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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
MICHAEL JOE JACKSON,
Defendant.

No. 1133603

PLAINTIFF'S REPLY TO OPPOSITION BY DEFENDANT AND MEDIA LAWYERS TO REQUEST FOR PROTECTIVE ORDER RE STATEMENTS CONCERNING THIS CASE

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

A. Introduction:

Defendant and, separately, counsel for National Broadcasting Company, Inc., CBS Broadcasting, Inc., Fox News Network LLC, ABC, Inc., Cable News Network, Inc., The New York Times Company, the *Los Angeles Times*, Courtroom Television Network LLC, Santa Barbara News-Press, and Associated Press (collectively, "Media") have filed opposition to Plaintiff's "Request for Protective Order Binding Both Parties Regarding Public Statements Concerning This Case."

This Reply will address, first, the merits of Media's claim to a First Amendment right to have access to "ungagged" trial participants. The People will then address Defendant's and Media's challenges to the proposed protective order on the ground that no "clear and present danger" to the parties right to an unbiased venire is shown by the evidence.

B. Media's Argument, Summarized

The requested protective order is overbroad. (Media Opp. 2:3-4.) The proposed order would extinguish the media's ability to receive statements concerning the case from defendant or his counsel, and "directly impair or curtail" Media's ability to gather the news concerning this trial.

The court should consider and "adopt a more balanced and measured response" (*Id.*, 2:10-11) that employs the "clear and present danger" test utilized by the Court of Appeal in *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, at 1241.

No justification for the proposed protective order has been offered by the People, "only bare 'speculation,' unsupported by any facts . . . ." (Media Opp., 4:3-7.) In any event, the Court has available to it "graduated measures to counter any actual negative influences" on the venire after prejudicial statements have been made, once this matter comes to trial. (*Id.*, 5:1-3.)

Finally, assuming the proposed order "reaches no further than what is proscribed by [California Rules of Professional Conduct, rule] 5-120's 'substantial likelihood of materially prejudicing an adjudicative proceeding in the matter,'" why not simply incorporate that rule into an order, the violation of which would be punishable as contempt? (Media Opp. 6:22 – 7:3.)

C. The People's Reply To Media's Argument

I

THE PROPOSED RESTRAINTS ON THE STATEMENTS OF TRIAL PARTICIPANTS DOES NOT INFRINGE FREEDOM OF THE PRESS

What the Ninth Circuit said in *Radio and Television News Ass'n v. United States Dist. Ct., supra*, 781 F.2d 1443 about the media's supposed First Amendment right to gain access to trial participants who are untrammeled by protective orders in what they may chose to say to the press bears setting out at length:

> [A]s we indicated in *Levine* [*v. United States District Court* (9th Cir. 1985) 764 F.2d 590] at 594, the impact on the media in this case

is significantly different from situations where the media is denied access to a criminal trial or is restricted in disseminating any information it obtains. We have invalidated as unconstitutional prior restraints on the reporting of events relating to a criminal proceeding. *E.g., CBS, Inc. v. United States District Court*, 729 F.2d 1174, 1178-79 (9th Cir. 1984); *see Nebraska Press Association v. Stuart*, 427 U.S. 539, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976); *ABA Standards for Criminal Justice* Standard 8-3.1 (1982). We have also invalidated restraints on the access of the media to criminal proceedings. *Associated Press v. United States District Court*, 705 F.2d 1143, 1145-47 (9th Cir. 1983); *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980).

In contrast, the district court's order in this case is not directed toward the press at all. On the contrary, the media is free to attend all of the trial proceedings before the district court and to report anything that happens. *Levine*, 764 F.2d at 594. In fact, the press remains free to direct questions at trial counsel. Trial counsel simply may not be free to answer. In sum, the media's right to gather news and disseminate it to the public has not been restrained. *See id.*

As we noted in *Levine*, the district court's order "raises a freedom of the press issue that is analytically distinct from the issues that were raised in *Associated Press* and *CBS*." *Id.; see* Sack, *Principle and Nebraska Press Association v. Stuart*, 29 Stan. L. Rev. 411, 427-28 (1977) (noting the "fundamental difference" between a restraining order against the press and a restraining order against trial participants). Rather, the RTNA asserts a first amendment right of full access to trial participants. This assertion is not supported by constitutional case law. *See Pell v. Procunier*, 417 U.S. 817, 829-35, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974) (in holding that freedom of the press was not infringed by government restrictions on interviews with prison inmates, Court rejected media assertion of "right of access to the sources of what is regarded as newsworthy information").

