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FILED
03 APR 29 PM 2:43
CLK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS
BY Mary Vento DEPUTY

STANISLAUS COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

----------o0o----------

D.A. No.
THE PEOPLE OF THE STATE OF CALIFORNIA) No. 1056770

Plaintiff,) OPPOSITION TO MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS

vs.)

SCOTT PETERSON,)

Respondent,) Hrg.: 5-5-03
Time: 9:30 am
Dept: 5

----------o0o----------

TO THE DEFENDANT, HIS ATTORNEY OF RECORD, AND COUNSEL FOR THE CONTRA COSTA NEWS, AND SAN JOSE MERCURY NEWS:

The People respectfully oppose any motion by the above mentioned news organizations to unseal the search warrant, arrest warrant, and any other information, in the above mentioned case.

The People request that their response to this issue in case number 1045098 be considered a part of this response (See attached copy).

The People further oppose the motion based on the fact that all proceedings regarding this issue are stayed in the Superior Court pending a decision by the 5th Appellate District (See attached order, case number F042848).

Dated this 28th day of April , 2003, at Modesto, California.

Respectfully submitted,

JAMES C. BRAZELTON
District Attorney

By _____
Rick Distaso
Senior Deputy District Attorney

IN THE

Court of Appeal of the State of California

IN AND FOR THE

Fifth Appellate District

F042848

(Stanislaus Sup. Ct. No. 1045098)

THE PEOPLE,

Petitioner,

v.

SUPERIOR COURT, COUNTY OF STANISLAUS,

Respondent;

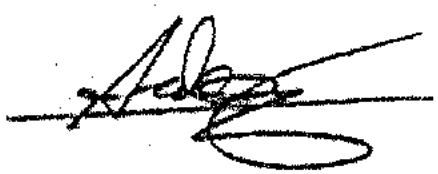
THE MODESTO BEE,

Real Party In Interest.

BY THE COURT*:

The enforcement of the local rule of court which allows disclosure of some information designating "what the search warrant was for" and of all orders in Stanislaus County case No. 1045098 authorizing disclosure or unsealing of any information regarding search warrants, returns, affidavits and the investigatory process is stayed pending determination of the petition in the above entitled action or further order of this court.

The Superior Court, Superior Court Clerk and County Clerk of Stanislaus County, their employees and agents, are hereby enjoined to **not** allow disclosure or unsealing of any information regarding search warrants, affidavits, returns or any other documents in that investigatory process in Stanislaus County Superior Court action No. 1045098 pending determination of the petition in the above entitled action or further order of this court.



P.J.

*Before Ardaiz, P.J., Dibiaso, J., and Vartabedian, J.

(5)

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FILED
03 MAR 17 PM 1:11
CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS
BY _____
DEPUTY

STANISLAUS COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

----------oOo----------

D.A. No. *

In Re 8 sealed search warrants - Laci Peterson investigation

THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.

No. 1045098

OPPOSITION TO THE MODESTO BEE'S PETITION FOR ACCESS TO CERTAIN SEALED WARRANTS
Hrg: 4-2-03
Time: 8:30 a.m.
Dept: 2

----------oOo----------

Comes now THE PEOPLE OF THE STATE OF CALIFORNIA to Oppose the Modesto Bee's Petition for Access to Certain Sealed Search Warrants:

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FACTS

This court has previously considered a search warrant application from a detective of the Modesto Police Department who has been investigating a possible criminal offense. After considering the information submitted under oath by the detective, this court issued a warrant. The court also considered the detective's request that the application, warrant, and return be sealed, as well as the factual basis for that request. After finding good cause, the court sealed the documents.

Subsequently, one or more additional warrant applications regarding the same investigation have been heard by this court, and granted. This court ordered that documentation for each of the additional warrants be sealed, after finding that a factual showing of good cause had been made, ex parte by the detective.

As of this date, no person has been arrested. No prosecuting agency has filed a complaint regarding the probable offenses under investigation, nor has the grand jury indicted any person for an offense. Police investigation continues. The investigation is the subject of intense news-media interest, and numerous accounts of the likely offenses and investigation have been televised and published in print and electronically by the local and national press.

On January 16, 2003 John Coté, a reporter for the Modesto Bee (hereafter intervenor), served a "Public Records Request" on the Modesto Police Department, the Stanislaus County District Attorney's Office and the Stanislaus County Superior Court, for

the search warrants and "documents relating to them" connected with the Laci Peterson investigation.

On January 21, 2003 the District Attorney responded to said request pointing out that the records were exempt from Disclosure pursuant to Government Code §6254(f). The response also pointed out that the courts were exempt from the California Public Records act pursuant to Copley Press, Inc. v. Superior Court, (1992) 6 Cal.App. 4th 106. The People did not receive a copy of the Superior Courts response, if any, to the Bee.

On January 23, 2003 a Superior Court official told a District Attorney investigator, that the court was about to consider a proposed court rule change, changing the maintenance of search warrants and in particular "sealed" search warrants."

On January 27, 2003 the Superior Court's Executive Committee apparently met and discussed this new proposal and approved the implementation of same. The District Attorney's Office attempted to communicate with the court prior to the implementation of this "new rule" but was not given the opportunity.

After January 27, 2003 the Superior Court implemented a new form to be used every time a search warrant was sealed. This form sets forth that the search warrant was sealed, which judge had signed the order and specifies what the search warrant was for.

Between January 27, 2003 and March 8, 2003 the Superior Court Administration provided to members of the media copies of these "new forms" which included the description of what the search warrants were for, despite the fact that the search warrants and affidavits were sealed. This description included

sealed information in violation of Rule of Court Rule 243.2(c).

On February 26, 2003 intervenor sent a letter to this court requesting access to the search warrants and included the information provided to them from the court's "new form."

On February 28, 2003 this court, by the Executive Officer, advised intervenor to file a petition to seek access to the sealed search warrants. Intervenor has now filed a petition.

LAW

1. **THE MODESTO POLICE DEPARTMENT, IS AN INTERESTED PARTY HEREIN, AND SHOULD HAVE AN OPPORTUNITY TO RESPOND TO INTERVENOR'S REQUEST.**

This court has issued an order sealing certain court records upon good cause shown by the Modesto Police Department. The order relates to search warrants issued for an ongoing police investigation; no criminal case has been filed, nor any indictment returned. Intervenor has not served notice of its request to gain access to the sealed search warrants upon the Modesto Police Department. Given that failure, and given the *in posse* prosecution inferred from the issuance of search warrants, the District Attorney responds as an officer of the court to protect the People's specific *in posse* interests and the interests of justice, in general.

As an officer of the court, with *in posse* interests, the People oppose intervenor's motion to unseal any search warrant documents, on the grounds that premature revelation of the information contained in the documents would jeopardize an on-going police investigation, potentially interfere with *in posse*

Constitutional trial rights, would violate the statutory right to protect privileged official information found in Evidence Code §1040, and as applied, Penal Code §1534 (hereafter §1534) and Rule of Court 243.1 would unconstitutionally violate the Separation of Powers to the detriment of the District Attorney.

