, the Supreme Court was not encroaching on the power of the legislature. The Supreme Court was simply usurping in all cases a determination that is generally left to the trial court in each case to make.

There are good reasons that appellate courts do not generally step into the role of the trial courts. One is simply that when the appellate court does so, to whom can the party aggrieved by the appellate court's decision complain? As this court is rejecting his argument under Section 19-3501 because the Supreme Court has said it must, it will almost certainly appear improper to Mr. Luna if the Supreme Court were to hear any complaint by him about this court's decision to obey its command. It is one thing to argue to the Supreme Court that a principle it adopted in an earlier dispute should be reconsidered in light of the facts of this one; it seems another thing for Mr. Luna to have to argue to the chief executives of the judicial branch that the commands the chief executives issued in this case were wrong. To the extent that the Court's Orders appear to be commanding trial courts how to resolve motions that are not yet before them, this court certainly understands how litigants in Mr. Luna's shoes might be left feeling denied, to use the currently popular turn of phrase, access to justice. Those are problems this court cannot resolve. They are reasons why the Idaho appellate courts historically have worked to maintain a distinction between their role and that of the trial courts. However, the fact that the Supreme Court usurped what is normally a function of the trial court in this case does not implicate the separation of powers doctrine.

Id. at 11-13.

This Court agrees with the findings set forth in *Luna*, specifically, "the fact that the Supreme Court usurped what is normally a function of the trial court in this case does not implicate the separation of powers doctrine." *Id.* at 12. For these reasons, this Court finds that I.C.R. 28 is valid and constitutional.

Harrell next argues:

> As will be shown, the [sic] some of the new additional considerations adopted by the Supreme Court are unrelated to the concerns of the statute. This Court is asked to find that I.C.R. 28 is unconstitutional and rely instead

> on the proper authorities that provide rulings on what counts for good cause set out above. However, should this Court find that I.C.R. 28 is a proper rule, and because two prongs still address the question of good cause, Mr. Harrell will tackle the prongs of this test in turn even as he argues against their inclusion.

Corrected Mot. to Dismiss for Violation of Right to Speedy Trial 6. This portion of Harrell's argument focuses on Harrell's contention that I.C.R. 28 does not relate to I.C. § 19-3501, and where it does relate to I.C. § 19-3501, Harrell argues that good cause has not been shown and dismissal is warranted. *Id.* at 6-11. Harrell's contention that good cause for delay has not been shown will be addressed later in this decision. This Court has already found above that I.C.R. 28 is a valid constitutional rule.

Finally, this Court finds that I.C.R. 28 would require a finding that Harrell's speedy trial rights have not been violated. Idaho Criminal Rule 28 reads:

> **Determination of Good Cause Regarding Statutory Trial Time Requirements**
>
> When considering whether good cause exists in ruling on a motion to continue a trial or a request to dismiss which is based upon the time requirements set forth in section 19-3501, Idaho Code, in exercising its discretion, the court shall consider the following factors:
> 1. the length of the delay beyond the statutory timeframe;
> 2. whether there have been prior continuances and the reasons therefore;
> 3. the reason(s) for the current delay, including but not limited to: whether the delay was necessary to safeguard the health or safety of the parties, jurors, attorneys, witnesses, court staff, or the public, and whether the delay was necessitated by the declaration of an emergency by the President of the United States or the Governor of the State of Idaho;
> 4. whether and when the accused requested compliance with the statutory trial time requirements;
> 5. the prejudice, if any, to the accused of permitting the prosecution to proceed beyond the statutory trial time requirements; and,
> 6. any other factor the court deems relevant.

The length of delay beyond the statutory time-frame will be less than four months. There have been prior continuances, all due to COVID-19. However, Harrell had a motion to suppress which took time to prosecute. The reason for the current delay is precisely and solely due to the necessity "to safeguard the health or safety of the partied, jurors,

attorneys, witnesses, court staff and the public." This factor is absolutely paramount in the Court's considerations. Harrell only requested his right to a speedy trial after that time period had run. There is little, if any, prejudice to the defendant. This is more thoroughly discussed below.

This Court will next address whether Harrell's right to a speedy trial was violated under the U.S. Constitution, and then this Court will address whether Harrell's right to a speedy trial was violated under the Idaho Constitution as well as Idaho Code § 19-3501.

B. The Sixth Amendment to the United States Constitution.

Harrell argues:

> The delay violates Mr. Harrell's federal constitutional right to a speedy trial because Mr. Harrell timely asserted his speedy trial right, he has been prejudiced by the delay, the will delay last ten months, and the State is responsible for the delay.

Id. at 27. Judge Medema in *Luna* laid out the Sixth Amendment protections for a person's right to a speedy trial:

> The Sixth Amendment states that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. This command is imposed on the States by the Due Process Clause of the Fourteenth Amendment. *Kloper v. North Carolina*, 386 U.S. 213 (1967). However, the federal constitution does not define "speedy." In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court recognized that the public, as well as a defendant, has an interest in ensuring a speedy trial, even when delay is preferable to a defendant. *See id.* at 519. This includes avoiding the burdens and expense of detaining those awaiting trial who cannot post bail in a local jail. *Id.* Therefore, the Court concluded that what constitutes a speedy trial in a given case is amorphous. The Court directed trial courts in deciding whether delay is consistent with the Sixth Amendment to engage in a balancing test. The Court identified four factors for the trial court to consider: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530. Length of delay is measured from the date of a defendant's arrest to his trial. *Id.* at 533.

Luna, Mem. Decision Den. Mot to Dismiss 13. The Court in *Luna* goes on to describe that:

> A warrant was served on Mr. Luna in this action on January 9, 2020. His trial

> is set to begin on October 21, 2020; a period of approximately 9 and ½ months. The court finds that length of delay to be sufficient to trigger the need for additional scrutiny.
>
> The reason for the delay is that the Idaho Supreme Court ordered it to happen. That is what the United States Supreme Court in *Barker* termed a neutral factor. It weighs in favor of a speedy trial violation, but not as heavily as a deliberate attempt by the prosecution to hamper a defendant's ability to prepare or to coerce him into accepting a plea bargain. *Id.* at 531. Because the parties have presented no evidence on the issue, this court is unable to conclude that delay of this trial was in fact necessary to protect the public from the SARS-CoV-2 virus; if so, that would have been reason to justify an appropriate delay in this case.

Id. at 13-14.

Applying the *Barker* test, *Luna* is very similar to the present case. In the present case, Harrell was arraigned on May 26, 2020, and his trial is currently set to begin on March 15, 2021, a period of approximately 9 and ½ months. This Court finds that the length of delay is sufficient to trigger the need for additional scrutiny. As with *Luna*, "[t]he reason for the delay is that the Idaho Supreme Court ordered it to happen." *Id.* at 14. This Court finds that this is a neutral factor under *Barker*, as apposed to "[a] deliberate attempt to delay the trial in order to hamper the defense". *Barker v. Wingo*, 407 U.S. 514, 531, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972).

Analyzing the *Barker* test, the instant case differs most from *Luna* in the third factor, the defendant's responsibility to assert his right to a speedy trial. In *Luna*, the defendant "asserted his right to a speedy trial when his not guilty plea was entered." *Luna,* Mem. Decision Den. Mot to Dismiss 14. Harrell made no such statement when he entered his not guilty plea on June 18, 2020. When Luna's trial had to be re-set in August 2020, due to the Idaho Supreme Court's Orders, on August 4, 2020, "Mr. Luna then stated that he wanted a trial date as soon as possible and asserted his right to a speedy trial, although his attorney declined to opine as to a date that would satisfy that right. The court finds Mr. Luna has asserted his right to a speedy trial in these proceedings." *Id.* Harrell did not

assert his right to a speedy trial until his attorney on December 16, 2020, filed Harrell's Continuing Demand for Speedy Jury Trial. This Court specifically finds that at no time prior to December 16, 2020, did Harrell or his attorney ever speak or write the words "speedy trial." This Court finds that Harrell's attorney's boilerplate language in his Notice of Appearance, Request for Timely Preliminary Hearing, Motion for Bail Reduction and Notice of Hearing filed on May 28, 2020, and its oblique references to Harrell's various Idaho and United States Constitutional rights, is not an assertion of Harrell's right to a speedy trial.

As found in *Barker*:

> We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

Barker, 407 U.S. at 531–532.

The third factor of the *Barker* test weighs heavily against Harrell's claim that his right to a speedy trial has been violated. Harrell has failed to assert his right to a speedy trial, and as found in *Barker*, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.*

The fourth and final factor of the *Barker* test is prejudice to the defendant. The Court in *Barker* found that:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare

> his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Barker, 407 U.S. at 532. Harrell has asserted that:

> In any case, Mr. Harrell has sat in custody under these accusations for over six months, watching trial after trial be reset due to COVID, with no likely end in sight. He has been harmed by the loss of the life he would have led had he not instead been locked in jail, where he contracted COVID. Although he has recovered, scientists are still learning what long-term consequences COVID carries. There is no way, as the Supreme Court recognize [sic] in *Barker*, for Mr. Harrell to show how the passage of time is harming the memories of the witnesses in this matter and skewing the case against him. This Court should find that he has been prejudiced.

Corrected Mot. to Dismiss for Violation of Right to Speedy Trial 16. In Harrell's 39-page memorandum, the only mention of prejudice to Harrell is as set forth above. Perhaps realizing this deficiency, counsel for Harrell called Harrell as a witness at the January 25, 2021, hearing on his motion to dismiss. Harrell testified errantly that he was arrested in early April of last year, and that he has not been out of custody since. He testified that he lost his house (later testifying that just prior to his arrest he rented or was about to rent a house in Butte, Montana, where he would live with his aunt, but that just prior to his arrest he had been in California for over a month). Harrell testified that he lost his job in a tattoo business due to his incarceration, but admitted that he no longer worked full time after COVID hit. Harrell testified that he had contracted COVID while in custody and that he "can now breathe OK."

In the present case, this Court finds that Harrell's interests, "to prevent oppressive pretrial incarceration", "to minimize anxiety and concern of the accused" and "to limit the possibility that the defense will be impaired" are simply not present. The first, "to prevent oppressive pretrial incarceration" has not been shown by admissible evidence. This Court

cannot find that exceeding the six-month speedy trial period by just over a month at present (and three months at the time of the March 15, 2021, trial setting) is "oppressive." The second, "to minimize anxiety and concern of the accused" has not been shown by admissible evidence. The third factor is the most important according to *Barker*. The third, "of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker,* 407 U.S. at 532. Harrell has not even made the claim, let alone provided any admissible evidence that his ability to adequately prepare his case has been impacted in any way, nor can he. The Court has personal knowledge that Stonecypher and Mosca still exist on this planet. The Court has seen the various body camera and dash camera footage involved in the stop of Harrell, Stonecypher and Mosca, the search of their persons and vehicle and subsequent arrest. The evidence against Harrell is not going to change.

This Court's findings on this fourth and final factor of the *Barker* test, prejudice (or lack thereof in the present case), are based on the lack of evidence of prejudice which Harrell has presented, and based on the fact that Harrell has not asserted his right to a speedy trial previous to December 16, 2020. If these interests were a concern to Harrell, asserting his right to a speedy trial would have been indicative of such concerns. This Court takes note that *Barker* still "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial." *Barker*, 407 U.S. at 529. Even taking this into account, this Court still finds that some level of assertion of a right to a speedy trial is required in order to find prejudice under the set of facts presented in this case. Even under normal circumstances, a failure to assert one's speedy trial rights weighs heavily against a claim of speedy trial violations under *Barker*. In the midst of what is about to become a year-long pandemic which has disrupted the courts as well as many

facets of daily life, assertion by the defendant of his right to a speedy trial is even more critical, when the relief sought is dismissal of his or her case. This Court finds that consideration of the four factors of the *Barker* test weighs heavily against Harrell's assertion that his rights to a speedy trial under the United States Constitution were violated.

