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14 **MICHAEL JOSEPH JACKSON**

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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

MICHAEL JOSEPH JACKSON,

Defendant.

) Case No. 1133603

) BRIEF RE: WAIVER OF ATTORNEY-CLIENT
) PRIVILEGE

) DATE: TBA
) TIME: TBA
) DEPT: SM-8

Defendant, MICHAEL JACKSON, submits the following brief in support of his contention that the attorney client privilege between himself and Mark Geragos was waived only as to the relevant time period relating to the alleged conspiracy ending March 12, 2003 and, in no event, should extend beyond the commencement of adversary proceedings at the time of his arrest on November 20, 2003. Any purported waiver beyond that date should be rescinded and, whether

BRIEF RE: WAIVER OF ATTORNEY-CLIENT PRIVILEGE

ORIGINAL

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

MAY 16 2005

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


1 or not the Court were to find a waiver occurred, the Court should not permit inquiry beyond the
2 end of the alleged conspiracy and, in no event, beyond the commencement of the adversary
3 proceedings on November 20, 2003 on the grounds that to do otherwise would violate Mr
4 Jackson's rights under the Fifth, Sixth and Fourteenth Amendments of the United States
5 Constitution, under the California Constitution and relevant case and statutory law. This brief
6 incorporates the pleadings, records, files, testimony and evidence herein and such other papers or
7 evidence as the Court may permit at and before the hearing hereon.

8 Dated: May 16, 2005

Respectfully submitted,

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16 MICHAEL JOSEPH JACKSON

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 ARGUMENT

3 I.

4 MR. JACKSON WAIVED THE ATTORNEY-CLIENT PRIVILEGE WITH REGARD TO
5 COMMUNICATIONS WITH MR. GERAGOS DURING THE ALLEGED PERIOD OF
6 THE CONSPIRACY

7 Mr. Jackson did not consent to a general waiver of the attorney-client privilege.¹ Mr.
8 Mesereau responded to the inquiry from the Court that Mr. Jackson had waived the attorney-client
9 privilege so that Mr. Geragos could testify. (RT 10249:9-11.) On cross-examination, a written
10 waiver was revealed that was stated to be for a limited time period. It is true that Mr. Mesereau
11 did not delineate the scope of the waiver when he originally spoke and he apologized to the Court
12 for failing to do so. Nevertheless, it is Mr. Jackson's position that his waiver was limited from the
13 beginning since it had to be construed under the circumstances within which it was given.

14 As an initial point, a limited waiver is allowed by Evidence Code Section 912. (Sec
15 *People v. Barnett* (1998) 17 Cal.4th 1044, 1139.) The language of Evidence Code Section 912,
16 i.e. "with respect to a communication protected by the privilege," makes it clear that the privilege
17 may be waived with regard to a particular communication, while maintaining the privilege as to
18 other communications. Therefore, it was legally possible for the waiver to have been limited.

19 Pursuant to Evidence Code Section 912, only the holder of the privilege, in this case Mr.
20 Jackson, can consent to the disclosure of confidential communications. It is true that Mr. Jackson
21 was present in court when Mr. Mesereau announced that he was waiving the attorney client
22 privilege between Mr. Geragos and Mr. Jackson. Mr. Jackson was not asked on the record if he
23 concurred. Instead, Mr. Mesereau prepared a written waiver which was presented to Mr. Jackson

24
25 ¹ Mr. Jackson is not unmindful of the Court's dissatisfaction at the manner in which the
26 waiver was addressed in court. Mr. Jackson, however, respectfully addresses the issue from the
27 perspective of the law of waivers and Constitutional rights. The impact of Mr. Mesereau's
28 failure to delineate the waiver is regrettable, however, he apologized. In the long run any
confusion from it does not prejudice the prosecution nor affect the manner in which the trial
should proceed.

1 at the next break. That written waiver waived the privilege with regard to communications with
2 Mr. Geragos from the time Mr. Geragos was retained up until the approximate date of Mr.
3 Jackson's arrest.²

4 To the extent that Mr. Jackson's silence during Mr. Mesereau's statement that there was a
5 waiver constitutes an implicit waiver by Mr. Jackson, the Court should consider the context in
6 which that disclosure was discussed. It is generally the nature of what is ultimately to be
7 disclosed that defines the scope of the waiver. The event that triggers the attorney-client privilege
8 being waived is disclosure of the confidential communication, not an announcement that the
9 holder intends to waive the privilege. (*Lohman v. Superior Court* (1978) 81 Cal.App. 3d 90.)
10 Therefore, it follows that Mr. Jackson reasonably would have understood that the waiver in this
11 case was as to confidential communications during the period that Mr. Geragos was alleged to
12 have been involved in the alleged conspiracy. Mr. Jackson reasonably would have understood
13 that he was waiving the privilege from the time Mr. Geragos was retained until the alleged end of
14 the conspiracy on March 12, 2003. In no event would the waiver reasonably be expected to
15 continue beyond Mr. Jackson's arrest.

