

1 George Gigarjian, SBN 124239
2 108 Locust Street, Suite 13
3 Santa Cruz, CA 95060
4 (831) 429-1440

5 Attorney for Defendant Alex Darocy

6 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 FOR THE COUNTY OF SANTA CRUZ

8 THE PEOPLE OF THE STATE OF
9 CALIFORNIA,

No. M84620

10 Plaintiff,

NOTICE OF MOTION AND MOTION
TO DISMISS

11 v.

12 ALEX DAROCY,

Hearing: October 30, 2015
Dept. 1
Time: 9:00 a.m.

13 Defendant.
14

15 _____ /
16 TO: JEFF ROSELL, DISTRICT ATTORNEY OF SANTA CRUZ COUNTY, STATE
17 OF CALIFORNIA and to his duly authorized deputies:

18 NOTICE IS HEREBY GIVEN that on October 30, 2015 in Department 1 of the above-
19 entitled court, defendant Alex Darocy will move this court for an order dismissing the charges
20 pending against him on the grounds that the conduct that the prosecution attempts to criminalize
21 is conduct that is protected under the First Amendment right to freedom of the press and freedom
22 of speech, and that the continued prosecution of Mr. Darocy under these circumstances would be
23 a violation of his First Amendment and due process rights.
24
25

1 This motion is based upon: this notice of motion and the points & authorities
2 incorporated herewith; all other pleadings, records, and files herein; and such evidence and
3 argument that may be presented at the hearing of this motion.
4

5 Dated: October 27, 2015

6 George J. Gigarjian
7 Attorney for Alex Darocy

8 **INTRODUCTION**

9 The government has charged defendant Alex Darocy with violation of Vehicle Code
10 section 2800(a), failing or refusing to comply with a lawful order of a peace officer (a
11 misdemeanor), and violation of Vehicle Code section 21718(a), stopping on a freeway (an
12 infraction).

13 On the date in question, there was a protest on Highway 1 involving six UCSC students
14 who blocked the freeway. As a result, CHP and Caltrans were on scene directing traffic around
15 the students. Mr. Darocy, a long time, established photojournalist, drove out to the scene in his
16 capacity as a journalist to take photographs of the protest. As shown in the video of this incident,
17 as Mr. Darocy passed by the protestors, he stopped his vehicle a few times for a few seconds to
18 take photographs. A Caltrans employee, not a peace officer, is seen gesturing toward Mr.
19 Darocy during this time. A copy of the video is contained in Exhibit A, which is a DVD
20 containing the video. The court and counsel are directed to approximately 52:10 on the video for
21 the pertinent portion of the video.

22 Here, it is the defense position that the criminal charges against Mr. Darocy for his de
23 minimus stopping on the freeway to take a few photographs of a newsworthy event is a violation
24 of his First Amendment and due process rights.
25

1 **BACKGROUND**

2
3 Mr. Darocy is a professional photographer and photo journalist. He maintains a website
4 for purposes of sharing his art (www.alexdarocy.com) and a blog, where he posts photographs
5 and discussions of current local events (alexdarocy.blogspot.com). He has a B.A. from U.C.
6 Santa Cruz in History of Art and Visual Culture, and his college senior thesis concerned social
7 documentary photography. (Declaration of Alex Darocy, attached hereto.) He began
8 documenting various local protests in 2010, publishing photographs and videos to various
9 websites including Indybay, which is an independent media company focused on covering social
10 and political events, and the police response thereto. (See Declaration of Alex Darocy and
11 www.indybay.org.) He has photographed and documented numerous social protest events,
12 including the Occupy movements in Oakland, Monterey, and Santa Cruz. Mr. Darocy's
13 numerous photographs and articles can be found at the Indybay website and at the Santa Cruz
14 Wiki website (<http://www.scruzwiki.org/>) where he has made over 16,000 total contributions and
15 edited approximately 4,000 different pages regarding his coverage of local news, events, and
16 features. Since 2011, he has uploaded over 200 different videos of his news coverage to
17 his YouTube channel (<https://www.youtube.com/alexdarocy>). (Declaration of Alex Darocy.)

18
19 As stated, Mr. Darocy has published for several years photographs to an online media
20 outlet called Indymedia, which was founded in 1999. (Declaration of Alex Darocy.) Mr. Darocy
21 is a member of the editorial board of Indybay, the Bay Area arm of Indymedia. (Declaration of
22 Alex Darocy.) This means he is permitted to write feature articles as well as review and edit the
23 postings of other members. (Id.) A person is not accepted to the editorial board unless they have
24 been nominated by someone already on the board. The person's prior contributions, education,
25

1 and experience are all reviewed during the process. (Id.) Mr. Darocy has a press card for
2 Indybay. (Id.) A person is not issued an Indybay press card unless he or she works regularly
3 with the organization and goes through an orientation process. (Id.)

4 In his role as a photo journalist, Mr. Darocy took photographs documenting the Highway
5 17 protest where 6 individuals chained themselves to garbage cans. Several of his photographs
6 of protestors on Highway 17, including one of the six chained to the garbage cans, were
7 published by Indybay. His article and photograph can be found at
8 <https://www.indybay.org/newsitems/2015/03/04/18769513.php>.

