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 CLERK OF THE SUPERIOR COURT
 COUNTY OF STANISLAUS
 BY *[Signature]*
 DEPUTY

9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

12 CASE NO. 1045188

13 In re Sealed Search Warrants, Warrant
 14 Affidavits, and Returns, and Arrest Warrant
 Possible Cause Showing—Laci Peterson
 Investigation

**NOTICE OF MOTION AND MOTION TO
 UNSEAL SEARCH WARRANT AND ARREST
 WARRANT RECORDS**

Date: May 5, 2003
 Time: 8:30
 Dept: 5
 Judge: Hon. Roger M. Beauchesne

18 TO DEFENDANT SCOTT PETERSON, THE PEOPLE OF THE STATE OF
 19 CALIFORNIA, AND THEIR COUNSEL OF RECORD, please take notice that on May 5, 2003,
 20 at 8:30 AM or as soon thereafter as the matter may be heard, in the courtroom of the Honorable
 21 Roger M. Beauchesne, Department 5 of the Stanislaus County Superior Court, 1100 I Street,
 22 Modesto, California, Contra Costa Newspapers, Inc., and the San Jose Mercury News, Inc., will
 23 move for an order unsealing the search warrants and related documents pertaining to this case, as
 24 well as the probable cause showing supporting the issuance of the warrant for Defendant's arrest.

25 This motion shall be made on the grounds that there is a presumptive right of public
 26 access to these records under the First Amendment, the California Constitution, California statute,
 27 the California Rules of Court, and the common law, which may be overcome only in exceptional
 28

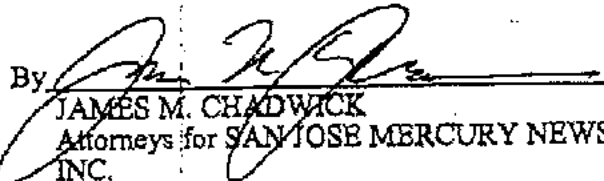
1 circumstances not presented by this case. The motion will be based on this notice, on the
2 accompanying memorandum of points and authorities in support of the motion, and on such
3 additional evidence, argument, or authority as may be presented prior to or at the hearing on the
4 motion.

5 Dated: April 25, 2003

LEVY RAM & OLSON LLP

6
7 By Karl Olson 
8 KARL OLSON
9 Attorneys for CONTRA COSTA
10 NEWSPAPERS, INC.

11 GRAY CARY WARE & FREIDENRICH LLP

12 By James M. Chadwick 
13 JAMES M. CHADWICK
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16 SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

17 CASE NO.

18 In re Sealed Search Warrants, Warrant
19 Affidavits, and Returns, and Arrest Warrant
20 Possible Cause Showing—Laci Peterson
21 Investigation

22 **MEMORANDUM OF POINTS AND
23 AUTHORITIES IN SUPPORT OF MOTION
24 TO UNSEAL SEARCH WARRANT AND
25 ARREST WARRANT RECORDS**

26 Date: May 5, 2003
27 Time: 8:30 a.m.
28 Dept: 5
Judge: Hon. Roger M. Beauchesne

29 I. INTRODUCTION.

30 This motion seeks access to the core documents which gave rise to the prosecution of
31 Scott Peterson in this case of overwhelming public interest: search warrants, search warrant
32 affidavits and returns, and the affidavits or other probable cause showing in support of the
33 warrant for the arrest of Defendant Scott Peterson ("Defendant"). The disclosure of the search
34 warrants and related records is specifically mandated by California law. Both the search warrant
35 records and the probable cause showing in support of the warrant for Defendant's arrest are court
36 records subject to the presumption of public access established by the First Amendment, by
37 California law, and by the California Rules of Court. Furthermore, because a prosecution has
38 now been commenced, this case has been transformed from an investigation into a court case.

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MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS

GRAY CARY WARE
& FREIDENRICH LLP

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1 Accordingly, the strict standards generally forbidding sealing and closure set forth by the
 2 California Supreme Court in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th
 3 1178 (1999), and embodied in California Rules of Court 243.1 and 243.2 apply, and there is no
 4 sound justification for refusing to make public the documents pertaining to the investigation.
 5 Those documents should be made public, and Contra Costa Newspapers, Inc. ("Contra Costa")
 6 and the San Jose Mercury News, Inc. ("Mercury News") request that this motion be granted.¹

7 II. FACTUAL SUMMARY.

8 Laci Peterson, eight months pregnant, disappeared from her Modesto home shortly before
 9 Christmas last year. Due to the circumstances of the case, it has received widespread publicity.
 10 A reward that ultimately reached \$500,000 was offered. The investigation into her disappearance
 11 was originally classified as a "missing person" case. Eventually, it was reclassified as a homicide
 12 case.

