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*Unsealed pursuant to 6/16/05 court order

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 REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO TRAVERSE AFFIDAVITS, TO QUASH WARRANTS AND TO SUPPRESS EVIDENCE; DECLARATION OF ROBERT M. SANGER ~~UNDER SEAL~~ Honorable Rodney S. Melville Date: August 16, 2004 Time: 10:00 am. Dept: SM 8

DECLARATION OF ROBERT M. SANGER

I, Robert M. Sanger, declare:

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 Sanger & Swysen, and co-counsel for Mr. Michael Jackson.

2. Despite numerous demands on our part and numerous representations that "the defense has everything" the prosecution has not provided defense counsel with anything like a full set of search warrant documents.

3. Mr. Jackson's counsel is willing, for the time being, to accept uncertified copies from the prosecution as discovery, however, we are not willing to stipulate that uncertified copies can be used in evidence for this motion or any other purpose.

4. Mr. Jackson's counsel cannot simply agree that the court take judicial notice of the documents since they have been sealed at the prosecutor's request and defense counsel has not been provided with a proper set.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct this 11th day of August, 2004, at Santa Barbara, California.

Robert M. Sanger

MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE STATEMENT IN THE AFFIDAVIT THAT DEFENDANT IS A PEDOPHILE WAS WILFULLY FALSE AND ONCE THE FALSE STATEMENT IS EXCISED THE SEARCH WAS BOTH OVERBROAD AND STALE[1]

A. Mr. Jackson Has Met His Initial Burden Under *Franks v. Delaware* (1978) 438 U.S. 154.

Mr. Jackson has demonstrated that the Affiant, Detective Zelis, knowingly and intentionally omitted Dr. Katz's opinion that, even under the prosecution's so-called facts, Mr. Jackson does not fit the profile of a pedophile included in the affidavit. (Motion, pages 13-14.) The omission was clearly not a negligent or innocent mistake, as Detective Zelis was aware of Dr. Katz's opinion and even explicitly agreed with his opinion. (Exhibit E to Motion; Opposition 13:18-25.) Under *People v. Cook* (1978) 22 Cal. 3d 67, 89, this type of omission is

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[1] A note on condescension and sarcasm in the People's Opposition:

Condescension can be an effective rhetorical tool and is often employed in lieu of a strong argument. Here the prosecutor selects quotes from the moving papers containing what he, erroneously, believes to be typographical errors. (For instance, "wilfully" is properly spelled with one "l" in the first syllable, despite his tedious and repetitive bracketed insertions to the contrary. (See, Opposition pp. 13 and 16; and see Webster's Seventh Collegiate Dictionary (1965) p.1021.) The prosecutor also describes Mr. Jackson's Supplemental Brief as "tardily-filed," when it is not. (See, Opposition pp. 1 and 15; and see the discussion herein below as to the effect of the prosecutor's failure to provide discovery on the defense's ability to proceed with motions to suppress.)

Sarcasm can also be effective but not if the reader is aware that the premise underlying the sarcastic remark is false. For instance, the prosecutor's sarcastic remarks about the demand for certified copies is fundamentally factually flawed. (See, Opposition pp. 1-2) First, the prosecution obtained orders sealing the search warrant documents on the condition that they would provide copies of the documents to Mr. Jackson. Despite numerous demands on our part and numerous representations that "the defense has everything" Mr. Jackson still does not have anything like a full set of search warrant documents. Second, the Court, understandably, did not wish to provide certified copies if the parties were able to make other arrangements. Hence, Mr. Jackson continued his quest to get a full set from the prosecution, but that has still not occurred. Third, since Mr. Jackson has not received the documents, or any assurance that what he has is correct, it would be inappropriate for the defense to stipulate that uncertified copies could be used by the prosecution. Mr. Jackson is willing, for the time being, to accept uncertified copies from the prosecution as discovery, however, he is not willing to stipulate that uncertified copies can be used in evidence for this motion or any other purpose. Furthermore, Mr. Jackson cannot simply agree that the court take judicial notice of the documents since they have been sealed at the prosecutor's request and he has not been provided with a proper set.

the equivalent of an allegation actually known to be untrue.

The District Attorney argues that Detective Zelis' statements regarding the characteristics of pedophiles was not wilfully false because, under the prosecution's version of the facts, Mr. Jackson meets a lay definition of the term pedophile. (Opposition, 14:14-21.) The lay definition of a pedophile, however, is irrelevant. Detective Zelis claims to be knowledgeable, if not an expert, based on this training and experience, and purports to be assisting the Magistrate by diagnosing Mr. Jackson as a pedophile and ascribing to him a detailed psychological profile. It was wilfully false to state that Mr. Jackson fit the typical profile of a pedophile, when Detective Zelis knew that Dr. Katz, a trained forensic psychologist, believed that Mr. Jackson did not fit the pedophile profile, and instead was more like a "regressed 10 year-old."

Additionally, Mr. Jackson has met the burden of demonstrating that Detective Zelis' statements regarding alcohol and the urine test were wilfully false statements pursuant to *Franks v. Delaware* (1978) 438 U.S. 154.[2] The defense respectfully submits that these particular allegations carry the initial burden and permit full inquiry into the basis for the affidavit.

