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8 Attorneys for Defendant  
9 PEDRO MARTINEZ

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **FOR THE COUNTY OF SAN BERNARDINO**

12 THE PEOPLE OF THE STATE OF  
13 CALIFORNIA,

14 v.

15 Plaintiff,

16 PEDRO MARTINEZ,

17 Defendant.

Case: FVI19000218

Dept. M2

Hon. Christopher Pallone

**EX PARTE APPLICATION OF  
DEFENDANT PEDRO MARTINEZ TO  
PERMIT HIS ATTORNEY, NANCY  
GRAY, TO ATTEND ALL ASPECTS OF  
THE TRIAL PROCEEDINGS;  
DECLARATION OF NANCY GRAY IN  
SUPPORT THEREOF**

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20 On September 12, 2023, the People made an oral motion to exclude from the courtroom  
21 Nancy Gray, counsel of record for Defendant Pedro Martinez in parallel civil actions. Over  
22 Defendant's objection, this Court granted the People's motion and ordered Ms. Gray to leave  
23 the courtroom.

24 This *ex parte* Application is brought in response to this Court's Order excluding Mr.  
25 Martinez's civil attorney from attending the trial of this action on the following grounds:

- 26 1. Defendant and his counsel of record have standing to bring this Application;  
27 2. This Court's Order violates the First and Sixth Amendments to the United States  
28 Constitution;

**FILED**  
SEP 13 2023

*Samantha Bobrowski* Dep. Clerk  
SAN BERNARDINO COUNTY  
SUPERIOR COURT, JOSHUA TREE DISTRICT

- 1 3. This Court's Order Violates Article I, sections 15 and 24 of the California
- 2 Constitution;
- 3 4. This Court's Order violates California Penal Code section 686;
- 4 5. This Court's Order violates Defendant's right to due process.

5 This *ex parte* Application is based on the attached Memorandum of Points and  
6 Authorities, the Declaration of Nancy Gray, the records on filed with the Court, upon argument  
7 by counsel and upon such further oral and documentary material which may be presented at the  
8 hearing of this matter or upon which the Court may take judicial notice.

9 Defendant's rights will be prejudiced irreparably if this Application is not granted.

10 Dated: September 13, 2023

GRAY & ASSOCIATES, P.C.

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13 By:  \_\_\_\_\_

Nancy Gray

14 Attorneys for Defendant PEDRO MARTINEZ  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

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3 I. STATEMENT OF FACTS

4 Defendant Pedro Martinez faces potential sentences of 25 years to life on the counts of  
5 which he is accused and is now on trial. Additionally, Mr. Martinez has two parallel civil cases  
6 pending against him in which his former employer, the Hesperia Unified School District  
7 (“HUSD”) is a co-defendant. In one of those cases, Complaining Witness Ismael R. and his  
8 mother are Plaintiffs.<sup>1</sup> Mr. Martinez is represented by Nancy Gray of Gray & Associates, P.C.  
9 in the civil cases. The outcome of the criminal case has a direct an immediate bearing on the  
10 civil cases.

11 Ms. Gray has attended every day of the criminal trial thus far seated in the gallery and  
12 not at counsel table. Although she has not appeared formally in this case, she communicates  
13 regularly with her client and assists criminal defense counsel. Ms. Gray is prepared to associate  
14 in as counsel.

15 Witnesses have been excluded from the courtroom pursuant to Evid. Code §777.

16 On September 12, 2023, the People brought an oral motion to exclude Ms. Gray from the  
17 trial. The People argued that because defense counsel has attempted to subpoena attorney Paul  
18 Matiasic, the civil lawyer representing Ismael R., then the People might call Ms. Gray as a  
19 witness. This Court granted the People’s motion without an offer of proof or a hearing.

20 This Application is brought because the People’s motion should have been denied and  
21 this Court’s Order should be reversed.

22 II. ARGUMENT

23 A. Mr. Martinez and Ms. Gray Have Standing to Bring this Application

24 As the defendant in this public trial, Mr. Martinez has a right to have his civil attorney  
25 attend the proceedings. Ms. Gray enjoys the same rights as a member of the public and as an  
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27 \_\_\_\_\_  
28 <sup>1</sup> A separate civil case brought by Complaining Witness Xzavier M. and his Guardian was dismissed. Another civil case is pending that has been brought by one of the People’s witnesses, Millie M.

