THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY
County of Santa Barbara
By: RONALD J. ZONEN (State Bar No. 85094)
Senior Deputy District Attorney
GORDON AUCHINCLOSS (State Bar No. 150251)
Senior Deputy District Attorney
GERALD McC. FRANKLIN (State Bar No. 40171)
Senior Deputy District Attorney
1112 Santa Barbara Street
Santa Barbara, CA 93101
Telephone: (805) 568-2300
FAX: (805) 568-2398

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

~~PROPOSED~~ **REDACTION**

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MICHAEL JOE JACKSON, Defendant.	No. 1133603 PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED BY SEARCH WARRANT NO. 5135 DATE: October 14, 2004 TIME: 8:30 a.m. DEPT: SM 2 (Melville)

~~FILED UNDER SEAL~~

A. Introduction

Defendant moves to suppress evidence seized from the residence of [redacted] on September 15, 2004 in obedience to a search warrant (SW 5135) on the following grounds:

-- "(1) . . . the search amounted to an overbroad, general search . . . .;

-- "(2) 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 [federal and state Constitutions];

-- "(3) the property to be seized, listed in the search warrant, could have been obtained by a subpoena that would have targeted the pertinent information and avoided abuse of Mr.

Jackson's rights under the Fourth Amendment to the United States Constitution;

-- "(4) the prosecution should have obtained the materials sought by the search warrant through the pretrial discovery process;" and

-- "(5) the seized items are protected by the attorney-client privilege."

Those grounds will be addressed here, more or less in that order.

B. Discussion

I

DEFENDANT HAS NO STANDING TO COMPLAIN ABOUT THE ALLEGED "OVERBREADTH" OF THE SEARCH OF PREMISES NOT HIS OWN. IN ANY EVENT, THE SEARCH WAS NOT OVERBROAD

A. Defendant's "Standing" To Complain About The Search Of [redacted] Residence

1. The Residence As "Residence"

Under the heading, "Mr. Jackson Has A Reasonable Expectation of Privacy In The Office Of His Personal Assistant," Defendant argues: "The Fourth Amendment protects people not places. (*Katz v. United States* (1967) 389 U.S. 347, 351.)

Defendant's reliance on *Katz's* famous catchphrase is misplaced. In his oft-quoted concurring opinion in that case, Justice Harlan said that "the question . . . is what protection the Fourth Amendment affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" (389 U.S. 347, at 361 (Harlan, J., conc.)

The high court's decisions since *Katz* embrace that formulation. See, e.g., *Terry v. Ohio* (1968) 392 U.S. 1, 9 [88 S.Ct. 1868, 20 L.Ed.2d 889] ("We have recently held that 'the Fourth Amendment protects people, not places,' *Katz v. United States*, 389 U.S. 347, 351 (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' *id.*, at p. 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable

governmental intrusion"). Quite uniformly, decisional law before and since *Katz* holds that a defendant does not have a "reasonable expectation of privacy" in someone else's home. (See, e.g., *People v. Ortiz* (1969) 276 Cal.App.2d 1, 5 [for purposes of knock-notice, "a trespasser – or a burglar – cannot make another man's home his castle . . . ."]; *United States v. Armenta* (9th Cir. 1995) 69 F.3d 304, 308-309 [without sufficient credible evidence he was an overnight guest in his friend's home, Armenta had no standing to challenge search of it]; *People v. Cowan* (1995) 31 Cal.App.4th 795, 707-798 [defendant's status as an occasional visitor to residence did not afford him standing to contest search of premises that disclosed methamphetamine between cushions of couch on which he was sitting]; *People v. Canada* (1987) 19 Cal.App.3d 402, 420-421 [search of defendant's former residence did not violate his present expectation of privacy].)

[redacted] home is not Mr. Jackson's castle. He has no standing to complain about the search of that place.

"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.)

2. The Residence As "Office"

Defendant alleges, "[redacted] is the personal assistant for Michael Jackson and the executive administrator of MJJ Productions. She administers the business and personal affairs for Mr. Jackson out of the office at her residence." (Motion 4:6-11.) And [redacted] declares that the detached garage at her residence "is built out and houses office equipment and supplies" which "was paid for and belongs to MJJ Productions." ([redacted] Decl., ¶¶ 3, 4.)

