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9 Attorneys for ANTHONY RAY SILVA defendant

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 12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 13 **FOR THE COUNTY OF SAN JOAQUIN**
 14

16 THE PEOPLE OF THE STATE OF)	StK-CR-FE 2017-27040CR61
)	INDICTMENT
17 CALIFORNIA,)	
)	NOTICE OF MOTION AND
18 Plaintiff,)	POINTS AND AUTHORITIES IN
)	SUPPORT OF MOTION TO SEAL
19 vs.)	GRAND JURY TRANSCRIPTS
)	
20 ANTHONY RAY SILVA,)	DATE:
)	TIME:
21 Mr. Silva.)	DEPT:

22
 23 TO THE CLERK OF THE COURT AND HON. RON A. NORTHUP, DISTRICT
 ATTORNEY, COUNTY SAN JOAQUIN:
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25 Notice is given that the defendant Anthony Ray Silva, through counsel, Allen Sawyer and
 26 Mark Reichel moves to seal grand jury transcript in this case.

27 This motion is made based on the attached memorandum of points and authorities,
 28 declaration of Attorney Allen Sawyer, and attachments.

1 Mr. Silva respectfully requests that the court enter an order directing that the grand jury
2 transcripts in this case be sealed pending final determination of his guilt or innocence to the
3 charges. It is further requested that the court direct the clerk of the court to deliver to counsel a
4 certified copy of the order sealing said transcripts so counsel can deliver to the custodian of the
5 grand jury transcript.

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9 Dated this Thursday, March 30, 2017

Respectfully submitted,

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12 ALLEN SAWYER
13 Attorney at Law
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4 **MEMORANDUM OF POINTS AND AUTHORITIES**
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6 Mr. Silva submits the following points and authorities, declaration, and exhibits in support of
7 the motion to seal the grand jury transcript in this case.
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9 **STATEMENT OF THE CASE**

10 Recently, the District Attorney elected to pursue a grand jury indictment against Mr.
11 Anthony Silva. The Court temporarily sealed the transcripts after the indictment was filed. Mr.
12 Silva asks this Court to preserve his right to a fair trial by keeping the transcripts sealed.
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15 **ARGUMENT**

16 A court must order grand jury transcripts sealed when there is a ‘reasonable likelihood’
17 that making them public will prejudice the defendant’s right to a fair and impartial trial. The
18 press and public do not have a First Amendment right to transcripts of grand jury proceedings
19 prior to the completion of trial. (Alvarez v. Superior Court (2007) 154 Cal.App.4th 642, 653).
20 Indeed, California has provided for secrecy in grand jury proceedings since the inception of its
21 criminal justice system. (People v. Superior Court (Mouchaourob) (2000) 78 Cal.App.4th 403,
22 414). The transcripts of such proceedings are not public records, even after an indictment has
23 been delivered. (Alvarez v. Superior Court, supra, 154 Cal.App.4th 642). The state may,
24 therefore, constitutionally limit access to grand jury transcripts. Unlike most jurisdictions,
25 California has provided for a limited right of access to such transcripts. (Alvarez v. Superior
26 Court, supra, 154 Cal.App.4m 642). It accomplishes this through the operation of Penal Code
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1 section 938. According to that section, the transcripts should be sealed when there is a
2 reasonable likelihood that making them public will prejudice the defendant’s right to a fair and
3 impartial trial. (Pen. Code § 938.1) The ‘reasonable likelihood test is the same as the test used to
4 determine the necessity of changing venue. (See Pen. Code § 1033). Prejudice is reasonably
5 likely when the chances it will occur are more than merely possible, but less than more probable
6 than not. (People v. Williams (1989) 48 Cal.3d 1112)

