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SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

SEP 13 2004

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order

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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

DEFENDANT'S REPLY TO THE DISTRICT
ATTORNEY'S SUPPLEMENTAL
RESPONSE IN OPPOSITION TO DEFENSE
MOTION TO SUPPRESS

~~UNDER SEAL~~

Honorable Rodney Melville

Date: September 17, 2004
Time: 8:20 am.
Dept: SM 8

DEFENDANT'S REPLY TO THE DISTRICT ATTORNEY'S SUPPLEMENTAL RESPONSE IN OPPOSITION
TO DEFENSE MOTION TO SUPPRESS

INTRODUCTION

The prosecution repeatedly justifies the seizure of items because it may be a lead to other evidence or is indicia of association among certain individuals. The probable cause affidavit does not request and the warrant does not authorize seizure of items that may reflect association among people. Moreover, those items cannot be seized under the plain view doctrine because incriminating character is not immediately apparent.

Furthermore, the prosecution concedes that the seizure of approximately 20 items was not justified by either the warrant or the plain view exception. The import of this concession is that the search was admittedly exploratory.

ARGUMENT

I.

APPLICABLE LAW

A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution. (*Groh v. Ramirez* (2004) 124 S.Ct. 1284, 1290.) The burden is on the prosecution to prove that probable cause existed to seize the property in question.

A. OVERBREADTH

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.)

B. PLAIN VIEW

In *Horton v. California* (1990) 496 U.S. 128, 136-137, the United States Supreme Court held that, a plain view exception to the Fourth Amendment may exist if:

1. The officer does not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed;
2. The incriminating character of the item is immediately apparent; and

3. The officer also has a lawful right of access to the object itself.

Probable cause is required to seize a particular item rather than mere suspicion. (*Arizona v. Hicks* (1987) 480 U.S.) The burden is on the prosecution to show that the plain view doctrine is applicable to each particular seizure. (*People v. Murray* (1978) 77 Cal.App. 3d 305.) In a situation where an officer seizes several objects under the plain view theory the trial court has the power to admit the lawfully seized objects and to suppress the unlawfully seized objects. (See, e.g., *People v. Clark-Van Brunt* (1984) 158 Cal.App. 3d Supp. 8, 18.) On the other hand, if the search is conducted with sufficient disregard for the limitations of the warrant, suppression of all items may be the appropriate remedy. (See *United States v. Retting*, 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.)

II

THE SEIZED ITEMS MUST BE SUPPRESSED

A. ITEM 329-A

Item 329-A is described as several DVD-R and CD-R digital computer storage disks that the government claims to have "discovered at the Santa Barbara Sheriff's Department after Item 329 had already been seized and booked into evidence." (People's Supplemental Response, page 4.) The District Attorney now asserts that this seizure was justified by the portion of the search warrant that authorizes seizure of computers and all things computer related.

The Fourth Amendment does not permit the government to seize all computers and computer related equipment based on an assertion that documents are commonly stored on computers, without some amount of particularity as to what computers are to be searched and what materials are expected to be seized. There is not an exception to the Fourth Amendment's particularity requirement for computers or computer disks.

B. ITEMS 333-A AND 334-A

1 The government has failed to meet its burden of demonstrating that the plain view
2 doctrine applies to Items 333-A and 334-A. Item 333-A is a piece of paper with names written
3 on it and Item 334-A is a receipt for CD music, customs declaration for Grace, and note from
4 Kate Browning. The District Attorney asserts that "[t]hese pieces of paper . . . came into plain
5 view in the search of the lawfully seized cases." (People's Supplemental Response, page 5.) The
6 government has failed to meet the second part of the three-part test of *Horton v. California*
7 (1990) 496 U.S. 128, 136-137.

8 The District Attorney has failed to show that the incriminating character of this item was
9 immediately apparent. The government cannot justify seizing items simply because they make
10 reference to the names of people mentioned in the search warrant or in a list distributed to law
11 enforcement.