Should this court hear intervenor's request without giving the Modesto Police Department an opportunity to respond and protect its interests, the District Attorney's files this response in opposition to intervenor's request, and as an officer of the court, as follows.

2. PENAL CODE §1534 AND RULE OF COURT 243.1, AS APPLIED TO A CRIMINAL INVESTIGATION PRIOR TO THE FILING OF A CRIMINAL CASE VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The separation of power doctrine is set forth in the California Constitution, Article 3, § 3:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

The California Supreme Court recently discussed the separation of powers and said:

> " '[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.' [Citations.]" (People v. Superior Court (Romero), (1996) 13 Cal.4th 497, 516 (Romero).) "[T]he power of the people through the statutory initiative is coextensive with the power of the Legislature." (Legislature v. Deukmejian, (1983) 34 Cal.3d 658, 675.) "[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from ' "the complex considerations necessary for the effective and efficient administration of law enforcement." ' [Citations.] The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial

branch. [Citations.]" (People v. Birks, (1998) 19 Cal.4th 108, 134.) "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." (People v. Tenorio, (1970) 3 Cal.3d 89, 94.)" (Emphasis added.)

Manduley v. Superior Court, (2002) 27 Cal.4th 537, 552.

Another California Supreme court decision held the same:

"It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. (E.g., People v. Eubanks, (1996) 14 Cal.4th 580, 588-589; Dix v. Superior Court, (1991) 53 Cal.3d 442, 451.) This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from " 'the complex considerations necessary for the effective and efficient administration of law enforcement.' " (People v. Keenan, (1988) 46 Cal.3d 478, 506, quoting People v. Heskett, (1982) 30 Cal.3d 841, 860.) The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch. (People v. Wallace, (1985) 169 Cal.App.3d 406, 409 ; People v. Adams, (1974) 43 Cal.App.3d 697, 708; see also Taliaferro v. Locke, (1960) 182 Cal.App.2d 752.)

People v. Birks, (1998) 19 Cal.4th 108, 134.

One of the duties of the "executive branch" is the investigation and prosecution of criminal acts. One Court of Appeals has held:

"Investigation and the gathering of evidence relating to criminal offenses is a responsibility which is inseparable from the district attorney's prosecutorial function. That the district attorney is charged with the duty of investigating as well as prosecuting criminal activity has been recognized by an unbroken line of California cases."

Hicks v. Board of Supervisors, (1977) 69 Cal.App.3d 228, 240-241.

Hicks was cited in another case in which a party sought to enjoin a District Attorney from conducting an investigation, and that court held:

"The separation of powers doctrine requires judicial restraint in enjoining criminal investigations or prosecutions. The prosecutor's authority stems from the executive branch of government (Cal. Const., art. III, § 3), and the investigation and gathering of evidence relating to criminal offenses is the prosecutor's responsibility and rests solely within his or her discretion. (Hicks v. Board of Supervisors, (1977) 69 Cal.App.3d 228, 241.) The discretionary authority vested in the district attorney to investigate and prosecute criminal conduct is considered too vital to the interest of public order to be subjected to prior restraint by the courts except under extraordinary circumstances. (Manchel v. County of Los Angeles , (1966) 245 Cal.App.2d 501, 505, 510; Pitchess v. Superior Court, (1969) 2 Cal.App.3d 644, 648; Reporters Com. v. American Telephone & Telegraph ,(D.C. Cir. 1978) 593 F.2d 1030, 1065.) "The balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive branch upon nothing more than a vague fear or suspicion that its officers will be unfaithful to their oaths or unequal to their responsibility." (Reporters Com. v. American Telephone & Telegraph, supra, at p. 1065.)"(Emphasis Added.)

Triple A Machine Shop, Inc. v. State of California, (1989) 213 Cal.App.3d 131, 144 -145.

It cannot be disputed that the duties of the executive branch to investigate and prosecute criminal violations may not be generally supervised by the judicial or legislative branch. Each branch of government operates as a check and balance of the other, and with these principals in mind, we turn to the examination of the two suspect sections.

Penal Code §1534 states:

"(a) A search warrant shall be executed and returned within 10 days after date of issuance. A warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. After the expiration of 10 days, the warrant, unless executed, is void. 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. Thereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record.
(b) If a duplicate original search warrant has been

executed, the peace officer who executed the warrant shall enter the exact time of its execution on its face.
(c) A search warrant may be made returnable before the issuing magistrate or his court."

Rule of Court 243.1 (hereafter Rule 243.1) states:

"(a) [Applicability]
(1) Rules 243.1-243.4 apply to records sealed or proposed to be sealed by court order.
(2) These rules do not apply to records that are required to be kept confidential by law. These rules also do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. The rules do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.
(b) [Definitions]
(1) "Record." Unless the context indicates otherwise, "record" as used in this rule means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court.
(2) "Sealed." A "sealed" record is a record that by court order is not open to inspection by the public.
(3) "Lodged." A "lodged" record is a record that is temporarily placed or deposited with the court but not filed.
(c) [Court records presumed to be open] Unless confidentiality is required by law, court records are presumed to be open.
(d) [Express findings required to seal records] The court may order that a record be filed under seal only if it expressly finds that:
(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.
(e) [Scope of the order]
(1) An order sealing the record must (i) specifically set forth the factual findings that support the order, and (ii) direct the sealing of only those documents and pages--or, if reasonably practicable, portions of those documents and pages--that contain the material that needs to be placed under seal. All other portions of each documents or page must be included in the public file.
(2) Consistent with Code of Civil Procedure sections 639 and 645.1, if the records that a party is requesting be placed under seal are voluminous, the court may appoint a referee and fix and allocate the referee's fees among the parties.

The relevant portion of Penal Code §1534(a) is:

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

The relevant portion of Rule 243.1 is:

> *(1) Rules 243.1-243.4 apply to records sealed or proposed to be sealed by court order.*
> *(2) These rules do not apply to records that are required to be kept confidential by law. These rules also do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. The rules do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.*
> *(b) [Definitions]*
> *(1) "Record." Unless the context indicates otherwise, "record" as used in this rule means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court.*
> *(2) "Sealed." A "sealed" record is a record that by court order is not open to inspection by the public.*
> *(3) "Lodged." A "lodged" record is a record that is temporarily placed or deposited with the court but not filed.*

Intervenor asserts when read together §1534 and Rule 243.1 mandates that search warrants and accompanying documents are court records that cannot be sealed without notice to the press and/or public. This interpretation if adopted by the court would amount to a violation of the separation of powers.