For the reasons described above, this Court finds that Harrell's Sixth Amendment rights to a speedy trial have not been violated.

C. The Idaho Constitution and Idaho Code § 19-3501.

Harrell argues that his case must be dismissed pursuant to Article 1 Section 13 of the Idaho constitution. Corrected Mot. to Dismiss 17-27.

Judge Medema in *Luna* expertly described the historical and legal background pertaining to the Idaho Constitution and time limits for a speedy trial. *Luna,* Mem. Decision Den. Mot to Dismiss 15-20. That opinion also provides an excellent background as to the historical and legal precedents of the courts' involvement in public health emergencies. *Id.* at 3-10. It is noted in that opinion that Article I, Section 13, of the Idaho Constitution provides that "in all criminal prosecutions, the party accused shall have the right to a speedy and public trial." *Id.* at 15, citing Idaho Const. Art. I § 13. "Like the federal constitution, the Idaho constitution does not include a definition of what speedy means." *Id.* After discussing three Idaho appellate cases, Judge Medema then correctly concluded: "Thus, what 'speedy' means under the state constitution can be determined by resorting to I.C. § 19-3501 if the question involves one of the timeframes set by that statute. It is only necessary to resort to the Barker factors if some other delay, such as between charging by complaint and arrest (something not addressed in Section 19-3501), is at issue." *Id.* at 16. Judge Medema then stated:

> The framers discussed Article I, Section 13 when it was enacted but they did not discuss what constituted a speedy trial. Therefore, the court must look to the statutes at the time. Idaho Code Section 19-3501 has existed in some form since Idaho was a territory. As originally enacted it read:
>
> > If a defendant, indicted for a public offence, whose trial has not been postponed upon his application, be not brought to trial at the next term of the court at which the indictment is triable, after the same is found, the court shall order the indictment to be dismissed, unless good cause to the contrary is shown.

Id. at 18. Judge Medema then engaged in an analysis of what is meant by "good cause" and "next term." *Id.* 18-22. Judge Medema then found that:

> This Court concludes that the framers of the Idaho Constitution, in enacting Article I, § 13, intended that criminal defendants be provided a jury trial at the next term following the filing of the Indictment, but the time period in which that must occur could be set by the legislature and that it was always subject to a delay for good cause. Good cause is a determination the trial court was to make on the record before it. Good cause did not include things like the convenience of the state or the court in conducting its business or failures on the part of the government (state or court) to adequately perform its duties; but good cause could include things outside the government's control, such as the inability to find competent jurors despite summoning multiple panels or the inability to locate a witness despite diligent efforts to do so. With that understanding of the framers' intent in adopting Article I, §13, this court will examine the record in this case to determine if good cause to delay Mr. Luna's trial existed in June and in August.

Id. at 22. Judge Medema then examined the history of the Idaho Supreme Court's orders regarding COVID-19, in the context of public health figures at various points in time. *Id.* at 22-26. Judge Medema then concluded, "Given the history of courts being deferential to public health authorities in times of public health crises, it is not surprising that there is some precedent for courts justifying the delay of a criminal trial due to the risk of infectious disease." *Id.* at 26, citing *In re Venable*, 261 O. 731 (Cal. Dist. Ct. App. 1927) and *State v. Bateman*, 186 P. 5 (Ore. 1919). *Id.* at 26. Judge Medema then noted that the Idaho Supreme Court in *In re Rash*, 64 Idaho 521, 134 P.2d 420 (1943), addressed the question of whether World War II justified a delay of a trial beyond the next term due to witnesses

and jurors not being able to be summoned from "defense projects where their presence is absolutely essential", and the Idaho Supreme Court "took the unusual step of simply ordering that Mr. Rash be brought to trial within thirty (30) days." *Id.* at 27. Judge Medema then concluded:

> In the end this court concludes the just thing for it to do is what the majority in *In re Rash* did—make sure this case goes to trial quickly, but not dismiss the case entirely. The Supreme Court in *Rash* found that the trial judge's reason for delaying the trial was of "doubtful justification" but "not so lacking in the elements of 'good' cause...as to demand the petitioner's discharge." *Id.* This court views the Idaho Supreme Court's Orders of April 22 and July 24 in the same way.

Id. at 28. This Court agrees with the reasoning and conclusions of Judge Medema in his decision in *Luna*. Through enacting Idaho Code § 19-3501, the Idaho legislature has set the time period for a speedy trial to be six months, after which good cause must be shown for the delay of trial. Idaho Code § 19-3501 states that:

> The court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed, in the following cases:... If a defendant, whose trial has not been postponed upon his application, is not brought to trial within six (6) months from the date that the defendant was arraigned before the court in which the indictment is found.

Harrell was arraigned on May 26, 2020, and trial is set to begin on March 15, 2021. Thus, just over nine and a half months will have passed from the time Harrell was arraigned to when trial is set to begin. Thus, Harrell's trial will take place outside of the statutory six-month period. For this reason, good cause must exist for the delay. If not, dismissal of his case is required under Idaho Code § 19-3501.

This Court is left to decide whether good cause existed in vacating the November 16, 2020, jury trial. In deciding whether good cause has been met, Judge Medema in *Luna* found that:

> This court would normally do so upon a factual record. In this case, this court's ability to consider facts is hampered by the failure of either party

> to present any facts at all in connection with this motion. Generally the State's failure to establish a record of good cause for delay would simply result in dismissal of the action. However, this court is mindful of the fact that the State likely felt any obligation it had to show the reason for delay of this trial was removed by virtue of the Idaho Supreme Court's Orders...
>
> Therefore, this court will take as true facts that can be readily and accurately determined by resort to sources whose accuracy cannot reasonably be questioned. I.R.E. 201. For the purposes of this motion the court will accept as true some statistics compiled by the Central District Health Department and will take judicial notice of some actions by local executive governmental authorities around the time Mr. Luna's trials were set to begin.

Luna, Mem. Decision Den. Mot to Dismiss 22-23.

In addressing Harrell's motion, this Court will take judicial notice of some actions by local executive governmental authorities around the time that Harrell's trial was set to commence (November 16, 2020), as well as information provided by the Idaho Supreme Court in their November 9, 2020, Commencement of Jury Trials Order and the Idaho Supreme Court's December 14, 2020, Commencement of Jury Trials and Grand Jury Empanelment Order.

In the fall of 2020, COVID-19 cases were rising rapidly in the Panhandle Health District, and the spike in cases threatened to overwhelm health services. On October 22, and October 29, 2020, Panhandle Health District issued press releases titled, "Kootenai, Boundary, and Shoshone Counties Move to Substantial (Red) Risk Category." (https://panhandlehealthdistrict.org/wp-content/uploads/2020/10/Counties-in-Red-Risk-Category1.pdf) and (https://panhandlehealthdistrict.org/wp-content/uploads/2020/10/County-Categories-Explained.pdf). The October 29, 2020 press release stated:

> as of today Kootenai Health is reporting that they have 41 inpatients with COVID-19, of those 13 are in critical care. In the Spokane area, they have 64 hospitalized COVID-19 patients, of those 19 are in critical care. Kootenai Health has been operating at 90+% capacity for two weeks now, they have medical staff out due to illness, and have been unable to fill open positions for traveling nurses.

On November 6, 2020, Panhandle Health District issued a press release titled "Case Surges Overwhelm Public Health Efforts Across Idaho. (https://panhandlehealthdistrict.Org/wp-content/uploads/2020/11/Investigation-press-release.pdf). That press release stated:

> **In the Panhandle Health District,** over 100 cases are coming in daily, the testing positivity and the testing demand continue to increase. The District is in a difficult position and cannot sustainably have staff continue to work after-hours. This is compounded by a stressful work environment where the public is, at times, resistant to the District's help.
>
> Due to the increased amount of daily cases that the District is receiving, they are focusing on case investigation by contacting those who tested positive and asking them to follow-up with their close contacts. This will allow staff to contact additional cases in a timely manner, but close contacts of those cases will not be called by PHD. This is temporary and normal case investigation and contact tracing will resume when they are able.
>
> "We are able to report over 100 cases per day, but that is only what we are able to get into data entry," said Hoyer. "Some days there may be double that amount of cases and our staff is struggling to just keep our heads above water. We want the public to have an accurate idea of what is occurring in our community while sustaining a modified case investigation."

Panhandle Health District press release (November 6, 2020), https://Panhandlehealthdistrict.org/wp-content/uploads/2020/11/Investigation-press-release.pdf.

The Idaho Supreme Court's November 9, 2020, Commencement of Jury Trials Order states:

> Data provided by the Idaho Department of Health and Welfare at coronavirus.idaho.gov evidences an increasing incidence of COVID-19 cases throughout the state. That data shows that the weekly moving average incidence rate of COVID-19 cases in the state has increased from September 13, 2020 to November 8, 2020 by 335%, with an average week over week increase of 21%. The moving average incidence rate statewide has trended upwards for seven of the last eight weeks.
>
> In addition, since the recording of statewide case counts in Idaho began on March 13, 2020, there have been only nine days with case counts over 1,000. All nine days have occurred since October 23, 2020.
>
> The virus is easily transmitted, especially in group settings, and it is essential

> that the spread of the virus be slowed to protect public health and safety as well as safeguard the ability of Idaho's healthcare professionals to manage the recent increase in cases.

The Idaho Supreme Court's December 14, 2020, Commencement of Jury Trials and Grand Jury Empanelment Order states:

> Since the entry of the November 9, 2020, order setting a commencement date for jury trials of January 4, 2021, data provided by the Idaho Department of Health and Welfare at coronavirus.idaho.gov indicates that the spread of the virus has not slowed and the difficulties faced by Idaho's healthcare professionals in managing the impact has worsened. Since November 9, 2020, there have been twenty seven days in which Idaho reported more than 1,000 new cases of COVID-19. Twice in the last seven days there were days in which over 2,000 new cases were reported. Since November 9, 2020, the number of patients currently hospitalized in an inpatient hospital bed with suspected or confirmed COVID-19 has increased twenty six percent and, for the first time since the pandemic began, on ten different days over one hundred patients were currently hospitalized in an intensive care unit with confirmed COVID-19. According to the Idaho Department of Health and Welfare, preliminary data collected from death certificates indicated that the leading cause of death in Idaho in November was COVID-19. On December 11, 2020, Idaho's state Board of Health and Welfare unanimously approved a temporary rule authorizing the Director of the department to activate crisis standards of care in the state.

Judge Medema in *Luna* ultimately denied the defendant'd motion to dismiss, finding, "it is difficult to conclude that the delay... was necessary to protect jurors, witnesses, or the parties from the SARS-CoV-2 virus". *Luna,* Mem. Decision Den. Mot to Dismiss 25. In the summer of 2020, the Court in *Luna* was dealing with unknowns about the nature, spread and effect of the virus. More is now known about the SARS-CoV-2 virus, and the disease it causes, COVID-19, than was known in the summer of 2020. And while the Court in the instant case is armed with more information about COVID-19, Kootenai County and Panhandle Health in November 2020 faced a dangerous and rapid spike in COVID-19 cases which was not present in the summer of 2020 in either Kootenai County or Ada County. This alarming increase in COVID-19 cases in October and November 2020 and the concerns presented by such a spike can be found in the public health data shown

above. These concerns persist to this day, though just now seem to be improving as of the date of this decision. For purposes of this Court's analysis, the most important time period is what was actually occurring just before and at the time Harrell's six-month period ran, which was November 26, 2020.

