

ORIGINAL

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FILED  
MAY - 5 2003  
CLERK  
*J. Cervantes*  
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON, et al.,

Defendant.

Case No. 1056770

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
CODE OF CIV. PROC. § 170.6  
FILED BY PROSECUTION

DATE: May 5, 2003  
TIME: 8:30 a.m.  
PLACE: Courtroom of Hon. Al Girolami

TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on May 5, 2003 at the hour of 8:30 a.m., or as soon thereafter as counsel can be heard, the Defendant, through counsel Mark J. Geragos, will move this Court for an order enforcing the Prosecution's filing of a C.C.P. § 170.6 peremptory challenge against Hon. Al Girolami, which deprives Judge Girolami of jurisdiction in all further matters in this case.

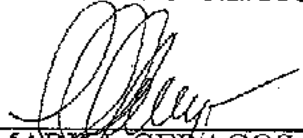
This motion is in response to the Court's request for briefing on the issue and will be based on this notice of motion, on the memorandum of points and authorities served and filed herewith, the reporter's transcript of the hearing held on May 2, 2003, on all the

1 papers and records on file in this action, and under Stanislaus Superior Court No.  
2 1045098, and on such oral and documentary evidence as may be presented at the hearing  
3 of the motion.  
4

5 Dated: May 4, 2003

Respectfully submitted,  
GERAGOS & GERAGOS

6  
7  
8 By:

  
MARK J. GERAGOS  
Attorney for Defendant  
SCOTT LEE PETERSON

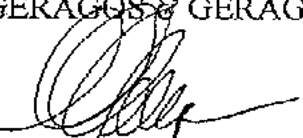
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13 MOTION

14 Scott Lee Peterson, by and through counsel, hereby moves the Court for an order  
15 enforcing the Prosecution's previous filing of a C.C.P. § 170.6 peremptory challenge  
16 against the Hon. Al Girolami which deprives Judge Girolami of jurisdiction in all further  
17 matters in this case.  
18

19 Dated: May 4, 2003

Respectfully submitted,  
GERAGOS & GERAGOS

20  
21  
22 By:

  
MARK J. GERAGOS  
Attorney for Defendant  
SCOTT LEE PETERSON

1  
2 **MEMORANDUM OF POINTS AND AUTHORITIES**

3 **I.**

4 **INTRODUCTION**

5 Unbeknownst to the defense in this matter, prior to appearing before the Hon. Al  
6 Girolami on May 2, 2003 the Prosecution filed a C.C.P. §170.6 peremptory challenge  
7 against Judge Girolami in the matter of "In Re 8 sealed search warrants - Laci Peterson  
8 investigation."<sup>1</sup> The filing of the peremptory challenge was revealed during the  
9 proceedings on May 2, 2003 when the defense made a request to change the date of the  
10 Motion to Unseal Search Warrant and Arrest Warrant Records which was scheduled to be  
11 heard on May 5, 2003 in Department 5 at 9:30 a.m. At that time, Judge Girolami  
12 confirmed the filing of the challenge and the Prosecution took the position that the  
13 peremptory challenge did not apply to this matter. The Court asked for briefing on this  
14 issue by May 4, 2003 at noon faxed to the Court.

15 Attached hereto as Exhibit A is the People's "Opposition to Motion to Unseal  
16 Search Warrant and Arrest Warrant Records." It is important to note that the Case  
17 Number on the Opposition is No. 1056770, the same number as this case, the caption is  
18 *People v. Scott Peterson* and the hearing date is set for May 5, 2003 at 9:30 a.m. in Dept  
19 5. Thus, the opposition was brought in this action. The Court will also notice that the  
20 opposition states:

21 "The People request that their response to this issue in case number  
22 1045098 be considered a part of this response. The People further oppose  
23 the motion based on the fact that all proceedings regarding this issue are  
24 stayed in the Superior Court pending a decision by the 5<sup>th</sup> Appellate  
25 District." (Page 1, lines 25-28).

26 Furthermore, the Court can take Judicial Notice pursuant to Evidence Code Section

27  
28 <sup>1</sup> See Transcript of May 2, 2003 Proceeding which should be in court by the time of this hearing.

1 452(d)(1) of Headnote Eight of the People's opposition which states:

2       **"This Court has the inherent authority, and the affirmative duty, to**  
3       **seal search warrant records to protect a future defendant's preeminent**  
4       **6<sup>th</sup> amendment right to a fair trial when a reasonable likelihood exists**  
5       **that disclosure of the records will cause inherently prejudicial pre-trial**  
6       **publicity."** (Exhibit A, page 27, lines 12-15).

7       Apparently, the Prosecution's position is that a party can selectively file  
8 peremptory challenges for certain portions of a case. Not only does this defeat the plain  
9 statutory language of C.C.P. § 170.6, but there is absolutely no case authority to support  
10 this remarkable position. In fact, this Court is invited to pages 27-30 of Exhibit A in  
11 which the Prosecution both argues and quotes from case law that:

12       "Given the preeminence of a defendant's Sixth Amendment rights, when  
13       deciding whether to seal search warrant records, this court should apply  
14       Craemer's "probability of unfairness" standard, rather than the "reasonable  
15       likelihood" test that Rosato applied . . ." (Exhibit A, page 30, lines 14-18)

16       According to the Prosecution's theory, this death penalty prosecution is to proceed  
17 on parallel tracks in different courtrooms with the caveat that the trial judge, Judge  
18 Girolami, is prohibited from exercising jurisdiction over questions involving the  
19 unsealing of affidavits in support of search warrants and arrest warrants in this case. In a  
20 case such as this, where the Mr. Peterson's fair trial has already been jeopardized by  
21 pervasive pretrial publicity, where the issue of venue has not even been addressed, it is  
22 inconceivable to believe that the trial court in a death penalty case has its hands tied on  
23 what may be the single most important issue as to prejudicial pretrial publicity. The  
24 absurdity of the Prosecution's position is apparent in the mere posing of the issue. As  
25 further demonstrated below, a trial court can not be recused on one issue in a proceeding  
26 yet maintain jurisdiction for others.

