

NOV 18 2004

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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 REQUEST THAT
COURT MODIFY ITS *TEAL* ORDER
AND EXERCISE JUDICIAL
OVERSIGHT REGARDING THE
SCOPE OF SUBPOENAS DUCES
TECUM ISSUED BY DEFENDANT
FOR RECORDS OF THIRD PARTIES
RELATING TO DOE FAMILY AND
TO CERTAIN PROFESSIONALS,
AND THAT IT REQUIRE
DEFENDANT TO DEMONSTRATE
THE RELEVANCE OF PARTICULAR
RECORDS BEFORE BEING
AFFORDED ACCESS TO THEM;
DECLARATION OF RONALD J.
ZONEN; MEMORANDUM OF
POINTS AND AUTHORITIES

DATE: November 29, 2004
TIME: ~~8:30 am~~ 10:00 AM
DEPT: SM 2 (Melville)

~~UNDER SEAL~~

TO: THE CLERK OF THE COURT, DEFENDANT MICHAEL JOE JACKSON,
AND THOMAS MESEREAU, JR. AND ROBERT SANGER, HIS COUNSEL OF RECORD
IN THIS PROCEEDING:

10:00
PLEASE TAKE NOTICE that on November 29, 2004, at ~~8:30~~ a.m. or as soon thereafter as the matter may be heard, the People will move the court for the following orders:

1. An order modifying its earlier order, granted to defendant in an ex parte proceeding, prohibiting "persons or entities subpoenaed by the defendant" from "disclos[ing] directly or indirectly to the People the fact that they have been subpoenaed or the nature of the subpoena";

2. An order directing Defendant to do the following:

a) Provide the Court with an accounting of each subpoena issued by him that calls for the production of documentation, writings, records, photographs or other tangible materials, if a given subpoena has not yet been filed with the Court;

b) Produce all materials obtained under the authority of the issued subpoenas for the court to review in camera, to the extent that material is not already part of the Court's files and record in this action;

c) Commit to the court that no copies of documents obtained by subpoena duces tecum will be made until after the court has determined that the materials subpoenaed are relevant to the defense case and not overly intrusive to the privacy of the [REDACTED] children and [REDACTED] (the "Doe family"); and

d) Notify all recipients of subpoenas duces tecum previously served by Defendant that they are free to communicate with the representative of the People concerning the subpoena, and to provide the District Attorney with a copy thereof if they so choose;

3. A protective order requiring that all materials received by defendant pursuant to a subpoena duces tecum issued by him be kept secure and confidential and not be turned over to any other party.

This motion is made on the ground that Defendant has grossly abused the process of the court in issuing subpoenas duces tecum in this case, both by seeking information that could not possibly lead to evidence relevant to his defense and by violating the constitutional right of privacy of the individuals whose records are demanded.

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1 This motion is supported by the Declaration of Ronald J. Zonen and the
2 accompanying Memorandum of Points and Authorities.

3 DATED: November 17, 2004

4 Respectfully submitted,

5 THOMAS W. SNEDDON, JR.
6 District Attorney

7 By: BS
8 Gerald McC. Franklin, Senior Deputy
9 Attorneys for Plaintiff

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I, Ronald Zonen, say:

1. I am an attorney licensed to practice in the state of California. I am currently employed as a prosecutor for the District Attorney of Santa Barbara County. I am assigned the prosecution of the above entitled matter.

2. I recently learned that the defendant is issuing subpoenas to a number of individuals, agencies and institutions, demanding the production of records, and that each subpoena is accompanied by an order issued by this Court on July 9, 2004, a copy of which is attached as Exhibit A..

3. I believe that Paragraph 3 of the order attached as Exhibit "A," commanding that "Persons or entities subpoenaed by the defendant shall not disclose directly or indirectly to the People the fact that they have been subpoenaed or the nature of the subpoena" is unsupported by law and is unreasonable in the circumstances of this case.

4. I am aware that subpoenas have been sent to at least three entities and two professional persons that have records relating to the Doe family. The entities are [REDACTED]

The professionals are

5. The subpoenas seek documents with little or no limitation on the information about the Doe family that would be revealed by those documents. I have been asked by Mr. Doe, the victim's stepfather, to seek the court's intervention to curb what he rightly believes to be Defendant Jackson's unlimited and unrestrained access to personal and private records and materials, without judicial review of the documents obtained by its process and without regard to whether such materials are relevant to his defense of the pending charges.