1 attorney of record for the defendant. Granting the People’s motion violates Mr. Martinez’s  
2 constitutional right to a public trial and to have his attorney attend and assist at trial.

3 B. Criminal Trials are Public Proceedings

4 This fundamental precept is a cornerstone of our democracy. *People v. Esquibel* (2008)  
5 166 Cal.App.4th 539, 551 *citing In re Oliver* (1948) 333 U.S. 257, 270, fn. 25. “The right to an  
6 open public trial is not the right of only the criminal defendant, but is rather a shared right of the  
7 accused and the public, the common concern being the assurance of fairness.” *People v.*  
8 *Esquibel*, 166 Cal.App. 4th at 552. “Due to its constitutional significance and the difficulty of  
9 proving prejudice, when a violation of the right to a public trial has occurred, there is no  
10 requirement to prove any specific prejudice to the appellant.” *Id.* at 551, *citing Waller v. Georgia*  
11 (1984) 467 U.S. 39, 46.

12 According to *Esquibel*, “While the United States Supreme Court ‘has made clear that the  
13 right to an open trial may give way in certain cases to other rights or interests ... [s]uch  
14 circumstances will be rare, however, and the balance of interests must be struck with special  
15 care.’” *Id.*

16 In this case, the People have not even approached, much less satisfied, the “presumption  
17 of openness” in criminal trials. *Id.* That presumption can be rebutted “only by a showing that  
18 exclusion . . . was necessary to protect some ‘higher value’ such as the defendant’s right to a fair  
19 trial, or the government’s interest in preserving the confidentiality of the proceedings.” *Id.*  
20 Here, it is the defendant’s right to a fair trial that is being abridged.

21 In support of their argument to exclude counsel, the People asserted that if the defense  
22 were to call Mr. Matiasic (plaintiff’s counsel), then the People might call Ms. Gray as a witness.  
23 No offer of proof was provided. Moreover, the defense’s decision to subpoena plaintiff’s  
24 counsel has nothing whatsoever to do with Ms. Gray. Mr. Matiasic was contacted by and  
25 communicated with a third party witness, Magdalena Serna, who did not enjoy an attorney client  
26 privilege with counsel. This communication occurred immediately following Mr. Martinez’s  
27 arrest. The contents of the communication are critical, as Ms. Serna allegedly received the first  
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1 disclosure by Ismael R. that instigated the entire criminal investigation, arrest and prosecution  
2 of Mr. Martinez. What Ms. Serna told Mr. Matiasic at the very inception of the facts in this case  
3 is highly probative, and this contact is not protected by the attorney client privilege.

4 In contrast, civil counsel for Mr. Martinez, Nancy Gray, did not enter an appearance until  
5 more than a year after charges were filed. Remarkably, the civil proceedings against Mr.  
6 Martinez and the HUSD were filed weeks after the arrest. Ms. Gray is neither a percipient  
7 witness nor the recipient of non-confidential information at a time that is central to this case.  
8 Any notes she may have taken are protected by the attorney work product doctrine. *See* Code of  
9 Civil Procedure section 2018.030. She has not spoken with any material witness in this case  
10 except through deposition.

11 Excluding the public requires the Court to “balance the competing interests and allow a  
12 form of exclusion no broader than needed to protect those interests.” *Id.* “The party seeking  
13 closure must advance an ‘overriding interest that is likely to be prejudiced.’” *People v. Lee*  
14 (2015) 242 Cal.App.4th 161, 179, *citing Waller v. Georgia, supra*, 467 U.S. 39 at 48.