Considering the [redacted] garage as a place of business doesn't significantly improve Defendant's standing to complain about the search of it. It is, at most, the office of MJJ Productions, Inc., a legal "person" and entity in its own right.[1] The Fourth Amendment

[1] MJJ Productions, Inc. is an active California corporation (No. C0944110), whose articles of incorporation were filed October 30, 1979 and whose agent for service of process is Zia Modabber, a

extends to business premises as well as residential premises, of course. (See, e.g., *Michigan v. Tyler* (1978) 436 U.S. 499, 504-505 [98 S.Ct. 1942, 56 L.Ed.2d 486].) But so far as is known, Defendant himself did not conduct business from those premises or maintain workspace of his own in the office-garage. It does not appear, then, that he has standing to complain about the search of MJJ Inc.'s/[redacted] office space. (See, e.g., *United States v. Britt* (5th Cir. 1975) 508 F.2d 1052, 1054-1055 [corporate president had no standing with respect to seizure of corporate records from a storage area where he never spent any of his time working]; *United States v. Taketa* (9th Cir. 1991) 923 F.2d 665, 675-678 [agent in charge of DEA office lacked standing regarding office of fellow agent adjoining his, as "O'Brien's office was given over to O'Brien's exclusive use and contained his personal desk and files"]; *State v. Richards* (Minn. 1996) 552 N.W.2d 197, 204 ["A defendant who cannot demonstrate a legitimate expectation of privacy relating to the area searched or the item seized will not have standing to contest the legality of the search or seizure. *Rakas v. Illinois*, 439 U.S. 128, 138-48, 58 L.Ed.2d 387, 99 S.Ct. 421 (1978)"].)

3. The Records Themselves

Defendant argues, "Mr. Jackson has a reasonable expectation of privacy with regard to materials in control of his personal assistant, particularly with regard to confidential legal documents." (Motion 4:6-11.)

Unless Defendant can satisfy the Court that the documents seized are his own personal property, as distinct from records generated by others in the course of the business of MJJ, Inc., his argument is not well taken. (Compare *Henzel v. United States* (5th Cir. 1961) 296 F.2d 650, 653 ["appellant was the organizer, sole stockholder and president of Chemoil Corporation. Appellant prepared much of the material seized, and this material was kept in his office along with some of his personal belongings. Although he was temporarily absent from his office when it was searched, appellant spent the greater part of every average working day

---

lawyer in Katten Muchin Zavis Rosenman, 2029 Century Park East, Suite 2600, Los Angeles. (This information was obtained from the records of the California Secretary of State, accessed online at Kepler.ss.ca.gov/corpdata/ShowList.)

there." Held: he had standing to contest the seizure of the company's records] with *United States v. Britt* (5th Cir. 1975) 508 F.2d 1052, 1055 ["Here, although Britt was president of Fitts, he was not its sole stockholder, the documents seized were normal corporate records not prepared personally by him, and the area searched . . . was described as a 'storage area.' Furthermore, there is not evidence that Britt spent any of his time working in the storage area – or in any other space at 1819 Peachtree for that matter – or that any of the material seized there was taken from his personal desk or briefcase or files." Held: no standing].)

Moreover, Defendant's assumed standing to protest the *seizure* of his property (if such property was seized) may not equip him with standing to protest the scope of the *search* that brought it to light. It was [redacted] home-office and her computers (or the computers of MJJ Productions, Inc.) that were searched, not Mr. Jackson's. Defendant has no possessory interest in either.

"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.)

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.)

B. Assuming "Standing," The Search Was Not Overbroad

So far as is relevant here, the warrant authorized the seizure of

-- "1. Any written, typed or printed documentation, which tends to show the activities and/or whereabouts of Michael JACKSON and/or his close associates [redacted]," and

-- "2. Computers and computer media including computer including central processing units (CPUs), hard disk drives, floppy disk drives, tape drives, removable media drives, optical/CD-ROM drives, servers, workstations, display screens, input devices (including but not limited to keyboards, mice, and trackballs), printers, modems, peripherals, floppy disks, magnetic tapes, cassette tapes, removable storage media, and/or optical/CD-ROM disks or cartridges, found together or separately from one another."

