

GIBSON, DUNN & CRUTCHER LLP
THEODORE J. BOUTROUS, JR., SBN 132099
MICHAEL H. DORE, SBN 227442
333 South Grand Avenue,
Los Angeles, CA 90071-3197
Telephone: (213) 229-7084
Facsimile: (213) 229-6084

Attorneys for NBC Universal, Inc.;
CBS Broadcasting Inc.; Fox News Network
L.L.C.; ABC, Inc.; Cable News Network LP,
LLLP; The Associated Press; *Los Angeles*
Times; The New York Times Company; and
USA Today

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 24 2005

GARY M. BLAIR, Executive Officer
BY *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

SUPERIOR COURT, STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

MICHAEL JOE JACKSON,

Defendant.

Case No.: 1133603

**ACCESS PROPONENTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR AN ORDER
DIRECTING THAT THE TESTIMONY OF
CHILD WITNESSES BE CLOSED TO THE
PUBLIC; DECLARATION OF
THEODORE J. BOUTROUS, JR.**

Date: January 28, 2005
Time: 9:30 a.m.
Place: Department SM-8,
Judge Rodney S. Melville

[VIA FACSIMILE]

The Access Proponents, a group of media organizations,¹ respectfully file this opposition to the District Attorney's motion for an order directing that the testimony of child witnesses be closed to the public. As explained below, the motion must be denied because the District Attorney has failed to meet the standards for closure established by the First Amendment and California law.

¹ NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network LP, LLLP; The Associated Press; *Los Angeles Times*; The New York Times Company; and *USA Today*.

**ACCESS PROPONENTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER DIRECTING THAT THE
TESTIMONY OF CHILD WITNESSES BE CLOSED TO THE PUBLIC; DECLARATION OF
THEODORE J. BOUTROUS, JR.**

1 The District Attorney seeks to close the courtroom during the testimony of the alleged victim
2 and his brother apparently to protect their anonymity and respective reputations. The District
3 Attorney concedes, however, that the identities of both minors are widely known to the public.
4 See Mot. at 4. And the closure sought by the District Attorney would do nothing to mask either the
5 identity or the substance of the witnesses' testimony, given the District Attorney's "suggest[ion] that
6 the interests of the media and the public can be served by an audio-only feed provided to an overflow
7 courtroom during the testimony of these two witnesses." Mot. at 5. There are no benefits created by
8 eliminating the public's ability to observe the proceedings, and thus the strict standards promoting
9 openness under the First Amendment and California law dictate that the testimony of both of these
10 witnesses must be held in open court.

11 The ability to observe, not merely to listen or read, testimony is a fundamental aspect of the
12 public's First Amendment right to attend a criminal trial. *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d
13 Cir. 2004). Indeed, "[t]he ability to see and to hear a proceeding as it unfolds is a vital component of
14 the First Amendment right of access." *Id.* And one of the key purposes served by such public access
15 is "enhancing truthfinding by promoting the accuracy of witness testimony." *NBC Subsidiary*
16 (*KNBC-TV, Inc. v. Superior Court*, 20 Cal. 4th 1178, 1219 (1999)). Here, the testimony of the
17 alleged victim in this case, and his credibility, are crucial to the District Attorney's case. Likewise,
18 his brother is purportedly an important corroborating witness. To bar the press and public from this
19 central aspect of the trial would not only be unjustified but would leave a cloud of doubt hanging
20 over the jury's verdict, no matter what the jury decides, because the public would have been denied
21 the ability to observe the testimony and make credibility determinations based on the witnesses'
22 demeanor during their testimony. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986)
23 ("*Press-Enterprise II*") ("Openness . . . enhances both the basic fairness of the criminal trial and the
24 appearance of fairness so essential to public confidence in the system.").

