

FILED

03 JUN -4 PM 4:41

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY *Amey Quila* DEPUTY

1 GERAGOS & GERAGOS

2 LAWYERS
3 39TH FLOOR
4 350 S. GRAND AVENUE
5 LOS ANGELES, CA 90071-3480
6 TELEPHONE (213) 625-3900
7 FACSIMILE (213) 625-1600

8 MARK J. GERAGOS SBN 108325
9 Attorney for Defendant SCOTT LEE PETERSON

10 McALLISTER & McALLISTER, Inc.
11 1012 11TH Street, Suite 100
12 Modesto, CA 95354
13 KIRK W. McALLISTER SBN 47324
14 Attorney for Defendant SCOTT LEE PETERSON

Fax Filing

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

17 THE PEOPLE OF THE STATE OF
18 CALIFORNIA,

19 Plaintiff,

20 vs.

21 SCOTT LEE PETERSON, et al.,

22 Defendant.

Case No. 1056770

DEFENDANT'S MEMORANDUM
IN RESPONSE TO COURT'S
INQUIRY RE "GAG" OR
PROTECTIVE ORDER

DATE: June 6, 2003
TIME: 8:30 a.m.
PLACE: Dept 2 / 8
Courtroom of Judge Al Girolami

23 TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and

24 TO: CLERK OF THE ABOVE-ENTITLED COURT:

25 Defendant Scott Lee Peterson ("Mr. Peterson") respectfully submits the following
26 Memorandum in response to the Court's inquiry regarding the issuance of a gag order.

27 ///

28 ///

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 PROLOGUE

3 Orders which restrict or preclude a citizen from speaking in
4 advance are known as "prior restraints," and are disfavored
5 and presumptively invalid. Gag orders on trial participants
6 are unconstitutional unless (1) the speech sought to be
7 restrained poses a clear and present danger or serious and
8 imminent threat to a protected competing interest; (2) the
9 order is narrowly tailored to protect that interest; and (3) no
10 less restrictive alternatives are available.

11 (footnotes omitted) (*Hurvitz v. Hoefflin et al.* (2nd Dist. 2000)
12 84 Cal.App.4th 1232, 1241, *review denied March 21, 2001.*)

13 * * *

14 It is clear that even a short-lived "gag" order in a case of
15 widespread concern to the community constitutes a substantial
16 prior restraint and causes irreparable injury to First
17 Amendment interests as long as it remains in effect.

18 (*Capital Cities Media, Inc. et al. v. Toole* (1983) 463 U.S.
19 1303, 1304, 103 S.Ct. 3524, 3526.)

20 * * *

21 The judicial system, and in particular our criminal justice
22 courts, play a vital part in a democratic state, and the public
23 has a legitimate interest in their operations.

24 (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1035,
25 111 S.Ct. 2720, 2724.)

26 * * *

27 Public awareness and criticism have even greater importance
28 where, as here, they concern allegations of police corruption

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(Gentile at 1035.)

* * *

The press . . . guards against the miscarriage of justice by
subjecting the police, prosecutors, and judicial processes to
extensive public scrutiny and criticism.

(Gentile at 1035.)

* * *

Public awareness and criticism have even greater importance
where, as here, they concern allegations of police corruption,
or where . . . the criticism questions the judgment of an elected
public prosecutor.

(internal quotation marks and citations omitted) (Gentile at
1035.)

I.

INTRODUCTION

During the May 27, 2003 hearing, the Court asked counsel for their arguments as
to the issue of a protective order. Mr. Peterson objects to such an order on practical
grounds. As will be discussed below, this Court's authority to fashion a protective order
is inherently limited to the participants and people in their immediate sphere of control.
As this Court is undoubtably aware, this matter has received unprecedented media
attention. As such, even if the participants are gagged it will do little to stop the tsunami
of coverage of this matter. In fact, it is the position of the defense that a so-called "gag"
order would result in the law of unintended consequences. Namely, all that a "gag" order
would do is increase the breath and depth of misinformation and scurrilous accusations
that swirl around this case, with no ability to mitigate the damage. Unless the media is
permitted to properly and accurately report on developments as they occur, Mr. Peterson
will have no opportunity to remedy the prior avalanche of disinformation disseminated in

1 the four months prior to his arrest. Moreover, the more appropriate remedy to protect Mr.
2 Peterson's right to fair trial is found in both the Superior Court and Fifth District's orders
3 sealing certain records in this matter.

