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**SUPERIOR COURT OF CALIFORNIA**
**COUNTY OF SAN FRANCISCO**

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,** **Plaintiff,** **vs.** **DAVID ROBERT DALEIDEN; SANDRA SUSAN MERRITT,** **Defendants.** | **CASE NOS.: 2502505/17006621** **DEFENDANT MERRITT'S OPPOSITION TO THE ATTORNEY GENERAL'S PRELIMINARY HEARING REQUESTS** |

Defendant Merritt respectfully submits her Opposition to the Attorney General's *Preliminary Hearing Brief & Request for Offer of Relevant Proof and Rulings* (hereinafter, "Request"). In addition to the Response contained herein, Merritt agrees with and adopts (as if fully set herein) the arguments contained in Defendant Daleiden's *Opposition to Preliminary Hearing Brief*, which is expected to be filed contemporaneously.

## INTRODUCTION

The Attorney General's Request puts the proverbial cart before the horse by filing objections to Merritt's defensive strategy before it has even occurred. Further, the Request is based upon pure conjecture, devoid of any evidentiary support. What is more, the Attorney General severely misstates relevant law and fails to discuss controlling law. To seal information and exhibits, or to close a preliminary hearing, exceedingly stringent standards apply to protect Merritt's fundamental, constitutional and statutory rights to a fair, public preliminary hearing. The Attorney General's Request utterly fails to overcome these high bars.

## I. Constitutional and Statutory Law Afford Merritt a Strong Presumption for An Open and Public Preliminary Hearing.

Merritt's fundamental right to an open and public hearing does not hinge on a simplified balancing test, but rather stringent standards must be applied under federal and California law. *See* U.S. Const. amends. VI (right to speedy and public trial), XIV; Cal. Const. art. I, § 15 (same)[1]; Cal. Rules of Court 2.550-2.551. *Cf.* Cal. Penal Code § 868.7[2] (State standard more stringent than federal standard).

The United States Supreme Court has held that the Sixth Amendment right to a public trial extends to preliminary hearings. *Waller v. Georgia*, 467 U.S. 39, 43 (1984). In *Waller*, the prosecution moved to close a suppression hearing to the public due to privacy interests of others who were indicted but not then on trial. *Id*. at 41-42. While the Court acknowledged that a defendant's rights to an open trial may give way to other rights or interests, the Court explained that "[s]uch circumstances will be **rare**, …and the **balance of interests must be struck with special care**." *Id*. at 45 (emphasis added). Thus, the Sixth Amendment requires the same scrutiny as the First Amendment, *id*. at 46:

> The **presumption of openness** may be overcome only by an overriding interest based on findings that closure is **essential** to preserve higher values and is **narrowly**

[1] Under Cal. Const. art. I, § 3, the public also has a right to access information "concerning the conduct of the people's business." *Id*.

[2] All future statutory references are to the Penal Code unless otherwise stated.

> **tailored** to serve that interest. The interest is to be **articulated along with findings specific** enough that a reviewing court can determine whether the closure order was properly entered.

*Id*. at 45 (quoting *Press–Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 510 (1984)) (emphasis added). Further, "the trial court must consider **reasonable alternatives** to closing the proceeding." *Id*. at 48 (emphasis added). The basis for such strict scrutiny in criminal proceedings rests on the right of the accused to a fair trial:

> The requirement of a public trial is for the benefit of the accused; **that the public may see** he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....

*Waller v. Georgia*, 467 U.S. at 46 (internal citation omitted) (footnote omitted) (emphasis added). As the Court further noted, "'[t]he knowledge that every criminal trial is subject to contemporaneous review **in the forum of public opinion** is an **effective restraint** on possible abuse of judicial power.'" *Id*. at 46 n.4 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)) (emphasis added). A public hearing also "encourages witnesses to come forward and **discourages perjury**." *Id*. at 46 (emphasis added).

