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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. SCOTT LEE PETERSON, Defendant.	NO. 1056770 **REPLY OF NON-PARTY JOURNALISTS JODI HERNANDEZ, KAREN BROWN, DAN ABRAMS, SANDY RIVERA, KEITH MORRISON, MICHAEL G. MOONEY, TY PHILLIPS, PATRICK GIBLIN, JUDY SLY, KIMBERLY CULP, JOHN WALSH, CHUCK ROSENBERG, MARVIN DAYE, MICHAEL REEL, GLORIA GOMEZ, DIANE SAWYER AND MARK ROBERTSON'S TO DISTRICT ATTORNEY'S "RELEASE OF WIRETAP RECORDINGS TO MEDIA AND OPPOSTION TO MEDIA REQUEST TO SEAL RECORDS"** [Cal. Penal Code § 629.68] Hearing Date: June 6, 2003 Hearing Time: 8:30 a.m. Department: 2

1. INTRODUCTION

The District Attorney agrees that Non-Party Journalists should be permitted to inspect their intercepted communications, and suggests a reasonable procedure for doing so. Moreover, Defendant has not opposed Non-Party Journalists' Motion, implicitly conceding that Non-Party Journalists should be permitted to inspect their intercepted communications. Accordingly, Non-Party Journalists respectfully request that the Court grant their Motion and order the release of their intercepted communications as proposed by the District Attorney. (Section 2.A., infra.)

Non-Party Journalists also ask that their communications otherwise remain sealed until they are able to inspect those communications and file any papers necessary to protect their rights. The District Attorney tries to minimize Non-Party Journalists' interests, arguing that California's Shield Law does not confer a privilege. However, the District Attorney ignores the First Amendment, which does confer a qualified privilege on Non-Party Journalists. Their communications with Defendant fall within the scope of this constitutional privilege and should not have been monitored by the State. (Section 2.B., infra.) Even if the Court concludes that the communications were not privileged, however, it still may restrict the disclosure or use of the communications "upon a showing of good cause." Penal Code § 629.80. The significant policy interests underlying the California Shield Law and the First Amendment reporter's privilege constitute good cause. (Section 2.C., infra.)

Accordingly, Non-Party Journalists respectfully request that they be given immediate access to their intercepted communications, in the manner proposed by the District Attorney Non-Party Journalists also ask that the Court maintain the current seal on these records, and prohibit their release to any party, including the District Attorney or the Defendant, pending Non-Party Journalists' review of their communications. Finally, Non-Party Journalists respectfully request that this Court establish a briefing schedule and hearing date to address any motion by Non-Party Journalists that their communications be permanently sealed or the dissemination of them otherwise limited. (Section 2.D., infra.)

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2. ARGUMENT

A. This Court Should Order Immediate Release to Non-Party Journalists of Their Intercepted Communications.

The District Attorney agrees that Non-Party Journalists should have access to their intercepted communications. (Release of Wiretap Recordings to Media and Opposition to Media Request to Seal Records ("Release") at 2.) In addition, Defendant has not opposed Non-Party Journalists' Motion. The District Attorney proposes that Investigator Jacobson make CD copies of the individual communications and release them to the journalists who have requested access. (Id.) Non-Party Journalists agree that this is a reasonable proposal and ask that this Court enter its Order directing immediate release of the communications as suggested by the District Attorney.

B. The Intercepted Communications Are Privileged under the First Amendment to the United States Constitution.

In their Motion for Order Authorizing Inspection of Intercepted Communications (the "Motion"), Non-Party Journalists explained that California's Shield Law and the First Amendment to the United States Constitution protect any unpublished information acquired in the course of newsgathering. (Motion at 3-4.) The District Attorney's only argument in response is that California's Shield Law does not confer a privilege on Non-Party Journalists. (Release at 5-6 (citations omitted).) The District Attorney ignores the First Amendment, although there can be no question that it gives Non-Party Journalists a qualified privilege to refuse to disclose unpublished information. (Motion at 3-4.)

