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FILED

2014 JUN 16 P 1:27

David H. Yarnasov, Clerk of the Superior Court
County of Santa Clara, California

By: 
 Mark McCoy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 FOR THE COUNTY OF SANTA CLARA

10 PEOPLE OF THE STATE OF CALIFORNIA,
 11 Plaintiff,
 12 v.
 13 ANTOLIN GARCIA TORRES
 14 Defendant.

Case No. 213515

**EX PARTE APPLICATION TO VACATE
 ORDER PROHIBITING PUBLICATION
 OR DISSEMINATION OF
 DECLARATION AND EXHIBITS**

Dept: 28
 Hon. Griffin Bonini

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1 **I. EX PARTE APPLICATION FOR ORDER VACATING JUNE 13, 2014 ORDER**
2 **BARRING PUBLICATION OR DISSEMINATION OF BRONSON**
3 **DECLARATION AND EXHIBITS**

4 Pursuant to Rule 3.1200, *et seq.* of the California Rules of Court and Local Rule 1.3, the
5 San Jose Mercury News (“Mercury News”) makes this *ex parte* application for an order vacating
6 the Court’s June 13, 2014 order barring the dissemination or publication of the declaration of
7 Edward J. Bronson and the exhibits thereto (“the Order”). Relief is sought on an expedited basis
8 because the Order, which was obtained without providing notice or an opportunity to be heard to
9 the San Jose Mercury News or its counsel (the “Mercury News”) constitutes an unconstitutional
10 prior restraint.

11 **II. INTRODUCTION AND BACKGROUND**

12 The Mercury News has filed a motion to unseal the grand jury transcript in this matter,
13 which is currently set for hearing on June 27, 2014. The Mercury News filed its motion to unseal
14 the grand jury transcript on April 1, 2014. The hearing was originally set for April 16, 2014.
15 However, the Deputy District Attorney handling the matter, David Boyd, was in trial at that time.
16 In order to accommodate him, the Mercury News agreed to continue the motion hearing until May
17 23, 2014. Counsel for Defendant Antolin Garcia Torres, The Law Offices of the Alternate
18 Defender, filed an opposition to the motion on May 7, 2014. Then Defendant asserted that the
19 declaration of their expert would not be prepared in time for May 23, 2014 hearing. Once again
20 attempting to accommodate the parties, the Mercury News stipulated to continue the hearing a full
21 month, to June 27, 2014. The Mercury News requested and Defendant agreed to provide the
22 declaration of its putative expert on June 13, 2014.

23 Without notice to the Mercury News or its counsel, counsel for Defendant applied for and
24 obtained an order prohibiting the Mercury News or its counsel from “distribut[ing] or
25 publiciz[ing] the information contained in Dr. Bronson’s declaration and supporting exhibits until
26 the Court has ruled on the Motion to Unseal the Grant Jury Transcripts and the Application to file
27 the declaration and supporting exhibits under seal and lifted this Order.” This Order was sent to
28 counsel for the Mercury News along with copies of the declaration and exhibits on the afternoon
of Friday, June 13, 2014.

1 Counsel for the Mercury News immediately objected to the Order. As explained in
2 correspondence to Defendant's counsel, the Order constitutes a presumptively unconstitutional
3 prior restraint. Therefore, the Mercury News was entitled to have notice of and an opportunity to
4 oppose the issuance of the Order. (Declaration of James Chadwick in Support of Ex Parte
5 Application, hereafter "Chadwick Decl.," ¶ 3.)

6 Moreover, the Order was not necessary. Had defense counsel provided notice, the
7 Mercury News would have explained that it did not want to receive any information that could not
8 be made public, and that it should be provided only with redacted versions of the documents
9 (reserving its right to object to the redactions and the sealing of the unredacted declaration and
10 exhibits). (Chadwick Decl., ¶ 4.)

