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March 21, 2020

To the Presiding Judges and Presiding Judge Committee:

I am writing on behalf of the elected District Attorneys in California. We hope you are all well and taking every personal precaution to stay healthy. We all know these are uncharted times with decisions being made under the worst of circumstances.

We are writing in the spirit of wanting California's criminal justice system to emerge from this crisis with honor, guided by compassion and girded by decency and the solemnity of our unique place in our community. And, we want everyone to be healthy.

To that end, we are requesting uniform guidelines to clarify the constitutional and statutory timelines and other important issues set forth in the various orders issued by the Presiding Judges across the state.

Right now, there are inequities in California's courthouses. Some courts have authority to close courtrooms, others do not. Some are closing all courtrooms; some are closing most but not all; some are opening courts for arraignment only and some are opening more courts to allow preliminary hearings, juvenile hearings and other ancillary matters. In other words, some courts are implementing variations of emergency procedures while some courts are "business as usual." This lack of equity and continuity in the treatment of criminal defendants and those who dedicate their lives to the administration of criminal justice raises concerns regarding equal protection under the law and now, most urgently, violates every health professional's warning about the spread of the coronavirus.

As District Attorneys, we are firmly committed to the protection of personal and constitutional rights of all individuals. I assure you, every prosecutor in this state is reviewing cases where individuals are currently incarcerated. We are only filing serious cases and cases where there is a danger to public safety. As prosecutors, we are exercising our authority in the spirit of the Governor's

declaration to “stay at home...we need to...flatten the curve together.”

However, it is becoming increasingly dangerous for the public, the court staff, the defense attorneys and our prosecutors to be in court. In one courtroom yesterday, the prosecutor observed a courtroom where multiple defendants were shoulder to shoulder, the defense attorneys were required to be inches apart from the accused in order to have protected communication, the defense attorney then positioned himself closely to the prosecutor which was followed by approaching the Court Clerk and handing her paperwork prepared in court. The deputies in court were then tasked with walking, in close proximity, the group of defendants in order to escort them to another area, arguably for transport.

Before the defendants were in the courtroom, they were in a holding cell, again shoulder to shoulder. In some Counties, the defendants are transported by bus to the court, again, shoulder to shoulder with no social distance or protection from droplets that contain the coronavirus.

This is a horrific situation and flies in the face of every, and we mean EVERY health professional warning about the spread of the coronavirus. Combine the real-world realities of courtroom practice with uncertainty on behalf of courts as to how to implement individual orders and we now are knowingly endangering lives.

Take Merced County: As of this writing, Merced County has no confirmed COVID-19 cases. On March 17, 2020, Merced County Superior Court issued an order in response to their County’s declaration of emergency that allowed all no-time-waiver, in-custody cases to proceed as normal. In progress was a three defendant, in custody homicide trial with one pro per defendant.” The People required 43 witnesses including one elderly man who used an oxygen tank, one witness traveling from the East Coast and four witnesses traveling from other California counties who have reported high rates of infection. A motion for mistrial due to the emergency was denied and the case proceeded.

As the case progressed, a warrant was issued for the elderly man because he failed to appear on his subpoena out of fear for his health. Two additional witnesses from Los Angeles were too afraid to fly and failed to appear.

On March 19, 2020, an officer with Merced Police Department was confirmed infected COVID 19 after testing 9 days prior. He had been closely associating with the homicide investigation and was subpoenaed to appear. The court was informed, and a mistrial was declared. As a result, two Deputy District Attorneys were quarantined with some other District Attorney staff self-quarantined.

Members of the Merced County District Attorney’s Office are frightened for their safety and that of their families. We believe that all District Attorney’s Offices across this state will soon be in similar circumstances. In other words, given this crisis, which appears to change from moment to moment, fears and concerns are heightening. This is true for members of the District Attorney’s Offices, the defense bar and the Court personnel.

We are aware that last night, Chief Justice Cantil-Sakauye issued a Second Advisory on Emergency Measures. She outlines several actions that can be taken to reduce the disruption and hardships caused by the COVID-19 crisis. It should be noted that in many counties, the prosecutors are working diligently with the defense and the Sheriff's Departments to review and where appropriate, to stipulate to early releases of those currently in custody who are serving a sentence, those who will not pose a danger or risk to the community or victims, those who have vulnerable health risks and do not pose a risk to the community and other unique circumstances that may exist. Even with these efforts, individuals who are in custody are still being transported to court in a manner that lacks all semblance of compliance with the CDC guidelines.

The situation calls out for clear guidance as we move forward during this pandemic. First and foremost, not every Court has received the Chief Justice's Order reducing Court operations. For those that have received the Chief Justice's Order, the processes implemented are not all the same. Critically, there remains confusion with respect to the definition of "holiday" within the Order. Some Courts are treating Court days as "holiday" which means the days are not counted against a 10-60 day demand for felony Preliminary Hearings; other courts are not interpreting the Order that way.

We are asking and urging the Court Leaders, specifically the Presiding Judges and its Committee, to seek from the Chief Justice guidance, clarity and definition on the following issues:

The designation, definition and imposition of court "holidays" and "extensions" in terms of calculating mandatory time for:

- In-custody arraignments;
- In-custody preliminary hearings, specifically with reference to both the 10- and 60-day rule;
- Sentencing hearings;
- Time for responsive pleadings and the filing of motions;
- Extensions to include Title 4E findings and other issues impacting detention decisions in Juvenile Court;
- Other in-custody hearings not mentioned in the courts' orders;

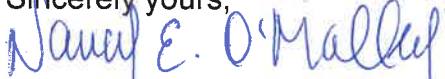
In addition, we are asking and urging the Court Leaders, specifically the Presiding Judges Committee, to seek from the Chief Justice the following:

- Allow video or telephonic arraignments for those who are in custody irrespective of whether the individual agrees or not;
- Provide a clear interpretation of Section 68115 that is not inconsistent with the health directives and issues;
- Clarify what constitutes an "essential function;"
- Should this emergency continue, give the courts authority to renew the orders and begin an additional 30-days for the extension of jury trials;

- If law enforcement officers who are witnesses are quarantined, allow them to testify via telephonically or through video;
- Allow Courts to take a PC 1170(h) felony plea via 977 Petition in lieu of personal appearance;
- If witnesses are unavailable due to the emergency, affirm that fact constitutes good cause to grant 1050 motions;

We appreciate the leadership the Presiding Judges have shown in this time of crisis. It is in moments like these where leadership is crucial to help guide the processes but also to keep those around us safe, calm and protected. We look forward to working with the Presiding Judges. Should you have any questions, please contact me at 510-272-6206 or nancy.omalley@acgov.org

Sincerely yours,



Nancy E. O'Malley
District Attorney, Alameda County
President, CDAA

Cc: Chief Justice Tani Cantil-Sakauye
California District Attorneys
Mark Zahner, CDAA Executive Director