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9 LLC

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. ~~G1233134~~ 213515

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MEDIA  
MOTION TO INTERVENE AND UNSEAL  
GRAND JURY TRANSCRIPT**

Date: April 16, 2014  
Time: 1:30 p.m.  
Dept: 27  
Judge: Hon. Thang N. Barrett

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**TABLE OF CONTENTS**

Page

I. REQUEST FOR PROMPT HEARING AND SUMMARY OF PERTINENT FACTS AND ARGUMENT ..... 1

II. PUBLIC ACCESS TO THE GRAND JURY TRANSCRIPT IS REQUIRED ..... 2

    A. There Is a First Amendment Right of Access to Judicial Proceedings and Records ..... 2

        1. The Compelling Interest Test Has Two Procedural Prerequisites ..... 4

        2. The Compelling Interest Test Has Three Substantive Prerequisites ..... 5

    B. The First Amendment-Based Compelling Interest Test Applies to the Sealing of Court Records ..... 5

    C. Passage of Proposition 59 Broadened Public Access Rights in California ..... 5

    D. The Compelling Interest Test Applies, and Defendant Cannot Meet the Compelling Interest Test As a Matter Of Law ..... 6

        1. Both Requirements for Applying the Compelling Interest Test Are Met ..... 7

        2. Speculative Pretrial Publicity Fears Cannot Form the Basis For Secrecy, Particularly in a County the Size of Santa Clara ..... 10

    E. Defendant Also Cannot Meet the *Alvarez* Test ..... 12

III. CONCLUSION ..... 13

**TABLE OF AUTHORITIES**

	<b>CASES</b>	<u>Page(s)</u>
3	<i>Alvarez v. Superior Court</i> (2007)	
4	154 Cal.App.4th 642 .....	2, 12
5	<i>Associated Press v. United States District Court</i> (1983)	
6	705 F.2d 1143 .....	10
7	<i>Ayala v. Speckard</i> (2d Cir. 1997)	
8	131 F.3d 62, cert. denied (1998) 524 U.S. 958 .....	4
9	<i>Branzburg v. Hayes</i> (1972)	
10	408 U.S. 665 .....	1
11	<i>CBS, Inc. v. United States Dist. Court</i> (9th Cir. 1985)	
12	765 F.2d 823 .....	4
13	<i>CBS Inc. v. Young</i> (6th Cir. 1975)	
14	522 F.2d 234 .....	1
15	<i>CBS v. U.S. Dist. Ct.</i> (9th Cir. 1983)	
16	729 F.2d 1174 .....	11
17	<i>Matter of Continental Illinois Securities Litigation</i> (7th Cir. 1984)	
18	732 F.2d 1302 .....	3
19	<i>Copley Press, Inc. v. Superior Court</i> (1991)	
20	228 Cal.App.3d 77 .....	3
21	<i>Copley Press, Inc. v. Superior Court</i> (1998)	
22	63 Cal.App.4th 367 .....	4, 6
23	<i>Craemer v. Superior Court</i> (1968)	
24	265 Cal.App.2d 216 .....	7
25	<i>Cummisky v. Superior Court</i> (1992)	
26	3 Cal.4th 1018 .....	3
27	<i>Daily Journal Corp. v. Sup. Ct.</i> (1999)	
28	20 Cal.4th 1117 .....	6, 9, 10
	<i>Elrod v. Burns</i> (1976)	
	427 U.S. 347 .....	2
	<i>F.T.C. v. Standard Financial Management Corp.</i> (1st Cir.1987)	
	830 F.2d 404 .....	7

1 **TABLE OF AUTHORITIES**

2 (continued)

	<u>Page(s)</u>
3 <i>Globe Newspaper Co. v. Superior Court</i> (1982) 457 U.S. 596.....	1, 2, 3
4 <i>McClatchy Newspapers v. Superior Court</i> (1988) 5 44 Cal.3d 1162 .....	9
6 <i>NBC Subsidiary (KNTV-TV), Inc. v. Superior Court</i> (1999) 7 20 Cal.4th 1178 .....	3, 5, 6
8 <i>Nebraska Press Ass'n v. Stuart</i> (1976) 9 427 U.S. 539 ( <i>Nebraska Press</i> ).....	10, 11
10 <i>Oregonian Publ. Co. v. Dist. Ct.</i> (9th Cir. 1990) 920 F.2d 1462.....	4
11 <i>People v. Jackson</i> (2005) 12 128 Cal.App.4th 1009 ( <i>Jackson</i> ).....	6, 9, 12
13 <i>People v. Jenkins</i> (2000) 14 22 Cal.4th 900 .....	11
15 <i>People v. Martinez</i> (2000) 22 Cal.4th 750 .....	3
16 <i>People v. Massie</i> (1998) 17 19 Cal.4th 550 .....	11
18 <i>People v. Proctor</i> 4 Cal.4th 499 (1992).....	11
19 <i>People v. Superior Court (Mouchaourab)</i> (2000) 20 78 Cal.App.4th 403 .....	6, 9, 10
21 <i>People v. Welch I</i> (1999) 22 20 Cal.4th 701 .....	11
23 <i>Phoenix Newspapers v. Dist. Ct.</i> (9th Cir. 1998) 156 F.3d 940.....	5
24 <i>Press Enterprise v. Superior Court</i> (1986) 25 478 U.S. 1.....	2, 3, 8, 12
26 <i>Press-Enterprise v. Superior Court</i> (1984) 27 464 U.S. 501 .....	2, 3, 4
28 <i>Press-Enterprise v. Superior Court</i> (1994) 22 Cal.App.4th 498 .....	6, 8, 10, 11