4
5 **II.**

6 **THERE IS NO BASIS ON WHICH TO ISSUE A GAG ORDER**

7 Gag orders on trial participants are unconstitutional unless (1) the speech sought to
8 be restrained poses a clear and present danger or serious and imminent threat to a
9 protected competing interest; (2) the order is narrowly tailored to protect that interest; and
10 (3) no less restrictive alternatives are available.¹ (*Hurvitz v. Hoefflin et al.*, *supra*, 84
11 Cal.App.4th at 1241.) Additionally, upon making such an order, the trial court must make
12 express findings showing it applied this standard and considered and weighed the
13 competing interests. (*Id.*) In the instant matter, as a practical and legal matter, none of
14 the three prongs set forth in *Hurvitz* are met.

15 **A. There is no clear and present danger or serious and imminent threat to**
16 **a protected competing interest.**

17 The paramount considerations of the Court must be (1) Peterson's right to a fair
18 trial, and (2) the First Amendment right upon which a gag order would infringe.

19 No right ranks higher than the right of the accused to a fair
20 trial.

21 (*In re Willon* (6th Dist. 1996) 47 Cal.App.4th 1080, 1092,
22 *rehearing denied, review denied*, citing *Press-Enterprise Co.*
23 *v. Superior Court* (1984) 464 U.S. 501, 508, and referring to
24 *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1075.

25 Here, Mr. Peterson stands wrongly and falsely accused of the capital murder of his
26

27
28 ¹The Court also requested the parties' opinion as to the appropriate standard for issuance of
a gag order. Peterson submits the three-prong *Hurvitz* approach sets forth the applicable California
law.

1 wife, Laci and their son. As such, Mr. Peterson has no trepidation about the fair and
2 accurate reporting of his case as it unfolds. However, as this Court is indeed aware, Mr.
3 Peterson has been relentlessly excoriated and vilified in the media. Just today, the
4 Modesto Bee published a study that chronicles just how pervasive and insidious this
5 campaign has been. Fully, 59.3 percent of the persons polled in Stanislaus County
6 believe Mr. Peterson "probably guilty" or "guilty beyond a reasonable doubt".^{2/}

7 Furthermore, because of the avalanche of disinformation that has already occurred
8 in this case, any danger of prejudice to Mr. Peterson is not just "clear and present", but
9 past and manifest. If the Court were to impose a prior restraint on the participants it
10 would do no more than result in the unfair and inaccurate reporting of this case.^{3/}

11

12 **B. There is no way to narrowly tailor a gag order on this case.**

13 During the May 27, 2003 hearing the Court alluded to the fact that this case is in
14 the newspapers and televised media on a daily basis. The media reports range from
15 accurate reporting of factual or procedural matters to the patently absurd and often
16 completely unfounded speculation. Although some, if not much, of what has been
17 reported about this case has been pure sensationalism designed to appeal to the public's
18 perceived more vile interests, a significant amount of the reporting has been fair and
19 accurate. In short, the sheer volume of attention this case has garnered prevents any type
20 of narrowly tailored gag order - - it would have to be a total gag to have any effect not
21 unlike the *sub judice* laws which are not found in American jurisprudence. Consequently,
22 there simply is no way to narrowly tailor a gag order that would render it constitutionally
23 permissible while at the same time protecting a defendant's right to fair trial.

24

25

26 ^{2/}"Study says Peterson can't get fair trial here", Modestobee.com, June 4, 2003. (Attached as
Exhibit A).

27

28 ^{3/}Certainly, false reports can and should be dealt with appropriately. However, the imposition
of a prior restraint in the form of a gag order is unlikely to deter those who traffic in the titillating
and uniformly wrong disinformation that has plagued this case.

