March 27, 2020

Chief Justice Tani Cantil-Sakauye
The Supreme Court of California
Members of the Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

RE: Judicial Council Agenda March 28, 2020

Dear Chief Justice Cantil-Sakauye and Members of the Judicial Council:

I write on behalf of California Public Defender’s Association (CPDA). As you know CPDA is a statewide organization of public defenders, private defense counsel and investigators that has approximately 4,000 members. CPDA stands in alliance with public defenders throughout the state and throughout the nation in promoting the rights of indigent clients accused of crimes. CPDA is also committed racial justice and to treating all those accused of criminal behavior with dignity and respect.

On behalf of our membership and considering COVID-19 that is impacting all our lives please understand that we share the obvious health concerns that all rational thinking citizens in this democracy share, and that we too seek to prevent the spread of this virus. We further share your stated goal to protect the health and wellbeing of all people who are direct participants in the operation of our state’s criminal justice system. However, the actions proposed in the March 27, 2020 Report, the recommendations to the state courts, and the identical request to the Governor for an executive order supporting such actions, seems clearly to result, not only in an eradication of existing due process protections, but in an increase in the number of citizens being placed at risk by being locked up in environments where the virus can and will spread. We believe these actions that suspend due process protections will increase the danger we all face. Specifically, by promoting the extensions of the statutory time for arraignments under Penal Code 825(a) and for preliminary hearings under Penal Code 859(b), more people will be held in local jail facilities for extended time periods without the right to have the reasons for their confinement reviewed. As the recommendations point out in your rationale for their implementation, many court holding and jail facilities are ill equipped to implement social distancing. Given that the custodial facilities that the accused are held in pending access to the court facilities are considerably less equipped to hold those awaiting their hearings in a requisite “social distance” from each other, the increase of holding people detained for longer periods of time in the close quarters of our jails without proper protections increases the risk of the spread of the disease before and after they actually are brought into court. This environment also increases the risk of the potential spread of the disease among the staff required to supervise them.
As we have seen, a majority of the out of custody criminal cases being placed on hold for the last two weeks in most counties has allowed for courts and lawyers to focus their resources on cases where individuals remain in-custody. Thus, it continues to be imperative that courts remain open to address in-custody cases in a timely fashion. Courts must continue to be able to arraign individuals who are in-custody following a new arrest quickly in order to assess whether those being held in-custody are necessarily held on cases both from a justice and a public health perspective. The courts critical role in reducing the density of the in-custody population through timely own-recognizance release, setting bail, resentencing and other measures cannot be postponed if we are to keep the numbers of people incarcerated (and thereby the spread of the virus) to a minimum.

In this regard we ask you to order that all courts in this state designate a courtroom or court department to hear and entertain bail and OR motions and to review all custody determinations. It has been reported that in some county’s courts have engaged in the wholesale shut down of such hearings or the denial of such hearings without prior stipulation of the prosecutors office before calendaring such hearings. We request that this total denial of due process protections be ordered to cease immediately. We further request that you recommend the release from custody of all persons charged with misdemeanors and that our jails only hold those charged with violent or serious felonies where the safety of the public is at risk.

It should be noted that more often than not limiting court proceedings to cases with the more serious charges often results in the accused “waiving time” or giving up statutory speedy hearing and trial rights in order to properly prepare those cases.

Video Technology. As for the use of video technology, we believe that only with the consent of the defendant should such technology be permitted. We are not in any way agreeing to this as a compromise in exchange for ensuring the statutory protections recommended to be suspended, but without the consent of the defendant they should not be abandoned.

In a recent letter to presiding judges the California District Attorneys Association (CDAA) recommended a number of novel emergency procedures that fall into this category. Chief among them is the request that courts conduct remote arraignment and preliminary hearings. In their letter the CDAA asserted that “Clearly, based upon the authority cited above, the Court has the inherent authority to allow remote appearances and testimony at preliminary hearings in the unprecedented circumstances now at hand.” (CDAA Letter to Presiding Judges, dated March 26, 2020 [hereafter CDAA letter], p. 6.)

The slippery analysis that leads to this conclusion overlooks a number of inconvenient truths.

For example, the letter states that there is no constitutional right to be personally present at a preliminary hearing and then suggests that “nothing in [Penal Code] section 977 prohibits the parties from using remote testimony for a preliminary hearing.” (CDAA letter, p. 3-4.)