25 To justify such a serious restriction on public access and dissemination of information sought
26 by the District Attorney, there must be an "overriding interest based on findings that closure is
27 essential to preserve higher values and is narrowly tailored to serve that interest." *NBC Subsidiary*,

20 Cal. 4th at 1204 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)) (emphasis added by Cal. S. Ct.). The District Attorney must show a "substantial probability" that the overriding interest will be prejudiced absent closure, *id.*, and that "it was substantially probable that 'closure would prevent' [the] publicity" and prejudice he supposedly seeks to avoid. *Id.* at 1222 n.47; see also *Globe Newspaper, Co. v. Superior Court*, 457 U.S. 596, 607-08 (1982) (overturning on First Amendment grounds state statute that required testimony of minors in sex offense to be held behind closed doors in all cases and recognizing that the fact the minor's identity has already been made public militates in favor of disclosure).

Where, as here, closure is intended to hide an identity that is already well-known, closure is absolutely unnecessary and unconstitutional. The District Attorney seeks to close the trial testimony of the alleged victim and his brother pursuant to California Penal Code § 859.1, which is designed to safeguard the anonymity of the victim and to prevent any consequences for a minor witness if his or her identity is revealed. The statute, of course, must be applied in conformance with the aforementioned strict constitutional principles. See *NBC Subsidiary*, 20 Cal. 4th at 1196. And the District Attorney must satisfy the terms of the statute itself, which presume that the identity of the witness is secret at the time of the testimony. See, e.g., Cal. Pen. Code § 859.1(b)(6) (noting that court must consider "[w]hether the prosecution has demonstrated a substantial probability that the disclosure of his or her identity would cause serious harm to the witness").

But here, the identities of the alleged victim and his brother were first disclosed in the documentary "Living With Michael Jackson," which was broadcast in the United Kingdom and the United States in February 2003. Their identities are therefore already widely known, although the Access Proponents and other news organizations in the United States have refrained from publishing their names and pictures since the charges were filed. Declaration of Theodore J. Boutrous, Jr. ("Boutrous Decl."), ¶ 2. Since the documentary aired, the alleged victim's family further revealed the alleged victim's identity, and the identity of his brother, in a publicly filed claim for damages filed against the County of Los Angeles and its Department of Children and Family Services. Boutrous Decl., ¶ 3. The restriction sought by the District Attorney thus violates the public's right of

access to criminal trials under the First Amendment and California law and would not further the goal of protecting the witnesses' identity or reputation because their identities are already widely known. As a result, the District Attorney cannot overcome the "presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." *Id.* at 1200 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality)). The District Attorney's motion, therefore, should be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. The First Amendment and California Law Establish a Strong Presumption of Openness That Includes the Ability to Observe Testimony of a Witnesses During a Criminal Trial

The First Amendment and California law establish a strong presumption that everything that happens in the courtroom will be open to public view and scrutiny. *See NBC Subsidiary*, 20 Cal. 4th at 1200 (1999) (noting that a "presumption of openness inheres in the very nature of a criminal trial under our system of justice.") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality)); *see also* Cal. Code Civ. Proc. 124 (noting that with limited exceptions, "the sittings of every court shall be public"). Indeed, "[i]n 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.*, 448 U.S. at 575. These freedoms become attenuated unless courts are prohibited "from limiting the stock of information from which members of the public may draw." *Id.* at 575-76 (quotations omitted).²

² Michael Jackson also has a right to a public trial under the Sixth Amendment. *See Waller v. Georgia*, 467 U.S. 39, 47 (1984) ("[T]here 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 press and public.").

