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FILED

SUPERIOR COURT of CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 12 2004

GARY M. BLAIR, EXEC. OFFICER

By Alicia Alcocer
ALICIA ALCOCER, Deputy Clerk

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 FOR THE COUNTY OF SANTA BARBARA

12 (COOK DIVISION)

COPY

13 THE PEOPLE OF THE STATE OF
14 CALIFORNIA,

15 Plaintiff,

16 vs.

17 MICHAEL JACKSON,

18 Defendant.

Case No.: 1133603

OPPOSITION TO PLAINTIFF'S
REQUEST FOR PROTECTIVE
ORDER REGARDING PUBLIC
STATEMENTS

DATE: January 16, 2004
TIME: 8:30 a.m.
DEPT: SM 2 (Melville)

19
20 Michael Jackson ("Mr. Jackson") hereby opposes the People's request for a
21 protective order forbidding Mr. Jackson, his attorneys and others from making public
22 comment concerning this case. The prosecution motion fails to set forth one scintilla of
23 evidence demonstrating that the speech it seeks to restrain creates a clear and present
24 danger or serious and imminent threat to a protected cognizable interest. Furthermore, the
25 prosecution has failed to establish that the relief it requests is narrowly tailored to protect
26 its asserted interest, or that less restrictive alternatives are not available. (See *Hurwitz v.*
27 *Hoefflin* (2000) 84 Cal.App.4th 1232, 1241.)
28

OPPOSITION TO PLAINTIFF'S REQUEST FOR PROTECTIVE ORDER REGARDING PUBLIC STATEMENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Orders which restrict or preclude a citizen from speaking in advance are known as "prior restraints," and are disfavored and presumptively invalid. Gag orders on trial participants are unconstitutional unless (1) the speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest; (2) the order is narrowly tailored to protect that interest; and (3) no less restrictive alternatives are available.

(Hurvitz v. Hoefflin, supra, 84 Cal.App.4th at p. 1241, footnotes omitted.)

* * *

It is clear that even a short-lived "gag" order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect.

(Capital Cities Media, Inc. et al. v. Toole (1983) 463 U.S. 1303, 1304.)

* * *

The prosecution's request for a protective order focuses predominantly on the case of Scott Peterson, who is on trial for double capital murder in Stanislaus County.¹ Notwithstanding its pretense of informing this Court of the manner in which Judge Girolami has addressed the media onslaught that characterizes the Peterson case, the prosecution's argument here amounts to nothing more than (1) an attack on Mr. Jackson's

¹On January 8, 2004, the Superior Court of Stanislaus County ordered that the trial of Mr. Peterson be held in a different venue due to the massive and prejudicial publicity in spite of the issuance of a protective order identical to the one sought by Plaintiff in this matter.

1 attorney, Mark J. Geragos, and (2) a further continuation of the prosecution's unremitting
 2 ten-year mission to create a negative perception of Mr. Jackson. Along the way, the
 3 prosecution invokes an outdated legal standard concerning issuance of a protective "gag"
 4 order.

5 Most notably, the motion presents absolutely no evidence which would overcome
 6 the fundamental presumption that the parties, counsel, and witnesses in this action should
 7 retain their free speech rights. That being the case, Mr. Jackson can only surmise that the
 8 prosecutors' true motivation in seeking this extreme relief is to protect them from
 9 themselves. Virtually every public pronouncement by the prosecution team has been
 10 characterized by what could at best be described as verbal gaffes, and at worst as
 11 prosecutorial misconduct. These actions range from vouching for the credibility of the
 12 witnesses and injecting a jocular atmosphere into what are obviously serious allegations,
 13 to making blatant misstatements of the law to millions of people watching this
 14 prosecutorial circus. And now prosecutors seek this Court's intervention to help cure
 15 their foot-in-mouth syndrome, which has required them to publicly apologize for making
 16 improper statements during televised press conferences or interviews. In other words,
 17 although the prosecution has initiated multiple staged-for-television press conferences
 18 and shown no reticence about making inappropriate attacks on Mr. Jackson, it has shot
 19 itself in the foot so many times that it now wants to protect itself from its own bad
 20 judgment by silencing everyone connected with this case.

21 That, of course, is not a sufficient reason for this Court to issue a "gag" order. The
 22 court must turn a deaf ear to the prosecution's cry for help, and deny the motion.

