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SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

JUL 08 2004

GARY M. BLAIR, Executive Officer
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MICHAEL JACKSON, Defendant.

Case No.: 1133603

Order for Release of Redacted Documents

The redacted form of the Motion to Suppress Pursuant to Penal Code Section 1538.5 and Non-Statutory Grounds, the Opposition thereto, and the Reply in the form attached to this order shall be released from seal and placed in the public file. The unredacted originals shall be maintained conditionally under seal pending the hearing on July 9, 2004.

DATED: July 8, 2004.

Rodney S. Melville

RODNEY S. MELVILLE
Judge of the Superior Court

REDACTED

COPY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. MICHAEL JOE JACKSON, Defendant.	Case No. 1133603 NOTICE OF MOTION TO SUPPRESS PURSUANT TO PENAL CODE SECTION 1538.5 AND NON-STATUTORY GROUNDS (PART 1); DECLARATION OF ROBERT M. SANGER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF ~~UNDER SEAL~~ Honorable Rodney Melville Date: June 25, 2004 Time: 8:30 am. Dept: SM 2

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF SANTA BARBARA, TOM SNEDDON, AND DEPUTY DISTRICT ATTORNEYS GERALD FRANKLIN, RON ZONEN AND GORDON AUCHINCLOSS:

Please take notice that Mr. Michael Jackson will hereby does, and will move on June 25th, 2004, at 8:30 a.m., or as soon thereafter as counsel may be heard, in Department 2 of the above-entitled court, for an order: (1) suppressing the materials seized from defense investigator Bradley Miller's office; (2) directing that those items be returned to Mr. Jackson's present attorneys; and (3) for such other relief as the Court may deem just and proper.

This motion is based on the grounds that: (1) the District Attorney invaded the defense camp in violation of Mr. Jackson's rights to counsel, due process, a fair trial and right against self-incrimination guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 15 and 16 of the California Constitution; (2) Mr. Jackson's rights against unreasonable search and seizure, and a reasonable expectation of privacy, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 1, 10, and 13 of the California Constitution, were violated by the illegal search; and (3) that the search amounted to an overbroad, general search, in violation of the Fourth Amendment to the United States Constitution, Article 1, Section 13 of the California Constitution, and California Penal Code Sections 1525, 1529 and 1538.5.

Mr. Jackson submits this motion now, based on the Court's order that he file his motion regarding the search of Mr. Miller's office and the seizure of privileged materials therein for hearing on June 25, 2004 and that additional motions to suppress would be heard in August, 2004.

Mr. Jackson files this motion without waiving his right to file additional motions regarding the remainder of the search and seizure issues that pertain to this search and other searches, pursuant

to Penal Code Section 1538.5, or on any other grounds.[1] This motion is based on this Notice of Motion, the Memorandum of Points and Authorities and Declaration of Robert M. Sanger attached hereto, the Court's papers, records and files in this case and such evidence and other matters as may be received by the Court at or after the hearing scheduled on this motion.

Dated: June 21, 2004

Respectfully submitted,

COLLINS, MESEREAU, REDDOCK & YU
Thomas A. Mesereau, Jr.
Susan Yu
KATTEN MUCHIN ZAVIS ROSENMAN
Steve Cochran
Stacey McKee Knight
SANGER & SWYSEN

By: _____
Robert M. Sanger
Attorneys for
MICHAEL JOE JACKSON

[1] In addition to the balance of the Penal Code Section 1538.5 issues that may pertain to this search and other searches, Mr. Jackson also anticipates filing motions for additional and further relief based in part on conduct discussed herein.

DECLARATION OF ROBERT M. SANGER

I, Robert M. Sanger, declare:

1. I am an attorney at law duly licensed to practice law in the courts of the State of California, a partner in the law firm of Sanger & Swysen, and co-counsel for Mr. Michael Jackson. I have viewed the search warrant, affidavit and the discovery provided to defense counsel by the prosecution and have learned the following:

2. On November 18, 2003, law enforcement officers entered and searched the Beverly Hills office of Bradley Miller, an investigator employed by Mr. Jackson's then defense counsel, Mark Geragos. The officers used a sledge hammer to force open Mr. Miller's personal office and his conference room. In the course of this search, the officers searched through and seized information protected by the attorney-client privilege. A true and correct copy of the Sheriff's Department report dated 11/19/03 is attached hereto as Exhibit A.

3. The prosecution knew, or should have known, that Bradley Miller was a private investigator, employed by then-defense counsel, Mark Geragos.

4. In the statement of probable cause, attached to the search warrant, Paul Zelis, the Affiant, states that a "confidential reliable agent" visited Bradley Miller's office and the receptionist told the agent that "Private Investigator Miller" was no longer in the office. The search warrant statement of probable cause also states, "Records of the California Bureau of Security and Investigative Services reflect that Bradley Greg Miller of Beverly Hills is currently licensed as a private investigator (License No. 17530)." A true and correct copy of the Statement of Probable Cause accompanying Search Warrant is attached hereto as Exhibit B.

5. In the statement of probable cause, the Affiant states that provided the District Attorney with correspondence between and Mark Geragos. The subject of this correspondence was "numerous items belonging to family" including possessions that were allegedly stored by Mr.

Miller in a storage unit The search warrant for Mr. Miller's office describes property that was referenced by and Mr. Geragos in their correspondence, including evidence related to the storage facility, as well as (Exhibit B.)

6. According to a memorandum drafted by District Attorney Tom Sneddon on November 8, 2003, Mr. Sneddon drove to the office of Bradley Miller. Mr. Sneddon went inside the building and examined the roster of occupants, photographed the roster, and climbed the stairs to the second floor in an unsuccessful attempt to find a door with Mr. Miller's name on it. Mr. Sneddon went across the street from the building and took a series of photographs of the building. Mr. Sneddon then found a nearby phone booth and looked up Mr. Miller in the Yellow Pages. A true and correct copy of the Memorandum from District Attorney Tom Sneddon dated 11/10/03 is attached hereto as Exhibit C.

7. Mr. Sneddon drove to a pre-arranged meeting place and met with to conduct a photographic lineup. During that meeting, he showed a series of Department of Motor Vehicles photographs of several people, including Mr. Miller. (Exhibit C.)

8. A Sheriffs Department report, dated November 19, 2003, states that Bradley Miller is a Private Investigator. The same report lists one of the items seized from his office as, "Item Number 821, one faxed Memo from Bradley Miller to Mark Geragos." (Exhibit A.)

9. The search warrant for Mr. Miller's office (a true and correct copy attached hereto as Exhibit D) listed the following described property:

> Records of Investigator Miller's professional employment by Michael Jackson or MJJ Productions or an individual or entity shown on the face of the document to be associated with Michael Jackson or MJJ Productions; letters, memoranda, invoices, billings and canceled checks evidencing his payment of the rental of a storage locker at

and/or reflecting his receipt and later disposition of property that had been stored in that facility.

Computer systems including, but not limited to, personal computers, laptops, notebooks, workstations, and/or servers. Computer networks including, but not limited to, servers, hubs, switches, routers, modems, and/or cabling. Computer hardware including but not limited to, monitors, input devices, printers, modems, scanners, peripherals, hard disk drives, floppy disk drives, magnetic tape drives, cassette tape drives, removable storage media drives, optical CD-ROM drives, and/or cabling found together or separately from one another. Personal Digital Assistants (PDA), docking devices, and/or cabling. Software and data, including but not limited to, hard disks, floppy disks, tapes, removable media, optical CD-ROM media, and/or networked data storage. Documentation or other material describing the operation of any computer systems, computer networks, computer hardware, software, and/or computer peripherals found at the premises, including instructions on how to access disks, files, or other material stored within same, including but not limited to computer manuals, printouts, passwords, file name lists, "readme" and/or "help files."

10. A true and correct copy of the Sheriff's Department Property Form is attached hereto as Exhibit E. The Property Form lists the following seized items by item number:

811	Video	
812	Video	
813	Video	
814	Video	
815	Video	
816	Video	
817	Audio	
818	Audio	
819	Mini DV	
820	Video	Michael Jackson- Unmasked
821	Fax/Memo	To Geragos/
822	Check Stub	Michael J. Jackson
823	Summary	Confidential "MJJ"
824	Hard Drive	Maxtor
825	Hard Drive	Maxtor
826	Copy of Hard Drive for Conf. Rm.	