The press does enjoy a constitutional interest in access to our criminal courts and criminal justice process. In *Richmond Newspapers*, 448 U.S. 555, 576, 65 L. Ed. 2d 973, 100 S. Ct. 2814

(1980) (plurality), the Supreme Court affirmed the first amendment "right of access" or "right to gather information" granted to the press with respect to criminal trials. However, the Court described that right only as a right to sit, listen, watch, and report. *Id. See also KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 678 P.2d 431, 441 (1984).

In *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609, 55 L. Ed. 2d 570, 98 S. Ct. 1306 (1978), the Supreme Court held that "the First Amendment generally grants the press no right to information about a trial superior to that of the general public." *See also Branzburg v. Hayes*, 408 U.S. 665, 684, 33 L. Ed. 2d 626, 92 S. Ct. 2646 (1972) (first amendment "does not grant the press a constitutional right of special access to information not available to the public generally."). *See generally* Comment, *News-Source Privilege in Libel Cases: A Critical Analysis*, 57 Wash. L. Rev. 349, 354-57, 360-62 (1982) (Supreme Court rejects "structural model" of first amendment granting to the press rights superior to those of the public). As with the public, the press has no greater privilege than the right to attend the trial. *See Associated Press*, 705 F.2d at 1145.

In short, the media's "right to gather information" during a criminal trial is no more than a right to attend the trial and report on their observations. *KPNX Broadcasting Co.*, 678 P.2d at 439-42 (1984) (holding that limitations on the media's ability to interview trial participants do not violate the first amendment); *see United States v. Hastings*, 695 F.2d 1278, 1280 (11th Cir. 1983) (press' right of access is right to attend, not to televise criminal trial).

The media is granted access to the same information, but nothing more, that is available to the public. *See Pell v. Procunier*, 417 U.S. at 835 (rights of media are not infringed by regulation restricting interviews with specific state prison inmates, as this does not deny the press access to information available to the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 41 L. Ed. 2d 514, 94 S. Ct. 2811 (1974) (same holding regarding interviews with federal prison inmates). The district court having determined that the free speech rights of the trial counsel must be restrained, the media has no greater right than the public to hear that speech.

The media never has any guarantee of or "right" to interview counsel in a criminal trial. Trial counsel are, of course, free to refuse interviews, whether or not restrained by court order. If such an individual refuses an interview, the media has no recourse to relief based upon the first amendment.

As a further example, and by way of analogy, elements within the government may use the press for their own purposes through "leaking" of information. Were the government to restrain the press from publishing that "leaked" information, a freedom of the press issue would be clearly presented. As one commentator has said, "When 'Deep Throat' has spoken and is believed, Woodward, Bernstein and Bradlee are free to publish." Sack, *supra*, 29 Stan. L. Rev. at 420. Were the government, instead, to order its officers not to engage in "leaking," the press would have no "right" to challenge that practice. *See id.* at 428 (while it is permissible to swear to secrecy clerks privy to conferences of Supreme Court justices, it would be an abridgement of freedom of the press to restrict reporting of discussions a journalist learned had taken place during such a conference).

In sum, the media's collateral interest in interviewing trial participants is outside the scope of protection offered by the first amendment. *KPNX Broadcasting Co.*, 678 P.2d at 439. The media's desire to obtain access to certain sources of information, that otherwise might be available, is not a sufficient interest to establish an infringement of freedom of the press in this case.

II

A "REASONABLE LIKELIHOOD" OF PREJUDICE, RATHER THAN THE "CLEAR AND PRESENT DANGER" OF SUCH PREJUDICE, IS SUFFICIENT TO JUSTIFY A PROTECTIVE ORDER

Media and Defendant both argue that "gag orders on trial participants are unconstitutional unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly

tailored to protect that interest, and (3) no less restrictive alternatives are available." (*Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, 1241.) (Media Opp. 3:5-11; Def. Opp. 2:4-11.)

