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January 13, 2021

Chief Justice Tani G. Cantil-Sakauye and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

RE: Proposed Administrative Order Regarding Confidentiality of Clemency Records / Application of Susan H. Burton for Executive Clemency (S255392)

To the Honorable Chief Justice Tani G. Cantil-Sakauye and Associate Justices of the Supreme Court:

This letter brief responds to the Court's Proposed Administrative Order (Order) concerning the confidentiality of information in clemency records of people convicted of more than one felony that have been forwarded to this Court for consideration of the justices. (See Cal. Const., art. V, § 8(a); Pen. Code, § 4851.)

The Governor appreciates the Court's efforts to devise an administrative order that reflects the singular nature of executive clemency, which has been described as "an ad hoc 'act of grace' that may be granted for any reason," unmoored from objective standards. (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 419; see also *Ex Parte Grossman* (1925) 267 U.S. 87, 120–121.) The California Constitution prescribes a role for the Court in this process—specifically, to determine whether granting clemency to a person convicted of more than one felony would be an abuse of executive authority. (Cal. Const., art. 5, § 8.) This function is constitutionally distinct from the Court's role in presiding over appeals, original proceedings, and other "ordinary…proceedings" that come before it. (*NBC Subsidiary, Inc. v. Super. Ct.* (1999) 20 Cal.4th 1178, 1212.) The differences between clemency applications and other matters in which the Court is called upon to assess the confidentiality of court records are inherent in the statutory procedures governing executive clemency, including those relating to this Court's review. (Compare Pen. Code, § 4851 [providing that clemency records will be "forwarded" to the Court, instead of being filed or lodged], with Cal. Rules of Court, rule 8.46 [contemplating the "fil[ing]" and "lodg[ing]" of court records]; see also Pen. Code, § 4807 [prescribing the public disclosure of clemency applications and the Governor's reasons for granting clemency in an annual report to the Legislature, without requiring disclosure of other records or information].)

To preserve these important distinctions and protect the significant privacy issues implicated by this process, the Governor's Office respectfully submits that the Order should be revised in the following limited respects. First, the Order should provide that the Court will not entertain motions to unseal filed more than 60 days after the date on which the Court makes a decision in a clemency matter. Second, the Order should indicate that whether another state or federal statute or regulation either limits or prohibits public disclosure is a relevant factor guiding the Court's consideration of whether information in a clemency record should be made public. Finally, the Order should expressly provide that, although the Order borrows from the general framework for sealing and unsealing records set forth in the California Rules of Court, these rules do not apply by their terms to clemency matters, which are neither appeals nor original proceedings.

1. **The Court should establish a time limit for filing motions to unseal clemency records**

Penal Code section 4852 provides for the return of clemency records to the Governor "[i]f a majority of the justices recommend that clemency be granted," while allowing records from applications for which a majority of the justices declined to recommend clemency to "remain in the Court's files." Because of this distinction, the Order appears to permit the filing of a motion to unseal many years after a majority of justices decline to recommend that clemency be granted to an applicant.

The public disclosure of sensitive clemency records long after the initial application and decision can cause prejudice to clemency applicants. Clemency files are compiled at a fixed point in time. After they are transmitted to the Court, they are not updated to account for subsequent developments that would demonstrate the applicant's further rehabilitation or other changed circumstances, such as significant changes in the applicant's medical condition, family circumstances, immigration status, educational attainment, vocational training, completion of targeted rehabilitative treatment, discharge from parole, attainment of sobriety, completion of restitution payments, or post-conviction relief such as a judicial finding of innocence.

Once outdated or incomplete clemency records are disclosed publicly, as is the case with six of the motions to unseal filed by the First Amendment Coalition currently pending before the Court,[1] it increases the likelihood that those records may be used for the improper or illegal denial of educational, employment, or housing opportunities to the applicant, notwithstanding a statutory scheme designed to prevent this outcome. (See, e.g., Civ. Code, § 1785.13, subd. (a)(6)–(7) [background check reports must exclude arrest and conviction records and other

[1] The First Amendment Coalition posted on its website full copies of redacted clemency files of applicants Susan H. Burton (S255392), Richard Flowers (S252284), James Harris (S252277), Anthony Guzman (S252285), Ramon Rodriguez (S252279), and Elaine Wong (S252271), following the Court's denial of the Governor's motion to seal these clemency files. (See First Amendment Coalition, FAC Obtains Clemency Records in 6 California Cases After Challenging Secret Docket, Dec. 23, 2019 <https://firstamendmentcoalition.org/2019/12/secret-docket-revealed-fac-obtains-clemency-records-in-6-california-cases/> [as of Jan. 11, 2021].)

adverse information that antedates the report by more than seven years]; Gov. Code, § 12952, subd. (a)(2) [prohibiting employers from considering an applicant's conviction history until after making a conditional offer of employment].) This perpetuates structural barriers to the applicant's successful reintegration into society, undermining a primary objective of executive clemency. The dissemination of incorrect information about an applicant can also cause unwarranted reputational harm.

These negative repercussions to the applicant can persist for many years. By contrast, the passage of time would seem to temper the public interest in the outcome of a clemency application that is stale, or was granted by a former governor. Accordingly, to the extent having access to this information would enhance the public's understanding of executive clemency decisions, the opportunity to request this information should not extend in perpetuity simply because the records remain in the Court's files.

Public release of outdated sensitive clemency records would be particularly unjust in the case of applicants who later obtain criminal record relief, such as a pardon or certificate of rehabilitation, intended to release them from the penalties and disabilities associated with their criminal histories. (See Pen. Code, § 4853 [a pardon "shall operate to restore to the convicted person, all the rights, privileges, and franchises of which he or she has been deprived in consequence of that conviction or by reason of any matter involved therein…"]; *id.,* § 4852.13 [a certificate of rehabilitation amounts to a showing that the petitioner "has demonstrated by his or her course of conduct his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship" and a "recommend[ation] that the Governor grant a full pardon to the petitioner"].)

Further, if the Court entertains motions to unseal clemency records that remain in the Court's files, irrespective of how much time has passed since the Court's recommendation, it will be challenging for the Governor's Office to make the "specific, case-by-case" showing needed to establish that information contained in these records should be withheld from public disclosure. (Order, p. 2.) The staff of the current Governor would be required to litigate sealing motions relating to applications submitted to the Court for review under previous administrations, and may lack ready access to records associated with these clemency applications, which are transferred at the end of the Governor's term to the State Archives where they are protected from public disclosure for a period of 25 years. (Gov. Code, § 6268, subd. (a).) In such cases, the Governor's Office may be able to access the records, or portions of them, but may be ill-equipped to assess, for example, "whether the information was obtained under an express or implied promise of confidentiality" or "[w]hether the public disclosure of the information could imperil the safety of the clemency applicant or another person." (Order, p. 2.) To require that the Governor's clemency staff develop the requisite showing to support a motion to seal in every case lodged with the Court, including clemency matters investigated by prior administrations, would impose an undue and, in many cases, insurmountable burden on the Governor's Office.

For these reasons, the Order should place a reasonable time limit for filing motions to unseal clemency records where the Court has declined to issue a recommendation for a grant. This

approach would be consistent with existing law limiting the time period for public access to other sensitive criminal records.[2] The Governor's Office requests that the Court apply the same principle here, modifying the Order to provide that the Court will not entertain motions to unseal filed more than 60 days after the date of the Court's recommendation. This proposed deadline would not supplant the Order's existing provision that the Court will not entertain motions to unseal records that the Court has already returned to the Governor. Rather, it would establish an additional, outside limit on the filing period for a motion to unseal in order to minimize the adverse results caused by the public release of obsolete records, as well as the practical difficulties associated with moving to seal clemency records from prior administrations.

2. In determining whether public access to information in a record is warranted, the Court should consider whether an existing statute or regulation limits the public's right of access to that information

The Order sets forth a non-exhaustive list of factors to guide the Court's consideration of whether the public may be denied access to information contained within records in a clemency file, and, presumably, the Governor's duties when preparing the record for resubmission where a motion to unseal has been filed. The Governor's Office suggests that the Court augment this list to include whether an existing statute or regulation restricts disclosure of information contained in records in a clemency file. (Cf. Gov. Code, § 6254(k) [recognizing an exemption from disclosure under the Public Records Act for public records, "the disclosure of which is exempted or prohibited pursuant to federal or state law"].)

In establishing a framework for sealing records, title 8, article 3, of the California Rules of Court defers to "other laws establish[ing] specific requirements for particular types of sealed or confidential records that differ from the requirements in this article, [which] supersede the requirements in this article." (Cal. Rules of Court, rule 8.45(a).) The Advisory Committee comment to this subsection elaborates further:

> Many laws address sealed and confidential records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to

[2] For example, Penal Code section 1203.05 provides that the public right to access probation reports generally terminates 60 days after sentencing. (Pen. Code, § 1203.05, subd. (a); see also *People v. Connor* (2004) 115 Cal.App.4th 669, 684–685 [Penal Code section 1203.05 "represents a legislative determination that (1) after 60 days, a defendant still has a privacy interest in personal information in his or her probation report that is entitled to some protection; (2) this interest outweighs the interests of nonspecified persons and the general public in *continued* unfettered access to this personal information; and therefore (3) the courts should have some control over access after the 60-day period has expired," internal citations and quotations omitted, italics in original].)

> determine if any such law applies with respect to a particular record because where other laws establish specific requirements that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

(*Id.,* Advisory Com. com.)

In determining whether an overriding interest exists that (1) overcomes the public's right to access a record, (2) supports sealing of the record, and (3) is substantially likely to be prejudiced if sealing does not occur (Cal. Rules of Court, rules 2.550(d)(1)–(3)), the existence of a statute or regulation prohibiting disclosure of the information in that record is a relevant consideration. Although the list of factors set forth in the Order does not purport to be exhaustive, to remove any doubt, the Governor's Office requests that the Court revise the Order to state expressly that the existence of a law restricting the disclosure of information contained within a clemency record is a pertinent factor in the Court's analysis.

3. The Order should clarify that clemency matters considered by this Court do not fall within the scope of California Rules of Court, rules 8.45 and 8.46

The Governor's Office requests that the Order state more explicitly that it follows the sealing framework of California Rules of Court, rules 8.45 and 8.46 without concluding expressly that those rules apply to clemency matters by their terms. This approach would preserve the Court's flexibility to modify its procedures as circumstances and experience warrant, and to avoid confusion about the extent to which the California Rules of Court apply to clemency matters subject to the justices' review.

The Order provides that, "[u]pon receipt of a motion to unseal a clemency record before the court pursuant to article V, section 8(a) and Penal Code section 4851, the Clerk and Executive Order shall return the record for resubmission in conformity with this order and the rules of court pertaining to filings under seal." (Order, pp. 1–2 [citing Cal. Rules of Court, rules 2.550(d), 8.45, 8.46].)