23 ///
 24 ///

II.

A PROTECTIVE "GAG" ORDER SHOULD NOT ISSUE UNLESS THE PROSECUTION SHOWS A CLEAR AND PRESENT DANGER OR SERIOUS IMMINENT THREAT TO A FUNDAMENTAL PROTECTED INTEREST.

A. The Prosecution fails to cite the controlling legal standard.

The prosecution requests that this Court issue a protective order "modeled closely on the order issued by the Stanislaus County Superior Court in the *Peterson* matter pending in that court." (Request at 9:17-19.) Citing *Younger v. Smith* (1973) 30 Cal.App.3d. 138, 163, the People urge:

An order based on a "reasonable likelihood" of prejudicial news which would make difficult the empaneling of an impartial jury and tend to prevent a fair trial suffices for the imposition of a gag order. Statements to the press may be barred if the making of such statements presents "a 'reasonable likelihood' of prejudicial news which would make difficult the empaneling of an impartial jury and tend to prevent a fair trial."

(Request at 9:9-15)

In bootstrapping its present request to the *Peterson* order, however, the prosecution fails to mention a significant aspect of Judge Girolami's ruling. Although ultimately invoking the test set forth by the Second District in *Younger v. Smith* (1973) 30 Cal.App.3d 138, the judge did also cite the Second District's more recent decision – and resulting legal standard – in *Hurvitz v. Hoefflin, supra*, 84 Cal.App.4th 1232:

The Court has considered two different standards applicable to imposing a Protective Order. Specifically, there is the "clear and present danger of serious imminent threat to a protected competing interest," *Hurvitz v. Hoefflin* (2000) 84 Cal.App.4th 1232, or the "reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial

1 jury and tend to prevent a fair trial" standard, Younger v. Smith (1973) 30
2 Cal.App.3d 138.

3 (See Request at Exhibit A, page 3.)

4 Thus, while Judge Girolami utilized the *Younger* test, finding it "more applicable
5 in a criminal case";² the judge also acknowledged that (1) *Hurvitz* was more recent (27
6 years) than *Younger* and, (2) the court in *Hurvitz* undertook an extensive review of the
7 application of federal law to protective "gag" orders, and invoked that precedent.³

8 We urge this Court to apply the *Hurvitz* test as embodying the current and more
9 informed legal standard for the issuance of a gag order. Under *Hurvitz*, the Court applies
10 a "clear and present danger" test to evaluate whether the requested order should be
11 imposed. (See *Hurvitz v. Hoefflin*, *supra*, 84 Cal.App.4th at p. 1241.) As we now show,
12 under that test – and in fact even under the former *Younger* test – the prosecution loses.

13
14 **B. The Prosecution fails to provide one shred of evidence to support the**
15 **issuance of a protective "gag" order, regardless of the legal standard**
16 **applied by this Court.**

17 We emphasize that a "gag" order infringes free speech, "one of the cornerstones of
18 our society." (*Hurvitz v. Hoefflin*, *supra*, 84 Cal.App.4th at p. 1241.) Such prior
19 restraints on speech are not only disfavored, but are "*presumptively invalid*." (*Ibid.*,
20 italics added.) The burden is thus on the prosecution here to produce evidence to
21 overcome this presumption. (*Id.*, at p. 1242.) The prosecution has not met this burden,
22 under either the *Hurvitz* or the *Younger* standard.

23 Instead, the prosecution seems to be fixated on the Scott Peterson case and
24

25
26 ²Mr. Jackson disputes that conclusion, particularly given that *Younger* hasn't been cited by
a reported California case in nearly 20 years.

27 ³Indeed, Judge Girolami's order indicates that he would have issued the protective order *even*
28 *if* he had applied the *Hurvitz* "clear and present danger" test. (See Request at Exhibit A, page 3.)

