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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

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GARY M. BLAIR, Executive Officer
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SUPERIOR COURT, STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

MICHAEL JOE JACKSON,

Defendant.

Case No.: 1133603

ACCESS PROPONENTS' NOTICE OF
MOTION AND MOTION REQUESTING
CONTEMPORANEOUS ACCESS TO
VIDEOTAPES PLAYED IN OPEN COURT
AND FOR PUBLIC RELEASE OF SUCH
VIDEOTAPES AND OTHER EXHIBITS
INTRODUCED AS EVIDENCE AT
ONGOING HEARINGS THAT BEGAN ON
JULY 27 AND AUGUST 16, 2004

Place: Department SM-2,
Judge Rodney S. Melville

[VIA FACSIMILE]

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as the matter may be heard before the above-entitled
Court, located at 312-C East Cook Street, Santa Maria, California 93456-5369, NBC Universal, Inc.;
CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network, Inc.;
The Associated Press; *Los Angeles Times*; The New York Times Company, and *USA Today* (collec-
tively, the "Access Proponents") will, and hereby do, move this Court to grant public access to the

ACCESS PROPONENTS' NOTICE OF MOTION AND MOTION REQUESTING CONTEMPORANEOUS ACCESS TO
VIDEOTAPES PLAYED IN OPEN COURT AND FOR PUBLIC RELEASE OF SUCH VIDEOTAPES AND OTHER
EXHIBITS INTRODUCED AS EVIDENCE AT ONGOING HEARINGS THAT BEGAN ON
JULY 27 AND AUGUST 16, 2004

1 videotapes and other exhibits introduced as evidence at the ongoing hearings that began on July 27
2 and August 16, 2004. This Motion is made pursuant to California Rules of Court 243.1-243.2, the
3 First Amendment of the United States Constitution, Article I, Section 2 of the California Constitu-
4 tion, and the common-law right of access to judicial records.

5 This Motion is based upon this Notice, the attached Memorandum of Points and Authorities,
6 all pleadings, records and papers on file herein, all matters of which the Court may properly take ju-
7 dicial notice, and upon such further argument and evidence as may be presented at the hearing on this
8 Motion.

9 DATED: August 23, 2004

10 GIBSON, DUNN & CRUTCHER LLP
11 Theodore J. Boutrous, Jr.
12 Michael H. Dore

13 By:  Theodore J. Boutrous, Jr.

14 Attorneys for NBC Universal, Inc.; CBS Broadcasting
15 Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News
16 Network LP, LLLP; The Associated Press; *Los Angeles*
17 *Times*; The New York Times Company; and *USA Today*

MEMORANDUM OF POINTS AND AUTHORITIES

I
INTRODUCTION

The Access Proponents, a group of media organizations,¹ respectfully move this Court pursuant to California Rules of Court 243.1-243.2² to grant public access to the videotapes and other evidence introduced during the ongoing hearings addressing Mr. Jackson's motions to quash the indictment and suppress evidence that began on July 27 and August 16, 2004. These videotapes and documents are judicial records to which the public may not be denied access absent explicit, narrowly-tailored findings that are issued *before* they are sealed. See Cal. R. Ct. 243.1(c). A "presumption of openness inheres in the very nature of a criminal trial under our system of justice." *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1200 (1999) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (plurality)). And because of "the critical importance of *contemporaneous* access . . . to the public's role as overseer of the criminal justice process," *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991), the tapes aired during the course of the hearing, as well as other exhibits like the 82-page warrant affidavit, must be made available to the public immediately.

II
ARGUMENT

A. The Public Has The Right To View Videotapes Entered Into Evidence As They Are Played In Open Court

This hearing on Mr. Jackson's motions to quash the indictment and to suppress evidence is subject to the presumptions of openness established by the First Amendment and California law. See generally *NBC Subsidiary*, 20 Cal. 4th at 1178. No portion of it can be closed to the public ab-

¹ NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network LP, LLLP; The Associated Press; *Los Angeles Times*; The New York Times Company, and *USA Today*.

² California Rule of Court 243.2(h)(2) provides in relevant part: "A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record."

