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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF STANISLAUS

in which preliminary hearings remained open, including for example the case of Richard Allen Davis, who was tried for the murder of Polly Klaas. The findings required by *Press Enterprise* cannot be made here.

This court's rulings in delaying access to sealed records and in issuing a protective "gag" order have anticipated that, at the time of the preliminary hearing, the public would have access to this presumptively public information. Witness testimony would be heard in open court subject to cross-examination, not on the streets and in the news media. Now is the time to protect the public's right of access to these proceedings.

Defendant's argument about exculpatory evidence, designed to inflame public curiosity, proves too much: the same argument could be used to close the trial itself, pending conclusion of a non-existent investigation into the "real perpetrators" of the crimes of which the defendant is accused. Dangling "exculpatory" but "necessarily secret" information before the public does not support a closed preliminary hearing.

Press Enterprise II requires the preliminary hearing in this matter to be open to the public and requires that the defendant's motion be denied.

II. THE PUBLIC HAS A RIGHT OF ACCESS TO CALIFORNIA PRELIMINARY HEARINGS

"The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II,* 478 U.S. at 7. The United States Supreme Court has "already determined in *Richmond Newspapers, Globe* and *Press-Enterprise I,* that public access to criminal trials and the selection of jurors is essential to proper functioning of the criminal justice system." *Id.* at 11-12.

The Court in *Press Enterprise II* found that public access to California preliminary hearings plays a significant positive role. *Id.* "[T]he very absence of a jury in these proceedings makes access even more important as "an inestimable safeguard against corrupt or overzealous prosecutor[s] and ... compliant, biased, or eccentric judge[s]." *Id.* In other words, public scrutiny is a primary safeguard of the *defendant's* rights.

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Overruling a California Supreme Court decision that applied Penal Code section 868 to permit a closed preliminary hearing of a nurse charging with murdering 12 patients by administering massive doses of lidocaine, the Court observed that the "near uniform practice of state and federal courts" is to conduct preliminary hearings in public:

> First, there has been a tradition of accessibility to preliminary hearings of the type conducted in California. Although grand jury proceedings have traditionally been closed to the public and the accused, preliminary hearings conducted before neutral and detached magistrates have been open to the public. Long ago in the celebrated trial of Aaron Burr for treason, for example, with Chief Justice Marshall sitting as trial judge, the probable-cause hearing was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens. *United States v. Burr*, 25 F.Cas. 1 (No. 14,692) (CC Va.1807). From *Burr* until the present day, the near uniform practice of state and federal courts has been to conduct preliminary hearings in open court.

Id. at 10-11.

The Court also found that the value of an open preliminary hearing is similar to the value of public trials to the proper functioning of the judicial system:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Id. at 13 (quoting *Press- Enterprise I*, 464 U.S 501, 508 (1984)(emphasis in original)).

Based on these determinations, the Court found a qualified First Amendment right of

III. THE DEFENDANT HAS NOT MADE AND CANNOT MAKE THE SHOWING NECESSARY TO SUPPORT CLOSING THE PRELIMINARY HEARING

A presumptively open preliminary hearing may be closed only on showing of substantial probability of irreparable injury to an interest higher than the right of the defendant and the public to open proceedings, accessible to the public and the news media. The court must first make "specific, on the record findings":

> "(1) that closure will *prevent* the harm which the [the moving party] asserts is substantially probable to result from an open . . . hearing
>
> and
>
> (2) that reasonable *alternatives* to closure are adequate to protect the defendant's fair trial rights."

Press-Enterprise II, 478 U.S. at 13-14. The party requesting closure has the burden to support the necessary findings with evidence. Finally, any limitation on the public right of access "must be narrowly tailored to serve [the asserted] interest." *Id.*

The United States Supreme Court has erected substantial substantive and procedural hurdles to closure of these proceedings. The defendant will be unable to clear them. In this case a plethora of information already exists in the public domain for exploitation by the news media whose efforts to observe the preliminary hearing the defense is attempting to frustrate. The defendant cannot show that the requested closure would be effective to prevent the speculative harm that he fears. The media are free to revisit their prior coverage and to speculate on the basis for this motion.

On the other hand, the loss of public confidence in the criminal justice system is a real harm certain to be inflicted by secret proceedings.

The defendant cannot support a finding by this court that closure would *prevent* the speculative harm. Further, the request is for a blanket closure of the entire proceeding; it is not narrowly tailored. Finally, this court cannot reject as inadequate alternatives to closure. Less drastic alternatives include change of venue, close questioning of jurors on voir dire and, if necessary, jury sequestration.

A. THE DEFENDANT'S RELIANCE ON THE COURT'S FINDINGS ON THE PROTECTIVE ORDER IS MISPLACED

The defendant relies on this court's findings in connection with the protective "gag" order, which is addressed to *out-of-court* statements by witnesses and the parties. (Defendant's memorandum of points and authorities at p.3). The court's order, which the court modified on the news media's request for reconsideration, protects against harm from extra-judicial statements that might be prejudicial to either party. The order anticipates that court testimony will be taken in public, that the court will be able to supervise the proceedings and counsel and that witnesses will be subject to cross-examination.

