

1 GIBSON, DUNN & CRUTCHER LLP
2 THEODORE J. BOUTROUS, JR., SBN 132099
3 WILLIAM E. THOMSON, SBN 187912
4 MICHAEL H. DORE, SBN 227442
5 333 South Grand Avenue,
6 Los Angeles, CA 90071-3197
7 Telephone: (213) 229-7000
8 Facsimile: (213) 229-7520

9
10 Attorneys for NBC Universal, Inc.; CBS
11 Broadcasting Inc.; Fox News Network L.L.C.;
12 ABC, Inc.; Cable News Network LP, LLLP;
13 The Associated Press; *Los Angeles Times*; The
14 New York Times Company; *The Washington*
15 *Post*; and *USA Today*

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

MAY 26 2004

GARY M. BLAIR, Executive Officer
BY *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

10 SUPERIOR COURT, STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA BARBARA

13 THE PEOPLE OF THE STATE OF
14 CALIFORNIA,

15 Plaintiff,

16 vs.

17 MICHAEL JOE JACKSON,

18 Defendant.

Case No.: 1133603

**REPLY TO THE OPPOSITIONS OF
MICHAEL JACKSON AND THE DISTRICT
ATTORNEY TO THE ACCESS
PROponents' (1) MOTION TO UNSEAL
GRAND JURY INDICTMENT; AND (2)
MOTION TO UNSEAL TRANSCRIPTS OF
GRAND JURY PROCEEDINGS**

Date: Friday, May 28, 2004

Time: 8:30 a.m.

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

21 The Access Proponents, a group of media organizations,¹ respectfully file this reply to the
22 oppositions submitted by Defendant Michael Jackson and the District Attorney to the Access
23 Proponents' (1) motion to unseal those portions of the grand jury's Indictment that this Court
24 provisionally redacted on April 30, 2004; and (2) motion to unseal the transcripts of the grand jury
25

26
27 ¹ NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News
28 Network LP, LLLP; The Associated Press; *Los Angeles Times*; The New York Times Company,
The Washington Post, and *USA Today*.

1 proceedings that produced that indictment. The Court should grant these motions. The parties have
2 utterly failed to satisfy the strict standards governing the sealing of these judicial records – in fact,
3 they have flouted and completely ignored those standards, which *impose the burden on them* to
4 demonstrate a substantial likelihood of prejudice to specific, overriding interests in order to overcome
5 the “presumption of openness” and to show that any sealing is narrowly tailored and the least
6 restrictive measure available. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178,
7 1200 (1999); Cal. R. Ct. 243.1.² Remarkably, Mr. Jackson and the District Attorney *do not cite a*
8 *single case or statute*, let alone distinguish the numerous authorities cited by the Access Proponents.

9 Instead, Mr. Jackson and the District Attorney resort to media bashing. *See, e.g., Jackson*
10 *Opp.* at 3; District Attorney Joinder at 1. They act as though press coverage of the official
11 proceedings before this Court is itself an evil that must be prevented, rather than a constitutionally
12 protected activity that “serves to (i) demonstrate that justice is meted out fairly, thereby promoting
13 public confidence in such governmental proceedings; (ii) provide a means by which citizens
14 scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding
15 function of the proceeding.” *See NBC Subsidiary*, 20 Cal. 4th at 1219. The press acts as a surrogate
16 for the public in covering criminal proceedings and “[o]ur national experience instructs us that except
17 in rare circumstances openness preserves, indeed, is essential to, the realization of [the right to a fair
18 trial] and to public confidence in the administration of justice. The burden is heavy on those who
19 seek to restrict access to the media, a vital means to open justice.” *ABC, Inc., et al. v. Martha*
20 *Stewart*, 360 F.3d 90, 105-06 (2d Cir. 2004).

21
22
23 ² There also is no excuse for Mr. Jackson’s violation of Rule 243.2’s requirements in connection
24 with his filing on May 14 of his motions to reduce bail and for discovery, which this Court
25 unsealed yesterday. This Court has on several occasions instructed the parties to follow Rule
26 243.2, which requires the filing on the *public record* of a *noticed* motion to seal. But Mr. Jackson
27 inexplicably filed *ex parte* applications to file his bail and discovery motions under seal, so the
28 public had no notice that the motions or request for sealing had even been filed. The *ex parte*
applications provided no reason for sealing the motions, other than a vague reference to this
Court’s protective order, which does not apply to the filing of motions in this Court. As this
Court ultimately found, there was no basis for sealing these motions, yet they remained under seal
for 11 days.

