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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN JOAQUIN

STOCKTON BRANCH

The People of the State of California, Plaintiff, v. WESLEY BROWNLEE, Defendant.	Court Case No. CR-FE-2022-0010220 POINTS AND AUTHORITIES IN SUPPORT OF MOTION AGAINST A PROTECTIVE ORDER AGAINST PUBLICITY Date: October 24, 2022 Time: 9:00 AM Dept: 9B

I. PROCEDURAL HISTORY

On October 17, 2022, Wesley Brownlee (hereinafter, "Mr. Brownlee") was arraigned in Department 8C on three counts of murder. In each of the murders, it is further alleged pursuant to Penal Code Section 190.2(a)(3), that Mr. Brownlee is accused of multiple murders (capital crimes). Mr. Brownlee is further accused pursuant to Penal Code Section 12022.53(d), of the personal and intentional discharge of a firearm during each murder. Lastly, Mr. Brownlee is charged with violating Penal Code Section 29800(a)(1), being a felon in possession of a firearm.

During the arraignment, the People requested that Mr. Brownlee's bail be set to no bail pursuant to Article 1, Section 12 of the California Constitution, which prohibits bail for those who are charged with capital offenses.

II. STATEMENT OF FACTS

Between August 30, 2022, through September 27, 2022, Mr. Brownlee shot and killed the three victims listed in the complaint. On October 15, 2022, Mr. Brownlee was arrested by the Stockton Police Department and found to have a firearm, commonly referred to a "ghost gun," in his waistband.

The firearm and the ballistic evidence discovered at the scene of the three murders has been examined. There is high confidence that the firearm is linked to those three murder scenes. In addition, cellular data associated with Mr. Brownlee placed him both in physical and temporal proximity to the three murders listed in the complaint.

At least three other murders are under active investigation. So far, those investigations have indicated that Mr. Brownlee is associated with the commission of those crimes. . One of the murders occurred in Oakland in 2021.

III. LEGAL ARGUMENT

The People strenuously oppose Mr. Brownlee's motion for an illegal gag order. Defense counsel's motion is without merit. Restraining the prosecution and law enforcement from fully investigating Mr. Brownlee's crimes by requesting assistance from the public is invalid under both the California Constitution and the United States Constitution. Furthermore, a comprehensive gag order is overbroad, vague, not warranted by the present circumstances, and clearly not in the public's interest given the nature of the ongoing criminal investigation into a serial killer, and determination of the expanse of his potential crimes.

Defense counsel's motion is without merit for the following reasons: (1) As a factual matter, the **mere possibility** of prejudice to future jurors does not justify the prior restraint; (2) The examples

cited in defense counsel's motion do not pose a **clear and present danger**, nor serious and imminent threat to his right to a fair trial; (3) The requested comprehensive gag order is vague, overbroad, and, therefore, unconstitutional because it is not narrowly tailored to protect the Mr. Brownlee's alleged interest; (4) The defense has not shown that there are no less restrictive alternatives available; and (5) the requested gag order will have a chilling effect on the criminal investigation of the current cases and will hamstring law enforcement in their efforts to locate additional witnesses and other potential victims.

A. GAG ORDERS ARE GENERALLY UNCONSITUTIONAL AND THE BURDEN TO ESTABLISH THE NECESSITY OF A PRIOR RESTRAINT RESTS ON THE DEFENSE.

Professor Erwin Chemerinsky may have said it best when he stated:

> The need to ensure a fair trial should not be a talismanic incantation that justifies sacrificing First Amendment values. Gag orders on lawyers and parties should be tolerated **only** if there is **proof** that a fair trial is unlikely without such a prior restraint, that no other alternatives can succeed, and that the gag order will significantly enhance the likelihood of a fair trial. It is almost impossible to imagine a situation in which all of these requirements will be satisfied. (Emphasis added.)

The Sound of Silence: Reflections on the Use of the Gag Order: Lawyers Have Free Speech Rights, too: Why Gag Order on Trial Participants are Almost Always Unconstitutional, Professor Erwin Chemerinsky, 17 Loy. L.A. Ent. L.J. 311, 319 (1997).

