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**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO
APPELLATE DIVISION**

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRIS NOEL TAGUNICAR, Defendant and Appellant.	Case No. 21-AD-000009 (19-NF-007704-A) **MEMORANDUM OPINION** (Filed Dec. 15, 2022)

Appellant and Defendant Chris Tagunicar appeals from his conviction by jury of two counts of making annoying telephone calls (Pen. Code, § 653m, subd. (b)), three counts of unlawful communications with the 911 emergency system (*id.*, § 653x, subd. (a)), two counts of making a false report of a criminal offense (*id*., § 148.5, subd. (a)) and one count of misdemeanor criminal threats (*id.*, § 422, subd. (a)). Appellant contends the trial court erred by limiting the public's access to his trial. We disagree and affirm.

BACKGROUND

Defendant filed a motion in limine seeking public access to the trial. The trial court denied the motion on March 26, 2021, explaining that there was insufficient space in the courtroom for the public in light of the social distancing requirement imposed by the County's public health order and the court's standing order

implementing those public health orders. Because all seats in the courtrooms used for voir dire and trial after applying that requirement had to be used by necessary court staff, the parties, and jurors, the trial court found that there was no space for the public to sit in the courtroom itself. Nonetheless, the trial court noted that the public could listen to the trial by calling into a phone number listed on the court's website.

Following the completion of jury selection on April 5, 2021, an attorney tried to enter the courtroom to observe the trial on April 7, 2021 but was advised that he could not do so because of the trial court's earlier ruling on Appellant's motion in limine. During the court session that immediately followed the attorney's attempt to observe, most of the time was spent listening to recordings of phone calls. Appellant moved for a mistrial based on the exclusion of that attorney from the courtroom. At the hearing on the motion, the trial court explained that nobody informed it that the attorney had been denied entrance to the courtroom. According to the court, it would have allowed that attorney to enter the courtroom to observe the trial because only one alternate juror had been seated, rather than two, leaving an extra seat for one member of the public to observe the trial. Nonetheless, the trial court denied a mistrial on April 9, 2021 due to lack of prejudice. In support, the trial court noted that: (1) the public could still listen to the trial by phone; (2) there were no media requests; and (3) the event center facilities used for jury selection could not be used for the trial; and (4) the one larger courtroom (2M) in the courthouse could not

be used for the trial because it was reserved for jury selection and other extenuating circumstances.

Appellant filed a second motion for mistrial on April 12, 2021, alleging a violation of his constitutional right to a public trial and equal protection. In denying this motion, the trial court explained that it had to limit public access because of the social distancing requirement imposed by the County's public health orders and the court's standing order and the physical limitations of the courtrooms. Acknowledging that there was space for one member of the public to attend the trial after jury selection, the trial court explained that the previous exclusion of an attorney was an inadvertent mistake. Finally, the trial court found no structural error requiring a mistrial.

DISCUSSION

A. Constitutional Right to an Open Public Trial

Appellant contends the trial court violated his constitutional right to an open public trial by excluding the public from his trial. He further contends the violation was a structural error, requiring reversal. We disagree.

Under the federal and California constitutions, "'[e]very person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times.'" (*People v. Bui* (2010) 183 Cal.App.4th 675, 680 (*Bui*).) The federal and state constitutional rights are coextensive,

and "[i]f a defendant has been denied the . . . right to public trial, the error is structural in nature, and reversible per se." (*Ibid.*) "The public trial right applies not only to the trial itself, but also to . . . voir dire." (*Ibid.*)

Nonetheless, "a defendant's right to a public trial is not absolute." (*United States v. Allen* (9th Cir. 2022) 34 F.4th 789, 796 (*Allen*).) "The test for determining whether a particular closure order violates a defendant's public trial right changes depending on whether the courtroom F1 closure is total or partial. A total closure of the courtroom means that '*all* persons other than witnesses, court personnel, the parties and their lawyers are excluded for the duration of the hearing.'" (*Ibid.*)

If there is a total closure, the constitutional "'public trial guarantee'" may only be rebutted "'by a showing that exclusion of the public was necessary to protect some "higher value" such as the defendant's right to a fair trial, or the government's interest in preserving the confidentiality of the proceedings.'" (*Bui*, *supra*, 183 Cal.App.4th at pp. 680-681.) Thus, to justify a total closure, the trial court must find "'that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" (*Id.* at p. 681.)

In making this finding, the trial court must "'consider alternatives to closure even when they are not offered by the parties.'" (*Bui*, *supra*, 183 Cal.App.4th at pp. 681-682.) Indeed, the court is "'obligated to take

every reasonable measure to accommodate public attendance at criminal trials.'" (*Id.* at p. 682.)

At the same time, the trial court is not required to ignore the practical limitations under which it is operating. Thus, the trial court, in determining whether total closure is necessary, may and should consider "'"the size of the courtroom, the conveniences of the court, . . . and . . . other things which may facilitate the proper conduct of the trial."'" (*Bui*, *supra*, 183 Cal.App.4th at p. 680.)

Here, the trial court excluded the public from portions of the trial but allowed the public to listen to the entire trial by telephone. Assuming, without deciding, that this constituted a total closure (see *Allen*, *supra*, 34 F.4th at p. 786 ["the 'public trial' guaranteed by the Sixth Amendment is impaired by a rule that precludes the public from observing a trial in person, regardless whether the public has access to a . . . audio stream"]), the trial court's decision to exclude the public from portions of the trial was narrowly tailored to serve a higher value under the unique constraints placed on the court at that time due to the pandemic.

First, the trial court's interest in keeping people in the courtroom safe and healthy and in limiting the spread of COVID-19 is an "overriding interest" that may justify the exclusion of the public from portions of the trial. (*Bui*, *supra*, 183 Cal.App.4th at p. 682; see also *Allen*, *supra*, 34 F.4th at p. 797 ["'[s]temming the spread of COVID-19 is unquestionably a compelling interest'"].) Appellant counters that the case law only

recognizes two interests that may support exclusion of the public from a criminal trial: a defendant's right to a fair trial and the government's interest in inhibiting disclosure of sensitive information. But none of the cases cited by Appellant suggests that these interests are intended to be exclusive.

Second, the exclusion of the public from portions of the trial was narrowly tailored to serve that overriding interest. In reaching this conclusion, we consider the unprecedented constraints placed on the trial court due to the pandemic. To comply with the social distancing requirement imposed by the County and the court's standing order, the trial court had to limit the number of persons physically present in the courtroom. Applying that requirement in light of the physical limitations of the courtrooms, the Court found that only necessary court staff, the parties, and the jurors could be seated in the courtroom. Appellant does not appear to challenge this factual finding by the Court.[1] And based on this factual finding, the trial court properly found that excluding the public from portions of the trial, including voir dire, was narrowly tailored to protect the health and safety of all persons in the courtroom and the public at large.[2]

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[1] Although Appellant questions whether the public should have been excluded from the courtroom if court staff, the parties, and the jurors were allowed to be there, he does not question whether there were seats available to the public in light of the social distancing requirement.

[2] The trial court initially held that no members of the public could be in the courtroom for the trial after jury selection because

Appellant counters that, if the courtroom could accommodate court staff and the parties, then the courtroom could have accommodated members of the public. But Appellant provides no facts to support this assertion. Indeed, Appellant does not even mention the social distancing requirement imposed by the County's public health order and the court's standing order relied upon by the trial court when it excluded the public from the courtroom, much less explain how members of the public could have been seated in the courtroom in light of those orders.

Appellant also contends any closure of the courtroom for portions of the trial was not narrowly tailored because the trial court could have continued the trial. This contention lacks merit. At the time of the trial court's ruling, a continuance would have been indefinite because there was no indication when the public could be accommodated in light of the size of the courtrooms and the social distancing requirement imposed by the County's public health order and the court's

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it anticipated two alternate jurors. But only one alternate juror was ultimately seated. As a result, the court stated that it would have allowed one member of the public to attend the trial in person after jury selection. Although one member of the public was inadvertently denied access to the trial after jury selection—which, as explained later in this memorandum opinion, resulted in a de minimus violation of Appellant's right to an open public trialthe ruling on the motion in limine, given the trial court's express willingness to allow one member of the public to sit where one alternate juror would have sat, did not bar the public from the courtroom during the trial itself.

standing order. An indefinite continuance is not a *reasonable* alternative under these circumstances.

The same is true for the other alternatives proposed by Appellant. For example, proof of vaccination, health questionnaires, and masking do not address the social distancing requirement imposed by the County's public health order and the court's standing order which limited the number of people who could be physically present in the courtroom.

And to the extent Appellant suggested at oral argument that video streaming was a reasonable alternative, he has forfeited that argument. At no time in his motions before the trial court or his opening and reply briefs before this Division did Appellant ever argue that video streaming was a reasonable alternative. Consequently, he has forfeited the argument. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 846.)

Finally, Appellant is not entitled to relief based on the trial court's inadvertent exclusion of a single individual during one morning session of the trial. "[N]ot every closure of a trial or exclusion of certain spectators, rises to the level of a constitutional violation." (*Bui*, *supra*, 183 Cal.App.4th at p. 682.) Here, the inadvertent exclusion of one individual from one session of the trial much of which was spent listening to phone call s was "de minimus." (*Id*. at pp. 682-83.)

Accordingly, we find no violation of Appellant's constitutional right to an open public trial.[3]

B. Equal Protection Challenge

Appellant's equal protection challenge also lacks merit. To prevail on that challenge, Appellant must show "that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*In re Jones* (2019) 42 Cal.App.5th 477, 481.) Appellant contends he is similarly situated to other defendants who had criminal trials with members of the public physically present in the courtroom during that same time period. But he has not shown that those defendants were similarly situated. For example, he has presented no evidence that the courtrooms used for those trials were similar in size to the courtrooms available in this County or that those courts were subject to the same social distancing requirement imposed on the trial court in this case. For those same reasons, the trial court's decision to exclude the public from Appellant's trial satisfies the rational basis test.

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[3] For the same reason, we reject Appellant's challenge under Code of Civil Procedure section 124, because, as Appellant concedes, "[o]ur Supreme Court has followed federal constitutional jurisprudence in ruling on this state provision."

DISPOSITION

Based on the foregoing, we affirm.

Dated: _____

Electronically
SIGNED
By /s/ Chou, Danny
12/15/2022
DANNY Y. CHOU
Judge, Appellate Division

We concur:

/s/ Electronically
SIGNED
By /s/ Dabel, Sean
12/15/2022
SEAN P. DABEL
Judge, Appellate Division

/s/ Electronically
SIGNED
By /s/ Greenberg, Ssuan
12/15/2022
SUSAN GREENBERG
Judge, Appellate Division

**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO
APPELLATE DIVISION**

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. CHRIS NOEL TAGUNICAR, Defendant and Appellant.	Case No. 21-AD-000009 (19-NF-007704-A) **ORDER DENYING PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION** (Filed Jan. 17, 2023)

Petitioner and Defendant Chris Tagunicar filed his Petition for Rehearing and Application for Certification of Transfer on December 28, 2022. After reviewing the Application, we conclude that transfer is unnecessary to secure uniformity of decision or to settle an important question of law. (Cal. Rules of Court, rule 8.1005.) Consequently, the Application is DENIED. After reviewing the Petition for Rehearing, we conclude that no meritorious issues were raised in

support of rehearing. Consequently, the Petition for Rehearing is denied.

Dated: _____

Electronically
SIGNED
By /s/ Chou, Danny
1/17/2023

DANNY Y. CHOU
Judge, Appellate Division

We concur:

/s/ Electronically
SIGNED
By /s/ Dabel, Sean
1/17/2023

SEAN P. DABEL
Judge, Appellate Division

/s/ Electronically
SIGNED
By /s/ Greenberg, Ssuan
1/17/2023

SUSAN GREENBERG
Judge, Appellate Division

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Vs. CHRIS NOEL TAGUNICAR, Defendant.	)	No. 19-NF-007704-A

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEFFREY R. FINIGAN
DEPARTMENT 24
APRIL 12, 2021

APPEARANCES:

For the Plaintiff: STEPHEN M. WAGSTAFFE,
SAN MATEO COUNTY
DISTRICT ATTORNEY
BY: RYAN GEISSER, D.D.A.

For the Defendant: PAUL DEMEESTER,
ATTORNEY AT LAW

THE DEFENDANT WAS PRESENT IN COURT

* * *

[657] **PROCEEDINGS**

APRIL 12, 2021 REDWOOD CITY, CALIFORNIA

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THE COURT: On the record in the Tagunicar matter. There are no jurors present. Mr. Tagunicar is present. We have two of our certified Tagalog interpreters with us as well.

And, counsel, if you would like to make your appearances.

MR. GEISSER: Ryan Geisser for the People.

MR. DEMEESTER: Good morning, your Honor. Paul DeMeester on behalf of Mr. Tagunicar. He is present, and also with me is defense investigator Mr. Doug Eckles.

THE COURT: Good morning, everybody.

All right. So we are on the record to put a variety of issues on the record. I'll also note, I did meet with counsel now in chambers before we started to preliminarily discuss jury instructions. We'll put those issues on the record later because there is obviously still some evidence to come in in the case. We're not ready to finalize that, but we did meet and hopefully make some headway in what the final instructions will be.

So among the issues to address this morning [658] are, I think first and foremost, Mr. DeMeester filed a renewed or second motion for mistrial.

And, Mr. Geisser, have you had an opportunity to review that as well?

MR. GEISSER: Yes.

THE COURT: Okay. All right. So let me just ask, other than what is in your motion, Mr. DeMeester, anything else to put on the record?

MR. DEMEESTER: If I can just summarize it in one line that if COVID-19 is indeed a reason to leave people outside the courtroom, then none of us should be here.

THE COURT: No, it's not that COVID-19 is to leave people out. It's that it limits the number we can have inside. It's not that nobody should be here, and believe me, I would love to have it open, and now it is – and I'll explain that going forward, but the reason this court and other courts here, and I'm sure around the state, have had to limit access is because of distancing requirements, not that we don't want people here or that people shouldn't be here. It's that we simply, given the physical nature of our courtrooms, and as I said, I'm sure courtrooms in lots of places, we just can't fit more people than the people who are essential to actually conducting the trial.