1 In short, Mr. Jackson and the District Attorney have fundamentally misunderstood the
2 traditional role of the press, and subverted the First Amendment and California law. Their specious
3 arguments should be rejected, and the grand jury indictment and transcripts should be unsealed
4 immediately.

5 **I. The Remaining Portions Of the Grand Jury Indictment Should be Unsealed**

6 Neither Mr. Jackson nor the District Attorney dispute that grand jury indictments are subject
7 to the presumption of openness established by the First Amendment, Article I, section 2 of the
8 California Constitution, Rule 243.1, and the common law. *See, e.g., United States v. Smith*, 776 F.2d
9 1104, 1112 (3d Cir. 1985) ("Because of our historic experience and the societal interest served by public
10 access to indictments and informations, . . . such access is protected by the First Amendment").
11 Instead, they assert that, because the press is likely to report on the contents of the indictment, it is
12 necessary to seal portions of it, including the 28 overt acts relating to the conspiracy charge and the
13 names of the alleged co-conspirators, to protect Mr. Jackson's right to a fair trial. *See Jackson Opp.*
14 at 4-5; District Attorney Joinder at 1. But "[t]he First Amendment right of access cannot be
15 overcome by the conclusory assertion that publicity *might* deprive the defendant of th[e] right [to a
16 fair trial]." *NBC Subsidiary (KNBC-TV)*, 20 Cal. 4th at 1225 (quoting *Press-Enterprise Co. v.*
17 *Superior Court*, 478 U.S. 1, 15 (1986) (emphasis added by California Supreme Court); *see also*
18 *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 565 (1976) ("[P]retrial publicity, even if pervasive and
19 concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an
20 unfair trial."). Accordingly, the California Supreme Court in *NBC Subsidiary* squarely rejected
21 precisely this type of "generalized conjecture" that juror deliberations "might be tainted irreparably
22 by . . . exposure" to press reports about official judicial proceedings. 20 Cal. 4th at 1225.³

23
24 ³ Courts have repeatedly stressed that it is improper simply to assume that exposure to publicity
25 about judicial proceedings and records will taint the jury pool and eliminate the possibility of a
26 fair trial. *See, e.g., NBC Subsidiary (KNBC-TV), Inc.*, 20 Cal. 4th at 1223 ("We repeatedly have
27 stressed our adherence to the fundamental premise that, as a general matter, cautionary
28 admonitions and instructions serve to correct and cure myriad improprieties, including the receipt
by jurors of information that was kept from them Consistent with this premise, courts have
held that, as a general matter, cautionary admonitions and instructions must be considered a
presumptively reasonable alternative—a presumption that can be overcome only in exceptional

[Footnote continued on next page]

1 Mr. Jackson's claim that "press coverage in this case is of the sensationalist variety" and that
2 "the press runs stories and entertainment pieces on every rumor," Jackson Opp. at 3; see also District
3 Attorney Joinder at 1 (referring to "unremitting and sensationalist commentary"), is both misguided
4 and beside the point. Unsealing the official allegations of the Indictment will ensure that more
5 accurate information will be disseminated, and will reduce the (unspecified) rumors about which Mr.
6 Jackson complains. The indictment of Mr. Jackson plainly raises issues of serious public concern,
7 and the fact that Mr. Jackson objects to some coverage of the case is no basis for cutting off the free
8 flow of information to the public. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ("The
9 constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and
10 beliefs which are offered.' *N.A.A.C.P. v. Button*, 371 U.S. 415, 445. As Madison said, 'Some degree
11 of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in
12 that of the press.' 4 Elliot's Debates on the Federal Constitution (1876), p. 571."); *Hustler Magazine*
13 *v. Falwell*, 485 U.S. 46, 55 (1988) (applying full First Amendment protections even though "[t]here
14 is no doubt that the caricature of respondent and his mother published in Hustler is at best a distant
15 cousin of the political cartoons described above, and a rather poor relation at that").

16 Mr. Jackson notes that the Indictment reflects a "one-sided, prosecution theory of the case,"
17 Jackson Opp. at 4, but that is of course true of every indictment and cannot justify overriding the
18 "historic tradition of public access to the charging document in a criminal case." *United States v.*
19 *Smith*, 776 F.2d at 1112. To the contrary, public access to the Indictment will allow the public to
20 scrutinize the basic charges being leveled by elected prosecutors, serve as a check against potential
21 prosecutorial overreaching, and avoid the appearance that Mr. Jackson is getting special treatment
22 because he is a celebrity.

