

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re Application of

SUSAN H. BURTON

For Executive Clemency.)

Case No. S255392

**MEMORANDUM IN SUPPORT OF FIRST AMENDMENT COALITION'S
MOTION TO UNSEAL CLEMENCY-RELATED COURT RECORDS**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

This Court recognized less than two months ago that records filed by the Governor pursuant to the California Constitution, Article V, section 8, seeking clemency for “twice-convicted felons,” must comply with California Rule of Court 2.550 *et seq.* – that is, the Governor must file a motion to request that such records be filed under seal. Order, Case No. S251879 (Mar. 13, 2019) (“the Wright matter”). Moreover, the Court recognized in the Wright matter that before the Court may seal records, the Governor’s motion must show that such records meet stringent standards for sealing records: He must demonstrate “an overriding interest that overcomes the right of public access to the record; and show that “a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed,” that the proposed sealing is “narrowly tailored,” and that no less restrictive means exist to achieve the overriding interest. *Id.*; Cal. Rules of Court 2.550 *et seq.*

Yet on April 23, 2019, Governor Gavin Newsom lodged numerous records labeled “confidential” without making any such showing, or even attempting to do so. Records filed in connection with the Request for Clemency (“Clemency Records”), Case No. S255392, captioned Burton on Clemency (the “Burton matter”) are unavailable to the public in their entirety. This is improper. The public has a right of access to clemency files just as it has a right of access to any materials filed in California courts. California law makes clear, as this Court recognized in the Wright matter, that the burden is on the proponent of sealing to justify sealing. The procedure followed by the Governor in the Burton matter improperly places the burden on the public to both identify instances where records have been automatically sealed, and further to independently move for unsealing of such records. California Rule of Court 2.550 *et seq.* requires the reverse.

The Governor must demonstrate, before anything is sealed from public view, that such sealing is justified.

Accordingly, on behalf of the public, the First Amendment Coalition (“FAC”) respectfully moves this Court to issue an order to unseal the Clemency Materials lodged by Governor Gavin Newsom in the Burton matter – and to clarify that going forward, the Governor must comply with the California Rules of Court when submitting materials pursuant to Article V, section 9 of the California Constitution. Specifically, FAC requests that the Court issue an order consistent with its orders issued on December 19, 2018, and March 13, 2019, in response to FAC’s Petition to Unseal similar records in the Wright matter, and further, to direct the Governor not to file any future Recommendations for Clemency in a manner that is inconsistent with the Rules of Court and this Court’s December 19, 2018 and March 13, 2019 orders.

II. FAC’S MOTIONS TO UNSEAL.

The First Amendment Coalition (“FAC”) is a non-profit organization based in San Rafael, California, with a mission to advance free speech, promote open government, and enable public participation in civic affairs. FAC has previously filed six motions with this Court to unseal clemency-related records, one of which was granted in part while the others remain pending. In its prior motions, FAC explained clemency procedure and the public’s strong interest in accessing clemency-related court records. *See, e.g.*, FAC Wright Mem. at 8-11; Mem. in Support of Petitioner’s Motion to Unseal Clemency-Related Court Records, Case No. S252271, at 8-11 (filed Dec. 27, 2018). In short, the California Constitution confers on Governor Newsom the power to grant clemency, Cal. Const. art. V, § 8, but for twice-convicted felons, the Governor’s power is restricted by the constitutional requirement that he obtain this Court’s recommendation.

Cal. Const. art. V, § 8(a). This Court last year interpreted its role in the clemency process as a “traditional judicial function.” *Procedures for Considering Requests for Recommendations Concerning Applications for Pardon or Commutation*, 4 Cal. 5th 897 (2018).

A. The Wright Matter

On November 20, 2018, FAC filed a Motion to Unseal Clemency-Related Court Records in the Wright on Clemency matter, Case No. S251879 (the “Wright matter”). See FAC’s Memorandum In Support Of Motion to Unseal Clemency-Related Court Records (“FAC Wright Mem.”), Case No. S251879 (filed Nov. 20, 2018). In response, this Court issued a minute order on December 19, 2018, granting FAC’s motion with respect to the Wright matter and directing the Governor to resubmit those records in compliance with California Rules of Court 8.45, 8.46 and 8.47. The Governor then moved to file approximately twenty pages from the Wright clemency file under seal, which FAC opposed. Governor’s Motion, Case No. S251879 (filed January 2, 2019); FAC Opposition, Case No. S251879 (filed January 16, 2019). On March 13, 2019, this Court issued an order granting in part and denying in part the Governor’s motion to file under seal, finding, with limited exceptions, that the public right of access overcame the justifications for nondisclosure. Order, Case No. S251879 (Mar. 13, 2019). The Court ordered the Governor to file the requested documents on or before March 20, 2019, with redactions limited to confidential personal information. *Id.*

