

October 13, 2020

By First Class Mail and Email:

Hon. James R. McCabria
Chief Judge, Douglas County District Court
111 East 11th Street
Lawrence, KS 66044
[REDACTED]

RE: Douglas County District Court and Public Criminal Trial

Dear Chief Judge McCabria,

We write to express concerns regarding Douglas County District Court's ("the Court") policies and practices concerning the ongoing COVID-19 pandemic and the constitutional right of defendants and the community to public criminal trials.

I. Factual Background

Over the last several months, you have issued several administrative orders altering the Court's operations to protect the health and safety of litigants, court staff, and the public. As a part of those orders, the Court has significantly curtailed the ability of members of the public, including the news media, to attend criminal trials in person. Instead, it appears that the Court has been attempting to provide remote public access through a live stream of criminal court proceedings to a channel on YouTube. In addition, we understand that, per Administrative Order 20-16 (dated March 13, 2020) members of the public may petition individual trial judges for permission to attend particular proceedings in person, while members of the media may attend any proceeding without obtaining prior permission.

We recognize the challenges courts are facing amid a global pandemic, and appreciate your proactive attempt to provide public access to court proceedings while balancing legitimate public health and safety concerns. Unfortunately, we have received reports indicating that these provisions—both the live YouTube stream and prior approval rules outlined in Order 20-16—are inadequate measures to protect criminal defendants' Sixth Amendment and the public's First Amendment rights to public criminal proceedings. Members of the media report that they were turned away at



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the courthouse door when they tried to attend proceedings in person, despite the fact that Order 20-16 specifically states that, “members of the media shall be permitted access to the courtrooms and adjacent hallways without special restriction.”¹ We also have heard that several times throughout the COVID-19 epidemic, the Court’s YouTube stream has been completely down, or without functioning audio and/or video.² When people raise concerns about not being able to view proceedings in real time, they are told that transcripts will be made available at a later, albeit unknown, date.³ One journalist described being denied access to court proceedings on a day when the YouTube stream was down and also noted that several remote proceedings were “glitchy” and that parts of the proceedings were frozen or inaudible.⁴

II. Legal Analysis

We understand that court operations likely look much different now than they did before the pandemic began, and that you and your staff are working hard to ensure that trials can continue unimpeded with everyone’s rights and safety in mind. However, based on the above, current Court operations are impeding on the constitutional rights to a public trial.

A. The Court’s practices infringe on the public’s First Amendment right of access to court proceedings.

The public’s right of access to court proceedings is essential not only to the functioning of the judiciary, but to representative democracy writ large. *See, e.g., Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984) (openness in judicial proceedings ‘enhances both the basic fairness of the [proceedings][and the appearance of fairness so essential to public confidence in the system’); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 556-57 (1980) (right to attend criminal trials is “implicit in the

¹ *See, e.g.,* Mackenzie Clark, *COVID-19 precautions, ‘technical difficulties’ hinder public access to court hearing in Lawrence murder case*, LAWRENCE WORLD-JOURNAL (July 13, 2020), <https://www2.ljworld.com/news/public-safety/2020/jul/13/covid-19-tech-difficulties-access-washington-case/>.

² *See, e.g., id.*

³ We recognize, however, that on at least one occasion when the YouTube video stream was not operational, the Court apologized for the error and worked to make the full transcript of the proceeding available that day.

⁴ We also heard some reports that defendants are appearing in person at the Court for hearings, but all other parties—including judges, prosecutors, and testifying witnesses—are appearing remotely. Although beyond the scope of this letter, we note that in addition to contorting and potentially violating defendants’ public trial rights, this practice may impermissibly infringe on defendants’ rights to confront accusatory witnesses as guaranteed by the Sixth Amendment’s Confrontation Clause.



guarantees of the First Amendment”). People have a general constitutional right and interest in watching criminal proceedings as a means of providing a check on court operations. Moreover, family members and friends of the accused, as well as other members of the public, may also want to attend criminal proceedings in person—or at least in a way that is known to accused individuals—to offer support. Current Court guidance prevents people from doing so and impermissibly infringes on their First Amendment rights.

