GERAGOS & GERAGOS
A PROFESSIONAL CORPORATION
LAWYERS
39TH FLOOR
350 S. GRAND AVENUE
LOS ANGELES, CA 90071-3480
TELEPHONE (213) 625-3900
FACSIMILE (213) 625-1600

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

McALLISTER & McALLISTER, Inc.
1012 11th Street, Suite 100
Modesto, CA 95354
KIRK W. McALLISTER SBN 47324
Attorney for Defendant SCOTT LEE PETERSON

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COUNTY OF STANISLAUS
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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

REPLY TO MEDIA ENTITIES' OPPOSITIONS TO MOTION TO CLOSE PRELIMINARY HEARING

[Penal Code section 868]

DATE: August 14, 2003
TIME: 8:30 a.m.
PLACE: Dept 2

Defendant Scott Lee Peterson ("Mr. Peterson") hereby replies to the media filings made in opposition to Mr. Peterson's Motion to Close Preliminary Hearing.[1/]

Dated: August 8, 2003

Respectfully submitted,

GERAGOS & GERAGOS

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

[1]On July 31, 2003, a document was filed by Attorney Charity Kenyon on behalf of various print media ("Print Opposition"). On August 1, 2003, a document was filed by Attorney Kelli L. Sager on behalf various broadcast media ("Broadcast Opposition").

MEMORANDUM OF POINTS AND AUTHORITIES

PROLOGUE

[T]he potential for prejudice from the release of the [sealed] Materials is enhanced rather than diminished by the arrest of [Mr. Peterson] and the filing of the complaint against him. The relationship of petitioner to the victims only serves to stimulate the public's appetite for the case, an appetite we would expect the media to satisfy. Release of the [sealed] Materials would undoubtedly be followed by their widespread dissemination and dissection in every sort of media medium, including daily television with parades of 'experts' endlessly commenting about likely prosecution and defense strategies, opining about the strengths, weaknesses and admissibility of the various factual tidbits disclosed by the Materials, and venturing predictions about the probable outcome of the trial against petitioner. ***How a fair trial for both parties - - and particularly how an untainted jury could be found anywhere - in the aftermath of such a frenzy escapes us.***

(Emphasis added.) (Exhibit 1 - - Opinion, *Scott Lee Peterson v. Superior Court (Contra Costa Newspapers, Inc.)* California Court of Appeal for the Fifth Appellate District, case number F043260 (Superior Ct. Nos. 1045098, 1045188, 1056770) at page 7.)

* * *

We recognize that evidence described in the Materials may be introduced, and **perhaps** made available to the public, during the preliminary hearing.

(Emphasis added) (Exhibit 1 at 7.)

I.

INTRODUCTION

This is not the latest offering of some reality TV show - - *this is a death penalty case*. The media have (as noted by this Court and others) attempted to sensationalize the prosecution of Mr. Peterson. Nearly every warrant, affidavit, and other operative document in this case is under seal by order of this Court and others. In keeping these materials sealed, the courts have made numerous on-the-record findings of *actual* prejudice justifying the sealing orders. The Court of Appeal for the Fifth Appellate District, in two separate opinions, has refused the media's attempts to unseal documents in this case, and the California Supreme Court has declined to intervene.

Throughout this case, items which are presumptively open have been closed by court order. The reason for this is simple; this Court and others have wisely recognized that Mr. Peterson's (and the prosecution's) right to a fair trial by an impartial jury requires the unusual amount of closure. As quoted above, the Court of Appeal has even concluded that the seating of an untainted jury in this case would be virtually impossible if the sealed materials are publicly disclosed. Additionally, the Court of Appeal's language clearly indicates its conclusion that matters raised during the preliminary hearing may "perhaps" become public - - providing a virtual roadmap to closure of the preliminary hearing.

II.