The executive branch (law enforcement) is mandated to seek a search warrant from the judicial branch as set fourth in the Fourth Amendment to the United States Constitution. This process is codified by the legislative branch in California in Penal Code §1523. The search warrant application process is part of the investigation process and is done confidentially and ex parte. As

the United States Supreme Court has said:

> "... a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge."
>
> U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division, (1972) 407 U.S. 297, 321. (See also Franks v. Delaware, (1977) 438 U.S. 154; Penal Code §1526.)

The Ninth Circuit Court of Appeals has ruled on this issue and found no public access right to pre-trial warrant materials:

> "We know of no historical tradition of public access to warrant proceedings. Indeed, our review of the history of the warrant process in this country indicates that the issuance of search warrants has traditionally been carried out in secret. Normally a search warrant is issued after an ex parte application by the government and an in camera consideration by a judge or magistrate. McDonnell Douglas Corp., 855 F.2d at 573. The practice of secrecy in warrant proceedings was recognized by the Supreme Court in Franks v. Delaware, (1977) 438 U.S. 154, where the Court considered whether a defendant has a constitutional right to make a post- indictment challenge to the truthfulness of an affidavit submitted in support of a warrant. In deciding that the defendant should have that right, the Court noted that it is impossible for the defendant to challenge the contents of the affidavits before the warrant is executed because the "proceeding is necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence." Id. at 169. The secrecy of warrant proceedings was also an important factor in the Court's decision in United States v. United States Dist. Court, (1972) 407 U.S. 297, requiring the government to comply with the warrant provision of the Fourth Amendment when engaging in domestic intelligence gathering activity. Although the Court recognized the importance of keeping domestic investigations secret, the Court found that requiring the government to obtain a warrant posed no threat to secrecy, since the warrant proceeding is not "public." Id. at 321."
>
> Times Mirror Co. v. U.S., (9th Cir., 1989) 873 F.2d 1210, 1213 -1214 [Footnote omitted..]

The investigation process, which includes the search warrant process, has been held to be confidential by the U.S. Supreme Court. This is the traditional and common law rule. An analogous

investigatory tool to the search warrant process is the grand jury. The grand jury has been the backbone of many criminal investigations, and are to this day confidential, until an indictment is returned. (See Press-Enterprise Co. v. Superior Court of California for Riverside County, (1986) 478 U.S. 1, 9, citing to Douglas Oil Co. v. Petrol Stops Northwest, (1979) 441 U.S. 211, 218 ["the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings."].) It clearly could not have been intended by the Legislature with the amendment to §1534 in 1963 to make the search warrant process public, nor by the enactment of Rules of Court 243.1 and 243.2 could the courts have meant to usurp the executives right to conduct investigations in secret.

Intervenor contends that §1534 and Rule 243.1 are intended to provide "openness" in government, however such a simplistic view ignores the separation of power issue and historical precedent in California. The legislature has created an analogous statute to the premise of intervenor's argument, that calls for the openness of government records; it is the California Public Records Act (hereafter CPRA), found in Government Code §6250, et. seq. The CPRA was passed in 1968, five years after the amendment to §1534. This court must look at the legislative findings made within the CPRA, which shows that "criminal investigations should remain confidential." (See Government Code §6254(f) which exempts criminal investigations from disclosure.)

The California Supreme Court has interpreted the CPRA

consistently in a manner preventing criminal investigations from being disclosed, even if there is no certainty that a crime has occurred. In one case the court proposed a hypothetical of whether a murder investigation should be open to public scrutiny and said:

> "Haynie's concession that records of a murder investigation would be exempt further illustrates the impossibility of making such a distinction. Law enforcement officers may not know whether a crime has been committed until an investigation of a complaint is undertaken. An investigation may be inconclusive either as to the cause of death or the circumstances in which the death occurred. A fire may be suspicious, but after investigation be found to have an accidental or natural origin. In this case we have no reason to believe that the deputies who stopped Haynie were not investigating a report of what they believed might be criminal conduct.
> ***
> The records of investigation exempted under section 6254(f) encompass only those investigations undertaken for the purpose of determining whether a violation of law may occur or has occurred. If a violation or potential violation is detected, the exemption also extends to records of investigations conducted for the purpose of uncovering information surrounding the commission of the violation and its agency."

Haynie v. Superior Court, (2001) 26 Cal.4th 1061, 1070-1071.

The Legislature has also enacted specific laws to prevent confidential information from being disclosed; such as Evidence Code §1040, et. seq. which allows government agencies to invoke a privilege to prevent information from being disclosed. This process was explained in a case involving a request to obtain investigations materials:

> "Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential. This notion finds expression in both case and statutory law. For example, in People v. Otte, (1989) 214 Cal.App.3d 1522, the court made the following observation concerning the confidentiality of criminal investigative files in the course of interpreting the section 1041 privilege as to confidential informants: " 'Communications are made to an

officer in official confidence when the investigation is of such a type that disclosure of the investigation would cause the public interest to suffer. An apt illustration of this situation is the investigation of a crime by police officers. [Citations.] It is not only where a witness requests that his statement be kept in confidence, but in all cases of crime investigation that the record and reports are privileged.' (Jessup v. Superior Court, (1957) 151 Cal.App.2d 102, 108.)" (People v. Otte, supra, 214 Cal.App.3d at p. 1532; see also Rivero v. Superior Court, (1997) 54 Cal.App.4th 1048, 1058-1059 [confidentiality of criminal investigations must be maintained so that potential witnesses come forward]; People v. Wilkins, (1955) 135 Cal.App.2d 371, 377; People v. Pearson, (1952) 111 Cal.App.2d 9, 18, 24.)

***

The Public Records Act (Gov. Code, §§ 6250 et seq.) includes a specific exemption from disclosure for law enforcement investigative files. This exemption permits the state to withhold "[r]ecords of ... investigations conducted by, or records of intelligence information or security procedures of ... any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency ... for correctional, law enforcement or licensing purposes ...." (Gov. Code, §§ 6254, subd. (f).) In Williams v. Superior Court, (1993) 5 Cal.4th 337, the Supreme Court interpreted the scope of this Public Records Act exemption for police investigative files. The court held that once an investigation has begun, all materials that relate to the investigation and are thus properly included in the file remain exempt from disclosure indefinitely. (Id. at pp. 355, 361-362.) Significantly, the court noted that the exemption "protects materials that, while not on their face exempt from disclosure, nevertheless become exempt through inclusion in an investigatory file." (Id. at p. 354.) Though the provisions of the Public Records Act are inapplicable to civil discovery proceedings (Gov. Code, §§ 6260), the act's express exemption of police investigative files from disclosure reinforces the view that such files are confidential in nature.

Given the broadly recognized confidentiality of investigative files, we find no need to separately analyze the manner in which each element of the file was obtained for application of the official information privilege. Instead, we conclude that the contents of police investigative files sought in civil discovery must remain confidential so long as the need for confidentiality outweighs the benefits of disclosure in any particular case. (§§ 1040, subd. (b)(2).)" (Emphasis added.)