Even before the Court's decision in *Waller v. Georgia*, the California Supreme Court concluded in *People v. Pompa-Ortiz*, 27 Cal. 3d 519, 526 (1980), that "the Legislature at all times perceived there was a right to **public preliminary examinations** and drafted [Cal. Penal Code sections 867 and 868] in light of that understanding. . . . We also believe that right was a **substantial right** the denial of which entitled him to have the information set aside pursuant to section 995." *Id*. at 526 (emphasis added). Also, Section 868 explicitly commands that Merritt's preliminary hearing "**shall be open and public."** § 868 (emphasis added).

## II. The Attorney General Has Completely Failed to Rebut the Strong Constitutional Presumption to An Open and Public Hearing with Any Compelling Interest or Evidence.

In addition to the constitutional standards cited above, California Rules of Court (CRC) 2.550 and 2.551 (sometimes referenced as "sealing Rules"), and Section 868.7 control when a prosecutor seeks to seal court records and close a preliminary hearing. Eschewing these authorities,

the Attorney General once again mistakenly relies heavily on section 293.5 (sex-crime statute) which is wholly inapplicable here.

### A. The Attorney General's Request to Keep Alleged Victims' Names Sealed Has No Evidentiary Foundation and Must Be Denied.

The Attorney General insists upon turning this case into a sex-crime case by again relying on Section 293.5 (and cases analyzed thereunder) as authority to continue to seal the alleged victims' names at a hearing strongly presumed to be open to the public for the defendant's benefit. As Merritt pointed out in her *Reply in Support of Her Demurrer to Complaint,* filed June 19, 2017, at pp. 1-2,

> the Attorney General appears either to have forgotten to read the Criminal Complaint he actually filed in this case (charging 14 counts of illegal recording of non-sexual conversations and 1 count of conspiracy to record non-sexual conversations), or he is now attempting to prosecute Ms. Merritt for alleged crimes that are altogether different from the ones charged in his Complaint (i.e., "sex crimes"). The charges that the Attorney General has purported to state against Ms. Merritt in the Criminal Complaint have absolutely nothing to do with any sex crimes.

Section 293.5 is wholly irrelevant because it **only** applies to sex crime cases, which is clear to even the most casual reader.[3] Citing these inapplicable sex-crime code sections a second time cannot be considered an argument made in good faith. Section 293.5 has a very specific purpose and rationale underlying that enactment, as explained in *People v. Ramirez,* a case on which the Attorney General relied:

> The section is intended to protect the privacy of **victims of sex offenses**, **to encourage such victims to report** the offenses so that rapists may be apprehended and prosecuted, and to protect these victims . . .. [Citations omitted.]
> ***
> "No crime is more horribly invasive or more brutally intimate than rape." [Citation omitted.] Justice White described the crime as the "**ultimate violation of self," short of homicide**. [Citation omitted.] The effects of rape, however, do not end with the crime itself. "At the same time a victim is suffering from the severe emotional and physical traumas brought on by the rape, she is also being scrutinized and judged by her community. **There is <u>no other crime</u> in which the victim risks being blamed and in so insidious a way** ...." [Citation omitted.]

[3] Section 293.5 is found within Chapter 5.5. ("Sex Offenders") of Title 9 of the Penal Code, ("Of Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals").

> ***
> If [sic] has been stated that "rape remains the **most underreported crime** within the criminal justice system" [citation omitted] and studies indicate "that rape victims allege they would be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, **if statutorily enforced anonymity were available** or dependable" [citation omitted].

*People v. Ramirez*, 55 Cal. App 4th 47, 53 (1997) (sixth alteration in original) (emphasis added). The Attorney General's Request contains no legal support (or evidentiary support for that matter) for applying Section 293.5 here, and thus, the request to apply Section 293.5's balancing test should be wholly disregarded. By seeking to continue to seal the alleged victim names at the preliminary hearing, the Attorney General seeks to either close the hearing, in part, or to seal this information from the public eye – both of which contravene the strong presumption and right of a criminal defendant to have an open and public hearing. As explained above, closure is **rarely** granted, requiring the Attorney General to overcome this lofty bar.

