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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.

Case No. **1056770**

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO CLOSE PRELIMINARY HEARING AND IN SUPPORT OF RULE 980 APPLICATIONS FOR TELEVISION COVERAGE OF THE PRELIMINARY HEARING FILED BY COURTROOM TELEVISION NETWORK, CABLE NEWS NETWORK, LP LLLP, NATIONAL BROADCASTING COMPANY, INC., AND AMERICAN BROADCASTING COMPANIES, INC.

[APPENDIX OF EXHIBITS A-L AND APPENDIX OF NON-CALIFORNIA AUTHORITIES FILED CONCURRENTLY.]

Hearing Date: August 14, 2003
Time: 8:30 a.m.
Department: 2

Non–party media organizations Courtroom Television Network ("Court TV"),[1] Cable News Network LP, LLLP ("CNN"),[2] National Broadcasting Company, Inc. ("NBC"),[3] and American Broadcasting Companies, Inc. ("ABC")[4] (collectively "Access Proponents") respectfully submit the following memorandum in support of their applications under California Rule of Court 980 for television coverage of the preliminary hearing in this matter, and in opposition to Defendant's Motion to Close Preliminary Hearing.[5]

DATED: July 31, 2003

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[1] Court TV is a national cable television network, dedicated to reporting on the legal and judicial systems of the United States, the 50 states, and the District of Columbia. Since its creation in 1991, Court TV's cornerstone has been to televise civil and criminal trials, and it has televised more than 800 trials and other legal proceedings.

[2] CNN is the world's largest news organization with over a dozen television and radio news networks and websites, as well as several news programming services, produced and distributed domestically and worldwide.

[3] NBC produces and distributes news programming through broadcast television, cable television, the internet, and other distribution channels.

[4] ABC, through its subsidiaries, owns and operates ABC News, the ABC Radio Network, and local broadcast television and radio stations that gather and report news to the public.

[5] Court TV's 980 application was filed and served on May 27, 2003, and a copy is attached to the concurrently filed Appendix ("App.") as Tab A. The 980 applications by CNN, NBC, and ABC are being filed and served concurrently, and copies are included in the Appendix collectively as Tab B.

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MEMORANDUM OF POINTS AND AUTHORITIES

1.

INTRODUCTION

In 1986, the United States Supreme Court held that the First Amendment guarantees the public a presumptive right to attend preliminary hearings in criminal cases. Press-Enterprise Co. v. Superior Court ("Press-Enterprise II"), 478 U.S. 1, 10 (1986). Because openness is so fundamental to the U.S. criminal justice system, a court may close a preliminary hearing only under the most extraordinary circumstances. As one judge noted in rejecting a motion to close the preliminary hearing in the Polly Klaas murder trial, "[t]his Court knows of ... no reported case in the State of California since [Press-Enterprise II was decided in] 1986 where a California preliminary hearing has been successfully closed." California v. Davis, 22 Media L. Rptr. 2465, 2466 (Cal. Municipal Ct.), aff'd, 22 Media L. Rptr. 2466, 2467-68 (Cal. Super. Ct. 1994). This is true notwithstanding the fact that California has experienced numerous high-profile trials in the last two decades, including the trials of O.J. Simpson, the Menendez brothers, and the Rodney King beating trial, among others. Nothing contained in defendant Scott Peterson's brief comes close to overcoming the high burden necessary to justify closure of the preliminary hearing in this case.

This Court also should permit the hearing to be televised. This case already has garnered extensive media coverage, and will continue to do so regardless of whether electronic access to the court is permitted. But the defendant's fair trial rights and the public's access rights will best be served if the focus is on the evidence actually presented in court, and not on rumors or speculation circulating outside the courtroom. Any attempt to limit access to information about the actual proceedings inevitably will result in the wide dissemination of inaccuracies, as gossip and rumor take the place of fact. This Court can ensure that accurate information about what actually happens within the confines of the courtroom is available, by permitting television coverage of the proceedings, as has been done successfully during the pendency of this case.[6]

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[6] As this Court knows from prior experience, the presence of a television camera in the courtroom is not disruptive. Before each proceeding, Access Proponents work with the Court and court personnel to ensure that all requirements concerning equipment placement and camera coverage are satisfied. In accordance with Rule 980's "pool" requirements, they would employ a single stationary camera, which produces no noise and requires no enhanced lighting.

2.

DEFENDANT HAS NOT COME CLOSE TO SATISFYING THE STRINGENT BURDENS REQUIRED TO JUSTIFY CLOSURE OF THE PRELIMINARY HEARING.

In response to requests for televised coverage of the preliminary hearing, defendant has asked that the entire hearing be closed to the public and press. Because he has not satisfied any of the constitutional hurdles for this extraordinary result, his motion must be denied.[7]

A. The Preliminary Hearing Must Be Open Absent Compelling Reasons, Supported By Specific, On-The-Record Findings.

The First Amendment mandates that preliminary hearings, like criminal trials, be open to the press and the public, absent compelling and clearly articulated reasons for closure. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 & n.17 (1980); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal. 4th 1178, 1206 (1999) (quoting Press-Enterprise II, 478 U.S. at 12-14).) Closure is constitutionally prohibited unless there is a clear showing that: (1) an overriding interest supports closure; (2) a substantial probability exists that the interest will be prejudiced absent closure; (3) closure is narrowly tailored to serve the overriding interest; and (4) no less restrictive means exist to achieve that interest. NBC Subsidiary, 20 Cal. 4th at 1218-19.[8] As the California Supreme Court has noted, access to preliminary hearings "plays a particularly significant positive role in the actual functioning of the process" because the preliminary hearing is "often the final and most important step in the criminal proceeding." Id. at 1206.[9]

---

[7] The remarkably thin showing offered by defendant for this highly unusual motion suggests that it has been presented largely as a ploy to avoid television access to the preliminary hearing, by creating the false suggestion that allowing public access without televised coverage is a "middle ground." Access Proponents urge the Court to reject this baseless motion, and to evaluate the Rule 980 applications on their merits.

