

1 seal.

2 **B.**

3 **SUBSTANTIAL PROBABILITY THAT THE INTEREST WILL**
4 **BE PREJUDICDED ABSENT SEALING**

5 The media coverage of this case has, thus far, been pervasive. Throughout the year that
6 this matter has been litigated, media has appeared at every one of the court dates. There has been
7 print, and TV media coverage following each appearance. Recognizing this and taking into
8 account the defendant's rights to due process and right to a fair trial, this court has already
9 signed a sealing order. The previous sealing order sealed the grand jury transcript and the
10 exhibits presented to the grand jury in their entirety until this matter is brought to trial. In this
11 previous order, pursuant to Penal Code section 938.1(b), the court explicitly recognized if the
12 grand jury transcript and exhibits were to be made public it would prejudice the defendant's right
13 to a fair and impartial trial.

14 In order to defend this case, the defense needs to file a motion to set aside the Indictment.
15 The motion that has been prepared summarizes the grand jury transcript in detail and makes
16 arguments based upon the sealed transcript throughout the entirety of the motion. In addition to
17 these concerns, the motion has three exhibits attached to it. The exhibits are actual pages from
18 the police report as well as a transcript of an audio recording that would constitute hearsay
19 documents and would not be admissible at the trial itself. Should these items be filed without a
20 sealing order, it is highly likely that these items would be covered by the media. It has already
21 been determined that there is a substantial probability of prejudice to the defendant's rights to
22 fair trial and due process if the grand jury proceedings are released. That has already been
23 determined by this court. It follows that the detailed summaries of the proceedings that appear in
24 the defense's motion will result in the same prejudicial outcome. It is also apparent that releasing
25 documents like police reports and transcript that would never be before a jury in this matter
26 holds the same substantial probability of prejudice.

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C.

**THE PROPOSED SEALING IS NARROWLY TAILORED TO SERVE THE
OVERRIDING INTEREST AND THERE IS NO LESS RESTRICTIVE MEANS**

The last two prongs of the test from *NBC Subsidiary v. Superior Court* are closely related. Thus, we will consider the last two prongs together. The request in this application to file the defense's motion under seal is narrowly tailored. At this time, there is no request that all filings be placed under seal. Similarly, we are not asking for a closed court session when the motion is argued. What is being proposed is that one document be allowed to be filed under seal. This is the least restrictive alternative available that preserves John Cowell's rights to due process, and to a fair trial by an impartial jury.

CONCLUSION:

For all of the foregoing reasons, defendant respectfully requests that this Court sign the attached order sealing the defendant's motion to set aside the indictment and the motion's accompanying exhibits.

DATED: 3rd day of October, 2019

Respectfully submitted,

BRENDON WOODS
PUBLIC DEFENDER



Christina Moore
Attorney at Law

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5 California State Bar No. 253034
Attorney for Defendant
6 John Cowell

7
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
RENE C. DAVIDSON COURTHOUSE

9 The People of the State
Of California,
10
11 Plaintiff,
12
13 v.
14 **John Cowell,**
15 Defendant.

Dept. No. 10
No. 18-CR-012419
Hearing Date: October 10, 2019
Time: 09:00 a.m

15 **MEMORANDUM OF POINTS AND AUTHORITIES**
16 **IN SUPPORT OF APPLICATION TO FILE**
17 **MOTION TO SET ASIDE THE INDICTMENT UNDER SEAL**

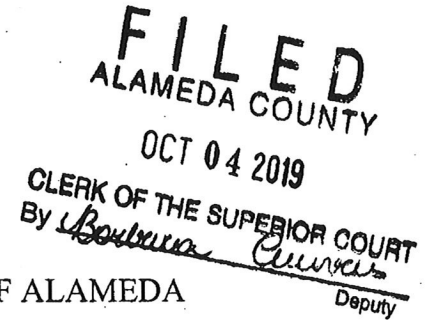
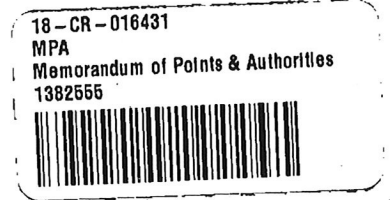
18 **INTRODUCTION:**

19 By this motion, defendant, through counsel, seeks an Order of this Court sealing: (1)
20 defendant's memorandum of points and authorities in support of motion to set aside the
21 Indictment, and (2) the aforementioned motion's attached exhibits, until completion of all
22 potential trial proceedings on this Indictment. Such an Order is necessary to protect defendant's
23 rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
24 Constitution to a fair trial free from prejudicial pre-trial publicity.

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1 **ARGUMENT:**

2 **I.**

3 **CONSTITUTIONAL LAW MANDATES SEALING THE MOTION AND EXHIBITS**
4 **UPON A SHOWING OF A REASONABLE LIKLIHOOD THAT DISCLOSURE MAY**
5 **PREJUDICE DEFENDANT’S RIGHT TO A FAIR AND IMPARTIAL TRIAL.**

6 Sealing of a court transcript or motion is appropriate where: (1) there exists an overriding
7 interest supporting sealing, (2) there is a substantial probability that the interest will be prejudiced
8 absent sealing, (3) the proposed sealing is narrowly tailored to serve the overriding interest, and (4)
9 there is no less restrictive means of achieving the overriding interest. (*NBC Subsidiary (KNBC-TV),*
10 *Inc. v. Superior Court* (1999) 20 Cal. 4th 1178, 1218.)

11 **A.**

12 **OVERRIDING INTEREST**

13 The rights to due process, and to a fair trial by an impartial jury are guaranteed by the
14 Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and parallel
15 protections of the California Constitution. *People v. Fauber* (1992) 2 Cal.4th 792, 817.

16 The United States and California Supreme Courts have long and repeatedly recognized
17 that exposure to pretrial publicity may undermine a defendant's guarantee to trial by an impartial
18 jury. (See *Gentile v. State Bar of Nev.* (1991) 501 U.S. 1030, 1032; *People v. Williams* (1989) 48
19 Cal.3d 1112, 1128.) This case has already garnered an overwhelming amount of media attention.
20 It is highly likely that if the motion to set aside the indictment, which heavily relies on the sealed
21 grand jury transcript, is not filed under seal that large portions of the motion will be discussed,
22 quoted, and written about in the media. It is also highly likely that if the motion is not filed under
23 seal, the exhibits—which would be inadmissible at trial—will be discussed, quoted, and written
24 about in the media. Such a result would interfere with Mr. Cowell’s ability to obtain a fair and
25 impartial trial as the potential jury pool would be exposed to inadmissible evidence. These
26 rights, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United
27 States Constitution and the parallel protections of the California Constitution are the overriding
rights that the defense asks the court to consider when ruling upon the application to file under

1 seal.

2 **B.**

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