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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
MICHAEL JOE JACKSON,
Defendant.

No. 1133603

PLAINTIFF'S REPLY TO "DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMO RE: DEFENDANT'S CLAIM OF ATTORNEY-CLIENT AND ATTORNEY WORK-PRODUCT PRIVILEGES"

DATE: February 13, 2004
TIME: 8:30 a.m.
DEPT: SM 2 (Melville)

In his tardily-filed[1] Response to plaintiff's Memorandum Re: Claims Of Attorney-Client And Attorney Work-Product Privileges, defendant (joined by Bradley Miller) makes essentially three arguments concerning disclosure to the prosecution of the items seized from Investigator Miller's office (identified as Items 811 through 820 on the Sheriff's Property Form and since lodged with the court) on November 18, 2003:

First, the prosecution *must* be denied access to evidence lawfully seized in the course of a warranted search if that same evidence could not be "discovered" by the prosecution pursuant to Penal Code section 1054.3. "[I]f this Court was to order that the

[1] Our copy was received at 4:18 p.m on Friday, February 6th. Cf. Santa Barbara Superior Court Criminal Rules, rule 1907 ("at least ten (10) days prior to the hearing").

Materials be turned over, the prosecution would have be[en] able to circumvent the applicable Penal Code sections and case law. As such, the prosecution would be in essence conducting 'discovery-by-search-warrant' rather than abide by the reciprocal provisions of the Penal Code." (Resp. 2:14-17; see generally *id.*, pp. 2-4.)

Second, the evidence seized from Investigator Bradley Miller's office constitutes "defense impeachment evidence" and so the prosecutor must be barred from examining it. Indeed, defendant cautions, "this Court has no authority to order disclosure." (Resp. pp. 4-5.)

Third, and in any event, the attorney work product protection attaches to all of the materials. (Resp. 6 – 8.)

Defendant's arguments will be addressed in that order.

I

THE ADMISSIBILITY OF EVIDENCE LAWFULLY SEIZED IN A WARRANTED SEARCH IS NOT GOVERNED BY WHETHER IT COULD HAVE BEEN DISCOVERED, POST-ARRAIGNMENT, PURSUANT TO THE DISCOVERY PROVISIONS OF THE PENAL CODE

A. Introduction

Defendant devotes a revealing amount of energy to an argument that conflates the execution of a search warrant with a demand for discovery – defendant uses the phrase "discovery by search warrant" three times (Resp. 2:16-17; 5:27; 8:12) – and he argues that "this Court should not legitimize the prosecution's attempt to circumvent the criminal discovery statute (Penal Code section 1534 et seq [sic; Pen. Code, § 1054 et seq.] through the use of a search warrant" (*id.*, 3:14-16). He cautions, "permitting the prosecution to conduct discovery-by-warrant would clearly be antithetical to the Supreme Court's opinions in [*People v.*] *Tillis* [(1998) 18 Cal.4th 284] and *Izazaga* [*v. Superior Court* (1991) 54 Cal.3d 356]." (Resp. 5:27-28.)

That argument (captioned "Introduction and Suggested Procedure") proceeds upon an unarticulated but demonstrably false premise; i.e., that if given evidence could not have

been demanded by the prosecution pursuant to the discovery provisions of the Penal Code in light of the explicit limitations of Penal Code section 1054.3, that same evidence seized pursuant to a search warrant may not be examined by the prosecution *even if it does not constitute "attorney work product."* (Thus, he concludes his exposition of his theme that "Items 811 through 820, inclusive, . . . are not discoverable under California well-established discovery procedures" (Resp. 2:11-14) with the assertion, "In light of the above, the defense believes the Court . . . need not address the work product protection/attorney-client privilege issues during the February 13, 2004 hearing." Resp. 3:17-19.) And just in case one supposed defendant was, nevertheless, concerned only with arguably *privileged* evidence, he devotes a separate argument to the "discoverability" of the "defense's *impeachment* evidence" which, he says, was seized by warrant on November 18th – though, as plaintiff will presently argue, evidence the defendant may rely upon to impeach prosecution witnesses is not "privileged" on that account.

