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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

Proposed redacted

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MICHAEL JOE JACKSON, Defendant.	No. 1133603 PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO TRAVERSE AFFIDAVITS, TO QUASH WARRANTS AND TO SUPPRESS EVIDENCE (Pen. Code, § 1538.5) DATE: August 16, 2004 TIME: 10:00 a.m. DEPT: TBA (Melville) ~~UNDER SEAL~~

A. Introduction:

This is Plaintiff's Opposition to Defendant's "Motion To Traverse Affidavits, To Quash Warrants And To Suppress Evidence Under Penal Code Section 1538.5" ("Motion"), and a response to his tardily-filed "Supplemental Brief" in support of that motion ("Supp. Br.").

Defendant's arguments in his Motion are many, wide-ranging and eclectic. After addressing Defendant's tardy demand for a certified copy of the relevant warrants, Plaintiff will set out what we understand to be the lawful boundaries of a motion to traverse a search warrant. Plaintiff will then discuss the limitations on Defendant's "standing" to challenge

many of the warrants issued in this case. Finally, Plaintiff will address the merits of each of Defendant's several arguments made in his Motion and in his Supplemental Brief.

B. Defendant's Demand For Certified Copies Of The Relevant Warrants Is Untimely

In his Motion, Defendant noted, "In the ordinary course of preparing motions to suppress and investigating the lawfulness of searches and seizures, counsel for the defense will rely upon the original documents filed with the court by the District Attorney and law enforcement. That cannot be done in this case and counsel must rely upon the District Attorney's office to provide copies through discovery. Therefore, Mr. Jackson asks the Court to take judicial notice of the original search warrants, affidavits and inventories (returns) filed with the Superior Court." (Motion 9:17-22.)

Defendant has changed his mind about proceeding in that fashion. In his Supplemental Brief, dated August 6th (the date of the parties' telephonic conference), Mr. Sanger declares, "As of this writing, Mr. Jackson has not been provided with a complete and proper set of search warrants, affidavits and returns by the prosecutor," and "Unless the prosecutor provides for this Court and for Mr. Jackson and his counsel, certified copies of search warrants, affidavits and returns, Mr. Jackson will assert that the prosecutor has not established that a warrant was in effect for any or all of the searches herein and will ask the Court to treat all such searches as warrantless." (Supp. Br. 2:9-14.)

Defendant doesn't explain why he cannot "rely upon the original documents filed with the court by the District Attorney and law enforcement" in this case, like others. But his request that the Court take judicial notice of those originals was a good idea when he filed his Motion, and it's a good idea now.

The People respectfully request, pursuant to Evidence Code section 452, subdivision (d), that the Court take judicial notice of the search warrants, supporting affidavits and returns in its own records, particularly the warrants issued on November 17, 2003 for the search of Neverland Ranch in Los Olivos (Santa Barbara County) and Bradley Miller's office in Beverly Hills (Los Angeles County) and collectively assigned No. [redacted].

Pursuant to Evidence Code section 453,

> The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:
>
> (a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request, and
>
> (b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

In the course of a motion to suppress, the trial court is the trier of fact. If the search in question was purportedly undertaken on the authority of a warrant, and the defendant demands that the People prove there was such a warrant, that proof must be made to the satisfaction of the court. If the court takes judicial notice of the fact of the search warrant and related documents, that fact is proven for purposes of the suppression motion and the defendant must shoulder his burden to show that the search and seizure made in obedience to the warrant was, nevertheless, unlawful.

As a practical matter, a certified copy of a court document may be necessary (or at least advisable) if the trier of fact does not have the original document at its elbow. Where the document in question *is* immediately available to the court, it is both time-consuming and unnecessary to oblige a party to have the court certify a copy of the document so that the copy may be then be handed back to that very court at the hearing as "proof" of what the court already knows.

Defendant has already appended copies of the search warrants in question to his motion. His lately-asserted demand for certified copies is a pointless and tiresome exercise.

C. The Fourth Amendment Limitations On A Motion To Traverse A Search Warrant

Franks v. Delaware (1978) 438 U.S. 154 [98 S.Ct. 2674, 57 L.Ed.2d 667] set out the substantive and procedural rules for a "subfacial" challenge under the Fourth Amendment to the veracity of the factual statements in search warrant affidavits.

[1] "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof."

[2] "[The movant's allegations] should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained."

[3] "Allegations of negligence or innocent mistake are insufficient."

[4] "The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant."

[5] "Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, **no hearing is required**. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing."

(438 U.S. at 171-172; Plaintiff's organization and numbering; emphasis added.)

The procedure dictated by the *Franks* decision must be followed by the courts of this state in adjudicating challenges to warranted searches undertaken after the adoption of Proposition 8 on June 9, 1983. (See, e.g., *People v. Glance* (1989) 209 Cal.App.3d 836, 846; *People v. Duval* (1990) 221 Cal.App.3d 1105, 1112 [the death of the affiant does not "relieve a defendant of the preliminary showing required under *Franks v. Delaware*, *supra*, 438 U.S. 154 before he or she is permitted to go forward to hearing on a motion to quash or traverse the warrant"].)

