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10  
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 COUNTY OF SANTA CLARA  
13

14 PEOPLE OF THE STATE OF CALIFORNIA,

15 Plaintiff,

16 v.

17 ANTOLIN GARCIA TORRES,

18 Defendant.

Case No. C1233134 / 213515

**OBJECTIONS TO AFFIDAVIT OF  
EDWARD J. BRONSON OFFERED IN  
OPPOSITION TO MEDIA MOTION TO  
INTERVENE AND UNSEAL GRAND  
JURY TRANSCRIPT**

Date: June 27, 2014  
Time: 9:00 a.m.  
Dept: 28  
Judge: Hon. Griffin Bonini

FILED

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David H. Yarnes, Clerk of the Superior Court  
County of Santa Clara, California  
By: *[Signature]*  
Deputy Clerk  
**P. ABOGADO**

1 **I. THE TESTIMONY OF EDWARD J. BRONSON SHOULD BE EXCLUDED**  
2 **BECAUSE IT IS OPINION ON A QUESTION OF LAW**

3 Defendant's purported expert Edward J. Bronson opines on the ultimate legal issue for  
4 determination on the motion to unseal. He concludes that "there is a reasonable likelihood that  
5 unsealing the Grand Jury transcript would unfairly prejudice the fair trial rights of the defendant,"  
6 and that "the Court should not unseal [the transcript] until the conclusion of trial." (Bronson Aff.  
7 at ¶ 115.) This legal conclusion is improper and both it and the testimony supporting it should be  
8 excluded, as Courts have recognized in past cases involving testimony from Prof. Bronson on the  
9 same issue. (See *People v. Harris* (2013) 57 Cal.4th 804, 829-830 [affirming denial of motion to  
10 transfer venue where trial court sustained objection to Prof. Bronson's statement that "there is a  
11 reasonable likelihood that the defendant could not have a jury panel that was unaffected by the  
12 pretrial publicity and could afford him the presumption of innocence to which he's entitled"].)

13 The analysis leading Bronson to his legal conclusion consists of little more than identifying  
14 articles published by the Mercury News, reading them, then logging the characteristics of those  
15 articles—page of publication, length, whether the story was accompanied by photographs.  
16 (Bronson Aff. Ex. 3.) In addition, Bronson applies something he refers to as "the Hierarchy of  
17 Prejudice," which Bronson states contains "four elements," including "publicity that is  
18 (1) inflammatory, (2) publicity that is inadmissible at trial, (3) publicity that is in accurate, and  
19 (4) publicity that generates a presumption of guilt." (Bronson Aff. at ¶ 30.)

20 Bronson provides no explanation of the origin of his "Hierarchy of Prejudice" or why it  
21 provides a reliable or accurate means of analysis of the question of juror prejudgment. Instead, he  
22 applies his four factors to some of the newspaper articles about the case, then draws broad  
23 conclusions based on excerpts of articles. He does not explain why or how the articles or excerpts  
24 were selected, or why he considered only articles published by the Mercury News, other than to  
25 state that "there was not sufficient time to do so." Bronson then purports to apply the factors  
26 articulated by California courts for determining whether a transfer of venue is warranted.  
27 (Bronson Aff. at ¶¶ 30-91.) The bulk of the Bronson Affidavit, as well as its ultimate conclusion,  
28 is legal analysis. As such, it is inadmissible and should thus be excluded and disregarded.

1 Expert opinion on an issue of law is prohibited. (*Summers v. A. L. Gilbert Co.* (1999) 69  
2 Cal.App.4th 1155, 1178-1180.) “The decision whether the court record was properly sealed is a  
3 question of law . . . .” (*Copley Press, Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 375.)  
4 Prof. Bronson’s testimony should be excluded, and should not be relied upon by this Court in  
5 deciding the motion to unseal.

6 **II. THE BRONSON TESTIMONY IS INADMISSIBLE BECAUSE IT DOES NOT**  
7 **ASSIST THE TRIER OF FACT**

8 To be a proper subject for expert opinion it is not enough that an inference be “beyond  
9 common experience;” the expert opinion must also “assist” the trier of fact. (Evid. Code § 801.)  
10 An expert opinion does not “assist” the trier of fact, and is thus inadmissible, when it consists of  
11 inferences or conclusions that: (1) can be drawn as intelligently and easily by laypersons  
12 (*Caloroso v. Hathaway* (2004) 122 Cal.App.4th 922, 928; *People v. Chapple* (2006) 138  
13 Cal.App.4th 540, 546-547); or (2) are irrelevant or inadmissible under other rules of law  
14 (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084-1085.)