13 On April 4, 2003, this Court held a hearing on a Petition by the *Modesto Bee* (filed on
 14 March 12) to unseal eight search warrants and related documents. In an April 10, 2003 ruling, the
 15 Court ordered that the warrants remain sealed. Significantly, however, the Court ruled: "*In the*
 16 *event a criminal complaint is filed or an indictment returned and made public as a result of the*
 17 *investigation at issue, the Court's order sealing the eight (8) search warrants, affidavits, and*
 18 *returns in their entirety shall be vacated and each of the documents shall become a public record.*"
 19 (April 10, 2003 Ruling on Petition to Unseal at p. 3, hereafter "April 10 Ruling," emphasis
 20 added.)

21 Eight days after this Court's ruling, Scott Peterson was arrested in San Diego. Criminal
 22 charges have been filed against him in this matter and he was arraigned on April 21. Thus, under
 23 the plain terms of the Court's April 10 Ruling, "*each of the documents shall become a public*
 24 *record.*"

25 ¹ Please note that this case is related to the matter initiated by the petition of the *Modesto Bee* for
 26 access to the search warrants and related documents, *In re 8 Sealed Search Warrants—Laci*
 27 *Peterson Investigation*, Case No. 1045098. The present motion has been filed before the
 28 Honorable Roger M. Beauchesne, and is also being provided by courtesy copy to the Presiding
 Judge of the Superior Court, Honorable Al Girolami, in accordance with the direction of the
 Executive Officer of the Court.

1 The Stanislaus County District Attorney, however, has appealed this Court's April 10
 2 Ruling, and on April 18—before the criminal complaint was filed and Mr. Peterson was
 3 arraigned—the Court of Appeal stayed the enforcement of "all orders in Stanislaus County case
 4 No. 1045098" (the petition to unseal warrants) "pending determination of the petition in the
 5 above entitled action" (No. 1045098). The *Modesto Bee* has asked that the People's Petition in
 6 the Court of Appeal be dismissed as moot, given the arrest and arraignment of Mr. Peterson. As
 7 of the date of this motion, the writ petition remains pending.

8 Since the *Bee*'s request and the District Attorney's writ petition, reporters for the Mercury
 9 News have requested access to both the search warrant materials and the affidavit or other
 10 probable cause showing supporting the issuance on April 17, 2003 by Judge Ladine of the
 11 warrant for the arrest of Defendant. The Mercury News' requests for the search warrant records
 12 have been rejected, and it has been told by representatives of the Court that the probable cause
 13 showing in support of the arrest warrant cannot be located.

14 **III. CALIFORNIA LAW MANDATES PUBLIC ACCESS TO COURT RECORDS,
 15 AND NOW THAT CHARGES HAVE BEEN FILED NO EXTRAORDINARY
 16 CIRCUMSTANCES JUSTIFYING SEALING EXIST.**

17 **A. California Law and the First Amendment Mandate Public Access to Court
 18 Records.**

19 California Rule of Court 243.1(d) provides that:

20 "The court may order that a record be filed under seal only if it
 21 expressly finds that:

- 22 (1) There exists an overriding interest that overcomes the right of
 23 public access to the record;
- 24 (2) The overriding interest supports sealing the record;
- 25 (3) A substantial probability exists that the overriding interest will
 26 be prejudiced if the record is not sealed;
- 27 (4) The proposed sealing is narrowly tailored; and
- 28 (5) No less restrictive means exist to achieve the overriding
 interest."

Rule 243.1 codifies a well-established body of law establishing that under the First
 Amendment and the California Constitution provide the public and the press with a presumptive

1 right of access to court records that can be overcome only by a compelling interest. "Although
 2 there is no specific statutory requirement for access to court documents, both the federal . . . and
 3 the state . . . Constitutions provide broad rights of access to judicial records in criminal and civil
 4 cases." *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367, 373 (1998) ("*Copley Press*
 5 *III*"); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 (1992) ("*Copley Press II*").
 6 The California Supreme Court has recently emphasized that the right of access is of constitutional
 7 dimension. *NBC Subsidiary (KNBC-TV), Inc.*, 20 Cal. 4th at 1212. Both California and federal
 8 authorities place a heavy burden on the party seeking nondisclosure to justify such interference
 9 with the public's first amendment rights—denial of access must be "*strictly and inescapably*
 10 *necessary*" to protect a compelling government interest. *Associated Press v. U.S. District Court*,
 11 705 F.2d 1143, 1145 (9th Cir. 1983), quoting *United States v. Brooklier*, 685 F.2d 1162, 1167
 12 (9th Cir. 1982) (emphasis added). See also *Copley Press, Inc. v. Superior Court*, 228 Cal. App.
 13 3d 77, 84 (1991) ("*Copley Press I*") (any order restricting access to court records must be "based
 14 on findings that closure is essential to preserve higher values and is narrowly tailored to serve that
 15 interest."); *Mary R. v. & R. Corp.*, 149 Cal. App. 3d 308, 317 (1983) ("Since court records are
 16 public records, the burden rests on the party seeking to deny public access to those records to
 17 establish compelling reasons why and to what extent these records should be made private.").

