CHARLES F. ROBINSON #113197
charles.robinson@ucop.edu
ERIC K. BEHRENS #79440
eric.behrens@ucop.edu
MICHAEL R. GOLDSTEIN # 129848
Michael.goldstein@ucop.edu
University of California
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
Telephone: 510-987-9800
Facsimile: 510-987-9757

Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

IN RE SEARCH WARRANT ISSUED DECEMBER 12, 2009,

CASE NO. 2009-2775

OPPOSITION BY RESPONDENT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO MOTION BY DAVID MORSE TO QUASH SEARCH WARRANT AND RETURN PROPERTY; DECLARATION OF CRISTA MANCHESTER; DECLARATION OF NICOLE MILLER

Hearing: June 18, 2010
Time: 2:00 p.m.
Dept. 115

EXEMPT FROM FEES PURSUANT TO GOV. CODE §6103

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 1

ARGUMENT 2

I. THE PUBLIC INTEREST IN PROSECUTING THE RIOTERS OUTWEIGHS THE QUALIFIED FIRST AMENDMENT PROTECTION AGAINST RETAINING THE PHOTOGRAPHS 3

II. SECTION 1070 OF THE EVIDENCE CODE IS INAPPLICABLE TO A MOTION TO QUASH A SEARCH WARRANT 5

III. MORSE'S ROLE IN THE PROTESTS NEGATES ANY POTENTIAL PROTECTIONS OF SECTION 1524(g) OF THE PENAL CODE 6

IV. MORSE HAS NO STANDING TO REQUEST THAT THE COPIES MADE BE RETURNED 7

V. THE EVIDENCE IS POTENTIALLY PROPERLY ADMISSIBLE AGAINST THIRD PARTIES REGARDLESS OF THE OUTCOME OF THIS CASE 8

VI. THE POLICY UNDERLYING THE "FRUIT OF THE POISONOUS TREE" DOCTRINE MAKES IT INAPPLICABLE HERE DUE TO THE OFFICER'S GOOD FAITH BELIEF AND ACTIONS 8

CONCLUSION 10

TABLE OF AUTHORITIES

CONSTITUTION & STATUTES

U.S. Const., 1st Amend. 3, 7

Code of Civil Procedure,
§ 1985 8
§ 2020.510 8
§ 2031.010 8

Evidence Code, § 1070 ..... 2, 5-6, 7

Penal Code,
§ 1524(g) 2, 6-7
§ 1538(n) 7

CASES

Branzburg v. Hayes (1972) 408 U.S. 665 ..... 3-4, 5, 7

Delaney v. Superior Court (1990) 50 Cal.3d 785 ..... 4, 6, 7

KSDO v. Superior Court (1982) 136 Cal.App.3d 375 3

New York Times v. Superior Court (1990) 51 Cal.3d 453 6

People v. Rich (1988) 45 Cal.3d 1036 8

People v. Superior Court (1972) 28 Cal.App.3d 600 7

Rosato v. Superior Court (1975) 51 Cal.App.3d 190 ..... 5, 6-7

Shoen v. Shoen (9th Cir. 1993) 5 F. 3d 1289 5

United States v. Beardslee (1999) 197 F.3d 378 8

United States v. Leon (1984) 468 U.S. 897 8-9

201176.1

INTRODUCTION

On December 11, 2009, at 11:00 p.m., a mob of some 75-100 people, carrying lit torches, and sporting bandannas on their faces to mask their identities, marched on the UC Berkeley Chancellor's House. The Chancellor and his wife were home alone, and fled to a secure location in the structure out of fear for their safety.

David Morse was part of that mob. His possessions were confiscated during a search incident to his arrest, and among them were the memory discs he is seeking to recover through this motion.

The University has already provided Morse with copies of all the photographs seized. In this motion, he is seeking the return of all copies. He is not entitled to them. Similarly, he is not entitled a motion preventing the University from using copies in subsequent proceedings. Accordingly, The Regents respectfully requests that the motion be denied.