1 sent specific findings, made prior to closure, that there is a substantial probability that openness will
2 jeopardize an overriding interest. *Id.* at 1204. And any closure must be narrowly tailored to afford
3 maximum public access based on specific findings entered before such closure. *Id.* These demand-
4 ing requirements apply in the context of a pretrial suppression hearing. *See, e.g., United States v.*
5 *Brooklier*, 685 F.2d 1162, 1170 (9th Cir. 1982) (applying “the public’s first amendment right of ac-
6 cess” to pre-trial suppression hearings). Without detailed findings justifying such restrictions, to ex-
7 clude the public from the hearing on Mr. Jackson’s motions, including blocking public view of evi-
8 dence introduced during the proceedings, clearly runs counter to the well-established presumption of
9 openness.

10 In fact, here, reversing the presumption of openness in such a manner is even more harmful to
11 the public’s constitutional and common law rights because of the allegations underlying the motions
12 being heard by the Court. Mr. Jackson alleges that “[t]he conduct of the District Attorney and other
13 agents of law enforcement in the investigation of this case amounts to outrageous government con-
14 duct.” Defendant’s Mot. to Suppress at 10. Such an allegation of wrongdoing by government offi-
15 cials creates an even greater need for total public access, in part so the press may fulfill their role, rec-
16 ognized by the Supreme Court, of “guard[ing] against the miscarriage of justice by subjecting the po-
17 lice, prosecutors, and judicial processes to extensive public scrutiny and criticism.” *Gentile v. State*
18 *Bar of Nev.*, 501 U.S. 1030, 1035 (1991) (plurality) (citation omitted); *see also id.* at 1035-36 (“Pub-
19 lic awareness and criticism have even greater importance where . . . the criticism questions the judg-
20 ment of an elected public prosecutor.”). The public is entitled to know, and to see, exactly what the
21 police and prosecutors—to whom they have bestowed so much power—are doing in their name.

22 Moreover, “the critical importance of *contemporaneous* access . . . to the public’s role as
23 overseer of the criminal justice process” *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir.
24 1991), demonstrates the need for these tapes to be made available contemporaneously with their in-
25 troduction into evidence. *See, e.g., NBC Subsidiary*, 20 Cal. 4th at 1211, 1219 (recognizing that “de-
26 laying public access until conclusion of a criminal trial is inconsistent with . . . utilitarian values” and
27 the First Amendment; emphasizing right to “contemporaneous access,” and rejecting argument that
28

1 delayed release of transcripts could remedy improper closure of hearings); *see also Associated Press*
2 *v. United States Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (noting that even a 48-hour delay in
3 unsealing judicial records "is a total restraint on the public's first amendment right of access even
4 though the restraint is limited in time").

5 Indeed, "there is a significant public interest in affording that opportunity [to see and hear the
6 evidence] contemporaneously with the introduction of the tapes into evidence in the courtroom, when
7 public attention is alerted to the ongoing trial." *In re Application of Nat'l Broad. Co.*, 635 F.2d 945,
8 952 (2d Cir. 1980).

9 **B. The Tapes Played Already, And Those To Be Played In The Future, Must Be Re-**
10 **leased And Available For Copying**

11 These tapes, which have been introduced into evidence as exhibits at the hearing, are clearly
12 judicial records within the meaning of Rule 243.1 of the California Rules of Court, which defines
13 "record" to include "all or a portion of any document, paper, exhibit, transcript, or other thing filed or
14 lodged with the court." Cal. R. Ct. 243.1(b)(1); *see also United States v. Graham*, 257 F.3d 143, 151
15 n.3 (2d Cir. 2001) (noting that the word "documents" "has been held to apply to audio and video
16 tapes"). As judicial records, the tapes are subject to the presumption of openness established by the
17 Rule and the First Amendment. Cal. R. Ct. 243.1(c) ("Unless confidentiality is required by law, court
18 records are presumed to be open"); *see also Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th
19 106, 111 (1992) ("in general" the First Amendment provides "broad access rights to judicial hearings
20 and records . . . both in criminal and civil cases").

21 To deny or delay public access to the tapes already aired in court, or any tapes to be aired in
22 the future, "impermissibly reverse[s] the presumption of openness that characterizes criminal pro-
23 ceedings under our system of justice." *Associated Press v. United States Dist. Court*, 705 F.2d 1143,
24 1147 (9th Cir. 1983) (internal citations omitted). Especially as to the tapes aired in open court, there
25 is no basis for sealing; they were viewed by the public, there was no threat to Mr. Jackson's fair trial
26 rights, no motion to seal has been filed, and there have been no findings offering the requisite bases
27 for sealing records that were already open for public viewing.