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**II.**  
**THE FILING OF A C.C.P. § 170.6 PEREMPTORY CHALLENGE**  
**DEPRIVES THE CHALLENGED JUDGE OF JURISDICTION**  
**IN ALL FURTHER MATTERS IN THE CASE.**

Court have long recognized that in enacting C.C.P. § 170.6 the Legislature guaranteed to litigants an extraordinary right to disqualify a judge. That right is “automatic” in the sense that a good faith belief in prejudice is alone sufficient, and proof of facts showing actual prejudice is not required. *McCartney v. Commission on Judicial Qualifications* (1974) 12 Cal.3d 512. Accordingly, the rule has developed that, when an affidavit of prejudice is timely and properly made, **immediate disqualification is mandatory**, and once an affidavit of prejudice has been filed under § 170.6, **the court has no jurisdiction to hold further proceedings in the matter** except to inquire into the timeliness of the affidavit or its technical sufficiency under this section. *Id.* (emphasis added); *see also In re Abdul Y.* (1982) 130 Cal.App.3d 847 (When a challenge is timely and properly made, the challenged judge immediately loses jurisdiction and must recuse himself. If he does not, his subsequent orders and judgments are void). Section 170.6 draws no distinction between civil and criminal actions. *McClenny v. Superior Court of Los Angeles County* (1964) 60 Cal.2d 677.

In *Le Louis v. Superior Court*, the court held that even in the case where two separate criminal complaints were consolidated for preliminary hearing, they became one proceeding for purposes of this section, allowing one preemptory challenge of the judge per civil or criminal proceeding. Since the petitioner had previously exercised its one-time entitlement to disqualification in municipal court, the appellant court held that the petitioner was precluded from filing a new, additional motion as to the assigned judge. *Le Louis v. Superior Court* (1989) 209 Cal.App.3d 669, review denied.

Moreover, in *Sunkyoung Trading (H.K.) Ltd. v. Superior Court*, the court held that when a motion for preemptory challenge to the presiding judge is made by a party, the

1 judge granting such a challenge may not sever pleadings of that party for reassignment to  
2 another judge and retain remainder of the action. *Sunkyong Trading (H.K.) Ltd.* (1992) 9  
3 Cal.App.4th 282. The prosecution's position in this matter is in direct contradiction with  
4 the holding in *Sunkyong*.

5 The results of not complying with the affidavit of prejudice are extreme. The  
6 courts have been vigilant to enforce the statutory restrictions set forth in Section 170.6.  
7 *See Solberg v. Superior Court* (1997) 19 Cal.3d 182, 197-198. In fact, in *In re Robert P.*,  
8 the court held that where an affidavit of prejudice was timely filed and in proper form,  
9 immediate disqualification was mandatory and the legal effect of juvenile court judge's  
10 improper refusal to recuse himself resulted in loss of jurisdiction. Consequently, the  
11 court's orders sustaining the petition against a minor on counts of petty theft, receiving  
12 stolen property and tampering with an automobile and directing the minor's disposition  
13 were thus void and error, and required reversal. *In re Robert P.* (1981) 121 Cal.App.3d  
14 36; *see also Brown v. Swickard* (1985) 163 Cal.App.3d 820 (where timely peremptory  
15 motion of disqualification had been filed, court lacked jurisdiction to rule on motion for  
16 summary judgment and the summary judgments granted by the judge were void).

17 Hence, the Prosecution's interpretation of C.C.P. § 170.6, i.e., that a trial judge can  
18 be disqualified on one issue in a proceeding yet maintain jurisdiction for others, runs  
19 afoul of the legislative intent. Section 170.6 clearly and unequivocally establishes that  
20 when a challenge is timely and properly made, the challenged judge immediately loses  
21 jurisdiction and must recuse himself, and if he does not, his subsequent orders and  
22 judgment are null and void. As such, pursuant to the Prosecution's filing of the C.C.P. §  
23 170.6 against Judge Girolami, Judge Girolami is without jurisdiction to take any further  
24 action in connection with this case. Any further judicial actions taken by Judge Girolami  
25 would be invalid as a matter of law under the authority of *In re Robert P, supra*. This  
26 appears to be the only conclusion that can be drawn from the current state of the case. To  
27 adopt the position of the Prosecution would require this death penalty case to bounce  
28 between two courts of concurrent jurisdiction on issues central to the case with Judge

1 Girolami precluded from acting on issues surrounding pretrial publicity, the defendant's  
2 right to a fair trial or ensuring a unbiased venire pool.

3  
4 **III.**


5 **CONCLUSION**

6 For the foregoing reasons, Mr. Peterson respectfully requests that this Court  
7 enforce the Prosecution's filing of a C.C.P. § 170.6 peremptory challenge against the  
8 Hon. Al Girolami which deprives Judge Girolami of jurisdiction in all further matters in  
9 this case.

10  
11 Dated: May 4, 2003

Respectfully submitted,  
GERAGOS & GERAGOS

12  
13  
14 By:

  
\_\_\_\_\_  
MARK J. GERAGOS  
Attorney for Defendant  
SCOTT LEE PETERSON

APR 29 2003  
9:13  
ES

1 JAMES C. BRAZELTON  
District Attorney  
2 Stanislaus County  
Courthouse  
3 Modesto, California  
Telephone: 525-5550  
4 Attorney for Plaintiff  
5  
6  
7  
8

9 STANISLAUS COUNTY SUPERIOR COURT

10 STATE OF CALIFORNIA

11 -----o0o-----

12 D.A. No. THE PEOPLE OF THE STATE OF CALIFORNIA ) No. 1056770  
13 Plaintiff, ) OPPOSITION TO MOTION TO  
14 vs. ) UNSEAL SEARCH WARRANT  
15 ) AND ARREST WARRANT  
16 SCOTT PETERSON, ) RECORDS  
17 Respondent, )  
18 ) Hrg.: 5-5-03  
Time: 9:30 am  
19 ) Dept: 5

20 -----o0o-----

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

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

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


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



1 Dated this 28<sup>th</sup> day of April, 2003, at Modesto, California.

2 Respectfully submitted,

3 JAMES C. BRAZELTON  
4 District Attorney

5 By   
6 Rick Distaso  
7 Senior Deputy District Attorney

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IN THE

COURT OF APPEAL  
FIFTH APPELLATE DISTRICT

Court of Appeal of the State of California

APR 18 2003

IN AND FOR THE

Fifth Appellate District

By \_\_\_\_\_  
Deputy

THE PEOPLE,

Petitioner,

v.