1 **TABLE OF AUTHORITIES**

2 (continued)

Page(s)

3 *Red Lion Broad. Co. v. FCC* (1969)  
395 U.S. 367 ..... 1

4 *Richmond Newspapers, Inc. v. Virginia* (1980)  
5 448 U.S. 555 (*Richmond*) ..... 2

6 *Savaglio v. Wal-Mart Stores, Inc.* (2007)  
7 149 Cal. App. 4th 588 ..... 6

8 *Seattle Times v. U.S. Dist. Court* (9th Cir. 1988)  
845 F.2d 1513 ..... 1, 11, 12

9 *Topanga Press, Inc. v. City of Los Angeles* (9th Cir. 1993)  
10 989 F.2d 1524 ..... 2

11 *U.S. v. Smith* (3d Cir. 1985)  
12 776 F.2d 1104 ..... 3, 6

13 *United States v. Brooklier* (9th Cir. 1982)  
13 685 F.2d 1162 (9th Cir. 1982) ..... 3, 4

14 *United States v. Doe* (2d Cir. 1995)  
15 63 F.3d 121 ..... 4

16 *United States v. Haller* (2d Cir. 1988)  
17 837 F.2d 84 ..... 4

18 *United States v. Hernandez* (9th Cir. 1979)  
18 608 F.2d 741 ..... 4

19 *United States v. Myers* (2d Cir. 1980)  
20 635 F.2d 945 ..... 10

21 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976)  
22 425 U.S. 748 ..... 1

23 *Waller v. Georgia* (1984)  
23 467 U.S. 39 ..... 2, 4, 8

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 (continued)

Page(s)

3 **STATUTES AND RULES**

4 California Code of Civil Procedure § 1904..... 7

5 California Penal Code

6 § 925 ..... 6, 7

7 § 938.1 ..... 6, 7

8 § 938.1, subd. (a)..... 7

9 § 938.1, subd. (b)..... 1

10 § 995 ..... 9

11 California Rules of Court,

12 Rule 2.400 ..... 5

13 Rule 2.500 ..... 5

14 Rule 2.550 ..... 5

15 Rule 2.550, subd. (b)(1) ..... 7

16 Rule 2.550, subd. (d)..... 5

13 **OTHER AUTHORITIES**

14 California Constitution,

15 Article I, § 2 ..... 1

16 Article I, §§ 2-3 ..... 1

17 Article I, § 3, subd. (b) ..... 5

18 Article I, § 3, subd. (b)(1)..... 6

19 Article I, § 14 ..... 3

1 **I. REQUEST FOR PROMPT HEARING AND SUMMARY OF PERTINENT FACTS**  
2 **AND ARGUMENT**

3 The San Jose Mercury News (hereafter the "Media") seeks leave to intervene in this  
4 important criminal case for the purpose of moving the Court to unseal the grand jury transcript in  
5 this egregious criminal case, which was provisionally sealed last month by the Court upon the  
6 motion of Defendant. Defendant Antolin Garcia Torres has been indicted by a criminal grand jury  
7 and charged with kidnapping and murdering 15-year-old Sierra LaMar, as well as the attempted  
8 kidnapping and carjacking of three women in 2009 in Santa Clara County. Given the seriousness  
9 of these serial crimes, the public interest in this case is immense.