1 As the Second Circuit held in *In re Application of National Broadcasting Co.*, 635 F.2d 945
2 (2d Cir. 1980), "there is a presumption in favor of public inspection and copying of any item entered
3 into evidence at a public session of a trial." *Id.* at 952. In that case, relating to the "Abscam" scandal
4 of the early 1980s, the court affirmed a decision allowing news organizations to have copies of audio
5 and videotapes aired in open court that risked far greater prejudice than the tapes involved here:
6 the defendants, including members of Congress, accepting alleged bribes from undercover operatives.
7 *Id.* at 947-48. Like this case, however, the involvement of public officials strengthened the need for
8 public access, because "[t]he presumption is especially strong . . . where the evidence shows the ac-
9 tions of public officials" *Id.* And, the court held, "[o]nce the evidence has become known to
10 the members of the public, including representatives of the press, through their attendance at a
11 public session of court, it would take the most extraordinary circumstances to justify restrictions
12 on the opportunity of those not physically in attendance at the courtroom to see and hear the evi-
13 dence" *Id.* (emphasis added).³

14 The tapes aired in open court do not show the defendant engaging in any purporting wrongdo-
15 ing; they do not show the defendant at all. And no matter what the tapes show, "[t]he media already
16 enjoy an incontestable first amendment right to publicize and editorialize on the contents of the tapes
17 whether or not copies are available for transmission." *Valley Broad. Co. v. United States*, 798 F.2d
18 1289, 1295, 1297 (9th Cir. 1986) (ordering access to duplicate tapes and access to new tapes on the
19 day they are received in evidence). Therefore, as the Second Circuit recently held, "while the events
20 surrounding the instant case have gained some notoriety, the possibility that the jury pool will be-
21 come so tainted as to prevent the defendants here from obtaining fair trials is too speculative to justify
22 denial of the public's right to inspect and copy evidence presented in open court." *Grant*, 257 F.3d at
23 155.

24
25
26 ³ The Access Proponents will make their best efforts in working with the Court to minimize the
27 burdens on court personnel of copying the videotapes aired at the proceedings.
28

1 C. All Exhibits Introduced During The Hearings Relating To The Motion To Quash
2 The Indictment And To Suppress Must Be Released, Including The 82-Page
3 Search Warrant Affidavit

4 Like the videotapes, the materials introduced into evidence as part of the hearing addressing
5 Mr. Jackson's motions to quash the indictment and suppress evidence are clearly "judicial records"
6 subject to the First Amendment and Rule 243.1. See generally Cal. R. Ct. 243.1(b)(1); *Copley Press*,
7 6 Cal. App. 4th at 111. These materials, including the 82-page search warrant affidavit, were submit-
8 ted to the Court as evidence in support of important rulings sought by the Defense. See July 27, 2004
9 Tr. at 116:2-14. They are at the heart of what Mr. Jackson alleges to be a pattern of "outrageous gov-
10 ernment conduct" (Defendant's Mot. to Suppress at 10) that includes a tainted indictment unique in
11 that "no case in the history of the State of California that has condoned anything like the abuse of
12 power demonstrated in this grand jury proceeding." Defendant's Mot. to Set Aside Indictment at 5.

13 Moreover, the search warrant materials are subject to literally four presumptions of openness:
14 The First Amendment presumption, the Rule 243.1 presumption, the common-law presumption, see
15 *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), and the presumption established
16 by Penal Code § 1534(a), which explicitly provides that "[t]he documents and records of the court
17 relating to the warrant," which include the affidavit supporting the search warrant along with the re-
18 turn and inventory, "shall be open to the public as a judicial record." *Id.* (emphasis added).

19 "[A]ccess to search warrant materials after indictment is almost universal." *In re Search*
20 *Warrant*, 1994 U.S. Dist. LEXIS 18360, at *17 (S.D. Ohio 1994) (emphasis added). "[T]here is, and
21 ought to be, widespread public access to search warrant materials in cases in which an indictment has
22 been returned." *Id.* at *15. "[P]ublic access to documents filed in support of search warrants is im-
23 portant to the public's understanding of the function and operation of the judicial process and may
24 operate as a curb on prosecutorial and judicial misconduct." *In re Search Warrant for Secretarial*
25 *Area Outside Office of Thomas Gunn*, 855 F.2d 569, 573 (8th Cir. 1988). Thus, it appears that every
26 court to reach the issue of post-indictment access to search warrant materials has concluded that the
27 press and public are, in fact, entitled to inspect such materials once an indictment has been obtained.
28 See, e.g., *In re Application and Affidavit for a Search Warrant*, 923 F.2d 324, 326 (4th Cir. 1991)

1 (upholding district court's order unsealing warrant affidavit following the indictment, but before
2 trial); *In re Search Warrants Issued on May 21, 1987*, 1990 U.S. Dist. LEXIS 9329 at *19 (D.D.C.
3 1990) ("[o]nce an individual is so indicted, the public has a legitimate interest in information con-
4 tained in the affidavits in support of the search warrant . . . which led to the indictment").