16 This is both consistent with the scope of the testimony on direct examination and with the
17 scope of the subsequent written waiver. If Mr. Jackson's silence during Mr. Mesereau's
18 statement that there was a waiver of attorney client privilege is implied to Mr. Jackson, it does not
19 follow that there has been a general waiver of the privilege.³ Instead, as argued in more detail
20 below, it would not be reasonable for a defendant to waive his fundamental post-arrest

22 ² The written waiver, hurriedly prepared by Mr. Mesereau and Ms. Yu at the break,
23 mentions a date in December of 2003. However, Mr. Geragos clarified, on the record, that the
24 date of arrest was actually in November of 2003, and implied that a waiver beyond that point, to
25 a date in December, would raise a question as to whether such a waiver was informed. (RT
10334:14-19.) We ask the Court to take notice from the files herein that the search warrants
were executed in this case on November 18, 2003 and the Mr. Jackson voluntarily surrendered
himself and was arrested on November 20, 2003.

26 ³Mr Mesereau does not intend to minimize his failure to delineate the extent of the waiver
27 nor does he intend to detract from his sincere apology before the Court. However, his broad
28 statement still has to be construed in light of the context and, certainly, any implied waiver on the
part of Mr. Jackson based on that statement has to be construed in light of Mr. Jackson's
reasonable understanding within that context.

1 constitutional rights, nor would it be reasonable for him to waive any more of the sacred attorney
2 client privilege than was at issue in the proceedings as defined by the scope of direct examination
3 of Mr. Geragos. Therefore, the scope of direct (and the scope of relevant inquiry on cross
4 examination) should place the end of the waiver at March 12, 2003. If nothing else, the arrest of
5 the defendant on November 20, 2003, must be the outward limit. This later date is consistent with
6 the written waiver ultimately given to Mr. Geragos.

7 II.

8 A GENERAL WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE WOULD DEPRIVE
9 MR. JACKSON OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH
10 AMENDMENTS OF THE UNITED STATES CONSTITUTION

11 The waiver of the attorney-client privilege in a criminal case implicates important
12 constitutional rights. Expanding the waiver beyond November 20, 2003, the date Mr. Jackson
13 surrendered and was arrested, will result in a violation of Mr. Jackson's rights under the Fifth,
14 Sixth and Fourteenth Amendments of the United States Constitution. (See *Massiah v. United*
15 *States* (1964) 377 U.S. 201; *Doyle v. Ohio* (1976) 426 U.S. 610.) These rights are also secured by
16 the California Constitution and relevant case and statutory law. Waiver of fundamental
17 Constitutional rights require a knowing and intelligent waiver by a defendant either in writing or
18 by way of voir dire of the defendant in person on the record.

19 In *Boykin v. Alabama* (1969) 395 U.S. 238, the United States Supreme Court held that
20 even if a defendant is represented by an attorney, a court may not accept a guilty plea from him
21 until it determines both that he is aware of the constitutional rights waived by pleading guilty --
22 namely, the privilege against compulsory self-incrimination, the right to trial by jury, and the right
23 to confront his accusers -- and that he has knowingly and voluntarily chosen to waive those rights.
24 Subsequently, in *In re Tahl* (1969) 1 Cal.3d 122, 132, the California Supreme Court interpreted
25 the refusal of the majority in *Boykin* to presume waiver of the three enumerated rights from a
26 silent record to mean that the record must show on its face that the defendant was made aware of
27 his rights and that has expressly waived them.

1 Here, Mr. Jackson is the defendant in a serious felony case. His former lawyer, Mark
2 Geragos, not only represented him prior to arrest but after arrest, after arraignment on the criminal
3 complaint and through pre-trial proceedings for several months until after his indictment.⁴ The
4 waiver announced by Mr. Mesereau, were it construed as an open ended one, would have had the
5 effect of waiving Mr. Jackson's attorney client privilege during the course of this very litigation.
6 Such a waiver could have far reaching consequences regarding documents, conversations, work-
7 product and other privileged material during the actual adversary proceedings. Such a waiver
8 would seriously compromise Mr. Jackson's ability to defend himself in this trial. Therefore, any
9 purported waiver of such a broad scope would have to be either in writing or by voir dire on the
10 record and it could not be implied by silence.

11 As argued below, it is not necessary to construe the waiver by Mr. Mesereau as open
12 ended. However, if it were, such a waiver would implicate Mr. Jackson's right to not incriminate
13 himself, his right to remain silent following arrest and his right to counsel. If the waiver is not
14 properly limited to apply only to the period of the alleged conspiracy or, at the most, to the pre-
15 arrest time period, it would result in reversible error on the grounds that there was not an express
16 waiver by the client of fundamental constitutional trial rights. Furthermore, there could be no
17 tactical basis for counsel to have waived the privilege beyond that necessary to present evidence in
18 the trial. Therefore, were such an over-broad waiver by counsel upheld by this Court, it would
19 deprive Mr. Jackson of his Sixth Amendment rights.

20 III.

21 **CONFIDENTIAL COMMUNICATIONS THAT OCCURRED AFTER THE END OF THE**
22 **ALLEGED CONSPIRACY AND CERTAINLY AFTER MR. JACKSON WAS**
23 **ARRESTED ARE IRRELEVANT AND BEYOND THE SCOPE OF DIRECT**
24 **EXAMINATION**

25 It is really not necessary to wrestle with the Constitutional difficulties which would arise if
26

27 ⁴We respectfully request that the Court take judicial notice of these facts from the record
28 of these proceedings.