6. In their identification of the records to be provided in obedience to the Court's order, the subpoenas do not distinguish between one member of the Doe family and another, so that, for instance, detailed information concerning Mr. and Mrs. Doe's three-month-old baby is ordered to be produced.

7. The records sought by the subpoenas are not limited by date or subject matter

1 and effectively demand any and every piece of paper or material involving the victim's family
2 in the possession of the agencies upon which they are served. The Doe family is convinced
3 that sensitive materials subpoenaed by Defendant will ultimately end up on NBC or CNN just
4 as did the [REDACTED]

5 8. I have reviewed the subpoenas issued to the [REDACTED]
6 [REDACTED] The subpoena for [REDACTED] demands all
7 records of each member of the family, including their three month-old-baby. The demand is
8 for actual copies of x-rays, lab tests, MRI film, ultrasounds, gynecological records, billing
9 records, examinations, medical diagnosis and history of medications. There is nothing a
10 medical institution can do to a patient or for a patient that is not demanded by defendant's
11 subpoena.

12 9. The subpoenas also demand the production of mental health records as to each
13 member of the family. These records, like the medical records, are confidential and protected
14 by statute. Each member of the family has asserted the privilege of confidentiality and request
15 that those records remain confidential.

16 10. One subpoena demands Mr. Doe's [REDACTED], going
17 back to the date of his enlistment. It calls for all aspects of his [REDACTED] including [REDACTED]

18 [REDACTED] mjfacts.com mjfacts.com
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 11. The subpoena to [REDACTED] seeks information on bank accounts,
24 deposits, withdrawals, balances, 401K accounts, retirement accounts, trusts, corporations and
25 joint ventures, as to each member of the family.

26 12. I am informed by [REDACTED] that a subpoena duces tecum issued on behalf
27 of Defendant by Attorney Brian Oxman calls for, among other information, [REDACTED]

28 [REDACTED] [REDACTED] is concerned that the

1 disclosure of such records will readily lead to Defendant's discovery of the identities of his

2 njfacts.com

3 mjfacts.com

4 mjfacts.com

5 13. It appears from the foregoing, and from the subpoenas themselves, that the
6 defendant has engaged in a pattern of issuing subpoenas to each and any institution and
7 individual that does business or has had dealings with the Doe family, regardless of how
8 irrelevant or private the information may be and how intrusive a violation of the family's
9 reasonable expectation of privacy the execution of a given subpoena duces tecum may be.

10 14. I am informed by the Court's clerk and believe that defense counsel have
11 drafted and issued the subpoenas without prior judicial review or approval of their content and
12 have then been allowed to copy whatever records are delivered to the Court in obedience
13 thereto without first having to demonstrate to the Court the relevance of the subpoenaed
14 material.

15 15. It is clear to me that unless the Court intervenes the defense will come into
16 possession, if it has not already come into possession, of materials that are intensely private
17 and personal to the Doe family, that will have been obtained in utter disregard of the Doe
18 family's constitutional right of privacy, and concerning which necessary relevance will not
19 have been and cannot be demonstrated to the Court.

20 16. I spoke by telephone with each adult member of the Doe family; Jane Doe,
21 Judy Doe and Mr. Doe. I have been advised by Jane, Judy and Mr. Doe that they consider the
22 subpoena of all medical records to be a serious intrusion into their privacy and request that this
23 motion to quash be brought on their behalf and on behalf of their minor children. They request
24 that the court quash the subpoena or, in the alternative, to limit its application to only those
25 records demonstrated to the Court's satisfaction to be relevant to the issues properly before the
26 court.

27 17. Each member of the Doe family asserts the privilege under Evidence Code
28 section 1014 that any and all medical and mental health records, to the extent that any such
records exist, be considered privileged and confidential and that such records not be turned

1 over to any third party without the specific consent of the holder of the privilege.

2 18. Jane Doe also advised me that she is the guardian of her two minor children;
3 John Doe and James Doe and that on their behalf she is asserting the privilege under Evidence
4 Code section 1014. Jane Doe and Mr. Doe are the guardians of their son Baby Doe. On his
5 behalf they are also asserting all relevant privileges.

6 I declare under penalty of perjury the foregoing is true and correct except as to
7 those matters which I state upon my information and belief, and as to those matters I believe it
8 to be true. I execute this declaration at Santa Barbara, California on November 17, 2004.