MR. DEMEESTER: But my point is that if [659] those restrictions kept out the public, then – then cases should not be conducted for jury trial, because, in other words, the public trial right could not be accommodated or guaranteed. I don't mind that there is restrictions. Today we have one member of the public

here. I think in the Chauvin trial that I mentioned as an example, they have four seats; two for the public, two for media, so it's limited. I can imagine that if – there was a trial in this county in 2019 that drew so many spectators, People versus Tiffany Li case, that every available courtroom seat was actually taken in Judge Foiles' department, and there was a signup and wait list, and people waited to try to get in when someone else left. Of course we wouldn't have that luxury now. It's appropriate to have restrictions and say, well, we can only accommodate one, two, three, four, whatever the number may be, et cetera, but from jury selection through four days of prosecution case-in-chief that the public was denied, and even though the Court has changed its order with respect to that starting from today on, we kind of included our motion hearing after the jury had gone home on Friday, and I appreciate that, but based on the earlier denial, I think the constitutional injury cannot be repaired, so hence I'm asking for mistrial.

The Supreme Court on Friday came out with a [660] very strong vindication of Bill of Rights guarantees that I think provide a very apt analogy. I realize it's in the religious clauses of the First Amendment, but still, strict scrutiny applies there. I have made the argument that strict scrutiny applies to our case and these – it is such an important right that its denial for the first part of the trial puts us in an irreparable structural error that can only be corrected by the granting of mistrial and start over again.

THE COURT: All right. Thank you.

MR. DEMEESTER: Thank you, your Honor.

THE COURT: Mr. Geisser, any response in addition to what you did the last time we litigated this motion?

MR. GEISSER: No. To reiterate, the public has not been denied. Access has been limited given the public health pandemic. Submitted.

THE COURT: So I do think I need to put a little bit on the record about this.

Okay. So first and foremost, I think I acknowledged this last week. If I didn't, I want to do it now very clearly. This issue exists because of me. I own this. It's nobody else's fault, and I don't – as I said, this is on me. So I hope that's clear.

Number two, I – addressing, first of all, the new issues raised by Mr. DeMeester in the most [661] recent filing, number one, I just don't find the Chauvin trial is relevant because I don't know what their capacity is, why they're able to allow certain people or designate some room for media and the public, and that is, in fact, what we are now doing, so it's a little bit distinguishable.

Number two, the Tandon case, T-a-n-d-o-n, as Mr. DeMeester has already pointed out, it is a very different factual scenario in that case having to deal with religious – or gatherings in private homes for religious purposes, so it's not quite applicable here, so I think that that is distinguishable. But getting to the issue, number one, I – I had actually before this was even

filed, your second motion, Mr. DeMeester, I was thinking about this, and I went back and I read the Weaver case, which you cited, W-e-a-v-e-r, in your original motion, and I'll make some comments on that in just a second. But in thinking about this and looking at Weaver, I think the main distinction here or what I find is that there really was no – I'm not sure exactly how to phrase it, but denial of public access because we have always had the open phone line that people can call into. And based on my recollection, we're alerted when somebody actually calls into the line and nobody has done so throughout this entire trial.

MR. DEMEESTER: Actually, that's not true. [662] I have had people who have been checking on it.

THE COURT: Well, usually that beeps and we are given some kind of notice. We haven't had any such notification.

MR. DEMEESTER: Last Friday I actually heard one person is on hold when the phone call started before the Court took the bench, but I could hear the machine say one person is on hold or, you know, the host had not opened the thing yet.

THE COURT: That was actually Miss Boffi when she was – okay. I'm not sure.

MR. DEMEESTER: Someone has been listening and commenting to me about what is being broadcast.

THE COURT: Very well.

MR. DEMEESTER: So it has been used, not every day, but it has been used.

THE COURT: Fair enough. I accept that. All right. So again, I don't think there is a structural error in the sense that's typically been addressed in Weaver, and I'm sure there are lots of cases on this issue, and I have by no means read all or even a lot of them. I have read Weaver and a couple cases cited in Weaver or referenced in Weaver. So I don't think there is a complete denial. Yes, there was – I did indicate in my ruling pretrial that we did have enough space – and again, I did so because in my [663] practice in conducting trials during these circumstances since, I think, last June, I have had two alternates for almost all trials – maybe not all, and in that case we actually literally cannot fit anybody else in the courtroom in the audience section. However, we only had one alternate, so there was potentially an open seat in the courtroom, which now counsel know, and if they have someone when the jury is here or, for example, today when the jury is not here, as Mr. DeMeester pointed out, we do have a member of the public here sitting out in the audience. So going forward, that has been remedied since last Friday.

Now, again, in looking at – so that's – one issue is I don't think there was a complete denial of a right to a public trial. And again, there has been – there was, as you both know, media need to make a specific request under Rules of Court, and there has been no such request here. But in looking at some of the language of Weaver, I do note that Weaver does describe, as Mr. DeMeester has, the denial of a public trial as a

structural repair, but it does not also say that although the public trial right is structural it is subject to exceptions, and I note that Weaver was a different context than we have here. Weaver, the attack on the denial of the public trial was made via an ineffective assistance of counsel, and that's different [664] here. Mr. DeMeester has actually directly attacked it and objected, so I do understand there is that distinction between our facts and Weaver, but nevertheless, the – an additional language from Weaver points out that "the fact that the public trial right is subject to these exceptions suggests that not every public trial violation results in fundamental unfairness." Later on and this is – well, there are a bunch of sections I'm reading, so I won't give a page cite for each one, but these are all within Weaver and within the majority opinion, because there were additional opinions in the case.

The Court also noted it would be likewise unconvincing if the Court had said, referring to an earlier decision, that a public trial violation always leads to a fundamentally unfair trial. And the Court focuses on sort of two reasons for why this is so a public trial. The Court also noted that the Court, referring to itself, the Supreme Court, has not said that a public trial violation renders a trial fundamentally unfair in every case. What the Court notes is that – right after that is that "A public trial violation is structural for different reason because of the difficulty of assessing the effect of the error." And so I think, again, for one that we don't have the structural error that's discussed in Weaver, at [665] least that's the Court's view. I understand

somebody may see this differently, and I am by no means placing myself above the Supreme Court. I understand on the hierarchy as far as the Courts go. I'm the bottom, and the Supreme Court is the top. I'm simply interpreting and applying it here. I'm by no means saying Weaver is wrong or I'm doing something outside of Weaver. That's not my intention at all.

All right. So another quote from Weaver is that "These precepts" – what I have been discussing – "confirm the conclusion the Court now reaches that while the public trial right is important for fundamental reasons, in some cases an unlawful closure might take place and yet the trial still will be fundamentally fair from the defendant's standpoint." And I do note the Court does say in Weaver that in the case of a structural error, which is the alleged error here, where there is an objection at trial, where there has been – Mr. DeMeester has made one – and raised on direct appeal that the defendant is generally entitled to automatic reversal. I acknowledge that language. Again, I just think it's distinguishable here because, number one, we don't have the complete denial. We have always had the public access line open, and now that I have pointed out to counsel that we do have one seat – and if we should lose Mr. Xxx, as we know we may because [666] he has an appointment tomorrow, then another potential seat could open up. But at least for now we do have one seat available, and obviously when the jury is not here, more. So I don't think that the error has occurred and as contemplated and seen in Weaver and other cases, but even if a Court were to see it as

such, I do think that the concerns that are addressed in Weaver can be addressed here, and by that what I mean – so the concern that's addressed in Weaver is that you can't know what the potential prejudice is or there is a difficulty in assessing the effect of the error, and I don't think that that's the case here. As I said last week, I simply – nobody has offered any – and I understand if your position is that we don't have to offer any prejudice or showing of prejudice, but I honestly can't even think of any, and based on the facts that I know there is no basis for the Court to find any – you know, I think Mr. Wine is the only person that I know of who made the request. There have been no others who, to the Court's knowledge, have wanted to come in, and I think importantly here is to point out that there is actually nobody really coming to the courthouse these days, other than people who actually have business here, their specific case, either an attorney or a person who has a particular case here or as a witness. As I noted out several times, I think we [667] have the on-call access. The court is now open. The other concerns about historically with the reason for having the public trial requirement about secret trials being unfair, et cetera, that's not the case here. Obviously, Mr. Tagunicar has been represented. Not only does he have Mr. DeMeester, Mr. Eckles has been here for most, not all the trial. We have our interpreters and other observers of the process here in the courtroom and via the telephone if they wish. So none of those historical concerns about secrecy and the defendant not being aware of what's going on or the public not being aware of what's going on are not the case here.

Also, my order was really only communicated to counsel. It's not as if it was posted on a website or there was a post on the front door denying people access to the courtroom. And again, as I said, to my knowledge Mr. Wine is the only person who wanted to be here. And you can correct me if I'm wrong, you obviously don't have to put anything on the record, but my understanding is he is a friend of Mr. DeMeester's and happened to be in the courthouse and wanted to watch his friend in trial. I don't know that that has any effect on the outcome of the trial.

All right. So for – I think that's everything that I wanted to say on that. So for those reasons, I'm going to deny the motion for a mistrial. [668] Number one, because, again, I don't think that the – I don't think that there is the structural error that requires – or excuse me, a granting of mistrial because as I think it was only physical presence, and that has been remedied as of last Friday. And number two, even if that initial not allowing physical presence in the courtroom is seen as such, I think that the Court has addressed the concerns expressed in Weaver and other cases about the fact that this is still an absolutely fair proceeding to the defendant, and there is just nothing I can even think of and no evidence I have been given where if the Court had made it known when we had a seat available that, hey, that seat is available for the public, that that would have somehow changed the outcome here, whatever that may be. We obviously don't know what the outcome is going to be yet. So that's what I just wanted to put on the record.

MR. DEMEESTER: Thank you, your Honor.

THE COURT: All right. Thank you.

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IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Vs. CHRIS NOEL TAGUNICAR, Defendant.	)	No. 19-NF-007704-A

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JEFFREY R. FINIGAN

DEPARTMENT 24

APRIL 9, 2021

APPEARANCES:

For the Plaintiff: STEPHEN M. WAGSTAFFE,
SAN MATEO COUNTY
DISTRICT ATTORNEY
BY: RYAN GEISSER, D.D.A.

For the Defendant: PAUL DEMEESTER,
ATTORNEY AT LAW

THE DEFENDANT WAS PRESENT IN COURT

* * *

[637] THE COURT: So now Mr. Xxx has left. None of the jurors are present.

Since we have some time now, I do want to take up the motion that was filed by Mr. DeMeester for a [638] mistrial, and the motion is based on denial of public access to the trial. And a Mr. Ken Wine, an attorney, tried to come in yesterday at, I think, about 9:40 a.m.

MR. DEMEESTER: Tuesday – I mean Wednesday.

THE COURT: Is that Wednesday? Okay. Hold on a second.

MR. DEMEESTER: I have an extra copy if you want.

THE COURT: That's okay. I think I can pull it up. Hold on a sec. Yes, April 7, so that was two days ago on Wednesday at approximately 9:40, and Mr. Wine, I guess, and was advised, according to his declaration, that there was – that he could not come in because of the Court's previous order about limited public access. So hold on one second. According to my notes, Sergeant Teixeira hit the stand right around that time. My notes say 9:38, and basically what he did was he laid some foundation for Exhibit 8 and then we spent a great deal of time listening to Exhibit 8, and then there was a very extremely brief cross-examination around 10:57 of Sergeant Teixeira. So it appears that the majority of what or when Mr. Wine arrived was basically just sitting here listening to phone calls, but be that as it may – so I do want to note a few things.

One is the first time I heard of this was [639] when I saw this motion. Nobody told me that Mr. Wine had tried to enter or wanted to. I have spoke with my clerk about that, and in the future that will be communicated to me, and if it had been, I actually would have allowed him to come in because at the outset of this trial, I had anticipated having 14 total jurors with two alternates. And in that instance then we literally don't have any room in the audience, but with only one alternate, there is one potential seat over in the corner that Mr. Wine could have taken, but again, I was never told that he made the request, so I couldn't do that. Nevertheless, I don't see, based on this record, that there is any prejudice whatsoever. There has still been the public access via the phone line, which my understanding is that was communicated to Mr. Wine. I don't know if he tried to make himself available to it. I don't think he did because we're usually notified when somebody tries to get onto the phone line, and I don't recall ever getting that notification, but again – so factually I wanted to, sort of, flush it out just a little bit with respect to what happened that morning.

And so other than your papers, is there anything else you wish to put on the record, Mr. DeMeester?

MR. DEMEESTER: Sure. Thank you, your [640] Honor.

Your Honor, I do appreciate the Court's comment that had you known, you would have accommodated Mr. Wine, and I think the Court is familiar with actually with Mr. Wine, who is very much more of a federal

lawyer than a state one. The – but I actually construe the Court's comments as a concession to my legal point that a trial should be public. And based on the Court's comments, I believe there is no other route for the Court to take than to grant the mistrial request. I think the Court has acknowledged the error, and it does not matter that we were just playing some tapes and so on. For all we know is any person, not just Mr. Wine, but any person may have wanted to sit through the entirety of the trial, so it doesn't matter that we were just doing something foundational at the time or not. In terms of public access to a trial there is no differentiation between the quality or the quantity of the evidence being proposed, so to speak. So there is prejudice. The prejudice lies precisely in the fact that Mr. Tagunicar has been denied his public trial.

Now, I do understand that with COVID, we're sort of in new territory; however, the Sixth Amendment or the First Amendment with respect to the media has not changed or been amended and so forth, and that, for [641] instance, when we had a larger group of people in the jury pool what the Court did was go to a different venue; first to M, a bigger courtroom in the courthouse; then the San Mateo County Event Center in order to accommodate the expected number of people. And so accommodations have been and can be made to accommodate members of the public being present because that is their constitutional right, as well as Mr. Tagunicar's. The audio link up is not a substitute for that. I think it is very important that members of the public can check – provide a constitutional

check on the executive function of our governmental institutions represented by the district attorney, as well as the judicial functions of our system, and an audio call cannot replace a person being in this very courtroom watching the judge's expression, watching how Mr. Tagunicar is treated by the various participants, watching the actions of counsel for both sides; an audio just cannot is not a substitute for that. It is a mere scintilla of representation of what goes on in a courtroom, and so we have been deprived, so to speak, of the opportunity to check on our governmental judicial executive functions, and that's not the America the United States Constitution and the Bill of Rights has created for us. And so I do think that a constitutional injury has taken place. I construe the Court's comments, which I very much [642] appreciate, as a de facto concession of the rightness of our position, and I do ask for the grant of the mistrial.

THE COURT: Mr. Geisser, your position?

