

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

JOHANNA KLEPPE,

Petitioner,

v.

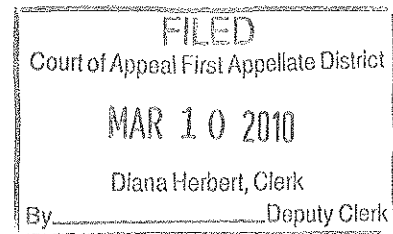
**SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF
MARIN,**

and

MARIN COUNTY,

Respondents.

Case No.



**PETITION FOR WRIT OF MANDAMUS AND PROHIBITION
(CODE OF CIVIL PROCEDURE §§ 1085 and 1103)**

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I. PRELIMINARY STATEMENT

Petitioner Johanna Kleppe, a Marin County taxpayer, seeks a writ of mandate, prohibition or other extraordinary relief requiring Respondents to comply with the U.S. and California Constitutions as well as state law that gives juveniles the right to be present at their court hearings. Unless otherwise ordered by this court, Respondents will begin conducting juvenile court hearings by videoconference for youth who are detained at the Marin County Juvenile Hall on or about March 15, 2010. *See* Marin County Superior Court Order 10-01, "Implementation of Video Appearances for Detained Juveniles in Uncontested Proceedings," (hereinafter, "Order 10-01") (A true and correct copy of Order 10-01 is attached herein as Exhibit A). The juvenile court judge, District Attorney, probation staff, witnesses, and family members will be in a courtroom at the Marin County Superior Court Civic Center, while the detained minor and his or her counsel participate remotely by videoconference from a room in the Juvenile Hall 4.6 miles away. *Id.*

Conducting juvenile court hearings by videoconference violates Welfare and Institutions Code Section 679, which provides that "a minor who is the subject of a juvenile court hearing ... is entitled to be present at such hearing." Videoconferencing hearings also deprives juveniles of the right to due process of law and effective assistance of counsel guaranteed by the federal and state constitutions. Petitioner seeks to enjoin the

implementation of Order 10-01 and to prevent further expenditure of taxpayer funds on illegal videoconferenced juvenile court hearings.

Petitioner has no other plain, speedy and adequate legal remedy.

A petition for writ relief is a proper means for obtaining review of Superior Court policies. *Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344, 1351 (prohibition); *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 312-13 (mandate). This Court has original jurisdiction over writ proceedings challenging acts of inferior tribunals and seeking to compel the performance of a public duty. Cal. Const. Art. 6, § 10; C. Civ. Proc. §§ 1085, 1103.

II. PARTIES

A. Petitioner

Petitioner JOHANNA KLEPPE (hereinafter “Kleppe”) is a citizen taxpayer in the State of California and a resident of Marin County. Kleppe is assessed to pay, and within one year of this lawsuit has paid, taxes to the State of California and the County of Marin. Kleppe, in her capacity as a citizen taxpayer pursuant to Code of Civil Procedure §526a, brings this action to secure a public right and enforce a public duty. She seeks to compel Respondents to cease their illegal policies and practices, and to refrain from violating the statutory and Constitutional rights of children in the Marin County juvenile delinquency system.

B. Respondents

Respondent SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF MARIN (“Superior Court”) is the court of record and exercises jurisdiction as the juvenile court for the County. Cal. Const. Art. 6, §4; Welf. & Inst. Code §245.¹

Respondent MARIN COUNTY (“County”) is a local governmental entity, duly authorized and formed under the laws of the State of California. The County is responsible for establishing and maintaining the juvenile hall where juveniles are held in custody pending adjudication of their juvenile court delinquency cases. §850.

III. STATUTORY FRAMEWORK AND FACTUAL ALLEGATIONS

A. California’s Delinquency System

The purpose of California’s delinquency system is to provide individualized care, treatment and guidance for children, hold them accountable for their actions, and support and strengthen families. §202. Any minor who may come under the custody and control of the delinquency system and “who is the subject of a juvenile court hearing ... is entitled to be present at such hearing.” §679. “Hearing” is defined at Section 727.4(7) of the Welfare & Institutions Code as “a noticed proceeding with findings and orders that are made on a case-by-case basis,

¹ All unspecified statutory references herein will be to the Welfare & Institutions Code.

heard by either of the following: (A) A judicial officer, *in a courtroom*, recorded by a court reporter; (B) an administrative panel, provided that the hearing is a status review hearing..." (emphasis added).

In person appearances for minors in juvenile court are essential to the individualized, rehabilitative and family centered purposes of juvenile court. Juvenile court hearings require factual findings and the court's evaluation of the minor, the minor's family, and their circumstances that depend on the presence of the minor, and the minor's ability to participate through counsel. For example, detention hearings (§632), disposition hearings (§§725, 726) and review hearings of detained minors awaiting placement in accordance with the disposition (§737), require the court to determine whether secure confinement is needed; whether the parent is able to adequately supervise the minor; whether reasonable efforts were made to keep the minor with his/her family; and whether the minor understands the conditions and expectations of placement, release or probation.

The decisions juvenile court judges make about the lives of young people who come before them depend on direct observations by the court and counsel, active participation by the minor and counsel, and colloquies among the participants that cannot occur when counsel and the minor are not physically present in the courtroom.

B. Marin County Superior Court's Order 10-01 Implementing Video Appearances for Detained Juveniles

On February 5, 2010, Marin County Presiding Judge Terrence R. Boren issued Order 10-01, "Implementation of Video Appearances for Detained Juveniles in Uncontested Proceedings," (Exhibit A). Judge Boren cites California's budget crisis and resulting cuts to the trial court security budget as the impetus for ordering changes to the operation of juvenile court in Marin County. *Id.* Respondent Superior Court staff have met with Respondent Marin County department staff to discuss the implementation of video appearances. *Id.* Currently, Juvenile Court is held for two hours in the afternoon on Mondays, Wednesdays, and Fridays in a courtroom next to the juvenile hall. Pursuant to Order 10-01, the Juvenile Court will be moved and its delinquency calendar heard at the main Marin Civic Center Courthouse 3501 Civic Center Dr. in San Rafael, a distance of 4.6 miles² from the Juvenile Hall at 16 Jeanette Prandi Way in San Rafael.