If anything, what we have learned about the SARS-CoV-2 virus is its ability to continue to spread at an alarmingly rapid rate throughout our community despite the prudent enactment of statewide precautions regarding social distancing as well as county and city mandates for the wearing of masks. Even with those mandates and recommendations, it is apparent that in this geographical area, these mandates will be frequently disregarded. Indeed, the new Kootenai County Sheriff has recently stated he will not enforce the mandate. Sheriff Robert B. Norris, *Incoming Sheriff Will Not Enforce Dictates on Healthy Citizens*, Kootenai County Sheriff's Department Media Release, (January 12, 2021), https://www.kcsheriff.com/CivicAlerts.aspx?AID=234.

Jury trials pose a difficult problem during this pandemic. With what we now know about the virus and how it spreads, actions, such as social distancing of jury members and mandated use of masks, would appear to go a very long way in alleviating fears of spreading the virus during a jury trial. Despite this, there does exist a harsh reality that such actions are not fool-proof. While this Court is confident that it can employ such methods, it would be willful blindness to suggest that human error, as well as a level of disregard for these mandates among some members of the jury, would not take place during the trial. The likelihood of human error and disregard likely increases during deliberation, and its ability to be detected by the Court vanishes during deliberation.

Jury panels are made up of citizens from our community using reasonably random methods. This means that the elderly and other persons predisposed to bad outcomes

with COVID-19 will inevitably be members of this jury pool. Thus, we are left with the haunting arithmetic of determining what level of risk is acceptable to safeguard speedy trial rights for a defendant in the face of the risk of infection to a member of the jury that is legally required to be there.

When considering the stark increase in the infection rates and community spread of the SARS-CoV-2 virus that Kootenai County has experienced during the fall and winter of 2020, and on into 2021, jury panels are at a substantially higher risk to its members being infected by the SARS-CoV-2 virus than at any point during this pandemic.

For the reasons described above, this Court finds that good cause has been met for the postponement of Harrell's jury trial until March 15, 2020. The increased risk of infection of juries to the SARS-CoV-2 virus is reason enough to find good cause has been established in the present case. Additionally, Harrell has not asserted his right to a speedy trial until his December 16, 2020, filing of a Continuing Demand for Speedy Jury Trial. Luna was first in custody prior to the pandemic; Harrell at all times has been in custody beginning about three months after the pandemic began and shutdowns started occurring. During this pandemic, for Harrell to assert for the first time on December 16, 2020, that the postponement of his November 16, 2020, trial date was a violation of his speedy trial rights strains the imagination as to how his speedy trial rights were violated. This Court finds that Harrell's speedy trial rights were not violated.

D. Decisions from Other Jurisdictions.

Neither counsel for Harrell nor counsel for the plaintiff have set forth what other jurisdictions have done when confronted with similar claims by defendants who are awaiting trial in the midst of this pandemic. The entire country has been impacted by this pandemic. It should come as no surprise to anyone that many other courts have

addressed this issue. This Court's research has found the vast majority of cases have not found the defendant's right to a speedy trial violated by COVID-19 responses. Some are an automatic denial; many engage in appropriate balancing and consideration of the facts.

The Court finds the analysis in *U.S. v. Smith*, 460 F.Supp.3d 981 (E.D. Calif., May 19, 2020), to be thoughtful in wrestling with the issues presented by the pandemic, even though federal statutes were analyzed which are not applicable in Harrell's case. Judge Menendez's analysis in *Smith* is as follows:

> Congress enacted the STA [Speedy Trial Act], in part, to codify the strong public interest in speedy justice. *United States v. Pollock*, 726 F.2d 1456, 1459-60 (9th Cir. 1984). But it was also born out of Congress's "concern[ ] about a number of problems ... that vex an individual who is forced to await trial for long periods of time." *Id.* (citing H.R.Rep. No. 1508, 93rd Cong. 2d Sess., reprinted in [1974] U.S.Code Cong. & Ad.News 7401, 7408). These problems include: "disruption of family life, loss of employment, anxiety, suspicion, and public obloquy." *Id.*
>
> To address these correspondent concerns, the STA sets strict time limits on the two phases of prosecution: the time period between arrest/service of summons and an indictment ("Phase 1"), and the time period between arraignment and trial ("Phase 2"). Absent an exclusion of time, Phase 1 cannot exceed 30 days and Phase 2 cannot exceed 70 days. 18 U.S.C. § 3161(b), (c). Section 3161(h) sets forth permissible grounds for excluding time under the STA. One of these grounds is now commonly referred to as an "ends of justice" exclusion. Provided by subsection (h)(7), this exclusion allows courts to exclude time for:
>
> > Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.
>
> 18 U.S.C. § 3161(h)(7)(A).
>
> The spread of COVID-19 and the resulting court closures has made Section 3161(h)(7) the exclusion of choice in recent months. Perhaps rightfully so. District courts, to little objection, have often invoked this catch-all provision in the wake of unforeseeable, emergency circumstances. See, e.g., *Furlow v. United States*, 644 F.2d 764, 768 (9th Cir. 1981) (upholding a district court's use of an ends-of-justice continuance to exclude a month-long delay following the eruption of Mt. St. Helens); *United States v. Scott*, 245 Fed. App'x 391, 394 (5th Cir. 2007) (upholding a district court's use of an ends-of-justice continuance

following Hurricane Katrina); *United States v. Sánchez-Senda*, No. 2:17-cr-00529, 2018 WL 1737615, at *1 (D. P.R. 2018) (excluding time under Section 3161(h)(7) following Hurricane María); *United States v. García-Báez*, No. 16-cr-00691, 2019 WL 2553621, at *1 (D. P.R. 2019) (same); *United States v. Correa*, 182 F. Supp. 2d 326, 329 (S.D.N.Y. 2001) (excluding time under Section 3161(h)(7) following the 9/11 terrorist attacks).

Almost every court faced with the question of whether general COVID-19 considerations justify an ends-of-justice continuance and exclusion of time has arrived at the same answer: yes. Many districts now simply resort to 2-page form orders invoking Section 3161(h)(7). See, e.g., *U.S. v. Rosales-Corria*, No. 4:20-cr-00046-DN-PK, 2020 WL 2476169 (D. Utah May 13, 2020); *U.S. v. Morrissey*, No. 2:19-cr-00190, 2020 WL 2082929 (D. Maine April 30, 2020); *U.S. v. Garza-Guzman*, No. 3:20-mj-00905-MSB, 2020 WL 1433359 (S.D. Cal. March 20, 2020). And most others, in one way or another, have wholly abandoned the type of balancing Section 3161(h)(7) requires. See, e.g., *U.S. v. Craig*, No. 2:18-cr-00105, 2020 WL 2094101 (E.D. Tenn. April 30, 2020); *U.S. v. Howard*, No. 19-cr-00071-JLR, 2020 WL 1433758 (W.D. Wash. March 24, 2020); *U.S. v. Musquiz*, No. 4:18-cr-03116, 2020 WL 1284941 (D. Neb. March 16, 2020). Only one court has denied the Government's request for an ends-of-justice continuance. *Elms v. United States*, No. 3:20-cv-00253-MMD-CLB, 457 F.Supp.3d 897 (D. Nev. April 30, 2020).

Although arriving at a different result, this Court agrees with the principle set forth in *Elms* that courts must conduct far more deliberate inquiries into whether an ends-of-justice continuance is justified by the circumstances surrounding a particular case.

A. Legal Standard

The STA permits defendant, defense counsel, and the government's counsel to seek an ends-of-justice continuance. 18 U.S.C. § 3161(h)(7)(A). A court may also grant an ends-of-justice continuance on its own motion. *Id.* Regardless of who seeks the continuance, a court must satisfy itself of each of section 3161(h)(7)'s requirements before granting the motion. As a preliminary matter, "an ends of justice exclusion must be "specifically limited in time." *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000). Although section 3161(h)(7) permits district courts to exclude "any period of delay," the Ninth Circuit has underscored that this temporal flexibility does not permit an ends-of-justice continuance to be indefinite. *U.S. v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990); *U.S. v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984).

Moreover, an ends-of-justice continuance must be "justified [on the record] with reference to the facts as of the time the delay is ordered." *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (emphasis in original) (internal quotations omitted). After independently considering factors listed in section 3161(h)(7)(B), "among others," a judge must determine whether "the ends of justice served [by granting a continuance" outweigh "the best interest of the public and the defendant in the speedy trial." 18 U.S.C. § 3161(h)(7)(A).

The STA "imposes strict specificity requirements" on these findings. *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997). "[T]he 'ends of justice' exclusion ... may not be invoked in such a way as to circumvent the time limitations set forth in the [Speedy Trial] Act." *U.S. v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994). The ends-of-justice provision "is not a general exclusion for every delay, and any continuance granted under it must be based on specific underlying factual circumstances." *U.S. v. Martin*, 742 F.2d 512, 514 (9th Cir. 1984). Judges are not entitled "to rely on the unverified claims" of the party seeking a continuance. *Id.* at 1270. Nor may they conclude that one of the Section 3161(h)(7)(B) factors justify a continuance without tethering that conclusion to case-specific considerations. *U.S. v. Perez-Reveles*, 715 F.2d 1348, 1352 (9th Cir. 1983) ("Although the complexity of the case is a permissible factor ... the mere conclusion that the case is complex is insufficient.").

A judge must set forth these findings on the record, either orally or in writing. 18 U.S.C. § 3161(h)(7)(A). See also *Zedner v. United States*, 547 U.S. 489, 509, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006); *Ramirez-Cortez*, 213 F.3d at 1153. A judge need not issue its specific findings "at the precise moment it grants a[n ends-of-justice] continuance." *U.S. v. Bryant*, 726 F.2d 510, 511 (9th Cir. 1984). That said, section 3161(h)(7)'s analysis is a forward-looking inquiry. "A court may not, 'subsequent to the grant of a continuance, undertake for the first time to consider the factors and provide the findings required by [section 3161(h)(7)(A)].' " *Jordan*, 915 F.2d at 566 (quoting *United States v. Frey*, 735 F.2d 350, 352 (9th Cir. 1984)); see also *Frey*, 735 F.2d at 352 (holding that a district court may not make *nunc pro tunc* ends-of-justice findings to accommodate an "unwitting violation of the [Speedy Trial] Act.").

B. Analysis

Before granting an ends-of-justice continuance, a judge must weigh "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Because section 3161(h)(7)(A) requires this balancing to be case-specific, the Court cannot find that considerations surrounding COVID-19's impact on public safety and this Court's operations will, in every case, outweigh the best interest of the defendant and the public in a speedy trial. And although ends-of-justice interests and speedy-trial interests are concededly abstract, a judge must nevertheless attempt to define them in each case and assess which set of interests is weightier under the circumstances. The factors set forth in section 3161(h)(7)(B), "among others," aid in this analysis.

1. Impossibility – Section 3161(h)(7)(B)(i)

This Court must first consider whether its failure to grant an ends-of justice continuance "would be likely to make a continuation of [the] proceeding impossible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(B)(i). Here, this factor weighs heavily in favor of granting a continuance. The state of California has made important strides in controlling the impact of COVID-19 statewide and in this district's community. The virus, however, continues to spread. State and local

shelter-in-place orders are still in effect. Although this district's general orders grant each judge discretion on when to resume with in-person proceedings, the undersigned finds it unlikely that an in-person jury trial can safely occur in his courtroom until, at the earliest, September 2020. If the Court does not grant the six-week exclusion of time sought by the government in this motion, Smith's speedy-trial clock will soon run out. At that point, the government will have no choice but to dismiss the charges brought against him. 18 U.S.C. § 3162. While the government may sometimes re-indict a defendant for previously-dismissed charges, re-indictment could prove to be a difficult—if not impossible—task. Consequently, the Court finds its failure to grant an ends-of-justice continuance in this case "would be likely to make a continuation of [this] case impossible." 18 U.S.C. § 3161(h)(B)(i).