B. Defendant Conflates The Prosecution's Right To Inspect Evidence Seized In A Warranted Search And Presently In The Government's Possession With The Government's Limited Right To Discover Evidence Still In The Defendant's Custody

Defendant's argument reveals considerable confusion about the admissibility of evidence seized pursuant to a warranted search.

A search warrant may authorize an invasion of Fourth Amendment privacy in pursuit of virtually all evidence that plausibly might further a criminal investigation. All that must be shown in support of the warrant is probable cause to believe the evidence will be found in the place to be searched, and probable cause to believe the evidence is relevant to the ongoing felony investigation.

Prosecutorial "discovery" in criminal cases – with respect both to what is discoverable and the procedure for obtaining discovery – "is a pure creature of statute, in the absence of which, there can be no discovery." (*People v. Hubbard* (1997) 66 Cal.App.4th 1163, 1167.) By their very terms, the discovery provisions of the Penal Code do not apply to

the process of uncovering evidence by warranted search. To be sure, materials assertedly protected by the work-product privilege, when identified as such at the time of a warranted search, are not subject to disclosure until the hearing authorized by *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703 has been completed. Defendant's phrase "discovery by search warrant" is cute, but to the extent defendant employs it to suggest that the admissibility of *unprivileged* evidence obtained by search warrant is limited by Penal Code section 1054.3, it is both without support in decisional law and grotesquely absurd in application.

In a criminal discovery proceeding, the defendant is not required to produce evidence that may tend to incriminate him. His obligation to provide discovery is limited to that evidence he intends to produce in his own defense at trial. (Pen. Code, § 1054.3.) But almost by definition, evidence lawfully obtained by search warrant tends – directly or indirectly – to incriminate the defendant. Until this case, no one has contended with a straight face that the discovery provisions of the Penal Code limit the admissibility of evidence obtained by search warrant, *other* than evidence subject to a statutory privilege.

The evidence in question was lodged with the court for one reason: so that the court could determine whether it was seized from an attorney or his agent and constitutes either a privileged communication between lawyer and client or the attorney's "work product."[2]

II

EVIDENCE SEIZED BY WARRANTED SEARCH MAY INCLUDE WHAT THE DEFENSE MAY LATER CONTEND IS "DEFENSE IMPEACHMENT EVIDENCE," BUT IT IS NOT "PRIVILEGED" FROM EXAMINATION ON THAT ACCOUNT

[2] Defendant appears to focus exclusively on the work-product doctrine. In the upcoming hearing, his counsel states, "the Court must resolve only one issue: *Are the Materials 'core' attorney work product?*" (Resp. 6:20-22; his emphasis.) Defendant mentions "attorney-client privilege" several times, but only in passing, and he offers no discussion concerning how that distinct privilege might be implicated on the facts of this case. In the circumstances, any claim that the lawyer-client privilege bars access by the prosecution to the evidence in question has been waived.

Defendant notes that "impeachment evidence," in the form of a defense investigator's notes his interview of a prosecution witness, may not be discovered by the prosecution *pursuant to Penal Code section 1054 et seq.* unless the defense decides to call the investigator to impeach the prosecution's witness. (*Hubbard v. Superior Court, supra*, 66 Cal.App.4th 1163, 1165.) It follows, he appears to argue, that if evidence seized in the course of an earlier warranted search is later characterized by the defense as "defense impeachment evidence," that evidence cannot be examined by the seizing officers or the prosecutor precisely because it would not be discoverable by the prosecution pursuant to Penal Code section 1054.3.

So understood, the argument is a non sequitur.

Of *course*, the prosecution may not demand discovery of "defense impeachment evidence." By the same token, neither may the prosecution seek "discovery" of, e.g., "all evidence in the possession of the defendant that tends to incriminate him."

