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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA
13 RENE C. DAVIDSON COURTHOUSE

14
15 THE PEOPLE OF THE STATE OF CALIFORNIA,

16 Plaintiff,

17 v.

18 JOHN LEE COWELL,

19 Defendant.

) Case No.: 18-CR-016431

) **NOTICE OF MOTION AND MOTION BY**
) **NON-PARTY FIRST AMENDMENT**
) **COALITION TO UNSEAL**
) **DEFENDANT'S MOTION TO SET**
) **ASIDE THE INDICTMENT AND GRAND**
) **JURY TRANSCRIPT; MEMORANDUM**
) **OF POINTS AND AUTHORITIES**

) Judge: Hon. Kevin Murphy

) Date: Nov. 15, 2019

) Time: 8:30 a.m.

) Department: 10

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25 PLEASE TAKE NOTICE that on November 15, 2019, at 8:30 a.m., or as soon thereafter as
26 counsel may be heard in Department 10 of the above-entitled Court, located at the Rene C.
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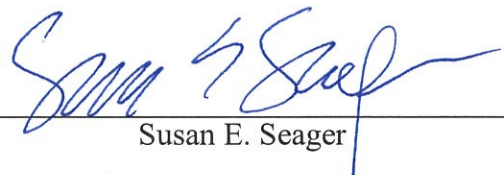
1 Davidson Courthouse, 1225 Fallon Street, Oakland, California, the First Amendment Coalition¹
2 will and hereby moves pursuant to California Rule of Court 2.551(h)(2) to unseal: (1) Defendant
3 John Lee Cowell's motion to set aside the indictment and related exhibits and briefs; and, (2) the
4 grand jury transcript and related exhibits that led to Defendant's indictment.

5 This Motion is based upon the concurrently filed Memorandum of Points and Authorities,
6 on all pleadings, records, and files in this action, on all matters of which judicial notice may be
7 taken, and on argument and evidence presented at the hearing on this Motion.

8 DATED: October 30, 2019

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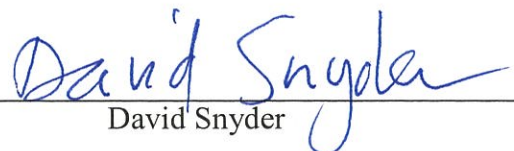


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18 DAVID SNYDER
19 GLEN SMITH

20 By: _____



David Snyder

22 Attorneys for Non-Party First Amendment Coalition

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24 ¹ The First Amendment Coalition ("FAC") is a nonprofit, public interest organization committed to
25 freedom of speech, more open and accountable government, and public participation in civic
26 affairs. Founded in 1988, FAC's activities include free legal consultations on First Amendment
27 issues, educational programs, legislative oversight of bills in California affecting access to
28 government and free speech, and public advocacy, including extensive litigation and appellate
work. FAC co-authored and sponsored Proposition 59, the Sunshine Amendment to the California
State Constitution, enacted by voters in 2004. FAC's members are news organizations, law firms,
libraries, civic organizations, academics, freelance journalists, bloggers, community activists, and
ordinary citizens.

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14 RENE C. DAVIDSON COURTHOUSE

15 THE PEOPLE OF THE STATE OF
16 CALIFORNIA,

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19 JOHN LEE COWELL,

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21

) Case No.: 18-CR-016431
)

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **MOTION BY NON-PARTY FIRST**
) **AMENDMENT COALITION TO**
) **UNSEAL DEFENDANT'S MOTION TO**
) **SET ASIDE THE INDICTMENT AND**
) **GRAND JURY TRANSCRIPT;**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES**
)

) Judge: Hon. Kevin Murphy
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1. SUMMARY OF ARGUMENT**

3 The First Amendment Coalition appears in this case pursuant to the First Amendment,
4 Article 1, §3(b) of the California Constitution and Rule of Court 2.551(h)(2) to request an order
5 immediately unsealing both Defendant John Lee Cowell’s motion to set aside the indictment and
6 the grand jury transcript. Because of the legitimate community interest in the prosecution of a white
7 man charged with violently attacking two young black women, it is essential to avoid secrecy to
8 ensure public confidence in the fairness of the proceedings. To the extent that defendant might be
9 seeking dismissal of the indictment due to alleged police or prosecutorial misconduct, the public
10 has an overriding interest in learning about the possibility of such misconduct in their community.