B. Detective Zelis' Purported Expert Opinion Lacked Foundation.

The District Attorney argues that Detective Zelis' lack of foundation to support the pedophile profile can be excused assuming that he read the "results of other's research" and that he was "conveying information the affiant had obtained from a reliable source or sources." (Opposition 15-16.) The affidavit does not say that, moreover, the District Attorney misses the point here. Detective Zelis failed to establish that, based on his knowledge, training, skill and experience, he was in a position to diagnose Mr. Jackson as a pedophile nor to opine on the detailed psychological profile of such a person.

The District Attorney disingenuously attempts to paint Detective Zelis as an expert by noting his investigation of "many . . . child molest" cases. (Opposition, 14:12-13.) This is not

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[2] The District Attorney purports to tell this Court "[w]hat Defendant means by "*no later than* May 11, 2004." (Opposition, 17:28-18:2.) Given the prosecution's failure to provide discovery in this case, Mr. Jackson meant exactly what he said, that we did not know what they had or when they had it, but that, no later than May 11, 2004, they had this information.

how Detective Zelis described his experience in the affidavit. What Detective Zelis actually states is that he has, "investigated numerous property crimes and crimes against persons, including burglary, child molest, theft, assault, domestic violence, narcotic and drug violations." (Supplemental 1538.5, 4:1-2.) If Detective Zelis had been able to assert under oath that he had investigated "many child molest cases" he would have done so. As argued in Mr. Jackson's Supplemental 1538.5 brief, there is a conspicuous lack of information regarding Detective Zelis' training and experience regarding cases involving the abuse and exploitation of children. (Id. at 4:11-20.)

Detective Zelis' lengthy psychological profile of characteristics of a pedophile provides the only alleged probable cause for conducting a search long after the supposed events. The so-called profile is the only possible justification for the overbroad list of places to be searched and items to be seized.

C. Once This Statement is Excised, The Search Was Both Overbroad and Stale.

Detective Zelis ascribes a specific psychological profile to Mr. Jackson that conveniently justifies an otherwise overbroad and stale search, despite a lack of foundation for his opinion and the fact that he knew Mr. Jackson did not fit the profile. The warrant would not have been issued if this information had been excluded from the affidavit for two reasons. First, the breadth of the search and the list of property to be seized was entirely dependent on the list of supposed pedophile characteristics. Second, the probable cause for issuing a search warrant 8 months after the alleged events occurred, despite a total absence of new information regarding activity at Mr. Jackson's residence, could not have been justified without statements in Detective Zelis' pedophile profile. (See *People v. Mesa* (1975) 14 Cal. 3d 466, 470)

II.

THE SHERIFF'S FLAGRANTLY DISREGARDED THE LIMITATIONS OF THE SEARCH WARRANTS

The District Attorney asserts that it is "Defendant's burden to identify those items he believes qualify neither as property specifically identified in the search warrant nor as property

whose relationship to the crimes under investigation would not be "immediately apparent" to the searching officers. (Opposition, 22:6-9.) This assertion is legally incorrect. The District Attorney has the burden of justifying the mountain of items seized that fall outside the scope of the search warrant. If something is seized outside of the property listed then it is a warrantless search. A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution. (*Groh v. Ramirez* (2004) 124 S.Ct. 1284, 1290.)

The District Attorney can attempt to justify the seizures of items outside the scope of the warrant by demonstrating that it is contraband or evidence of a crime. Mr. Jackson has moved to suppress the results of all warrantless searches and seizures. It is the District Attorney's burden to justify any such searches or seizures.

III.

THE SEARCH OF BRADLEY MILLER'S OFFICE WAS AN IMPERMISSIBLE GENERAL SEARCH

In response to Mr. Jackson's argument that the search of Mr. Miller's office was a general search because the search warrant authorized the seizure of all computers and computer related materials, the District Attorney asserts that the only way to know "whether, e.g., a given computer contains such records is to first *seize* the hard drive and then *examine* it for its content." This argument misses the point. The affiant must first provide probable cause to believe that particular relevant items will be found. As asserted in Mr. Jackson's Motion, there was nothing in the affidavit that supported a search of this scope. There was nothing to suggest that any particular documents would be found on the computers. Such a search is similar to authorizing the taking of every piece of paper of a person's filing cabinet or every piece of paper in their desk or dresser drawer.

IV.

ALL OF THE SEIZED PROPERTY MUST BE SUPPRESSED AND RETURNED

All evidence seized should be suppressed because the officers executed the warrant in flagrant disregard for its limitations, not only those items beyond the scope of the warrant. (See

United States v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978); *United States v. Heldt*, 668 F.2d 1238, 1259 (D.C. Cir. 1981).) This remedy is required in an appropriate case where the violations of the warrant's requirements are so extreme that the search essentially is transformed into an impermissible general search . (*People v. Bradford* (1997) 15 Cal. 4th 1229, 1305-1306.) This is such a case.

V.

THE SHERIFFS CONDUCTED AN ILLEGAL SWEEP OF AREAS THAT WERE OUTSIDE THE SCOPE OF THE WARRANT

The search warrant for Neverland Ranch was limited to "the buildings described as the arcade building, the main residence, and the security headquarters." (Exhibit B to Motion; Opposition 24:10-11.) Mr. Jackson's private office, the video arcade and the guest apartment are all outside of the area particularly described in the warrant. They have separate entrances and are not accessible through the security office or the main house. To the extent that law enforcement exceeded this limitation, Mr. