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03 JUL 22 AM 8:17

CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

BY Cindy Quirk DEPUTY

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

McALLISTER & McALLISTER, Inc.
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Modesto, CA 95354

KIRK W. McALLISTER SBN 47324
Attorney for Defendant SCOTT LEE PETERSON

FILED BY FAX

**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.

Case No. 1056770

**MOTION TO CLOSE
PRELIMINARY HEARING**

[Penal Code section 868]

DATE: August 14, 2003

TIME: 8:30 a.m.

PLACE: Dept 2

TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and

TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on August 14, 2003 at the hour of 8:30 a.m., or as soon thereafter as counsel can be heard, Defendant Scott Lee Peterson ("Mr. Peterson"), through counsel, will move this Court for an order directing that the preliminary hearing in this matter shall be closed pursuant to Penal Code section 868. The Motion will be based upon the grounds that said closure is necessary to protect Mr. Peterson's right to a fair and impartial trial and that no less restrictive means exist for protecting said right.


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The Motion will be based on this Notice, the attached memorandum of points and authorities, the pleadings and records on file herein, and upon such other and further argument as may be presented to the Court at the hearing of this matter.

Dated: July 21, 2003

Respectfully submitted,
GERAGOS & GERAGOS

By:


MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

MOTION


Scott Lee Peterson, by and through counsel, hereby moves the Court for an order:

1. Closing the preliminary hearing in this matter; and,
2. Granting whatever other relief the Court may deem necessary to further the ends of justice.

Dated: July 21, 2003

Respectfully submitted,
GERAGOS & GERAGOS

By:


MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

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MEMORANDUM OF POINTS AND AUTHORITIES
PROLOGUE

[I]n the unique facts of this case, there is a clear and present danger [of serious imminent threat to a protected interest] because of the modern media's capability easily to store and recall bits of information in order to relate them at any time including during jury selection. Further compounded in this case is the effect that the publicity is nationwide and cannot be automatically cured by a change of venue or extensive voir dire. If witnesses are allowed to discuss publicly their expected testimony or if trial counsel or their staff are allowed to comment on strategy or on the weight of the evidence, even if jurors can be found that are willing to be fair and impartial, it may never be known if a juror were to rely consciously or subconsciously on the out-of-court information.

Although the Court is extremely concerned with the due process and fair trial rights in this case, it is also keenly aware of the public's right of access to the proceedings herein and the right of free speech of the participants. However, after balancing these rights, and in order to protect against disruption of the proper administration of justice, the Court finds that good cause exists for the issuance of a pre-trial Protective Order.

(People of the State of California v. Scott Lee Peterson, Stanislaus County Superior Court case number 1056770, June 12, 2003 Protective Order/Decision at page 3.)

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I.

INTRODUCTION

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3 This Court has already found that the unique circumstances surrounding the
4 prosecution of Mr. Peterson require the imposition of a protective order in order to protect
5 Mr. Peterson's (and the prosecution's) right to a fair and impartial trial. The Court has
6 also found probable cause to hold a future hearing inquiring into whether the prosecuting
7 District Attorney, James Brazelton, has violated the protective order by stating that the
8 prosecution would "open some eyes" at the preliminary hearing. As this Court noted in
9 the June 12, 2003 protective order, the United States Supreme Court in *Sheppard v.*
10 *Maxwell* (1966) 384 U.S. 333 stated,

11 [i]t is obvious that the judge should have further sought to
12 alleviate this problem by imposing control over the statements
13 made to the news media by counsel, witnesses and especially
14 the Coroner and police officers. The prosecution repeatedly
15 made evidence available to the new media, which was never
16 offered in the trial. Much of the 'evidence' disseminated in
17 this fashion was clearly inadmissible. The exclusion of such
18 evidence in court is rendered meaningless when news media
19 make it available to the public.

20 (July 12, 2003 protective order at page 3, quoting *Sheppard*.)

21 Given, *inter alia*, (1) this Court's prior findings concerning the prejudice to Mr.
22 Peterson's right to a fair trial created by the intense media attention that plagues this case;
23 (2) District Attorney Brazelton's improper commentary regarding what will supposedly
24 transpire during the preliminary hearing; and Mr. Peterson respectfully requests that the
25 Court close the preliminary hearing to the public so that further prejudice can be avoided -
26 - particularly in light of the fact that the defense is (and will be) unable to publicly
27 respond to any prosecutorial misconduct or false media reports stemming from the
28 preliminary hearing.

1 The defense is particularly concerned with the danger that this prosecution team
2 will attempt to utilize the preliminary hearing as a vehicle to disseminate bogus
3 "evidence" and theories that will not be admissible at trial and that the prosecution has no
4 intention of introducing at trial. As correctly predicted by the U.S. Supreme Court in
5 *Sheppard*, the exclusion of inadmissible evidence or offers of proof that are based on
6 proposed evidentiary theories will be rendered meaningless if the preliminary hearing is
7 open to the public and covered wall to wall in the national media. In addition, as this
8 Court has noted that "[t]he local print media rarely does not have a daily front page article
9 on this matter." (June 12, 2003 protective order at page 1.)

