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Attorneys for Non-Party Journalist
LARRY KING

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL JACKSON, et al.,

Defendant.

Case No. 1133603

MEMORANDUM IN SUPPORT OF NON-PARTY JOURNALIST LARRY KING'S REQUEST FOR ORDER LIMITING THE SCOPE OF HIS TESTIMONY; SUPPORTING DECLARATION OF JEFFREY BLUM

Date: May 19, 2005
Time: 8:30 a.m.
Dept.: 8

[Assigned to the Hon. Rodney Melville]
Action Filed: December 18, 2003

INTRODUCTION

Non-party journalist Larry King respectfully submits this memorandum of law concerning the application of the California shield law and the First Amendment reporter's privilege. As explained in greater detail below, the shield law is a constitutional provision that protects against the disclosure of unpublished information, and what is deemed to be "published" for purposes of the shield law is narrowly construed. A criminal defendant may, if the testimony sought from a reporter is necessary to secure his fair trial rights under the Sixth Amendment, overcome the shield law if he satisfies the requirements of Delaney v. Superior Court, 50 Cal. 3d 785, 805 (1990). The prosecution, by contrast, has no countervailing fair trial right sufficient to overcome the shield law. Miller v. Superior Court, 21 Cal. 4th 883, 898 (1999).

Journalists' unpublished information also may be protected under the qualified First Amendment privilege. Mitchell v. Superior Court, 37 Cal. 3d 268, 274-84 (1984); Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) ("Shoen I").[1] A party may overcome the First Amendment privilege "only upon a showing that the requested material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in this case." Shoen I, 48 F.3d at 416.

Mr. King, a television journalist employed by Cable News Network ("CNN"), has been subpoenaed by the defendant to appear at the trial in this matter. Mr. King is a well-respected journalist and has spent nearly fifty years in broadcasting. He is the host of CNN's *Larry King Live*, the first worldwide phone-in television talk show and CNN's highest-rated program.[2]

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[1] All non-California authorities cited in this brief were submitted to the Court two weeks ago in connection with Ian Drew's testimony.

[2] Described as the "Muhammad Ali of the broadcast interview," Mr. King has been inducted into five of the nation's leading broadcasting halls of fame and is the recipient of the prestigious Allen H. Neuharth Award for Excellence in Journalism. In addition, both his radio and television shows have won the George Foster Peabody Award for Excellence in Broadcasting. Throughout his career, Mr. King has accumulated more than 40,000 headlining interviews, including every U.S. president since the Ford Administration, former U.S. Senate Majority Leader Trent Lott, former British Prime Minister John Major, current British Prime Minister Tony Blair, Marianne Pearl (widow of slain journalist Danny Pearl), former Enron CEO Jeffrey Skilling, Marlon Brando,

Although the subpoena does not state the purpose of the testimony or the material that Mr. King is to be questioned about, the defense has represented to counsel that the defense will not seek any information from Mr. King that is "unpublished," or that would reveal the identification of confidential sources. For that reason only, Mr. King has not filed a motion to quash the subpoena. (Blum Decl. at ¶ 3.) But Mr. King intends to object to any question – from either side – that seeks testimony about "unpublished" information obtained by him in the course of newsgathering activities, and submits this memorandum in advance of his scheduled appearance to assist the Court in its consideration of these objections.

2.

THE CALIFORNIA REPORTER'S SHIELD LAW.

Article I, Section 2(b) of the California Constitution provides, in pertinent part, that a journalist:

> shall not be adjudged in contempt [by a court] for refusing to disclose the source of any information procured while so connected or employed [as a news reporter], ... or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.

As used in this subdivision, "unpublished information" includes "information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such materials has been disseminated." Cal. Const. Art. I, § 2(b).

A. The California Shield Law Broadly Protects Against The Compelled Disclosure Of Unpublished Information.

Mindful of the shield law's constitutional mandate, California courts have interpreted the law broadly. As the California Supreme Court explained in Delaney, the shield law applies to any unpublished information, even if not obtained in confidence:

Johnny Carson, Mikhail Gorbachev, Dr. Martin Luther King, Monica Lewinsky, Sean Penn, Elizabeth Taylor, Margaret Thatcher, Oprah Winfrey, and Malcolm X.

