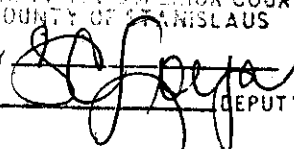


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COURT OF THE SUPERIOR COURT  
COUNTY OF STANISLAUS  
BY  DEPUTY

8 Attorneys for McClatchy Newspapers, Inc.  
9 dba *The Modesto Bee*, and for *Los Angeles Times*,  
10 Hearst Communications, Inc. dba *San Francisco Chronicle*,  
11 Contra Costa Newspapers, Inc., and San Jose Mercury News, Inc.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF STANISLAUS

The People of the State of California,  
Plaintiff,

v.

Scott Lee Peterson

Defendant.

Case No. 1056770

**News Media's Opposition to Motion  
to Seal Evidence Admitted in  
Preliminary Hearing; Support for  
Reconsideration of Protective Order;  
Request for Reconsideration of  
Order Sealing Search and Arrest  
Warrant Affidavits and Autopsy  
Report**

Date: December 3, 2003  
Time: 8:30 a.m.  
Dept: 2  
Hon. Al Girolami

**I. INTRODUCTION**

*The Modesto Bee*, *San Francisco Chronicle*, *Los Angeles Times*, *San Jose Mercury News*, and *Contra Costa Times* submit this memorandum of points and authorities in opposition to the parties' request to seal certain evidence admitted in the preliminary hearing and in support of the suggestion that the protective order should be reconsidered. In addition the news media request that the court reconsider and vacate the orders that sealed the arrest

1 and search warrant affidavits and autopsy report pending the now-completed preliminary  
2 hearing.

3 This court's orders delaying access to sealed records and framing a protective "gag"  
4 order anticipated that, at the time of the preliminary hearing, the public would have access to  
5 this presumptively public information. The preliminary hearing has been completed and,  
6 properly, was conducted in public. The parties have now requested that, notwithstanding their  
7 admission into evidence, certain items of evidence should remain sealed. The court has  
8 suggested that its protective order should be reconsidered. The news media request that  
9 affidavits in support of the arrest and search warrants, consistent with Penal Code section 1534  
10 and the prior orders of this court, as well as the autopsy report, should now be released to the  
11 public. It is unclear whether the court will order a change of venue. It is clear that this and  
12 other protections exist to protect the defendant's Sixth Amendment rights as well as the  
13 public's common law and First Amendment rights of access to court proceedings and records,  
14 including evidence.

15 This memorandum of points and authorities addresses each of these issues.

16  
17 **II. ITEMS ADMITTED INTO EVIDENCE ARE PRESUMPTIVELY OPEN TO  
18 THE PUBLIC AND SHOULD NOT BE SEALED**

19 The California Rules of Court, rules 243.1 and 243.2 recognize that the public has  
20 presumed constitutional and common law rights of access to records in criminal court.  
21 "Records" include evidence: "all or any portion of any document, paper, exhibit, transcript, or  
22 other thing filed or lodged with the court." Rule 243.1 (b) (1). The rules governing sealing of  
23 presumptively open records recognize that openness in criminal trials "enhances both the basic  
24 fairness of the criminal trial and the appearance of fairness so essential to public confidence in  
25 the system." *See generally, Press-Enterprise v. Superior Court (Press Enterprise II)*, 478 U.S.  
26 1, 9 (1986); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999)  
27 (reviewing history of constitutional and common law right of access to both criminal and civil  
28 proceedings and records).

1 Under *Press Enterprise II*, such presumptively open records cannot be sealed unless:

2 specific, on the record findings are made demonstrating that "closure is essential to  
3 preserve higher values and is narrowly tailored to serve that interest." [citation omitted].  
4 If the interest asserted is the right of the accused to a fair trial, the preliminary hearing  
5 shall be closed only if specific findings are made demonstrating that, first, there is a  
6 substantial probability that the defendant's right to a fair trial will be prejudiced by  
7 publicity that closure would prevent and, second, reasonable alternatives to closure  
8 cannot adequately protect the defendant's fair trial rights.

9 478 U.S. at 13-14. The burden is on the party seeking closure to support the required findings  
10 with evidence. *Id.*

11 California Rules of Court, rule 243.1 now contains the *Press Enterprise II* standards  
12 for sealing records. The court may order that a record be filed under seal only if it expressly  
13 finds that:

- 14 (1) There exists an overriding interest that overcomes the right of public access to the  
15 record;
- 16 (2) The overriding interest supports sealing the record;
- 17 (3) A substantial probability exists that the overriding interest will be prejudiced if the  
18 record is not sealed;
- 19 (4) The proposed sealing is narrowly tailored; and
- 20 (5) No less restrictive means exist to achieve the overriding interest.

21 *See generally, KNSD Channels 7/39 v. Superior Court*, 63 Cal. App. 4th 1200 (1998)(public,  
22 through the news media, has a right to obtain copies of evidence introduced and played for the  
23 jury in a criminal trial).