SUPERIOR COURT, COUNTY OF  
STANISLAUS,

Respondent;

THE MODESTO BEE,

Real Party In Interest.

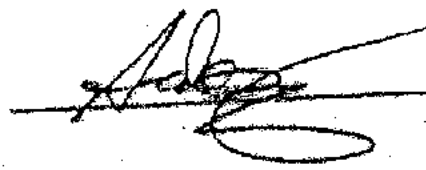
F042848

(Stanislaus Sup. Ct. No. 1045098)

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., Diblaso, J., and Vartabedian, J.

FILED

03 MAR 17 PM 1:11

CLERK OF THE SUPERIOR COURT  
COUNTY OF STANISLAUS

BY Ronald A. [Signature]  
DEPUTY

1 JAMES C. BRAZELTON  
2 District Attorney  
3 Stanislaus County  
4 Courthouse  
5 Modesto, California  
6 Telephone: 525-5550  
7  
8 Attorney for People

8 STANISLAUS COUNTY SUPERIOR COURT  
9 STATE OF CALIFORNIA

10 D.A. No. \*

) No. 1045098

11  
12 In Re 8 sealed search warrants - Laci  
13 Peterson investigation

)  
) OPPOSITION TO THE  
) MODESTO BEE'S PETITION  
) FOR ACCESS TO CERTAIN  
) SEALED WARRANTS

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

) Hrg: 4-2-03  
) Time: 8:30 a.m.  
) Dept: 2

16  
17 Comes now THE PEOPLE OF THE STATE OF CALIFORNIA to Oppose  
18 the Modesto Bee's Petition for Access to Certain Sealed Search  
19 Warrants:

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RECORDS. . . . . 23

8. DESPITE ANY STATUTORY REQUIREMENT OF PUBLIC ACCESS TO  
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FACTS

1  
2 This court has previously considered a search warrant  
3 application from a detective of the Modesto Police Department who  
4 has been investigating a possible criminal offense. After  
5 considering the information submitted under oath by the  
6 detective, this court issued a warrant. The court also  
7 considered the detective's request that the application, warrant,  
8 and return be sealed, as well as the factual basis for that  
9 request. After finding good cause, the court sealed the  
10 documents.

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

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

24 On January 16, 2003 John Coté, a reporter for the Modesto  
25 Bee (hereafter intervenor), served a "Public Records Request" on  
26 the Modesto Police Department, the Stanislaus County District  
27 Attorney's Office and the Stanislaus County Superior Court, for  
28

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

3 On January 21, 2003 the District Attorney responded to said  
4 request pointing out that the records were exempt from Disclosure  
5 pursuant to Government Code §6254(f). The response also pointed  
6 out that the courts were exempt from the California Public  
7 Records act pursuant to Copley Press, Inc. v. Superior Court,  
8 (1992) 6 Cal.App. 4<sup>th</sup> 106. The People did not receive a copy of  
9 the Superior Courts response, if any, to the Bee.

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

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

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

23 Between January 27, 2003 and March 8, 2003 the Superior  
24 Court Administration provided to members of the media copies of  
25 these "new forms" which included the description of what the  
26 search warrants were for, despite the fact that the search  
27 warrants and affidavits were sealed. This description included  
28

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

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

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

8 LAW

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

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

23 As an officer of the court, with *in posse* interests, the  
24 People oppose intervenor's motion to unseal any search warrant  
25 documents, on the grounds that premature revelation of the  
26 information contained in the documents would jeopardize an on-  
27 going police investigation, potentially interfere with *in posse*  
28

1 Constitutional trial rights, would violate the statutory right to  
2 protect privileged official information found in Evidence Code  
3 §1040, and as applied, Penal Code §1534 (hereafter §1534) and  
4 Rule of Court 243.1 would unconstitutionally violate the  
5 Separation of Powers to the detriment of the District Attorney.

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

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

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

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

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

22 "[S]ubject to the constitutional prohibition against cruel  
23 and unusual punishment, the power to define crimes and fix  
24 penalties is vested exclusively in the legislative branch.  
25 [Citations.]" (People v. Superior Court (Romero), (1996) 13  
26 Cal.4th 497, 516 (Romero)). "[T]he power of the people  
27 through the statutory initiative is coextensive with the  
28 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

1 branch. [Citations.]" (People v. Birks, (1998) 19 Cal.4th  
2 108, 134.) "When the decision to prosecute has been made,  
3 the process which leads to acquittal or to sentencing is  
4 fundamentally judicial in nature." (People v. Tenorio,  
5 (1970) 3 Cal.3d 89, 94.)" (Emphasis added.)

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

7 Another California Supreme court decision held the same:

8 "It is well settled that the prosecuting authorities,  
9 exercising executive functions, ordinarily have the sole  
10 discretion to determine whom to charge with public offenses  
11 and what charges to bring. (E.g., People v. Eubanks, (1996)  
12 14 Cal.4th 580, 588-589; Dix v. Superior Court, (1991) 53  
13 Cal.3d 442, 451.) This prosecutorial discretion to choose,  
14 for each particular case, the actual charges from among  
15 those potentially available arises from "the complex  
16 considerations necessary for the effective and efficient  
17 administration of law enforcement." (People v. Keenan,  
18 (1988) 46 Cal.3d 478, 506, quoting People v. Heskett, (1982)  
19 30 Cal.3d 841, 860.) The prosecution's authority in this  
20 regard is founded, among other things, on the principle of  
21 separation of powers, and generally is not subject to  
22 supervision by the judicial branch. (People v. Wallace,  
23 (1985) 169 Cal.App.3d 406, 409 ; People v. Adams, (1974) 43  
24 Cal.App.3d 697, 708; see also Taliaferro v. Locke, (1960)  
25 182 Cal.App.2d 752.)