The Request to seal names at this public hearing (and presumably in the transcript) is particularly suspect because it comes **more than three years** after the initial release of the videos in question. In that time, several Does, themselves, have publicized their names in association with this case (*see* Daleiden's *Opp. to Prelim. Hr'g Brief*). The California Supreme Court has commented on voluntary disclosure of sealed witness names in a related context, in *Alvarado v. Superior Court*, 23 Cal. 4th 1121 (2000) (defendants challenged pre-trial, permanent sealing of witness identities through trial, under federal Sixth Amendment confrontation clause). The prosecutor in *Alvarado* proceeded by a grand jury indictment (rather than by complaint and preliminary hearing), and the California Supreme Court rejected the lower court's ability to enter an order **permanently** withholding the identity of prosecution witnesses "in advance of trial and **without regard to the evidence and circumstances** as they **then** may appear." *Id*. at 1126 (emphasis added). The Court further noted that trial court would be permitted to reassess whether identities should be disclosed "as [the] case proceed[ed]," because "[m]uch may have happened in the **considerable time** that has elapsed since the trial court's order, or **may happen between now and the time of trial**, that may affect the necessity for a disclosure order." *Id*. at 1149 n.14

(emphasis added). Explaining, the Court contemplated that a changed circumstance could occur, such as "the witnesses may choose **voluntarily to disclose their names** to defense counsel at a pretrial interview." *Id*. (emphasis added). As noted above, many of the alleged Does in this case have voluntarily publicized their identity in connection with this case. Additionally noteworthy, Dr. Savita Ginde, a former Planned Parenthood medical officer from Colorado, **recently** published her alleged encounter with Daleiden and Merritt in her book, *The Real Cost of Fake News, The Hidden Truth Behind the Planned Parenthood Video Scandal*, which was released in or about **August 2018**. *See* Dr. Savita Ginde, The Real Cost of Fake News, https://therealcostoffakenews.com/ (last visited Jan. 16, 2019). **The book releases the full names of Does 9 and 10**, and further presents Dr. Ginde's spin on the events with Daleiden and Merritt with great detail (*see, e.g.*, Chs. 3-4).

Under *Alvarado*, and in conjunction with the sealing Rules and Section 868.7 (*see* discussion *infra*, II.B.), this Court must require the Attorney General to provide **current** evidence demonstrating an essential need to continue to close (and seal) the preliminary hearing. The Attorney General's conclusory allegations are not evidence, let alone sufficient evidence.[4]

### B. The Attorney General's Request to Limit the Display of Video Evidence During the Preliminary Hearing and Seal Trial Exhibits Has No Evidentiary Foundation and Must Be Denied Under Controlling Law.

The Attorney General fails to cite controlling California law pertaining to the Request to close the preliminary hearing, even though specifically requesting, in addition to sealing the video evidence, that "any monitor displaying the videos be screened from or directed away from the public gallery." (Request at 10:20-21.)

[4] *See, e.g.*, the Attorney General's allegation that "the defense continues to aggrandize a conspiratorial political narrative intended to incite his followers." (Request at 7:26-27.) Defense counsel is entitled to zealously defend against the criminal charges brought by the Attorney General. Without an evidentiary basis made in good faith, this bald allegation amounts only to the Attorney General's opinion and should be stricken from the pleadings. Merritt has not engaged in any such behavior. The allegation is offensive and unscrupulous.

