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CLERK OF THE SUPERIOR COURT
COUNTY OF STANISLAUS

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

FRANK CLIFFORD CARSON,
BALJIT ATWAL,
DALJIT ATWAL,
WALTER WESTLEY WELLS,
GEORGIA DEFILIPPO,
EDUARDO QUINTARA AND
SCOTT MCFARLANE,
Defendants.

CASE NO.: 1490969

NOTICE OF MOTION AND MOTION
TO TEMPORARILY SEAL PRE-
TRIAL PLEADINGS BEFORE
RESPONSES ARE FILED;
PROPOSED ORDER

Date: October 13, 2015
Time: 10:00 a.m.
Dept. 26
The Honorable Barbara Zuñiga

NOTICE IS HEREBY GIVEN that on the above date and time, or as soon thereafter as the matter can be heard, in Department 3 of the Superior Court, County of Stanislaus, State of California, the People of the State of California, the Plaintiff, will move the court for an order to temporarily seal pre-trial pleadings before responses are filed.

Dated this 6th day of October, 2015, at Modesto, California.

Respectfully submitted,

BIRGIT FLADAGER
District Attorney

Marlisa A. Ferreira

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10
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF STANISLAUS

13 THE PEOPLE OF THE STATE OF CALIFORNIA,

14 Plaintiff,

15 vs.

16 FRANK CLIFFORD CARSON,
17 BALJIT ATWAL,
18 DALJIT ATWAL,
19 WALTER WESTLEY WELLS,
20 GEORGIA DEFILIPPO,
21 EDUARDO QUINTARA AND
22 SCOTT MCFARLANE,

23 Defendants.

CASE NO.: 1490969

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PEOPLE'S MOTION TO
TEMPORARILY SEAL PRE-TRIAL
PLEADINGS BEFORE RESPONSES
ARE FILED

Date: October 13, 2015

Time: 10:00 a.m.

Dept. 26

The Honorable Barbara Zuñiga

24 The People move to temporarily seal all pre-trial pleadings before the responses are filed.
25 This motion is made pursuant to California Rules of Court, Rule 2.550. The People respectfully
26 request the court grant this motion.
27

28 **PROCEDURAL HISTORY**

Defendants were arrested on August 14, 2015. On August 18, 2015, the People filed a four
count felony complaint. Beginning with defendants' first appearance to the writing of this motion,
defendants have filed approximately 11 motions, multiple joinders, 1 demurrer, and multiple

1 declarations. The People have also filed responses in these matters in addition to filing a few
2 motions.

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4 **LAW AND ARGUMENT**

5
6 **I. THE PEOPLE HAVE A DUTY TO ENSURE JUSTICE IS DONE**

7 In *Gannett Co., Inc. v. DePasquale*, (“Gannett”) (1979) 443 U.S. 368, 384, the United
8 States Supreme Court remarked,

9
10 The Court has recognized that a prosecutor “is the representative not of an ordinary
11 party to a controversy, but of a sovereignty whose obligation to govern impartially
12 is as compelling as its obligation to govern at all; and whose interest, therefore, in a
13 criminal prosecution is not that it shall win a case, but that justice shall be done. As
14 such, he is in a peculiar and very definite sense the servant of the law” *Berger*
15 *v. United States*, 295 U.S. 78, 88. The responsibility of the prosecutor as a
16 representative of the public surely encompasses a duty to protect the societal interest
17 in an open trial. But this responsibility also requires him to be sensitive to the due
18 process rights of a defendant to a fair trial. *A fortiori*, the trial judge has the same
19 dual obligation.

20
21 **II. DESPITE ANY RIGHT OF PUBLIC ACCESS TO COURT RECORDS,
22 THIS COURT HAS THE INHERENT AUTHORITY TO SEAL RECORDS
23 IF THERE IS A PROBABILITY THAT DISCLOSURE WILL RESULT IN
24 PREJUDICIAL PRE-TRIAL PUBLICITY**

25 Cal. Rules of Court, rule 2.550, subdivision d, provides

26 The court may order that a record be filed under seal only if it expressly finds facts
27 that establish:

- 28 (1) There exists an overriding interest that overcomes the right of public access to
the record;
(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.