D. The "Add-Negligently-Omitted-Information-And-Retest" Rule

Suppose certain information known to the applicant for a search warrant is negligently omitted by him in his affidavit, but comes to light in a challenge to the integrity of

the supporting affidavit. What must the court do?

The negligently omitted information must be added to the affidavit and the sufficiency of the application for a search warrant must then be retested to determine whether probable cause for the resulting search is shown.

See *People v. Costello* (1988) 204 Cal.App.3d 431, 443:

> Federal and state courts recognize that two types of correction are envisioned in *Franks*: (1) material misstatements are stricken and (2) material omissions are added. The aim in either case is not punitive but remedial – to make the affidavit read as it should have so that the reviewing court can then retest for probable cause support. [Citations.] To that end, correction of the affidavit should not take one form (striking or adding) to the exclusion of the other. Where, as in this case, the defendant makes out a case for striking a misstatement, the proper remedy is to add back the true facts known to the affiant on that precise point, if revealed at the hearing, rather than strike and jettison the passage altogether.

E. If A Fact Is Recklessly Omitted, Or Omitted With An Intent To Mislead, The Warrant Should Be Quashed Only If The Omitted Fact Was "Material"; I.e, Only If Its Inclusion In The Affidavit Would Have Defeated Probable Cause

Pre-Proposition 8, the rule was this: "If a fact is recklessly omitted or omitted with an intent to mislead, the warrant should be quashed, regardless of whether the omission is ultimately deemed material." (*People v. Carpenter* (1997) 15 Cal.4th 312, 363, quoting *People v. Aston* (1985) 39 Cal.3d 481, 497-498, which in turn quoted *People v. Kurland* (1980) 28 Cal.3d 376, 390). *Carpenter*, *Aston*, and *Kurland* all involved pre-Proposition 8 searches.

In searches made after adoption of Proposition 8, even a recklessly omitted fact is added back and the sufficiency of the affidavit to demonstrate probable cause for a search is retested. If probable cause remains, the complained-of statement is not material, because its inclusion does not tend to defeat the showing of probable cause.

See *People v. Lopez* (1985) 173 Cal.App.3d 125, 135. And see *United States v. Colkley* (4th Cir. 1990) 899 F.2d 297, in which the court observed "this case presents a

question of omission rather than commission on the part of the agent." The court noted "While omissions may not be *per se* immune from inquiry [citations], the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory" (*id.*, at p. 301). The court then held:

> The district court misstated the type of materiality that *Franks* requires. It believed that the affiant's omission was material because it "may have affected the outcome" of the probable cause determination. However, to be material under *Franks*, an omission must do more than potentially affect the probable cause determination: it must be "necessary to the finding of probable cause." *Franks*, 438 U.S. at 156. For an omission to serve as the basis for a hearing under *Franks*, it must be such that its inclusion in the affidavit would defeat probable cause for arrest. See [*United States v.*] *Reivich* [8th Cir. 1986] 793 F.2d [957] at 961. Omitted information that is potentially relevant but not dispositive is not enough to warrant a *Franks* hearing. *Id.* at p. 962.
>
> In determining whether the affidavit with the omitted information would be supported by probable cause, we must apply the "totality of the circumstances" test of *Illinois v. Gates* , 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). This test requires "a practical, commonsense decision whether, given all the circumstances set forth in the affidavit," *id.* at 238, there is probable cause to believe the suspect committed an offense. [Citation.] (*Id.*, at pp. 301-302.)

California's decisional law is in accord: "A defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause. (See *People v. Luttenberger* (1990) 50 Cal.3d 1, 14-15 & fn. 4.) 'Pursuant to [California Constitution, article I,] section 28[, subdivision] (d), materiality is evaluated by the test of *Illinois v. Gates* (1983) 462 U.S. 213, . . ., which looks to the totality of the circumstances in determining whether a warrant affidavit establishes good cause for a search. [Citation.]' (*People v. Luttenberger*, *supra*, 50 Cal.3d 1, 23.)" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297.)

F. A Showing That An Affiant's Averment Was Made With "A Conscious Indifference To The Truth" And So Is "Deemed The Equivalent Of An Allegation Actually Known To Be Untrue" Is Insufficient As A Ground For A *Franks* Hearing, Unless Excision Of That Statement Defeats The Magistrate's Finding Of Probable Cause

Defendant cites *People v. Cook* (1978) 22 Cal.3d 67, 89 for its holding that "a sworn misstatement made with conscious indifference to whether it is true or false is deemed the equivalent to an allegation actually known to be untrue." (Motion 12:13-27.)

That is true, as far as it goes. It remains to be seen whether any allegations in the original affidavit were "known to be untrue" by Detective Zelis, let alone whether those statements were "material" to the magistrate's finding of probable cause for the search (i.e., whether excision of those statements would "defeat probable cause").

