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ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2010

CLERK OF THE SUPERIOR COURT
By A. SALTA Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

IN RE SEARCH WARRANT ISSUED
DECEMBER 12, 2009

Case No.: 2009 - 2775

**NOTICE OF MOTION AND MOTION TO
QUASH SEARCH WARRANT AND
RETURN PROPERTY; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO QUASH
SEARCH WARRANT AND RETURN
PROPERTY; [PROPOSED] ORDER**

DATE: MAY 11, 2010
TIME: 9:00 AM
DEPT: 115

Hon.

**NOTICE OF MOTION AND MOTION TO QUASH SEARCH WARRANT AND RETURN PROPERTY; MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SEARCH WARRANT AND RETURN
PROPERTY; [PROPOSED] ORDER**

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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU ARE HEREBY NOTIFIED THAT at a date and time to be determined, and before a judge and in a department to be determined, Movant DAVID MORSE will and does hereby move the Court for an order to quash the search warrant issued on December 12, 2009 as it pertains to the Sony Digital Camera, Model MVC-CD500, serial number 36459 and two Memorex CD-R discs, 210 MB each, belonging to DAVID MORSE; and to order the return of all copies of unpublished photographs seized pursuant to the warrant. The motion will be based upon this Notice and the attached Memorandum of Points and Authorities; declarations of DAVID MORSE, GEOFFREY KING, J.T. JOHNSON, PETER MAIDEN AND MARY RATCLIFF with exhibits thereto, filed with the motion; and any other pleadings, papers, evidence, and written or oral arguments that the parties may submit.

FIRST AMENDMENT PROJECT

Dated: April 15, 2010

By:

_____

Geoffrey King

Attorneys for Movant David Morse

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	2
A.	Morse's Coverage of Student Protests, Past and Present	2
B.	Events at the UC Berkeley Chancellor's House	2
C.	The Issuance of the Search Warrant	5
D.	The Search Warrant, Supporting Affidavit and Statement of Probable Cause ...	5
E.	David Morse Is An Experienced Journalist and Member of the Indybay Collective	6
1.	Morse Is An Experienced Journalist	6
2.	Indybay Is a Decade-Old Online News Outlet	7
3.	Morse Is a Member of the Indybay Collective	7
4.	Other Publications Source Morse's Reportage From Indybay	8
III.	ARGUMENT	8
A.	The Court Has the Authority to Quash the Warrant and Return the Items Seized Pursuant to its Authority	8
B.	California Law Absolutely Prohibits the Issuance of a Search Warrant for Items Covered by the Shield Law	10
C.	The Contents of Morse's Camera and Memory Discs Are Items Described in Section 1070 of the Evidence Code	11
1.	Morse is Connected With Indybay and Was Newsgathering on the Night of December 11, 2009	11
2.	Indybay Is a News Outlet of the Type Described in Section 1070	12
a.	Indybay Is a Periodical Publication	12
b.	Indybay Is Also a Wire Service	12
c.	Indybay Is Also a Press Association	13
IV.	CONCLUSION	13

TABLE OF AUTHORITIES

FEDERAL CASES

Burdett v. Reynoso, 2007 WL 2429426 (N.D. Cal 2007)	12
Online Policy Group v. Diebold, 337 F.Supp.2d 1195 (N.D. Cal 2004)	12
Schoen v. Schoen, 5 F.3d 1289 (9th Cir. 1993)	10
Zurcher v. Stanford Daily, 436 U.S. 547 (1978)	10

STATE CASES

Gershenhorn v. Superior Court, 227 Cal.App.2d 361 (1964)	10
New York Times Co. v. Superior Court, 51 Cal.3d 453 (1990)	11
O'Grady v. Superior Court, 139 Cal.App.4th 1423 (2006)	12
People v. Fleming, 29 Cal.3d 698 (1981)	9
People v. Grant, 1 Cal.App.3d 563 (1969)	9
People v. Superior Court, 28 Cal.App.3d 600 (1972)	9, 10
People v. Von Villas, 10 Cal.App.4th 201 (1992)	11
Williams v. Justice Court, 230 Cal.App.2d 87 (1964)	9

FEDERAL STATUTES

42 U.S.C. § 2000	1
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STATE STATUTES

California Evidence Code

Section 1070	<i>passim</i>
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1 California Penal Code