Order 10-01 directs the Court to install videoconferencing equipment at Marin County Juvenile Hall and the main county courthouse in order to begin two-way videoconferencing of certain hearings of minors detained at the juvenile hall. *Id.* The Order directs that "[t]he juvenile and his or her counsel will be situated in the juvenile detention facility while all other participants in the hearing, including the judicial officer and

² This distance was calculated using Google Maps, <http://maps.google.com>.

courtroom support staff, the deputy district attorney, parents or guardian of the juvenile, victims and witnesses, as well as others summoned or required to appear in court shall attend the juvenile hearing at the main courthouse.”

Id. Documents and other evidence relied upon by the court would be maintained at the Civic Center and sent by fax to the Juvenile Hall. *Id.*

Marin County Superior Court has fewer than 600 delinquency case filings per year³ and the average daily population of the juvenile hall is less than 30.⁴ Respondent Marin County is responsible for establishing and maintaining the juvenile hall where juveniles are held in custody pending adjudication of their juvenile court delinquency cases. §850. Pursuant to Order 10-01, Respondent Marin County’s Probation Department will transport detained juveniles to the main courthouse in cases where the judicial officer “determines that the juvenile’s physical presence would contribute to the fairness of the proceedings.”

FIRST CAUSE OF ACTION
Writ of Mandate and/or Prohibition C.C.P §§ 1085, 1103

(Violation of Welf. & Inst. C. § 679)

Petitioner realleges and incorporates by reference as if fully set forth herein the allegations contained in all of the above paragraphs.

³ Judicial Council of California, *2009 Court Statistics Report: Statewide Caseload Trends - 1998-1999 Through 2007-2008*, Table 11a, p. 130, available at <http://www.courtinfo.ca.gov/reference/documents/csr2009.pdf>.

⁴ Correctional Standards Authority Detention Survey Profile, available at http://www.cdcr.ca.gov/Divisions_Boards/CSA/FSO/Surveys/Juvenile_Profile/JDSRdocs/2Q08_JUVDS_juv_in_detention.pdf.

Respondents' Order depriving detained minors of their right to be physically present at their juvenile court hearings violates Welfare & Institutions Code § 679. This violation constitutes an illegal expenditure of public funds within the meaning of Code of Civil Procedure § 526a.

SECOND CAUSE OF ACTION
Writ of Mandate and/or Prohibition C.C.P §§ 1085, 1103
(Violation of U.S. Const. amend. V and XIV pursuant to
42 U.S.C. §1983)

Petitioner realleges and incorporates by reference as if fully set forth herein the allegations contained in all of the above paragraphs.

Respondents' Order depriving detained minors of their right to be physically present at their juvenile court hearings violates the minors' right to due process and fundamental fairness guaranteed to all persons accused of a crime under the Fifth and Fourteenth Amendments of the United States Constitution. This violation constitutes an illegal expenditure of public funds within the meaning of Code of Civil Procedure § 526a.

THIRD CAUSE OF ACTION
Writ of Mandate and/or Prohibition C.C.P §§ 1085, 1103
(Violation of the U.S. Const. amend. VI pursuant to 42 U.S.C. §1983)

Petitioner realleges and incorporates by reference as if fully set forth herein the allegations contained in all of the above paragraphs.

Respondents' Order depriving detained minors of their right to be physically present at their juvenile court hearings violates the minors'

confrontation rights under the Sixth Amendment of the United States Constitution, as well as their Sixth Amendment right to effective assistance of counsel at trial. This violation constitutes an illegal expenditure of public funds within the meaning of Code of Civil Procedure § 526a.

FOURTH CAUSE OF ACTION
Writ of Mandate and/or Prohibition C.C.P §§ 1085, 1103)

(Violation of the California Constitution Art. I, § 15)

Petitioner realleges and incorporates by reference as if fully set forth herein the allegations contained in all of the above paragraphs.

Respondents' Order depriving detained minors of their right to be physically present at their juvenile court hearings violates juveniles' right to be personally present, their confrontation rights, and right to effective assistance of counsel under Article I, Section 15 of the California Constitution. This violation constitutes an illegal expenditure of public funds within the meaning of Code of Civil Procedure § 526a.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner respectfully prays for the following relief:

That this Court assert jurisdiction over this matter;

Issue a writ of mandate and/or prohibition directing Respondent Superior Court to vacate its February 5, 2010 Order 10-01 implementing videoconferencing for juvenile court hearings;

Issue a writ of mandate directing Respondents Superior Court and Marin County to refrain from expending any additional taxpayer funds on and using any system of video appearances for detained juveniles in juvenile court hearings, absent specific legislative authorization;

Award the Petitioner the costs of this action and award reasonable attorneys' fees and costs; and

Such other relief as the Court may deem just and proper.

DATED: March 10, 2010

Respectfully submitted,

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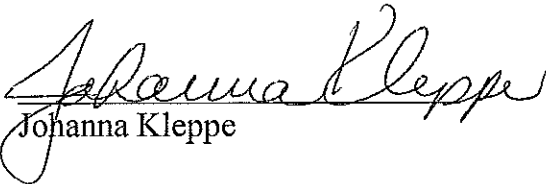
By:

Corene Kendrick
Corene Kendrick
Attorneys for Petitioner

VERIFICATION

I am the Petitioner to this action. I have read the Petition and I certify the facts contained therein are true of my own knowledge. I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of March 2010, in Mill Valley, California.