11 The Mercury News itself has not been provided with copies of the unredacted versions of
12 the declaration and exhibits, and counsel for the Mercury News have refrained from reviewing the
13 unredacted versions. (Chadwick Decl., ¶ 5.) Counsel for the Mercury News has requested that
14 Defendant provide redacted versions of the documents, and has offered to destroy the unredacted
15 versions upon receipt of the redacted versions. (*Id.*) Defendant's counsel has rejected that
16 request. (*Id.*)

17 The Order constitutes a prior restraint. Prior restraints are presumptively unconstitutional.
18 Moreover, a prior restraint issued against the press without notice or an opportunity to be heard is
19 invalid. The Mercury News requests that the Order be vacated. In its place, the Court should
20 issue an order requiring Defendant to provide redacted versions of the declaration and the
21 accompanying exhibits, to be provided to the Mercury News no later than Tuesday, June 17, 2014,
22 in order to permit the Mercury News to prepare its reply in support of the motion to unseal and to
23 prepare for the hearing on that motion. The order to Defendant should further provide that the
24 redactions must be limited to those portions of the grand jury testimony included in the declaration
25 or exhibits the sealing of which is essential to the preservation of the interests he claims would be
26 prejudiced by disclosure. Counsel for the Mercury News is prepared to destroy, and to certify
27 destruction of, the unredacted copies.

28

1 Because the ongoing constraint on the Mercury News' First Amendment rights constitutes
2 irreparable harm, the Mercury News requests that prior Order be vacated and the new order sought
3 by this application be entered without a hearing. Defendant has been notified of the Mercury
4 News intent to seek this relief. Although it cannot imagine any legitimate reason for Defendant to
5 oppose this application, the Mercury News requests that the Court direct Defendant to submit any
6 opposition no later than the close of business on Monday, June 16, 2014. Thereafter, the Court
7 should rule on this application without a hearing, unless a hearing is requested by Defendant and
8 the Court determines that due to the nature of this case the law compels a hearing.

9 **III. THE ORDER IS AN UNCONSTITUTIONAL AND UNNECESSARY PRIOR**
10 **RESTRAINT**

11 The Order imposes a constraint on the publication or dissemination of information by a
12 media entity and its counsel, prior to any such publication and without a determination that such a
13 constraint is justified under the law. It therefore constitutes a prior restraint. (*Balboa Island*
14 *Village Inn v. Lemen* (2004) 121 Cal.App.4th 583, 596 ["A prior restraint is an administrative or
15 judicial order that forbids certain speech in advance of it being made"]; see also *Alexander v.*
16 *United States* (1993) 509 U.S. 544, 550.)

17 Prior restraints are "one of the most extraordinary remedies known to our jurisprudence."
18 (*Nebraska Press Association v. Stuart* (1976) 427 U.S. 539, 562.) An order restraining publication
19 bears a "heavy presumption against... constitutional validity." (*Id.*, at p. 545, quoting *New York*
20 *Times Co. v. United States* (1971) 403 U.S. 713, 714.). "Prior restraints are disfavored and
21 presumptively invalid. Circumstances more urgent than these have been adjudged insufficient to
22 justify the imposition of a prior restraint." (*Gilbert v. National Enquirer* (1996) 43 Cal.App.4th
23 1135, 1144.)¹ Prior restraints are so disfavored and so rare that, as one California Court of Appeal
24 observed, we are "unaware of any case, in either federal or state court, that has upheld a prior

25 ¹ "As noted by the California Supreme Court, even the publication of the purloined
26 Pentagon Papers concerning matters of national security could not be restrained: 'A recent case
27 declined to restrain publication of the so-called 'Pentagon Papers' despite the urging of the
28 government that the publication would result in a serious breach of national security'"
(*Gilbert*, supra, 43 Cal. App. 4th at 1144 [quoting *Wilson v. Superior Court* (1975) 13 Cal. 3d 652,
657-58; see also *New York Times Co. v. United States*, supra, 403 U.S. 713 .)

1 restraint under the *Nebraska Press* criteria.” (*South Coast Newspapers v. Superior Court* (2000)
2 85 Cal.App.4th 866, 870.)

