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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

(COOK DIVISION)

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL JACKSON,

Defendant.

Case No.: 1133603

OPPOSITION TO MEDIA ENTITIES' MOTION TO UNSEAL

DATE: January 16, 2004
TIME: 8:30 a.m.
DEPT: SM 2 (Melville)

Defendant Michael Jackson ("Mr. Jackson") hereby opposes the media entities' Motion to Unseal Certain Court Records Related to Search Warrant #884686 (the "Motion to Unseal") on the grounds that the relief requested cannot be granted (or denied) prior to the defense having had an opportunity to review the records *in camera*. Granting the motion absent such review would deny Mr. Jackson the effective assistance of counsel guaranteed by the United States and California Constitutions.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The media entities seek the unsealing of documents that the defense has not yet had an opportunity to review. (See Declaration of Mark J. Geragos at paragraph 2.) Therefore, the merits – or lack thereof – of the motion cannot be determined without first granting the defense an *in camera* hearing during which it has an opportunity to review the documents and determine whether, and if so, to what degree, their unsealing would affect Mr. Jackson's ongoing investigation into the matters set forth in the felony complaint

II.

MR. JACKSON IS ENTITLED TO AN *IN CAMERA* REVIEW OF DOCUMENTS PRIOR TO A HEARING ON UNSEALING

The media entities base their request essentially on the California Rules of Court.[1] (See Motion to Unseal, *passim*.) As the moving papers themselves demonstrate, however, the rules implicitly presume that the affected parties have had an opportunity to actually review the records sought to be unsealed. (See, e.g., Cal. Rules of Court, rule 243.1 (d).) Otherwise, the parties could not intelligently respond to the request.

Indeed, rule 243.2 (h) provides that "[n]otice of any motion, application, or petition to unseal must be filed and served on all parties in the case." That notice requirement, along with the right to oppose the motion and obtain a hearing, would be meaningless if the defendant were not entitled to first review and evaluate the records at issue.

In other words, the detailed factual findings advocated here by the media

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[1]The applicable rules of court are a codification of *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1171. (See Cal. Rules of Court, rule 243.1, Advisory Com. Com. (2004).)

defendants (see, e.g., Cal. Rules of Court, rule 243.2 (c) (d)) cannot, by definition, be knowingly litigated if the defendant's counsel does not know what it is the media wants unsealed.

Here, as noted, neither Mr. Jackson nor his counsel has not had an opportunity to review the sealed documents, so it is impossible for him to put forth an informed argument as to why the documents should or should not remain sealed.[2] The defense respectfully submits that the proper procedure by which to handle the media entities' motion is for the Court to conditionally unseal the documents, order a copy be provided to the defense, order the documents placed back under seal and order that the hearing on the motion to unseal be continued to a future date with a further briefing schedule.

Swanson v. Superior Court (1989) 211 Cal.App.3d 332 provides analogous support for this position. There, a defendant sought access to an affidavit supporting a search warrant, arguing that if the affidavit were sealed in its entirety he would not be able to intelligently challenge the warrant. The Court of Appeal held:

> A defendant who cannot view any portion of the affidavit cannot make a judgment as to whether any of these challenges should be made. . . .This of course, leaves the defendant without an adversary before the court who can not only ascertain that the appropriate challenges are considered but also that the defense argument is vigorously and effectively pursued. [¶] We conclude that the only portion of an affidavit that may be concealed from the defendant is that portion which necessarily would reveal the identity of a confidential informant.

(*Id.*, at p. 339.)

The court noted that "[t]he problem with sealing the entire affidavit is one of due process.

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[2]On December 24, 2003, the defense stipulated that the material in question was confidential, and that its disclosure would harm the parties' respective investigations. That stipulation at such an early stage of the proceedings was properly based upon the fact that (1) a search was conducted, and (2) the trial court sealed the records on its own *before* any stipulation.

It prevents the defendant from being able to attack the warrant with the assistance of counsel." (*Id.*, at p. 340.)