Article 3 of title 8 of the California Rules of Court "establish[es] general requirements regarding sealed and confidential records in appeals and original proceedings in the Supreme Court and Courts of Appeal." (Cal. Rules of Court, rule 8.45(a).) The Court's recommendations regarding executive clemency for applicants with more than one felony conviction is neither an appeal nor an original proceeding. (See Cal. Const., art. VI, § 10 ["The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."].)

The Order, fairly construed, appears to borrow from the general framework for sealing records set forth in article 3 of title 8 of the California Rules of Court, without expressly finding that the clemency applications of persons convicted of more than one felony necessarily fall within the

scope of these rules. To remove any doubt, the Order should be revised to state this conclusion expressly.

Conclusion

The Governor appreciates this opportunity to comment on the standards and procedures for protecting confidential and sensitive information contained within clemency records and looks forward to working with Court staff to develop processes to implement them.

Sincerely,

ANNA FERRARI
Deputy Attorney General

For XAVIER BECERRA
Attorney General

DECLARATION OF ELECTRONIC SERVICE

Case Name: Susan H. Burton

Case No.: S255392

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. All participants in this case are registered with TrueFiling.

On January 13, 2021, I electronically served the attached LETTER BRIEF by transmitting a true copy via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on January 13, 2021, at San Francisco, California.

Robert Hallsey	/s/ Robert Hallsey
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

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1/13/2021

Date

/s/Anna Ferrari

Signature

Ferrari, Anna (261579)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm

CALIFORNIA NEWS PUBLISHERS ASSOCIATION
CNPA Services, Inc.

2701 K Street, Sacramento, CA 95816 ♦ Ph: 916.288.6000 ♦ Fax: 916.288.6002 ♦ www.cnpa.com

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

"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,

B. Barsotti

Brittney Barsotti,
General Counsel, CNPA
(916) 288-6006

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

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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.

1/13/2021

Date

/s/Brittney Barsotti

Signature

Barsotti, Brittney (327661)

Last Name, First Name (PNum)

CNPA

Law Firm

January 13, 2021
Drop LWOP Coalition
c/o CCWP
4400 Market St.
Oakland, CA 94608

To: Supreme Court of California
% Jorge E. Navarette, Clerk and Executive Officer
350 McAllister St.
SF, CA 94102

To the Supreme Court of California:

We respectfully oppose the proposed administrative order concerning the confidentiality of clemency records of twice convicted felons who are en banc petitioners for commutation review.

We represent a statewide coalition of family members of those serving Life Without Parole (LWOP) sentences, those who formerly served LWOP and were commuted and have been released from prison, and other advocates for sentencing review.

We want to start by reminding the court that of the 5100+ people currently serving Life Without Parole sentences in CA prisons, 3200 of them were under the age of 25 when convicted, with the predominant age for those sentenced to LWOP as 19 years of age. The imposition of extreme sentences, such as LWOP and those often being served by people convicted of more than one felony, is often quite random and is impacted greatly based on race (and racism), ethnicity, social and economic class, and even which county one is tried in. Our own experience has led us to believe that the commutation process is neither fair nor equitable. For those who have more than one felony conviction, necessitating an en banc review, that is doubly so.

We value fairness, honesty and transparency in the commutation and pardon process, and so understand the concerns raised by the First Amendment Coalition. We understand that part of their concern was raised when the court denied commutations to 10 people with more than one felony conviction who had been approved for clemency at the end of Governor Brown's term. These denials were made without providing any further information to the public, leaving many concerned about the court's lack of transparency regarding how decisions are made. The question arose whether political concerns rather than merit were operating in the denial of those commutations.

The court states that "this policy of confidentiality must be revised to account for the public's legitimate interest in understanding how the court exercises its responsibilities" under the law. People applying for clemency are entering an uneven playing field. Just the fact that they have been convicted--more than once— and sentenced and serving the time means that there is a preexisting judgement. The act of making public some of the most personal, and potentially most prejudicial, records and documents relating to those incarcerated persons filing for sentencing relief causes unconscious biases. Having their full records open to the public only serves to further prejudice the public and heighten existing trauma that most incarcerated people live with.

Many times, these applications for commutation include highly personal information about an applicant's history of trauma and abuse- whether that trauma was as an adult or as a child- whether the abuse be physical, sexual, psychological or emotional. These files often include documentation of intimate partner violence. And these files may well include highly confidential psychological evaluations of the applicant.

Commutation files may also include a detailed "Relapse Plan" in which the applicant has revealed their very deeply personal understandings of past actions and motivations for those actions, as well as their hard worked for changes. If they had a history of substance abuse or anger management problems, these relapse plans may also

include that very personal information as well as the detailed plans of where they will continue to do the work of healing and development when they are released—names and locations of agencies.

The court also states that, “The extent to which the contents of the record will be made available to the public is evaluated on a case-by-case basis.” This statement makes the issue of exposure more unclear and may very well create an environment that both intimidates and discourages current and future commutation applicants, adding an even greater level of trauma to those whose lives have been so affected.

Additionally, for the court to maintain these documents in its public records in perpetuity certainly raises concerns of violations of a person’s rights to privacy, such as in the case of Ms. Susan Burton. As well, this may become an intimidating and discouraging factor for anyone who may wish to reapply for sentencing relief in the future.

We believe that the court can insure the public’s right to understand how deliberations and decisions are made in en banc commutation cases without making public the most personal—and potentially prejudicial—records of an incarcerated person’s life. This can surely be accomplished by the Court issuing a summary statement—as is currently done.

We cannot emphasize enough the amount of trauma that an incarcerated person endures by the very fact of the daily conditions of incarceration.

We, as family members and concerned advocates, conclude that it is NOT in the public’s best interest to re-traumatize a commutation applicant. Transparency in the court process can be realized through appropriate summaries of court decisions *without* making public the most personal details of an incarcerated person’s records.

Respectfully,

Candace Chavez-Wilson (**Candace CW** ccjay4ever@gmail.com)

Pamela Fadem, MPH (pfadem@gmail.com)

For the Drop LWOP Coalition

cc:
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Eliza Hersh, Deputy Legal Affairs Secretary
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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/13/2021 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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OPPOSITION	1.12.21Oppose CA SupCt AdminOrder.re.Clemency.Records

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Anna Ferrari California Department of Justice 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 10:41:39 AM
Pamela Fadem California Coalition for Women Prisoners	pfadem@gmail.com	e-Serve	1/13/2021 10:41:39 AM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 10:41:39 AM
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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.

1/13/2021
Date

/s/Pamela Fadem
Signature

Fadem, Pamela (Pro Per)
Last Name, First Name (PNum)

California Coalition for Women Prisoners

Law Firm

Coalition fo
4400 Market Street, Oakland, CA 94608
Phone: (415) 255-7036 x4 Fax: (415) 552-3150
Email: info@womenprisoners.org

Jorge E. Navarette
Clerk of the Court
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

January 13, 2021

Re: Proposed Administration Order regarding clemency records

To the Supreme Court of California:

On behalf of the California Coalition for Women Prisoners (CCWP), I write to respectfully oppose the proposed administrative order concerning the confidentiality of clemency records of people twice-convicted. CCWP is a community-based organization working with currently and formerly incarcerated women, transgender people and communities of color impacted by the criminal legal system. For 25 years we have worked directly with people in California's women's prisons. Our work includes clemency education, application support, and advocacy.

We believe that improvements to the clemency process, including increasing transparency, should be made through the legislative process. Changes in the clemency process — particularly because they impact highly marginalized populations, including incarcerated people and their loved ones, crime survivors, and criminalized survivors — necessitate meaningful input from our most vulnerable stakeholders, for whom the disclosure of sensitive records can have dangerous and damaging effects. Further, since this order impacts people with multiple felony convictions, we know that it will disproportionately impact people of color, including women, with drug convictions.

We believe that the privacy and safety concerns of twice-convicted clemency applicants and their families outweigh public access interests. At the very least, we believe these concerns need proper consideration through the legislative process. Our privacy concerns include the disclosure of applicants' personal information from records including: medical and mental health documents, psychological evaluations, probation reports, police reports, cognitive assessments, etc. Most of the applicants we work with in California's women's prisons have extensive histories of abuse, including documented intimate partner violence — information that, if made public, will undoubtedly lead to serious safety concerns. Further, the laborious process of redacting extensive clemency files is likely to result in the inadvertent disclosure of sensitive or protected information.

In addition to privacy concerns, we fear that disclosing clemency records in this manner will increase the likelihood that detailed criminal history information will fuel unlawful and

California Coalition for Women Prisoners
4400 Market Street, Oakland, CA 94608
Phone: (415) 255-7036 x4 Fax: (415) 552-3150
Email: info@womenprisoners.org

discriminatory housing and employment decisions for our members, as well as for other applicants.

Respectfully, we believe that transparency in the court process can be realized through appropriate summaries of court decisions without making public highly personal, sensitive, and potentially prejudicial records.

Thank you for your consideration. Please do not hesitate to contact me directly if you have any questions or concerns. I can be reached on my cell at (510) 388-6553 or by email at colby@womenprisoners.org.

Sincerely,

Colby Lenz

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **colby@womenprisoners.org**

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Filing Type	Document Title
LETTER	CCWP Letter - Proposed CSC Admin Order re Clemency Records

Service Recipients:

Person Served	Email Address	Type	Date / Time
Katie Townsend Reporters Committee for Freedom of the Press 254321	ktownsend@rcfp.org	e-Serve	1/13/2021 5:38:17 PM
Robert Hallsey California Dept of Justice, Office of the Attorney General	robert.hallsey@doj.ca.gov	e-Serve	1/13/2021 5:38:17 PM
Vanessa Nelson-Sloane Life Support Alliance	admin@lifesupportalliance.org	e-Serve	1/13/2021 5:38:17 PM
Glen Smith First Amendment Coalition	gsmith@firstamendmentcoalition.org	e-Serve	1/13/2021 5:38:17 PM
Anna Ferrari California Department of Justice 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 5:38:17 PM
Thomas Burke Davis Wright Tremaine LLP 141930	thomasburke@dwt.com	e-Serve	1/13/2021 5:38:17 PM
Selina Maclaren Davis, Wright ,Tremaine LLP 300001	selinamaclaren@dwt.com	e-Serve	1/13/2021 5:38:17 PM
Pamela Fadem California Coalition for Women Prisoners	pfadem@gmail.com	e-Serve	1/13/2021 5:38:17 PM
Jennifer Mann EDCA Federal Defender, Capital Habeas Unit 215737	jennifer_mann@fd.org	e-Serve	1/13/2021 5:38:17 PM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 5:38:17 PM
Brittney Barsotti CNPA	brittney@cnpa.com	e-Serve	1/13/2021 5:38:17 PM

327661			

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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.

1/13/2021

Date

/s/Colby Lenz

Signature

Lenz, Colby (Pro Per)

Last Name, First Name (PNum)

California Coalition for Women Prisoners

Law Firm

January 13, 2021

Mr. Jorge E. Navarette
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: A New Way of Life's Response to Court's Proposed Administrative Order Concerning Clemency Records, in Connection with the Matter *Application of Burton (Susan) for Clemency* (S255392)

Dear Mr. Navarette:

A New Way of Life Reentry Project ("ANWOL") submits this Letter Brief in response to the Court's November 24, 2020, Proposed Administrative Order which amends the Internal Operating Practices and Procedures regarding clemency applications.

