SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
Including Professional Corporations
JAMES M. CHADWICK, Cal. Bar No. 157114
jchadwick@sheppardmullin.com
GUYLYN R. CUMMINS, Cal. Bar No. 122445
gcummins@sheppardmullin.com
DAVID E. SNYDER, Cal. Bar No. 262001
dsnyder@sheppardmullin.com
379 Lytton Avenue
Palo Alto, CA 94301
Telephone: 650-815-2600
Facsimile: 650-815-2601

Attorneys for SAN JOSE MERCURY NEWS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANTOLIN GARCIA TORRES, Defendant.	Case No. C1233134 / 213515 **REPLY IN SUPPORT OF MEDIA MOTION TO INTERVENE AND UNSEAL GRAND JURY TRANSCRIPT** Date: June 27, 2014 Time: 9:00 a.m. Dept: 28 Judge: Hon. Griffin Bonini

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I. INTRODUCTION

Once an indictment is entered, the records of the proceedings of the grand jury are presumptively open under California Penal Code section 938.1 ("Section 938.1"), and under the constitutional right of access guaranteed by the First Amendment and the California Constitution. Defendant seeks to continue the indefinite sealing of the transcript and related exhibits from the grand jury proceedings that resulted in his indictment (the "grand jury transcript").

The question presented is whether Defendant has demonstrated a substantial probability of prejudice to his ability to obtain a fair trial, or at least a "reasonable likelihood" that he will be unable to obtain a fair trial if the transcript is unsealed. Although the San Jose Mercury News (the "Mercury News") is the movant, Defendant has the burden of demonstrating that the grand jury transcript should remain sealed. Defendant has failed to show even a reasonable likelihood, much less a substantial probability, that the Court will not be able to seat an impartial jury if the grand jury transcript is unsealed. Thus, he has not justified the continued sealing of the transcript.

The only basis for Defendant's claim that the transcript should remain sealed is the possibility of harm to his right to a fair trial arising from pretrial publicity that might be generated by its disclosure. However, the law is clear that such prejudice cannot be presumed and cannot be proven by the type of conjecture that is the basis of Defendant's argument. Defendant must show, at a minimum, that news reports of the grand jury transcript would be so extensive and prejudicial that there is a "reasonable likelihood" twelve unbiased jurors could not be found.[1] He has not.

The Affidavit of Edward J. Bronson and supporting materials submitted in support of Defendant's argument fall far short of meeting this standard. The Bronson materials contain no survey data and no other substantive evidence of likely prejudice. Instead Defendant relies on sweeping generalizations and speculation, which plainly do not rise to the level of proof required to justify continued sealing of the grand jury transcript. Courts have routinely rejected Bronson's predictions in more compelling circumstances than are present here.

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[1] As shown in the Mercury News moving papers, the constitutional "compelling interest" standard should apply here. However, for the purposes of this reply, the Mercury News will focus on the reasonable likelihood standard, as it is plain that Defendant has failed to meet even that lower bar.

California law is clear: where, as here, the case is being tried in a major metropolitan area with a large, diverse jury pool, it is virtually impossible for pretrial publicity—even extensive, prejudicial publicity about inadmissible matters, which Defendant has not demonstrated here—to so contaminate the jury pool that an adequate number of unbiased jurors cannot be found. Any effect of pretrial publicity regarding the grand jury proceedings can be sufficiently countered by less restrictive means than the sealing of the transcript, such as extensive voir dire and clear and emphatic jury instructions, which are presumptively sufficient. Thus, the Mercury News respectfully requests the Court vacate the interim sealing order, and promptly unseal the transcript.