Cook, a pre-Proposition 8 decision, had noted:

> [I]n two significant respects the [*Franks*] decision would afford our citizens less protection than is guaranteed to them under California law: It forbids such a challenge when the misstatements are negligent rather than intentional, contrary to our decision in *Theodore* [*v. Superior Court* (1972) 8 Cal.3d 77]; and even when deliberate lies are proved it requires only that they be excised and the remainder of the affidavit be tested for probable cause, contrary to our holding in the case at bar under article I, section 13, of the California Constitution. In these cases, it is settled doctrine . . . that *Franks* is not to be followed in California and that all challenges to the veracity of search warrant affidavit in our courts are to be governed by *Theodore* and article I, section 13, of the California Constitution as explicated herein." (22 Cal.3d 67, 88.)

People v. Cook, then, is largely irrelevant to this Court's determination whether defendant has demonstrated the need for an evidentiary hearing pursuant to *Franks v. Delaware*, *supra*, 438 U.S. 154 on the facts of this case.

To the merits of Defendant's challenge to the integrity of Detective Zelis' affidavit. Plaintiff will identify each of Defendant's substantive arguments by quoting his

bold-cap summary of a given argument as numbered by him before undertaking a response to that argument.

I

DEFENDANT MAY CONTEST ONLY THE SEARCH OF PROPERTY IN WHICH HE HAS SHOWN A LEGITIMATE EXPECTATION OF PRIVACY

A. Introduction:

Defendant argues, "III. Mr. Jackson has A Legitimate Expectation Of Privacy With Regard To The Searches Executed By Law Enforcement." (Motion, pp. 10-11.)

Given that Defendant challenges the search not only of his residence at Neverland Ranch but also of [redacted] residence and Bradley Miller's office, and the seizure of records from various banks, credit-card providers, credit reporting companies and providers of telephone service (see Motion, *ibid.*), that assertion surely is overbroad.

It should be unnecessary to rehearse the governing principle: "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 [99 S.Ct. 1035, 58 L.Ed.2d 387, 393]; see *People v. Ooley* (1985) 169 Cal.App.3d 197, 202.) If Defendant unwisely left documents or property belonging to him in the care of one or another of his associates, he has no "standing" to contest the constitutionality of the search of the premises that revealed the property.

"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.)

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B. Defendant Has No Legitimate Expectation Of Privacy In [redacted] Residence

Beyond an unsupported assertion that "the unnumbered search warrant pertaining to [redacted] . . . contain portions which may be attorney/client privileged material relating to Mr. Jackson" (Motion 11:8-10) – whatever that means – Defendant makes no showing that he had a "legitimate expectation of privacy" in [redacted] residence on November 18, 2003. That argument may safely be seen for what it is, a "throw-away" argument for which no real factual support could be articulated by Defendant.

C. Defendant Has No Legitimate Expectation Of Privacy With Respect To The Residences Searched On The Authority Of Search Warrants Nos. 4913 and 4915

Defendant asserts, "[S]earch warrants 4913 and 4915 contain portions which may be attorney-client privileged material relating to Mr. Jackson." (Motion 11:8-10.)

Those warrants authorized the search of the residences of individuals other than defendant. That argument by Defendant is as unsupported as is his claim to an expectation of privacy in [redacted] residence.

D. The Search Of Bradley Miller's Office

Defendant challenges the search of Bradley Miller's office in Beverly Hills, undertaken on the same day his Neverland Ranch was searched. He asserts, "Mr. Jackson has a legitimate expectation of privacy in the confidentiality of the attorney/client privilege which includes the right to confidential employment of investigators and experts." (Motion 10:23-27.)

It is not clear how one can have an "expectation of privacy in [a] privilege."

In any event, the scope and intensity of the search of Mr. Miller's office, and Defendant's standing to complain about it, were made the focus of Defendant's "1538.5 (Part I)" motion. That separate motion was premised on the assumed fact that Mr. Miller, a private

investigator, was employed by attorney Mark Geragos on behalf of Defendant at all times relevant to the showing of probable cause for the search. From that premise, defendant argued Mr. Miller's office should be regarded as a campsite of "the defense" and treated as though it was Mr. Geragos' office.

Beyond reiterating that with respect to the search of Mr. Miller's office, Defendant's legitimate concern is limited to the seizure of any "client file" of his that may have been found in Miller's possession, Plaintiff assumes that the Court is fully informed in the premises.

E. Defendant Has No Standing To Contest The Search Of Telephone Records -- His, Or Anyone Else's

Defendant challenges the admissibility of evidence obtained by the execution of "Search warrant numbers 4895, 4897, 4898, 4899, 4900, 4901, 4902, 4977, 4977A, 5020 and 5035 to the extent they pertain to telephone records of other private communications of Mr. Jackson." (Motion 11:1-3.)

Defendant has no reasonable expectation of privacy in the toll records of calls on his phone, let alone anyone else's.

On April 2 and April 21, 2004, three warrants (4976, 4977 and 4977A) issued, and on May 20, 2004, 18 warrants (Nos. 5015-5032) issued, all to telephone and cell-phone service providers around the country, for records of telephone and cell-phone use by defendant and other individuals satisfactorily associated with him, either as his employees or as colleagues who involved themselves in the commission of the crimes that were the objects of the conspiracy alleged in Count One of the indictment.