As an organization founded by the applicant in this matter, Susan Burton; and dedicated to supporting the full reentry and restoration of formerly incarcerated and convicted people, ANWOL must strongly oppose the Proposed Administrative Order. This administrative rule marks a significant change to the nature of the Court's past handling of clemency records and is at odds with the distinctly non-litigation nature of clemency and clemency records. In doing so, it violates long-established tenets of privacy and protection of sensitive information that surround criminal cases that are in place to protect not only people convicted of offenses, but also victims, witnesses, law enforcement personnel, and others. This impact further exacerbates the outsized burden borne by low-income people and people of color, who are disproportionately likely to be impacted by the criminal system, whether as defendants, victims, or bystanders.

An applicant's clemency file addresses extraordinarily personal details about the life and history of the applicant and other parties who may be discussed in the applicant's file. Clemency files may include documents about medical and mental health history and psychological evaluations; family history, including details of extreme physical harm, sexual abuse, exploitation, and other challenging familial circumstances; military history; prison conduct; education history; evaluations by work supervisors; substance use history; and gang involvement. These documents and facts are rarely part of the public record of criminal proceedings.

Clemency applications also include sensitive information about people other than the applicant. Applications may include detailed information, documents, and photos that concern not only the applicant, but also crime victims or their surviving family members or friends, witnesses to the crime, and the applicant's family members.

The contents of application materials may also reach beyond the personal concerns of individuals involved in a particular crime, to law enforcement and prison personnel. Statements of prison staff and reports including material that, if disclosed, would pose significant risk to the safety and security of prison staff and inmates. These may include reports of inmates leaving gangs and providing information during debriefings, or reporting criminal activity in the prisons.

In Susan's particular case, her application involved many of the above-mentioned personal details, including sex trafficking, parental drug addiction, sexual assault, and physical abuse. While Susan literally wrote a book about her life, which includes some (but not all) of the details disclosed in her clemency application, the vast majority of clemency applicants do not undertake such a public airing of their histories; nor should they be required to in order to access the constitutionally-established remedy of clemency.

The vast majority of clemency applicants and their family members also differ from Susan, in that they are far more likely to be materially harmed by the disclosure of their private information. Conviction histories are regularly used against formerly incarcerated people to deny them employment, housing, education, and licensure. This is precisely why various federal and state laws, as well as the California Rules of Court, create a network of protections to reduce the availability and improper use of many records involved in and created by criminal proceedings.[1]

In practice, these protections are eviscerated for applicants, their families, and crime victims by this proposed rule. As a case in point, upon receiving documents sought, the First Amendment Coalition uploaded them on a public platform, creating permanent access to documents that are otherwise unavailable for public access, and cannot be updated for accuracy. The bitterly ironic result is that those who have been deemed most worthy of forgiveness and full restoration to society, will be the most exposed to the continued misuse of information related to their past crimes.

Because of the highly sensitive nature of clemency files, unsealing should be the rare exception, and the Court should unseal these documents only when extraordinary circumstances warrant it. The burden to warrant such broad and permanent disclosure of information about an applicant, their family, and others involved in their crime, should be a heavy one.

---

[1] A by no means exhaustive list of such protections include the federal Fair Credit Reporting Act (15 U.S.C. ch. 41 §§ 1681 et seq.); California's Consumer Credit Reporting Agencies Act (Civ. Code, §§ 1785.1 et seq.) and Investigative Consumer Credit Report Agencies Act (Civ. Code, §§ 1786 et seq.); protections regarding state and local summary criminal history information (Pen. Code, §§ 11105 et seq., Pen. Code, §§ 13300 et seq.); and Division 4 of Title 2 of the California Rules of Court.

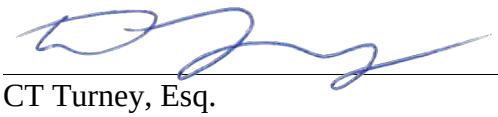
If the impetus for this proposed order is to increase insight into the Court's decision-making surrounding clemency petitions, the Court could instead announce its reasons for a decision to *deny* a recommendation. This is the most direct way to increase transparency of the Court's clemency process, the stated goal of the First Amendment Coalition, while also furthering the goals of clemency by providing guidance to the clemency applicant about what additional rehabilitative measures they must undertake to receive a recommendation.

Stakeholders should improve the transparency and fairness of the clemency process through legislative means. For example, they could amend the statutes relating to Executive Clemency reports to require inclusion of the applications the Court has declined to recommend for clemency in addition to those the Governor granted. At a minimum, the legislature should be involved in any decision to circumvent the extensive protections that the legislature has seen fit to grant to much of the information contained in clemency files.

For the foregoing reasons, A New Way of Life Reentry Project strongly urges the Court to reconsider this proposed rule, and continue the established and reasoned practice of protecting the privacy of clemency applicants, crime victims and witnesses, and their family and friends.

Dated: January 13, 2021

Respectfully submitted,



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Eliza Hersh, Office of Governor Newsom, eliza.hersh@gov.ca.gov

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ctturney@anewwayoflife.org**

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Person Served	Email Address	Type	Date / Time
Glen Smith First Amendment Coalition	gsmith@firstamendmentcoalition.org	e-Serve	1/13/2021 11:47:06 PM
Anna Ferrari California Dept of Justice, Office of the Attorney General 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 11:47:06 PM
Selina Maclaren Davis, Wright ,Tremaine LLP 300001	selinamaclaren@dwt.com	e-Serve	1/13/2021 11:47:06 PM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 11:47:06 PM

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1/13/2021
Date

/s/CT Turney-Lewis
Signature

Turney-Lewis, CT (279241)
Last Name, First Name (PNum)

Law Firm

OFFICE OF THE FEDERAL DEFENDER
Eastern District of California
Capital Habeas Unit (CHU)
801 I Street, 3rd Floor
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HEATHER E. WILLIAMS
Federal Defender

BENJAMIN D. GALLOWAY
Chief Assistant Defender

DAVID HARSHAW III
Supervising Assistant Federal Defender

January 13, 2021

California Supreme Court
Attn: Jorge Navarrete
Clerk and Executive Officer
California Supreme Court
350 McAllister Street
San Francisco, California 94102-4797

RE: Comment on Proposed Administrative Order Regarding the Court's Clemency Records
Application of Burton (Susan) for Clemency, No. S255392

Dear Mr. Navarrete,

Please accept for filing our comment on the Court's *Proposed Administrative Order Regarding the Court's Clemency Records*. On November 24, 2020, the Court invited responses to its proposed administrative order regarding clemency record confidentiality and its potential revision of part XIV.A of the Court's published *Internal Operating Practices and Procedures*.

The Office of the Federal Defender for the Eastern District of California is authorized under 18 U.S.C. § 3006A, the Criminal Justice Act, to provide legal representation to persons financially unable to retain counsel in federal criminal and related proceedings. My Office includes a Capital Habeas Unit: attorneys and support personnel who represent persons sentenced to death, challenging their judgments of conviction and sentence in federal 28 U.S.C. § 2254 proceedings. Federal Defender attorneys regularly appear in this Court, representing death-sentenced persons in habeas corpus and other writ proceedings. Our appointments include representing such persons in clemency proceedings.

Our role representing persons seeking clemency gives us a unique perspective on the Court's proposed administrative order. As such, we recommend the Court modify its proposed rule to include a requirement that any entity seeking access to this Court's clemency records serve notice on the clemency applicant or their counsel and that the clemency applicant be permitted opportunity to file a response. Because the Governor's interests are unique to his office and may not be the same as a clemency applicant's interests, we further recommend that any entity seeking access to this Court's clemency files be required to serve said request on the Governor and that the Governor be entitled opportunity to respond.

With these recommendations, we propose the following addition to the Court's proposed order (our addition in **bold**):

> 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. The papers and documents transmitted to the court by the Governor with the application often contain sensitive material. When a clemency record is before the court, a person seeking access to its contents must file a motion to unseal the record. **The person seeking access must serve the motion to unseal on the Governor and the applicant's counsel or the applicant, if not represented by counsel. The person seeking access must file proof of such service with the Court. The Governor and the applicant may file a response to the motion to unseal**. The extent to which the contents of the record will be made available to the public is evaluated on a case-by-case basis.

Clarifying that the clemency applicant and the Governor have a role to play in the unsealing process will assist the Court to carry out its stated duty: determining on a case-by-case basis whether to deny access to its clemency files.

The Court has identified certain factors it will consider when adjudicating a motion to unseal clemency files:

> Whether disclosure of specific information would infringe upon the legitimate privacy expectations of the clemency applicant or others, with relevant considerations including whether the information already has been disclosed to or is available to the public, or may be revealed to the public if clemency is granted; whether the information was obtained under an express or implied promise of confidentiality; and whether the information is of a highly personal or sensitive nature;
>
> Whether public disclosure of the information could imperil the safety of the clemency applicant or another person;
>
> Whether the information appears within preliminary notes, communications, or work product that has been superseded by or is incidental to the preparation of reports or other documents appearing within the file;
>
> Whether public disclosure of the information realistically would inhibit the flow of information relevant to the clemency process; and

> The extent to which disclosure of the information would provide insight into the court's exercise of its responsibilities under article V, section 8(a).

The clemency applicant or their counsel is in the best position to argue:

- Whether disclosure would infringe upon the clemency applicant's or another's legitimate privacy expectations;
- Whether the clemency applicant obtained included information under an express or implied promise of confidentiality;
- Whether the included information is of a highly personal or sensitive nature;
- Whether publicly disclosing the information could imperil the safety of the clemency applicant or another person; and
- Whether publicly disclosing the information realistically would inhibit others in the future from providing information relevant to clemency petitions or process.

The Governor may have a differing perspective on these issues and, naturally, will assert the interests of their office and not necessarily those of the clemency applicant.

Thank you for the opportunity to comment here. We appreciate the Court's thoughtful consideration of the sensitive information which may be submitted in support of clemency applications.

Sincerely,

Heather E. Williams
Federal Defender, Eastern District of California

PROOF OF SERVICE

I, the undersigned hereby declare:

I am over the age of 18 and not a party to the within action. I certify that on January 13, 2021, I served the within **FEDERAL DEFENDER'S RESPONSE TO PROPOSED ADMINISTRATIVE ORDER REGARDING THE CONFIDENTIALITY OF CLEMENCY RECORDS**.

The following parties were served via electronic mail via TrueFiling per California Rules of Court 8.70-8.79.