JAN 24 '05 02:10PM GIBSON, DUNN & CRUTCHER

1 The ability to actually *observe* the proceedings provides important information that is
2 fundamental to the public's ability to access and scrutinize a criminal trial. As the Second Circuit
3 recently held in overruling a lower court order that closed voir dire proceedings in the Martha Stewart
4 case and allowed the release of only redacted transcripts of each day's proceedings, "[t]he ability
5 to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of
6 access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004) (emphasis added); *see also*
7 *NBC Subsidiary*, 20 Cal. 4th at 1220 (noting that "'the availability of a trial transcript is no substitute
8 for a public presence at the trial itself'" because "'[a]s any experienced appellate judge can attest, the
9 'cold' record is a very imperfect reproduction of events that transpire in the courtroom'" (quoting
10 *Richmond Newspapers*, 448 U.S. at 597 n.22 (conc. opn. of Brennan, J.)); *see also U.S. v. Simone*,
11 14 F.3d 833, 842 (3d Cir. 1994) ("'[A] transcript is not the equivalent of presence at a proceeding; it
12 does not reflect the numerous verbal and non-verbal cues that aid in the interpretation of meaning,"
13 and "[t]hus closure will in many cases effectively prevent the public from receiving information that
14 contributes to the news value of a proceeding"); *United States v. Antar*, 38 F.3d 1348, 1360 n.13
15 (3d Cir. 1994) (noting that "a transcript would not fully implement the right of access because some
16 information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the
17 translation of a live proceeding to a cold transcript"); *Soc. of Prof'l Journalists v. Sec. of Labor*, 616
18 F. Supp. 569, 578 (D. Utah 1985) ("Emotions, gestures, facial expressions, and pregnant pauses do
19 not appear on the reported transcript.") (citation omitted)).

20
21
22
23 The testimony of both witnesses, especially the alleged victim, is crucial to this case.
24 Their demeanor is a key aspect of the upcoming trial testimony, and the jury's determination of their
25 credibility will largely determine the outcome. If the public cannot observe these proceedings, a
26 cloud of public doubt will hang over any verdict because the public will have been barred from
27 observing the most important part of the trial. Indeed, "[p]eople in an open society do not demand
28

1 infallibility from their institutions, but it is difficult for them to accept what they are prohibited from
2 observing." *Press-Enterprise II*, 478 U.S. at 13 (quoting *Richmond Newspapers*, 448 U.S. at 572
3 (plurality)).

4 **II. The First Amendment and California Law Also Establish Strict Standards That**
5 **Must Be Satisfied Before A Court May Restrict The Public's Right of Access to a**
6 **Criminal Trial By Closing the Courtroom**

7 The fundamental importance of public access to criminal trials is demonstrated by the
8 rigorous requirements that must be satisfied before any closure is permitted. In *NBC Subsidiary*
9 *(KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), the California Supreme Court held that
10 the "presumption of openness may be overcome only by an overriding interest based on findings
11 that closure is essential to preserve higher values and is narrowly tailored to serve that interest."
12 20 Cal. 4th at 1204 (quoting *Press-Enterprise I*, 464 U.S. at 510); see also *Globe Newspaper, Inc. v.*
13 *Superior Court*, 457 U.S. 596, 606-07 (1982) ("Where . . . the state attempts to deny the right of
14 access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is
15 necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.")
16 (emphasis omitted).

17
18 To be sure, protecting a minor in a sexual molestation case is an important interest, but it does
19 not automatically qualify as an overriding interest that will justify closure of the courtroom. In *Globe*
20 *Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the United States Supreme Court invalidated
21 a state statute providing for the automatic exclusion of the general public from trials of certain sexual
22 offenses against minors. *Id.* at 608. The Court noted that "the right of access to criminal trials
23 permits the public to participate in and serve as a check upon the judicial process – an essential
24 component in our structure of self-government," and that "the institutional value of the open criminal
25 trial is recognized in both logic and experience." *Id.* at 606. Against the backdrop of this important
26 role served by complete public access, the regulation at issue did not serve a sufficiently compelling
27
28

1 interest because it was simply too broad. *See id.* at 608. According to the Court, "the circumstances
2 of the particular case may affect the significance of the interest," *id.*, and one infirmity of the statute
3 was that it required closure even if the victim would not suffer injury by the presence of the press and
4 general public. *Id.* The Court continued: "[i]n the case before us, for example, the names of the
5 minor victims were already in the public record." *Id.* This public information was one reason why
6 "closure might well have been deemed unnecessary." *Id.*; *see also NBC Subsidiary*, 20 Cal. 4th at
7 1222 n.47 (noting that "some of the most sensitive of the information sought to be suppressed" had
8 been reported by the press, "and hence the closure order did not, in fact, prevent the kind of publicity
9 that the court sought to forestall").