The Court pauses here to note that the statute makes this a factor but one of several to consider in determining whether an ends-of-justice continuance is appropriate. This provision illustrates Congress contemplated the possibility that, under some circumstances, a court's decision not to grant an ends-of-justice continuance might ultimately prevent the government from prosecuting someone. But by declining to make this factor dispositive, Congress indicated that the possibility of non-prosecution, though worthy of mandatory consideration, is not the end-all-be-all in determining whether an ends-of-justice continuance is appropriate.

2. Complexity – Section 3161(h)(7)(B)(ii)

Judges must also assess whether a case "is so unusual or so complex ... that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself" within the STA's prescribed limits. 18 U.S.C. § 3161(h)(7)(B)(ii). The "number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law" may give rise to a judge's complexity finding. *Id.* Neither party contends this case is complex. Indeed, it involves two, relatively common charges against a single defendant. The straightforward nature of the proceedings is either neutral or weighs slightly in favor of Smith and the public's interest in a speedy trial.

3. Pre-indictment Delay – Section 3161(h)(7)(B)(iii)

In cases where an arrest precedes indictment, judges must consider whether a delay in filing the indictment was caused by one of two circumstances: (1) the arrest occurred "at such a time that it is unreasonable to expect return and filing of the indictment" within the STA's time limits, or (2) "the facts upon which the grand jury must base its determination are unusual or complex." This factor is only relevant to the STA's "Phase 1" timing limits. It has no bearing on this case's analysis.

4. Competency/Continuity of Counsel – Section 3161(h)(7)(B)(iv)

Section 3161(h)(B)(iv) requires judges to consider counsels' ability to prepare and present their case, even when the case is not so complex that it bears independent consideration under the "complexity" factor. Under this factor, judges must ask whether denying an ends-of-justice continuance would (1) deny defendant reasonable time to obtain counsel,

(2) "unreasonably deny" either party continuity of counsel, or (3) deny either parties' counsel "reasonable time necessary for effective preparation, taking into account the exercise of due diligence." 18 U.S.C. § 3161(h)(7)(B)(iv).

This consideration intersects with COVID-19 in obvious ways. The intuitive appeal of this factor does not, however, free judges from making case-specific findings. When invoking this provision, "[t]he government should [offer] something about the specific people and documents involved in the underlying case, why they were unavailable, or what information they were looking for they lacked access to because of teleworking or other conditions created by COVID-19." *Elms*, 457 F.Supp.3d at 901. Here, the government does not make any specific representations about how COVID-19's spread or the resulting stay-at-home orders have impeded their trial preparation in this case. This factor, therefore, weighs in favor of honoring Smith's and the public's speedy trial rights.

5. "Other" Factors – Section 3161(h)(7)(B)

Section 3161(h)(7)(B) instructs that judges must consider the enumerated factors, "among others." Other than the prohibited considerations discussed below, the statute is silent about what non-statutory factors judges should consider. The Court interprets this silence as conferring broad discretion to consider factors it deems relevant based upon the specific facts of the case and surrounding circumstances. Indeed, in *Lloyd*, the Ninth Circuit criticized the district court judge for failing to take non-statutory considerations into account. 125 F.3d at 1269 (finding the district judge should have considered whether the parties "actually want[ed] and need[ed] a continuance, how long a delay [was] actually required, [and] what adjustments [could have been] made with respect to the trial calendars [to avoid a continuance].").

The caselaw surrounding COVID-19 ends-of-justice continuances is insufficiently robust for this court to obtain guidance from others on what non-statutory factors it should consider under these circumstances. But bearing in mind the need to balance the ends of justice served by granting the continuance against the interests of the public and the defendant in a speedy trial, the Court finds the following factors relevant:

- Whether the defendant is detained pending trial;
- Whether COVID-19 is present in the facility where the defendant is detained (and if so, whether the defendant belongs to a population that is particularly susceptible to the virus);
- Whether the court can safely conduct a jury trial;
- Whether the defendant has invoked his speedy trial rights since the case's inception;
- How long the defendant has been detained;
- Whether the defendant is charged with a violent crime or has a history of violent crime;
- Whether the defendant was denied bail solely because of the risk of nonappearance; and

• Whether there is a specific reason to suspect recidivism if charges are dismissed.

A defendant's interest in a speedy trial is higher when he is detained awaiting trial, is detained in dangerous conditions, has invoked his speedy trial rights since the case's inception, and/or has been detained for a particularly long period of time. Alternatively, the ends of justice served by excluding time under the STA are higher when the court lacks the ability to safely hold a jury trial, when a defendant is charged with a particularly violent crime, and when there are other indications that a defendant may pose a danger to society or risk of recidivism if the STA clock runs and the charges are dismissed.

The undersigned finds that the Court is currently unable to safely hold a jury trial, and that it likely will not be able to hold a jury trial until September 2020. The counties that make up the Eastern District of California are still reporting new COVID-19 cases, along with new COVID-19-related deaths. To date, there is no treatment, cure, or vaccine for COVID-19. Nor does there appear to be one on the horizon. The undersigned recognizes that predicting the trajectory of this virus and its impact on the Court comes with a fair measure of speculation. But based on current circumstances and the uncertainty that still looms largely around this novel coronavirus and how to effectively treat it, the undersigned finds it reasonable to conclude that he will not be able to safely hold jury trials for, at least, another four months. The undersigned's current and pending inability to hold trials in a way that promotes public safety weighs in favor of granting a continuance.

The undersigned also finds Smith has been in custody since December 2019 on charges of possession with intent to distribute methamphetamine and possession of a firearm in furtherance of this offense. Smith's detention in a facility with at least one COVID-19 case heightens his interest in a speedy trial, but his track record of violent crime weighs heavily in favor of granting the government's requested continuance. In 2003, Smith was convicted of two counts of voluntary manslaughter and one count of assault with possession of a firearm. He received a twelve-year prison sentence. Smith was indicted for the present gun-related offense four years after his release. Smith did not invoke his speedy trial rights until May 8, 2020. See Smith Opp'n at 1.

6. Prohibited Considerations – Section 3161(h)(7)(C)

The STA bars judges from granting ends-of-justice continuances based on (1) "general congestion of the court's calendar," (2) the government's "lack of diligent preparation," or (3) the government's "failure to obtain available witnesses." 18 U.S.C. § 3161(h)(7)(C). The Ninth Circuit has also held that the negotiation of a plea bargain is not a factor that may support granting an ends-of-justice continuance. *Ramirez-Cortez*, 213 F.3d at 1156 (citing *Perez-Reveles*, 715 F.2d at 1352). The Court does not take any of these prohibited considerations into account.

7. Conclusion

This Court does not take lightly either Smith or the public's strong interests in a speedy trial. But after carefully weighing the factors

> discussed above, the undersigned finds that the ends of justice served by granting the exclusion of time requested by the government in this motion currently outweigh those speedy-trial interests.
>
> **III. ORDER**
>
> For the reasons set forth above, the Court GRANTS IN PART and DENIES IN PART the government's motion. The Court cannot retroactively exclude time under the ends-of-justice exclusion. The government's motion to exclude time between April 19, 2020 and April 30, 2020 is therefore denied. The time between May 1, 2020 and the date of this order, however, is excludable under a separate provision of the STA: 18 U.S.C. § 3161(h)(1)(D). Moreover, the Court confirms the June 16, 2020 status conference and further excludes time between May 20 and June 16, 2020 under section 3161(h)(7)(A).

460 F.Supp.3d 983-89. Balancing these factors set forth in *Smith* to the facts of the present case, this Court finds the following. Specificity of time is known...Harrell has his trial scheduled to begin less than two months from now. His is the first set case, the case with the highest priority to begin on March 15, 2021. This is likely not an impossible case to be re-filed were Harrell's motion granted. While the charges are severe in consequence, this is not a complex trial. There is no pre-charge delay. Counsel are competent, and again, this is not a complex case.

The "other factors" listed in *Smith* are important. Harrell has been in custody since his arrest. He has been held in a facility which has had COVID-19 and he has contracted COVID-19. This cuts both ways. While unfortunate that he has had COVID-19, that fact should give him some immunity. There has been no evidence as to whether Harrell has received a vaccine, or if not, when he will be offered such. The Court is confident that it can safely conduct a jury trial once the Idaho Supreme Court authorizes such. Most importantly, the factor "whether the defendant has invoked his speedy trial rights since the case's inception", is simply not present, Harrell's counsel's boilerplate notwithstanding. Harrell has been detained eight months as of the date of his hearing, and will be detained just under ten months at the time of his scheduled jury trial. Harrell is not charged with a

violent crime but he is charged with serious crimes. There are reasons to expect recidivism given Harrell's prior record which was summarized to this Court at a June 18, 2020, hearing, and dates back to the 1990's.

There is one "other factor" not listed in *Smith* which this Court finds to be very important. Well before his six-month period ran, Harrell was given the option of having his case tried to a jury in Shoshone County. Not only did Harrell not take advantage of that offer, his attorney never got back to the Court regarding that option. Had he done so, Harrell could have had his trial concluded in October 2020.

This Court has every reason to believe that if this Court's decision today were appealed to the Idaho appellate courts, either of those courts would uphold this Court's decision. The Court makes that statement not because the Idaho Supreme Court might be analyzing its own rules and orders (Judge Medema discussed that oddity), but because the Idaho Supreme Court or the Idaho Court of Appeals will likely follow precedent. This Court set forth the *Smith* decision above nearly in its entirety because Judge Menendez wrote an excellent decision discussing factors in the COVID-19 context. All the factors in the Smith decision translate to those discussed by the Idaho Court of Appeals in *State v. Davis*, 141 Idaho 828, 118 P.3d 160, 167 (Ct. App. 2005). While *Davis* was written fifteen years before COVID-19, it provides a thoughtful and detailed analysis of the balancing of the *Barker* factors which must be taken into account when determining whether a criminal defendant's right to a speedy trial has been violated. Counsel for Harrell did not mention Davis in briefing or in oral argument, neither did counsel for plaintiff. The Court commends counsel to read *Davis* in light of the facts of this case in the COVID-19 context. *Davis* reiterates *Barker's* holding that "Failure to assert the right will make it difficult for a defendant to prove that he or she was denied a speedy trial." 141 Idaho at 839, 118 P.3d

at 171. *Davis* makes it clear that a defendant must continue to **reassert** that right. This Court feels that answers any questions regarding Harrell's counsel's claim that Harrell asserted his right to a speedy trial in his Notice of Appearance, Request for Timely Preliminary Hearing, Motion for Bail Reduction and Notice of Hearing. A criminal defendant cannot hide behind boilerplate language and then say nothing about speedy trial until after that speedy trial period has run, which is exactly what Harrell is trying to do here. As the Idaho Court of Appeals noted in Barker, "The [United States Supreme] Court concluded that 'the record strongly suggests that while [the defendant] hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried.'" *Id.* "As in *Barker*, the record in this case demonstrates that Davis did not want a speedy trial on the subsequent charge but, instead, acquiesced to the delay in her prosecution in hopes that her motion to reconsider would be granted and the subsequent DUI charge would also be dismissed." *Id.*

IV. CONCLUSION

For the reasons described above, Harrell's Corrected Motion to Dismiss for Violation of Right to a Speedy Trial is denied. Harrell's rights under the United States Constitution, the Constitution of the State of Idaho, the Idaho Criminal Rules and Idaho Statutes have not been violated.

