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FRESNO COUNTY SUPERIOR COURT
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SUPERIOR COURT OF CALIFORNIA

COUNTY OF FRESNO, CENTRAL DIVISION

In the Matter of: Four Sealed Search Warrants. AND RELATED ACTION. PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MARCUS WESSON, Defendant.	W04912037-9 W04912038-7 W04912039-5 W04912450-4 CASE NO. F049017856 **NON-PARTY MEDIA ENTITY *THE FRESNO BEE'S* MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANT RECORDS** HEARING DATE: May 20, 2004 TIME: 8:30 a.m. DEPT: 53 (Honorable R. L. Putnam) Estimated time for hearing: 30 minutes

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The McClatchy Company, doing business as *The Fresno Bee* ("*The Fresno Bee*"), submits this memorandum of points and authorities in support of its motion to unseal search warrant records in the above action.

I. INTRODUCTION.

On Friday evening, March 26, 2004, *The Fresno Bee* learned that multiple search warrants in this action were likely to be returned as early as Monday, March 29, 2004, by the Fresno Police Department. On Monday, March 29, 2004, information obtained by *The Fresno Bee*, indicated that the search warrants would not be returned on Monday. A *Fresno Bee* reporter specifically asked the Fresno Police Department Legal Advisor, Larry Donaldson, which judge would be hearing any motion to seal the warrant returns. Mr. Donaldson refused to provide that information and told the reporter he would have to wait until after the motion was made.

On Tuesday, March 30, 2004, even though it was not aware whether a motion or application to seal the search warrant documents had been made, *The Fresno Bee*, through its attorneys, sent by facsimile to the County Administrative Office its preliminary opposition to sealing of the search warrants. The preliminary opposition was a precautionary measure to inform the court of *The Fresno Bee's* interest in the search warrant documents as public documents and as a means to request an opportunity to be heard if any motion or application were made.[1]

On Tuesday, March 30, 2004, at the end of the day, *The Fresno Bee* learned from the court's administrative office that three search warrants had been returned and ordered sealed by Judges R. L. Putnam and Bruce Smith. It appeared the judges had not received *The Fresno Bee's* preliminary opposition before entertaining the motions to seal. In any event, *The Fresno Bee* had no notice that there was a request to seal the search warrants and had no opportunity to appear and oppose the motions. *The Fresno Bee* learned of the sealing only after the sealing orders were made.

On Wednesday, March 31, 2004, attorney Bruce A. Owdom spoke to Fresno Police Department Legal Advisor, Larry Donaldson. Mr. Donaldson advised that he had assisted the Fresno

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[1]A true and correct copy of *The Fresno Bee's* [Preliminary] Opposition to Sealing of Search Warrants received by the court on March 30, 2004, is attached to the Declaration of Bruce A. Owdom in Support of Motion to Unseal Search Warrant Records, as exhibit A.

Police Department in moving to seal the three search warrant files on March 30, 2004. Mr. Donaldson advised that the motions themselves were also sealed and that the hearings on those motions were not open to the public. Apparently, no notice was given to the public that the motion to seal was being made and the hearing was taking place. After that closed hearing, only the orders sealing the search warrant documents were available to the public, and on March 31, 2004, at about 4:00 p.m., Mr. Donaldson faxed to Mr. Owdom copies of three public orders sealing search warrants and related materials.[2]

On Thursday, April 1, 2004, attorney Bruce A. Owdom called the Fresno County Superior Court Executive Office to inquire about the appropriate department to request a hearing on a motion to unseal the three search warrant files. Mr. Owdom was advised that the case had been assigned to Department 60 and that department may be called directly to inquire about its availability to hear a motion to unseal. Mr. Owdom called and spoke to the clerk in Department 60 and requested a hearing on a motion to unseal the search warrant files and mentioned that the matter was of some urgency. Mr. Owdom was later advised at approximately 2:00 p.m. that a telephone conference would occur at 3:30 p.m. regarding his request to set a hearing. A short time later, Mr. Owdom was advised that he was to appear personally in Department 60 at 3:30 p.m.