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

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

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

36 Hicks v. Board of Supervisors, (1977) 69 Cal.App.3d 228, 240  
37 -241.

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

1 "The separation of powers doctrine requires judicial  
2 restraint in enjoining criminal investigations or  
3 prosecutions. The prosecutor's authority stems from the  
4 executive branch of government (Cal. Const., art. III, § 3),  
5 and the investigation and gathering of evidence relating to  
6 criminal offenses is the prosecutor's responsibility and  
7 rests solely within his or her discretion. (Hicks v. Board  
8 of Supervisors, (1977) 69 Cal.App.3d 228, 241.) The  
9 discretionary authority vested in the district attorney to  
10 investigate and prosecute criminal conduct is considered too  
11 vital to the interest of public order to be subjected to  
12 prior restraint by the courts except under extraordinary  
13 circumstances. (Manchel v. County of Los Angeles, (1966)  
14 245 Cal.App.2d 501, 505, 510; Pitchess v. Superior Court,  
15 (1969) 2 Cal.App.3d 644, 648; Reporters Com. v. American  
16 Telephone & Telegraph, (D.C. Cir. 1978) 593 F.2d 1030,  
17 1065.) "The balance between the Executive and Judicial  
18 branches would be profoundly upset if the Judiciary assumed  
19 superintendence over the law enforcement activities of the  
20 Executive branch upon nothing more than a vague fear or  
21 suspicion that its officers will be unfaithful to their  
22 oaths or unequal to their responsibility." ( Reporters Com.  
23 v. American Telephone & Telegraph, supra, at p.  
24 1065.)" (Emphasis Added.)

25 Triple A Machine Shop, Inc. v. State of California, (1989)  
26 213 Cal.App.3d 131, 144 -145.

27 It cannot be disputed that the duties of the executive  
28 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

1 executed, the peace officer who executed the warrant shall  
2 enter the exact time of its execution on its face.

3 (c) A search warrant may be made returnable before the  
4 issuing magistrate or his court."

5 Rule of Court 243.1 (hereafter Rule 243.1) states:

6 "(a) [Applicability]

7 (1) Rules 243.1-243.4 apply to records sealed or proposed to  
8 be sealed by court order.

9 (2) These rules do not apply to records that are required to  
10 be kept confidential by law. These rules also do not apply  
11 to discovery motions and records filed or lodged in  
12 connection with discovery motions or proceedings. The rules  
13 do apply to discovery materials that are used at trial or  
14 submitted as a basis for adjudication of matters other than  
15 discovery motions or proceedings.

16 (b) [Definitions]

17 (1) "Record." Unless the context indicates otherwise,  
18 "record" as used in this rule means all or a portion of any  
19 document, paper, exhibit, transcript, or other thing filed  
20 or lodged with the court.

21 (2) "Sealed." A "sealed" record is a record that by court  
22 order is not open to inspection by the public.

23 (3) "Lodged." A "lodged" record is a record that is  
24 temporarily placed or deposited with the court but not filed.

25 (c) [Court records presumed to be open] Unless  
26 confidentiality is required by law, court records are  
27 presumed to be open.

28 (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.

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

2 The documents and records of the court relating to the  
3 warrant need not be open to the public until the execution  
4 and return of the warrant or the expiration of the 10-day  
5 period after issuance. Thereafter, if the warrant has been  
6 executed, the documents and records shall be open to the  
7 public as a judicial record.

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10 be sealed by court order.

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12 be kept confidential by law. These rules also do not apply  
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18 (b) [Definitions]

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21 document, paper, exhibit, transcript, or other thing filed  
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23 (2) "Sealed." A "sealed" record is a record that by court  
24 order is not open to inspection by the public.

25 (3) "Lodged." A "lodged" record is a record that is  
26 temporarily placed or deposited with the court but not  
27 filed.

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

33 The executive branch (law enforcement) is mandated to seek a  
34 search warrant from the judicial branch as set fourth in the  
35 Fourth Amendment to the United States Constitution. This process,  
36 is codified by the legislative branch in California in Penal Code  
37 §1523. The search warrant application process is part of the  
38 investigation process and is done confidentially and ex parte. As



1 the United States Supreme Court has said:

2 ".... a warrant application involves no public or adversary  
3 proceedings: it is an ex parte request before a magistrate  
or judge."

4 U.S. v. U.S. Dist. Court for Eastern Dist. of Mich.,  
5 Southern Division, (1972) 407 U.S. 297, 321. (See also  
Franks v. Delaware, (1977) 438 U.S. 154; Penal Code §1526.)

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

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

23 Times Mirror Co. v. U.S., (9<sup>th</sup> Cir., 1989) 873 F.2d 1210,  
24 1213 -1214 [Footnote omitted..]

25 The investigation process, which includes the search warrant  
26 process, has been held to be confidential by the U.S. Supreme  
27 Court. This is the traditional and common law rule. An analogous  
28

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

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

27 The California Supreme Court has interpreted the CPRA  
28

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

6 "Haynie's concession that records of a murder investigation  
7 would be exempt further illustrates the impossibility of  
8 making such a distinction. Law enforcement officers may not  
9 know whether a crime has been committed until an  
10 investigation of a complaint is undertaken. An investigation  
11 may be inconclusive either as to the cause of death or the  
12 circumstances in which the death occurred. A fire may be  
13 suspicious, but after investigation be found to have an  
14 accidental or natural origin. In this case we have no reason  
15 to believe that the deputies who stopped Haynie were not  
16 investigating a report of what they believed might be  
17 criminal conduct.