10 Pursuant to the First Amendment to the United States Constitution ("First Amendment"),  
11 the California Constitution (Cal. Const., Art. I, § 2), and the common law, the public, including the  
12 media, must be heard on public access issues. (*Globe Newspaper Co. v. Superior Court*, (1982)  
13 457 U.S. 596, 609 n. 25 (*Globe Newspaper*); *Seattle Times v. U.S. Dist. Court*, (9th Cir. 1988) 845  
14 F.2d 1513, 1514 (*Seattle Times*.) Representatives of the media have standing to challenge orders  
15 denying public access to court proceedings and records. (*Globe Newspaper, supra*, 457 U.S. at  
16 p. 609 n.25 ["representatives of the press and general public must be given an opportunity to be  
17 heard on the question of their exclusion"]; *Seattle Times, supra*, 845 F.2d at p. 1514 [same].<sup>1</sup>)

18 Access to the grand jury transcript is mandated by the First Amendment (the public has a  
19 constitutional right of access to court records), the California Constitution (Cal. Const., Art. I,  
20 §§ 2-3) (same), California Penal Code section 938.1, subdivision (b) (the grand jury transcript  
21 "shall be open to the public" 10 days after delivery to the defendant unless the appropriate  
22

23 <sup>1</sup> See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425  
24 U.S. 748, 756 (potential recipients of speech, including news agencies, have standing to challenge  
25 an abridgment of speech); *Red Lion Broad. Co. v. FCC* (1969) 395 U.S. 367, 386-90 (the public  
26 has the right to receive suitable access to social, political, esthetic, moral, and other ideas through  
27 media); *Branzburg v. Hayes* (1972) 408 U.S. 665, 681 ("Without some protection for seeking out  
28 the news, freedom of the press would be eviscerated"). These cases demonstrate that the First  
Amendment unwaveringly protects the right to receive information. (See also *CBS Inc. v. Young*  
(6th Cir. 1975) 522 F.2d 234, 238 ["The protected right to publish the news would be of little  
value in the absence of sources from which to obtain it"].)

1 showing of prejudice to the defendant's fair trial right is made), and the common law  
2 (guaranteeing the public's right of access to court records).

3 As the United States Supreme Court has held, the loss of First Amendment and other  
4 constitutional freedoms, for even minimal periods of time, unquestionably constitutes irreparable  
5 harm. (*Elrod v. Burns* (1976) 427 U.S. 347, 373-374; accord *Topanga Press, Inc. v. City of Los*  
6 *Angeles* (9th Cir. 1993) 989 F.2d 1524, 1528.) For the reasons set forth below, a prompt hearing  
7 should be afforded the Media on this important issue, and public access to the grand jury transcript  
8 should be granted forthwith.

## 9 **II. PUBLIC ACCESS TO THE GRAND JURY TRANSCRIPT IS REQUIRED**

10 As stated above, this important case involves heinous serial crimes for which Defendant is  
11 charged, including the kidnapping and murder of a minor. Neither the U.S. Supreme Court nor the  
12 California Supreme Court has ruled on whether the First Amendment-based "compelling interest"  
13 test or the *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642 (*Alvarez*) "reasonable  
14 likelihood" of prejudice to fair trial rights test apply to keep grand jury transcripts sealed  
15 (discussed below). However, as a matter of law, Defendant fails both tests. The tests cannot be  
16 met in a county the size of Santa Clara County. Moreover, the grand jury transcript was filed with  
17 the court and provided to Defendant on or about February 13, 2014 and Defendant has thus had it  
18 in his possession for more than six weeks. No further delay should be tolerated. Accordingly, the  
19 grand jury transcripts should be unsealed forthwith.

### 20 **A. There Is a First Amendment Right of Access to Judicial Proceedings and** 21 **Records**

22 The grand jury transcript has been filed with the Court and is now a court record. Courts  
23 have uniformly recognized that the First Amendment gives the press and the public the right to  
24 attend and monitor criminal trials and pretrial proceedings. (*Richmond Newspapers, Inc. v.*  
25 *Virginia* (1980) 448 U.S. 555, 580 (*Richmond*); *Globe Newspaper, supra*, 457 U.S. at p. 609, n.  
26 25; *Press-Enterprise v. Superior Court* (1984) 464 U.S. 501, 508, 510 (*Press-Enterprise I*); *Press*  
27 *Enterprise v. Superior Court* (1986) 478 U.S. 1, 12-13 (*Press-Enterprise II*); *Waller v. Georgia*  
28 (1984) 467 U.S. 39 (*Waller*)). In fact, the United States Supreme Court has applied the



1 constitutional right of access to preliminary hearings, which serve the same purpose as grand jury  
2 proceedings. (*Press-Enterprise II, supra*, 478 U.S. at p. 13.)<sup>2</sup>

3 In *NBC Subsidiary (KNTV-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217-1218  
4 (*NBC Subsidiary*), California's Supreme Court, like other courts across the nation, including every  
5 federal Court of Appeals, applied the constitutional right of access to court records, including  
6 court records that flesh out criminal charging allegations. (*Ibid.*, see also, *Press-Enterprise I*, 464  
7 U.S. at pp. 508-510 [transcripts of voir dire]; *Press-Enterprise II, supra*, 478 U.S. 1 [transcripts of  
8 preliminary hearings]; *U.S. v. Smith* (3d Cir. 1985) 776 F.2d 1104, 1111 (*Smith*) [bill of  
9 particulars].)