23
24 [Footnote continued from previous page]

25 circumstances."); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1054-55 (1991) (opinion of
26 Kennedy, J., joined by Marshall, Blackmun, and Stevens, JJ.) (noting that "[v]oir dire can play an
27 important role in reminding jurors to set aside out-of-court information and to decide the case
28 upon the evidence presented at trial," and that empirical research suggests where jurors have been
exposed to extensive and prejudicial publicity, "they are able to disregard it and base their verdict
upon the evidence presented in court").

1 Although Mr. Jackson also suggests that it is "particularly" unfair to release the full contents
2 of the Indictment "while Mr. Jackson is subject to the constraints of the protective order," Jackson
3 Opp. at 4, this complaint rings particularly hollow given that his attorneys recently dropped their
4 opposition to the protective order and proclaimed that they "support" the protective order. See
5 Exhibit A, attached hereto (May 14, 2004 Letter from Mr. Jackson's lawyers to Chief Justice
6 George). The existence of the protective order cannot be used to thwart the public's rights of access
7 to judicial records and proceedings.

8 At bottom, both Mr. Jackson and the District Attorney rely on a wholly unsupported and very
9 dangerous argument: that the intense public interest in this case, in an of itself, mandates secrecy,
10 even as to basic allegations of the Indictment. This Court should firmly reject that argument because
11 the "mere fact that the suit has been the subject of intense media coverage is not . . . sufficient to
12 justify closure. To hold otherwise would render the First Amendment right of access meaningless;
13 the very demand for openness would paradoxically defeat its availability." *ABC, Inc., et al. v.*
14 *Martha Stewart*, 360 F.3d at 102.

15 II. The Grand Jury Transcripts Also Should Be Unsealed Immediately

16 Mr. Jackson and the District Attorney do not dispute that section 938.1 of the California Penal
17 Code and California Rule of Court 243.1 create a presumption of openness as to the grand jury
18 transcripts. Their arguments in support of keeping those transcripts under seal mirror their arguments
19 as to the indictment: a conclusory assertion of the need to protect fair trial rights and an attack on the
20 press. These arguments would apply to virtually every case that garners public attention and would
21 render meaningless section 938.1's general requirement that transcripts be made public once an
22 indictment has been returned. For the reasons discussed above, and in the Access Proponents'
23 motion to unseal, these arguments are baseless and wholly insufficient to justify sealing the grand
24 jury transcripts.

25 III. The Court Should Reject Mr. Jackson's Request For Delay

26 This Court should reject Mr. Jackson's alternative argument that the Court should hold the
27 Access Proponents' motions "in abeyance" until June 25. Jackson Opp. at 5. The Court gave the
28 parties ample notice and time to address the sealing issues, announcing at the April 30 hearing that

1 these issues would be taken up on May 28. In response, Mr. Jackson and the District Attorney simply
2 ignored their obligations to meet the standards established by Rule 243.1, the First Amendment,
3 Article I, Section 2, the common law and section 938.1 of the Penal Code.

4 Further delay also is unwarranted because of "the *critical* importance of *contemporaneous*
5 access . . . to the public's role as overseer of the criminal justice process." *Washington Post v.*
6 *Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphases added) (citing *Richmond Newspapers, Inc.*
7 *v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring)); *see also Associated Press v. United*
8 *States Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that even a 48-hour delay in unsealing
9 documents was "a total restraint on the public's first amendment right of access even though the
10 restraint is limited in time"). The "Supreme Court has made clear that '[t]he loss of First Amendment
11 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury . . .'"
12 *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002) (quoting *Elrod v. Burns*,
13 427 U.S. 347, 373 (1976)). Indeed, "each passing day may constitute a separate and cognizable
14 infringement of the First Amendment." *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun,
15 J., in chambers) (ordering immediate stay of injunction). As one court has explained, "[t]imeliness of
16 publication is the hallmark of 'news' and the difference between 'news' and 'history' is merely a
17 matter of hours." *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972).

18 For all of these reasons, this Court should immediately unseal the remaining portions of the
19 grand jury Indictment and release the grand jury transcripts as well.

20 DATED: May 26, 2004

Respectfully submitted,

21 GIBSON, DUNN & CRUTCHER LLP
22 Theodore J. Boutrous, Jr.
23 William E. Thomson
24 Michael H. Dore

By: 

Theodore J. Boutrous, Jr.

