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FILED

2003 JUN -4 PM 2:07

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY Cindy A. ... DEPUTY

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON,

Defendant.

Case No. 1056770

REPLY TO OPPOSITION TO MEDIA
REQUEST TO SEAL RECORDS

Date: June 6, 2003
Time: 8:30 a.m.
Dept.: 2
Judge: Hon. A. Girolami

BY FAX

I. INTRODUCTION

On May 11, 2003, Ted Rowlands, a journalist for KTVU, received notice from the Stanislaus County District Attorney that certain communications he had with Scott Peterson were intercepted pursuant to two separate wiretaps authorized by the Stanislaus County Superior Court on January 10, 2003 and April 15, 2003, respectively. Those wiretaps lasted from January 10 to February 4, 2003 (Wiretap No. 2), and April 15 to April 18, 2003 (Wiretap No. 3). Mr. Rowlands had multiple conversations with Mr. Peterson in the process of gathering news and reporting on the investigation into the death of Mr. Peterson's wife. Mr. Rowlands did not believe that his conversations with Mr. Peterson were being recorded at any time, and he conducted himself accordingly during the interviews.

On May 14, 2003, Mr. Rowlands filed a motion pursuant to Penal Code section 629.68 requesting to inspect the intercepted communications in order to determine which of his

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1 communications were intercepted, to evaluate the content of those communications, and to decide
2 whether he needs to take additional steps to protect against improper disclosure of any intercepted
3 communications.

4 On June 3, 2003, the District Attorney filed a response stating that the People do not
5 object to Mr. Rowlands having access to the intercepted communications which involved him,
6 and further offering to facilitate that access upon an order of this Court. That portion of Mr.
7 Rowlands' motion is, therefore, undisputed. However, the District Attorney objected to Mr.
8 Rowlands' invocation of the California Shield Law to protect against disclosure of the
9 unpublished information contained in the wiretap recordings. The District Attorney's position in
10 this regard is contrary to Article I, section 2(b) of the California Constitution and applicable case
11 law providing that the intercepted communications should be protected from disclosure to the
12 extent they contain unpublished information obtained by journalists in the newsgathering process.

13 **II. ARGUMENT**

14 **A. The California Constitution Protects Against Disclosure Of Unpublished**
15 **Information Acquired By Journalists In The Course Of News Gathering.**

16 Article I, section 2(b) of the California Constitution, commonly called the California
17 Shield Law, specifically provides that a journalist shall not be held in contempt for refusing to
18 disclose a source of information or unpublished information obtained or prepared in the process
19 of gathering or receiving information to be reported to the public. The Article goes on to define
20 "unpublished information" as information not reported to the public, including "outtakes,
21 photographs, tapes, or other data of whatever sort not itself disseminated to the public through a
22 medium of communication."¹ Cal. Const. Art. I § 2(b); Cal. Evid. Code § 1070 (setting forth the
23 similar "Newsmen's Privilege").

24 The primary purposes of the Shield Law are to protect the newsperson's future ability to
25 gather news and to protect the autonomy of the press. Miller v. Superior Court, 21 Cal. 4th 883,
26 898 (1999); Delaney v. Superior Court, 50 Cal. 3d 785, 810 (1990).

27 ¹ Mr. Rowlands recognizes that if the information contained on the recordings was already published or broadcast by
28 him, then it would not be protected by the California Shield Law. However, at this time, Mr. Rowlands does not
know which of his conversations were recorded, and is therefore not aware of the substance of the intercepted
communications.

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The threat to press autonomy is particularly clear in light of the press's unique role in society. As the institution that gathers and disseminates information, journalists often serve as the eyes and ears of the public. Because journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to being called upon by litigants seeking to minimize the costs of obtaining needed information. The threat to the autonomy of the press is posed as much by a criminal prosecutor as by other litigants.

Miller, 21 Cal. 4th at 898 (internal citations omitted). The Shield Law protects the newsgathering process from harmful government interference and coercion. Outside government interference would severely inhibit a journalist's ability to gather news. For example, if citizens understood that journalists could be forced to disclose a source's identity, or information obtained from a source, they would be much less likely to cooperate with the journalist or to divulge information in the future. See Delaney, 50 Cal. 3d at 810 n. 25. Without the open flow of information to journalists, journalists could not act at the "eyes and ears of the public." The Shield Law recognizes the importance of the media and promotes the newsgathering process by removing the fear of outside interference and providing some level of confidentiality.