B. Other Clemency Matters

In addition to requesting access to the Wright clemency records, FAC’s Wright motion also requested access to all clemency-related records lodged with this Court, including in future clemency matters. FAC Wright Mem. at 29-30. The Court denied the

motion as to this request “without prejudice to the filing of a request or requests for access in a particular matter or matters in which access to the record is sought.” Order, Case No. S251879 (Dec. 19, 2018). Accordingly, FAC, on December 27, 2018, filed additional motions to unseal clemency-related court records in five then-pending clemency matters.¹ By letter dated January 2, 2019, the Office of the Governor requested that this Court delay briefing in those matters to give the new administration of Governor-elect Gavin Newsom an opportunity to consider and address the issues they present, and on February 15, 2019, Governor Newsom filed oppositions to FAC’s unsealing motions. These motions remain pending before this Court.

C. The Burton Matter

FAC now moves again to unseal clemency materials, this time in a new matter initiated by Governor Newsom’s administration. Governor Newsom filed the Burton matter on April 23, 2019. Although this was over four months after this Court issued its order requiring the Governor to comply with the California Rules of Court in the Wright matter, and more than a month after this Court reaffirmed that the public has a right of access to clemency-related records, *see* Order, Case No. S251879 (Mar. 13, 2019), Governor Newsom failed to comply with the California Rules of Court or otherwise acknowledge the public right of access to the clemency file.

¹ *See* FAC’s Motion to Unseal Clemency-Related Court Records in the Wong on Clemency matter, Case No. S252271; FAC’s Motion to Unseal Clemency-Related Court Records in the Harris on Clemency matter, Case No. S252277; FAC’s Motion to Unseal Clemency-Related Court Records in the Rodriguez on Clemency matter, Case No. S252279; FAC’s Motion to Unseal Clemency-Related Court Records in the Flowers on Clemency matter, Case No. S252284; FAC’s Motion to Unseal Clemency-Related Court Records in the Guzman on Clemency matter, Case No. S252285.

Indeed, the new Governor's Office provided *even less* public information about the underlying criminal case than in prior clemency requests. For example, in the Wong matter, the Governor's request stated that Ms. Wong "owed significant gambling debts," "shot two victims, hit another with a gun," "set a fire at the scene," and "was convicted of attempted escape," and it provided details about the sentence and quoted from the sealed clemency file. *See* Request for Recommendation for Clemency, Case No. S252271 (filed Oct. 30, 2018). Here, by contrast, the Governor's request summarily states that "Ms. Burton was convicted of felonies in 1989, 1991, and 1992," *see* Request for Recommendation for Clemency, Case No. S255392 (filed Apr. 23, 2019), and provides no information about her felonies or sentences. In light of this Court's recent orders, the Governor should be providing more, not less, information about its clemency requests to the public.

III. THE CALIFORNIA CONSTITUTION, THE CALIFORNIA RULES OF COURT AND THE COMMON LAW MANDATE PUBLIC ACCESS TO COURT RECORDS.

Article V., §8(a) places a hard brake on the Governor's pardon powers, and Penal Code §§ 4851 & 4852 establish the procedure for the submission of the instant clemency recommendation request to the Court. There is nothing in these provisions that requires a blanket of secrecy be thrown over the process. In fact, as shown below, the same California Constitution that establishes this unique procedure also mandates public access to judicial records.

This Court has expressly recognized that the public has a right of access to clemency-related court records in the Wright matter. *See* Order, Case No. S251879 (filed Mar. 13, 2019). As FAC has stated in prior motions to unseal clemency materials, this right of access is secured by the California Rules of Court, the common law, and the

federal and state constitutions. As with all other records considered by the Court in making judicial decisions, the materials filed by the Governor are court records that should be available to the public except in those cases in which this Court makes a finding, on the record, that the document or a portion thereof must be redacted or sealed.

First, under the California Court Rules, a record not filed in the trial court may be sealed *only if* a party “serve[s] and file[s] a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing.” Rule 8.46(d)(2). Sealing is a remedy that should only be employed under extraordinary circumstances, after the court “expressly finds facts that establish,” *inter alia*, that “an overriding interest [] overcomes the right of public access to the record,” “[t]he proposed sealing is narrowly tailored,” and “[n]o less restrictive means exist to achieve the overriding interest.” Rule 2.550(d); *see also* Rule 8.46(d)(6). Moreover, a sealing order must “[s]pecifically state the facts that support the finding.” Rule 2.550(e)(1).