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11 Ronald J. Zonen
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 DEFENDANT HAS ISSUED EXTRAORDINARILY
4 BROAD SUBPOENAS AND HAS THEREBY OBTAINED
5 ACCESS TO RECORDS THAT BY THEIR NATURE ARE
6 CONFIDENTIAL AND WHICH COULD NOT REASONABLY
7 FURTHER DEFENDANT'S PREPARATION OF HIS DEFENSE
8 TO THE PENDING CHARGES. BECAUSE DEFENDANT
9 HAS DEMONSTRATED HE IS UNWILLING TO EXERCISE
10 RESTRAINT IN HIS DISCOVERY EFFORTS, OR IS
11 PHILOSOPHICALLY INCAPABLE OF DOING SO, AND
12 BECAUSE THE LAW OBLIGES THE COURT TO DO SO,
13 COURT MUST EXERCISE JUDICIAL OVERSIGHT AS TO
14 THE RECORDS RELEASED TO DEFENDANT

15 1. Plaintiff's Standing To Protest

16 The prosecutor is not the attorney for the victim or for any witnesses to a crime, and
17 thus may not file pleadings or motions on behalf of a crime victim or witness. (*Bullen v.*
18 *Superior Court* (1988) 204 Cal.App.3d 22, 25.) But where the prosecutor believes that a
19 subpoena directed to a third party in a criminal case appears to be overbroad, it may bring that
20 fact to the court's attention. The court has inherent authority to prevent the abuse of its process
21 (*Neal v. Bank of America* (1949) 93 Cal.App.2d 678, 682) and "to set aside on its own motion
22 any order which has been wrongfully obtained" (*Coley v. Superior Court* (1928) 89 Cal.App.
23 330, 335), and it surely may quash an improperly issued or served subpoena duces tecum. (Cf.
24 Code Civ. Proc., § 1987.1 ["... the court ... upon the court's own motion after giving counsel
25 notice and an opportunity to be heard, may make an order quashing the subpoena entirely [or]
26 modifying it ..."]. And see *Mansell v. Otto* (2003) 108 Cal.App.4th 265, 277 [trial court
27 properly granted prosecutor's request for protective order directing that crime victim's
28 psychiatric records be returned to victim, treating it as a belated motion to quash], *People v.*
Kaurish (1990) 52 Cal.3d 648, 686 [motion to quash subpoena for police reports], *People v.*
Condley (1977) 69 Cal.App.3d 999, 1017 [prosecutor's motion to quash subpoena for sheriff's

1 personnel files], and *People v. Cohen* (1970) 12 Cal.App.3d 298, 324-325 [upholding trial
2 court's order granting People's motion to quash defendant's subpoena DT issued to State Farm
3 Insurance].)

4 2. The Supposed Authority For The "Protective Order"

5 In his "Motion for Confidential Subpoena Duces Tecum Proceedings," filed June
6 4, 2004 (his "*Teal* Motion"), Defendant argued that

7 If Mr. Jackson decides to invoke his right to compel the production of
8 witnesses and evidence and subpoena records from third-parties, he risks
9 revealing possible defense strategies. The identities of persons or
10 entities subpoenaed, the nature of the materials subpoenaed, and the
11 nature of materials provided in response to defense subpoenas will
12 disclose potential defense strategies or work product. Without the relief
13 sought, the identities of persons or entities subpoenaed, the nature of the
14 materials subpoenaed, and the nature of materials provided in response
15 to defense subpoenas would be readily accessible to the prosecution.

16 (Motion 6:4-10.)

17 Defendant cited and discussed *People v. Superior Court (Barrett)* (2000) 80
18 Cal.App.4th 1305, and *Teal v. Superior Court* (2004) 117 Cal.App.4th 488 in his motion. He
19 correctly noted that *Barrett* entitles him "to make his . . . relevancy arguments to the court in an
20 in camera hearing. (*Id.* at pp. 1320-1321.)" (Motion 5:2-7; emphasis added.) He observed
21 that *Teal* went beyond *Barrett* in allowing the defendant there not to provide to the prosecution
22 a copy of the documents he had obtained by subpoena. It follows, Defendant appears to
23 reason, that he should be allowed to keep the prosecution in the dark about the subpoenas
24 themselves:

25 A public subpoena duces tecum process presents Mr. Jackson with the
26 same unconstitutional "Hobson's choice" that the *Barrett* and *Teal*
27 courts found untenable: to compel the production of witnesses and
28 evidence, thereby revealing possible defense strategies and work
product, or to refrain from doing so in order to protect his constitutional
rights and prevent undesirable disclosures to the prosecution.

Therefore, under *Teal* and *Barrett*, this Court should order that Mr.
Jackson be permitted to subpoena materials without disclosing the

1 nature of the subpoena, the person or items sought by the subpoena, or
2 the response to the subpoena and any materials returned therewith.”