To be sure, in *Younger v. Smith* (1973) 30 Cal.App.3d 138, Presiding Justice Kaus rejected the "clear and present danger" test after a lengthy and careful analysis (see *id.*, pp. 158-164) in favor of the "reasonable likelihood" test as the preferred gauge for measuring the need for a protective order in a criminal case. But, defendant notes dismissively, *Younger* was decided 27 years before *Hurvitz*, and *Hurvitz* "embod[ies] the current and more informed legal standard for issuance of a gag order" (Def. Opp. 5:4-9).

"Informed" is rather too generous a characterization of *Hurvitz'* application of the "clear and present danger" test to the protective order issued in that libel and slander per se lawsuit. For one thing, *Hurvitz* was a civil case. Different policies considerations come into play when the right of the parties to an unbiased jury in a criminal case is at stake. For another, the *Hurvitz* court cited the Ninth Circuit's decision in *Levine v. U.S. District Court* (9th Cir. 1985) 764 F.2d 590, 595 as its authority. But that decision actually upheld the trial court's determination that leaks from, apparently, the defense camp in that espionage prosecution posed a "serious and imminent threat to the administration of justice." (*Id.*, pp. 597, 598.) *Levine* had no occasion to decide whether the "reasonable likelihood of prejudice" test would be too restrictive. Finally, the *Hervitz* decision neither cited *Younger* nor analyzed for itself the appropriateness of the "clear and present danger" test as a workable standard for a protective order in a criminal case. The *Younger* court, for its part, concluded "that the 'clear and present danger' test is inappropriate as a criterion for the validity of protective orders, not so much because it is too restrictive, but because it is irrelevant." (30 Cal.App.3d 138, 162.)

"Under the rule of *stare decisis*, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) "Of course, the rule under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." (*Id.*, p. 456.)

The People commend *Younger's* careful analysis of the competing standards to this court, and respectfully urge that it be adopted as the standard applicable to the parties in this case.

IV
THE TRANSCRIPTS OF DEFENSE COUNSEL'S INTERVIEWS ARE SUFFICIENT EVIDENCE OF THE PROBLEM. IT IS FOR THE COURT TO DECIDE WHETHER SIMILAR STATEMENTS IN FUTURE WOULD POSE A "REASONABLE LIKELIHOOD" OF PREJUDICE TO THE RIGHT OF BOTH PARTIES TO AN UNBIASED VENIRE

With characteristic extravagance,[1] Defendant asserts that the prosecution has not presented "one scintilla of evidence" (Def. Opp. 1:22-24); "absolutely no evidence" (*id.*, 3:5); not "*one shred of evidence*" (*id.*, 6:13-14; his emphasis) of the need for a protective order, whichever standard is utilized.

The best evidence of the need for a protective order is the transcripts of defense counsel's hour-long chat with Larry King and his follow-up comments to Ed Bradley on "60 Minutes." To be sure, the prosecution has held press conferences and the district attorney submitted to a few interviews. **In none of those interviews was the evidence available to the prosecution discussed or the bounds of rule 5-120 exceeded.** And when an inappropriate comment was made by the prosecutor,[2] he forthrightly acknowledged his error and publicly

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[1] Of a piece with "the prosecution's unrelenting ten-year mission to create a negative perception of Mr. Jackson" (Def. Opp. 3:1-2) and "an apparent 10-year-old vendetta against Mr. Jackson" (*id.*, 6:27-28 [fn. 6])....

[2] In a November 20, 2003 interview on Court TV, Mr. Sneddon referred to the defendant as "a guy everybody calls 'Jacko Wacko.'" On December 5, Mr. Sneddon stated to CNN that "I knew as soon as I said it, it was inappropriate, it was unprofessional [and] I was immediately sorry for it." "My wife, when she saw the interview, chided me on it, and in all candor I'd have to say that if my mom was still alive she would take me to task for not being a good person, and I do feel badly for making that remark." when she saw the interview, chided me on it, and in all candor I'd have to say that if my mom was still alive she would take me to task for not being a good person, and I do feel badly for making that remark."

apologized for it. Defense counsel, on the other hand, offers no apology for, e.g., his vilification of the alleged victim and his family. He characterizes that as simply the "zealous defense" of his client. (Def. Opp. 6:27-28 [fn. 6].)