18 In short, both California law and the United States Constitution establish a right of access
 19 to court records that can be overcome only in exceptional circumstances. No such circumstances
 20 exist in this case.

21 **B. California Law Specifically Provides for Public Access to Search Warrants**
 22 **and Related Records, and Makes No Provision for the Sealing of Arrest**
 23 **Warrant Records.**

24 California law provides that a search warrant may issue only on a showing of probable
 25 cause supported by an affidavit. Cal. Pen. Code § 1525. California law also expressly requires
 26 that search warrants and related records be made public after execution. Section 1534 of the
 27 California Penal Code provides, in pertinent part:

28 The documents and records of the court relating to the warrant need
 not be open to the public until the execution and return of the
 warrant or the expiration of the 10-day period after issuance.

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Thereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record.

Cal. Pen. Code § 1534(a) (West 2000) (emphasis added).

This statute, which has been in effect in California for more than one hundred and thirty years, reflects an unambiguous Legislative mandate that search warrants and related documents (such as affidavits and returns) are to be made available to the public. The search warrants at issue have been executed and returned. Accordingly, Penal Code section 1534 mandates the unsealing of the search warrant records.

Many courts have recognized a right of public access to materials filed in support of search warrants, either under the First Amendment or under common law. See, e.g., *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (First Amendment right of access); *Baltimore Sun Co.*, 886 F.2d 60, 65-66 (4th Cir. 1989) (common law right of access); *State of Vermont v. Schaefer*, 157 Vt. 339, 599 A.2d 337, 348 (1991), cert. denied 502 U.S. 1077 (1992) (First Amendment right of access). As one court recognized in upholding the unsealing of a search warrant affidavit:

Society has an understandable interest not only in the administration of criminal trials, but also in law enforcement systems and how well they work. The public has legitimate concerns about methods and techniques of police investigation: for example, whether they are outmoded or effective, and whether they are unnecessarily brutal or instead cognizant of suspect's rights.

In the Matter of Application and Affidavit for a Search Warrant, 923 F.2d 324, 331 (4th Cir. 1991). Accord *In re Search Warrant (Gunn)*, 855 F.2d at 573 ("even though a search warrant is not part of the criminal trial itself . . . a search warrant is certainly an integral part of a criminal prosecution.").

Similarly, California law requires a demonstration of probable cause to support the issuance of a warrant for arrest. Cal. Pen. Code § 817. In general, the showing is made by a sworn statement in writing, and if made otherwise the probable cause showing must be recorded and transcribed. Cal. Pen. Code § 817(b), (c). Nothing in the provisions of California law pertaining to the issuance of arrest warrants provides for the sealing of the warrant or the probable

1 cause showing. Thus, arrest warrants, and the affidavits, declarations, or other probable cause
2 showings supporting their issuance, are—like other court records—presumptively public.

3 **C. No Extraordinary Circumstances Justifying Sealing Exist, so the Requested**
4 **Records Should Be Made Available to the Public and Press.**

5 None of the findings required by Rule 243.1(d) or by the constitutional right of access can
6 be made now that criminal charges have been filed and Defendant has been arraigned and taken
7 into custody. Indeed, section IV of this Court's April 10, 2003 Order expressly recognized that as
8 soon as the investigation was completed and charges were filed, the search warrants should and
9 would be made public.

10 First, now that Defendant has been taken into custody, there is no "overriding interest"
11 that overcomes the right of public access to the search warrants. The Court's concerns that
12 revelation of information in the search warrant affidavits would harm the investigation, and that
13 the investigation should be thorough and unhampered, no longer apply now that criminal charges
14 have been filed, as the Court clearly found in ordering that "each of the documents shall become a
15 public record" once a criminal complaint is filed. See April 10 Ruling, at p. 3. Defendant is now
16 in custody, and alerting him to the investigation is no longer a concern. Nor can he destroy
17 evidence or otherwise interfere with the investigation. Indeed, the government clearly believes
18 that it now has evidence sufficient to prosecute Defendant. Stanislaus County District Attorney
19 Jim Brazelton has said that the prosecution has "voluminous" evidence, both direct and
20 circumstantial, implicating Defendant.