Johanna Kleppe

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF PETITION FOR WRIT OF MANDAMUS AND PROHIBITION**

I. STATEMENT OF THE CASE

This case presents the legal issue of whether a system of video appearances for detained juveniles in juvenile court hearings may be established by a Superior Court. Respondents plan to conduct certain juvenile court hearings via videoconference for youth who are detained at the Marin County Juvenile Hall. *See* Marin County Superior Court Order 10-01(hereinafter "Order 10-01," Exhibit A). Under Order 10-01, the juvenile court judge, District Attorney staff, Probation staff, victims and witnesses, and family members will appear in a courtroom at the Marin County Superior Court Civic Center, while the detained minor and his or her counsel participate remotely by videoconference from a room in the Juvenile Hall 4.6 miles away. *See* Petition at 5; Exhibit A. Petitioner Johanna Kleppe, a taxpayer, seeks a writ of prohibition, mandate and/or other extraordinary relief to enjoin the implementation of Order 10-01 and to prevent the further expenditure of taxpayer funds on illegal videoconferenced juvenile court hearings.

Respondents' Order and their plan to conduct juvenile court hearings without the presence of the minor who is the subject of the proceedings or his or her legal counsel, violates the statutory and constitutional rights of the minor and interferes with the ability of counsel to provide effective

representation. Respondents have a ministerial duty to comply with the Welfare and Institutions Code, which requires that minors be present for all hearings. Welf. & Inst. C. §679; *In re Sidney M.*, (1984) 162 Cal.App.3d 39. They also must comply with the U.S. and California Constitutional rights of juveniles in delinquency proceedings. U.S. Const. amends. V, VI, XIV; Calif. Const. Article 1, Section 15; *In re Gault*, (1967) 387 U.S. 1, 28 (“Under our Constitution, the condition of being a boy does not justify a kangaroo court.”). The Constitutional and statutory rights of juveniles to be present at their hearings and have meaningful and effective representation are a question of public right and is the highest of public duties for the Respondents. *see, e.g.*, Gov. C. § 77001(e) and Administrative Office of the Courts Policy No. AOC-FIN-1.01, §6.3.2(1) (Trial court management must ensure “equal access to justice throughout California...”).

II. VENUE/ORIGINAL JURISDICTION

The Petitioner challenges the implementation of a standing general order of the Marin Juvenile Court establishing a system of videoconference appearances for in-custody juveniles for certain juvenile court hearings. A petition for writ relief is a proper means for obtaining review of Superior Court policies. *Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344, 1351 (prohibition); *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 312-13 (mandate).

This Court has original jurisdiction over writ proceedings that challenge acts of inferior tribunals and seek to compel the performance of a public duty. Cal. Const. Art. 6, §10; C. Civ. Proc. §§1085, 1103. A writ of prohibition may be issued by any court to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. C. Civ. Proc. §1103. A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, C. Civ. Proc. §§1085. Furthermore, the Superior Court has no power, authority, or jurisdiction to issue mandamus and prohibition against itself; mandamus or prohibition may be issued only by a court to another court of inferior jurisdiction. *Haldane v. Superior Court of Los Angeles County* (1963) 221 Cal.App.2d 483. Venue lies in the First Appellate District. Cal Const. Art. 6, §3; Govt. C. §69100.

A. Petitioner is Entitled to a Writ of Prohibition and/or Writ of Mandamus

A writ of prohibition will lie to invalidate a court policy, rule or order of general application that violates rights guaranteed by established law. *Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344 (prohibiting juvenile court policy of shackling all in custody juveniles in courtroom without individualized determination of safety need); *Los*

Angeles County v. Superior Court (1967) 253 Cal.App.2d 670 (preventing injunction against law enforcement officials from disclosing information to press about arrestees during pre-arraignment period); *Turlock Golf and Country Club v. Superior Court* (1966) 240 Cal.App.2d 693 (prohibiting court from refusing to grant jury trial to defendant for failure to deposit full jury fees pursuant to local court rule). Acts which exceed the defined power of a court, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction and may be restrained by prohibition. *Los Angeles County v. Superior Court*, 253 Cal.App.2d at 675; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (invalidating local superior court rule as inconsistent with hearsay rule and various statutory provisions).

A traditional writ of mandate will lie to “compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station...” C. Civ. Proc. §1085. “A petitioner seeking a writ of mandate under this section is required to show the existence of two elements: a clear, present, and usually ministerial duty upon the part of the respondent, and a clear, present, and beneficial right belonging to the petitioner in the performance of that duty.” *Bergeron v. Dep’t of Health Svcs.* (1999) 71 Cal.App.4th 17, 21-22.

Where the issue involves a question of public right and the object of the writ is to procure performance of a public duty, the petitioner need have no private interest in order to have standing. *Green v. Obledo* (1981) 29 Cal.3d 126, 144; *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 798-801. The statutory and constitutional rights of pre-trial detainees are matters involving a question of public right. *Mendoza v. Tulare County* (1982) 128 Cal.App.3d 403 (jail conditions); *Van Atta v. Scott* (1980) 27 Cal.3d 424 (pre-trial bail release system); *Blair v. Pitchess* (1971) 5 Cal.3d 258 (jail conditions).