**1. California Rules of Court 2.550 and 2.551, and Section 868.7 Control.**

The Attorney General's Request effectively closes public access at the preliminary hearing to **all** video evidence, without regard to actual content. The AG's failure to cite controlling law is indeed puzzling. Section 868.7 speaks directly to prosecutorial motions to close preliminary examinations. Section 868.7 provides, in pertinent part,

> a) Notwithstanding any other provision of law, the magistrate may, upon motion of the prosecutor, close the examination in the manner described in Section 868 during the testimony of a witness:
>
> (1) [Applicable to minors who complain as victims of sex offenses].
>
> (2) Whose **life** would be subject to a **substantial risk** in appearing before the general public, and **where no alternative security measures**, including, but not limited to, efforts to conceal his or her features or physical description, searches of members of the public attending the examination, or the temporary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat.
>
> (b) In any case where public access to the courtroom is restricted during the examination of a witness pursuant to this section, **a transcript of the testimony of the witness shall be made available to the public as soon as is practicable**.

§ 868.7 (emphasis added). This statutory standard is similar to, but more stringent than, the federal standard set forth in *Waller v. Georgia*, 467 U.S. at 45, 48. Section 868.7(a)(2) requires that there be a substantial risk of life to appear in public (as opposed to being "essential to preserve higher values," 467 U.S. at 45). Additionally, rather than a consideration of "reasonable alternatives," 467 U.S. at 48, Section 868.7(a)(2) requires that "**no other alternative security measures**… would be adequate . . .." *Id.* (emphasis added). Even where closure is necessary, the transcript **must** be made available to the public, and not sealed as the Attorney General proposes.

Furthermore, to seal court documents (such as the transcript or exhibits), **both** CRC Rules 2.550 **and 2.551** apply, as the Attorney General well knows. The Attorney General mentions only Rule 2.550(d), conveniently neglecting to mention Rule 2.551 which **emphatically requires a declaration** as **evidentiary support** for a request to seal. The Attorney General readily admits the sealing Rules apply to his Request to seal. (*See* Request at 8:13-23.) The sealing Rules provide, in pertinent part, as follows:

(a) Application

(1) Rules 2.550-2.551 apply to records sealed or proposed to be sealed by court order. . . .

**(c) Court records presumed to be open**
Unless confidentiality is required by law, **court records are presumed to be open.**

(d) **Express factual findings required to seal records**
The court may order that a record be filed under seal **only** if it expressly finds facts that establish:
(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.

(e) Content and scope of the order
(1) An order sealing the record must:
(A) **Specifically state the facts that support the findings;** and
(B) Direct the sealing of only those documents and pages, or, if reasonably practicable, **portions of those documents and pages**, that contain the material that needs to be placed under seal. All other portions of each document or page **must** be included in the public file.

CRC Rule 2.550 (emphasis added).

To seal any exhibit, or portion of an exhibit in this case, the strictures of CRC Rule 2.551 must be followed. Rule 2.551 provides, in pertinent part, as follows:

(a) Court approval required

A record **must not** be filed under seal without a court order. The court **must not** permit a record to be filed under seal **based solely on the agreement or stipulation of the parties**.

(b) Motion or application to seal a record

(1) **Motion or application required**
A party requesting that a record be filed under seal **must file a motion or an application for an order sealing the record.** The motion or application **must** be accompanied by **a memorandum and a declaration** containing **facts** sufficient to justify the sealing.

. . .

CRC Rule 2.551 (emphasis added).

Instead, the Attorney General tersely refers to the possibility of overriding interests, citing *NBC Subsidiary (KNBC-TV) vs. Super. Ct.*, 20 Cal. 4th 1178, 1222 n.46 (1999), which collected

cases providing examples of overriding interests, including *inter alia*, protecting minor victims of sex crimes, trade secrets, and "protection of witnesses from embarrassment or intimidation **so extreme that it would traumatize them or render them unable to testify**," *id*. (emphasis added). However, the Attorney General's Request is bereft of any evidence whatsoever.