In a discovery proceeding, the defendant is obliged to provide only that evidence he intends to produce himself at trial. In a warranted search, the custodian of the property sought by the warrant may object to the seizure and to examination of the evidence seized only if the evidence comes within, e.g., the attorney-client or attorney work-product privileges. The mere fact that the evidence may tend to incriminate the suspect is, almost self-evidently, unavailable as a reason to lawfully resist a warranted search or examination of the fruits thereof by investigating officers and, later, the prosecutor.

The difference between a suspect's Fifth Amendment privilege not to hand over incriminating evidence against him, on the one hand, and having to confront incriminating evidence obtained without his cooperation, on the other, was famously articulated by Justice Holmes in *Johnson v. United States* (1913) 228 U.S. 457, 458, 33 S.Ct. 572, 57 L.Ed. 919, 920: "A party is privileged from producing the evidence but not from its production." (See, too, *Andresen v. Maryland* (1976) 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627, holding that the Court's earlier rejection of the "mere evidence" restriction on the scope of a lawful warranted search in *Warden v. Hayden* (1967) 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 extended as well to documents having a "communicative" component, because the seizure of such evidence

"falls within the principle stated by Mr. Justice Holmes . . . . (*Johnson v. United States* . . . .)" (*Id.* , at p. 473; 96 S.Ct. at p. 2745, 49 L.Ed.2d at p. 638.)

To be sure, Penal Code section 1524, subdivision (c) makes explicit and exhaustive procedural provisions for the search of, inter alia, a lawyer's office, and for judicial consideration of any claim of privilege as to matters seized by a special master in obedience to the warrant. But such evidence may be kept from the law enforcement agency only if it is found to come within a relevant privilege. ("At the hearing, the party searched shall be entitled to raise . . . a claim that the item or items are privileged, as provided by law." (§ 1524, subd. (c)(2); first sentence, second paragraph.)

The claim that certain evidence constitutes impeachment evidence is not a claim that the evidence is privileged. Indeed, defendant makes no argument that potentially impeaching evidence is "privileged" on that account. But other than demonstrating that the search violated the Fourth Amendment interests of the defendant,[3] a meritorious claim of privilege is the *only* means by which the defendant may bar access by the prosecution to the fruits of a warranted search.

The problems inherent in the notion that the government's right to utilize evidence seized in a warranted search is limited to evidence it could seek by discovery seem obvious. For one thing, evidence the defense may regard as "defense impeachment evidence" may be relevant for other reasons as well. For another, how is a searching officer to distinguish "defense impeachment evidence" from other evidence the seizure of which is authorized by warrant. How would a suspect bring the "impeachment" potential of given evidence to the court's attention before the evidence had been examined by the seizing officers in furtherance

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[3] Defendant has no discernable standing to assert that the search of Mr. Miller's office violated his rights under the Fourth Amendment. See, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1171: " 'An illegal search or seizure violates the federal constitutional rights only of those who have a legitimate expectation of privacy in the invaded place or seized thing. (*United States v. Salvucci* (1980) 448 U.S. 83, 91-92 [65 l.Ed.2d 619, 628, 100 S.Ct. 2547].) The legitimate expectation of privacy must exist in the *particular area searched or thing seized* in order to bring a Fourth Amendment Challenge.' [Citation.]" (Emphasis the court's.)

of their investigation? Might such an argument be raised only where, as here, a "privilege" is asserted as well? If so, why?

The examples need not be multiplied. The notion that the government's access to unprivileged evidence seized in a warranted search is restricted to the evidence listed in Penal Code section 1054.3 is footless.