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> The language of article I, section 2(b) is clear and unambiguous ... The section states plainly that a newsperson shall not be adjudged in contempt for 'refusing to disclose any unpublished information' ... The use of the word 'any' makes clear that article I, section 2(b) applies to all information, regardless of whether it was obtained in confidence. Words used in a constitutional provision 'should be given the meaning they bear in ordinary use.' ... In the context of article I, section 2(b), the word 'any' means without limit and no matter what kind.

50 Cal. 3d at 798 (citations omitted); accord New York Times Co. v. Superior Court, 51 Cal. 3d 453, 461-62 (1990) (unpublished photographs of a public event are protected by the shield law).

The shield law thus immunizes from compelled disclosure any information received, or materials generated or compiled, during the newsgathering process that have not actually been published. Such "unpublished information" is protected from disclosure even when closely related information has been published. For example, in Playboy v. Superior Court, 154 Cal. App. 3d 14, 21 (1984), a civil litigant sought audio and videotapes, notes, and other documents relating to an interview conducted by a reporter for Playboy magazine, portions of which had been republished verbatim in an article. 154 Cal. App. 3d at 21. The court rejected the litigant's argument that the protections of California's shield law were inapplicable because portions of the interview were published, noting that the language in Article I, Section 2(b) defines "unpublished information" as including any information "not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated[.]" Id. The court noted:

> Against the construction we have adopted, defendants contend that petitioner [Playboy] has waived whatever protection it might have under article 1, section 2, by having published information that is either an exact transcription of the ... source materials or so closely derived therefrom that disclosure of the source materials would essentially be a repeat disclosure of the already published statements[.]
>
> It is evident that the published material . . . in the article is either based upon or related to the underlying records of the interview. Accordingly, this material falls squarely within the ambit of article I, section 2 protection whether the published information is an exact transcription of the source material or paraphrases or summarizes it.

Id. at 23-24.

Thus, California's statutory and constitutional provisions protect Mr. King from being compelled to disclose any information that he has not already specifically published, regardless of whether that information was gained in confidence, and regardless of whether related information has been published.

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B. As A Criminal Defendant, Mr. Jackson May Overcome The Shield Law Only Where Necessary To Secure His Right To A Fair Trial.

In Delaney, the California Supreme Court recognized that the journalist's immunity afforded by the shield law may be "overcome in a criminal proceeding on a showing that nondisclosure would deprive the defendant of his federal constitutional right to a fair trial." 50 Cal. 3d at 798. The Court then explained how trial courts should proceed to evaluate claims by a defendant that information protected by the shield law should be disclosed.

Where, as here, a journalist is entitled to the protections of the shield law, the court must engage in a "two-stage inquiry" before it can properly find that the journalist's rights under the shield law should be overcome. Miller, 21 Cal. 4th at 891. First, the defendant must "show that nondisclosure would deprive him of his federal constitutional right to a fair trial." People v. Sanchez, 12 Cal. 4th 1, 56 (1996). See also In re Willon, 47 Cal. App. 4th 1080, 1085 (1996) (holding "that the shield law protects the news media from contempt absent a specific showing that nondisclosure of the source will create a substantial probability of injury to a criminal defendant's right to a fair trial"). To satisfy this requirement, the defendant must establish "a reasonable possibility the information will materially assist his defense." Delaney, 50 Cal. 3d at 808. The "burden is on the criminal defendant to make th[is] required showing." Id. at 809.

In Delaney, the Court found that the defendant had satisfied this test because the reporters were eyewitnesses to the police officers' warrantless search of the defendant and were the only disinterested witnesses on the issue of whether the defendant consented to the search. 50 Cal. 3d at 814-16. In so holding, the Supreme Court found that the testimony sought from the reporters was "pivotal" and would "likely be determinative of the outcome" of the case. Id. at 815. In circumstances where the information sought from a journalist is less "pivotal" than it was in Delaney, courts have been reluctant to find that such information is likely to provide material assistance to the defense. See, e.g., Sanchez, 12 Cal. 4th at 57 (holding that defendant who sought unpublished information that "might have shown" that reporter's testimony regarding published information "was his own interpretation of [defendant's] account, not an actual admission," and "might have proven that [the reporter's] conclusion was not supported by the interviews" failed to

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make threshold showing required to overcome the shield law); People v. Cooper, 53 Cal. 3d 771, 820 (1991) (declining to compel reporter to produce anonymous letter describing mishandling of murder investigation where "the competency of the investigation, which was only tangentially relevant to the issue of guilt, was exhaustively explored").