18 \*\*\*

19 The records of investigation exempted under section 6254(f)  
20 encompass only those investigations undertaken for the  
21 purpose of determining whether a violation of law may occur  
22 or has occurred. If a violation or potential violation is  
23 detected, the exemption also extends to records of  
24 investigations conducted for the purpose of uncovering  
25 information surrounding the commission of the violation and  
26 its agency."

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

28 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

1 officer in official confidence when the investigation is of  
2 such a type that disclosure of the investigation would cause  
3 the public interest to suffer. An apt illustration of this  
4 situation is the investigation of a crime by police  
5 officers. [Citations.] It is not only where a witness  
6 requests that his statement be kept in confidence, but in  
7 all cases of crime investigation that the record and reports  
8 are privileged.' (Jessup v. Superior Court, (1957) 151  
9 Cal.App.2d 102, 108.)" (People v. Otte, supra, 214  
10 Cal.App.3d at p. 1532; see also Rivero v. Superior Court,  
11 (1997) 54 Cal.App.4th 1048, 1058-1059 [confidentiality of  
12 criminal investigations must be maintained so that potential  
13 witnesses come forward]; People v. Wilkins, (1955) 135  
14 Cal.App.2d 371, 377; People v. Pearson, (1952) 111  
15 Cal.App.2d 9, 18, 24.)

16 \*\*\*

17 The Public Records Act (Gov. Code, §§ 6250 et seq.) includes  
18 a specific exemption from disclosure for law enforcement  
19 investigative files. This exemption permits the state to  
20 withhold "[r]ecords of ... investigations conducted by, or  
21 records of intelligence information or security procedures  
22 of ... any state or local police agency, or any such  
23 investigatory or security files compiled by any other state  
24 or local police agency ... for correctional, law enforcement  
25 or licensing purposes ...." (Gov. Code, §§ 6254, subd. (f).)  
26 In Williams v. Superior Court, (1993) 5 Cal.4th 337, the  
27 Supreme Court interpreted the scope of this Public Records  
28 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, §§  
6250), 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.

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

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

22       Id., 767 -768.

23       Even in criminal cases where an accused faces the greatest  
24 potential loss of a constitutional right, the judiciary has  
25 recognized the need to allow the executive branch to maintain a  
26 level of secrecy. (See People v. Hobbs, (1994) 7 Cal. 4<sup>th</sup> 948,  
27 971.) Clearly, the history of the search warrant process  
28 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

1 the idea without citation and is not controlling here. (See PSC  
2 Geothermal Services Co. v. Superior Court, (1994) 25 Cal.App.4th  
3 1697, 1715.)

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

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

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

18 "Once again, however, subdivision (a) of the Penal Code,  
19 section 1534 must be construed together with subdivision (a)  
20 of section 1041 of the Evidence Code establishing the  
21 privilege of nondisclosure of the identity of a confidential  
22 informant. For the same reason we rejected defendant's  
23 argument that the name of the confidential informant whose  
24 affidavit has been taken must appear on the face of the  
25 warrant, we reject his argument that the affidavit of a  
26 confidential informant must be made a public record prior to  
27 compelled disclosure of his identity. The result otherwise  
28 would be to nullify the nondisclosure privilege. "

24 People v. Sanchez, (1972) 24 Cal.App.3d 664, 678;  
25 disapproved on other grounds in People v. Martin, (1973) 9  
26 Cal.3d 687.

26 "Thus, the privilege to conceal the identity of an informant  
27 is well established, as is the notion that the privilege can  
28 properly be implemented by use of partially sealed  
affidavits. Contrary to one of appellant's arguments, these

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

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

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

14 Rule 243.1 must also be read in harmony with Rule 243.2  
15 which was passed at the same time to meet the requirements of NBC  
16 Subsidiary (KNBC-TV), Inc. v. Superior Court, (1999) 20 Cal.4th  
17 1178. The advisory committee's comments to California Rule of  
18 Court 243.1. state:

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

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

1 search warrant, since it is neither being the used at trial or as  
2 a basis of adjudication. These rules do not apply to pre-  
3 complaint search warrant records because they are part of the  
4 "discovery" process and the court must keep them confidential by  
5 law. (PSC Geothermal Services Co. v. Superior Court, supra, at  
6 1712; cf. Arnett v. Dal Cielo, (1996) 14 Cal.4th 4.)

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

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

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

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

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



1 (1980) 448 U.S. 555[access to criminal trials], as conferring  
2 standing to oppose orders "impinging on the First Amendment right  
3 of the press and public to attend court proceedings and review  
4 court records." None of the cases cited by intervenor are  
5 applicable because they deal with post-arrest, charged criminal  
6 cases.

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

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

17 Id., at page 448.

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

25 " (1) To prevent the escape of those whose indictment may  
26 be contemplated; (2) to insure the utmost freedom to the  
27 grand jury in its deliberations, and to prevent persons  
28 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 untrammelled disclosures by

1 persons who have information with respect to the commission  
2 of crimes; (5) to protect the innocent accused who is  
3 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. " "

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

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

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

19 Oziel dealt with the media's request to obtain the  
20 "documents and records" seized in the Menendez brothers murder  
21 case including a video tape of a special masters search of a  
22 psychotherapist involved with the case. The court found no  
23 statutory, common law or First Amendment right to access the  
24 records sought. Oziel, at page 1297, cited to Times Mirror Co.  
25 v. United States, supra, and said "the First Amendment does not  
26 establish a qualified right of access to search warrant  
27 proceedings and materials while a pre-indictment investigation is  
28

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

3 "Rather, we are asked to hold that the Constitution itself  
4 gave the petitioner an affirmative right of access to this  
5 pretrial proceeding, even though all the participants in the  
6 litigation agreed that it should be closed to protect the  
7 fair-trial rights of the defendants.  
8 For all of the reasons discussed in this opinion, we hold  
9 that the Constitution provides no such right."