County of Orange v. Superior Court, (2000) 79 Cal.App.4th 759, 764 -765.

The County of Orange case is instructive in the instant matter because that court found the needs of the Sheriff to investigate a homicide were paramount:

> "We conclude on the record before us that the public interest in solving C. T. Turner's homicide and bringing the perpetrator(s) to justice outweighed the Wus' interest in obtaining the discovery sought, at least at the time this matter was considered below. We recognize the rather arbitrary nature of this conclusion, but the order we review was made less than a year after this civil action was filed. (And it is still less than three years since it was filed.) When one reflects that the lives of other children may be at risk with the killer(s) still at large, the important interests in vindicating wronged plaintiffs and clearing dockets do not seem quite so important. Consequently, we find the superior court abused its discretion in ordering production of the investigative file to the Wus' attorney. And, parenthetically, we think that most reasonable parents in the Wus' position would concur that the interest in apprehending a child's killer must continue to take priority over any civil action of theirs."
>
> Id., 767 -768.

Even in criminal cases where an accused faces the greatest potential loss of a constitutional right, the judiciary has recognized the need to allow the executive branch to maintain a level of secrecy. (See People v. Hobbs, (1994) 7 Cal. 4th 948, 971.) Clearly, the history of the search warrant process demonstrates that the separation of powers has been balanced by the court keeping the secrets of the investigators (United States v. United States Dist. Court, supra, 407 U.S. 297, 321) and the legislature intending those secrets to remain secret until a case is no longer an "investigation." Only one case has mentioned the issue of §1534 violating the separation of power. That case, a post-filing case, stating in dicta, that the court was only controlling the "issuance" of the warrant and dismissed

the idea without citation and is not controlling here. (See PSC Geothermal Services Co. v. Superior Court, (1994) 25 Cal.App.4th 1697, 1715.)

If this court were to interpret §1534 and Rule 243.1 as intervenor requests, this court would be violating the separation of power and ignoring the long history of secrecy with regards to the search warrant process in a pre-complaint investigative stage. It would be unconstitutional for the court to force the Executive branch to choose between seeking a search warrant to fulfill its constitutional duty to investigate, as against seeking a warrant and thereby waiving its right to conduct the investigation in secret.

3. EVEN IF THE COURT FINDS THAT §1534 AND RULE OF COURT 243.1 DO NOT VIOLATE THE SEPARATION OF POWERS AS APPLIED TO A CRIMINAL INVESTIGATION PRIOR TO THE FILING OF A CRIMINAL CASE, DISCLOSURE OF SEARCH WARRANT DOCUMENTS IS STILL NOT REQUIRED.

The language of §1534 has been interpreted by courts to require it to be read in harmony with other law:

> "Once again, however, subdivision (a) of the Penal Code, section 1534 must be construed together with subdivision (a) of section 1041 of the Evidence Code establishing the privilege of nondisclosure of the identity of a confidential informant. For the same reason we rejected defendant's argument that the name of the confidential informant whose affidavit has been taken must appear on the face of the warrant, we reject his argument that the affidavit of a confidential informant must be made a public record prior to compelled disclosure of his identity. The result otherwise would be to nullify the nondisclosure privilege. "
>
> People v. Sanchez, (1972) 24 Cal.App.3d 664, 678; disapproved on other grounds in People v. Martin, (1973) 9 Cal.3d 687.
>
> "Thus, the privilege to conceal the identity of an informant is well established, as is the notion that the privilege can properly be implemented by use of partially sealed affidavits. Contrary to one of appellant's arguments, these

well-defined principles comprise a decisional exception to the statutory requirement that court documents relating to a warrant become a public record after the warrant is executed. (§ 1534, subd. (a).)"

People v. Seibel, (1990) 219 Cal.App.3d 1279, 1291.

Intervenor suggests that there must be an informant for a privilege to be invoked. This ignores the premise that Evidence Code §1040 also codifies traditional principles that investigatory files and information is presumed to be confidential and that the government may invoke this privilege to prevent disclosure. (See County of Orange v. Superior Court (Wu), supra, 79 Cal.App.4th 759, 764 -765.) Case law and common sense dictate that §1534 not be read in isolation.

Rule 243.1 must also be read in harmony with Rule 243.2 which was passed at the same time to meet the requirements of NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, (1999) 20 Cal.4th 1178. The advisory committee's comments to California Rule of Court 243.1. state:

"This rule and rule 243.2 provide a standard and procedures for courts to use when a request is made to seal a record. These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents **used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law.** Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Family Code, § 1818(b)) and in forma pauperis applications (Cal. Rules of Court, rule 985(h)). **The sealed records rules also do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication.**" (Emphasis added.)

From the plain language of this note it can be ascertained that the purpose of this Rule did not apply to a pre-complaint

search warrant, since it is neither being the used at trial or as a basis of adjudication. These rules do not apply to pre-complaint search warrant records because they are part of the "discovery" process and the court must keep them confidential by law. (PSC Geothermal Services Co. v. Superior Court, supra, at 1712; cf. Arnett v. Dal Cielo, (1996) 14 Cal.4th 4.)

There can be no doubt that the Modesto Police Department has invoked its privilege pursuant to Evidence Code §1040 to prevent disclosure of a(ny) search warrant in this investigation.

4. **INTERVENOR HAS NO FIRST AMENDMENT OR COMMON LAW RIGHT OF ACCESS TO SEARCH WARRANT DOCUMENTS RELATING TO AN ON-GOING, PRE-PROSECUTION CRIMINAL INVESTIGATION AND NO STANDING TO OPPOSE A SEALING ORDER.**

Despite its claim to the contrary, neither the 1st Amendment nor the common law afford intervenor a right of access to search warrant documents relating to a pre-prosecution, on-going criminal investigation. As set out above in the *Times Mirror Co. v. United States*, the 9th Circuit Court of Appeal, at page 1221, has said:

> "The public has no qualified First Amendment right of access to warrant materials during the pre-indictment stage of an ongoing criminal investigation. Nor is the public entitled to access to the materials under … the common law …."

Intervenor cites to Press-Enterprise v. Superior Court (Press Enterprise II), (1986) 478 U.S. 1[access to preliminary hearing transcripts]; Press-Enterprise v. Superior Court (Press Enterprise I), (1984) 464 U.S. 501[access to jury voir dire]; Globe Newspaper Co. v. Superior Court, (1982) 457 U.S. 596[access to criminal trials]; and Richmond Newspapers, Inc. v Virginia,

(1980) 448 U.S. 555[access to criminal trials], as conferring standing to oppose orders "impinging on the First Amendment right of the press and public to attend court proceedings and review court records." None of the cases cited by intervenor are applicable because they deal with post-arrest, charged criminal cases.

