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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MICHAEL JOE JACKSON, Defendant.	No. 1133603 PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS FOR "VINDICTIVE PROSECUTION" AND "OUTRAGEOUS GOVERNMENT CONDUCT," AND TO SUPPRESS EVIDENCE FOR THOSE REASONS; MEMORANDUM OF POINTS AND AUTHORITIES DATE: December 20, 2004 TIME: 10:00 a.m. DEPT: TBA (Melville) ~~UNDER SEAL~~

A. Introduction

Defendant has moved separately for an order dismissing the pending prosecution on the ground of "vindictive prosecution" (his "*Twiggs* Motion") and for an order dismissing the prosecution on the ground of "outrageous government conduct," and to suppress evidence obtained by warranted search as a sanction for that "outrageous" conduct (his "Suppression Motion"). This is Plaintiff's response to those two motions to dismiss. (Defendant also has separately moved to continue trial of this case. Plaintiff will separately respond to that motion.)

B. Argument

I

DEFENDANT'S MOTION TO DISMISS FOR "VINDICTIVE PROSECUTION" IS MERITLESS

Defendant argues: "The doctrine of vindictive prosecution precludes the government from responding to a defendant's exercise of his or her rights by changing the manner of the prosecution in a fashion which punishes defendant." (*Twiggs* Motion 4:8-10.) The "change" he complains about appears to be the People's decision to convene a grand jury rather than commence the prosecution with a preliminary examination, and to seek an indictment on a count of conspiracy in addition to the nine counts alleged in the felony complaint. (*Id.*, 4:5-7.) By the "exercise of his . . . rights," defendant appears to refer to his "asserting his innocence and hiring counsel to defend against the false charges" (*Twiggs* Motion 3:6-7), and to his "vigorous[] defense" of the charges outlined in the felony complaint in a "series of hearings" before his indictment "that included discussion about the schedule for a preliminary hearing." (*Id.*, 4:1-2.)

Initiation of a felony prosecution by indictment rather than by information is hallowed by history and legal tradition. The tactical decision to proceed in that fashion in this case "outraged" only defendant and his counsel. Of course the defendant asserted his innocence, hired competent counsel and commenced a vigorous defense. That fact gives defendant no cause to complain that counsel for the People, for their part, have engaged in a vigorous prosecution of him.

Defendant relies primarily on *Twiggs v. Superior Court* (1983) 34 Cal.3d 360 and *United States v. Goodwin* (1982) 457 U.S. 368 [73 L.Ed.2d 74] to support his claim that his prosecution is merely "vindictive."

An important and oft-cited limitation on the *Twiggs* doctrine – quite overlooked by defendant – was discussed in *People v. Johnson* (1991) 233 Cal.App.3d 425:

> California decisions have refrained from presuming vindictiveness in a prosecutor's pretrial charging determinations. (*People v. Hudson*

> [(1989)] 210 Cal.App.3d [784] at p. 788; see *People* v. *Farrow* (1982) 133 Cal.App.3d 147, 152 ; see also *Twiggs* v. *Superior Court* (1983) 34 Cal.3d 360, 368-373 [considerations favoring application of presumption only in posttrial contexts apply when, after mistrial occurs and defendant asserts right to jury retrial by rejecting plea bargain, prosecutor amends information to charge five additional prior felony convictions].) Such a presumption would be unworkable in the pretrial context; since section 1009 allows the prosecution to amend the charges against a defendant at any time to include offenses shown by evidence at the preliminary hearing, and since a defendant can assert innumerable pretrial rights, a defendant could assert that retaliation was the motive for any amendment in the charges. (34 Cal.3d at pp. 372-373.) Moreover, as the United States Supreme Court has observed, "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." (*United States* v. *Goodwin* [(1982)] 457 U.S. [368] at p. 381 [73 L.Ed.2d [74] at p. 85].)

(233 Cal.App.4th at p. 447-448.)