Prior to the enactment of Proposition 8, a California defendant had a reasonable expectation of privacy in the telephone company's records of his toll calls, whether from his own residence or made from, e.g., a phone in his hotel room. (See *People v. McKunes* (1975) 51 Cal.App.3d 487 [defendant's home or office]; *People v. Blair* (1979) 25 Cal.3d 640, suppressing records of Blair's calls from the Hyatt House hotel in Philadelphia.)

In *Blair*, our Supreme Court acknowledged that the federal rule was contrary, citing *Smith v. Maryland* (1979) 442 U.S. 735 [99 S.Ct. 2577, 61 L.Ed.2d 220]. And in *People v. Lissauer* (1985) 169 Cal.App.3d 413, the Court of Appeal noted:

> Whether appellant's telephone number and address were listed need not be determined. As a consequence of *Lance W.* [in which the Supreme Court upheld Proposition 8], we conclude that the police did not required a warrant to obtain appellant's name and address from the telephone company. Although prior California law would have barred its reception [citations to, inter alia, *Blair*], the Fourth Amendment does not. (*Id.*, 169 Cal.App.3d at p. 419.)

In *United States v. Baxter* (9th Cir. 1973) 492 F.2d 150, the Ninth Circuit rejected the argument that

> the divulgence of telephone company toll and billing records prior to the issuance of a subpoena violated their Fourth Amendment rights as declared in *Katz v. United States*, 389 U.S. 347 . . . . Telephone subscribers are fully aware that records will be made of their toll calls. [Citation.] This Court has held that the expectation of privacy protected by the Fourth Amendment attaches to the content of the telephone conversation and not to the fact that a conversation took place. [Citation.] The defendants have failed to show a violation of their Fourth Amendment rights. (*Id.*, 492 F.2d, at p 167.)

(See also *United States v. Ahumada-Avalos* (9th Cir. 1989) 875 F.2d 681, 683: subpoenaed records of defendant's unlisted phone properly admitted.)

F. Defendant Has No Legitimate Expectation Of Privacy With Respect To The Records Of Banks Or The Records Of Credit Providers – His Records, Or Anyone Else's

Defendant asserts, "Search warrant numbers 4913, 4915, 4926, 4946, 4953, 4976, 4998, 5005, 5006, 5007, 5008, 5047-5071 call for records which may include private records pertaining to Mr. Jackson. In particular, 5005, 5047, 5053 and 5061 specifically mention records pertaining to Mr. Jackson." (Motion 11:4-7.)

That's true. And it is irrelevant.

The warrants in question sought bank or credit account records, of both defendant and most of the other persons identified as conspiring with him to commit the "target" crimes alleged in Count 1. On May 14, 2004, four warrants (Nos. 5005-5008) issued for records of credit-reporting agencies (Bank of America, TransUnion, Equifax and Experian) regarding credit information for Defendant and other persons. On June 11, 2004, 25 warrants (Nos 5047-5068 and 5070-5071) issued for evidence of the use by Defendant and relevant others of credit cards over a short period in early 2003.

Prior to enactment of Proposition 8 in 1983, a California defendant could assert a reasonable expectation of privacy in bank records, just as in telephone records, and enforce that expectation as a right under California's Constitution. Post-Proposition 8, our courts are governed by the binding authority of the United States Supreme Court in matters touching on the Fourth Amendment.

With respect to bank records (and, by extension, credit-card transaction records), an individual was held not to have reasonable expectation of privacy in them in *United States v. Miller* (1976) 425 U.S. 435 [96 S.Ct. 1619, 48 L.Ed.2d 71]. *Miller* held that business records held by a bank are the bank's records, not its customers' records. In *People v. Meyer* (1986) 183 Cal.App.3d 1150, 1163, the Court of Appeal noted, "The [*Miller*] court reasoned that the bank customer has no legitimate expectation of privacy in those records since they are not confidential communications but negotiable instruments to be used in commercial transactions voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business. The court concluded that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him by government authorities."

Plaintiff's research has not uncovered a decision discussing records of a defendant's own use of his legitimately-obtained credit card, but it is unlikely a different rule would apply to them.

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II

THE PORTION OF THE AFFIDAVIT ASSERTING THAT [redacted] IS A STATEMENT THE AFFIANT BELIEVED TO BE TRUE. TRUE OR NOT, THE STATEMENT CERTAINLY IS NOT A "WILLFULLY FALSE" ASSERTION

A. Detective Zelis vs. Dr. Katz

Defendant argues, "VI. The Portion Of The Affidavit Stating That [redacted] Was Wil[l]fully False And That Assertion Was Used To Support The Broadest Claims For Intrusion Into Mr. Jackson's Privacy." (Motion 13:1-5; see *id.*, pp. 13-14.)

Defendant grounds this argument of his on a portion of a telephone interview by Detective Zelis of Dr. Stan Katz (whose occupation as a trained forensic psychologist Defendant insists on bracketing with quotation marks) that Detective Zelis did not include in his affidavit. In that interview, [redacted]

Defendant characterizes the "4 single spaced pages of the Statement of Probable Cause" which Detective Zelis devoted to [redacted] as "the centerpiece to the affidavit," from which (Defendant argues) the affiant "attempted to

justify the broadest aspects of the warrant request." Defendant insists that Detective Zelis' omission of Dr. Katz's [redacted] makes his own belief that [redacted] – which he based upon his own "training and experience," a "wil[l]fully false claim."