MR. GEISSER: The People are strongly opposed to a mistrial in this case. I do believe that what the Court has represented is not a concession to the defense argument, it's actually an expression of the public health concerns that are kind of prevalent in all of this, which is that public health concerns trump and if there is availability to accommodate the public given the public health emergency, the Court strives to do that. Those opportunities were there. They were not attempted, and the public access line is still available throughout all of this. So I do not believe a mistrial is

appropriate and do not believe there has been any prejudice established here.

THE COURT: So the last factor which Mr. Geisser mentioned, which I mentioned earlier as well, which is what I think is the key, and that is that – you know, this was a mistake in the fact that I wasn't alert ed that the request was being made by Mr. Wine. So if Mr. Wine wishes to come back and that seat is open, he may do so. But again, I don't see that there is any prejudice whatsoever here with respect to the fact that Mr. Wine was not able to enter the [643] courtroom the other morning. Defense counsel mentioned the media request. There have been no media requests, just note that. The fact that defense counsel also mentioned that, well, we have made accommodations by using Courtroom 2-M, which is a larger courtroom, or the event center, which we have rented out for jury selection, and the reason we don't use those for trials – well, 2-M could potentially be used for a trial, but that's reserved in case jury selection needs to happen at the courthouse or there is some other extenuating circumstance requiring using that courtroom, and the event center is only for jury selection. The event center we have not rented out for purposes of holding trials because that would then tie it up and we wouldn't be able to pick juries. So it is strictly a jury service selection location, and then trials, once the jury goes down to a much smaller body, are moved back to the courthouse. So again, I do think that the court has done all they can do under the extraordinary circumstances, and the fact that there was, for lack of a better term, one

mistake here in not alerting the Court that somebody wanted to enter when we did have one chair available, which would still allow for sufficient distancing, I don't feel, again, shows any prejudice or warrants granting a mistrial. So the motion for a mistrial is denied.

[644] MR. DEMEESTER: If I may, your Honor? The – I think it's a bit unfair to make it seem like it was an error by court staff. I want to point out that I have fully presented our legal position as in limine motion No. 8, and that the Court at that time had denied the motion for a public trial and with public in attendance in the courtroom. And so in other words, there was – there was nothing for the defense, or the court staff for that matter, to do further in light of that ruling. So it's not – I wouldn't typify that some error was made because you didn't find out. I think the error was your initial in limine ruling which set the stage for everyone and for the denial of Mr. Wine to come in. So the injury has now occurred. It's not just – it makes it sound like it's a negligent error. No, it wasn't. It was a deliberate motion ruling at the very start that caused this, and so I characterize it as more like that.

THE COURT: Okay. And that's a fair way to look at it. I don't take any offense to that. That was my ruling and perhaps once I realized that we only had 13 instead of the anticipated 14, because I have typically been picking two alternates for trials and then we literally are at capacity, maybe should have recognized we had one chair available. But in any event, however it's characterized, I don't see – just [645] because there was one colleague of Mr. DeMeester's who wanted to

come and watch the trial for a little bit that that rises to the level of creating any prejudice or any violation of rights that would justify a mistrial. We're now well over a week into this trial. There has been a significant amount of resources on both sides spent in getting the trial to this point, and it's not as if, you know, somebody wanted to appear who was going to contribute or make some kind of difference. And I understand, Mr. DeMeester, that the law is what it is and the public can appear, I get that, but I don't think, again, under the extraordinary circumstances that the Court is operating under and all the restrictions that are put on us with respect to who can be here and who cannot – in fact – well, I'll just leave it at that; again, that there is any prejudice or that it warrants granting a mistrial at this stage of the proceedings.

MR. DEMEESTER: If I may, one more thing, your Honor? The Court mentioned that Mr. Wine may have wanted to be here for a little bit. Again, he was denied entry, so we don't know if he was going to be here for a little bit or the duration of the trial. He was turned away so that, sort of, made that impossible for us to put any timing on it. Thank you.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Vs. CHRIS NOEL TAGUNICAR, Defendant.	)	No. 19-NF-007704-A

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEFFREY R. FINIGAN
DEPARTMENT 24
MARCH 26, 2021; APRIL 5, 2021

APPEARANCES:

For the Plaintiff: STEPHEN M. WAGSTAFFE,
SAN MATEO COUNTY
DISTRICT ATTORNEY
BY: RYAN GEISSER, D.D.A.

For the Defendant: PAUL DEMEESTER,
ATTORNEY AT LAW

THE DEFENDANT WAS PRESENT IN COURT

* * *

[98] THE COURT: Yes. If you could give that to me so I can read it to the jury. And again, I'm sorry to keep jumping around, but I guess there now is – [99]

because I thing keep thinking about it – one other motion we should probably address now, and that is the defense has made a motion for public access to the trial. And what I can say to that is we have public access with respect to our court's website publishing call-in information for members of the public to call in and be able to listen to the proceedings. We simply at this point under the guidelines that we're operating under, both from the county health officer and our own court guidelines, literally do not have the physical space in the courtroom to allow members of the public to come in and observe in person. The entire audience section of this courtroom, and I'm in courtroom 2-M, as in "Mary," will be used for potential jurors to sit during voir dire. Counsel will use the space, you know, in front of the bar where we don't allow the public to sit anyway, and so out in the audience there is just nowhere for anybody to sit who is not a potential juror because we have used every possible space to fit as many potential jurors in this room as possible. And that will be true for the Court's courtroom once we begin the trial as well, which will be back in my courtroom in 2-B, which is smaller. But we just literally cannot fit anybody else.

And it's noon, Mr. DeMeester, so if you want to put something on the record, I'm happy to let you do [100] that, but we'll do that at another time, but I just wanted to note on the record I did see that motion, and for the record, the Court is doing everything that it can to allow public access under the current restrictions that we're under.

All right. With that, counsel, I really don't want to argue it right now, Mr. DeMeester.

* * *

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, Vs. CHRIS NOEL TAGUNICAR, Defendant.	No. 19-NF-007704-A

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JEFFREY R. FINIGAN
DEPARTMENT 24
APRIL 6, 2021

APPEARANCES:

For the Plaintiff: STEPHEN M. WAGSTAFFE,
SAN MATEO COUNTY
DISTRICT ATTORNEY
BY: RYAN GEISSER, D.D.A.

For the Defendant: PAUL DEMEESTER,
ATTORNEY AT LAW

THE DEFENDANT WAS PRESENT IN COURT

* * *

[122] THE COURT: All right. So we're on the record this morning to address motions in limine before the jury comes in for instructions and opening

statements and getting started with the evidence, so I want to go through those.

I did rule on a couple of them a couple of weeks ago when the trial started, specifically defense in limine 3, which had to do with juror information, and then also defense Number 8, which has to do with public access have already been ruled upon. So let me just go through – as long as I'm on the defense motions, I'll go through the others.

So defense Number 1 is to exclude witnesses with the exception of an investigating officer for the People and Mr. Eckles for the defense.

I assume there is no objection, Mr. Geisser?

* * *

[131] THE COURT: Fair enough, but I'm not going to do that, because as I said, CALCRIM and the authorities that are cited thereafter, CALCRIM 106 specifically, indicate that jurors may pose questions.

Number 8, as I said we have already dealt with.

I believe that's the last one, but hold on.

* * *

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

THE PEOPLE, Plaintiff and Respondent, v. CHRIS NOEL TAGUNICAR, Defendant and Appellant.	A167063 (San Mateo County Super. Ct. No. 19-NF-007704-A)

Appellant's January 30, 2023 petition to transfer is denied. Appellant has not demonstrated transfer "appears necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, Rule 8.1002; rule references are to the Rules of Court.) The clerk of this court is ordered to send a copy of this order to the parties, the appellate division of the San Mateo County Superior Court, and the Attorney General forthwith. (Rule 8.1008(b)(3).) This decision is final immediately. (Rule 8.1018(a).)

Dated: 02/14/2023 /s/ Tucher, P.J. P.J.

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IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS TAGUNICAR, Defendant. /	Case Nos. 19-NF-007704-A 19-NF-009179-A 19-NM-13303-A (Filed Mar. 26, 2021)

DEFENDANT'S IN LIMINE MOTIONS NOS. 1-

Defendant, CHRIS TAGUNICAR, by counsel, makes the following *in limine* motions:

* * *

In Limine No. 8: Allow the public and media in the courtroom.

The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." (U.S. Const., Amdt. 6.) This provision is applicable to the

States via the Due Process Clause of the Fourteenth Amendment. (*In re Oliver* (1948) 333 U.S. 257, 273.)

> . . . a trial is public, in the constitutional sense, *when a courtroom has facilities for a reasonable number of the public to observe the proceedings*, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.
>
> (*Estes v. State of Texas* (1965) 381 U.S. 532, 584 (Warren, C.J., concurring opinion.)

The high Court has set out the test that must be met to allow for an infringement o the Sixth Amendment public trial Tight: (1) the party seeking the closing of the courtroom to the public must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) reasonable alternatives must be considered; and, (4) findings must be made on the record adequate to support closure. (*Waller v. Georgia* (1984) 467 U.S. 39, 48.)

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U.S. Const., Amdt. 1.) The Fourteenth Amendment also renders this provision applicable to

the States. (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539; *Gitlow v. New York* (1925) 268 U.S. 652.)

"Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment." (*Globe Newspaper Co. v. Superior Court for Norfolk County* (1982) 457 U.S. 596, 604; footnote omitted (*Globe Newspaper*).) The U.S. Supreme Court explained that " . . . the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. (*Ibid.;* citations omitted.) Said the Court:

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government.

(*Globe Newspaper, supra*, 457 U.S., at 604.)

"Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." (*Id.*, at 604-605.) Then Chief Justice Burger wrote: "In

guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 575 (plurality opinion) (*Richmond Newspapers*).) Furthermore, the right to assemble includes the public doing so in a courtroom. (*Id.*, at 577-578.)

"The roots of open trials reach back to the days before the Norman Conquest. . . ." (*Press-Enterprise Co. v. Superior Court v. Superior Court of California, Riverside County* (1984) 464 U.S. 501, 505 (*Press-Enterprise I*).) Lord Coke wrote that " . . . all Causes ought to be heard, ordered, and determined before the Judges of the King's Courts *openly* in the King's Courts, *wither all persons may resort*. . . ." (2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681) (emphasis added); quoted in *Richmond Newspapers, supra*, 448 U.S., at 565.) The same decision also quoted reports of the Eyre of Kent, a general court held in 1313-1314, which stressed the importance of public attendance at trials:

> "the King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; *and for the better accomplishing of this*, he prayed the community of the county *by their attendance* there to lend him their aid in establishing of a happy and certain peace that should be both for-the honour of the realm and for their own welfare." 1 W. Holdsworth, A History of English Law 10, 268 (1927), quoting from the S. S. edition of the

> Eyre of Kent, vol. I, p. 2 (emphasis added); quoted in *Richmond Newspapers, supra*, 448at 566.)

Sir Thomas Smith, in 1565, explained that, while the indictment was put in writing:

> "All the rest is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as to heare it*, and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide."* (T. Smith, De Republica Anglorum 101 (Alston ed. 1972) (emphasis added); quoted in *Richmond Newspapers, supra*, 448 U.S, at 566.)

Then-Chief Justice Burger, who authored the plurality opinion in *Richmond Newspapers*, stated that "[w]have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential qualities of a court of justice,' *Daubney v. Cooper*, 10 B. & C. 237, 240, 109 Eng.Rep. 438, 440 (K.B. 1829), was not also an attribute of the judicial systems of colonial America." (*Richmond Newspapers, supra*, 448 U.S., at 567.) The Bill of Rights, encompassing both the First and Sixth Amendments, "was enacted against the backdrop of the long history of trials being presumptively open." (*Id.*, at 575.)

The openness of trials was explicitly recognized in the fundamental law of the Colony of New Jersey, in

the 1677 Concessions and Agreements of West New Jersey, which provided:

> "That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner." Reprinted in Sources of Our Liberties 188 (R. Perry ed. 1959); quoted in *Richmond NewsPapers, supra*, 448 U.S., at 567.)

In *Press-Enterprise I*, the U.S. Supreme Court explained the value of open trials:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.
>
> (*Press-Enterprise I, supra*, 464 U.S., at 508; italics in original, citation omitted.)

"Although the right of access to criminal trials is of constitutional stature, it is not absolute." (*Globe Newpaper, supra*, 457 U.S., at 606.) The presumption of openness may be rebutted " . . . only by an overriding

interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Press Enterprise I, supra*, 464 U.S., at 510.) "[T]he State's justification in denying access must be a weighty one." (*Globe Newspaper, supra*, 457 U.S., at 606.) "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." (*Id.*, at 607.) The trial court must consider available alternatives. "Absent consideration of alternatives to closure, the trial court could not constitutionally-close the [proceedings]." (*Press Enterprise I, supra*, 464 U.S., at 511.)

"The Sixth Amendment right, as the quoted language makes explicit, is the right of the accused." (*Presley v. Georgia* (2010) 558 U.S. 209, 212.) *Gannett Co. v. DePasquale* (1979) 443 U.S. 368, held that the Sixth Amendment right to a public trial was personal to the accused.

Then there is the First Amendment. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." (*Press-Enterprise Co. v. Superior Court of California for Riverside County* (1986) 478 U.S. 1, 7 (*Press-Enterprise II*).) Members of the media "are entitled to the same rights as the general public" when it comes to courtroom access. (*Estes v. State of Texas*, *supra*, 381 U.S., at 540.) Given that the United States Supreme Court has described the rights at issue as

"shared rights," implicitly a criminal defendant has First Amendment standing.

"[I]n *every* criminal case . . . the public is a party." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Ca1.4th 1178, 1210; italics in original.) Our California Supreme Court and the nation's high court agree that "the governing principles under [the Sixth] [A]mendment are the same as those pertaining to the right of access under the First Amendment." (Id., at 1213, fn. 31.) Some courts have construed that the First Amendment rights to access to a criminal trial are third party rights. (*See Hutchins v. Garrison* (1983) 724 F.2d 1425, 1431 [" . . . the petitioner cannot rely on the rights of third parties"]; *State v. Herron* (2015) 183 Wash.2d 737; *Doe v. Sex Offender Registry Bd.* (2011) 459 Mass. 603, 625; *State v. Macbale* (2013) 353 Or. 789.) But the cited cases have it plain wrong. Any criminal defendant is a member of the public also.