11. The search amounted to a general search. Many of the items they seized were not described by the overbroad warrant. For instance, no mention of video or audio tapes in the search warrant, the Sheriff's Department seized at least 8 videotapes and 2 audiotapes from Mr. Miller's office, according the Sheriff's Department Property

Form. (Exhibit E.)

12. I met with Sheriff's detectives on June 8, 2004, and was informed that the Sheriff's Office made additional copies of the hard drives and tapes seized from Mr. Miller. They lodged one copy with the Court but maintained other copies at the Sheriff's Department.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct this 21st day of June, 2004, at Santa Barbara, California.

Robert M. Sanger

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FACTUAL SUMMARY

On November 18, 2003, law enforcement officers entered and searched the Beverly Hills office of Bradley Miller, an investigator employed by Mr. Jackson's then defense counsel, Mark Geragos. The officers used a sledge hammer to force open Mr. Miller's personal office and his conference room. In the course of this search, the officers searched through and seized information protected by the attorney-client privilege. (Sanger Declaration at ¶ 2; Exhibit A attached thereto.)

The prosecution knew, or should have known, that Bradley Miller was a private investigator, employed by defense counsel, Mark Geragos, in the present case. (Sanger Declaration at ¶ 3.) In the statement of probable cause, attached to the search warrant, Paul Zelis (hereinafter "the Affiant), states that a "confidential reliable agent" visited Bradley Miller's office and the receptionist told that agent that "Private Investigator Miller" was no longer in the office. Further, the search warrant statement of probable cause states "Records of the California Bureau of Security and Investigative Services reflect that Bradley Greg Miller of Beverly Hills is currently licensed as a private investigator (License No. 17530)." (Sanger Declaration at ¶ 4; Exhibit B attached thereto)

In the statement of probable cause, the Affiant states that provided the District Attorney with correspondence between and Mark Geragos. The subject of this correspondence was "numerous items belonging to including possessions that were allegedly stored by Mr. Miller in a storage unit The search warrant for Mr. Miller's office describes property that was referenced by Mr. and Mr. Geragos in their correspondence, including evidence related to the storage facility. . (Sanger Declaration at ¶ 5; Exhibit B attached thereto.)

Mr. Miller was clearly under investigation prior to the search of his office. In fact, he was of so much interest to the prosecution that the District Attorney, Tom Sneddon, personally visited

Mr. Miller's office and photographed it prior to the search. (Exhibit C.)

According to a memorandum drafted by District Attorney Tom Sneddon on November 8, 2003, Mr. Sneddon drove to the office of Bradley Miller. He went inside the building and examined the roster of occupants, photographed the roster, and climbed the stairs to the second floor in an unsuccessful attempt to find a door with Mr. Miller's name on it. Mr. Sneddon went across the street from the building and took a series of photographs of the building. Mr. Sneddon then found a nearby phone booth and looked up Mr. Miller in the Yellow Pages. (Sanger Declaration at ¶ 6; Exhibit C attached thereto.)

Mr. Sneddon drove to a pre-arranged meeting place and met with to conduct a photographic lineup. During that meeting, he showed a series of Department of Motor Vehicles photographs of several people, including Mr. Miller. (Sanger Declaration at ¶ 7; Exhibit C attached thereto.)

A Sheriffs Department report, dated November 19, 2003, states that Bradley Miller is a Private Investigator. The same report lists one of the items seized from his office as, "Item Number 821, one faxed Memo from Bradley Miller to Mark Geragos." (Sanger Declaration at ¶ 8; Exhibit A attached thereto.)

II.

THE SEARCH OF BRADLEY MILLER'S WAS AN INVASION OF THE DEFENSE CAMP AND IS NOT AN ISSUE THAT CAN BE ANALYZED USING THE RULES OF DISCOVERY

Former counsel for Mr. Jackson, Mark Geragos, originally represented to the Court that he would proceed regarding the search of Bradley Miller's office by attorney-client privilege log, under the core work-product doctrine. We must respectfully withdraw that request in light of further developments including testimony of witnesses before the Grand Jury.[2]

The search of Bradley Miller's office was an invasion of the defense function without a

[2] If the Court requires any further showing on this issue, present counsel would request to be heard *in camera* out of the presence of the prosecution.

showing of crime or fraud or other justification. Mr. Jackson is entitled to address the legality of the search *ab initio*, rather than taking a piecemeal approach that would treat this invasion of the defense camp as a discovery matter falling under *Izazaga v. Superior Court* (1991) 54 Cal. 3d 356, 382, fn 19. *Izazaga* is a case about discovery. The question of core work product addressed in *Izazaga* is not relevant to a search of a defense lawyer or defense investigator's office at least for two reasons. First, the search itself was blatantly illegal. Second, *Izazaga* pertains to reciprocal discovery exchanged thirty days before trial.

This motion addresses first the constitutional violations resulting from the invasion of Mr. Jackson's defense camp. The violation of the attorney-client privilege and work product doctrine relating to particular seized items that occurred with regard to Mr. Jackson or other clients of Mr. Geragos or Mr. Miller would be addressed if necessary, after this Court's ruling on the validity of the search.

III.

THE GOVERNMENT'S SEARCH OF BRADLEY MILLER'S OFFICE CONSTITUTED AN INVASION OF THE DEFENSE CAMP AND VIOLATED MR. JACKSON'S RIGHTS TO COUNSEL, DUE PROCESS, A FAIR TRIAL, AND RIGHT AGAINST SELF-INCRIMINATION

The conduct of the District Attorney and other agents of law enforcement in the investigation of this case amounts to outrageous government conduct. The District Attorney has demonstrated a blatant disregard for Defendant's rights to counsel, due process, a fair trial and right against self-incrimination. The prosecution has invaded the attorney-client relationship, undermined the work product doctrine and has so contaminated the prosecution of this case that, at the very least, the materials seized must be suppressed and returned.[3]

The District Attorney's actions indicate to Mr. Jackson that he cannot trust defense

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[3] Mr. Jackson intends to address the consequences of this conduct in subsequent motions.

counsel to protect his confidences and that no defense materials are beyond the reach of the prosecution. This type of conduct causes a loss of confidence in the defense function, not only for Mr. Jackson, but for all those merely accused but presumed innocent of crimes.

Suppression and return of the items seized from Mr. Miller is proper irrespective of whether the seized materials are privileged. The Supreme Court of California, in *Barber v. Municipal Court* (1979) 24 Cal. 3d 742, 756, stated:

> Whether or not the prosecution has directly gained any confidential information which may be subject to suppression, the prosecution has been aided by its agent's conduct. Petitioners have been prejudiced in their ability to prepare their defense. They no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney.

The court of appeal addressed this same issue in another case involving the Santa Barbara District Attorney's Office. "When the conduct on the part of the authorities is so outrageous as to interfere with an accused's right of due process of law, proceedings against the accused are thereby rendered improper." (*Baulas v. Superior Court* (1986) 188 Cal.App.3d 422, 429.) The fruits of this government misconduct must be suppressed and returned.

Evidence seized from the office of Bradley Miller was under the control of defense counsel. The United States Supreme Court, in *United States v. Nobles* 422 U.S. 225, 238, held:

> At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

The attorney-client or attorney work product privilege extends to documents in the possession of retained investigators. (*People v. Meredith* (1981) 29 Cal.3d 683, 690, n.3.)

When the District Attorney's office and the law enforcement officers began conducting the search of the defense lawyer's investigator, they blatantly disregarded the attorney-client and work product privileges and, more critically, the right of a person to the absolute confidentiality of the attorney-client relationship. These actions denied Mr. Jackson's fundamental due process

rights and impaired his right to the effective assistance of counsel under the Fifth and Sixth Amendments to the United States Constitution.

IV.

THE INVASION OF THE DEFENSE CAMP WAS NOT SUPPORTED BY A SHOWING IN THE AFFIDAVIT OF PROBABLE CAUSE TO BELIEVE THAT CRIME OR FRAUD OCCURRED

The only possible justification for invading the attorney-client relationship is a showing that the services of the lawyer were obtained to commit crime or fraud, or to prevent a criminal act by the client. (California Evidence Code Section 956.) California Penal Code Section 1524(c) requires reasonable suspicion that a lawyer in possession or control of documentary evidence is engaging or has engaged in criminal activity related to the documentary evidence in order to bypass the special master procedures articulated in Penal Code Section 1524. Such a showing of probable cause was not made in the search warrant affidavit.