III

EVIDENCE OF THE STATEMENTS OF POTENTIAL WITNESSES, MADE TO DEFENSE COUNSEL OR HIS AGENT, IS NOT NECESSARILY THE "WORK PRODUCT" OF THE ATTORNEY

"Attorney work product protection is a separate and distinct doctrine from the attorney-client privilege, and, as noted above, is codified in criminal cases to preclude evidence of an attorney's writings that reflect his or her 'impressions, conclusions, opinions or legal research or theories' from being disclosed during discovery to the opponent in litigation. [Citations.] Thus, statements that merely reflect what a person said during an interview are not work product. (*Hobbs v. Municipal Court* (1991) 233 Cal.App.3d 670.)" (*People ex rel. Lockyer v. Superior Court* (2000) 83 Cal.App.4th 387, 399, disapproved on another ground in *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 719 n. 5.) That is so because "recorded or written statements of a prospective witness are considered material of a nonderivative or noninterpretative nature." (*Rodriguez v. McDonnell Douglas Corporation* (1978) 87 Cal.App.3d 626, 647. And see 2 Jefferson, Cal Evidence Benchbook (Cont.Ed.Bar 3d ed. 1997) Privileges, § 41.12, p. 915.)

However, comments by the interviewer (assuming the interviewer is a lawyer or his agent) concerning the statements are protected absolutely from disclosure, as a "writing that reflects an attorney's [or attorney's agent's] impressions, conclusions, opinions, or legal research or theories." (*Rodriquez, id.*, 87 Cal.App.3d at p. 648.) In some cases, separating the interviewer's comments from the interviewee's statements may prove impossible. (See *Rodriguez v. McDonnell Douglas Corporation, supra*, 87 Cal.App.3d at p. 648 ["Miller's

comments were so intertwined with Higgins' recorded statements that all portions of the notes should be held protected by the *absolute* portion of the attorney's work-product privilege"].)

Defendant cites *Nacht & Lewis Architects, Inc. v. Superior Court (McCormick)* (1996) 47 Cal.App.4th 214 as holding "that notes or recorded statements taken by counsel while interviewing potential witnesses are 'core' work product as defined in Code of Civil Procedure section 2018, subdivision (c). . . . *Nacht* makes it clear that when an attorney questions or otherwise seeks out information from potential witnesses, recordings thereof are absolutely protected from disclosure." (Resp. 7:9-15.)

With due respect, defendant reads too much into *Nacht*. That case involved two interrogatories "requesting the identity of and information regarding individuals interviewed concerning the incident (form interrogatory No. 12.2) and individuals from whom written or recorded statements were obtained concerning the incident (form interrogatory No. 12.3)" (47 Cal.App.4th 214, at p. 216.) Defendants replied identically to each of those interrogatories: "Counsel for the Defendants has conducted interviews of employees of Nacht & Lewis Architects. The information collected from the interviews is protected by the attorney-client privilege and work product doctrine." (*Id.*, pp. 216-217.) The trial court ordered defendants to answer the interrogatories.

The Court of Appeal granted defendants' petition for writ of mandate. It readily agreed with defendants that the identity of the individuals from whom statements were obtained was entitled to qualified work-product protection.

"The issue is more subtle as to interrogatory No. 12.3," since a reasonable construction of defendants' response was that "defendant's counsel collected from the employees statements the employees had previously written or recorded themselves." If so, employee-authored statements "neither reflect an attorney's evaluation of the case nor constitute derivative material, and therefore are neither absolute nor qualified work product." On the other hand, "any . . . notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's 'impressions, conclusions, opinions, or legal research or theories' within the meaning of Code

of Civil Procedure section 2018, subdivision (c)." (*Id.*, p. 217.)

The *Nacht* court plainly did not say that the physical act of, e.g., tape-recording a potential witness's statement, or taking it down in shorthand, makes the statement "core work product" without more. The cases before and since *Nacht* have given attorney-"recorded" interviews enhanced protection only when the attorney went beyond acting as scrivener and injected his own "impressions, conclusions, opinions, or legal research or theories" into his recordation of the interview. To qualify as either "conditional" ("qualified") work product or "core" work product, the information sought must be "derivative" or "interpretative" material. A potential witness' own statement (written or recorded) is neither. An attorney-scriviner's recordation of a witness' statements becomes "core" work product only if it "reflects the attorney's impressions, conclusions, opinions, or legal research or theories." (See Code Civ. Proc., § 2018(c) and *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, at pp. 68-69.)