Defendant makes too much of Detective Zelis's omission of Dr. Katz's [redacted]"

Several observations seem to be in order.

First of all, Dr. Katz believed [redacted]

Secondly, Dr. Katz [redacted]

Thirdly, Detective Zelis based his own belief [redacted] That definition, if not right on the mark, is close enough. [redacted]

Detective Zelis described not only [redacted]

[redacted]

Finally, it is unlikely that defendant, if pressed on the point, [redacted]

Defendant has not come close to demonstrating that Detective Zelis's [redacted] probable cause to search Neverland would not be diminished in the least.

B. Detective Zelis Did Not Offer An "Expert Opinion"

In his tardily-filed "Supplemental Brief," Defendant argues, "Detective Zelis' 'Expert' Opinion In The Statement Of Probable Cause Lacks Foundation." (Supp. Br., 3:16-17.)

The premise of that argument is faulty. Detective Zelis didn't purport to be an "expert." [redacted]

Most of us acquire substantial blocks of information in just that fashion; by reading the results of others' research. The magistrate who reviewed Detective Zelis's affidavit could assume he

was conveying information the affiant had obtained from a reliable source or sources.

Indeed, Defendant does not so much quarrel with the accuracy of Detective Zelis's [redacted] Defendant argued that "The Search Warrant Is Invalid Because It Is Stale" (Supp. Br. 5:15 – 6:5) and "Because It Is Overbroad" by reason of [redacted]

III

AFFIANT'S "OTHER WILLFULLY FALSE STATEMENTS" ARE NO SUCH THING

Defendant argues, "VII The Affidavit Contained Other Wil[l]fully False Statements" (Motion 15:1-2). He specifies [redacted]

A. "[redacted]

Defendant does not indicate the significance he attaches to [redacted]

[redacted]. Its importance is not readily apparent.

[redacted]

B [redacted]

Defendant argues:

[redacted]

What Defendant means by "*no later than* May 11, 2004" is "*on* May 11, 2004" –

about six months after the warrant in question issued for the search of Neverland. (Please see Exh. "F.")

That correction is dispositive of an argument that, in any event, has no merit because (a) the misinformation is attributed to [redacted] (recall the United States Supreme Court's caution in *Franks v. v. Delaware*, *supra*, 438 U.S. 154 at p. 171: "The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant") and (b) it misstates [redacted] information.

First, [redacted]

Secondly, [redacted].

For these reasons, this argument of defendant's lacks the factual support required to impeach Detective Zelis' affidavit.

IV

THE SEARCH OF BRADLEY MILLER'S OFFICE WAS NOT "OVERBROAD" OR A "GENERAL SEARCH"

Defendant asserts, "VIII The Searches Were Overbroad, General Searches." (Motion 16:1-2.) "The Warrants Were Overbroad On Their Faces Because They Exceeded The Probable Cause Showing" (*id.* 16:3-5), and "The Warrants Were Overbroad On Its Face [sic] Because They Lacked Particularity" (*id.*, 16:15-20).

In the text following those headings, Defendant confines himself to the warrant for the search of Bradley Miller's office. But what our Supreme Court said about search warrants in complex case is worth noting: In *People v. Bradford*, *supra*, 15 Cal.4th 1229, the court stated:

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> "General warrants, of course, are prohibited by the Fourth Amendment. 'The problem (posed by the general warrant) is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings .... (The Fourth Amendment addresses the problem) by requiring a "particular description" of the things to be seized.' (*Coolidge v. New Hampshire*, 403 U.S. 443, 467 . . . (1971)." (*Andresen v. Maryland* (1976) 427 U.S. 463, 480 [96 S.Ct. 2737, 2748 49 L.Ed.2d 627].) The high court also has recognized, however, that in a complex case resting upon the piecing together of "many bits of evidence," the warrant properly may be more generalized than would be the case in a more simplified case resting upon more direct evidence. (*Id.* at p. 481, fn. 10 [96 S.Ct. at p. 2749].)

(*People v. Bradford, supra*, 15 Cal.4th at p. 1291.)

Defendant complains that in Mr. Miller's case, "the search warrant . . . authorized the search and seizure of virtually all computers and computer related materials in his office" (Motion 16:10-12) and "the warrant describes all computer systems, and all items related to computer systems, without giving any specific indications of what is to be searched" (*id.*, 16:18-20).

It must be a sufficient answer to say that the affidavit supporting the warrant for Mr. Miller's office sought [redacted] (Affid., 77:17-27.) "It is reasonable to infer that some of these records may be stored either in a computer or on some type of computer storage device such as floppy disks, zip drives, removable tape cartridges, or CD-ROMs." The only way to whether, e.g., a given computer contains such records is to first seize the hard drive and then examine it for its content.