Anna Theresa Ferrari
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
E-mail: anna.ferrari@doj.ca.gov

Thomas R. Burke
Davis Wright Tremaine, LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111
E-mail: burke@dwt.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 13, 2021 in Sacramento, California.

s/ Patricia R. Castillo
PATRICIA R. CASTILLO

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **jennifer_mann@fd.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
LETTER	COMMENT LETTER

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Person Served	Email Address	Type	Date / Time
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Glen Smith First Amendment Coalition	gsmith@firstamendmentcoalition.org	e-Serve	1/13/2021 8:04:22 AM
Anna Ferrari California Department of Justice 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 8:04:22 AM
Thomas Burke Davis Wright Tremaine, LLP 141930	thomasburke@dwt.com	e-Serve	1/13/2021 8:04:22 AM
Selina Maclaren Davis, Wright ,Tremaine LLP 300001	selinamaclaren@dwt.com	e-Serve	1/13/2021 8:04:22 AM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 8:04:22 AM

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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.

1/13/2021
Date

/s/Jennifer Mann
Signature

Mann, Jennifer (215737)

Last Name, First Name (PNum)

EDCA Federal Defender, Capital Habeas Unit

Law Firm

USC Gould School of Law

POST-CONVICTION JUSTICE PROJECT
Michael J. Brennan
Director and Supervising Attorney
Tel: 213 740 2527 • mbrennan@law.usc.edu

Heidi L. Rummel
Director and Supervising Attorney
Tel: 213 740 2865 • hrummel@law.usc.edu

January 13, 2021

Supreme Court of California
Clerk and Executive Officer Jorge E. Navarrete
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

RE: Letter Brief Opposing Proposed Administrative Order Concerning Clemency Records Re: Motion to Seal the Record in *Application of Burton (Susan) for Clemency* (S255392)

To the Honorable Justices of the Supreme Court of California:

The Post-Conviction Justice Project at the University of Southern California, Gould School of Law (PCJP) respectfully submits this letter in opposition to the Court's proposed administrative order concerning clemency records based on the detrimental impact to the clemency process and to clemency applicants and their families.

PCJP is a clinical legal education program where certified law students represent clients serving life terms in California state prisons. For more than two decades, PCJP has represented clients at parole suitability hearings, on habeas corpus in state and federal courts, and in commutation and pardon applications. PCJP has substantial, particularized knowledge of the documents, records and investigations that would be subject to public disclosure under the proposed administrative order and the potential impact disclosure of information contained in the record on applicants and their families.

Clemency applications may include: (1) complete prison files including an applicant's criminal history (including juvenile criminal history); police and investigative reports, sometimes crime scene photos and autopsy reports and photos (that are not public documents); some medical and psychological records and evaluations; hospitalizations; gang involvement;

cooperation with CDCR staff; programming history which may disclose a history of substance abuse, domestic violence or mental illness; documented disabilities; lists of approved visitors; (2) BPH investigative reports containing interviews with family members, crime witnesses, documentation of domestic violence, sexual assault and other abuse; (3) statements by the applicant relating to childhood trauma, participation in criminal activities, disassociation from gangs.

C-Files contain sensitive and personal information and are strictly maintained by the California Department of Corrections and Rehabilitation. Even in the public parole process, where the C-File is also part of the hearing record, attorney access to the file is limited and monitored to prevent disclosure beyond the participants in the hearing.

The proposed order allowing public disclosure of clemency application materials, even on a case by case basis, presents serious concerns. The prospect of unsealing records will have a detrimental effect on the applicants' willingness to disclose personal information about themselves and their family members that is often highly relevant to the clemency process, including childhood trauma (physical or sexual abuse, mental illness, substance abuse), intellectual and learning disabilities, mental illness, gang involvement and subsequent disassociation, and cooperation with law enforcement. Concerns about disclosure will range from embarrassment and humiliation to the adverse impact on family relationships (in cases where abuse or mental illness is disclosed) and potential familial support after release to very real concerns about retaliation against the applicant or the applicant's family. Applicants in prison who disclose sexual abuse face becoming the target of violent attacks. Applicants who disclose gang disassociation or cooperation with law enforcement, including CDCR staff, face a very real threat of violent retaliation against themselves and their families.

Public access to these materials will adversely impact the already-difficult re-entry process. The ability of a curious potential employer or landlord to research a successful clemency applicant and review investigative reports of the commitment offense, probation reports, or a history of substance abuse would exacerbate the challenges people already face upon release from prison.

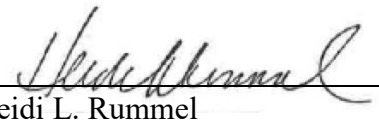
Clemency applications include information that will create security risks for applicants while they remain incarcerated awaiting the Governor's decision or parole eligibility. C-Files include gang affiliation, documented enemies, housing designations such as placement on certain yards that belie that an applicant was validated as a prison gang member, debriefed or otherwise provided information to law enforcement ("snitched"), descriptions of disciplinary activity, and prior criminal activity. Clemency applicants are often forthcoming about their personal history, such as childhood abuse (physical or sexual), difficult relationships with their parents and family, drug abuse, and more. Public disclosure of such information poses a danger to both the applicant and their family. Within the prison, an applicant may become the target of retaliatory violence for "snitching" on fellow gang members. Given the stigma surrounding sexual abuse, an applicant may be targeted for admitting to being a victim of such abuse. Outside of prison, their

family may be subjected to threats, violence, or other tactics designed to punish the applicant for any actions that might be categorized as "snitching".

The prospect of disclosure is likely to have a chilling effect on applicants' willingness to be honest and forthcoming about sensitive information that is central to the clemency determination. Clemency applications typically include information of a singularly personal nature, explicitly discussing applicants' past trauma and criminal conduct and charting their personal growth. Though the proposed amendment to the Court's practices and procedures discloses information on a case-by-case basis, the prospect of disclosure balanced against the high risk repercussions may stifle candor, or even affect a person's decision to apply.

The proposed change places the determination of which information is highly personal or sensitive or imperils safety in the hands of those who may not fully understand the impact of disclosure of certain information. C-Files and clemency applications can contain thousands of pages of documents, some with internal notation or documentation that might mean little to the reviewer but much to a person seeking to do the applicant harm. To change the existing practice of sealing applications in favor of a process that presents a real threat to the privacy and security of applicants and collection of relevant information to support clemency applications.

For the above reasons, we respectfully urge the Court to reject the proposed change to its Internal Operating Practices and Procedures and maintain its current practice of sealing all clemency applications forwarded to the Court.



Heidi L. Rummel
USC Post-Conviction Justice Project
Co-Director and Supervising Attorney

Michael J. Brennan
USC Post-Conviction Justice Project
Co-Director and Supervising Attorney

___

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **hrummel@law.usc.edu**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
JOINDER	2021-01-13 PCJP Comment re Order Concerning Clemency Records (S255392)

Service Recipients:

Person Served	Email Address	Type	Date / Time
Katie Townsend Reporters Committee for Freedom of the Press 254321	ktownsend@rcfp.org	e-Serve	1/13/2021 11:45:28 PM
Robert Hallsey California Dept of Justice, Office of the Attorney General	robert.hallsey@doj.ca.gov	e-Serve	1/13/2021 11:45:28 PM
Vanessa Nelson-Sloane Life Support Alliance	admin@lifesupportalliance.org	e-Serve	1/13/2021 11:45:28 PM
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Pamela Fadem California Coalition for Women Prisoners	pfadem@gmail.com	e-Serve	1/13/2021 11:45:28 PM
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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.

1/13/2021

Date

/s/Heidi Rummel

Signature

Rummel, Heidi (183331)

Last Name, First Name (PNum)

USC Law, Post-Conviction Justice Project

Law Firm

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January 13, 2021

Via electronic filing by
Katie Townsend (SBN 254321)
ktownsend@rcfp.org

Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
Supreme Court of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Re: Motion to Seal the Record in Application of Burton (Susan) for Clemency *(S255392) / Confidentiality of Clemency Records*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of California:

The Reporters Committee for Freedom of the Press writes in response to the Court's invitation for comment from interested parties on its proposed administrative order that would modify the Court's treatment of records submitted by the Governor in support of applications for clemency for individuals twice convicted of felonies under article V, section 8, subdivision (a) of the California Constitution. As an organization dedicated to defending the First Amendment and newsgathering rights of journalists, the Reporters Committee has a strong interest in ensuring that court records are presumptively accessible to members of the press and the public.

The Court's reexamination of the policy treating clemency files submitted by the Governor as confidential and sealed by default is welcome and necessary. However,

the Reporters Committee joins the First Amendment Coalition in submitting that the Court should treat these documents as it treats other records filed with courts under California Rules of Court 8.45, 8.46, 8.47, and 2.550(d)–(e). Documents filed in support of clemency applications should be presumptively open to public inspection absent a "motion or application . . . accompanied by a declaration" filed by the Governor's Office containing facts sufficient to establish that:

> (1) There exists an overriding interest that overcomes the right of public access to the record;
> (2) The overriding interest supports sealing the record;
> (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
> (4) The proposed sealing is narrowly tailored; and
> (5) No less restrictive means exist to achieve the overriding interest.

(Cal. Rules of Court, rule 2.550(d).)

While the Court's proposed amendment to Internal Operating Practices and Procedures, XIV.A is an improvement over current policy, it nevertheless places the burden on the public to assert its right of access on a case-by-case basis, rather than appropriately placing the burden on the Governor's Office to demonstrate that the public's right of access has been overcome in a given case. An amendment to the Court's Internal Operating Practices and Procedures that instead recognizes that the California Rules of Court control this inquiry would properly place this burden on the party advocating for sealing, and make clear the public's presumptive right to inspect clemency files under the common law, First Amendment, and California

Constitution. In addition, as stated below, presumptive public access to such materials will facilitate important reporting in the public interest about the exercise of executive pardon power.

I. The access provisions in the California Rules of Court comport with the public's common law and constitutional rights of access to court records.

The Court's proposed administrative order acknowledges that applications for executive clemency, including supporting documentation, are "records" that have been "lodged" with the Court within the meaning of California Rules of Court 8.45(b)(1) and (2). And, in contrast to the current, published Internal Operating Practices and Procedure, XIV.A, the Court's proposed administrative order would not designate clemency files as "confidential." (See Cal. Rules of Court, rule 8.45(b)(5).)[1]

While an improvement over current policy, the Court's proposed administrative order departs from the California Rules of Court in an important way. Under the Court's proposal, "[w]hen a clemency record is before the court, a person seeking access to its contents must file a motion to unseal the record. The extent to which the contents of the record will be made available to the public is evaluated on a case-by-case basis." In essence, clemency files would be automatically sealed, by default, and remain so until a member of the press or public affirmatively moves for access. The California Rules of Court, on the other

[1] While the proposed administrative order notes that such applications "often contain sensitive material," there is no indication in the source of the Governor's clemency power, (Cal. Const., art. V, § 8, subd. (a)), that the materials in the Governor's application to this Court for a recommendation of clemency should be sealed or treated as confidential.

hand, provide in relevant part that "[t]o obtain an order [sealing a record not previously sealed by a trial court], a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing." (Cal. Rules of Court, rule 8.46(d)(2).) This framework comports with the constitutional and common law presumptions in favor of public access; it places the burden on the party seeking confidentiality to demonstrate to the Court that the presumption is overcome in a particular case.

