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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF STANISLAUS

The People of the State of California,

Plaintiff,

v.

Scott Lee Peterson

Defendant.

/

Case No. 1056770

News Media's Request for Reconsideration of Protective "Gag" Order

Date: June 26, 2003
Time: 8:30 a.m.
Dept: 2
Hon. Al Girolami

INTRODUCTION

The Modesto Bee, San Francisco Chronicle, Los Angeles Times, San Jose Mercury News, Contra Costa Times, KNTV Television, Inc. and National Broadcasting Company, Inc. submit this supplemental memorandum of points and authorities in support of reconsideration of the court's protective order filed June 12, 2003. The news media's initial memorandum filed June 4, 2003 addressed issues of standing and prior restraint and opposed issuance of a gag order. That authority and argument is incorporated by this reference. This memorandum addresses specific defects of the order issued by the court--its overbreadth in particular.

The controversy swirling around the gag order since it was issued demonstrates that the People, the defense and the news media were correct in their original positions: no order should issue that seeks to control speech beyond that proscribed by Rules of Professional Conduct, rule 5-120.

There is no evidence to support the conclusion that a gag order is necessary to protect the defendant's fair trial rights. The experience in California has been that an unbiased jury can be predictably selected even for very highly publicized trials, such as O.J., Polly Klaas and the Unabomber. Equally important, the order will not be *effective* to achieve the court's goal -- news reporting will continue, including rehashing of old gossip and leaks. The remedy for the perceived danger is new, accurate information and response to misinformation, consistent with Rule 5-120.

The news media request that the court reconsider its reliance on *Younger v. Smith,* 30 Cal. App. 3d 138 (1973). *Younger reversed* a prosecutor's contempt conviction where the court's gag order punished statements with no tendency to prejudice the pending criminal prosecution. Further, the *Younger* court specifically did *not* find that the gag order in question could lawfully apply to the *defense* counsel. Finally, the prosecutor attacked the order *as a whole*. The court of appeal noted that specific provisions of the order were problematic, including provisions adopted by this court in its June 12, 2003 order.

ARGUMENT

I. NO EVIDENCE SUPPORTS THE CLEAR AND PRESENT DANGER FINDING

The news media will not repeat their prior arguments about the standards applicable to gag orders, except to say that *Hurvitz v. Hoefflin,* 84 Cal. App. 4th 1232 (2000), is the only California appellate court decision addressing gag order standards after *Gentile v. United States,* 501 U.S. 1030 (1991) (speech of lawyers may be regulated under the standard of "substantial likelihood of material prejudice"); *Press-Enterprise Co.* v. *Superior Court* (*Press-Enterprise II*), 478 U.S. 1 (1986); *Press-Enterprise Co.* v. *Superior Court* (*Press-Enterprise I*),

464 U.S. 501 (1984); and *Nebraska Press Association v. Stuart,* 427 U.S. 539, 545 (1976) (gag order bears a "heavy presumption against . . . constitutional validity").

Younger v. Smith, decided in 1973, precedes all these decisions and Rule 5-120. For this reason alone, the court should reconsider its reliance on this outdated precedent.

No matter what standard applies, the court lacks *evidence* upon which to base its finding of a "clear and present danger" to the defendant's fair trial right, the implicit finding that the gag order would be *effective* to guard against the perceived danger, or its finding that alternatives to a gag order, including change of venue, would be *ineffective* to protect the defendant's fair trial rights.

The United States Supreme Court has stated generally that empirical evidence shows that alternatives to gag orders (and sealing documents) *are* effective to protect the defendant's fair trial rights:

> Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. [Citations.] Voir dire can play an important role in reminding jurors to set aside out-of-court information, and to decide the case upon the evidence presented at trial. All of these factors weigh in favor of affording an attorney's speech about ongoing proceedings our traditional First Amendment protections.

Gentile v. State Bar of Nevada, 501 U.S. at 1054-1055.

At no time during any of these proceedings on the potential impact of pretrial publicity has any party seeking to maintain documents under seal produced *evidence* about the potential impact on jurors throughout the state to support a finding of prejudice. Because all parties and the news media opposed a broad gag order, no evidence was presented to the court to support the gag order. The nature and kind of evidence that the moving parties must produce to support closure of presumptively open judicial records and proceedings is discussed in *Tribune Newspapers West, Inc. v. Superior Court,* 172 Cal.App.3d 443 (1985) (finding abuse of discretion in closing proceedings involving juveniles charged with armed robbery). The opinion also addresses the right of the public to respond to any evidentiary showing.

The court's order is based on *speculation.* While thousands of people may have followed the reporting as assiduously as has the court, thousands or even millions of people have not. As the United States Supreme Court has found, empirical research shows that even those jurors who have been exposed to prejudicial publicity have been capable of deciding cases on the basis of the evidence introduced during trial.

Based on these authorities, the court should reconsider its order because it lacks evidence to support its findings.