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V

THE SEARCHING OFFICERS DID NOT DISREGARD
THE LIMITATION IMPOSED BY THE WARRANT
FOR THE SEARCH OF NEVERLAND RANCH

Defendant argues: "IX. The Sheriff Flagrantly Disregarded The Limitations Of The Search Warrants." (Motion 16:20-22.) In support of that charge, Defendant alleges: "A. The Officers Seized Items Which Were Not Described In The Search Warrant" (*id.*, 17:15 – 18:12) and "B. The Officers Exceeded The Scope Of The Place To Be Searched In The Warrant" (*id.* 18:13-25).

A. To The Extent The Searching Officers Seized Items That Were Not Particularly Described In The Search Warrant, Those Items Were Seized In The Reasonable Belief They Had Evidentiary Value In The Ongoing Investigation

With respect to the search of Neverland Ranch, defendant complains that though the warrant authorized seizure of [redacted] was clearly outside the scope of the warrant." (Motion 17:15-24.)

That is not so. The warrant also called for [redacted]

Defendant further complains, [redacted]

[redacted] (Motion 17:25 – 18:8.) Defendant continues,

> These are some examples of the overbroad execution of the search warrant, which indicate that the search became a general exploratory rummaging, and the seizures became an indiscriminate dragnet. An evidentiary hearing after full discovery is necessary to establish the overbroad execution of the search [warrant]. (Motion 18:9-12.)

In Attorney Sanger's Declaration, he referenced his attached "Exhibit D" as "the inventories which have been provided through discovery and which we believe represent the returns for items seized pursuant to search warrant . . . ." (Motion 6:2-4.)

With respect to property seized at Neverland Ranch, the Sheriff's Property Forms as part of Defendant's Exhibit D reflect Items [redacted] (68 items). Counsel somehow overlooked the property forms recording Items [redacted] (74 items), though discovery of those additional forms (numbered for discovery as [redacted]) was provided some time ago, and the defense has examined the items themselves.

Plaintiff remedies that oversight by appending to this Opposition the relevant property forms for [redacted] as Exhibit A. Plaintiff also appends, as Exhibit B, relevant follow-up investigative reports concerning the examination of many of the items seized at Neverland Ranch, discovery of which was likewise provided the defense. Plaintiff believes that additional information will assist the Court in more accurately determining the nature and number of items seized and in evaluating the extent to which those items pertained to the investigation, and whether the search was exploratory in nature. (See *People v. Bradford*, *supra*, 15 Cal.4th 1229, 1290.)

With all due respect, it is not enough for defendant to offer a few "examples" of seized items the defense claims "indicate that the search became a general exploratory rummaging." Evidence lawfully observed by searching officers may be seized without a warrant "if its incriminating character is immediately apparent," i.e., its evidentiary significance is apparent "without conducting some further search of the object." (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 375 [113 S.Ct. 2130, 124 L.Ed.2d 334].) It is Defendant's burden to identify those items he believes qualify neither as property specifically identified in the search warrant nor as property whose relationship to the crimes under investigation would not be "immediately apparent" to the searching officers.

In his Supplemental Brief, Defendant argues "In addition to the item being in plain view, the officer must have probable cause to believe that the item is subject to seizure, rather than mere suspicion. (*Arizona v. Hicks* (1987) 480 U.S. 321.)" (Supp. Br. 7:22-24.)

That may not be so. In *People v. Bradford*, *supra*, 15 Cal.4th 1229, our Supreme Court noted,

> The plain-view doctrine permits, in the course of a search authorized by a search warrant, the seizure of an item not listed in the warrant, if the police lawfully are in a position from which they view the item, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object. (*Horton v. California* (1990) 496 U.S. 128, 135-137 [110 S.Ct. 2301, 2307-2308]; *Texas v. Brown* (1983) 460 U.S. 730, 739 [103 S.Ct. 1535, 1541-1542, 75 L.Ed.2d 502] (plur. opn.); see *Minnesota v. Dickerson* (1993) 508 U.S. 366, 374-375 [113 S.Ct. 2130, 2136-2137, 124 L.Ed.2d 334].) In such circumstances, the warrantless seizure of evidence of crime in plain view is not prohibited by the Fourth Amendment, eve if the discovery of the evidence is *not* inadvertent. (*Horton v. California*, *supra*, 496 U.S. 128, 130 [110 S.Ct. 2301, 2304].) Where an officer has a valid warrant to search for one item but merely a suspicion, not amounting to probable cause, concerning a second item, that second item is not immunized from seizure if found during a lawful search for the first item. (*Id.*, at pp. 138-139 [110 S.Ct. at pp. 2308-2309].) This rule was stated by the high court in *Horton* in the context of a search conducted pursuant to a

warrant, notwithstanding the circumstance that in other cases applying the plain view doctrine in various contexts, the determination that the incriminating nature of an item was "immediately apparent" was based upon whether the officers had probable cause to believe that the item was either evidence of a crime or contraband. (E.g., *Minnesota v. Dickerson*, *supra*, 508 U.S. 366, 375 [113 S.Ct. 2130, 2136-2137]; *Arizona v. Hicks* , *supra*, 480 U.S. 321, 326-327 [107 S.Ct. 1149, 1153-1154].)

In the present case, the testimony of the officers involved in the search indicated their belief that they could search for items not listed in the warrant. This testimony, read in context and considered in light of the information in their possession concerning not only the Campbell and Stewart matters but the other incidents, simply reflected their entirely appropriate understanding that such items lawfully might be seized if reasonably believed to be related to criminal activity.