In *Estate of Hearst* (1977) 67 Cal.App.3d 777, 785, the Second District Court of Appeal
noted that the trial court did “possess limited power, exercisable under exceptional circumstances

1 and on a showing of good cause, to restrict public access to portions of court records on a temporary
2 basis.” However the court also noted that “the trial court must be careful to limit its denial of access
3 by narrow and well-defined orders.” *Id.*

4 In *NBC Subsidiary (KNBC-TV) Inc. v. Superior Court (“NBC Subsidiary”)* (1999) 20
5 Cal.4th 1178, 1217, the Court outlined the test necessary “before substantive courtroom proceedings
6 are closed or transcripts are ordered sealed...” The Court stated, “a trial court must hold a hearing
7 and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii)
8 there is a substantial probability that the interest will be prejudiced absent closure and/or sealing;
9 (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and
10 (iv) there is no less restrictive means of achieving the overriding interest.” (*Id.* at p. 1217-18.)

11 The overriding interests in this case are the concern for the tainting of prospective jurors in
12 Stanislaus County and the dissuasion of witnesses, who have already been threatened by the
13 defendants. In the afore-mentioned case of *Gannett*, the High Court upheld the court’s restriction
14 of access of the public to the pretrial suppression hearing and a temporary delay of the transcripts
15 from the pretrial suppression hearing. *Id.* Following the defendants’ plea to a lesser charge, the
16 transcripts were released to the public. (*Id.* at p. 376.) While the county in *Gannett* boasted of a
17 population of 40,000, the county of Stanislaus may be larger, but what it is not is not a metropolitan
18 area of Los Angeles, similar to the matter of *Stroble v. State of California* (1952) 343 U.S. 181. (*Id.*
19 at p. 372.) Furthermore, the court noted the multiple articles published by *Gannett* regarding the
20 case. (*Gannett, supra*, at p. 372-375.) This is also similar to the instant case, for example a local
21 article which ran in the Modesto Bee on September 19, 2015, followed a recent filing by defendant
22 Atwal, a motion claiming “outrageous government conduct” by the District Attorney’s Office, to
23 which no reply had yet been filed. (Exhibit A.)
24

25 In addition in *Stroble*, the Court noted that the newspaper accounts occurred six weeks
26 before the beginning of the petitioner’s trial. (*Stroble, supra* at p. 195.) Here, defendants are
27 scheduled for preliminary hearing as early as October 13, 2015 and it appears, this matter is on a
28

1 fast track for trial, causing further concern for contaminating a much smaller jury pool than the one
2 in Los Angeles County and additional concern for witnesses who live within this same community.

3 The People also meet with the requirements of items (3) and (4) under the California Rules
4 of Court Rule 2.550 and in *NBC Subsidiary*, as their request is narrow in nature and similar to the
5 court's remark in *Gannett*, "any denial of access ... [is] only temporary; once the danger of
6 prejudice had dissipated, [the sealed items will be] made available." (*Id.* at p. 370.)

7 Members of the press have no greater right to sealed court records than any other members
8 of the public.

9 At issue here are rights of public access to public court records and in this respect
10 members of the press have no greater rights or privileges than do members of the
11 general public. (See *Kirstowsky v. Superior Court* (1956) 143 Cal.App.2d 745, 754-
12 755; *Craemer v. Superior Court, supra*, 265 Cal.App.2d 216, 219; *Los Angeles Free*
13 *Press, Inc. v. City of Los Angeles* (1970) 9 Cal.App.3d 448, 455; see also *Zemel v.*
14 *Rusk* (1965) 381 U.S. 1, 16-17.) The key factor here is the public nature of records,
15 not freedom of the press, and not prior restraint of the press. In *Kirstowsky, supra*,
16 the court said, "If the court had the right to exclude the public during the time
17 defendant was upon the witness stand it had the right also to exclude the members
18 of the press. The freedom of the press is in no way involved in this proceeding."
19 (143 Cal.App.2d at pp. 754-755.) As was said in *Zemel v. Rusk, supra*, "The right to
20 speak and publish does not carry with it the unrestrained right to gather information."
21 (381 U.S. at p. 17.)