11 It is well-established that pretrial criminal proceedings and records are presumptively public
12 under the First Amendment to the United States Constitution, the California Constitution and the
13 California Rules of Court. In California, the post-indictment grand jury transcript is presumptively
14 public under California Penal Code § 938.1(b), which requires the disclosure of the grand jury
15 transcript unless the defendant can show that disclosure will create a “reasonable likelihood” that it
16 would be impossible to find twelve impartial jurors. The bare existence of pre-trial publicity is not
17 enough to justify secrecy.

18 Defendant’s motions to seal the grand jury transcript and the separate motion to set aside his
19 indictment are based on speculative concerns that pre-trial publicity “may” harm Defendant’s right
20 to a fair trial. But mere speculation is not enough to justify secrecy. The October 11 and October
21 16 sealing orders do not cite any facts sufficient to satisfy the heavy burden to justify secrecy under
22 the First Amendment, Rules of Court 2.550 and 2.551, and Penal Code Section 938.1(b). Defendant
23 failed to prove by admissible evidence any facts to support secrecy and it does not appear that the
24 Court considered any alternatives to sealing the entire records. This Court can adequately protect
25 the fair trial rights of Defendant by conducting a searching *voir dire* of prospective jurors, issuing
26 juror admonitions to avoid media reports, and if necessary, changing the venue.

27 Defendant has not – and cannot – demonstrated that the unsealing of his motion to set aside
28 his indictment and his grand jury transcript would make it impossible to find twelve unbiased jurors

1 in a large, diverse county like Alameda County with a population of 1.7 million. Because
2 Defendant has not met the strict standard for sealing, the Court should unseal his motion to set
3 aside the indictment and grand jury transcript.

4 **2. STATEMENT OF FACTS**

5 As alleged in the Indictment, on July 22, 2018, two African-American sisters, Nia and
6 Letifah Wilson, were attacked by a stranger who slashed them with a knife at an Oakland BART
7 train station. On October 9, 2018, a grand jury indicted Defendant, a white man, on charges of
8 murdering Nia and attempted murder of Letifah, along with a special charge of killing Nia while
9 lying in wait. This case has attracted understandable interest from the local community of Oakland
10 because of the race of the victims and the defendant, and the apparent lack of provocation for the
11 attack.

12 Defendant apparently made an oral motion asking this Court to seal his post-indictment
13 grand jury transcript, contending the release of the transcript might harm his right to a fair trial. On
14 Oct. 16, 2018, Alameda County Superior Court Judge James P. Cramer granted the motion, holding
15 that allowing the public to see the transcript “may prejudice the defendant’s right to a fair and
16 impartial trial.” 10/16/18 Order. The order did not cite any facts supporting its holding. *Id.*

17 On October 4, 2019, Defendant filed another motion asking for more secrecy. This time,
18 Defendant asked this Court to seal Defendant’s motion to set aside the indictment. Defendant
19 asserted that because his motion describes the grand jury transcript and three exhibits – including
20 the police report of the attack and an audio recording – disclosure would taint the jury pool because
21 the grand jury transcript and exhibits might be inadmissible at trial. On October 11, 2019, this
22 Court issued a one-page order sealing Defendant’s motion to set aside the indictment based on the
23 “find[ing] that making such motion and exhibits public may prejudice the defendant’s right to a fair
24 and impartial trial.” 10/11/19 Order. The order failed to cite any supporting evidence.

25 **3. THE FIRST AMENDMENT COALITION HAS STANDING TO BRING THIS** 26 **MOTION**

27 The First Amendment Coalition has standing to appear as a moving party in this case to
28 vindicate the presumptive public right of access to criminal court proceedings and records, under

1 the First Amendment, California Rules of Court, and Penal Code section 938.1(b).