The relevant California Rules of Court are derived from and align with this Court's decision in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178 [86 Cal.Rptr.2d 778, 980 P.2d 337] (*NBC Subsidiary*). (Advisory Com. com., Cal. Rules of Court, rule 8.46 [stating that California Rules of Court, rules 8.46 and 2.550–2.551 are based on *NBC Subsidiary* and "recognize the First Amendment right of access to documents used at trial or as a basis of adjudication"].) In *NBC Subsidiary*, this Court interpreted an open courts statute (California Code of Civil Procedure section 124) in the context of a trial that was preemptively closed to the public by the trial court due to concerns about press coverage of the proceeding. The Court held that courts must provide public notice of a contemplated closure of proceedings or sealing of court records; additionally, "*before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find" the factors quoted above, and now set

forth in California Rule of Court 2.550(d). (*NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1217–18, original italics.)

In so holding, the Court looked to the line of Supreme Court of the United States cases recognizing our "'unbroken, uncontradicted history' that a 'presumption of openness inheres in the very nature of a criminal trial under our system of justice,'" and concluding that "'absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.'" (*Id.* at p. 1200 [quoting *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 555, 573 [100 S.Ct. 2814, 65 L.Ed.2d 973]].) And *NBC Subsidiary* affirmed this Court's adoption of the First Amendment principle that courts cannot order proceedings closed at their "unfettered discretion." (See *id.* at p. 1202 [citing *Richmond Newspapers*, *supra*, 448 U.S. at p. 598].) As the Court's decision in *NBC Subsidiary* and the California Rules of Court make clear, these principles apply equally to the public's right of access to court records. (See *Sander v. State Bar of California* (2013) 58 Cal.4th 300, 309 [165 Cal.Rptr.3d 250, 314 P.3d 488] ["access to court records is governed by long-standing common law principles as well as constitutional principles derived from the First Amendment right of public access to trials" (citing *NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1208, fn. 25; *Copley Press, Inc. v. Superior Court* (1992) 6 Cal.App.4th 106 [7 Cal.Rptr.2d 841])].) The Court should not promulgate an Internal Operating Practice and Procedure inconsistent with these well-settled principles by permitting automatic, default sealing of an entire category of court records and eschewing the

case-by-case findings required by *NBC Subsidiary* and California Rule of Court 2.550(d). That clemency files may contain "sensitive material" does not justify an automatic, default sealing rule.

II. Application of the constitutional and common law presumptions of public access to clemency files will facilitate essential reporting on the exercise of executive pardon power.

Just as California Constitution, article V, section 8, subdivision (a) provides a check on the Governor's clemency power by requiring the Governor to seek the recommendation of this Court before pardoning some individuals, the transparency provided by consistent public access to clemency files will enable the press to serve its function as a watchdog guarding against the risk of executive overreach.

The news media played an essential role in uncovering perhaps the best-known overt abuse of state executive pardon power. In 1977, journalist Lee Smith broke the news that Roger Humphreys, a convicted double-murderer sentenced to 20 to 40 years in 1975, had been granted work-release status by Tennessee Governor Ray Blanton and hired as an official state photographer. (Hunt, Coup: The Day the Democrats Ousted Their Governor, Put Republican Lamar Alexander in Office Early, and Stopped a Pardon Scandal (2013) pp. 48–49.) Humphreys' father was the chairman of a county patronage committee that worked on behalf of the Blanton campaign. (*Id.* at 49.) Blanton then conducted an interview on a local television station, during which he defended his treatment of Humphreys, suggested the station's FCC license should not be renewed, and

stated: "I have not sold a single pardon or parole. . . . Neither has any of my people." (*Id.* at 52.) The story became national news; three years later, the FBI arrested three of Blanton's aids (eventually convicting two) on charges of accepting payoffs for arranging the pardon and release of certain prisoners. (*Id.* at 69.)

More recently, increased transparency surrounding use of executive clemency authority has led to other important public interest reporting. For example, access to data about individuals who were granted and denied federal pardons (obtained via the federal Freedom of Information Act) enabled ProPublica and *The Washington Post* to determine that "[w]hite criminals seeking presidential pardons over the past decade have been nearly four times as likely to succeed as minorities." (Linzer & LaFleur, *Presidential Pardons Heavily Favor Whites* (Dec. 3, 2011) ProPublica <https://perma.cc/5M5Y-GVUU> [as of Jan. 7, 2021]; LaFleur, *How ProPublica Analyzed Pardon Data* (Dec. 3, 2011) ProPublica <https://perma.cc/L638-VEDP> [as of Jan. 7, 2021].) Moreover, the ProPublica-*Washington Post* investigation found that federal pardon applicants frequently found favor after donating to elected officials, who then lobbied the executive branch on their behalf. (Linzer, *Pardon Applicants Benefit From Friends in High Places* (Dec. 4, 2011) ProPublica <https://perma.cc/C96A-HJUM> [as of Jan. 7, 2021] ["Since 2000, a total of 196 members of Congress . . . have written to the pardons office on behalf of more than 200 donors and constituents, according to copies of their letters obtained through the Freedom of Information Act. Many of the letters urged the

White House and the Justice Department to take special note of felons whom lawmakers described as close friends"].) This reporting provides a vivid example of the kinds of insight the public can gain when the press is able to access records related to the exercise of executive pardon power.

* * *

For these reasons, the Reporters Committee respectfully urges the Court to revise its proposed administrative order to treat the sealing of clemency files as it does the sealing of other court records, in accordance with the California Rules of Court. Doing so would properly place the burden to demonstrate that sealing is necessary in a given matter on the Governor's Office, vindicate the public's presumptive rights of access under common law, the First Amendment, and the California Constitution, and facilitate the news media's ability to gather and report news regarding the exercise of clemency power.

Thank you for your consideration of this response.

Respectfully submitted,

REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS

/s/ Katie Townsend
Katie Townsend,
Legal Director

cc: Office of the Governor (*via U.S. Mail*)
First Amendment Coalition (*via electronic filing*)

PROOF OF SERVICE

I, Demetrios Papageorgiou, affirm that I am over the age of 18 years, employed in the City of Washington, D.C., and not a party to the above-captioned action. I am an employee of the Reporters Committee for the Press, and my business address is 1156 15th Street NW, Suite 1020, Washington, D.C. 20005. On January 13, 2021, I served the following document: **Response of the Reporters Committee for Freedom of the Press to the Court's Proposed Administrative Order Regarding Confidentiality of Clemency Records** as follows.

[x] **By TrueFiling electronic delivery:** All counsel of record in *Application of Burton (Susan) for Clemency (S255392).*

[x] By mail: I enclosed a copy of the copy of the document identified above in an envelope and deposited the sealed envelope with the U.S. Postal Service, with the postage fully prepaid. The envelope was addressed as follows:

Eliza Hersh, Deputy Legal Affairs Secretary
Office of Governor Gavin Newsom
State Capitol
1303 10th Street, Suite 1173
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 2021, in Washington, D.C.

/s/ Demetrios Papageorgiou
Demetrios Papageorgiou
dpapageorgiou@rcfp.org

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ktownsend@rcfp.org**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
LETTER	Letter Response of the Reporters Committee for Freedom of the Press to the Courts Proposed Administrative Order Regarding Confidentiality of Clemency Records

Service Recipients:

Person Served	Email Address	Type	Date / Time
Robert Hallsey California Dept of Justice, Office of the Attorney General	robert.hallsey@doj.ca.gov	e-Serve	1/13/2021 12:08:00 PM
Glen Smith First Amendment Coalition	gsmith@firstamendmentcoalition.org	e-Serve	1/13/2021 12:08:00 PM
Anna Ferrari California Department of Justice 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 12:08:00 PM
Thomas Burke Davis Wright Tremaine, LLP 141930	thomasburke@dwt.com	e-Serve	1/13/2021 12:08:00 PM
Selina Maclaren Davis, Wright ,Tremaine LLP 300001	selinamaclaren@dwt.com	e-Serve	1/13/2021 12:08:00 PM
Pamela Fadem California Coalition for Women Prisoners	pfadem@gmail.com	e-Serve	1/13/2021 12:08:00 PM
Jennifer Mann EDCA Federal Defender, Capital Habeas Unit 215737	jennifer_mann@fd.org	e-Serve	1/13/2021 12:08:00 PM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 12:08:00 PM

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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.

1/13/2021

Date

/s/Katie Townsend

Signature

Townsend, Katie (254321)

Last Name, First Name (PNum)

Reporters Committee for Freedom of the Press

Law Firm

Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, California 94607-4139
Telephone: (510) 267-3300
Fax: (510) 452-8712

January 13, 2021

California Supreme Court
Attn: Jorge Navarette
Clerk and Executive Officer
350 McCallister Street
San Francisco, CA 94102-4797

Re: Opposition to Proposed Administrative Order Regarding the Court's Clemency Records Application of Burton (Susan) for Clemency, No. S255392

Dear Mr. Navarette:

The Office of the State Public Defender (OSPD) is a statewide appellate public defender office created in 1976 whose primary mission for more than 30 years has been the representation of capitally-convicted defendants before this Court. (See Gov. Code, §§ 15420-15421.) Historically, appointment orders named OSPD as executive clemency counsel at the time of the office's appointment to the direct appeal. The Habeas Corpus Resource Center (HCRC) was created as part of the judicial branch, effective January 1, 1998, by Senate Bill (SB) 513 (Stats 1997, ch. 869). HCRC's mission is to provide high quality representation to men and women on California's death row in their postconviction proceedings and serve as a resource center for attorneys appointed in capital cases. HCRC is also appointed as executive clemency counsel in 71 cases.

We are writing to express our objections to Court's proposed administrative order dated November 24, 2020, in Application of Burton (Susan) for Clemency (No. S255392), which will allow public access to records that, since 1999, been deemed confidential by this Court. (Cal. Supreme Ct., Internal Operating Practices and Proc., XIV.A.) We believe that a policy change with such a far-reaching and potentially devastating effect on the clemency process should not be promulgated via an administrative order by

this Court but would be better addressed by the legislature or by this Court's rule-making process, with more opportunity for all interested parties to be heard.

A request for executive clemency, a pardon, commutation of sentence, or reprieve, is the last hope for a person convicted of a crime. It is an opportunity for the executive in appropriate cases to grant a second chance, to afford mercy, to right a wrongful conviction the courts were unable to remedy, or to ameliorate harsh sentences, imposed years ago at the peak of mass incarceration.

Applications for clemency, and the ensuing investigations by the Board of Parole Hearings, often involve highly personal, otherwise protected information from a range of sources, including medical information. Because of the sensitivity of such information, the files transmitted by the Governor to this Court are currently treated as confidential.

A change in that policy that could lead to the widespread unsealing of clemency files implicates the privacy and public safety concerns not only of the clemency applicant but of victims, witnesses, supporters and opponents of clemency, and those interviewed in the course of investigations. For some applicants there might be litigation reasons not to fully cooperate with the process for fear of incriminating themselves. The legitimate interests of these parties, and of other stakeholders in the clemency process must be balanced with the public's need for transparency.