24 Here, the court records disclose *no* showing to support the requested sealing of  
25 evidence specified in this court's order of November 18, 2003. The evidence was admitted in  
26 proceedings open to the public and provides an essential framework for understanding this  
27 court's order that Scott Peterson shall stand trial for multiple felonies. Once the evidence is  
28 publicly admitted, has been the subject of testimony and cross-examination and forms a basis

1 for the court's orders, the parties cannot overcome the common law and constitutional  
2 presumption that the evidence will be made available for public inspection.

3 Certainly no motion to seal was noticed or docketed and the news media has had no  
4 meaningful opportunity to oppose the parties' unsupported request.

5 **II. THE COURT SHOULD RECONSIDER ITS PROTECTIVE "GAG"**  
6 **ORDER**

7 In *Bridges v. California*, 314 U.S. 252, 265-268 (1941), the United States Supreme  
8 Court recognized that the First Amendment protects discussion about pending cases (rejecting  
9 the British system of proscription). The Court opined "the other evil feared, disorderly and  
10 unfair administration of justice, is more plausibly associated with restricting publications  
11 which touch upon pending litigation." *Id.* at 271.

12 Prior to the preliminary hearing the news media opposed imposition of a protective  
13 "gag" order and submitted memoranda of points and authorities that reviewed the pertinent  
14 law. The news media showed that gag orders broadly restricting public comment on pending  
15 cases infringe on First Amendment rights not only of counsel and the parties but also of the  
16 news media. Because a gag order enjoins individuals from uttering words not yet spoken, it is  
17 a classic "prior restraint" on speech. *Younger v. Smith*, 30 Cal. App. 3d 138, 159 (1973);  
18 *Nebraska Press Association v. Stuart*, 427 U.S. 539, 556 (1976). As a prior restraint, a gag  
19 order bears a "heavy presumption against . . . constitutional validity." *Nebraska Press*  
20 *Association*, 427 U.S. at 545.

21 The media asserted that any gag order broader than the corresponding Rule of  
22 Professional Conduct governing lawyer speech, rule 5-120 would inhibit news gathering and is  
23 a prior restraint on the speech of the lawyers and parties. Rule 5-120 permits speech unless it  
24 will have a "substantial likelihood of materially prejudicing an adjudicative proceeding" (5-  
25 120 (A)) and even then allows lawyers to state various specified facts (5-120 (B) (1)-(7)), as  
26 well as to make statements necessary to protect a client from undue prejudicial effect of recent  
27 publicity (5-120 (C)). The media suggested that the court should remind counsel of this rule of  
28 professional conduct instead of entering a protective order.

1           The court has now had several months experience with its protective order and can  
2 assess whether it should be continued or modified, now that the preliminary hearing has  
3 concluded and the defendant has been held over for trial. The court's assessment should  
4 consider the four tests necessary to support imposition of the order in the first place:

- 5           1.     The order either must be necessary to prevent a "clear and present danger of a  
6               serious and imminent threat to the administration of justice" or there must be at  
7               least a "substantial likelihood" that prejudicial publicity will prevent a fair trial;
- 8           2.     There must not be less restrictive alternatives available to the court;
- 9           3.     The order cannot be entered unless it is likely to be effective; and
- 10          4.     The order must be narrowly drawn to avoid unnecessary infringement of First  
11               Amendment rights.

12           *See Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, 1241-42 (2000); *see generally, Nebraska Press*  
13 *Association v. Stuart*, 427 U.S. at 562-570 (invalidating order restraining media from reporting  
14 news lawfully gathered). *Hurvitz* held that the burden is on the party seeking the gag order to  
15 justify it and the trial court must make express findings showing it applied this constitutional  
16 standard and considered and weighed the competing interests. 84 Cal. App. 4th at 1243.  
17 Finally, the court held that constitutional protection against prior restraint applies with equal  
18 force to speech that violates a privilege or subjects the speaker to administrative or  
19 professional sanctions. *Id.* at 1244.

20           Continuing the gag order would not prevent publication of information about the case  
21 pending and during trial, but could result in the perpetuation of an error or misunderstanding  
22 of information already reported to the public.

23           Referring specifically to the constitutional test set forth above:

- 24           1.     There is no basis for concluding that there is a substantial threat of imminent  
25               harm to defendant's fair trial rights. Rule 5-120 exists as a rule of professional  
26               conduct applicable to all counsel in the matter;
- 27           2.     Less restrictive alternatives exists: the court could remind and admonish counsel  
28               to adhere to the rules of professional conduct. During voir dire the court will

1 have the opportunity to identify and excuse any jurors who have developed an  
2 unalterable bias against either party and to admonish all jurors to avoid media  
3 coverage of this newsworthy trial. If necessary, venue can be changed to another  
4 more metropolitan area;

- 5 3. Continuing the order is not likely to have the effect sought by the parties and the  
6 court. All news media have available myriad details that they can report about  
7 the case. Instead, continuing the gag order may impair the ability of the news  
8 media to report accurately.