The California Court of Appeals defines prior restraints as orders which restrict or preclude a citizen from speaking in advance. (*Hurvitz v. Hoefflin*, (2000) 101 Cal. Rptr. 2d 558, 565). Such restraints are strongly disfavored and presumptively invalid. (*Id.*). Gag orders on trial participants are unconstitutional unless: (1) The speech sought to be restrained poses a clear and present danger, or serious and imminent threat to a competing interest; (2) The order is narrowly tailored to protect that interest; (3) No less restrictive alternatives are available. (*Hurvitz* at 565).

The gag order requested by the defense in the current case is not only an unconstitutional prior restraint, but also fails constitutional strict scrutiny because it is overbroad. To be clear, the defense is asking the court to curtail all speech by the prosecution and law enforcement regarding this case. The Supreme Court cautioned in *Neb. Press Ass'n* that, "a prior restraint, by contrast and, by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (*Neb. Press Ass'n v. Stuart*, (1976) 427 U.S. 539, 559).

Courts have explained the presumption that other means are available to address the possibility of prejudice. In *Freedom Communications, Inc. v. Superior Court*, (2008) 167 Cal. App. 4th 150, the Court held that, "the trial court could admonish witnesses not to read press accounts of the trial. '[A]dmonitions must be considered presumptively reasonable alternative" to restricting First Amendment rights.' (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, (1999) 20 Cal.4th 1178, 1224).

In *Neb. Press Ass'n*, the Supreme Court, in articulating a test for when gag orders may be imposed on the press, outlined various alternatives to such orders. These alternatives included a change of venue, postponement of trial to allow public attention to subside, probing interrogation of prospective jurors to screen out those with fixed opinions as to guilt or innocence, providing clear instructions to the jury as to what may be considered in reaching a verdict, and sequestering jurors. (Chemerinsky, 17 Loy. L.A. Ent. L.J. 311, citing *Neb. Press Ass'n*).

Where a party contends his or her right to a fair trial has been or will be compromised by pervasive pretrial publicity, the law has long imposed on that party the burden of producing evidence to establish the prejudice. (*Hurvitz, supra.*). **It is not enough for a court to decide that the right to a fair trial *may* be affected by the exercise of free speech.** (*Hurvitz, supra,* emphasis added.) "Reasonable minds can have few doubts about the gravity of the evil pre-trial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require." (*Neb. Press Ass'n v. Stuart*, at 569).

Moreover, pretrial publicity is not presumptive of a deprivation of a defendant's constitutional right to a fair trial. "It is clear from these and many similar cases that it cannot be laid down as a general rule that pretrial publicity of a prejudicial nature invariably deprives all defendants of their constitutional right to a fair trial before an impartial jury. It is equally clear that the burden rests on each defendant to establish affirmatively that he has been deprived of that right by such publicity." *(County of Los Angeles v. Superior Court of Los Angeles County,* (1967) 253 Cal.App.2d 670, 684). Mr. Brownlee has made no such showing in this case, but rather many conclusory assertions.

B. <u>"CLEAR AND PRESENT DANGER" IS THE CORRECT STANDARD FOR ANALYSIS.</u>

The speech sought to be restrained by the defense must meet the clear and present danger test enunciated in *Near v. Minnesota,* (1931) 283 U.S. 697 and *United States v. Ford,* (6th Cir. Tenn. 1987) 830 F.2d 596, 598. In *Ford,* the court held that the test for gag orders applied to the press also extends to **trial participants**. *Ford, supra,* extending *Neb. Press Ass'n v. Stuart,* at 556. ("We see no legitimate reasons for a lower threshold standard for individuals, including defeendants, seeking to express themselves outside of court than for the press); see *Pell v. Procunier,* (1974) 417 U.S. 817, 834-35 (rejecting the distinction between first amendment rights of the press and "members of the public generally").

