



Northern
California

March 23, 2020

Via Email

Honorable Barry Baskin
Presiding Judge
Contra Costa County Superior Court
725 Court Street
Martinez, CA 94553
ctadmin@contracosta.courts.ca.gov; dept01@contracosta.courts.ca.gov

RE: COVID-19 and Contra Costa Superior Court System’s Shutdown Through at Least April 1, 2020

Dear Judge Baskin:

We write to express our concern with Contra Costa County Superior Court’s emergency order (“Order”), issued March 13, 2020, denoting the 16-day period between March 16 and April 1, 2020 as a “court holiday.”¹ We oppose a shutdown of criminal courts during this period to the extent that it deprives incarcerated pre-trial defendants essential, timely rights such as an arraignment and appointment of counsel.

We appreciate that courts need to exercise vigilance during this public health emergency and that accommodations should be made to conform to public health recommendations regarding social distancing. Access to courts will understandably be limited and many hearings will need to be continued. Some hearings that normally occur with parties physically present may now require the use of video technology.² For defendants who are out of custody, these steps should be minimally disruptive. Notwithstanding these necessary accommodations, access to courts for the *incarcerated* cannot be eliminated.

Courts are essential to our democracy. Indeed, court personnel performing essential services are “categorically exempt” from the Shelter in Place Orders in effect in Bay Area Counties, including Contra Costa County.³ If the government is going to continue arresting, prosecuting

¹ See General Order Re: Implementation of Emergency Relief Authorized Pursuant to Government Code Section 68115 by Chair of Judicial Counsel (Mar. 13, 2020), available at <http://www.cc-courts.org/general/docs/ImplementationOrderSigned.pdf>.

² See, e.g., Penal Code § 977(c)(1) (describing procedure for in custody felony or misdemeanor video arraignments). We are not suggesting that video appearances should routinely substitute for physical presence, simply that these exigent times may warrant some adaptations.

³ See Contra Costa Health Services, Order of the Health Officer (Mar. 16, 2020), available at <https://cchealth.org/coronavirus/pdf/HO-COVID19-SIP-0316-2020.pdf> (ordering all individuals to shelter at their place of residence, except to provide or receive certain essential services, including essential governmental services). The Shelter in Place order specifically exempts court personnel: “For purposes

and incarcerating people during this public health emergency, courts need to afford detainees basic due process, including a judicial determination of probable cause, notice of the charges, an opportunity for release from custody and access to counsel. Maintenance of these core constitutional protections, even during times of crisis, is one of the principal characteristics distinguishing our democracy from a police state.

And yet, as we read the Contra Costa Superior Court's order, someone arrested and jailed on March 20, 2020 may not have an official court hearing until April 8, 2020. This Order would apparently suspend arraignments entirely through April 1, 2020, and then afford the state seven days in which to arraign a defendant, instead of the standard 48 hours. This Order also does not provide an explicit mechanism for a court to refer an incarcerated indigent defendant to the Public Defender.⁴

In sum, this Order poses an unacceptable risk of denying jailed defendants in Contra Costa County any meaningful access to the courts, or counsel, for the next several weeks. We have serious concerns about its constitutionality. Access to the courts is a fundamental tenet of due process. The U.S. Constitution demands a prompt judicial determination of probable cause no later than 48 hours after an arrest, excluding weekends and holidays. *See e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991); *Gerstein v. Pugh*, 420 U.S. 103, 114–17 (1975). The federal and state Constitutions guarantee other attendant rights. *See* U.S. Const. amend. VI (right to counsel); *Gideon v. Wainwright* (1963) 372 U.S. 335 (right to counsel); U.S. Const. amend XIV (due process); Cal. Const. art. I § 7 (state due process); Cal. Const. art I, § 14 (right to felony arraignment on complaint without unnecessary delay), 15 (right to counsel and due process), 12 and 28 (right to bail).⁵