Accord, *In re Bower* (1985) 38 Cal.3d 865, 875, which noted the United States Supreme Court's observation in *Goodwin*, *supra*, that "The timing of the prosecutor's action is important because '[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct. [Fn. omitted.] As we made clear in *Bordenkircher* [*v. Hayes* (1978) 434 U.S. 357 [54 L.Ed.2d 605]], the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.' (*Id.*, at p. 382 [73 L.Ed.2d at p. 86].)" See also *People v. Bracey* (1994) 21 Cal.App.4th 1532, 1544 ["California courts have followed the Supreme Court in refusing to apply a presumption of vindictiveness for prosecutorial action before commencement of trial. [Citations]."]

Defendant's mistaken reading of the "vindictive prosecution" doctrine apparently proceeds from his core belief that the district attorney is treating him "differently [because] he is a celebrity [and] he is wealthy." (Motion 2:20-21.) He notes that an "immense amount of government resources . . . have been devoted to" his case, and that "there has been more investigation on this case than in capital murder cases or complex white collar prosecutions." "The prosecution has, in essence, punished Mr. Jackson for being a celebrity and defending himself." (Motion 3:15-24.)

The argument that equates a thorough investigation of a celebrated defendant's reported crimes with "punishment" of him answers itself. Defendant surely is a celebrity. But the argument "I am a celebrity. I am being punished. Therefore, I am being punished because I am a celebrity" is embarrassingly post hoc. When a "celebrity" commits a crime, he should expect to be prosecuted for it – not because he is a celebrity, but because he is believed to have committed a crime.

II

THE PROSECUTION HAS NOT "ENGAGED IN OUTRAGEOUS GOVERNMENT CONDUCT"

If there has been a defense motion in this case in which the word "outrageous" wasn't used at least once, it doesn't come to mind. Defendant asks the court to reconsider all of defendant's earlier, failed efforts to have the case against him dismissed "in the context" of this most recent effort. But that "context" is pretty much just his rehearsal of all his old complaints. A meritless argument doesn't gain substance by its repetition.

Defendant complains that "the sheer number of search warrants is outrageous for a case of this sort. To date, more than 100 search warrants have been executed." He concludes, "The obvious explanation is that the prosecutor is going after a celebrity." (Suppression Motion 4:11-13.)

The great majority of the search warrants in this case were for business records in the custody of third parties, and because they invaded no Fourth Amendment interest of the

defendant, they have not been challenged by him. Of the five warrants approved for the search of residence or office premises prior to the grand jury proceeding, only two implicated defendant's own privacy interests. Only three warrants issued subsequent to defendant's indictment implicated his privacy interests and only one of them – notably, not the second warrant recently approved for the search of Neverland Ranch – has been contested.

A more reasonable explanation for all the warrants is that the prosecutor is diligently seeking evidence to support the prosecution of an individual who appears to have committed serious – even "outrageous" – crimes and who relied in part on his celebrity in committing those crimes.

Defendant's motion to dismiss the prosecution on the ground of "outrageous government conduct," with its reprise of his "I am a celebrity; therefore I am being prosecuted" argument, is without merit. It should be denied

III

DEFENDANT TACITLY CONCEDES THAT THE WARRANTED SEARCHES OF HIS RESIDENCE AND HIS PERSON WERE SUPPORTED BY A SHOWING OF PROBABLE CAUSE. HIS MOTION TO SUPPRESS THE RESULTING EVIDENCE MUST THEREFORE BE DENIED

Two search warrants were served on defendant on December 3, 2004: One (Search Warrant 5192) authorized a limited search of certain structures at Neverland Valley Ranch for particularly-described evidence. The other (Search Warrant 5196) authorized the painless swabbing of the inner surface of defendant's cheeks to collect cast-off cell tissue for DNA analysis. Each was executed with the greatest possible respect for defendant's dignity and privacy.[1]

[1] When SW 5192 was executed, the Neverland Valley Ranch staff was advised that the officers would not enter the main residence until 90 minutes had passed, and that Mr. Jackson and his family were free to leave the ranch if they were so inclined. The search itself was

Defendant complains that the number of search warrants in this case "exeed[] any reasonable limitation[]" and is "outrageous" (Suppression Motion 4:11-17). The most recent warrants had "no purpose other than to shock and intimidate Mr. Jackson and to disorient his legal team." (*Id.*, 6:8-10).