2 California Rule of Court 2.551(h)(2) provides that any “*member of the public* may move,
3 apply, or petition ... to unseal a [court] record.” Cal. R. Ct. 2551(h)(2) (emphasis added). Rule of
4 Court 2.551(h)(2) is based upon the United States Supreme Court’s recognition that members of the
5 public and press have standing under the First Amendment to intervene in criminal cases to
6 challenge court restrictions of public access to court proceedings and records. *See Globe*
7 *Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n. 25 (1982) (“[R]epresentatives of the press
8 and general public ‘must be given an opportunity to be heard on the question of their exclusion.’”).
9 The California Supreme Court reaffirmed the standing of the public and press to challenge court
10 secrecy in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1217, n 36 (1999)
11 (“The court in *Globe* ... observed that, in order to facilitate a trial court’s case-by-case
12 determination of closure, “representatives of the press and general public must be given an
13 opportunity to be heard on the question of their exclusion.”) (citation and quotation omitted).

14 Members of the public also have standing to file motions to unseal grand jury transcript
15 under Penal Code section 938.1 (b). *See Alvarez v. Superior Court*, 154 Cal. App. 4th 642, 647
16 (2007) (newspaper “was entitled to seek inspection of the transcript and properly did so by filing a
17 motion to unseal”); *Press-Enterprise Co. v. Superior Court*, 22 Cal. App. 4th 498, 500-01 (1994)
18 (“*Press-Enterprise III*”) (implicitly recognizing that newspaper had standing to challenge sealing of
19 post-indictment grand jury transcript in high-profile rape and murder case by granting relief sought
20 by newspaper); *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 218, n. 1 (1968) (reporter had
21 “standing to challenge the superior court’s order” sealing post-indictment grand jury transcript).

22 Based on the First Amendment, Rule 255.1(h)(2), and Penal Code section 938.1(b), FAC
23 has standing to appear in this case as a non-party for the limited purpose of filing a motion to ask
24 this Court to unseal Defendant’s motion to set aside the indictment and related exhibits and briefs,
25 and to unseal the post-indictment grand jury transcript and related exhibits.

26 **4. THE ONGOING SEALING OF THESE COURT RECORDS VIOLATES THE FIRST**
27 **AMENDMENT**

28 In *NBC Subsidiary*, the California Supreme Court held that orders denying public access to

1 court proceedings and documents, even if only temporarily, “are subject to ‘exacting First
2 Amendment scrutiny.’” *Id.* (citations omitted). This principle is based on well-established
3 constitutional authority. As the United States Supreme Court explained, “[t]he loss of First
4 Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable
5 injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). In *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539,
6 560 (1976), the Supreme Court rejected the claim that a restraining order against the press was
7 acceptable because it only “delayed” the dissemination of information” about court proceedings.
8 “[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of
9 bringing news to the public promptly.” *Id.* at 560-61. In *Associated Press v. United States District*
10 *Court*, 705 F.2 d 1143, 1147 (9th Cir. 1983), the Ninth Circuit quickly vacated the trial court’s
11 order sealing pretrial briefs in the high-profile criminal trial of automaker John DeLorean even
12 though some of the documents “might only be under seal for ... 48 hours[.]” *Id.* at 1145-47.
13 “[E]ven though the restraint [wa]s limited in time,” the Ninth Circuit vacated the sealing order
14 because the “effect of the order [wa]s a total restraint on the public’s first amendment right of
15 access.” *Id.*

16 In this case, any further delay in unsealing the defendant’s motion to set aside his
17 indictment without meeting the substantive and procedural requirements announced by the United
18 States Supreme Court, the California Supreme Court, and Rules of Court violates the constitutional
19 right of public access to court proceedings and records. The continued sealing of Defendant’s grand
20 jury transcript violates Penal Code § 938.1(b)’s mandate that grand jury transcripts “shall” be made
21 public just 10 days after they are delivered to the indicted defendant absent circumstances not
22 present here.