III. ARGUMENT

A. State Law Prohibits the Exclusion of Youth From Their Juvenile Court Hearings

The Respondents' plan to videoconference detained juveniles' court hearings violates state law. Welfare and Institutions Code Section 679 states that "a minor who is the subject of a juvenile court hearing ... is entitled to be present at such hearing." The Court of Appeal held in *In re Sidney M.* (1984) 162 Cal.App.3d 39, that based upon Section 679, a minor has a right to be present at his or her delinquency hearing, and that there is "no provision in [§679] that establishes exceptions or qualifications" to the juvenile's right to be present at the hearing. 162 Cal.App.3d at 46. The Court explained that the provisions in Section 594 of the Code of Civil Procedure which allow certain trials or hearings to occur in the absence of

the adverse party clearly only applied to adults and did not apply to juveniles because “had the Legislature intended ... [C. Civ. Proc. §594] to apply as an exception to the rule established in [§679] it would have expressly so provided.” 162 Cal.App.3d at 47. The Court rejected the state’s argument that Penal Code Section 1043 applies to the analysis of a juvenile’s right to be present.⁵ The Court stated “It is apparent that the Legislature did not intend that it apply to juvenile court proceedings. The use of the words ‘defendant,’ ‘felony case,’ ‘trial,’ ‘prosecution,’ and ‘punishable’ preclude such application.” 162 Cal.App.3d at 47-48, *citing* §203. The Court concluded that “Welfare and Institutions Code section 679 simply requires that the state not do anything that would preclude the minor from being present...” *Id.* at 48. Respondents’ order will preclude detained minors from being physically present at their own hearings, in clear violation of §679 and *Sidney M.*

⁵ Penal Code §1043 (at the time of the decision) provided that “except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial. The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including the return of the verdict...” *In re Sidney M.*, (1984) 162 Cal.App.3d at 47-48.

B. Juveniles Have a Constitutional Due Process Right to Be Present at Delinquency Hearings

The right to be present at criminal hearings arises in part from the due process clauses of the Fifth and Fourteenth Amendments. *Kentucky v. Stincer* (1987) 482 U.S. 730, 745. In *Stincer*, the Court noted that:

[E]ven in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge...due process clearly requires that...a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome.

482 U.S. at 745 (internal citations omitted).

It is well-settled that minors have a Constitutional right to fundamental fairness and due process in juvenile court proceedings. *Sidney M.*, 162 Cal.App.3d at 47, quoting *Richard M. v. Superior Court* (1971) 4 Cal.3d 370, 375 (“Juveniles are entitled to the fundamental protection of the Bill of Rights in proceedings that may result in confinement or other sanctions, whether the state labels these proceedings ‘criminal’ or ‘civil.’”); *Alfredo A. v. Superior Court* (1994) 6 Cal.4th 1212, 1225 (“There is no doubt that the Due Process Clause is applicable in juvenile proceedings.”), citing *Schall v. Martin* (1984) 467 U.S. 253, 263; see also *In re Gault* (1967) 387 U.S. 1, 31-34; *In re Kevin S.* (2003) 113 Cal.App.4th 97, 107; *In re Jesse P.* (1992) 3 Cal.App.4th 1177, 1182.

The Court of Appeal in *Sidney M.* held that in addition to the statutory right of §679, the minor's Constitutional right to due process and fundamental fairness mandates that a minor be personally present at proceedings unless the minor knowingly and intelligently waives the right to be present. 162 Cal.App.3d at 47-48, citing *Richard M.* 4 Cal.3d at 375 (holding double jeopardy protections apply to juvenile delinquency proceedings); see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 260 (a defendant has a constitutional right to be present at all critical stages of a criminal prosecution or whenever his or her presence has a reasonably substantial relation to his or her ability to defend).⁶

C. Juveniles Have a Sixth Amendment Right to Have Effective Assistance of Counsel and a Sixth Amendment Confrontation Right To Be Present at Delinquency Hearings

1. Sixth Amendment Right to Counsel

The Sixth Amendment also provides that "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S. Const. amend. VI. Minors in delinquency court have the same Sixth Amendment right to effective assistance of counsel as adults. *Gault* 387 U.S. at 36 (holding that children need the assistance of counsel "to cope with problems of law, to make skilled

⁶ Similar to the due process rights under the United States Constitution, persons accused of a crime have a right under Article I, Section 15 of the California Constitution, "to be personally present with counsel" at criminal trials. Cal. Const. art. I, §15 discussed *infra* at 23.

inquiry into the facts, to insist upon regularity of the proceedings and to ascertain whether he has a defense and to prepare and submit it. The child requires the guiding hand of counsel at every step of the proceedings”).

In a recent Court of Appeal case finding ineffective assistance of counsel in a juvenile delinquency matter, the Court held that the right to counsel under the Sixth Amendment of the U.S. Constitution and Article I, Section 15 of the California Constitution “entitles the defendant not to some bare assistance but rather to *effective* assistance.” *In re Edward S.* (2009) 173 Cal.App.4th 387, 406 *quoting People v. Ledesma* (1987) 43 Cal.3d 171, 173 (internal citations removed). The Court went on to state, “Specifically, it entitles him to ‘the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.’” *Id.*, *quoting U.S. v. DeCoster* (D.C. Cir. 1973) 487 F.2d 1197, 1202; *see also Kent v. U.S.* (1966) 383 U.S. 541, 561 (finding the right to counsel and counsel’s access to relevant records “are meaningless – an illusion, a mockery, unless counsel is given an opportunity to function”).

The Fourth Circuit of the U.S. Court of Appeals articulated the problems facing attorneys who are representing individuals through videoconferencing, which in that case was in the context of immigration asylum hearings:

A ... problem inherent in the video conferencing of asylum hearings is its effect on a petitioner’s lawyer. Because video conferencing permits the petitioner to be in one location and

an IJ [immigration judge] in another, its use results in a “Catch 22” situation for the petitioner’s lawyer. While he can be present with his client – thereby able to confer privately and personally assist in the presentation of the client’s testimony – he cannot, in such a circumstance, interact as effectively with the IJ or his opposing counsel. Alternately, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option.