Albeit in a different context, the same basic reasoning applies here. The media now seeks access to sealed records which the defense has not yet been able to see. Just as was true for the defendant in *Swanson*, Mr. Jackson cannot be effectively represented on this motion unless and until his counsel is permitted to review the records in question to determine the degree of prejudice, if any, the unsealing will cause him.[3]

CONCLUSION

In light of the foregoing, Mr. Jackson respectfully requests that the Court permit a copy of the materials be provided to the defense only. Mr. Jackson further requests that a subsequent briefing schedule and hearing on the media entities' motion be set. Mr. Jackson believes this procedure is mandated by the United States and California Constitutions and the California Rules of Court, and that it will also further the objectives of this Court's December 26, 2003 Order sealing the materials "until, at a minimum, the arraignment in this matter."

Dated: January 11, 2004

Respectfully submitted,
GERAGOS & GERAGOS

By: _____
MARK J. GERAGOS
Attorney for Defendant
MICHAEL JACKSON

_____
SHEPARD S. KOPP
Attorney for Defendant
MICHAEL JACKSON

[3]Mr. Jackson notes that at least one movant, the Los Angeles Times, has acknowledged under similar circumstances in the case of *People v. Scott Lee Peterson*, the defense's right to "have an opportunity to make a showing in support of sealing." (See Exhibit 1 at 4:4-5.)

DECLARATION OF MARK J. GERAGOS

I, MARK J. GERAGOS, declare as follows:

1. I am an attorney at law, licensed to practice in the State of California, State Bar No. 108325, with principal offices located at 350 South Grand Avenue, 39th Floor, Los Angeles, California 90071. I am the attorney for the defendant, Michael Jackson, in this criminal action. I have personal knowledge of the following facts and if called as a witness, I could and would competently testify thereto.

2. Despite a prior request directed to the prosecution, the defense has not been given an opportunity to view the search warrants and related materials the media entities now seek to have unsealed. Absent such a review I cannot provide effective counsel to Mr. Jackson concerning the media entities motion to unseal the documents.

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

Dated this 11th day of January 2004, Los Angeles, California.

MARK J. GERAGOS

EXHIBIT 1

CHARITY KENYON - 078823
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Sacramento, CA 95833
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Facsimile: (916) 779-7120

Attorneys for McClatchy Newspapers, Inc. dba *The Modesto Bee*, and for *Los Angeles Times*, Hearst Communications, Inc. dba *San Francisco Chronicle*, Contra Costa Newspapers, Inc., and San Jose Mercury News, Inc.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF STANISLAUS

The People of the State of California,

Plaintiff,

v.

Scott Lee Peterson

Defendant.

Case No. 1056770

Newspapers' Opposition to People's Motion to Seal Search Warrant, Addenda and Arrest Warrant

Date: May 27, 2003
Time: 8:30 a.m.
Dept: 2 (sitting in Dept. 8)
Hon. Al Girolami

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CHARITY KENYON - 078823
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Hon. Al Girolami

The Modesto Bee, San Francisco Chronicle, Los Angeles Times, San Jose Mercury News, and *Contra Costa Times* submit this memorandum of points and authorities in opposition to the People's motion filed May 6, 2003. While the motion states that "the People and the Defense are hereby moving" for an order sealing the search warrant issued April 24, 2003 and the *Ramey* warrant, the news media anticipate that the defense will file additional papers to which the news media may reply under the terms of the court's May 9, 2003 minute order.

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FACTS

Beginning in late January, *The Modesto Bee* and others sought disclosure of certain search warrants addressed to the person and property of Scott Peterson in connection with an ongoing investigation of the disappearance of his wife, Laci Peterson. *The Bee* filed a petition for access to those documents, relying on Penal Code section 1534 and California Rules of Court, rules 243.1 and 243.2. The District Attorney opposed the petition on the basis that Penal Code section 1534 did not apply to pre-arrest warrants and, if it did, the statute violated the constitutional separation of powers doctrine. The matter was heard April 4, 2003 by the Hon. Roger Beauschane.