15 Under no circumstances can a court close proceedings to counsel. “*And without exception*  
16 *all courts have held that an accused is at the very least entitled to have his friends, relatives and*  
17 *counsel present, no matter with what offense he may be charged.’” *People v. Esquibel, supra,*  
18 *166 Cal.App.4th at 553, quoting In re Oliver, 333 U.S. 257, 270 (1948) (emphasis added by*  
19 *Esquibel).**

20 When the trial Court closes or partially closes the courtroom, it must make “specific  
21 written findings . . . to enable a reviewing court to determine the propriety of the exclusion.” *Id.*  
22 at 351. The circumstances of exclusion will be “rare.” *People v. Lee, 242 Cal.App.4th at 179,*  
23 *citing Waller v. Georgia, supra, 467 U.S. 39, 45.* The standard of review is “abuse of  
24 discretion.” *Id.*

25 No specific written findings were made by the trial court because the People’s position  
26 was nothing more than a tit-for-tat argument, *i.e.*, if the defense can subpoena Plaintiff’s counsel,  
27 then the People **might** call Ms. Gray. Absent a very compelling offer of proof, mere speculation  
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1 cannot be the basis for an Order excluding the public from the trial. The People’s motion was  
2 not only baseless, against the weight of all authority and deprived Mr. Martinez of his right to  
3 due process, but may also constitute prosecutorial misconduct given the enormity of the  
4 violation.

5 In *People v. Lee, supra*, 242 Cal.App.4th at 179, the Court held that allowing the civil  
6 attorney of a witness in a criminal prosecution to remain in the courtroom was not an abuse of  
7 discretion. The concern by the defense in *Lee* was the civil attorney might share information  
8 with his client, who was the actual victim of the crime. The trial court’s decision was upheld,  
9 citing *Esquibel* and Penal Code section 1102.6. No different result should occur here.

10 That the public has a First Amendment right to attend all trials, criminal or civil, was  
11 confirmed in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 580. The Court in  
12 *Los Angeles Times v. Superior Court* (2003) 114 Cal.App.4th 247, 250-51 held that “[T]he right  
13 to an open public trial is a shared right of the accused and the public, the common concern being  
14 the assurance of fairness.” *Id.* at 250, quoting *Press-Enterprise Co. v. Superior Court* (1986)  
15 478 U.S. 1, 7.

16 C. The People Cannot Interfere with the Defendant’s Right to Counsel

17 Mr. Martinez is entitled to counsel of his choice. *People v. Crovedi* (1966) 65 Cal.2d 199  
18 (*en banc*). “[T]he state should keep to a necessary minimum its interference with the individual’s  
19 desire to defend himself in whatever manner he deems best, using any legitimate means within  
20 his resources – and that ... desire can constitutionally be forced to yield only when it will result  
21 in significant prejudice to the defendant himself or in a disruption of the orderly processes of  
22 justice unreasonable under the circumstances of the particular case.” *Id.* at 208. Depriving a  
23 defendant of his right to defend with counsel of his choice results in “automatic reversal.”  
24 *People v. Ortiz* (1990) 51 Cal.3d 975, 988.

25 In the case of *Wenger v. Commission On Judicial Performance* (1981) 29 Cal.3d 615,  
26 653, disapproved on other grounds by *Doan v. Commission on Judicial Performance* (1995) 11  
27 Cal.4th 474A, the trial court’s threatening or purporting to exclude attorneys from his courtroom  
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1 constituted interference with the practice of law; *see also People ex rel. Curtis v. Peters (1983)*  
2 143 Cal.App.3d 597 (trial court committed reversible error in excluding a party's principal  
3 investigator from the courtroom during the trial).

4 D. Civil Counsel is Prepared to Associate in to the Criminal Case

5 Although not necessary, Ms. Gray offers to associate in to the criminal case. *See Code of*  
6 *Civil Procedure* section 284, applicable to criminal cases; *Mandell v. Superior Court (1977) 67*  
7 *Cal.App.3d 1*. This, too, would mandate her remaining in the courtroom for the entire trial.

8 Alternatively, Ms. Gray offers to leave the courtroom for the testimony of civil counsel  
9 for Plaintiff, Paul Matiasic, should he be allowed to testify.

10 III. CONCLUSION

11 For all of the foregoing reasons, this Court must allow Mr. Martinez's civil counsel to  
12 remain in the courtroom throughout this trial. Absent an extraordinary offer of proof by the  
13 People, Ms. Gray cannot be excluded.