V. ORDER.

IT IS HEREBY ORDERED that Harrell's Corrected Motion to Dismiss for Violation of Right to a Speedy Trial is **DENIED.**

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 26th day of January, 2021 copies of the foregoing Order were e-mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Jay Logsdon pdfaxemail.us
Prosecuting Attorney – Laura McClinton kcpaicourt3

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: Deputy

Filed: 09/21/2020 10:46:55
Fourth Judicial District, Ada County
Phil McGrane, Clerk of the Court
By: Deputy Clerk - Ellis, Janet

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, vs. JOSEPH LUNA, Defendant.	Case No. CR01-20-01526 **MEMORANDUM DECISION DENYING MOTION TO DISMISS**

Mr. Luna moves to dismiss the Indictment in this criminal action. He argues the government has violated his right to a speedy trial guaranteed by Idaho statute, the federal constitution, and the state constitution. For the reasons explained below, his motion is denied.

Relevant Procedural History

On February 4, 2020, the sitting grand jury for Ada County presented the court with an Indictment accusing Mr. Luna of having raped a woman in November of 2019. Mr. Luna pleaded not guilty and the court set a trial to begin June 17, 2020. On April 22, 2020, the Idaho Supreme

Court issued a command to all trial courts in the state. In pertinent part, the Court's command read as follows:

> No jury trials shall commence, nor shall a juror be required to appear, in a criminal case before August 3, 2020 . . . . This order suspending jury trials shall be deemed good cause to deny a motion to dismiss a criminal case based on the time requirements set forth in section 19-3501.

Emergency Reduction in Court Services and Limitation of Access to Court Facilities Order, April 22, 2020 [hereinafter April 22 Order].

Obeying this command, this court continued trial in this action to August 12, 2020. On July 24, 2020, the Idaho Supreme Court issued another command to the trial courts. This command was that trial courts shall not commence any jury trials in criminal cases before September 14, 2020. Obeying this command, this court continued Mr. Luna's trial to October 21, 2020. The parties did not want a trial date in September because of the attorneys' schedules and because Mr. Luna wanted time to litigate a motion to dismiss.

Mr. Luna filed this motion to dismiss on August 3, 2020. The court held a hearing on August 26, 2020 and took the motion under advisement. Mr. Luna argues this court should dismiss the charge in the Indictment because the government[1] has violated his right to a speedy trial under Idaho Code Sections 19-106 and 19-3501, the Sixth Amendment of the United States Constitution, and Article I, Section 13 of the Idaho Constitution. The court will address each question separately. The court will begin with the constitutional arguments. Before doing so the court will review some

[1] The court is using the term 'the government' as distinguishable from the State, which is a party to this action. Mr. Luna's argument is that it is the courts, not the prosecutor, who have violated his right to a speedy trial. The state and federal constitutions are limitations upon, and protections against, the power of the government, including the judicial branch.

relevant history of how the courts have dealt with perceived invasions of individual rights guaranteed under the Constitution in times of public health crises.

History of the courts' involvement in public health emergencies

The role of the courts in the federal constitution was viewed as being unique at the time the federal Constitution was ratified. That role was illuminated during the debates regarding whether to include the Bill of Rights. While living in Paris, Thomas Jefferson received a copy of the Constitution from James Madison in the fall of 1787. Jefferson wrote back to Madison to say he was troubled by the omission of a bill of rights. He believed the Bill of Rights would "provide a check on the passions and interests of the popular majorities." JACK N. RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 154, 156 (Bedford, 1998). Madison replied with the query: "What use . . . can a bill of rights serve in popular Governments?" *Id.* at 160–162. Jefferson replied that Madison's thoughts had missed one consideration "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent . . . merits great confidence for their learning and integrity." *Id.* at 165.

The independence of the judiciary was key to Jefferson because it enabled the courts to act as a check on the passions of the popular majorities; i.e., to make decisions that are unpopular with a majority of the citizens in order to preserve individual liberties. Madison came to agree and argued for judicial review and incorporation of the Bill of Rights into the Constitution. In a speech to the House of Representatives in June of 1789, Madison argued that if the Bill of Rights was

> incorporated into the constitution, independent tribunals of justice will consider themselves . . . the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

Id. at 170, 179.

The United States Supreme Court has a long history of performing this anticipated role and making decisions that are unpopular with many at the time they are made. The Supreme Court has done so in each case because a majority of the justices felt it necessary to do so in order to protect an individual right guaranteed by the Constitution. Examples range from *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Elfbrandt v. Russell*, 384 U.S. 11 (1966), to *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).[2] These decisions were unpopular when made because they went against the prevailing passions of the populace at the time. And history has shown that few passions are more powerful than fear for one's own safety and the safety of those one loves.

The first widely documented public health crises arose after Louis Pasteur and Robert Koch identified the agents causing many infectious diseases. Fear of these newly discovered pathogens led early advocates of public health in the United States, such as Herman Briggs, the general medical officer of the City of New York near the turn of the 20th Century, to unabashedly defend the use of coercion against individuals to protect the populace at large from public health threats. Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health: Talking Point on Public Health Versus Civil Liberties*, 8(12) EMBO[3] Reps. 1099–1103 (2007). To prevent the spread of cholera and typhus, immigrants arriving in New York City in 1892 were confined in isolated and squalid conditions, with little popular opposition given the prevailing negative feelings towards immigrants. HOWARD MARKEL QUARANTINE!: EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892 (Johns Hopkins University Press, 1997). However, such heavy-handed approaches to governance naturally sparked opposition by

[2] The Court is not without its obvious failings in this area as well. *See Dred Scott v. Sanford*, 60 U.S. 393 (1856). The fact that the process is not perfect simply underscores the need for it to exist. The courts are to whom individuals turn when they believe their rights have been violated and they can get no redress from the political process.
[3] The European Molecular Biology Organization.

some, typically among groups who felt underrepresented in the legislative process. A law passed by the Wisconsin legislature mandating forced vaccinations sparked riots among the German immigrant population in Milwaukee in the 1890s. JAMES COLGROVE, STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA (University of California Press, 2006).

The United States Supreme Court first addressed the tension between public health and individual liberties in *Jacobson v. Massachusetts,* 197 U.S. 11 (1905). That case involved a challenge to a law compelling all persons to be vaccinated against smallpox and making it a crime to refuse. Mr. Jacobson refused and was convicted at trial. The United States Supreme Court held that the states have inherent police powers that include the power to enact reasonable legislation as will protect the public health and public safety. *Id.* at 25. The Court held that by doing so the Massachusetts legislature had not invaded any right secured by the Constitution. The Court recognized that:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.

Id. at 26 (internal citations omitted).

From the decision in *Jacobson* until the 1980s, American courts largely deferred entirely to public health officials regarding what individual liberties may be denied in the name of public health through exercise of the police power. Oft repeating the maxim "*salus populi suprema lex esto*" (Let the good (or safety, health, welfare) of the people be the supreme law)[4] courts upheld government restrictions on individual freedoms from the relatively innocuous requirement that plumbers purchase a license before they may lawfully practice their trade, *Felton v. City of Atlanta*, 61 S.E. 27 (Ga. Ct. App. 1908), to sanctioning the forcible removal by police of a baby from the arms of its mother to be vaccinated against the mother's wishes. *Haverty v. Bass*, 66 Me. 71 (1876). As recently as 1966, the California Court of Appeals upheld a statute giving a public health officer the power to indefinitely confine a citizen upon the health officer's determination that the citizen suffered from tuberculosis, despite having few symptoms, without provisions in the statute for judicial review of that decision. In that case the California court stated: "Health regulations enacted by the state under its police power and providing even drastic measures for the elimination of disease, whether in human beings, crops or cattle, in a general way are not affected by constitutional provisions, either of the state or national government." *Application of Halko,* 246 Cal. App. 2d 553, 555 (Cal. Ct. App. 1966) *citing Lausen v. Board of Supervisors*, 214 N.W. 682, 684 (Iowa 1927). This court suspects Thomas Jefferson would have found that statement to be a shocking one for a court to make.

The idea that exercise of government power is beyond judicial review renders the Bill of Rights Jefferson favored ineffective in the face of a passionate popular majority. That was the reason behind Madison's initial query. Each recognized that in a popular government elected officials will do as the majority desires, regardless of what the constitution contains, especially

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[4] From CICERO, *DE LEGIBUS.*

when the majority is motivated by fear. It is an inescapable fact of being human that passion rules reason. Courts have been designed over the centuries to protect against that reality and to elevate the role of reason in decision making. Jefferson and Madison certainly envisioned the courts as a place where the learned and honorable judiciary would use reason to temper the passions of the majority in order to ensure individuals were given those protections guaranteed them in the Bill of Rights.

It also cannot be argued that preying upon the fears of the populace for their own safety is a common tactic used by dictators throughout history to maintain their hold on power and to keep their citizens docile and compliant. Those in power can focus attention on a 'boogeyman,' whether that be other people, certain ideas, or a threat from the natural world, and argue that only they, as people in power, can protect their citizens, although that may involve the citizens losing some of their freedoms. One author has observed that a "fundamental difference between modern dictatorships and all other tyrannies of the past is that terror is no longer used as a means to exterminate and frighten opponents, but as an instrument to rule masses of people who are perfectly obedient." HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (Houghton Mifflin Harcourt 1976) (previously published as *ELEMENTE UND URSPRÜNGE TOTALER HERRSCHAFT,* (Shocken, 1951)).

In this country, if the courts abdicate all decision making authority to the executive and legislative branches and require no judicial fact finding to ensure a health crisis necessitates the degree of restriction on liberty imposed, to whom may an individual turn for protection against a perceived abuse of the police power? The electoral process was likely of small comfort to Mr. Halko who was confined against his will in a hospital for six months and also convicted of a crime

and jailed for a day when he refused to submit voluntarily. Perhaps he needed to be, but the courts offered him little opportunity to have his grievance heard and the health officer apparently none.

After the civil rights movement of the 1960s and 1970s and with the rise of the HIV/AIDS epidemic in the early 1980s, gay rights activists and civil libertarians began to have some political success in moderating the government's paternalistic approach to combating the spread of the virus, such as by forcible quarantine of those whose behavior might place their sexual partners at risk. Bayer at 5. But the tension between public health concerns and individual freedoms remains in topics as diverse as wearing a helmet when riding a motorcycle; the use of substances, such as marijuana and tobacco; immunization of children; and the production of food. Indeed some view obesity as the greatest public health danger of this age and advocate government restrictions on things like the size of the portions of food served in restaurants and the caloric contents of drinks. These questions will continue to arise, emergently or not.

This court has recited this history simply to argue that in our constitutional system the good of the majority is not the supreme law of the land, even in the states, and to remind of the important role the founders of this country envisioned the courts would play in protecting individuals against the passions of the majority; including the majority's fear for its own safety.

There are limitations on the power of the government, including the courts, to restrict certain freedoms held by the citizens. The courts are to whom citizens turn when they believe such freedoms have been improperly restricted by the other branches of the government. Courts historically have been—and should continue to be—reluctant to be the arm of government which engages in restricting those rights, even when we have the power to do so, and even in the face of a legitimate public health emergency.

Alexander Hamilton understood the dangers of vesting executive power in a plurality of persons, such as the members of the Court, rather than an individual, such as the Governor. Hamilton argued that plurality in the Executive tends to conceal faults and destroy responsibility. THE FEDERALIST NO. 70 (Alexander Hamilton). The executive and legislative branches of the state and county governments had more than enough power to safely protect jurors, lawyers, and litigants from transmission of the SARS-CoV-2 virus in the spring of this year without the Idaho Supreme Court stepping in to do so itself. The Court's decision to step out of the role envisioned for it by Thomas Jefferson and into a role where it wielded what amounts to broad executive power over the rights of parties to individual disputes has likely left Mr. Luna wondering if he can trust the court system to decide his motion fairly. It has certainly left this court in the awkward position of having to decide if it may follow the Supreme Court's commands without violating its oath to uphold the state and federal constitutions. Thus, it seems incumbent on the Idaho judiciary to recognize the temptations and dangers of stepping out of the traditional role of the courts of adjudicating disputes in order to rush to the rescue in an emergency. Judicial restraint is an admirable trait in those who administer and supervise, as well as those who judge.