10 Since at the present time with discovery still proceeding at best at a glacial pace
11 there is no way to predict what evidence the prosecution might seek to introduce and the
12 defense is unable six weeks away to predict what possible affirmative defenses will be
13 presented there is no less restrictive means to protect Mr. Peterson's rights than total
14 closure of the preliminary hearing.

15 II.

16 THE COURT MUST CLOSE THE PRELIMINARY HEARING TO PROTECT 17 MR. PETERSON'S RIGHT TO A FAIR AND IMPARTIAL TRIAL

18 Penal Code section 868 permits a defendant to request that all persons (other than
19 statutorily specified persons) be excluded from his preliminary hearing.^{1/} The United
20 States Supreme Court has found that under California law, a preliminary hearing may be
21 closed if specific, on the record findings are made demonstrating that closure is essential
22 to preserve higher values and is narrowly tailored to serve that interest. (See *Press-*
23 *Enterprise Co. v. Superior Court of California for the County of Riverside* (1984) 464
24 U.S. 501, 510.) ("*Press-Enterprise I*")

25
26
27 ^{1/}Section 868 provides in pertinent part:

28 The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial[.]

1 Subsequently, the Supreme Court reaffirmed its findings in *Press-Enterprise*
2 *Company, etc. v. Superior Court* (1986) 478 U.S. 1 ("*Press-Enterprise II*"). In *Press-*
3 *Enterprise II* the Court noted,

4 If the interest asserted [in support of closing the hearing] is
5 the right of the accused to a fair trial, the preliminary hearing
6 shall be closed only if specific findings are made
7 demonstrating that, first, there is a substantial probability that
8 the defendant's right to a fair trial will be prejudiced by
9 publicity that closure would prevent and, second, reasonable
10 alternatives to closure cannot adequately protect the
11 defendant's fair trial rights. See *Press-Enterprise I, supra*;
12 *Richmond Newspapers, supra*, 448 U.S., at 581, 100 S.Ct., at
13 2829.

14 (*Press-Enterprise II* at 14.)

15 The California Supreme Court recently acknowledged the continuing validity of
16 the *Press-Enterprise* cases in noting that a preliminary hearing may be closed pursuant to
17 Penal Code section 868 upon the making of,

18 specific, on the record findings that closure is essential to
19 preserve higher values of overriding interest . . . [including]
20 the interest in providing a fair trial.

21 (Internal citations and quotation marks omitted.) (*NBC*
22 *Subsidiary (KNBC-TV), Inc. v. Superior Court*, (1999) 20
23 Cal.4th 1178, 1206-1207.)

24 The *NBC Subsidiary* court also noted the two-prong inquiry required by the *Press-*
25 *Enterprise* cases in determining whether to close a preliminary hearing. (See *NBC*
26 *Subsidiary* at 1207, (preliminary hearing shall be closed only if (1) specific findings are
27 made demonstrating substantial probability of prejudice that closure would prevent, and
28 (2) reasonable alternatives will not protect the defendant's rights.)

1 As noted above, this Court has already made numerous on-the-record findings that
2 publicity in this matter has and will continue to prejudice Mr. Peterson's right to a fair
3 and impartial trial. The Court has also found that there was no less restrictive means of
4 protecting Mr. Peterson's right to a fair trial than the imposition of a comprehensive
5 "gag" order. In terms of the unprecedented media attention given to this matter, nothing
6 has changed since the Court's June 12, 2003 Order. However, in terms of the ongoing
7 discovery and investigation, significant developments have occurred - - developments
8 further necessitating the closure of the preliminary hearing.

9 Specifically, within the past week, the defense is in receipt of discovery that is not
10 only exculpatory, but which the defense contends totally exonerates Mr. Peterson. The
11 defense further believes this exonerating evidence will likely be introduced during the
12 preliminary hearing. However, the evidence, which demonstrates Mr. Peterson's
13 innocence, also provides evidence of the true killer or killers' *modus operandi* and
14 provides clues as to the method of and circumstances surrounding the killings. Therefore,
15 if the evidence is made public the ability of both the prosecution and defense to ascertain
16 the identity of the actual perpetrator(s) will be irreparably prejudiced. This is clearly
17 prejudicial to Mr. Peterson's right to a fair and impartial trial and requires that the
18 preliminary hearing be closed pursuant to Section 868 so that Mr. Peterson (and the
19 prosecution) and continue to pursue leads as to the identity of the killer or killers.^{2/}

20 The defense also believes the appellate proceedings concerning Judge Beauchesne
21 and his June 12, 2003 unsealing order demonstrate the prejudice that will occur if the
22 preliminary hearing is open to the public. In its May 5, 2003 opinion in case number
23 F042848, the Court of Appeal for the Fifth Appellate District noted that "[t]he trial
24 court's findings that prejudice to both the prosecution and defense would result from
25

26
27 ^{2/}The defense is prepared to make an *in camera* offer of proof regarding the exonerating
28 evidence. Additionally, as much as the defense might desire to have the evidence made public, the
defense is concerned with maintaining the confidentiality of the evidence so that the actual
perpetrators will not be alerted to the existence of the evidence.