[8] See also Associated Press v. District Court, 705 F.2d 1143, 1145 (9th Cir. 1983) (public's right of access in criminal proceeding can be overcome only by an affirmative showing that closure is "strictly and inescapably necessary" to promote a competing interest of the highest order) (emphasis added); Estate of Hearst, 67 Cal. App. 3d 777, 785 (1977) (sealing orders can be justified only in "exceptional" circumstances where sealing is necessary to promote a "compelling" interest; Hearst family's claim that disclosure of sealed court documents would put their family, including minor children, in physical danger, was insufficient to justify blanket sealing orders).

[9] An independent right of access to preliminary hearings exists under the California Constitution, see, e.g., Copley Press v. Superior Court, 6 Cal. App. 4th 106, 111 (1992), and under California Penal Code § 868.

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Critically, it is the party advocating closure that bears the burden of demonstrating the exceptional circumstances that justify such an extraordinary remedy. See, e.g., Mary R. v. B. & R. Corp., 149 Cal. App. 3d 308, 317 (1983) ("the burden rests on the party seeking to deny public access ... to establish compelling reasons why and to what extent [court] records should be made private"); Estate of Hearst, 67 Cal. App. 3d at 785 (same). Defendant has not met this high burden.

B. Defendant Has Not And Cannot Justify The Extreme Closure Order He Requests.

Defendant's primary ground for advocating the extraordinary remedy of closing the preliminary hearing is the allegation that there might be prejudicial evidence admitted that would be publicized before the trial. This concern, no different in this case from any other case, cannot justify closure. The United States Supreme Court addressed this precise issue in Press-Enterprise II, noting that "[t]he First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]," even though the public might be exposed to information that could be deemed inadmissible at trial. 478 U.S. at 15. Instead, the party advocating closure of a preliminary hearing must affirmatively show that, absent closure, there is a substantial probability that a defendant's fair trial interests will be prejudiced. Id. at 9. "Substantial probability" is a high hurdle, and it is not sufficient to show simply a "reasonable likelihood" of prejudice. Id.

Courts routinely have rejected pretrial publicity as a basis for denying the public's right of access to court proceedings and documents. As the Supreme Court noted more than thirty years ago, in any "important case,"

> scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23 (1961) (citations omitted). When faced squarely with the issue, the United States Supreme Court emphasized that "pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976) (emphasis added). On the contrary, the Court noted that "[i]n the

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overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to the rights of the accused." Id. at 551. The Court reached the same conclusion in the context of gag orders, finding that "[e]mpirical research suggests that in the few cases when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict on the evidence presented in court. ..." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1053 (1991).

The United States Supreme Court's skepticism concerning the prejudicial impact of pretrial publicity is shared by lower courts. In the high-profile drug prosecution of John DeLorean, for example, the Ninth Circuit held that "[w]idespread publicity ... does not necessarily lead to an unfair trial." CBS, Inc. v. District Court, 729 F.2d 1174, 1179 (9th Cir. 1984) ("CBS I"). Despite the "enormous, incessant, and continually increasing publicity," the court rejected the defendant's arguments that the dissemination of government videotapes purporting to show him engaging in narcotics trafficking would compromise his right to a fair trial. Id. As the court explained:

> Recent highly publicized cases indicate that even when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage. In one of the recent Abscam prosecutions, the court found that, despite concentrated media coverage, "only one-half of the prospective jurors indicated that they had ever heard of Abscam ... and [of those] only eight or ten had 'anything more than a most generalized kind of recollection what it was all about." ... Similarly, in one of the Watergate prosecutions, the District of Columbia Circuit stated that, despite perhaps the most pervasive publicity accorded any trial in American history, "without undue effort, it would be possible to empanel a jury whose members had never even heard the [Watergate] tapes."

Id. at 1179-80 (citations omitted).

California state courts have reached the same conclusion. In People v. Manson, 61 Cal. App. 3d 102, 187-91 (1976), the Court of Appeal rejected the argument that widespread pretrial publicity about Charles Manson and his followers' notorious killing spree, which dwarfed anything in the present case, prejudiced the defendants' right to a fair trial. Similarly, in Press-Enterprise v. Superior Court, 22 Cal. App. 4th 498, 503 (1994), the Court of Appeal reversed a trial court's order sealing portions of the grand jury transcript in a high-profile murder case, finding that the defendant had not satisfied the strict requirements for demonstrating prejudice to his Sixth Amendment rights. "Even accepting the trial court's finding that prospective jurors reading newspaper accounts of the grand jury transcripts are likely to remember these reports and may even develop a preconception"

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concerning the defendant's "guilt or innocence," the court held that it could not "conclude that release of this material would make it difficult to find 12 jurors capable of acting impartially." Id.