12 It was possible for law enforcement officers to apply for a warrant to seize indicia of
13 specific association with specific named individuals. They did not do so in this case. Even if the
14 officers had applied for a warrant to seize indicia of associates, they would have had to tailor it to
15 a specific name or names. A warrant cannot simply authorize seizure of documents relating to
16 unspecified associates. In *Griffin v. Superior Court* (1972) 26 Cal.App. 3d 672, 693, 694-695,
17 the Court of Appeal held that a search warrant authorizing the seizure of "any papers showing
18 names and addresses of associates of [the suspect]" to be unconstitutionally overbroad. Here, of
19 course, the papers were seized without any authorization in the warrant.

20 C. Item 340.

21 The government has failed to meet its burden of establishing that the plain view doctrine
22 applies with regard to Item 340. The District Attorney asserts that the fact that Item 340 was
23 unlabeled, "gave the seizing officer reason to believe they contained depictions of the types
24 authorized for seizure." (People's Supplemental Response, page 5.) The seizure of this item was
25 based on a law enforcement hunch rather than immediately apparent incriminating character. In
26 fact, the District Attorney is attempting to use the lack of immediately apparent incriminating
27 character to justify this seizure. The seizure of this item falls into the "mere suspicion" category
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discussed in *Arizona v. Hicks* (1987) 480 U.S. rather than under the plain view exception. The seizure of tape recordings on the grounds that they "might reveal something" was held to be unconstitutional by the California Supreme Court. (*People v. Hill* (1974) 12 Cal. 3d 731, 763, overruled on other grounds by *People v. DeVaughn* (1977) 18 Cal. 3d 889, 896 fn 6.)

D. Item 348

Item 348, an inoperable digital camera is not contraband or evidence of a crime. The District Attorney's assertion that law enforcement "suspected it might contain photographs of individuals or images of the type specified in Attachment B, paragraph 1 . . . , paragraph 2 . . . and paragraph 4" (People's Supplemental Response, page 5) establishes "more suspicion" rather than probable cause. The search warrant did not authorize law enforcement to seize all cameras and look at all digital images or undeveloped film. The District Attorney has not demonstrated probable cause to believe that this particular camera contained any particular images. The government did not have probable cause to seize the camera or to look at the images contained on the camera.

E. ITEMS 350, 351 and 352

The government attempts to justify the seizure of Items 350, 351 and 352 by asserting that the "all relate to the identity of the nanny 'Grace'." (People's Supplemental Response, page 6.) However, the test for the plain view exception is not met by demonstrating that items "relate to the identity" of a particular person, whether or not that person is mentioned in the search warrant affidavit. Seizure of documents not authorized by the warrant, as argued above, cannot be lawful.

The government also attempts to justify this seizure by arguing that "[t]he paperwork contained information directly linking her to Michael Jackson and contained address and contact information that would facilitate the investigators' efforts to find and interview her." (People's Supplemental Response, page 6.) This attempted justification, however, is without any support in the law.

The government knew in advance that certain individuals may have some relationship to

1 the case. A list of "Named Individuals" was distributed to law enforcement so that they knew
2 what to seize. (People's Supplemental Response, page 6.) As argued above, if the government
3 believed that there was probable cause to seize items containing indicia of certain individuals
4 then they were obligated present that information to the magistrate. The failure of the
5 government to present this information to the Court prior to the issuance of the search warrant
6 cannot be justified by a claim that the items fall under the plain view exception.

7 **F. ITEM 354**

8 The District Attorney asserts that the seizure of Item 354, a November, 2003 calendar,
9 was justified by the plain view exception because it could have been "useful in apprehending the
10 defendant or facilitating the assistance of other agencies." (People's Supplemental Response,
11 page 8.) The District Attorney acknowledges that the item has no "present evidentiary value."
12 (People's Supplemental Response, page 8.) What the District Attorney implicitly acknowledges
13 is that the calendar never had evidentiary value. The attempted justification makes no sense.