22 (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 785-86.)

23 Nor is an order to seal judicial records a "gag order." "Accordingly, the so-called "clear and present
24 danger test" does not apply, and the issue is the reasonableness of the trial court's sealing and
25 unsealing orders under the circumstances of the case. (*Estate of Hearst* (1977) 67 Cal.App.3d 777,
26 782; See also *Rosato, supra*, 51 Cal.App.3d at p. 208; *Craemer, supra*, 265 Cal.App.2d at pp. 225-
27 226.)

28 In performing the court's duty to protect a defendant from prejudicial publicity, "...a judge
may require the removal from public scrutiny of a public record containing data or material which,
if publicized prior to trial, could result in publicity so inherently prejudicial as to endanger a fair
trial." (*Craemer, supra*, 265 Cal.App.2d at p. 225.) The Craemer Court found that an order sealing

1 public records need not be based on evidence showing a reasonable likelihood of prejudice from
2 disclosure, but merely upon “the probability of unfairness.” (*Id.* at p. 225-226 citing *Sheppard v.*
3 *Maxwell, supra*, 384 U.S. at p. 352 and *Estes v. Texas, supra*, 381 US at p. 542-543.) In *Oziel v.*
4 *Superior Court* (1990) 223 Cal.App.3d 1284, the Court found the “reasonable likelihood” test
5 applies.

6
7 **III. PRE-TRIAL PLEADINGS MAY BE SEALED AND REMAIN SEALED**
8 **UNTIL RESPONSES ARE FILED**

9 Without arguing the factual or legal merits of any such assertion at this time, failure to seal
10 or lifting of the seal might possibly implicate defendant’s right to a trial free of prejudicial publicity.

11 Regarding pre-trial publicity, the United States Supreme Court stated,

12 We have always held that the atmosphere essential to the preservation of a fair
13 trial—the most fundamental of all freedoms—must be maintained at all costs. Our
14 approach has been through rules, contempt proceedings and reversal of convictions
15 obtained under unfair conditions. Here the remedy is clear and certain of application
16 and it is our duty to continue to enforce the principles that from time immemorial
17 have proven efficacious and necessary to a fair trial.
(*Estes v. State of Tex.* (1965) 381 U.S. 532, 540-41.)

18 *Craemer v. Superior Court*, (1968) 265 Cal.App.2d 216, and *Rosato v. Superior Court*
19 (1975) 51 Cal.App.3d 190, hold that a defendant’s right to a fair trial outweighs any statutory or
20 common law right of pre-trial public access to public documents.

21 Unlike the aforementioned cases wherein the order to seal was to permanently withhold
22 access to public, the People only seek to seal the incoming pleadings, for either side, for a temporary
23 period of time to allow the opposing side to respond.

24 **IV. NO FIRST AMENDMENT RIGHT EXISTS TO CHALLENGE THIS**
25 **COURT’S INHERENT DISCRETIONARY POWER TO SEAL**

26 “While the law favors disclosure of judicial records, *the right of access is not absolute.*
27 Nondisclosure may be appropriate “for compelling countervailing reasons.” (*Pantos [v. City and*
28

1 *County of San Francisco* (1984) 151 Cal.App.3d 258], *supra*, at p. 263; see also *Black Panther*
2 *Party v. Kehoe* (1974) 42 Cal.App.3d 645, 651-652; Gov. Code, § 6255.)” (*People v. Rhodes*
3 (1989) 212 Cal.App.3d 541, 550 superseded on other grounds in *People v. Tuggles* (2009) 178
4 Cal.App.4th 1106.) “Clearly, a court has inherent power to control its own records to protect rights
5 of litigants before it, but “where there is no contrary statute or countervailing public policy, the
6 right to inspect public records must be freely allowed.” (*Estate of Hearst* (1977) 67 Cal.App.3d
7 777, 783.) However, “where there is no contrary statute or countervailing public policy, the right
8 to inspect public records must be freely allowed. (*Craemer v. Superior Court In and For Marin*
9 *County* (1968) 265 Cal.App.2d 216, 222.)