II. THE GAG ORDER IS UNCONSTITUTIONALLY BROAD AND VAGUE

To avoid being unconstitutionally overbroad, a gag order must be "no broader than is necessary to achieve th[e] ends sought to be achieved by the trial court." *United States v. Salameh,* 992 F.2d 445, 447 (2d Cir. 1993); *Carroll v. President and Commissioner of Princess Anne,* 393 U.S. 175, 183 (1968) (gag order "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate").

The court's order cannot achieve the court's expressed goal: to prevent the rehash of gossip and rumors near the time of the trial, in order to protect the defendant's constitutional right to a fair trial. The court has proscribed virtually all comment on or discussion of the case outside the courtroom. The statements that are "permitted" are all already matters of public record and have been widely disseminated -- description of the accused, circumstances of the arrest, nature of the charges, quotes (without comment) from records that are already public, scheduling of proceedings. The public will receive *no new* information about the case outside of the courtroom.

A broad gag order such as the court's has the opposite, unintended consequence: if dissemination of non-prejudicial, accurate information about court proceedings and records is proscribed, *only* gossip and rumor can be published and republished by the news media. Inaccuracies in reporting cannot be corrected. Leaks and misunderstandings cannot be

explained away. Neither the prosecution nor the defense may challenge unfettered commentary by nonparticipating "experts."

Courts, including *Younger v. Smith,* 30 Cal. App. 3d at 150 (vacating contempt citation), have not hesitated to strike down such sweeping gag orders as "unconstitutionally overbroad." *See also, United States v. Ford,* 830 F.2d 596, 596-99 (6th Cir. 1987); *Levine v. U.S. Dist. Court for Cent. Dist. of California,* 764 F.2d 590, 599 (9th Cir. 1985); *CBS v. Young*, 522 F.2d 234, 239 (6th Cir.1975); *Chase v. Robson*, 435 F.2d 1059, 1061-62 (7th Cir.1970).

Without going into the specifics of the order, which are discussed below, the order should be reconsidered because it cannot achieve the court's goal of preventing rehashed discussions of potentially prejudicial gossip and inaccurate leaks. Its proscription of even nonprejudicial factual statements and comments -- far broader than Rule 5-120 -- renders the order unconstitutional in its overbreadth.

III. THE COURT'S ORDER IS OVERBROAD AND VAGUE, ESPECIALLY AS APPLIED TO INDIVIDUALS OTHER THAN THE PROSECUTION

The court should clarify and narrow the individuals covered by its order. *Younger v. Smith* made clear that its holding pertained only to a challenge by the prosecution, not to a challenge by "any other attorney," a prospective witness or the defendant. 30 Cal. App. 3d at 157 n.28.

Younger emphasized that courts must distinguish among officers of the court, the prosecutor and police, as opposed to the defendant and other "unwilling participants" in the criminal trial:

> We emphasize what needs no emphasis: what we are discussing is the standard applicable to the propriety of protective orders insofar as they are directed against the prosecutor and his staff, officers of the court. Quite conceivably a different standard might be applicable to the defendant himself. Indeed, *Hamilton v. Municipal Court,* 270 Cal.App.2d 797 [76 Cal.Rptr. 168] did involve the impact of a protective order on the defendant. If it be thought that *Hamilton* did actually hold that a clear and present danger test was appropriate, it should be remembered that there the contemner was not an officer of the court, but an unwilling party.

This court's order purports to bind: attorneys connected with this case as prosecutor or defense counsel, attorneys working in those offices, their agents, staff or experts, judicial officers and court employees, law enforcement employees of any agency involved in this case and any persons "subpoenaed or expected to testify in this matter."

First, many, if not most, of the people described by the order may have no inkling that they are within its broadest circumference -- every employee of the Contra Costa County Coroner's office, every employee or agent of every attorney working in the Stanislaus County District Attorney's office and the Garegos & Garegos firm -- are just examples. "Witnesses" are described based on "expectation" of their testimony -- whose expectation? the court's?, the witness'?, the attorneys' (which attorney)?

In fact, *all of the news reporters who report every day on this case and whose telephone calls to Scott Peterson were wiretapped* are potential witnesses! While they, individually, because of the shield law certainly do not "expect" to testify, who knows whether the prosecutor or the court "expects" them to testify. These reporters have not been permitted to hear their own conversations and yet it could be argued that they are subject to the court's broad gag order. This cannot be the court's intent, which shows that the order must be reconsidered.

The request for a contempt order in connection with attorney Gloria Allred's comments to the press is an indication that neither the people subject to the order nor the news media can know in advance whether a particular speaker is covered by the court's order.

Second, the court should reconsider its order to the extent that it may appear to bar statements by or on behalf of the defense. Of course, a defendant has the right to speak about his treatment at the hands of the law.