Rusu v. U.S. INS (4th Cir. 2002) 296 F3d 316,323

Respondents’ Order will result in the juvenile and his or her attorney sitting in a room in the juvenile hall more than four miles away from all other persons, records, reports, and evidence involved in the case. This action hobbles attorneys by preventing them from meeting their ethical duty to their clients, and eviscerates the juveniles’ right to an effective attorney at all stages of the adjudication. Videoconferenced hearings present barriers to an attorney’s ability to effectively represent a client. For example, with the judge in a different location from the attorney and minor, the attorney’s view of the judge is limited by the placement and position of the camera at the courthouse. Thus, if the camera is pointed in such a way that only the judge is visible, the attorney would not be able to observe the presence of (or hear comments by) other parties who may be in the courtroom. The attorney may not be able to see, hear, or engage in private side colloquies and negotiations among the judge, the Assistant District Attorney or Probation staff. Similarly, by not being physically present in

the same location, the defense attorney may not be able to engage in the off-the-record discussions with Probation and the District Attorney that often help to resolve cases more quickly and without formal proceedings. The attorney also will be unable to meet with or interact with family members who could provide additional information, placement options, or supervision guarantees that would make it more likely that the judge could decide to release the youth to the community.

2. Sixth Amendment Confrontation Right to Be Present

Order 10-01 also violates minors' Sixth Amendment right to be present at hearings for the purpose of confrontation and cross-examination. *U.S. v. Gagnon* (1985) 470 U.S. 522, 526 ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment."). The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause presumes the defendant will meet face-to-face with witnesses appearing before the trier of fact. *Coy v. Iowa* (1988) 487 U.S. 1012, 1016. The confrontation right applies to minors in juvenile court proceedings. *Gault* 387 U.S. at 56; *see also In re Kevin S.* (2003) 113 Cal.App.4th 97, 108.

In a case regarding the constitutionality of videoconferencing the judge into a courtroom filled with all parties, including the defendant, the Sixth Circuit noted that "[o]f the various elements to the confrontation right

– ‘physical presence, oath, cross-examination, and observation of demeanor by the trier of fact’ – physical presence, or a defendant’s right to confront the witnesses against him face-to-face, forms ‘the core of the values furthered’ by the Clause.” *U.S. v. Burke* (6th Cir. 2003) 345 F.3d 416, 425, quoting *Maryland v. Craig* (1990) 497 U.S. 836, 846-47.

Even in juvenile court hearings that are ostensibly non-contested, issues regularly arise that require confrontation. For example, if the probation officer or other person makes a representation to the court that is factually incorrect, it is important for the minor and his or her attorney to be able to quickly probe and respond to the misstatement. In many instances, too, the minor would want to be able to turn to his or her parents for confirmation of particular facts to be able to effectively respond to assertions by the probation officer or prosecutor – without having to stop and make a telephone call to the courtroom.

Respondents’ Order, which excludes detained minors from juvenile hearings and has “all other participants in the hearing, including the judicial officer and courtroom support staff, the deputy district attorney, parents or guardian of the juvenile, victims and witnesses, as well as others summoned or required to appear in court” at the main courthouse (Exhibit A), while the minors and their attorneys are appearing by videoconference, violates the minors’ Sixth Amendment Confrontation right to be present at their hearings.

D. The California Constitution Guarantees the Right to Be Personally Present, to Confront Witnesses, and to Effective Assistance of Counsel

The rights to be present, to confront witnesses, and to effective assistance of counsel are protected by Article 1, Section 15 of the California Constitution, which states, “the defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, *to be personally present with counsel*, and to be confronted with the witnesses against the defendant” (emphasis added).

California courts recognize these rights to be co-extensive with the federal Fifth, Sixth and 14th Amendment constitutional rights discussed herein. *See People v. Butler* (2009) 46 Cal.4th 847, 861 (right to be present co-extensive with Federal Due Process); *In re Edward S.* (2009) 173 Cal.App.4th 387, 406 (Sixth Amendment ineffective assistance of counsel); *In re Damon H.* (2002) 102 Cal.App.4th 995 (Sixth Amendment right to confront witnesses). These rights have been applied to juvenile cases. *Edward S.* 173 Cal.App.4th at 406; *Damon H.* 102 Cal.App.4th 995.

For the same reasons as detailed *supra* at 15 though 22, Respondents' Order and plan to videoconference hearings of detained juveniles violates Article 1, Section 15 of the California Constitution.

E. The U.S. Supreme Court and Other Courts Have Held That Videoconferencing Should Be Used in Hearings Only in Exceptional Circumstances and Upon an Individualized Determination

The seminal case on the use of videoconference technology in criminal hearings is *Maryland v. Craig* (1990) 497 U.S. 836. The U.S. Supreme Court reviewed a statutory provision that authorized the taking of testimony by one-way closed-circuit television from a 6-year-old sexual molestation victim during trial. *Id.* at 840. The Court articulated the test for evaluating whether to use videoconference technology in a hearing as, “a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Id.* at 850. The Court emphasized that the determination of whether a particular case requires the usual procedure of physical, face-to-face confrontation must be made on an individualized case-by-case basis. *Id.* at 855.

The *Craig* test is used by the California Courts of Appeal to review the use of videoconferencing. *People v. Murphy* (2003) 107 Cal.App.4th 1150, 1157-58; *People v. Williams* (2002) 102 Cal.App.4th 995, 1006-07. Five Circuits of the U.S. Court of Appeals – including the Ninth Circuit – have held that the *Craig* analysis applies to two-way videoconferencing, such as that proposed by Respondents. *See, e.g., U.S. v. Yates* (11th Cir.

2006) 438 F.3d 1307, 1313-14; *U.S. v. Bordeaux* (8th Cir. 2005) 400 F.3d 548, 554-55 (“confrontation via two-way closed-circuit television is not constitutionally equivalent to a face-to-face confrontation”); *U.S. v. Moses* (6th Cir. 1998) 137 F.3d 894, 897-98; *U.S. v. Quintero* (9th Cir. 1994) 21 F.3d 885, 892; *U.S. v. Carrier* (10th Cir. 1993) 9 F.3d 867, 869-70; *U.S. v. Garcia* (9th Cir. 1993) 7 F.3d 885, 887-88.