STATEMENT OF FACTS

On December 11, 2009, a mob marched on the UC Berkeley Chancellor's House at around 11:00 p.m. (Declaration of Crista Manchester [filed concurrently with this Opposition] ["Manchester Decl."], ¶ 3.) A bullhorn informed marchers that they were at the Chancellor's house, where rioters proceeded to break windows. (Declaration of Nicole Miller [filed concurrently with this Opposition] ["Miller Decl."], ¶ 7.) They terrorized the Chancellor and his wife. (Manchester Decl., ¶ 12.) The damage included breaking pots, planters and lights surrounding the house. (*Id.*, ¶ 9).

When police officers arrived on the scene, many rioters began to flee, but some threw homemade torches at a police car. (*Id.*, ¶¶ 5-6.) Burning embers entered the vehicle through the window. (*Id.*, ¶ 6.) In the experience of UC police officers, those who participate in demonstrations and protests at the campus regularly use cameras and later employ the photographs they've taken to promote their events. (Declaration of Geoffrey King in Support of Motion to Quash Search Warrant and Return Property [filed April 16, 20010], Exh. C [Statement of Probable Cause], page 2, second paragraph.)

As two officers exited their vehicle, they saw Morse coming down the steps of the

Chancellor's house. He had a camera in his hand. Morse was detained on suspicion of participating in a riot and trespassing and his camera was seized as evidence to the crime. (Manchester Decl., ¶ 7.)

At the time he was detained, Morse told the officers he was a member of the press and that he had a press pass. During a safety search, they found a press pass, but it had expired as of December 2008, a year earlier. (*Id.*, ¶¶ 7-8.)

After determining that a search warrant would be required to view the contents of Morse's camera, as well as the discs, UC police officers sought, and obtained, one. (Miller Decl., ¶¶ 3-4.)

The University subsequently offered to return a disc containing the photographs to Morse, but Morse did not accept the offer prior to the June 4th hearing. (Declaration of Eric K. Behrens in Support of Ex Parte Motion to Continue Hearing on Motion to Quash Search Warrant and Return of Property [filed May 26, 2010], ¶ 6.)

ARGUMENT

Morse is not entitled to the copies of the photographs from his camera, or to prevent the University from using them in its ongoing efforts to prosecute the perpetrators of the late-night raid on the Chancellor's home. As a participant in that raid, and as a trespasser, he is not entitled to the protections provided by section 1524(g) of the Penal Code against the issuance of a search warrant.

Even if that statute applied to him,[1] it does not require that the University return copies of the photographs, as opposed to the originals. Nor does it preclude the University from using those copies in litigation and administrative proceedings against the perpetrators.

Morse's reliance on section 1070 of the Evidence Code is misplaced. That section bars the use of certain evidence in contempt proceedings, and Morse has not been threatened, much less charged, with contempt.

Beyond this, there is a strong public interest in prosecuting the torch-bearing

[1] The University does not concede that Morse qualifies for the protections of California Evidence Code Section 1070(a). The Court, however, need not address that question to decide this motion.

violent rioters who attacked the Chancellor's residence, to punish past misconduct and deter future acts of a similar harmful nature. For this reason, the First Amendment supports the University's right to retain and use the copies of the photographs.

Even if the Court were to determine that the search warrant was improperly issued – it wasn't – Morse lacks standing to ask that the copies of the photographs be given to him. Without a First Amendment argument, the only justification for such a broad remedy would be that the copies are the "fruit of the poisonous tree." But this doctrine does not require that the University turn over all copies and desist from using them in its pursuit of the perpetrators, because the University could have obtained the photographs through a subpoena duces tecum in any subsequent action. Moreover, the "fruit of the poisonous tree" doctrine is inapplicable because the UC Berkeley Police Department relied in good faith on the validity of the warrant. When they submitted the affidavit in support of the application for the warrant, they had a reasonable belief that Morse was not a journalist – because he was using an expired press pass – and therefore did not knowingly mislead the Court when seeking the warrant.

I. THE PUBLIC INTEREST IN PROSECUTING THE RIOTERS OUTWEIGHS THE QUALIFIED FIRST AMENDMENT PROTECTION AGAINST RETAINING THE PHOTOGRAPHS

Morse contends that the First Amendment shields these photographs. His contention is meritless.