3 (Motion 6:11-17.)

4 That conclusion doesn't follow from a fair reading of either *Teal* or *Barrett*.
5 Unlike subpoenas for the attendance of witnesses in an upcoming court proceeding, which
6 need not be filed with the court unless the witness fails to appear, a subpoena duces tecum
7 must be filed with the court. So must the documents provided by the custodian of the
8 subpoenaed records. Defendant acknowledges that much: “The defendant may not, however,
9 subpoena the records directly; she or he must direct the producing party to bring the records to
10 the court for a judicial determination that the defendant is entitled to receive them. (*People v.*
11 *Superior Court (Barrett)*, *supra*, 80 Cal.App.4th 1305, 1316.) Any attempt to short-cut this
12 process may constitute a constitutional violation by the defendant. (See, e.g., *Susan S. v.*
13 *Israels* (1997) 55 Cal.App.4th 1290, 1299.)” (Motion 4:12-17.)

14 Neither *Barrett* nor *Teal* discussed an order that would prohibit disclosure of the
15 contours of the subpoena itself, as distinct from its supporting affidavit. *Barrett* dealt with the
16 appropriateness of permitting the defendant to “present his relevancy theories at an in camera
17 hearing” in order to protect his Fifth and Sixth Amendment rights. (*Barrett, supra*, at pp.
18 1320-1321.) *Teal* dealt with production to the prosecution of the subpoenaed materials
19 themselves.

20 There is a distinction with a difference between “subpoenaed materials” and the
21 subpoena that caused the materials to be lodged with the court to begin with. *Teal* addressed
22 the former, not the latter, and concluded that “the trial court abused its discretion in ordering
23 defense counsel to provide the subpoenaed materials to the prosecution and that the error
24 impinged upon *Teal*’s constitutional rights.” (*Teal v. Superior Court, supra*, 117 Cal.App.4th
25 488 at 492.)

26 As will be discussed, the person whose records are demanded by a subpoena duces
27 tecum likely will have a privacy interest in the records and so must be afforded a means of
28 vindicating that interest. Defendant implicitly recognizes as much by acknowledging that there

1 may well be proceedings in which a claim of privilege will be "asserted." (Protective Order, ¶
2 6.) It is unreasonable to expect that the individual whose privacy is invaded – in the nature of
3 things, a prosecution witness whom the defense hopes to impeach – could or would keep the
4 fact of the invasion a secret from the prosecution.

5 The People did not give what hindsight reveals would have been appropriate
6 attention to the particulars of the order Defendant proposed on the supposed authority of *Teal*
7 in his "Motion for Confidential Subpoena Duces Tecum Proceedings" last June. The order's
8 provision that the recipient of a subpoena is prohibited from disclosing the nature of the
9 subpoena to the district attorney lent itself to exactly the enthusiastic overreaching evidenced
10 by the subpoenas in this case.

11 An earlier decision by the same district and division of the Court of Appeal that
12 decided *Teal* and *Barrett* underscores the point that the prosecutor may not be excluded from
13 any participation whatsoever in defendant's discovery efforts.

14 In *Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, at
15 issue was the propriety of an ex parte protective order directing that a subpoena duces tecum
16 seeking certain records of the Department of Corrections, its supporting declaration and the
17 documents obtained in obedience thereto be sealed and forbidding disclosure of the contents
18 thereof to the San Diego District Attorney's office. In a writ proceeding, the Court of Appeal
19 "conclude[d] that the ex parte proceedings violated the People's right to due process of law.
20 Further, the nondisclosure order that resulted from the ex parte proceedings prevented the
21 People from having an opportunity to be heard even after the fact and served to compound and
22 perpetuate the due process violation." (199 Cal.App.3d, at p. 1093.)

23 The reviewing court in that earlier case determined that

24 "The fundamental requisite of due process of law is the opportunity to
25 be heard' [citation], a right that 'has little reality or worth unless one is
26 informed that the matter is pending and can choose for himself whether to
27 . . . contest.' [Citations.]" (*Goss v. Lopez* (1975) 419 U.S. 565, 579 [42
28 L.Ed.2d 725, 737, 95 S.Ct. 729].) In the context of the opportunity to be
heard, it is not just the defendant but also the People who are entitled to due

1 process in a criminal proceeding. (*People v. Dennis* (1986) 177 Cal.App.3d
2 863, 873; see *Stein v. New York* (1953) 346 U.S. 156, 197 [97 L.Ed. 1522,
3 1549, 73 S.Ct. 1077], overruled on other grounds in *Jackson v. Denno*
4 (1964) 378 U.S. 368 [12 L.Ed.2d 908, 84 S.Ct. 1774, 1 A.L.R.3d 1205].)