Judge Beauschane agreed with the news media that Penal Code section 1534 and rules 243.1 and 243.2 apply to pre-arrest search warrants. After an *in camera* hearing Judge Beauschane nevertheless concluded that the documents should remain sealed in their entirety based on the showing made by the People. He ordered that the documents should be automatically disolosed on the occurrence of either: filing of a complaint or passage of 90 days. The People, *not* the news media, filed a petition for writ of mandate in the Court of Appeal for the Fifth Appellate District. The People did not challenge the aspect of the court's order requiring disclosure of the documents after the filing of a complaint. Instead, they challenged application of Penal Code section 1534 and the rules of court to pre-arrest warrants.

The court of appeal upheld 99% of Judge Beauschane's order *and modified its temporary stay order* to make clear it was *not* prejudging any subsequent application for presumptively and statutorily open judicial records. The court of appeal rejected the People's entire legal argument. It determined *only* that the superior court erred in determining that disclosure should be *automatic* upon filing of a complaint or lapse of 90 days. The question whether, with respect to these 8 sealed warrants, disclosure should now be ordered, is pending before Judge Beauschane and is set to be heard on June 3, 2003.

The court of appeal modified its stay order by deleting the second paragraph and inserting the word "prior" in the first sentence so that it is clear that its order applied *only* to prior orders of the superior court and not to any new proceeding that might be brought. The

last sentence of the opinion confirmed that the court's decision was *not* addressed to subsequent applications for the same or similar documents:

> Nothing in this order forecloses any interested person or entity from re-applying to the superior court for a release order at an appropriate time in the future and upon a showing of a change in circumstances.

Opinion filed May 5, 2003 in F042848, p. 6.

The People move to seal the documents in question under very different circumstances from their prior applications. The bodies have been found, an arrest has been made, and a complaint has been filed. Pretrial proceedings are under way. Not only Penal Code section 1534, but also the United States Supreme Court *Press-Enterprise* decisions require public access to court documents and proceedings. The exceptions are narrowly limited and the People have failed to make any showing that would support the extraordinary findings necessary to continue sealing the documents at issue in this motion. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (access to voir dire and to related court documents); *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986) (access to preliminary hearings).

ARGUMENT

The People must, in order to support the requested sealing, make a showing that supports the findings required by rule 243.2, including, for example, the applicability and weight of exceptions described in the case law, primarily *People v. Hobbs*, 7 Cal. 4th 948 (1994). The People have not attempted to make the type of showing that might be sufficient to support sealing all or a portion of the conditionally sealed documents as set forth in the court of appeal's recent decision.[1] The People do *not* claim that a potential suspect might be alerted, that evidence would likely be destroyed or that witnesses would conceivably disappear, much less that a confidential informant requires protection. *See* Opinion filed May 5, 2003 in F042848, p. 5. Since the People have agreed to provide *all* of the sealed information to the

[1] The People refer to these exceptions at page 9 and footnote 36 without invoking them.

defendant, it would seem that the People agree that the concerns identified by the court of appeal do not apply to these documents.

Instead, the People rely on generalizations about pretrial publicity *insufficient as a matter of law* to permit sealing of statutorily open judicial records. The People argue first that the defense should have an opportunity to make a showing in support of sealing. We agree. The news media anticipate responding to any such showing. Second, the People argue "there is a probability that disclosure will result in prejudicial pre-trial publicity." (People's memorandum of points and authorities at pp. 4-10). The cited authorities are insufficient to support sealing on such a generalized basis. The governing authorities require the court to reject such generalizations and to refuse to continue sealing of the conditionally sealed documents.

I. A GENERAL INVOCATION OF PREJUDICE IS INSUFFICIENT TO SUPPORT SEALING PRESUMPTIVELY OPEN JUDICIAL RECORDS; THE MOVING PARTIES MUST SUPPORT THEIR MOTIONS WITH EVIDENCE

The rules of court do not permit continued sealing based on generalizations. The court may order the record sealed if (but only if) it expressly finds--based on a noticed motion to seal:

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

Rules of Court, rule 243.1(d).