Defendant's submission does not come close to satisfying his heavy burden. His primary argument appears to be based on the fact that that this Court already has taken steps to alleviate any potentially prejudicial pre-trial publicity in this case. (Motion at 3-4, 7.) But defendant's attempt to shoehorn the Court's imposition of a gag order into justifying closure of the entire preliminary hearing ignores the fact that a completely different standard applies to gag orders than must be applied to closure orders. As defendant's criminal counsel is aware, under Younger v. Smith, 30 Cal. App. 3d 138 (1973), the Court was required only to find a "reasonable likelihood of prejudical news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." (Order at 3 (emphasis added).) This is far different than the test for closure, which requires a "substantial probability" of prejudice that could not be alleviated by alternative means.[10]

Moreover, in entering its protective order this Court expressed concern with "the rumors and gossip" that it feared "would be rehashed shortly before trial ...." (Id.) That concern is not raised by public access to the actual court proceedings, which ensures that accurate information about what has transpired is available.[11]

Defendant also asserts that the prosecution will offer false evidence at the preliminary hearing, but provides no facts to support this self-serving claim. General statements by the District

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[10] Ironically, as this Court has recognized, "Defense Counsel was a regular commentator prior to the Defendant's arrest and his being retained on the case. Also, Second Counsel gave a lengthy televised interview prior to the arrest." (June 10 Order at 1; see also App. Tab L.) Defendant also invited publicity in the past, quickly calling on the press for help after his wife disappeared. (App. Tab L.) Defendant and his counsel should not be permitted to pursue publicity only when it suits their interests, and attempt to bar access to information about what actually happens before the Court.

[11] This distinction was noted by the Fifth Appellate District in its decision issued in this case on June 30, 2003. Access Proponents strongly disagree with the skepticism expressed by the Court of Appeal about the difficulty of obtaining an "untainted" jury if the search warrant materials at issue were released (Op. at 7); such skepticism is inconsistent with the Supreme Court's explicit findings in the cases cited above, as well as anecdotal experience in numerous high-publicity criminal trials. But even the Court of Appeal's decision yesterday recognized that a different standard applies during the preliminary hearing, and that even release of the same information under the control of the parties and the trial court would not generate the same concerns. (Op. at 8.)

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Attorney that the preliminary hearing will "open some eyes" say nothing about the evidence they intend to offer, and provide no basis for defense counsel's assertion that what is presented will be false. (Motion at 4.) Nor can defendant's complaint about discovery conceivably give rise to the specific, on-the-record findings the Court must enter to justify closure. (Motion at 5.) If defendant's counsel is concerned about the discovery from the prosecution, the remedy is not to close the preliminary hearing; instead, if a sufficient showing is made, the Court can enter the Orders necessary to ensure that defendant gets discovery in time to prepare for the hearing, or move the hearing date. Both of these are reasonable alternatives to closure, and are less restrictive means of protecting defendant's rights as required by the First Amendment.

Finally, defendant claims that the ongoing search for the "true killer" of Laci Peterson and her unborn child will be impeded if the public gets access to the exculpatory evidence defense counsel intends to offer at the preliminary hearing. Even assuming that this conjectural assertion has any validity, it militates against closure. As discussed above, access to preliminary hearings is particularly important because it is "often the final and most important step in the criminal proceeding." NBC Subsidiary, 20 Cal. 4th at 1206. If this may be the last hearing in this case, the public is entitled to complete information about what has transpired. Moreover, defendant's fair trial rights would only be furthered by public exposure to such exculpatory evidence.[12]

Ultimately, the concerns expressed by defendant can be resolved through alternative to closure, including voir dire, admonitions, instructions, and other tools. In Press-Enterprise II, the United States Supreme Court held that "[t]hrough 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." 478 U.S. at 15. Likewise, in NBC Subsidiary, the California Supreme Court rejected arguments that admonitions and instructions were insufficient to secure a fair trial in a celebrity case involving "intense and pervasive media coverage." 20 Cal. 4th

[12] In any event, if there was a basis for keeping some particular piece of evidence or testimony from public view temporarily, that does not justify closure of the entire preliminary hearing. The constitutional requirement that closure orders be "narrowly drawn" mandates that only the portion of the hearing for which sufficient justification can be shown – if any – be closed. Press Enterprise II, 478 U.S. at 15.

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at 1223. As the Court noted, "frequent and specific admonitions and instructions, coupled with careful voir dire of the jurors," is sufficient in virtually every case. Id. at 1224. This Court is more than capable of taking the necessary steps to ensure that defendant receives a fair trial. Sacrificing the public's right of access is neither necessary nor permissible. Because defendant has not and cannot demonstrate that this case presents extraordinary circumstances – circumstances that did not exist in cases receiving far more publicity than this case, including the trials of O.J. Simpson, the Manson family, and John DeLorean, among others – his closure request should be rejected.

3.

PUBLIC POLICY STRONGLY SUPPORTS TELEVISION COVERAGE OF THE PRELIMINARY HEARING.

The presence of cameras in the courtroom confers numerous benefits on the public. In addition to the empirical data refuting the "parade of horribles" claimed by the prosecution to result from the presence of cameras, the Court must consider the competing public interest in obtaining comprehensive, contemporaneous electronic coverage of judicial proceedings.

As described above, it is a matter of federal constitutional law that the public has a right of access to criminal proceedings, which historically has been considered vital not only to protect the rights of the parties, but also to increase public confidence in the eventual result. As the United States Supreme Court recognized in Press-Enterprise II, "[t]he 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[.]" 478 U.S. at 13 (quoting Press-Enterprise v. Superior Court ("Press-Enterprise I"), 464 U.S. 501 (1984)).