14 Dated: September 13, 2023

Respectfully submitted,

16 GRAY & ASSOCIATES, P.C.

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18 By: 

19 Nancy Gray

20 Attorneys for Defendant PEDRO MARTINEZ



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DECLARATION OF NANCY GRAY

I, Nancy E. Gray, declare and state as follows:

1. I am an attorney admitted to practice law before all of the state and federal courts in the States of California and New York. I am a principal in the firm of Gray & Associates, P.C., counsel of record for Defendant Pedro Martinez in two currently pending civil cases that are parallel to the criminal proceeding. I have personal knowledge of the following facts, and if called upon as a witness, I could and would testify competently under oath.

2. This Declaration is submitted in support of Defendant Pedro Martinez’s ex parte Application to permit me, as Mr. Martinez’s civil attorney, to remain in the courtroom throughout the trial of this action.

3. I am not a percipient witness in this case.

4. I have been counsel of record for Mr. Martinez in two (and at one time three) parallel civil cases since April of 2020. I have not spoken with any material or primary witness in the criminal case except through deposition, with the obvious exception of my client.

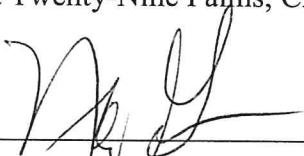
5. I am aware that Paul Matiasic, counsel for Plaintiffs Billy Roe et al (complaining witness Ismael R. in this case) was contacted by and communicated with a non-party third party witness, Magdalena Serna, who did not enjoy an attorney client privilege with counsel. This communication occurred immediately following Mr. Martinez’s arrest. Plaintiff filed suit within a couple of weeks following Mr. Martinez’s arrest. This communication occurred immediately following Mr. Martinez’s arrest. The contents of the communication are critical, as Ms. Serna allegedly received the first disclosure by Ismael R. that instigated the entire criminal investigation, arrest and prosecution of Mr. Martinez. What Ms. Serna told Mr. Matiasic at the very inception of the facts in this case is highly probative.

6. I have no probative, relevant or non-privileged information to offer in this case. Although not necessary, I am willing to associate in as counsel to allow me to attend all proceedings in court.



1           7.       In the event the defense is allowed to call Paul Matiasic as a witness pursuant to  
2 subpoena, I am willing to leave the courtroom during his testimony, provided I am allowed to return  
3 when his testimony is concluded.  
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5           I declare under penalty of perjury under the laws of the State of California that the foregoing is  
6 true and correct. Executed on September 13, 2023 at Twenty-Nine Palms, CA.

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9 Nancy Gray  
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

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4 I am employed in the County of Los Angeles, State of California. I am over the age of  
5 eighteen years and not a party to the within action. My business address is 11500 West  
6 Olympic Blvd., Suite 400, Los Angeles CA 90064.

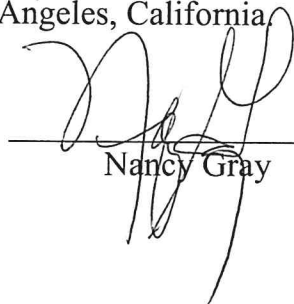
7 On September 13, 2023, I served the following document(s) described as: **EX PARTE  
8 APPLICATION OF DEFENDANT PEDRO MARTINEZ TO PERMIT HIS  
9 ATTORNEY, NANCY GRAY, TO ATTEND ALL ASPECTS OF THE TRIAL  
10 PROCEEDINGS; DECLARATION OF NANCY GRAY IN SUPPORT THEREOF**

11 in this action by placing true copies thereof enclosed in sealed envelopes and/or  
12 packages addressed as follows:

13 Deena M. Pribble  
14 San Bernardino County District Attorney  
15 E-mail: [DPribble@sbcda.org](mailto:DPribble@sbcda.org)

- 16  **BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles,  
17 California, I caused each such document to be transmitted electronically to the  
18 party(ies) at the e-mail address(es) indicated above. To the best of my knowledge, the  
19 transmission was reported as complete, and no error was reported that the electronic  
20 transmission was not completed.
- 21  **STATE:** I declare under penalty of perjury under the laws of the State of California  
22 that the foregoing is true and correct.

23 Executed on September 13, 2023 at Los Angeles, California,

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Nancy Gray