FAILURE TO CLOSE THE PRELIMINARY HEARING WILL CONSTITUTE REVERSIBLE ERROR

Penal Code section 868 requires that "the magistrate *shall*" exclude the public from the preliminary hearing when "necessary in order to protect the defendant's right to a fair and impartial trial." (Penal Code section 868.) California Courts of Appeal have repeatedly stated that an accused's right to a closed preliminary hearing is a substantial

right within the meaning of Penal Code section 995.[2] (See *People v. Pennington,* (1st Dist. 1991) 228 Cal.App.3d 959, 964; *People v. West* (2nd Dist. 1991) 224 Cal.App.3d 1337, 1342-1343; *Dustin v. Superior Court* (5th Dist. 2002) 99 Cal.App.4th 1311, 1332, Ardaiz, J., dissenting opinion.) Hence, an improper denial of Mr. Peterson's request to close the preliminary hearing will constitute reversible error.[3]

III.

THE REQUIREMENTS OF *PRESS-ENTERPRISE II* ARE CLEARLY SATISFIED IN THIS DEATH PENALTY CASE

Mr. Peterson, the print media, and the broadcast media appear to be in agreement that *Press-Enterprise Company v. Superior Court* (1986) 478 U.S. 1 ("*Press-Enterprise II*") and its progeny state the law applicable to Mr. Peterson's request to close the hearing. *Press-Enterprise II* provides,

> [t]he preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial be prejudiced by publicity that closure would prevent and, second reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.
>
> (*Press-Enterprise II* at 14.)

The broadcast media note that the *Press-Enterprise II* factors were refined in *NBC*

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[2]Penal Code section 995 governs the setting aside of invalid informations and/or indictments.

[3]The language of the Fifth Appellate District in *Dustin* is instructive, "We cannot fathom why any prosecutor would want to inject error into a case that carries the potential of death, knowing that if there is a conviction, the error will follow the case for the rest of its appellate life. Now is the time to rectify the prosecutor's error while it is still relatively easy and economical to do so - - not wait 20 years down the appellate road." The defense respectfully submits that the Court of Appeal's reasoning as to a prosecutor is applicable to this Court as well.

Subsidiary (KNBC-TV), Inc. et al. v. Superior Court (1999) 20 Cal.4th 1178, wherein the California Supreme Court stated that before closure, the trial court must find,

> (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.
>
> (*NBC Subsidiary* at 1218-19.)

However, absent from the media filings is the significant observation that *NBC Subsidiary* was a *civil* case - - not a death penalty criminal case. As such, the two-prong *Press-Enterprise II* test is applicable herein.[4/]

A. There is a substantial probability of prejudice that will be prevented by closure of the hearing.

As set forth in Mr. Peterson's Motion, this Court has made specific findings of a "clear and present" danger of prejudice because of the unique attention given to this case by the media. The media attempt to discount this Court's findings on the grounds that the findings of prejudice set forth in the June 12, 2003 protective order/decision apply only to extra-judicial statements by attorneys, witnesses, etc., and that such findings of prejudice are inapplicable to the closure of the preliminary hearing. That characterization of these express findings is utterly without basis. As the Court stated in the protective order,

> 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

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[4]In any event, even if the Court applies the *NBC Subsidiary* four-prong test, the preliminary hearing must be closed because (i) the interest asserted is Mr. Peterson's (and the prosecution's) right to a fair and impartial right to a jury trial, and (ii) the third and fourth *NBC Subsidiary* prongs are encompassed in the second *Press-Enterprise II* prong.

> rehashed shortly before trial thereby making it extremely difficult to select a fair and impartial jury.
> (June 12, 2003 protective order/decision at 3.)
>
> * * *
>
> 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.
> (June 12, 2003 protective order/decision at 3.)

The primary premise upon which this Court appears to have based the protective order is that the order would facilitate the impaneling of a fair and impartial jury. The defense believes this is likely why the Court found that protective order must remain in place "until shortly before jury selection." Otherwise, the protective order would be rendered entirely meaningless. As a practical matter, *there is no difference between the activities prohibited by the gag order and those that will occur during the preliminary hearing and media coverage thereof will have the same prejudicial impact on Mr. Peterson and the prosecution.* The facts that (1) during the preliminary hearing witnesses will be under oath and (2) that evidence must be deemed admissible do not ameliorate the prejudice. On the contrary, any testimony given or evidence produced during the preliminary hearing, no matter how spurious, will then be cloaked with a legitimacy that may be wholly unwarranted. As this Court has stated,

> [T]here is a clear and present danger because of the modern media's capability easily to store and recall bits of information in order to relate them at anytime including during jury selection.
> (June 12, 2003 protective order/decision at 3.)