In March and April of this year there was significant uncertainty around the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2),[5] such as its mechanism and rate of transmission between people and the effects on people who are infected, such as how many develop the disease caused by the virus—COVID-19—and what health problems people who

[5] In its April 22, 2020 Order, the Supreme Court referred to the "COVID-19 virus." This is a misnomer. Viruses and the diseases they cause have different names and different processes are used to name a virus versus the disease it causes. A common example is the human immunodeficiency virus (HIV) and the disease it causes—acquired immune deficiency syndrome (AIDS). Naming the Coronavirus Disease (COVID-19) and the Virus that Causes it, WHO, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited Sept. 2, 2020). COVID-19 is the name of the disease caused by the SARS-CoV-2 virus.

develop the disease were likely to have. Certainly this court may accept as true that the disease is fatal to some.

In the face of that uncertainty, the Supreme Court could have, in keeping with its traditional role as the final protector of individual rights as against the power of the government, or in faithful performance of the duties the citizens have given it under Article V, § 9 of the Idaho Constitution, simply left it to the executive and legislative branches of government or to the district courts themselves to determine if it was possible to both protect jurors and also afford defendants a speedy trial. In that event, this court could have received some evidence and made findings of fact regarding the risks to jurors and the resources available in this judicial district to mitigate those risks without delaying the trial in this action. The answers to whether and how that could be done would likely have varied between the counties given their different resources, differing courthouses, and the differing rates of infection in their local populace. Consistent with the duties assigned to it under Article V, § 9 of the Idaho Constitution, the Supreme Court could then have reviewed such decisions by the district courts to discern if the district court in a particular case had violated a defendant's right to a speedy trial or if the district court had erred in refusing to find that the executive or legislative branches had done so. Under that scenario, the Supreme Court could have provided each defendant, such as Mr. Luna, with an opportunity to be heard and to have his arguments considered before the Supreme Court finally adjudicated the scope of that individual's rights in a particular criminal action. Instead, the Supreme Court took a more hands on approach to governance and simply precluded any trials from being conducted.

Perhaps the Court's decision to do so was a great benefit to all of us who do not stand in Mr. Luna's shoes. It leaves this court in the position of having to decide if, when the Court did so, the Court violated Mr. Luna's right under state and federal constitutions to a speedy trial.

The Federal Constitution

Mr. Luna argues the Idaho Supreme Court impermissibly usurped powers reserved for the legislature when it issued its Orders. He also argues the Court's Orders violated his right to a speedy trial under the Sixth Amendment. The Court will address each argument separately.

The Separation of Powers Doctrine

Mr. Luna argues that the Supreme Court's Orders violated the separation between the powers granted in Articles I and III of the United States Constitutions by impinging on the legislative branch of government. The separation of powers doctrine recognizes the inherent limitations on the powers of the three branches of the federal government as those powers were granted to them in the federal constitution. *See generally, Mistretta v. U.S.*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988). The federal constitution says nothing about the power of the Idaho Supreme Court versus the Idaho legislature. While the Bill of Rights limits what the Idaho Supreme Court can do in exercising the power the people of Idaho have given it; the Bill of Rights protects the rights of individuals, not another branch of state government. The separation of powers doctrine in Articles I and III of the United States Constitution simply has nothing to do with the Idaho Supreme Court's power to issue Orders such as the one it did on April 22, 2020. Therefore, this court rejects Mr. Luna's argument. Mr. Luna has not made a similar argument under the state constitution. Therefore, this court declines to reach that issue except to make the following observations.

Mr. Luna argues the Idaho Supreme Court usurped the power of the legislative branch by commanding a delay in his trial. This court disagrees. In so far as the Court's April 22 Order deems the COVID-19 disease to be good cause (or substantial reason rising to legal excuse) to delay every

criminal trial in the state, the Supreme Court is simply doing what courts are required by the legislature to do under Section 19-3501—determine whether good cause to delay a trial exists. Thus, the Supreme Court was not encroaching on the power of the legislature. The Supreme Court was simply usurping in all cases a determination that is generally left to the trial court in each case to make.

There are good reasons that appellate courts do not generally step into the role of the trial courts. One is simply that when the appellate court does so, to whom can the party aggrieved by the appellate court's decision complain? As this court is rejecting his argument under Section 19-3501 because the Supreme Court has said it must, it will almost certainly appear improper to Mr. Luna if the Supreme Court were to hear any complaint by him about this court's decision to obey its command. It is one thing to argue to the Supreme Court that a principle it adopted in an earlier dispute should be reconsidered in light of the facts of this one; it seems another thing for Mr. Luna to have to argue to the chief executives of the judicial branch that the commands the chief executives issued in this case were wrong. To the extent that the Court's Orders appear to be commanding trial courts how to resolve motions that are not yet before them, this court certainly understands how litigants in Mr. Luna's shoes might be left feeling denied, to use the currently popular turn of phrase, access to justice. Those are problems this court cannot resolve. They are reasons why the Idaho appellate courts historically have worked to maintain a distinction between their role and that of the trial courts. However, the fact that the Supreme Court usurped

what is normally a function of the trial court in this case does not implicate the separation of powers doctrine.[6]

The Sixth Amendment

The Sixth Amendment states that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury. This command is imposed on the States by the Due Process Clause of the Fourteenth Amendment. *Kloper v. North Carolina*, 386 U.S. 213 (1967). However, the federal constitution does not define "speedy." In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court recognized that the public, as well as a defendant, has an interest in ensuring a speedy trial, even when delay is preferable to a defendant. *See id.* at 519. This includes avoiding the burdens and expense of detaining those awaiting trial who cannot post bail in a local jail. *Id.* Therefore, the Court concluded that what constitutes a speedy trial in a given case is amorphous. The Court directed trial courts in deciding whether delay is consistent with the Sixth Amendment to engage in a balancing test. The Court identified four factors for the trial court to consider: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530. Length of delay is measured from the date of a defendant's arrest to his trial. *Id.* at 533. A warrant was served on Mr. Luna in this action on

[6] Mr. Luna has not argued that while the Supreme Court was vested in Art. V, § 2 with the power to administer and supervise the courts, the Supreme Court's power to make decisions that affect the rights of a party to a particular action before the courts was limited by the citizens in Article V, § 9 to reviewing decisions of the district courts and various administrative agencies, and to issuing writs of mandamus, certiorari, prohibition, and habeas corpus. In other words, that there is a distinction between appellate and original jurisdiction, the Supreme Court does not possess original jurisdiction in every case, it did not possess original jurisdiction in this action sufficient to reject Mr. Luna's argument about good cause under § 19-3501, and when the people amended Art. V, § 2 in 1961 to include the language about an integrated judicial system under the administration and supervision of the Supreme Court the people did not give the Supreme Court the power to abrogate the limits on its own jurisdiction set in Art. V, § 9 or to usurp the jurisdiction of the district courts conveyed under Art. V, § 20, under the guise of supervising the district courts' decisions or administering how the district court conducts its business. *See the discussion of the difference between original and appellate jurisdiction in Marbury v. Madison*, 5 U.S. 137 (1803). Therefore, this court will not address that possibility. While it is incumbent on this court to *sua sponte* examine whether it has the power to make this decision, this court does not feel compelled to *sua sponte* examine whether the Supreme Court did when it made it.

January 9, 2020. His trial is set to begin on October 21, 2020; a period of approximately 9 and ½ months. The court finds that length of delay to be sufficient to trigger the need for additional scrutiny.

The reason for the delay is that the Idaho Supreme Court ordered it to happen. That is what the United States Supreme Court in *Barker* termed a neutral factor. It weighs in favor of a speedy trial violation, but not as heavily as a deliberate attempt by the prosecution to hamper a defendant's ability to prepare or to coerce him into accepting a plea bargain. *Id.* at 531. Because the parties have presented no evidence on the issue, this court is unable to conclude that delay of this trial was in fact necessary to protect the public from the SARS-CoV-2 virus; if so, that would have been reason to justify an appropriate delay in this case.

This court must next consider the defendant's responsibility to assert his right. Mr. Luna asserted his right to a speedy trial when his not guilty plea was entered. At a hearing on June 2, 2020, this court raised the reality that the court was precluded by the Supreme Court's April 22 Order from holding trial as scheduled later that month. Likely recognizing the inherent futility of doing so, Mr. Luna did not object or try to dissuade this court from following that Order. He did say that he was ready to go to trial at the first available opportunity. The court set trial to begin in August. At a hearing on August 4, the court again raised the fact that the Supreme Court's July 24 Order precluded holding the trial in August. Mr. Luna then stated that he wanted a trial date as soon as possible and asserted his right to a speedy trial, although his attorney declined to opine as to a date that would satisfy that right. The court finds Mr. Luna has asserted his right to a speedy trial in these proceedings.

This court must also consider prejudice to Mr. Luna. There are three types of potential prejudice: oppressive pretrial incarceration; anxiety and concern on the part of the accused; and

impairment of a defendant's ability to present a defense. *Id.* at 532. Mr. Luna has been incarcerated throughout these proceedings. That is a factor that weighs in favor of dismissal. Mr. Luna presented no evidence of anxiety or concern by him occasioned with the delay. At argument on this motion, counsel for Mr. Luna conceded that Mr. Luna's ability to defend himself has not been impaired by the delay.

Balancing those factors, this court concludes the Idaho Supreme Court's Orders have not resulted in a violation of Mr. Luna's right to a speedy trial under the federal constitution, largely because the delay has been a short one. A nine and a half month delay between arrest and trial does not violate his right to a speedy trial, despite his pre-trial incarceration, given the neutral reason for the delay and the absence of other prejudice to him.

The Idaho Constitution

The state constitution also guarantees that "in all criminal prosecutions, the party accused shall have the right to a speedy and public trial." Idaho Const. Art. I § 13. Like the federal constitution, the Idaho constitution does not include a definition of what speedy means. In some circumstances the Idaho Supreme Court has adopted the balancing test from *Barker* to interpret what 'speedy' means under the state constitution as well as the federal. *See State v. Folk,* 151 Idaho 327, 256 P.3d 735 (2011); *State v. Young,* 136 Idaho 113, 117, 29 P.3d 949, 953 (2001). However, the Idaho Supreme Court does not use the *Barker* test in all situations.

The Court first adopted that manner of interpreting the state constitution's speedy trial provision in *State v. Lindsay*, 96 Idaho 474, 531 P.2d 236 (1975). In *Lindsay*, there was a delay of approximately one year between when the State filed a complaint and when it was able to successfully extradite Mr. Lindsay from the State of Utah. Once he appeared, his trial was held

within the timeframe required under Idaho Code Section 19-3501. That statute provides the charges against a defendant must be dismissed if an indictment or information is not filed within six months of a defendant's arrest or if the trial is not held within six months of the filing of the indictment. Mr. Lindsay argued that the delay between charging him and his trial had violated Art. I, § 13, irrespective of compliance with Section 19-3501, once he appeared. The Court held:

> The right of speedy trial as guaranteed by a state constitution or statute cannot be said to be necessarily identical to that right to speedy trial guaranteed in the Constitution of the United States. We find, however, that the 'balancing test' laid down in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) is consistent with decisions of this court stating that whether one has been deprived of his right to a speedy trial must be decided by reference to considerations in addition to the mere passage of time. *Hadlock v. State*, 93 Idaho 915, 478 P.2d 295 (1973); *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954).