In a further restriction of court access, we understand that the court is not allowing any written filings during this period. This means that neither defense counsel nor inmates can file any motions to challenge the prosecution. For example, an inmate cannot file any *pro se* paperwork in superior court, including a petition for a writ of habeas corpus, to challenge any condition of

of this Order, all first responders, emergency management personnel, emergency dispatchers, *court personnel*, and law enforcement personnel, and others who need to perform essential services are categorically exempt from this Order. Further, nothing in this Order shall prohibit any individual from performing or accessing 'Essential Governmental Functions,' as determined by the governmental entity performing those functions." *Id.* at 10(d) (emphasis added). This order is in effect through April 7, 2020. *Id.* at 12. This accords with Governor Newsom's subsequent State-wide Executive Order, N-33-20 (Mar. 19, 2020), available at <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>, which classifies "the Courts," as part of the essential workforce. *See* Essential Workforce, Essential Critical Infrastructure Workers 10 (Mar. 22, 2020), available at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

⁴ *See* FAQs, Contra Costa Public Defenders, <https://www.cocopublicdefenders.org/faq> (last visited Mar. 20, 2020).

⁵ We are informed that "bail hearings" are still informally being conducted but we have concerns about the statutory authority of those hearings and the availability of any review, given that the government is not filing criminal charges in these cases. *Cf.* Penal Code §§ 1270.2, 1275. We are also informed that defendants denied affordable bail or release on their own recognizance are not arraigned, not appointed counsel, and returned to jail with no future court dates. This is untenable.

confinement, abuse or maltreatment while in custody during the next several weeks. This cannot be squared with the federal and state Constitutional guarantees of the right to habeas relief. U.S. Const., art I, § 9 (habeas shall not be suspended except during rebellion or invasion when public safety so requires); Cal. Const. art I, § 11 (same right under state constitution).

We recognize that this Order was authorized pursuant to Government Code § 68115,⁶ but no administrative order can eliminate constitutional protections for those who are arrested and jailed, simply by deeming the next few weeks a “court holiday.”⁷ To do so would set a dangerous precedent for the indefinite suspension of constitutional rights for incarcerated inmates. Nor do we believe that this was the intent of the administrative order. It is worth noting that in her Second Advisory to the Courts issued on March 20, 2020, our Chief Justice urged courts to “[p]rioritize arraignments and preliminary hearings for in-custody defendants, and the issuance of restraining orders.”⁸ Prioritizing such hearings presupposes that they continue to occur.

The Contra Costa Superior Court’s near total shutdown stands in stark contrast to the numerous businesses which remain functioning during this period because they are considered essential under local and state health advisory orders. It is equally, if not more, critical for the courts to ensure that incarcerated detainees are guaranteed access to courts during this time.

Moreover, Contra Costa’s approach appears out of step with implementation of emergency orders from other jurisdictions. We are informed that other counties, including Alameda, San Francisco, San Mateo and Solano, which are all also operating under Government Code § 68115 court orders, continue to ensure that arraignments for incarcerated defendants occur and that attorneys are appointed to represent those defendants.⁹

We urge you to ensure that the fundamental rights of those whom the government arrests and incarcerates remain in place during these challenging times. We thank you in advance for carrying out these essential services.

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⁶ See Judicial Council Order regarding Contra Costa Superior Court 2 (Mar. 13, 2020), available at https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/2020/2/202003171719/Contra%20Costa%203.13.20.pdf.

⁷ We acknowledge that this emergency may also take longer than two weeks to resolve and that contingencies may need to be in place for longer. Contra Costa’s Shelter in Place Order is in effect through April 7, 2020, which means courts are unlikely to re-open on April 1, 2020. The Governor’s state-wide order is open-ended. In our view, that makes our civil liberties concerns even more pressing.

⁸ See *California Chief Justice Issues Second Advisory on Emergency Relief Measures*, California Courts (Mar. 20, 2020), available at <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-second-advisory-on-emergency-relief-measures>.

⁹ See, e.g., News Release, Superior Court of California, County of San Francisco (Mar. 16, 2020), available at <https://www.sfsuperiorcourt.org/sites/default/files/images/News%20Release%20--%20Coronavirus%20%28COVID-19%29%20%28007%29.pdf?1584464205582> (conducting arraignments within seven days, as opposed to 48 hours).

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Regards,



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