

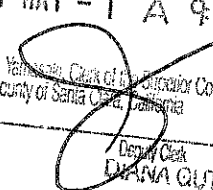
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FILED

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

By: 
Diana Gutierrez
Deputy Clerk

9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF SANTA CLARA

11 People of the State of California,

12 Plaintiff,

13 vs.

14 Antolin Garcia Torres,

15 Defendant

Case No.: C1233134 / 213515

Opposition to Motion to Unseal Grand Jury
Transcript

Date: May 23, 2014

Time: 9:00 am

Dept.: 28

Time Est.: 20 minutes

16
17
18 Issue Presented

19 Mr. Garcia Torres is charged with the abduction and homicide of fifteen-year old Sierra
20 LaMar. The case has been the subject of pervasive publicity since her disappearance
21 approximately two years ago. Most recently, Mr. Garcia Torres was indicted by a criminal grand
22 jury. The transcripts of those proceedings contain information that may or may not ever be heard
23 by the future trial jury and its release is reasonably likely to be prejudicial to his ability to obtain
24 fair and impartial trial. Should this court refuse the Mercury News's request to unseal the grand
25 jury transcripts?

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2 Points and Authorities

3
4 Statement of the Case

5
6 Recently, the District Attorney elected to pursue a grand jury indictment against Mr.
7 Garcia Torres. The Court temporarily sealed the transcripts after the indictment was filed. The
8 Mercury News subsequently moved to intervene and requested that the Court unseal them. By
9 this motion, Mr. Garcia Torres asks this Court to preserve his right to a fair trial by keeping the
10 transcripts sealed.

11 A defense expert, Dr. Edward Bronson, is in the process of preparing a declaration
12 supporting the defense opposition to the Mercury News's request. The declaration will be filed
13 with the Court upon receipt.

14 Argument

15
16 **I. A court must order grand jury transcripts sealed when there is a 'reasonable
17 likelihood' that making them public will prejudice the defendant's right to a fair
18 and impartial trial**

19 The press and public do not have a First Amendment right to transcripts of grand jury
20 proceedings prior to the completion of trial. (*Alvarez v. Superior Court* (2007) 154 Cal.App.4th
21 642, 653) Indeed, California has provided for secrecy in grand jury proceedings since the
22 inception of its criminal justice system. (*People v. Superior Court (Mouchaourab)* (2000) 78
23 Cal.App.4th 403, 414) The transcripts of such proceedings are not public records, even after an
24 indictment has been delivered. (*Alvarez v. Superior Court*, supra, 154 Cal.App.4th 642) The state
25 may, therefore, constitutionally limit access to grand jury transcripts. (*Id.*)

26 Unlike most jurisdictions, California has provided for a limited right of access to such
27 transcripts. (*Alvarez v. Superior Court*, supra, 154 Cal.App.4th 642) It accomplishes this through
28 the operation of Penal Code section 938.1. According to that section, the transcripts should be
sealed when there is a reasonable likelihood that making them public will prejudice the
defendant's right to a fair and impartial trial. (Pen. Code § 938.1) The 'reasonable likelihood'

1 test is the same as the test used to determine the necessity of changing venue. (See Pen. Code §
2 1033) Prejudice is reasonably likely when the chances it will occur are more than merely
3 possible, but less than more probable than not. (*People v. Williams* (1989) 48 Cal.3d 1112)

4 The court has the duty to protect the right of the accused to a fair trial. (*Alvarez v.*
5 *Superior Court*, supra, 154 Cal.App.4th at p. 652; *Craemer v. Superior Court* (1968) 265
6 Cal.app.2d 216, 225) This duty could not be any higher than it is in this case given the severity of
7 the charges and the potential consequences to Mr. Garcia Torres. Death, as both the United
8 States Supreme Court and the California Supreme Court have consistently held, is different.
9 (*Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586; *People*
10 *v. Hernandez* (1988) 47 Cal.3d 315)

11 The importance of guaranteeing Mr. Garcia Torres's right to a fair trial is beyond
12 question. "The atmosphere essential to the preservation of a fair trial—the most fundamental of
13 all freedoms—must be maintained at all costs." (*Cromer v. Superior Court* (1980) 109 Cal.App.
14 728, 731-732 (citing *Estes v. Tx.* (1965) 381 U.S. 532, 540)) The Court of Appeal has
15 recognized that "it is a truism of our law that: "Due process requires that the accused receive a
16 trial by an impartial jury free from outside influences. Given the pervasiveness of modern
17 communications and the difficulty of effacing prejudicial publicity from the minds of the jurors,
18 *the trial courts must take strong measures to ensure that the balance is never weighed against*
19 *the accused.*" (*Cromer v. Superior Court*, supra, 109 Cal.App.3d 728, 731-32 (quoting
20 *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362))