The Ninth Circuit explained that "when facts acquired by a journalist in the course of gathering the news become the target of discovery, a qualified privilege against compelled disclosure comes into play." Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993) ("Shoen I") (emphasis added); see also New York Times Co. v. Superior Court, 51 Cal. 3d 453, 469 (1990) ("a reporter's claim to protect unpublished information and confidential sources may be based both on the shield law and on a qualified First Amendment privilege") (Mosk, J., concurring and dissenting). The reporter's privilege reflects "the preferred position of the First Amendment and the importance of a vigorous press." Zerilli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981). Courts

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have made clear that the privilege applies in both civil and criminal cases. In Shoen I, for example, the Ninth Circuit affirmed that "the journalist's privilege ... [is] a partial First Amendment shield that protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike." Id. at 1292; see also United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) ("the interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceedings out of which the request for the information arises is a criminal trial"); United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983) (noting that rationale for privilege is "particularly compelling in criminal cases"). Finally, the Ninth Circuit, like most federal courts that have addressed the issue, has held that the reporter's privilege protects confidential and non-confidential material. Shoen I, 5 F.3d at 1295; Shoen v. Shoen, 48 F.3d 412, 414 (9th Cir. 1995) ("Shoen II"). Only by protecting both types of information can the important interests underlying the reporter's privilege be fully protected.

The disclosure of non-confidential information obtained in the newsgathering process may be compelled "only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case." Shoen II, 48 F.3d at 416 (emphasis added). In addition, the party seeking to overcome the privilege "must [make] a showing of actual relevance; a showing of potential relevance will not suffice." Id. (emphasis added). See also United States v. Ahn, 231 F.3d 26, 37 (D.C. Cir. 2000) (holding that to overcome journalist's rights in information sought, it must be "essential and crucial" to defendant's case).

In short, the showing necessary for the issuance of a wiretap does not come close to that required to compel unpublished information from a journalist. Because the prosecution has yet to make the necessary showing to compel disclosure of otherwise privileged communications between a journalist and his or her source, those communications retain their privileged character notwithstanding the interception. See Cal. Penal Code § 629.80. Moreover, the government should have followed the procedure established by the statute to ensure that communications of a privileged nature, such as that between a journalist and source, are not monitored. See id. This Court should not allow the government's failure to follow these procedures to inure to its benefit by

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allowing it unfettered access to otherwise privileged communications.[1] Rather, at a minimum, the prosecution and defense should be required to comply with the test set forth in Shoen II before they are given access to these communications.

C. Even if the Communications Were Not Privileged, this Court May Conclude that Good Cause Exists for Their Permanent Sealing.

Non-Party Journalists submit that under the plain language of the Penal Code, their communications should not have been monitored during the interception because they are subject to a qualified privilege under the First Amendment. However, even if the Court disagrees and finds that the communications were not privileged, the Court nevertheless may conclude that the communications should not be released. Penal Code § 629.70 provides in part as follows:

> (b) Within the time specified in subdivision (c), the prosecution shall provide to the defendant a copy of all recorded interceptions from which evidence against the defendant was derived, including a copy of the court order, accompanying application, and monitoring logs.
>
> (c) A court may issue an order limiting disclosures pursuant to subdivisions (a) and (b) upon a showing of good cause.

Id.

Section 629.70(c) thus authorizes the Court to limit disclosure of the intercepted communications on a showing of "good cause." The significant policy interests underlying California's Shield Law and the federal reporter's privilege provide the requisite "good cause" here. Courts repeatedly have recognized that government attempts to obtain information acquired by journalists pose a pernicious threat to the freedom of the press. For example, compelling journalist testimony "risk[s] the symbolic harm of making journalists appear to be an investigative

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[1] The District Attorney's suggestion that these communications are not privileged because, by analogy, the District Attorney would be entitled to use any tape they found while executing a search warrant misses the point. (Release at 7.) Here, the Penal Code expressly provides that privileged communications retain their character notwithstanding the interception. Id. § 629.80. In any event, the District Attorney's example is flawed. If the hypothetical tape contained a conversation between the defendant and his attorney, there can be little doubt that the conversation would remain privileged and the State would not be able to use it. Similarly, any non-consensual recording of communications between Non-Party Journalists and Defendant also should retain their qualified privilege.

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arm of the judicial system, the government, or private parties." Gonzales v. National Broadcasting Co., 194 F.3d 29, 35 (2d Cir. 1999). As the California Supreme Court explained:

> A comprehensive reporter's immunity . . . has the effect of safeguarding 'the autonomy of the press.' [] The threat to press autonomy is particularly clear in light of the press' 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 be called upon by litigants seeking to minimize the costs of obtaining needed information.

Miller v. Superior Court, 21 Cal. 4th 883, 898 (1999) (citations omitted).

