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18 **MICHAEL JOSEPH JACKSON**

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

DEC 15 2004

GARY M. BLAIR, Executive Officer
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** Unsealed pursuant
to 611605 court order*

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

15 THE PEOPLE OF THE STATE OF
16 CALIFORNIA,

17 Plaintiffs,

18 vs.

19 MICHAEL JOSEPH JACKSON,

20 Defendant.

) Case No. 1133603

) APPLICATION TO RECALL ORDER TO
) SHOW CAUSE RE: CONTEMPT;
) DECLARATIONS OF THOMAS
) MESEREAU JR., SUSAN C. YU AND
) MAUREEN JAROSCAK; PROPOSED
) ORDER

21 ~~UNDER SEAL~~

22 Honorable Rodney S. Melville

23
24
25
26 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT
27 ATTORNEY OF THE COUNTY OF SANTA BARBARA, TOM SNEDDON, AND DEPUTY

28 APPLICATION TO RECALL ORDER TO SHOW CAUSE

1 DISTRICT ATTORNEYS GERALD FRANKLIN, RON ZONEN AND GORDON
2 AUCHINCLOSS:

3 Mr. Jackson requests that the Court recall its order to show cause re contempt, issued on
4 December 14, 2004 and for such other such further relief as the Court may deem just and proper.
5 This application is made on the grounds that the request for an order to show cause re contempt
6 is not properly supported by evidence as required by C.C.P. Section 1211 and the right of a
7 person accused of contempt to proper notice and due process of law under the state and federal
8 constitution.

9 This application is based on this application, the memorandum of points and authorities
10 attached hereto, the declarations of counsel, the records, pleadings and papers herein, and such
11 other and further matters as may be submitted to the Court.

12 Dated: December 15, 2004

13 Respectfully submitted,

14 COLLINS, MESEREAU, REDDOCK & YU
15 Thomas A. Mesereau, Jr.
Susan C. Yu

16 SANGER & SWYSEN
17 Robert M. Sanger

18 OXMAN & JAROSCAK
19 Brian Oxman

20 By:

21 
22 Robert M. Sanger
23 Attorneys for Defendant
24 MICHAEL JOSEPH JACKSON
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Court was presented with a request for an order to show cause re contempt on
5 December 13, 2004. An order was issued on December 14, 2004. Counsel for Mr. Jackson did
6 not have an opportunity to respond to the request prior to the Court's order.

7 The last time such an order was requested was when defense counsel requested an order
8 to show cause re contempt regarding comments made by former Sheriff Jim Thomas. The
9 District Attorney had an opportunity to respond to the request before the OSC issued. Defense
10 counsel was not given such an opportunity. However, we respectfully request the Court to recall
11 the order to show cause issued on December 14, 2004 for the reasons set forth below.

12 Here, the affidavit is defective in that it is based on unreliable hearsay. Furthermore, the
13 statements attributed to Mr. Oxman were not made by him and logically would not have been
14 made by him. This OSC re contempt is not based on a review of the prosecution of legitimate
15 evidence and the timing suggests it is for publicity purposes and for the further purpose of
16 distracting Mr. Jackson's lawyers from his defense.

17 **II.**

18 **THE AFFIDAVIT OFFERED TO SUPPORT THE ORDER TO SHOW CAUSE IS**
19 **INSUFFICIENT**

20 The New York Post is a Rupert Murdoch tabloid and its contents are not reliable.
21 Furthermore, as a matter of law, a declaration which seeks to rely on statements attributed to a
22 person in a tabloid is hearsay and, as such, cannot be the basis for a proper affidavit. Code of
23 Civil Procedure Section 1211 states, in relevant part:

24 When the contempt is not committed in the immediate view and presence of the
25 court, or of the judge at chambers, an affidavit shall be presented to the court or
judge of the facts constituting the contempt.

