

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

MAR 07 2005

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SANTA BARBARA
10 SANTA MARIA DIVISION

11
12 THE PEOPLE OF THE STATE OF CALIFORNIA,)
13)
14) Plaintiff,
15)
16) v.
17)
18 MICHAEL JOE JACKSON,
19)
20) Defendant.

No. 1133603
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS
INDICTMENT AND TO PERMIT
DEFENDANT'S "BROADCAST
RESPONSE" TO BASHIR
PROGRAM
DATE: March 11, 2005
TIME: 8:30 AM
DEPT.: SM2 (Melville)

21 Introduction:

22 Defendant moves for an order dismissing the pending indictment for what it
23 characterizes as the Court's "outrageous" conduct (Motion 10:2) in "exempting" Journalist
24 Martin Bashir from the Court's protective order in order to "permit" Mr. Bashir to broadcast a
25 follow-up production to "Living with Michael Jackson," all to defendant's prejudice.¹ He also

26
27 ¹ The program was aired after the prospective jurors in this case were admonished not to
28 watch television programs dealing with Michael Jackson or the pending prosecution of him.
Defendant does not address that fact in his motion.

1 moves for an order permitting him "to respond in a national broadcast with equal time and
2 under the same terms and conditions that Witness Bashir was permitted to defame Mr.
3 Jackson." (Motion 2:12-15.) That latter request is not framed as a proposed alternative to
4 dismissal.

5 Defendant correctly notes that the Court's "Gag Order" dated January 23, 2004
6 placed certain restrictions on the parties, their lawyers, certain other government employees and
7 all "persons subpoenaed or expected to testify in this matter" (Motion 2::4-23; see Exh. A. to
8 the Motion).

9 On January 28, 2005, the Court considered the request of ABC Commentator Martin
10 Bashir, subpoenaed as a witness by the People, for an order effectively quashing the subpoena
11 for his attendance as a witness and exempting him from the restrictions imposed on other
12 subpoenaed witnesses in the case. The Court ruled as follows:

13 "The Court denied the requested protective order re: the Bashir subpoena. The
14 Court further ordered that the intent of the 'Gag' Order is that Mr. Bashir, along with other
15 witnesses, would not identify the minors involved and would not disclose through the media
16 evidence on the charges known to him by personal observation; that as long as the order
17 remains in effect Mr. Bashir will be bound by these restrictions, but he is not prevented from
18 reporting or giving commentary to the same extent that a non-witness journalist could."
19 (Criminal Minute Order, 1/28/05; p. 5; Exh. B to the Motion.)

20 Defendant² argues:

21 1. The court's order of January 28, 2005 "modified" the earlier "gag" order and
22 created an "exemption" for "Witness Bashir, and only for Witness Bashir." (Motion 3:7-8.)³
23 "The court permitted Witness Bashir, above any other witness, including other witness
24

25 ²We say "defendant," but it is Attorney Oxman who authored the pending motion, and it is
26 Attorney Oxman, not defendant, who is responsible for its rhetorical excesses.

27 ³ With nice inconsistency, defendant also claims that the Court's protective order is now
28 "riddled with exemptions." (Motion 7:23.)

1 journalists such as Larry King, Rita Cosby, and Ed Bradley, to be exempt from the court's
2 Protective Order" (Motion 3:20-21);

3 2. "The Court modified the protective order for Witness Bashir without cause"
4 (Motion 2:24);

5 3. The Court's order granting that "exemption" was improper, "irrational" [Motion
6 8:6], "outrageous" (*id.* 10:1-3) and unwarranted.

7 4. "The 'gag order' is no longer neutral as to all persons and now contains
8 exemptions based on content and class of speaker. It cannot pass constitutional muster in its
9 present form. *Hurvitz v. Hoefflin* 84 Cal.App.4th 1232, 1241." "By creating one 'gag order'
10 for one class of witnesses, but another 'gag order' for another class of witnesses, the Court in
11 Mr. Jackson's case not only failed in the second and third prongs of the [*Hurvitz*] test, but also
12 engaged in flagrant misconduct." (Motion 7:17-23.)