Counsel for Mr. Brownlee mistakenly relies on *Sheppard v. Maxwell,* (1966) 384 U.S. 333 and *Younger v. Smith,* (1973) 30 Cal.App.3d 138, to argue that this court should use the "reasonable likelihood" test to evaluate whether Mr. Brownlee's right to a fair trial will be violated by investigative pretrial publicity. However, in *Neb. Press Ass'n v. Stuart,* (1976) 427 U.S. 539, 561, the Court acknowledged the positions in *Sheppard* and *Younger*, but emphatically stated, **"it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it."**

Defense counsel's allegation that the information disseminated by the media will taint any potential juror lacks any foundation. In fact, a potential juror's mind need not be a blank slate. It is sufficient if the juror can render a verdict based solely on the evidence presented. (*Irwin v. Dowd* (1961) 366 U.S. 717, 725, 728, 81 S. Ct 1639). The type of gag order requested by the defense only applies where there is pervasive pretrial publicity, causing a build-up of prejudice and "a wave of public passion" adversely prejudicial to the defendant. (*Patton v. Yount,* (1984) 467 U.S. 1025,1034, 104 S. Ct 2885, *Murphy v. Florida,* (1975) 421 U.S. 794, 799, 95 S. Ct 2031; *Irwin v. Dowd, supra.*). This case has generated media attention for a relatively brief period of time – much of which was dedicated to warning the public. The defense has entirely failed to meet its burden to establish that pretrial publicity in this case presents a clear and present danger to his right to a fair trial.

Additionally, the *Sheppard* case cited by the defense is completely distinguishable from the present case. Law enforcement has not "gossiped to the press," "divulged inaccurate information," "divulged prejudicial information such as the defendant's refusal to submit to interrogation or take a lie detector test," nor "expressed any belief in the defendant's guilt or innocence." *Sheppard* at 359-362. (See defense's motion, page 10) The United States Supreme Court in *Murphy v. Florida*, (1975) 421 U.S. 794, 799, also distinguished the unusual circumstances of the Sheppard case:

> "*Sheppard* arose from a trial infected not only by a background of extremely inflammatory publicity but also by a courthouse given over to accommodate the public appetite for carnival. The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Defense counsel's reliance on this case is therefore entirely misplaced, as this case does not, in any manner, mirror the type of unusual circumstances in *Sheppard.*

Rather than supplying any evidence or foundation for her motion, defense counsel simply asserts the allegations made by Chief McFadden and District Attorney Tori Verber Salazar far exceed the bounds of fairness to the accused and serve to inflame the entire prospective jury pool in

San Joaquin County. These allegations by defense counsel are wholly conclusory and lacking any factual basis. The nature of the charges is not the fault of the media or law enforcement, but instead is based on the Mr. Brownlee's own criminal actions.

Moreover, counsel protests that seeking assistance and information from the media is inappropriate. Law enforcement routinely seeks assistance from the media on cases such as this in order to properly investigate and pursue justice, whether the information generated is ultimately inculpatory or exculpatory. What defense counsel is requesting is that the court prevent law enforcement from performing their responsibility to fully investigate this case, by cutting off any assistance from the public and media-generated leads.

C. THE MERE POSSIBILITY OF PREJUDICE TO POTENTIAL JURORS DOES NOT JUSTIFY THE PRIOR RESTRAINT

In the present case, not only is there no evidence of potential prejudice to future jurors, but numerous more highly publicized cases have established it to be entirely probable to impanel an impartial jury despite media coverage. Best said in *Neb. Press Ass'n*, "We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." (*Neb. Press Ass'n*, at 565).

Furthermore, defense counsel must establish actual prejudice at time of trial. Mere exposure to pretrial publicity does not constitute actual prejudice. The defendant must show that the jurors are unable to render a verdict based solely on the evidence presented. (*Harris v. Pulley*, (1989) 885 F.2d 1354). The court in *Harris v. Pulley*, at 1363, outlined the standard, relying upon *Murphy,* supra, and *Irvin v. Dowd,* supra: "To determine whether actual prejudice existed to deny defendant his right to 'a panel of impartial, "indifferent" jurors,' [Citations] a court must determine if the jurors demonstrated actual partiality or hostility that could not be laid aside. (*Murphy*, 421 U.S. at 800). **'Jurors need not, however, be totally ignorant of the facts and issues involved.'** (*Id.*, Emphasis added). The Court in *Irvin* defined the constitutional level of impartiality required to ensure a fair trial:

> To hold that the **mere** existence of any preconceived notion as to the guilt or

> innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish **an impossible standard**. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Harris held instead, "Actual prejudice is not demonstrated by a mere showing of exposure to pretrial publicity. 'The relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" (*Id.* at 1363-1374). At this point, the issue of pretrial publicity is premature given we are not at the point of jury trial.