26 The requirement of filing an affidavit is jurisdictional. Any contempt order made concerning
27 matters not occurring in the court's presence, and not supported by a proper affidavit, is

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APPLICATION TO RECALL ORDER TO SHOW CAUSE

procedurally invalid. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 532.) Without a proper and sufficient affidavit, no indirect contempt may be found or punished. (*Sorell v. Superior Court* (1967) 248 Cal.2d 157, 160.) The affidavit's insufficiency cannot be cured by presenting proof of contempt at a hearing. (*In re Cowan* (1991) 230 Cal.App 3d 1281.)

III.

MR. OXMAN DID NOT MAKE THESE STATEMENTS

First, as set forth above, Murdoch's New York Post is simply not a reliable source of information.

Second, it is extremely unlikely that Mr. Oxman would have made the statements attributed to him since: (1) he did not have any information as to what was being searched for at Mr. Jackson's residence; (2) he would not have made statements that would be harmful to the defense if he decided to violate the gag order; and (3) he was well aware that there was a gag order.

Third, Maureen Jarosak, Mr. Oxman's law partner, was present in the room when he was speaking to Mr. Li. She heard Mr. Oxman tell David Li, the reporter, that Mr. Oxman could not comment because of the Court's gag order. (Declaration of Maureen Jarosak, ¶ 3.)

Fourth, immediately upon discovering the following day that Mr. Li had quoted him, Mr. Oxman demanded a retraction. (Declarations of Thomas Mesereau, Jr., ¶ 5.)

IV.

WERE THIS NOT A "CELEBRITY" CASE, A REASONABLE PROSECUTOR WOULD HAVE EVALUATED THE CASE BEFORE SEEKING A PROSECUTION FOR CONTEMPT

It is not coincidental that the prosecution was so quick to seek contempt against Mr. Oxman at a time so close to trial. First, the prosecution well knows that the defense is vigorously preparing for trial. Second, as has been demonstrated in more detail in the motions filed for hearing during the week of December 20th, 2004, it is clear that the prosecution itself is not ready for trial. Third, the prosecution has thrown a tremendous amount of material at the defense at the

1 last moment, making the job all the more difficult. Fourth, the prosecution through its error
2 ridden witness list, has suggested the need for even more defense investigation and preparation.

3 The use of the contempt process not based on reliable information or admissible evidence
4 is improper. The extreme prejudice that this distraction has caused to the defense should not be
5 tolerated by the Court.

6 V.

7 **THE NEW YORK POST REPORTER, DAVID LI, IS PARTICULARLY UNRELIABLE**

8 While the prosecution should be aware that the tabloid press, and in particular such
9 publications as Rupert Murdoch's New York Post, is not reliable, they may or may not have
10 known that David Li is particularly unscrupulous. As set forth in the declaration of Thomas
11 Mescreau Jr., Mr. Li has a history of unreliable reporting. (Declaration of Thomas Mesereau, Jr.,
12 at ¶ 7.) Therefore, whether or not Mr. Auchincloss knew or reasonably should have known that
13 the New York Post is an exploitive, tabloid publication, and whether they knew or should have
14 known that Mr. Li is an unreliable reporter, both of those facts are true.

15 Therefore, even if the affidavit in support of the OSC were technically proper, which it is
16 not, the Court should recall the OSC due to the additional information regarding the extreme
17 unreliability of the underlying information.

18 VI.

19 **IT IS INAPPROPRIATE FOR EITHER SIDE TO BE TAKING THE COURT'S TIME**
20 **OR THE TIME OF OPPOSING COUNSEL TO DEAL WITH ILL THOUGHT OUT**
21 **AND UNSUPPORTED CHARGES OF CONTEMPT**

22 In the past, both Mr. Sneddon and Mr. Mesereau have attempted to resolve statements
23 allegedly made to the press by attorneys on either side by way of a clarification.¹

24 Recently, Celebrity Justice's web page indicates that as late as December 6, 2004, Gerald
25 Franklin was quoted in the following passage:

26
27 ¹ The only time defense sought an order to show cause re contempt, it was denied after a
28 thoughtful hearing by the court. In that instance, however, the defense only came before the
Court with an actual video taped interview of former Sheriff Thomas demonstrating conclusively
that he did make inappropriate statements. The OSC was denied based on the lack of legal
responsibility on the part of current law enforcement for the acts of the former Sheriff.