The documents seized in the course of the warranted search either "tended to show the activities or whereabouts of Michael Jackson [redacted]" or the folders in which they were maintained suggested the contents would be relevant, or the document appeared to have other relevance to the ongoing investigation when they came into the plain view of the searching officer. The Court has possession of the documents seized in that search and can make its own determination of their relevance to the prosecution.

IV

THE SEARCH OF THE HOME-OFFICE OF DEFENDANT'S PERSONAL ASSISTANT DID NOT CONSTITUTE AN "INVASION OF THE DEFENSE CAMP"

A claimed "invasion of the defense camp" was the theme of some of defendant's earlier motions to suppress evidence. Now, as before, he cites *Barber v. Municipal Court* (1979) 24 Cal.3d 742 as authority for his argument that anyone associated with defendant who

might be in possession of evidence of interest to law enforcement is a member of the "defense camp," and a warranted search of the premises occupied by that person is an "invasion of the defense camp."

Barber involved the intrusion of undercover law enforcement officers into confidential attorney-client conferences arising out of the arrest of "sit-in" protesters at the Diablo Canyon nuclear facility in San Luis Obispo County by posing as fellow protesters. The execution of a search warrant on premises maintained by someone closely involved with defendant's activities and knowledgeable about his comings and goings over the years, and who is likely to be in possession of relevant evidence, was no more an "invasion of the defense camp" than was the search of Defendant's own residence. [redacted] is not immune from search merely because she regards herself as an essential link between Defendant and his many lawyers.

V

A SUBPOENA WOULD NOT BE AN APPROPRIATE MEANS OF OBTAINING THE EVIDENCE SOUGHT BY THE SEARCH WARRANT, FOR SOME OF THE VERY REASONS DISCUSSED BY DEFENDANT

Defendant complains that the investigators should have sought the information they desired "through the use of a subpoena, rather than a search warrant." (Motion 8:3-5) With nice inconsistency, Defendant then argues that "Neither a search warrant nor a subpoena are the appropriate vehicle for obtaining the types of documents sought by the search warrant. The District Attorney was obligated to seek these materials through California's reciprocal discovery process." (*Id.*, 9:5-8.)

Defendant notes, "A search warrant does not afford Mr. Jackson the status of a litigant and does not afford him . . . his right to counsel. A search warrant is an intrusive technique, used to identify crime." (Motion 8:3-7.)

Execution of a search warrant is, almost by definition, "intrusive." The function of a search warrant is to allow investigators to secure evidence believed necessary to further a criminal investigation, and to secure that evidence without the prior notice that might prompt

its custodian to conceal it. A search warrant's scope is broader than a subpoena. A warrant is not a pleading in a lawsuit. Even so, the person affected by the resulting search, and counsel of his or her choice, may "litigate" the sufficiency of the underlying warrant and the propriety of its execution. (This Opposition responds to the third effort by Defendant to suppress evidence obtained on the authority of a warrant issued by the Court.)

There was, evidently, "reason . . . to search the office of Mr. Jackson's personal assistant" for evidence of Defendant's "whereabouts and activities during [redacted]." If there were not, a motion to suppress on that ground would have been made. Beyond a throwaway sentence in the pending motion to that effect (Motion 8:9-10), no such ground has been raised, let alone discussed. Defendant's argument is simply rhetorical.

VI

THE MATERIAL OBTAINED ON THE AUTHORITY OF THE SEARCH WARRANT COULD NOT HAVE BEEN OBTAINED THROUGH DISCOVERY

As noted, Defendant argues "the District Attorney was obligated to seek these materials through California's reciprocal discovery process." (*Id.*, 9:6-8.)

The People have been conspicuously unsuccessful in obtaining much of <u>anything</u> from the defense by way of discovery. Be that as it may, the information sought by Search Warrant No. 5135 would not appear to come within the provisions of Penal Code section 1054.3. To the extent some of it might constitute "relevant written or recorded statements of" persons the defense "intends to call as witnesses at trial," defense counsel surely would claim that the defense has not yet formed a clear intention to call <u>anyone</u> as a witness in the upcoming trial. In Dr. Johnson's famous phrase, "Depend upon it, Sir . . . ."