What is not permissible and will not withstand review is a conclusory finding without reference to evidence, that "disclosure will result in prejudicial pre-trial publicity." If such general invocations of potential prejudice were sufficient, all search warrant documents could

be sealed indefinitely and the public's rights under Penal Code section 1534 would be rendered meaningless. *See generally, United States v. Brooklier*, 685 F.2d 1162, 1169 (9th Cir. 1982) (observing that if such findings were sufficient, all testimony in pretrial proceedings could be taken in secret); *see also Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 611 n.27 (1982) (holding unconstitutional rule requiring closure of court proceedings without "particularized determinations in individual cases").

The nature and kind of *evidence* that the moving parties must produce to support closure of presumptively open judicial records and proceedings is discussed in *Tribune Newspapers West, Inc. v. Superior Court*, 172 Cal. App. 3d 443 (1985) (finding abuse of discretion in closing proceedings involving juveniles charged with armed robbery). The opinion also addresses the right of the public to respond to any evidentiary showing.

II. EXTENSIVE PUBLICITY IS INSUFFICIENT TO SUPPORT CLOSURE

Extensive publicity is not alone sufficient to support closure of a presumptively open hearings or records. *Tribune Newspapers West, Inc. v. Superior Court*, 172 Cal. App.3d 443 (1985), observed:

> Media dissemination of the alleged facts of horrifying and threatening criminal activity, particularly multiple murders, unfortunately is a fact of life in our society. The news reports may, and do, contain inadmissible hearsay, rank and unfounded opinions, incriminating statements, in accurate sketches and more. But our criminal justice system is deemed to be hearty enough to withstand prejudicial publicity and still guarantee a given defendant the most basic right to receive a fair trial. In this regard, the cost to the criminal justice system to provide a fair trial is the price we pay for an open society, and a free press with access to criminal proceedings.

172 Cal. App. 3d at 458-59.

Where, as here, there exists a plethora of publicity already in the public domain, it may be difficult to show that closure would be *effective* to prevent the perceived harm to the defendant. *See Press-Enterprise II*, 478 U.S. at 14 (defendant must demonstrate that closure would *prevent* the publicity). The ample existing information about the crimes in this case may simply be repeated, fueled by speculation as to why the court's records must be sealed and what the warrant, addenda and affidavits might show. Indeed, the news media have little to report

except speculation, which does not enhance prospects for a fair trial. Since secrecy would not be effective to *prevent* the perceived harm, the rules require the court to deny the requested sealing.

The cases controlling this court's decision analyze *evidence* and reject reliance on conclusory or speculative findings. They place a value on openness as a primary safeguard and attribute of the American criminal justice system. Comparing the facts and factors analyzed in these cases to the circumstances of this case, neither the People nor the defendant can meet their burden of proof to support sealing--partial or total.

In a case involving a community of *850 people,* the United States Supreme Court observed: "We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Nebraska Press Assn. v Stuart,* 427 U.S. 539, 565 (1976); *see also, CBS v. United States District Court for C.D. of Calif. (DeLorean),* 729 F.2d 1174 (9th Cir. 1984)(even when exposed to heavy widespread publicity, many if not most potential jurors are untainted by press coverage). *DeLorean* pointed out that almost all cases in which the Supreme Court has found that press coverage deprived the defendant of a fair trial have been tried in small rural communities. *See Rideau v. Louisiana,* 373 U.S. 723 (1963); *Irvin v. Dowd,* 366 U.S. 717 (1961)(county of approximately 30,000).

Needless to say, the Watergate and O.J. Simpson trials also showed that unbiased jurors can be selected, even in the face of pervasive pretrial publicity. In a community more similar in size to Stanislaus County, the Sonoma County Court denied the defendant's request to close the preliminary hearing in the Polly Klaas trial without impairing the defendant's eventual fair trial rights. Other examples abound. This has been California's experience; it may be a relatively rare one for Stanislaus County but many counties have kept open their courts and records while fully protecting the fair trial rights of defendants in cases with worldwide notoriety. Directing a trial court to set aside its order sealing the grand jury transcript in *Press-Enterprise v. Superior Court,* 22 Cal. App. 4th 498, 503 (1994), the court of appeal observed all it takes is "12 jurors capable of acting impartially."

Not only is there no evidence in the record of the size of the jury pool in Stanislaus County, but the defense has already stated that it anticipates moving for a change of venue.