1 Meanwhile, in a rare moment, Jackson prosecutor Gerald Franklin spoke
2 to us outside the DA's office. While he stressed that the gag order prevented him
3 from discussing details . . . "What will be, will be," Franklin said to us, regarding
4 discovery, "I don't have any expectations. I imagine there will be the odd
5 document."

6 (Attached as Exhibit A to the Declaration of Thomas Mesereau, Jr.)

7 While Mr. Franklin's remarks, if he made them, would have violated the gag order, we
8 did not deem it appropriate to even bring these remarks before the Court by way of a
9 "clarification." We made this decision in light of the need of both sides to prepare for trial and
10 the relatively innocuous content of his remarks. We also were quite aware that the fact that
11 someone is quoted by Celebrity Justice does not mean that they actually said anything. The same
12 could certainly be said for the New York Post, which is a Rupert Murdoch tabloid. (Declaration
13 of Thomas Mesereau, Jr., ¶ 10.)

14 The decision of Mr. Auchincloss to go after Mr. Oxman may be based on the perception
15 that Mr. Oxman is held in disfavor by the Court as a result of previous sanctions issued against
16 him. Defense counsel respectfully submits that Mr. Oxman has attempted to comport himself in
17 a professional and straightforward manner since that time. Defense counsel believes that this
18 Court is according Mr. Oxman the respect that he has been attempting to earn and we urge this
19 Court to recall the order to show cause.

20 VII.

21 THERE WOULD BE NO PURPOSE IN INVOKING THE COURT'S SANCTIONS 22 UNDER THESE CIRCUMSTANCES

23 The statements attributed to Mr. Oxman are no more harmful to the case than Mr.
24 Franklin's alleged comments to Celebrity Justice last week. A technical, but innocuous, violation
25 of a pretrial publicity order that has no tendency to prejudice a pending criminal proceeding is
26 not punishable as contempt. (*Younger v. Smith* (1973) 30 Cal.App.3d 138, 150.) However, Mr.
27 Oxman immediately demanded a retraction both from Mr. Li and from Diane Diamond, who
28 republished the report. (Declaration of Thomas Mesereau, Jr., at ¶ 5.) If there was any harm to

the case, Mr. Oxman did his best to immediately mitigate the harm. Even if there were some means to prove these untrue allegations about Mr. Oxman, no harm was done and he took the appropriate remedies. Therefore, there would be no purpose in invoking the Court's sanctions as to Mr. Oxman.

It is also clear that the timing of this request for an OSC re contempt is designed for publicity purposes and to gain unfair advantage with the jury pool. The flimsy, virtually nonexistent, evidence based on something published in the New York Post cannot give rise to a desire to do justice. It is simply an effort to enlist the Court in an attempt to gain unfair advantage.

Were we not subject ourselves to the same objections, it would be easy to request sanctions against Mr. Auchincloss. Prosecutors are required to review cases to determine if they have credible evidence before seeking prosecution. Prosecutors are required to review the motives of the accusers and their own motions before seeking prosecution. Had the prosecution done that here in a clear-headed fashion, neither counsel nor the Court would be wasting valuable time and resources on this matter.

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VIII.

CONCLUSION

As stated before, Mr. Jackson is entitled to neither more nor less protection under the law. The same can be said for his lawyers. We respectfully submit that the Court should issue a clarification as to the manner in which the prosecution has attempted to invoke the serious sanction of contempt and that the Court should recall the order to show cause.