10 Because the public has a presumptive right of access to judicial proceedings and records  
11 under the First Amendment, court proceedings can be closed and court records sealed only upon  
12 proof of an interest more compelling than the constitutional right of public access, that can be  
13 served by no less restrictive means than a sealing order, and which is supported by clear findings  
14 made on the record to allow *de novo* review by a higher court. (*Globe Newspaper, supra*, 457  
15 U.S. at pp. 606-607 ["Where . . . the state attempts to deny the right of access in order to inhibit  
16 the disclosure of sensitive information, it must be shown that the denial is necessitated by a  
17 compelling governmental interest and is narrowly tailored to serve that interest."].) "The public's  
18 right of access to judicial records has been characterized as 'fundamental to a democratic state.'"'  
19 (*Matter of Continental Illinois Securities Litigation* (7th Cir. 1984) 732 F.2d 1302, 1308.)

20 Thus, under the First Amendment, a heavy burden exists on the party seeking  
21 nondisclosure or sealing of documents to show such interference with the public's First  
22 Amendment access rights is "*strictly and inescapably necessary*" to protect a compelling  
23 government interest. (*United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1165-66 (9th Cir.  
24 1982) (*Brooklier*); *Copley Press, Inc. v. Superior Court* (1991) 228 Cal.App.3d 77, 84 [compelling  
25

26 <sup>2</sup> Unless waived by the defendant, a criminal prosecution can be pursued only by a grand jury  
27 indictment or a preliminary hearing. (Cal. Const., Art. I, § 14; *People v. Martinez* (2000) 22  
28 Cal.4th 750, 758.) Grand jury proceedings resulting in an indictment are the functional equivalent  
of a preliminary hearing. (*Cummisky v. Superior Court* (1992) 3 Cal.4th 1018, 1026-1027.)

1 reasons must establish why and to what extent records should be made private].) An order  
2 denying access to court records must satisfy both the procedural and substantive requirements of  
3 the First Amendment. (See *United States v. Haller* (2d Cir. 1988) 837 F.2d 84, 86; *Copley Press,*  
4 *Inc. v. Superior Court* (1998) 63 Cal.App.4th 367, 374 (*Copley III*) [compelling reasons must  
5 establish why and to what extent records should be made private].)

6 Furthermore, the presumption of openness may be overcome only by *competent evidence*  
7 sufficient to meet the test. (*Oregonian Publ. Co. v. Dist. Ct.* (9th Cir. 1990) 920 F.2d 1462, 1467  
8 (*Oregonian Publ.*) [vacating trial court's sealing order entered with "no evidentiary support"].)  
9 Speculation and conjecture cannot support a denial of access. (See, e.g., *CBS, Inc. v. United States*  
10 *Dist. Court* (9th Cir. 1985) 765 F.2d 823, 825 and *Oregonian Publ., supra*, 920 F.2d at p. 1466  
11 [findings cannot be based on conclusory assertions; rather the interest justifying sealing must be  
12 specified with particularity, and there must be findings that the closure remedy is narrowly  
13 confined to protect that interest]; *Waller, supra*, 467 U.S. at p. 46-48 [speculation that some harm  
14 or prejudice might occur cannot meet the compelling interest test]; *Ayala v. Speckard* (2d Cir.  
15 1997) 131 F.3d 62, 70, *cert. denied* (1998) 524 U.S. 958 ["trial judge[s] [must] recognize that  
16 open trials are strongly favored, [and] require persuasive evidence of serious risk to an important  
17 interest in ordering any closure, and [] realize the more extensive the closure requested, the greater  
18 must be the gravity of the required interest and the likelihood of risk to that interest."]; *United*  
19 *States v. Hernandez* (9th Cir. 1979) 608 F.2d 741; *United States v. Doe* (2d Cir. 1995) 63 F.3d 121  
20 [remand of denial of closure motion due to sparseness of the evidentiary record].)

### 21 1. The Compelling Interest Test Has Two Procedural Prerequisites

22 Courts must satisfy two procedural prerequisites before sealing court records: (1) Those  
23 seeking access must be afforded a reasonable opportunity to state their objections; and (2) The  
24 reasons supporting closure or sealing must be articulated in findings. (*Brooklier, supra*, 685 F.2d  
25 at pp. 1167-68; *see also Press-Enterprise I*, 464 U.S. at p. 509 [requiring findings specific enough  
26 for a reviewing court to determine if the closure order was properly entered].)

1                   **2.     The Compelling Interest Test Has Three Substantive Prerequisites**

2                   A proponent of sealing must also satisfy all of the following three-part test to seal any  
3 portion of a court record: That (1) sealing the records serves a compelling interest; (2) there is a  
4 substantial probability, in the absence of sealing, this compelling interest would be harmed; and  
5 (3) there are no alternatives to sealing that would adequately protect the compelling interest at issue.  
6 (*Phoenix Newspapers v. Dist. Ct.* (9th Cir. 1998) 156 F.3d 940, 949.)