On April 1, 2004, at 3:30 p.m., Judge Lawrence Jones called the matter of the *People of the State of California v. Marcus Wesson*, case number F049017856. The matter was not called in open court, but rather in chambers, and was transcribed by a court reporter. Mr. Owdom was present and other appearances were Lisa Gamoian, Fresno County District Attorney's Office; Larry Donaldson, Fresno Police Department Legal Advisor; Peter Jones, Fresno County Public Defender's Office; the court clerk and court reporter; and an unknown male whose identity was not announced or otherwise placed on the record. Mr. Owdom requested an expedited hearing on a motion to unseal the search warrant records because of the constitutional considerations involved. Mr. Donaldson stated his desire to research whether Judge Jones was the proper judicial officer to hear such a

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[2]True and correct copies of the three orders sealing search warrants W04912037-9, W04912038-8 and W04912039-8, and the related documents are attached to the Declaration of Bruce A. Owdom in Support of Motion to Unseal Search Warrant Records, as exhibit B.

motion, and requested a hearing date for a motion to address that question. A hearing date was set for April 21, 2004, in Department 60, and the motion was ordered to be filed by April 7, 2004. Mr. Owdom repeated his request for an expedited procedure on a hearing of a motion to unseal the records. Ms. Gamoian refused to waive any time for notice of Mr. Donaldson's motion and any motion to unseal, and the court declined to set an earlier hearing date for Mr. Donaldson's motion. Mr. Owdom suggested that the issue of which judge should hear the motion to unseal the search warrant documents could also be handled on an expedited basis in a matter of days.[3] The court declined that invitation because Ms. Gamoian refused to waive timely notice for Mr. Donaldson's motion.

It is believed at this time that the only public record of the warrants having been issued, executed or returned to the Fresno County Superior Court are the orders sealing them. (See exs. B and C to Owdom declaration.)[4]

On April 21, 2004, Judge Lawrence Jones, department 60, again called the matter of the *People of the State of California v. Marcus Wesson* for the hearing on Plaintiff's Motion to Have Judge Who Sealed Search Warrant Hear Motion to Unseal Warrants. At that hearing, Judge Jones granted the motion and set a hearing on the matter of sealed search warrants in Fresno County Superior Court, Department 53, before Judge R. L. Putnam, on Monday, April 26, 2004, at 9:00 a.m. At that hearing, Judge Putnam ordered Ms. Gamoian to provide the sealed search warrant materials

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[3]The United States Supreme Court has emphasized that, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod v. Burns* (1976) 427 U.S. 347, 373 [49 L.Ed.2d 547, 96 S.Ct. 2673]. See also, *New York Times Co. v. United States* (1971) 403 U.S. 713, 714-715, 29 L.Ed.2d 822, 91 S.Ct. 2140] (Black, J., concurring) ["every moment's continuance" of a wrongful restraint of speech "amounts to a flagrant, indefensible, and continuing violation of the First Amendment."].)

The California Supreme Court has emphasized that dangers of even temporary restraints on public access to court documents and proceedings. In *NBC Subsidiary (KMBC-TV), Inc., v. Superior Court* (1999) 20 Cal.4th 1178, 1220, fn. 44, the court rejected the argument that the release of trial transcripts after trial satisfies the First Amendment. The court held a delayed release is "fundamentally inconsistent with the basic value of a right of access."

Because any delayed release of the search warrant document in this case does not satisfy the mandate of the First Amendment, the search warrants and related documents should be unsealed immediately.

[4]On about April 19, 2004, attorneys for *The Fresno Bee* learned from a paper served by defendant Wesson entitled "Wesson's Brief re: Sealed Search Warrant Records" that an order sealing a fourth search warrant and related documents was signed by Judge Bruce Smith on April 7, 2004 and filed April 16, 2004.A true and correct copy of the fourth order sealing search warrant W04912450-4 and related documents is attached to the Declaration of Bruce A. Owdom in Support of Motion to Unseal Search Warrant Records, as exhibit C.

to Mr. Jones and the defense team and set the following hearing and briefing schedule. *The Fresno Bee's* motion to unseal shall be filed by April 27, 2004, at 4:00 p.m., the response shall be filed by May 14, 2004, at 4:00 p.m., and any reply shall be filed by May 17, 2004, by 4:00 p.m. The hearing on *The Fresno Bee's* motion is set for May 18, 2004, at 8:30 a.m., in Department 53. (By the court's later minute order, *The Fresno Bee's* reply shall be filed by May 18, 2004, and the hearing is set for May 20, 2004.)