1 C. Less restrictive alternatives exist in the event certain information
2 should not be disclosed.

3 The parties to this case have the option of filing documents under seal or
4 requesting *in camera* hearings if necessary. Moreover, the Court has the inherent
5 authority (within certain Constitutional strictures) to seal matters, order documents or
6 filings to be sealed, or hold proceedings *in camera*. All of these procedures are much
7 more likely to protect the various competing interests and clearly represent a less
8 restrictive alternative to a gag order. The Court also has the power to (again, within certain
9 Constitutional guidelines) close certain proceedings or exclude cameras from hearings or
10 trial.⁴ The Court's exercise of these powers is also a much less restrictive alternative to a
11 gag order.

12
13 III.

14 POTENTIAL PREJUDICE TO POTENTIAL JURORS
15 DOES NOT JUSTIFY A GAG ORDER

16 California law requires an actual showing of prejudice in order to justify a gag
17 order. As noted by the Court of Appeal in *Hurvitz*,

18 Where a party contends his or her right to a fair trial has been
19 or will be compromised by pretrial publicity, the law has long
20 imposed on that party the burden of producing evidence to
21 establish the prejudice. It is not enough for a court to decide
22 that the fair trial right *may* be affected by the exercise of free
23 speech.

24 (internal quotation marks and footnotes omitted) (*Hurvitz* at
25 1242.)

26 In the instant matter, no party has alleged *as to the gag order*, that potential jurors
27

28 ⁴Further briefing on closure matters, cameras in the courtroom and related sealing orders will
be addressed separately in accordance with the Court's briefing/hearing schedule.

1 have been prejudiced or will be prejudiced if the gag order does not issue.^{5/}

3 IV.

4 STATE BAR RULE 5-120 GOVERNS THE ATTORNEYS' CONDUCT

5 As the Court noted, Rule 5-120 governs the conduct of attorneys as to trial
6 publicity. Consequently, there is no need for the Court to impose further restrictions than
7 those to which all attorneys involved in this matter have acquiesced by being sworn in as
8 members of the State Bar of California. In the event, attorney misconduct does occur,
9 such misconduct can be directly addressed by the Court or by an appropriate motion by
10 the aggrieved party. A wholesale gag order on this matter provides no greater guard
11 against attorney misconduct than that which is already binding and in place.

13 V.

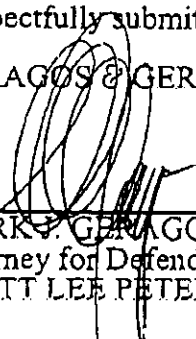
14 CONCLUSION

15 WHEREFORE, in light of the foregoing, Peterson respectfully requests that the
16 Court refrain from issuing a gag order at this time without prejudice. If there is a change
17 in circumstances that warrants a reconsideration of this issue we would respectfully ask
18 the Court to address the issue at that time.

19 Dated: June 4, 2003

20 Respectfully submitted,
21 GERAGOS & GERAGOS

22
23 By:


24 MARK GERAGOS
25 Attorney for Defendant
26 SCOTT LEE PETERSON

26 ⁵As this Court knows, counsel for Mr. Peterson has already indicated on the record that a
27 request for a change of venue is forthcoming at the appropriate time. Nothing argued in this
28 Memorandum is to be construed as a waiver of the arguments that will be raised in Mr. Peterson's
motion for a change of venue. In any event, the standards and interests that must be balanced are
different as to a change of venue *vis a vis* a gag order.

EXHIBIT "A"



Equipment

Turlock - Stockton - Tulare - Newman
New - Used - Rentals




The Modesto Bee, Modesto CA

Home Delivery | News | Classified | Cars | Jobs | Homes | Site Help

E-mail this story Print this story E-mail updates Home Delivery of The Bee

ADVERTISERS

I'm looking for that reliable, practical type.



CAR SHOPPING JUST GOT FUN.