9 POINTS AND AUTHORITIES

10 **I. Mr. Darocy Was Engaged In Conduct That Is Protected By The First Amendment**

11 “Freedom of speech and freedom of the press, which are protected by the First
12 Amendment from infringement by Congress, are among the fundamental personal rights and
13 liberties which are protected by the Fourteenth Amendment from invasion by state action.”
14 *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). These constitutional guarantees secure the free flow
15 of information, which is essential to a healthy democracy.

16 Both of these protections apply to a broad range of people, topics, and activities.
17 “Freedom of the press is a fundamental personal right which is not confined to newspapers and
18 periodicals.... The press in its historic connotation comprehends every sort of publication which
19 affords a vehicle of information and opinion.” *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)
20 (citation omitted). Thus, the constitutional protections for the press extend beyond the
21 institutional press to anyone who would gather information about matters of public interest and
22 disseminate it to the public: The Supreme Court has “consistently rejected the proposition that
23 the institutional press has any constitutional privilege beyond that of other speakers. With the
24 advent of the Internet and the decline of print and broadcast media, moreover, the line between
25

1 the media and others who wish to comment on political and social issues becomes far more
2 blurred.” *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876, 905-06 (2010); *see Gilk v.*
3 *Cunniffe*, 655 F.3d 78, 82–84 (1st Cir. 2011) (holding First Amendment right to gather news was
4 violated and noting that “[i]t is of no significance that the present case ... involves a private
5 individual, and not a reporter, gathering information about public officials”). Furthermore, what
6 constitutes “news” is not limited to “simple accounts of public proceedings and abstract
7 commentary on well-known events.” *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 208
8 (1998) (lead opn. of Werdegar, J.). To the contrary, “a publication is newsworthy if some
9 reasonable members of the community could entertain a legitimate interest in it.” *Id.* at 225.

10 See also *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, a 2006 appellate court
11 opinion that held that a blogger who owned and operated an online news magazine devoted to
12 news and information about Apple MacIntosh computers and compatible software and hardware
13 was entitled to the protections of the state shield law. Also of note is *Shoen v. Shoen*, 5 F.3d
14 1289, a 1993 Ninth Circuit opinion, that held that an investigative book author could invoke the
15 constitutionally based reporter's privilege. That court stated, "What makes journalism, journalism
16 is not its format but its content. Hence, the critical question for deciding whether a person may
17 invoke the journalist's privilege is whether she is gathering news for dissemination to the public.”

18 Freedom of the press does not permit a journalist to be charged as an aider and abettor of
19 the illegal activity that he or she documents and reports on, even when such reporting is done
20 from the “front lines.” In other words, a journalist’s presence at the scene of criminal activity
21 may not be said to encourage or facilitate such activity because the First Amendment provides
22 journalists with “protection for seeking out the news.” (*Branzburg v. Hayes* (1972) 408 U.S.
23 665, 681.)

1 “News must not be unnecessarily cut off at its source,” Justice Stewart wrote in 1972,
2 “for without freedom to acquire information the right to publish would be impermissibly
3 compromised.” *Id.* at 728 (Stewart, J., joined by Brennan, J., and Marshall, J., dissenting). Here,
4 the news would be cut off at its source if Mr. Darocy’s brief presence at the scene of the protest
5 was not protected by the First Amendment. Without the presence of journalists newsgathering
6 and taking photographs directly from the scene, the public would be prevented from knowing
7 important information and facts about protestors’ actions as well as the government’s response to
8 the protestors. In attempting to criminalize Mr. Darocy’s brief stop on the freeway to take a few
9 photographs of the protestors and the police, i.e., his conduct as a journalist, the prosecution
10 arbitrarily seeks to prevent Mr. Darocy from exercising his constitutionally protected news
11 gathering activities. Thus, the criminal charges filed against Mr. Darocy constitute a violation of
12 his First Amendment rights to freedom of the press and free speech.

13 The prosecution Mr. Darocy arises out of activity that receives First Amendment
14 protection under the foregoing principles. The protest by the UCSC students on Highway 1 was
15 clearly newsworthy; indeed, advocacy for social and political change lies “at the core of the First
16 Amendment.” *Nat’l Ass’n for Advancement of Colored People v. Claiborne Hardware Co.*, 458
17 U.S. 886, 926-27 (1982) (citation omitted). And, not surprisingly, the Santa Cruz Sentinel
18 published multiple stories about it. See, e.g., [http://www.santacruzsentinel.com/general-](http://www.santacruzsentinel.com/general-news/20150304/santa-cruz-six-protesters-who-blocked-highway-1-arrested)
19 [news/20150304/santa-cruz-six-protesters-who-blocked-highway-1-arrested](http://www.santacruzsentinel.com/general-news/20150304/santa-cruz-six-protesters-who-blocked-highway-1-arrested).

20 It is thus undisputed that Mr. Darocy took photographs of a newsworthy event and
21 published those photographs on the Indymedia website. It is also undisputed that he has acted as
22 journalists in the past. Whatever else the prosecution alleges that Darocy did on the subject date,
23 his conduct in taking photographs of a newsworthy event for publication was indisputably
24 protected by the First Amendment.