5 To assure due process, open proceedings involving the participation of
6 both parties are the general rule in both criminal and civil cases. (See, e.g.,
7 Cal. Rules of Court, rule 379; *McDonald v. Severy* (1936) 6 Cal.2d 629,
8 631.)

9 (*Department of Corrections v. Superior Court*, *supra*, 199 Cal.App.3d 1087 at p. 1092.)

10 The reviewing court continued:

11 We are mindful that ex parte proceedings may be necessary to
12 protect the constitutional rights of a defendant or to protect the
13 attorney's work product. (See, e.g., *Keenan v. Superior Court* (1982) 31
14 Cal.3d 424, 430 [providing for confidentiality of a defense motion for
15 appointment of a second attorney to avoid undue disclosure of defense
16 strategy].) Here, however, the order sweeps too broadly. Even if, as
17 Ayala argues, he is required to divulge privileged information to make a
18 showing of good cause in support of the subpoena duces tecum, it is
19 unnecessary to totally exclude the District Attorney's office from the
20 proceedings. Rather, the court may review the supporting documents in
21 camera on an ex parte basis to determine if any specific information
22 constitutes privileged information. The court may then seal those
23 specific items. "In this manner the court will protect the defendant's
24 constitutional rights and the attorneys' work product while, to the extent
25 possible, still providing for open proceedings."

26 (*Id.*, 199 Cal.App.3d at p. 1094.)

27 In *People v. Superior Court (Barrett)*, *supra*, 80 Cal.App.4th 1305, the Court of
28 Appeal distinguished its earlier decision in *Department of Corrections* by noting that the trial
court in that case "issued an order that . . . prohibited the department from communicating with
the district attorney about the produced records. We found it was a denial of the district
attorney's due process rights to issue such a broad order without affording the district attorney
any opportunity to be heard. At issue in this case at this point in time is a defendant's offer of

1 proof on the relevancy of the materials he seeks – an offer of proof that very well may involve
2 privileged information or the attorney's work product." (*Id.*, at p. 1321.)

3 3. The Right Of Privacy Under The California Constitution

4 Article 1, section 1 of the California Constitution provides: "All people are by
5 nature free and independent and have inalienable rights. Among these are enjoying and
6 defending life and liberty, acquiring, possessing, and protecting property, and pursuing and
7 obtaining safety, happiness, and privacy." The phrase "and privacy" was added to article 1,
8 section 1's list of "inalienable rights" in 1972 by the "Privacy Initiative"; the provision was
9 reworded to read as above by an initiative measure in 1974.

10 In *White v. Davis* (1975) 13 Cal.3d 757, our Supreme Court overturned the trial
11 court's ruling sustaining a demurrer to a taxpayer's suit seeking to enjoin the expenditure of
12 public funds in connection with the Los Angeles Police Department's covert intelligence-
13 gathering activities which included sending undercover agents into college classrooms to
14 report on classroom discussions. The Supreme Court regarded the constitutional amendment
15 as "controlling." It took appreciative note of a statement in the election brochure ("a statement
16 which represents, in essence, the only 'legislative history' of the constitutional amendment
17 available to us" – *id.*, at p. 775) which identified "the overbroad collection and retention of
18 unnecessary personal information by government and business interests" and "makes clear that
19 the amendment does not purport to prohibit all incursion into individual privacy but rather than
20 any such intervention must be justified by a compelling interest." (*Ibid.*)

21 "The constitutional provision is self-executing; hence, it confers a judicial right of
22 action on all Californians. (*White v. Davis, supra*, 13 Cal.3d at p. 775.) Privacy is protected
23 not merely against state action; it is considered an inalienable right which may not be violated
24 by anyone." (*Porten v. University of San Francisco* (1976) 64 Cal.3d 825, 829-830; fn.
25 omitted.)

26 Where a person whose communications with another are privileged by statute and
27 who is not a party to given court proceedings, "the appropriate court, in its discretion and on its
28 own motion, may protect an absentee holder of the privilege who has not waived it." (*Rudnick*

1 v. *Superior Court* (1974) 11 Cal.3d 924, 932-933.)

