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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **FOR THE COUNTY OF KERN**

13  
14 **The People of the State of**  
15 **California,**

16 Plaintiff,

17 v.

18 **Armando Cruz,**

19 Defendant.

Case No. BF181682A

**Defendant's Reply to First  
Amendment Coalition's Brief  
in Opposition to Defense  
Motion to Close Preliminary  
Hearing and All Pretrial  
Hearings.**

20 Armando Cruz, by and through defense counsel, submits this reply to the  
21 First Amendment Coalition's Brief in Opposition to Defense Motion to Close  
22 Preliminary Hearing and All Pretrial Hearings under Penal Code section 868.

23 Until 1982, section 868 required a closed preliminary hearing at the  
24 defendant's request. That year, the San Jose Mercury News challenged section  
25 868 in the California Supreme Court after the municipal court had barred the  
26 newspaper from covering the preliminary hearing for a member of the San Jose  
27 City Council accused of accepting bribes. (*San Jose Mercury-News v. Municipal*  
28 *Court* (1982) 30 Cal.3d 498 (*Mercury News*).)

1       The Mercury News' challenge was unsuccessful. The supreme court held  
2 that section 868's closure provisions were key to protecting defendants against  
3 bias from prejudicial pretrial publicity, which, the court noted, was often difficult  
4 to prove. (*San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d 498,  
5 502.)

6       The Supreme Court's decision in *Mercury-News* appears to have  
7 prompted the 1982 amendment of section 868 and concomitant enactment of  
8 section 868.7, which occurred almost immediately after issuing the opinion in  
9 that case. By its amendment to section 868, the Legislature essentially vitiated  
10 the holding of *Mercury-News* that public access rights were subordinate to a  
11 defendant's fair-trial rights. In effect, the 1982 legislation placed public access  
12 rights on par with fair-trial rights. The revised section 868 directed courts to  
13 resolve any conflict between these rights by balancing the competing  
14 considerations on a case-by-case basis. (*Eversole v. Superior Court* (1983) 148  
15 Cal.App.3d 188, 196-197.)

16       Even the United States Supreme Court has held that in general, access  
17 restrictions are legitimate means of protecting fair-trial rights. (*Sheppard v.*  
18 *Maxwell* (1966) 384 U.S. 333, 360-361.)

19       Against this backdrop, the First Amendment Coalition argues as follows:

- 20       1. The defendant's "conclusory assertion that any publicity is  
21       prejudicial is insufficient to overcome the first amendment right of  
22       access"
- 23       2. The defendant presents no evidence that, absent closure, there is a  
24       substantial probability his fair trial interests will be prejudiced.
- 25       3. If there were a substantial probability of prejudice, the defendant's  
26       motion would also fail because reasonable alternatives to closure  
27       exist

28       The nature and timing of preliminary hearings present dangers that public

1 access may prejudice fair-trial rights. As with other pretrial proceedings, the  
2 climate they may generate in advance of the trial cannot always be nullified by  
3 relatively simple controls, such as sequestration and exclusion of witnesses, that  
4 are available to counter inflammatory publicity at the time of trial.  
5 (See *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 580-581 [opn.  
6 of Burger, C.J.], 598, fn. 25; *Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539,  
7 563-565; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 357-362.)

8 However, inflammatory or misleading publicity is not the only unfair  
9 publicity. Factual, relevant reporting may be prejudicial too if it produces a jury  
10 pool within which a defendant's guilt has already been presumed.  
11 (See *Irvin v. Dowd* (1961) 366 U.S. 717, 722-729.)

12 The testimony heard at the preliminary examination is often that of the  
13 prosecution only. The defense may remain silent if it appears that the People  
14 have not established reasonable or probable cause. One of the primary purposes  
15 of section 868 is to give the defendant the opportunity of protecting his right to  
16 an impartial and unbiased jury by preventing the dissemination of this testimony,  
17 either by a newspaper or other media before trial. This right may be substantially  
18 impaired if a court denies a defendant the protection afforded by section 868.

19 Prejudice at times may be acute because of the superficial resemblance  
20 between preliminary hearing and trial. The distinct functions served by the two  
21 proceedings are not always clear to nonlawyers. They may ascribe to a one-sided  
22 preliminary hearing the legitimacy and credibility of a trial. Accordingly, a  
23 defendant denied the protection of section 868 might feel compelled to abandon  
24 his right of silence at the hearing and to embrace a tactic of trying the case in the  
25 media.

26 The precedents suggest that the propriety of closure depends on the nature  
27 and extent of the publicity a public hearing might generate, its probable effect on  
28 the jury pool, the efficacy of closure as a means of preventing prejudice, and the

1 availability of alternative means. (*Gannett Co., Inc. v. DePasquale* (1979) 443  
2 U.S. 368, 400, 402, fn. 4 [conc. opn. of Powell, J.

3 Often the defendant cannot make a showing of likely prejudice sufficient  
4 to justify closure. The evidence required may not be available at an early stage  
5 when community reaction and the media's attitude are not apparent. Moreover,  
6 the defendant may have little knowledge before the hearing of the prosecution's  
7 strategy and evidence. That additionally clouds his ability to prove the value to  
8 him of closure. (*San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d  
9 498, 513.)