HOME

ARCHIVES / Study says Peterson can't get fair trial here

NEWS

- Local News
- State News
- National News
- World News
- Obituaries
- Births
- License to Wed
- Dissolutions of Marriage
- School Info.
- Oddly Enough
- Mobile Edition

By JOHN COTÉ and GARTH STAPLEY
Published: June 4, 2003, 08:00:58 AM PDT

Scott Peterson cannot get a "fair and impartial trial" from Stanislaus County jurors, according to a survey conducted by a criminal justice professor at California State University, Stanislaus.



Whether or not the trial will be moved will be up to Judge Al Girolami.
BEE FILE

OPINION

OBITUARIES

Seventy-five percent of the people surveyed in the county said they had decided whether double-murder suspect Peterson was guilty, what his sentence should be or both.

WEATHER

SPORTS

LIFE

THE ARTS

BUSINESS

The survey of 150 people conducted in late May showed that 59.3 percent of the respondents thought Peterson was either "probably guilty" or "guilty beyond a reasonable doubt." Only 2.7 percent believed Peterson was innocent.

COLUMNISTS

GALLERIES

VALLEY MALL

It also showed that 51 percent of the respondents favored the death penalty if Peterson were found guilty.

CLASSIFIED

SITE HELP

"There is clear evidence that a fair and impartial trial cannot be had in Stanislaus County," Stephen Schoenthaler, the professor who oversaw the survey, wrote in a summary of the results.

Local Stories

Study says Peterson can't get fair trial here

Schoenthaler, who did the poll on his own, has conducted similar surveys in 24 felony cases. He was the court-appointed expert in the request to move the 1995 trial of Richard Allen Davis, who was convicted of murdering 12-year-old Polly Klaas from Petaluma, in Sonoma County. That trial was held in Santa Clara County.

Judge to hear information on Laci Peterson's 'real killers'

The survey of 150 Stanislaus County residents, picked at random from telephone directories and contacted by Stanislaus State graduate students, has a margin of error of plus or minus 8 percentage points.

Arrests in Medic Alert theft

'Clear and convincing'

Detectives on leave in wake of video

A 1961 U.S. Supreme Court ruling said there was "clear and convincing" evidence that a trial needed to be moved when 62 percent of the jury pool admitted to having prejudgments about a defendant.

"Unless between now and the time of the trial there is substantial releases of

Readers
heed the cry
for Kids' Day

information to the media that says Scott Peterson is not guilty, these levels of prejudice aren't going to go down," Schoenthaler said. "The trial would have to be moved."

Complete
Index »

Peterson defense attorney Mark Geragos has said in court that he would ask for the trial to be moved. "Obviously this survey is something I'm extremely interested in looking at," he said Tuesday.

Chief Deputy District Attorney John Goold said it was premature to talk about moving the trial until the defense requested it.

"I haven't seen the study. We haven't commissioned our own expert, and no motion has been brought," he said.

Goold said prosecutors would oppose a motion to move the trial, but he indicated that could change if a prosecution expert produced the same results as Schoenthaler.

"Nobody is interested in having a trial anywhere it shouldn't be held," Goold said. "But we won't know until we're closer to an actual setting of a trial date whether those numbers mean anything or whether they are going to change."

Scott Peterson, 30, has been charged with murdering his wife, Laci, and their unborn son, Conner. The district attorney has announced that he will seek the death penalty.

Laci Peterson, 27 and eight months pregnant, was reported missing from her Modesto home Dec. 24. Scott Peterson said he went fishing in San Francisco Bay on Christmas Eve.

The bodies of mother and child were found in April along the eastern shoreline of the bay.

Geragos, whose clients have included actress Winona Ryder and Clinton Whitewater figure Susan McDougal, has called the media attention surrounding the case "unprecedented."

If the defense asks for a trial in another county, under what is called a change of venue, California law mandates approval when it appears that there is a "reasonable likelihood" that a fair and impartial trial cannot be obtained in the county of origin. Or jurors from another area can be brought in.

For comparison, Schoenthaler conducted the same survey among Los Angeles residents. In that survey, 54 percent said they had made a judgment about either Peterson's guilt or what sentence he deserved.