23 **5. THERE IS A STRONG PRESUMPTION FAVORING PUBLIC ACCESS TO JUDICIAL**
24 **PROCEEDINGS AND RECORDS**

25 The United States Supreme Court has held that that the First Amendment creates a
26 presumptive right of access to criminal trials and proceedings for the general public and the press.
27 *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580 (1980) (access to criminal
28 trials); *Globe Newspaper*, 457 U.S. at 609 (access to victim testimony), *Press-Enterprise Co. v.*

1 *Superior Court*, 464 U.S. 501, 505-508 (1984) (“*Press-Enterprise I*”) (access to *voir dire*); *Waller*
2 *v. Georgia*, 467 U.S. 39, 47 (1984) (access to suppression hearings). The court also extended this
3 right of access to preliminary hearings, which serve the same purpose as grand jury hearings.
4 *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 5-6 (1986) (“*Press Enterprise II*”). Because of
5 this strong presumption against secrecy, the “justification in denying access” to criminal court
6 proceedings “must be a weighty one.” *Globe Newspaper*, 457 U.S. at 606.

7 The California Supreme Court, in its *NBC Subsidiary* decision, recognized the First
8 Amendment right of access extends to court documents in criminal and civil cases. *NBC*
9 *Subsidiary*, 20 Cal. 4th at 1208. This presumption of access, applies to “public judicial records,”
10 which include records that are “filed with the court or are used in judicial proceeding,” including
11 judicial records in criminal cases. *NBC Subsidiary*, 20 Cal. 4th at 1208. The court held that a judge
12 may not seal a court record without finding that:

- 13 (1) an overriding interest supports sealing;
- 14 (2) a substantial probability exists that the interest will be prejudiced absent sealing;
- 15 (3) the sealing is narrowly tailored to serve the overriding interest; and
- 16 (4) no less restrictive means exist to achieve the identified overriding interest.

17 *Id* at 1218-19.

18 The *NBC Subsidiary* decision and test for sealing was codified in California Rules of Court
19 2.550 and 2.551.¹ “Unless confidentiality is required by law, court records are presumed to be
20 open.” Cal. R. Ct. 2.550. Rules 2.550 and 2.551 “apply to civil and criminal cases.” Cal. R. Ct.
21 2.550, Advisory Committee Comment.

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26 ¹ See Cal. R. Court 2.550(d) (court record may only be sealed based on factual findings that (1) an
27 overriding interest overcomes the presumptive right of public access to the record, (2) the interest
28 supports sealing the record, (3) a substantial probability exists that the interest will be prejudiced
absent sealing, (4) sealing is narrowly tailored, and (5) no less restrictive means exist to achieve the
overriding interest, a court may not order that a record be filed under seal).

1 **6. THE ORDER SEALING DEFENDANT’S MOTION SET ASIDE THE INDICTMENT**
2 **VIOLATES THE FIRST AMENDMENT AND RULES OF COURT**

3 **A. This Court’s Order Allowing Defendant to File a Secret Motion to Set Aside the**
4 **Indictment Lacked the Necessary Factual Findings**

5 A party seeking the sealing of a court record “*must*” file a motion “accompanied by ... a
6 declaration containing *facts* sufficient to justify the sealing.” Cal. R. Ct. 2.551(b)(1) (emphasis
7 added). And a court may not seal a court record unless “it expressly finds *facts* that establish” that
8 the sealing order meets the requirements of the rule. Cal. R. Ct. 2.550(d) (emphasis added). These
9 rules are grounded in the First Amendment right of access to criminal court proceedings and
10 records. *See Press-Enterprise II*, 478 U.S. at 13-14 (court may not grant a motion to seal unless the
11 court cites “specific, on-the-record findings” of fact); *Waller*, 467 U.S. at 46-48 (mere speculation
12 that some prejudice might occur cannot meet the compelling interest test); *Oregonian Publ. Co. v.*
13 *District Court*, 920 F.2d 1462, 1467 (9th Cir. 1990) (vacating trial court’s sealing order because
14 “no evidentiary support” was presented for the belief that sealing documents would “serve ‘higher
15 values’”); *Washington Post Co. v. Soussoudis*, 807 F.2d 383, 392-93 & n.9 (4th Cir. 1986) (“[T]he
16 court may not base its decision on conclusory assertions alone, but must make specific factual
17 findings”). The trial court’s findings supporting the sealing of documents must be specific enough
18 for a reviewing court to determine if the closure order was properly entered. *Press-Enterprise I*, 464
19 U.S. at 509.