The last case cited by intervenor is Tribune Newspapers West, Inc. v. Superior Court (1985) 172 Cal.App.3d 443, for the proposition that the media has the right to notice and an opportunity to be heard. That case dealt with the press having access to a juvenile fitness hearing, after the legislature had amended the Welfare and Institutions Code to provide access, and the court said:

> "The plain language of the amendment indicates a legislative intent to increase access to juvenile hearings. The legislative history supports this conclusion."

Id., at page 448.

Again reliance on this case is unavailing since it dealt with a post-filing case and does not deal with the traditional secret functioning of an on-going criminal investigation. To grant the media access to an ex-parte search warrant application process would frustrate criminal investigations. See Press Enterprise II, footnote 18, at page 27, for the five reasons must commonly given for the policy of grand jury secrecy:

> " '(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by

persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.' "

The same reasoning given by Press Enterprise II for grand jury secrecy applies equally as well here. A criminal investigation should not be subject to public scrutiny prior to a criminal case being filed. To do so would allow the same travesty cited above to occur and allow the guilty to go unpunished.

5. PRESS ENTERPRISE II AND RULE 243.1 DOES NOT REQUIRE A SHOWING BE MADE PRIOR TO SEALING A COURT RECORD IN AN ON-GOING, PRE-PROSECUTION CRIMINAL INVESTIGATION.

Intervenor's premise is that search warrants and supporting documents are "presumptively open records." (Petition page 4.) As has been set forth above, this is not the case. Neither Press Enterprise II, nor Rule 243.1 apply to a search warrant request in an on-going criminal investigation. Intervenor also states that the public has a statutory, common law and First Amendment right to access the records sought here, but this same claim was rejected in Oziel v. Superior Court, (1990) 223 Cal.App.3d 1284.

Oziel dealt with the media's request to obtain the "documents and records" seized in the Menendez brothers murder case including a video tape of a special masters search of a psychotherapist involved with the case. The court found no statutory, common law or First Amendment right to access the records sought. Oziel, at page 1297, cited to Times Mirror Co. v. United States, supra, and said "the First Amendment does not establish a qualified right of access to search warrant proceedings and materials while a pre-indictment investigation is

still ongoing." (Emphasis added.) Another case cited by Oziel was Gannett Co., Inc. v. DePasquale, which held:

> "Rather, we are asked to hold that the Constitution itself gave the petitioner an affirmative right of access to this pretrial proceeding, even though all the participants in the litigation agreed that it should be closed to protect the fair-trial rights of the defendants.
> For all of the reasons discussed in this opinion, we hold that the Constitution provides no such right."
>
> Gannett Co., Inc. v. DePasquale, (1979) 443 U.S. 368, 394.

Oziel also rejected the argument that §1534 created an absolute right for the press to have access to the search warrant process saying, "Assuming arguendo that such property constitutes a judicial record, "the right of access [to judicial records] is not absolute. Nondisclosure may be appropriate 'for compelling countervailing reasons.'" (Id.,at page 1295.)

It is clear that §1534 and Rule 243.1 do not create a right to participate in the search warrant process. This is because §1534 is merely a rule of procedure, and does not distinguish between filed documents that are sealed and unsealed. Therefore, nothing cited by intervenor supports their claim that a hearing must be held before a search warrant is sought; it has never been and is not required. To hold that a magistrate must do so would change the historical practice of California.

6. CONCEALED SEALING OF WARRANTS IS THE RULE AND NOT THE EXCEPTION

Intervenor's claim that the only exception to allow a search warrant to be sealed is when an informant is used, is wrong. It cannot be disputed that the process by which a search warrant has been obtained has historically been a closed one. (See United

States v. U.S. Dist. Court, supra, 407 U.S. 297, 321 ("*warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge*"); Franks v. Delaware, supra, 438 U.S. 154, 169 (*search warrant proceedings are "necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence*"); Times Mirror, supra, 873 F.2d at 1213-14 ("*The process of disclosing information to a neutral magistrate to obtain a search warrant, therefore, has always been considered an extension of the criminal investigation itself. It follows that the information disclosed to the magistrate in support of the warrant request is entitled to the same confidentiality accorded other aspects of the criminal investigation.*"). These cases make no distinction between an informant vs. a non-informant application.

The Oziel case cited by intervenor was not an informant case. That court refused to allow the press access to protect an individuals privilege and/or privacy interest. Intervenor glosses over this point to argue that Oziel applied the Press-Enterprise II test.

Applying the Press-Enterprise II test to the instant case also shows that sealed warrants, without notice to the public, are the norm and not an exception. As recited in Oziel:

> First, because a '"tradition of accessibility implies the favorable judgment of experience" ' [citations], we have considered whether the place and process have historically been open to the press and general public .... [¶] Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question. [Citation]. Although many governmental processes operate

> best under public scrutiny, it takes little imagination to recognize that there are some kinds of governmental operations that would be totally frustrated if conducted openly .... [¶] ... If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute.
> ***
> Access to the videotapes is not necessary for the public to obtain knowledge about the execution of the search warrant and about the activities of authorities in regard thereto. Further, as was stated in Gannett Co. v. DePasquale (1979) 443 U.S. 368, 383, "In an adversary system of criminal justice, the public interest in the administration of justice is protected by the participants in the litigation." Moreover, there are "other mechanisms- including suppression motions and civil actions for violation of constitutional rights-that are already in place to deter governmental abuses of the warrant process."

Oziel, supra, at 1296-1297.

If this court were to apply the Press-Enterprise II test here, intervenor would not be able to show either ,(1)tradition of public involvement with the warrant process, or (2) that access to the ex-parte sealing of a search warrant would play a significant positive role. In fact many reasons exist to show why the public/press should be excluded from the search warrant application process.

Even the cases cited been intervenor demonstrate that the warrant should be sealed in a pre-complaint stage:

> "Evidence Code section 1042, subdivision (b) provides that with a warrant which is valid on its face, the District Attorney "bringing a criminal proceeding" need not reveal the informant's identity nor any "official information" to prove the search is legal. We believe "bringing" a criminal proceeding must include pre-arrest investigation. Otherwise the prosecution might feel or be pressured to bring charges without adequate investigation, charges which might later be dismissed because there was insufficient evidence. Subjects of such investigations might be alerted and impede the investigation by tampering with or destroying evidence. The public interest is served when charges are brought only when the appropriate cause has been developed and established. The policy behind the privilege protecting confidential

informants obtains whether or not charges have been pressed. Thus, the official information privilege must apply whether or not charges have actually been brought." (Emphasis added.)

PSC Geothermal Services Co. v. Superior Court, supra, at 1714.