For the Court to deny Mr. Peterson's Motion would be entirely inconsistent with the Court's prior findings.[5/] Denial of Mr. Peterson's Motion would also require the Court to disregard the findings of prejudice made by the Fifth Appellate District in case number F043260 - - in particular, that Court's implicit finding that it would be virtually impossible to impanel an untainted jury after the media frenzy resulting from public disclosure of the sealed materials.

Despite the Court of Appeal's skepticism as to whether an impartial jury can ever be impaneled, the defense remains confident that an impartial jury can be found - - somewhere. However, the ability to seat such a jury, even outside of Stanislaus County will be jeopardized if the hearing is not closed. As this Court noted in the protective order/decision, "the publicity is nationwide and cannot be automatically cured by a change of venue or extensive voir dire." (Order/Decision at 3.) Consequently, there is a substantial probability that an open preliminary hearing will cause prejudice in any possible venue, not just Stanislaus County. Indeed, even if the Court denies the Rule 980 applications for television broadcasting and/or photography, the contents of the preliminary hearing will receive national, prejudicial, media attention via the print media, on the Internet, and on television. The only measure that can be taken to avoid further prejudice is closure of the preliminary hearing. Closure, coupled with the gag order will serve to ensure that Mr. Peterson (and the prosecution) receive an opportunity to have this matter determined by a fair and impartial jury.[6/]

In light of the above it is clear that there is a substantial probability of prejudice, and that closing the preliminary hearing will prevent the prejudice.

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[5]The Fifth Appellate District has already reversed Judge Beauchesne's June 12, 2003 unsealing order in part because the order was inconsistent with Judge Beauchesne's prior findings.

[6]Or, as the defense anticipates, the exculpatory evidence recently provided during discovery will result in a dismissal of this case.

B. Reasonable alternatives to closure cannot adequately protect Mr. Peterson's fair trial rights.

As noted in the Introduction, this case is unique in that the presumptions of openness that generally accompany criminal trials have been rebutted. Every judge who has not been reversed and who has ruled on matters in this case has set forth specific, on-the-record, findings of fact as to why documents must be sealed and participants must be gagged. This Court has ordered that,

> [N]o attorney connected with this case as Prosecutor or Defense Counsel, nor any other attorney working in those offices, nor their agents, staff, or experts, nor the Defendant himself, nor any judicial officer or court employee, nor any law enforcement employee of any agency in this case, nor any persons subpoenaed or have been told by the Prosecution or the Defense that they are expected to testify in this matter, shall [violate paragraphs 1 - 8, inclusive, of the Order].
>
> (Protective order as Amended July 1, 2003 at 2.)

It is difficult to imagine a more expansive protective order. This Court's protective Order prohibits every person who might conceivably participate in the Preliminary Hearing from discussing the case or releasing "any documents, exhibits, photographs, or any evidence that may be relevant to the guilt or innocence of [Mr. Peterson] in that the document, exhibit, or photograph or any other evidence tends to prove or disprove a material fact in issue in this matter."[7] (Protective order as Amended July 1, 2003 at page 2, paragraph 2.)

Since the mere introduction of evidence at the preliminary hearing would appear to place the producing party in contempt of the protective order, there is no reasonable alternative to closure that will adequately protect Mr. Peterson's rights as long as the protective order remains in effect. Additionally, the protective order would be rendered

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[7] Notably, the protective order appears to apply to *all* evidence, not just sealed evidence.

entirely meaningless if the preliminary hearing is not closed to the public.[8/]

Noting this Court's and the Court of Appeal's prior findings of actual (not just "substantially likely") prejudice, it is clear that there is no reasonable alternative to closure that will protect Mr. Peterson's rights.