20 Here, Defendant failed to cite any facts to justify an order sealing Defendant’s motion to set
21 aside the indictment and related exhibits, including the police report. There is simply no admissible
22 evidence to show that twelve unbiased jurors cannot be found in Alameda County, a large urban
23 county with 1.7 million residents.² Nor was there any evidence about the supposed overwhelming
24 number and nature of news articles and broadcasts about this case.

25 Any orders sealing court records cannot rest on the conclusory statement that Defendant’s
26 right to a fair trial “*may*” be prejudiced by public access to his motion to set aside his indictment,
27 without citing any supporting facts. 10/11/2019 Order (emphasis added). The sealing order violates

28 ² https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bk1nk

1 the U.S. Supreme Court’s requirement that sealing orders contain “specific, on-the-record findings”
2 of fact, *Press-Enterprise II*, 478 U.S. at 13-14, and violates Rule of Court 2.550(d) (sealing order
3 must “expressly find facts that establish” that the sealing test is satisfied).

4 In the absence of any factual findings demonstrating a substantial probability that
5 Defendant’s right to a fair trial will be prejudiced absent sealing and overcomes the right of public
6 access, this Court should immediately unseal Defendant’s motion to set aside the indictment and
7 related exhibits and briefs.

8 **B. Defendant Has Not Shown It Is Impossible to Find Twelve Impartial Jurors in**
9 **a Large Urban County Such as Alameda County**

10 The United States Supreme Court has emphasized that “pretrial publicity — even pervasive,
11 adverse publicity — does not inevitably lead to an unfair trial.” *Nebraska Press*, 427 U.S. at 565.
12 Even in high-profile murder trials, “[t]he First Amendment right of access cannot be overcome by
13 the conclusory assertion that publicity *might* deprive the defendant of [the right to a fair trial].”
14 *Press-Enterprise II*, 478 U.S. at 15 (emphasis added). *See also Associated Press*, 705 F.2d at
15 1146; *United States v. Myers*, 635 F.2d 945, 953 (2d Cir. 1979); *Seattle Times v. District Court*,
16 845 F.2d 1513, 1517 (9th Cir. 1988). Similarly, in *NBC Subsidiary*, the California Supreme Court
17 emphasized: “[A]s the high court made clear in *Press-Enterprise II*, . . . ‘The First Amendment
18 right of access cannot be overcome by the conclusory assertion that publicity *might* deprive the
19 defendant of [a fair trial].’” *Id.* at 1225 (quoting *Press-Enterprise II*, 478 U.S. at 15).

20 Where there is pre-trial publicity in urban jurisdictions, sealing court records is disfavored
21 because of the large jury pool makes all but certain that the court will find impartial jurors. In
22 *Seattle Times*, the Ninth Circuit rejected the criminal defendant’s request to seal court documents,
23 explaining that “highly publicized cases indicate that most potential jurors are untainted by press
24 coverage despite widespread publicity” and that “prejudicial publicity is less likely to endanger the
25 defendant’s right to a fair trial in a large metropolitan area.” 845 F.2d at 1517.