But Schoenthaler said the "depth of conviction is quite a bit different."

Only 10 percent of Los Angeles County respondents said they thought Peterson was guilty "beyond a reasonable doubt" -- the legal standard required for a conviction.

In Stanislaus County, that number was 24 percent.

Three legal experts had not reviewed the survey report but said the results suggest a saturation of news about the murders in Stanislaus County.

William Cahill, a retired San Francisco Superior Court judge, called the numbers "remarkable" and said he "absolutely would take them into account" if he were presiding and the defense asked to move the trial.

"You need people who haven't prejudged the case," he said. "I've never seen those kinds of numbers before. If people have already got their minds made up, well, that's not really the kind of trial we have in this country. It's important that the government prove its case -- it's vital."

Mariano Florentino-Cuellar, who teaches law at Stanford University, said the survey suggests that it "would be very difficult to argue that a cross-section of the community would be open-minded enough to give (Peterson) a fair trial."

Professor David W. Miller of the McGeorge School of Law in Sacramento said: "Seventy-five percent is a pretty high number. It's sort of paradoxical. The more newspapers publish (articles) about the case, the more they create the very possibility of prejudgment."

THE PETERSON FILE

Tuesday's developments

VAN FOUND -- The Stanislaus County district attorney's office reported that law enforcement agents had found a brown van that defense attorneys claim might have been involved in Laci Peterson's disappearance. Prosecutors said investigators examined the van, questioned "several people associated with the van" and found it had no connection with the case.

Upcoming

FRIDAY -- Hearings are scheduled on information gathered from a wiretap on Scott Peterson's phones and to consider issuing a gag order.

JULY 9 -- Hearing is set on media coverage of the preliminary hearing and any potential defense request to close that hearing.

JULY 16 -- Preliminary hearing is scheduled.

Bee staff writer John Coté can be reached at 578-2330 or jcote@modbee.com.

Bee staff writer Garth Stapley can be reached at 578-2390 or gstapley@modbee.com.

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:

**DEFENDANT'S MEMORANDUM IN RESPONSE TO COURT'S
INQUIRY RE "GAG" OR PROTECTIVE ORDER**

_____ 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.

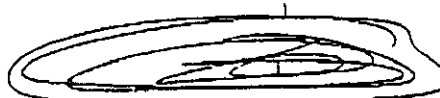
PARTIES SERVED BY FAX:

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

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

Executed on June 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 : 06/04/2003 15:48
NAME : GERAGOS&GERAGOS
FAX : 2136251600
TEL : 2136253900
SER.# : BRDL2J854125

DATE, TIME	06/04 15:46
FAX NO./NAME	12095255545
DURATION	00:01:54
PAGE(S)	13
RESULT	OK
MODE	STANDARD ECM

GERAGOS & GERAGOS

LAWYERS

39TH FLOOR

350 S. GRAND AVENUE

LOS ANGELES, CA 90071-3480

TEL: (213) 625-3900

FAX: (213) 625-1600

FAX COVER SHEET

From: Raffi Naljian for Mark J. Geragos
Client/Matter: People vs. Peterson
Date: June 4, 2003
Pages: 12 (INCLUDING COVER)

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

TRANSMISSION VERIFICATION REPORT

TIME : 06/04/2003 15:51
NAME : GERAGOS&GERAGOS
FAX : 2136251600
TEL : 2136253900
SER.# : BR0L2J854125

DATE, TIME	06/04 15:49
FAX NO. /NAME	12095256385
DURATION	00:02:09
PAGE(S)	13
RESULT	OK
MODE	STANDARD ECM

GERAGOS & GERAGOS

LAWYERS

39TH FLOOR

350 S. GRAND AVENUE

LOS ANGELES, CA 90071-3480

TEL: (213) 625-3900

FAX: (213) 625-1600

FAX COVER SHEET

From: Raffi Najjian for Mark J. Geragos
Client/Matter: People v. Peterson
Date: June 4, 2003
Pages: 12 (INCLUDING COVER)

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