IV.

THE DEFENSE CANNOT PROPERLY EVALUATE THE MEDIA'S RULE 980 APPLICATIONS UNTIL HIS MOTION IS RULED UPON AND FURTHER DISCOVERY HAS OCCURRED

Mr. Peterson believes the law and facts of this case require that the preliminary hearing be closed. As such, he believes the media's Rule 980 Applications (as to the preliminary hearing) must be denied. However, in the event Mr. Peterson's Motion is denied, the defense will need to assess whether having the print media and/or cameras in the courtroom will further or hinder his right to a fair and impartial jury trial.

Additionally, discovery in this case is still occurring on a nearly daily basis, and the content of this discovery will likely have a significant impact on Mr. Peterson's ultimate position on the Rule 980 Applications.

In light of these facts, Mr. Peterson respectfully requests leave of this Court (should the motion to close be denied) for Mr. Peterson (and the media) to file further briefing on the Rule 980 Applications.

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[8]Mr. Peterson recognizes that at first blush it would appear this logic would require closure of a preliminary hearing whenever a gag order is in place. Such a conclusion is incorrect in that it is the combination of three factors that require closure in this case: (1) the unprecedented publicity this case has received; (2) the prior findings of this Court and the Court of Appeal; and, (3) the extraordinarily broad gag order.

V.

CONCLUSION

In light of the foregoing, Mr. Peterson respectfully requests that the relief requested in the Motion and herein be granted.

Dated: August 8, 2003

Respectfully submitted,

GERAGOS & GERAGOS

By: _____

MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

EXHIBIT 1

Filed 7/30/03 Peterson v. Sup. Ct. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SCOTT LEE PETERSON,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS COUNTY,

Respondent;

CONTRA COSTA NEWSPAPERS, INC.,

Real Party in Interest.

F043260

(Super. Ct. Nos. 1045098, 1045188, 1056770)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of mandate. Roger M. Beauchesne, Judge.

Mark Geragos, for Petitioner.

No appearance for Respondent.

Charity Kenyon, for Real Party in Interest, Contra Costa Newspapers, Inc., and David P. Harris, for The People.

-ooOoo-

*Before Dibiaso, A.P.J., Vartabedian, J., and Buckley, J.

Petitioner contends that the superior court abused its discretion in failing to maintain the confidentiality of pre-arrest search warrants, affidavits and returns (hereafter Materials) filed and sealed in connection with the disappearance of Laci Peterson. and her unborn son. We agree.

FACTS

The Materials were gathered after the victims' disappearance during Christmas, 2002, and sealed by court order. When the expected delivery date passed and the victim did not seek medical assistance with the birth, the investigation was reclassified a murder.

Real party in interest, McClatchy Newspapers, Inc., filed a petition to unseal the Materials in Stanislaus County Superior Court action No. 1045098. Other members of the media, including Contra Costa Newspapers, Inc., another real party in interest in this proceeding, joined in the petition.

The superior court conducted an in camera hearing concerning the Materials and filed an order on April 10, 2003, containing detailed findings (hereafter Findings) in support of its denial of the petition "in its entirety." However, that order sealed the Materials only until July 9, 2003, and also provided that "In the event a criminal complaint is filed ... the Court's order sealing the eight (8) search warrants, affidavits, and returns in their entirety shall be vacated and each of the documents shall become a public record."

On April 18, 2003, real party in interest, Office of the District Attorney of Stanislaus County, filed a petition for writ of mandate in this court in F042848, challenging those portions of the order unsealing the materials. Opposition was filed on April 23, 2003.

Shortly after the Findings were filed, the bodies of the Laci Peterson. and her unborn son were discovered and identified. Defendant Scott Peterson. was arrested and charged with their murders in Stanislaus County Superior Court action No. 1056770.

Real parties in interest Contra Costa Newspapers, Inc., et al. (hereafter CCN) filed a petition in Stanislaus County Superior Court action no. 1045188 seeking to unseal the Materials. That action was deferred pending the writ proceeding in F042848.