II. DEFENDANT HAS FAILED TO MEET HIS BURDEN TO DEMONSTRATE THAT SEALING THE GRAND JURY TRANSCRIPT IS NECESSARY

A. Defendant Has the Burden of Showing that Sealing Is Necessary to Protect His Right to a Fair Trial

Defendant has the burden of demonstrating that the grand jury transcript should remain sealed. (*Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 645. See also *Gannett Co., Inc. v. DePasquale* (1979) 443 U.S. 368, 401, Powell, J., concurring (*Gannett*) [defendant's responsibility to make showing that fairness of trial likely will be prejudiced by public access to the proceedings]; *People v. Harris* (2013) 57 Cal.4th 804, 822 (*Harris*) [in seeking a change of venue, defendant bears burden of proving likelihood of prejudice].) As noted, this requires that Defendant show, at a minimum, that a reasonable likelihood of prejudice to his ability to obtain a fair trial would result from its unsealing. (Pen. Code § 938.1.) To show such prejudice, Defendant must demonstrate that "publicity of the contents of the entire grand jury transcript would be so extensive that twelve unbiased jurors could not be found." (*Press-Enterprise v. Superior Court* (1994) 22 Cal.App.4th 498, 505 ("*Press-Enterprise III*").)

B. Defendant Cannot Rely on Speculation to Meet His Burden

Defendant's contention about the effect of pretrial publicity on his right to a fair trial is the only basis asserted for the continued sealing the grand jury transcript. However, it is well established that it is insufficient for Defendant to simply assert that pretrial publicity will have a detrimental effect on his right to a fair trial. (*Globe Newspaper Co. v. Super. Ct.* (1982) 457 U.S. 596, 609-10 (*Globe Newspaper*) [speculative claims do not justify closure]; *Press-Enterprise*

Co. v. Super. Ct. (1986) 478 U.S. 1, 14 ("*Press-Enterprise II*") [right of access cannot be overcome "by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]."]; *People v. Cooper* (1991) 53 Cal.3d 771, 807 (*Cooper*) [Defendant failed to demonstrate reasonable likelihood of prejudice because "[i]t was speculation to suppose the results of jury selection would have been significantly different in ***any*** county," emphasis added].) Defendant has failed to meet his burden.

Defendant has submitted the Bronson Affidavit in support of his assertion that the release of the grand jury transcript is "reasonably likely to be prejudicial to his ability to obtain a fair and impartial trial." (Opp. p. 1:23-24.). The entire affidavit should be excluded, as demonstrated by the Mercury News' Objections to the Affidavit of Edward J. Bronson, filed herewith. However, even if the affidavit were admissible, it does not establish a reasonable likelihood that the release of the grand jury transcript would prejudice Defendant's right to a fair trial.

Bronson fails to offer any survey evidence or demographic data to back up his claims. His 35-page affidavit is based on an admittedly cursory review of some of the media coverage of this case. He admits that it "may be possible to avoid the necessity of a change of venue." (Bronson Aff. ¶ 29.) As Bronson acknowledges, the "reasonable probability" standard applied to the sealing of grand jury transcripts is the same as that for change of venue. Thus, he effectively concedes that it is mere speculation that the release of grand jury transcripts would prejudice Defendant's ability to obtain a fair trial. Speculation is insufficient to justify continued sealing. (See, e.g., *Globe Newspaper, supra*, 457 U.S. at pp. 609-610; *Cooper*, *supra*, 53 Cal.3d at p. 807.)

Similar assertions by Prof. Bronson have been rejected by numerous courts, in both criminal and civil cases.[2] However, in virtually all of these cases Bronson at least provided survey evidence as to the proportion of potential members of the juror pool who had heard about the case at issue and had formed opinions about it. Here, Defendant has presented no such evidence.

[2] (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 45-46 (*Coffman*) [affirming denial of motion to change venue where Bronson offered testimony and survey evidence]; *Harris, supra,* 57 Cal.4th at pp. 825-826 [same]; *People v. Davis*, 46 Cal.4th 539, 577-78 [same]; *People v. Famalaro* (2011) 52 Cal.4th 1, 24 [same]; *Mikelonis v. State Farm* (Oct. 2, 2007) Case No. 1:06CV866 LTS-RHW (S.D. Miss) [denying motion to transfer venue]; *McCoy v. State Farm* (May 10, 2007), Case No. 1:06CV004 (S.D. Miss.) [same]; *United States v. Fariz* (May 23, 2005), Case No. 8:03-cr-77-T-30TBM [same]; *United States v. Grace* (Jan. 11, 2005), Case No. CR 05-07-M-DWM [same].)