2 Section 1524(g) *passim*

3 Section 1538.5 9

4 Section 1539 9

5 Section 1540 9

6 OTHER AUTHORITIES

7 4 B. Witkin, Cal. Crim. Law
8 (3d ed. 2000) Illegally Obtained Evidence 9

[illegible]

I. INTRODUCTION

The search warrant issued against veteran reporter David Morse for his unpublished photographs was secured by deceit by the University of California Police (“UCPD”). Morse identified himself as a journalist to his arresting officers *six times* prior to issuance of the warrant, provided his press pass to multiple officers and a sergeant, and protested the illegality of the search of his journalistic work product.¹ The police response was to (a) tell him, “You’re not a lawyer, so shut the fuck up,” and (b) refrain from telling any of this to the Court when the UCPD sought a warrant for the unpublished photographs stored in Morse’s camera and memory discs.

The Statement of Probable Cause the UCPD filed with the Court contains no mention of the fact that Morse is a journalist. It does not note his protestations, his possession of a press pass or his newsgathering activities at the scene. By omitting this crucial information, the UCPD deliberately misled the Court and arrogated unto itself the judicial power to make a determination on a dispositive question of law. The UCPD got that determination wrong and subsequently obtained a warrant that California law prohibits in all cases.

Section 1524(g) of the California Penal Code prohibits the issuance of a search warrant for *any* items covered by California Evidence Code section 1070, the journalist “shield law,” including any unpublished photographs that are obtained during the process of “gathering, receiving or processing” information for communication to the public.

The UCPD favored seizing and searching a journalist's camera over chasing down masked individuals running from the scene of a crime. In so doing, the police violated Morse's right to communicate facts and the People's right to be informed, disregarded the public policy of the State of California, overrode state and federal law, interfered with Morse's ability to cover news events

¹ As used in this motion, which is brought pursuant to California Penal Code section 1524(g), “journalistic work product” is intended to refer to Morse’s unpublished photographs made while newsgathering. The federal Privacy Protection Act of 1980 (“PPA”), which the UCPD also violated, defines “work product” differently. See 42 U.S.C. § 2000aa-7. This motion does not adopt the PPA definition of work product.

1 in the future, and deliberately encroached on the power of the Court.

2 The Court must quash the warrant and order the return of items and photographs improperly
3 seized under its authority.

4 **II. STATEMENT OF FACTS**

5 **A. Morse's Coverage of Student Protests, Past and Present**

6 David Morse is a 42-year old veteran photojournalist who has for many years documented
7 social and political movements in the Bay Area. (*Declaration of David Morse ("Morse Decl.")* ¶
8 1) He has documented hundreds of demonstrations, rallies, conferences, public meetings and court
9 hearings, encompassing a wide variety of causes. (*Morse Decl.* ¶¶ 1)

10 Morse covered student protests at UC Berkeley on November 20, December 7 and December
11 9, 2009, and at San Francisco State University on December 9 and into the early morning hours of
12 December 10, 2009. (*Morse Decl.* ¶ 6) Morse published stories on all of these demonstrations to the
13 online news organization *Indybay*, of which he is a member. (*Morse Decl.* ¶ 6) He similarly intended
14 to publish a selection of his photographs from the demonstration on December 11 before those
15 photographs were seized by the UCPD. (*Morse Decl.* ¶ 29)

16 **B. Events at the UC Berkeley Chancellor's House**

17 Morse had hoped to cover an off-campus concert at UC Berkeley on December 11, 2009.
18 (*Morse Decl.* ¶ 7) However, he arrived too late to do so. Upon pulling up to the concert venue at
19 11:00 p.m., he encountered a group of approximately one hundred people leaving the concert venue
20 and chanting in what appeared to be a political march like the many he had covered previously.
21 (*Morse Decl.* ¶ 7) Morse grabbed his backpack and camera and caught up to the demonstrators.
22 (*Morse Decl.* ¶¶ 8-9)

23 Morse followed the demonstrators as they marched to a building. (*Morse Decl.* ¶ 8) He
24 followed one masked demonstrator up the steps of the building and took a picture as the
25 demonstrator threw a large plastic garbage can at the front door, to no effect. (*Morse Decl.* ¶ 8) A
26 demonstrator informed Morse that the building was the UC Berkeley Chancellor's office. (*Morse*
27 *Decl.* ¶ 9) The building was actually the Chancellor's house, though Morse did not learn this until