In *Branzburg*, the High Court held that compelling governmental interests in a criminal case can take precedence over First Amendment rights to preserve the confidentiality of certain information. (*Branzburg v. Hayes* (1972) 408 U.S. 665, 700-701; *see also KSDO v. Superior Court* (1982) 136 Cal.App.3d 375, 385 ("in criminal cases, it appears clear that public interest in law enforcement creates a substantial public need for disclosure.") As Justice Powell explained in his oft-quoted concurrence in *Branzburg*,

> "the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and

societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." (*Branzburg v. Hayes*, *supra*, 408 U.S. at p. 710 [Powell, J., concurring].)

Here, even under the "compelling and paramount interest test" – criticized by the *Branzburg* Court as overly restrictive (*id.* at pp. 705-706) – the prosecution has the right to the information. As in *Branzburg*, the criminal acts being investigated are serious and implicate the State's interest in "preventing the community from being disrupted by violent disorders endangering both persons and property." (*Id.* at p. 701.) A mob attempted to break into the residence of the Chancellor of the University of California, Berkeley late at night, destroyed property, and terrorized the Chancellor and his wife. And, as in *Branzburg*, the evidence sought here – photographs of the crime itself – provides crucial and compelling information vital to identifying the perpetrators. (*Ibid.*)

In *Delaney v. Superior Court* (1990) 50 Cal.3d 785, the California Supreme Court applied an "alternative source rule" to criminal cases:

> "the trial court should consider the type of information being sought . . . the quality of the alternative source, and the practicality of obtaining the information from the alternative source. The trial court must also consider the other balancing factors set forth above: whether the information is confidential or sensitive, the interests sought to be protected by the shield law, and the importance of the information." (*Id.* at p. 813.)

But even the Alternative Source Rule does not help Morse in this case. Here, as in *Delaney*, the information cannot be obtained by an alternative source, because pictures taken from the crime scene are uniquely able to help identify rioters. (*Id.* at p. 812.) In addition, the information was in no sense confidential or sensitive. In fact, by his own admission, Morse intends to publish them. (Declaration of David Morse in Support of Motion to Quash Search Warrant and Return Property [filed April 16, 2010] ["Morse Decl."], ¶ 29.) Finally, the information sought is crucial to identify who perpetrated the crime. Because many rioters wore

masks and fled – (Morse Decl., ¶ 8), the photographs are essential to identifying who participated in the crime. Additionally, some of the photographs document the rioters committing destructive acts, so they are a central piece of evidence against the perpetrators.

Morse contends that the First Amendment interest at stake here is the interest in ensuring that the press's independent status is not undermined, so they may continue to have access to "meetings or places where a policeman or politician would not be welcome." (*Shoen v. Shoen* (9th Cir. 1993) 5 F. 3d 1289, 1295.) Although Morse documents and reports on social movements, and participants in such movements are often wary of individuals connected to the police, the Ninth Circuit also made clear in *Shoen* that this First Amendment interest must be balanced against the interests of the party seeking disclosure. (*Ibid.*)

And that balancing of interests cuts against Morse. The Supreme Court settled the matter in *Branzburg*:

> "[W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." (*Branzburg v. Hayes*, *supra*, 408 U.S. at p. 695.)

The Court's observation is especially applicable here because of the egregious nature of the crime and the indispensability of the photographs to the successful pursuit of those who perpetrated it.

For all of these reasons, the Constitutional balancing under the First Amendment and existing case law supports the University's right to retain the photographs. The result is the same under the California Constitution. (*Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 215.)

II. SECTION 1070 OF THE EVIDENCE CODE IS INAPPLICABLE TO A MOTION TO QUASH A SEARCH WARRANT

By its plain language, section 1070 of the Evidence Code does not apply here: "reporter or other person connected with or employed upon a newspaper, magazine, or other

periodical publication . . . cannot be adjudged in contempt by a judicial, legislative, administrative body." (Cal. Evid. Code, § 1070(a).)

And the cases interpreting the statute confirm this as well. As the California Supreme Court explained in *Delaney*, "the shield law provides only an immunity from contempt, not a privilege." (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at p. 797, fn. 6.) As the Court also has explained, "there is nothing from which to seek relief until a newsperson has been adjudged in contempt." (*New York Times v. Superior Court* (1990) 51 Cal.3d 453, 459.)