The media – and, in particular, television – play an indispensable role in informing the public about the conduct of judicial proceedings. In Richmond Newspapers, the United States Supreme Court noted that "[i]nstead of acquiring information about trials by first hand observation or by word of mouth from those who attend, people now acquire it chiefly through the print and electronic media." 448 U.S. at 573. "In a sense," the Court explained, this development "validates the media claim of functioning as surrogates for the public. ... [Media representatives] often are provided special seating and priority of entry so that they may report what people in attendance

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have seen and heard. This 'contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire judicial system ....'" Id. at 573 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in judgment)).

In cases such as this one, which has generated significant public interest, the public's right of access is devalued unless the media is allowed to function as a surrogate. While newspapers can provide descriptive coverage of court proceedings, they cannot show the public exactly what happens in the courtroom, and physical limits restrict the availability of seats in the courtroom for all interested spectators. "In advancing the [] purposes [of open judicial proceedings], the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom." Richmond Newspapers, 448 U.S. at 597 n.22 (Marshall, J. and Brennan, J. concurring) (emphasis added). To enable the media to perform its surrogate function most effectively, the maximum amount of information must be available to the public. The most effective means of making that information available in its most accurate, objective form is through cameras.

The fact that this is a highly-publicized case does not provide any basis for restricting public access by barring camera coverage. To the contrary, regardless of whether cameras are permitted in the courtroom, the preliminary hearing will be widely discussed and commented upon. As the Florida Supreme Court observed, "newsworthy trials are newsworthy trials, and ... they will be extensively covered by the media both within and without the courtroom," whether or not cameras are permitted. In re Petition of Post-Newsweek Stations, Inc., 370 So. 2d 768, 776 (Fla. 1979). Indeed, this Court already has recognized and enunciated the importance of television coverage of courtroom events. Permitting cameras to observe what actually takes place, as this Court has recognized, "foster(s) accuracy in reporting ...." (June 12, Minute Order, App. Tab E at 2.) Quoting the United States Supreme Court in Sheppard v. Maxwell, 384 U.S. 333, 359 (1966), this Court explained that it is the disclosure of inaccurate information which "lead[s] to groundless rumors and confusion." (App. Tab E at 2; see also id. at 3.)

Without cameras in the courtroom, information about what happens during the preliminary

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hearing will come from the few members of the public and press able to fit inside the courtroom, or from individuals speculating about what has occurred. (App. Tab F.) Without cameras, it is more likely that commentators will offer only abbreviated summaries of the evidence offered or "sound bites" from out-of-court interviews, perhaps juxtaposed against out-of-court photographs of participants. Without cameras, citizens will judge the proceedings with whatever information they possess, however truncated, salacious, or inaccurate. Thus, as a practical matter, allowing cameras in newsworthy trials reduces speculation about the proceedings, and decreases inaccuracies.[13]

The question raised by Access Proponents' applications, then, is not whether the preliminary hearing will generate public attention and interest. The question is whether public information about the preliminary hearing is to come solely from second-hand summaries of the news, or whether the public will be permitted to observe the actual in-court proceedings – dignified, somber, and under the firm control of this Court. The latter is not only appropriate under Rule 980, but better serves the public interest. As Supreme Court Justice Anthony Kennedy told Congress:

> You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom, and it is the outside coverage that is really the problem. In a way, it seems perverse to exclude television from the area in which the most orderly presentation of the evidence takes place.

Hearings Before Subcomm. of House Comm. on Approp., 104th Congress, 2d Sess. 30 (1996).

4.

THE COURT SHOULD PERMIT TELEVISION COVERAGE OF THE PRELIMINARY HEARING UNDER CALIFORNIA RULE OF COURT 980.

California long has recognized the importance of allowing television coverage of trials. As early as 1967, long before technological advances permitted the unobtrusive recording of court proceedings, a California State Assembly committee emphasized that cameras in the courtroom are wholly consistent with our tradition of public trials. Because "sprawling urbanism has replaced

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[13] This is particularly true in light of the broad Protective Order issued by the Court on June 12, 2003. Pursuant to that Order, the parties involved may only discuss "[t]he scheduling and result of any stage of the pretrial proceedings held in open court in an open or public session." (App. Tab E at 5.) The Order prohibits them from discussing the substance of any such proceedings, to counter any inaccurate information that might otherwise be publicly disseminated. As discussed above, defendant's suggestion that the entire proceeding be closed only magnifies this problem, as everything about the proceeding becomes the subject of speculation, rumor, and leaks.

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concentrated ruralism," and because "no courtroom in the land could hold even a minute fraction of the people interested in specific cases," the committee concluded that "a trial is not truly public unless news media are free to bring it to the home of the citizens by newspaper, magazine, radio, television or whatever device they have."[14] In 1981, California adopted Rule 980, which permits television coverage of criminal and civil trials.

Fifteen years later, after the O.J. Simpson criminal trial, the Chief Justice of the California Supreme Court appointed a special task force to evaluate whether television coverage of trials should be continued.[15] The task force solicited the views of judges, media representatives, victims' rights groups, public defenders, prosecutors, and other representatives of the bar, and analyzed other states' experiences with television coverage of trials. Based on all the evidence that it gathered, the task force concluded that cameras should remain in California courtrooms.