The United States Supreme Court rejected speculative concern about jury contamination as a sufficient basis to close a preliminary hearing. The Court found that through *voir dire* "cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict." *Press-Enterprise II,* 478 U.S. at 15. Of course, some jurors (as in Watergate, Abscam and other high profile trials) will not have heard of the case or will know only the basic charges against the defendant.

B. *SHEPPARD V. MAXWELL* IS NOT ON POINT

Defendant's reliance on *Sheppard v. Maxwell,* 384 U.S. 333 (1966) (Defendant's memorandum of points and authorities at p.4), a case decided 20 years before *Press Enterprise II* and addressing different issues, is also misplaced. *Sheppard* addressed the failure of the court to control the trial itself. In particular, nothing was done to control jury access to publicity during trial, including extensive coverage of discussions that occurred outside the presence of the jury. The newspapers published the names and addresses of the veniremen. "As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors." *Id.* at 343. During the trial the jurors were themselves the subjects of ongoing news coverage:

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> [I]ndividual pictures of prospective [jury] members appeared daily. During the trial, pictures of the jury appeared over 40 times in the Cleveland papers alone. The court permitted photographers to take pictures of the jury in the box, and individual pictures of the members in the jury room. . . . The day before the verdict was rendered--while the jurors were at lunch and sequestered by two bailiffs--the jury was separated into two groups to pose for photographs which appeared in the newspapers.

Id. 345. During their deliberations jurors were permitted to make telephone calls every evening. "The calls were placed by the jurors themselves; no record was kept of the jurors who made calls, the telephone numbers or the parties called. " *Id.* at 349. The jurors were not sequestered and they were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. *Id.* at 353. "Moreover, the jurors were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers." *Id.*

It is in this context of jury exposure to publicity *during trial*, that the *Sheppard* Court lamented the failure of the trial court to control the antics of the news media inside the courtroom ("bedlam reigned" *id.* at 355; "carnival atmosphere" *id.* at 358) and failure adequately to protect the jury from news coverage. The Court observed:

> Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel.

Id. at 362-63.

Here, in contrast, the court has issued a protective "gag" order, the defendant may still move to change venue, the trial date can be continued and the eventual jury can be questioned extensively and, if appropriate, sequestered. Nothing in *Sheppard* suggests closing court proceedings to protect the defendant's rights to a fair trial. The Court was aware of *Sheppard* when it decided *Press Enterprise II.* The alternatives of which the Court required consideration do *not* include closing the preliminary hearing to guard against *Sheppard*-type problems at trial.

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C. EXTENSIVE PUBLICITY IS INSUFFICIENT TO SUPPORT CLOSURE

Finally, the defendant relies on speculation about the effect of extensive pretrial publicity. Extensive publicity is not alone sufficient to support closure of a presumptively open hearings or records. *Tribune Newspapers West, Inc. v. Superior Court,* 172 Cal. App.3d 443 (1985), observed:

> Media dissemination of the alleged facts of horrifying and threatening criminal activity, particularly multiple murders, unfortunately is a fact of life in our society. The news reports may, and do, contain inadmissible hearsay, rank and unfounded opinions, incriminating statements, inaccurate sketches and more. But our criminal justice system is deemed to be hearty enough to withstand prejudicial publicity and still guarantee a given defendant the most basic right to receive a fair trial. In this regard, the cost to the criminal justice system to provide a fair trial is the price we pay for an open society, and a free press with access to criminal proceedings.

172 Cal. App. 3d at 458-59.

Where, as here, there exists a plethora of publicity already in the public domain, it cannot be shown that closure would be *effective* to prevent the perceived harm to the defendant. *See Press-Enterprise II*, 478 U.S. at 14 (defendant must demonstrate that closure would *prevent* the publicity). The ample existing information about the crimes in this case may simply be repeated, fueled by speculation as to why the court's records and proceedings must be closed to the public. Since secrecy would not be effective to prevent the perceived harm, the court must deny the defendant's motion.

Press-Enterprise II recognized that publicity concerning the proceedings at a pretrial hearing could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial. 478 U.S. at 14. This is not sufficient to support closure:

> [T]his risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through *voir dire,* cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict. And even if closure were justified for the hearings on a motion to suppress, closure of an entire 41-day proceeding would rarely be warranted. The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right. And any limitation must be "narrowly tailored to serve that interest."

Id. at 15.

The defendant makes no more than the conclusory showing rejected by the United States Supreme Court. The request is not narrowly tailored. Alternatives cannot be rejected.

IV. THE DEFENDANT CANNOT DEMONSTRATE THAT ALTERNATIVES TO CLOSURE ARE INADEQUATE TO PROTECT HIS SIXTH AMENDMENT RIGHTS

A mere conclusory statement that "[n]o matter how searching the questions . . . certain matters are not detectable, especially those motives relative to bias and prejudice" was rejected in *DeLorean* as a proper basis for rejecting voir dire as an alternative to closure. *CBS v. United States District Court for C.D. of Calif. (DeLorean)*, 729 F.2d 1174, 1182 (9th Cir. 1984)(even when exposed to heavy widespread publicity, many if not most potential jurors are untainted by press coverage).