3 Furthermore, the issuance of a prior restraint without providing notice or an opportunity to
4 be heard by those subjected to a constraint is impermissible. (*United States v. Quattrone* (2nd Cir.
5 2005) 402 F.3d 304, 312 [“the lack of notice or opportunity to be heard normally renders a prior
6 restraint invalid”].) As the United States Supreme Court has held, “[t]here is a place in our
7 jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short
8 duration; *but there is no place within the area of basic freedoms guaranteed by the First*
9 *Amendment for such orders where no showing is made that it is impossible to serve or to notify*
10 *the opposing parties and to give them an opportunity to participate.”* (*Carroll v. President &*
11 *Comm'rs of Princess Anne* (1968) 393 U.S. 175, 180, emphasis added.) Thus, in addition to
12 violating the First Amendment rights of the Mercury News, the prior restraint also violates “the
13 due process rights of the third-party news organizations,” (*Procter & Gamble v. Bankers Trust*
14 (6th Cir. 1996) 78 F.3d 219, 226), because they are not parties and “did not receive notice or a
15 hearing prior the court’s enjoining it from publishing.” (*Id.* at p. 228.)

16 The foregoing authority makes it unmistakably clear that the Order is an unconstitutional
17 prior restraint that is beyond the power of the Court to properly issue or enforce. No further
18 analysis is required. Nonetheless, to the extent the standards for the issuance of an order imposing
19 such a prior restraint are considered, they demonstrate that the Order is unconstitutional. The
20 proponent of a prior restraint must show, and the issuing court must specifically find:

- 21 (A) That the prior restraint meets the applicable substantive standard
- 22 -- ***clear and present danger*** for all restraints except those on
- 23 attorneys' speech about their cases, for which a substantial
- 24 likelihood of material prejudice must be shown;
- 25 (B) That there are ***no alternatives*** short of prior restraints available
- 26 to protect defendant's right to a fair trial;
- 27 (C) That the order is ***effective and workable***; and
- 28 (D) That the prior restraint is ***narrowly tailored and precise***.

26 (See *Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at pp. 562-68, emphasis added.) To meet the
27 “clear and present danger” test requires:

1 [T]hat the *substantive evil or danger* must be *extremely serious* and
2 the degree of imminence extremely high. First Amendment rights
3 may not be sacrificed merely because some evil may result. There
4 must be *no doubt that the utterances in question are a serious and*
5 *imminent threat to the administration of justice*; the danger must
6 not be remote or even probable; it must *immediately imperil*.

7 (*Sun Co. v. Superior Court* (1973) 29 Cal.App.3d 815, 826 [emphasis added]; accord *Bridges v.*
8 *California* (1941) 314 U.S. 252, 263; *Wilson, supra*, 13 Cal. 3d at p. 660.)

9 The extraordinary circumstances required to render a prior restraint constitutionally valid
10 are not present here. There is no clear and present danger of any imminent and serious harm.
11 Even if the Mercury News published the contents of the unredacted declaration and affidavits,
12 which it has no intention of doing until this issue is resolved, the only justification that has ever
13 been offered for the sealing of the grand jury transcript is the possibility of an adverse effect on
14 Defendant's ability to obtain a fair trial. It cannot be presumed that pretrial publicity deprives a
15 defendant of a fair trial; pretrial publicity, even if pervasive and concentrated, does not inevitably
16 lead to an unfair trial in criminal cases. (*Nebraska Press Ass'n v. Stuart, supra*, 427 U.S. at 554.
17 See also *Murphy v. Florida* (1975) 421 U.S. 794, 799 [The decided cases "cannot be made to
18 stand for the proposition that juror exposure to . . . news accounts of the crime with which [a
19 defendant] is charged alone presumptively deprives the defendant of due process"]; *United States*
20 *v. Myers* (2d Cir. 1980) 635 F.2d 945, 953 [intensive publicity surrounding the events of
21 Watergate, "very likely the most widely reported crime of the past decade," did not prevent the
22 selection of impartial jurors]).² Conclusory or speculative assertions that pretrial publicity will
23 have a detrimental effect on a defendant's right to a fair trial are insufficient to justify sealing.
24 "The First Amendment right of access cannot be overcome by the conclusory assertion that
25 publicity might deprive the defendant of [the right to a fair trial]." (*Press-Enterprise Co. v.*
26 *Superior Court* (1986) 478 U.S. 1, 15; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999)

27 ² See also *People v. Harris* (1981) 28 Cal.3d 935, 949 [the "controlling cases 'cannot be made to
28 stand for the proposition that juror exposure to information about a state defendant's prior
convictions or to news accounts of the crime with which he is charged alone presumptively
deprives the defendant of due process'"]; *People v. Jennings* (1991) 53 Cal.3d 334, 362 ["The fact
that a case receives enormous publicity does not by itself establish error nor does conceded
'massive' publicity automatically translate into prejudice"].