Whether to close the preliminary hearing or to seal any name or exhibit, the Attorney General's Request necessarily must fail because no declaration from any witness has been filed. Evidentiary support to justify either closure or sealing is essential, but the Request is based upon nothing more than conclusory argument and conjecture. Additionally, argument in the Request incredibly assumes that the Attorney General has already proven his case to a jury. For example, he asserts that "privacy was violated without [the alleged victims'] consent," (Request at 8:6-7); "[t]he videos are essentially contraband evidence deserving of being treated as such," (*id*. 8:8-9); and "the rights of third persons, victims of privacy violations already," (*id*. at 10:18). Nonsense. Conclusory argument and bald accusations are not evidence, let alone sufficient evidence to seal or close a preliminary hearing.

**2. In Large Part, The Attorney General Takes Cited Authority Out of Context or Implies Cited Authority Stands for Inaccurate Propositions.**

Several cases cited by the Attorney General in support of closing the preliminary hearing and sealing video evidence discuss the **common law right of access** (rather than applying Section 868.7 or Rules 2.550 and 2.551) to inspect and copy judicial records in situations. Even so, the Attorney General takes these cases out of context in several respects, or asserts they stand for an inaccurate proposition. For example, none of these cases were analyzed or decided outside the context of articulated evidentiary facts and circumstances. While the Attorney General correctly recognizes the presumption in favor of public access to judicial records, his Request fails to acknowledge that "'the **strong** presumption' in favor of access [may be] overcome **only 'on the basis of articulable facts** known to the court, **not on the basis of unsupported hypothesis or conjecture.'"** *Valley Broad. Co. v. United States Dist. Ct. for the Dist. of Nev.*, 798 F.2d 1289, 1293 (9th Cir. 1986) (emphasis added). Similarly, the Attorney General cites to *Nixon v. Warner*

*Commc'ns, Inc.*, 435 U.S. 589 (1978), a case concerning a unique circumstance of access to "tapes obtained by subpoena over the opposition of a sitting President," 435 U.S. at 603. Yet the Attorney General ignored the Supreme Court's ruling that, having custody of the tapes, the lower court has "a **responsibility** to exercise an **informed discretion** as to release of the tapes, with a **sensitive appreciation of the circumstances** that led to their production." *Id.* (emphasis added).[5]

Likewise, *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981), another case cited by the Attorney General, is selectively quoted. The Attorney General overlooks the inconvenient fact that the appellate court's review of the district court's observation that "'the tapes now under consideration are replete with scurrilous and libelous statements about third parties,'" was "hampered because the district court has failed to specify the nature of the offending statements or identify the persons concerned." 648 F.2d at 829. Therefore, the appellate court remanded the case so that the trial court could "determine whether specific portions of the tapes merit excision." *Id*. The court held that "the application of the broadcasters should be granted, except for that material which the district court explicitly determines to be impermissibly injurious to third parties." *Id.* Yet again, in relying on *In re Nat'l Broad. Co.*, 653 F.2d 609 (D.C. Cir. 1981), the Attorney General fails to mention that the court remanded the case to the trial court for development of further factual information to allow "innocent third persons who are mentioned on the tapes to file objections . . .." 653 F.2d at 610-11. Contrary to the very authority cited by the Attorney General, the Request glaringly lacks evidentiary support, and instead impermissibly relies on mere hypotheses or speculation.

The authority cited by the Attorney General to argue restricted access to evidence and information to protect the privacy of third parties is also severely misleading. Although the court in *Criden* did refer to *In re Application of KSTP Television* (KSTP), 504 F. Supp. 360 (D. Minn. Dec. 1, 1980) regarding protection for third parties, the circumstances there were significantly egregious. In *KSTP*, the district court found that "further broadcast [of a recorded rape] would

[5] The case was ultimately decided based on the Presidential Recordings Act, giving Congress control over the tapes' release. *Id*.