Intervenor tries to limit the scope of PSC Geothermal by citing Shepard v. Superior Court, (1976) 17 Cal.3d 107, 124-126. However, Shepard was a post-investigation case involving a subpoena served for the District Attorney's file and the facts are clearly distinguishable from the present case. Shepard did not mean to prevent the government from invoking the privilege of Evidence Code §1040, in fact the case was remanded to allow the court to rule on that privilege. In can also be argued that Shepard has been put in doubt by Williams v. Superior Court, (1993) 5 Cal.4th 337, 356 -362, where the court found that a District Attorney's investigation file was exempt from disclosure under the CPRA because of the legislative purpose to prevent disclosure, saying: "...a document in the file may have extraordinary significance to the investigation even though it does not on its face purport to be an investigatory record and, thus, have an independent claim to exempt status. Examples abound. A commonplace business card may reveal the name and endanger the safety of an informant. Receipts for transportation may tell the astute observer which clues the police have checked and which they have not yet found." (Id., at page 356.)

Other courts have found "any" communication gathered during a on-going criminal investigation to be confidential within the meaning of §1040, et.seq. (See County of Orange v. Superior Court

(Wu), supra, 79 Cal.App.4th 759, 764 -765; People v. Otte, (1989) 214 Cal.App.3d 1522.) In yet another case dealing with the governments ability to maintain the secrets of police records (involving the prosecution of a Sheriff's Sargent for removing documents) a court has said:

> "The contention that the papers removed were not public records is a mere quibble. They were kept by the sheriff's office as evidence of what had been done, of what was to be done and proof of activities of those elements against whom the law-enforcing agencies should be on the alert. They were convenient to an expeditious discharge of the duties of the sheriff's office and they were necessary to the enlightenment of the sheriff as to past failures and achievements and to current endeavors. They were not open to public inspection. The sheriff's office would be handicapped in enforcing the laws if at every sunset vicious elements might read all the sheriff's reports of vice activities during the preceding day and all plans for defeating crime in the ensuing night. Such documents are confidential public records and because of public policy are entitled to the protection of the statute."
>
> People v. Pearson, (1952)111 Cal.App.2d 9,18.

As the above case demonstrates, just because a document may be called "public" does not mean that it is not confidential. The extreme need for confidentiality in the search warrant application process is why this court should not allow intervenor to participate in the search warrant application process. Nor should the court allow intervenor to gain access to the sealed information, because once this court allows the press access to the search warrant materials the court has no control over what the press can do with it.

7. THIS COURT HAS THE INHERENT POWER TO SEAL ITS JUDICIAL RECORDS.

Even if this court is not persuaded by the previous

arguments it still has the discretion not to disclose the sought materials. "While the law favors disclosure of judicial records, the right of access is not absolute. Nondisclosure may be appropriate 'for compelling countervailing reasons.'" (People v. Rhodes (1989) 212 Cal.App.3d 541, 550, quoting Pantos v. City and County of San Francisco (1984) 151 Cal.App.3d 258, at p. 263; citing Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645, 651-652; Gov. Code, § 6255. See also Oziel, supra, 223 Cal.App.3d, at p. 1295.) "Clearly, a court has inherent power to control its own records to protect rights of litigants before it…." (Estate of Hearst, (1977) 67 Cal.App.3d 777, 783; see also: Oziel, supra; Pantos v. City and County of San Francisco, supra.) However, "…where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." (Craemer v. Superior Court, (1968) 265 Cal.App.2d 216, 226-227 ["Craemer"].) Only one California case, Oziel v. Superior Court, has addressed these principles in the context of search warrant documents after warrant service. Under Oziel, as set out above no First Amendment right existed, and further the court found that maintaining the seal on the search warrant documents was a matter within the court's sound discretion. (Oziel, supra, at 1302.)

Oziel framed the issue as:

> "whether the public, including the media, has any right to disclosure of the videotapes before they have been offered as an exhibit or admitted into evidence in any court proceeding, and before either [the therapist or the defendants] have been afforded a hearing on the issues of the suppression or return of the videotapes or suppression of any items depicted thereon." Id, at pp. 1294-1295.

Even if the tapes were judicial records, Oziel decided, there was no First Amendment right to pre-trial public access to them. Oziel determined that the press had not met either of the Press-Enterprise II tests. The court found the intervenors had not shown any historical right of public access to property seized under a warrant, nor demonstrated any positive public benefit from disclosure of the tapes. (Oziel, at pp. 1296-1297.) The same applies here.

Intervenors in Oziel failed to establish a historical right of public access to search warrant proceedings, because none existed. The Supreme Court acknowledged that the common law holds no right to pre-trial public access, (Gannett Co. v. DiPasquale, supra, at pp. 389-390) and that "[t]he investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved." (See U.S.v. U.S. District Court, supra, 407 U.S. 297, 320-321.) California has also established a statutory privilege against divulging "official information," and it applies to information in search warrant documents. (Evid. Code §§ 1040, et seq.; People v. Hobbs, supra, 7 Cal.4th 948, 974; People v. Luttenberger (1990) 50 Cal.3d 1, 9-11.) Many other statutory exceptions to the right of public access to court and law enforcement documents exist. (Craemer, at p. 220, and fn.4, citing inter alia: Veh. Code § 20012, accident reports confidential; Pen. Code § 1203.10, access to probation records limited; Welf. & Inst. § 827, limited access to juvenile court records; Pen. Code § 25, pre-indictment grand jury transcript

sealed, and; Pen. Code § 1203.45, certain criminal records sealed.) No historic right of unlimited access exists.

Nor have the intervenors here, as in Oziel, shown that disclosure would play a significant positive role in the warrant process. As stated in Oziel, the public interest in the fair and effective administration of justice will be protected by the defendant and his use of the mechanisms available to deter abuse of the warrant process, not by the news media. As in Oziel, a review of the documents showed the information which the parties agree should remain under seal held nothing which might advance public knowledge about the search warrant process, in general, or the specific process in that case. (Oziel, at pp. 1296-1297, citing Gannett Co. v. DiPasquale, supra, 443 U.S., at p. 383; Times Mirror Co. v. U.S., supra, 873 F.2d 1210, 1218.)

Here, as in Oziel, there is no First Amendment right to public access to search warrant documents. Whether to unseal the documents is a matter for this court's sound discretion, and a potential or future defendant's preeminent Sixth Amendment right to a fair trial establishes a countervailing public policy which overwhelmingly trumps the public access requirement of Penal Code 1534.(Oziel, at pp. 1302-1303.)

Intervenor cite People v.Tockgo,(1983)145 Cal.App. 3d 635, 641-642, for the proposition that there can be no privilege here because it has been waived by seeking a search warrant. The premise from that case is dicta and decided without authority. It ignores the history of search warrant applications and cases holding that a privilege is maintained and it does not address

the courts ability to seal a warrant.

The criminal investigation in this matter is ongoing, and while the search warrants have already been executed, public disclosure at this time would cause the press and public to speculate about the nature, scope and focus of the governmental inquiry, while providing an incomplete knowledge base. Public disclosure would also put evidence and witnesses at risk. Accordingly, at this investigative stage the court should find that the balance of the competing interest weighs in favor of keeping the affidavits and inventories sealed.