The defendant cannot produce evidence to support the finding that there is a "substantial probability" that, even if it exercises its right to move for change of venue, twelve unbiased jurors could not be found in this county *or anywhere in the state*. Certainly the media and public have not been permitted to review any such evidence to test its adequacy.

III. THAT INFORMATION INADMISSIBLE AT TRIAL MAY BE DISCLOSED DOES PERMIT RECORDS TO BE SEALED

The fact that information may be disclosed which ultimately may not be offered or admitted in trial is insufficient to support closure of pretrial hearings or documents. In *Press Enterprise II*, the Court recognized that "publicity concerning the proceedings at a pretrial hearing . . . could influence public opinion against the defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial." 478 U.S. at 14. This risk did not automatically justify refusing public access. *Id.* at 15. "Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Id.*

In this respect, the public right of post-complaint access to search and arrest warrants is indistinguishable from its right of access to the preliminary hearing and to voir dire hearings and transcripts. Here, a statute, Penal Code section 1534, grants that right of access; in the latter instances the United States Supreme Court has ruled that the right of access is rooted in the First Amendment. In all three instances the news media may publicize inculpatory information without the defendant's having had an opportunity to bar its admission at trial or to offer exculpatory evidence in response. Nevertheless, the public's right of access and the need to consider alternatives to closure are well-established.

IV. THE DEFENDANT CANNOT DEMONSTRATE THAT ALTERNATIVES TO CLOSURE ARE INADEQUATE TO PROTECT HIS SIXTH AMENDMENT RIGHTS

"Mindful that trial courts are understandably reluctant to change venue when the parties and witnesses are in place," the supreme court in *Odle v. Superior Court*, 32 Cal. 3d

932 (1982), pointed out that trial courts have the authority to change venue in an appropriate case even after jury selection has begun. 32 Cal. 3d at 943. At the time of jury selection the jury panel itself provides additional evidence on the impact of pretrial publicity. *Id.* "What had been a matter of some speculation at the earlier motion--i.e., the actual extent of exposure of those who are potential jurors--becomes, on a later motion, subject to more precise measurement and evaluation." *Id.* at 943-44.

A mere conclusory statement that "[n]o matter how searching the questions . . . certain matters are not detectable, especially those motives relative to bias and prejudice" was rejected in *DeLorean* as an effective basis for rejecting voir dire as an alternative to closure. *DeLorean*, 729 F.2d at 1182.

Further, rejection of voir dire on principle is inconsistent with applicable precedent. The United States Supreme Court in *Nebraska Press*, 427 U.S. at 563-64 and circuit courts of appeals have repeatedly found that voir dire is a viable alternative to restraints on the press, even in cases attracting massive publicity. *DeLorean*, 792 F.2d at 1182 (and cases cited). Similarly, in this case, alternatives recognized and approved by the Supreme Court may not be rejected summarily. Their rejection must be based on evidence peculiar to this case. *See Nebraska Press Assn.*, 427 U.S. at 565 (record lacked *evidence* to support finding rejecting alternative measures).

Referring again to the discussion in *Tribune Newspapers*, the news media assert that this court, before ordering sealing on the basis of pretrial publicity, must consider:

> (1) the nature and extent of the media coverage, including circulation figures and geographical distribution; . . . ; (4) a change of venue; (5) protection afforded by a searching voir dire of potential jurors; and (6) sequestration of the jury panel.

172 Cal. App. 3d at 460. "Alternative measures may present difficulties for trial courts but none are beyond the realm of the manageable." *Id.*

V. THE COST FACTOR IS NOT CONTROLLING OR EVEN CONSTITUTIONALLY RECOGNIZED

Tribune Newspapers West, 172 Cal. App. 3d at 458, discusses at length the "dangerous and totally unacceptable" notion that alternatives to a jury trial within an area where

prejudicial publicity has circulated may not be pursued before the press is excluded, based on cost. The court points out:

> Expense to those parties and courts was *not* a discussed factor, much less a deciding one in *San Jose Mercury News* [*v. Municipal Court*, 30 Cal. 3d 498 (1982)], nor in *Odle*.