10 Section 868 places preliminary hearing public access rights on the same  
11 plane with the defendant's fair trial rights. If the court gets it wrong, yes, the  
12 public may be deprived of news and information about the proceedings.  
13 However, the resulting prejudicial publicity can deprive a defendant of a fair trial  
14 and, as a result, **his life**. Thus, in a capital case, the court must give the  
15 defendant's right to a fair trial more weight than the public access right.

16 Notably, section 868 "does not specifically require that the defendant  
17 present competent evidence in support of the closure motion. *Tribune*  
18 *Newspapers* suggested that the closure motion be treated in a fashion similar to a  
19 motion to change venue." (Quotation is from 1 Simons, California Preliminary  
20 Examinations and 995 Benchbook — (2020 Edition) § 3.2.4 (Matthew Bender,  
21 Rev. Ed.) and it references *Tribune Newspapers West, Inc. v. Superior Court*  
22 (1985) 172 Cal.App.3d. 443, 456.)

23 The case of *Telegram-Tribune, Inc. v. Municipal Court* (1985) 166  
24 Cal.App.3d 1072 (*Telegram-Tribune* ) may provide a guide for how to proceed in  
25 this case. In *Telegram-Tribune*, Herman W. Rose, who had been charged with  
26 first-degree murder with special circumstances, sought to have his preliminary  
27 hearing closed to the public and press. The trial court (then the superior court)  
28 devised a procedure which required the municipal court either to show cause why

1 the preliminary hearing should not be open to the public or, in the alternative, to  
2 hold a further hearing upon Rose’s request to exclude the public from the  
3 preliminary hearing. (*Telegram-Tribune, Inc. v. Municipal Court* (1985) 166  
4 Cal.App.3d 1072, 1074.) The alternative writ allowed Rose to present in “general  
5 terms and conclusions” the basis for his motion for closure. If necessary, the  
6 alternative writ provided that Rose could, “by declarations under seal or  
7 testimony in camera, set forth any specific reasons why opening the preliminary  
8 hearing to the public would adversely affect his right to a fair and impartial trial.”  
9 (*Telegram-Tribune, Inc. v. Municipal Court* (1985) 166 Cal.App.3d 1072, 1076.)

10 The municipal court held the hearing in accordance with the two-part  
11 procedure outlined by the superior court. Rose called several witnesses from the  
12 news media to testify about local news coverage of the case and requested the  
13 final witness, an expert in evaluating the impact of pretrial publicity, to testify in  
14 camera because hypothetical questions to be asked would reveal specific facts  
15 about the case. The court granted the request and allowed interested parties,  
16 including appellants, to submit written questions. (*Telegram-Tribune, Inc. v.*  
17 *Municipal Court* (1985) 166 Cal.App.3d 1072, 1076.)

18 The municipal court determined that if the preliminary hearing were  
19 public, “not only would there be a reasonable likelihood of prejudice to the  
20 defendant and his ability to have a fair trial, the Court feels that there is a very  
21 substantial probability that irrevocable damage to his fair trial could result from  
22 the conducting of the proceeding in public.” (*Telegram-Tribune, Inc. v.*  
23 *Municipal Court* (1985) 166 Cal.App.3d 1072, 1076.)

24 The Court of Appeal found “that the procedures used by the magistrate in  
25 conducting the hearing on Rose’s motion were well within its discretion.”  
26 (*Telegram-Tribune, Inc. v. Municipal Court* (1985) 166 Cal.App.3d 1072, 1079.)

27 To be sure, “[P]retrial publicity — even pervasive, adverse publicity — does  
28 not invariably lead to an unfair trial. . . .” (*Nebraska Press Assn., supra*, 427 U.S.

1 at pp. 539, 554.) On the other hand, “[t]he costs of failure to afford a fair trial are  
2 high. In the most extreme cases . . . the risk of injustice [may be] avoided when  
3 the convictions [are] reversed. But a reversal means that justice has been delayed  
4 for both the defendant and the State; in some cases, because of lapse of time  
5 retrial is impossible or further prosecution is gravely handicapped. Moreover, in  
6 borderline cases in which the conviction is not reversed, there is some possibility  
7 of an injustice unredressed. . . .” Strong measures are necessary “to avoid  
8 exacting these costs from society or from the accused.” (*Id.*, at p. 555.)

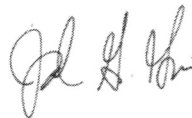
9 Finally, alternate means of preventing prejudice from adverse pretrial  
10 publicity, such as gag orders or restraints on publication, can involve equal and  
11 even greater intrusions on speech and press rights. (See, e.g., *Nebraska Press*  
12 *Assn. v. Stuart* (1976) 427 U.S. 539, 556-560; *Brian W. v. Superior Court* (1978)  
13 20 Cal.3d 618, 624, fn. 7.) Changes of venue or continuances may subject the  
14 parties and courts to considerable inconvenience or expense and may even violate  
15 the defendant’s right to a speedy trial in the vicinage. (U.S. Const., Amends. VI,  
16 XIV; Cal. Const., art. I, § 15; *Brian W.*, *supra*, 20 Cal.3d at p. 625.)

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20 Date: 10/20/2020

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