Even if the defendant satisfies the "threshold requirement" discussed above, he or she is "not necessarily entitled to a newsperson's unpublished information." Delaney, 50 Cal. 3d at 809. Rather, the trial court must then proceed to the second stage of the Delaney inquiry and "consider the importance of protecting the unpublished information" by "balancing the defendant's and newsperson's respective . . . interests." Id.

The Delaney Court set forth four factors that a trial court should weigh in applying this balancing test:

- First, the court must consider whether "disclosure would somehow unduly restrict the newsperson's access to future sources and information," because "protection of that ability is the primary purpose of the shield law." Delaney, 50 Cal. 3d at 810.
- Second, the "trial court must determine whether the policy of the shield law will in fact be thwarted by disclosure." Id. at 811. The shield law was enacted to prevent journalists from being subpoenaed routinely by litigants; "'[b]ecause journalists not only gather a great deal of information, but publicly identify themselves as possessing it, they are especially prone to be called upon by litigants seeking to minimize the costs of obtaining needed information.'" Miller, 21 Cal. 4th at 898 (citation omitted).
- Third, the court must consider the "importance of the information to the criminal defendant." Id. Specifically, where a defendant is "able to show that the evidence would be dispositive in his favor, ... the balance will weigh more heavily in favor of disclosure than if he could show only a reasonable possibility the evidence would assist his defense." Id.

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- Fourth, the Court should consider "whether there is an alternative source for the unpublished information." Id. at 811-12. Where an alternative source exists, courts require parties to seek testimony from that witness, rather than from a reporter.

Only if the balance of these factors favors the defendant may he compel a reporter to testify about unpublished information.

C. The Prosecution Does Not Have A Countervailing Fair Trial Right Sufficient To Overcome The Shield Law.

The California Supreme Court has squarely held that, unlike a criminal defendant, the prosecution has no constitutional interest sufficient to overcome the shield law's immunity against the compelled disclosure of unpublished information. Miller, 21 Cal. 4th at 896-97. In Miller, the California Supreme Court reaffirmed that California's shield law "is, by its own terms, absolute rather than qualified in immunizing a newsperson from contempt for revealing unpublished information obtained in the newsgathering process." 21 Cal. 4th at 890 (emphasis in original). The prosecution thus cannot compel Mr. King testify about unpublished information.

D. The Court Should Not Permit The Prosecution To Seek Unpublished Information On Cross-Examination.

Under the Court of Appeal's decision in Fost v. Superior Court, 80 Cal. App. 4th 724, 731 (2000), before a trial court permits testimony on direct examination of a reporter even about published information, it should examine the ultimate impact of such testimony on the reporter's shield law protection upon subsequent cross-examination. In Fost, the defendant sought testimony from a reporter concerning only what the witness conceded was published information, and the prosecution asserted that, once such testimony had been permitted, it was entitled to cross-examine the reporter, even though the questions would elicit unpublished information. Citing Miller, the Fost court held that because the prosecution could not require such testimony, the direct testimony of the reporter should be "barred or stricken." Id. at 736-37 ("where the shield law is invoked to resist proper cross-examination regarding material matters, a trial court may bar the receipt in

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evidence of the direct testimony to which it relates or strike such testimony if it has already been given").[3]

The Fost court recognized that the only exception to barring or striking direct testimony on such an occasion occurs where "the defendant can show that excluding or striking such evidence would deprive him of his federal constitutional right to a fair trial and, if he makes this threshold showing, that his right transcends the conflicting right protected by the shield law." 80 Cal. App. 4th at 737 (emphasis added). See also id. (where the witness refuses to disclose unpublished information on cross-examination, "the remedy is ... to move to exclude or strike related testimony sought from the witness on direct examination. The motion should be granted unless the defendant can [make such a showing]").