172 Cal. App. 3d at 458. In virtually all cases, the court found, as between preserving rights of public access and free press and the interest in minimizing the *expense* of empaneling an impartial jury "it is no contest." *Id.* at 458.

VI. THE PEOPLE'S CITED AUTHORITIES DO NOT SUPPORT SEALING

As noted at the outset, the District Attorney relies solely on generalized concerns about pre-trial publicity; he does not rely on any of the factors or types of evidence discussed in the court of appeal's recent decision. The documents the People seek to seal must be disclosed to the public under Penal Code section 1534 and the First Amendment, unless the moving party makes the *Press Enterprise* type showing embodied in rules of court 243.1 and 243.2.

The authorities discussed above compel the court to deny the motion, unless a moving party produces evidence to show alternatives to closure (such as the proposed change of venue) would not protect the defendant's right to a fair trial.

The People's cited authorities do not support closure. *Estes v. Texas*, 381 U.S. 532, 540 (1965) (People's memorandum of points and authorities at p. 3), dealt with conduct of the trial itself, not with access to pre-trial proceedings and documents (which were the subject of the more recent *Press-Enterprise* decisions). In *Estes* the Court (which issued six separate opinions) held that the defendant was deprived on due process rights by the televising of his trial. In *Chandler v. Florida*, 449 U.S. 560 (1981), the Court held that television coverage does not necessarily deprive a defendant of due process rights and affirmed the convictions. Since these cases dealt with conduct of the trial itself, they are inapposite.

Also, the news media do not assert greater rights of access than the rights of the public generally; nor do they assert that the court has issued a gag order. (People's memorandum of points and authorities at p. 4). These arguments are not on point.

Allegrezza, Rosato and *Craemer* are pre-*Press Enterprise* decisions. (People's memorandum of points and authorities at p. 3). For this reason alone they are of limited or no value. As will be shown, they are also inapposite. In *Allegrezza v. Superior Court*, 47 Cal. App. 3d 948, 952 (1975), the First Appellate District found no pretrial right of public access to the defendant's confession. There is no suggestion that the sealed documents in this case contain a confession. In *Rosato v. Superior Court*, 51 Cal. App. 3d 190 (1975), the court considered the asserted right of the news media not to disclose the source of information obtained in violation of a court order. The decision preceded (and prompted) elevation of the shield law to the California Constitution. *See* Cal. Const. Art. I, Sec. 2. Again, there is no issue here of publication in violation of a court order.

In *Craemer v. Superior Court*, 265 Cal. App. 2d 216 (1968), the court of appeal reviewed a trial court order sealing the transcript of the indicting grand jury. There is no grand jury transcript at issue here. However, contrary to the People's description of the holding, the *Craemer* court *granted* the news media's petition for writ of mandate, directing the trial court to require an evidentiary showing by the defendant. (People's memorandum of points and authorities at p. 5). Moreover, *Craemer* dealt with a claimed right of access to records governed by an entirely different statute (since also changed). To the extent that *Craemer* requires an evidentiary showing by the moving party, it supports the news media.

The test laid out in *Craemer* has since been changed by the *Press-Enterprise* decisions and the rules of court. The People suggest that there is a split of authority with respect to whether a "probability of unfairness" or "reasonable likelihood" test applies to this court's determination of the motion to seal. To the contrary, the California Rules of Court and *Press-Enterprise* require the showing advocated by the news media (and affirmed by the court of appeal in the proceedings before Judge Beauschane):

(1) There exists an overriding interest that overcomes the right of public access to the record;

(2) The overriding interest supports sealing the record;

(3) A substantial probability exists that the overriding interest will be prejudiced if the

record is not sealed;

(4) The proposed sealing is narrowly tailored; and

(5) No less restrictive means exist to achieve the overriding interest.

As in *Craemer*, evidence, not generalities must be produced to support the court's findings on any of these points. The People have presented none.

Waller v. Georgia, 467 U.S. 39 (1984) (People's memorandum of points and authorities p. 5), is inapposite because it dealt with the *defendant's* right to object to closure of pretrial suppression proceedings. The Court reversed where *closure* of the entire hearing was plainly unjustified and violated the *defendant's* Sixth Amendment public-trial guarantee.