14 The plain view exception to the Fourth Amendment requires more than a mere
15 explanation of why the officers seized a particular item. Law enforcement efficiency is not a
16 valid justification for an unconstitutional seizure. The fact that the District Attorney is now
17 willing to voluntarily return this item (People's Supplemental Response, page 8) ten months after
18 it was seized does not change the fact that the seizure of this item was unconstitutional.

19 **G. ITEM 368**

20 The government failed to meet its burden of establishing a plain view exception for Item
21 368, three videotapes. One of the tapes is labeled "Larry. Security Tape." A second tape is
22 labeled "MJJ Rehearsals and Poppers." A third tape is unlabeled. The District Attorney claims
23 that the "search warrant specifically authorized the seizure of tapes and video." However, the
24 District Attorney fails to point to language in the search warrant that would authorize the seizure
25 of these particular tapes. This is because no such authorization exists. Two of the tapes have
26 labels that do not suggest the kind of materials covered by the search warrant and the third tape
27 contains no label at all.

1 The District Attorney claims that the fact that the tapes were "stored in a safe was
2 evidence of the significance defendant attached to them." (People's Supplemental Response,
3 page 9.) Significance to the defendant, however, is not an element of the test for the plain view
4 exception. There was nothing that was apparently incriminating about these tapes and their
5 seizure is evidence of an unconstitutionally overbroad search.

6 **H. ITEM 510-A**

7 The District Attorney had failed to establish that Item 510-A falls under the plain view
8 exception to the Fourth Amendment. Item 510-A is a portion of the underwear found in Item
9 510. Nothing in the search warrant authorized the seizure of adult clothing. The presence of
10 body fluid on underwear does not establish immediately apparent incriminating character. This
11 item was located in the arcade which is separate from Mr. Jackson's private living area. This
12 item must be suppressed.

13 **I. ITEMS 514 AND 516**

14 The government attempts to justify the seizure of Item 514, an unlabeled vial, by claiming
15 that it is the type of vial used for "tightly controlled injectable substances." (People's
16 Supplemental Response, page 9.) The government further attempts to justify the seizure by
17 claiming that "[t]here would be no reason for anyone to remove the label if he lawfully possessed
18 the controlled drug to begin with." (People's Supplemental Response, page 10.) This argument
19 is unpersuasive.

20 The government has failed to meet the burden of establishing that this item's allegedly
21 incriminating character was immediately apparent. The fact that the label was removed does not
22 establish anything more than a mere suspicion that the vial was illegally possessed. The item
23 was also seized in the arcade which is separate from Mr. Jackson's private living area.

24 The government has failed to demonstrate that Item 516 is covered by the plain view
25 exception to the Fourth Amendment. The District Attorney asserts that among the "numerous
26 pieces of paper," "the one of the most interest to the seizing officer was the paper with notations
27 about 'Buprenex' and its reference to being a substitute for Demoral." (People's Supplemental
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1 Response, page 10.) The District Attorney further asserts that Item 516 is further evidence that
2 Item 514 contained a controlled substance. (People's Supplemental Response, page 10.)

3 There was nothing to establish probable cause that the vial and the notations regarding
4 medicine were illegal or that they had anything to do with the allegations at issue in the
5 investigation of Mr. Jackson. The officer's mere suspicions that these items may be contraband,
6 or evidence of an interest in contraband, does not constitute probable cause to believe that they
7 are contraband. These items must be suppressed.

8 J. ITEMS 515 AND 518

9 The District Attorney asserts that the seizures of Items 515 and 518, prescription bottles
10 and prescription paperwork, were justified because the items contained references to Co-
11 Conspirator No. 3, that they provide evidence that Co-Conspirator No. 3 was in the area of
12 Neverland during February of 2003, and that the items might constitute evidence of violations of
13 Health and Safety code section 11173 and 11174. (People's Supplemental Response, page 11.)
14 None of these rationalizations constitute an exception to the Fourth Amendment.