Although Penal Code section 977 does not specifically mention “remote” preliminary hearings, it does say that:

“The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by
paragraph (2). If the accused agrees, the initial court appearance, arraignment, and plea may be by video, as provided by subdivision (c).” (Penal Code § 977(b)(1); italics added.)

Section 977(b)(1) expressly permits video arraignments, so long as the “accused agrees.” But under well-settled canons of statutory construction, the Legislature’s specification of arraignments as the only felony proceeding that can be held remotely means that other felony proceedings, like the preliminary hearing, cannot be conducted remotely. This view is buttressed by the fact that section 977 explicitly states that “the accused shall be personally present . . . during the preliminary hearing.”

Also overlooked by the CDAA, but even more to the point, is Penal Code section 865 which reads as follows:

“EXAMINATION OF WITNESSES TO BE IN PRESENCE OF DEFENDANT, ETC. The witnesses must be examined [at the preliminary hearing] in the presence of the defendant, and may be cross-examined in his behalf.”

Although this statute guarantees a defendant the right to cross examine at the preliminary hearing, and the right to be present during that cross examination, the CDAA letter also claims that Whitman v. Superior Court (1991) 54 Cal.3d 1063 “found that the defendant’s right to confrontation does not extend to the preliminary hearing.” This is hardly a neutral assessment of the court’s holding.1 But more importantly, it completely overlooks the defendant’s statutory right to cross examine the witness against him “in his presence.” (Penal Code § 865.)

Although we recognize that constitutional rights are superior to statutory rights, logic dictates that the considerations that inform the constitutional right of confrontation must likewise inform the statutory right expressed in Penal Code section 865. This is why perhaps the most glaring omission in CDAA’s letter occurs during its discussion of Maryland v. Craig (1990) 497 U.S. 836. Craig involved a Maryland statute which permitted child abuse victims to testify via one-way closed circuit television whenever their “testimony . . . in the courtroom will result . . . in serious emotional distress that the child cannot reasonably communicate.” (Id. at p. 840.)

Writing for the majority, Justice O’Connor acknowledged that face to face confrontation “forms the core of values furthered” by the right to confront and cross

---

1 Whitman dealt with the constitutionality of Penal Code section 872. The court’s precise holding was “the new, limited form of preliminary hearing in this state sufficiently resembles the Fourth Amendment probable cause hearing examined in Gerstein, supra, 420 U.S. 103, to meet federal confrontation clause standards despite reliance on hearsay evidence.” (Whitman v. Superior Court, supra, 54 Cal.3d at p. 1082.) On the way to that conclusion, the court acknowledged that in Coleman v. Alabama (1970) 399 U.S. 1, the United States Supreme Court ruled that a defendant had a constitutional right to counsel at a preliminary hearing. The court distinguished Coleman on the ground that under “Alabama law . . . not only was the purpose of the hearing to determine probable cause to charge an offense, but the suspect was specifically allowed to confront and cross-examine prosecution witnesses at such hearings, thus making it essential that the defendant have counsel’s assistance.” (Id. at p. 1080.) Of course, Penal Code section 865 provides exactly the same safeguards.
examine witnesses. (Id. at p. 847.) Although that “core” right is not “absolute,” it may not “easily be dispensed with.” (Id. at p. 847.) Indeed, “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation” only when it is “necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” (Id. at p. 850.) Such a determination is warranted only in “certain narrow circumstances” after a “close” case-specific examination of the “competing interests.” (Id. at p. 850.)

While we can all agree that the pandemic raises important public policy issues, the CDAO makes no attempt to explain how videotaped preliminary hearings would be conducted or how remotely examining witnesses would “assure[] the reliability of the testimony” and would “not impinge upon the truth-seeking or symbolic purposes” of the right of confrontation. (Id. at p. 850, 852.) It does appear that, unlike Craig, there would be no face to face confrontation or cross examination by either the defendant or his attorney. Nor does it appear that the Penal Code section 865’s requirements would be satisfied.

The CDAO letter also fails to mention People v. Arredondo (2019) 8 Cal.5th 694, the California Supreme Court’s latest word on this subject. Like Craig, that case involved a prosecution for child molestation. During the testimony of the child victims, the court “positioned a computer monitor so they could not see defendant and he could not see them.” (Id. at p. 696.) Although the trial judge described it as “a very limited blockage...at best it’s a small infringement” (Id. at p. 698), a unanimous Supreme Court ruled that it violated Arredondo’s constitutional right to see, hear and cross examine the witnesses against him.