1 the following evening. (*Morse Decl.* ¶ 9) Within minutes, sirens drew close. As police cars
2 converged on the scene, the demonstrators ran off. (*Morse Decl.* ¶ 10)

3 Morse took a flash photograph of the first police car as it approached the scene via a path that
4 ran past the bottom of the stairs. (*Morse Decl.* ¶ 10) Morse walked calmly down the stairs to the edge
5 of the path upon which the police car was approaching and stood there, waiting to document any
6 arrests that might occur as a result of the property damage. (*Morse Decl.* ¶ 10-11) He had no
7 expectation that he would be targeted by the police. (*Morse Decl.* ¶ 10) To his surprise, rather than
8 chase after the fleeing demonstrators, the police car pulled up directly in front of him. (*Morse Decl.*
9 ¶ 11) Officer Henderson exited the passenger side of the police car and began walking briskly toward
10 Morse. Officer Wyckoff exited the driver's side, overtook Officer Henderson, pointed at Morse and
11 shouted, "I saw you take a picture of us. We want your camera. We believe your camera contains
12 evidence of a crime." (*Morse Decl.* ¶ 11)

13 Morse did not participate in the demonstration at any point. (*Morse Decl.* ¶ 16) He was
14 present solely to gather news. (*Morse Decl.* ¶ 16) Thus, Morse replied to Officer Wyckoff that he
15 was a journalist, that he could show the officers his press pass, and that they should not to take his
16 camera. (*Morse Decl.* ¶ 12) Officer Wyckoff refused to look at the press pass. (*Morse Decl.* ¶ 12)
17 He told Morse that he was being detained and ordered Morse to stand face-forward against the police
18 car. (*Morse Decl.* ¶ 12) Officer Henderson took Morse's camera and backpack. Officer Wyckoff told
19 Morse to "stop resisting" as he pulled Morse's arms behind his back, even though Morse was
20 complying fully. (*Morse Decl.* ¶ 12) Officer Wyckoff then placed Morse in the back of the police
21 car. (*Morse Decl.* ¶ 12)

22 Approximately thirty minutes later, Morse's thumbs began to go numb from the tightness of
23 the handcuffs. (*Morse Decl.* ¶ 13) He called out to the officers, who took Morse out of the car and
24 loosened the handcuffs somewhat. (*Morse Decl.* ¶ 13) At this point, Morse reiterated to Officer
25 Wyckoff that he was a journalist. Officer Wyckoff ignored Morse and placed him back in the police
26 car. (*Morse Decl.* ¶ 13) When Morse opined to Officer Wyckoff that the police would not detain him
27 and take his camera if they saw a KTVU logo on it, Officer Wyckoff replied, "We've done it to

1 them, too,” and closed the door. (*Morse Decl.* ¶ 13)

2 Officer Wyckoff later removed Morse from the car to search him more thoroughly. (*Morse*
3 *Decl.* ¶ 14) At this point, while searching through the contents of his back pocket, Officer Wyckoff
4 finally removed Morse’s press pass. (*Morse Decl.* ¶ 14) Morse urged Officer Wyckoff to examine
5 the press pass, and again said that he was a journalist. (*Morse Decl.* ¶ 14) Officer Wyckoff examined
6 Morse’s press pass, as did several other officers, including a Sergeant Harris who was now on the
7 scene. (*Morse Decl.* ¶ 14) Feeling relieved that a commanding officer was now present and had
8 viewed his press pass, Morse told Officer Wyckoff that he did not think that it was legal for the
9 police to detain him and seize his camera. (*Morse Decl.* ¶ 14) Officer Wyckoff responded by saying,
10 “You’re not a lawyer, so shut the fuck up,” and placed Morse back in the police car. (*Morse Decl.*
11 ¶ 14)

12 Approximately two hours after he had arrived at the UC Berkeley campus, Morse was told
13 that he was being arrested for “riot” and vandalism. (*Morse Decl.* ¶ 16) Morse responded by telling
14 Officer Wyckoff for a fourth time that he was present at the demonstration to cover it as a journalist.
15 (*Morse Decl.* ¶ 16) Officer Wyckoff ignored Morse and searched him again. (*Morse Decl.* ¶ 16)
16 Morse was then taken Santa Rita Jail, where he was booked in on the riot and vandalism charges.
17 (*Morse Decl.* ¶ 16)²