21 The Court's April 10 ruling stated, as an alternative basis for the ruling, that unsealing the
22 documents "would likely impair any suspects' rights to a fair trial," at least at the pre-arraignment
23 stage. There are no express factual findings to that effect, however, and Contra Costa and the
24 Mercury News respectfully submit that there is no basis for such a finding now that charges have
25 been filed.

26 Rule 243.1 also requires any party seeking to deny public access to court records to show
27 a "substantial probability exists that the overriding interest will be prejudiced if the record is not
28 sealed." As set forth above, no "overriding interests" of the prosecution will be jeopardized now

1 that criminal charges have been filed, as this Court's April 10 Ruling recognized. Similarly, Mr.
2 Peterson's interests in a fair trial will not be prejudiced by the unsealing of the documents.

3 So far as the Mercury News has been able to determine, Defendant has not asserted that
4 any of the records in this matter should be sealed in order to protect his right to a fair trial.
5 Should such an assertion be made, however, the Mercury News points out that prejudice to the
6 Defendants' right to a fair trial cannot be presumed. *Nebraska Press Ass'n. v. Stuart*, 427 U.S.
7 539, 554 (1976). See also *People v. Harris*, 28 Cal. 3d 935, 949 (1981) (citation omitted), cert.
8 denied, 454 U.S. 882 (1981) (the "controlling cases 'cannot be made to stand for the proposition
9 that juror exposure to information about a state defendant's prior convictions or to news accounts
10 of the crime with which he is charged alone presumptively deprives the defendant of due
11 process'"); *People v. Mendonsa*, 137 Cal. App. 3d 888, 895 (1982) ("there is no presumption that
12 an accused suffers prejudice from unfriendly news stories"). At most, any claims of prejudice to
13 Defendant's fair trial rights from publicity about unsealed search warrant or arrest warrant records
14 would be "conclusionary," and such conclusionary claims do not pass the daunting tests set forth
15 in Rule 243.1(d) for the sealing of documents." *In re Providian Credit Card Cases*, 96 Cal. App.
16 4th 292, 305 (2002).

17 Moreover, this case has already received a great deal of publicity, both before and
18 immediately after Scott Peterson was taken into custody, and it is highly doubtful that whatever
19 publicity might result from making additional records public would add measurably to the
20 existing publicity or tip the scales in a way they haven't already been tipped. "In fact . . . the
21 instances in which pretrial publicity alone, even pervasive and adverse publicity, actually
22 deprives a defendant of the ability to obtain a fair trial will be quite rare." *Gannett Co. v.*
23 *DePasquale*, 443 U.S. 368, 404 n.1 (1979) (Rehnquist, J., concurring). As the U.S. Supreme
24 Court observed in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), a preliminary
25 hearing can be closed only if that is a substantial probability that the defendant's right to a fair
26 trial will be prejudiced by publicity "that closure would prevent." *Press-Enterprise Co.*, 478 U.S.
27 at 14. This Court's April 10 ruling that the search warrants should be made public once a
28 complaint is filed implicitly found that continued sealing of the search warrants would not prevent

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1 whatever prejudicial publicity might allegedly have occurred, and that is the only reasonable
2 conclusion.²

3 It is significant that since the U.S. Supreme Court set forth the "substantial probability of
4 prejudice" test for closure of preliminary hearings (*Press-Enterprise Co.*, 478 U.S. at 14)—a test
5 followed by the California Supreme Court in *NBC Subsidiary* (20 Cal. 4th at 1207, 1218) and
6 enacted in Rule 243.1(d)(3)—no reported case has affirmed the closure of a preliminary hearing.
7 Similarly, no reported case has affirmed sealing under Rule 243.1(d). In short, there is no basis
8 for finding that there is a substantial probability of prejudice to fair trial rights which will be
9 prejudiced if the search warrants do not remain sealed.