C. Defendant Has Failed to Show that He Meets the Requirements to Demonstrate a Reasonable Probability of Prejudice

The California Supreme Court has identified the factors to be considered in addressing a motion for change of venue: the nature and gravity of the offense, the nature and extent of the media coverage, the size of the community, the status of the defendant in the community, and the prominence of the victim. (*Coffman, supra*, 34 Cal.4th at p. 44; *People v. Proctor* (1992) 4 Cal.4th 499, 523.) The consideration of these factors, in light of the applicable legal authority, demonstrates that Defendant has failed to meet his burden.

1. Nature and Gravity of the Offense

Defendant is charged with kidnapping and murder in connection with the killing of a 15-year-old girl. The Santa Clara County District Attorney has said he will seek the death penalty in the case. While the charges and potential sentence are grave, by themselves they do not require a change of venue. (See, e.g., *Harris, supra*, 57 Cal.4th at p. 825 ["Even in a capital case . . . this factor standing alone does not compel change of venue"]; *People v. Farley* (2009) 46 Cal.4th 1053, 1083 ["on numerous occasions we have upheld the denial of change of venue motions in cases involving multiple murders"]; *People v. Ramirez* (2006) 39 Cal.4th 398, 407, 434-435 (*Ramirez*) [denying change of venue in case involving 13 counts of murder].)

Defendant asserts that "death . . . is different," and that "[a]llowing the jury pool to hear evidence that may not otherwise be admitted at trial runs a significant risk of depriving [Defendant]" of the "right to a reliable sentencing procedure." (Opp. p. 4:26-5:2.) He cites no authority for the proposition that the fact that the jury pool has been exposed to potentially inadmissible evidence threatens the integrity of the death-penalty sentencing procedure or justifies sealing. Bronson asserts that sealing is justified because there are "61 references to the death penalty" in "80 Mercury News articles," and there has been a "strong belief expressed by many that the ultimate penalty should be used as an inducement to get Mr. Garcia Torres to tell where Sierra's body will be found." (Bronson Aff. at ¶ 59.) There is no authority for the proposition that "references to the death penalty" in pretrial publicity, or that assertions that the death penalty should be used, "strongly supports" the need to seal a grand jury testimony. Moreover, these arguments are based on the presumption that the entire jury pool will inevitably be exposed to and tainted by

pretrial publicity arising from the unsealing of the grand jury transcripts. That presumption is not supported by any evidence, and is contrary to the law. (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 554, 565 (*Nebraska Press*); *People v. Jenkins* (2000) 22 Cal.4th 900, 945 (*Jenkins*).)

2. The Size of the Community

The lack of justification for sealing is demonstrated by the large and diverse nature of Santa Clara County's jury pool. The county's population is nearly 1.9 million—the largest county in the Bay Area and the sixth largest in California. (See Decl. of James Chadwick in Support of Mot. to Intervene and Unseal ("Chadwick Decl.") at ¶ 3 & Ex. 1 & Request for Judicial Notice filed therewith) That population is economically, racially, and culturally diverse. (*Id.*) Moreover, practical experience—in this County and elsewhere—shows that in a county as populous as Santa Clara, the Court will have little difficulty finding a impartial jury.

The California Supreme Court has frequently examined claims of prejudice based on pretrial publicity in the context of motions for change of venue, and has consistently rejected such claims. (See, e.g., *Jenkins*, *supra*, 22 Cal.4th at pp. 942-46; *People v. Welch* (1999) 20 Cal.4th 701, 743-45 (*Welch*).) It has consistently held that a defendant will be able to obtain an unbiased jury when the proceedings occur in a county with a large population, such as Santa Clara County. (See, e.g., *id.*, at pp. 743-45 (Alameda County, seventh largest in the state); *People v. Sully* (1991) 53 Cal.3d 1195, 1236-37 (*Sully*) (San Mateo County, eleventh most populous); *People v. Vieira*, (2005) 35 Cal.4th 264, 279-283 (Stanislaus County, population 370,000).