2 Quite apart from statutorily-created privileges, the constitutional right of privacy
3 “may be invoked by a litigant as justification for refusal to answer questions which
4 unreasonably intrude on that right. [Citations.]” (*Fults v. Superior Court* (1979) 88
5 Cal.App.3d 899, 903.) *Fults* arose out of a paternity action brought by the petitioner mother.
6 The Court of Appeal granted a peremptory writ of mandate directing the trial court to vacate its
7 discovery order with respect to Mr. Fults’ inquiries into plaintiff’s sexual activities unrelated to
8 the possible period of conception. The court noted that “the right [of privacy] is invoked
9 against governmental process to compel disclosure.

10 Petitioner is represented by state attorneys but it is the state, over her
11 objection, that seeks, in the form of a judicial order, to compel the
12 answers. When the state itself employs judicial process to compel
13 disclosure, the governmental involvement is obvious [citation] but
14 [since?] ‘judicial discovery orders inevitably involve *state-compelled*
15 disclosure of presumptively protected information, the [constitutional]
16 principles have equal application to purely private litigation.’ (*Britt v.*
17 *Superior Court* [(1978)] 20 Cal.3d [844] at 856, fn. 3.) (Italics in
18 original.) ‘When the inquiry is conducted by the use of compulsory
19 process, the judiciary must bear the responsibility of protecting
20 individual rights.’ [Citations.]”

21 (88 Cal.App.3d, at p. 903, n. 2.)

22 4. The Initial Showing Of “Materiality” and “Good Cause”

23 a. “Materiality”

24 In the case at bar, the declaration supporting each of the three subpoenas duces
25 tecum that were provided to the Doe family by entities maintaining confidential records
26 concerning one or more of the family members recited that the requested information is
27 “material to the issues involved in the case” because it

28 -- “will lead to witness, documents, and discoverable evidence that will show the claims
made in the Pending Criminal Case . . . are unfounded,” or

1 -- "disclose motives, biases and exaggerations on behalf of and engaged in by" members
2 of the Doe family, and
3 -- "contains the prior inconsistent statements, recollections, observations and reactions of
4 [them] to the events and circumstances which gave rise to the Pending Criminal Case," and
5 -- "constitute evidence of a financial motive for making false and inaccurate claims in
6 this matter."

7 Code of Civil Procedure section 1985, subdivision (b) provides that a supporting
8 affidavit "shall be served with a subpoena duces tecum before trial, showing good cause for the
9 production of the matters and things described in the subpoena, specifying the exact matters or
10 things desired to be produced, setting forth in full detail the materiality thereof to the issues
11 involved in the case, and stating that the witness has the desired matters or things in his or her
12 possession or under his or her control." In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531,
13 the Supreme Court noted that "Unlike the statutory development of civil discovery in
14 California, the right of an accused to seek discovery in the course of preparing his defense to a
15 criminal prosecution is a judicially created doctrine evolving in the absence of guiding
16 legislation [¶] In accordance with these principles, it has long been held that civil
17 discovery procedure has no relevance to criminal prosecutions." (*Id.* , pp. 535-536.)

18 But criminal discovery, including the "production of information from . . . law
19 enforcement agencies which investigated or prepared the case against the defendant" that
20 concerned the court in *Pitchess*, is now a creature of statute. (Pen. Code, §§ 1054 -1054.10;
21 see § 1054.4, subd. (a).) A defendant's efforts to obtain documents in the custody of third
22 parties is not governed by the discovery statutes. As noted in *People v. Superior Court*
23 (*Barrett*), *supra*, 80 Cal.App.4th 1305, 1318, "The reciprocal discovery statutory scheme has
24 no application to discovery sought from third parties. [Citation.]" *Barrett* went on to observe,
25 "A criminal defendant has a right to discovery by a subpoena duces tecum of third party
26 records on a showing of good cause – that is, specific facts justifying discovery. [Citation.]"
27 (*Ibid.*)

28 In view of the constitutional right to privacy of individuals concerning whom

1 In view of the constitutional right to privacy of individuals concerning whom
2 records have been generated and maintained the government and business, no reason appears
3 why the standard of particularity set out in Code of Civil Procedure section 1985, subdivision
4 (b) should not apply alike to a criminal defendant's effort to obtain evidence, consistently with
5 his need to effectively prepare for trial. (See *People v. Bigelow* (1988) 200 Cal.App.3d 59,
6 61.)

7 Granting that evidence of "motive and bias" and "prior inconsistent statements"
8 may be admissible for impeachment purposes at trial, a subpoena duces tecum that necessarily
9 will intrude upon the constitutionally-protected privacy of potential witnesses in this case
10 should be supported by a declaration "setting forth in full detail the materiality thereof to the
11 issues involved in the case." That is, each of the particular documents should be shown to
12 have impeaching potential in and of itself. As the court put it in *Fulfs v. Superior Court*,
13 *supra*, 88 Cal.App.3d 899, "When compelled disclosure intrudes on constitutionally protected
14 areas, it cannot be justified solely on the ground that it may lead to relevant information." (*Id.*,
15 p. 904.)