11 To close the proceedings here, the District Attorney invokes California Penal Code § 859.1.
12 This statute must be applied in accordance with the constitutional principles that establish a
13 presumption of openness to criminal trial proceedings which may only be overcome by a compelling
14 government interest. *See NBC Subsidiary*, 20 Cal. 4th at 1196 (noting that "federal constitutional
15 considerations . . . would apply" in interpreting statute regarding openness of court proceedings).
16 In addition, the District Attorney must satisfy the terms of the statute itself, which permits a court
17 under certain circumstances to close testimony by or relating to a minor in any criminal proceeding in
18 which the defendant is charged with an offense identified in Penal Code § 868.8 and that crime was
19 committed "on a minor under the age of 16 years." Cal. Pen. Code § 859.1(a). The core purpose of
20 closure under this statute is "to protect the minor's . . . reputation," *id.*, and the anonymity of the
21 alleged victim or the witness is a key factor to be weighed by a court. The Court must consider, for
22 example, "[w]hether the prosecution has demonstrated a substantial probability that the identity of the
23 witness would otherwise be disclosed to the public during that proceeding, and demonstrated a
24 substantial probability that the disclosure of his or her identity would cause serious harm to the
25 witness." Cal. Pen. Code § 859.1(b)(6).

1 **III. The District Attorney's Proposed Closure Cannot Meet the Rigorous Standards**
2 **Established by the First Amendment and California Law**

3 Here, the identity of both the alleged victim and his brother are already public knowledge, so
4 closure is unnecessary, inherently overbroad and would violate the First Amendment and section
5 859.1. The District Attorney is not clear about how a restriction on the public's ability to observe the
6 testimony would provide "protection" for the alleged victim and his brother. In fact, the prosecution
7 suggests "that an audio-only feed be provided to an overflow courtroom that is open to the public"
8 during their testimony. Mot. at 3, 5. It thus concedes that nothing about the *content* of the witnesses'
9 testimony can override the strong constitutionally based presumption in favor of public access to
10 criminal trials. What is left is the contention that allowing the members of the press to sit in the
11 courtroom and actually observe the testimony will somehow damage the witnesses' reputation in
12 such a way as to warrant curtailing the public's right of access. Such a restriction, however, would
13 violate the public's constitutional right to attend this trial while offering none of the benefits
14 contemplated by California Penal Code § 859.1, since the identity of both the alleged victim and his
15 brother are public knowledge.
16

17 Without closure, according to the District Attorney, "John Doe and his brother would become
18 this trial's sacrificial icons and their faces would be on the cover of every tabloid newspaper from
19 Miami to Tokyo." Mot. at 4-5. But video or photographic coverage of the trial is not at issue in this
20 motion. Moreover, the alleged victim's face has already been broadcast worldwide in the
21 documentary "Living with Michael Jackson," which includes an interview with both Jackson and the
22 alleged victim. Boutrous Decl. ¶ 1; *see also* redacted Request for Attendance of Out-of-State
23 Witness, Martin Bashir at 2 (filed Jan. 7, 2005). In addition, the alleged victim's family identified
24 him and his brother in a publicly filed claim for damages against the County of Los Angeles and its
25
26
27
28

1 Department of Children and Family Services on May 25, 2004 that links the alleged victim to the
2 arrest of Michael Jackson. Boutrous Decl. ¶ 2.³

3 The District Attorney concedes, as he must, that the public is already aware of the identity of
4 these witnesses. Mot. at 4. Closing the courtroom during their testimony will not change that fact.
5 The Access Proponents are sensitive to the situation faced by these witnesses and this Court in this
6 case and they have refrained from identifying them throughout the pre-trial proceedings. But it
7 would serve no purpose, let alone an overriding interest, to close the courtroom during this testimony
8 given that the identity of these witnesses is widely known and the District Attorney concedes that the
9 content of their testimony should be made public via contemporaneous audio feed.
10