The issues are complex. A decision made without due consideration to all points of view could have a negative impact on the Governor's ability to obtain the information he needs to exercise his clemency power appropriately. It could discourage deserving people from applying for clemency and deter people from providing information – favorable or unfavorable – to investigators. It risks creating permanent access to criminal history and other documents that are otherwise not publicly available. This could result in the unlawful and improper use of criminal history information in housing and employment decisions, or for purposes of harassment. Once unsealed and posted on the internet, these documents cannot be updated for accuracy.

Notably, given the pervasive history of racial discrimination in the criminal legal system, the people most likely to be affected—those with more than one felony conviction—are disproportionately likely to be people of color. Executive clemency is one mechanism for mitigating the damage caused by convictions and sentences tainted by race discrimination. The proposed rule would make that remedy more difficult to obtain.

For these reasons, we believe that any change in the rules relating to the confidentiality of clemency applications should be made through the legislative process or the Judicial Council's rule making process, where all interested parties can be heard, and there can be a thorough evaluation of the proper balance between confidentiality and transparency.

Sincerely yours,

//s//

Mary K. McComb
State Public Defender
Office of the State Public Defender

//s//

Michael J. Hersek
Interim Executive Director
Habeas Corpus Resource Center

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mary.mccomb@ospd.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
LETTER	OSPD HCRC Opposition Clemency Unsealing rule 210113

Service Recipients:

Person Served	Email Address	Type	Date / Time
Anna Ferrari California Department of Justice 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 7:16:49 PM
Thomas Burke Davis Wright Tremaine LLP 141930	thomasburke@dwt.com	e-Serve	1/13/2021 7:16:49 PM
Eliza Hersh	Eliza.Hersh@gov.ca.gov	e-Serve	1/13/2021 7:16:49 PM
OSPD	docketing.ospd@ospd.ca.gov	e-Serve	1/13/2021 7:16:49 PM

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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.

1/13/2021
Date

/s/Marcus Thomas
Signature

McComb, Mary (132505)
Last Name, First Name (PNum)

Office of the State Public Defender
Law Firm

Amicus Populi
The Beverly Hills Law Building
424 South Beverly Drive
Beverly Hills, CA 90212

January 13, 2021

RE: Motion to Seal the Record in *Application of Burton (Susan) for Clemency* (S255392)/Confidentiality of Clemency Records

Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Amicus Populi is an organization devoted to enhancing public safety and democratic self-government. Both are implicated by clemency proceedings.

Amicus supports the proposed order, except it favors making files presumptively accessible to the public, so the party favoring confidentiality must affirmatively establish a need for it. The proposed order otherwise properly rests on case precedent, the recognized imperative of transparent government, and the changing role of clemency.

I. This Court should adhere to *Runyon* in finding the application to be a public record.

The Court of Appeal's decision in *Runyon v. Board of Prison Terms* (1939) 26 Cal.App.2d 183, may be the most apposite precedent, as it also addressed which documents sent on inmates' behalf were available for public inspection, although the case concerned parole rather than clemency proceedings. *Runyon* recalled the two kinds of documents presented in such applications: official documents that state law required to be filed by and with the Board of Prison Terms, and those sent "voluntarily" by various individuals in connection with parole applications and "not required by law to be sent to the board" nor to be "filed as official records." (*Id*. at pp. 184-185.) The Court of Appeal held the latter were not open to inspection by the public. (*Id*. at p. 184.) But as to "official documents" that had to be filed as part of an application, even respondents "concede[d] such documents are doubtless open to public inspection." (*Id*. at p. 185.)

Though *Runyon* is a Court of Appeal case from 1939, recent decisions of this Court have likewise prioritized transparency over confidentiality. *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940 (*SDPH*) involved an investigative organization that asked the Department of Public Health to disclose all citations issued to state-owned

care facilities in the preceding nine years. (*SDPH*, *supra*, at pp. 946-947.) The Department, citing the confidentiality requirements of Welfare and Institutions Code section 5328 (the Lanterman Act), provided only some of the records, which were heavily redacted. (*Id*. at p. 947.) The trial court, and this Court, held the Long-Term Care Act of 1973, which deemed such citations to be public records and prescribed more limited redactions, superseded the Lanterman Act. (*Id*. at pp. 951, 957.) Though the Legislature was aware of patients' privacy concerns, it "reaffirmed the importance of publicly releasing" the details of DPH citations for public review. (*Id*. at p. 962.)

This Court cited *Runyon*, *supra*, 26 Cal.App.2d 183, in acknowledging the imperative of confidentiality where information was obtained through a "promise it would remain confidential." (*Sander v. State Bar of California* (2013) 58 Cal.4th 300, 325.) However, so long as the information's source could remain unidentified, or the information was not obtained through such a promise, this imperative would not block public access. If there is a particular piece of information in a convict's file that was obtained through a promise of confidentiality, that promise could justify nondisclosure of that information; it would not justify wholesale sealing.

Full disclosure will enhance public confidence in governmental proceedings; sunlight remains the best disinfectant. (*Davis v. County of Fresno* (2018) 22 Cal.App.5th 1122, 1138.) Even if no specific legal authority resolves the instant question, this Court should still favor transparency to further the principles of open debate and self-government.

II. This Court should favor transparency to further public debate and self-government.

Transparency has special value in matters of life and death. Some Californians were surprised when a German double-murderer won the right to erase his name from internet searches under Europe's "right to be forgotten."[1] In fact, this policy was not new, as Germany had shielded the name of a homicidal terrorist almost a half-century ago from public disclosure.[2] California itself had followed the same policy to compel suppression of a hijacker's identity in 1971, though it has since disapproved that decision. (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, disapproved in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679.)

Gates more fully appreciated the value of transparency

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[1] Marika Malaea, Germany's Highest Court Rules Convicted Murderer Has the 'Right to Be Forgotten' Online, Newsweek, Nov. 28, 2019 https://www.newsweek.com/germanys-highest-court-rules-convicted-murderer-has-right-forgotten-online-1474561

[2] *Lebach* case, 35 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 202 (1973), cited in Mitchell Keiter, *Criminal Law Principles in California: Balancing a "Right to be Forgotten" with a Right to Remember* (2018) 13 Cal. Legal Hist. 421 (*Balancing*).

than *Briscoe*, having been informed by intervening United States Supreme Court precedents, which protect speech on public issues as "more than self-expression; it is the essence of self-government." (*Garrison v. Louisiana* (1964) 379 U.S. 64, 75.) Even where the name to be suppressed was that of an entirely blameless rape-murder victim and not a twice-convicted felon, the high Court protected public disclosure, because the "freedom of the press to publish that information appears to us to be of critical importance to our type of government in which **the citizenry is the final judge of the proper conduct of public business**. (*Cox Broadcasting Corp v. Cohn* (1975) 420 U.S. 469, 495, emphasis added.)

A major reason why California abandoned *Briscoe* but Germany retained its analogous rule is that the citizenry is not the final judge of public business in Germany and the European Union, so suppressing information imposes fewer costs there.[3] Americans can shape public policy more directly than Europeans, and Californians have more opportunity than any other Americans to implement their policy preferences through initiatives. (*People v. Kelly* (2010) 47

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[3] California developed a version of the "right to be forgotten" that provided greater protection to speech about public events. (*Balancing*, *supra*, 13 Cal. Legal Hist. at 422-423.)

Cal.4th 1008, 1030-1031.) Many California initiatives concern criminal punishment, indicating the concern Californians have for the subject.

If the citizenry is to be the final judge of public business, it must have access to the information used in conducting it. (See *Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 788, quoting *Renne v. Geary* (1991) 501 U.S. 312, 349 (dis. opn. of Marshall, J.: "If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process—voters, candidates, and parties—the First Amendment rights that attach to their roles.") Governor Newsom has used his clemency power promiscuously, pardoning numerous individuals who have committed violent crimes, including murder, and oversight of this exercise rests primarily with the voters. (*Procedures for Considering Requests for Recommendations Concerning Applications for Pardons or Communtation* (2018) 4 Cal.5th 897, 898 (*Procedures*), citing Moylan & Carter, Clemency in California Capital Cases (2009) 14 Berkeley J. of Crim L. 37, 41, fn. 25.) Voters can exercise over*sight* only if the can over*see* those decisions – and the evidence reviewed in making them.

III. Sentencing reforms have narrowed the role of clemency in preventing injustice.

Contemporary clemency differs profoundly from past versions. Centuries ago, death was the prescribed punishment for not just murder but all felonies, and defendants had little opportunity to present mitigating defenses. (Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L.Rev. (1992) 327, 329, fn. 7, citing Deborah Leavy, Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings* (1981) 90 Yale l.J. 889, 895-896.) Defendants also lacked modern procedural protections like appointed counsel, confrontation of witnesses, or the right to exclude unlawfully obtained evidence. Under these conditions, clemency executive clemency was *the* instrument for preventing injustices.

Those historical conditions bears no resemblance to contemporary sentencing. Death is an unconstituional punishment for nonhomicide crimes. (*Kennedy v. Louisiana* (2008) 554 U.S. 437.)[4] Homicides are also graded; after English law divided homicide into murder and manslaughter, California followed Pennsylvania in dividing murder itself into

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[4] This prohibition does not extend to some crimes *against the state*, such as treason or espionage. (*Ibid.*)

degrees. (*People v. Whitfield* (1994) 7 Cal.4th 437, 472 (Mosk, J. dissenting; see also Joshua Dressler, Understanding Criminal Law (4th ed. 2005) § 31.02[A], p. 543.) California further requires prosecutors to prove special circumstances as a condition for even permanent imprisonment. (Pen. Code, § 190.2.)

Similar grading occurs with nonhomicide offenses. Many felonies like robbery and burglary can be committed in different degrees (see e.g. Pen. Code, §§ 212.5, 460), and the penal law provides for the aggravated commission of others like, mayhem and kidnapping. (See e.g. Pen. Code, § 205, 209.) Defendants can present mitigating defenses such as voluntary intoxication or imperfect self-defense. (See e.g. *People v. Soto* (2018) 4 Cal.5th 968.) Sentencing triads enable distinctions among those warranting more or less punishment than usual. (See *Cunningham v. California* (2007) 549 U.S. 270, 275.) Further fine-tuning occurs through sentence enhancements, which prosecutors may or may not charge, jurors may or may not find, and judges may or may not dismiss. (See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497; *People v. Morrison* (2019) 34 Cal.App.4th 217, 222.) And parole boards determine which inmates should remain in prison and which should be released. (See Pen. Code, § 3041 et seq.)

This separation of powers among legislators, prosecutors, jurors, judges, and parole officials implements what Alexis de Tocqueville described as the American model of constraining state power by distributing authority "among various hands and in multiplying functionaries."[5] Inmates currently confined in a California prison are there due to the combined decisions of legislators who prescribed their sentences, prosecutors who charged them, jurors who convicted them, judges who sentenced them, and parole boards who deemed them unfit for early release. Executive clemency is no longer the exclusive, or primary, means of preventing sentencing injustices.