The Shield Law prevents a prosecutor from compelling a journalist to reveal unpublished information acquired in the process of gathering news, even in the course of a law enforcement investigation. Miller, 21 Cal. 4th at 890, 897. It provides a journalist with absolute immunity from contempt for refusing to disclose unpublished information obtained in the newsgathering process. Id. That the Shield Law "might lead to the inability of the prosecution to gain access to all the evidence it desires does not mean that a prosecutor's right to due process is violated, any more than the assertion of established evidentiary privileges against the prosecution would be a violation." Id. at 898.

In Miller, a news reporter conducted a videotaped interview of a defendant charged with murder. Id. at 888. The District Attorney sought access to both the broadcast and unbroadcast portions of the tape. Id. However, the Court recognized that the reporter could not be held in contempt for refusing to release the unpublished portions of the videotape. Id. at 890. Furthermore, the Court stated, "[s]ince contempt is generally the only effective remedy against a nonparty witness, the California enactments [article I, section 2(b) and Evidence Code section

1 Whether the Shield Law provides a "privilege" or an "immunity" is irrelevant. The goal and end
2 result of the law is to protect unpublished information acquired in the newsgathering process from
3 public dissemination and government required disclosure.

4 B. The District Attorney's Effort To Circumvent The Protections Of The
5 California Shield Law Is Contrary Both To The California Constitution And
6 To Applicable Case Law Not Cited By The District Attorney.

7 The California Supreme Court has held that nothing in the Shield Law's language or
8 history suggests that it can be overcome by a showing of need for the protected information.
9 Miller, 21 Cal. 4th at 890 (citing New York Times Co. v. Superior Court, 51 Cal. 3d 453, 461
10 (1990)). Indeed, the Court specifically held that the District Attorney may not rely on Article I,
11 section 29 of the California Constitution, the people's right to due process, to trump the California
12 Shield Law. Id. at 893-94. The Court further held that the "'right' to withhold unpublished
13 information obtained in the newsgathering process" survived the passage of Article I, section 29.
14 Id. The protections provided by the Shield Law are absolute, guaranteed in the California
15 Constitution, "and may be overcome only by a countervailing federal constitutional right." Id. at
16 897.

17 The protections of the Shield Law can be overcome in a criminal case by a showing that
18 nondisclosure would deprive a criminal defendant of his federal constitutional right to a fair trial.²
19 Id. at 891 (citing Delaney, 50 Cal. 3d at 805-806). The defense has made no such claim here,
20 however, and in any event the District Attorney's suggestion that federal constitutional provisions
21 dictate the result the People request is directly contrary to the law. The "'virtually absolute
22 protection' provided under the shield law need never yield to any superior constitutional right of
23 the People, [but] 'the protection of the shield law must give way to a conflicting federal
24 constitutional right of a criminal defendant.'" Fost v. Superior Court, 80 Cal. App. 4th 724, 731
25 (1st Dist. 2000) (quoting Miller, 21 Cal. 4th at 891).

26 ² Even then, a criminal defendant must show "a reasonable possibility [that] the information will materially assist his
27 defense." Miller, 21 Cal. 4th at 891 (citing Delaney, 50 Cal. 3d at 805-806) (emphasis in original). If the criminal
28 defendant first meets that burden, then the court must balance the conflicting interests of the criminal defendant and
the newsperson, considering a number of factors such as the confidential or sensitive nature of the information, the
interests sought to be protected by the Shield Law, the importance of the information to the criminal defendant, and
whether there is an alternative source for the unpublished information. Delaney, 50 Cal. 3d at 810-13.

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III. CONCLUSION

For the reasons set forth above, Mr. Rowlands respectfully requests that the Court order that he be provided with a copy of the recordings, and that the Court further order the recordings sealed pursuant to the California Shield Law.

DATED: June 4, 2003

FARELLA BRAUN & MARTEL LLP

By: *Douglas R. Young*
Douglas R. Young

Attorneys for Non-Party Journalist Ted Rowlands

PROOF OF SERVICE

I, Sharon M. Villalobos, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Russ Building, 30th Floor, 235 Montgomery Street, San Francisco, California 94104. On June 4, 2003, I served a copy of the within document(s):

REPLY TO OPPOSITION TO MEDIA REQUEST TO SEARCH RECORDS

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

Rick Distaso
Deputy District Attorney
Stanislaus County District Attorney
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Modesto, CA 95353
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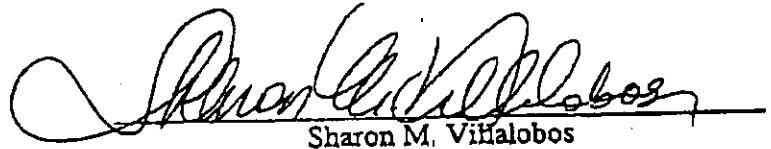
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on June 4, 2003, at San Francisco, California.


Sharon M. Villalobos

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