21 The right to a fair and impartial trial is jeopardized by the untimely release of grand jury
22 transcripts. "Judicial experience has shown that pretrial publication of grand jury proceedings
23 has had a tendency, in some instances, to prejudice a defendant's right to a fair trial. Such
24 transcripts often contain criminal records, alleged confessions, and other matter which is later
25 ruled out as evidence in the trial. That such information should be kept from the eyes and ears of
26 prospective jurors is undeniably in the interest of justice." (*Craemer v. Superior Court*, supra,
27 265 Cal.App.2d at p. 226) Indeed, grand jury proceedings are notoriously one-sided. The defense
28 is not allowed to participate and the prosecutor has substantial freedom to present the facts in any
way he wants. The transcripts will offer, therefore, only one side's version of events without
challenge.

1 With the paramount objective of ensuring a fair and impartial trial in mind, this Court
2 should consider whether releasing the transcripts of the grand jury proceedings would be
3 reasonably likely to impair that goal. The reasonable likelihood test in the sealing context is the
4 same as the test used to determine motions to change venue. (*Alvarez v. Superior Court*, supra,
5 154 Cal.App.4th at p. 655) The benefit of the test is that it “permits the court to consider openly
6 and frankly the many future variants which collectively may amount to a reasonable likelihood
7 but, by their very contingent nature, can never amount to a clear and present danger”
8 (*Younger v. Smith* (1973) 30 Cal.App.3d 138, 164 (involving pre-trial protective order)
9 Importantly, the test “does not demand impossible feats of clairvoyant fact finding” and a
10 showing of actual prejudice is not required. (*ibid.*; *People v. Williams*, supra, 48 Cal.3d at p.
11 1126 (involving change of venue motion)) “Put differently, because the prejudicial effect of
12 publicity before jury selection is necessarily speculative, it is settled that “any doubt as to the
13 necessity of removal ... should be resolved in favor of a venue change.” (*People v. Williams*,
14 supra, 48 Cal.3d at p. 1126 (citing *Williams v. Superior Court* (1983) 34 Cal.3d 584, 588))

15 Because the test used to determine whether sealing is appropriate is the same as that used
16 when considering a motion to change venue, the court should consider similar factors. (*Alvarez*
17 *v. Superior Court*, supra, 154 Cal.App.4th at p. 655) These include the nature and gravity of the
18 offense, the nature and extent of the news coverage, the size of the community, the status of the
19 defendant in the community, and the popularity and prominence of the victim. (*ibid.*) An analysis
20 of these factors leads to the conclusion that the transcript should remain sealed.

21 Nature and Gravity of the Charge

22 The term ‘gravity’ refers to the crime’s level of seriousness in the law and to the possible
23 consequences to the accused in the event of a guilty verdict. (*Martinez v. Superior Court* (1981)
24 29 Cal.3d 574, 583) It is beyond dispute that murder is among the most serious of crimes and the
25 potential of a death sentence means Mr. Garcia Torres faces the most severe consequence the law
26 can impose.

27 Indeed, the potential of a death sentence and the jury’s role in making that determination
28 provides another compelling reason to seal the transcripts. A capital defendant has the right to a
reliable sentencing procedure—one that does not subject him to arbitrary or capricious decision-
making. (*Woodson v. North Carolina* (1976) 428 U.S. 280; *Lockett v. Ohio* (1978) 438 U.S. 586

1 Allowing the jury pool to hear evidence that may not otherwise be admitted at trial runs a
2 significant risk of depriving Mr. Garcia Torres of this significant protection.

3 The nature of this particular crime also weighs significantly against unsealing the
4 transcripts. The Supreme Court has defined the 'nature of the offense' as those "facts or aspects
5 of a crime which made it sensational, or otherwise brings it to the consciousness of the
6 community." (*Martinez v. Superior Court*, supra, 29 Cal.3d at p. 582) Several facts related to this
7 incident make it unusually sensational. For example, the case involves a young girl who is
8 alleged to have been kidnapped while on the way to the school bus. The search for her has
9 garnered significant coverage over the last two years in newspapers, on radio, on television, and
10 online. The high interest in the case is evidenced by the presence of reporters from print,
11 television, and radio outlets at even the most common and uneventful court appearances. Indeed,
12 according to an article published in the San Jose Mercury News on March 12, 2014 (and still
13 available online), the initial searches for Ms. LaMar included up to 750 people. And two years
14 after her disappearance weekly searches draw a 40-50 people.