The other authorities cited for the proposition that the court has broad discretion to seal and control its records (People's memorandum of points and authorities at p. 6, n. 18 and p. 7 n. 19), do not affect or relate to the standard this court has already adopted, which, contrary to the People's assertions in their petition for writ of mandate, have been approved by the court of appeal.

VII. THE NEWS MEDIA DO NOT SEEK ACCESS TO THE EVIDENCE SEIZED

Finally, the People persist in relying on *Oziel v. Superior Court*, 223 Cal. App. 3d 1284 (1990) (People's memorandum of points and authorities at p.7-8). Not only did *Oziel* precede adoption of rules 243.1 and 243.2, but *Oziel* addressed access to the *fruits* of the search, *not* to the warrant and supporting affidavits. The news media do not seek access to the evidence itself. More important, the Fifth Appellate District, by affirming Judge Beauschane's order applying section 1534 to pre-arrest warrants *rejected* this argument.

VIII. CONCLUSION

The news media have statutory and First Amendment rights of access to the documents sought to be sealed, absent a showing satisfying the *Press Enterprise* test adopted by the California Rules of Court. So much has already been decided and affirmed by the court of appeal. Now, as in *Craemer*, any party seeking to seal presumptively open judicial records must make an evidentiary showing satisfying the test laid out in the rules of court.

Openness in court proceedings and documents "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-571 (1980). "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest . . . ." *Press-Enterprise I*, 464 U.S. at 508-09.

For these reasons and based on this authority, the court should deny the motion to seal. The experience of the California courts is that, even in the most high profile cases, the courts are able to protect the constitutional rights of criminal defendants and of the public. There is no evidence to support findings that, first, there is a *substantial probability* that the defendant's right to a fair trial would be prejudiced by publicity that sealing would prevent and, second, reasonable alternatives to sealing cannot adequately protect the defendant's fair trial rights. *Id.* at 510.

The court should find, under the rules of court and *Press-Enterprise* decisions:

(1) There is an absence of evidence to show that the interest in protecting the defendant's fair trial rights supports continued sealing of the records;

(2) Given the amount of information already available, there is an absence of evidence to show that sealing would be *effective* to protect against pretrial publicity;

(3) The proposed sealing is overbroad;

(4) There is an absence of evidence to show that alternatives, including but not limited to voir dire, sequestration of the jury or change of venue would be ineffective to protect the defendant's fair trial rights;

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(5) The showing in support of the motion is insufficient to outweigh the statutory and constitutional rights of the press and public to access to these documents and proceedings.

DATED: May 15, 2003

RIEGELS CAMPOS & KENYON LLP

By _____
CHARITY KENYON
Attorneys for *The Modesto Bee, San Francisco Chronicle, Los Angeles Times, Contra Costa Times,* and *San Jose Mercury News*

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Riegels, Campos & Kenyon, LLP, 2500 Venture Oaks Way, Suite 220, Sacramento, CA 95833. On March 31, 2003, I served the following document(s) by the method indicated below:

Newspapers' Opposition to People's Motion to Seal Search Warrant, Addenda and Arrest Warrant

☒ by transmitting via facsimile on this date from fax number (916) 779-7120 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

Kirk McAllister
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350 S. Grand Avenue, #3900
Los Angeles, CA 90071-3480

FAX: (213) 625-1600

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 15, 2003, at Sacramento, California.

LAURI KENT

PROOF OF SERVICE BY FAX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 N. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

OPPOSITION TO MEDIA ENTITIES' MOTION TO UNSEAL

____ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

__X__ transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

Judge Thomas R. Adams Fax No.: 805-568-2219	Judge Clifford Anderson Fax No.: 805-56-2847	Judge Rodney S. Melville Fax No.: 805-346-7616
DA Thomas Sneddon Fax No.: 805-568-2396	DDA Gerald Franklin Fax No.: 805-568-2396	Julian W. Poon, Esq. Fax No.: 213-229-7520

Executed on January 12, 2004, at Los Angeles, California.

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

RAFFI NALJIAN