Strikingly, the task force found that judges who actually had presided over televised trials favored allowing cameras in the courtroom. Ninety-six percent of those judges reported that the presence of a video camera did not affect the outcome of a trial or hearing in any way. In addition, the overwhelming majority of them reported that the camera did not affect their ability to maintain control of the proceedings, nor did it diminish jurors' willingness to serve. The Judicial Council subsequently adopted nearly all of the task force's findings, and revised Rule 980. In its current form, the Rule instructs courts to consider eighteen factors in deciding whether to permit television access. Each of the relevant factors supports television coverage of this important hearing.

"(i) Importance Of Maintaining Public Trust And Confidence In The Judicial System." This factor unquestionably supports permitting television access. Members of the public can feel confident that proceedings are fair – and that the parties are adequately and fairly performing their roles in that prosecution – by seeing for themselves how and what evidence is presented. Indeed, the underlying purposes behind the constitutional right to attend and observe

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[14] Final Report Of The Subcommittee On Free Press – Fair Trial, Assembly Interim Committee On Judiciary, January 5, 1967 (emphasis added) (App. Tab C at 9.)

[15] See 1996 Report of Task Force on Photographing, Recording, and Broadcasting in the Courtroom (App. Tab D at 8.)

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criminal proceedings are furthered by permitting electronic coverage of court proceedings. As Justice Brennan observed in describing the importance of public observation of court proceedings:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n, 427 U.S. at 587 (Brennan, J., concurring).

A few years later, in Richmond Newspapers, the Court explained further:

> The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' ... A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' . . . and the appearance of justice can best be provided by allowing people to observe it.

448 U.S. at 571 (emphasis added; citations omitted). "People in an open society do not demand infallibility from their institutions," the Court stated, "but it is difficult for them to accept what they are prohibited from observing." Id. at 572 (emphasis added). The Court was not concerned with whether the "right to attend criminal trials to hear, see and communicate observations concerning them" is "a 'right of access' or a 'right to gather information.'" Id. at 576. What mattered was that the right of access "would lose much meaning if access to observe the trial could ... be foreclosed arbitrarily." Id. at 576-77 (emphasis added).

The District Attorney's contrary argument concerning this factor is mere rhetoric. As discussed below, studies and anecdotal evidence demonstrate that television coverage does not adversely affect the trial participants. Furthermore, the suggestion that anything on television is purely "entertainment" is remarkably misguided; studies show that the public overwhelmingly gets most of its news coverage from television, rather than from the print media, making it essential that there is complete, accurate information for such news reporting.

"(ii) Importance Of Promoting Public Access To The Judicial System." This factor also overwhelmingly supports television access to the preliminary hearing. The courtroom can only accommodate a few dozen spectators. (Appendix Tab F.) The public – particularly the citizens of

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Stanislaus County – will have no meaningful access to this proceeding if they cannot watch it on television. Members of the public have shown a great deal of interest in this case from the outset, responding in force to pleas for help from the Peterson family, and joining the family in grieving the death of Mrs. Peterson and her unborn child. They need and deserve to understand what happened, and should be entitled to see for themselves whether there is evidence to support the District Attorney's murder charges against defendant.

The District Attorney refers dismissively to the public's interest in the case, commenting that "courtrooms are not constructed as coliseums," as if this was intended to limit the number of people who are able to view events in the courtroom. (DA Brief at 6.) This is specious.[16] As the California State Assembly emphasized in 1967, it is important to permit those interested to have access to courtroom events. If it was the intent of California's governing bodies that public access be limited only to the few people who can physically sit in a courtroom, Rule 980 would not exist.

"(iii) Parties' Support Of Or Opposition To The Request." The parties' position regarding television coverage is only one of eighteen factors for the Court to consider. Indeed, during the experimental phase of Rule 980, the Rule was amended to remove a requirement that the parties consent to allow cameras in the courtroom. One reason not to allow either side to veto camera coverage is the "community therapeutic value" of openness, recognized by the Supreme Court in the cases discussed above. For those who prefer not to view the preliminary hearing, they can exercise their right not to watch it.[17] But just as the Judicial Council wisely chose not to allow the parties to veto the public's right of access, this Court should not view the parties' opposition to camera coverage to be dispositive here.

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[16] As the Supreme Court recognized in Press-Enterprise II, the government traditionally has attempted to accommodate the public's desire to attend trial proceedings. For example, the probable-cause hearing in the Aaron Burr trial "was held in the Hall of the House of Delegates in Virginia, the courtroom being too small to accommodate the crush of interested citizens." 478 U.S. at 10. Technology affords a much easier way to provide access to members of the public who are interested in following this proceeding.

[17] The suggestion that the preliminary hearing will be broadcast repeatedly also is unsupported. The experience of Access Proponents with virtually all similar televised hearings is that coverage is focused around the actual event, and is not the subject of repeated rebroadcasts.

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"(iv) **The Nature Of The Case.**" This factor strongly supports television coverage. The police, Mrs. Peterson's family, and defendant asked the public for help after Mrs. Peterson disappeared. They sought and received national publicity in the hope that it would help find the missing woman. When the bodies of Mrs. Peterson and her unborn child were found, the nation grieved. To ask for the public's interest and involvement in the search, and then disregard the public's ongoing interest in the result of criminal proceedings, is cavalier. This nature of the case heavily supports Access Proponents' position.