II. *THE FRESNO BEE* HAS STANDING TO CONTEST SEALING OF COURT ORDERS.

The Fresno Bee has standing as a member of the public at large to enforce the rights of public access to judicial proceedings and documents filed in those proceedings as recognized by the courts. *Press Enterprise Co. v. Superior Court (Press Enterprise II)* (1986) 478 U.S. 1, 13-14, 9 L.Ed.2d 1 [106 S.Ct. 2735]; *Times Mirror Company v. U.S.* (9th Cir. 1989) 83 F.2d 1210 and *United States v. Brooklier* (9th Cir.1982) 685 F.2d 1162; Cal. Rules of Court, rule 243.2(h)(2) "a party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record."

III. *THE FRESNO BEE* OBJECTS TO THE LACK OF ANY PUBLIC RECORD OF SEARCH WARRANTS AND TO THE SEALING PROCEDURE IN FRESNO COUNTY.

As set forth in *The Fresno Bee's* preliminary opposition to sealing of search warrant, received by the court on March 30, 2004, Penal Code section 1534 provides that search warrant affidavits shall be open to the public 10 days after execution or return. On April 20, 2004, the California Assembly Public Safety Committee considered and rejected an amendment to Penal Code section 1534. (*The Fresno Bee's* Request for Judicial Notice in Support of Motion to Unseal Search Warrant Records, ex. B.) The proposed amendment (AB2986) would have changed existing law which declares that search warrant records of the court "are open to the public as a judicial record after the execution and return of the warrant or the expiration of a 10-day period after issuance." The rejected revision would have allowed sealing of search warrant materials on a showing that public disclosure "will interfere with or prejudice an ongoing investigation." The defeat of AB2986 in the

Public Safety Committee illustrates current California law. Penal Code section 1534 provides that search warrant documents are open to the public after execution and return or expiration of 10 days after issuance. Further, California Rules of Court, rules 243.1 and 243.2, require a publicly docketed motion for an order sealing the records, accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing. (Cal. Rules of Court, rule 243.2(b)(1)(4)(5).) A court record must not be filed under seal without a court order, and the court must not permit a record to be filed under seal only on the agreement or stipulation of the parties. (Cal. Rules of Court, rule 243.2(a).)

The motion to seal should be placed on the docket in a manner that makes it identifiable to the public. Non-parties who seek, under rule 243.2, to oppose a motion to seal a court record must monitor the court's docket for such proceeding in which they may have an interest. Under the Rules of Court, it is not appropriate to docket such a motion to seal a record in a fashion that hides or even obscures the nature of the matter.

The procedure for giving notice to the public is the same as for motions to close court proceedings. (See *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217 [86 Cal.Rptr.2d 778].)

> [W]hen a motion to close a proceeding is made in open court (or, for example, at a closed bench conference held during open court proceedings), adequate notice of the contemplated closure is provided if the trial judge thereafter announces in open court that he or she plans to hold (or to consider holding) that proceeding in closed session. When a motion seeking closure is made in a written filing, adequate notice is provided by publicly docketing the motion reasonably in advance of a determination thereon. In either circumstance, the notice requirement should not impose an onerous or undue burden on trial courts.
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> Second, *before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (I) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.

(*Id.*, footnotes omitted.) The Advisory Committee Comment (2004) to California Rule of Court, rule 243.1, states:

> This rule and rule 243.2 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law. . . .

Of course, here, the expression of California law in Penal Code section 1534 is explicit that search warrant materials are "open to the public as a judicial record." (Pen. Code, § 1534.)

In *NBC Subsidiary*, *supra*, at page 1217, footnote 36, the California Supreme Court cited *United States v. Criden* (3d Cir. 1982) 675 F.2d 550, emphasizing the constitutional basis underlying these rules. *Criden*, *supra*, held that although the Constitution does not require "individual notice to the press or the public," due process requires that a motion for closure must be posted on the docket reasonably in advance of a hearing on or disposition of a closure motion, in order to give notice to the public of the closure request. (*Criden*, *supra*, 675 F.2d at p. 559.)