18 As Officer Wyckoff was processing Morse into Santa Rita Jail, Morse asserted that he was
19 a journalist for a fifth time and explained that he had been at the scene for a journalistic purpose.
20 (*Morse Decl.* ¶ 17) Officer Wyckoff said that it did not matter. (*Morse Decl.* ¶ 17) Later, Officer
21 Wyckoff interrogated Morse and asked him to sign a statement that Officer Wyckoff indicated
22 included an admission that Morse was being uncooperative. (*Morse Decl.* ¶ 18) Morse refused and
23 said that he thought that his arrest was wrongful due to the fact that he was present at the scene as
24 a journalist. (*Morse Decl.* ¶ 18) Officer Wyckoff, visibly angered, crumpled the paper and threw it
25

26 ² Morse believes that his arrest was wrongful. However, this motion only seeks redress on
27 the narrow question of whether Morse’s unpublished photographs were properly seized and
28 searched pursuant to Cal. Penal Code 1524(g).

1 away. (*Morse Decl.* ¶ 18) Morse was then processed into general population. (*Morse Decl.* ¶ 19)

2 At approximately noon the next day, Morse was told that he had made bail on the initial
3 charges. (*Morse Decl.* ¶ 20) He turned in his bedding to jail guards and was taken to a small,
4 unlocked waiting room to be processed out of jail, where he waited for approximately forty-five
5 minutes. (*Morse Decl.* ¶ 20) A voice then came over the intercom and told him that his charges and
6 his bail had been increased, and that he was not being released. (*Morse Decl.* ¶ 20)

7 **C. The Issuance of the Search Warrant**

8 The Court issued its search warrant at 6:40 p.m. on December 12, 2009. (*Declaration of*
9 *Geoffrey King* ("King Decl.") Ex. A) Less than an hour later, Morse was released from jail after his
10 mother posted bond of \$13,250. (*Morse Decl.* ¶ 21) Morse later learned that the new charges against
11 him included attempted arson of an inhabited structure, vandalism, participation in a riot, attempted
12 burglary, and two counts of assault with a deadly weapon on an officer. (*Morse Decl.* ¶ 21) All
13 charges were dropped at Morse's initial appearance on Tuesday, December 15, 2009. (*Morse Decl.*
14 ¶ 21)

15 After some effort, Morse was able to recover his backpack, camera and blank memory discs,
16 but not the memory discs containing his unpublished photographs. (*Morse Decl.* ¶¶ 22-28) As he
17 left the UCPD offices, a man followed Morse out of the building and apparently photographed him
18 with a telephoto lens. (*Morse Decl.* ¶¶ 26-27)

19 **D. The Search Warrant, Supporting Affidavit and Statement of Probable Cause**

20 The search warrant targets the property of multiple parties and deliberately obfuscates
21 Morse's role at the scene. (See *King Decl. Exs. A and C*). Despite Morse's repeated entreaties to the
22 arresting officers, the Statement of Probable Cause supporting the search warrant makes no mention
23 whatsoever of the fact that Morse was present at the scene to gather news, that he identified himself
24 as a journalist, that he offered to show his press pass to officers, or that multiple officers, including
25 a sergeant, had reviewed his press pass.³ (*King Decl. Ex. C*) Indeed, the Statement of Probable Cause
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27 ³ The search warrant Statement of Probable Cause also states that Morse was running
28 when detained. (*King Decl. Ex. C*) Morse disputes the contention. He was walking as the police
NOTICE OF MOTION AND MOTION TO QUASH SEARCH WARRANT AND RETURN PROPERTY; MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO QUASH SEARCH WARRANT AND RETURN
PROPERTY; [PROPOSED] ORDER

1 appears to be written in such a way as to deliberately mischaracterize to the Court the nature of the
2 evidence to be seized from Morse. (*King Decl. Ex. C*) It reads, in paragraph ten, "Based on my
3 training and experience I know that individuals that take part in demonstrations and protest regularly
4 take photographs and videos of their events. The photographs ad [sic] videos are often later posted
5 to internet websites or used to promote future events." (*King Decl. Ex. C*) Based on these deceptive
6 representations by the UCPD, the Court issued a warrant to search Morse's camera and memory
7 discs for photographs, video and "any and or all electronically stored data." (*King Decl. Ex. A*)