In the nature of things, one cannot "establish by evidence that the publicity would taint so much as one potential juror" (Def. Opp. 8:1-4) in advance of voir dire. It is the *potential* for such prejudice that is at issue, and that potential must be assessed by this court from the evidence of pre-trial statements to date.

Media cites *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 for its approval of Nevada's rule of professional conduct (i.e., the rule's prohibition of statements which pose a "substantial likelihood of materially prejudicing" a judicial proceeding) as "narrowly tailored" to achieve the objectives of "protect[ing] the integrity and fairness of a State's judicial system" and the "right to a fair trial by 'impartial' jurors," a "fundamental right." (*Id.*, at pp.1075-1076.) Media notes that the "substantial likelihood of materially prejudice" standard tracks California's Rules of Professional Conduct, rule 5-120 and characterizes that standard as "federal constitutional minimum." "In other words [Media argues], anything that sweeps more broadly and restrains more speech than is covered by this standard falls outside the outer bounds of constitutionality set by *Gentile*." (Media Opp. 6:13-21.)

The *Gentile* Court did not purport to describe "the outer bounds of constitutionality" for a protective order in a criminal case. As at least one court has recognized, "the *Gentile* holding does not invalidate the 'reasonable likelihood' standard; on the contrary, it provides ample support for the constitutionality of such a standard." (*United States v. Cutler* (E.D.N.Y. 1993) 815 F.Supp. 599, 613, and see that court's analysis, *id.*, pp. 613-614.) And please note that in *Sheppard v. Maxwell* (1966) 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, the Supreme Court said, "Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a *reasonable likelihood* that prejudicial new prior to trial will prevent a fair trial, the judge should continue the case until the threat abates,

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or transfer it to another county not so permeated with publicity." (*Id.*, at pp. 362-363; emphasis added.)

Media argues that, assuming the proposed order "reaches no further than what is proscribed by [California Rules of Professional Conduct, rule] 5-120's 'substantial likelihood of materially prejudicing an adjudicative proceeding in the matter,'" the court could simply incorporate that rule into an order, the violation of which would be punishable as contempt. "Doing so would eliminate much of the uncertainty, and the apparent unconstitutionality, of the capaciously worded protective order presently sought by the prosecution. (Media Opp. 6:22 – 7:3)

But even if the proposed order reaches no further than what is proscribed by Rule 5-120, it affords more certainty by its specific delineation of what may be said and what may not be said, eliminating the need (and the temptation) on the part of the lawyer to define for himself whether a proposed statement would violate 5-120 necessarily conclusionary language. "Certainty," rather than "uncertainty," is the word that best describes the limits imposed by the proposed protective order.

CONCLUSION

Plaintiff respectfully submits that a protective order as proposed in our motion is both necessary and appropriate in the circumstances.

DATED: January 14, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY
County of Santa Barbara

By: Gerald McC. Franklin

Gerald McC. Franklin, Senior Deputy

Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SANTA BARBARA } SS

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and I am not a party to the within-entitled action. My business address is: District Attorney's Office; Courthouse; 1105 Santa Barbara Street, Santa Barbara, California 93101.

On January 14, 2004, I served the within PLAINTIFF'S REPLY TO OPPOSITION BY DEFENDANT AND MEDIA LAWYERS TO REQUIEST FOR PROTECTIVE ORDER RE STATEMENTS CONCERNING THIS CASE on Defendant, by MARK JOHN GERAGOS, his counsel in this action, and on other interested parties, by faxing a true copy to counsel at the facsimile number shown with the address for each on the attached Service List, and then by causing to be mailed two true copies thereof to counsel at that address.

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

Executed at Santa Barbara, California on this 14th day of January, 2004.

Gerald McC. Franklin

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