The better view has been expressed by more thoughtful courts. Said one New York court:

> . . . the People are able to argue in favor of the societal, First Amendment right to an open courtroom, as would the defense be able to so argue. If the parties to this proceeding,cannot argue in favor of this societal right, who could? While large media organizations at times ask to intervene when-these issues arise; and-argue in favor of open courtrooms, it is not reasonable to deputize the media as the only enforcers of the public's right. The vast majority of criminal trials begin and end

> without ever becoming of interest to the media. That should not be the deciding factor on whether there is anyone to argue in favor of the public's right to an open trial.
>
> (*People v. McRae* (2015) 47 Misc.3d 619, 622, 8 N.Y:S.3d 549, 552.)

One Missouri Court of Appeal noted that "[t]he United States Supreme Court's public-trial cases have not yet reached the issue of whether a criminal defendant may raise the public's First Amendment right to a public trial, or whether the defendant is limited to the Sixth Amendment to claim a violation of the right to a public trial." (*State v. Williams* (Mo.App. W.D.2010) 328 S.W.3d 366, 371.) In *Williams*, the criminal defendant has sought closure of the courtroom. The appellate court, and defendant Seymour agrees, the "Williams's explicit advocacy for courtroom closure forecloses *him* from now raising such a First Amendment claim. . . ." (*Id.*, at 373.) In the case at bench, defendant's First and Sixth Amendment claims are in perfect alignment in favor of an open trial.

In *People v. Harris* (1992) 10 Cal.App.4th 672, the Court of Appeal fully considered all the implications of the public's right to access in a criminal case where peremptory jury challenges had been made in chambers, not in open court, even though the defense joinder of the People's objection was expressed in First Amendment terms only. (*Id.*, at 686-687.) Implicitly, the *Harris* court deemed the defendant to have First Amendment standing. (*Id.*, at 687-688.)

Often, tension arises when the defendant in a criminal case seeks to close the courtroom and the media want access. (See *Press-Enterprise II, supra*, 478 U.S., at 7 [the defendant requested a closed preliminary hearing; the media sought access to the transcript of the preliminary hearing].) This is not the case here. Defendant Taginucar wants a public trial, both as the accused (Sixth Amendment) and as a member of the public (First Amendment). What the nation's high Court stated in *Press Enterprise I* equally applies to our case:

> For present purposes, how we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefitting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.

(*Press Enterprise I, supra*, 464 U.S., at 508.)

Defendant Taginucar's demand for a public trial and the public's right to access at such a trial result in individual defendant rights and public rights coinciding. The United States Supreme Court has noted that the two Amendments are intertwined: "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the free press and public." (*Waller v. Georgia, supra*, 467 U.S., at 46.)

Banning the public and the media from the courtroom violates the First and Sixth Amendments.

A. SIXTH AMENDMENT ANALYSIS

None of the *Waller* factors is met here to permit barring the public and the media from the courtroom:

1. If there was an overriding interest to bar people physically from the courtroom, then what are the rest of us (jury, court, parties) doing there?

Reported cases indicate only two interests for which the right to an open trial may give way: "the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." (*Waller v. Georgia, supra*, 467 U.S., at 45.) Neither interest is implicated here. The contrary is true, as defendant Taginucar insists he can obtain a fair trial only if the public is allowed to be present in the courtroom. The current COVID-19 pandemic does not furnish such an interest. The *Waller* court cautioned that "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care." (*Ibid.*) If the COVID-19 threat to public health is indeed that compelling an interest to override the presumption of an open trial, then this begs the question why any of the remaining participants (judge, jurors, counsel, clerk, court reporter, bailiff, and witnesses) are still present in the courtroom? The proffered COVID19 interest militates in favor of continuing the trial until it no longer poses a threat to anyone, not just the

excluded members of the public and the media. If the overriding interest is COVID-19, then none of us should be in that courtroom.

An audio feed for which one has to apply falls short of the purpose of an open trial. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." (*Globe Newspaper, supra*, 457 U.S., at 606; footnote omitted.) The public and media must be able to see what the judge does, what the Government's prosecutor does, what the jurors do. A pause in the proceedings can be pregnant with meaning. The audio version of that would completely miss the point. "[T]he appearance of justice can best be provided by allowing people to observe it." (*Richmond Newspapers, supra*, 448 U.S., at 572.) The meaning of "observe" includes "watching," not merely listening to an audiofeed. (See https://www.merriam-webster.com/dictionary/observe; retrieved on June 10, 2020.) Then Chief Justice Burger described the "right of access" in attending criminal trials as "to hear, see, and communicate observations concerning them. . . ." (*Richmond Newspapers, supra*, 448 U.S., at 576.) The Chief Justice was not limiting his discussion to "hearing only."

The Court's exclusion of the public and the media from the courtroom for health reasons is akin to the unlawful exclusion of the public during the voir dire portion of the jury trial of Eric Presley in *Presley v. Georgia, supra*, 558 U.S. 209, wherein the trial court had stated that, " '[t]here just isn't space for them to sit

in the audience.'" (*Id.*, at 210.) The Court in our present case is essentially saying that given the coronavirus pandemic, there just is not enough space for members of the public and the media to sit in the courtroom.

My search of the authorities of the States and the United States has not revealed any cases in support of the notion that the public may be excluded from the courtroom due to flu pandemic of 1918. The federal Center for Disease Control and Prevention (CDC) estimates that one-third of the world's population of 1.5 billion people was infected and that 675,000 persons in the United States died thereof. (See https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-hlnl.html; retrieved on June 11, 2020.) The population of the United States was estimated to be about 103 million in 1918, 106 million in 1920. (See https://www.census.gov/population/estimates/nation/popclockest.txt; retrieved on June 11, 2020.)

There exist other considerations. What if an audio listener tapes the proceedings and puts them out over the internet, violating a court rule against taping court proceedings. Such rule deviation is easily monitored in the courtroom but not when an audio feed broadcasts what is said.

2. Closing the courtroom to the public and the media is overbroad

If the Court can fashion ways to seat our, the parties and their counsel and investigators, the court staff

and the Court, despite the ongoing COVID-19 pandemic in the absence of a vaccine against the new illness, then the Court can also accommodate members of the public and the media who wish to attend. Granted, there may be a need to limit the numbers but that is acceptable; physical exclusion is not.

B. FIRST AMENDMENT ANALYSIS

Because of the congruence of the two constitutional provisions in this particular case, the First Amendment analysis is very similar. *Press Enterprise I* provides us with the analytical framework. " . . . only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Press Enterprise I, supra*, 464 U.S., at 510.) "[T]he State's justification in denying access must be a weighty one." (*Globe Newspaper, supra*, 457 U.S., at 606.) "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." (*Id.*, at 607.) The trial court must consider available alternatives. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the [proceedings]." (*Press Enterprise I, supra*, 464 U.S., at 511.) Worded differently, the *Press Enterprise* I test examines the same factors as *Waller.* Defendant Seymour's arguments are obviously the same. The

outcome should be a resounding victory for the right of the public and the media to physically attend the trial.

C. DENYING PUBLIC AND MEDIA THEIR RIGHTFUL PLACE IN THE COURTROOM CONSTITUTES STRUCTURAL ERROR

The United States Supreme Court has held that "a violation of the right to a public trial is a structural error." (*Weaver v. Massachusetts* (2017) 582 U.S., 137 S.Ct. 1899, 1908.) In light of that, defendant Taginucar stresses that his request, with two alternative requests appended to it, are the only way to comport with constitutional requirements.

D. PERSUASIVE OUT-OF-STATE AUTHORITY SUPPORTS DEFENDANT SEYMOUR'S POSITION

We may be venturing into new territory given the pandemic but not completely. A Florida Court of Appeal has grappled with the same issue of the public and media having only audio access to a portion of a criminal jury trial. A Florida trial court "excluded the media from physical access to the courtroom during the voir dire examination of prospective jurors. While the media were given access to an overflow room with an audio feed to the courtroom, the media's ability to hear the proceeding was severely compromised that day." (*Morris Publishing Group, LLC v. State* (Fla. 1st DCA 2014) 136 So.3d 770, 780 (*Morris Publishing*).)

The *Morris Publishing* court holding is instructive for the issue at bench:

> The trial court states in its order that there has been "*no* closure *nor* any prohibition of media access during jury selection; rather the audio feed serves as the media and public's access to the proceedings." We disagree. By limiting their observation of the proceedings to audio, Petitioners were deprived of the ability to see the judge, prospective jurors, and attorneys to evaluate their demeanor, body language, and other non-verbal expressions. In analogous situations, courts have held that the availability of a transcript of a proceeding is not a sufficient substitut for a public presence at the proceeding. *See*, *e.g.*, *AB, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir.2004) ("[O]ne cannot transcribe an anguished look or a nervous tic. The ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access-not, as the government describes, an incremental benefit."); *Soc'y of Prof'l Journalists v. Sec'y of Labor*, 616 F.Supp. 569, 578 (D.Utah 1985) ("[T]he full flavor of [a] hearing cannot be sensed from the sterile sheets of a transcript. Emotions, gestures, facial expressions, and pregnant pauses do not appear on the reported transcript. Much of what makes good news is lost in the difference between a one-dimensional transcript and an opportunity to see and hear testimony as it unfolds." (citation omitted)). Even if the audio feed was working properly in the overflow room, the trial court's

> decision to exclude the public from physical access to the courtroom during jury selection was a sufficient constitutional infringement to trigger application of the *Press-Enterprise I* test. (*Ibid.*)

The defense would normally wholeheartedly yell "hear, hear," just as members of the British House of Commons have done by way of parliamentary practice in lieu of applause. The defense, however, does not wish to be mistaken as conceding the audio argument, hence, instead, we take the position: "Hear, see and be there." *Morris Publishing* is on point with regard to the audio feed issue and should be followed in our state.

The Florida court was also well aware of the physical limitations of attendance by the public and the media. "All courtrooms have limited capacity, and precedent permits courts to place reasonable restrictions on general access. In this case, the media suggested allocating a limited number of seats for media representatives, who would pool their resources and alternate attendance." (*Id.*, at 782.) Public and media access are workable.

The *Morris Publishing* decision finds long-standing support in the words of Justice Oliver Wendell Holmes when he was a member of the Massachusetts Supreme Court:

> In *Cowley v. Pulsier* (1884).137 Mass. 392, 394 [50 Ame. Rep. 318], Justice Oliver Wendell Holmes wrote that public access to civil judicial proceedings was "of vast importance" because of "the security which publicity gives for

> the proper administration of justice. . . . It is desirable that the trial of [civil] causes should take place *under the public eye*, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."
>
> (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, 20 Ca1.4th, at 1198, fn. 14; italics added for emphasis.)

E. CALIFORNIA LAW PROVIDES AN INDEPENDENT SOURCE TO RULE IN FAVOR OF ALLOWING THE PUBLIC AND THE MEDIA IN THE COURTROOM DURING OUR RESUMED JURY TRIAL

"Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal. Const., Art. I, § 24.)

Code of Civil Procedure section 124 provides that, "Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public." Our Supreme Court has followed federal constitutional jurisprudence in ruling on this state provision. (*See NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, supra*, 20 Ca1.4th 1178.) Therefore, this Court is free to base the correct decision of opening

the resumed jury trial to the public and the media on independent state grounds.

CONCLUSION

In 1978, the United States Supreme Court held that, "[n]or does the Sixth Amendment require that the trial – or any part of it – be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed." (*Nixon v. Warner Communications, Inc.* (1978) 435 U.S. 589, 610.) Defendant Taginucar requests the same in his trial, in accordance with the requirements of both the First and Sixth Amendments and their state constitutional counterparts.

DATED: March 26, 2021.

Respectfully submitted,

/s/ Paul F. DeMeester
PAUL F. DeMEESTER
Attorney for Mr. Tagunicar

[SEAL]

SUPERIOR COURT OF SAN MATEO COUNTY

400 County Center 1050 Mission Road
Redwood City, CA 94063 South San Francisco, CA 94080
www.sanmateocourt.org

Minute Order

The People of the State of California vs.
Chris Noel N Tagunicar

19-NF-007704-A
04/06/2021 9:00 AM
Continued Jury Trial
Hearing Result: Held

Judicial Officer: Finigan, Jeffrey R.
Location: Courtroom 2B
Courtroom Clerk: Erica Boffi
Courtroom Reporter: Rhiannon Smith
Deputy District Attorney: Ryan Geisser

Court Interpreter Information (Language – Cert # – Name) :; Court Interpreter Information (Language – Cert # – Name): Tagalog – Dacquel, Roberto; Tagalog – 300521 – Castro, Karenina

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Parties Present

DEMEESTER, PAUL F.	Attorney
Tagunicar, Chris Noel N	Defendant
The People of the State of California	Plaintiff

Exhibits

Minutes

Journals

– Trial Day: 3

9:12 AM: Court convenes.

Counsel present. Defendant present in custody.

Jurors not present.

* * *

11:09 AM: Jury now present.

11:11 AM: The Court instructs the jury.

11:23 AM: The opening statement of the People was made to the Court and jury by Ryan Geisser.

11:31 AM: The opening statement of the People concluded.

11:32 AM: The opening statement of the Defense was made to the Court and jury by Paul DeMeester.

11:49 AM: The opening statement of the Defense concluded.

11:50 AM: Hernaldo Vanegas, called by the People, was sworn and testified under direct examination.

11:55 AM: The exhibits listed below were marked for identification and admitted into evidence on behalf of the People:

Exhibit 1: Color Google image of 110 S Idaho

Exhibit 2: Color body worn camera image of defendant at 110 S Idaho

Exhibit 3: Color image of broken door pieces

Exhibit 4: Color image of broken door frame

12:02 PM: Jurors admonished.

12:02 PM: The Court recesses.

1:36 PM: The Court reconvenes.

Counsel present. Defendant present in custody.

Jurors present.

1:37 PM: Hernaldo Vanegas, previously sworn, resumed the stand and testified under cross examination.

1:41 PM: The exhibits listed below were marked for identification and admitted into evidence on behalf of the Defense:

Exhibit A: Color image of broken door piece

Exhibit B: Color image of broken door piece

Exhibit C: Color image of broken door piece

Exhibit D: Color image of broken door pieces

Exhibit E: Color image of items on stairway

Exhibit F: Color image of broken door frame

Exhibit G: Color image of door jam

Exhibit H: Body camera image

Exhibit I: Color body camera image of 110 S Idaho

Exhibit J: Color body camera image of cell phone

Exhibit K: Color body camera image of male subject
Exhibit L: Body camera image

Exhibit M: Body camera image

Exhibit O: Color body camera image of 110 S Idaho doorway

2:10 PM: Witness testified under re-direct examination.