On May 5, 2003, this court granted peremptory relief in action no. F042848.[1]

On May 30, 2003, in action No. 1056770, Judge Girolami ordered post-arrest warrant materials, wiretaps and an autopsy report (hereafter Materials II) sealed. Judge Girolami also made findings on June 12, 2003, in support of his granting a "gag" order.

On June 12, 2003, in action no. 1045188, the trial court granted the petition of CCN to unseal the Materials. The court considered the evidence presented at the in camera hearing held in April in action no. 1045098 and the in camera hearing in action No. 1056770. The court found that "the entire thrust of the People's evidence presented on April 9, 2003, in case No. 1045098 was directed toward preserving the integrity of the investigation before an arrest was made in order to avoid alerting any suspect," "[n]o evidence was presented at the in-camera hearing held on June 6, 2003," in action No. 1045188, and "The People have not produced any evidence since [defendant's] arrest to indicate they are investigating other suspects." The court found there were changed circumstances which warranted unsealing the Materials, which consisted of the discovery and identification of the victim's bodies, the arrest and charging of defendant with their alleged murders, and defendant's representation "by multiple and able defense counsel who can muster all available, legitimate means to assist the trial judge in ensuring their client receives a fair trial." The court also concluded that the parties opposing the unsealing of the Materials had not met their burden.

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[1] Pursuant to requests of the parties, this court takes judicial notice of its file in F042848 and the exhibits attached to the pleadings in this action.

DISCUSSION

I.

The most pertinent Findings in the April order sealing the Materials consist of the following:

> "Testimony at the hearing also established that revelation of confidential information contained in the warrants, affidavits and returns would irreparably harm the investigation. Investigation techniques, clues and focus on future avenues of inquiry by law enforcement personnel would unduly alert any potential suspect. Evidence would likely be destroyed and witnesses would be reluctant to provide information."
>
> "Any information released at this time from any of the documents in question would harm the reliability of information already gleaned and to be gleaned in the future. Furthermore, any information released to the public at this time would adversely impact future tips to law enforcement who must discern whether or not information provided to them by tipsters is based upon public information or independently verifiable." [¶] ... [¶]
>
> "The court also concludes that unsealing any of the documents in issue would likely impair any suspects' rights to a fair trial."

In its opinion in F042848, this court concluded that those Findings "... are thorough, complete and unambiguously establish that the court carefully balanced all of the factors relevant under the case law, the provisions of Penal Code section 1534, and the California Rules of Court. [Citations.] The trial court's findings that prejudice to both the prosecution and the defense would result from disclosure of the Materials stand unchallenged; McClatchy has not in its opposition or in a separate writ petition put the propriety of any of these Findings in issue. We therefore must accept them as valid and justified by the record evidence."

After this court's opinion in F042848 was filed, none of the members of the media filed petitions for rehearing or otherwise sought to challenge that decision in this court.

Neither did they challenge in the Supreme Court the Findings or this court's opinion. That opinion is now final in all courts in this state.

Neither in this present proceeding has CCN or the other members of the media questioned the Findings or this court's opinion in F042848.

It necessarily follows that the Findings and this court's opinion in F042848 remain persuasive and establish that the parties seeking to seal the Materials met their evidentiary burden in April. That evidence was considered by the trial court in connection with the June order in action No. 1045188.

It also follows that the grounds for the inconsistent findings made in June in action No. 1045188 are the changed circumstances noted in the order filed on June 12, 2003: the fact that defendant is represented by competent counsel, the discovery and identification of the victims' bodies and the arrest and prosecution of defendant. The trial court also concluded that the "entire thrust of the People's evidence [in action no. 1045098]...was directed toward preserving the integrity of the investigation before an arrest was made..."

There is no conflict or dispute as to the nature of those changed circumstances.

The trial court's consideration that the defendant was represented by competent counsel should apply in every criminal case. While counsel may have tactical control over the presentation of their defense, they do not have any control over the use to which the Materials may be utilized by the media. All of the potential prejudice to the investigation and to the rights of suspects described in the Findings are beyond the control of counsel. Thus, having competent counsel has minimal if any weight in determining whether the Materials may be disclosed.