8 The court has the duty to protect the right of the accused to a fair trial. (Alvarez v.
9 Superior Court, supra, 154 Cal.App.4th at p. 652; Craemer v. Superior Court (1968) 265
10 6 Cal.app.2d 216, 225) This duty in this case is high given the severity of the charges and the
11 potential consequences to Mr. Anthony Silva. The importance of guaranteeing Mr. Anthony
12 Silva’s right to a fair trial is beyond question. “The atmosphere essential to the preservation of a
13 fair trial-the most fundamental of all freedoms~must be maintained at all costs.” (Cromer v.
14 Superior Court (1980) 109 Cal.App. 728, 731-732 (citing Estes v. Tx. (1965) 381 U.S. 532,
15 540)) The Court of Appeal has recognized that ““it is a truism of our law that: “Due process
16 requires that the accused receive a trial by an impartial jury free from outside influences. Given
17 the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity
18 from the minds of the jurors, the trial courts must take strong measures to ensure that the
19 balance is never weighed against the accused. ”” (Cromer v. Superior Court, supra, 109
20 Cal.App.3d 728, 731-32 (quoting Sheppard v. Maxwell (1966) 384 U.S. 333, 362)) The right to
21 a fair and impartial trial is jeopardized by the untimely release of grand jury transcripts.
22 “Judicial experience has shown that pretrial publication of grand jury proceedings has had a
23 tendency, in some instances, to prejudice a defendant’s right to a fair trial. Such transcripts often
24 contain criminal records, alleged confessions, and other matter which is later ruled out as
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1 evidence in the trial. That such information should be kept from the eyes and ears of prospective
2 jurors is undeniably in the interest of justice.” (Craemer v. Superior Court, supra, 265
3 Cal.App.2d at p. 226). Indeed, grand jury proceedings are notoriously one-sided. The defense is
4 not allowed to participate and the prosecutor has substantial freedom to present the facts in any
5 way he wants. The transcripts will offer, therefore, only one side’s version of events Without
6 challenge.

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8 With the paramount objective of ensuring a fair and impartial trial in mind, this Court
9 should consider whether releasing the transcripts of the grand jury proceedings would be
10 reasonably likely to impair that goal. The reasonable likelihood test in the sealing context is the
11 same as the test used to determine motions to change venue. (Alvarez v. Superior Court,
12 supra, 154 Cal.App.4th at p. 655). The benefit of the test is that it “permits the court to consider
13 openly and frankly the many future variants which collectively may amount to a reasonable
14 likelihood but, by their very contingent nature, can never amount to a clear and present danger ...
15 ” (Younger v. Smith (1973) 30 Cal.App.3d 138, 164 (involving pre-trial protective order).
16 Importantly, the test “does not demand impossible feats of clairvoyant fact finding” and a
17 showing of actual prejudice is not required. (ibid; People v. Williams, supra, 48 Cal.3d at p. 5
18 1126 (involving change of venue motion)). “Put differently, because the prejudicial effect of
19 publicity before jury selection is necessarily speculative, it is settled that “any doubt as to the
20 necessity of removal should be resolved in favor of a venue change” (People v. Williams, supra,
21 48 Cal.3d at p. 1126 (citing Williams v. Superior Court (1983) 34 Cal.3d 584, 588)). Because the
22 test used to determine whether sealing is appropriate is the same as that used when considering a
23 motion to change venue, the court should consider similar factors. (Alvarez v. Superior Court,
24 supra, 154 Cal.App.4th at p. 65 5). These include the nature and gravity of the offense, the nature
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1 and extent of the news coverage, the size of the community, the status of the defendant in the
2 community, and the popularity and prominence of the victim. (ibid) An analysis of these factors
3 leads to the conclusion that the transcript should remain sealed.
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5 **Nature and Gravity of the Charge.**
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7 The term ‘gravity’ refers to the crime’s level of seriousness in the law and to the
8 possible consequences to the accused in the event of a guilty verdict. (Martinez v. Superior
9 Court (1981)29 Cal.3d 574, 583. It is beyond dispute that embezzlement with numerous
10 enhancements is a serious crime and the potential of a state prison sentence means Mr. Anthony
11 Silva faces severe consequences. Indeed, the potential of a lengthy sentence and the jury’s role
12 in making that determination provides another compelling reason to seal the transcripts. A
13 defendant has the right to a reliable sentencing procedure-one that does not subject him to
14 arbitrary or capricious decision making. (Woodson v. North Carolina (1976) 428 U.S. 280;
15 Lockett v. Ohio (1978) 438 U.S. 586.
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18 Allowing the jury pool to hear evidence that may not otherwise be admitted at trial runs
19 a significant risk of depriving Mr. Anthony Silva of this significant protection. The nature of this
20 particular crime also weighs significantly against unsealing the transcripts. The Supreme Court
21 has defined the ‘nature of the offense’ as those “facts or aspects of a crime which made it
22 sensational, or otherwise brings it to the consciousness of the community.” (Martinez v. Superior
23 Court, supra, 29 Cal.3d at p. 582). Several facts related to this incident make it unusually
24 sensational. For example, the case involves a former public official who is alleged to have
25 embezzled monies from a prominent non-profit agency that provides services to at-risk youth.
26 The search of Mr. Silva’s residence garnered significant coverage over the last month in
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1 newspapers, on radio, on television, and online. The high interest in the case is evidenced by the
2 presence of reporters from print, television, and radio outlets at even the most common and
3 uneventful court appearances.
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5 **Nature and Extent of News Coverage.**
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7 A simple Google news search reveals hundreds of documents addressing the case,
8 ranging from print publications like the Los Angeles Times to television clips from local news
9 stations, to blogs written by individuals (including one purporting to document the search that
10 also provides updates on the prosecution). (See attachment “A”)
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12 **Status of the Defendant in the community**