The government knew that material under the control of defense counsel and information falling under the protection of the attorney-client privilege and work product doctrine would be seized. The Affiant, in the statement of probable cause, states that "computer and computer-related items subject to seizure pursuant to the requested warrants may contain privileged information." While the Affiant limits his explicit discussion of privileged materials to computer systems and computer related items, the government knew or should have known that any other documents and items to be seized from Mr. Miller's office were held for Mr. Jackson's counsel.

If the District Attorney believed that crime or fraud had occurred, this should have been spelled out in the affidavit. The failure to do so renders the search invalid.

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V.

THE APPROPRIATE REMEDY IS, AT THE VERY LEAST, TO SUPPRESS THE SEIZED MATERIALS AND TO RETURN THEM TO MR. JACKSON

At a minimum, suppression and the return of the items to Mr. Jackson's present attorneys is a necessary step towards remedying this type misconduct by overzealous government agents. Exclusion and return of the unlawfully obtained evidence does not adequately address the invasion of the attorney-client relationship, but it at least prevents the government from exacerbating their outrageous misconduct by preventing them from using the seized materials as evidence against Mr. Jackson.[4]

The courts have repeatedly warned prosecutors in California, and specifically the Santa Barbara County District Attorney's Office, about intruding into the constitutional rights of the accused. (*Barber v. Municipal Court* (1979) 24 Cal. 3d 742; *Boulas v. Superior Court* (1986) 188 Cal. App. 3d 422; *People v. Zapien* (1993) 4 Cal. 4th 929; *Morrow v. Superior Court* (1994) 30 Cal. App. 4th 1252.) Both *Boulas* and *Zapien* involved misconduct of the Santa Barbara County District Attorney's Office. The District Attorney knew, or should have known, that it was misconduct to invade the defense camp.

The invasion of the defense camp in the case at bar is the kind of outrageous conduct that the court has repeatedly warned prosecutors about. Dismissal has been held to be the only adequate remedy to address such misconduct of the District Attorney and law enforcement. However, at the very least, the materials should be suppressed and returned to Mr. Miller, Mr. Jackson or such other rightful owner as may be determined.

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[4] The Santa Barbara Sheriff's Office made additional copies of the hard drives and tapes seized from Mr. Miller. They lodged one copy with the Court but maintained other copies at the Sheriff's Department. (Sanger Declaration at ¶ 12.)

VI.

THIS EVIDENCE MUST BE SUPPRESSED PURSUANT TO PENAL CODE SECTION 1538.5

Mr. Jackson has a legitimate expectation of privacy in the office of his lawyer's investigator, to the extent that the materials it contained related to Mr. Jackson's defense. Penal Code Section 1538.5 provides that the grounds for suppression evidence obtained as a result of an unreasonable search or seizure are:

> (A) The search or seizure without a warrant was unreasonable.
> (B) The search or seizure with a warrant was unreasonable because any of the following apply:
> (I) The warrant is insufficient on its face.
> (ii) The property or evidence obtained is not that described in the warrant.
> (iii) There was no probable cause for the issuance of the warrant.
> (iv) The method of execution of the warrant violated federal or state constitutional standards.
> (v) There was any other violation of federal or state constitutional standards.

(Penal Code Section 1538.5(a)(1).)

Under Penal Code Section 1538(a)(1)(B)(v), the search was unreasonable and in violation of federal and state constitutional standards because, as argued above, it was conducted in violation of Mr. Jackson's rights to counsel, due process, a fair trial and right against self-incrimination, ~~as well as his right against unlawful search and seizure, guaranteed by the Fourth,~~ Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 10, 13, 15 and 16 of the California Constitution.

VII.

THE SEARCH WAS AN OVERBROAD, GENERAL SEARCH

A. The Warrant Was Overbroad On Its Face Because It Exceeded The Probable Cause Showing.

The Fourth Amendment to the United States Constitution, Article 1, Section 13 of the

California Constitution, and California Penal Code Sections 1525 and 1529 require that a search warrant describe the items to be seized with "particularity." This requirement precludes both a "general search" and the seizure of one thing under a warrant describing a different thing. (*Marron v. United States* (1927) 275 U.S. 192; *Stanford v. Texas* (1965) 379 U.S. 476.)

The search warrant for Mr. Miller's office (Exhibit D) listed the following described property:

> Records of Investigator Miller's professional employment by Michael Jackson or MJJ Productions or an individual or entity shown on the face of the document to be associated with Michael Jackson or MJJ Productions; letters, memoranda, invoices, billings and canceled checks evidencing his payment of the rental of a storage locker at
>
> . and/or reflecting his receipt and later disposition of property that had been stored in that facility.
>
> Computer systems including, but not limited to, personal computers, laptops, notebooks, workstations, and/or servers. Computer networks including, but not limited to, servers, hubs, switches, routers, modems, and/or cabling. Computer hardware including but not limited to, monitors, input devices, printers, modems, scanners, peripherals, hard disk drives, floppy disk drives, magnetic tape drives, cassette tape drives, removable storage media drives, optical CD-ROM drives, and/or cabling found together or separately from one another. Personal Digital Assistants (PDA), docking devices, and/or cabling. Software and data, including but not limited to, hard disks, floppy disks, tapes, removable media, optical CD-ROM media, and/or networked data storage. Documentation or other material describing the operation of any computer systems, computer networks, computer hardware, software, and/or computer peripherals found at the premises, including instructions on how to access disks, files, or other material stored within same, including but not limited to computer manuals, printouts, passwords, file name lists, "readme" and/or "help files."

Here, the warrant was overbroad on its face because it exceeded the probable cause showing. The Affiant suggests that probable cause existed to believe that Mr. Miller was employed by or was acting as an agent of Mr. Jackson. (Exhibit B, page 74.) In particular, the Affiant states that the storage unit, that allegedly contained things that belonged to was opened in Mr. Miller's name. (Ibid.) The Affiant also alleges that Mr. Miller was present during . (Ibid.)

The Affiant concludes that Mr. Miller may have "some documentation in the form of notes, or correspondence, memoranda or other such writings reflecting their transfer to someone

else." (Exhibit B, page 75.) The Affiant states that a search of Mr. Miller's business records would produce "records showing his employment by Michael Jackson, MJJ Productions, or one of the other Michael Jackson agents responsible for the false imprisonment of the Arvizo family." (Ibid.) The Affiant further states that such records would include "letters, memorandums, invoices, billings and cancelled checks confirming his payment of the rental of where possessions were kept and the letters were taken." (Ibid.)

The Affiant's own conclusions fall far short of justifying the overbroad warrant that was signed by the magistrate. Despite the fact that the Affiant never mentions anything specifically related to computers or computer files with regard to Mr. Miller, the search warrant includes language that allows for the seizure of any and all computers, as well as any and all items related to computers. The Affiant's general statements, not specifically related to Mr. Miller, that "many people use computers to conduct their business" and that "some of the information sought to be searched/seized may be contained on computers" (Exhibit B at page 78) is blatantly overbroad and without any support from the statement of probable cause. The search warrant is overbroad.

B. The Warrant Was Overbroad On Its Face Because It Lacked Particularity.

The warrant clause of the Fourth Amendment provides that no warrant may issue except those particularly describing the place to be searched, and ~~the persons or things to be seized~~. The warrant describes all computer systems, and all items related to computer systems, without giving any specific indications of what is to be searched. The affidavit did not provide any factual support, let alone enough to justify a finding of probable cause, to suggest that Mr. Miller was in possession of any computer systems, or related items, that in any way related to this case.

The failure to describe with particularity is evidenced by the fact that the sheriffs did not know what not to take. The inventory of property seized (Exhibit E) discloses that the sheriffs took everything in Mr. Miller's office that contained a reference to Mr. Jackson, Mr. Geragos, or

C. The Sheriff's Flagrantly Disregarded The Limitations Of The Search Warrant.

The evidence must be suppressed because the execution of the search was overbroad and amounted to an impermissible general search. The framers of the constitution drafted the Fourth Amendment to prohibit "exploratory rummaging" in a person's belongings. *(Andresen v. Maryland*, 427 U.S. 463, 480, 49 L.Ed.2d 627, 96 S.Ct. 2737, 2748 (1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L.Ed.2d 564, 91 S.Ct. 2022, 2038 (1971)); see, *Payton v. New York*, 445 U.S. 573, 584-85, 63 L.Ed.2d 639, 100 S.Ct. 1371, 1378-79 (1980); *U.S. v. Beaumont*, 972 F.2d 553, 560-561 (5th Cir. 1992).) The law emphatically prohibits government agents from using a warrant as a "key" to obtain entry and then to violate the terms of the warrant by engaging in a search or seizure beyond its scope. A "governmental official [may not] use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *(Stanley v. Georgia*, 394 U.S. 557, 572, 22 L.Ed.2d 542, 89 S.Ct 1243, 1251-52 (1969) (Stewart, J., concurring).) To the extent the officers here searched through and seized items beyond those described by the warrant, they conducted a warrantless search.