Further, there are examples of cases in other jurisdictions such as Los Angeles County that received substantial media exposure and nevertheless succeeded to impanel impartial juries; it is commonplace. Recently, the infamous and widely-publicized case of *People v. Robert Durst*, resulted in a verdict after a lengthy trial.. The *Durst* case has been subject to far-reaching media coverage, innumerable news articles, and even an HBO 6-part documentary series. Other high-profile cases in Los Angeles County have included *People v. Lonnie Franklin*, aka the "Grim Sleeper," *People v. Conrad Murray*, the doctor who caused the death of superstar musician Michael Jackson, *People v. Phil Spector*, the music mogul who murdered Lana Clarkson, and more recently, *People v. Pearl Fernandez and Isauro Aguirre* for the torture and murder of 8-year-old Gabriel Fernandez. In the Grim Sleeper case, a documentary and a dramatized television movie, as well as multiple news articles and interviews, were in the public sphere prior to trial.

The murder cases of *People v. Charles Manson*, *People v. Richard Ramirez* (aka the Night Stalker; serial killer), *People v. Samuel Little* (serial killer), and *People v. Michael Hughes* (aka the Southside Slayer; serial killer), all received an enormous amount of regional and national media attention.. *See Williams v. Superior Court*, (1989) 49 Cal. 3d 736, 742 ("a far-flung megapolis — Los Angeles County.") In each of these famous cases, a fair and impartial jury was impaneled, despite extensive media attention.

Juries in high-profile cases are routinely questioned regarding their exposure to the media. As indicated, the standard for impaneling an impartial jury is **not** whether the jurors read or viewed any media coverage, but whether the jurors are able to be impartial despite their media exposure. No one can forget the high-profile, double-murder case of Nicole Brown Simpson and Ron Goldman, where

the jury returned a verdict of not guilty for internationally-recognized star O.J. Simpson. Mr. Brownlee's case has not come close to reaching this level of notoriety, and, regardless, it is clearly possible to impanel an impartial jury in a county the size of San Joaquin.

Defense counsel also argued that the District Attorney, Tori Verber Salazar, gave a press conference indicating that Mr. Brownlee "does not deserve to have a name", and breachedher duty of fairness to the accused. The District Attorney did not breach her duty.Rather, she was condemning the viciousness of the crimes committed in this community. Not once in the interview did she declare that Mr. Brownlee's rights should or would be abrogated. Rather, she condemned the criminal acts that Mr. Brownlee committed. The fact that the arraignment was covered by the news media does not indicate that the interest in this case, "has continued to peak," as counsel alleges. Rather, there has been minimal media coverage of this case since Mr. Brownlee's arrest.

Additionally, the People strongly oppose the unconstitutional overbroadness of the gag order because the Stockton Police Department may be required to perform additional brief interviews with news stations in order to find additional alleged victims or witnesses who can provide additional information to law enforcement. Such conduct is routine in cases such as this, given the pattern followed by most serial killers. Currently, we are aware that Mr. Brownlee, by way of his employment as a long-haul trucker, has had the opportunity to commit other similar crimes in outside jurisdictions.

D. <u>TIMING OF PRETRIAL PUBLICITY.</u>

The timing of the media coverage is yet another highly relevant factor the court must take into account when determining the prejudicial effect of pretrial publicity. (*Patton v. Yount, supra.*). Courts generally look to the effect of prejudicial publicity immediately preceding the trial. (*Irvin v. Dowd,* supra.). The more distant in time, the less likely the pretrial publicity is considered to be prejudicial. (*Patton v. Yount, supra, Murphy v. Florida, supra.*) In *Murphy*, the court noted, "that the news articles concerning petitioner had appeared almost entirely during the period between December 1967 and January 1969, the latter date being **seven months** before the jury in this case was selected." (*Murphy*, at 802). Various other courts have also determined that the more distant in

time the publicity, the less likely it can be considered prejudicial. (*See*, *Williams v. Vasquez*, 817 F. Supp. 1443, 1474 (E.D. Cal. 1993), *aff'd*, 52 F.3d 1465 (9th Cir. 1995) (limited number of stories published months before trial); *United States v. Rewald*, 889 F.2d 836, 864 n.28, (9th Cir. 1989), *modified on other grounds*, 902 F.2d 18 (9th Cir. 1990) (publicity occurred one or two years before trial); *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988) (media accounts dissipated in months preceding trial).

At this time, there has been pretrial publicity concerning the Mr. Brownlee's case. However, the trial is likely many months, if not years, away. Once again, defense counsel's motion is premature and anticipates problems that do not presently exist.

E. NATURE AND EXTENT OF PRETRIAL PUBLICITY

The nature and extent of pretrial publicity are also factors that must be considered regarding any potential prejudicial effect. Factual coverage, however, is *not* considered prejudicial. In *Williams*, the court reviewed the media coverage and noted:

> Only a limited number of stories, twenty-four, was published. Furthermore, all the articles were published months prior to the March 20, 1979, trial date; eighteen (78.25%) were published in October of 1978, and six (21.75%) were published in November and December of 1978. Moreover, the articles were **factual** in nature, and a majority of them was very brief.

(*Williams v. Vasquez*, 817 F. Supp. 1443, 1474 (E.D. Cal. 1993), *aff'd*, 52 F.3d 1465 (9th Cir. 1995)).

In *Bundy v. Dugger*, (1988) 850 F.2d 1402, 1424, the court asserted, "Jury prejudice can be presumed from pretrial publicity if that publicity is sufficiently prejudicial and inflammatory and if it saturated the community where the trial was held."

However, the same court stated that a defendant's prior record is **not** considered inflammatory:

> Although publicity concerning a defendant's involvement in other crimes is relevant in presuming jury prejudice, especially if the defendant's involvement in that crime is inadmissible in the guilt/innocence phase, *Murphy* stands for the proposition that prejudice is **not** presumed simply because the defendant's criminal record is well publicized. (*Bundy*, at 1425).

Hence, any mention of Mr. Brownlee's prior trial for a similar-type murder is undoubtedly not inflammatory or sensational, especially given that the same news coverage also referred to Mr. Brownlee's acquittal in that case. Defense has failed to establish that the pretrial publicity was extremely inflammatory and sensational rather than factual in nature, and so saturated the community where the trial is to be held that impaneling an impartial jury will be virtually impossible. (*Harris v. Pulley*, supra at 1363-1364).

F. A GAG ORDER WILL HAVE A CHILLING EFFECT ON THE CRIMINAL INVESTIGATION AND PREVENT LAW ENFORCEMENT FROM DISCOVERING ADDITIONAL EVIDENCE.

Mr. Brownlee is accused of murdering three people in Stockton and is currently being investigated for the murder and shooting of an additional four more victims. Because of the news coverage at the time of his arrest, other law enforcement agencies have contacted the Stockton Police Department of similar crimes in other jurisdictions. Any order curtailing dissemination of information will prevent law enforcement from fully investigating the extent of Mr. Brownlee's crimes. As the court is aware, criminal investigations typically continue long after the filing of criminal charges. Furthermore, a gag order will also hamstring the prosecution in the pursuit of justice. In *Hurvitz*, the court was similarly concerned:

> The order, in this case, is particularly troubling because of its chilling effect on the litigants' ability to properly prepare for trial. Every third-party witness must be shown the order, and agree to be bound thereby before counsel can interview them about the case. Thus, unless a witness agrees to voluntarily have his or her right of free speech curtailed on penalty of contempt of court, he or she may not be interviewed or deposed. This burden on the parties' ability to freely communicate with witnesses and potential witnesses is not justified, even by the patients' right to privacy. (*Hurvitz* at 1245).

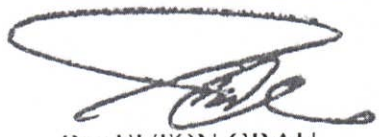
Given that a gag order would seriously hamper the full investigation and successful prosecution of the most vicious and serious type of crimes, the People respectfully urge this court to reject such an unfounded and unconstitutional request.

IV. CONCLUSION

Based on the aforementioned reasons, the People respectfully request that this court deny the Mr. Brownlee's motion for an unfounded and unconstitutional gag order.

Dated: October 21, 2022

Respectfully submitted,
TORI VERBER-SALAZAR
DISTRICT ATTORNEY



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