10 Gannett Co., Inc. v. DePasquale, (1979) 443 U.S. 368, 394.

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

17 It is clear that §1534 and Rule 243.1 do not create a right  
18 to participate in the search warrant process. This is because  
19 §1534 is merely a rule of procedure, and does not distinguish  
20 between filed documents that are sealed and unsealed. Therefore,  
21 nothing cited by intervenor supports their claim that a hearing  
22 must be held before a search warrant is sought; it has never been  
23 and is not required. To hold that a magistrate must do so would  
24 change the historical practice of California.

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

27 Intervenor's claim that the only exception to allow a search  
28 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

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

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

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

24 First, because a "tradition of accessibility implies the  
25 favorable judgment of experience" [citations], we have  
26 considered whether the place and process have historically  
27 been open to the press and general public .... [¶] Second,  
28 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

1 best under public scrutiny, it takes little imagination to  
2 recognize that there are some kinds of governmental  
3 operations that would be totally frustrated if conducted  
4 openly .... [¶] ... If the particular proceeding in question  
5 passes these tests of experience and logic, a qualified  
6 First Amendment right of public access attaches. But even  
7 when a right of access attaches, it is not absolute.  
8 \*\*\*

9 Access to the videotapes is not necessary for the public to  
10 obtain knowledge about the execution of the search warrant  
11 and about the activities of authorities in regard thereto.  
12 Further, as was stated in Gannett Co. v. DePasquale (1979)  
13 443 U.S. 368, 383, "In an adversary system of criminal  
14 justice, the public interest in the administration of  
15 justice is protected by the participants in the litigation."  
16 Moreover, there are "other mechanisms- including suppression  
17 motions and civil actions for violation of constitutional  
18 rights-that are already in place to deter governmental  
19 abuses of the warrant process."

20 Oziel, supra, at 1296-1297.

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

28 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

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

5 PSC Geothermal Services Co. v. Superior Court, supra, at  
6 1714.

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

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

1 (Wu), supra, 79 Cal.App.4th 759, 764 -765; People v. Otte, (1989)  
2 214 Cal.App.3d 1522.) In yet another case dealing with the  
3 governments ability to maintain the secrets of police records  
4 (involving the prosecution of a Sheriff's Sargent for removing  
5 documents) a court has said:

6 "The contention that the papers removed were not public  
7 records is a mere quibble. They were kept by the sheriff's  
8 office as evidence of what had been done, of what was to be  
9 done and proof of activities of those elements against whom  
10 the law-enforcing agencies should be on the alert. They were  
11 convenient to an expeditious discharge of the duties of the  
12 sheriff's office and they were necessary to the  
13 enlightenment of the sheriff as to past failures and  
14 achievements and to current endeavors. They were not open to  
15 public inspection. The sheriff's office would be handicapped  
16 in enforcing the laws if at every sunset vicious elements  
17 might read all the sheriff's reports of vice activities  
18 during the preceding day and all plans for defeating crime  
19 in the ensuing night. Such documents are confidential public  
20 records and because of public policy are entitled to the  
21 protection of the statute."

22 People v. Pearson, (1952) 111 Cal.App.2d 9, 18.

23 As the above case demonstrates, just because a document may  
24 be called "public" does not mean that it is not confidential. The  
25 extreme need for confidentiality in the search warrant  
26 application process is why this court should not allow intervenor  
27 to participate in the search warrant application process. Nor  
28 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

1 arguments it still has the discretion not to disclose the sought  
2 materials. "While the law favors disclosure of judicial records,  
3 the right of access is not absolute. Nondisclosure may be  
4 appropriate 'for compelling countervailing reasons.'" (People v.  
5 Rhodes (1989) 212 Cal.App.3d 541, 550, quoting Pantos v. City and  
6 County of San Francisco (1984) 151 Cal.App.3d 258, at p. 263;  
7 citing Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645,  
8 651-652; Gov. Code, § 6255. See also Oziel, supra, 223  
9 Cal.App.3d, at p. 1295.) "Clearly, a court has inherent power to  
10 control its own records to protect rights of litigants before it...  
11 ." (Estate of Hearst, (1977) 67 Cal.App.3d 777, 783; see also:  
12 Oziel, supra; Pantos v. City and County of San Francisco,  
13 supra.) However, "...where there is no contrary statute or  
14 countervailing public policy, the right to inspect public records  
15 must be freely allowed." (Craemer v. Superior Court, (1968) 265  
16 Cal.App.2d 216, 226-227 ["Craemer"].) Only one California case,  
17 Oziel v. Superior Court, has addressed these principles in the  
18 context of search warrant documents after warrant service. Under  
19 Oziel, as set out above no First Amendment right existed, and  
20 further the court found that maintaining the seal on the search  
21 warrant documents was a matter within the court's sound  
22 discretion. (Oziel, supra, at 1302.)

23 Oziel framed the issue as:

24 "whether the public, including the media, has any right to  
25 disclosure of the videotapes before they have been offered  
26 as an exhibit or admitted into evidence in any court  
27 proceeding, and before either [the therapist or the  
28 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.