Those same harms exist here, notwithstanding the different posture of this case. The California Supreme Court has made clear that the State has no right to compel a journalist to disclose unpublished information. Miller, 21 Cal. 4th at 901. The State here should not be permitted to contravene this immunity by simply intercepting those communications. Moreover, the government should not be permitted to rely on the efforts of journalists – who by profession hold themselves out as having relevant information – to meet their burden of establishing Defendant's guilt. Finally, journalists should not have to fear that their communications with a witness or crime suspect are being monitored by the government. The journalists who spoke with Scott Peterson believed – and had a right to believe – that their communications were protected and that disclosure could only be compelled if the parties demonstrated a significant need for those communications.[2] This Court can and should find that Non-Party Journalists' significant interests constitute the "good cause" necessary to prohibit disclosure of their communications.

D. The Communications Should Be Sealed Until Non-Party Journalists Have Had a Chance to Review Their Communications and Determine Whether to Seek Permanent Sealing.

This Court need not decide on June 6 whether the communications at issue are privileged or otherwise warrant protection. On that date, there are only two questions before the Court. First,

[2] While other persons with whom Scott Peterson spoke also may have expected that their communications were private, their situation is very different. Other than Mr. Peterson's attorneys, investigators, doctors or pastors, those individuals can be compelled to testify regarding the contents of their conversations with him. Journalists cannot be.

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should Non-Party Journalists be given access to their intercepted communications? As set forth above, all interested parties agree that Non-Party Journalists should be given such access. Second, should the Court maintain the current seal on these communications? Non-Party Journalists submit that the seal should be maintained until they are able to inspect their communications and decide whether to assert a privilege as to those communications or portions of those communications. This will create little or no harm, because the preliminary hearing in this matter is more than six weeks away, and there is adequate time to resolve these issues before then. Moreover, this will give the parties an opportunity to fully evaluate and argue the competing interests, and perhaps render moot the privilege question in its entirety.

Releasing copies of the intercepted communications to the prosecution and the defense at the same time that they are released to Non-Party Journalists would eviscerate Non-Party Journalists' ability to protect the important federal and state constitutional rights at stake. Accordingly, Non-Party Journalists respectfully request that the Court order that the intercepted communications remain under seal pending further Order of the Court, and that the Court set a briefing schedule and hearing date to address any requests that Non-Party Journalists may have to permanently seal their communications or otherwise limit their dissemination.

3. CONCLUSION

For the foregoing reasons, Non-Party Journalists respectfully request that they be given immediate access to their intercepted communications, in the manner proposed by the District Attorney. Non-Party Journalists also ask that the Court maintain the current seal on these records, and prohibit their release to any party, including the District Attorney and the Defendant, pending Non-Party Journalists' review of their communications. Finally, Non-Party Journalists respectfully

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DATED: JUNE 4, 2003

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PROOF OF SERVICE BY FACSIMILE AND U.S. MAIL

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 Davis Wright Tremaine LLP, Suite 2400, 865 South Figueroa Street, Los Angeles, California 90017-2566.

On June 4, 2003, I served the foregoing document(s) described as: **NON-PARTY JOURNALISTS JODI HERNANDEZ, KAREN BROWN, DAN ABRAMS, SANDY RIVERA, KEITH MORRISON, MICHAEL G. MOONEY, TY PHILLIPS, PATRICK GIBLIN, JUDY SLY, KIMBERLY CULP, JOHN WALSH, CHUCK ROSENBERG, MARVIN DAYE, MICHAEL REEL, GLORIA GOMEZ, DIANE SAWYER AND MARK ROBERTSON'S REPLY TO DISTRICT ATTORNEY'S "RELEASE OF WIRETAP RECORDINGS TO MEDIA AND OPPOSTION TO MEDIA REQUEST TO SEAL RECORDS"** on the interested parties to this action, by **Facsimile** and by **U.S. Mail** by placing a **true copy** of said document(s) enclosed in a sealed envelope(s) for each addressee named below, with the name and address of the person served shown on the envelope as follows:

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(FROM FACSIMILE TELEPHONE NO. (213) 633-6899) at Suite 2400, 865 South Figueroa Street, Los Angeles, California. Upon completion of the said facsimile machine transmission, the transmitting machine will issue a transmission report showing that the transmission was complete and without error.

(U.S. MAIL) - I placed such envelope(s) with postage thereon fully prepaid for deposit in the United States Mail in accordance with the office practice of Davis Wright Tremaine LLP for collecting and processing correspondence for mailing with the United States Postal Service. I am familiar with the office practice of Davis Wright Tremaine LLP, for collecting and processing correspondence for mailing with the United States Postal Service, which practice is that when correspondence is deposited with the Davis Wright Tremaine LLP, personnel responsible for delivering correspondence to the United States Postal Service, such correspondence is delivered to the United States Postal Service that same day in the ordinary course of business.

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

☑ State I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

☐ Federal I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

HILDUR ROSIE DIAZ
Print Name

Signature

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