As recognized by the federal Court of Appeals in a case involving the pretrial disclosure of videotapes of John DeLorean engaging in drug transactions, "in a large metropolitan area, prejudicial publicity is far less likely to endanger the defendant's right to a fair trial. . . . Even in cases attracting extensive and inflammatory publicity, it is usually possible to find an adequate number of untainted jurors." (*CBS, Inc. v. United States Dist. Ct.* (9th Cir. 1983) 729 F.2d 1174 (*CBS, Inc.*), emphasis added. See also *United States v. Myers* (2d Cir. 1980) 635 F.2d 945, 948 (*Myers*) [in highly publicized Abscam prosecution, only half of potential jurors had heard anything about case]; *People v. Manson* (1976) 61 Cal.App.3d 102, 190 (*Manson*) ["[a] metropolitan setting with its diverse population tends to blunt the penetrating effect of publicity"].)

Bronson asserts that "population size is not likely to be much help," but offers no legal or evidentiary support for this assertion. (Bronson Aff. at ¶ 41.) He asserts that he has "[come] to believe" that "in some cases" a larger population "provided only marginal additional protection from community prejudice." (*Id.* at ¶ 73.) He provides "four major reasons that could explain how a large population size makes sealing of the Grand Jury transcript (or a change of venue) less needful or helpful." (*Id.* at ¶ 74.) However, his explanation for why those factors do not weigh against sealing in this case is conjectural. Bronson admits that a large population can make it easier to pick an untainted jury, but asserts that media coverage "can create pressure on local jurors, perhaps consciously, perhaps not, to return a verdict of guilty," and that voir dire is inadequate to identify such jurors. (Bronson Aff. at ¶¶ 75-77.) However, he provides no basis for these assertions. He did not conduct a survey of Santa Clara County (or if he did he has not provided it to the Court). Bronson admits that informal communication of information is less likely in a large community, but claims that "fear and concern" about this case are "likely" to have reduced this benefit. (Bronson Aff. at ¶¶ 80-81.) He offers no explanation as to why, and no evidence that this is the case. (Bronson Aff., *passim.*) Bronson speculates that the passage of time will not ameliorate the putative effects of pretrial publicity because, "like 'The Great Flood'" this case is now part of the permanent collective memory of everyone in the community. Again, his assumption that there is pervasive community knowledge of the details of this case is not supported by any evidence. (Bronson Aff., *passim.*) He admits that in a large community the portion of the population with a direct connection to the case is proportionately smaller, but claims that the involvement of "thousands of searchers" counteracts that effect in this case. (Bronson Aff. at ¶¶ 84-85.) Again, he provides no actual evidence of the number of people involved in the searches, but even if he did he does not explain why the existence of that group—none of whom, presumably, would be permitted to serve as jurors—would make it more difficult for the Court to select a jury. Ultimately, Bronson's assertion that the size of Santa Clara County is not important is simply contrary to California law which, logically, makes clear that the size of the jury pool is a vital factor. (See, e.g., *Welch*, *supra*, 20 Cal.4th at pp. 743-45; *Sully, supra,* 53 Cal.3d at pp. 1236-37.)

3. Nature and Extent of the Coverage

As noted, it cannot be presumed that pretrial publicity deprives a defendant of a fair trial. Pretrial publicity, even if pervasive and concentrated, does not inevitably lead to an unfair trial in criminal cases. (*Associated Press v. U.S. Dist. Ct.* (9th Cir. 1983) 705 F.2d 1143, 1146 (*Associated Press*); *Nebraska Press, supra*, 427 U.S. at pp. 554, 565 (it cannot be said that "juror exposure to ... news accounts of the crime with which [a defendant] is charged alone presumptively deprives the defendant of due process"); *Myers, supra*, 635 F.2d at p. 953 (finding that intensive publicity surrounding the events of Watergate, "very likely the most widely reported crime of the past decade," did not prevent the selection of impartial jurors and concluding that "[d]efendants, as well as the news media, frequently overestimate the extent of the public's awareness of news").)

In fact, the "instances in which pretrial publicity alone, even pervasive and adverse publicity, actually deprives a defendant of the ability to obtain a fair trial will be quite rare." (*Gannett, supra*, 443 U.S. 368 at p. 404 n.1 [Rehnquist, J., concurring].) Thus, even where jurors have been exposed to information about the case and have formed some impression or opinion as to the merits, prejudice may not be presumed. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722-23 [jurors are generally able to lay aside their impressions or opinions and render a verdict based solely upon the evidence at trial]; *Cooper, supra*, 53 Cal.3d at p. 807 ["It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court"].) Instead, to justify sealing the "publicity must create a 'pattern of deep and bitter prejudice'... throughout the community." (*Seattle Times v. Dist. Ct.* (9th Cir. 1988) 845 F.2d 1513, 1517.) Documents in cases generating significant public interest are "routinely opened to the public without jeopardizing the fair trial guarantee." (*Associated Press, supra*, 705 F.2d at p. 1146.)