The search of Mr. Miller's office was a general search. The probable cause statement focused on Mr. Miller's alleged role in renting a storage unit, his alleged employment by Mr. Jackson, and his alleged presence. It was permissible for the sheriffs to search for documents related to those activities. However, it was impermissible to use that information as a pretext for conducting a general search. The sheriffs entered Mr. Miller's office with an overly broad warrant. Nevertheless, many of the items they seized were not described by the overbroad warrant. The Property Form, attached as Exhibit E, lists the following seized items by item number:

811 Video
812 Video
813 Video
814 Video
815 Video

816	Video	
817	Audio	MJ Tel
818	Audio	
819	Mini DV	
820	Video	Michael Jackson- Unmasked
821	Fax/Memo	To Geragos/
822	Check Stub	Michael J. Jackson
823	Summary	Confidential "MJJ"
824	Hard Drive	Maxtor
825	Hard Drive	Maxtor
826	Copy of Hard Drive for Conf. Rm.	

Despite no mention of video or audio tapes in the search warrant, the Sheriff's Department seized at least 8 videotapes and 2 audiotapes from Mr. Miller's office, according the Sheriff's Department Property Form. (Sanger Declaration at ¶ 11; Exhibit E attached thereto.)

All evidence seized -- not only those items beyond the scope of the warrant -- should be suppressed because the officers executed the warrant in flagrant disregard for its limitations. (See *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981).) This remedy is required in an appropriate case where the violations of the warrant's requirements are so extreme that the search essentially is transformed into an impermissible general search . (*People v. Bradford* (1997) 15 Cal. 4th 1229, 1305-1306.)

Here the sheriffs flagrantly exceeded even the broad limitations that were imposed by the warrant. They explored, rather than searched for specified items, and they seized numerous items that were outside the scope of the warrant.

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VIII.

CONCLUSION

For all of the foregoing reasons, Mr. Jackson respectfully submits that the Court issue an order; (1) suppressing the materials seized from defense investigator Bradley Miller's office; (2) directing that those items be returned to Mr. Jackson's present attorneys; and (3) for such other relief as the Court may deem just and proper.

Dated: June 21, 2004

Respectfully submitted,

COLLINS, MESEREAU, REDDOCK & YU
Thomas A. Mesereau, Jr.
Susan Yu
KATTEN MUCHIN ZAVIS ROSENMAN
Steve Cochran
Stacey McKee Knight
SANGER & SWYSEN

By: _____
Robert M. Sanger
Attorneys for
MICHAEL JOE JACKSON

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By: RONALD J. ZONEN (State Bar No. 85094)
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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 OPPOSITION TO DEFENDANT'S "MOTION TO SUPPRESS" ON STATUTORY AND NON-STATUTORY GROUNDS; MEMORANDUM OF POINTS AND AUTHORITIES ~~UNDER SEAL~~ DATE: August 16, 2004 TIME: 9:30 a.m. DEPT: SM 2 (Melville)

Introduction

This is the People's opposition to defendant's "Motion to Suppress Pursuant to Penal Code Section 1538.5 and Non-Statutory Grounds (Part 1)," filed June 21, 2004.

Defendant's Arguments, Summarized

Under the caption, "The Government's Search of Bradley Miller's Office Constituted an Invasion Of The Defense Camp and Violated Mr. Jackson's Rights to Counsel, Due Process, a Fair Trial, and Right Against Self-Incrimination," defendant asserts "The conduct of the District Attorney and other agents of law enforcement in the investigation of this case amounts to outrageous government conduct. . . . The prosecution has invaded the

attorney-client relationship, undermined the work product doctrine and has so contaminated the prosecution of this case that, at the very least, the materials seized must be suppressed and returned." (Motion 10:14-24.)

Defendant asserts he "has a legitimate expectation of privacy in the office of his lawyer's investigator, to the extent that the materials it contained related to Mr. Jackson's defense." (Motion 14:4-6.) He then argues that the evidence must also be suppressed pursuant to Penal Code section 1538.5, subdivision (a)(1)(B)(v) ("There was [a] violation of federal or state constitutional standards") because, as he had argued in support of his non-statutory motion to suppress based on "outrageous government conduct," the search "was conducted in violation of Mr. Jackson's rights to counsel, due process, a fair trial and right against self-incrimination, as well as his right against unlawful search and seizure . . . ." (*Id.*, 14:6-21.)

Defendant also argues that the "Search Was An Overbroad, General Search" for three reasons: "A. The Warrant Was Overbroad On Its Face Because It Exceeded The Probable Cause Showing" (Motion 14:22-25), "B. The Warrant Was Overbroad On Its Face Because It Lacked Particularity" (*id.*, 16:17), and "C. The Sheriff's [sic] Flagrantly Disregarded The Limitations Of The Search Warrant" (*id.*, 17:1).

Plaintiff's Opposition, Summarized

Not every "invasion" of the office of a lawyer or his agent is "outrageous." In this case, it was not known that Mr. Miller was employed by a lawyer retained by defendant when the search was initiated. The search of Bradley Miller's office was justified by the belief, spelled out with some particularity in the affidavit supporting the search warrant, that it would reveal evidence of Miller's acts in acquiring property of and in Defendant's standing to litigate the constitutionality of the search of premises of a third party is limited. In any event, the warrant itself was not overbroad in its scope, and the search undertaken pursuant to that warrant did not go beyond the limits set by the warrant.

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I

PROBABLE CAUSE FOR THE SEARCH OF PRIVATE INVESTIGATOR MILLER'S OFFICE WAS SET OUT IN ITS SUPPORTING AFFIDAVIT. THAT AFFIDAVIT DISCLOSED INVESTIGATOR MILLER HAD ON BEHALF OF THE DEFENDANT, WHOEVER MAY HAVE EMPLOYED HIM TO THE WARRANTED SEARCH OF MILLER'S OFFICE DID NOT CONSTITUTE "OUTRAGEOUS GOVERNMENT CONDUCT"

In his "invasion-of-the-defense-camp"[1] argument, defendant appears to reason that any search of the office of an attorney or his agent, absent evidence "that the services of the lawyer were obtained to commit crime or fraud," or that the search was undertaken "to prevent a criminal act by the client" (Motion 12:7-14) is, ipso facto, "outrageous" misconduct that must result, "at a minimum," in suppression of the evidence seized in the "invasion" (*id.*, 13:17-22).

Firstly, it was not apparent at the time the warrant was obtained that Investigator Miller was in the employ of Attorney Geragos, or that he may have been working at the direction of the latter rather than upon the orders of defendant himself. (For that matter, no documentary evidence of that relationship has been given us to this day.) Private investigators work for a wide variety of clients.[2]

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[1] References to the government's "invasion of the defense camp" would be appropriate in the context of a case like, e.g., *People v. Zapien* (1993) 4 Cal.4th 929 (the decision from which the phrase was borrowed) or *Barber v. Municipal Court* (1979) 24 Cal.3d 742. They seem odd in a case like this, where the "invasion" took place before criminal charges were filed against defendant and apparently before Mr. Jackson suspected he was under investigation. Mr. Geragos told Larry King's audience he was retained at or about the time "Living with Michael Jackson" was telecast to a critical audience. He said he sought to protect his client from a family who were seeking to capitalize on the renewed public suspicion that defendant behaves inappropriately with young boys by "shaking him down." If attorney Geragos' and his employees undertook their excessively proactive efforts on behalf of his client with knowledge that a criminal investigation was afoot, those efforts would constitute witness intimidation. (Pen. Code, § 136.1, subd. (b).) Be that as it may, Investigator Miller's own interference with the and property earned him the attention he received.

[2] Among them, attorneys. That is why the affiant, Detective Zelis, described the procedure the searching officers would follow "to ensure that no . . . computerized information will be accessed" from computers seized in the contemplated searches without an opportunity for the computer's owner or designees to assert that some of it is "privileged," and, in such an event, to seek a special master before the information is inspected. (Affidavit 77:21 – 78:3.)