Dated: December 15, 2004

COLLINS, MESEREAU, REDDOCK & YU
Thomas A. Mesereau, Jr.
Susan C. Yu

SANGER & SWYSEN
Robert M. Sanger

OXMAN & JAROSCAK
Brian Oxman

By:


Robert M. Sanger
Attorneys for Defendant
MICHAEL JOSEPH JACKSON

DECLARATION OF THOMAS A. MESEREAU, JR.

I, Thomas A. Mesereau, Jr., declare as follows:

1. I am an attorney at law duly licensed to practice law in the courts of the State of California, a partner in the law firm of Collins, Mesereau, Reddock & Yu, and lead counsel for Mr. Michael Jackson in this criminal proceeding. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, I could and would competently testify thereto under oath.

2. This declaration is being submitted in opposition to the Prosecution's Request for an OSC re contempt as to my colleague and co-counsel, Brian Oxman.

3. I was at the Neverland Ranch during the Prosecution's search of the premises on December 3, 2004. I returned to the Neverland Ranch the following day and was present when Mr. Jackson voluntarily submitted a DNA sample. The submission of the DNA sample had been prearranged.

4. I received a phone call from Mr. Oxman when he learned that he had been misquoted by a reporter named David Li, who writes for the New York Post. Mr. Oxman was furious that he had been quoted at all. He was, of course, more furious that he was misquoted by Mr. Li. Mr. Oxman told me that Mr. Li had quoted him as stating that the Prosecution was seeking DNA samples in addition to Mr. Jackson's DNA. Mr. Oxman was upset that he had been both misquoted and that a public statement that the Prosecution was seeking DNA samples in addition to Mr. Jackson's samples was false and potentially damaging to Mr. Jackson. The truth is the Prosecution sought only Mr. Jackson's DNA samples during that particular search. Mr. Oxman vigorously and repeatedly claimed that he had told Mr. Li that he could not comment and that he did not know what was happening at the Ranch.

5. I advised Mr. Oxman to immediately to send a letter to Mr. Li demanding a retraction. Mr. Oxman followed my advice.

6. I subsequently learned from Mr. Oxman that a tabloid reporter named Diane Diamond republished the misinformation published by Mr. Li. I, again, advised Mr. Oxman to send a letter demanding a retraction. Again, he followed my advice.

1 7. I have prior experience with reporter David Li. I first met Mr. Li when I was
2 defending actor Robert Blake against a murder charge in Los Angeles. Because there was no gag
3 order in that case, I talked with some reporters including Mr. Li. However, I noticed that he tended to
4 ask "loaded" and "trick" questions. Mr. Li likes to ask questions that begin with the phrase "Confirm
5 or Deny the following." I was very careful with Mr. Li in the Robert Blake case and found him to be
6 far less trustworthy than other reporters.

7 8. Because of the gag order in this case, I have been unwilling to speak to Mr. Li.
8 Initially, he telephoned me on a couple of occasions requesting information. When I would inform
9 him of the Court's gag order, he would persist with his typical "Confirm or Deny" questions. My
10 response was to hang up the phone. Mr. Li stopped calling me after a few hang-ups. I do not believe
11 that Mr. Li is a professional or ethical journalist. I have no doubt that he did not publish the truth
12 about Mr. Oxman. It would make no logical sense for Mr. Oxman to say what Mr. Li reported. I do
13 not believe that Mr. Oxman had any idea what was being searched at Neverland when the alleged
14 statements were reportedly made.