26 In the high-profile drug prosecution of carmaker John DeLorean in Los Angeles, the Ninth
27 Circuit rejected the defendant’s request to block the media from broadcasting government
28 surveillance videotapes purporting to show him engaging in narcotics trafficking would

1 | compromise his right to a fair trial. *CBS v. District Court*, 729 F. 2d 1174, 1179 (9th Cir. 1983).
2 | The Ninth Circuit noted that despite the “enormous, incessant, and continually increasing publicity”
3 | surrounding the DeLorean case, “prejudicial publicity is less likely to endanger the defendant’s
4 | right to a fair trial” in the metropolitan area of Los Angeles. *Id.* at 1180. The court explained that
5 | “[t]he pool of potential jurors is so large that even in cases attracting extensive and inflammatory
6 | publicity, it is usually possible to find an adequate number of untainted jurors[.]” *Id.* at 1180-81.
7 | *See also ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004) (vacating trial court order excluding
8 | the media from *voir dire* in celebrity Martha Stewart’s criminal trial on the grounds that closure
9 | order was not supported by sufficient factual basis and was not narrowly tailored; “[t]he mere fact
10 | of intense media coverage of a celebrity defendant, without further compelling justification, is
11 | simply not enough to justify closure”).

12 | The fact that *People v. Cowell* will be tried in Alameda County — a large urban county with
13 | 1.7 million residents that is part of a much larger metropolitan area — undermines any prejudicial
14 | publicity argument by Defendant. It would be impossible for Defendant to show that there is a
15 | “substantial probability” that he could not find twelve unbiased jurors after the media reported
16 | about his unsealed motion to set aside the indictment and related exhibits.

17 | Defendant asserts that his motion to set aside his indictment should be sealed because he is
18 | discussing evidence from the sealed grand jury transcript that might not be admissible at trial and
19 | potential jurors should not hear about excluded evidence. But now that Defendant has attached
20 | these grand jury exhibits as exhibits to his dispositive motion, the exhibits become a court record
21 | that is presumed to be open. *See* Cal. R. Ct. 2.550(b) (a court “record” subject to Rules 2.550 and
22 | 2.551 includes “any document, paper, exhibit, transcript, or other thing filed or lodged with the
23 | court[.]”) In *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292, 311 (2002), the First District
24 | held that documents attached to a dispositive motion are court records that are presumptively open
25 | under the First Amendment and rules of court, even if those records are trade secrets that are not
26 | normally available to the public. By filing grand jury exhibits, police records and an audio
27 | recording to his dispositive motion to set aside the indictment, Defendant transformed those
28 | documents into court records, subject to the presumptive public access under the First Amendment

1 and Rule of Court.

2 Defendant’s motion to set aside his indictment is similar to a suppression brief and hearing.
3 Both contain evidence that might be excluded from trial. Both are presumptively open to the public
4 and press. In *Press-Enterprise II*, the Supreme Court said that the First Amendment right of access
5 “would in most instances attach to a suppression hearing.” 478 U.S. at 7. In *Waller v. Georgia*, the
6 court held that any closure of a suppression hearing over the objections of the accused must meet
7 the tests set out in *Press Enterprise*, and noted that the need for openness at suppression hearings
8 “may be particularly strong” because the conduct of police and prosecutor is often at issue. *Id.* at
9 47. The Supreme Court reversed the trial court’s closure of suppression hearing. *Id.* at 50.

10 Here, the a one-page order sealing Defendant’s motion to set aside the indictment based on
11 its “find[ing] that making such motion and exhibits public *may* prejudice the defendant’s right to a
12 fair and impartial trial.” Oct. 11, 2019 Order (emphasis added). This is not the correct standard.
13 Under the First Amendment, the Court is required to find that there is a “substantial probability”
14 that Defendant’s right to a fair trial would be prejudiced by disclosure of the motion and its
15 exhibits. *NBC Subsidiary*, 20 Cal. 4th at 1218-19. Because Defendant failed to show that there is a
16 “substantial probability” that he could not find twelve impartial in a county of 1.7 million residents
17 after the contents his motion to set aside the indictment and related exhibits are disclosed to the
18 public and media, his motion and exhibits should be unsealed immediately.