Practical experience in highly publicized trials resulting in not guilty verdicts (for example, those of O.J. Simpson and Michael Jackson) demonstrates that prejudice to Defendant's right to a fair trial in this case arising from adverse pretrial publicity is not only not inevitable, but highly unlikely. "[B]oth precedent and experience indicate that widespread publicity, without more, does not automatically lead to an unfair trial." (*CBS, Inc., supra*, 729 F.2d at pp. 1179-80.) For example, the case of former Attorney General John Mitchell "was very heavily publicized in

Washington, D.C., where the trial was held, and a private survey conducted by Mr. Mitchell's attorneys revealed that 84% of those who had heard of the case thought Mr. Mitchell was guilty. Yet, Mr. Mitchell was eventually acquitted." (*CBS, Inc.*, *supra*, 729 F.2d at 1181 (citation omitted).)

Moreover, motions for change of venue have been rejected in cases involving publicity comparable to or greater than that involved in the present case. For example, in *People v. Coffman* (2004) 34 Cal.4th 1, Prof. Bronson testified in support of a motion for change of venue from San Bernardino County. The defense presented evidence of more than 150 articles about the case. Unlike this case, Prof. Bronson presented the results of a survey. He testified that at least 70.9 percent of those polled were familiar with the case, and that 80 percent of those familiar with the case believed the defendants were definitely or probably guilty. The trial court denied the motion for change of venue. The Supreme Court affirmed.

Similarly, in *United States v. W.R. Grace* (D. Mont. 2005) 408 F. Supp. 2d 998, Bronson testified in support of a motion for change of venue in a federal criminal prosecution involving alleged crimes committed in the operation of the notorious Libby mine, where hundreds of workers and residents suffered debilitating disease as the result of exposure to asbestos. The defense presented evidence of 1,632 articles in Montana relating to the case. There were 846 articles in the Missoula Division alone. The court found that there were only 14,282 eligible jurors in the Missoula Division. Nonetheless, the court denied the motion for change of venue.

Here, Bronson has presented no survey evidence, but only a "content analysis." According to that analysis, there have been 80 articles published in the Mercury News over the course of more than two years. (Bronson Aff., Ex. 4 at p. 2.) Of those 80 articles, more than two thirds were published in 2012. (*Id.*) Defendant offers no evidence as to media other than the Mercury News, nor as to the audience for newspapers or broadcasters in Santa Clara County. The data demonstrates that the daily readership of the Mercury News represents less than 19 percent of the population of Santa Clara County, and Sunday readership less than 25 percent. (See Decl. of James H. Robinson in Supp. of Reply re Mot. For Unsealing at ¶¶ 3-5 & Ex. A; Chadwick Decl. at ¶3 and Ex. 1.) Obviously, not all readers of the Mercury News will have read about or be

familiar with the details of this case. Thus, the evidence demonstrates that the percentage of people in Santa Clara County who could have potentially been exposed to coverage of this case is relatively small. Whether any of them have formed an opinion that would affect their ability to serve as jurors is a matter of pure speculation.

4. Status of the Victim and Defendant

As for the last two factors—status of the victim and of the defendant—where "neither defendant nor the victims were known to the public prior to the crimes and defendant's arrest," neither of the two factors support a change of venue. (*Ramirez, supra,* 39 Cal.4th at p. 434, citing *People v. Panah* (2005) 35 Cal.4th 395; *Coffman, supra,* 34 Cal.4th at p. 46.) Addressing cases similar to this, the California Supreme Court has held that the status of the defendant in the community did not establish a reasonable likelihood of prejudice to the defendant's ability to obtain a fair trial. (See, e.g., *Jenkins*, *supra*, 22 Cal.4th at p. 944.) These two factors also favor unsealing.