> A criminal defendant awaiting trial in a controversial case has the full power of the government arrayed against him and the full spotlight of media attention focused upon him.
>
> The defendant's interest in replying to the charges and to the associated adverse publicity, thus, is at a peak. So is the public's interest in the proper functioning of the judicial machinery. The "accused has a First Amendment right to reply publicly to the

prosecutor's charges, and the public has a right to hear that reply, because of its ongoing concern for the integrity of the criminal justice system and the need to hear from those most directly affected by it."

United States v. Ford, 830 F.2d 596, 599-600 (6th Cir. 1987).

The defendant or his agents should be permitted to reply publicly (and the public should be allowed to hear the reply) to both the government's conduct and to the leaks and gossip with which the court is concerned. Any limitation on the defendant's attorney's speech must be narrow and necessary, carefully aimed at comments likely to influence the trial or judicial determination. *See Gentile,* 501 U.S. at 1075.

Finally, the court should reconsider its order to the extent that it may be interpreted to apply to attorneys not participating in the trial and to witnesses. *Gentile* expressed "no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made." *Gentile*, 501 U.S. at 1072 n. 5, 111 S.Ct. 2720. Once witnesses in a criminal case are outside the courtroom, they have the full prerogatives of any private citizen to question, criticize, or condemn the actions of government even though they may be swept up on its processes at the time. Alternative measures are available to the courts to protect the integrity of the jury's deliberations. *Ford,* 830 F.2d at 600.

In these regards the order is void for vagueness because it "fails to provide 'fair notice to those to whom [it] is directed.'" *Gentile,* 501 U.S. at 1048. "[T]he result [is] that a news reporter covering the [case] would be at a loss to know with any degree of certainty what persons were embraced by these terms" and for this additional reason the order is "void for vagueness." *CBS,* 522 F.2d at 239.

IV. THE PROSCRIBED SPEECH IS OVERBROAD AND VAGUE

As discussed above, virtually *all* discussion of the case by lawyers and by anyone "expected to testify" is proscribed by the court's order. This is an unconstitutional prior restraint on the speech of people whose freedom to criticize the conduct of the government

-- the courts, the prosecutors, the police and other law enforcement agencies -- is protected by the First Amendment.

In *Nebraska Press,* the Court found overbroad a gag order that restrained not only confessions or admissions against interest but, "all 'other information strongly implicative of the accused as the perpetrator of the slayings.'" 427 U.S. at 568.

In *Younger v. Smith,* the court disapproved the language this court adopted, which prohibits dissemination of "any evidence, the admissibility of which may have to be determined by the Court." 30 Cal. App. 3d at 158 n.30. As the *Younger* court stated, "The problems which the qualifying phrase may engender are obvious." *Id.*

Paragraph 1 of the court's order proscribes release of "extrajudicial statements" of the defendant or any witness -- *including by the defendant or the witness.* Referring to paragraphs 2 to 4 of the court's order, every single piece of evidence has yet to be "determined to be admissible." Many people covered by the broad order may have no concept of what the scope of potential "evidence" is -- except *everything* having to do with the case. Paragraphs 3 and 4 prohibit any such person from commenting about the "existence or possible existence" of any evidence and from giving an opinion of guilt or innocence. Together, these provisions seem to proscribe discussing the case at all. Can this be the court's intent with respect to nonprosecution participants in these proceedings?

No authority supports such a pervasive gag not only on the prosecutor (the limited question in *Younger*), but also on the defense team and on the as-yet-unidentified witnesses.

The court should reconsider and narrow the proscriptions on speech of persons unconnected with the prosecution. It should narrow to Rule 5-120 the proscriptions on speech of any attorney involved in the case.

CONCLUSION

The news media cannot, in any event, be restrained from reporting in detail on the ongoing litigation, including by "rehashing" prior reports. The narrower, constitutionally appropriate alternative to the court's current overbroad and vague order is to admonish counsel

and their agents to observe the requirements of Rule 5-120. Otherwise, the sideshow claims and counterclaims of breach will divert the court's and parties' attention and energy from the conduct of the upcoming preliminary hearing and eventual trial. The public's receipt of accurate and current information about the case will be compromised and the freedom of all involved to criticize the government will be unconstitutionally curtailed.

Despite the court's laudable intentions, the current order has already proved unworkable, as shown by its role in the writ proceedings now pending before the Court of Appeal for the Fifth Appellate District.

For all of these reasons and based on the cited authorities, the court should reconsider and narrow its protective order issued June 12, 2003.

DATED: June __, 2003

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BY: Charity Kenyon
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Attorneys for *The Modesto Bee, San Francisco Chronicle, Los Angeles Times, Contra Costa Times, San Jose Mercury News* and KNTV and National Broadcasting Company, Inc.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Riegels, Campos & Kenyon, LLP, 2500 Venture Oaks Way, Suite 220, Sacramento, CA 95833. On June 19, 2003, I served the following document(s) by the method indicated below:

News Media's Request for Reconsideration of Protective "Gag" Order

☒ by transmitting via facsimile on this date from fax number (916) 779-7120 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

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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 19, 2003, at Sacramento, California.

Lauri Hale

LAURI HALE