Fost also teaches that, wherever possible, a trial court should resolve the shield law issues before any testimony from the reporter is elicited. As the Court of Appeal noted in Fost: "[i]f the issue can then be anticipated, the defendant can be required to make this [Delaney] showing by an in limine motion in advance of trial." Id. at 736-37 & n.8. The very purpose of a preliminary motion "is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." Kelly v. New West Federal Savings, 49 Cal. App. 4th 659, 669 (1996). In other words, to avoid the difficulties of trying to "unring the bell" by striking a reporter's direct examination testimony after the fact, the court should resolve the issue before the reporter testifies at all.

Applying these principles, it is clear that the defendant cannot meet the Delaney test, and thus cannot inquire as to unpublished information. Meanwhile, the prosecution simply does not have the right to seek unpublished information from any journalist. Mr. King, therefore, respectfully asks the Court to limit his testimony solely to published information.

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[3] See also People v. Phillips, No. H020377, 2001 WL 518415, at *7 (Cal. App. 6 Dist., May 16, 2001) (relying on Fost, court held that trial court did not err in striking direct testimony of witness who refused to answer certain questions on cross examination); see also People v. Hecker, 219 Cal. App. 3d 1238, 1249 (1990); People v. Reynolds, 152 Cal. App. 3d 42, 47 (1984); 3 Witkin, California Evidence § 228, p. 295 (4th ed. 2000).

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3.

MR. KING INDEPENDENTLY IS PROTECTED BY A QUALIFIED PRIVILEGE UNDER THE FIRST AMENDMENT

In addition to the protections offered by California's shield law, Mr. King also has a qualified privilege against forced disclosure of unpublished information under the First Amendment to the United States Constitution.[4] The United States Supreme Court recognized the important First Amendment interests in journalists' newsgathering activities in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), observing that "news gathering is not without its First Amendment protections; without some protection for seeking out the news, freedom of the press could be eviscerated." Following Branzburg, numerous federal circuit courts have recognized a qualified "journalists' privilege" under the First Amendment, which protects both confidential sources and unpublished information. See, e.g., Shoen I, 5 F.3d at 1292 & n.5; Shoen v. Shoen, 48 F.3d 412, 416 (9th Cir. 1995) (Shoen II).

In Shoen II, the Ninth Circuit ruled that a party may overcome the qualified First Amendment privilege "only upon a showing that the requested material is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in this case." California state courts also have recognized a similar, qualified journalists' privilege arising from the First Amendment. See Mitchell, 37 Cal. 3d at 274-84; KSDO v. Superior Court, 136 Cal. App. 3d 375, 185-86 (1982) (holding that qualified First Amendment reporter's privilege protected journalist's notes from compelled disclosure).

Before either the defense or prosecution examines Mr. King, they must meet each prong of this three-part, federal constitutional test. To the extent that they cannot do so, the Court should bar them from examining Mr. King about anything other than published information.

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[4] Courts regularly have applied the federal constitutional privilege to journalists working in various media. See, e.g., Shoen I, 5 F.3d at 1290 (book author); United States. v. Burke, 700 F.2d 70, 75 (2d Cir. 1983) (magazine reporter); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (documentary filmmaker).

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CONCLUSION

For the reasons set forth above, Mr. King respectfully requests that the Court limit the scope of the defense's examination and the prosecution's cross-examination of Mr. King strictly to published information.

DATED: May 18, 2005

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DECLARATION OF JEFFREY H. BLUM

I, Jeffrey H. Blum, declare:

1. I am a lawyer admitted to practice before all the courts in the State of California and before this Court. I am a partner in the law firm of Davis Wright Tremaine, and am one of the lawyers responsible for representing non-party reporter Larry King in this action. The matters stated here are true of my own personal knowledge, except for those matters stated on information and belief, which matters I believe to be true.

2. I am informed and believe that Mr. King was subpoenaed by the Defendant to appear and testify in this criminal trial.

3. I am informed and believe that last week, Kelli L. Sager, my partner at Davis Wright Tremaine, spoke with defense counsel on the telephone. During that conversation, Ms. Sager was informed that the defense intended to ask Mr. King about information disseminated during a breakfast conversation in which Mr. King participated. During this breakfast, apparently one of the prosecution's witnesses was discussed. In addition, the defense counsel informed Ms. Sager that it would not ask Mr. King any questions that would seek the identity of confidential sources or any unpublished information that is within the scope of the reporter shield law.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on May 18, 2005, at Los Angeles, California.

Jeffrey H. Blum