7                   **B.     The First Amendment-Based Compelling Interest Test Applies to the Sealing**  
8                   **of Court Records**

9                   California applies the compelling interest standard to the sealing of court records. (*NBC*  
10 *Subsidiary, supra*, 20 Cal.4th at pp. 1217-18; Rules 2.400, 2.500 and 2.550 *et. seq.*) Under  
11 California court rules, court records are presumed to be open. A record must not be filed under  
12 seal without a court order. (Cal. R. Court 2.550.) The court may order that a record be filed under  
13 seal only if it expressly 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 (Cal. R. Court 2.550, subd. (d).) These prerequisites to sealing of court records apply to all civil  
22 and criminal cases. (Cal. R. Court 2.550 (Advisory Committee Comment).)

23                   **C.     Passage of Proposition 59 Broadened Public Access Rights in California**

24                   Court rules must be construed liberally in furtherance of the public's right of access after  
25 the passage of Proposition 59, resulting in a constitutionally-based right of access under Article I,  
26 Section 3, subdivision (b) of the California Constitution. Proposition 59 was placed on the ballot  
27 by unanimous votes of both houses of the California Legislature, and passed in November 2004 by  
28 more than 83 percent of California voters. It amended the California Constitution to add Article I,  
section 3, subdivision (b). California's Constitution now sets forth this fundamental provision:

1 “The people have the right of access to information concerning the conduct of the people’s  
2 business, and, therefore, the meetings of public bodies and the writings of public officials and  
3 agencies shall be open to public scrutiny.” (Cal. Const., Art. I, § 3, subd. (b)(1).) Proposition 59  
4 therefore expressly establishes that “the people have a right of access” which is broadly construed.  
5 (Cal. Const., Art. I, § 3, subd. (b)(1); cf. *NBC Subsidiary*, *supra*, 20 Cal.4th at pp. 1216-1218, and  
6 fn. 25; *Copley III*, *supra*, 63 Cal.App.4th at p. 373 [“both the federal . . . and the state . . .  
7 Constitutions provide broad access rights to judicial records in criminal and civil cases.”];  
8 *Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal. App. 4th 588, 596 [same].)

9 **D. The Compelling Interest Test Applies, and Defendant Cannot Meet the**  
10 **Compelling Interest Test As a Matter Of Law**

11 It is clear that transcripts of grand jury proceedings that result in an indictment are court  
12 records. Since at least 1933, California law has required grand jury transcripts be filed with the  
13 clerk of the Superior Court following the issuance of an indictment. (Pen. Code §§ 925, 938.1.)  
14 Since 1971, California law has expressly provided that transcripts of grand jury proceedings that  
15 result in an indictment are to be made public ten days after being provided to the defendant, unless  
16 sealed on the motion of the defendant or the court. (*Ibid.*)

17 At least three published decisions of the Courts of Appeal have addressed the public’s right  
18 of access to grand jury transcripts resulting in criminal indictments, and have recognized at least  
19 some of the constitutional requirements for sealing these court records. (*See Press-Enterprise v.*  
20 *Superior Court* (1994) 22 Cal.App.4th 498, 505 n. 5 (*Press-Enterprise III*); *People v. Superior*  
21 *Court (Mouchaourab)* (2000) 78 Cal.App.4th 403; and *People v. Jackson* (2005) 128 Cal.App.4th  
22 1009, 1021-1022 (*Jackson*.) Application of the constitutional right of access has also been  
23 favorably cited by California’s Supreme Court. (*Daily Journal Corp. v. Superior Court* (1999) 20  
24 Cal.4th 1117, 1132 (*Daily Journal*). But see Section I, E, *infra.*)

25 Similarly, federal cases hold that the public has a First Amendment right of access to the  
26 charging documents and records specifying the basis for criminal charges, such as a bill of  
27 particulars. (See, e.g., *Smith*, *supra*, 776 F.2d at p. 1111 [First Amendment right of access applies  
28 to criminal indictment, information, and bill of particulars].) Accordingly, grand jury transcripts

1 should be made public under the First Amendment-based compelling interest test applicable to  
2 court records.