2:11 PM: Witness testified under re-cross examination.

2:16 PM: Witness excused subject to recall.

2:20 PM: Ina Chou, called by the People, was sworn and testified under direct examination.

2:31 PM: The exhibits listed below were introduced and marked for identification on behalf of the People:

Exhibit 5: CD containing Ring videos

Exhibit 5A: Transcript of CD

Exhibit 5 admitted.

2:35 PM: Counsel stipulate the court reporter does not need to transcribe audio.

2:35 PM: People play CD (exhibit 5).

2:37 PM: CD concludes.

2:39 PM: The exhibits listed below were introduced and marked for identification on behalf of the People:

Exhibit 6: CD containing Ina Chou's 911 calls

Exhibit 6A: Transcript of CD

Exhibit 6 admitted.

2:41 PM: Sidebar conference held.

2:44 PM: Sidebar conference concluded.

2:45 PM: Counsel stipulate the court reporter does not need to transcribe audio for the duration of the trial.

2:45 PM: People play CD (exhibit 6).

2:53 PM: CD concludes.

3:01 PM: Jurors admonished.

3:01 PM: The Court recesses.

3:19 PM: The Court reconvenes.

Counsel present. Defendant present in custody.

Jurors present.

3:21 PM: Ina Chou, previously sworn, resumed the stand and testified under cross examination.

3:33 PM: Court releases subpoenaed records from Patelo to Defense.

3:34 PM: Sidebar conference held.

3:38 PM: Sidebar conference concluded.

3:39 PM: The exhibits listed below were introduced and marked for identification on behalf of the Defense:

Exhibit P: Copy of check dated 2/22/19

Exhibit Q: Records from Patelco

Exhibit S: 3 page Secretary of State document

Exhibit T: Single page contractor's license detail document

Exhibit Q admitted.

4:29 PM: Jurors admonished and ordered to return on 4/7/21 at 9:00 AM.

4:31 PM: Court and counsel discuss witness availability.

4:35 PM: Court denies Defense motion to lower bail.

4:45 PM: Court adjourned.

* * *

[SEAL]

SUPERIOR COURT OF SAN MATEO COUNTY

400 County Center 1050 Mission Road
Redwood City, CA 94063 South San Francisco, CA 94080
www.sanmateocourt.org

Minute Order

The People of the State of California vs.
Chris Noel N Tagunicar

19-NF-007704-A
04/07/2021 9:00 AM
Continued Jury Trial
Hearing Result: Held

Judicial Officer: Finigan, Jeffrey R.
Location: Courtroom 2B
Courtroom Clerk: Erica Boffi
Courtroom Reporter: Rhiannon Smith
Deputy District Attorney: Ryan Geisser

Court Interpreter Information (Language – Cert # – Name) :; Court Interpreter Information (Language – Cert # – Name): Tagalog – 300521 – Castro, Karenina; Tagalog – Pino, Dulce

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Parties Present

DEMEESTER, PAUL F.	Attorney
Tagunicar, Chris Noel N	Defendant
The People of the State of California	Plaintiff

Exhibits

Minutes

Journals
– Trial Day: 4

9:08 AM: Court convenes.

Counsel present. Defendant present in custody.

Jurors present.

9:10 AM: Christine Granucci, called by the People, was sworn and testified under direct examination.

9:15 AM: The exhibits listed below were introduced and marked for identification on behalf of the People:

Exhibit 7: Burlingame CAD reports

Exhibit 8: CD containing Burlingame 911 calls

Exhibit 8A: Transcript of CD

9:32 AM: Witness testified under cross examination.

9:38 AM: Witness excused.

9:39 AM: Glen Teixeira, called by the People, was sworn and testified under direct examination.

9:48 AM: Exhibits 7 and 8 admitted.

9:56 AM: People play CD (exhibit 8).

10:00 AM: Erica Martin replaces Erica Boffi as court clerk.

10:08 AM: Playback paused.

10:09 AM: Sidebar conference held.

10:11 AM: Sidebar conference concluded.

10:12 AM: Playback of CD resumes.

10:38 AM: CD concludes.

10:38 AM: Jurors admonished.

10:39 AM: The Court recesses.

10:57 AM: The Court reconvenes.

Counsel present. Defendant present in custody.

Jurors present.

10:57 AM: Witness testified under cross examination.

11:00 AM: Witness excused subject to recall.

11:01 AM: Joshua Wang, called by the People, was sworn and testified under direct examination.

11:10 AM: The exhibits listed below were marked for identification and admitted into evidence on behalf of the People:

Exhibit 9: Color image of Millbrae substation

11:19 AM: Witness testified under cross examination.

11:48 AM: Witness testified under re-direct examination.

11:52 AM: Witness testified under re-cross examination.

11:54 AM: Witness excused subject to recall.

11:55 AM: Jurors admonished.

11:56 AM: Court and counsel discuss exhibits 8 and 8A.

11:59 AM: The Court recesses.

1:30 PM: Erica Boffi replaces Erica Martin as court clerk.

1:37 PM: The Court reconvenes.

Counsel present. Defendant present in custody.

Jurors present.

1:39 PM: Nicholas Franquez, called by the People, was sworn and testified under direct examination.

1:42 PM: The exhibits listed below were marked for identification and admitted into evidence on behalf of the People:

Exhibit 10: Color body worn camera image of driveway at 1735 Echo

Exhibit 11: Color body worn camera image of entryway at 1735 Echo

Exhibit 12: Color image of Fe Docot at 1735 Echo

Exhibit 13: Color image of defendant at 1735 Echo

1:50 PM: Witness testified under cross examination.

2:00 PM: Witness testified under re-direct examination.

2:00 PM: Witness excused.

2:04 PM: Bridget Heffelfinger, called by the People, was sworn and testified under direct examination.

2:11 PM: The exhibits listed below were introduced and marked for identification on behalf of the People:

Exhibit 14: CD containing Officer Heffelfinger's call with defendant

Exhibit 14A: Transcript of CD

Exhibit 14 admitted.

2:13 PM: People play CD (exhibit 14).

2:29 PM: CD concludes.

2:33 PM: The exhibits listed below were marked for identification and admitted into evidence on behalf of the People:

Exhibit 15: Color body worn camera image of Racquel Corpuz

2:37 PM: Witness testified under cross examination.

2:44 PM: Witness testified under re-direct examination.

2:45 PM: Witness excused subject to recall.

2:45 PM: People recall Glen Teixeira.

2:54 PM: The exhibits listed below were marked for identification and admitted into evidence on behalf of the People:

Exhibit 16: Color image of house on 3928 Branson

3:02 PM: Jurors admonished.

3:02 PM: The Court recesses.

3:21 PM: The Court reconvenes.

Counsel present. Defendant present in custody.

Jurors present.

3:21 PM: Witness testified under cross examination.

3:26 PM: Sidebar conference held.

3:30 PM: Sidebar conference concluded.

3:30 PM: Jurors admonished and ordered to return on 4/8/21 at 9:00 AM.

3:32 PM: Court and counsel discuss Defense exhibits and alternate juror scheduling issue.

3:34 PM: Court adjourned.

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E-mail: paulfdemeester@msn.com

Attorney for Defendant CHRIS TAGUNICAR

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS TAGUNICAR, Defendant. /	Case No. 19-NF-007704-A Dept.: 24 - Hon. Jeffrey Finigan Date: 04/09/2021 - Jury Trial

DEFENDANT'S MISTRIAL MOTION

(Filed Apr. 8, 2021)

Defendant, CHRIS TAGUNICAR, by counsel, moves for a mistrial based on a violation of his federal constitutional right to a public trial as guaranteed him by the Sixth Amendment.

In his *in limine motion no. 8*, filed on March 26, 2021, Tagunicar demanded that the public and the media be afforded their constitutional rights under the First and Sixth Amendments to be present in the courtroom during the trial. The Court denied these

demands, stating that the public has call-in audio access to listen in to the audio proceedings.

The Court's denial of Taginucar's Sixth Amendment public trial demand caused an abstract constitutional injury at the time. But on Wednesday, April 7, 2021, that constitutional injury ripened into an actual, concrete one, when a member of the public, Mr. Kenneth H. Wine, sought access to the courtroom to attend the proceedings in support of defendant Tagunicar but was denied entry. (See accompanying Declaration of Kenneth H. Wine.) Tagunicar's worst fears about the Sixth Amendment violation have now come true. His trial is no longer a public trial as the public was turned away. For the reasons stated herein and in the accompanying declaration of Mr. Wine, as well as the reasons proffered in *in limine motion no. 8*, Tagunicar moves for a mistrial.

DATED: April 8, 2021.

Respectfully submitted,

/s/ Paul F. DeMeester
PAUL F. DeMEESTER
Attorney for Mr. Tagunicar

[Proof Of Service Omitted]

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Attorney for Defendant CHRIS TAGUNICAR

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS TAGUNICAR, Defendant. /	Case No. 19-NF-007704-A Dept.: 24 - Hon. Jeffrey Finigan Date: 04/09/2021 - Jury Trial

DECLARATION OF KENNETH H. WINE

I, KENNETH H. WINE, hereby declare that:

On April 7, 2021, at about 9:40 a.m., I attempted to enter courtroom 2B, Department 24 of the San Mateo County Superior Court, presided over by the Honorable Jeffrey Finigan, Judge. I wanted to be present in the courtroom to watch the jury trial proceedings in *People v. Chris N. Tagunicar*, San Mateo County Superior Court No. 19-NF-007704-A, in support of defendant Taginucar, whose counsel Paul F. DeMeester is a friend and colleague of mine.

When I entered the courtroom entryway chamber (two sets of doors are between the hallway and the courtroom), the bailiff, San Mateo County Sheriff's Deputy Silva observed me in the entryway chamber and got up to meet me at the second set of doors that open into the courtroom.

I asked Deputy Silva if the public could enter the courtroom and watch the jury trial. Deputy Silva asked me to wait in the chamber before entering into the public seating area of the courtroom. Deputy Silva then walked over to the courtroom clerk and had a conversation. Deputy Silva returned to where I was at in the entryway chamber to inform me that the public was not able to enter the courtroom but could call in by phone and listen to the jury trial proceedings that way. I then left the courthouse.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on April 8, 2021.

/s/ Kenneth H. Wine
KENNETH H. WINE

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Attorney for Defendant CHRIS TAGUNICAR

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. CHRIS TAGUNICAR, Defendant. /	Case No. 19-NF-007704-A Dept.: 24 - Hon. Jeffrey R. Finigan Date: 04/12/2021 - Jury Trial

DEFENDANT'S SECOND MISTRIAL MOTION

(Filed Apr. 12, 2021)

Defendant, CHRIS TAGUNICAR, by counsel, moves for a second time for a mistrial based on a violation of his federal constitutional right to a public trial as guaranteed him by the Sixth Amendment, based on an additional violation of his Equal Protection Rights guaranteed by the United States Constitution and a ruling issued last Friday, April 9, 2021, by the United States Supreme Court in *Tandon v. Newsom* (April 9, 2021) 593 U.S., Court No. 20A151 (slip opinion is attached).

Prior to jury selection, the Court had denied Mr. Tagunicar's *in limine motion no. 8*, filed on March 26, 2021, in which Mr. Tagunicar demanded that the public and the media be afforded their constitutional rights under the First and Sixth Amendments to be present in the courtroom during the trial. The Court denied these demands, stating that the public has call-in audio access to listen in to the audio proceedings.

The Court's ruling was implemented in full during jury selection and four days of the prosecution's case-in-chief (which only has a portion of a fifth day remaining), during which time the public was turned away from attending the jury trial in person (see first mistrial motion).

On Friday, April 9, 2021, the Court heard and denied Mr. Tagunicar's first mistrial motion but reversed itself on the public being able to be present in the courtroom. Although Mr. Tagunicar welcomes the reversal of the Court's initial order, the damage has been done. The constitutional injury train left the station on March 26, 2021. As the late Attorney General Ramsey Clark said about rights: "*A right is not what someone gives you, it's what no one can take from you*." Mr. Tagunicar's right to a public trial was taken from him and cannot be given back short of a mistrial declaration at this point, in order to provide him with his right to a complete public trial in the future.

In addition to the grounds and reasons proffered during the litigation on in limine no. 8 and the first mistrial motion, Mr. Tagunicar proffers these additional

reasons and requests that a mistrial be granted at this time. In *Tandon v. Newsom*, the high court struck down California's COVID-19 restrictions on people getting together to worship. *Tandon* involved a constitutional right to religious worship under the Free Exercise Clause of the First Amendment. Mr. Tagunicar's rights under the Sixth and Fourteenth Amendments have equal rank to those discussed in *Tandon*. This Court's COVID-19 banning of the public from the courtroom during the first six days of trial is unlawful in light of *Tandon*.

Furthermore, over the weekend, I learned that Mr. Derek Chauvin, the former Minneapolis police officer charged with the murder of Mr. George Floyd, has his right to a public trial vindicated by having one seat available for his family or supporters, one sea for Mr. Floyd's family, and two seats for the media (one print pool reporter, one broadcast pool reporter). (See attached article from USA Today, April 9, 2021, 5:57 p.m.). Mr. Chauvin's trial is ongoing, as is Mr. Tagunicar's. One criminal defendant has his public right guaranteed. The other not. This constitutes an Equal Protection violation based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Art. I, Section 7(a) of the California Constitution.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state shall " . . . deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., Amdt. 14.) The California Constitution provides that "[a] person

may not be . . . denied equal protection of the laws." (Cal. Const., Art. I, § 7(a).) The Fourteenth Amendment's Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." (*City of Cleburne, Tex. v. Cleburne Living Center* (1985) 473 U.S. 432, 439 (*Cleburne*), citing *Plyler v. Doe* (1982) 457 U.S. 202, 216.)