15 The “jury need not be totally ignorant of the subject matter of the opinion to justify its  
16 admission.” (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1072.) However, where the expert  
17 witness is not “so sufficiently better informed than the juror that the [expert’s] opinion” that he  
18 does not “assist the deliberation of the [trier of fact],” the expert’s testimony is inadmissible.  
19 (*People v. Clay* (1984) 153 Cal.App.3d 433, 459.) That is, the inference must be one which an  
20 expert of a certain type is himself entitled to make as a matter of logic, expertise and law. Where  
21 an expert in a given field is not better equipped than a lay person to make a particular inference, or  
22 if neither a lay person nor an expert is allowed to make that inference, then the expert’s testimony  
23 does not “assist” the trier of fact within the meaning of Evidence Code section 801 and must be  
24 excluded. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.) For example, an expert witness may  
25 not opine on whether certain crimes have been committed because while “there are some crimes a  
26 jury could not determine had occurred without the assistance of expert opinion as to an element of  
27 the crime, robbery and extortion . . . are not among them.” (*Id.*, at p. 47.)

28

1 Here, Bronson's opinion does not provide the Court with any insights it cannot with equal  
2 expertise and justification reach on its own. Bronson's testimony consists, in essence of two  
3 predictions. First, Bronson speculates that unsealing the grand jury transcripts will cause an  
4 increase in news coverage.<sup>5</sup> Second, Bronson speculates that that increase in news coverage will  
5 so prejudice the community that Defendant will be unable to receive a fair trial. Neither of these  
6 suppositions is supported by any empirical data or evidence, such as a survey. Bronson's  
7 experience with the impact of pretrial publicity in criminal cases is not superior to the Court's, nor  
8 has he provided the Court with any evidence of a reliable, systematic, and proven methodology for  
9 reaching supportable conclusions. Indeed, the California courts and others have routinely rejected  
10 Prof. Bronson's conclusions in denying motions for change of venue, and have consistently been  
11 affirmed in doing so, even when he has provided addition support for his conclusions, such as  
12 survey evidence. (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 45-46 [affirming denial of  
13 motion to change venue where Bronson offered testimony and survey evidence]; *People v. Harris*  
14 (2013) 57 Cal.4th 804, 825-826 (*Harris*) [same]; *People v. Davis*, 46 Cal.4th 539, 577-78 [same];  
15 *People v. Famalaro* (2011) 52 Cal.4th 1, 24 [same]; *Mikelonis v. State Farm* (Oct. 2, 2007) Case  
16 No. 1:06CV866 LTS-RHW (S.D. Miss) [denying motion to transfer venue]; *McCoy v. State Farm*  
17 (May 10, 2007), Case No. 1:06CV004 (S.D. Miss.) [same]; *United States v. Fariz* (May 23, 2005),  
18 Case No. 8:03-cr-77-T-30TBM [same]; *United States v. Grace* (Jan. 11, 2005), Case No. CR 05-  
19 07-M-DWM [same].)

20 The Court is perfectly capable of reviewing the existing press coverage and determining  
21 the likely impact of disclosure. “‘When pretrial publicity is at issue, ‘primary reliance on the  
22 judgment of the trial court makes [especially] good sense’ because the judge ‘sits in the locale  
23 where the publicity is said to have had its effect’ and may base [the] evaluation on [the judge’s]  
24 ‘own perception of the depth and extent of news stories that might influence a juror.’” (*Harris*,  
25 *supra*, 57 Cal.4th at p. 825, quoting *People v. Famalaro* (2011) 52 Cal.4th 1, 24.) Bronson’s  
26 testimony should be excluded.

1 **III. THE BRONSON TESTIMONY DOES NOT MEET THE *KELLY* STANDARD FOR**  
2 **ADMISSIBILITY**

3 Evidence based upon a scientific method, technique or device may be received in evidence  
4 only if the following factors have been established: (1) the reliability of the method in general; (2)  
5 the evidence is furnished by a properly qualified expert (3) the use of proper scientific procedures  
6 in the particular case. (See *People v. Kelly* (1976) 17 Cal.3d 24, 30 (*Kelly*); *People v. Venegas*  
7 (1998) 18 Cal.4th 47, 78.) The proponent of such evidence must make “a preliminary showing of  
8 general acceptance of the new technique in the relevant scientific community.” (*Kelly, supra*, 17  
9 Cal.3d at pp. 30–31.) Views held by a typical cross-section of the scientific community, including  
10 representatives who oppose or question any new technique, should be taken into consideration.  
11 (*See id.* at p. 37; *People v. Leahy* (1994) 8 Cal.4th 587, 612.)

12 Prof. Bronson purports to apply “social science standards for prejudice from pretrial  
13 publicity,” and based on those “standards,” he discusses the concept of a “story model,” in which  
14 news coverage creates a “belief framework about the defendant’s guilt.” (Bronson Aff. at ¶¶ 19–  
15 20.) These assertions, and thus Prof. Bronson’s analysis, fail the *Kelly* standard for expert  
16 testimony based upon a scientific method for at least two reasons. First, Prof. Bronson fails to  
17 establish that the “social science standards” he discusses are reliable or accepted. Second, and  
18 more fundamentally, he fails to show how those “social science standards” apply to the core of his  
19 analysis, the “media content analysis.” As a result, Prof. Bronson fails to establish the  
20 admissibility of his purported “media content analysis” and any testimony on that topic should be  
21 excluded.