3 **1. Both Requirements for Applying the Compelling Interest Test Are Met**

4 Under the historic prong of the compelling interest test, by statute, since 1933 post-  
5 indictment grand jury transcripts are required to be filed with the Superior Court by the clerk of  
6 the court. (Pen. Code § 938.1, subd. (a); § 925 [the predecessor to Section 938.1 was amended to  
7 specifically require that grand jury transcripts be certified and filed with the county clerk, being  
8 withheld from the public only until the defendant was in custody].) Under California law, court  
9 records include all documents “filed in or received by the court, such as the pleadings and motions  
10 filed by the parties and evidence admitted in court proceedings.” (Civ. Proc. Code § 1904 [“A  
11 judicial record is the record or official entry of the proceedings in a Court of justice, or of the  
12 official act of a judicial officer, in an action or special proceeding.”]; Cal. Rules of Court, Rule  
13 2.550, subd. (b)(1) [“court record” is “all or a portion of any document, paper, exhibit, transcript,  
14 or other thing filed or lodged with the court”]; *F.T.C. v. Standard Financial Management Corp.*  
15 (1st Cir.1987) 830 F.2d 404, 409 [“[d]ocuments which are submitted to, and accepted by, a court  
16 of competent jurisdiction in the course of adjudicatory proceedings, become documents to which  
17 the presumption of public access applies.”].) Indeed, the presumption of public access to court  
18 records has been specifically applied to grand jury transcripts. (*Craemer v. Superior Court* (1968)  
19 265 Cal.App.2d 216, 220-223 [holding grand jury transcripts filed with the court following an  
20 indictment were public records, to which there was a presumptive right of public access; “It is  
21 clear that within the meaning of the foregoing statutes the transcripts filed with the county clerk  
22 after the return of the indictments by the grand jury are ‘public writings’” and therefore “should  
23 not be unnecessarily and without reason withheld from public scrutiny....”].)

24 Under the function prong of the compelling interest test, public release of grand jury  
25 transcripts provides vital information to the public. When a prosecutor seeks a grand jury  
26 indictment, the grand jury serves the same role that a judge of the Superior Court serves at a  
27 preliminary hearing—to determine whether there is sufficient evidence to require the defendant to  
28 answer charges. Without access to the transcripts of grand jury proceedings, the public has no

1 ability to assess whether the prosecutor and the grand jury are discharging their responsibilities  
2 fairly, responsibly, and thoroughly. (See also, *Waller, supra*, 467 U.S. at p. 47 [public has a  
3 strong interest in exposing misconduct by law enforcement to public scrutiny].) Moreover, the  
4 disclosure of information from grand jury transcripts enhances the truth-finding function of the  
5 courts. Press coverage derived from grand jury transcripts provides detail regarding the version of  
6 events presented to the grand jury by the prosecution, which can and does prompt witnesses to  
7 come forward to support or dispute that version of events.

8 Additionally, the conduct of the grand jury can be challenged in a motion to dismiss the  
9 indictment. Such a motion may be dispositive. The grand jury transcript may provide the only  
10 evidence of mistakes or misconduct that can result in the dismissal of criminal charges in even the  
11 most serious cases—a factor the United States Supreme Court found to be central in affording the  
12 public access to preliminary hearings in (*Press-Enterprise II, supra*, 478 U.S. at pp. 12-13.)

13 The constitutional right of access has also been expressly applied to grand jury transcripts  
14 in California. (*Press-Enterprise III, supra*, 22 Cal.App.4th at p. 505 n. 5.) The court in *Press*  
15 *Enterprise III* was not required to and did not directly resolve the standard applicable to the  
16 sealing of post-indictment grand jury transcripts. (*Id.* at p. 503.) However, it was required to, and  
17 did, address the question of whether the constitutional right of access applies to grand jury  
18 transcripts after an indictment is issued. The defendant in *Press Enterprise III* asserted that there  
19 was no requirement that the court consider alternatives to sealing. (*Id.* at pp. 504-505.) The court  
20 held that:

21 [C]onsideration of reasonable alternatives is necessary in light of United States  
22 Supreme Court decisions providing that where a qualified First Amendment right  
23 of access attaches to a criminal proceeding, “. . . the proceeding shall be closed  
24 only if specific findings are made demonstrating that the defendant’s right to a fair  
25 trial will be prejudiced by publicity that closure would prevent and, second,  
26 reasonable alternatives to closure cannot adequately protect the defendant’s fair  
27 trial rights.”

28 (*Id.* at p. 505, n. 5, quoting *Press-Enterprise II, supra*, 478 U.S. at p. 14.) Finding the trial court’s  
discussion of alternatives deficient, the Court of Appeal reversed its order sealing a portion of the  
grand jury transcript.

1 In *People v. Jackson*, the trial court also sealed the transcript of the grand jury proceedings  
2 and portions of the indictment. (*Jackson, supra*, 128 Cal.App.4th at p. 1016.) It also sealed  
3 documents relating to a motion to dismiss the indictment under Penal Code section 995. (*Id.*) The  
4 media sought a writ mandating public access to these materials. In determining whether the  
5 records that were the subject of the petition had been properly sealed, the court of appeal applied  
6 the constitutional compelling interest test. (*Jackson, supra*, 128 Cal.App.4th at pp. 1022, 1027.)  
7 Thus, the decision in *People v. Jackson* also applied the qualified constitutional right of access in  
8 determining the propriety of sealing grand jury materials.