support sensationalism, would not serve the public interest, and 'would impinge upon the precious privacy rights of the unfortunate [rape] victim of the crime, and would lend the court's approval to the commercial exploitation of a voice and photographic display **catering to prurient interests** . . .'" *Criden*, 648 F.2d at 825 (quoting *In re App. of KSTP Television*, 504 F. Supp. at 362). Merritt's case is wholly distinguishable. There are no prurient interests that would be promoted by ensuring that Merritt's preliminary hearing is open to the public. Thus, the Attorney General's broad jump from noting the **possibility** of a third party's privacy interests overriding the strong presumption of a public Preliminary Hearing, to the very broad proposition that "this principle rebuts the presumption," (Request at 10:8-12), manifestly overreaches. Likewise, there has been no evidence in this case whatsoever that Merritt has used any evidence to gratify private spite or to promote public scandal. The Attorney General's reliance on *Nixon* for that point is baseless. (*See* Request at 10:14-17.) Neither does the Attorney General's reliance on Section 632(d) assist regarding matters purportedly "deemed to be private." (Request at 9:21.) The argument fails because that section was abrogated "to the extent it is invoked to suppress relevant evidence in a criminal proceeding" by "the 'Right to Truth-in-Evidence' provision of the California Constitution (Cal. Cons., art. I, § 28, subd. (f), par. (2))." *People v. Guzman*, 11 Cal. App. 5th 184, 186 (Dist. Ct. App. 2017), *review granted*, 220 Cal. Rptr. 3d 669 (Mem.) (July 26, 2017).

As the court in *Criden* observed, "there is a **vast difference** between republication which would intensify the pain already inflicted on an innocent victim of a [rape] crime, as in the KSTP case," and that of the defendants in *Criden*, because they were public figures whose conduct "**was already the subject of national publicity and comment**." *Id.* at 825 (emphasis added). Whereas several of the Does have spoken publicly about their involvement in the facts underlying this case, that observation rings true in the case at bar.

**3. Courts Do Not Analyze "Invasion of Privacy" In a Vacuum, As the Attorney General Implies.**

Quoting from *Sanders v. Am. Broad. Co.*, 20 Cal. 4th 907 (1999), the Attorney General makes a blanket statement that appears to impose a *per se* rule regarding secret monitoring and privacy. (Request at 9:25-27 to 10:1-2.) However, *Sanders* (as well as *In re M.H.*, 1 Cal. App. 5th

699 (2016) (construing bathroom privacy under Section 647(j)(1)) stand for the polar opposite principle of a *per se* rule. Context is key, based upon all facts and circumstances. First, *Sanders* does not analyze privacy elements under Section 632 (the jury determined that Section 632 had not been violated, 20 Cal. 4th at 911), but rather the elements of the tort of invasion of privacy by intrusion. The Court's holding was limited: "We hold **only** that, where the other elements of the intrusion tort are proven, the cause of action is not defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears." *Id*. at 911. As with the common law access cases discussed above, the Court's decision in *Sanders* hinged upon "[w]hether a reasonable expectation of privacy is violated by such recording **depends on the exact nature of the conduct and all the surrounding circumstances**." *Id*. at 911. The Court specifically denied that it was adopting a *per se* privacy doctrine. *Id*. at 923. Contrary to the Attorney General's blanket application of privacy law in the case at bar, privacy law is not one-size-fits-all. In *In re M.H.* (also not construing privacy under Section 632), the court agreed with the Attorney General's position taken there, that "the phrase 'invade the privacy' [in Section 647(j)(1)] does not connote the tort of invasion of privacy, and many courts have used that phrase when addressing Fourth Amendment claims without ever discussing privacy tort law." *Id*. at 712. Thus, elements in various causes of action involving privacy are not all alike.