Further, rejection of voir dire on principle is inconsistent with *Press-Enterprise II* and with cases both preceding and following it. The United States Supreme Court in *Nebraska Press Assn. v Stuart,* 427 U.S. 539, 563-64 (1976) and circuit courts of appeals have repeatedly found that voir dire is a viable alternative to restraints on the press, even in cases attracting massive publicity. *DeLorean,* 792 F.2d at 1182 (and cases cited).

The United States Supreme Court recently stated again that empirical research shows that jurors can disregard pretrial publicity:

> 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. 1030, 1054-1055 (1991). *Gentile* addressed the standards for limiting out-of-court speech by a protective order. *A fortiori*, where a gag order is in place to protect against prejudicial out-of-court statements by the parties and witnesses, this court cannot reject *voir dire* as an alternative to closing the courtroom based on pure speculation.

Other alternatives, including change of venue, have yet to be explored and the record contains no basis to reject them at the preliminary hearing stage of the proceedings. "Mindful that trial courts are understandably reluctant to change venue when the parties and witnesses are in place," the California Supreme Court in *Odle v. Superior Court,* 32 Cal. 3d 932 (1982), pointed out that trial courts have the authority to change venue in an appropriate case even after jury selection has begun. 32 Cal. 3d at 943. At the time of jury selection the jury panel itself provides additional evidence on the impact of pretrial publicity. *Id.* "What had been a matter of some speculation at the earlier motion--i.e., the actual extent of exposure of those who are potential jurors--becomes, on a later motion, subject to more precise measurement and evaluation." *Id.* at 943-44.

Needless to say, the Watergate, Abscam, DeLorean and O.J. Simpson trials all showed that unbiased jurors can be selected, even in the face of pervasive pretrial publicity. In a community more similar in size to Stanislaus County, the Sonoma County Superior Court denied the defendant's request to close the preliminary hearing in the Polly Klaas trial. *People v. Richard Alan Davis,* 22 Media L. Rptr. 2465, affirmed 22 Media L. Rptr. 2466 (1994). Other examples abound--Unabom, SLA, the synagogue burnings in Sacramento. This has been California's experience; it may be a relatively rare one for Stanislaus County but many counties have kept open their courts and records while fully protecting the fair trial rights of defendants in cases with worldwide notoriety. Directing a trial court to set aside its order sealing the grand jury transcript in *Press-Enterprise v. Superior Court,* 22 Cal. App. 4th 498, 503 (1994), the court of appeal observed that all it takes is "12 jurors capable of acting impartially."

V. THE PARTY SEEKING CLOSURE MUST PRODUCE EVIDENCE TO SUPPORT THE FINDING OF NECESSITY

Alternatives recognized and approved by the Supreme Court may not be rejected summarily. Their rejection must be based on evidence peculiar to this case. *See Nebraska Press Assn.,* 427 U.S. at 565 (record lacked *evidence* to support finding rejecting alternative measures). The court has before it no evidentiary basis for concluding that this is the unique

case in which alternatives to closure of the preliminary hearing would be inadequate to protect the defendant's fair trial rights.

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. Before ordering sealing on the basis of pretrial publicity, must consider:

> (1) the nature and extent of the media coverage, including circulation figures and geographical distribution; . . . ; (4) a change of venue; (5) protection afforded by a searching voir dire of potential jurors; and (6) sequestration of the jury panel.

172 Cal. App. 3d at 460. "Alternative measures may present difficulties for trial courts but none are beyond the realm of the manageable." *Id.*

In the context of the California Public Records Act, the court of appeal for the Fifth Appellate District recently held in *California State University Fresno v. Superior Court,* 90 Cal. App. 4th 810 (2001), that "speculative" assertions of harm were insufficient. "The unsupported statements constitute nothing more than speculative, self-serving opinions designed to preclude the dissemination of information to which the public is entitled. There is no admissible evidence in the record that any license agreements will be canceled if licensee names are disclosed to the public." *Id.* at 835.

The defendant cannot produce evidence to support the finding that there is a "substantial probability" that twelve unbiased jurors could not be found in this county *or anywhere in the state*. Certainly the media and public have not been permitted to review any such evidence to test its adequacy.

VI. CONCLUSION

For all of these reasons and based on the cited authorities, the court should deny the motion to close the preliminary hearing to the public. An open hearing would be consistent with the court's prior orders protecting the defendant from extra-judicial statements and

premature exposure to evidence that may or may not be presented in court, subject to the court's rulings on its admissibility. At stake is public confidence in a judicial system that abhors taking evidence in secret and assumes that any member of the public may be present to observe its operation. An open preliminary hearing is a primary safeguard of both the public's and the defendant's rights.

DATED: July 30, 2003

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BY: _____
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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 July 30, 2003, I served the following document(s) by the method indicated below:

NEWS MEDIA'S OPPOSITION TO MOTION TO CLOSE PRELIMINARY HEARING

☒ 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 July 30, 2003, at Sacramento, California.

Lauri Hale

LAURI HALE