9 In *People v. Superior Court* (2000) 78 Cal.App.4th 403, the court addressed the claims of  
10 criminal defendants for access to the non-testimonial portions of grand jury transcripts. The  
11 People asserted that disclosure would violate the principle of grand jury secrecy. (*Id.* at pp. 425,  
12 431.) The court disagreed. The court carefully reviewed the history of grand jury secrecy and the  
13 reasons for such secrecy, addressing in particular this Court's prior decisions in *McClatchy*  
14 *Newspapers v. Superior Court* (1988) 44 Cal.3d 1162 (*McClatchy*) and *Daily Journal, supra*, 20  
15 Cal.4th at p. 1117. (*People v. Superior Court, supra*, 78 Cal.App.4th at pp. 414-417, 431-434.)  
16 Addressing the purported need for secrecy after the conclusion of grand jury proceedings, the  
17 court held that "[t]he court in *McClatchy* emphasized that the watchdog function and the  
18 indictment function of a grand jury served different social purposes. ... The court's comments in  
19 *McClatchy* regarding the continuing need to maintain the secrecy of evidentiary and other  
20 materials after the grand jury is discharged are thus limited to the circumstances before it." (*Id.* at  
21 pp. 432-433.) It also noted this Court's determination in the *Daily Journal* decision  
22 "acknowledg[ing] that '[t]he same [secrecy] considerations do not . . . adhere when there has been  
23 an indictment, because it is but 'the first step in a long process in which the accused may seek  
24 vindication through exercise of the right to public trial, to a jury, to counsel, to confrontation of  
25 witnesses against him and, if convicted to an appeal.'" (*Id.* at pp. 433-434, quoting *Daily Journal,*  
26 *supra*, 20 Cal.4th at p. 1117 [citations omitted].) In addition, *People v. Superior Court* recognized  
27 the qualified constitutional right of access applied in *Press-Enterprise III*, and cited with approval  
28 in *Daily Journal*:

1 If an indictment is returned, Penal Code section 938.1 requires that a transcript of  
2 the grand jury proceedings be prepared and delivered to the district attorney and the  
3 defendant' and thereafter to the public. Thus although grand jury proceedings  
4 [themselves] are not open to the public, once an indictment has been returned,  
5 'section 938.1 . . . implicitly recognizes the public's qualified right of access to the  
6 record of those proceedings.

7 (*Id.* at pp. 433-434, quoting *Daily Journal*, *supra*, 20 Cal.4th at pp. 1123, 1132, and *Press-*  
8 *Enterprise III*, *supra*, 22 Cal.App.4th at p. 505, fn. 5 [citations omitted].)

9 These decisions recognize that the policies supporting the secrecy of grand jury  
10 proceedings no longer pertain once an indictment has been returned, and that, at that point, the  
11 qualified constitutional right of access attaches.

12 Because grand jury transcripts are court records upon being filed with the clerk of the court  
13 after an indictment, under both California law and the First Amendment, they should be publicly  
14 released absent strict compliance with the compelling interest tests. Defendant cannot meet this  
15 test.

16 **2. Speculative Pretrial Publicity Fears Cannot Form the Basis For**  
17 **Secrecy, Particularly in a County the Size of Santa Clara**

18 Defendant has failed to identify, much less prove, any compelling interest to keep the  
19 grand jury transcript sealed. As a matter of law, speculative fears about the impact of press  
20 coverage cannot constitute a compelling interest in this case. (See Section II, A, *supra*.)

21 Many courts have held that concerns about the impact of press coverage, prior to or during  
22 trial, are almost always misplaced. Pretrial publicity, even if pervasive and concentrated, does not  
23 inevitably lead to an unfair trial in criminal cases. (*Associated Press v. United States District*  
24 *Court* (1983) 705 F.2d 1143, 1146; *Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 554, 565  
25 (*Nebraska Press*) [it cannot be said that "juror exposure to ... news accounts of the crime with  
26 which [a defendant] is charged alone presumptively deprives the defendant of due process"];  
27 *United States v. Myers*, (2d Cir. 1980) 635 F.2d 945, 953 [pointing out that even the intensive  
28 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".])



1 Indeed, although the standard for obtaining a change of venue is lower than the standard for  
2 sealing a grand jury transcript, the Supreme Court has consistently rejected claims that a change of  
3 venue was improperly denied. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 942-46; *People*  
4 *v. Welch I* (1999) 20 Cal.4th 701, 743-45; *People v. Massie* (1998) 19 Cal.4th 550, 577-79.) In  
5 doing so, it has emphasized that that “there is ‘no presumption of a deprivation of due process of  
6 law aris[ing] from juror exposure to publicity concerning the case.’” (*Jenkins, supra*, 22 Cal.4th at  
7 p. 945, quoting *People v. Proctor* (1992) 4 Cal.4th 499, 527.)