The context for the other changed circumstances must be considered. CCN does not dispute that defendant has been accused of a unique crime. The defendant was the husband of one victim and the father of the other. Neither does CCN dispute that the defendant was in a position of trust and power over the victims and that they were in a position of vulnerability. In this context, the discovery and identification of the victims'

bodies and the arrest and prosecution of defendant could only magnify the significance and inflammatory nature of any disclosures made now. The considerations which made it appropriate to seal the Materials in April have actually been enhanced by these changed circumstances. Thus, those circumstances cannot support the June order unsealing the Materials. On the contrary, those circumstances almost compel a conclusion that the Materials should remain sealed.

This court in its opinion in F042848 found:

> "Though the portion of the trial court's order which sealed the Materials is legally sound, the portion of the order which requires disclosure of the Materials upon the filing of a criminal complaint and, in any event, by July 9, 2003, is so fundamentally inconsistent with the Findings as to constitute a manifest abuse of discretion. [Fn. omitted] A criminal investigation does not automatically cease upon the filing of a complaint or upon the passage of an arbitrary period of time. The Findings themselves implicitly recognize that the investigation would likely continue for a substantial period, certainly more than the 11 days which elapsed before the complaint was filed."

> "Moreover, the Findings expressly recognize that the disclosure of the '[i]nvestigation techniques, clues and focus on the future avenues of inquiry by law enforcement personnel would unduly alert any potential suspect. Evidence would likely be destroyed and witnesses would be reluctant to provide information.' These considerations would conceivably disappear only if the complaint was filed against the *actual* perpetrator or perpetrators, but an accurate identification of a perpetrator has yet to be made and legally will not be made by the filing of a complaint against a particular suspect. As we see it, the portion of the trial court's order requiring disclosure upon the filing of a complaint or the arrival of a specific date in the future is based upon an erroneous assumption – that an arrest or the lapse of time would remove the possibility, among others, that a 'potential suspect' would be alerted, that evidence would be destroyed, or that witnesses would be discouraged." (emphasis added)

In other words, this court concluded in F042848 that the filing of a complaint could not support an order unsealing the Materials in view of the practical realities of an investigation. As noted above, no member of the media has ever challenged in an

appellate court the findings in the opinion in F42848, including in this proceeding. The fact that a complaint has been filed virtually assumes that an arrest has been made. The fact that an arrest has been made is as arbitrary a reason for disclosure as the fact that a complaint is filed. Thus, neither an arrest nor the filing of a complaint can constitute a changed circumstance supporting disclosure.

A fundamental maxim of our justice system is the presumption of innocence during a prosecution. The proceeding against defendant is in its earliest stage. A preliminary examination has yet to be held. Even when it occurs, that hearing will determine only whether probable cause exists to proceed to trial. There will be a substantial period of time remaining before trial during which the investigation necessarily remains open.

It was unrealistic to conclude in June that there could be no other potential suspects, that all evidence had been developed and preserved, that all potential witnesses and other informants having pertinent information had come forward and that such individuals would not be compromised by the disclosure of the same confidential materials which were sealed in April for the protection of the investigation. Such conclusions amount to speculation.

Therefore, the trial court's conclusion that the People's evidence in action No. 1045098 established that disclosure would compromise the investigation prior to an arrest also applies after an arrest and filing of a complaint.

CCN does not persuasively contend otherwise. Rather, their arguments studiously ignore the unique considerations presented by the facts of this case which make any disclosures potentially inflammatory. None of the cases cited by CCN evoked a comparable level of sympathy for their victims. CCN impliedly acknowledges that few cases have generated the degree of media coverage comparable to the coverage following these criminal proceedings.

Instead, CCN focuses on the fact that petitioner has failed to provide an adequate record. However, the June order notes that no new evidence was presented at the in camera hearing held in action no. 1045188. The June order states that it was based in part on the evidence presented in action no. 1045098 which resulted in the Findings; yet the Findings are inherently inconsistent with the June order in action No. 1045188. The June order was also based on evidence presented on May 27, 2003, in action no. 1055770; yet on that evidence the trial court in action no. 1055770 reached substantially the same conclusions as those in the Findings. More importantly, this opinion is based upon the conclusion that the change of circumstances upon which the June order is expressly based actually weigh in favor of maintaining the sealed condition of the Materials.