Defendant claims "the prosecution knew, or should have known, that Bradley Miller was a private investigator, employed by then-defense counsel, Mark Geragos." (Motion 4:14-15.) He offers no facts to support that assertion.

Later events -- Attorney Geragos' revealing disclosures to Larry King, among them -- suggest that Mr. Miller may have been working at the direction of Mr. Geragos rather than for defendant himself. Be that as it may, the identity of Investigator Miller's employer does not make his own actions nor the evidence in his possession less relevant.

Secondly, neither a lawyer's office nor that of his hired investigator is immune from search if it is reasonably believed that the office of either contains unprivileged evidence that will disclose a suspect's commission of crime. To be sure, the search of a lawyer's office ought not to be undertaken lightly. The Legislature has wisely mandated that a special master accompany investigating officers before any such search is undertaken, even when the lawyer himself is suspected of crime. (See Pen. Code, § 1524, subds. (c)-(j).) But those provisions of Penal Code section 1524 do not apply to the offices of *other* than the professionals specifically listed in subdivision (c). (*PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1703-1705 [search of office of expert hired by lawyer need not have been undertaken by a special master].) A private investigator is not one of the listed professionals

If hindsight suggests that Bradley Miller was Attorney Geragos' employee, it also suggests that the suspicions of the searching officers concerning Miller's involvement in activities on behalf of defendant[3] were well-founded. Subsequent events sharpening that hindsight flatter neither Attorney Geragos nor his client, but that is not a reason to suppress the evidence against defendant.

[3] Defendant complains, "If the District Attorney believed that crimes or fraud had occurred, this should have been spelled out in the affidavit. The failure to do so renders the search invalid." (Motion 12:21-23.) But the affidavit did just that: It noted that the "Jackson people" had retained (Aff. 36:1-3) and had stolen certain letters from defendant to (Aff. 32:22-28), (Aff: 36:17-20) On page 72 of the affidavit, Detective Zelis declared: "Your affiant believes this affidavit also establishes probable cause to believe that private investigator Bradley G. Miller was employed by or acting as an agent for Michael Jackson or representatives or employees of Michael Jackson in the prolonged from her stored contents." (Emphasis added.)

Defense counsel observes:

> The courts have repeatedly warned prosecutors in California, and specifically the Santa Barbara District Attorney's Office, about intruding into the constitutional rights of the accused. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422; *People v. Zapien* (1993) 4 Cal.4th 929; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252.) Both *Boulas* and *Zapien* involved misconduct of the Santa Barbara County District Attorney's Office. The District Attorney knew, or should have known, that it was misconduct to invade the defense camp. (Motion 13:11-17.)

Barber involved the intrusion, through trickery, of undercover law enforcement officers in confidential attorney-client conferences arising out of the arrest of "sit-in" protesters at the Diablo Canyon nuclear facility in San Luis Obispo County. In *Boulas*, a sales-of-cocaine case, the prosecutor intentionally interfered with a charged defendant's relationship with his retained counsel by stating that a proposed plea-bargain could only be made if the defendant replaced his retained counsel with another that would be agreeable to his client working as an informant. *Zapien* involved the intentional, improper but non-prejudicial destruction by a district attorney's investigator of a tape recording, prepared by defense counsel, inadvertently left behind by him in a county vehicle used by employees of both the public defender's office and the district attorney's office and fortuitously discovered by the prosecutor's investigator. *Morrow* involved the eavesdropping by a district attorney's investigator on a courtroom conference between defendant and his counsel.

Those decisions offer no support to defendant in the circumstances of his case. His characterization of the search as "blatantly illegal," and undertaken with a "blatant disregard" for his rights and by "blatantly disregard[ing] the attorney-client and work product privilege" (Motion 10:6, 10:20, 11:25) does not make it so.

Defendant notes, "Dismissal has been held to be the only adequate remedy to address such misconduct of the district attorney and law enforcement. However, at the very least, the materials should be suppressed and returned to Mr. Miller, Mr. Jackson, or such other rightful

owner as may be determined." (Motion 13:18-22.)

When "government conduct" is made out by an accused, it may implicate his right to due process under the Fifth and Fourteenth Amendments if it is sufficiently "outrageous" as to "violat[e] that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment." (*United States v. Russell* (1973) 411 U.S. 423, 432 [36 L.Ed.2d 366, 93 S.Ct. 1637].) If the complained-of conduct meets that criteria, "it bars prosecution" and dismissal of the case is the only sanction. (*People v. Wesley* (1990) 224 Cal.App.3d 1130, 1138.)

The suggested "lesser" sanction of suppression of the evidence against him is not available for that reason, and because relevant evidence seized in the course of a search may not be "suppressed" unless that evidence was seized in violation of the accused's rights under the Fourth Amendment. "Challenges to the reasonableness of a search by government agents clearly fall under the Fourth Amendment, and not the Fourteenth." (*Conn v. Gabbert* (1999) 526 U.S. 286, 293 [119 S.Ct. 1292, 1296.)

Penal Code section 1538.5 is the only statute invoked by defendant in the pending motion. But "Section 1538.5 is properly used only to exclude evidence obtained in violation of a defendant's state and/or federal (Fourth Amendment) right to be free of unreasonable search and seizure." (*People v. Martson* (1990) 50 Cal.3d 826, 850-851. Accord, *People v. Stansbury* (1993) 4 Cal.4th 1017, 1049.) And Penal Code section 1538.5, subdivision (m) declares, in pertinent part:

> (m) The proceedings provided for in this section, and Section 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her.

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II

DEFENDANT'S STANDING TO LITIGATE THE CONSTITUTIONALITY OF A SEARCH OF PREMISES BELONGING TO A THIRD PARTY, AND THE SEIZURE OF PROPERTY NOT HIS OWN, IS LIMITED

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." (*Rakas v. Illinois* (1978) 439 U.S. 128, 131, fn. 1 [58 L.Ed.2d 387, 393, 99 S.Ct. 1035]; see *People v. Ooley* (1985) 169 Cal.App.3d 197, 202.)

Defense counsel asserts, without citation of authority, that "Mr. Jackson has a legitimate expectation of privacy in the office of his lawyer's investigator, to the extent that the materials it contained related to Mr. Jackson's defense." (Motion 15:4-6.)

That may be true, so far as it goes. See *DeMassa v. Nunez* (9th Cir. 1985) 770 F.2d 1505, 1508: "We . . . hold that an attorney's clients have a legitimate expectation of privacy in their client files." See also *United States v. Knoll* (2d Cir. 1994) 16 F.3d 1313, 1321: "In general, we believe the protection of the Fourth Amendment extends to those papers that a person leaves with his or her lawyer. . . . This is because the client has a subjective expectation that such papers will be kept private and such expectation is one society recognizes as reasonable."

But the argument assumes as its premise a fact than has not yet been established by competent evidence, i.e., that Mr. Miller was Attorney Geregos' employee at all times relevant, not defendant's. The People respectfully request that defendant make the requisite showing of Mr. Miller's employment status.

Assume, for the sake of this discussion, that at all relevant times defendant was Attorney Geragos' client and Mr. Miller was Attorney Geragos' agent. Neither Mr. Jackson's "client file" -- under California law, his own property (*Kallen v. Delug* (1984) 157 Cal.App.3d 940, 951) -- nor papers he may have left with his lawyer appear to have been seized from Investigator Miller's custody. So far as can be determined from their labels and our inspection

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of Item 818, the audio and video tapes are, at best, the qualified work product of Attorney Geragos.

Defendant's assumed standing to protest the *seizure* of his property may not equip him with standing to protest the scope of the *search* that brought it to light. It was Mr. Miller's office and Mr. Miller's computer that was searched, not Mr. Jackson's. Defendant has no possessory interest in either. In less heralded cases, if an accused elected to leave his property in the care of an acquaintance in whose residence he himself had no reasonable expectation of privacy, that accused may not seek to suppress such property as evidence against him on the ground that the search which disclosed it was unlawful. See, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148 [murder weapon belonging to defendant, located under his cousin's pillow in her own room]:

> "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." (*People v. Hernandez* (1998) 199 Cal.App.3d 1182, 1189, italics in original.)

(*McPeters, supra*, 2 Cal.4th at p. 1171.)