In reaching this decision, the court emphasized the need for an individualized case-by-case analysis of any infringement upon the right confrontation and cross examination. It also stressed the importance of face to face confrontation:

“... something deep in human nature ... regards face-to-face confrontation between accused and accuser as essential to a fair trial in a criminal prosecution, the right of confrontation contributes to the establishment of a system of criminal justice in which the perception ... of fairness prevails.

And the perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. ... It is always more difficult to tell a lie about a person “to his face’ than ‘behind his back.’ In the former context, even if the lie is told, it will often be told less convincingly. In this sense, the right to face-to-face confrontation, like the right to cross-examine the accuser, serves to ensure the integrity of the factfinding process. It is true that this face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.” (Id. at pp. 699-700; quoting Coy v. Iowa (1988) 487 U.S. 1012, 1016-109; italics added, citations and internal quotation marks omitted.)
Finally, the CDAA letter cites People v. Lujan (2012) 211 Cal.App.4th 1499 for the proposition that “Trial courts also possess a constitutionally conferred, inherent authority to ‘create new forms of procedures’ in the gaps left unaddressed by statutes and the rules of court.” (CDAA letter, p. 5.) But the letter fails to mention that the court also said that:

“We are mindful that courts must tread carefully when exercising their inherent authority to fashion new procedures. We may not sanction procedures of dubious constitutional validity. (Citation.) Nor may we bless procedural innovations inconsistent with the will of the Legislature or that usurp the Legislature’s role by fundamentally altering criminal procedures.” (People v. Lujan (2012) 211 Cal.App.4th at p. 1507; see also People v. Sekhon (2018) 26 Cal.App.5th Supp. 26, 30; italics added.)

In section 68115 of the Government Code, the Legislature has prescribed a clear and comprehensive set of protocols for handling emergency court closures. Had it believed that remote felony arraignments and preliminary hearings should be included among those protocols, it certainly knew how to draft such provisions. Penal Code section 977 already contains a provision for video arraignments and, as the CDAA letter points out, Penal Code section 1346 authorizes the videotaping of the preliminary hearing testimony of “person[s] 15 years of age or younger or . . . developmentally disabled” in certain sex cases under specified circumstances. The Legislature’s decision to exclude such provisions from section 68115 must be presumed to be a deliberate choice (Estate of McDill (1975) 14 Cal.3d 831, 837 [“It is assumed that the Legislature has in mind existing laws when it passes a statute”]), one that reflects a legislative judgment that they were unnecessary or inappropriate. (People v. Woodhead (1987) 43 Cal.3d 1002, 1010 [it is a “settled axiom that when the drafters of a statute have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded”]; citing Ford Motor Co. v. County of Tulare (1983) 145 Cal.App.3d 688, 691; see also In re Edwayne V. (1987) 197 Cal.App.3d 171, 175 [“The specific enumeration of things as coming within a statute precludes the inclusion by implication of other things”]; citing Greempre v. Rodman (1985) 184 Cal.App.3d 662, 674, People v. Mancha (1974) 39 Cal.App.3d 703, 713.)

Under these circumstances, we cannot “bless [a] procedural innovation” that is so “inconsistent with the will of the Legislature.” (People v. Lujan (2012) 211 Cal.App.4th at p. 1507.) CDAA’s proposal that courts institute an ad hoc program of remotely videotaped preliminary hearings simply cannot be squared with the Legislature’s determination that the appropriate way to handle court cases during an emergency is to postpone them. Moreover, and perhaps more importantly, such a program could not be fashioned would almost certainly violate Penal Code section 865 and run afoul of Penal Code section 977.