Only the court can compel the parties to observe and follow the California Rules of Court with respect to the sealing of court records, and the court's authority is especially important where the rights of non-parties are affected. In this case, all of the facts and circumstances surrounding the sealing are not yet known, precisely because the proponent of the sealing order did not publicly docket its motion to seal the court records. *The Fresno Bee* and other interested public members had no opportunity to appear and be heard in opposition to the motion. (See *Globe Newspapers Co. v. Superior Court* (1982) 457 U.S. 596, 609, fn. 25 [73 L.Ed.2d 248, 102 S.Ct. 2613; *NBC Subsidiary (KNBC-TV)*, *supra*, p. 1217.)

The court should enter an order stating that the procedure followed in this case has violated clear constitutional authority and the California Rules of Court. The court should make clear the proper procedure to be followed in future cases. Courts in other jurisdictions in this state have implemented rules 243.1 and 243.2 in the following manner. When the court receives a motion or application for an order sealing records and accompanying documents in support of the motion, the court may conditionally seal the documents pending a hearing on that motion. The order conditionally sealing the search warrant documents would set forth a date and time for a hearing and that order would be publicly docketed so that interested members of the public, including media

entities, would be notified of the pending motion and would be afforded an opportunity to appear and oppose the motion if they desired. This or a similar procedure would avoid disclosure of documents that should be properly sealed and would protect the rights and interests of members of the public to oppose such motions if appropriate.

IV. ANY SEALING ORDER MUST BE SUPPORTED BY SPECIFIC FACTS AND NARROWLY TAILORED.

The parties seeking to seal a record has the burden to justify the sealing of search warrant documents. (Cal. Rules of Court, rule 243.2(b)(1).)

California Rules of Court, rule 243.1(d), provides:

> The court may order that a record be filed under seal only if it expressly finds facts that establish:
>
> (1) there exists an overriding interest that overcomes the right of public access to the records;
>
> (2) the overriding interest supports sealing the record;
>
> (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
>
> (4) the proposed sealing is narrowly tailored; and
>
> (5) no less restrictive means exist to achieve the overriding interest.

(Emphasis added.) As the court stated in *Criden, supra*, 675 F.2d at p. 562, "[t]he articulation requirement is essential for meaningful appellate review of trial court decisions on motions to hold closed hearings." The rationale for the "articulation requirement" applies also to the sealing of public judicial records. Since the purpose of the findings is to allow the appellate court to determine whether a closure or sealing order is appropriate, the Ninth Circuit Court of Appeals has held "the findings must be sufficiently specific to show that the three substantive prerequisites to closure have been satisfied – that there is a substantial probability (1) that public proceedings would result in irreparable damage to defendant's right to a fair trial, (2) that no alternative to closure would adequately protect this right, and (3) that closure would effectively protect it." (*United States v. Brooklier* (9th Cir.1982) 685 F.2d 1162, 1168-1169.)

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In *NBC Subsidiary*, *supra*, the California Supreme Court examined the specific structural values served by public access to court proceedings, including promoting public confidence in governmental proceedings, and allowing citizens to scrutinize those proceedings for abuse of judicial power. (*Id.* at p. 1202.) The court determined that Code of Civil Procedure section 124 [generally sittings of every court shall be public] was consistent with those values. Penal Code section 1534 and Rules of Court, rules 243.1 and 243.2, accomplish these same purposes, consistent with First Amendment rights of public access to judicial records.

The factual findings required by rule 243.1 are consistent with and protective of the state's rights to investigate and commence criminal proceedings while also protecting the public's statutory and constitutional rights of access to judicial records.

General assertions of potential prejudice are not sufficient. Otherwise, all search warrant documents could be sealed indefinitely and the public's rights under Penal Code section 1534 would be rendered meaningless. (See, for example, *United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1169 [observing that if general findings were sufficient, all testimony and pretrial proceedings could be "taken in secret"].) Here, the public orders sealing the search warrant documents contain nothing more than a recital of the requirements of rule 243.1. There are no facts stated whatsoever that would satisfy the clear requirements of rule 243.1. The search warrant documents should be immediately made public unless and until the sealing proponent files a proper motion, with supporting documents, which *The Fresno Bee* and other members of the public may review, analyze, and contest, and unless and until the court makes <u>factual</u> findings required by rule 243.1.