1 **II. Even If The Government Is Not Able To Prove Its Case Beyond A Reasonable Doubt,**
2 **The Harm To The Right To Freedom Of The Press Will Have Already Been Done As The**
3 **Prosecution Will Cause A Chilling Effect On The Exercise Of First Amendment Rights**

4 It may well be that the government is unable to prove beyond a reasonable doubt that Mr.
5 Darocy violated Vehicle Code section 2800(a) (recall that the person appearing in the video with
6 Mr. Darocy is a Caltrans worker, not a peace officer, and that the prosecution must prove that
7 Mr. Darocy heard any alleged order from the police), but by then the harm to journalistic
8 independence will have been done: “[t]he chilling effect upon the exercise of First Amendment
9 rights may derive from the fact of the prosecution, unaffected by the prospect of its success or
10 failure.” *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). Courts must therefore be particularly
11 careful not to allow such prosecutions to go forward unless they are justified by the evidence.
12 *See Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 228 (1998) (“[B]ecause
13 unnecessarily protracted litigation would have a chilling effect upon the exercise of First
14 Amendment rights, speedy resolution of cases involving free speech is desirable.”). This Court
15 should accordingly act now to ensure that Mr. Darocy is not required to stand trial for
16 unsupported charges.

15 **III. Mr. Darocy’s Right To Due Process Requires Dismissal Of This Case**

16 It is defendant’s position in this motion that under the facts of this case, the prosecution
17 of this matter is so fundamentally unfair that established principles of due process of law require
18 this court to enter an order dismissing this case.

19 Defense counsel acknowledges that the instant motion to dismiss is not strictly predicated
20 upon the more typical due process issues arising under the case of *Brady v. Maryland* (1963) 373
21 U.S. 83, and its progeny, where the prosecution in a case has failed to disclose to the defense in
22 pretrial discovery (1) evidence that was material either to guilt or to punishment (i.e., evidence
23 that would tend to exculpate the defendant or reduce the penalty) irrespective of the good faith or
24 bad faith of the prosecution (*Brady v. Maryland, supra*, 373 U.S. 83, 87-88 [10 L.Ed.2d 215]), or
25

1 (2) has failed to disclose to the defense evidence affecting the credibility of a witness (i.e.,
2 materials that, whatever their other characteristics, may be used to impeach a witness) (*Strickler*
3 *v. Greene* (1999) 527 U.S. 263, 280 [144 L.Ed.2d 286]; *United States v. Bagley* (1985) 473 U.S.
4 667, 677 [87 L.Ed.2d 481]; *Giglio v. United States* (1972) 405 U.S. 150, 154 [31 L.Ed.2d 104]).

5 However, the due process principles underlying the *Brady* case are not strictly limited to
6 issues of a prosecutor’s dereliction of the pretrial discovery duties established by the *Brady* case
7 and its progeny. As the United States Supreme Court noted in the *Brady* case itself, the
8 underlying due process principle involved in that case “. . . is not punishment of society for
9 misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only
10 when the guilty are convicted but when criminal trials are fair; our system of the administration
11 of justice suffers when any accused is treated unfairly.” (*Brady v. Maryland, supra*, 373 U.S. 83,
12 87 [10 L.Ed.2d 215].)

13 Furthermore, appellate court cases in this state, citing to and quoting the just quoted
14 language from the *Brady* case, unequivocally have stated “[t]he sole concern in *Brady* was the
15 fairness of the trial” (*Eulloqui v. Superior Court* (2010) 181 Cal.App.4th 1055, 1065), and “[f]or
16 the public to have confidence in the result, it must have confidence in the process” (*In re*
17 *Sodersten* (2007) 146 Cal.App.4th 1163, 1170). In other words, as a result of what is happening
18 in this case is there “. . . such an impact on the integrity and fairness that are the cornerstones of
19 our criminal justice system, that continued public confidence in that system requires . . .” a
20 remedy of dismissal at this time? (Cf. *In re Sodersten, supra*, 146 Cal.App.4th 1163, 1171.) That
21 is, in the context of this case, “[d]espite any seeming unfairness to the prosecution, no other
22 result would satisfy due process[.]” (*In re Brown* (1998) 17 Cal.4th 873, 882.)
23
24
25

1 As argued herein, the government's prosecution against Mr. Darocy attempts to
2 criminalize conduct protected by the First Amendment. Thus, the prosecution of Mr. Darocy
3 under these circumstances is unfair and a violation of his due process rights. Other than this
4 motion to dismiss, Mr. Darocy has no other meaningful manner to contest the government's
5 prosecution of him based on his position that his conduct is protected by the First Amendment.
6 Accordingly, due process principles provide a sufficient basis for the Court to hear this motion
7 and to dismiss the subject case.
8
9

10 CONCLUSION

11 For the reasons stated herein, Mr. Darocy respectfully requests that this Court dismiss the
12 subject charges.

13 Dated: October 27, 2015

14 _____
George J. Gigarjian
Attorney for Alex Darocy
15
16
17
18
19
20
21
22
23
24
25