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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 FOLLOW-UP MEMORANDUM REGARDING DEFENDANT'S CLAIM OF ATTORNEY WORK-PRODUCT PRIVILEGE FOR "ITEM 818" SEIZED IN WARRANTED SEARCH OF INVESTIGATOR MILLER'S OFFICE DATE: April 2, 2004 TIME: 8:30 A.M. DEPT: SM 2 (Melville)

Introduction:

By its "Findings and Order Re: Claims of Work Product Privilege," filed March 11, 2004, the Court barred access by the prosecution to "Item 818," an audiotape of an interview by a defense investigator for Attorney Mark Geragos of unidentified individuals, on the ground that because it is "qualified work product," "the balance weighs against release of the audiotape" to the prosecution.

The People requested reconsideration by the Court of that aspect of its Findings and Order. We argued that lawfully seized, relevant evidence is not protected from inspection by

the prosecution in a criminal case because it is "qualified work product." Only "core" work product is so privileged, we asserted.

The Court calendared the request for reconsideration for hearing on April 2, 2004, and has asked counsel

> to be prepared to comment on the following possible line of analysis. Prior to the passage of Proposition 115, the California Supreme Court held that the work product doctrine applied to criminal cases and protects the work product of defense investigators. [See *People v. Collie* (1981) 30 C3d 43, 59]. Penal Code § 1054.6 and the Supreme Court's observation at *Izazaga v. Sup. Ct.* (1991) 54 C.3d 356, 382, fn. 19, have specific references to issues in criminal discovery. Does, then, the broader protection for qualified work product privilege have application before a criminal defendant has been held to answer or indicted?

This Memorandum is respectfully offered for consideration by the Court and opposing counsel in anticipation of argument on April 2nd.

> "ITEM 818" WAS SEIZED IN OBEDIENCE TO A SEARCH WARRANT, AS EVIDENCE WHICH MIGHT FURTHER A CRIMINAL INVESTIGATION. THAT INVESTIGATION IS ON-GOING. UNLESS THE EVIDENCE IS OF SUCH A NATURE THAT IT MAY NEVER BE CONSIDERED BY THE PROSECUTION, IT IS MAKES NO SENSE TO BAR THE GOVERNMENT'S ACCESS TO IT UNTIL THE DEFENDANT HAS BEEN HELD TO ANSWER OR INDICTED

In our respectful submission, a careful reading of the Supreme Court's decision in *People v. Superior Court* (*Laff*) (2001) 25 Cal.4th 703 ("*Laff*") provides an answer to the Court's question whether the broader protection afforded by the qualified work product privilege has application to the case of a criminal defendant before he has been held to answer or indicted.

Laff mandated the procedure – largely modeled on the procedure upheld by the Court of Appeal in *People v. Superior Court* (*Bauman & Rose*) (1995) 37 Cal.App.4th 1757 ("*Bauman & Rose*") – of an in-camera hearing, even prior to the filing of a complaint in a criminal case, to determine whether evidence seized pursuant to warrant in a criminal

investigation was privileged from disclosure to the government.

In doing so, *Laff* rejected the People's argument "that neither the attorney-client privilege nor the work-product doctrine precludes disclosure of documents properly seized under a valid search warrant." (*Id.*, at p. 712.)

> The People claim that the doctrine precludes disclosure of attorney work product only during *discovery*, and that a search warrant is not a tool of discovery. Therefore, according to the People, a hearing to determine the applicability of the work-product doctrine would serve no purpose. Contrary to the People'[s position, however, the work-product doctrine applies outside the context of formal discovery between parties to a pending action.

(*Id.*, at p. 717; italics the court's.)

Laff noted that "the work-product doctrine is codified in [Code of Civil Procedure] section 2018. . . . Pursuant to subdivision (c) of section 2018, '[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be *discoverable* under any circumstances.' (Italics added.)" (*Ibid.*)

> The work-product doctrine expressly is made applicable to criminal cases by Penal Code section 1054.6, which states: "Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States." (See *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 380-382; *People v. Collie* (1981) 30 Cal.3d 43, 59 [holding, before enactment of Penal Code section 1054.6, that the work-product doctrine applies in criminal cases].)

(*Ibid.*)

Subdivision (c) defines what is referred to as "core" work product, as distinct from what is known as "qualified work product," protected in civil cases by subdivision (b) of the same section. The *Laff* court's reference to "the work-product doctrine . . . applicable to

criminal cases" is, then, a reference to "core work product" and only core work product. *Laff* said nothing that would suggest that qualified work product, as distinct from "core" work product, was likewise privileged from access by investigators pursuing a criminal investigation. It cited a number of cases, both state and federal, "holding that materials seized pursuant to a search warrant, as part of a criminal investigation, are protected by the work-product doctrine" (*id.*, pp. 718-719). All of those cases involved core work product.