Federal and state cases that have upheld the public policy interest in the use of two-way videoconferencing for criminal trials have been adult cases involving vulnerable witnesses, i.e. young children, victims of sexual assault, or Mafia informants. *See, e.g., Craig* 497 U.S. 836; *U.S. v. Gigante* (2d Cir. 1999) 166 F.3d 75; *Williams* 102 Cal.App.4th 995. Again, there is no authority for any form of videotaping in California juvenile court proceedings. *See* §679; *Sidney M.* 162 Cal.App.3d at 47. But even if there were, Respondents’ blanket order to videoconference hearings for juveniles housed at the Marin County Juvenile Hall fails the test set out in *Craig* and its progeny. Respondents have offered no important public policy interest to justify the intrusion on minors’ Constitutional rights,⁷ nor does Order 10-01 require an individualized determination that videoconferencing is appropriate in a particular case before imposing it on a minor and his or her attorney.

⁷ See *infra* pages 30-33 regarding budgetary constraints not justifying a restriction on minors’ rights.

F. Videoconferenced Hearings Negatively Impact the Court's Ability to Evaluate Credibility and Demeanor and to Make Factfinding Decisions

Videoconferenced hearings are not the functional equivalent of an in-person hearing because they do not provide the close and personal physical interaction that is necessary for a judge to adequately determine a minor's credibility and demeanor. *See Thornton v. Snyder* (7th Cir. 2005) 428 F.3d 690, 697 ("the immediacy of a living person is lost' with video technology") *quoting Stoner v. Sowders* (6th Cir. 1993) 997 F.2d 209, 213; *see also U.S. v. Burke* 345 F.3d at 425 ("[P]resence through a television is not the same thing as direct physical presence..."). One study examining the use of videoconferencing in asylum removal hearings noted that

The expressions, gaze, posture, and gestures that provide important insight into an asylum applicant's credibility or level of understanding are skewed when viewed via VTC [video teleconferencing]. Video transmission may exaggerate or flatten an applicant's affect and audio transmission may cut off the low and high frequencies of the applicant's voice; both of these anomalies impair the fact finder's ability to assess the veracity of the applicant's story.

Frank Walsh & Edward Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Proceedings* (2008) 22 GEO. IMMIGR. L.J. 259, 268 (hereinafter Walsh & Walsh).

In-person proceedings allow the judge to personally assess the credibility of the youth by physically observing and interacting with him/her, analyzing the minor's nonverbal cues while judging whether the

youth's release to the community presents any safety concerns. These judgments of credibility, demeanor, and safety are best made when the judge can physically detect the youth's hand gestures, body language, and facial expressions – which cannot be accurately conveyed or depicted through a television screen. See Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant* (2004) 78 TUL. L.REV. 1089, 1110-11, 1114 (hereafter Bowen Poulin) (noting that videoconferencing impacts nonverbal cues, eye contact and viewer expectations, and therefore “[t]o the extent that technology changes behavior or masks or distorts information, it may undermine the accuracy of perceptions and corrupt the result of the proceeding”); Federal Rule of Criminal Procedure 10(c), Advisory Committee Notes to the 2002 amendments (“Much can be lost when video teleconferencing occurs...the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental conditions of a defendant – a factor that may weigh on pretrial decisions, such as release from detention”).

In *Thornton v. Snyder* (7th Cir. 2005) 428 F.3d 690, Judge Richard Posner, writing for the Seventh Circuit, compiled language from relevant caselaw from across the country on videoconferencing and noted:

Clearly, a jury trial conducted by videoconference is not the same as a trial where the witnesses testify in the same room as the jury. Videoconference proceedings have their shortcomings. “[V]irtual reality is rarely a substitute for actual presence and ... even in an age of advancing

technology, watching an event on the screen remains less than the complete equivalent of actually attending it.” *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir.2001). ...As the court in *Edwards v. Logan*, 38 F.Supp.2d 463 (W.D.Va.1999), observed, “Video conferencing ... is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.” 38 F.Supp.2d at 467.

428 F.3d at 697.

Experiments testing the effectiveness of videoconferencing suggest that fact-finders evaluate televised testimony as less credible than in-court testimony and that “testifying through a video monitor is less persuasive because it is a less direct form of communication.” *Developments in the Law – Access to Courts: Access to Courts and Videoconferencing in Immigration Court Proceedings* (2009) 122 HARV.L.REV. 1181, 1185, quoting David F. Ross *et al.*, *The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse* (1994) 18 LAW & HUM. BEHAV. 553, 565 and Gail Goodman, *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Juror’s Decisions* (1998) 22 LAW & HUM. BEHAV. 165, 195-96, 564-65. One study analyzed the outcome disparities in immigration proceedings and found a statistically significant difference in the rate of asylum grants based upon whether the

hearing was in-person or by videoconference – the grant rate for asylum applicants whose cases were heard in-person was roughly double the grant rate for asylum applicants whose cases were heard via videoconferencing. Walsh & Walsh, 22 GEO. IMMIGR. L.J. at 271.