"(v) **Privacy Rights Of All Participants In The Proceeding, Including Witnesses, Jurors, And Victims.**" This factor does not weigh against television coverage. Empirical evidence demonstrates that television coverage has no adverse effect on witnesses, jurors, victims or other trial participants. (See Section xix below.) The fact that the trial participants did not choose "to be in the public eye" is not the dispositive factor. The same could be said of virtually every criminal trial, yet Rule 980 does not draw such a distinction. Criminal proceedings are public events, and there is nothing about this particular case, or the preliminary hearing, that involves any extraordinary interest in privacy.[18] The victims here are deceased, and there are no juror issues to consider in the preliminary hearing. There is no showing that any witnesses will be adversely affected by televised coverage, and if such a showing is made about a particular witness, the Court can issue an appropriate limiting order on coverage of that individual's testimony. Consequently, this factor provides no basis for denying camera access.

"(vii) **Effect On The Parties' Ability To Select A Fair And Unbiased Jury.**" There are no grounds for any concern that television coverage in this case would negatively impact these proceedings, prejudice the defendant, or adversely impact the potential jury pool. To the contrary, as this Court previously recognized, it is the absence of television coverage that potentially poses the greatest threat to defendant's rights. (App. Tab E.) The preliminary hearing inevitably will receive publicity with or without television coverage. This Court can best protect Defendant's

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[18] This factor was intended primarily to address matters involving crimes against or involving children, sexual assault, or similar crimes, where the victim or other witnesses might be forced to describe embarrassing and private details about the crime.

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rights – and ensure that the public has ready access to the fair and unbiased presentation of the evidence that will occur under this Court's control – by permitting television coverage of the preliminary hearing.[19]

"(viii) Effect On Any Ongoing Law Enforcement Activity In The Case." This Court should reject the vague and unsupported claims made regarding this factor. No ongoing law enforcement activity has been identified that would be impacted by televised coverage of what is otherwise presumptively a public court proceeding. Any genuine concern about undercover officers can easily be resolved by a limiting order that prevents video of their faces, or requires their identities to be masked. This factor should not affect the Court's decision.

"(x) Effect On Any Subsequent Proceedings In The Case." This factor also supports television coverage of the preliminary hearing. The assertion that cameras mean more coverage (DA Brief at 8), is purely speculative; but it is indisputable that televised access results in more accurate coverage. If this case goes to trial in Stanislaus County, anyone in the County who regularly watches television, and thus would be likely to watch the preliminary hearing, undoubtedly has seen extensive television coverage on this case, including information that may or may not have been accurate. In contrast, at the preliminary hearing, the Court will have control over the evidence presented. This result does not negatively impact the defendant's fair trial rights, and actually has the opposite effect.

"(xi) Effect Of Coverage On The Willingness Of Witnesses To Cooperate, Including The Risk That Coverage Will Engender Threats To The Health Or Safety Of Any Witness." The District Attorney's claim that television coverage of the preliminary hearing will pose a threat to any witness also is wholly unsupported.[20] Although the District Attorney refers generally to

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[19] The District Attorney's bald assertion that "[i]t is a given fact, in this modern, media-driven age, that a news story without video will receive less 'air time' than a similar story with a video" is unsupported and irrelevant. (DA Brief at 7.) This case already has had, and will continue to receive, publicity regardless of this Court's decision about television access. No showing has or can be made that mere quantity of coverage prevents the selection of impartial jurors, or the conduct of a fair trial.

[20] Assuming that the reports of possible threats to the defendant are true, they are are irrelevant. There is no evidence that any witness – or any other person at all – has been threatened.

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claims about letters from "mentally unstable" persons, there is no link between these letters and television coverage of what has happened in the courtroom. Nor does the District Attorney suggest that any prospective witnesses are concerned – or have reason to be – about the effect that television coverage may have on their health or safety. Consequently, this factor also does not justify restricting televised coverage of the trial.

"(xii) Effect On Excluded Witnesses Who Would Have Access To The Televised Testimony Of Prior Witnesses." This factor also should not affect the Court's decision. The parties estimate that the preliminary hearing will take only a few days. It will be little burden on excluded witnesses to avoid television coverage of the preliminary hearing during that time. The District Attorney's claim that "[t]his admonishment becomes completely unworkable and unenforceable with cameras in the courtroom" has no basis in fact, and is inconsistent with the presumption that witnesses – like jurors – will follow the admonishment of the Court.

"(xv) Security And Dignity Of The Court." Television coverage has no adverse effect on the security and dignity of the Court. To the contrary, it has furthered these important concerns by presenting information to the public in the controlled setting of the courtroom.

"(xviii) Maintaining Orderly Conduct Of The Proceeding." This factor also supports television access. The presence of a single camera in the courtroom has not caused any disruption in these proceedings. Although the parties at one time were concerned about the placement of the microphones, their concern has proven unfounded. The microphones have not captured any private or privileged conversation, and Access Proponents will work to ensure that this remains true. Moreover, the District Attorney's skepticism about the trustworthiness of the media also is unfounded. The media have broadcast every hearing in this matter and there have not been any significant problems. Access Proponents have proven here and in the countless other trials they have covered that they will adhere to this Court's Rules.[21]

In addition, the District Attorney does not and cannot provide any link between the purported threats against the defendant and television coverage of any court proceedings in this case.