9 For these reasons, the court should decline to continue the gag order and should instead direct  
10 counsel to adhere to rule 5-120. Through *voir dire* "cumbersome as it is in some  
11 circumstances, a court can identify those jurors whose prior knowledge of the case would  
12 disable them from rendering an impartial verdict." *Press-Enterprise II*, 478 U.S. at 15.

13  
14 **III. THE COURT SHOULD RECONSIDER AND VACATE ITS ORDERS**  
15 **SEALING THE PRESUMPTIVELY OPEN SEARCH AND ARREST**  
16 **WARRANT AFFIDAVITS AS WELL AS THE AUTOPSY REPORT**

17 Beginning in late January, *The Modesto Bee* and others sought disclosure of certain  
18 arrest and search warrants addressed to the person and property of Scott Peterson in connection  
19 with an ongoing investigation of the disappearance of his wife, Laci Peterson. *The Bee* filed a  
20 petition for access to those documents, relying on Penal Code section 1534 and California  
21 Rules of Court, rules 243.1 and 243.2 and *Press-Enterprise II*.

22 After a series of hearings and after review by the Fifth Appellate District (sought not  
23 by the media but by the prosecution and the defense), this court concluded that the documents  
24 should remain sealed pending the preliminary hearing, notwithstanding the requirement of  
25 Penal Code section 1534 that these court records be made public 10 days after execution of the  
26 warrants.

27 Now that the prosecution has publicly made the case for trial of Scott Peterson, there is  
28 no basis for continuing to keep from the public the affidavits making the case for the multiple  
searches and eventual arrest of Mr. Peterson. Access had been delayed in this case to ensure

1 that witnesses and evidence were vetted in court and not outside the courtroom pending and  
2 during the preliminary hearing. The purposes of sealing articulated by the court have been  
3 accomplished. The court should reconsider and vacate its sealing orders.

4 In addition, the court sealed the autopsy report pending testimony based on that report  
5 in the preliminary hearing. The Coroner, Dr. Peterson, testified at length based on the autopsy  
6 report. The court should reconsider and vacate its order sealing the report, now that this  
7 testimony has been received in open court.

8 Neither the prosecution nor the defense could make the showings and the court could  
9 not make the findings required by Rules of Court rules 243.1 and 243.2 to continue the sealing  
10 of these court records.

11 With respect specifically to the arrest and search warrant affidavits, no recognized  
12 exception to Penal Code section 1534 has been or could be shown at this time. If the  
13 prosecution were to show that confidential informants were not identified in the course of the  
14 preliminary hearing (and are unknown to the defendant), the court could protect against  
15 disclosure of their identities by redacting their names. The other recognized exception, for  
16 information protected by the official information privilege (Evidence Code sections 1040 and  
17 1042), would not appear to apply, now that the defendant has had full opportunity to review  
18 these materials and the prosecution has presented its evidence to support Scott Peterson's trial  
19 on multiple felony counts.

20 Public access to these court records is a part of the public supervision of executive and  
21 judicial branches that serves as a check on the power of the government. It can no longer be  
22 justified (and no such attempt has been made) under the pertinent rules of court, rules 243.1  
23 and 243.2. Penal Code section 1534 requires that the public have the opportunity to review the  
24 bases for the searches and arrest without further delay.

## 25 V. CONCLUSION

26 For all of these reasons and based on the cited authorities, the court should (1) deny the  
27 request to seal evidence admitted at the preliminary hearing, (2) reconsider and vacate its  
28

1 protective "gag" order and (3) reconsider and vacate its orders sealing the arrest and search  
2 warrant affidavits as well as the autopsy report.

3 Respectfully submitted,

4 DATED: November 26, 2003

5 RIEGELS CAMPOS & KENYON LLP

6 BY: Charity Kenyon  
7 CHARITY KENYON  
8 Attorneys for *The Modesto Bee, San*  
9 *Francisco Chronicle, Los Angeles Times,*  
10 *Contra Costa Times, and San Jose Mercury*  
11 *News*

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**PROOF OF SERVICE**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Riegels, Campos & Kenyon, LLP, 2500 Venture Oaks Way, Suite 220, Sacramento, CA 95833. On November 26, 2003, I served the following document(s) by the method indicated below:

**News Media's Opposition to Motion to Seal Evidence Admitted in Preliminary Hearing; Support for Reconsideration of Protective Order; and Request for Reconsideration of Order Sealing Search and Arrest Warrant Affidavits**

- by transmitting via facsimile on this date from fax number (916) 779-7120 the document(s) listed above to the fax number(s) set forth below. The transmission was completed before 5:00 p.m. and was reported complete and without error. The transmission report, which is attached to this proof of service, was properly issued by the transmitting fax machine. Service by fax was made by agreement of the parties, confirmed in writing. The transmitting fax machine complies with Cal.R.Ct 2003(3).
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 26, 2003, at Sacramento, California.

  
\_\_\_\_\_  
JILL KEEHNEN