16 In our respectful submission, most of the documents described in the three
17 subpoenas duces tecum to which the People have become privy demonstrate no such potential.

18 b. "Good Cause"

19 The declaration in support of each of the three subpoenas recites that "good cause"
20 for production of those records existed because

21 -- the pertinent Custodian of Records "is the sole and exclusive source of all such
22 information, and

23 -- the requested information "discloses the motive, intent, and conscious state of mind
24 of persons making claims in the Santa Barbara Superior Court, along with persons directing,
25 counseling and controlling the complainants in the Santa Barbara Superior Court action, and

26 -- "no other source exists for such information because such disclosures were made
27 only in the records of [the named person or entity], and the only person with such information
28 is the subpoenaed party,"

family made "disclosures" to the subpoenaed entity of his or her "motive, intent and conscious state of mind" in "making claims" in this court concerning the Does' treatment at the hands of Michael Jackson and his coconspirators, on the one hand, and the information actually sought by each subpoena, on the other, is self-evident.

-- The subpoena served on American Express seeks only financial documents, not evidence of any of the Does' "motive, intent, and conscious state of mind" in complaining about Michael Jackson;

-- The subpoena served on [REDACTED] primarily seeks records of medical diagnosis and treatment (including "images and reports for X-ray's, MRI's, CT Scan's, ultrasound's, IVP's, and all other medical imaging scans") for all of the family members, most if not all of which is confidential and privileged as well as irrelevant;

-- The subpoena served on the [REDACTED] seeks information, most of which (i.e., items (3) through (11)) has no evident relationship to his "motive, intent, and conscious state of mind" in this case¹

"A subpoena duces tecum that makes a blanket demand for . . . documents and amounts to nothing more than a fishing expedition is subject to being quashed. (*People v. Serrata* (1976) 62 Cal.App.3d 9, 15 [84 A.L.R.3d 952].)" (*People v. Superior Court (Barrett)*, *supra*, 80 Cal.App.4th 1305, 1320.)

5. Defendant's Subpoenas Duces Tecum Are Overbroad,
Well Past The Point Of Harassment.

Please review the subpoenas duces tecum issued by defendant. There is no reasonable basis for, e.g., the demand upon the [REDACTED] for "ALL

¹ Items (10) and (11) have apparent reference to [REDACTED]

1 DOCUMENTS . . . mentioning Baby [REDACTED] born July 27, 2004" or, for that matter, for all but
2 a few of the medical records for any member of the Doe family. It states the obvious to point
3 out that those records are confidential and, for the most part, subject to statutory restrictions
4 against disclosure. What possible explanation can Defendant offer for his demand of the
5 [REDACTED] for "documents constituting . . . gynecology reports and examinations"
6 for Jane Doe and Judy Doe (Declaration 2. B. (5) (a)), other than that the demand was either
7 the product of his utter indifference to the Does' right of privacy or was calculated to produce
8 evidence that would satisfy his prurient interest.

9 6. The Subpoena For Mr. Doe's [REDACTED]
10 [REDACTED] Calls For Privileged Information And
11 Is Not Authorized By *Teal*

12 One of Defendant's "everything-but-the-kitchen-sink" subpoenas was directed to
13 the [REDACTED], calling for a virtually complete copy of Mr. Doe's personnel file.

14 Without his prior consent, most of Mr. Doe's personnel file is theoretically exempt
15 from disclosure,² particularly in obedience to process issued by a state court.³ The People are
16 informed that Mr. Doe has given no consent for Defendant's acquisition of his personnel file.
17 Whether the [REDACTED] has, nevertheless, provided records to this Court in obedience to the
18 subpoena is unknown to us. The point here is that most of the information sought by the
19 subpoena is (a) private in nature, and (b) irrelevant to any legitimate concern of the
20 defendant's.

21 Not only does the authority discussed above put Mr. Doe's personnel file beyond
22 Defendant's reach, so does *Teal v. Superior Court*, *supra*, 117 Cal.App.4th 488, the case he
23 cited in support of his supposed right to issue subpoenas in secret. *Teal* had this to say:
24 "Teal also contends he is entitled to the documents produced by the motel in response to the
25 subpoena to assist him in locating the motel security guard who witnessed the incident.