[21] For example, in the recent preliminary hearing in the Robert Blake matter, Los Angeles Superior Court Judge Lloyd M. Nash initially was extremely hesitant to permit cameras in the courtroom. However, after considering Court TV's request and the experiences of other judges who have permitted televised hearings, Judge Nash agreed to permit television coverage for that

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"(xix) **Any Other Factor The Judge Deems Relevant.**" This Court should reject the District Attorney's suggestion that television coverage affects the ability of the system "to work in 'calmness and solemnity.'" (DA Brief at 10.) In fact, any concerns about the adverse impact on the proceedings or witnesses are belied by the research conducted in more than a dozen states – including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Virginia, and Washington – that studied the potential impact of electronic media coverage on courtroom proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon witnesses, attorneys and judges.[22] The results from the state studies were unanimous: the claims of a negative impact from electronic

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hearing. Judge Nash later advised Court TV that the experience was better than he expected and not disruptive at all of the proceedings. Access Proponents submit that the Court's experience in this case also has proven that television access causes no disruption of courtroom proceedings (or other adverse effect). Access Proponents urge this Court to speak with Judge Nash or others who have permitted television coverage of preliminary hearings and trials to fully evaluate the value of television coverage of such proceedings.

[22] Copies of the state studies or summaries of these studies that Access Proponents were able to obtain are included in the Appendix as follows: Arizona (untitled), which is at handwritten page 39 of the Information Service Memorandum IS 88.002, TV Cameras In the Courts, Evaluation of Experiments ("Sample Survey"), included in App. Tab G; California – Evaluation Of California's Experiment With Extended Media Coverage Of Courts, Submitted by Ernst H. Short and Associates, Inc. (Sept. 1981), which is included in App. Tab H; see also Cameras In Court, 1983 Report To The Governor And Legislature, which is included at handwritten page 106 of the Sample Survey in App. Tab G; Florida (untitled), which is at handwritten pages 3 and 62 of the Sample Survey included in App. Tab G; Louisiana – Report On Pilot Project On The Presence Of Cameras And Electronic Equipment In The Courtroom (undated), which is at handwritten page 101 of the Sample Survey included in App. Tab G; Minnesota – Report Of The Minnesota Advisory Commission On Cameras In The Courtroom To The Supreme Court (Jan. 1982), which is at handwritten page 79 of the Sample Survey included in App. Tab G; Nevada – Final Statistical Report Cameras In The Courtroom In Nevada (1980), which is at handwritten page 18 of the Sample Survey included in App. Tab G; New York – Report Of The Chief Administrator To The New York State Legislature The Governor And The Chief Judge On The Effect Of Audio-Visual Coverage On The Conduct Of Judicial Proceedings, Matthew T. Crosson (March 1991), included in App. Tab I; Report Of The Committee On Audio-Visual Coverage Of Court Proceedings, Hon. Burton B. Roberts, Chair (May 1994), which is included in App. Tab J; and Washington – Cameras In the Courtroom – A Two-Year Review In The State Of Washington, A Project Of The Washington State Superior Court Judges' Association Committee On Courts And Community (Sept. 1978), which is at handwritten page 10 of the Sample Survey, included in App. Tab G.

Most of these state studies, and studies from Hawaii, Kansas, Maine, Massachusetts, New Jersey, Ohio and Virginia, are described in Electronic Media Coverage Of Courtroom Proceedings: Effects On Witnesses And Jurors, Supplement Report Of The Federal Judicial Center To The Judicial Conference Committee On Court Administration And Case Management (1994), which is included in App. Tab K.

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media coverage of courtroom proceedings – whether civil or criminal – are baseless. Among other things, the state studies revealed that fears about witness distraction, nervousness, distortion, fear of harm, and reluctance or unwillingness to testify were unfounded.

California's report on the effect of electronic coverage of court proceedings is one of the most comprehensive of the state evaluations that have been completed. The California study included observations and comparisons of proceedings that were covered by the electronic media, and proceedings that were not. (App. Tab H, at 20, 55-67, 82-98.) Not only did California's survey results mirror those of other states – finding that there was no noticeable impact upon witnesses, judges, counsel, or courtroom decorum when cameras were present during judicial proceedings – but the state's "observational" evaluations further buttressed these results. (Id. at 220-227, 243-45.) For example, after systematically observing proceedings where cameras were and were not present, consultants who conducted California's study concluded that witnesses were equally effective at communicating in both sets of circumstances. (Id. at 103-04.) Not surprisingly, the California Study also revealed that there was no, or only minimal, impact upon courtroom decorum from the presence of cameras. (Id. at 78-79.)[23]

The positive results of the state court evaluations were further bolstered by the Federal Judicial Center's 1994 study of a three-year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts. (App. Tab K.) The federal study concluded that no negative impact resulted from having cameras in the courtroom. Thus, the extensive empirical evidence that has been collected on the impact of electronic coverage consistently has concluded that such coverage is not detrimental to the parties, to witnesses, to counsel, or to courtroom decorum.[24]

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[23] The overwhelmingly positive results from the California Study cannot be distinguished on the ground that the case at hand is a "high-profile" case. To the contrary, as noted in the California study, it is precisely the "sensational heinous crime case type" that constitutes a large portion of the proceedings that are covered by electronic media, and such cases were included in the State's study. (Id. at 67-69.)

[24] This Court should evaluate these Rule 980 factors and enunciate the reasoning underlying its decision. KFBM-TV Channel 9 v. Municipal Court, 221 Cal. App. 3d 1362, 1368-699 (1990). As the Court of Appeal explained, "Rule 980 recognizes that media access should be granted except where to do so will interfere with the rights of the parties, diminish the dignity of the court,

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5.
THE PUBLIC'S FIRST AMENDMENT RIGHT TO OBSERVE CRIMINAL PROCEEDINGS INDEPENDENTLY JUSTIFIES AN ORDER GRANTING THE RULE 980 APPLICATIONS.