Second, the common law right of access independently applies to clemency-related court records. California courts have long championed the public’s right under the common law to inspect judicial records. *See, e.g., Sander v. State Bar*, 58 Cal. 4th 300, 316-18 (2013) (discussing the common law presumption of access and noting that “[a]bsent strong countervailing reasons, the public has a legitimate interest and right of general access to court records.....”); *Mushet v. Dept. of Public Service*, 35 Cal. App. 630, 636-638 (1917) (“At common law every interested person was entitled to the inspection of public records”). When determining whether the right should attach to a particular judicial record, courts consider whether disclosure of that record would ““contribute significantly to public understanding of government activities.”” *Sander*, 58 Cal. 4th at

324 (internal quotations and citation omitted). This presumption of public access to courts records can be overcome only by “compelling countervailing reasons.” *Pantos v. City & County of San Francisco*, 151 Cal. App. 3d 258, 262-63 (1984).

Third, the constitutional right of access, secured at both the federal and state levels, likewise applies to clemency-related court records. Article I, § 3(b)(1) of the California Constitution requires broad public access to judicial records. In *Savaglio v. Wal-Mart Stores*, 149 Cal. App. 4th 588, 597 (2007), the Court of Appeal overturned a sealing order that had been entered without first complying with the California Rules of Court, observing that, “Lest there be any question, [Art. I, §3(b)(1)] requires us to broadly construe a statute or court rule ‘if it furthers the people’s right of access’ and to narrowly construe the same ‘if it limits the right of access.’” *Id.* at 600.

Moreover, as the United States Supreme Court recognized, open court proceedings allow “the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Courts around the country have held that the strong presumption of openness in court proceedings extends to a presumption of openness in court records. *See, e.g., Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983).²

Because the presumption of access applies under the above authorities, the Clemency Materials, as well as clemency-related records in other matters, may be sealed,

² As explained in FAC’s prior motions, clemency-related records are the type of record that was historically understood to be available to the public, and openness of these records would play a significant positive role in the functioning of the criminal justice system. These factors counsel in favor of finding a constitutional right of access to clemency-related records. *See, e.g., FAC Wright Mem.* at 17-22.

if at all, only after judicial review and articulated findings. The party seeking nondisclosure, here the Governor, has the burden of establishing interests sufficient to overcome that presumption. *See Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 374 (1998) (citing *Estate of Hearst*, 67 Cal. App. 3d at 785). If the party seeking nondisclosure meets this burden, the court must adopt the party’s “enumerated findings expressly.” *McNair v. National Collegiate Athletic Assn.*, 234 Cal. App. 4th 25, 32 (2015) (citations omitted).

In accordance with these well-established principles, this Court recognized “the public right of access” to the clemency-related records in the Wright matter and made express, enumerated findings to support limited nondisclosure. Specifically, this Court identified “overriding interests” that “overc[a]me the right of public access to these records,” namely, “an interest in maintaining the confidentiality of specific personal information and attorney communications contained within the records,” and ordered that any sealing be “narrowly tailored.” Order, Case No. S251879 (Mar. 13, 2019).

IV. CONCLUSION.

As the U.S. Supreme Court has observed, “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 557 (1980). For the above reasons, FAC respectfully requests that this Court order the

Governor to immediately follow the California Rules of Court with respect to the Clemency Materials in the Burton matter and in future clemency proceedings.

Dated: May 6, 2019

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
Selina MacLaren

By

A handwritten signature in blue ink, appearing to read "Thomas R. Burke", is written over a horizontal line.

Thomas R. Burke

*Attorneys for
First Amendment Coalition*

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief in support of First Amendment Coalition's Motion to Unseal Clemency-Related Records is produced using 12-point Roman type including footnotes and contains approximately 2221 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: May 6, 2019

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke
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By



Thomas R. Burke

*Attorneys for
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PROOF OF SERVICE

I declare that I am over the age of 18 years, employed in the City and County of San Francisco, and not a party to the within action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111. On May 7, 2019, I served the following document(s):

**MEMORANDUM IN SUPPORT OF FIRST AMENDMENT COALITION'S
MOTION TO UNSEAL CLEMENCY-RELATED COURT RECORDS**

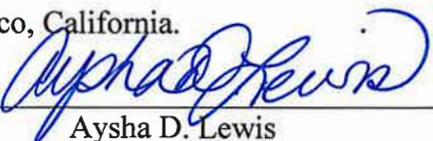
- U.S. MAIL - I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence is deposited with the United States Postal Service in a sealed envelope or package that same day with first-class postage thereon fully prepaid. I served said document on the parties below by placing said document in a sealed envelope or package with first-class postage thereon fully prepaid, and placed the envelope or package for collection and mailing today with the United States Postal Service at San Francisco, California addressed as set forth below:

Rei R. Onishi, Deputy of Legal Affairs
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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on May 7, 2019, at San Francisco, California.



Aysha D. Lewis