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

9 Intervenor in Oziel failed to establish a historical right  
10 of public access to search warrant proceedings, because none  
11 existed. The Supreme Court acknowledged that the common law  
12 holds no right to pre-trial public access, (Gannett Co. v.  
13 DiPasquale, supra, at pp. 389-390) and that "[t]he investigation  
14 of criminal activity has long involved imparting sensitive  
15 information to judicial officers who have respected the  
16 confidentiality involved." (See U.S.v. U.S. District Court,  
17 supra, 407 U.S. 297, 320-321.) California has also established  
18 a statutory privilege against divulging "official information,"  
19 and it applies to information in search warrant documents. (Evid.  
20 Code §§ 1040, et seq.; People v. Hobbs, supra, 7 Cal.4th 948, 974;  
21 People v. Luttenberger (1990) 50 Cal.3d 1, 9-11.) Many other  
22 statutory exceptions to the right of public access to court and  
23 law enforcement documents exist. (Craemer, at p. 220, and fn.4,  
24 citing inter alia: Veh. Code § 20012, accident reports  
25 confidential; Pen. Code § 1203.10, access to probation records  
26 limited; Welf. & Inst. § 827, limited access to juvenile court  
27 records; Pen. Code § 25, pre-indictment grand jury transcript  
28

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

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

15 Here, as in Oziel, there is no First Amendment right to  
16 public access to search warrant documents. Whether to unseal the  
17 documents is a matter for this court's sound discretion, and a  
18 potential or future defendant's preeminent Sixth Amendment right  
19 to a fair trial establishes a countervailing public policy which  
20 overwhelmingly trumps the public access requirement of Penal Code  
21 1534. (Oziel, at pp. 1302-1303.)

22 Intervenor cite People v. Tockgo, (1983) 145 Cal.App. 3d 635,  
23 641-642, for the proposition that there can be no privilege here  
24 because it has been waived by seeking a search warrant. The  
25 premise from that case is dicta and decided without authority. It  
26 ignores the history of search warrant applications and cases  
27 holding that a privilege is maintained and it does not address  
28

1 the courts ability to seal a warrant.

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

11  
12 8. DESPITE ANY STATUTORY REQUIREMENT OF PUBLIC ACCESS TO COURT  
13 RECORDS, THIS COURT HAS THE INHERENT AUTHORITY, AND THE  
14 AFFIRMATIVE DUTY, TO SEAL SEARCH WARRANT RECORDS TO PROTECT  
15 A FUTURE DEFENDANT'S PREEMINENT 6TH AMENDMENT RIGHT TO A  
16 FAIR TRIAL WHEN A REASONABLE LIKELIHOOD EXISTS THAT  
17 DISCLOSURE OF THE RECORDS WILL CAUSE INHERENTLY PREJUDICIAL  
18 PRE-TRIAL PUBLICITY.

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

26 Although not a party to this criminal action, any member of the  
27 public, including the press, can assert a common law privilege  
28 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,

1 1031-1032.) Intervenor argues that it was improper for the  
2 court to seal the search warrant materials without giving prior  
3 notice and opportunity to be heard to the public and press. They  
4 cite many cases which stand for the "undisputed" proposition that  
5 normally court proceedings should be open to the public and the  
6 press. The United States Supreme Court, however, has also  
7 recognized that this is a qualified right which must, on  
8 occasion, yield when there is a compelling and overriding need to  
9 maintain secrecy of court proceedings, records and exhibits.  
10 "[The Court has made clear that the right to an open trial may  
11 give way in certain cases to other rights or interests, such as  
12 the defendant's right to a fair trial or the government's  
13 interest in inhibiting disclosure of sensitive  
14 information." (Waller v. Georgia, (1984) 467 U.S. 39, 45.)

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

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

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

6 Craemer, at pp. 219-220.

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

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

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

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

5 "Thus, it is clear beyond cavil that the trial court had the  
6 authority and the affirmative duty to issue the protective  
7 order here and, pursuant to and independent of the authority  
8 contained in Penal Code section 938.1, to seal the  
9 transcript until the trials of the defendants were  
10 completed."

11 Rosato, at p. 207.

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

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

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

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

Evidence Code §915(b) provides that:

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

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

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

28 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

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

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

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

22 Further, there is little public interest served by  
23 disclosure. The affidavits are permitted to be based upon  
24 hearsay, which is normally not admitted at criminal trials except  
25 under judicially monitored circumstances that assure its  
26 reliability. The information in an affidavit only supports a  
27 finding of probable cause for the search warrant; it does not  
28



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

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

21 |       If published, the sealed materials may communicate to the  
22 | general public that the some individual or individuals, in the  
23 | opinion of law enforcement, are guilty, or may be guilty, of a  
24 | felony. This broad brush assertion will be unaccompanied by any  
25 | facts providing a context for evaluating the basis for the  
26 | opinion with respect to any given individual. When one adds to  
27 | this that the opinion was formed on the basis of an investigation  
28 |

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

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

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

23 ///

24 ///

25 ///

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

2 STATE OF CALIFORNIA )  
3 COUNTY OF STANISLAUS )

4 I, the undersigned, say:

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

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

10 That affiant served a copy of the attached OPPOSITION TO  
11 MODESTO BEE'S PETITION FOR ACCESS TO CERTAIN SEALED WARRANTS by  
12 placing said copy in an envelope addressed to Kirk McAllister, Esq.  
13 1012 11th Street, #100, Modesto, California, 95354, which envelope  
14 was then sealed and postage fully prepaid thereon, and thereafter  
15 was on March 17, 2003, deposited in the United States mail at  
16 Modesto, California. That there is delivery service by United  
17 States mail at the place so addressed, or regular communication by  
18 United States mail between the place of mailing and the place  
19 addressed.

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

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

23  
24 D. Hill  
25  
26

27 Court No. 1045098.

28 dlh

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

2 STATE OF CALIFORNIA )  
3 COUNTY OF STANISLAUS )

4 I, the undersigned, say:

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6 age, a resident of Stanislaus County, and not a party to the within  
7 action.

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

10 That affiant served a copy of the attached OPPOSITION TO  
11 MODESTO BEE'S PETITION FOR ACCESS TO CERTAIN SEALED WARRANTS by  
12 placing said copy in an envelope addressed to Chastity Kenyon, Esq.  
13 2500 Venture Oakes Way, Suite, 220, Sacramento, California, 95833,  
14 which envelope was then sealed and postage fully prepaid thereon,  
15 and thereafter was on March 17, 2003, deposited in the United  
16 States mail at Modesto, California. That there is delivery service  
17 by United States mail at the place so addressed, or regular  
18 communication by United States mail between the place of mailing  
19 and the place addressed.