Id. at 475; 531 P.2d at 237. However, the Court also stated:

> Idaho's constitution, Art. I, § 13, provides in pertinent part:
>
> > 'In all criminal prosecutions, the party accused shall have the right to a speedy and public trial; * * *'
>
> The provisions of I.C. s 19-3501, which generally require that an indictment must be returned against a person at the next term of court after which he has been held to answeer and that a defendant must be tried at the next term after an indictment against him is found, reflect the meaning of that constitutional guarantee. *Jacobson v. Winter*, 91 Idaho 11, 415 P.2d 297 (1966); *Schrom v. Cramer*, 76 Idaho 1, 275 P.2d 979 (1954); *Ellenwood v. Cramer*, 75 Idaho 338, 272 P.2d 702 (1954).

Id. Thus, what 'speedy' means under the state constitution can be determined by resorting to I.C. § 19-3501 if the question involves one of the timeframes set by that statute. It is only necessary to resort to the *Barker* factors if some other delay, such as between charging by complaint and arrest (something not addressed in Section 19-3501), is at issue.

The Court reaffirmed that view in *State v. Hobson*, 99 Idaho 200, 579 P.2d 697 (1978). There the Court held: "Barker v. Wingo . . . is not applicable when I.C. s 19-3501 has been violated." *Id.* at 202; 579 P.2d at 699. Although the Court in *Hobson* introduced some confusion

when it referred to that statute as a supplementation of Idaho's constitutional guarantee rather than simply as a codification of what the state constitution demands, as the Court referred to Section 19-3501 in *Lindsay*.

Subsequent to *Hobson* the Court has applied the factors in *Barker* to determine whether a violation of Art. I, § 13 had occurred when Section 19-3501 did not apply because the delay was between filing of a complaint and arrest, *see State v. Holtslander*, 102 Idaho 306, 629 P.2d 702 (1981), and where Section 19-3501 did not apply because trial had been postponed beyond the requisite time period upon the defendant's application, *State v. Folk,* 151 Idaho 327, 256 P.3d 735 (2011). However, the Court has also used the *Barker* factors to determine whether a violation of the state constitution occurred in at least one situation where resorting to I.C. § 19-3501 would have been sufficient. *See State v. Young,* 136 Idaho 113, 29 P.3d 949 (2001) (delay between arraignment and trial).

Any confusion about whether Section 19-3501 supplements the right to a speedy trial under Art. I, § 13 or codified that right was resolved by the Court in *State v. Clarke*, 165 Idaho 393, 446 P.3d 451 (2019). In *Clarke,* the Court reaffirmed its long-standing practice of interpreting the rights guaranteed under the state constitution by using the statutes which were in place at the time of the adoption of the Idaho Constitution. *Id.* at 396, 446 P.3d at 454. The Court stated:

> When construing the Idaho Constitution, "the primary object is to determine the intent of the framers." *Idaho Press Club, Inc. v. State Legislature*, 142 Idaho 640, 642, 132 P.3d 397, 399 (2006) (*quoting Williams v. State Legislature*, 111 Idaho 156, 158-59, 722 P.2d 465, 467-68 (1986)). The best resource is the compilation of the Proceedings and Debates of the Constitutional Convention of Idaho 1889 (I.W. Hart ed., 1912). Unfortunately, Article I, section 17 was adopted without debate. In the absence of the words of the framers, rights guaranteed by the state constitution are "examined in light of the practices at common law and the statutes of Idaho when our constitution was adopted and approved by the citizens of Idaho." *State v. Creech*, 105 Idaho 362, 392, 670 P.2d 463, 493 (1983).

Id. at 397, 446 P.3d at 455.

Clarke involved interpreting what constitutes an unreasonable seizure for purposes of applying Art. I, § 17's bar against unreasonable seizures. At the time of the adoption of the Idaho Constitution, the courts had adopted a rule at common law limiting when police may make an arrest. The Court in *Clarke* used that common law rule to interpret what constitutes an unreasonable seizure under Art. I, § 17. *See id.* Importantly for this discussion, the Court in *Clarke* determined that the Idaho legislature's subsequent statutory modifications to the common law rule did not change the original meaning of what constitutes an unreasonable seizure under Article I, Section 17. The meaning of that phrase was set in stone by the intent of the framers at the time of the ratification, if such intent may be discerned by resorting to the sources cited in *Clarke.* Thus, this court must look there to discern what the framer's intended when they guaranteed a 'speedy' trial.

The framers discussed Article I, Section 13 when it was enacted but they did not discuss what constituted a speedy trial. Therefore, the court must look to the statutes at the time. Idaho Code Section 19-3501 has existed in some form since Idaho was a territory. As originally enacted it read:

> If a defendant, indicted for a public offence, whose trial has not been postponed upon his application, be not brought to trial at the next term of the court at which the indictment is triable, after the same is found, the court shall order the indictment to be dismissed, unless good cause to the contrary be shown.

Cr. Prac. 1864 § 581. The statute was rewritten in 1887 when the revised statutes were compiled and it was codified as Rev. Stat. 1887, § 8212; however, the meaning remained unchanged. At the time of the adoption of the Idaho Constitution a defendant, if indicted for a public offence, must have been brought to trial at the next term of the court at which the indictment was triable, absent

a showing of good cause. Following the Court's commands in *Clarke,* this court concludes that is what 'speedy' means in Art. I, § 13. That is consistent with the Court's holdings in *Lindsay* and *Hobson* as well. Thus, this court must determine what the framers would have understood 'next term' to mean.

The Idaho Constitution created a judicial department divided into five judicial districts. A district court was to be held in each county at least twice a year to continue for such time in each county as may be prescribed by law. Art. V, § 11. Thus it is clear the framers intended a speedy trial under Art. I, § 13 to mean a trial held at the next term after an indictment is found and that terms shall occur at least twice every year; however, the legislature could set and alter the length of each term. Terms therefore were going to average about one-half of one year each, although they need not last precisely that long. In 1919 the first term of the year in the Bannock County District Court began on January 13 and ended on November 8. The second term began on November 10. *See State v. Athens*, 36 Idaho 224 (1922). Thus, the framers would have understood that what constituted a 'speedy' trial under Art. V, § 13 might vary depending upon how the legislature set the terms to begin and end in each county. Where Art. V, § 11 required at least two terms per year but permitted those terms be set by law, the legislature had to set each term to last less than one (1) year. Each term was to last until the court's business was concluded or until the start of the next term. Rev. St. 1887, § 3831. This court concludes it was the intent of the framers that a 'speedy' trial for purposes Art. I, § 13 meant a delay of no more than (1) year between when a person was held to answer and when an indictment was filed unless good cause to contrary be shown[7] and a delay of no more than one (1) year between when an indictment was filed and trial

[7] Section 8212, Rev. St. 1887 required a prosecution be dismissed unless good cause to the contrary be shown when a person has been held to answer for a public offense if an indictment is not found against him at the next term at which he is held to answer."

was held unless good cause to the contrary be shown, but that the legislature could more precisely set those limits as to each county. In 1980, the legislature set each of those time periods to be six (6) months in all counties. I.C. § 19-3501.

Thus, this court concludes that, as the Court stated in *Lindsay*, Section 19-3501 reflects the meaning of the guarantee to a speedy trial under the Idaho Constitution as to those time periods listed in that statute. That brings the court back to whether good cause has been shown to avoid dismissal. Here, however, this court cannot simply follow the Supreme Court's Orders to deem it so. The Court's Orders reference 'good cause' under Section 19-3501 and a tolling of the time period of that statute. The Court did not say in its Orders that it was interpreting the state constitution. Consistent with *Clarke,* this court must discern what the framers would have understood 'good cause' to mean when Idaho's constitution was ratified, because that phrase existed in the statute at the time. Thus, this court will start as directed by *Clarke* with the words of the framers at the time of the ratification and the statutes and common law that existed at the time.

The framers did not discuss what constitutes good cause to delay a trial beyond the next term of court during the debate over ratifying Art. I, § 13. The statutes at the time also did not define the term. Therefore, this court must look to the common law of the time.

In *In re Jay,* 10 Idaho 540, 79 P. 202 (1905), the Idaho Supreme Court granted an application for a writ of habeas corpus commanding a sheriff to release the petitioner from custody. The Court did so because no indictment was filed in the next court term after the defendant had been arrested and held to answer. While the Court did not explicitly discuss good cause, the Court found that the fact the clerk had lost or mislaid the complaint was not sufficient cause to hold the defendant until the next term. *Id.*

At the time Idaho ratified our constitution, the state of California had a statute that provided:

> when a person has been held to answer for a public offense, if an indictment be not found against him at the next term of the Court at which he is held to answer, the Court shall order the prosecution to be dismissed, unless good cause to the contrary be shown.

Ex parte Bull, 42 Cal. 196, 199 (1871) *citing* Art. 1, 783. The California Supreme Court explained how to determine good cause this way:

> The case in which a dismissal of the prosecution is not to follow upon the non-presentment of an indictment against the accused is exceptional--the accused has a right to depart, "unless good cause to the contrary be shown." This general provision of the statute, that the prisoner is not to be held indefinitely, is designed to secure to him a speedy trial, and this right is absolute, except some good cause be shown which may be supposed to take the case out of the operation of the general rule. What is "good cause," may be difficult to define with precision, since it must, in a great measure, be determined by reference to the particular circumstances appearing in each case. There should, undoubtedly, be some fact or circumstance disclosed to the Court upon which its authority in this respect, somewhat discretional, could be brought into exercise. Its discretion is not to be arbitrary, but should proceed upon such knowledge or information as would enable it to determine for itself whether or not public justice requires the further detention of the prisoner, notwithstanding the delay upon the part of the prosecution.

Id.

Certainly the framers of the Idaho Constitution intended that mere inconvenience or difficulty in procuring witnesses or in summoning jurors was not good cause to deny a defendant a speedy trial and that it is incumbent on the State to establish good cause. *See People v. Morino*, 24 P. 892 (Cal. 1890) (need to conduct trial of other causes, without additional showing by state, not good cause for delay); *State v. Arkle*, 245 P. 526 (Mont. 1926) (trial judge's determination that it was unwise, inexpedient and unnecessary to call a jury during term of court not good cause to delay trial); *Newlin v. People*, 77 N.E. 529 (Ill. 1906) (fatal illness and death of two of three circuit court judges not good cause to delay trial, also did not toll time period); *Hernandez v. State*, 11 P.2d 356 (Ariz. 1932) (court's ten year practice of not summoning jurors in July and August due

to heat not good cause to delay trial); *U.S. v. Fox*, 3 Mont. 512 (Sup. Ct. Terr. Of Mont. 1880) (Failure of congress to provide funds for summoning jurors and therefore causing delay in trial violated Sixth Amendment right to speedy trial); *Ex parte Stanley*, 4 Nev. 113 (1868) (Good cause existed when court timely summoned two jury panels and could not secure a competent jury from either).

This court concludes that the framers of the Idaho Constitution, in enacting Article I, § 13, intended that criminal defendants be provided a jury trial at the next term following the filing of the Indictment, but the time period in which that must occur could be set by the legislature and that it was always subject to a delay for good cause. Good cause is a determination the trial court was to make on the record before it. Good cause did not include things like the convenience of the state or the court in conducting its business or failures on the part of the government (state or court) to adequately perform its duties; but good cause could include things outside the government's control, such as the inability to find competent jurors despite summoning multiple panels or the inability to locate a witness despite diligent efforts to do so. With that understanding of the framers' intent in adopting Article I, §13, this court will examine the record in this case to determine if good cause to delay Mr. Luna's trial existed in June and in August.