Rule 243.1(e)(1) provides:

> An order sealing the record must (I) specifically set forth the facts that support the findings and (ii) direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

In this case, the orders contain no facts and simply state in a bare conclusion that there is an "ongoing" investigation which "would be compromised by a public disclosure of the warrant and any items obtained after service of the warrant . . . ." (Owdom Dec., exs. B and C.) Each of the

four orders simply repeats the findings required by the rule and offers only conclusions, not facts, in support of those findings. There is no factual basis for such a conclusion, and no facts are stated that support the findings required under rule 243.1(d). (Cal. Rules of Court, rule 243.1(e)(1).) In fact, a suspect has been arrested and arraigned on a criminal complaint. That defendant has been ordered to stand trial after a preliminary hearing and now arraigned on an information. It is difficult to understand how any investigation could be compromised after these public milestones in this case.

Under California law, there is a presumption of disclosure of court records. (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782 [136 Cal.Rptr. 831] [". . . There can be no doubt that court records are public records, available to the public in general, including news reporters, unless a specific exception makes specific records non-public." [Footnote and citation omitted.]].) Penal Code section 1534 provides that after execution of a search warrant, "the documents and records shall be open to the public as a judicial record," and California Penal Code section 243.1(c) provides "[u]nless confidentiality is required by law, court records are presumed to be open." In every single case, the police or the prosecution may state that disclosure would compromise the investigation and, as here, without any facts to support that conclusion, write Penal Code section 1534 and rules 243.1 and 243.2 out of existence. The orders sealing the search warrant documents are defective and must be vacated.

V. CONCLUSION.

The court should reconsider and vacate its orders sealing search warrant documents entered in this case without an opportunity for *The Fresno Bee* to be heard in opposition and without the proponent having made the showings required by *Press-Enterprise Company v. Superior Court (Press-Enterprise II)* (1986) 478 U.S. 1, 92 L.Ed.2d 1 [106 S.Ct. 2735],[5] and California Rules of Court, rule 243.1. Search warrant records are presumptively open to the public under Penal Code section 1534 and rule 243.1(c). (*People v. Tockgo* (1983) 145 Cal.App. 635, 642 [193 Cal.Rptr. 503].) The court should permit sealing only after an opportunity for opponents to be heard and only if the court can make the factual findings required by the Rules of Court. The court should narrowly

[5] *Press-Enterprise II* addressed access to judicial proceedings, but the Ninth Circuit Court of Appeals has held that the same analysis applies also to documents arising from a judicial proceeding. (*Times Mirror Co. v. U.S.* (9th Cir. 1989) 873 F.2d 1210, 1213, fn. 4.

tailor its sealing of these search warrant documents through redaction or other means, but only to the extent that the required evidentiary showings support such redaction. Finally, beyond the specifics of this case, the court should require in the future that all sealing motions are docketed in the public record, that any sealing made without a motion is conditioned on a motion being filed and a hearing conducted consistent with the Rules of Court, and that any sealing ordered be narrowly tailored and supported by findings consistent with the Rules of Court.

DATED: April 27, 2004.

DIETRICH, GLASRUD, MALLEK & AUNE

BY: Bruce A. Owdom
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Attorneys for The McClatchy Company,
doing business as *The Fresno Bee*

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am 18 years of age or over and not a party to the within action; my business address is 5250 North Palm Avenue, Suite 402, Fresno, California, 93704.

On April 27, 2004, I served the within document described as **NON-PARTY MEDIA ENTITY *THE FRESNO BEE'S* MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO UNSEAL SEARCH WARRANT RECORDS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope at Fresno, California, addressed as follows:

See attached Service List.

_____ (BY MAIL) depositing the sealed envelope with the United States Postal Service with the postage fully prepaid.

___X___ (BY MAIL) placing the envelope for collection and mailing on the date and at my address shown above following our ordinary business practices. I am completely familiar with Dietrich, Glasrud, Mallek & Aune's practice of collection and processing of correspondence for mailing. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in declaration.

_____ (BY OVERNIGHT MAIL SERVICE) by placing the envelope for collection following our ordinary business practices for collection and processing correspondence for mailing by express or overnight mail to the person(s) by whose name an asterisk is affixed.

___X___ (BY FACSIMILE) In addition to service by mail as set forth above, the person(s) by whose name an asterisk is affixed was also forwarded a copy of said documents by facsimile.

_____ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 27, 2004, at Fresno, California.

Lori L. Bailey

LORI L. BAILEY

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