19 **C. *Voir Dire* and Jury Admonitions Are Adequate Alternatives to Sealing**

20 Both the United States Supreme Court and the California Supreme Court have instructed
21 trial courts to rely on *voir dire*, admonitions, instructions, and other tools — instead of closure and
22 sealing — to weed out biased jurors in high-profile cases. As the United States Supreme Court
23 explained in *Press-Enterprise II*, “[t]hrough *voir dire*, cumbersome as it is in some circumstances, a
24 court can identify those jurors whose prior knowledge of the case would disable them from
25 rendering an impartial verdict.” 478 U.S. at 15.

26 Relying on this well-established authority, the California Supreme Court held in *NBC*
27 *Subsidiary* that “as a general matter, cautionary admonitions and instructions must be considered a
28 presumptively reasonable alternative” to closure of court proceedings and records, *even where there*

1 is “intense and pervasive media coverage” of a case, absent proof of “exceptional circumstances.”
2 20 Cal. 4th at 1223-24 (emphasis added). In that case, which generated substantial publicity
3 because it involved celebrity Clint Eastwood, the court rejected the trial court’s conclusion that jury
4 admonitions “are not adequate, reasonable alternatives” to closure. *Id.* at 1223. “We repeatedly
5 have stressed our adherence to the fundamental premise that, as a general matter, cautionary
6 admonitions and instructions serve to correct and cure myriad improprieties, including the receipt
7 by jurors of information that was kept from them.” *Id.* at 1223-24. Courts are required to consider
8 other alternatives to secrecy including a change of trial venue to a place less exposed to intense
9 publicity and postponement of trial for public attention to subside. *Nebraska Press*, 427 U.S. at
10 563-564.

11 To uphold a valid finding that the jury pool may be biased due to publicity, the evidence
12 must be “clear... that further publicity, unchecked, would so distort the views of the potential jurors
13 that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a
14 just verdict exclusively on the evidence presented in open court.” *Nebraska Press*, 427 U.S. at 569;
15 *see also CBS*, 729 F. 2d at 1178 (same).

16 Unsealing Defendant’s motion to set aside the indictment now, when his trial is months
17 away, poses no threat to his fair trial rights. Defendant will have plenty of opportunity to question
18 potential jurors during *voir dire*. Not all potential jurors who have read or heard media reports
19 about this case will automatically become impartial. If and when Defendant goes to trial, *voir dire*
20 can be used to weed out only those jurors who are not impartial.

21 This Court’s sealing order made no indication that any less restrictive methods of ensuring a
22 fair trial, including those listed above, were proposed or considered, as required under *NBC*
23 *Subsidiary*, 20 Cal. 4th at 1218-19 and Rule 2.550(d). Sealing an entire dispositive motion in a
24 criminal case of public interest is hardly the least restrictive means of ensuring an impartial jury
25 when *voir dire* and jury admonition are available and preferred.

26 Because there are no exceptional circumstances justifying sealing here, the Court should
27 rely on *voir dire* to protect Defendant’s fair trial rights and unseal Defendant’s motion to set aside
28 the indictment and all its exhibits and related briefs.

1 **7. DEFENDANT’S MOTION TO SEAL THE GRAND JURY TRANSCRIPT FAILED TO**
2 **MEET THE REQUIREMENTS OF PENAL CODE SECTION 938.1(b)**

3 Pursuant to California Penal Code Section 938.1(b), the transcript of grand jury proceedings
4 resulting in a criminal indictment “shall be open to the public” ten days after the indictment is
5 delivered to the defendant unless “the court finds that there is a ‘reasonable likelihood’ that their
6 release will prejudice the defendant’s right to a fair trial.” *Alvarez*, 154 Cal. App. 4th at 647
7 (emphasis added) (quoting Penal Code Section 938.1(b)). A court sealing grand jury transcripts
8 must find that “publicity of the contents of the entire grand jury transcript would be so extensive
9 and widespread that it threatens to prejudice the entire jury pool so that twelve unbiased jurors
10 could not be found.” *Press-Enterprise III*, 22 App. 4th at 504 (citation omitted).