13 5. "The Court's modification of the January 23, 2004, Protective Order [was] to
14 permit Witness Martin Bashir to engage in an irrational and fraudulent attack on Mr. Jackson in
15 several nationally broadcast television programs" (Motion 6:13-15.) Because Mr.
16 Bashir's most recent broadcasts followed the Court's ruling that he was not prevented by the
17 Protective Order from pursuing his profession, the court "authorized," "sanctioned" and
18 "approved" the content of those broadcasts and "permitted" Martin Bashir "to engage in a
19 unprovoked, nationally broadcast attack against Mr. Jackson the same as if he were a non-
20 witness." (Motion 3:20-23.) "By granting Witness Bashir an exemption from the 'gag order'
21 so that he could pay witnesses to give interviews and defame Mr. Jackson in two (2)
22 nationwide television broadcasts, the Court has permitted the case to be tried in the press."
23 (Motion 7:1-3.)

24 6. Defendant is very upset about the two-hour television program produced by
25 Bashir and broadcast by ABC on February 17, 2005. (Motion, *passim*.)

26 7. "To the public, and especially to Mr. Jackson, it appeared the Court approved of
27 what Witness Bashir did because he could not have done it without the Court's help." (Motion
28 4:18-19.) "Not only the jury, but also the world, . . . realizes the Court gave special permission

1 to a vindictive witness to engage in a vicious attack against Mr. Jackson. The Court is
2 irreversibly tainted with the appearance of impropriety, favoritism, and prejudice against Mr.
3 Jackson.” (Motion 8:21-24.)

4 8. The Court’s order “created a discrimination against Mr. Jackson” (Motion 3:19-
5 20), or at least “the appearance of impropriety, favoritism, and a violation of civil rights”
6 (Motion 2:10) that was “invidious” (*id.*, 6:27) and “inexcusable” (*id.*, 4:1).

7 The Court[-] approved assault on Mr. Jackson was unlike any prior
8 incident in the history of American law or journalism. No court has ever
9 permitted, by modifying a “gag order,” a witness to engage in such a
10 vicious and vindictive nationwide broadcast against a party to a
11 proceeding before it, and the appearance of impropriety created by the
12 Court’s modification of the “gag order” to permit Witness Bashir’s
13 attack will live in infamy.

14 (Motion 4:4-8.)

15 9. The court’s modification of the protective order for Mr. Bashir “violated Mr.
16 Jackson’s rights to a fair trial” (Motion 2:12-15);

17 10. Therefore, the case should be dismissed; and, finally

18 11: “Mr. Jackson should be permitted to respond in a national broadcast with equal
19 time and under the same terms and conditions that Witness Bashir was permitted to defame Mr.
20 Jackson.”

21 Attorney Oxman followed his usual practice of repeating the argument portion of
22 his motion, word for word, in his supporting Declaration. (Compare Motion 1:19 – 6:22 with
23 Declaration 1:7 – 5:27.)

24 Discussion:

25 Virtually everything about Defendant’s “Motion to Dismiss” is wrong. It is wrong
26 in its premise that the court “modified” its protective order to create an “exemption” for Martin
27 Bashir. Importantly, it is wrong in its assumption that the broadcast about which he so bitterly
28 complains (see Exh. D to Motion; a transcript of the “Primetime Live” broadcast of February
17, 2005) violates the Court’s Protective Order of January 23, 2004. It is mistaken in its

1 statement that the Court's order regarding application of that protective order to a broadcast
2 journalist is "discriminatory." It is overtly contemptuous in characterizing the Court's order as
3 "irrational" and the Court itself as having engaged in "flagrant" (Motion 7:22) and
4 "outrageous . . . conduct" (*id.*, 10:2) and in committing "an inexcusable act of discrimination"
5 (*id.*, 10:19) pursuant to "a design to destroy Mr. Jackson" (*id.*, 11:5).

6 Defendant does not appear to understand the Court's ruling on Mr. Bashir's motion
7 for a determination that he was not bound by the terms of the protective order. The Court
8 denied that motion.

9 To be sure, the Court quite properly deemed it appropriate to state what a practicing
10 television journalist who is also under subpoena as a witness may say and not say in the course
11 of his employment, consistently with the language and intent of the protective order and the
12 First Amendment. It did so because its denial of Mr. Bashir's motion required without such a
13 statement would have created confusion on his mind and in the minds of all of the print and
14 television journalists who may find themselves subpoenaed as a witness in this lawsuit, for one
15 reason or another.