Unlike the privacy interests at issue for sex-crime victims or sexual harassment cases (*e.g.*, *Rossbach v. Rundle*, 128 F. Supp. 2d 1348 (S.D. Fla. 2000)), privacy interests (if any) potentially related to the allegations against Merritt (as well as Daleiden) would be connected with investigating illegal **business practices** of abortion providers by posing as a business associate or similar. As the Supreme Court of California held in *Sanders v. Am. Broad. Co.*, 20 Cal. 4th at 923, "where, for example, the workplace is regularly open to entry or observation by the public or press, or the interaction that was the subject of the alleged intrusion was between **proprietor (or employee) and customer**, any expectation of privacy against press recording is **less likely** to be deemed reasonable." *Id*. at 923. Thus, the **business practices** of abortion providers are not

protected on equal footing with **intimate or personal matters**, such as the distribution of child pornography that the Attorney General referenced citing to *New York v. Ferber*, 458 U.S. 747, 759 n. 10 (1982). Similarly, *Rossbach v. Rundle* is incomparable because the materials in question were discovery materials (specifically, requests for admission) in a sexual harassment case that contained mere assertions that the court found "highly personal and inflammatory in nature." 128 F. Supp. 2d at 1353.

**4. Public Interest in The Subject Matter of This Case Is an Important Factor Weighing in Favor of Public Access.**

What is more, the public interest is an important factor in supporting the strong presumption of the right of access. In *In re Nat'l Broad. Co*., the broadcaster sought access to copy video and audio tapes containing FBI surveillance during an investigation into possible congressional corruption. 653 F.2d at 611. There, the court noted that it was in "essential agreement with the broadcasters," *id*. at 614, and that, *inter alia*, the case involved "issues of major public importance." *Id*. The Ninth Circuit likewise explained that, "[s]uch factors as promoting the public's understanding of the judicial process and of **significant public events** justify creating a 'strong presumption' in favor of copying access." *Valley Broad. Co.*, 798 F.2d at 1294. As Merritt has previously argued, the subject matter of her journalistic endeavors in this case drew national attention. **The video footage has received tens of millions of views and sparked legislative action, a successfully completed prosecution, and federal and state criminal investigations**. Few journalists are so successful. Considering the debate over cutting Planned Parenthood's federal funding, the subject matter of this litigation is nothing short of an issue of major public importance.

Moreover, even the common law right of a trial court's discretion is "not open ended"; it is based upon "'relevant **facts and circumstances of the particular case**,'" and the interests asserted must be weighed "'**in light of the public interest**.'" *In re Nat'l Broad. Co.*, 653 F.2d at 613 (citations omitted) (emphasis added). Further, such discretion must "'clearly be informed by this country's strong tradition of access to judicial proceedings,'" a right which is "'**precious**'"

and "'**fundamental**.'" *Id*. (citations omitted) (emphasis added). As held by the *In re Nat'l Broad. Co.* court, "restricting the common law right to inspect and copy judicial records **is rarely the proper protection.**" 653 F.2d at 615.

## III. The Attorney General's Summary of *People v. Eid* Merely States General Law Pertaining to Offers of Proof, But *Eid* is Not a Blanket Prohibition To Calling Victims as Witnesses.

*People v. Eid*, 31 Cal. App. 4th 114 (Dist. Ct. App. 1994) does not stand for a remarkable proposition pertaining to offers of proof that would affect Merritt's defense. The court there simply required the defense to provide proper evidentiary foundation before being permitted to call the victim of an alleged **rape by multiple men** after the prosecution proceeded under Section 872 (allowing hearsay testimony by a qualified investigative officer) at the preliminary hearing. The magistrate did **not** refuse to allow the defense to call the victim under any circumstances. Rather, the magistrate would have allowed "a hearsay report of an admission" by the victim as foundation. *Id.* at 124. The appellate court noted that the defense failed to name or call to testify any of the "claimed numerous independent witnesses" that the defense had argued would contradict the victim's account. *Id*. at 127. Simply, "optimistic expectation" will not qualify as an offer of proof. *Id*. Neither Merritt nor Daleiden have submitted an optimistic expectation as an offer of proof.

## IV. The Attorney General Seeks to Violate Merritt's Right to Due Process by Seeking a Blanket Order Limiting the Scope of Cross Examination Before Merritt Has Even Had the Opportunity to Develop A Cross Exam Question.