26 ² See [REDACTED]
27 [REDACTED]

28 ³ See, e.g., [REDACTED]

1 Although the trial court correctly ruled that personnel records produced by the motel are
2 not discoverable, Teal is entitled to disclosure of the name, address and telephone number of
3 the security guard who witnessed the incident, assuming this information is contained in the
4 materials provided by the motel.” (*Id.*, p. 492; emphasis added.)

5 7. The Court Has A Statutory And Constitutional Obligation
6 To Restrain Defendant’s Counsel In Their Excessive Prying
7 And To Require Them To Demonstrate, In Camera, Their
8 Tactical Need For Each Document Obtained By Subpoena

9 The decisional law discussed above places a burden on the Court to restrict a party’s
10 access to records obtained it obtained by court process unless and until that party demonstrates
11 the relevance of given records to his defense. See *Susan S. v. Israels* (1997) 55 Cal.App.4th
12 1290:

13 [T]he subpoena duces tecum procedure itself implicitly recognizes an
14 expectation of privacy on the part of the person whose records are
15 subpoenaed. (*People v. Blair* (1979) 25 Cal. 3d 640, 651.) The
16 subpoena duces tecum in a criminal case requires the witness to appear
17 before a judge and to bring the described books, papers or documents.
18 (Pen. Code, § 1327.) The Judicial Council subpoena duces tecum form
19 allows the subpoenaing party to offer the witness the option of not
20 appearing before the judge in person. To exercise this option, the
21 witness must place a copy of the records in a sealed envelope, place that
22 envelope inside another envelope and mail it to the clerk of the court,
23 not to the subpoenaing party. The reason the records are produced to the
24 court instead of to the attorney for the subpoenaing party was explained
25 in *Blair*: “The issuance of a subpoena duces tecum . . . is purely a
26 ministerial act and does not constitute legal process in the sense that it
27 entitles the person on whose behalf it is issued to obtain access to the
28 records described therein until a judicial determination has been made
that the person is legally entitled to receive them. . . .” (25 Cal.3d at p.
651, citations and fn. omitted.)

(*Susan S. v. Israels*, *supra*, 55 Cal.App.4th at p. 1296; emphasis the court’s.)

Regrettably, Defendant has already been afforded access to records for which he

1 has no legitimate need, and without being required to satisfy the Court of their relevance to his
2 defense. Presumably, the Court relied on defense counsel's own self-restraint in subpoenaing
3 the records to begin with.

4 The subpoenas themselves demonstrate that reliance on the self-restraint of the
5 issuing party was misplaced. Still, it is not too late for the Court to order Defendant to account
6 for all documents he has copied from the Court's file, and to demonstrate to the Court their
7 relevance to his defense. Defendant should be ordered to return, and to make no use whatever
8 of, any record he cannot show will further a legitimate defense interest or need. In addition,
9 Defendant should be barred from further access to any records lodged with the Court in
10 obedience to a given subpoena duces tecum until he has demonstrated to the Court, in writing,
11 that each and every record described in the subpoena is relevant to his defense and that his
12 need for that record outweighs the privacy interest of the individual to whom the record relates.

13 The People respectfully submit a proposed remedial Order for the Court's
14 consideration.

15 CONCLUSION

16 If the subpoenas duces tecum served upon the [REDACTED]
17 [REDACTED] may be taken as a representative sampling, Defendant
18 has sought far more information than he is entitled to, upon little or no showing of the
19 materiality or relevance of that information to his defense, and with no regard whatsoever for
20 the constitutionally-protected right of privacy of the individuals whose records he demands.
21 The Court should hold Defendant strictly accountable for his overreaching.

22 DATED: November 17, 2004

23 Respectfully submitted,

24 THOMAS W. SNEDDON, JR.
25 District Attorney

26 By: 181
27 Gerald McC. Franklin, Senior Deputy
28 Attorneys for Plaintiff



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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; 1112 Santa Barbara Street, Santa Barbara, California 93101.

On November 17, 2004, I served the within PLAINTIFF'S REQUEST THAT COURT MODIFY ITS *TEAL* ORDER AND EXERCISE JUDICIAL OVERSIGHT REGARDING SUBPOENAS DUCES TECUM ISSUED BY DEFENDANT, ETC. on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by delivering a true copy thereof to Mr. Sanger at his office, and by faxing a true copy to Mr. Mescreau at the facsimile number shown with his address on the attached Service List, and then by causing to be mailed a true copy to him.

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

Executed at Santa Barbara, California on this 17th day of November, 2004.

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Gerald McC. Franklin

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