1 disclosure of [search warrants] stand unchallenged." (Opinion at 4.) The Court of
2 Appeal further noted that,

3 A criminal investigation does not automatically cease upon
4 the filing of a complaint or upon the passage of an arbitrary
5 period of time. The Findings themselves implicitly recognize
6 that the investigation would likely continue for a substantial
7 period, certainly more than the 11 days which elapsed before
8 the complaint was filed.

9 Moreover, the Findings expressly recognize that the
10 disclosure of the '[i]nvestigation techniques, clues and focus
11 on future avenues of inquiry by law enforcement personnel
12 would unduly alert any potential suspect. Evidence would
13 likely be destroyed and witnessed would be reluctant to
14 provide information.' These considerations would
15 conceivably disappear only if the complaint was filed against
16 the actual perpetrator or perpetrators, but an accurate
17 identification of a perpetrator has yet to be made and legally
18 will not be made by the filing of a complaint against a
19 particular suspect. As we see it, the portion of the trial court's
20 order requiring disclosure upon the filing of a complaint or
21 the arrival of a specific date in the future is based upon an
22 erroneous assumption - - that an arrest or the lapse of time
23 would remove the possibility, among others, that a 'potential
24 suspect' would be alerted, that the evidence would be
25 destroyed, or that witnesses would be discouraged.

26 (May 5, 2003 Opinion at 4-5.)

27 The Court of Appeal properly noted that the considerations requiring sealing in
28 this case would disappear only if the complaint was filed against the *actual perpetrator or*

1 *perpetrators.*^{3/} The recent discovery provided by the prosecution negates any possibility
 2 that Mr. Peterson committed this horrific crime. Consequently, in order to safeguard the
 3 ability of the defense (and prosecution) to identify the actual perpetrator(s), thereby
 4 exonerating Mr. Peterson, the preliminary hearing must be closed.

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³More recently, on June 27, 2003, in connection with a petition filed by Mr. Peterson (case number F043260), the Court of Appeal for the Fifth Appellate District has, *inter alia*, stayed Judge Beauchesne's June 12, 2003 unsealing order. No final ruling has been made on Mr. Peterson's petition, but the Court of Appeal requested briefing by all parties as to the propriety of peremptory relief. The parties' final briefs were all filed on or before July 7, 2003.

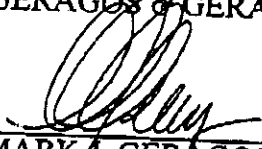
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III.
CONCLUSION

WHEREFORE, in light of the foregoing, Mr. Peterson respectfully requests that the relief sought herein be granted and that the Court make specific, on-the-record findings including, but not limited to, the facts that: (1) the Court's findings upon which the June 12, 2003 protective order were based have not changed and are applicable to the requested closure of the preliminary hearing; (2) the considerations noted by the Court of Appeal in case number F042848 are applicable herein and compel this Court to close the preliminary hearing in order to protect Mr. Peterson's right to a fair and impartial trial; and, (3) based on the unique circumstances of this case previously noted by this Court⁴ there is no less restrictive means of protecting Mr. Peterson's right to a fair and impartial trial.

Dated: July 21, 2003

Respectfully submitted,
GERAGOS & GERAGOS

By: 
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

⁴(e.g. "tremendous amount of pre-trial publicity", "publicity has been massive" (June 12, 2003 protective order at 1.), "nature of the publicity is especially troubling" (*Protective Order* at 2.); "if this case were to proceed to trial without a Protective Order in place until shortly before jury selection, all the statements by the witnesses, all of the rumors and gossip would be rehashed shortly before trial thereby making it extremely difficult to select a fair and impartial jury" (*Protective Order* at 3.); "there is a clear and present danger [of prejudice]" (*Protective Order* at 3.) All of these circumstances are applicable to the preliminary hearing and should be considered by the Court in its ruling upon the instant motion.

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 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

MOTION TO CLOSE PRELIMINARY HEARING

_____ 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.

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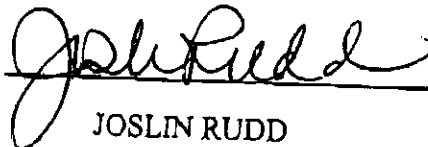
_____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

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

Executed on July 21, 2003, at Los Angeles, California.

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



JOSLIN RUDD

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From: Mark J. Geragos
Client/Matter: Peterson
Date: July 21, 2003
Pages: 11 (INCLUDING COVER)

RECIPIENT	FACSIMILE NUMBER
Deputy District Attorney Rick Distaso	(209) 525-5545

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