Traditionally, trial practice requires that counsel wait for an improper question before objecting. Oddly, the Attorney General has waisted ink and paper seeking to prohibit what the Rules of Evidence already prohibit by black letter law. California's Evidence Code Section 350 provides that "No evidence is admissible except relevant evidence." *Id*. Evidence Code Section 210 also defines "relevant evidence" as that which includes the **credibility** of witnesses and hearsay declarants, "having **any** tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." *Id*. (emphasis added).

The Attorney General next makes a phenomenal leap from generally discussing the permissible bounds of cross-examinations in a preliminary hearing as a basis to limit Merritt's

cross-examination to the specific content of the speaker's privacy expectations, and prohibiting all questions related to "the subject matter of the recorded conversation." (Request at 6:12-14.) That request blatantly disregards Merritt's affirmative defense that hinges specifically on the content of the videos (see Daleiden's *Opp. to Prelim. Hr'g Brief*), as well as Evidence Code § 356, which permits Merritt to introduce the whole content of any video where the Attorney General introduces only part:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

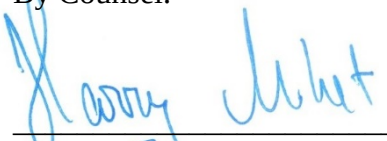
*Id*. Again, the Attorney General's Request is based on pure conjecture, without any evidentiary basis, as he argues that the defense has made "irrelevant submissions for the purpose of discovery." (Request at 6:15). The Request further seeks an admonishment limiting cross exam to evidence "attested to in direct exam." (*Id.* at 6:16-17.) The Attorney General inexplicably ignores this own authority cited in his Request, which holds:

> "While the trial judge has broad discretion to control the ultimate scope of cross-examination designed to test the credibility or recollection of a witness [citation], yet wherever possible that examination 'should be given **wide latitude**, particularly in cases involving "a witness against a defendant in a **criminal** prosecution" ' [citations]. . . . But it is settled that even the cross-examination of a defendant who chooses to take the stand **need not be "confined to a mere categorical review** of the matters, dates or times mentioned in the direct examination. [Citations.] It may be directed to the eliciting of **any matter** which may tend to overcome **or qualify the effect of** the testimony given by him on his direct examination." [Citations.] This rule applies *a fortiori* when the witness is not the defendant **but his accuser**.

*Jennings v. Super. Ct. of Contra Costa Cty.*, 66 Cal.2d 867, 877 (1967) (emphasis added) (fourth alteration in original).

In sum, all of the Attorney General's Requests are improper and unsupported, and should be denied.

Respectfully submitted,
DEFENDANT SANDRA S. MERRITT
By Counsel.

BY: 

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**CERTIFICATE OF SERVICE**

Pursuant to Cal. Code Civ. P. 1013(a), I hereby certify that, on **January 18, 2019**, I served the forgoing *Defendant Merritt's Opposition to The Attorney General's Preliminary Hearing Brief & Request for Offer of Relevant Proof and Rulings*, on the following parties/entities via the following methods:

| | |
|---|---|
| Johnette Jauron<br>Deputy Attorney General<br>California Department of Justice<br>455 Golden Gate Avenue, Suite 11000<br>San Francisco, CA 94102<br>Johnette.Jauron@doj.ca.gov | Steve Cooley<br>Brentford J. Ferreira<br>Steve Cooley & Associates<br>5318 E. 2nd Street, #399<br>Long Beach, CA 90803<br>Steve.Cooley@stevecooley.com<br>Bjferreira47@hotmail.com |
| Attorney for the State of California | Attorneys for Defendant David Daleiden |

[Via Electronic Mail at the email addresses shown above, pursuant to their agreement to receive electronic service].

I further certify that I am over the age of 18 and not a party to this action.

Dated: January 18, 2019

Horatio G. Mihet