14 Nature and Extent of News Coverage

15 A simple Google news search reveals hundreds of documents addressing the case,
16 ranging from print publications like the Mercury News to television clips from major local news
17 stations, to blogs written by individuals (including one purporting to document the search that
18 also provides updates on the prosecution). They discuss such things as the search for Ms. LaMar
19 including the participation of major celebrities, such as former 49'ers quarterback Alex Smith.
20 Many residents have become personally invested in the prosecution.

21 The Mercury News attempts to downplay the extent of coverage the case has received by
22 comparing it to the recent Michael Jackson case. (See *People v. Jackson* (2005) 128 Cal.App.4th
23 1009) The coverage of the Jackson case was extraordinary and should not be considered the
24 standard by which future cases are measured. But even when considered with the Jackson case in
25 mind, the coverage in this case has been extreme and cut to the heart of the community and its
26 desire to keep its children safe.
27
28

1 Status of the Defendant in the community

2 Mr. Garcia Torres has been vilified since his arrest. Indeed, articles have been written in
3 the San Jose Mercury News saying that prosecutors and the Sheriff believe he is responsible for
4 Ms. LaMar's disappearance, but will not say where she is. One article featured quotes
5 characterizing him as cruel for refusing to say where she is and decrying the fact that he is fed
6 while in custody. The stories frame the case in a context that presumes guilt; all the defense is
7 asking for is a fair trial where Mr. Garcia Torres can defend himself.

8 Status of the Victim in the community

9 Ms. LaMar disappeared when she was 15 years old. Her standing in the community as a
10 young person has caused community members to participate in searches for her and to attend
11 court hearings. Indeed, according to the Mercury News article cited above, many of the searchers
12 wear T-shirts featuring a photo of Ms. LaMar accompanied by the words, "Everyone's
13 Daughter." There is great interest in the community along with a good deal of speculation of
14 what may have happened to her. Unsealing the grand jury transcripts will only serve to feed that
15 interest and risks exposing potential jurors to inadmissible information.

16 All four factors militate in favor of sealing the transcripts. Unsealing them would only
17 result in further prejudice to Mr. Garcia Torres right to a fair trial and a reliable penalty
18 determination.

19 **A. Less restrictive alternatives offered by the media are insufficient**

20 The Mercury News suggests that the Court redact portions of the transcripts that may
21 cause prejudice while unsealing portions that may not. Redaction of the approximately 2,000
22 pages will not sufficiently protect Mr. Garcia Torres's right to a fair trial. Indeed, one of the risks
23 in releasing grand jury transcripts is that potential jurors will be exposed to inadmissible
24 material. Redacting would require this Court to parse out information that would be inadmissible
25 in trial; something it is not well-positioned to do. The parties are continuing to investigate the
26 case and more motions are likely to be brought that may serve to alter the character of what now
27 may appear to be evidence that will be admissible at trial. This Court should wait for the judge in
28 the trial department to make evidentiary rulings.

 Secondly, the grand jury transcripts are, by definition, biased documents. The defense is
only given extremely limited avenues to participate and cannot even be in the room to lodge


1 objections or offer argument about the facts. Instead, the prosecutor is permitted to present
2 evidence, instruct jurors, and explain his theory to them without the defendant's voice in the
3 room and without a judge to decide the admissibility of evidence. The trial will certainly be
4 different; therefore, prospective jurors should not be exposed to a one-sided version of the case.

5
6 Conclusion

7
8 Mr. Garcia Torres has the right to a fair trial and a reliable penalty determination under
9 the 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and their California corollaries.
10 Protecting these rights is central to this Court's mission. It should, therefore, refuse to unseal the
11 grand jury transcript. Unsealing it would be reasonably likely to prejudice Mr. Garcia Torres's
12 right to a fair trial. The case has already generated substantial publicity; most of it based on an
13 assumption of guilt and accompanied by statements attacking Mr. Garcia Torres. Unsealing the
14 grand jury transcript is likely to exacerbate those problems and make a change of venue, already
15 looming as a strong possibility, a necessity.

16 Dated: May 7, 2014

17 Respectfully submitted,

18 
19 Brian Matthews
20 Deputy Alternate Defender