16 Defendant's argument that that the Court "modified the protective order for witness
17 Bashir without cause" (Memo 2:24) is baseless. What does he think the Court was doing when
18 it considered Mr. Bashir's written motion and the arguments of counsel on January 28th?

19 At the risk of being repetitious, the Court's statement concerning the applicability
20 of its protective order to journalists covering this case was not a "modification" of the
21 protective order. Nor was the Court's clarifying statement made "without cause."

22 The tension between a "celebrity" defendant's undoubted right to have the merits of
23 the case against him considered by an unbiased jury and the public's right to know why the
24 defendant is being prosecuted is what gave rise to the protective order in the first place.

25 Courts are not uniquely equipped with prescience. The provisions of a protective
26 order the court made early in the prosecution of a given case may later be shown to have
27 provided ambiguous guidance to individuals arguably within its scope. Precisely for that
28 reason, anyone who has reason to question the applicability of the protective order's

1 restrictions to him or her may seek clarification of the scope of the order with respect to that
2 individual's activity.

3 The degree of involvement of each of the several hundred witnesses summoned by
4 one side or the other as a witness in the trial of this case ranges from "incidental" to "fully
5 involved." The burden imposed by the protective order on a given witness is roughly parallel
6 to the extent to which he or she has been or continues to be involved in the case – and the
7 extent to which application of the protective order impacts the ability of that witness to carry on
8 with his or her life and employment.

9 The investigators in this matter are "fully involved" in the progress of the case.
10 Plainly, they need to communicate with one another and with others (e.g., potential witnesses)
11 in the course of their ongoing duties. Just as plainly, there is little or no need for those
12 investigators to make statements to the media for public consumption. The Court's protective
13 order quite properly limits the inclination of one or another of those investigators to "go
14 public" with information that would not otherwise find its way into the morning paper or the
15 evening telecast.

16 A journalist whose primary assignment is to cover the prosecution of a "celebrity,"
17 and who has been subpoenaed as a witness in the trial of the matter by reason of his or her
18 personal involvement in some of the events that led to the prosecution, is uniquely situated.
19 His or her job is to "go public" with the fruits of his/her own investigation of the case. In a
20 given case, that information may discomfit the prosecution. In a given case, it may disclose
21 more than the defendant would choose to have revealed.

22 The considerable body of decisional law confirming the First Amendment right of
23 reporters to publish whatever comes to them in the course of their employment was discussed
24 with admirable thoroughness by Mr. Bashir's counsel. It is not explicitly challenged by
25 defendant in the pending motion. Instead, he simply assumes, without discussion, that the
26 ability of a given reporter to publish information the reporter has gained independently of his or
27 her own observations may be stymied by service upon him or her of a subpoena by either side.

28 In his just-filed "Opposition to Motion for Clarification That "Gag Order" Docs Not

1 Apply to Jay Leno," a television personality subpoenaed by the defense, defendant reiterates his
2 belief that subpoenaing a television personality in this matter prevents that individual from
3 saying anything at all about defendant's current travails.

4 No useful purpose would be served by responding further, allegation by allegation, to
5 defendant's splenetic "motion."

6 Conclusion:

7 Defendant's "motion to dismiss and motion to permit broadcast response" is quite
8 meritless. It should be denied.

9
10 DATED: March 7, 2005

11 Respectfully submitted,

12 THOMAS W. SNEDDON, JR.
13 District Attorney

14 By: 

15 Gerald McC. Franklin, Senior Deputy

16 Attorneys for Plaintiff
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2 **PROOF OF SERVICE**


3 STATE OF CALIFORNIA
4 COUNTY OF SANTA BARBARA } SS

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6 I am a citizen of the United States and a resident of the County aforesaid; I am over
7 the age of eighteen years and I am not a party to the within-entitled action. My business
8 address is: District Attorney's Office; Courthouse; 1112 Santa Barbara Street, Santa Barbara,
9 California 93101.

10 On March 7, 2005, I served the within PLAINTIFF'S OPPOSITION TO MOTION
11 TO DISMISS INDICTMENT AND MOTION TO PERMIT BROADCAST RESPONSE on
12 Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER and BRIAN OXMAN, by
13 personally delivering a true copy to Mr. Sanger's office and a true copy to be transmitted to Mr.
14 Mesereau at the confidential facsimile number given us for their Santa Maria branch office.

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

16 Executed at Santa Barbara, California on this 7th day of March, 2005.

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18 Gerald McC. Franklin

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