All of which is academic in light of Penal Code section 1054.4, which provides, "Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section" (i.e., June 5, 1990). Whatever else may be encompassed by that statute, it surely answers Defendant' argument that once charges are filed, the prosecution is limited by

the discovery statutes in its efforts to obtain further evidence.

VII

THE COURT WILL DETERMINE WHETHER GIVEN ITEMS OF EVIDENCE "ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE.

Certain of the property seized in obedience to Search Warrant No. 5135 was sealed and submitted to the Court for its determination whether some or all of it is protected by the attorney-client privilege. By definition, any documents that are found to come within the privilege are privileged from disclosure to the prosecution.

Defendant lists 15 items of seized property he asserts "are subject to the protection of the attorney-client privilege." (Motion 9:4 – 10:8.)

Defendant makes no effort to articulate what he believes is the scope of the attorney-client privilege. Given that most if not all of the seized documents appear to be business records rather than confidential communications between lawyer and client, it is plain that the scope of the privilege is not as broad as Defendant supposes.

"The question of whether an attorney-client relationship exists is one of law. [Citations.] However, when the evidence is conflicting, the factual basis for the determination must be determined before the legal question is addressed." (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733.)

With exceptions not relevant here, "the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer" if the privilege is claimed by the client, the lawyer or someone else authorized by either of them to claim the privilege." (Evid. Code, § 954.)

"As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the

transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.)

"The attorney-client privilege and the work product protection doctrine are both statutory creations. (§ 1054.6; Code Civ. Proc., § 2018; Evid. Code, § 954.)" (*People ex rel. Lockyer v. Superior Court* (2000) 83 Cal.App.4th 387, 397; overruled on other grounds by *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 718, n. 5.)

> The purpose of the privilege is to encourage a client to make a full disclosure to his attorney without fear that others may be informed (*Greyhound Corp.* v. *Superior Court* [(1961)] 56 Cal.2d 355, 396; *Holm* v. *Superior Court* [(1954)] 42 Cal.2d 500; *City & County of San Francisco* v. *Superior Court* [(1951)] 37 Cal.2d 227), and the communication is nevertheless privileged although given by an agent of the client for transmission to the attorney (*San Francisco Unified Sch. Dist.* v. *Superior Court* [(1951)] 55 Cal.2d 451). But the privilege is to be strictly construed in the interest of bringing to light relevant facts. (*Greyhound Corp.* v. *Superior Court, supra*, 56 Cal.2d 355, 396.) . . . . While the privilege fully covers communications as such, it does not extend to subject matter otherwise unprivileged merely because that subject matter has been communicated to the attorney.

(*People ex rel. Department of Public Works v. Donovan* (1962) 57 Cal.2d 346, 355, internal quotation marks omitted.) (See also *Martin v. Workers' Comp. Appeals Bd.* (1997) 59 Cal.App.4th 333, 342.)

Included within the privilege are reports "created as a means of communicating confidential information to the attorney." (*Jessup v. Superior Court* (1957) 151 Cal.App.2d 102, 108.) And a lawyer or client may include in a confidential communication publications that also are available to the public. (*In re Jordan* (1974) 12 Cal.3d 575, 580 [law review article or newspaper clipping of potential use to inmate-client].) But "a litigant cannot silence a witness by having him reveal his knowledge to the litigant's attorney. We hold that the forwarding to counsel of nonprivileged records, in the guise of reports, will not create a privilege with respect to such records and their contents where none existed before.

[Citations.]" (*San Francisco Unified School Dist. v. Superior Court* (1961) 55 Cal.2d 451, 457 [internal quotation marks omitted].)

Motion picture film taken of a plaintiff suing for injuries, by defense counsel's investigator, is not within the privilege. (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166, 176 ["It is quite clear that although the investigator, the attorney and his client may have intended the films to be confidential, to be privileged they must constitute a 'communication made by the client to [the attorney]' as that phrase is used in [Code of Civil Procedure] section 1881. The film here involved obviously was not such a 'communication.' It is simply a physical object transmitted to the attorney either with or without an accompanying report or letter of transmittal. As already pointed out, transmission alone, even where the parties intend the matter to be confidential, cannot create the privilege if none, in fact, exists"].)