8 The search warrant Statement of Probable Cause is wholly devoid of any allegation of fact
9 that could support the charges briefly levied against Morse. Thus, although the affidavit lists the
10 camera and discs as both "[p]roperty or things used as a means of committing a felony" and
11 "[p]roperty or things that are evidence that tends to show a felony has been committed, or . . . that
12 a particular person has committed a felony," it is clear that the evidence being sought pertains not
13 to Morse's conduct, but to the conduct of third parties. (*See King Decl. Ex. B*)

14 **E. David Morse Is An Experienced Journalist and Member of the Indybay**
15 **Collective**

16 **1. Morse Is An Experienced Journalist**

17 David Morse began his journalism career with a monthly column in a music magazine in
18 1991. (*Morse Decl. ¶ 1*) Since late 2002, he has focused his work on the documentation of social and
19 political movements. (*Morse Decl. ¶ 1*) Although his reportage often requires him to attend
20 contentious protests with large police presences, Morse had avoided any serious incident with the
21 police prior to December 11, 2009.⁴ (*Morse Decl. ¶¶ 1-2*)

22 _____
23 car approached, and he was standing still with his camera when it pulled up in front of him.
24 (*Morse Decl. ¶ 10-11*)

25 ⁴ Until December 11, 2009, Morse had been detained by police only twice while covering
26 a demonstration. In these instances, each of which occurred at a large protest, police briefly
27 detained hundreds of members of the press and public who happened to be in the area at the time.
28 (*Morse Decl. ¶ 2*) In the first incident, Morse was cited and released, and the ticket was later
dismissed. (*Morse Decl. ¶ 2*) In the second incident, Morse was released without citation or
charge. (*Morse Decl. ¶ 2*)

1 **2. Indybay Is a Decade-Old Online News Outlet**

2 *Indybay* is an online newspaper, press association and wire service that generates and
3 distributes edited audio, visual and print stories of local events for media outlets around the world
4 and the general public. (*Declaration of Peter Maiden* (“*Maiden Decl.*”) ¶ 1; *Declaration of J.T.*
5 *Johnson* (“*Johnson Decl.*”) ¶¶ 7-10, 12) Founded in 2000, *Indybay* is associated with more than 150
6 Indymedia outlets worldwide, including 60 in the United States. The website receives between
7 20,000-30,000 page views on any given day. (*Maiden Decl.* ¶¶ 1-2) *Indybay* stories are also
8 syndicated by Google News. (*Maiden Decl.* ¶ 1) Stories are published to *Indybay* as they are
9 produced, which occurs at least daily. (*Maiden Decl.* ¶ 1) *Indybay* previously also published a print
10 periodical, *Fault Lines*, which was published between June 2004 and June 2007. (*Morse Decl.* ¶ 3)

11 *Indybay* began issuing press credentials to reporters in 2001 as a way to allow frequent
12 contributors to identify themselves as journalists to police. (*Maiden Decl.* ¶ 10-11). To obtain an
13 *Indybay* press pass, an individual must meet two criteria. First, he or she must contribute to *Indybay*
14 on an ongoing basis from the field. (*Maiden Decl.* ¶ 11). An individual must also agree in writing
15 to adhere to the following statement: “I am currently providing media to *Indybay*. I agree that while
16 using the *Indybay* credential, I will not put *Indybay* at legal risk. If I do so, I understand my card may
17 be revoked.” (*Maiden Decl.* ¶ 11) *Indybay* takes its credentialing system seriously: only about 20
18 press passes are in circulation at any one time, and *Indybay* has revoked at least one press pass due
19 to a violation of the pledge.⁵ (*Maiden Decl.* ¶ 11)

20 **3. Morse Is a Member of the Indybay Collective**

21 Although *Indybay* accepts submissions from unaffiliated individuals, Morse is one of
22 approximately a dozen members of the *Indybay* collective, a position he has held since May 2004.
23 (*Morse Decl.* ¶ 3; *Maiden Decl.* ¶ 9) A collective member has the same responsibilities as a staff
24 reporter and/or editor at a for-profit news organization. Membership in the collective is based on
25

26 ⁵ Some *Indybay* contributors also held press passes issued by the California Highway
27 Patrol until 2004, in which year the agency discontinued its press pass program. (*Maiden Decl.* ¶
28 10)