III. MORSE'S ROLE IN THE PROTESTS NEGATES ANY POTENTIAL PROTECTIONS OF SECTION 1524(g) OF THE PENAL CODE

Section 1524(g) of the Penal Code provides that "no warrant shall be issued for any item or items described in section 1070 of the Evidence Code." Morse's reliance on this statute is misplaced because of his role as a participant or observer the evening the Chancellor's home was assaulted. As the court held in *Rosato*:

> "While petitioners have not expressly contended that section 1070 shields newspersons from testifying about criminal activity in which they have participated or which they have observed, it is noted that this approach has been denied by the Supreme Court of the United States and by the Legislature in analogous statutory privileged relationships." (*Rosato v. Superior Court*, *supra*, 51 Cal.App.3d at p. 218.)

What precisely Morse was doing on campus the night of the riot is not exactly clear. According to the officers who observed him, he appeared to be a participant. When the officers emerged from their vehicle, they saw him walking down the stairs of the Chancellor's residence after burning objects were thrown at the police. By his own admission, he was there. Finally, his photographs potentially were part of the crime. As one of the police officers testified, photographs often are used to help perpetrate future felonies as they are used to promote the event in the future and advertise what happened. In that regard as well Morse became a participant.

For these reasons, *Rosato* dictates against providing Morse with the protections afforded by section 1070. Because of his role in the events, his presence, and the fact that his photographs could have been, and likely will be, used to promote the crime or future crimes, he stepped outside his role as an observer and documenter and became a participant.

IV. MORSE HAS NO STANDING TO REQUEST THAT THE COPIES MADE BE RETURNED

Morse has no standing to ask that the copies of the photographs be returned to him. His property is the discs themselves, not the copies which UC police made of the images on those discs. And, although Morse relies on section 1538.5(n) of the Penal Code, that statute does not apply here.

Morse relies on *People v. Superior Court* (1972) 28 Cal.App.3d 600. In that case, however, the State was asking to keep the film, the tangible property. The University is not trying to do that here. As explained above, the University already offered and in fact has returned the photographs to Morse.

Section 1538(n) does not apply either, because the University's possession of the copies of the photographs does not violate the First Amendment. Under section 1538.5(n), a person can make a motion "to return property brought on the ground that the property is protected by the free speech and press provisions of the United States and California Constitution." That is not the case here. Under *Branzburg* and *Delaney*, the First Amendment does not require the return of the copies of the pictures and, in fact, supports the University's rights to retain them. Thus, Morse has no standing to request the return of copies of photographs made by the University police.

Morse contends that he will be injured in two ways if the University is permitted to retain the copies of the photographs. (1) he would be made an unwitting arm of law enforcement and (2) he would be deprived of the use of his photographs. (*See* Memorandum of Points and Authorities in Opposition to University of California's Motion to Continue Hearing on Motion to Quash Search Warrant and Return Property [filed June 2, 2010], page 2, line 21, through page 3, line 7.) However, the public's interest in prosecution outweighs Morse's concerns that he

unwittingly help the University police in identifying individuals who have committed a crime. (*See Branzburg v. Hayes*, *supra*, 408 U.S. at pp. 695.) Additionally, since he will be given the photographs he will not, in fact, be deprived of their use.

V. THE EVIDENCE IS POTENTIALLY PROPERLY ADMISSIBLE AGAINST THIRD PARTIES REGARDLESS OF THE OUTCOME OF THIS CASE

Even if it were determined that the search warrant was improperly granted, under the "fruit of the poisonous tree" doctrine, the evidence would nevertheless be admissible in subsequent hearings "if that evidence ultimately or inevitably would have been discovered by lawful means." (*United States v. Beardslee* (1999) 197 F.3d 378, 386; *see also People v. Rich* (1988) 45 Cal.3d 1036.) The University could have obtained Morse's photographs by a *subpoena duces tecum* in an action against the perpetrators. The University would have issued such a subpoena because UC police officers saw Morse coming down the stairs from the Chancellor's house with his camera in hand. Therefore, officers knew both that Morse had a camera at the scene of the crime and that someone was taking pictures, which would have led them to subpoena the photographs.