1 there were found to be an open ended waiver of the attorney client privilege.. Cross-examination
2 regarding communications that occurred after the end of the alleged conspiracy and, certainly,
3 after Mr. Jackson's arrest are inadmissible in any event. They are irrelevant and beyond the scope
4 of direct examination. Therefore, whether or not there were a knowing and intelligent personal
5 waiver of the privilege by Mr. Jackson, the District Attorney is still not allowed to inquire into any
6 communications or material beyond either March 12, 2003 or, at worst, November 20,2003.

7 Mr. Geragos was called as a witness to testify to the claims of the prosecution that a
8 conspiracy existed between February and March 12 of 2003 involving Mr. Jackson, Mr. Geragos,
9 and others.⁵ His testimony as to communications that occurred after the supposed conspiracy
10 ended on March 12, 2003 are simply not relevant.

11 The prosecution's right to full and fair cross-examination is not implicated here. This is
12 not a situation in which direct examination was conducted under one set of rules, and, then, on
13 cross-examination, it was announced that another set of rules should apply. The direct
14 examination of Mr. Geragos was focused on February and March of 2003. There was not a single
15 inquiry on direct with regard to a communication between Mr. Jackson and Mr. Geragos that
16 occurred following the arrest.

17 The only questions on direct examination that involved the post-arrest time period were
18 with regard to when Mr. Geragos learned of the Brazil trip and his handling of the Arvizos'
19 passports. (RT 10281:28-10282:2.) The relevance of when Mr. Geragos learned of the Brazil trip
20 is limited to whether he was aware of the trip at the time of the alleged conspiracy. The question
21 about the passports relates to real evidence that is not covered by the attorney-client privilege and
22 was required to be disclosed in any event. The questions on these two areas did not implicate any
23 confidential communication that would be subject to the attorney-client privilege. The
24 prosecution is free to cross-examine Mr. Geragos regarding when he learned of the Brazil trip and
25 his possession of the Arvizo's passports.

26

27 ⁵The prosecution has referred to Mr. Geragos as an unindicted co-conspirator in pre-trial
28 motions.

1 While it is obvious that the prosecution would like to question Mr. Jackson's former
2 attorney regarding communications that occurred up until his departure from the case in April of
3 2004, these questions would be irrelevant and beyond the scope of direct examination.⁶ Each of
4 the questions marked by the Court at the end of the proceedings on Friday was objectionable as
5 beyond the scope of direct, relevance and hearsay. Each question could properly have been asked
6 if it had been prefaced by, "During February and up to March 12, 2003 . . ."

7 Here, the limited waiver of attorney-client privilege allows the prosecution to conduct a
8 full and fair cross-examination of Mr. Geragos as to relevant issues. The limitations of relevance
9 make the discussion of an implied open-ended waiver based on Mr. Mesereau's remarks moot.
10 Certainly the Court could conclude that the original statement was misleading – and for that Mr.
11 Mesereau apologized – but, ultimately, it has no effect on the case.

12 In essence, the failure to delineate the scope of the waiver really had no effect on the case.
13 The limited waiver would have been sufficient to permit the testimony of Mr. Geragos on direct
14 examination. The prosecution would have been no less restricted on cross-examination whether
15 there was a broad or a limited waiver. Therefore, the prosecution should not receive a windfall as
16 a result of counsel's statement nor should Mr. Jackson be penalized.

17 IV.

18 CONCLUSION

19 Mr. Jackson waived the attorney-client privilege with regard to privileged communications
20 that occurred between February of 2003 and the end of the alleged conspiracy on March 12, 2003
21 based on the nature of the disclosures intended to be made. There is no basis to extend the waiver
22 beyond Mr. Jackson's arrest which is the limit set out in the express written waiver signed by Mr.
23 Jackson. The Court should consider that a general waiver would threaten to deprive Mr. Jackson
24 of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

25
26 ⁶ The cross-examination question that immediately preceded Mr. Geragos clarifying that
27 the written waiver was limited was whether Mr. Geragos had investigated the 1993 allegations
28 against Mr. Jackson. (RT 10339:20-23.) This question is an example of a question that is both
irrelevant and beyond the scope of direct examination.

1 Furthermore, questions regarding confidential communications or work product made after the
2 arrest of Mr. Jackson are irrelevant and beyond the scope of direct examination. Therefore, a
3 limitation on the waiver is not prejudicial to the opposing party..

4 Mr: Mesereau has apologized for his statement regarding the waiver. He indicated he did
5 not intentionally mislead the Court. While it caused a disruption in the proceedings, Mr. Geragos
6 would have had to return in any event. The purported waiver statement did not ultimately
7 prejudice the prosecution. Therefore, it is not necessary to fashion any other remedy other than to
8 simply proceed with cross examination within the scope of direct and limit the waiver as stated.

9 Dated: May 16, 2005

Respectfully submitted,

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