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[5] Tocqueville, Democracy in America (Daniel Boorstin ed. 1990), Vol. I, p. 70; see also *Parker v. Riley* (1941) 18 Cal.2d 83, 89; *People ex rel. Attorney General v. Provines* (1868) 34 Cal. 520, 537.

IV. Oversight is especially needed where the pardoned crime is against a person and not the state.

Though clemency is less needed than ever to prevent injustice, it scope has nonetheless expanded. Clemency's historic function was to "forgive crimes **against the state**." (*Procedures, supra,* 4 Cal.5th 897, 898, emphasis added.) Immanuel Kant insisted such limitation was imperative: [The sovereign] "can make use of this right to pardon only in connection with an injury committed against himself (*crimen laesae majestatis*)."[6] But to pardon "[w]ith respect to a crime of one subject against another, he absolutely cannot exercise this right, for in such cases exemption from punishment . . . constituted the greatest injustice toward his subjects."[7] As the decision to forgive belongs to victims, the state can more easily forgive crimes against itself than against individual persons.[8] As might be expected, executives have exercised

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Immanuel Kant, The Metaphysical Elements of Justice, Penal Law and the Universal Principle of Justice (Kant), (translated by John Ladd) (1985), available at http://www.yorku.ca/blogan/kant%20punishment.pdf [551]

7

Ibid.

8

Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 Ohio St. J. Crim. L. (2007) 329, 341.

pardons in inverse proportion to the vitality of democratic self-government.

Pardoning was more extensive in Europe largely because crimes against the state generated a disproportionate share of imprisonment. Political opponents and dissenters were punished more in Europe than in the United States, where the division of powers, especially trial by jury, ensured serious punishment tended to attach to offenders who committed violent crimes against persons.[9] While Continental (and contemporary authoritarian) regimes pardoned to manifest and reinforce their authority (and reward political allies), American executives, accountable to voters, have tended to offer fewer pardons on their behalf.[10]

Just as California expanded popular self-government through the initiative process more comprehensively than other states, it also more fully constrains executive pardoning power, by introducing a judicial check on clemency, at least for repeat offenders. (*Procedures*, *supra*, 4 Cal.5th at p. 899.)

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[9] James Q. Whitman, *Harsh Justice* (2003) 133-134, 143-144, 178-179, 186.

[10] *Id*. at p. 164; James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice* (2016) 94 Tex. L. Rev. 933, 949 (2016).

Kant recognized the pardoning power as "certainly the most slippery of sovereign rights,"and now that there are both substantive and procedural checks on sentencing injustices, clemency can *create* injustice by offering disparate punishment to offenders based not on objective factors, democratically measured, but executive favor. It challenges the Anglo-American aspiration of equal time for equal crime.[11]

More than two centuries ago, Kant noted the detrimental impact of pardoning on public safety, insisting even crimes against the state must not go "unpunished **if the safety of the people might be endangered thereby**."[12] The danger created by pardoning murderers and other violent criminals renders transparency especially critical, to enable the public to serve as the final judge over governmental conduct. (*Cox*, *supra*, 420 U.S. 469, 495.)

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[11] Blackstone, *Commentaries on the Laws of England*, 4 vols. (Chicago, 1979) 4:370-371, *quoted in* Harsh Justice at 41-42: "And it is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has before ordained, for every subject alike, without respect of persons."

[12] See note 6.

Conclusion

To conform to precedent, enhance transparency and confidence on government, and enforce a constitutional separation of powers, this Court should adopt the proposed order.

Dated: January 13, 2021

Respectfully submitted,

_____

Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

Certification of Word Count
(Cal. Rules of Court, rule 8.204(c).)

I, Mitchell Keiter, counsel for amicus curiae, certify pursuant to the California Rules of Court, that the word count for this document is 2,225 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect version X3 word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 13, 2021

_____

Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On January 13, 2021, I served the foregoing document described as **LETTER BRIEF** in case number **S255392** on the interested parties in this action through TrueFiling:

Anna Theresa Ferrari
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Thomas R. Burke
thomasburke@dwt.com

Executed this 13th day of January, 2021, at Beverly Hills, California.

_____
Mitchell Keiter

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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1/13/2021

Date

/s/Mitchell Keiter

Signature

Keiter, Mitchell (156755)

Last Name, First Name (PNum)

Keiter Appellate Law

Law Firm

S255392

Amicus Populi
The Beverly Hills Law Building
424 South Beverly Drive
Beverly Hills, CA 90212

January 25, 2021

RE: **Supplemental Letter** Regarding Motion to Seal the Record in *Application of Burton (Susan) for Clemency* (S255392)/Confidentiality of Clemency Records

Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Amicus supplements its initial letter brief to note the instant debate is an opportune moment for the Supreme Court to provide greater transparency on *all* appellate matters by posting filed briefs and records on its website. The United States Supreme Court and lower federal courts provide such access. The closing of the Los Angeles clerk's office and recent COVID protocols impede public access to these materials. The Court's website now provides only access to briefs, and only right before oral argument, and this month they were not even posted by the day of argument. As these documents are intended as public records, website posting will be the most effective means of providing transparency.

Dated: January 25, 2021

Respectfully submitted,

_____

Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

Proof of Service

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On January 25, 2021, I served the foregoing document described as **SUPPLEMENTAL LETTER BRIEF** in case number **S255392** on the interested parties in this action through TrueFiling:

Anna Theresa Ferrari
anna.ferrari@doj.ca.gov

Thomas R. Burke
thomasburke@dwt.com

Executed this 25th day of January, 2021, at Beverly Hills, California.

_____
Mitchell Keiter

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S255392**
Lower Court Case Number:

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1/25/2021

Date

/s/Mitchell Keiter

Signature

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January 13, 2021

Mr. Jorge E. Navarette
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

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)

Dear Mr. Navarette:

The First Amendment Coalition ("FAC") submits this Letter 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. The proposed amendment is a significant improvement to the existing language in the Internal Operating Practices and Procedures, which prioritizes confidentiality and secrecy over the public's well-established right of access to court records. FAC requests, however, 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.

FAC previously filed seven motions to unseal clemency-related records, which consumed significant time and resources – an effort that the public cannot be expected to undertake for all future clemency matters. FAC's experience illustrates why the Rules of Court strike the proper balance. Those rules 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. There is no good reason why those rules, which have withstood the test of time, should not apply when the Governor asks to file confidential records. That is the proper balance to strike between any purported need for secrecy and the public's rights of access to court records.

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 also 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 "narrowly tailored," and that no less restrictive means exist to achieve the overriding interest. *Id*.; Cal. Rules of Court, Rules 2.550, 8.46. The Court has issued similar orders in response to other motions to unseal filed by the First Amendment Coalition ("FAC"), *see* Orders, Case Nos. S255392, S252284, S252277, S252279, S252271, and S252285 (May 22, 2019) (collectively, "the May 2019 Orders").

The May 2019 Orders led to motions by the Governor to "File Clemency Matters Under Seal" in the same matters. In companion rulings, the Court consistently denied the Governor's motions to file under seal, again ordering him to resubmit the record to the Court in the manner required by the California Rules of Court. *See* Orders, Case Nos. S255392, S252284, S252277, S252279, S252271, and S252285 (Sept. 11, 2019) (collectively, "the September 2019 Orders"). The proposed amendment flips the burden, creating a host of unnecessary complications in the process.

The Executive Branch has the resources to comply with the Rules of Court from the outset. The public is not only constrained by having to find counsel willing to file such motions, but also by the poor position created by the proposed amendment. Any such motion will start with a severe disadvantage because, in part, so little information is contained in the letter from the Office of Legal Affairs that is posted on the Court's docket. There is also uncertainty as to when the Court may act on the Governor's request, so it is unclear when a motion to unseal must be filed. Further complicating matters, 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.

Moreover, requiring the Governor to comply with the Rules of Court only after a motion to unseal is filed will greatly increase the workload for all concerned and put a strain on private and judicial resources. The Court will be forced to consider repeated motions to unseal – which will likely be redundant by virtue of the fact that the public is operating in the dark, with limited information from the Office of Legal Affairs' letter – and then also consider the Governor's motions to file under seal. In short, putting the onus on the public to assert its right of access adds an unnecessary step to the process. By contrast, 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.

I. FAC'S MOTIONS TO UNSEAL

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 seven motions with this Court to unseal clemency-related records. These motions have consumed a considerable amount of time and effort by FAC (with only four full-time employees) and its *pro bono* attorneys. The public will not always be able to mount this type of effort. FAC's experience illustrates why the approach long required by the California Rules of Court strikes the proper balance. The Governor, with the resources available to the Executive Branch, should bear the burden of justifying secrecy from the outset.

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"). 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's 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 – And Motions Still Pending Before This Court

In addition to requesting access to the Wright clemency records, on December 27, 2018, FAC filed additional motions to unseal clemency-related court records in five then-pending clemency matters.[1] On May 22, 2019, the Court ordered the Governor to resubmit records in

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

those five clemency matters – as well as a sixth, the Burton matter[2] – in compliance with California Rules of Court 8.45 and 8.46. In each of those six matters, motions filed by the Governor to seal clemency materials in part remain pending before this Court.[3]

C. The Banks Matter

FAC also moved to unseal clemency materials in yet another matter initiated by the Governor. The Governor filed the Banks matter on May 26, 2020 – a year after the Court issued six orders reminding the Governor to follow the California Rules of Court, and 16 months after the Court described the already unmistakable procedure in the Wright matter.

II. 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 requesting a clemency recommendation from the Court. There is nothing in these provisions that requires blanket secrecy over the entire file submitted by the Governor. In fact, as shown below, the same California Constitution that establishes this unique clemency 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.

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[2] On May 7, 2019, FAC again moved to unseal clemency materials, this time in a new matter initiated by Governor Newsom's administration. Governor Newsom filed Case No. No. S255392, captioned Burton on Clemency (the "Burton matter"), on April 23, 2019. Although this was more than 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's right of access to the clemency file.

[3] On December 6, 2019, the Governor filed motions to seal clemency materials in part in the Burton, Flowers, Wong, Harris, Rodriguez, and Guzman matters. On January 22, 2020, FAC opposed each of these motions.

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

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 . . . ." (citation omitted)); *Mushet v. Dept. of Public Service*, 35 Cal. App. 630, 636-38 (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 (citation omitted). This presumption of public access to court 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)-(2) of the California Constitution requires broad public access to judicial records. In *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588 (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)] 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).

Because the presumption of access applies under the above authorities, clemency files may be sealed, 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). If the party seeking nondisclosure meets this burden, the court must adopt the party's "enumerated findings expressly." *McNair v. National Collegiate Athletic Ass'n*, 234 Cal. App. 4th 25, 32 (2015).