15 9. I submit that a contempt hearing would be a waste of time and completely uncalled
16 for. Please note that neither side has previously sought contempt sanctions against the other when
17 alleged violations occurred. Both sides typically sought "Clarification" regarding issues such as this.
18 The Court well knows that the Prosecution has now changed this procedure because of prior sanctions
19 against Mr. Oxman. They are hoping that publicity surrounding the OSC will hurt the Defense. If the
20 Court accommodates the Prosecution in this regard, the Defense will be put in the position of seeking
21 contempt sanctions against the Prosecution in situations like this. For example, the Sheriff's
22 Department and the Prosecution recently leaked detailed information to the National Enquirer about
23 alleged fingerprint evidence found in magazines in Mr. Jackson's home. Should a full-blown
24 contempt hearing now occur to investigate this issue? Since the prosecution could not possibly have
25 been damaged by the misquotation attributed to Mr. Oxman, what is the point in going forward with
26 full-blown contempt hearing? I submit that the Court should accept the declarations and information
27 provided in opposition to Mr. Auchincloss's pleading and both sides should prepare for trial.

28

1 10. Recently, an article from the Celebrity Justice's web page, a true and correct printout
2 of which is attached hereto as Exhibit A, indicates that as late as December 6, 2004, Gerald Franklin
3 was quoted in the following passage:

4 Meanwhile, in a rare moment, Jackson prosecutor Gerald Franklin spoke to us
5 outside the DA's office. While he stressed that the gag order prevented him
6 from discussing details, sources are privately pointing to a possible rift within
7 the DA's office, with one faction saying they are ready for a January 31st trial,
8 while others insist the last-minute raid shows they need to buy more time to get
9 the case ready.

10 We also spoke with defense attorney Robert Sanger, who was similarly mum,
11 but sources tell us that the defense might not ask for a delay -- precisely
12 because they sense the DA might not be ready, even as both sides hit the
13 Monday deadline to turn over discovery to the other side.

14 "What will be, will be," Franklin said to us, regarding discovery. "I don't have
15 any expectations. I imagine there will be the odd document."

16 11. While Mr. Franklin's remarks, if he made them, would have violated the gag
17 order, we did not deem it appropriate to even bring these remarks before the Court by way of a
18 "Clarification." We made the decision not to bring such a request because both sides must
19 prepare for trial and because the content of the Celebrity Justice article quoting Mr. Franklin
20 was relatively innocuous. We were also mindful of the fact that the quotation of Mr. Franklin
21 could have been false -- as is the case for the extant tabloid New York Post article misquoting
22 Mr. Oxman.

23 12. I respectfully request that the Court accept the declarations and information
24 submitted in opposition to Mr. Auchincloss's OSC pleading, deny the OSC hearing and direct
25 both sides should prepare for trial.

26 I declare under penalty of perjury under the laws of the State of California that the foregoing
27 is true and correct and that this declaration was executed on this 14th day of December 2004, at Los
28 Angeles, California.

Thomas A. Mesereau, Jr.
THOMAS A. MESEREAU, JR.

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Jackson Prosecution Split?

December 6, 2004

Citizens — and potential jury pool members — in Santa Barbara, California, are scratching their heads over Friday's 11th hour raid on pop star Michael Jackson's ranch, and "CJ" has discovered the search may signal a division in the ranks of his molestation case's prosecution.

"CJ" talked to Santa Barbara florist Maurice Sourmany, who says he was in the Junior Chamber of Commerce with District Attorney Tom Sneddon. "I don't want to judge Tom Sneddon because he's a personal friend of mine," Sourmany told us. "But by the same token, people are starting to talk."

Sourmany said he wonders why his old buddy waited until such a late date to put a cotton swab in Michael Jackson's mouth to get a DNA sample from the superstar. "Why now? Why so late in the game?" Sourmany asked. "These are things I thought he should have done a long time ago."

Meanwhile, in a rare moment, Jackson prosecutor Gerald Franklin spoke to us outside the DA's office. While he stressed that the gag order prevented him from discussing details, sources are privately pointing to a possible rift within the DA's office, with one faction saying they are ready for a January 31st trial, while others insist the last-minute raid shows they need to buy more time to get the case ready.

We also spoke with defense attorney Robert Sanger, who was similarly mum, but sources tell us that the defense might not ask for a delay — precisely because they sense the DA might not be ready, even as both sides hit the Monday deadline to turn over discovery to the other side.