11 Here, the order that sealed the grand jury transcript is based on a finding disclosure “may
12 prejudice the defendant’s right to a fair and impartial trial.” 10/16/2019 Order (emphasis added).
13 This is not the correct standard. Penal Code § 938.1(b) requires the court to justify sealing based on
14 a finding that there is a “reasonable likelihood” that media coverage of the unsealed grand jury
15 transcript would deprive Defendant of an impartial jury. The Court cites no evidence to support its
16 holding. Even if Defendant were to attempt to submit admissible evidence to the Court, it would be
17 unpersuasive. There is no “reasonable likelihood” that media reports and public knowledge of the
18 grand jury transcript would be so pervasive as to prejudice the entire juror pool in a county with a
19 population of 1.7 million so that twelve impartial jurors could be found.

20 A court deciding whether to seal a grand jury transcript must consider “reasonable
21 alternatives to sealing,” such as “a change of venue” or “voir dire examination.” *Press-Enterprise*
22 *III*, 22 Cal. App 4th 504. In *Press-Enterprise III*, the court of appeal found that the trial court did
23 not give adequate consideration to change of venue or voir dire as alternatives to sealing, and
24 ordered the court to vacate its order sealing a grand jury transcript. *Id.* at 505. The Court’s sealing
25 order suffers from the same fatal flaw; it did not consider any alternatives to sealing. Voir dire will
26 be more than adequate alternative for Defendant to counteract any prejudicial publicity. *People v.*
27 *Jackson*, 128 Cal. App. 4th 1009 (2005), which involved the sealing of grand jury transcripts does
28 not apply here. The court in *Jackson* affirmed the trial court’s sealing of the grand jury transcripts

1 to protect the privacy interest of the alleged minor victims, unindicted purported co-conspirators,
2 and ongoing investigation in a child sexual abuse case. *Id.* at 609. None of these factors are present
3 here.

4 Because the Court sealed the grand jury transcript based on a conclusory finding that
5 disclosure “may” cause prejudice to Defendant’s right to a fair trial instead of the correct
6 “reasonable likelihood” standard, and because the Court failed to consider reasonable alternatives
7 such as *voir dire* and change of venue, this Court should unseal Defendant’s grand jury transcripts
8 immediately.

9 **8. CONCLUSION**

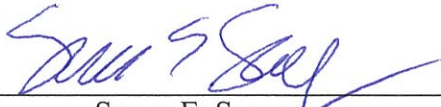
10 Secrecy is not justified in this case. Defendant has failed to make any factual showing to justify
11 the broad secrecy orders, citing mere speculation that Defendant’s fair trial rights “may” be
12 prejudiced by disclosure of his motion to set aside the indictment and exhibits and grand jury
13 transcript. The October 16, 2018 sealing order failed to find a “substantial probability” that
14 disclosure of the motion to dismiss the indictment would make it impossible for Defendant to find
15 twelve impartial jurors – as required by the First Amendment and Rules of Court. The Oct. 11,
16 2019 sealing order failed to follow the mandate of Penal Code § 938.1(b), which requires a finding
17 that sealing grand jury transcript is necessary because there is a “reasonable probability” that
18 disclosure would harm Defendant’s fair trial rights. It does not appear that the Court considered any
19 alternatives to sealing, such as limited sealing and *voir dire*. In fact, a large metropolitan county like
20 Alameda County, Defendant would not be able to show that twelve impartial jurors cannot be

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1 found after these court records are disclosed. For these reasons, the Court should immediately
2 unseal Defendant's motion to set aside the indictment and grand jury transcript.

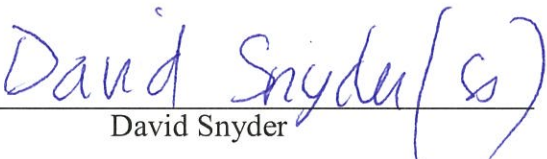
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