When faced with an equal protection challenge, courts will subject state government action to strict scrutiny when state action impinges on personal rights protected by the Constitution. (*Cleburne, supra*, 473 U.S., at 440, citing *Kramer v. Union Free School District No. 15* (1969) 395 U.S. 621; *Shapiro v. Thompson* (1969) 394 U.S. 618; and *Skinner v. Oklahoma ex rel. Williamson* (1942) 316 U.S. 535.) Such state actions "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." (*Cleburne, supra*, 473 U.S., at 440.) Equal protection challenges often involve state laws but not always. The U.S. Supreme Court has been faced with equal protection challenges against state university admissions policies and court custody orders. (See respectively, *Mississippi University for Women v. Hogan* (1982) 458 U.S. 718; and *Palmore v. Sidoti* (1984) 466 U.S. 429.) Like *Palmore v. Sidoti*, the Tagunicar case involves an order by the trial court.

Defendant Tagunicar's public trial right is expressly stated in the Bill of Rights. His right, as a member of the public, for public and media access to his jury trial emanates from " . . . the amalgam of the First Amendment guarantees of speech and press . . . and

their affinity to the right of assembly. . . ." (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 577 (plurality opinion).) "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment. . . ." (*Id.*, at 580; footnote omitted.)

In *Palmore v. Sidoti*, the nation's highest Court noted that when it comes to child custody disputes, "[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." (*Palmore v. Sidoti, supra*, 466 U.S., at 433.) Certainly, public health concerns in an age of the COVID-19 pandemic are a substantial governmental interest for purposes of the Equal Protection Clause in the case at bench. Messrs. Chauvin and Tagunicar are similarly situated: both are criminal defendants protected by the U.S. Constitution.

If public health concerns were that compelling to be sustained once subjected to strict scrutiny, then why is it that a trial is public in one defendant's case but was not in the other? The answer is that the public health concern is not compelling enough to validate the initial closure of the Tagunicar trial to the public and the media. If the public health concern were that compelling, a continuance is in order because then none of us should be in that courtroom.

By being treated differently than similarly situated defendants, Mr. Tagunicar has been denied the equal protection of the laws.

What the high Court said in 1942 is apt today:

> But no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey v. Ohio*, 273 U.S. 510, 535. It is the state's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the state's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. . . . Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all-the least deserving as well as the most virtuous.
>
> (*Hill v. Texas* (1942) 316 U.S. 400, 406 [rape conviction reversed because of exclusion of grand jurors based on race].)

The initial exclusion of the public and media from our courtroom is constitutionally unacceptable and violates equal protection.

For the reasons stated herein, the prior mistrial motion and *in limine motion no. 8*, Mr. Tagunicar moves for a mistrial.

DATED: April 12, 2021.

Respectfully submitted,

/s/ Paul F. DeMeester
PAUL F. DeMEESTER
Attorney for Mr. Tagunicar

[Proof Of Service Omitted]

Cite as: 593 U. S. ___ (2021)

Per Curiam

SUPREME COURT OF THE UNITED STATES

No. 20A151

RITESH TANDON, ET AL. v. GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[April 9, 2021]

PER CURIAM.

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is granted pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

* * *

The Ninth Circuit's failure to grant an injunction pending appeal was erroneous. This Court's decisions have made the following points clear.

First, government regulations are not neutral and generally applicable, and therefore trigger strict

scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S., ___, ___–___ (2020) (*per curiam*) (slip op., at 3-4). It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue. *Id.*, at ___–___ (KAVANAUGH, J., concurring) (slip op., at 2–3).

Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue. *Id.*, at ___ (*per curiam*) (slip op., at 3) (describing secular activities treated more favorably than religious worship that either "have contributed to the spread of COVID-19" or "could" have presented similar risks). Comparability is concerned with the risks various activities pose, not the reasons why people gather. *Id.*, at ___ (GORSUCH, J., concurring) (slip op., at 2).

Third, the government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow. *South Bay United Pentecostal Church v. Newsom*, 592 U. S. ___, ___ (2021) (statement of GORSUCH, J.) (slip op., at 2); *id.*, at ___ (BARRETT, J., concurring) (slip op., at 1). Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not

address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too. *Roman Catholic Diocese*, 592 U. S., at ___–___ (slip op., at 4–5); *South Bay*, 592 U. S., at ___ (statement of GORSUCH, J.) (slip op., at 3).

Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions. *Roman Catholic Diocese*, 592 U. S., at ___ (slip op., at 6); see also *High Plains Harvest Church v. Polis*, 592 U. S. ___ (2020).

These principles dictated the outcome in this case, as they did in *Gateway City Church v. Newsom*, 592 U. S. ___ (2021). First, California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time. App. to Emergency Application for Writ of Injunction 183–189. Second, the Ninth Circuit did not conclude that those activities pose a lesser risk of

transmission than *applicants*' proposed religious exercise at home. The Ninth Circuit erroneously rejected these comparators simply because this Court's previous decisions involved public buildings as opposed to private buildings. *Tandon v. Newsom*, ___ F. 3d ___, ___, ___–___, 2021 WL 1185157, *3, *5–*6 (CA9 2021). Third, instead of requiring the State to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities, the Ninth Circuit erroneously declared that such measures might not "translate readily" to the home. *Id.*, at *8. The State cannot "assume the worst when people go to worship but assume the best when people go to work." *Roberts v. Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). And fourth, although California officials changed the challenged policy shortly after this application was filed, the previous restrictions remain in place until April 15th, and officials with a track record of "moving the goalposts" retain authority to reinstate those heightened restrictions at any time. *South Bay*, 592 U. S., at ___ (statement of GORSUCH, J.) (slip op., at 6).

Applicants are likely to succeed on the merits of their free exercise claim; they are irreparably harmed by the loss of free exercise rights "for even minimal periods of time"; and the State has not shown that "public health would be imperiled" by employing less restrictive measures. *Roman Catholic Diocese*, 592 U. S., at ___ (slip op., at 5). Accordingly, applicants are entitled to an injunction pending appeal.

This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. See *Harvest Rock Church v. Newsom*, 592 U. S. ___ (2020); *South Bay*, 592 U. S. ___; *Gish v. Newsom*, 592 U. S. ___ (2021); *Gateway City*, 592 U. S. ___. It is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546 (1993) (internal quotation marks omitted). That standard "is not watered down"; it "really means what it says." *Ibid.* (quotation altered).

THE CHIEF JUSTICE would deny the application.

Cite as: 593 U. S. ___ (2021)

KAGAN, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 20A151

RITESH TANDON, ET AL. v. GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[April 9, 2021]

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

I would deny the application largely for the reasons stated in *South Bay United Pentecostal Church v. Newsom*, 592 U. S. ___ (2021) (KAGAN, J., dissenting). The First Amendment requires that a State treat religious conduct as well as the State treats comparable secular conduct. Sometimes finding the right secular analogue may raise hard questions. But not today. California limits religious gatherings in homes to three households. If the State also limits all secular gatherings in homes to three households, it has complied with the First Amendment. And the State does exactly that: It has adopted a blanket restriction on at-home gatherings of all kinds, religious and secular alike California need not, as the *per curiam* insists, treat at-home religious gatherings the same as hardware stores and hair salons—and thus unlike at-home secular gatherings, the obvious comparator here. As the *per curiam*'s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons.

And even supposing a court should cast so expansive a comparative net, the *per curiam*'s analysis of this case defies the factual record. According to the *per curiam*, "the Ninth Circuit did not conclude that" activities like frequenting stores or salons "pose a lesser risk of transmission" than applicants' at-home

religious activities. *Ante*, at 3. But Judges Milan Smith and Bade explained for the court that those activities do pose lesser risks for at least three reasons. First, "when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting," with participants "more likely to be involved in prolonged conversations." *Tandon v. Newsom*, ___ F. 3d ___, ___, 2021 WL 1185157, *7 (CA9, Mar. 30, 2021). Second, "private houses are typically smaller and less ventilated than commercial establishments." *Ibid.* And third, "social distancing and mask-wearing are less likely in private settings and enforcement is more difficult." *Ibid.* These are not the mere musings of two appellate judges: The district court found each of these facts based on the uncontested testimony of California's public-health experts. *Tandon v. Newsom,* ___ F. Supp. 3d ___, ___, 2021 WL 411375, *30 (ND Cal., Feb. 5, 2021); see *Tandon,* ___ F. 3d at ___, 2021 WL 1185157, *7 (noting that the applicants "do not dispute any of these findings"). No doubt this evidence is inconvenient for the *per curiam*'s preferred result. But the Court has no warrant to ignore the record in a case that (on its own view, see *ante*, at 2) turns on risk assessments.

In ordering California to weaken its restrictions on at-home gatherings, the majority yet again "insists on treating unlike cases, not like ones, equivalently." *South Bay*, 592 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 5). And it once more commands California "to ignore its experts' scientific findings," thus impairing "the State's effort to address a public health

emergency." *Ibid.* Because the majority continues to disregard law and facts alike, I respectfully dissent from this latest *per curiam* decision.

George Floyd's family is in court
every day, but not Derek Chauvin's

https://www.usatoday.com/story/opinion/2021/04/09/george-floyds-famil . . .

[LOGO] **USA TODAY**

OPINION *This piece expresses the views of its author(s), separate from those of this publication.*

A courtroom chair for Derek Chauvin supporters has sat nearly empty through two weeks of his trial

Suzette Hackney USA TODAY
Published 5:57 p.m. ET Apr. 9, 2021 | **Updated 8:07 p.m. ET Apr. 9, 2021**

National columnist Suzette Hackney is in Minneapolis for the trial of Derek Chauvin, reporting on the people, the scene and the mood.

Former Minneapolis police officer Derek Chauvin sits day after day in a Hennepin County courtroom, listening to testimony and writing on a legal pad. His notetaking is constant.

I wish I knew what he was writing. Chauvin is apparently on an island, with only his defense attorneys. There is a chair reserved in the courtroom for his friends and family. Most days, no one sits there.

By contrast, members of George Floyd's family take turns daily sitting in the one allotted seat reserved for them in the back corner of the courtroom. Only two reporters are in the courtroom, one pool representative from a print organization and one from broadcast.

Chauvin is accused of killing Floyd last May, kneeling on his neck for more than nine minutes while trying to arrest him. The trial, which has concluded its second week, is being televised because of crowd restrictions due to COVID-19 precautions.

The trial has been difficult to stomach. The constant replaying of the video from different angles; the graphic nature and descriptions of how Floyd died; the emotional testimony from those who witnessed the incident – it's all traumatizing.

Maybe too traumatizing for those who love Chauvin. Imagine how Floyd's family feels.

Chauvin's wife filed for divorce just days after Floyd's death, according to a May 29,2020 statement from the Sekula Family Law office.

"This evening, I spoke with Kellie Chauvin and her family. She is devastated by Mr. Floyd's death and her utmost sympathy lies with his family, with his loved ones and with everyone who is grieving this tragedy. She has filed for dissolution of her marriage to Derek Chauvin," the statement said. "While Ms. Chauvin has no children from her current marriage, she respectfully requests that her children, her elder parents, and

her extended family be given safety and privacy during this difficult time."

George Floyd's death: Former gang members inspired to help the local neighborhood

On Monday, Minneapolis Police Chief Medaria Arrondondo testified that Chauvin continuing to kneel on Floyd's neck once he was handcuffed, lying face-down and not showing signs of resistance was "in no way, shape or form" department policy or training, "and it is certainly not part of our ethics or our values."

Chauvin, 45, is charged with second-degree murder, third-degree murder and second-degree manslaughter.

National columnist Suzette Hackney is a member of USA TODAY'S Editorial Board. Contact her at shackney@usatoday.com *or on Twitter: @suzyscribe*

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN MATEO

APPELLATE DIVISION

-o0o-

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF(S)/ RESPONDENT(S), -VS- CHRIS NOEL TAGUNICAR, DEFENDANT(S)/ APPELLANT(S). /	SUPERIOR COURT CASE NO.: 19-NF-00704-A APPEAL CASE NO.: 21-AD-000009

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPELLATE HEARING
BEFORE THE
HONORABLE SEAN P. DABEL, JUDGE AND THE
HONORABLE SUSAN L. GREENBERG, JUDGE
COURTROOM 2M
FRIDAY, OCTOBER 14, 2022

APPEARANCES:

FOR THE PEOPLE:
RACHEL WINER, DEPUTY DISTRICT ATTORNEY
SAN MATEO DISTRICT ATTORNEY'S OFFICE
STEPHEN M. WAGSTAFFE, DISTRICT ATTORNEY
400 COUNTY CENTER, 4TH FLOOR
REDWOOD CITY, CA 94063-1662

FOR THE DEFENDANT:
PAUL F. DEMEESTER, ESQ.
EMILY K. ANDREWS, ESQ. (VIA ZOOM VIDEO)
SMCBA PRIVATE DEFENDER PROGRAM
333 BRADFORD STREET, SUITE 300
REDWOOD CITY, CA 94063

[2] PROCEEDINGS

REDWOOD CITY, CALIFORNIA

AFTERNOON SESSION FRIDAY, OCTOBER 14, 2022

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JUDGE FINIGAN: And the next matter, the Tagunicar matter, myself, Judge Finigan, I am recused from that, so I'm going to step off the bench. Judges Dabel and Greenberg will handle that matter.

Okay?

Thank you.

(Whereupon, Judge Finigan exits the courtroom.)

JUDGE DABEL: Thank you.

Ms. Andrews, can you hear the Court?

MS. ANDREWS: Yes.

Good afternoon, Your Honors.

JUDGE DABEL: Okay. Thank you.

So we are going to go to – on the record on the People v. Tagunicar.

Appearances, please.

MS. WINER: Rachel Winer for Respondent.

MR. DEMEESTER: Good afternoon, Your –

MS. ANDREWS: Good after- – go ahead.

MR. DEMEESTER: Good afternoon, Your – Your Honors.

Paul DeMeester, on behalf of Mr. Tagunicar.

MS. ANDREWS: And Emily Andrews, also on behalf [3] of Mr. Tagunicar.

JUDGE DABEL: Okay. Just for the record, then, I should note that, again, Judge Chou was planning to be here today, but, unfortunately, he was not able to be here today. So the first thing I needed to ask the parties is whether or not they would be agreeable to waiving his presence and also allowing him, then, to review these proceedings – the transcript of these proceedings to make any determination.

Is that going to be agreeable with all the parties that are present?

MS. WINER: Yes, Your Honor, so waived.

MR. DEMEESTER: That is agreeable, Your Honor.

MS. ANDREWS: So waived, Your Honors.

JUDGE DABEL: Okay. Thank you.

Okay. Very well then. Otherwise, I'll start with the People.

Do you have anything additional, oral arguments, to add to your written submissions?

MS. WINER: No, Your Honor. Nothing additional than what was already provided in the brief.