22 First, and most fundamentally, Bronson provides no showing that his “media content  
23 analysis” approach to purportedly predicting the prejudicial effect of pretrial publicity is generally  
24 accepted in any scientific community. He provides no evidence or authority recognizing this  
25 approach as a useful or reliable method for predicting the effect of pretrial publicity on potential  
26 jurors. (Bronson Aff., *passim*.) This alone is sufficient to justify the exclusion of his affidavit.

27 Second, Prof. Bronson provides citations to what are evidently scholarly articles on the  
28 subject of “the effects of pretrial publicity.” (Bronson Aff. at ¶ 19.) He asserts that these studies

1 show that “subjects exposed to negative [pre-trial publicity] were significantly more likely to  
2 judge the defendant guilty compared to subjects exposed to less or no [pre-trial publicity].” (*Id.*)  
3 However, he offers no information about the methods employed by these studies or their  
4 conclusions. Thus, to the extent that Prof. Bronson relies on such studies, he has failed to show  
5 that his methods are reliable within the meaning of California law.

6 Third, the analysis Prof. Bronson undertakes—the methods that must pass muster under  
7 *Kelly* and related authority—do not appear to be grounded in the social science studies he cites.  
8 Instead, Prof. Bronson undertakes a “content analysis,” which he claims without citation to any  
9 authority is what “social scientists and others use.” (Bronson Aff. at ¶ 24.) He cites one 1985  
10 article for the proposition that “content analysis is a research tool devised to analyze large amounts  
11 of material in a manner that is objective, neutral and systematic.” (*Id.* at ¶ 24.) But how it is  
12 applied, whether it can be applied to the question of likely juror prejudice, and whether Prof.  
13 Bronson’s application is consistent with either accepted principles or applications of “content  
14 analysis” is not addressed. The so-called “Hierarchy of Prejudice” applied by Prof. Bronson  
15 suffers a similar opacity. By what methods did he arrive at the “hierarchy”? What does it  
16 demonstrate? Is it reliable? Has it been peer reviewed? Prof. Bronson’s affidavit is silent. Thus,  
17 pursuant to *Kelly* and related authorities, Bronson has failed to show either the first factor,  
18 reliability, or the second factor, proper application of the methods.

19 Indeed, it is not even clear what Bronson’s methods *are*, much less whether he is applying  
20 reliable methods or applying them properly. How does he go about selecting the articles? Why  
21 did he only select articles from the Mercury News? How does he come to the conclusion that the  
22 number of articles is “substantial”? Why is the length of the articles an “important point to  
23 observe”? (Bronson Aff. at ¶ 28.) What does Bronson mean when he asserts that this case  
24 “involves inflammatory overload”? (Bronson Aff. at ¶ 32.) Does that mean there are more  
25 “inflammatory” terms contained in the coverage of the instant crimes than in the coverage of  
26 comparable crimes? How does he define “inflammatory”? How does that definition operate  
27 within the “content analysis”? Bronson asserts that “prejudice can arise even when publicity is  
28 non-inflammatory, admissible and accurate.” (*Id.* at ¶ 37.) How? Under what circumstances?

1 How does he know this? None of these questions are answered. Prof. Bronson's failure or  
2 inability to adequately identify and explain his methods precludes any determination that there is a  
3 reliable, scientific basis for his testimony. His testimony should therefore be excluded.

4 **IV. THE BRONSON AFFIDAVIT SHOULD BE UNSEALED**

5 Because there is no sound basis for the only foundation Defendant has provided in support  
6 of his contention that the grand jury transcript should remain sealed, the grand jury transcript  
7 should be unsealed. If the transcript is unsealed, the Court should also unseal the unredacted  
8 version of the Bronson Affidavit, and should vacate its June 13, 2014 and June 23, 2014 orders  
9 provisionally sealing the unredacted Bronson Affidavit. The First Amendment and common law  
10 rights of access apply to all records submitted to the Court as the basis for any adjudication. (See  
11 *NBC Subsidiary (KNBC TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1212; Cal. Rules of  
12 Court 2.550 *et seq.*) There can be no legitimate claim of prejudice based on the unsealing of this  
13 affidavit if the grand jury transcript itself is public. Thus, upon the determination of the pending  
14 motion to unseal, the Court should require Defendant to formally file and serve an unredacted  
15 copy of the Bronson Affidavit.

16 **V. CONCLUSION**

17 For the reasons set forth, the testimony of Edward J. Bronson should be excluded and  
18 should not be considered by the Court on the motion to unseal. Furthermore, the Bronson  
19 Affidavit should be unsealed, and the unredacted version of that affidavit should be made public.

20 Dated: June 25, 2014

21 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

22 By 

23 JAMES M CHADWICK

24 Attorneys for SAN JOSE MERCURY NEWS, LLC

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