Recommendations:
We continue to believe we must work together to ensure the safe operation of the courts, consistent with the advice of the medical community and public health

---

2 It is worth noting that the statute does not dispense with face to face confrontation.
experts. We believe social distancing is possible in courtrooms and the hallways of courthouses and it is crucial during this public health emergency to protect our clients, court staff, ourselves, each other and our families that such practices are implemented. Therefore, we ask you to immediately institute best practices of social distancing for all court appearances. To that end, we are requesting you provide the following guidance to all the courts operating in our state:

- Screen everyone as they enter the courts for fever or cough;
- Make clear that courts cannot prohibit public access completely but should limit courtroom seating to every third seat or a distance of 6 feet between persons and should provide remote public viewing if possible;
- Excuse the appearance of out of custody individuals whenever possible and in the rare instances where they do appear, do not require out of custody individuals to enter the well of the courtroom when their case is called;
- With consent of counsel and the individual, excuse in-custody defendants from appearing at court proceedings whenever possible;
- Provide a space for in-custody individuals to speak with their lawyer without having to whisper in close physical proximity;
- Permit attorneys and other court staff to wear protective face masks;
- Provide sanitized (when possible wireless) headsets for interpreters and the individuals they are working with and allow safe distancing from persons they are interpreting for;
- Permit all attorneys to appear via telephone when requested;
- Provide hand sanitizer to all people in-custody;
- Do not handcuff people in custody to each other;
- Minimize use of handcuffs for in custody clients to the greatest extent possible and, when handcuffs are deemed absolutely necessary for public safety, ensure they are thoroughly cleaned and sanitized between every use;
- Do not group in-custody individuals in small holding cells waiting for court proceedings; and
- Require the judge or magistrate to make an announcement at the beginning of the calendar regarding new protocols for social distancing and reminding out of custody people that they can appear through counsel until further notice.
General Comments on what we are facing and what we are doing:

Before you act or vote to make any order restricting the statutory and constitutional rights of our clients I ask you to consider the following sentiments recently expressed by a member of the Wisconsin Supreme Court faced with similar issues:

If this court countenances the suspension of the constitutional and statutory rights of its citizens, citing the exigency of a public health emergency we abandon the principles we were founded upon. The Constitution does not countenance such an infringement. Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. Our Constitution was adopted in a period of grave emergency. Its grants of power to the federal government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. The Sixth Amendment to the United States Constitution commands: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial." U.S. Const. amend. VI. If this court says a public health emergency justifies a blanket [30]-day suspension of a constitutional right and, in California, the further extension of those rights after the emergency ceases then the following constitutionally enumerated rights of the people (among others) may also be subject to suspension by judicial decree:

the free exercise of religion,
the freedom of speech,
the freedom of the press,
the right of the people to peaceably assemble,
the right of the people to petition the Government for a redress of grievances,
the right of the people to keep and bear arms,
the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.

Informed by the lessons of history, the Constitution was established to safeguard the rights of the people even under the most exigent circumstances. The framers "foresaw that troubous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority. Ex parte Milligan, 71 U.S. 2, 120-21 (1866) (emphasis added). The Sixth Amendment's Speedy Trial Clause enshrines an ancient liberty. The Assize of Clarendon, an English code of legal procedure
safeguard to liberty" and "the very palladium of free government." The Federalist No. 83, at 499 (Alexander Hamilton). "[T]here is only one instance in the Constitution where the government is expressly permitted to suspend a fundamental right[.]" Mitchell F. Crusto, State of Emergency: An Emergency Constitution Revisited, 61 Loy. L. Rev. 471, 504 & n.189 (2015); see U.S. Const. art I., § 9, cl. 2. Article I. § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." If the framers had contemplated suspension of Sixth Amendment rights or any other liberties, they would have said so in the text.

By refusing to enforce statutory law the court’s proposed action says "the ends of justice served by temporarily suspending jury trials [or the procedural speedy hearing rights in our statutes] in the courts of this state outweigh the interest of the public and the defendant in fair proceedings and due process. The broad sweep of the court's proposed orders precludes every county court in the state from exercising its discretionary power to weigh various statutory protections before continuing hearings."

"History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure . . . when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

Justifying the suspension of the people's constitutionally and statutorily guaranteed due process rights based on a public health emergency nullifies our Constitution and our laws. Justice Antonin Scalia once explained that "every tinpot dictator has a Bill of Rights which he casually ignores. What was debated in 1787 and what insures our freedom is our structure of government which holds each branch (and in turn by its people) to account." If the people's constitutional rights may be suspended by the judicial branch in the name of a public health emergency, our freedom is in peril; our republic is lost. More than one million Americans have died defending our liberty from external threats. The liberty for which so many have laid down their lives should not be cast aside even in "troubulous times."

We implore you not to suspend the protections of the right to speedy hearing and not to deny the right to confront and cross examine under the 6th amendment with the consent of the defendant.

Sincerely,

Oscar Bobrow
President
California Public Defenders Association