This court would normally do so upon a factual record. In this case, this court's ability to consider facts is hampered by the failure of either party to present any facts at all in connection with this motion. Generally the State's failure to establish a record of good cause for delay would simply result in dismissal of the action. However, this court is mindful of the fact that the State likely felt any obligation it had to show the reason for delay of this trial was removed by virtue of the Idaho Supreme Court's Orders; indeed the State may not know the reasons the Court ordered this trial delayed and the State may well have been able and willing to proceed to trial in July. The

Supreme Court's July 24 Order mentions a "current inability of court administration throughout the state to comply with minimum safety protocols necessary for addressing the COVID-19 pandemic." In asserting his individual right to a speedy trial in this action, this court suspects Mr. Luna cares little about the ability of the trial courts in Boundary County or Clark County[8] to comply with safety protocols. He, likely correctly, argues that this court could have done so in this case in June. Because the Supreme Court stepped into the shoes of the State in seeking a delay of Mr. Luna's trial and into the shoes of this court in ordering one, it is understandable why neither party has approached this motion in the normal way. Therefore, it seems unfair to the State to dismiss the case because it failed to offer an explanation for the Supreme Court's decisions, especially when it may not have one itself.[9]

Therefore, this court will take as true facts that can be readily and accurately determined by resort to sources whose accuracy cannot reasonably be questioned. I.R.E. 201. For the purposes of this motion the court will accept as true some statistics compiled by the Central District Health Department and will take judicial notice of some actions by local executive governmental authorities around the time Mr. Luna's trials were set to begin.

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[8] This court has chosen these counties to reference by name because they are both geographically remote from Ada County and have somewhat smaller courthouses than does Ada County. This court has no reason to suspect that the District Courts in Boundary and Clark counties, at any point, have been unable to safely conduct business. It is using them for reference only because of their location and size. This court is unaware of what caused the Idaho Supreme Court to reach its conclusion that "court administration throughout the state" was unable to comply with safety protocols. It is not clear from the Order who 'court administration throughout the state' is. Perhaps that is simply a statement that the statewide Administrative Office of the Courts, as of the time of the July 24 Order, had been unable to provide the trial courts in some counties with resources they needed in order to safely afford people like Mr. Luna a speedy and public jury trial, such as face masks. If the Court was ordering a delay in trials so as to provide resources to some counties in order to comply with safety protocols, it is notable that, as far as this court is aware, Ada County has received none. In other words, the Ada County District Courts and Trial Court Administrator are the same position now to meet safety protocols, as they were in July.

[9] The State could have presented testimony by the Administrative Director of the Courts as to how and why the Supreme Court's Orders came to be.

In June and early July of 2020, the number of people who had tested positive for the SARS-CoV-2 virus was rising in Ada County. *See* Central District Health, District-Wide COVID Information, Tableau Public, *https://public.tableau.com/profile/central.district.health#!/vizhome/CDHCOVID-19/CDHCOVID-19Information*. It is not clear if that was due to an increase in the rate of transmission of the virus between persons, an increase in the number of people being tested, or some combination of the two. In response, on July 7, 2020, Central District Health issued an order placing all bars and nightclubs in quarantine. Central District Health also banned gatherings of 50 or more persons in Ada County and mandated that unrelated persons stay at least six feet apart. CENTRAL DISTRICT HEALTH, ORDER OF THE DISTRICT BOARD OF HEALTH CENTRAL DISTRICT HEALTH, STATE OF IDAHO 2 (2020), https://www.cdhd.idaho.gov/pdfs/cd/Coronavirus/Order/CDH%20Quarantine%20and%20Restriction%20Order%2007-07-20.pdf, (last visited Sept. 9, 2020). On July 14, 2020, Central District Health amended its order to include a requirement that those persons congregating in groups of less than 50 also wear face masks.

While the number of positive tests on a weekly basis has decreased since mid-July, Ada County remains under the same restrictions now as it was when Mr. Luna's trial was scheduled to begin in August, restrictions that were not in place when his trial was set to begin in June. When Mr. Luna's trial was set to begin on June 17, Ada County, with the rest of the state, had entered into Stage 4 of the Idaho Rebounds Plan. *See COVID-19 Latest Information & Data*, CENTRAL DISTRICT HEALTH, https://www.cdhd.idaho.gov/dac-coronavirus.php (last visited Sept. 10, 2020). None of the Stage 4 recommendations would have precluded this court from conducting a jury trial. Certainly, this court has no reason to conclude that this court could not have conducted a jury trial on either of those occasions in compliance with the commands of Central District Health and Governor Little's Idaho Rebounds Plan.

The Idaho Supreme Court's July 24 Order contains many commands to the trial courts about how to ensure the safety of jurors and the public during trials. Many of those precautions are things this court already does, such as employ the struck panel method of jury selection; or that this court would have been required to do by the orders of Central District Health, such as ensure people are kept at least six feet apart and that everyone wears a mask; or that this court could have done on its own in June or August, such as excuse jurors in advance who fall into a high risk demographic. The only thing the Supreme Court did in its Order to protect the public and litigants that any trial court in the state could not have done on its own was to amend the criminal rule regarding the number of peremptory challenges to which each party is entitled. The Court's decision to reduce the number of peremptory challenges is almost certainly designed to reduce the number of jurors who need to be summoned to appear at the same time in each case. This court could have avoided that problem without the rule change simply by conducting *voir dire* of jurors individually, as it does in cases with a high degree of pre-trial publicity, or in smaller groups. For these reasons it is difficult to conclude that the delay in Mr. Luna's trial was necessary to protect jurors, witnesses, or the parties from the SARS-CoV-2 virus. However, this court recognizes it is making that statement with the benefit of some degree of hindsight.[10]

In June and July there was more uncertainty about the SARS-CoV-2 virus than exists presently. More is known now about how the virus is transmitted from person to person, how many people contract the disease COVID-19 when infected, and what ill effects people who do are likely to suffer. *See* Laura Helmuth, *Nine Important Things We've Learned about the Coronavirus Pandemic So Far,* SCIENTIFIC AMERICAN (SEPT. 5, 2020), https://www.scientificamerican.com/

[10] Another benefit of having the court with original jurisdiction to hear the matter make decisions in the first instance is that this court would have had to make the decision in June, with information available then, and this court would have had to articulate its reasons for doing so at the time. Generally, courts are to decide cases one case at a time with faithfulness to the rule of law; not en masse by executive order.

article/nine-important-things-weve-learned-about-the-coronavirus-pandemic-so-far/. That uncertainty in the face of a public health danger to individuals certainly suggests a need to delay in order to gather more information. In its July 24 Order, the Supreme Court delayed jury trials in all criminal actions, including this one, to the seemingly arbitrary date of September 14. Perhaps the Court did so simply to buy time to gather additional information about the virus. Unfortunately, despite making a decision generally left to the trial court to make in each case, the Supreme Court did not articulate the reasons for its decision with the precision that the trial courts are accustomed to using when making such decisions ourselves or that the Court uses when exercising its appellate jurisdiction. Thus, this court is left to speculate somewhat about why the Supreme Court made the decision it did in this case.

Given the history of courts being deferential to public health authorities in times of public health crises, it is not surprising that there is some precedent for courts justifying the delay of a criminal trial due to risk of infectious disease. In *In re Venable*, 261 P. 731 (Cal. Dist. Ct. App. 1927), a district court in California reviewing on appeal a decision of the justice court found an epidemic of infantile paralysis prevalent in the town where the justice's court was conducted was good cause to delay a trial beyond the period permitted at the time under California law. *Id.* at 731–32. In *State v. Bateman*, the Oregon Supreme Court found the prevalence of influenza and deference to the requirements of the board of health to be good cause to delay a trial to a term of court beyond that normally provided for by law as the court summoned no jurors during one of its terms. 186 P. 5, 7 (Ore. 1919). While it is not explicit in either opinion, there is a fair inference that the trial courts in each case were not physically capable of complying with the directives of the public health authorities in the time allotted. As stated above, it is highly likely this court could

have done so and still provided Mr. Luna with his trial in the timeframe required under the state constitution; but for the Supreme Court's order commanding it not to do so.

In the early days of World War II the Idaho Supreme Court wrestled with the question of whether the war effort was sufficient justification to delay a trial beyond the next term. In *In re Rash*, 64 Idaho 521, 134 P.2d 420 (1943), the Court held that the prosecution's inability to secure witnesses and the court's inability to summon jurors without removing persons from "defense projects where their presence is absolutely essential" and where "it would be virtually impossible to obtain a jury...without working a great hardship upon everyone that would be called to the jury duty" did not constitute good cause to delay trial beyond the next term. *Id.* at 524, 526; 134 P.2d 420–21. The Court stated:

> The present stage of the war or present consequent demand for service of all man and woman power in activities directly contributing to our successful prosecution or assistance in the prosecution of the worldwide conflict, or the fact that during certain seasons of the year farmers should not be called upon to sacrifice their farm activities, does not authorize unlimited continuance of criminal cases or cessation of judicial functions, an integral and constitutional part thereof being speedy jury trials.

Id. However, the Court took the unusual step of simply ordering that Mr. Rash be brought to trial within thirty (30) days.[11] *Id.* Justice Dunlap dissented and opined that the prosecution should be dismissed. *Id.* at 528, 134 P.2d at 423. In Justice Dunlap's view, the majority erred by including the word 'unlimited' in the quote above. Justice Dunlap simply believed the war effort did not authorize continuance of criminal cases at all. *Id.* This court wonders how many judges and

[11] The case was in an unusual procedural posture to begin with as Mr. Rash was out of custody, but nonetheless petitioning the court for a writ commanding his release. At the time, defendants who were being held in custody who moved to have the case against them dismissed for a speedy trial violation and whose motion was denied by the trial court did not have to languish in custody waiting for an appellate court to review the trial court's denial. Defendants could simply petition to the Supreme Court for a writ commanding the sheriff to release them from custody. If the Court did so, it was effectively also telling the trial court to dismiss the prosecution. Where Mr. Rash was out of custody, normally he would have had to wait for trial and appeal to complain. The Court was worried enough about his right to a speedy trial that it took the unusual step of telling the trial court when it had to conduct the trial.

lawyers today would agree with Justice Dunlap. If the answer is, as the court suspects, not many, this court wonders if modernity has desensitized the judiciary and the bar to the detriments of delay; both to people in Mr. Luna's position and to people like the woman he is accused in this action of having raped.

In the end this court concludes the just thing for it to do is what the majority in *In re Rash* did—make sure this case goes to trial quickly, but not dismiss the case entirely. The Supreme Court in *Rash* found that the trial judge's reason for delaying the trial was of "doubtful justification" but "not so lacking in the elements of 'good' cause . . . as to demand the petitioner's discharge." *Id.* This court views the Idaho Supreme Court's Orders of April 22 and July 24 in the same way.

Mr. Luna's right to a speedy trial under I.C. §§ 19-601 and 19-3501

Mr. Luna argues that even if the Supreme Court did not violate his constitutional right to a speedy trial, it violated his right to a speedy trial under Idaho law. As discussed above, this court concludes that the Idaho legislature has simply codified a portion of the rights guaranteed under Art. I, § 13 of the Idaho Constitution. Therefore, the court need not address the parties' arguments about the application of that statute separately from the state constitution.

CONCLUSION

For the reasons explained herein, this court concludes that the Idaho Supreme Court did not violate Mr. Luna's right to a speedy trial as guaranteed under the federal and state constitutions when the Court issued its Orders of April 22, 2020 and July 24, 2020, requiring a delay in the trial in this case. Mr. Luna's motion to dismiss is denied.

Signed: 9/18/2020 04:35 PM
JONATHAN MEDEMA
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of September 2020, I served a true and correct copy of the within instrument to:

ADA COUNTY PROSECUTOR'S OFFICE
VIA EMAIL

ADA COUNTY PUBLIC DEFENDER'S OFFICE
VIA EMAIL

PHIL McGRANE
Clerk of the District Court

Signed: 9/21/2020 10:47 AM

By: _____
Deputy Court Clerk