25 Attorneys for NBC Universal, Inc.; CBS
26 Broadcasting Inc.; Fox News Network L.L.C.;
27 ABC, Inc.; Cable News Network LP, LLLP; The
28 Associated Press; *Los Angeles Times*; The New
York Times Company; *The Washington Post*; and
USA Today

EXHIBIT A

CMRY

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ATTORNEYS AT LAW

1875 CENTURY PARK EAST, 7th FLOOR
LOS ANGELES, CALIFORNIA 90067

TELEPHONE: (310) 284-3120 FACSIMILE: (310) 284-3133

WEBSITE: WWW.CMRYLAW.COM

EMAIL: MESEREAU@CMRYLAW.COM

THOMAS MESEREAU, JR.
A PROFESSIONAL LAW CORPORATION
SPECIALIZING IN CRIMINAL DEFENSE

May 14, 2004

VIA FACSIMILE & EXPRESS MAIL

Chief Justice Ronald M. George and
Associate Justices
CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94101

Re: National Broadcasting Co., et al. v. Santa Barbara County Superior Court;
The People and Michael Jackson, RPLs, No. S124828 (B174852; SBSC No. 1133603)

To the Honorable Chief Justice and Associate Justices:


As current counsel for Mr. Michael Jackson in the above-referenced proceeding, we hereby withdraw any objections made by Mr. Jackson's prior counsel, Mr. Mark Garragos and/or Mr. Ben Brafman, to the Honorable Rodney S. Melville's Gag Order.

We respectfully submit that we support Judge Melville's Gag Order.

Respectfully submitted,


THOMAS A. MESEREAU, JR.
SUSAN C. YU
Collins, Mesereau, Reddock & Yu


STEVE COCHRAN
Katten, Muchin, Zavis & Rosenman


ROBERT SANGER
Sanger & Swysen

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

I, **Cynthia C. Altounian**, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Theodore J. Boutros, Jr., a member of the bar of this Court, and at his direction, on May 26, 2004, I served the following:

REPLY TO THE OPPOSITIONS OF MICHAEL JACKSON AND THE DISTRICT ATTORNEY TO THE ACCESS PROPONENTS' (1) MOTION TO UNSEAL GRAND JURY INDICTMENT; AND (2) MOTION TO UNSEAL TRANSCRIPTS OF GRAND JURY PROCEEDINGS

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

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

| | |
|---|---|
| Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs | Tel.: (805) 568-2300 Fax: (805) 568-2398 |
| Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson | Tel.: (310) 284-3120 Fax: (310) 284-3133 |
| Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93001 Co-Counsel for Defendant Michael Jackson | Tel.: (805) 962-4887 Fax: (805) 963-7311 |

| | |
|--|---|
| Steve Cochran, Esq. Katten, Muchin, Zavis & Rosenman, Lawyers 2029 Century Park East, Suite 2600, Los Angeles, CA 90067-3012 Co-Counsel for Defendant Michael Jackson | Tel.: (310) 788-4455 Fax: (310) 712-8455 |
|--|---|

BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

BY FACSIMILE: From facsimile number (213) 229-7520, I caused each such document to be transmitted by facsimile machine, to the parties and numbers indicated below, pursuant to Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported by the machine. Pursuant to Rule 2008(e)(4), I caused the machine to print a transmission record of the transmission, a copy of which is attached to the original of this declaration.

| | |
|--|---|
| Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs | Tel.: (805) 568-2300 Fax: (805) 568-2398 |
| Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson | Tel.: (310) 284-3120 Fax: (310) 284-3133 |
| Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93001 Co-Counsel for Defendant Michael Jackson | Tel.: (805) 962-4887 Fax: (805) 963-7311 |
| Steve Cochran, Esq. Katten, Muchin, Zavis & Rosenman, Lawyers 2029 Century Park East, Suite 2600, Los Angeles, CA 90067-3012 Co-Counsel for Defendant Michael Jackson | Tel.: (310) 788-4455 Fax: (310) 712-8455 |

1 **BY UPS NEXT DAY AIR:** On the above-mentioned date, I placed a true copy of the above
2 mentioned document(s) in a sealed envelope or package designated by the United Parcel
3 Service with delivery fees paid or provided for, addressed to the person(s) as indicated above
4 and deposited same in a box or other facility regularly maintained by United Parcel Service or
5 delivered same to an authorized courier or driver authorized by United Parcel Service to
6 receive documents.

7 I am employed in the office of Theodore J. Boutrous, Jr., a member of the bar of this court, and
8 that the foregoing document(s) was(were) printed on recycled paper.

9 **(STATE)** I declare under penalty of perjury under the laws of the State of California that
10 the foregoing is true and correct.

11 **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

12 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing
13 document(s), and all copies made from same, were printed on recycled paper, and that this Certificate
14 of Service was executed by me on May 26, 2004, at Los Angeles, California.

15 
16 _____
17 Cynthia C. Altounian

18 10789496_11.DOC