CCN also argues that the disclosure of the Materials to defendant should also be considered a changed circumstance. However, the June order expressly states that "The change in circumstances is discussed in Sections II and III above." Sections II and III articulate in detail the changed circumstances relied upon by the trial court. None of those circumstances include the disclosure of the Materials to the defendant. Neither do sections II and III even mention that the Materials have been made available to the defendant. Because of the very detailed descriptions of the grounds for the June order, it would not be appropriate for the first time in this court to consider the disclosure to defendant to be an additional changed circumstance. The arguments of CCN should be made in the first instance to the trial court. CCN has failed to show that that remedy is inadequate.

Moreover, the Materials were ordered in April to remain sealed because "...unsealing any of the documents in issue would likely impair any suspects' rights to a fair trial." The only reasonable inference which can be drawn from the quoted conclusion is that the defendant would be acting against his own interest in preserving a fair trial if he failed to maintain the confidentiality of the Materials. It follows that

disclosure to the defendant creates virtually no risk of further dissemination.[2] Thus, the disclosure to the defendant would not constitute a changed circumstance warranting disclosure to the media.

We conclude that the trial court abused its discretion in granting the petition of CCN for disclosure of the Materials.

II.

CCN opposes issuing peremptory relief because of the limited nature of the issues raised in the petition. For the above stated reasons, it is unnecessary to discuss petitioner's arguments. The brief filed by the People in the present case raises in support of the petition the basic issue upon which this opinion is based. The trial court's error is also apparent from the terms of the April and June orders and this court's opinion in F042848. The similarity of issues is further evident from a comparison of the opinion in F042848 and this one. The parties have thus been given adequate notice of the issues discussed herein.

CCN also argues against issuing peremptory relief because there is no "Temporal urgency." An expeditious decision in this court settling these issues serves the interest of all parties and other interested persons. Any further proceedings, such as the issuance of an order to show cause, would consume substantial time during which CCN could seek further review.

Finally, CCN contends that petitioner's entitlement to relief is not "so obvious that no purpose could reasonably be served by plenary consideration of the issue..." (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) However, this opinion is not based upon any disputed facts. There have been no challenges to the Findings or the opinion in F042848.

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[2] Even if there was a danger that the defendant might further disseminate the Materials, such danger was eliminated by the "gag" order which issued in action No. 1056770.

CCN was twice given the opportunity in this proceeding to address those issues and presented no persuasive arguments. In light of the limited grounds for this decision, peremptory relief is authorized. (*Ng v. Superior Court, supra.*)

Petitioner is entitled to appropriate relief. (Code of Civ. Proc. Sec. 1085; see *Whitney's at the Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 266.) A peremptory writ of mandate is proper and should issue. (Code Civ. Proc. Sec. 1088; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180-181; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

DISPOSITION

Let a peremptory writ of mandate issue directing the trial court to vacate the order filed on June 12, 2003, in Stanislaus County Superior Court action No. 1045188 and to enter a new and different order denying the petition of CCN, et al. for disclosure of the Materials.

The order filed in this proceeding on June 27, 2003, staying the order filed on June 12, 2003, in action No. 1045188 shall remain in effect only until this opinion is final in all the courts of this state, the superior court complies with this disposition, or the Supreme Court grants a hearing herein, whichever shall first occur; thereafter said stay is dissolved.

Insofar as petitioner requests relief in addition to that granted above, the request is denied.

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:

REPLY TO MEDIA ENTITIES' OPPOSITIONS TO 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.

__X__ transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

____ 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

Kelli L. Sager, Esq.
Fax No.: 213-633-6899

Charity Kenyon, Esq.
Fax No.: 916-779-7120

Executed on August 8, 2003, at Los Angeles, California.

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

Raffi Naljian