8. DESPITE ANY STATUTORY REQUIREMENT OF PUBLIC ACCESS TO COURT RECORDS, THIS COURT HAS THE INHERENT AUTHORITY, AND THE AFFIRMATIVE DUTY, TO SEAL SEARCH WARRANT RECORDS TO PROTECT A FUTURE DEFENDANT'S PREEMINENT 6TH AMENDMENT RIGHT TO A FAIR TRIAL WHEN A REASONABLE LIKELIHOOD EXISTS THAT DISCLOSURE OF THE RECORDS WILL CAUSE INHERENTLY PREJUDICIAL PRE-TRIAL PUBLICITY.

Members of the press have no greater right to sealed court records than any other members of the public. Nor is an order to seal judicial records a "gag order." "Accordingly, the so-called 'clear and present danger test' does not apply, and the issue is the reasonableness of the trial court's sealing and unsealing orders under the circumstances of the case." (Estate of Hearst, supra.)

Although not a party to this criminal action, any member of the public, including the press, can assert a common law privilege granting public access to most judicial records. (Globe Newspaper Co. v. Superior Court (1982) 457 U.S. 596, 609, fn. 25; Wilson v. Science Applications Internat. Corp., (1997) 52 Cal.App.4th 1025,

1031-1032.) Intervenor argues that it was improper for the court to seal the search warrant materials without giving prior notice and opportunity to be heard to the public and press. They cite many cases which stand for the "undisputed" proposition that normally court proceedings should be open to the public and the press. The United States Supreme Court, however, has also recognized that this is a qualified right which must, on occasion, yield when there is a compelling and overriding need to maintain secrecy of court proceedings, records and exhibits. "[T]he Court has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information."(Waller v. Georgia, (1984) 467 U.S. 39, 45.)

The holding and analysis of Craemer, supra, which decided a news-media challenge to a trial court's order sealing grand jury transcripts, is significant here. Grand jury transcripts, like search warrant documents, are made confidential by statute pending certain procedural events. The indicted defendants had been arrested, and trial was pending. The news media argued that former Penal Code section 938.1, making grand jury transcripts confidential until arrests are made, no longer applied and freedom of the press and the right to a public trial required unsealing the transcripts.(Craemer, at pp. 218-219.)

Craemer held that "sealing" did not implicate the right to a public trial, and only indirectly implicated any issue of a free press. Rather, it said:

"The key issue here is whether access to and inspection of public records may be withheld in order to insure that a defendant in a criminal action will receive a fair trial, a right which is guaranteed by the United States and California Constitutions."

Craemer, at pp. 219-220.

After analyzing the constitutional principles involved, Craemer applied a "countervailing public policy" test and determined that the need to protect fair-trial rights outweighed the statutory requirement for public access.(Id, at pp. 219-223.) This action was justified because grand jury transcripts often contain information which might later be ruled inadmissible at trial,(Id, at p. 226) just as search warrant affidavits do.

In performing the court's duty to protect a defendant from prejudicial publicity, "...a judge may require the removal from public scrutiny of a public record containing data or material which, if publicized prior to trial, could result in publicity so inherently prejudicial as to endanger a fair trial." Craemer found that an order sealing public records need not be based on evidence showing a reasonable likelihood of prejudice from disclosure, but merely upon "the probability of unfairness." (Id, at pp. 225-226.)

In 1971, three years after Craemer, the Legislature amended Penal Code section 938.1 to specifically provide for public access to grand jury transcripts, and it also required a sealing order during trial when "the court determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair trial,...."(See Pen. Code § 938.1(b)

In 1975, Rosato v. Superior Court,(1975), 51 Cal.App.3d 190, upheld such an order. Significantly, after reviewing Estes v. Texas,(1965) 381 U.S. 532, 540, Sheppard v. Maxwell, Craemer, and several other California cases, Rosato declared:

> "Thus, it is clear beyond cavil that the trial court had the authority and the affirmative duty to issue the protective order here and, pursuant to and independent of the authority contained in Penal Code section 938.1, to seal the transcript until the trials of the defendants were completed."
>
> Rosato, at p. 207.

This constitutional duty arises, according to Rosato, when a judge finds "a reasonable likelihood" that news coverage of grand jury transcripts will prejudice a defendant's right to a fair trial.

Given the preeminence of a defendant's Sixth Amendment rights, when deciding whether to seal search warrant records, this court should apply Craemer's "probability of unfairness" standard, rather than the "reasonable likelihood" test that Rosato applied under the constraint of Penal Code section 938.1.

9. IF THE COURT FINDS THE NEED TO BALANCE THE INTERESTS HERE IT MUST DO SO IN CAMERA

Due to the sealed nature of the search warrants which are the subject of this Petition, the People request that the Court conduct a hearing pursuant to Penal Code §915(b) to rule if the basis for the sealing orders are still in existence and the extent, if any, to which privileged material is contained in the search warrants which are the subject of this motion.

Evidence Code §915(b) provides that:

"When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) . . . and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and such other persons as the person authorized to claim the privilege is willing to have present."

An in camera hearing pursuant to §915(b) is appropriate whenever the party claiming the privilege declares that showing why the matter is privileged in open court would compromise the privilege. (People v. Torres, (2000) 80 Cal.App.4th 867, 873.) In this case the Modesto Police Department have declared their need to have these warrants sealed and cannot discuss the basis for the sealing of the warrants without risking the disclosure of the confidential information which was the basis for the sealing order. Therefore, the Court should hold an in camera hearing pursuant to Penal Code §915(b) in order to ascertain the claim of privilege.

"In camera proceedings can effectively protect the government's confidentiality interests while safeguarding the defendant's rights and the integrity of the warrant issuing process. (See 1 LaFave, op. cit. supra (2d ed. 1987) §§ 3.3(g), pp. 709-711.)"

People v. Luttenberger, (1990) 50 Cal.3d 1, 19.

Conclusion

For the court to decide that the Executive Branch of government, an equal to the Judiciary under the Constitution, has no right to maintain the secrecy of an criminal investigation in

a pre-complaint posture undermines and violates the Separation of Powers. Penal Code §1534 and Rule 243.1 are procedural rules that do not provide the intervenors any rights. History and common sense mandate that the public and the press be kept out of the search warrant application process.

To do otherwise would reek havoc to our system of justice. Damage would be done to a criminal investigation by public disclosure of the search warrant affidavits and inventories. Names of possible cooperating witnesses would be revealed, and they could be subject to intimidation, tampering, physical injury or death, and public inquiries. Evidence could be destroyed or modified. Public access would discourage unfettered testimony from witnesses who knew their identities and statements would be made public through the press.

Public disclosure further runs the risk that anyone suspected of criminal activity might tailor their actions and accounts of events to take advantage of perceived strengths or weaknesses in the Government's investigation. These threats to the effective operation of an ongoing criminal investigation are the same reasons that grand jury proceedings have traditionally been kept secret.