The statutory privilege does not extend to communications to a lawyer by other than his client (excepting third-party conduits of communications between lawyer and client), even though those communications may convey facts relevant to the client's case that were obtained from sources other than the client himself, and even though they may come from an employee of the client. (*Green & Shinee v. Superior Court* (2001) 88 Cal.App.4th 532, 536-537 ["The privilege covers all forms of communication, including transmittal of documents. (*Wellpoint Health Networks, Inc. v. Superior Court* [(1997)] 59 Cal.App.4th 110, 119.) Nevertheless, the privilege does not cover every document turned over to an attorney by the client. 'Documents prepared independently by a party, including witness statements, do not become privileged communications or work product merely because they are turned over to counsel.' (*Ibid.*) The person claiming the attorney-client privilege must establish that the evidence sought to be protected falls within the statutory terms. (*People ex rel. Lockyer v. Superior Court* (2000) 83 Cal.App.4th 387, 397-398.)"])

A confidential conversation with a lawyer who is not the attorney for the person making the communication is not within the attorney-client privilege. (*Sharon v. Sharon* (1889) 79 Cal. 633, 678 ["[I]t must appear that the witness learned the matter in question only as counsel, or attorney, or solicitor for the party, and not in any other way . . . . . Nor does

the rule apply to conversations had between the attorney and a third party, or between the third parties in the presence of the attorney and client. [Citations]"].)

The attorney-client privilege does not apply to the client's instructions to his counsel or to the authority given by client to his lawyer to act on his behalf. (*People v. Tucker* (1964) 61 Cal.2d 828, 831.)

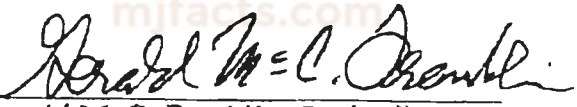
CONCLUSION

Defendant's motion to suppress evidence should be denied. He has no "standing" to complain about the search of [redacted] residence or her garage equipped as an office by her corporate employer. Even assuming Defendant's "standing" to prosecute this motion, the search he complains about was not overbroad. It was not an "invasion of the defense camp." The search was undertaken to secure evidence that could not readily be obtained by subpoena or pursuant to the discovery statutes. So far as is known, none of the documents seized in the search constitute confidential communications between Defendant and his team of lawyers, past and present.

DATED: October 7, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR.
District Attorney

By: 
Gerald McC. Franklin, Senior Deputy

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 October 7, 2004, I served the within PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS EVIDENCE OBTAINED BY SEARCH WARRANT NO. 5135 on Defendant, by THOMAS A. MESEREAU, JR., STEVE COCHRAN, ROBERT SANGER, and BRIAN OXMAN by personally delivering a true copy thereof to Mr. Sanger's office in Santa Barbara, by transmitting a facsimile copy thereof to Attorneys Mesereau and Cochran, and by causing a true copy thereof to be mailed to each of them (Mr. Sanger excepted), first class postage prepaid, at the addresses shown on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California on this 7th day of October, 2004.

Gerald McC. Franklin

SERVICE LIST

THOMAS A. MESEREAU, JR.
Collins, Mesereau, Reddock & Yu, LLP
1875 Century Park East, No. 700
Los Angeles, CA 90067
FAX: (310) 284-3122
Attorney for Defendant Michael Jackson

STEVE COCHRAN, ESQ.
Katten, Muchin, Zavis & Rosenman, Lawyers
2029 Century Park East, Suite 2600
Los Angeles, CA 90067-3012
FAX: (310) 712-8455
Co-counsel for Defendant

ROBERT SANGER, ESQ.
Sanger & Swysen, Lawyers
233 E. Carrillo Street, Suite C
Santa Barbara, CA 93001
FAX: (805) 963-7311
Co-counsel for Defendant

BRIAN OXMAN, ESQ.
Oxman & Jaroscak, Lawyers
14126 E. Rosecrans Blvd.,
Santa Fe Springs, CA 90670

Co-counsel for Defendant