



CALIFORNIA NEWS PUBLISHERS ASSOCIATION CNPA Services, Inc.

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January 12, 2021

RE: First Amendment Coalition's Letter Brief In Response To Court's Proposed Administrative Order Concerning Clemency Records, In Connection With Matter *Application of Burton (Susan) for Clemency* (S255392)

To Whom It May Concern:

I am writing on behalf of the California News Publisher's Association, which represents over 450 news publications throughout California, in support of the First Amendment Coalition's (FAC) brief in response to the Court's November 24, 2020 Proposed Administrative Order which amends the Internal Operating Practices and Procedures regarding applications for a recommendation of clemency from the Governor. While the proposed amendment is a substantial improvement to the existing language in the Internal Operating Practices and Procedures, CNPA additionally requests that the proposed amendment be changed to be consistent with and emphasize the primacy of the California Rules of Court with respect to requests to file materials under seal.

The California Rules of Court require that court records are presumptively open to the public from the outset and place the burden to justify secrecy on the party seeking to file records under seal. These rules have withstood the test of time because they strike the proper balance between any purported need for secrecy and the public's rights of access to court records. The Governor should be held to the same standard of all other parties when seeking to seal documents.

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 findings." Rule 2.550(e)(1); *see also* Rule 8.46(d)(6).

Further, the Court has consistently ruled that the records filed 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. *See*, Order, Case No. S251879 (Mar. 13, 2019) ("the Wright matter"). Moreover, before the Court accepts sealed records, the Governor must demonstrate "overriding interests exist that overcome the right of public access to these records." *Id.*; Cal. Rules of Court 2.550 *et seq.* The Governor must show that "a substantial probability exists that the overriding interests will be prejudiced if the records are not sealed," that the proposed sealing is

Document received by the CA Supreme Court.

“narrowly tailored,” and that no less restrictive means exist to achieve the overriding interest. *Id.*; Cal. Rules of Court 2.550 *et seq.*

The public is improperly constrained by the proposed amendment because the little information in the letter from the Office of Legal Affairs posted on the Court’s docket and the uncertainty of when the Court may act on the Governor’s request making it unclear when a motion to unseal must even be filed. Further, the proposed amendment states that the Court will not even entertain such motions if filed after the record has been returned to the Governor, forcing the public to operate on an uncertain timeline and rush to file motions faster than the Court rules on them. This proposed practice contradicts the procedures that must be followed 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.

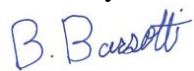
Requiring the Governor to comply with the Rules of Court from the outset will allow the public to make an informed decision about which subset of matters may warrant an objection to the proposed sealing. Additionally, Penal Code §§ 4851–4852 establish the procedure for requesting a clemency recommendation from the Court and there is nothing in these provisions that requires blanket secrecy over the file submitted by the Governor. In fact, the California Constitution establishes this unique clemency procedure also mandates public access to judicial records. Moreover, the constitutional right of access, secured at both the federal and state levels, applies to clemency-related court records. Article 1, § 3(b)(1) of the California Constitution requires broad public access to judicial records. 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).

Accordingly, CNPA supports FAC’s submission, for this Court’s consideration, the following language for the first paragraph of the proposed amendment:

“An application for a recommendation for executive clemency comes before this court pursuant to article V, section 8, subdivision (a) of the California Constitution and Penal Code section 4851. When such applications are received by the Clerk’s Office, they are given a file number, and the fact that they have been filed is a matter of public record. Such applications must be submitted to this court in the manner prescribed by the California Rules of Court, rules 8.45 and 8.46(d)(2)-(5). The court will then review any proposed redactions, if necessary, and make the findings required by California Rules of Court, rules 2.550(d) and (e) and 8.46(d)(6). When a clemency record is before the court, a person challenging any proposed redaction to the record must file a motion to unseal the record. The extent to which the redacted contents of the record will be made available to the public is evaluated on a case-by-case basis.”

If you have any questions, please contact me at the telephone number listed below.

Sincerely,



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