Assume, again, that Investigator Miller was Attorney Geragos's employee and agent, not defendant's, and that what was seized from Miller's custody was either defendant's own property that had been delivered to his counsel (or his counsel's agent) or constituted a "client file" in which, for that reason, defendant had a legitimate expectation of privacy. Even so, his "standing" to contest the search of Mr. Miller's office is limited. As *DeMassa v. Nunez*, *supra*, 770 F.2d 1505 phrased it, the two factual inquiries by this court must be: "(1) in what items does he . . . assert a legitimate expectation of privacy; and (2) as to each such item, did a Fourth Amendment violation occur (i.e., does the item fall within the scope of the warrant)." (*Id.* at p. 1508.)

"When a defendant only has standing to object to the seizure, then 'the case is the same as though the [goods] had been found in plain view in a public place and then seized,' that is, the defendant may only contend that the police lacked grounds to believe that the items were connected with criminal activity or some other lawful basis for seizure." (5 LaFave, Search and Seizure (3d ed. 1996), Standing, § 11.3(d), p. 161 (fns. omitted), citing and quoting *United States v. Lisk* (7th Cir. 1975) 522 F.2d 228, 230.)

III

THE SEARCH WARRANT, CONSIDERED IN LIGHT OF ITS SUPPORTING AFFIDAVIT, ADEQUATELY IDENTIFIED PROPERTY OF EVIDENTIARY VALUE TO THE ONGOING INVESTIGATION, ONLY THAT PROPERTY, OR OTHER PROPERTY THE EVIDENTIARY VALUE OF WHICH WAS IMMEDIATELY APPARENT, WAS SEIZED

A. Introduction

Defendant claims that the search of Bradley Miller's office "was conducted in violation of Mr. Jackson's rights to counsel, due process, a fair trial and right against self-incrimination, as well as his right against unlawful search and seizure" (Motion 14:6-21), and under Penal Code section 1538.5, subdivision (a)(1)(B)(v) ["There was [a] violation of federal or state constitutional standards"], he may seek to suppress evidence for violation of any of those constitutional rights.

Defendant is mistaken. As noted above, Penal Code section 1538.5 is properly used only to exclude evidence obtained in violation of a defendant's Fourth Amendment right to be free of unreasonable search and seizure. (*People v. Stansbury*, *supra*, 4 Cal.4th 1017, 1049.)

B. Claimed "Overbreadth" Of The Warrant

Defendant argues that "The Warrant Was Overbroad On Its Face Because It Exceeded The Probable Cause Showing." (Motion 14:25-26.) That argument boils down to his assertion that

> Despite the fact that the Affiant never mentions anything specifically related to computers or computer files with regard to Mr. Miller, the search warrant includes language that allows for the seizure of any and all computers, as well as any and all items related to computers. The Affiant's general statements, not specifically related to Mr. Miller, that "many people use computers to conduct their business" and that "some of the information sought to searched/seized may be contained on computers" . . . is blatantly overbroad and without any support from the statement of probable cause. (Motion 16:9-16.)

That argument is reprised under the heading, "The Warrant Was Overbroad On Its Face Because It Lacked Particularity," where defendant asserts "The affidavit did not provide any factual support, let alone enough to justify a finding of probable cause, to suggest that Mr. Miller was in possession of any computer systems, or related items, that in any way relate to this case." (Motion 16:17-23.)

Keep in mind that the investigators apparently had not observed the interior of Mr. Miller's office so as to be able to state with absolute certainty that he had computers in the premises. In the circumstances, the affiant was obliged to make an educated guess that in this twenty-first century, some 25 years after the founding of Microsoft, a modern-minded investigator officing in Beverly Hills would have equipped himself with at least one computer. In our respectful submission, that assumption was firmly rooted in the realities of today's business world.

C. Claim That The Search Went Beyond The Limits Of The Warrant

Defendant argues that the scope of the search itself exceeded the limits imposed by the warrant and so "amounted to an impermissible general search." (Motion 17:1-3.)

Defendant acknowledges that "the probable cause statement focused on Mr. Miller's alleged role in renting a storage unit, his alleged employment by Mr. Jackson, and his alleged presence at . It was permissible for the sheriffs to search for documents relating to those activities." (Motion 17:19-20.) He might have added, in the interest of entire accuracy, that the warrant also authorized a search for "letters, and other documents relating to one or more members of , and or reflecting

his receipt and later disposition of property that had been stored in [facility."

The affidavit in support of the warrant recited that Investigator Miller was present during the filming of the "rebuttal video" at (Aff. 27:1-5). It conveyed information that she had letters from defendant . in a was stored at by Mr. Miller – documents that were missing when her property was returned to her. (Aff. 31:1-7; 32:25-29). The affiant declared his belief that his showing "establishes probable cause to believe that private investigator Bradley G. Miller was employed by or acting as an agent for Michael Jackson or representatives or employees of Michael Jackson in the . . . unlawful taking of correspondence from her stored contents." (Aff. 74:21-25.) The affidavit reflects that the storage unit was rented in Brad Miller's name and billed to his business address. Affiant expressed his belief that

> Based on s conversation with the owner regarding customer access to the storage unit, it is reasonable to conclude that any entry into the storage unit, any search thereof, or the taking of the notes stored there was done by Brad Miller or with his permission.
>
> Therefore, your Affiant also believes there is reasonable and probable cause to believe that Brad Miller, as a licensed, professional investigator, may still have the notes or some documentation in the form of notes, or correspondence, memoranda or other such writings reflecting their transfer to someone else." (Aff. 74:28 – 75:7.)

The warrant's specification of "letters, and other documents relating to one or more members , and /or reflecting his [i.e., Miller's] receipt and later disposition of property that had been stored at that facility" was sufficient.

(!) "Other Documents" In "Plain View"

In the course of the search, six video tapes, all with labels indicating their relevance to and two audio tapes were observed and seized. One of the tapes, Item No. 817 and labeled "MJ Tel. 2-13-03," likely is evidence of telephone

conversation. The other tape is labeled "Michael Jackson

Those items certainly "relate to one or more members ." They are "writings" within the meaning of Evidence Code sections 250 and 1521 and the latter's predecessor, section 1500 (See *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440 [videotape]; *People v. Kirk* (1974) 43 Cal.App.3d 921, 928 [tape recording], *People v. Enskat* (1971) 20 Cal.App.3d Supp. 1, 3 [motion picture film]), and, by extension, are "documents" within the meaning of that word in the search warrant, considered in context.

Those tapes came to light in the course of a search for more particularly-described "documents." They were therefore in the "plain view" of the searching officers, and their observations did not constitute a "search." (See *Arizona v. Hicks* (1987) 480 U.S. 321, 328 [94 L.Ed.2d 347, 107 S.Ct. 1149] ["merely looking at what is already exposed to view, without disturbing it . . . is not a 'search' for Fourth Amendment purposes . . . ."].) The relevance and evidentiary value of those items was apparent, and would have been apparent to any reasonable investigator.

In *Horton* v. *California* (1990) 496 U.S. 128 the Supreme Court reaffirmed the right of officers to seize items of incriminating evidence that come into their plain view while conducting a search authorized by warrant even though the items are not named within the warrant. Such a seizure does not additionally intrude on the occupant's privacy. (*Id.* at pp. 141-142.) The high court held it makes no difference whether the officers suspected or knew about the unlisted items, so long as that property was found during a lawful search for items listed in the warrant. (*Id.*, at pp. 138-139.)

Similarly, in *Skelton* v. *Superior Court* (1969)1 Cal.3d 144, a warrant issued for the search of defendant's residence and seizure of stolen property, including particularly-described rings, dominoes, and engraved silverware. The officers executing the search warrant brought with them unrelated burglary reports in the hope of "discovering property listed as stolen" in them. In the course of the search, dangerous drugs and stolen property not particularly described in the warrant were found and seized. Our Supreme Court held that the additional property was properly seized in the course of that thorough search, formulating "what seems to

us the rule that has been applied without express articulation, in many similar cases, thus: When officers, in the course of a bona fide effort to execute a valid search warrant, discover articles which, though not included in the warrant, are reasonably identifiable as contraband, they may seize them whether they are initially in plain sight or come into plain sight subsequently, as a result of the officers' efforts." (*Id.*, 1 Cal.3d at p. 157.)