The Supreme Court noted that "If law enforcement authorities were permitted to seize and inspect privileged items *that would be protected against discovery in a criminal proceeding*, the prosecution simply could delay filing charges until a search warrant for those items is executed. Although the prosecution could not introduce the privileged information discovered by such a search as evidence in the proceeding, it nevertheless could use the information in preparing its case and thereby gain an unfair advantage over individuals intended to be protected by the privilege." (*Id.*, p. 719; italics added.) But of course, only "core" work product is "protected against discovery in a criminal proceeding" by Penal Code section 1054.6.

The *Laff* court upheld the procedure earlier approved by *Bauman & Rose*: "[T]he superior court has an obligation to consider and determine claims that materials seized pursuant to a search warrant . . . are protected by the attorney-client privilege or work-product doctrine and thus should not be inspected by or disclosed to law enforcement authorities." (*Id.*, p. 720.) But as noted, the only kind of "work product" that is protected from inspection in a criminal case is core work product.

Laff intended that evidence seized pursuant to a warrant and as to which a claim of privilege had been asserted would be kept from inspection by government investigators until – and only until – the claim, if contested, could be adjudicated in an in-camera hearing and found to have merit. The Supreme Court noted that "The superior court did not err in ordering that the documents seized from the attorneys remain under seal *pending resolution of their claims*." (*Id.*, pp. 720-721, n. 8; italics added.)

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In summary, *Laff* held that only "core" work product is "privileged" from disclosure to and inspection by investigators in criminal cases, because the Legislature has accorded that privilege only to core work product in a criminal proceeding. In a criminal investigation in which evidence has been seized pursuant to warrant and a claim is asserted that some or all of the evidence is protected from disclosure as "attorney work product," the holder of that privilege is entitled to a prompt, in-camera hearing on the merits of his claim before the seized evidence may be disclosed to the investigators and inspected by them.

The People were mindful of *Laff's* holding when the warrants were sought and executed in this case. *Laff* involved a search of lawyers' offices, while here the premises searched belonged to a private investigator. But private investigators frequently work for attorneys, and there was absolutely no hesitation of the part of the searching officers in this case to accept Attorney Daniel Nixon's assertion of attorney-client and work product privileges and in securing the evidence without examining it pending this court's determination of the validity of his claims.

To paraphrase *Laff*, this Court has "resolved the claims," in precisely the fashion approved by the *Bauman & Rose* decision and mandated by *Laff*. It forthrightly declared that "None of the tapes at issue in this proceeding qualify for absolute work product protection." (Order 2:18-19.)

That being the case, the investigation properly interrupted by the timely assertion of the only privileges that apply in a criminal prosecution to evidence seized from a third party – the privilege against disclosure of attorney-client communications and "absolute" attorney work product – should now be permitted to proceed in the usual fashion.

Evidence entitled to the status of "qualified work product" is not privileged from disclosure in a criminal investigation or a later prosecution, because the Legislature has made it crystal-clear that only "core work product" enjoys that privileged protection from disclosure in a criminal case.

The answer to this Court's question, "Does . . . the broader protection [of the] qualified work product privilege have application before a criminal defendant has been held to

answer or indicted" must, then, be "No." The qualified work-product privilege applies only to discovery in civil cases. Prosecutorial discovery in criminal cases is limited by Penal Code section 1054.3 and, with respect to "work product," by section 1054.6 ("core" work product only). The government's access to work-product evidence seized in a warranted search enjoys no greater protection.

For purposes of an ongoing investigation, access to evidence seized in a warranted search is limited by *Laff* and earlier cases, and by statute, only to evidence of attorney-client communications and to core work product. *Laff* mandates an in-camera hearing expressly for the important but limited purpose of obtaining a judicial determination whether core work product had been seized. "Qualified" work product may well further a criminal investigation, but it is not protected from inspection for that reason. If the Supreme Court had intended in *Laff* to have qualified work product as well as core work product identified in the hearing and thereafter shielded from disclosure until the target of the investigation had been indicted or held to answer, it surely would have said so.

DATED: April 1, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY
County of Santa Barbara

Gerald McC. Franklin, 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 April 1, 2004, I served the within PLAINTIFF'S FOLLOW-UP MEMORANDUM REGARDING DEFENDANT'S CLAIM OF ATTORNEY WORK-PRODUCT PRIVILEGE FOR "ITEM 818" SEIZED IN WARRANTED SEARCH OF INVESTIGATOR MILLER'S OFFICE on Defendant, by MARK JOHN GERAGOS, and on associated counsel, by faxing a true copy to counsel at the facsimile number shown with the address of each on the attached Service List, and then by causing to be mailed a true copy (two true copies, to Attorney Geragos) to each counsel at that address.

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

Executed at Santa Barbara, California on this 1st day of April, 2004.

Rosemary Moll

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