(*People v. Bradford*, *supra*, 15 Cal.4th at pp. 1293-1294.)

B. If Property Having No Apparent Connection To The Investigation Was Seized, The Remedy Is To Suppress Only The Improperly Seized Items

In *People v. Bradford*, *supra*, 15 Cal.4th 1229, our Supreme Court noted:

> The high court has rejected . . . the contention that police action disregarding the authorized scope of a warrant transforms the warrant into an impermissible general warrant, requiring suppression of the entire fruit of the search, rather than merely those items as to which there was no probable cause to support seizure – where the officers have not exceeded the scope of the warrant in the *places* searched, but only in seizing items unconnected to the investigation or prosecution of the crime. In such circumstances, when all items unlawfully seized are suppressed, "there is certainly no requirement that lawfully seized evidence be suppressed as well. [Citations.]" (*Waller v. Georgia* (1984) 467 U.S. 39, 43-44, fn. 3 [104 S.Ct. 2210, 2214, 81 L.Ed.2d 31]; *Andresen v. Maryland*, *supra*, 427 U.S. 463, 482, fn. 11 [96 S.Ct. 2737, 2749].) In the present case, the officers searched for and seized items –

> including some that the trial court considered unlawfully seized and ordered suppressed – only from the "places" designated in the warrant.

(*People v. Bradford*, *supra*, 15 Cal.4th at p. 1296.)

C. The Searching Officers Did Not Exceed The Scope Of The "Place To Be Searched" As Described In The Warrant For The Search Of Neverland Ranch

The warrant authorizing a search of Neverland Ranch described the "place to be searched" as "NEVERLAND RANCH, located at [redacted], Los Olivos, California, further limited to the buildings described as the arcade building, the main residence and the security headquarters, the locations of which are depicted on the aerial photograph attached as Attachment 'A-1' or (in the case of the [redacted]) in the photograph attached as 'A-2.'" (See Motion, Exh. B-1.) The building identified in "A-2" as the [redacted] is attached to the building identified in "A-1" as the [redacted]" by an archway structure.

Defendant argues, "It appeared that law enforcement agents exceeded the scope of the place described in the search warrant by searching Michael Jackson's private office and by searching a video library and apartment that were not included in the description." (Motion 18:17-19.)

Defendant's "private office," the "video library" and a small apartment adjoining it are located above a garage, itself part of the building identified in "A-2" as the "[redacted] building.

"Buildings described as . . ." are the operative words. The "Neverland Ranch" search warrant did not attempt to further define or specify rooms within the three identified buildings by their supposed function. (Compare the limiting description set out in the second "Neverland Ranch" warrant, obtained the evening of the execution of the first warrant and authorizing the seizure [redacted] "So much of 'Neverland Ranch,' located at [redacted], Los Olivos, CA as constitutes the bedroom of the

main residence." Emphasis added.)

Greater specificity is required when a search is commanded for the living quarters of an individual who, as it happens, resides in a multiple-occupancy building. (See, e.g., *People v. Estrada* (1965) 234 Cal.App.2d 136, 146, 148). This is not such a case. [redacted].

D. There Was No Violation Of The "Knock-Notice" Requirement In This Case

In his Supplemental Brief, Defendant argues, "The Search Of Mr. Jackson's Private Suite Was Invalid Because There Was No Knock And Notice." (Supp. Br. 6:16-25.)

Defendant has been provided with a copy of the report that details the procedure followed by the peace officers who constituted the "entry team" for the search of Neverland Ranch [redacted]) and that the entries were videotaped, and so has been informed that officers knocked on both outer and inner doors of the structures searched in obedience to the warrant. He acknowledges that recent appellate decisions have held that the "knock-notice" requirement of Penal Code section 1531 applies only to the outer doors of a structure. (See *People v. Mays* (1998) 67 Cal.App.4th 969, 974-976, citing and relying on *People v. Howard* (1993) 18 Cal.App.4th 1544; see also *United States v. Crawford* (9th Cir. 1981) 657 F.2d 1041.)

VI

THE REMEDY OF SUPPRESSION OF "ALL EVIDENCE" IS NOT AVAILABLE TO DEFENDANT ON THE FACTS OF THIS CASE

Defendant asserts, "X. All Evidence Seized, Not Just The Items Beyond The Scope, Must Be Suppressed" (Motion 19:1-3) "because the officers executed the warrant in flagrant disregard for its limitations. [Citations.] This remedy is required in an appropriate case where

the violations of the warrant's limitations are so extreme that the search essentially is transformed into an impermissible general search. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1305-1306.)" (Motion 19:4-9..)

In his several motions in this matter, Defendant frequently has used "flagrant" (and "blatant") to add desired emphasis to his arguments. But at least since the United States Supreme Court quoted petitioner's use of that phrase in *Waller v. Georgia* (1984) 467 U.S. 39, 43-44, fn. 3 [104 S.Ct. 2210, 2214, 81 L.Ed.2d 31], "flagrant disregard" of a warrant's limitations has become a phrase of art in search-and-seizure jurisprudence.