The *Skelton* court reasoned:

> Since the warrant mandated a search for and the seizure of several small and easily secreted items, the officers had the authority to conduct an intensive search of the entire house, looking into any places where they might reasonably expect such items to be hidden. With the issuance of this warrant, the judgment had already been made by a judicial officer to permit a serious invasion of petitioner's privacy. No legitimate interest is enhanced by imposing artificial restrictions on the reasonable conduct of officers executing the warrant. No purpose is subserved, other than that of an exquisite formalism, by requiring that when the officers discovered contraband in the course of this search they return to the issuing magistrate and obtain a second warrant directing the seizure of the additional contraband.

(*Id.*, p. 158.)

The fact that the tapes in this case were "mere evidence" and not contraband did not bar their seizure. (*Warden v. Hayden* (1967) 387 U.S. 294, 310 [18 L.Ed.2d 782, 794-794, 87 S.Ct. 1642]; *People v. Sloss* (1973) 34 Cal.App.3d 74, 82-83.)

(2) Computers

Defendant complains that "the warrant describes all computer systems, and all items relating to computer systems, without giving any specific indications of what is to be searched." (Motion 16:19-21.)

The computers were not described as contraband, but as the likely containers of digitalized documents that constitute relevant evidence. As the search warrant affidavit made clear, there is no way to safely extract documents and information stored in a computer without seizing much of the computer hardware and peripherals for more careful examination away

from the site where they are seized. The actual search of the computers' informational contents awaits defense counsel's long-overdue production of a "privilege log"; the government's acquisition of that information awaits the court's ruling on pending claims of "privilege."

CONCLUSION

Defendant's "outrageous government conduct" theory is unsupported by the facts mustered in its support, and it is useless as a ground for suppressing evidence. His "standing" to contest the search of premises in which he had no reasonable expectation of privacy, and the seizure of property that has not been shown to belong to him, is problematic and limited. It is defendant's burden to demonstrate he has standing, by competent evidence that Brad Miller worked for Attorney Geragos, not him. In any event, the warrant authorizing the search of Bradley Miller's office was amply supported by a showing of probable cause. The search itself was confined to that required to locate the property described in the warrant. The searching officers seized only those described items, and property that came to view in the course of the search and appeared to have evidentiary value.

The pending "Motion to Suppress [Part I]" should be denied.

DATED: June 30, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR., District Attorney

By: _____
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 June 30, 2004, I served the within PLAINTIFF'S OPPOSITION TO DEFENDANT'S "MOTION TO SUPPRESS" ON STATUTORY AND NON-STATUTORY GROUNDS; MEMORANDUM OF POINTS AND AUTHORITIES on Defendant, by THOMAS A. MESEREAU, JR., STEVE COCHRAN, and ROBERT SANGER, 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 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 30th day of June, 2004.

Gerald McC. Franklin

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. MICHAEL JOSEPH JACKSON, Defendant.	Case No. 1133603 REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO SUPPRESS PURSUANT TO PENAL CODE SECTION 1538.5 AND NON-STATUTORY GROUNDS (PART 1); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF ~~UNDER SEAL~~ Honorable Rodney Melville Date: July 9, 2004 Time: 8:30 am. Dept: SM 2

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE SEARCH OF BRAD MILLER'S OFFICE MUST BE ANALYZED AS AN INVASION OF THE DEFENSE FUNCTION

The search of defense investigator Bradley Miller's office was an invasion of the defense function in violation of Mr. Jackson's right to counsel, under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 15, of the California Constitution. The threshold issue is whether the government can justify such an invasion. If the government cannot, it is not entitled to keep or exploit the fruits of the invasion. The violation of the sanctity of the attorney-client relationship gives rise to its own remedies. Out of an abundance of caution, we also bring up the violation of Mr. Jackson's rights and the illegality of the search under the Fourth Amendment and Penal Code Section 1538.5.

II.

THE GOVERNMENT KNEW THAT BRADLEY MILLER WAS AN INVESTIGATOR WORKING FOR THE ATTORNEY WHO WAS REPRESENTING MR. JACKSON

The government asserts that the search of Mr. Miller's office was not improper because, "[i]t was not known that Mr. Miller was employed by a lawyer retained by defendant when the search was initiated." (Plaintiff's Opposition at 2:18-20.) The bald assertion that the government was not aware that Brad Miller worked for an attorney who represented Mr. Jackson is made without any evidentiary support. The government failed to provide a declaration from the District Attorney or from the law enforcement officers who conducted the search stating that they did not know that Mr. Miller worked for Mr. Jackson's lawyer, Mark Geragos.

To the contrary, the evidence establishes that the government knew that Mr. Miller was a private investigator who worked for Mark Geragos, who represented Mr. Jackson. First, the government knew that Mr. Geragos was an attorney who worked for Mr. Jackson according to a Sheriff's report dated September 10, 2003. In that report, Sergeant Robel describes "Jackson's Attorney's" as "Mark Geragos & Michele Boote." A true and correct copy of that report is

attached hereto as Exhibit A. Second, the government knew that Mr. Geragos had engaged in correspondence with , a lawyer who represented . (Ibid.) Third, the government knew that the subject of the correspondence involved "numerous items belonging to which were allegedly stored by Mr. Miller in a storage unit. (Motion to Suppress Pursuant to Penal Code Section 1538.5 and Non-Statutory Grounds (Part 1) at 8.) Fourth, the government knew that Mr. Miller was an agent for Mr. Geragos with regard to this property. Consistent with that knowledge, the search warrant for Mr. Miller's office and the supporting affidavit describes the property that was referenced by and Mr. Geragos in their correspondence, including "letters, and other documents."

In addition, the government also knew that Mr. Miller was a private investigator. Tom Sneddon, himself, in an unorthodox move, drove from Santa Barbara to Los Angeles and surveilled Mr. Miller's office. (See Memorandum of Tom Sneddon dated November 10, 2003, attached hereto as Exhibit B.) Mr. Sneddon, himself, took pictures of the office. He looked up Mr. Miller's telephone number in the Beverly Hills Yellow Pages. Mr. Sneddon, himself, brought with him a DMV photograph of Mr. Miller and met with . Therefore, Mr. Sneddon knew that Bradley Miller was a private investigator working for Mark Geragos before the search occurred.

III.

SUPPRESSION OF THE FRUITS OF THE VIOLATION OF MR. JACKSON'S SIXTH AMENDMENT RIGHT TO COUNSEL IS AN APPROPRIATE REMEDY

The District Attorney claims that dismissal is the only appropriate remedy for invasion of the sanctity of the defense function. He asserts that outrageous government conduct "bars prosecution" and that "dismissal of the case is the only sanction." (Plaintiff's Opposition 6:6-8.) This is bold, but illogical. The District Attorney is correct that courts have found that remedies such as suppression are not adequate to fully address outrageous government conduct. Ultimately, dismissal may well be the only relief that is adequate to address the unconstitutional

intrusion into the defense function. At the appropriate time, Mr. Jackson intends to move the Court to dismiss the case based on this and other conduct.

However, in the interim, the government must not be allowed to benefit from the fruits of this illegal intrusion.[1] There must be an available remedy for this constitutional violation to address the fact that the government is now in position to use the illegally obtained materials against Mr. Jackson. Suppression is that remedy.

IV.

THE OUTRAGEOUS GOVERNMENT CONDUCT ALSO AMOUNTED TO A VIOLATION OF MR. JACKSON'S FOURTH AMENDMENT RIGHTS

Mr. Jackson's right to privacy under the Fourth Amendment was violated by the government's search of the office of his lawyer's investigator. Mr. Geragos was representing Mr. Jackson while Mr. Jackson was the target of the criminal investigation. Mr. Miller worked for Mr. Geragos. Materials in the control of Mr. Geragos, including attorney-client materials and attorney work product, belonging to Mr. Jackson were seized during the search.

The United States Supreme Court, in *Katz v. United States* (1967) 389 U.S. 347, 351, held that:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Therefore, we have stated alternative grounds for relief. Here Mr. Jackson has a right to privacy in his lawyer's investigative activities. The unlawful search and seizure of Mr. Jackson's lawyer's investigator's office is a direct violation of Mr. Jackson's right to privacy. Under *Katz*, a violation of the privacy right of a person gives rise to a motion to suppress.

The District Attorney has conflated Mr. Jackson's arguments for the purposes of refuting them. Mr. Jackson does seek to suppress this evidence based on the violation of his right to

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[1] Again, the Court ordered the defense to address the issue of the unlawfulness of the search of the defense investigator's office at this time and has allowed the defense to address other issues later.

counsel. However, Mr. Jackson also seeks suppression of the materials seized on Fourth Amendment and Penal Code Section 1538.5 grounds.