1 20 Cal.4th 1178, 1225 [same].) Even where jurors have been exposed to information about the
2 case and have formed some impression or opinion as to the merits, prejudice may not be
3 presumed. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722-23 [jurors are generally able to lay aside their
4 impressions or opinions and render a verdict based solely upon the evidence at trial]; *People v.*
5 *Cooper* (1991) 53 Cal.3d 771, 807 ["It is sufficient if the juror can lay aside his impression or
6 opinion and render a verdict based on the evidence presented in court."].)

7 Furthermore, there are alternatives to restrictions on publication that are more than
8 adequate to protect the Defendants' right to a fair trial. As the courts have recognized in cases
9 addressing requests for sealing or denial of access to information regarding court proceedings,
10 there are numerous alternatives to imposing an unconstitutional prior restraint, including careful
11 voir dire (with individual and sequestered voir dire, if necessary), peremptory challenges
12 (increasing the number of peremptory challenges if appropriate), assembling a larger than normal
13 jury pool, instructions and admonitions to the jury, postponement of trial, and change of venue.
14 (*Nebraska Press Assn. v. Stuart, supra*, 427 U.S. at 563-564; *NBC Subsidiary, supra*, 20 Cal.4th at
15 pp. 1223-1225; *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 625; *United States v. W.R.*
16 *Grace* (D. Mont. 2006) 408 F.Supp.2d 998, 1020.) Alternatives to sealing are presumptively
17 adequate to protect Defendants' right to a fair trial, and that presumption can be overcome only in
18 exceptional circumstances. (*NBC Subsidiary, supra*, 20 Cal.4th at p. 1224.) Thus, there are
19 alternatives to imposing a prior restraint that are more than adequate to protect any potential threat
20 to the Defendants' ability to obtain a fair trial. For this reason, the imposition of a prior restraint
21 on publication cannot be justified.

22 Because none of the requirements for a prior restraint has been or can be met, the
23 imposition of the Order constitutes irreparable harm and the Order should be immediately vacated.
24 This is true even though the order is of limited duration. "The loss of First Amendment freedoms,
25 even for minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod v. Burns*
26 (1976) 427 U.S. 347, 373. See also *Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d
27 1528, 1539; *Associated Press v. United States Dist. Court* (9th Cir. 1983) 705 F.2d 1143, 1147.)
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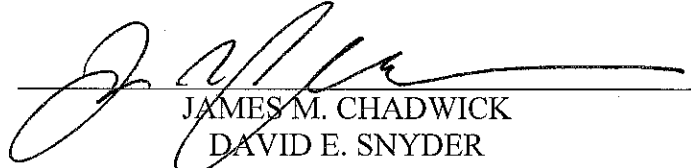
1 **IV. CONCLUSION**

2 The Court's June 13, 2014 Order is an unconstitutional prior restraint and accordingly
3 should be vacated.

4 Dated: June 16, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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6 By



JAMES M. CHADWICK

DAVID E. SNYDER

Attorneys for SAN JOSE MERCURY NEWS

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1 the unredacted versions upon receipt of the redacted versions. Defendant's counsel has rejected
2 that request, agreeing only to comply with whatever the Court orders.

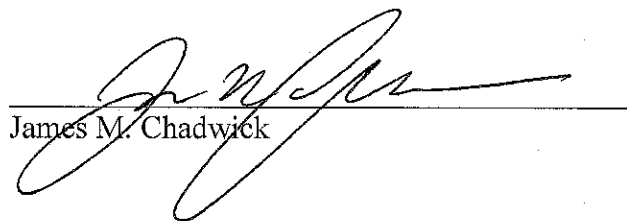
3 I declare under penalty of perjury under the laws of the state of California that the above
4 statements are true and correct to the best of my knowledge and belief.

5 Executed June 16, 2014, at Palo Alto, California.

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James M. Chadwick

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