1 experience and an individual's level of commitment. (*Maiden Decl.* ¶ 4) As a member of the
2 collective, Morse is authorized, with the consent of one other collective member, to edit and
3 categorize stories, change the design of the site, choose feature stories, and nominate stories for
4 promotion to the front page of the national Indymedia website. (*Maiden Decl.* ¶¶ 5-9)

5 Morse also reports for *Indybay*. He has consistently published stories and photographs to
6 *Indybay* since March 2004. (*Morse Decl.* ¶¶ 3) Morse variously reports and edits for *Indybay*
7 anywhere from 20-40 hours a week. (*Morse Decl.* ¶ 3)

8 Morse has held an *Indybay* press pass since January 2007. (*Morse Decl.* ¶¶ 3-4) Morse met
9 the ongoing contribution criteria, and he made the above-mentioned pledge to act in a responsible
10 manner in an email sent on November 24, 2006. (*Maiden Decl.* ¶ 11; *Morse Decl. Ex. A*)

11 Between June 2004 and January 2006, Morse was involved in the financing, layout,
12 production, distribution, and promotion of *Indybay's* print periodical, *Fault Lines*, which was
13 published monthly. (*Morse Decl.* ¶ 3)

14 4. Other Publications Source Morse's Reportage From *Indybay*

15 Morse's reportage has been published by mass and independent media outlets alike. For
16 example, Morse has licensed protest footage to ABC/Disney. (*Morse Decl.* ¶ 5) Morse's
17 documentation of the demonstrations over the January 1, 2009 shooting of Oscar Grant at the
18 Fruitvale BART station has been used in dozens of articles in the *San Francisco Bay View*
19 newspaper.⁶ (*Ratcliff Decl.* ¶ 6) The editor of the *Bay View* republished Morse's work after finding
20 it on *Indybay*. (*Ratcliff Decl.* ¶ 5)

21 III. ARGUMENT

22 A. The Court Has the Authority to Quash the Warrant and Return the Items 23 Seized Pursuant to its Authority

24 The UCPD's deliberate omissions deprived the Court of facts necessary to rule on the

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26 ⁶ The *Bay View* has existed since 1976. It reaches tens of thousands of people a month in
27 print and online. (*Declaration of Mary Ratcliff* ("Ratcliff Decl.") ¶ 2) The editor of the *Bay*
28 *View*, who has never met Morse and who knows him only through his work, considers him "one
of the Bay Area's best and most dedicated journalists." (*Ratcliff Decl.* ¶ 3)

1 lawfulness of the search warrant before it issued. But the court is empowered to quash its own
2 warrant both by California statutory law and the Court's inherent authority to control and prevent
3 abuses of its processes. 4 B. Witkin, Cal. Crim. Law (3d ed. 2000) Illegally Obtained Evidence
4 § 139, p. 764. Penal Code section 1540 specifically authorizes a motion by the person from whom
5 property has been seized: "If it appears that the property taken is not the same as that described in
6 the warrant, or that there is no probable cause for believing the existence of the grounds on which
7 the warrant was issued, the magistrate must cause it to be restored to the person from whom it was
8 taken." Cal. Penal Code § 1540. Penal Code section 1539 also makes clear that the Court is entitled
9 to hear a motion to challenge "the grounds on which the warrant was issued" or to return property
10 by a "person who is not a defendant in a criminal action at the time the hearing is held." Cal. Penal
11 Code § 1539. The remedy these statutes provide is mandated by due process:

12 Due process of law entitles the claimant of seized property to an early court hearing
13 to determine whether the articles were subject to seizure. The determination may be
14 had in advance of the trial of the criminal action which ordinarily follows the seizure.
15 The purpose of Penal Code sections 1539 and 1540 is to provide the owner of seized
16 property with a readily accessible court to pass on lawfulness of the seizure. By
17 offering the claimant an opportunity for challenge under sections 1539-1540 and
18 review of an unfavorable decision by prerogative writ, the state satisfies the demands
19 of due process.

20 People v. Grant, 1 Cal.App.3d 563, 568-69 (1969) (quoting Williams v. Justice Court, 230
21 Cal.App.2d 87, 98 (1964)), disapproved of on other grounds in People v. Fleming, 29 Cal.3d 698
22 (1981).