Defendant insists that "questions posed by an attorney (or the attorney's agent at the direction of the attorney) will necessarily reveal the attorney's impressions, conclusions, opinions, or legal research or theories." (Resp. 7:19-22; defendant's emphasis.)

Not so. Unless the interrogator is particularly garrulous in formulating his questions, the questions themselves directly reveal only the nature of the information he wants the interviewee to provide, and indirectly his interest in obtaining that information. A lawyer's interest in obtaining given information does not fit comfortably within the meaning of "impressions, conclusions, opinions, or legal research or theories."

In any event, defense counsel's motivation for interviewing potential witnesses is no secret, even if his agenda is disclosed by the questions he asked. In his hour-long interview on December 18, 2003 on CNN's "Larry King Live," Attorney Geragos was generous in sharing with Mr. King the fact that he "was brought in" on the case the preceding February "when somebody – wisely, in retrospect – felt that there was something wrong here with this particular family. And they knew there was something wrong." (Verbal emphasis Mr. Geragos'.) Mr. Geragos went on to assert that he and his investigators have "monitored the whole way; investigation." "We know everything about this case from Day One, if you will."

> . . . I and my investigator already have statements. . . . [W]e know that after March 10th we've got statements. . . . [W]e've got videotape of; audiotape, and everything else of these people; locked into statements. Gave them every opportunity in the world to make any kind of a complaint, and they didn't. (Verbal emphasis Mr. Geragos'.)

Assuming that "locking people into statements" on the factual issue of Mr. Jackson's relationship with a young boy and his family members is a smart tactic, it also is an obvious one. In our respectful submission, barring the prosecution's access to an individual's recorded statements concerning a particular subject for no better reason than that defense counsel deemed it prudent to interview the witness for obvious (and publicly-revealed) reasons would not further the undeniable interest in protecting an attorney's "core" work product.

CONCLUSION

Plaintiff's right of access to relevant information is barred only if the information is privileged, or if the means of its acquisition violated the United States Constitution. Access to material obtained by a presumptively valid search warrant is not governed by the limits set out in Penal Code section 1054.3, because evidence characterized as "impeachment evidence" when in the hands of the defendant may have other uses in the hands of the prosecution. And statements obtained by a lawyer in his interview of prospective witness are not the lawyer's "core" work product. Nor are the questions that prompted the answers "core" work product, unless the questions themselves evidence the attorney's "impressions, conclusions, opinions, or legal research or theories."

DATED: February 9, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR.
District Attorney

By: _____
Gerald McC. Frankin, Senior Deputy

Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA BARBARA)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and I am not a party to the within-entitled action. My business address is: District Attorney's Office; Courthouse; 1105 Santa Barbara Street, Santa Barbara, California 93101.

On February 9, 2004, I served the within PLAINTIFF'S REPLY TO "DEFENDANT'S RESPONSE TO PLAINTIFF'S MEMORANDUM REGARDING DEFEDANT'S CLAIM OF ATTORNEY-CLIENT AND ATTORNEY WORK-PRODUCT PRIVILEGES" on Defendant, by MARK JOHN GERAGOS, ROBERT SANGER, STEVE COCHRAN and BENJAMIN BRAFMAN, his counsel in this action, and on BRADLEY MILLER, by his counsel, DANIEL V. NIXON, by faxing a true copy to each of them at the facsimile number shown below the addresses on the attached Service List, and then by causing the Santa Barbara County Mailing Center to mail two true copies thereof to counsel at those addresses, by first class mail, postage fully prepaid.

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

Executed at Santa Barbara, California on this 9th day of February, 2004.

Rosemary Moll

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