



Northern
California

April 6, 2020

The Honorable Deborah A. Ryan
Presiding Judge, Santa Clara County Superior Court
191 North First Street
San Jose, California 95113
media@scscourt.org; BRada@scscourt.org

Via Email

RE: COVID-19 and Court Secrecy: Preserving Public Access to the Santa Clara County Superior Court

Dear Presiding Judge Ryan,

The American Civil Liberties Union of Northern California (“ACLU”), along with community groups that work to empower family members of incarcerated loved ones, are very concerned that criminal proceedings in Santa Clara County Superior Court are still apparently being conducted in secret, closed entirely to the public or press, since this Court’s March 23, 2020 general order.¹

We are aware that the First Amendment Coalition (“FAC”) raised concerns about this in a letter to you on March 25, 2020. We are not aware of any modifications the court has made in response, but if some have been made please do let us know. We did, however, learn that the court recently set up video arraignments and is establishing other technological adaptations to facilitate access to the court. We believe that a public dial-in conference line for the public to access and participate in criminal proceedings is far easier and relies on technology already available in courts.

In the wake of the COVID-19 pandemic, families of those incarcerated are more concerned than ever about what is happening to their loved ones when they finally get to court. Silicon Valley De-Bug engages in participatory defense daily in Santa Clara courts—except of course, since this Court’s March 23rd order prohibiting it from doing so. Essie Justice Group also frequently attends bail hearings; its members are women whose loved ones are incarcerated across the state.

¹ See Superior Court of the State of California, in and for the County of Santa Clara, “General Order Restricting Courthouse Entry and Permitting Access to Only Those Persons Required to Appear in Person at any Santa Clara County Superior Courthouse” (Mar. 23, 2020), *available at* http://www.scscourt.org/general_info/news_media/newspdfs/General%20Order%20Restricting%20Court%20Entry%20and%20Permitting%20Access%20to%20Only%20Those%20Persons%20Required%20to%20Appear%20in%20Person%203.23.20.pdf.

Since March 23, 2020, when this court closed to the public without providing alternative access, family members whose loved ones are incarcerated cannot participate in court hearings or hear first-hand what has happened. Families and community members play an important part in our court process, especially during bail hearings. Families are often called upon by defense attorneys to announce their presence and relationship to their client to show the community ties. Families may often be called upon to verify certain information, such as residence or employment.

In the wake of this pandemic, these initial hearings are critical. The court's decision to release someone from an overcrowded jail pending trial now can literally mean the difference between life and death. Moreover, now that arraignments may not occur until seven days after an arrest², and families may not have access to their loved ones in jail due to increased security measures, the arraignment often presents the first opportunity to learn what is happening to someone's loved one. Family participation is therefore even more necessary in this current crisis to ensure the safety of individuals facing the opportunity for release.

The public has a right under both the First Amendment and the California constitution to know how our judiciary conducts itself in our courtrooms.³ Someone charged with a crime has a right to a public trial under the Sixth Amendment, including a public preliminary hearing.⁴ We recognize that public health and safety are compelling interests and that physically restricting courthouse access is warranted to prevent the spread of COVID-19. But the court has the ready ability to set up a lesser restrictive alternative of a public dial-in line, just as the Judicial Council has done for its recent emergency meetings.⁵ In fact, other courts throughout the state are responding to the pandemic by encouraging telephonic appearances whenever possible and

² See Judicial Council of California, "Statewide Emergency Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council" (Mar. 30, 2020), available at https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/2020/2/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-30-2020.pdf.

³ The U.S. Constitution guarantees the right of access to criminal proceedings. U.S. Const. amend. I; *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 20 Cal. 4th 1178, 1211 (1999). The California Constitution provides the public the right of access to information "concerning the conduct of the people's business[.]" Cal. Const. art. I, § 3(b), and the California Code of Civil Procedure provides that unless otherwise indicated, "every court shall be public." Cal. Code Civ. P. § 124.

⁴ Penal Code § 868 (preliminary hearings are open and public); see also *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 13 (1986) ("We therefore conclude that the qualified First Amendment right of access to criminal proceedings applies to preliminary hearings as they are conducted in California.").

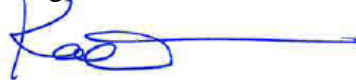
⁵ See California Courts, Newsroom, "Judicial Council Meeting" (Apr. 6, 2020), <https://newsroom.courts.ca.gov/calendar/judicial-council-meeting-20200403>; California Courts, News Release, "Judicial Council to Hold Special Meeting Amid COVID-19 Pandemic" (Mar. 26, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-to-hold-special-meeting-amid-covid-19-pandemic>. Although courts may close a preliminary hearing if the court makes specific findings on the record that "closure is essential to preserve higher values[.]" the court must also find that such an action "is narrowly tailored to serve that interest" and "there is no less restrictive means of achieving the over-riding interest." *NBC Subsidiary*, 20 Cal. 4th at 1204 (internal citations omitted); see also *In re Copley Press Inc.*, 518 F.3d 1022, 1028 (2008) (requiring that there be "no alternatives to closure that would adequately protect the compelling interest" (internal citations omitted)).

livestreaming public proceedings to ensure public access.⁶ Because the court's March 23 order fails to account for such lesser means of accessing court proceedings, we have serious concerns about its constitutionality.

These uncertain times unquestionably warrant flexibility in the administration of court proceedings. Physical access may be properly curtailed. But conducting criminal proceedings in secret is simply untenable. Transparency should not be suspended during an epidemic—if anything, it should be increased. After all, openness in judicial proceedings “enhances both the basic fairness of the [proceeding] and the appearance of fairness so essential to public confidence in the system[.]” *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984), and forms “an indispensable predicate to free expression about the workings of government[.]” *Courthouse News Serv. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014).

We therefore ask that this Court put in place a simple way for the public to meaningfully access criminal proceedings, such as a public dial-in line. We look forward to a response by Monday April 13, 2020. Please do not hesitate to contact us with any questions.

Regards,



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Also on behalf of:

Silicon Valley De-Bug

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 - Molly O’Neal, Santa Clara County Public Defender, moneil@pdo.sccgov.org
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 - Raj Jayadev, Silicon Valley De-Bug, raj@siliconvalleydebug.org
 - Felicia Gomez, Essie Justice Group, felicia@essiejusticegroup.org

⁶ See, e.g., Superior Court of California, County of Sacramento, “Access to Court Proceedings by General Public Restricted” (Mar. 30, 2020), available at <file:///C:/Users/agilbert/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/9491Y75F/Sacramento%20public-access-order-033020.pdf>; The Superior Court of California, County of Orange, *Courtroom Live Streaming*, available at https://www.occourts.org/media-relations/LiveStream.html?fbclid=IwAR2TWXezu-tqKp0uE9SxZPs9q_s8a5iX9_LvYxM0G76ZEslekrECCxly9A (last visited Apr. 6, 2020).