11 See *NBC Subsidiary*, 20 Cal. 4th at 1222 n.47 (noting that the "closure order did not, in fact, prevent
12 the kind of publicity that the court sought to forestall" because the information was already reported
13 by the press).
14

15 CONCLUSION

16 For all the aforementioned reasons, the District Attorney's motion should be denied.
17
18
19
20
21
22
23
24

25 ³ See Cal. Pen. Code § 859.1(7) (noting that one factor to be considered by a court in deciding
26 whether to close testimony of a minor witness pursuant to section 859.1 is "[w]hether the witness
27 has disclosed information concerning the case to the public through press conferences,
28 public meetings, or other means").

1 DATED: January 24, 2005

Respectfully submitted,

2 GIBSON, DUNN & CRUTCHER LLP

Theodore J. Boutrous, Jr.

3 Michael H. Dore

4 By:

Theodore J. Boutrous, Jr.

5 Attorneys for NBC Universal, Inc.;

6 CBS Broadcasting Inc.; Fox News Network L.L.C.;

7 ABC, Inc.; Cable News Network LP, LLLP;

8 The Associated Press; *Los Angeles Times*; The New
9 York Times Company; and *USA Today*

DECLARATION OF THEODORE J. BOUTROUS, JR.

I, THEODORE J. BOUTROUS, JR., hereby declare and state that:

I am a lawyer admitted to practice in the State of California, a partner in the law firm of Gibson, Dunn & Crutcher LLP, and counsel for the Access Proponents. I have personal knowledge of all facts herein stated. If called as a witness, I could testify competently to the following:


1. The alleged victim is interviewed and shown in the documentary "Living with Michael Jackson," reported by journalist Martin Bashir. A copy of this documentary, authenticated by the custodian of records for ABC News – Joel Kanoff – was filed with this Court on January 18, 2005 as part of Martin Bashir's motion for a protective order.

2. The Access Proponents and other news organizations in the United States have refrained from publishing the names and pictures of the alleged victim and his brother since the charges were filed.

3. The family of the alleged victim in the criminal prosecution of Michael Jackson revealed the identity of the alleged victim and his younger brother in a publicly filed claim for damages filed against the County of Los Angeles and its Department of Children and Family Services on May 25, 2004. The claim for damages links the alleged victim and to the arrest of Michael Jackson.

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

Executed this 24th day of January, 2005, at Los Angeles, California.


Theodore J. Boutrous, Jr.

**CERTIFICATE OF SERVICE
BY FAX AND REGULAR MAIL**

I, Barbara Cruz, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Michael H. Dore, a member of the bar of this Court, and at his direction, on January 24, 2005, I served the following:

ACCESS PROPONENTS' OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER DIRECTING THAT THE TESTIMONY OF CHILD WITNESSES BE CLOSED TO THE PUBLIC; DECLARATION OF THEODORE J. BOUTROUS, JR.

on the interested parties in this action, by the following means of service:

☒ **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

| | |
|---|---|
| Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs | Tel.: (805) 568-2300 Fax: (805) 568-2398 |
| Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson | Tel.: (310) 284-3120 Fax: |
| Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93001 Co-Counsel for Defendant Michael Jackson | Tel.: (805) 962-4887 Fax: (805) 963-7311 |

☒ **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated below. No error was reported by the machine.

| | |
|---|---|
| Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs | Tel.: (805) 568-2300 Fax: (805) 568-2398 |
| Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson | Tel.: (310) 284-3120 Fax: |
| Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93001 Co-Counsel for Defendant Michael Jackson | Tel.: (805) 962-4887 Fax: (805) 963-7311 |

☒ I am employed in the office of Michael H. Dore, a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.

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

☐ (FEDERAL) I declare under penalty of perjury that the foregoing is true and correct.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on January 24, 2005, at Los Angeles, California.


Barbara Cruz

10841091_1 (4).DOC