D. Alternatives to Sealing the Grand Jury Transcript Are More Than Adequate

Defendant fails to acknowledge or seriously address the many alternatives to sealing. Court records may not be sealed unless less restrictive alternatives will not protect the ability to obtain a fair trial. (*Press Enterprise II, supra,* 478 U.S. at p. 14; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217-1218 (*NBC Subsidiary*); *Press-Enterprise III, supra,* 22 Cal.App.4th at p. 504.) There are numerous alternatives to sealing, including careful voir dire (with individualized and sequestered voir dire, if necessary), peremptory challenges (increasing the number of peremptory challenges if appropriate), assembling a larger than normal jury pool, instructions and admonitions to the jury, postponement of trial, and change of venue. (*Nebraska Press, supra,* 427 U.S. at pp. 563-564; *Brian W. v. Superior Court* (1978) 20 Cal.3d 618, 625.) Alternatives to sealing are presumptively adequate to protect Defendant's right to a fair trial. (*NBC Subsidiary*, *supra*, 20 Cal.4th at p. 1224.)

Alternatives to closure, specifically calling an appropriate venire from the large and diverse population of Santa Clara County and using a careful voir dire, are more than sufficient to insulate Defendant from any potential effect of publicity. Careful voir dire will ensure that pretrial publicity has no detrimental effect on Defendant's right to a fair trial. "In a large metropolitan

area . . . it is unlikely that 'searching questioning of prospective jurors . . . to screen out those with fixed opinions as to guilt or innocence' and 'the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court' will fail to produce an unbiased jury. . . ." (*Associated Press*, *supra*, 705 F.2d at 1146, *quoting Nebraska Press*, *supra*, 427 U.S. at p. 564.) Thus, in a case such as this, which is to be tried in a large metropolitan area, "careful jury selection is an alternative that can adequately protect the right to a fair trial." (*Id.* See also *Manson*, *supra*, 61 Cal.App.3d at pp. 187-88 [voir dire adequate to counter effects of publicity in one of most highly-publicized cases in state history].)

E. If Sealing Were Appropriate, Only Those Portions of the Grand Jury Transcript that Would Cause Undue Prejudice Could Be Sealed

Section 938.1 specifically states that "[i]f the court determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair and impartial trial, ***that part of the transcript*** shall be sealed until the defendant's trial has been completed." (Pen. Code § 938.1(b), emphasis added.) Any order restricting access to court records must be "narrowly tailored." (*Copley Press v. San Diego County* (1991) 228 Cal.App.3d 77, 84, *quoting* , *Press Enterprise Co. v. Superior Court* (1984) 464 U.S. 501, 510 (*Press-Enterprise I*). See also *NBC Subsidiary*, *supra*, 20 Cal. 4th at p. 1218.) Thus, an order sealing a grand jury transcript must be "reasonable and not unnecessarily broad in its application." (*Craemer v. Superior Court* (1968) 265 Cal.App.2d 216 226.) The burden is on Defendant to identify the specific portions of the grand jury transcript the disclosure of which will prejudice his right to a fair trial. The Court must then review the identified portions of the transcript to determine whether sealing is justified. (*People v. Connor* (2004) 115 Cal.App.4th 669, 696 [court must review records and redact only information not subject to disclosure].)

III. CONCLUSION

For the reasons set forth, the grand jury transcript should be unsealed.

Dated: June 25, 2014

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
JAMES M CHADWICK
Attorneys for SAN JOSE MERCURY NEWS, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Santa Clara, State of California. My business address is 379 Lytton Avenue, Palo Alto, CA 94301-1479.

On June 25, 2014, I served true copies of the following document(s) described as **REPLY IN SUPPORT OF MEDIA MOTION TO INTERVENE AND UNSEAL GRAND JURY TRANSCRIPT** on the interested parties in this action as follows:

David Epps
Alfonso O. Lopez
Brian J. Matthews
Law Offices of the Alternate Defender
County of Santa Clara
701 Miller Street
San Jose, CA 95110

Jeffrey F. Rosen
David R. Boyd
Santa Clara County District Attorney's Office
County Government Center, West Wing
70 West Hedding Street
San Jose, CA 95110

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Executed on June 25, 2014, at Palo Alto, California.

Robin P. Regnier