JUDGE DABEL: Okay. Thank you.

And the same question, then, for, I'll start with, Ms. Andrews.

MS. ANDREWS: Oh. Thank you, Your Honors. I'm going to defer to Mr. DeMeester.

[4] JUDGE DABEL: Okay.

MS. ANDREWS: Thank you.

MR. DEMEESTER: May it please the Court.

JUDGE DABEL: Please proceed.

MR. DEMEESTER: I have proceeded, Your Honor.

I winked at each one of you. I gave the thumbs-up signal. I shrugged my shoulders. I frowned my eyebrows. All of these things can never be captured by an audio link. Yet, these things are important if a judge winks or gives a thumbs-up to a party. That's a big deal. It could never be observed by the public. Yet, the public have a right to see how judges and how government counsel operate and what is happening to a criminal defendant. These are important values.

And on the date that Ms. Andrews electronically filed her opening brief in this matter was also the date that the Ninth Circuit panel in United States versus Allen, which we cited in the reply brief, published their opinion, which is on point in this case. Now, I realize that federal authority is persuasive. It is not binding. It is not controlling in a state appellate court. However, it is persuasive on both a substantive level as well as a procedural level, and I'll start with the procedural level first. Were Mr. Tagunicar not obtained relief through the appellate process all the way through a petition for certiorari, then, of course, he has [5] recourse to the federal habeas statute, section 2254, and a Sixth Amendment public trial claim is a viable claim that would be entertained by our federal courts. And in that sense, the Ninth Circuit decision in United States versus Allen would be binding and controlling on his habeas proceeding, so I – I think that's a very strong, persuasive reason why this Court should follow United States versus Allen.

Secondly is the substantive of conformance of Allen on our case. Allen was a little bit different in the sense that defense counsel in Allen, which was a – a criminal jury trial in the Northern District here in San Francisco, that counsel there said, "I don't want the audio link, we want a video link," whereas the only difference with Mr. Tagunicar was that Mr. Tagunicar requested full public access in the courtroom, public members to be present, in limited fashion. However, that distinction does not differ in terms of the application of Allen to our case, because in our case, the

Tagunicar case, video access was not – not even provided. It was only an audio link. And the Allen case is an audio link case.

And the Ninth Circuit in Allen states – stated that only providing an audio link for the members of the public to follow the proceedings was a total closure, and that is an important aspect beca- – with respect to the [6] remedy. A partial closure has a lesser standard than a total closure in terms of how constitutionally the remedy gets afforded. Allen said audio link is the same as a total closure, and that Allen court reversed the criminal convictions it had against Mr. Allen and remanded the case for new trial. So the total closure view of the court and the reversal are what should happen in the Tagunicar case if this Court, indeed, follows the reasoning and the analysis which was quite in-depth. It was not just a – a cursory review of the issue. It was an in-depth analysis, and it was the only issue in the published Allen case.

So it also makes rational sense in a policy matter. The Bill of Rights – and there's been a – large movements in – in the – since 1980s, which – what we call, sort of, adherence to the original intent. And, indeed, when we apply the notion of original intent to the public trial issue, it cannot have meant anything but members of the public being in physical attendance in the courtroom so they can see and hear all those winks and thumbs-ups and shrugged shoulders and everything that happens in the courtroom that an electronic means would not afford, not even a video link, and that's where we differ with Allen's defense counsel,

where we would say even a video link cannot capture, because the – the camera could only be focused on one end or the other, but [7] it doesn't capture everything in the courtroom. One can scan at one's own free will, and it's important sometimes to look at the jurors to see what they are doing or it's important to look at the bench or at counsel or at the witness or whoever it may be. Those are choices that are not afforded with video link, but we don't have to get into that whole difference between video and – and public presence, because the Allen case decides that an audio link, which is what our case had, was reversible error, and that's, indeed, what's presented here.

We'll have to leave it for a – a future case to decide whether video versus public presence is – is in the – a good or acceptable constitutional adjudication.

So with that, we urge the Court to follow Allen, to apply Allen, and to reverse all eight convictions against Mr. Tagunicar and to remand the case for new trial.

Thank you.

JUDGE DABEL: Okay. Thank you, Mr. DeMeester. I'd just ask the People again whether or not they have any further comments based on what Mr. DeMeester just forwarded or, again, are you submitting on the written materials?

MS. WINER: Your Honor, just briefly.

May it please the Court.

[8] Rachel Winer for Respondent, The People of the State of California.

To go to Mr. DeMeester's point that the – there were things done in a courtroom, perhaps, that are nonverbal, oftentimes, those nonverbal actions, for example, if they are done by a witness while they are testifying, they are reflected on the record, and that's so that it is in the record for the public to have access to.

This was a very rare circumstance. It was at the peak of COVID-19, and the judge at the time did what was necessary to keep this trial proceeding and that included keeping individuals six feet apart in the courtroom. There were not circumstances that allowed for the public to be physically present. And by doing so, the Count found an alternative of – or means to allow the public access, which was by allowing this audio line. The fact that this was during COVID-19 is what's dispositive here, and the defendant was not denied any constitutional right in this case. Therefore, the People would ask that a mistrial not be granted and that the respondent – or that Petitioner – or – my apologies – Appellant's motion be denied.

JUDGE DABEL: All right.

And it looks like Mr. DeMeester might give a brief rebuttal.

[9] MR. DEMEESTER: Thank you, Your Honor.

JUDGE DABEL: Go ahead.

MR. DEMEESTER: Thank you.

The Allen case answers the People's concerns. COVID was, indeed, an overriding interest and the parties agreed on that with Allen. However, the Allen court said to provide only the audio link is a closure that's not narrowly tailored to the situation at hand. There could have been a myriad of other things that could have happened, could have been done – temperature checks, limiting the number of people in a courtroom, requiring vaccination, any of the sort – and it comes back to the point that we raised both in the trial court and in our briefing, which is, if COVID-19 was, indeed, as bad to be an overriding concern, then what were the rest of the people doing there? Why was the judge there? Why was the bailiff there? Where – why were court staff there? the parties? counsel?

If it's a public health concern, they shouldn't be in that courtroom either, and there is, indeed, an alternative – a reasonable alternative that the California Courts of Appeal in our district, actually recently on a San Francisco case, have decided, which was a – and I think it's called Hernandez-Valenzuela versus Superior Court; it's listed in our – stated in our re- – reply brief – where the Court of Appeal in [10] California stated COVID-19 is a sufficient reason for a trial court, on its own, to continue a jury trial because of COVID-19, and – in other words, that was an alternative. Even over the objection of the defendant for a court to say we can't do it in the COVID-19 atmosphere, we are going to continue the case. We are going to continue all

jury trial cases. So there were a number of reasonable alternatives that were not explored.

And as the Allen court pointed out constitutionally in Sixth Amendment jurisprudence, it is the court's obligation to consider the reasonable alternatives. They don't have to be proffered by any of the parties, and, of course, the – it was not narrowly tailored and – and that governs in this case also, so Allen is right on point and displaces all of the People's arguments.

Thank you.

JUDGE DABEL: Okay. Thank you folks.

At this point I'd just ask if Judge Greenberg has any questions.

JUDGE GREENBERG: I do not.

JUDGE DABEL: Okay.

The Court also, Judge Dabel, does not have any questions either.

All right folks.

Thank you for your submissions.

[11] You will receive a written order.

Okay?

MR. DEMEESTER: Thank you both.

JUDGE GREENBERG: Thank you.

MS. ANDREWS: Thank you.

MS. WINER: Thank you.

(Whereupon, proceedings were concluded.)

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[Reporter's Certificate Omitted]

IN THE COURT OF APPEAL OF THE S[ILLEGIBLE]
IN AND FOR THE FIRST APPELLATE DISTRICT
DIVISION ___

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
CHRIS NOEL TAGUNICAR,
Petitioner-Appellant. /

No. A___

PETITION FOR TRANSFER

(Filed Jan. 30, 2023)

Appellate Division No. 21-AD-000009
Superior Court No. 19-NF-007704-A
County of San Mateo

Following the December 15, 2022
Unpublished Decision and January 17, 2023
Denial of the Application for Certification
By the Appellate Division

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ATTORNEYS FOR PETITIONER
CHRIS NOEL TAGUNICAR

PETITION FOR TRANSFER

TO THE HONORABLE JIM HUMES, ADMINISTRATIVE PRESIDING JUSTICE, FIRST DISTRICT COURT OF APPEAL OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE FIRST DISTRICT COURT OF APPEAL:

Petitioner CHRIS NOEL TAGUNICAR petitions this Court to transfer this case to this Court pursuant to the Court's transfer authority. (Cal. Rules of Court, rule 8.1006.)

This petition is timely and Mr. Tagunicar has fulfilled the procedural requirements therefor. The Appellate Division of the Superior Court of San Mateo County filed its unpublished *Memorandum Opinion* on December 15, 2022. A copy of the decision is hereto attached at pp. 25-31.

The decision of the Appellate Division became final on January 17, 2023 (the 30th and 31st days were a Sunday and a holiday), 32 days after the Clerk of the Superior Court had mailed the decision to the parties on December 16, 2022. (See Cal. Rules of Court, rule

8.888(a)(1).) The *Affidavit of Mailing* is hereto attached at p. 32.

Mr. Tagunicar filed his *Appellant's Petition for Rehearing and Application for Certification* on December 28, 2022, pursuant to California Rules of Court, rules 8.889 and 8.1005.

On January 17, 2023, the Appellate Division denied the application for certification and petition for rehearing. A copy of the Denial Order is hereto attached at pp. 33-34.

ISSUES PRESENTED

(1) Does the Sixth Amendment public trial right mean that members of the public have a right to be physically present in the courtroom during the trial?

(2) May a criminal defendant assert the media's First Amendment right to be physically present in the courtroom during trial?

NECESSITY FOR TRANSFER

Transfer is necessary to settle an important and novel question of law. (Cal. Rules of Ct., rule 8.1002).) Transfer is appropriate to resolve an issue of first impression. (*Rudnick v. Superior Court* (1974) 11 Cal.3d 924, 928 ["[W]e are presented with a question of first impression which is of general importance to the trial courts and to the profession, and in conjunction with

which general guidelines can be laid down for future cases."].)

This case raises an important issue of first impression. The COVID19 pandemic impacted court proceedings throughout the state commencing on March 16, 2020, with the suspension of trials, limits on who could enter a courtroom, social distancing, masking and vaccinations requirements. COVID is still present among us and may flare up again in the future, rendering courts to take measures once again to limit its spread.

Mr. Tagunicar's trial took place in the midst of the pandemic, during March and April 2021. He demanded that the public and the media be allowed to be present in the courtroom during his trial, asserting his First and Sixth Amendment rights to a public trial. His in limine motion was denied and the public was excluded. Only an audio feed was made available. When during the prosecution case-in-chief, a member of the public sought to gain entry to the courtroom, he was turned away. Mr. Tagunicar's abstract constitutional rights had ripened into a concrete constitutional injury. His mistrial motions following the violation of his rights were denied, although the trial court permitted a limited public presence after the first mistrial motion had been brought. The court's belated change of heart did not remedy the constitutional violation caused by the earlier total closure court decision.

No published decision from either the United States highest court or our state's appellate courts has addressed total closure during the COVID pandemic.

The United States Ninth Circuit of Appeals issued a decision that supported Mr. Tagunicar's public trial demand but that case differed from this case in that the federal defendant agreed to video streaming (unlike Mr. Tagunicar who wanted full public access) but the district court permitted only audio access. (*United States v. Allen* (9th Cir. 2022) 34 F.4th 789 (*Allen*) [conviction reversed and case remanded for a new trial].) Mr. Tagunicar urged the Appellate Division to follow *Allen* but the court below declined.

Three public trial right appellate cases currently have petitions for review pending in our Supreme Court but none of them present the total public closure issue raised herein. The unpublished decision by Division Four of this Court in *People v. Flowers* (Dec. 16, 2022) 2022WL17727128 (rev. filed 1/16/2023; S278120) involved a defense request to have the testimony of sex assault victims to be video streamed as opposed to merely audio streamed. Division One of this Court's unpublished decision in *People v. Waldron* (Dec. 28, 2022) 2022WL17974642 (rev. filed 1/27/2023; S278349) involved limited public access (one seat) but did not involve any claim that anyone was turned away or prevented from attending the trial, unlike in the instant case. A published Fourth District Court of Appeal decision is not on point because eight members of the public were admitted into the courtroom during the trial. (*People v. Kocontes* (2022) 86 Cal.App.5th 787 [rev. filed 1/26/2023; S278325].)

The infringement of the right to a public trial based on public health concerns is an important question of law meriting this Court's review.

STATEMENT OF THE CASE AND FACTS

Mr. Tagunicar was convicted by jury of eight misdemeanors: two counts of making annoying phone calls (Pen. Code, § 653m, subd. (b)), three counts of unlawful communications with the 911 emergency system (*id.*, § 653x, subd. (a)), two counts of falsely reporting a crime (*id.*, § 148.5, subd. (a)), and one count of making criminal threats (*id.*, § 422, subd. (a).)

At the outset of his jury trial, on March 26, 2021, the court denied Mr. Tagunicar's Motion In Limine No. 8 to allow the public's presence at his trial. The public only had audio access. (RT 99; CT 104-118.) During the People's case-in-chief, a member of the public, Mr. Kenneth H. Wine, was refused entry into the courtroom when he tried to enter to watch the trial. (CT 128-129.) Mr. Tagunicar twice moved for a mistrial based on the violation of his public trial rights. (CT 125-129, 185-199.) The court denied both motions. (RT 643, 660-668.) On April 21, 2021, the jury convicted Mr. Tagunicar on the eight above-mentioned charges and was unable to render verdicts on three other charges that were dismissed upon the People's motion. (RT 1005-1007, 1020, 1028.)

Mr. Tagunicar filed a timely notice of appeal. (CT 400-402.) On appeal, he claimed that the trial court erred by excluding the public from the first part of his

jury trial, in violation of his First and Sixth Amendment public trial rights, requiring a reversal of the judgment based on structural error. The Appellate Division of the Superior Court disagreed and affirmed the judgment. Mr. Tagunicar's petition for rehearing and application for certification were subsequently denied. This petition follows.

SUMMARY OF THE ARGUMENT

The Sixth Amendment guarantees Mr. Tagunicar his right to a public trial. The exclusion of the public from the courtroom during the trial, without any of the requirements having being met that might justify closure, violated that right and constitutes structural error, requiring reversal.