In *People v. Bradford*, *supra*, 15 Cal.4th 1229, our Supreme Court observed that subsequent to *Waller v. Georgia*, *supra*, a number of lower federal courts (the Fifth Circuit excepted) had held that a "flagrant disregard" of a warrant's limitations in the *seizure of property* not specified by the warrant will mandate total suppression of the evidence seized.

But, the *Bradford* court noted,

> In *U.S. v. Chen*, *supra*, 979 F.2d 714, the United States Court of Appeals for the Ninth Circuit explained that the suppression of all evidence is an extraordinary remedy, used only when the violations of the warrant's requirements are so extreme that the search essentially is transformed into an impermissible general search. (*Id.*, at p. 717.) The courts rarely have actually concluded that police conduct was so extreme as to warrant total suppression. The remedy has been justified when the police exceeded the "scope of the warrant in the places searched" (*Waller v. Georgia*, *supra*, 467 U.S. 39, 44, fn. 3 [104 S.Ct. 2210, 2214]; *U.S. v. Decker*, *supra*, 956 F.2d 773, 779), the police used the warrant as a pretext to search for evidence of unrelated crimes (*United States v. Rettig*, *supra*, 589 F.2d 418, 423), or the police were motivated "'by a desire to engage in indiscriminate "fishing"' rather than by "considerations of practicality" (*U.S. v. Chen*, *supra*, 979 F.2d 714, 717; *U.S. v. Medlin* (10th Cir. 1988) 842 F.2d 1194, 1199. The mere magnitude of the seizures does not establish a violation of the federal Constitution. (*U.S. v. Lambert*, *supra*, 887 F.2d 1568, 1572-1573; *United States v. Wuagneux*, *supra*, 683 F.2d 1343, 1352.)

(*People v. Bradford*, *supra*, 15 Cal.4th 1229, at pp.1305-1306; fn. omitted.)

Bradford upheld the trial court's finding that the police were not in "flagrant disregard" of the warrant before the court in that case: "Although the officers seized a number of items that clearly fell outside the scope of the warrant, the record reveals that the bulk of these items might have had some bearing upon the current offenses. . . . Nor was the behavior of the officers so unconscionable as to amount to a due process violation. [Citation.] Under these circumstances, the trial court did not err in declining to order the "extraordinary remedy" of total suppression of all items seized." (15 Cal.4th, at pp. 1306-1307.)

VII

A WARRANTED SEARCH COMMENCED BEFORE 10:00 P.M. MAY CONTINUE PAST THAT HOUR WITHOUT FURTHER JUDICIAL AUTHORIZATION

Defendant argues, "XI. The Search Of Neverland Ranch Became An Unjustified Nighttime Search When The Sheriffs Continued Searching After 10 P.M." (Motion 19:17-20:2.)

Nonsense.

Penal Code section 1533 provides, in relevant part, that "Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 a.m. and 10 p.m."

There is an obvious difference between "serving" a search warrant and "executing" that warrant. The warrants for the search of Neverland Ranch and Brad Miller's office were "served" mid-morning, and their "execution" commenced immediately upon "service."

That aside, a search begun before 10 p.m. may continue as long after 10 p.m. as is reasonably required to complete the search. See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 5: "We hold that a search warrant is not invalidly executed pursuant to section 1533 when its execution is part of one continuous transaction which begins before 10 p.m. and continues after that hour." (Accord, *People v. Maita* (1984) 157 Cal.App.3d 309, 321-322.)

CONCLUSION

Defendant has "standing" to challenge only the warrant for the search of Neverland Ranch and, arguably, the seizure of some of the contents of Bradley Miller's office. He has no reasonable expectation of privacy in the homes of his friends and business associates, or in telephone records, bank records or the records of credit providers.

Defendant has not met *Franks*' requirement of a preliminary showing of either a "deliberate falsehood" or of "reckless disregard for the truth" by the affiant that, if excised, would defeat the affidavit's showing of probable cause for the search. Neither has he shown that material information was omitted from the affidavit.

The searches at issue were not "overbroad," nor did it constitute a "general search." The searching officers confined their search to the buildings identified in the warrant. The property that was seized was either specified in the warrant or its evidentiary relationship to the ongoing investigation was "immediately apparent" to them when it came to light. There was no failure to give "knock-notice," nor was there a need for judicial authorization to extend the search past 10:00 p.m.

Defendant's motion to traverse the warrant and to suppress evidence should be denied.

DATED: August 9, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR.
District Attorney

By: _____
Gerald McC. Franklin, Senior Deputy

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SANTA BARBARA } SS

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 August 9, 2004, I served the within PLAINTIFF'S NOTICE OF MOTION FOR ORDER DIRECTING THAT PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO TRAVERSE AFFIDAVITS, ETC. BE MAINTAINED UNDER SEAL & proposed order on Media's counsel & proposed redacted opposition and on Defendant, by THOMAS A. MESEREAU, JR., STEVE COCHRAN, ROBERT SANGER and BRIAN OXMAN, by faxing a true copy to counsel (except Mr. Oxman) 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 9th day of August, 2004.

Gerald McC. Franklin