Given the particular vulnerabilities of minors and their developmental immaturity relative to adult defendants, (*see, e.g., Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 859-60), the negative ramifications of videoconferencing are all the more acute. The Court of Appeal in *Sidney M.* found it significant that in writing Section 594 of the Code of Civil Procedure and Section 1043 of the Penal Code (allowing for some limited videoconferencing of adults' hearings) the California Legislature did not include juvenile court proceedings. 162 Cal.App.3d at 47-48. Similarly, the Florida Supreme Court has ordered that juvenile detention proceedings cannot be held via videoconferencing. Recognizing that “robotic justice” denied the trial judge important, non-verbal information upon which to base a decision concerning detention of a juvenile, the Court ruled that juvenile detention hearings “should only be made in person, not by long distance.” Amend. to Fla. R. of Juv. Proc. 8.100(a) (Fla. March 15, 2001) 796 So.2d 470, 474-75. Furthermore, in *Gault*, the Court was concerned that young Gerald Gault was not physically present at the hearing at which his mother waived his right to counsel. In requiring that juveniles receive due process protections and the right to

counsel, the Court noted that judges should not refrain to “appropriately take to account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted.” 387 U.S. at 26-27. Videoconferencing prevents the juvenile court from taking into account the demeanor, conduct, and psychological attitude of the minors. Finally, the National Juvenile Defender Center noted:

Given the technological and physical limitations, it is not surprising that children feel a sense of alienation from the detention process and limited in the control they have over their own cases. One trial court judge has noted that “most juveniles at video first appearances appear almost like zombies... Conversations via video screen with a juvenile who is in detention is extremely difficult and problematic.” Similar remarks and conclusions have been made by various juvenile defenders and children.

National Juvenile Defender Center, *Video Conferencing and Detention Proceedings* (2001), available at www.njdc.info/pdf/factsheetvideo.pdf.

F. Budgetary or Security Problems Do Not Justify Violation of Minors’ Fundamental Rights

One of the justifications offered by Respondents for adopting a videoconference system for in-custody minors is to save money. *See* Exhibit A. However, “[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard.” *Mathews v. Eldridge* (1976) 424 U.S. 319, 348. “Numerous cases illustrate that financial distress and dependence on third parties to provide funding for legally mandated services does not constitute a

sufficient basis for denying a writ of mandamus.” *Morris v. Harper* (2001) 94 Cal.App.4th 52, 61. Inadequate funding is never a defense to a writ of mandate where a party is compelled by law to perform a certain action. See *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 413-14; *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136, 151; *Bellino v. Superior Court* (1977) 70 Cal.App.3d 824, 831; *City and County of San Francisco v. Superior Court* (1976) 57 Cal.App.3d 44, 47; *Mooney v. Pickett* (1971) 4 Cal.3d 669, 680. For example, despite the *Cooke* court’s sympathy for the financial deprivation counties suffered in the wake of Proposition 13, it noted that “a lack of funds is no defense to a county’s obligation to provide statutorily required benefits.” 213 Cal.App.3d at 413-14, citing *Mooney*, 4 Cal.3d at 680. The *Bellino* court also recognized this sentiment when it ruled that counties were responsible to initiate wardship proceedings for developmentally disabled minors. When the respondent county cited the expense of providing care for such minors, the court held “where a governmental entity has a mandatory duty to act, the excuse that it cannot afford to do so is unavailing.” 70 Cal.App.3d at 831, citing *City and County of San Francisco*, 57 Cal.App.3d at 47.

As noted by one academic, “[w]hen live hearings are replaced with videoconferencing, the perceived gains inure primarily to the governmental side of the system, benefiting judges, court personnel, and prosecutors. As a result, the decision-making process that leads courts to rely on

videoconferencing may be biased, failing adequately to consider the defendants' interests." (Bowen Poulin, 78 TUL. L.REV. at 1098, footnotes deleted). As detailed *supra* pages 20-22 and 26-30, detained minors will be adversely affected by videoconferenced hearings.

Likewise, lack of funding for security staff as a justification for videoconferencing is equally unpersuasive. (Exhibit A). In a recent case that raises issues similar to these in the instant case, the Court of Appeal held that lack of funding for security personnel did not justify a juvenile court's blanket policy of shackling all minors in the courtroom, which denied minors' basic rights. *Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344. The Court held that

[T]he Juvenile Delinquency Court may not, as it did here, justify the use of shackles solely on the inadequacy of the courtroom facilities or the lack of available security personnel to monitor them. ... Neither the People nor the Sheriff's Department have offered any other sound justification for a blanket policy to shackle all minors in the juvenile delinquency court. **In light of the rights as well as the potential harms at stake, none of the reasons offered-not inconvenience, the lack of security personnel or the inadequacy of the facilities warrants a different result.** ... While we are sympathetic to the obligations and responsibility our conclusion may impose upon the juvenile delinquency court, the Sheriff's Department and the People, those pale in comparison to the values we uphold.

150 Cal.App.4th at 1359, 1362 (emphasis added, footnotes deleted). As in *Tiffany A.*, budgetary concerns or lack of security personnel of Respondents

does not justify a blanket policy of conducting juvenile hearings by videoconference.

IV. CONCLUSION

Respondents' Order and their plan to conduct juvenile court hearings without the presence of detained minors who are the subjects of the proceedings, or their counsel, violates statutory and constitutional rights of the minor and interferes with the ability of counsel to provide effective representation. Respondents have a ministerial duty to comply with the Welfare and Institutions Code, which requires that minors be present for all hearings. §679; *In re Sidney M.*, (1984) Cal.App.3d 39. They also must comply with the U.S. and California Constitutional rights of juveniles in delinquency proceedings. U.S. Const. amends. V, VI, XIV; Calif. Const. Article 1, § 15.

Petitioner is entitled to a writ of mandate from this Court requiring Respondents to comply with state law by ensuring the presence of minors at all of their juvenile court hearings in Marin County. Petitioner is alternatively entitled to a writ of prohibition, mandate or other extraordinary relief to enjoin the implementation of Order 10-01 and

prevent further expenditure of taxpayer funds on illegal videoconferenced
juvenile court hearings.

Dated: March 10, 2010

Respectfully Submitted,



Corene Kendrick

Susan L. Burrell

Maria Ramiu

Damon King

YOUTH LAW CENTER

Attorneys for Petitioner

Johanna Kleppe

CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR WRIT OF
MANDAMUS AND PROHIBITION and MEMORANDUM OF
POINTS AND AUTHORITIES** uses a 13 point Times New Roman font
style and contains 7,257 words according to the Microsoft Office Word
Count function.