5 There is no basis for the sealing of the 82-page search warrant affidavit here, and any basis for
6 doing so before has evaporated. Mr. Jackson is attacking the searches as improper, and these issues
7 are being fought in open court with Mr. Jackson introducing the affidavit as Exhibit 19 in the hearing
8 on his motion to suppress. As counsel for the Access Proponents argued at the July 27, 2004 hearing,
9 that document was submitted as evidence and has now become part of the record, subject to an even
10 stronger presumption of openness and access. July 27, 2004 Tr. at 229:5-13. Nevertheless, even af-
11 ter counsel made this point to the Court and the parties, no sealing motions have been filed and
12 no reasons have been given for sealing the search warrant materials. In its original January 23, 2004
13 order sealing the warrant affidavit, the Court said it would remain "alert to [the] possibility" that it
14 might revisit the issue whether the warrant affidavit could be unsealed. January 23, 2004 Order at 5.
15 Now is the time to do so, and the Court should release that document and all of the other exhibits.

16 III. 17 CONCLUSION

18 The First Amendment to the United States Constitution, Article I, Section 2 of the California
19 Constitution, the common law, and California Rule of Court 243.1 all mandate contemporaneous ac-
20 cess in open court and the public release of videotapes and other exhibits introduced into evidence at
21 the Court's ongoing hearing. Accordingly, this Court should grant this motion in its entirety and al-
22 low the Access Proponents to work with court personnel to create and obtain copies of the materials
23 introduced into evidence.

1 DATED: August 23, 2004

Respectfully submitted,

2 GIBSON, DUNN & CRUTCHER LLP
3 Theodore J. Boutrous, Jr.
4 Michael H. Dore

5 By: 

Theodore J. Boutrous, Jr.

6 Attorneys for NBC Universal, Inc.; CBS
7 Broadcasting Inc.; Fox News Network
8 L.L.C.; ABC, Inc.; Cable News Network
9 LP, LLLP; The Associated Press;
10 *Los Angeles Times*; The New York Times
11 Company; and *USA Today*

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**CERTIFICATE OF SERVICE
BY FAX AND REGULAR MAIL**

I, **Michael H. Dore**, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am a member of the bar of this Court, and on August 23, 2004, I served the following:

**ACCESS PROPONENTS' NOTICE OF MOTION AND MOTION REQUESTING
CONTEMPORANEOUS ACCESS TO VIDEOTAPES PLAYED IN OPEN COURT AND FOR
PUBLIC RELEASE OF SUCH VIDEOTAPES AND OTHER EXHIBITS INTRODUCED AS
EVIDENCE AT ONGOING HEARINGS THAT BEGAN ON JULY 27 AND AUGUST 16, 2004**

on the interested parties in this action, by the following means of service:

BY MAIL: I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
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1 ☒ **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to be
2 transmitted by facsimile machine, to the parties and numbers indicated below, pursuant to
3 Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported
4 by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transmission record
of the transmission, a copy of which is attached to the original of this declaration.

5 Thomas W. Sneddon 6 District Attorney 7 Santa Barbara County 8 1105 Santa Barbara Street 9 Santa Barbara, CA 93101-2007 10 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
11 Thomas A. Mesereau, Jr. 12 Collins, Mesereau, Reddock & Yu LLP 13 1875 Century Park East, 7th Floor 14 Los Angeles, CA 90067 15 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
16 Robert Sanger 17 Sanger & Swysen, Lawyers 18 233 E. Carrillo Street, Suite C 19 Santa Barbara, CA 93001 20 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

21 I certify under penalty of perjury under the laws of the State of California that the foregoing is
22 true and correct, that the foregoing document(s), and all copies made from same, were printed on re-
23 cycled paper, and that this Certificate of Service was executed by me on August 23, 2004, at Los An-
24 geles, California.

25 
26 Michael H. Dore

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