10 “Although many governmental processes operate best under public scrutiny, it takes little
11 imagination to recognize that there are some kinds of government operations that would be totally
12 frustrated if conducted openly.” (*Press-Enterprise Co. v. Superior Court of California for Riverside*
13 *County* (1986) 478 U.S. 1, 8-9.)

14 Under English common law, the public had no right to attend pretrial proceedings. *E. g.*, *E.*
15 *Jenks*, *The Book of English Law* 75 (6th ed. 1967) (“It must, of course, be remembered, that the
16 principle of publicity only applies to the actual trial of a case, not necessarily to the preliminary or
17 prefatory stages of the proceedings . . .”) (*Gannett Co., Inc. v. DePasquale* (1979) 443 U.S. 368,
18 389.) “Closed pretrial proceedings have been a familiar part of the judicial landscape in this country
19 as well.) (*Id.* at p. 390.) “Indeed, eight of the States that have retained all or part of the Field Code
20 have kept the explicit provision relating to closed pretrial hearings.” (*Id.* at p. 390-391.)

21 The High Court in *Gannett* reasoned,

22
23 If the examination must necessarily be public, the consequence may be that the
24 testimony upon the mere preliminary examination will be spread before the
25 community, and a state of opinion created, which, in cases of great public interest,
26 will render it difficult to obtain an unprejudiced jury. The interests of justice require
27 that the case of the defendant should not be prejudiced, if it can be avoided; and no
28 one can justly complain, that until he is put upon his trial, the dangers of this
prejudgment are obviated.

(*Id.* at p. 390.)

1 Here, the People request merely the opportunity for the opposing side to submit their
2 response to a pleading submitted to the court before the public is provided access to the pleadings.
3


4 **CONCLUSION**

5 For the foregoing reasons the People respectfully request the Court to grant the motion to
6 temporarily seal pre-trial pleadings before responses are filed.
7

8 Dated this 6th day of October 2015, at Modesto, California.

9 Respectfully submitted,

10 BIRGIT FLADAGER
11 District Attorney

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13 Marlisa A. Ferreira
14 Chief Deputy District Attorney

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PROOF OF SERVICE BY ELECTRONIC MAIL

STATE OF CALIFORNIA)
COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

That I am over the age of 18 years and am not a party to this action and I am employed by the Stanislaus County District Attorney's Office, 832 12th Street, Suite 300, Modesto, California.

That I served a copy of the **People's Notice of Motion and Motion to Temporarily Seal Pre-Trial Pleadings Before Responses are Filed** on October 6, 2015 pursuant to California Code of Civil Procedure section 1010.6(a)(6) by electronically sending a copy thereof to the offices of Timothy Rien at rienlaw@sbcglobal.net, Tim Allen Pori at tim@defense-attorney-pori.com, Martha Carlton-Magana at carltnm@hotmail.com, Preciliano Martinez at attymartinezp@yahoo.com, Hans Hjertonsson at Hans.hjertonsson@gmail.com, Alonzo Gradford at gradfordlaw@gmail.com, Lawrence Niermeyer at lniermeyer@aol.com, Robert Lee Forkner at RLFCrimLaw@aol.com, Bruce Perry at brucerperry@msn.com and Stephanie Mitchell at stephanie.mitchell@stanct.org.

That I placed a hard copy in the box assigned to each attorney located at the District Attorney's Office at 832 12th Street, Suite 300, Modesto, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of October 2015, at Modesto, California.


Declarant

Case No. 1490969
People v. Carson et al.
Hearing: 10/13/2015
Dept. 26