Under section 2020.510(a) of the Code of Civil Procedure, the University would have issued a subpoena requiring that Morse appear at a deposition and produce the photographs in question. In addition, pursuant to section 2031.010 of the Code of Civil Procedure, the University would have been able to state with reasonably particularity the category of documents sought, namely, copies of photographs taken on the evening of December 11, 2009, when Morse was at the Chancellor's residence. Finally, the University could have obtained the photographs under section 1985 of the Code of Civil Procedure.

VI. THE POLICY UNDERLYING THE "FRUIT OF THE POISONOUS TREE" DOCTRINE MAKES IT INAPPLICABLE HERE DUE TO THE OFFICER'S GOOD FAITH BELIEF AND ACTIONS

The police conduct in this case does not fit the policy reasons underlying the "fruit of the poisonous tree" doctrine and its related exclusionary rule: to "deter police misconduct." (*United States v. Leon* (1984) 468 U.S. 897, 898.) Therefore, there is no cause to apply the exclusionary rule where the University police reasonably relied on a validly issued search

warrant. (*Ibid.*)

In this case, as in *Leon*, there is no legitimate argument for police misconduct. The police seized the camera pursuant to a lawful arrest and accessed the pictures to make copies only after obtaining the search warrant.

Additionally, the police reasonably relied on the search warrant. Under the *Leon* standard, the officers can reasonably rely on a search warrant issued by a "neutral or detached judge" unless "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth." (*Id.* at pp. at 898-899.)

Morse contends that the judge was misled because the affidavit did not mention Morse's alleged role as a news reporter. As explained above, the evidence is not particularly clear on this issue. Nevertheless, even if the Court were to determine that the warrant should not have been issued in the first place, because of Morse's relationship with Indybay, the police officer could not have known that at the time. Morse claimed he was a member of the press and, to support that claim, told the police officers he had a press pass. However, when they examined it, it had expired a year earlier. Their actions, on the basis of being furnished an expired press pass, were reasonable, so there was no reason to believe that Morse was accurately representing his relationship with Indybay. This is particularly true when combined with the other circumstances, including the fact that Morse was descending the stairs of a violent crime scene. Therefore, the police did not mislead the judge with information they knew or should have known when they included the fact that he had a camera on scene but not that he claimed to be a member of the media.

As the Supreme Court stated in *Leon*, the "fruit of the poisonous tree" doctrine "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity." (*United States v. Leon*, *supra*, 468 U.S. at p. 898.) In this case, the police officers could not have known that Morse was a bona fide journalist and, as a result, there was no inappropriate police behavior to deter. The search warrant obtained here was "reasonable law enforcement activity" and the University police should not be penalized by not being able to use

copies of the photographs to identify perpetrators.

CONCLUSION

For the foregoing reasons, the University respectfully requests that the Court deny the motion.

Dated: June 8, 2010

CHARLES F. ROBINSON
ERIC K. BEHRENS
MICHAEL R. GOLDSTEIN

By: _____
Eric K. Behrens
Attorneys for Respondent
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

Case Name: In Re Search Warrant Issued December 12, 2009 **Case No.** 2009-2775

PROOF OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in Alameda County, California, in which county the within-mentioned transmission occurred, and not a party to the subject cause. My business address is Office of the General Counsel, 1111 Franklin Street, 8th Floor, Oakland, California 94607-5200.

On June 8, 2010, I caused to be served the following document: OPPOSITION BY RESPONDENT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA TO MOTION BY DAVID MORSE TO QUASH SEARCH WARRANT AND RETURN PROPERTY; DECLARATION OF CRISTA MANCHESTER; DECLARATION OF NICOLE MILLER

on the interested party(ies) in this action addressed as follows:

David A. Greene Email: dgreene@thefirstamendment.org	Geoffrey King gking@thefirstamendment.org
Judge Yolanda Neill Northridge Email: dept.115@alameda.courts.ca.gov	

☒ (By **E-MAIL OR ELECTRONIC TRANSMISSION**) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ (Federal) I declare that I am employed by the office of a member of the bar of this court at whose direction the service was made.

Executed on June 8, 2010 at Oakland, California.

GLORIA SAMSON

201318.1