"What will be, will be," Franklin said to us, regarding discovery. "I don't have any expectations. I imagine there will be the odd document."

In terms of strategy, the defense is now reportedly expected to attack Jackson's accuser's mother. Published reports say the defense will likely question that the mother appropriately used money raised at The Laugh Factory in 2000 by comedians like Chris Tucker and George Lopez; the funds were earmarked for the accuser's medical expenses since the boy had cancer at the time. A source close to the Los Angeles comedy club told us he thinks the money went to the accuser's father, but the dad's attorney scoffed at that claim, saying he's never heard of any money from any fundraiser going to his client.

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DECLARATION OF SUSAN C. YU

I, Susan C. Yu, declare as follows:

1. I am an attorney at law duly licensed to practice law in the courts of the State of California, a partner in the law firm of Collins, Mesereau, Reddock & Yu, and co-counsel for Mr. Michael Jackson in this criminal proceeding. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, I could and would competently testify thereto under oath.

2. I submit this declaration in opposition to the Prosecution's Request for an OSC re contempt as to my colleague and co-counsel, Mr. Brian Oxman.

3. On December 3, 2004, Mr. Jackson's Neverland Ranch was searched. At that time, my staff and I were busy working on the Court's mandated December 6, 2004 discovery compliance deadline. So too was Mr. Oxman. He and I were on the phone throughout that day discussing the discovery compliance.

4. The following day, on December 4, 2004, I received a call from Mr. Oxman. He was very shocked and upset about an article written by Mr. David Li, a reporter for the New York Post. Mr. Oxman told me that Mr. Li completely misquoted him. Mr. Oxman stated that Mr. Li repeatedly asked him questions about the DNA samples the Prosecution allegedly took, and he repeatedly replied that he did not know. Mr. Oxman told me that he could not believe he would be placed in a false light. I, too, was very surprised that Mr. Li would do such a thing.

5. I have been working very closely with Mr. Oxman in this case since May of this year. Thus, I believe I know Mr. Oxman well enough to represent to the Court that Mr. Oxman was misquoted. Because the New York Post article was published ten days ago, i.e., December 4, 2004, the Prosecution could have contacted, and indeed had ample time to contact, the Defense to clarify the misquote before resorting to a motion for OSC re contempt. Unfortunately, the Prosecution has demonstrated that its OSC re contempt motion is yet another last minute effort to distract the Defense from preparing for trial.

1 The Court should not countenance such gamesmanship and deny the OSC re contempt
2 motion.

3 I declare under penalty of perjury under the laws of the State of California that the
4 foregoing is true and correct and that this declaration was executed on this 14th day of
5 December 2004, at Los Angeles, California.

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DECLARATION OF MAUREEN JAROSCAK

I, Maureen Jaroscak, declare and say:

1. I am an attorney at law admitted to practice before all the Courts of the State of California, and I am an attorney for Mr. Michael Jackson. I am Mr. Oxman's law partner.

2. On December 3, 2004, I was present when Mr. Oxman received a telephone call from David Lee of the New York Post. I overheard Mr. Lee asking Mr. Oxman a series of questions as to whether he could verify information regarding the search. Mr. Oxman said he refused to comment because of the court's gag order. Mr. Oxman would not comment on Mr. Lee's repeated questions.

3. On December 4, 2004, Mr. Oxman informed me about the article Mr. Lee had written in the New York Post. I was astounded by the inaccuracies in the article and commented to Mr. Oxman, "Where is he getting this? You didn't say anything of the kind." I told Mr. Oxman to demand a retraction. Mr. Oxman then drafted a written demand for retraction, and I sent it to Mr. Lee by fax on December 5, 2004.

4. Mr. Oxman did not make the statements contained in the article. Mr. Oxman stated to Mr. Lee that he could not comment and would not do so.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed this 14th day of December, 2004, at Santa Fe Springs, California.


Maureen Jaroscak