Second, from the outset, Mr. Tagunicar consistently asserted the media's right to attend the trial in the courtroom based on the First Amendment. (CT 105-112, 115-118.) His assertion was proper.

ARGUMENT

I BANNING THE PUBLIC FROM THE COURTROOM VIOLATED MR. TAGUNICAR'S RIGHTS UNDER THE SIXTH AMENDMENT

A. Standard of Review

Appellate courts review a defendant's claim that he was denied his constitutional right to a public trial *de novo*, but review the trial court's underlying factual

determinations for closure for substantial evidence. (*People v. Scott* (2017) 10 Cal.App.5th 524, 531.)

B. No Justification Was Shown for Excluding the Public

The Sixth Amendment directs, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." (U.S. Const., Amdt. 6.) This provision is applicable to the States via the Due Process Clause of the Fourteenth Amendment. (*In re Oliver* (1948) 333 U.S. 257, 273.)

> . . . a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.
>
> (*Estes v. State of Texas* (1965) 381 U.S. 532, 584 (Warren, C.J., concurring opinion.)

The right to a public trial serves two important interests. (*People v. Scott, supra*, 10 Cal.App.5th, at p. 530.) First, it protects those who are accused of a crime by helping to ensure that the innocent are not unjustly convicted and that the guilty are given a fair trial. (*Ibid.*, citing *In re Oliver, supra*, 333 U.S., at p. 270, fn. 25.) Second, there is a "strong societal

interest in public trials"; they provide an opportunity for spectators to observe the judicial system, improve the quality of testimony, encourage witnesses to come forward with relevant testimony, and prompt judges, lawyers, witnesses, and jurors to perform their duties conscientiously. (*People v. Scott, supra*, 10 Cal.App.5th, at p. 530, citing *Gannett Co. v. DePasquale* (1979) 443 U.S. 368, 363; *Press-Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 508 (*Press-Enterprise I*.)

In *Press-Enterprise I*, the U.S. Supreme Court explained the value of open trials as follows:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.
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> (*Ibid.*, italics in original, citation omitted.)

In construing a constitutional provision, a court must look for its meaning. (*District of Columbia v. Heller* (2008) 554 U.S. 570, 576 (*Heller*).) In interpreting a constitutional text, courts are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." (*United States v. Sprague* (1931) 282 U.S.

716, 731; see also *Gibbons v. Ogden* (1824) 9 Wheat. 1, 188.)

> When this Court is called upon to consider the meaning of a particular provision of the Bill of Rights—whether in a case arising from a state court or a federal one—it is necessary to look to the specific language of the provision and the intent of the Framers when the Bill of Rights itself was adopted. This approach is necessary, not because the Framers intended the Bill of Rights to apply to the States when it was proposed in 1789, but because the application of those provisions to the States by the Fourteenth Amendment requires that the original intent be the governing consideration in state as well as federal cases.
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> (*Williams v. Florida* (1970) 399 U.S. 78, 108, fn. 2 (Black, J., conc. and diss.).)

The meaning of the term "public" at the time of the framing of the Bill of Rights is without controversy. Samuel Johnson's Dictionary of the English Language, the same language authority relied upon by the U.S. Supreme Court in *Heller* (at p. 581), defines "public" as "open for general entertainment," and provides an example: "The income of the commonwealth is raifed on fuch as have money to fpend at taverns and publick houfes." 2 S. Johnson, Dictionary of the English Language 419 (6th ed.) (1785) (original spelling maintained).

"Public" meant members of the public were present on the spot. They could see, hear, smell, taste if you will. There were no phones back in 1789. Besides, phones do not allow a member of the public to see, smell or taste. And one may not even hear everything over a phone line. An audio link does not render a trial "public" as that term was understood by those who drafted and voted on the Bill of Rights. Mr. Tagunicar was denied a public trial.

"Given the importance of public trials to both the accused and the public, there is a '"presumption of openness"' in the courtroom that '"may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."'" (*People v. Baldwin* (2006) 142 Cal.App.4th 1416, 1421, quoting *Waller v. Georgia* (1984) 467 U.S. 39, 45 (*Waller*).)

The Supreme Court in *Waller* identified four requirements necessary to justify exclusion: (1) the existence of an overriding interest that is likely to be prejudiced absent the closure; (2) the closure is narrowly tailored, i.e., no broader than necessary to protect that interest; (3) no reasonable alternatives to closing the proceeding are available; and (4) the trial court must "make findings adequate to support the closure." (*Id.*, at p. 48; accord, *People v. Woodward* (1992) 4 Cal.4th 376, 383.)

A court cannot determine the application of the above principles in the abstract; they must be determined by

reference to the facts of the particular case. (*People v. Pena* (2012) 207 Cal.App.4th 944, 949.)

Further, "[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute." (*Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 606.) The presumption of openness may be rebutted " . . . only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." (*Press Enterprise I, supra*, 464 U.S., at p. 510.) "[T]he State's justification in denying access must be a weighty one." (*Globe Newspaper v. Superior Court, supra*, 457 U.S., at p. 606.) "[I]t must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." (*Id.*, at p. 607.) The trial court must consider available alternatives. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the [proceedings]." (*Press Enterprise I, supra*, 464 U.S., at p. 511.)

None of the *Waller* factors that permit barring the public and the media from the courtroom have been met here.

1. No Overriding Interest Demonstrated

Reported cases indicate only two interests for which the right to an open trial may give way: "the defendant's right to a fair trial or the government's

interest in inhibiting disclosure of sensitive information." (*Waller, supra*, 467 U.S., at p. 45.) Neither interest is implicated here. The contrary is true, as Mr. Tagunicar insisted, he could obtain a fair trial only if the public is allowed to be present in the courtroom.

The current COVID-19 pandemic does not furnish such an interest. The *Waller* court cautioned that "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care." (*Ibid.*) If the COVID-19 threat to public health is indeed that compelling an interest to override the presumption of an open trial, then this begs the question why any of the remaining participants (judge, jurors, counsel, clerk, court reporter, bailiff, and witnesses) were still present in the courtroom? The proffered COVID-19 interest militates in favor of continuing the trial until it no longer poses a threat to anyone, not just the excluded members of the public and the media. If the overriding interest is COVID-19, then no one should have been in that courtroom.

2. Closing the Courtroom Was Overbroad

If the trial court can fashion ways to seat the parties, their counsel and investigators, the court staff and the judge, despite the ongoing COVID-19 pandemic, then the Court could also have accommodated members of the public who wished to attend. Granted, there may be a need to limit the numbers. That is acceptable but physical exclusion is not.

The closure was not narrowly tailored, as that *Waller* factor was extinguished by the trial court's comments that had the court known that Mr. Wine was trying to attend the trial, the court would have accommodated him, and would do the same from that point forward. (RT 639, 642.)

Also, it must be borne in mind that the right to a public trial is always limited because it is impossible to seat the world's population of 7.9 billion people in a courtroom, or a thousand San Mateo County residents, or even a hundred. Hence, size limitations are always imposed but that is a far cry from total public exclusion, which the trial court imposed at the in limine proceedings. A narrowly tailored ruling would have been to limit the number of public and media spectators without putting that number at zero, as did the trial court.

3. Audio Was Not a Reasonable Alternative

An audio feed for which one has to apply falls short of the purpose of an open trial. "Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." (*Globe Newspaper v. Superior Court, supra*, 457 U.S., at p. 606; footnote omitted.) The public and media must be able to see what the judge does, what the Government's prosecutor does, what the jurors do. A pause in the proceedings can be pregnant with meaning. The audio

version of that would completely miss the point. "[T]he appearance of justice can best be provided by allowing people to observe it." (*Richmond Newspapers Inc. v. Virginia* (1980) 448 U.S. 555, 572.) The meaning of "observe" includes "watching," not merely listening to an audiofeed. (See https://www.merriamwebster.com/dictionary/observe; retrieved on June 10, 2020.) Then Chief Justice Burger described the "right of access" in attending criminal trials as "to hear, see, and communicate observations concerning them. . . ." (*Richmond Newspapers, Inc. v. Virginia, supra*, 448 U.S., at p. 576.) The Chief Justice was not limiting his discussion to "hearing only."

The federal appeals court in *Allen* held that audio streaming of the trial is not a reasonable alternative. (*United States v. Allen, supra*, 34 F.4th, at p. 796.) The trial court rejected Mr. Tagunicar's suggestion for a bigger courtroom or an alternate venue, such as the Event Center where jury selection had taken place. (RT 643.)

4. Findings Inadequate to Support Closure

The Court's exclusion of the public and the media from the courtroom for health reasons is akin to the unlawful exclusion of the public during the voir dire portion of the jury trial of Eric Presley in *Presley v. Georgia* (2010) 558 U.S. 209, wherein the trial court had stated that, "'[t]here just isn't space for them to sit in the audience.'" (*Id.*, at p. 210.)

The trial court below essentially said that given the coronavirus pandemic, there just is not enough space for members of the public and the media to sit in the courtroom.

II BANNING THE PUBLIC AND MEDIA FROM THE COURTROOM VIOLATED MR. TAGUNICAR'S FIRST AMENDMENT RIGHTS

The First Amendment provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U.S. Const., Amdt. 1.) The Fourteenth Amendment renders this provision applicable to the States. (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539; *Gitlow v. New York* (1925) 268 U.S. 652.)

"Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment." (*Globe Newspaper Co. v. Superior Court, supra*, 457 U.S., at p. 604; footnote omitted.) The U.S. Supreme Court explained that " . . . the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. (*Ibid.*; citations omitted.) Said the Court:

> Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government.
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> (*Globe Newspaper Co. v. Superior Court, supra*, 457 U.S., at p. 604.)

"Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." (*Id.*, at pp. 604-605.) Then Chief Justice Burger wrote: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees." (*Richmond Newspapers, Inc. v. Virginia, supra*, 448 U.S., at p. 575).) Furthermore, the right to assemble includes the public doing so in a courtroom. (*Id.*, at pp. 577-578.)

"The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." (*Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 7 (*Press-Enterprise II*).) Members of the media "are entitled to the same rights as the general public" when it comes to courtroom access. (*Estes v. State of Texas, supra*, 381 U.S., at

p. 540.) Given that the United States Supreme Court has described the rights at issue as "shared rights," implicitly a criminal defendant has First Amendment standing.

"[I]n *every* criminal case . . . the public is a party." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1210; italics in original.) Our Supreme Court and the nation's high court agree that "the governing principles under [the Sixth] [A]mendment are the same as those pertaining to the right of access under the First Amendment." (*Id.*, at p. 1213, fn. 31.) First Amendment access rights to a criminal trial are not third party rights that are external to a criminal defendant. A criminal defendant is a member of the public also. Said one New York court:

> . . . the People are able to argue in favor of the societal, First Amendment right to an open courtroom, as would the defense be able to so argue. If the parties to this proceeding cannot argue in favor of this societal right, who could? While large media organizations at times ask to intervene when these issues arise, and argue in favor of open courtrooms, it is not reasonable to deputize the media as the only enforcers of the public's right. The vast majority of criminal trials begin and end without ever becoming of interest to the media. That should not be the deciding factor on whether there is anyone to argue in favor of the public's right to an open trial.
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> (*People v. McRae* (2015) 47 Misc.3d 619, 622, 8 N.Y.S.3d 549, 552.)

In *People v. Harris* (1992) 10 Cal.App.4th 672, the Court of Appeal fully considered all the implications of the public's right to access in a criminal case where peremptory jury challenges had been made in chambers, not in open court, even though the defense joinder of the People's objection was expressed in First Amendment terms only. (*Id.*, at pp. 686-687.) Implicitly, the *Harris* court deemed the defendant to have First Amendment standing. (*Ibid.*)

A Missouri court noted that "[t]he United States Supreme Court's public-trial cases have not yet reached the issue of whether a criminal defendant may raise the public's First Amendment right to a public trial, or whether the defendant is limited to the Sixth Amendment to claim a violation of the right to a public trial." (*State v. Williams* (Mo.App. W.D.2010) 328 S.W.3d 366, 371.) In *Williams*, the criminal defendant had sought closure of the courtroom. The appellate court held that "Williams's explicit advocacy for courtroom closure forecloses *him* from now raising such a First Amendment claim. . . ." (*Id.*, at p. 373.) In the case at bench, defendant's First and Sixth Amendment claims are in perfect alignment in favor of an open trial.

Often, tension arises when the defendant in a criminal case seeks to close the courtroom and the media want access. (See *Press-Enterprise II, supra*, 478 U.S., at p. 7 [the defendant requested a closed preliminary hearing; the media sought access to the transcript of the preliminary hearing].) This is not the case here. Mr. Tagunicar wanted a public trial, both as the

accused (Sixth Amendment) and as a member of the public (First Amendment). What the nation's high Court stated in *Press Enterprise I* equally applies here:

> For present purposes, how we allocate the "right" to openness as between the accused and the public, or whether we view it as a component inherent in the system benefitting both, is not crucial. No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness.

(*Press Enterprise I, supra*, 464 U.S., at p. 508.)

Mr. Tagunicar's demand for a public trial and the public's right to access at such a trial coincide. The two Amendments are intertwined: "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the free press and public." (*Waller v. Georgia, supra*, 467 U.S., at p. 46.)

The First Amendment analysis is very similar to that under the Sixth Amendment. *Press Enterprise I* provides us with the analytical framework: overriding interest; narrowly tailored to serve that interest; reasonable alternatives to be considered; and based on findings. (*Press Enterprise I, supra*, 464 U.S., at pp. 510-511.) Worded differently, the *Press Enterprise I* test examines the same factors as *Waller*.

III REVERSAL IS REQUIRED AS PUBLIC TRIAL VIOLATION CONSTITUTES STRUCTURAL ERROR

"[A] violation of the right to a public trial is a structural error." (*Weaver v. Massachusetts* (2017) 582 U.S. ___, 137 S.Ct. 1899, 1908.) When a defendant has been deprived of the right, "no showing of prejudice is required '[b]ecause the right to a public trial protects the defendant from very subtle but very real injustices,' and '[r]equiring such a defendant to prove actual prejudice would deprive most defendants of the right to a public trial.'" (*People v. Scott, supra*, 10 Cal.App.5th, at p. 531; see also *People v. Esquibel* (2008) 166 Cal.App.4th 539, 551-552.)

CONCLUSION

For the foregoing reasons, transfer should be granted.

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Respectfully submitted,

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