

1 Nor does *The Fresno Bee* cite any such authority. Indeed, the closest *The Bee*
2 comes is to cite stating that it is not deciding the question.

3 In its Memorandum, page 4, line 12, *The Bee* cites *Times Mirror Company v. U.S.*
4 (9th Cir.) 83 [sic: should be 873] F.2d 1210. In that case, the Times Mirror Company
5 claimed a First Amendment right “to search warrant materials associated with ... a[n]
6 FBI investigation” The 9th Circuit Court of Appeal held otherwise, stating “members
7 of the public have no right of access to search warrant materials while a pre-indictment
8 investigation is under way.”¹

9 The *Times Mirror* court also “d[id] not decide ... the question whether the public
10 has a First Amendment right of access to warrant materials after an investigation is
11 concluded or after indictments have been returned.”²

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13
14 But even if *The Fresno Bee* does have such a First Amendment right, Wesson’s
15 interest in a fair trial outweighs it.³

16
17 We start with a general principle. It is well-established that a criminal defendant’s
18 right to a fair trial outweighs the public’s, or the media’s right of access to pretrial access
19 to public records. See, e.g., *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 223,
20 226 – 227 (access to transcripts of grand jury witnesses, although statutorily allowed after
21 indictment, restricted to preserve the defendant’s right to a fair trial.)

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24 ¹ *Times Mirror Company v. U.S.*, *supra*, 873 F.2d at 1211.

25 ² *Times Mirror Company v. U.S.*, *supra*, 873 F.2d at 1211.

26 ³ The defense does not suggest in any way, by its representations in this motion, that Mr.
Wesson could receive a fair trial in the present venue, under any circumstances.

1 Specifically when the First Amendment and court processes are involved, the U.S.
2 Supreme Court, in *Press-Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 8 – 9,
3 teaches that “the Court has traditionally considered whether public access plays a
4 significant positive role in the functioning of the particular process in question.”
5

6 There is serious doubt that “public access [to the search warrant records here
7 would] play[] a significant positive role in the functioning of the particular process in
8 question” here, namely providing Mr. Wesson with a fair trial.
9

10 It is common knowledge, that affidavits in support of the search warrants often
11 contain (1) hearsay that is often inadmissible at trial, (2) bare bones information that
12 often turns out to have been misleading, and (3) facts proffered in good faith that often
13 later turn out to be inaccurate. Without disclosing sealed material, we can say that there
14 is no reason to think these affidavits are any different. Surely, also, the same can be said
15 for the affidavits supporting the sealing of these warrants.

16 Obviously, public access to (1) inadmissible hearsay, (2) incomplete information
17 or (3) inaccurate facts would “play[] [no] significant positive role in the functioning of
18 the particular process in question,” namely, a fair trial. On the contrary, that would play a
19 significant negative role.

20 As to questionable material like this, the rule is well-established that “[t]he public
21 generally has no right to pretrial disclosure of questionable evidence, a disclosure which
22 might well deny to the accused the fair and impartial trial which is his due.” See, e.g.,
23 *Allegrezza v. Superior Court* (1975) 47 Cal.App.3d 948, 951 (public and media barred
24 from a pretrial hearing on the voluntariness of a minor’s purported confession, because
25 that purported confession may never come into evidence.)
26

1 Thus, even if *The Bee* has a First Amendment interest in the search warrant
2 records, this court should still not grant it access to the affidavits in support of the search
3 warrants, nor to the affidavits in support of sealing those warrants.

4
5 As to the returns on the search warrants, the rule is also well-established that the
6 court has authority to preclude access to evidence and to exhibits until the parties can
7 litigate the admissibility of any prejudicial information. See, e.g., *Oziel v. Superior Court*
8 (1990) 223 Cal.App.3d 1284, 1302, and 1302 fn 10 (psychiatrist's office searched for
9 records of two criminal defendants; search videotaped; *held*: the trial court abused its
10 discretion in ordering media access to the videotape before it was offered or admitted into
11 evidence at trial, and before the psychiatrist's claim could be litigated).

12 Much, maybe even all, of the material returned from the searches may never be
13 offered in evidence, either because of a successful Penal Code section 1538.5 motion, or
14 because the prosecution simply doesn't use it, or the court rules it inadmissible on
15 traditional evidentiary grounds. Accordingly, the court should not release material until
16 its admissibility at trial is fully litigated.

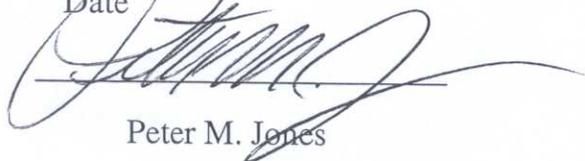
17
18 **IV. Conclusion**

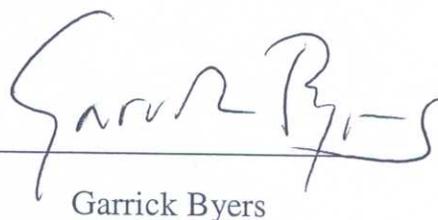
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20 The court should deny *The Bee*'s motion to unseal the search warrant records.

21 Respectfully Submitted,

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23 5/14/04

24 Date

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26 Peter M. Jones


Garrick Byers