1 Attorney Mark J. Geragos. For example:

2 1. The filing contains a subsection entitled "B. Parallels Between This Case
3 And The *Peterson* Case:" (Request at 2:2.);

4 2. The prosecution for unstated reasons believes it is necessary to point out that
5 "the [*Peterson* and *People v. Michael Jackson*] cases are similar in another respect: lead
6 counsel for the defense in each of them is the same." (Request at page 2, fn1.);

7 3. The prosecution seems fascinated that "[a]t the outset of his interview with
8 Larry King on December 27, 2003, Mr. King observed, 'Mr. Geragos, a frequent guest on
9 this program, had to stop being a guest when a gag order was issued in the Scott Peterson
10 case. And so you can not discuss that case at all, right?' Mr. Geragos replied, 'Right,
11 isn't that the greatest? There's nothing you can ask me that I can answer.'" (Request at
12 4:4-8.)⁴

13 What the prosecution has not provided to this Court however is *one shred of*
14 *evidence* demonstrating a clear and present danger to a protected right of a party, as
15 required by *Hurvitz*. *The prosecutor's contentions are conclusory only.*

16 Indeed, although the District Attorney claims to be interested in protecting the
17 parties' rights to a fair trial,⁵ his true motivation is evidenced by his statement that:

18 For reasons that ought to be self-evident, Mr. Geragos should be
19 similarly enjoined in this case.⁶

20 (Request at 4:9-10.)

21
22 "Mr. Geragos' statement to Mr. King would seem to belie the District Attorney's thinly-
23 veiled insinuation that Mr. Jackson's counsel delights in having to repeatedly and publicly defend
24 Mr. Jackson against, *inter alia*, false press reports and the prosecution's tasteless and improper
25 commentary. Indeed, for the duration of the District Attorney's 10-year preoccupation with Mr.
26 Jackson, it has been Mr. Sneddon who has sought to use the media as a stick with which to bludgeon
27 Mr. Jackson.

26 ⁵See Request at 4:11-23.

27 ⁶Enjoined from what? From responding to an apparent 10-year-old vendetta against Mr.
28 Jackson? From zealously defending Mr. Jackson in the face of baseless allegations?

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1 The moving papers show, by their evidentiary defects, that the District Attorney
 2 is not concerned about the People's right to a fair trial, but is instead concerned with (1)
 3 having this Court issue an order that would have the practical effect of ensuring that the
 4 prosecution will not endure the embarrassment of having to apologize for future episodes
 5 of inappropriate public comments; (2) having this Court issue an order that would
 6 eliminate the need for the prosecution to repeatedly defend the perception that this
 7 prosecution is floundering; and (3) having this Court eliminate Mr. Jackson's (and his
 8 counsel's) ability to respond to "recycled speculation," as the prosecution has so aptly
 9 predicted and characterized it. In regard to this latter point, the prosecution states:

10 *But experience has shown that when the "talking heads" on what could*
 11 *be called "tabloid television" do not have Mr. Geragos or other lawyers*
 12 *and principals to interview, they interview one another and indulge in*
 13 *speculation. That gets old in a hurry. The purveyors of recycled*
 14 *speculation lose their audience without fresh "information" to fuel the*
 15 *commentary. The enthusiastic participation of a well-known defendant's*
 16 *well-known lawyer in interviews on television is calculated to do just*
 17 *that.*

18 (Request at 5:19-24., italics added.)

19 The prosecution thus recognizes that when defense counsel is unavailable (due to
 20 a protective "gag" order) to comment about a case, the media "interview one another and
 21 indulge in speculation." What the prosecution does not say, however, is that such
 22 speculation prejudices all parties to a proceeding by further tainting the jury pool with
 23 wild, almost always incorrect information. More specifically, the problem here is that the
 24 prosecution's public statements were so inappropriate, so out of bounds, that the
 25 speculative recycling of commentary based upon them - without an opportunity for Mr.
 26 Jackson or his counsel to address them - would be untenable. In fact, the only press
 27 sought out by the defense has been to respond to that press initiated by the prosecution.
 28

1 Although there has been a significant amount of press coverage concerning this
2 case (some of which has directly focused on those the prosecution seeks to "gag"), the
3 prosecution has failed to even allege - let alone establish by evidence - that the publicity
4 would taint so much as one potential juror. Thus, regardless of what standard this Court
5 employs, the prosecution's request must be denied due to its abysmal failure to provide
6 any evidence that the publicity will (or has) cause(d) any prejudice to either party.