In accordance with these well-established principles, this Court recognized "the public right of access" to the clemency files in the Wright matter and made express, enumerated findings to support limited nondisclosure. Specifically, this Court identified "overriding interests" that "overcome the right of public access" to certain 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). FAC respectfully contends that this same procedure should apply to all clemency matters going forward, and should be incorporated into the proposed amendment to part XIV.A of the Court's Internal Operating Practices and Procedures.

Accordingly, FAC respectfully submits, for this Court's consideration, the following language for the first paragraph of the proposed amendment. This proposal incorporates the language from this Court's September 11, 2019 Orders:

> 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.

FAC does not suggest any changes to the second paragraph of the proposed amendment.

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, 572 (1980). The burden should not be placed on the public to first decipher the clemency request from the Governor and then guess by when a motion to unseal must be filed. For the above reasons, FAC respectfully

requests that this Court revise its Proposed Administrative Order and the proposed amendment therein, and require compliance with the Rules of Court from the outset when the Governor seeks to file records under seal.

Sincerely,

DAVIS WRIGHT TREMAINE LLP

/s/ Thomas R. Burke
Thomas R. Burke

FIRST AMENDMENT COALITION

/s/ Glen Smith
Glen Smith
Litigation Director

Attorneys for First Amendment Coalition

cc: Anna Theresa Ferrari, Office of the Attorney General
Eliza Hersh, Deputy Legal Affairs Secretary, Office of the Governor

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 years, employed in the City and County of Los Angeles, California, and not a party to the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 865 South Figueroa Street, Suite 2400, Los Angeles, CA 90017-2566.

On January 13, 2021, I hereby certify that I electronically filed the foregoing **FIRST AMENDMENT COALITION'S LETTER BRIEF IN RESPONSE TO COURT'S PROPOSED ADMINISTRATIVE ORDER CONCERNING CLEMENCY RECORDS** through the Court's electronic filing system, TrueFiling. I certify that participants in the case who are registered TrueFiling users will be served via the electronic filing system (TF3).

[X] 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 referenced 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 Los Angeles, CA:

Rei R. Onishi, Deputy Legal Affairs
Eliza Hersh, Deputy Legal Affairs
Office of Governor Gavin Newsom
State Capitol
1303 10th Street, Suite 1173
Sacramento, CA 95814

Xavier Becerra
Attorney General of California
Office of the Attorney General
State of California
1300 I Street
Sacramento, CA 95814

Anna Ferrari
Deputy Attorney General
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on January 13, 2021, at Riverside, California.

/s/ Ellen Duncan
Ellen Duncan

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **thomasburke@dwt.com**

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Filing Type	Document Title
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Glen Smith First Amendment Coalition	gsmith@firstamendmentcoalition.org	e-Serve	1/13/2021 1:04:22 PM
Anna Ferrari California Department of Justice 261579	anna.ferrari@doj.ca.gov	e-Serve	1/13/2021 1:04:22 PM
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Selina Maclaren Davis, Wright ,Tremaine LLP 300001	selinamaclaren@dwt.com	e-Serve	1/13/2021 1:04:22 PM
Pamela Fadem California Coalition for Women Prisoners	pfadem@gmail.com	e-Serve	1/13/2021 1:04:22 PM
Jennifer Mann EDCA Federal Defender, Capital Habeas Unit 215737	jennifer_mann@fd.org	e-Serve	1/13/2021 1:04:22 PM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 1:04:22 PM
Brittney Barsotti CNPA 327661	brittney@cnpa.com	e-Serve	1/13/2021 1:04:22 PM
Ellen Duncan	ellenduncan@dwt.com	e-	1/13/2021

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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.

1/13/2021

Date

/s/Thomas Burke

Signature

Burke, Thomas (141930)

Last Name, First Name (PNum)

Davis Wright Tremaine LLP

Law Firm

CRIME SURVIVORS FOR SAFETY AND JUSTICE

January 13, 2021

Mr. Jorge E. Navarette
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Dear Mr. Navarette,

Crime Survivors for Safety and Justice - CA is a part of a national network of crime survivors joining together to create healing communities and shape public safety policy. We work to change laws and systems to put the communities that have been most harmed and least helped at the center of public safety strategies and public safety investments. Crime Survivors for Safety and Justice - CA has chapters in San Francisco, the East Bay, the Central Valley, Los Angeles, Sacramento, San Diego, Stockton, and the Inland Empire. We represent nearly 12,000 crime survivors across the state.

We are writing in opposition to the proposed administrative rule on the unsealing of clemency records. Significant changes to the state's clemency process, including new approaches to transparency and confidentiality in the process, should be made through the legislative process. All stakeholders, including crime survivors and people with past criminal records, deserve a meaningful opportunity to weigh in on the nature and specifics of any such policy changes. The legislative process affords stakeholders the opportunity to express their concerns and advocate for their positions on the rules, procedures, timelines, and other specifics of a new policy approach.

This rule is a significant policy change and as such deserves to be the subject of debate and open stakeholder input. The rule also runs counter to the state's past approach to clemency records, which has recognized the sensitivity of the contents of the clemency files and the interests of the parties whose information and records are part of those files. We believe that the public interest in access to clemency records is outweighed by the privacy interests of both the applicant and the people whose information is part of the applicant's record.

Clemency files include huge amounts of private, highly sensitive materials that are not otherwise accessible to the public, including RAP sheets, medical and mental health documents, cognitive

testing information, housing information, probation reports, information about victims and law enforcement personnel, and more. These should be subject to a categorical exemption from unsealing, but relying on the line-by-line redaction of clemency files - which can be hundreds of pages long - will almost certainly lead to errors that result in the inadvertent disclosure of sensitive or protected information.

Uploading the documents onto a public platform means that these records - which are otherwise not publicly accessible - are now permanently accessible by the public, increasing the risk of unlawful use in hiring and housing contexts and the risk of harassment. And there is no mechanism in place for anyone whose information is in these records to even correct or update them for accuracy.

Also, given the state's approach to felony drug cases over the last five decades and the millions of felony convictions generated in its prosecution of the war on drugs over those many years, limiting the scope of the rule change to people with multiple felony convictions does little to limit its impact in any meaningful or fair way.

Thank you for your consideration,

Tinisch Hollins

Tinisch Hollins
Statewide Director

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 1/13/2021 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **adimartino@safeandjust.org**

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Filing Type	Document Title
LETTER	Crime Survivors for Safety and Justice_Opposition_Clemency Records

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Vanessa Nelson-Sloane Life Support Alliance	admin@lifesupportalliance.org	e-Serve	1/13/2021 6:51:33 PM
Glen Smith First Amendment Coalition	gsmith@firstamendmentcoalition.org	e-Serve	1/13/2021 6:51:33 PM
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Pamela Fadem California Coalition for Women Prisoners	pfadem@gmail.com	e-Serve	1/13/2021 6:51:33 PM
Anthony DiMartino Crime Survivors for Safety and Justice	adimartino@safeandjust.org	e-Serve	1/13/2021 6:51:33 PM
Jennifer Mann EDCA Federal Defender, Capital Habeas Unit 215737	jennifer_mann@fd.org	e-Serve	1/13/2021 6:51:33 PM
David Snyder First Amendment Coalition 262001	dsnyder@firstamendmentcoalition.org	e-Serve	1/13/2021 6:51:33 PM

Brittney Barsotti CNPA 327661	brittney@cnpa.com	e-Serve	1/13/2021 6:51:33 PM

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1/13/2021

Date

/s/Anthony DiMartino

Signature

DiMartino, Anthony (Pro Per)

Last Name, First Name (PNum)

Crime Survivors for Safety and Justice

Law Firm

LIFE SUPPORT ALLIANCE
& California Lifer Newsletter
HOPE *HELP* *HOME*

January 13, 2021

Mr. Jorge E. Navarette

Clerk of the Court

Supreme Court of California

350 McAllister Street

San Francisco, CA 94102

Re: Court's Proposed Administrative Order Concerning Clemency Records, In Connection With the Matter Application of Burton (Susan) for Clemency (S255392)

Dear Mr. Navarette:

I file this Letter Brief in response to the Court's November 24, 2020 Proposed Administrative Order which amends the Internal Operating Practices and Procedures regarding clemency applications.

I am a layman at law, unaware of the process to file with the California Supreme Court, but aware that I personally and professionally have a vital stake in the case before the court involving public disclosure of clemency investigation information.

Professionally I am the Director of Life Support Alliance, a non-profit organization working to assist life term prisoners in understanding and obtaining grants of parole from the California Board of Parole Hearings. As part of my duties in this position I have, over the space of some 9 years, attended well over 100 parole hearings as a non-participating observer. Additionally, in the 10 years my organization has been in business I have never missed the single monthly Executive Meeting of the Board of Parole Hearings, meetings at which en banc hearings involving clemency recommendations are held.

I have a deep understanding of and appreciation for the work of parole and clemency considerations. I would certainly oppose the disclosure of materials involved in clemency deliberations, in no small part for the safety of those inmates who are being so considered.

As an observer at those parole hearings over the years I have heard, seen and experienced victims' family members threaten, curse and promise ill to those inmates involved in the crime and their family members. Not only that, but I have myself, as a non-participating observer, been threatened simply on the basis of my identification as a prisoner advocate. While I do not often write letters in support of clemency requests, when I do so, it is for inmates I personally know and those letters are written from a personal perspective, not from my non-profit's office.

Because of this, those letters contain my personal contact information, information I purposefully do not make publicly available. Should that information become easily available, it could become a safety issue for me, my husband (himself a former life term prisoner) and other family members. I have no doubt others who submit letters in support of clemency applications, and in opposition as well, would share many of these concerns.

Information form an inmate's Central File is carefully supervised by the California Department of Corrections and Rehabilitation and the Board, as much of that information could be used to harass, intimidate, and even harm both the inmate and his/her family and friends, even after release from prison. Inmates do, despite loosing many of their rights on entrance to the justice system, retain a modicum of privacy expectations. Release of clemency investigations could not but violate that privacy.

I also agree with the notation that those interviewed as part of the clemency investigation might be less forthcoming, either in support or opposition, should they be aware that their personal information and opinions would be available for public pursual. This could be especially important in the case of correctional officers who might be loath to speak favorably of an inmate, should that opinion be discovered by fellow officers, who could, and often do, harass other custody and free staff members who are seen as "inmate lovers."

It is critical that in making these important decisions both the Board of Parole Hearings members and the Governor have benefit of the honest and considered opinion of those interviewed, not an opinion colored by concern for future reprisals or unwanted public attention as a result of those individuals' contributions.

I submit these comments in the hope that they will be considered in this decision.

Respectfully,

/s/Vanessa Nelson-Sloane, Director

Life Support Alliance

PO Box 277

Rancho Cordova, CA 95741

(916) 402-3750

admin@lifesupportalliance.org

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **BURTON (SUSAN H.) ON CLEMENCY**
Case Number: **S255392**
Lower Court Case Number:

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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.

1/13/2021

Date

/s/Vanessa Nelson-Sloane

Signature

Nelson-Sloane, Vanessa (Pro Per)

Last Name, First Name (PNum)

Life Support Alliance

Law Firm