Dated: March 10, 2010



Corene Kendrick
Susan L. Burrell
Maria Ramiu
Damon King
YOUTH LAW CENTER

Attorneys for Petitioner
Johanna Kleppe

DECLARATION OF SERVICE

Case Name *Johanna Kleppe v. Superior Court of the California in and for
the County of Marin and Marin County*

I am employed in the County of San Francisco, State of California. I
am over the age of 18 and not a party to this action. My business address is
200 Pine Street, Suite 300, San Francisco, California 94104.

On the date indicated below, I employed a legal process server to
personally deliver the attached Petition for Writ of Mandamus and
Prohibition (Code of Civil Procedure §§ 1085 and 1103) to the parties
hereinafter listed:

Honorable Terrence R. Boren, Presiding Judge
Superior Court of California, County of Marin
3501 Civic Center Drive, Department C
San Rafael, CA 94903
(2 copies)

Judy Arnold, President
Marin County Board of Supervisors
3501 Civic Center Drive, Suite 329
San Rafael, CA 94903
(415) 499-7331

Renee Giacomini Brewer
Deputy County Counsel
County Counsel of Marin County
3501 Civic Center Drive, Suite 275
San Rafael, CA 94903-6117
(415) 499-6117

In addition, on the date indicated below, I personally delivered the attached
Petition for Writ of Mandamus and Prohibition (Code of Civil Procedure §§
1085 and 1103) to the following party:

Judicial Counsel of California
Administrative Office of the Courts
Office of General Counsel
ATTN: Eric Schnurpfeil or Brad Heinz
455 Golden Gate Ave.
San Francisco, CA 94102

I, Robin Bishop, declare under penalty of perjury that the foregoing
is true and correct. Served and executed on this 10th day of March, 2010.

Robin Bishop

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA
County of Marin



Order 10-01

**IMPLEMENTATION OF VIDEO APPEARANCES
FOR DETAINED JUVENILES
IN UNCONTESTED PROCEEDINGS**

WHEREAS, Marin County Superior Court has an abiding and fundamental responsibility to provide a safe environment for those who have business with the Court; and

WHEREAS, there is an unprecedented budget crisis in California, causing significant funding reductions in the Judicial Branch and the trial courts; and

WHEREAS, the Court has sustained a substantial reduction in operational and court security funding in FY 2009-10, which is expected to persist, and potentially increase, in the foreseeable future; and

WHEREAS, reductions in the Court's security funding have caused the elimination of sworn deputies to provide court security services at the Court's offsite juvenile facility and courtroom; and

WHEREAS, the remote location of the juvenile facility, as well as the design of the juvenile courtroom and appurtenant waiting area are acknowledged by the Marin County Sheriff's Office and the Court as having significant public safety shortcomings even when sworn deputies were historically available to provide court security; and

WHEREAS, there are inadequate detention facilities at the main courthouse to house more than one juvenile detainee at any one time and to ensure that juveniles are detained safely and separately from adult defendants; and

WHEREAS, transportation of multiple detained juveniles to the main courthouse would pose a security risk to the public and the juveniles; and

WHEREAS, the Court met with criminal justice departments and other stakeholders to discuss the court security personnel shortages and public safety issues at the juvenile

court facility and reached concurrence that protection of the rights of juveniles and public safety were of the utmost concern and highest priority; and

WHEREAS, the Court has determined that video appearance constitutes personal appearance for purposes of uncontested juvenile hearings and does not hinder effective assistance of counsel.

IT IS HEREBY ORDERED that the Court install video conferencing equipment at the juvenile detention facility and the main courthouse to facilitate court appearances by video of detained juveniles in uncontested matters that are before the Court. The juvenile and his or her counsel will be situated in the juvenile detention facility while all other participants in the hearing, including the judicial officer and courtroom support staff, the deputy district attorney, parents or guardians of the juvenile, victims and witnesses, as well as others summoned or required to appear in court shall attend the juvenile hearing at the main courthouse.

IT IS FURTHER ORDERED that video conferencing shall include two way voice communications such that the juvenile and his/her counsel shall have the ability to communicate with the Court and that there shall be installed a telephone line to allow the juvenile to communicate privately with his or her parent or guardian prior to or during the uncontested hearing. There shall also be installed equipment for two way facsimile transmission such that the Court and the juvenile or juvenile's counsel may send and/or receive documents during the uncontested hearing.

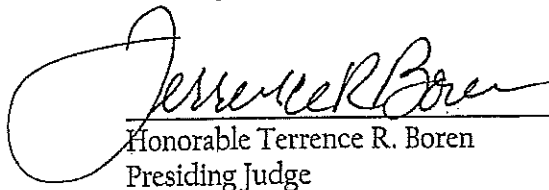
IT IS FURTHER ORDERED that all persons entitled to receive notice of the juvenile proceedings, including victims, shall have the ability to speak on any matter before the Court and that such statements shall be transmitted to the juvenile and his or her counsel at the juvenile detention facility.

IT IS FURTHER ORDERED that all contested juvenile hearings that require the presentation of witnesses, or when the judicial officer determines that the juvenile's physical presence would contribute to the fairness of the proceedings, shall be conducted at the main courthouse and the juvenile shall be transported in custody to the main courthouse by the Probation Department to attend such contested hearings for appearance before the juvenile judge or commissioner.

IT IS FURTHER ORDERED that juvenile hearings for all out-of-custody juveniles shall be conducted at the main courthouse.

IT IS FURTHER ORDERED that the Court, all criminal justice departments and private attorneys representing detained juveniles shall develop policies and procedures to ensure that these juveniles have full access to all protections afforded them under the U.S. Constitution and California state law and that the policies set forth procedures that enable juveniles and their counsel to engage in side colloquies or other off-the-record discussions with the District Attorney or Probation staff that may lead to resolution of these matters.

2/5/2010
Date


Honorable Terrence R. Boren
Presiding Judge