The First Amendment also protects the right of the press to attend criminal proceedings. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers*, 448 U.S. at 573. Journalists often act as “surrogates” for the public by reporting on court proceedings of public interest or importance. *Richmond Newspapers*, 448 U.S. at 573; *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (because individuals cannot always attend court proceedings or comb through court documents, news organizations play a vital role in calling attention to specific cases of importance or flaws in the justice system by attending proceedings and reviewing documents on the public’s behalf).

B. The Court’s practices infringe on Defendants’ Sixth Amendment right to a public trial.

Likewise, criminal defendants are entitled to a public trial under the Sixth Amendment of the U.S. Constitution. *See* US. CONST. AMEND. 6 (“In all criminal prosecutions, the accused shall enjoy the right to a speedy *and public* trial”) (emphasis added); *see also State v. Reed*, 302 Kan. 227, 237 (2015). This right extends not only to jury trials, but to all proceedings throughout the case in which the public would have an interest. *See generally Press-Enterprise Co.*, 464 U.S. at 508.

Public proceedings are essential to ensure fair trials, allow for a public check on the judicial and prosecutorial functions, encourage witnesses to come forward, and to discourage perjury. *See State v. Reed*, 302 Kan. at 240-41. For these reasons, “trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials.” *Presley v. Georgia*, 558 U.S. 209, 215 (2010). Courts should only close proceedings to the public where there is an overriding interest that would be prejudiced by public attendance, the closure is no broader than necessary to protect that interest, and reasonable alternatives to closing the proceeding are unavailable. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).



C. The Court’s current policies and practices are insufficient and create an undue burden.

Current Court policies and procedures have proven to be inadequate in protecting people’s First and Sixth Amendment rights to public court proceedings. By several accounts, the Court’s YouTube streaming is unreliable and an unsatisfactory method of ensuring that members of the public can watch court proceedings. In addition, the lack of consistently available transcripts following the proceedings also burdens public access. Although the Court’s administrative orders note that individual judges may grant in-person access on a case-by-case basis, nothing in the order explains how a member of the public should go about petitioning the court for access or the criteria that judges will use to evaluate such requests. The order only states that judges shall give “due consideration to such requests and timely respond.” Moreover, requiring members of the public to affirmatively petition the court for permission to attend in person places an undue burden on those who want to exercise their constitutional rights—many of whom may not even know about Administrative Order 20-16 or how to file a petition in advance of the proceeding they would like to attend.

It is also clear that Court personnel are not following your Administrative Order consistently, at least with respect to members of the news media who reported being turned away despite the order’s explicit statement that media may attend proceedings in person “without special restriction.” This indicates that your staff may require additional training or procedures to ensure the press retains unfettered access to court proceedings.

D. Reasonable alternatives exist that would protect the health and safety of litigants, court personnel, and the public.

The Court has an obligation to keep proceedings as open to the public as possible, especially when reasonable alternatives are available and would create less of a burden on the public and criminal defendants’ exercise of their constitutional rights. We are now over six months into the COVID-19 pandemic. Restaurants, schools, county and state government services (such as drivers’ license and car registration renewals), and other public places have all put in places new procedures that allow for in-person operations in a manner that keeps people as safe as possible.

Although we understand the need to adjust Court procedures in light of the public health risks posed by this deadly virus, it is clear that the Court



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could alter operations in a way that does not infringe on peoples' constitutional rights. For example, you could reduce the capacity of each courtroom to allow for physical distancing. The Court could also require masks, consistent with State and County public health guidance, and provide hand sanitizer stations at each courthouse door. For cases with significant public interest, capacity restrictions may mean that some members of the public may be unable to attend in person. However, by allowing for at least some public attendance by community members, in addition to the media, the Court will more adequately protect the rights of both attendees and defendants alike.

We are sympathetic to the Court's valid public health and safety interests and the need to protect all those who enter the courthouse doors. However, we need not choose between public health and constitutional public access rights. Even at this difficult and operationally complex point in time, we cannot set aside fundamental constitutional rights.

We are eager to assist you with the development of revised Administrative Orders and plans for safely reopening public proceedings. Should you wish to discuss this matter more, please do not hesitate to reach out.

Kind regards,

A handwritten signature in black ink that reads "Sharon Brett".

Sharon Brett
Senior Staff Attorney
ACLU of Kansas

A handwritten signature in blue ink that reads "Lauren Bonds".

Lauren Bonds
Legal Director
ACLU of Kansas