Defendant admits there is no "per se limit on the number of search warrants that can be served in a particular case" (Suppression Motion 4:14-15), and the supporting affidavits make the "purpose" of the warrants readily apparent.

Defendant suggests that the Court's order that defendant submit to a buccal swabbing could and should have been obtained upon "noticed motion" rather than by application for a search warrant (Suppression Motion 9:14-15). But either way, the result would have been the same – an order of court. Proceeding by way of search warrant had the obvious advantage of expediency when time was of the essence, without denying defendant the ability to challenge the reasonableness of the seizure in a motion to suppress the fruit of the buccal swabbing. And resort to a warrant assured defendant a degree of privacy that would not have attended the public hearing of a noticed motion.

Defendant conflates two quite distinct investigations of his conduct with young boys over a decade when he complains that the prosecution "invade[d] [defendant's] home five times[2] in what should be a garden variety case." (*Id*, 5:19-24.) Defendant doesn't define the

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conducted in the presence of two of his lawyers and a defense investigator equipped with a video camera. The DNA swabbing authorized by SW 5196 was conducted at Neverland Valley Ranch three days later at defendant's specific request, and in the ranch's theater, some distance from his residence. The personnel who conducted that procedure arrived at the ranch in a single, unmarked car.

[2] Three warrants were served at Neverland Ranch over more than 10 years without Mr. Jackson's prior knowledge and consent, commencing with the Los Angeles investigation in 1990. The video-taped inspection of his home was accomplished without a warrant and with the consent of Mr. Jackson's lawyers. The warrant authorizing the "intimate inspection and photographing of Mr. Jackson's body" was executed at Neverland Ranch, rather than elsewhere, at his request. (The propriety of that procedure was litigated in Mr. Jackson's motion for return of the photographs, pursuant to Penal Code sections 1539 and 1540. It was upheld by the Santa Barbara Superior Court.) The reasonableness of the warranted search of

parameters of a "garden variety" child molestation case – presumably, he does not mean the garden in which multi-million-dollar civil settlements once grew.

Every molestation investigation is sui generis, and by any standard, the particulars of Mr. Jackson's case take it out of the ordinary.

Execution of the search warrants did not violate the Fourth Amendment's prohibition of "unreasonable searches and seizures." If the warrants were defective or if the manner of their execution violated the law, defendant would have moved to suppress the resulting evidence pursuant to Penal Code section 1538.5. He did not.

Instead, defendant complains in his omnibus "Motion to Dismiss For Outrageous Government Conduct [and] To Suppress All Evidence Seized Pursuant To Search Warrants 5192 and 5196 . . ." that execution of the warrants "this close to trial constitutes outrageous government conduct and an abuse of the search warrant process," and sought information "not critical to the prosecution of the case, and so was "unnecessary" and constituted an "unlawful intrusion."

Investigators and prosecutors tend to rely on their own judgment and a magistrate's review of search warrant applications in deciding whether a given search is "necessary." They rarely seek the defendant' opinion whether particular evidence is "critical" to the successful prosecution of the case against him. And if an intrusion to execute a warrant was "unlawful," defendant's remedy -- his sole remedy – is a statutory motion to suppress the evidence obtained by the search.

Penal Code section 1538.5, subdivision (m) declares, in relevant part:

> "The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her."

Neverland Ranch on November 18, 2003 was later upheld by this Court.

That provision means what it says.

CONCLUSION

Defendant's "*Twiggs*" Motion and his Suppression Motion are without discernable merit. They should be denied.

DATED: December 14, 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; 1114 Santa Barbara Street, Santa Barbara, California 93101.

On December 14, 2004, I served the within PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS FOR "VINDICTIVE PROSECUTION" AND "OUTRAGEOUS GOVERNMENT CONDUCT," AND TO SUPPRESS EVIDENCE FOR THOSE REASON, Etc., and a REDACTED COPY thereof, on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by personally delivering a true copy there of to Mr. Sanger's Office and by faxing a true copy to Mr. Mesereau, and then by mailing a true copy to Mr. Mesereau at the address 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 14th day of December, 2004.

Gerald McC. Franklin

SERVICE LIST

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