Further, there is little public interest served by disclosure. The affidavits are permitted to be based upon hearsay, which is normally not admitted at criminal trials except under judicially monitored circumstances that assure its reliability. The information in an affidavit only supports a finding of probable cause for the search warrant; it does not

comprise the entirety of the government's evidence, nor does it clearly indicate the scope and focus of the investigation. Evidence in a criminal investigation is continually developing, and evidence that may at first seem material may prove to be inconsequential; conversely, evidence that initially seems irrelevant may prove to be critical. Thus, there is no public good served in disclosing a distorted, inaccurate, or incomplete picture of the basis for the criminal investigation. The public's interest in a complete factual basis for an investigation is served once a complaint or an indictment has returned.

Neither experience nor logic provides a basis for a First Amendment right of public access to the affidavits and inventories. Even if there was such a right, this court should find that there is compelling governmental and privacy interests that override that right. There is undoubtedly the need to conduct a criminal investigation unfettered by early public disclosure of its sources of evidence and identities of witnesses. Moreover, there are the privacy interests of the individuals who may be identified in the affidavits and who may be witnesses or potential targets of criminal activity.

If published, the sealed materials may communicate to the general public that the some individual or individuals, in the opinion of law enforcement, are guilty, or may be guilty, of a felony. This broad brush assertion will be unaccompanied by any facts providing a context for evaluating the basis for the opinion with respect to any given individual. When one adds to this that the opinion was formed on the basis of an investigation

that had not yet reached the point where a decision on whether to prosecute or not, it becomes apparent that the risk of serious injury to innocent third parties is a grave one.

The historical tradition of secrecy attending search warrant applications, the sensitive nature of the information contained in the affidavit, and the procedural posture of the criminal investigation significantly diminish the strength of the common law right to view judicial records. The criminal investigation in this matter is ongoing, and while the search warrants have already been executed, the information contained therein should be kept confidential, particularly at the pre-indictment stage. Public disclosure at this time would cause the press and public to speculate about the nature, scope and focus of the governmental inquiry, while providing an incomplete knowledge base. Public disclosure would also put evidence and witnesses at risk. Accordingly, at this pre-indictment stage, the court must find that the balance of the competing interest weighs in favor of keeping the affidavits and inventories sealed.

This court must also protect a future defendants rights and exercise discretion to protect those rights. This court must maintain the seal on warrants before it. For all of these reasons the People ask the court to deny the intervenor's request to

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unseal the warrants.

Dated this 14th day of March, 2003, at Modesto, California.

Respectfully submitted,

JAMES C. BRAZELTON
District Attorney

D.P.H.

David P. Harris
Senior Deputy District Attorney

AFFIDAVIT OF SERVICE BY MAIL (C.C.P 1013a)

STATE OF CALIFORNIA)
(
COUNTY OF STANISLAUS)

I, the undersigned, say:

That I am a citizen of the United States, over 18 years of age, a resident of Stanislaus County, and not a party to the within action.

That affiant's business address is Stanislaus County Courthouse, Modesto, California.

That affiant served a copy of the attached OPPOSITION TO MODESTO BEE'S PETITION FOR ACCESS TO CERTAIN SEALED WARRANTS by placing said copy in an envelope addressed to Kirk McAllister, Esq. 1012 11th Street, #100, Modesto, California, 95354, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on March 17, 2003, deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place addressed.

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

Executed this 17th day of March, 2003, at Modesto, California.

D. Hill

Court No. 1045098

dlh

AFFIDAVIT OF SERVICE BY MAIL (C.C.P 1013a)

STATE OF CALIFORNIA)
(
COUNTY OF STANISLAUS)

I, the undersigned, say:

That I am a citizen of the United States, over 18 years of age, a resident of Stanislaus County, and not a party to the within action.

That affiant's business address is Stanislaus County Courthouse, Modesto, California.

That affiant served a copy of the attached OPPOSITION TO MODESTO BEE'S PETITION FOR ACCESS TO CERTAIN SEALED WARRANTS by placing said copy in an envelope addressed to Chastity Kenyon, Esq. 2500 Venture Oakes Way, Suite, 220, Sacramento, California, 95833, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on March 17, 2003, deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place addressed.

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

Executed this 17th day of March, 2003, at Modesto, California.

D. Hill

Court No. 1045098

dlh

DECLARATION OF PERSONAL SERVICE

I, the undersigned, say:

I was at the time of service of the attached **OPPOSITION TO MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS** over the age of eighteen years and not a party to the above-entitled action. I served a copy of the above-entitled document(s) on the 29 day of April, 2003, by delivering a copy thereof to the office(s) of:

Public Defenders
1021 I Street, Suite 201
Modesto, California 95354

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

Executed this 29 day of April, 2003, at Modesto, California

Chris Kamplain

People v. PETERSON

D.A. No. 1056770

Court No. 1056770

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AFFIDAVIT OF SERVICE BY MAIL (C.C.P 1013a)

STATE OF CALIFORNIA)
(
COUNTY OF STANISLAUS)

I, the undersigned, say:

That I am a citizen of the United States, over 18 years of age, a resident of Stanislaus County, and not a party to the within action.

That affiant's business address is Stanislaus County Courthouse, Modesto, California.

That affiant served a copy of the attached **OPPOSITION TO MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS** by placing said copy in an envelope addressed to Karl Olson, Levy, Ram and Olson LLP, 639 Front Street, 4th Floor, San Francisco, California 94111-1913 which envelope was then sealed and postage fully prepaid thereon, and thereafter was on April 29, 2003 deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place or mailing and the place addressed.

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

Executed this 29th day of April, 2003, at Modesto, California.

B Rosetta

People v. PETERSON
D.A. No. 1056770
Court No. 1056770

AFFIDAVIT OF SERVICE BY MAIL (C.C.P 1013a)

STATE OF CALIFORNIA)
(
COUNTY OF STANISLAUS)

I, the undersigned, say:

That I am a citizen of the United States, over 18 years of age, a resident of Stanislaus County, and not a party to the within action.

That affiant's business address is Stanislaus County Courthouse, Modesto, California.

That affiant served a copy of the attached **OPPOSITION TO MOTION TO UNSEAL SEARCH WARRANT AND ARREST WARRANT RECORDS** by placing said copy in an envelope addressed to James M. Chadwick, Scott W. Pink, Gray, Cary, Ware and Freidenrich LLP, 1755 Embarcadero Road, Pal Alto, California 94303-3340 which envelope was then sealed and postage fully prepaid thereon, and thereafter was on April 29, 2003 deposited in the United States mail at Modesto, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place or mailing and the place addressed.

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

Executed this 29th day of April, 2003, at Modesto, California.

B Rosta

People v. PETERSON
D.A. No. 1056770
Court No. 1056770