23 Moreover, the Legislature has anticipated the importance of an individual's right to retrieve
24 materials where a First Amendment interest exists:

25 Nothing contained in this section shall prohibit a person from making a motion,
26 otherwise permitted by law, to return property, brought on the ground that the
27 property obtained is protected by the free speech and press provisions of the United
28 States and California Constitutions.

Cal. Penal Code § 1538.5(n).

Finally, the Court has inherent authority to quash the warrant and order the return of property
"to prevent the abuse of court processes." See People v. Superior Court, 28 Cal.App.3d 600, 608-09

(

(1972). A summary proceeding by nonstatutory motion for return of property seized incident to arrest is an appropriate remedy even as to property still in the possession of the seizing officer and not introduced into evidence. Id. at 609; see also Gershenhorn v. Superior Court, 227 Cal.App.2d 361 (1964). And where the materials seized are imbued with First Amendment value, their improper retention creates an even more compelling case for a prompt judicial determination on the merits. People v. Superior Court, 28 Cal.App.3d at 617-18.

B. California Law Absolutely Prohibits the Issuance of a Search Warrant for Items Covered by the Shield Law

Section 1524(g) of the California Penal Code provides, in its entirety, that “No warrant shall issue for any item or items described in Section 1070 of the Evidence Code.” The Legislature added subsection (g) to section 1524 in response to the United States Supreme Court decision in Zurcher v. Stanford Daily, 436 U.S. 547 (1978). In that case, which also involved unpublished photographs of a student demonstration, the Supreme Court held that although the First Amendment does not prohibit the issuance of a search warrant for journalistic work product,⁷ states are free to create such rights through legislation. Id. at 567.

Section 1524(g) affords journalists the latitude necessary to cover controversial subjects without becoming involuntary agents of the state. Without protections against the forced disclosure of unpublished materials, reporters would almost surely lose access to the subjects of their reportage. The Ninth Circuit has further recognized that the resulting erosion of the public trust could cause reporters to be “physically harassed if, for example, observed taking notes or photographs at a public rally.” Schoen v. Schoen, 5 F.3d 1289, 1295 (9th Cir. 1993) (citations and quotes omitted) (describing the policy behind the qualified First Amendment immunity from contempt of court).

⁷ Morse does not concede that the search warrant was properly issued under the Fourth Amendment. However, the Court need not address that question today.

1 **C. The Contents of Morse's Camera and Memory Discs Are Items Described in**
2 **Section 1070 of the Evidence Code**

3 The "items" described in section 1070 of the Evidence Code include unpublished
4 "photographs" sought from:

5 [a] publisher, editor, reporter, or other person connected with or employed upon a
6 newspaper, magazine, or other periodical publication, or by a press association or
7 wire service, or any person who has been so connected or employed . . . [when such
8 items are] obtained or prepared in gathering, receiving or processing of information
9 for communication to the public.

10 Cal. Evid. Code § 1070; Cal. Penal Code § 1524(g).

11 Morse's unpublished photographs are protected from disclosure even though they
12 were made in public and without an expectation of confidentiality. New York Times Co. v.
13 Superior Court, 51 Cal.3d 453 (1990).

14 **1. Morse is Connected With *Indybay* and Was Newsgathering on the Night**
15 **of December 11, 2009**

16 That Morse is "connected with" *Indybay* is beyond dispute. His long-running membership
17 in the collective, editing responsibilities, level of access, extensive reportage, and *Indybay* press pass
18 are all indicia of a deep relationship with *Indybay* that easily qualifies him as a reporter, editor and
19 publisher of the website. Section 1070 has been extended to freelance journalists with a far less
20 extensive connection to media outlets than Morse has with *Indybay*. See People v. Von Villas, 10
21 Cal.App.4th 201 (1992).

22 It is just as clear that Morse's unpublished photographs were "obtained or prepared in
23 gathering, receiving or processing of information for communication to the public." Cal. Evid. Code
24 § 1070(c). Morse has covered hundreds of events as a journalist. (*Morse Decl.* ¶ 1) He immediately
25 and repeatedly insisted to the officers on scene that he was a journalist who was only there to gather
26 news. (*Morse Decl.* ¶ 12, 16) He pleaded with them to review his press pass. (*Morse Decl.* ¶ 14) And
27 he intended to publish a selection of his images from that night, along with a written report, to
28 *Indybay*. (*Morse Decl.* ¶ 29)

1 **2. Indybay Is a News Outlet of the Type Described in Section 1070**

2 *Indybay* is “an internet-based alternative news outlet,” Burdett v. Reynoso, 2007 WL
3 2429426 (N.D. Cal 2007) that is at once a periodical publication, wire service and press association
4 as those terms are used in section 1070 of the Evidence Code.