7 III.

8 **RULE 5-120 OBVIATES THE NEED FOR A PROTECTIVE "GAG" ORDER**

9 The prosecution alleges that "[c]omments [made by Mr. Geragos] implicate the
10 limits of rule 5-120 of the Rules of Professional Responsibility." (Request at 6.) What
11 the prosecution fails to mention in their motion is the fact that it is the prosecution team
12 that has conducted at least three separate nationally televised press conferences preceded
13 by press releases, a well-timed leak that provided live coverage of the made for television
14 search of Neverland by eighty law enforcement officers, three "exclusive" television
15 interviews of the District Attorney (two of which were coincidentally with the same
16 reporter who got the "tip" on the search of Neverland), interactive Question and Answer
17 press conferences slandering Mr. Jackson and assuming his guilt, an Internet site complete
18 with prosecutorial vouching of their witnesses and the prosecution's much ballyhooed
19 hiring of a PR firm to "coach" its press efforts.

20 Any alleged implication of "the limits of rule 5-120 of the Rules of Professional
21 Responsibility" is not only expressly permitted by the rule itself and the United States
22 Supreme Court⁷ as a reasonable response to the prosecution's activities but it would be
23 malpractice for a defense attorney not to respond.

24 Furthermore, contrary to the entirely unsubstantiated claim that "historically the
25 threat of disciplinary proceedings down the road for an alleged violation of rule 5-120 has
26 not been shown to deter potentially prejudicial comments by counsel to the press in the

27 _____
28 ⁷ Gentile v. State Bar of Nevada (1991) 501 U.S. 1030.

1 fervor of pretrial maneuverings," the defense is unaware of anyone within its ranks who
2 would knowingly and intentionally subject himself or herself to the scrutiny of the State
3 Bar of California by making statements prohibited by Rule 5-120. As such, the existence
4 of Rule 5-120 will prevent any improper statements by the defense. Naturally, the
5 defense cannot speak to whether the prosecution views Rule 5-120 as a legitimate
6 deterrent to improper commentary and name-calling.⁸

7
8 V.

9 THE PROSECUTION FAILS TO EVEN PAY LIP-SERVICE TO THE
10 FACT THAT - EVEN ASSUMING A PROTECTIVE "GAG" ORDER
11 WERE PERMISSIBLE - IT MAY ISSUE ONLY IF IT IS NARROWLY
12 TAILORED AND THERE ARE NO LESS RESTRICTIVE MEANS TO
13 PROTECT THE PARTIES' RIGHTS.

14 As set forth above, a protective order must be narrowly tailored and may only
15 issue when there are no less restrictive means available to protect the parties' rights to a
16 fair and impartial jury trial. (E.g., *Hurvitz v. Hoefflin, supra*, 84 Cal.App.4th at p. 1241.)
17 The proposed protective order filed by the prosecution is remarkably expansive and
18 would effectively silence even those peripherally involved with these proceedings.
19 Additionally, the prosecution's filing does not eliminate less restrictive measures that
20 could be available to remedy the supposed harm. The prosecution's failure to address
21 these two key requirements in and of itself mandates denial of the request for a protective
22 "gag" order.

23
24
25 ⁸Mr. Jackson notes that during a nationally televised interview on Court TV, the District
26 Attorney referred to Mr. Jackson as "Wacko Jacko." It should not come as a surprise that someone
27 with such an inability to control the content of his speech would seek a Court-fashioned muzzle.
28 However, a prosecutor's individual desires are irrelevant to this Court's determination of whether
or not a protective "gag" order is necessary to protect the parties' rights to a fair and unbiased jury trial.

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CONCLUSION


In light of the foregoing, Mr. Jackson respectfully requests that the prosecution's request be denied in its entirety.

Dated: January 11, 2004

Respectfully submitted,
GERAGOS & GERAGOS

By:


MARK J. GERAGOS
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MICHAEL JACKSON


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PROOF OF SERVICE BY FAX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 N. Grand Avenue, 39th Floor, Los Angeles, California. 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

OPPOSITION TO PLAINTIFF'S REQUEST FOR PROTECTIVE ORDER REGARDING PUBLIC STATEMENTS

_____ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

_____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

Judge Rodney S. Melville Fax No.: 805-346-7616	DA Thomas Sneddon Fax No.: 805-568-2396	DDA Gerald Franklin Fax No.: 805-568-2396
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Executed on January 12, 2004, at Los Angeles, California.

I declare under penalty of perjury that the above is true and correct.



RAFFI NALJIAN

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