15 As argued elsewhere, there is no exception to the Fourth Amendment for names of people
16 mentioned in the affidavit or a law enforcement list. If the District Attorney had probable cause
17 to seized items that demonstrated particular people knew Mr. Jackson or were in Santa Barbara
18 County at a particular time, they were obligated to present this information to the Court, prior to
19 the search. Furthermore, there is nothing more than mere suspicion that these items were
20 contraband. These items must be suppressed because they do not fall under a recognized
21 exception to the Constitution.

22 K. ITEMS 601, 602, 611-642

23 To the extent that the government justifies the seizure of Items 601 and 602 based on
24 paragraph 10 of the search warrant authorizing the seizure of "all other paperwork related to the
25 [Doe] family" (People's Supplemental Response, page 11), the search warrant was overbroad in
26 that it did not state with particularity what items were to be seized. (See *Griffin v. Superior*
27 *Court* (1972) 26 Cal.App. 3d 672.)

1 The government asserts that the seizure of Items 614, 615, 616, 617, 618, 619, 620, 622,
2 623, 636, 638, 639, 640, 641, and 642 is justified by the fact that the names of Doc family
3 members are listed in these documents. As argued above, the search warrant was
4 unconstitutionally overbroad in that it did not state with particularity were to be seized and instead
5 authorized the seizure of any paperwork related to the Doe family.

6 The District Attorney asserts that the seizure of Items 611-613, 621, 624-629, 630-634,
7 635 and 637 were justified because these logs contained the names of either co-conspirators, Dr.
8 Farschian or Hamid Moslehi. The District Attorney asserts that the plain view requirement was
9 satisfied by the mere mention of the names of the alleged co-conspirators. The District Attorney
10 further claims that, with regard to the items that reference Mr. Moslehi, "it was most reasonable
11 for the officers to retain these documents as evidence linking Mr. HM to Michael Jackson, to co-
12 conspirators and to events described by the Doc family in the supporting affidavit." (People's
13 Supplemental Response, page 13.)

14 The problem with this argument is that if the government knew it would be seizing
15 anything and everything containing the names of anyone on the "Named Individuals" list that
16 was distributed to law enforcement, but not the Court. The plain view exception to the Fourth
17 Amendment does not provided for the for seizure items that law enforcement intended to seize
18 all along but never bothered to include in the application for the search warrant. Furthermore, as
19 argued elsewhere, the test for the plain view exception is not met by mere references to names in
20 the affidavit or on a "Named Individuals" list and even a general warrant listing unspecified
21 association evidence would be invalid. (*Griffin v. Superior Court* (1972) 26 Cal.App. 3d 672.)

22 **L. ITEMS 1001, 1002, 1009A AND 1010**

23 Items 1001, 1002, 1009-A and 1010 were seized from Mr. Jackson's office, which, as
24 argued elsewhere, was beyond the scope of the areas authorized to be searched in the warrant.
25 These items must be suppressed.

26 **M. ITEMS 1103-1108**

27 The District Attorney has conceded that this item has no evidentiary value. (People's
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1 Supplemental Response, page 15.) Alternatively, these items, primarily promotional
2 photographs, are neither subject to seizure under the warrant nor immediately incriminating in
3 nature.

4 III.

5 CONCLUSION

6 For the reasons stated above, the above listed items must be suppressed.

7 Dated: September 10, 2004

8 Respectfully submitted,

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17 By: 

18 Robert M. Sanger.
19 Attorneys for
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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 September 10, 2004, I served the foregoing document **DEFENDANT'S REPLY TO THE DISTRICT ATTORNEY'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENSE MOTION TO SUPPRESS** on the interested parties in this action by depositing a true copy thereof as follows:

Tom Snoddon
Gerald Franklin
Ron Zonen
Gordon Auchincloss
District Attorney
1105 Santa Barbara Street
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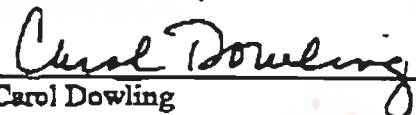
☐ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid 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 568-2398.

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

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

Executed September 10, 2004, at Santa Barbara, California:


Carol Dowling