5 **a. Indybay Is a Periodical Publication**

6 *Indybay* is a “periodical publication” as that term is used in section 1070. O’Grady v.
7 Superior Court, 139 Cal.App.4th 1423 (2006). See also Online Policy Group v. Diebold, 337
8 F.Supp.2d 1195, 1198 (N.D. Cal 2004) (accepting that *Indybay* is an “online newspaper”). An
9 online-only publication is a periodical publication for the purposes of section 1070 where “individual
10 articles are added as and when they become ready for publication, so that the home page at a given
11 time may include links to articles posted over the preceding several days.” O’Grady, 139 Cal.App.4th
12 at 1465.

13 This is precisely how *Indybay* works. Individual contributors submit print, visual and
14 occasionally audio works to *Indybay*’s news wire. (*Maiden Decl.* ¶¶ 1, 5-6) Some of these stories
15 are contributed by reporters who, like Morse, have a formal and ongoing relationship with *Indybay*.
16 Others are uploaded by individuals without a formal relationship with *Indybay*. (*Maiden Decl.* ¶ 5)
17 Regardless of source, *Indybay* editors like Morse review and categorize these stories as they come
18 in and re-package the strongest ones for publication to the main section of the website. A smaller
19 number of stories are also promoted upward and outward to the national Indymedia website and
20 other publications. (*Maiden Decl.* ¶¶ 6-8) These stories are date-stamped and remain archived on
21 the *Indybay* website indefinitely. (*Maiden Decl.* ¶ 6)

22 **b. Indybay Is Also a Wire Service**

23 *Indybay* is also a “wire service” as that term is used in section 1070 of the Evidence Code.
24 (*Johnson Decl.* ¶ 9, 12) As discussed above, *Indybay* distributes stories by its own reporters, along
25 with information sourced from others who submit stories to *Indybay*, which it then makes available
26 to a variety of media institutions and individuals. (*Maiden Decl.* ¶¶ 1-2, 5-8) As discussed above,
27

1 Morse's own work has been sourced from *Indybay* in this very manner. (*Ratcliff Decl.* ¶ 3)

2 **c. *Indybay* Is Also a Press Association**

3 *Indybay* is also a "press association" for purposes of section 1070. Press associations are
4 characterized by the collective facilitation of marketing, publicity, training and legal analysis on
5 issues relevant to all members of the association. (*Johnson Decl.* ¶ 10, 12). *Indybay* conducts
6 orientations for those who are potentially interested in getting involved in the collective. (*Morse*
7 *Decl.* ¶ 3) It also provides online media production tutorials and connects interested parties with
8 other media resources. (*Morse Decl.* ¶ 3)

9 **IV. CONCLUSION**

10 The Court must quash the warrant and order the return of all items seized, and all copies
11 made, pursuant to its inherent and statutory authority.

12
13 FIRST AMENDMENT PROJECT

14
15 Dated: April 15, 2010

16 By:



17 Geoffrey King

18 Attorneys for Movant David Morse
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

IN RE SEARCH WARRANT ISSUED
DECEMBER 12, 2009

Case No.:

**[PROPOSED] ORDER TO QUASH
SEARCH WARRANT AND RETURN
PROPERTY**

DATE:
TIME:
DEPT:

Hon.

[PROPOSED] ORDER

Good cause appearing,

The Court grants the Motion to Quash Search Warrant and Return Property as to Movant DAVID MORSE. The Court ORDERS that the search warrant issued on December 12, 2009 be quashed as it pertains to the Sony Digital Camera, Model MVC-CD500, serial number 36459; two Memorex CD-R discs, 210 MB each; and all unpublished photographs; all belonging to DAVID MORSE. The Court further ORDERS the return of the aforementioned items and all copies of unpublished photographs by DAVID MORSE seized pursuant to the warrant.

IT IS SO ORDERED.

April __, 2010

Judge of the Superior Court