8 In fact, pretrial publicity cannot justify secrecy in this case both because the trial date has  
9 not been set and the legal standard for demonstrating prejudice cannot be met in this county. First,  
10 there no evidence in the record of which the Media is aware to suggest that publicity will saturate  
11 the entire jury pool of Santa Clara County (which has more than 1.8 million people) to support  
12 sealing. (*Nebraska Press, supra*, 427 U.S. at p. 539, *Press-Enterprise III, supra*, 22 Cal.App.4th  
13 at pp. 503-04; see Declaration of Guylyn Cummins filed herewith, ¶¶ 2-3 [showing population of  
14 Santa Clara County at an estimated 1,862,041].) Second, to uphold a valid prejudice finding, the  
15 evidence must be “clear ... that further publicity, unchecked, would so distort the views of  
16 potential jurors that 12 [c]an not be found who would, under proper instructions, fulfill their sworn  
17 duty to render a just verdict exclusively on the evidence presented in open court’ ....” (*CBS v. U.S.*  
18 *Dist. Ct.* (9th Cir. 1983) 729 F.2d 1174, 1178 (quoting *Nebraska Press, supra*, 427 U.S. at p.  
19 569).) The Ninth Circuit Court of Appeal reinforced this high standard in *Seattle Times, supra*,  
20 845 F.2d at p. 1519:

21 [P]ervasive publicity, without more, does not automatically result in an unfair trial.  
22 In assessing the prejudicial nature of such publicity, this court looks “not simply to  
23 its effect on individual viewers but to its capacity to inflame and prejudice the  
entire community. In other words, [does it create] a pattern of deep and bitter  
prejudice . . .” throughout the community” (Citations omitted).

24 In highlighting the fact that “[p]retrial proceedings have grown increasingly important in the  
25 modern era,” the Court noted that disclosure of even prejudicial information is minimized when it  
26 occurs “almost two months before the jury is scheduled to be impaneled.” (845 F.2d at p. 1518.)  
27 The Court further held that “prejudicial publicity is less likely to endanger the defendant’s fair trial  
28 in a large metropolitan area such as Seattle.” (*Ibid.*) Moreover, searching voir dire, peremptory

1 challenges, admonitions and instructions to the jury, redaction, and media self-restraint are all  
2 viable alternatives to secrecy. (*Ibid.*) If voir dire fails to impanel an impartial jury, the options of  
3 a continuance or change of venue are still open. (*Ibid.*)

4 Here, Santa Clara County's population in excess of 1.8 million from which the jury pool is  
5 drawn is sufficiently large to seat a fair jury in this case regardless of the amount or substance of  
6 pretrial publicity. Any argument to the contrary is necessarily speculative. Given that such an  
7 argument is further not supported by evidence, and adequate alternatives to secrecy exist, as a  
8 matter of law it is constitutionally infirm.

9 **E. Defendant Also Cannot Meet the *Alvarez* Test**

10 Notably, the *Alvarez* decision treats grand jury transcripts differently than other court  
11 records filed in which the constitutional right of access clearly applies. See Section II, A-D,  
12 *supra*. Neither the California Supreme Court nor the U.S. Supreme Court has ruled on the issue of  
13 whether the compelling interest test must be implied, instead of the "reasonable likelihood" test  
14 articulated by the Court in the *Alvarez* decision.<sup>3</sup> In any event, for the reasons stated in Section D,  
15 *supra*, there is no reasonable likelihood "that making all or any part of the grand jury transcript  
16 public will prejudice any defendant's right to a fair and impartial trial" in a county the size of  
17 Santa Clara County, especially given that there has not even been a "substantial" amount of  
18 publicity about the case, such as there was in *People v. Jackson, supra*, 128 Cal.App.4th at  
19 pp. 1021-1022. In any event, alternatives, including the following, are available to protect  
20 Defendant's fair trial rights:

- 21 - Searching voir dire
- 22 - Peremptory challenges
- 23 - Juror oaths, admonitions, and instructions
- 24 - Redaction of any sensitive portions of the transcripts
- 25 - Trial continuances

26 \_\_\_\_\_  
27 <sup>3</sup> A similarly outdated California statute regarding public access to preliminary hearings, applying  
28 a lesser (reasonable likelihood) test, was thrown out by the U.S. Supreme Court in *Press-Enterprise II, supra*, 478 U.S. at pp. 12-13, and the compelling interest test applied.

1 - Change of venue

2 These alternatives to protect Defendant's fair trial cannot be ruled out, or they would be used in  
3 every criminal case to automatically seal grand jury transcripts. Such is not the law.

4 **III. CONCLUSION**

5 For the reasons set forth, an immediate hearing should be afforded the Media and the grand  
6 jury transcript should be made public forthwith.

7 Dated: April 1, 2014

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