Thirty-eight years ago, the United States Supreme Court reversed the criminal conviction of Billy Sol Estes by a narrow margins, in part because of the perceived prejudicial impact of the televising of Estes' trial. Estes v. Texas, 381 U.S. 532 (1965). The technology used in 1965 was markedly different than the unobtrusive equipment used by Access Proponents today; at the Estes trial, there were twelve camera persons, several thick cables snaking through the courtroom, and numerous microphones, all of which caused "considerable disruption" in the courtroom. Id. at 536. Although he agreed that the intrusive nature of the equipment used in 1965 jeopardized the defendant's due process rights, Justice Harlan, the dispositive concurring vote in Estes, recognized that the day might come when "television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause." Id. at 595–96 (Harlan, J., concurring) (emphasis added).

By 1981, technology had advanced to the point that a unanimous Supreme Court held that televising a trial – over the objections of two criminal defendants – was not a violation of their due process rights. Chandler, 449 U.S. at 576.[25] Chief Justice Burger's opinion emphasized that Estes had not established a rule banning states from experimenting with an "evolving technology, which, in terms or modes of mass communication, was in its relative infancy in 1964 … , and is, even now, in a state of continuing change." Id. at 560. The unanimous Chandler opinion also observed that "the data thus far assembled was cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials." Id. at 576 n.11.

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or impede the orderly conduct of the proceedings," and enunciating the Court's reasoning is the only way to ensure that any challenge can "be objectively analyzed." Id.

[25] Accord People v. Spring, 153 Cal. App. 3d 1199 (1984) (presence of television camera during trial did not violate criminal defendant's Sixth Amendment right to a fair trial); State of New Hampshire v. Smart, 622 A.2d 1197 (N.H. 1993) (televised coverage of high-profile murder trial did not prejudice defendant); Stewart v. Commonwealth of Virginia, 427 S.E.2d 394 (Va. 1993) (presence of video cameras during criminal trial did not violate defendant's due process rights).

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Thirty-eight years after Estes, as Justice Harlan predicted, the technological advances and commonplace reliance on television are here. Consequently, Access Proponents respectfully submit that a constitutional presumption exists in favor of allowing cameras in the courtroom.

A. The Public Should Be Afforded The Most Direct Access To Matters Of Public Record.

In modern society, demographics preclude the overwhelming majority of Americans from physically attending court proceedings. Id. at 572-73. Yet those societal changes do not mean that the constitutional right of access can be exercised only by the small number of citizens who actually fit into the courtroom. As one court asked, "what exists of the right of access if it extends only to those who can squeeze through the [courtroom] door?" United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994). Here, only 42 people – 21 members of the media and 21 members of the public – will be permitted into the courtroom. (App. Tab F.) Through cameras in the courtroom, however, others have a meaningful opportunity to exercise their constitutional right to observe criminal proceedings. For that right to have meaning, the First Amendment right of access must include a presumptive right for the media to televise criminal proceedings and for the public to observe those proceedings on television. To conclude otherwise is inconsistent with the fundamental meaning of Richmond Newspapers and NBC Subsidiary.[26]

B. Other Courts Have Recognized That The First Amendment Guarantees The Right To Observe Televised Court Proceedings.

Given the increasing weight accorded the public's right of access by the United States Supreme Court, it is not surprising that some lower courts have recognized that the First Amendment guarantees the right to observe televised court proceedings. For example, in Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580, 589 (S.D.N.Y. 1996), the federal district court

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[26] The Supreme Court and lower courts also have held that differential treatment of different media is impermissible under both the First Amendment and the Fourteenth Amendment. See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 590 (1983) (differential tax scheme impermissible); Cable News Network, Inc. v. American Broadcasting Cos., 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (ordering White House to drop its exclusion of the electronic media from a media pool because such an exclusion "denies the public and the press their limited right of access, as guaranteed by the First Amendment.") Although the United States Supreme Court has not yet applied these principles to the broadcast media's ability to televise court proceedings, these decisions are inconsistent with restrictions on the electronic coverage, unless there is a compelling justification for differentiating among the different media.

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distinguished Estes, noting that the Supreme Court in that case "explicitly recognized that its holding ultimately relied on the then-state of technology[.]" Relying on subsequent "advances in technology," the Katzman court concluded that the old objections to cameras in the courtroom – which were the same objections that previously had been raised against the public's right to attend trials – "should no longer stand as a bar to a presumptive First Amendment right of the press to televise ... court proceedings, and of the public to view those proceedings on television." Id.

In another criminal case that generated enormous public interest, a New York state court granted Court TV's request to televise the trial of four New York policemen charged in the shooting of unarmed African immigrant Amadou Diallo. See People v. Boss, 182 Misc. 2d 700, 705 (N.Y. Supreme Ct. 2000). Echoing Katzman, the court in Boss held that there was a "presumptive First Amendment right of the press to televise court proceedings, and of the public to view those proceedings on television." Id. (emphasis added). Over objections by the criminal defendants, the court declared – with words equally apt to this case – that televised coverage was warranted because "the denial of access to the vast majority will accomplish nothing but more divisiveness while the broadcast of the trial will further the interests of justice, enhance public understanding of the judicial system and maintain a high level of public confidence in the judiciary." Id. at 706.[27] Consistent with the rulings in Katzman and Boss, Access Proponents respectfully request that this Court find a presumptive First Amendment right for the public to observe this important case on television.

DATED: July 31, 2003

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[27] Other New York trial courts have reached a different result; to date, there is no decision from the New York appellate court resolving this dispute.

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