13 Mr. Anthony Silva has been vilified since his arrest. Indeed, articles have been written in
14 The Record saying that prosecutors believe he is responsible for stealing millions of dollars
15 from disadvantaged youth in Stockton. The stories frame the case in a context that presumes
16 guilt; all the defense is asking for is a fair trial where Mr. Anthony Silva can defend himself.
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19 **Status of the Victim in the community.**

20 The Stockton Boys Club (now known as the Stockton’s Kids Club) is over fifty years
21 old. The clubs standing in the community has caused community members to attend court
22 hearings. There is great interest in the community along with a good deal of speculation of what
23 may have happened. Unsealing the grand jury transcripts will only serve to feed that interest and
24 risks exposing potential jurors to inadmissible information.
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1 All four factors militate in favor of sealing the transcripts. Unsealing them would only
2 result in further prejudice to Mr. Anthony Silva right to a fair trial and a reliable penalty
3 determination.
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5 **Less restrictive alternatives are insufficient.**
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7 Redaction will not sufficiently protect Mr. Anthony Silva’s right to a fair trial. Indeed,
8 one of the risks in releasing grand jury transcripts is that potential jurors will be exposed to
9 inadmissible material. Redacting would require this Court to parse out information that would
10 be inadmissible in trial; something it is not well positioned to do. The parties are continuing to
11 investigate the case and more motions are likely to be brought that may serve to alter the
12 character of what now may appear to be evidence that will be admissible at trial. This Court
13 should wait for the judge assigned to the trial to make evidentiary rulings.
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15 Secondly, the grand jury transcripts are, by definition, biased documents. The defense is
16 only given extremely limited avenues to participate and cannot even be in the room to lodge
17 objections or offer argument about the facts. Instead, the prosecutor is permitted to present
18 evidence, instruct jurors, and explain his theory to them without the defendant’s voice in the
19 room and without a judge to decide the admissibility of evidence. The trial will certainly be
20 different; therefore, prospective jurors should not be exposed to a one-sided version of the case.
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23
24 **CONCLUSION**
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26 Mr. Anthony Silva has the right to a fair trial and a reliable penalty determination under
27 8th, 5th, 6th, 812, and 14th Amendments to the U.S. Constitution and their California
28 corollaries. Protecting these rights is central to this Court’s mission. It should, therefore, refuse

1 to unseal the grand jury transcript. Unsealing it would be reasonably likely to prejudice Mr.
2 Anthony Silva’s right to a fair trial. The case has already generated substantial publicity; most
3 of it based on an assumption of guilt and accompanied by statements attacking Mr. Anthony
4 Silva. Unsealing the grand jury transcript is likely to exacerbate those problems and make a
5 change of venue, already looming as a strong possibility, a necessity.
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8 Dated this Thursday, March 30, 2017

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10 N. ALLEN SAWYER
11 Attorney at Law
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