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

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

23  
24 D. Hill

25  
26  
27 Court No. 1045098

28 dlh

PROOF OF SERVICE BY FAX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
CODE OF CIV. PROC. § 170.6 FILED BY PROSECUTION**

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

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

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

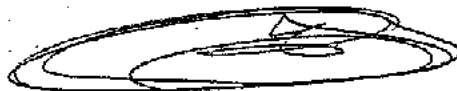
PARTIES SERVED BY FAX:

**Hon. Al Girolami**  
Fax. No.: 209-525-6385

**Rick Disatso, DDA**  
**David P. Harris, DDA**  
Fax No.: 209-525-5545

Executed on May 4, 2003, at Los Angeles, California.

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



RAFFI NALJIAN

TRANSMISSION VERIFICATION REPORT

TIME : 05/04/2003 12:01  
NAME : GERAGOS&GERAGOS  
FAX : 2136251600  
TEL : 2136253900  
SER.# : BRDL2J854125

DATE, TIME	05/04 11:52
FAX NO./NAME	12095255545
DURATION	00:09:40
PAGE(S)	55
RESULT	OK
MODE	STANDARD ECM

# GERAGOS & GERAGOS

LAWYERS

39<sup>TH</sup> FLOOR

350 S. GRAND AVENUE

LOS ANGELES, CA 90071-3480

TEL: (213) 625-3900

FAX: (213) 625-1600

## FAX COVER SHEET

**From:** Mark J. Geragos  
**Client/Matter:** Peterson  
**Date:** May 4, 2003  
**Pages:** (INCLUDING COVER)

RECIPIENT	FACSIMILE NUMBER
Rick Distaso or David P. Harris	(209) 525-5545

TRANSMISSION VERIFICATION REPORT

TIME : 05/04/2003 11:51  
NAME : GERAGOS&GERAGOS  
FAX : 2136251600  
TEL : 2136253900  
SER. # : BRDL2J854125

DATE, TIME  
FAX NO. /NAME  
DURATION  
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MODE

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00:09:57  
55  
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LAWYERS

39<sup>TH</sup> FLOOR

350 S. GRAND AVENUE

LOS ANGELES, CA 90071-3480

TEL: (213) 625-3900

FAX: (213) 625-1600

## FAX COVER SHEET

**From:** Mark J. Geragos  
**Client/Matter:** People v. Peterson  
**Date:** May 4, 2003  
**Pages:** (INCLUDING COVER)

RECIPIENT	FACSIMILE NUMBER
Hon. Al Girolami	209-525-6385.

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): <b>MARK J. GERAGOS</b> <b>GERAGOS &amp; GERAGOS</b> <b>350 SOUTH GRAND AVENUE</b> <b>39TH FLOOR</b> <b>LOS ANGELES, CALIFORNIA 90071</b>		TELEPHONE NO.: <b>213-625-3900</b>	FOR COURT USE ONLY  <b>FILED</b> <b>MAY 2 - 2003</b> <b>MICHAEL A. TOZZI, CLERK</b> <i>BY: Connelly</i> <b>DEPUTY</b>
ATTORNEY FOR (Name): <b>SCOTT PETERSON</b>			
NAME OF COURT: <b>STANISLAUS SUPERIOR COURT</b> STREET ADDRESS: <b>1100 I STREET</b> MAILING ADDRESS: CITY AND ZIP CODE: <b>MODESTO, CALIFORNIA 95353</b> BRANCH NAME: <b>MAIN COURTHOUSE</b>			
CASE NAME: <b>PEOPLE V. PETERSON</b>			
<b>SUBSTITUTION OF ATTORNEY -</b> <b>(Without Court Order)</b>		CASE NUMBER: <b>MPD-02-142591</b>	

THE COURT AND ALL PARTIES ARE NOTIFIED THAT (name): **SCOTT PETERSON** makes the following substitution:

1. Former legal representative  Party represented self  Attorney (name): **PUBLIC DEFENDER**

2. New legal representative  Party is representing self\*  Attorney

a. Name: **MARK J. GERAGOS** b. State Bar No. (if applicable): **108325**

c. Address (number, street, city, ZIP, and law firm name, if applicable): **GERAGOS & GERAGOS**  
**350 SOUTH GRAND AVENUE, 39TH FLOOR**  
**LOS ANGELES, CALIFORNIA 90071**

d. Telephone No. (include area code): **213-625-3900**

3. The party making this substitution is a  plaintiff  defendant  petitioner  respondent  other (specify):  
**SCOTT PETERSON**

**\*NOTICE TO PARTIES APPLYING TO REPRESENT THEMSELVES**

- Guardian
- Conservator
- Trustee
- Personal representative
- Probate fiduciary
- Corporation
- Guardian ad litem
- Unincorporated association

If you are applying as one of the parties on this list, you may NOT act as your own attorney in most cases. Use this form to substitute one attorney for another attorney. SEEK LEGAL ADVICE BEFORE APPLYING TO REPRESENT YOURSELF.

**NOTICE TO PARTIES WITHOUT ATTORNEYS**

A party representing himself or herself may wish to seek legal assistance. Failure to take time and appropriate action in this case may result in serious legal consequences.

4. I consent to this substitution.  
 Date: \_\_\_\_\_

**SCOTT PETERSON** \_\_\_\_\_  
 (TYPE OR PRINT NAME) (SIGNATURE OF PARTY)

---

5.  I consent to this substitution.  
 Date: \_\_\_\_\_

*Tom B...* \_\_\_\_\_  
 (TYPE OR PRINT NAME) (SIGNATURE OF FORMER ATTORNEY)

---

6.  I accept this substitution.  
 Date: **APRIL 28, 2003**

**MARK J. GERAGOS** \_\_\_\_\_  
 (TYPE OR PRINT NAME) (SIGNATURE OF NEW ATTORNEY)

(See reverse for proof of service by mail)

**SUBSTITUTION OF ATTORNEY -**