It is a violation of the Fourth Amendment to use a search warrant to view all of the information stored on an investigators computer and in his office. In addition to the fact that such a violation constitutes an invasion of the defense function, and requires dismissal, the violation of the attorney-client relationship provides an independent basis under the Fourth Amendment to suppress and return the materials seized from Mr. Miller's office.[2] (See *Katz v. United States* (1967) 389 U.S. 347.)

V.

THE GOVERNMENT WAS OBLIGATED TO OBTAIN A SPECIAL MASTER PRIOR TO THE SEARCH

This is a criminal case and Mr. Jackson's liberty is at stake. His constitutional rights are entitled to neither more nor less protection than anyone else. The District Attorney tries to trivialize the substantial invasion of Mr. Jackson's right to counsel by comparing Mr. Miller's role to that of an expert witness in a civil case.

The District Attorney's assertion that a private investigator hired by an attorney in a criminal case is analogous to an expert hired by an attorney in a civil lawsuit, like the environmental consultant in *PSC Geothermal Services Co.* (Plaintiff's Opposition 4:10-17), is mistaken. An investigator working for a criminal defense attorney who represents a person who is the target of a criminal investigation is distinguishable from an expert in a civil case. The search of an environmental consultant's office does not implicate a defendant's Fifth and Sixth Amendment rights to due process and assistance of counsel.

For the purposes of analysis and operation of the attorney-client relationship, a defense

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[2] The issue of attorney-client privilege with regard to the specific items, in particular the hard drives of computers, cannot be addressed at this time. As the Court was informed, present defense counsel has not had access to the computer, or to the Encase mirror images in the possession of the District Attorney, in time to do such an analysis. We believe that such an analysis will take an additional month.

investigator stands in the same position as the attorney. (*People v. Meredith* (1981) 29 Cal.3d 683, 690, n.3.) This has not been said of a consultant in a civil lawsuit. When searching a criminal defense lawyer's office or that of his investigator, law enforcement must employ a special master under Penal Code Section 1524. The failure to do so or to take other meaningful steps to protect the interests of Mr. Jackson require suppression of the items seized. (See *Katz v. United States* (1967) 389 U.S. 347.)

VI.

THE SEARCH WARRANT WAS INVALID ON ITS FACE DUE TO A LACK OF PARTICULARITY

The District Attorney asserts that "the affiant was obliged to make an educated guess" (Plaintiff's Opposition 10:15-17) that Mr. Miller's office would contain at least one computer. Fair enough, but such an educated guess cannot justify taking all computers and computer-related materials in the office without any particular showing of what materials are or are not relevant to the case based on probable cause.

The items to be seized in a search warrant must be described with particularity. Taking all computers is no different than taking every piece of paper and every file in a file cabinet. Worse yet, here there was not a showing of good cause for seizing any single item in the computer let alone good cause for taking all of them.

VII.

THE SEARCH AMOUNTED TO AN IMPERMISSIBLE GENERAL SEARCH

The government seized items not listed in the described property portion of the search warrant that were neither contraband nor evidence of a crime. The District Attorney asserts that six videotapes had "labels indicating their relevance" and that two audio tapes were "observed" and seized. (Plaintiff's Opposition at 11:26-27.) One audiotape was labeled "MJ Tel. 2-13-03" and the other was labeled "Michael Jackson ." However, the District Attorney misses the point.

Relevance is not the standard of probable cause necessary to justify a search outside the

scope of a warrant. The right to seize evidence outside of the particularized description of property listed in the warrant requires that it either plainly be contraband or evidence of a crime. To be evidence of a crime, there must exist probable cause to make the warrantless seizure and not merely an after the fact belief in "relevance." Here, no tapes were described, no permission was granted to search for or seize tapes, and the officers engaged in a general search for what they deemed relevant. The United States Supreme Court has held that this type of search is unconstitutional. In *Lo-Ji Sales, Inc. v. New York* (1979) 442 U.S. 319, 326, the Court held that "a warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out a crime."

In *Lo-Ji Sales, Inc.*, the United States Supreme Court held that the determination of probable cause must be made by the magistrate in advance of the search. The Fourth Amendment is not satisfied by a determination made during the search. Hence, the Court rejected the idea of allowing a magistrate to accompany officers to the premises to make a determination of what could be seized. Here the officers, on their own, made determinations of relevancy once they obtained access to the premises.

The District Attorney asserts that this evidence was "incriminating" and in "plain view" of the officers conducting the search. (Plaintiff's Opposition at 12.) The claim that anything labeled with the word is incriminating is mistaken. Except for the audiotape labeled "Tel, 2-13-03", none of the items seized have a title that even arguably suggests that the content of the tape is relevant

Furthermore, the "plain view" requires that officers can actually view what they are seizing, prior to the seizure. Here, the video and audio tapes were not viewable without actually picking up the tapes and putting them into a VCR or a cassette player.

The District Attorney claims that these items were in "plain view" under *Arizona v. Hicks* (1987) 480 U.S. 321, 328. (Plaintiff's Opposition 12:8-11.) The prosecutions reliance on *Hicks*, however, is misplaced. In *Hicks*, the United States Supreme Court held that a police officer's

moving of stereo equipment to read the serial numbers constituted an unreasonable search because it was not sustainable under the "plain view" doctrine. *(Arizona v. Hicks* (1987) 480 U.S. 321.) Here, the government seized video and audio tapes based on the labels of those tapes. Even if the labels of those tapes were in "plain view," the contents of the tapes were not viewable. The government's actions, in seizing the tapes, and later viewing and listening to them, was more of an unreasonable search than the search in *Hicks*.

VIII.

CONCLUSION

For all of the foregoing reasons, Mr. Jackson respectfully submits that the Court issue an order; (1) suppressing the materials seized from defense investigator Bradley Miller's office; (2) directing that those items be returned to Mr. Jackson's present attorneys; and (3) for such other relief as the Court may deem just and proper.

Dated: July 6, 2004

Respectfully submitted,

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Susan C. Yu
KATTEN MUCHIN ZAVIS ROSENMAN
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~~Stacey McKee Knight~~
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~~Robert M. Sanger~~

By: _____
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MICHAEL JOE JACKSON

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On July 6, 2004, I served the foregoing document REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO SUPPRESS PURSUANT TO PENAL CODE SECTION 1538.5 AND NON-STATUTORY GROUNDS (PART 1); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF on the interested parties in this action by depositing a true copy thereof as follows:

Tom Sneddon
Gerald Franklin
Ron Zonen
Gordon Auchincloss
District Attorney
1105 Santa Barbara Street
Santa Barbara, CA 93101
568-2398

___ BY U.S. MAIL - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

___ BY FACSIMILE - I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at

_X_ BY HAND - I caused the document to be hand delivered to the interested parties at the address above.

_X_ STATE - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed July 6, 2004, at Santa Barbara, California.

Carol Dowling

PROOF OF SERVICE

1013A(1)(3), 1013(c) CCP

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA:

I am a citizen of the United States of America and a resident of the county aforesaid. I am employed by the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 312-H East Cook Street, Santa Maria, California.

On JULY 8, 20 04, I served a copy of the attached ORDER FOR RELEASE OF REDACTED DOCUMENTS addressed as follows:

THOMAS W. SNEDDON, DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
1105 SANTA BARBARA STREET
SANTA BARBARA, CA 93101

THOMAS A. MESEREAU, JR.
COLLINS, MESEREAU, REDDOCK & YU, LLP
1875 CENTURY PARK EAST. 7TH FLOOR
LOS ANGELES, CA 90067

X FAX

By faxing true copies thereof to the receiving fax numbers of: 805-568-2398 (DISTRICT ATTORNEY); 310-861-1007 (THOMAS A. MESEREAU, JR) . Said transmission was reported complete and without error. Pursuant to California Rules of Court 2005(l), a transmission report was properly issued by the transmitting facsimile machine and is attached hereto.

___ MAIL

By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Santa Maria, County of Santa Barbara, addressed as above. That there is delivery service by the United States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

____ PERSONAL SERVICE

By leaving a true copy thereof at their office with their clerk therein or the person having charge thereof.

____ EXPRESS MAIL

By depositing such envelope in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail, in a sealed envelope, with express mail postage paid.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 8TH day of JULY , 20 04 , at Santa Maria, California.

Carrie L Wagner

CARRIE L. WAGNER