10 Finally, Rule 243.1 compels those seeking to maintain the secrecy of court records to
11 demonstrate that there are no less restrictive means adequate to protect the asserted interests. The
12 U.S. Supreme Court, in the seminal *Press-Enterprise* decision, identified several "less restrictive
13 means" which are sufficient to protect fair trial rights short of closing hearings or sealing
14 documents:

15 "[R]isk of prejudice does not automatically justify refusing public
16 access to hearings on every motion to suppress. Through voir dire,
17 cumbersome as it is in some circumstances, a court can identify
18 those jurors whose prior knowledge of the case would disable them
19 from rendering an impartial verdict. And even if closure were
20 justified for the hearings on a motion to suppress, closure of an
21 entire 41-day proceeding would rarely be tolerated. The First
22 Amendment right of access cannot be overcome by the conclusory
23 assertion that publicity might deprive the defendant of that right."

24 *Press-Enterprise Co.*, 478 U.S. at 15. Not surprisingly, the California Supreme Court has also
25 held that careful and thorough admonishments to the jury are presumptively adequate to ensure a
26 fair trial: "[A]s a general matter, cautionary admonitions and instructions must be considered a
27 presumptively reasonable alternative [to sealing]—a presumption that may be overcome only in
28 exceptional circumstances." *NBC Subsidiary, (KNBC-TV), Inc.*, 20 Cal. 4th at 1223-24. Careful

29 ² Indeed, the claims of Mr. Peterson's family that there has been a "rush to judgment"
30 themselves provide independent justification for *unsealing* the search warrants at this time, so that
31 the people of Modesto — and of California and the United States — can assess for themselves
32 whether there was sufficient justification to take Mr. Peterson into custody.

1 pre-trial voir dire and other measures also generally provide an adequate alternative to sealing or
2 closure. *Brian W. v. Superior Court*, 20 Cal. 3d 618, 625 (1978).³

3 Here, the less restrictive means identified by the United States Supreme Court and the
4 California Supreme Court—and the potential alternative of a change of venue, which is likely to
5 be sought by the defendant regardless of whether the search warrants are unsealed—are
6 constitutionally preferable and presumptively adequate alternatives to the continued sealing of
7 documents. Accordingly, the records should be unsealed.

8 **IV. CONCLUSION.**

9 The sealing of documents such as those at issue here is, as the California Supreme Court
10 has recognized, a step which can be justified "only in the rarest of circumstances." *NBC*
11 *Subsidiary, (KNBC-TV), Inc.*, 20 Cal. 4th at 1226. This Court found on April 10 that once a
12 criminal complaint was filed, those "exceptional" circumstances would no longer exist. That
13 finding was amply supported by the law and the facts. This motion should be granted and the
14 documents pertaining to the search and arrest warrants issued in this case should be made public
15 forthwith.

16 Dated: April 25, 2003

LEVY RAM & OLSON LLP

17 By Karl Olson
18 KARL OLSON
19 Attorneys for CONTRA COSTA
20 NEWSPAPERS, INC.

GRAY CARY WARE & FREIDENRICH LLP

21 By James M. Chadwick
22 JAMES M. CHADWICK
23 Attorneys for SAN JOSE MERCURY
24 NEWS, INC.

25 ³ The California Supreme Court in *NBC Subsidiary* rejected the argument that jurors would
26 ignore instructions to disregard press accounts, or that sequestration of the jury is not an adequate
27 alternative to delaying public access. *NBC Subsidiary, (KNBC-TV), Inc.* 20 Cal. 4th at 1222.
28 "We must presume that jurors generally follow instructions to avoid media coverage, and to
disregard coverage that they happen to hear or see. . . . We repeatedly have stressed our
adherence to the fundamental premise that, as a general matter, cautionary admonitions and
instructions serve to correct and cure myriad improprieties, including the receipt by jurors of
information that was kept from them." *Id.* at 1223-1224.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

CASE NO.

DECLARATION OF SERVICE

13 In re Sealed Search Warrants, Warrant
 14 Affidavits, and Returns, and Arrest Warrant
 15 Possible Cause Showing—Laci Peterson
 Investigation.

DECLARATION OF SERVICE

GRAY CARY WARE
& FREIDENRICH LLP

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2100449-901600

DECLARATION 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 Gray Cary Ware & Freidenrich, 1755 Embarcadero Road, Palo Alto, California 94303-3340. On April 25, 2003, I served the within documents:

- 1. **NOTICE OF MOTION AND MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS; and,**
- 2. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS.**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
 - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, California addressed as set forth below.
 - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by consigning such copies in a sealed envelope to an overnight delivery courier for next business day delivery to the person(s) at the address(es) set forth below.

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Courtesy Copy:
 The Honorable Al Girolami
 Presiding Judge
 Stanislaus County Superior Court
 800 11th Street, Rm. 100
 Modesto, CA 95354

I am readily familiar with the firm's practice of collection and processing 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 postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.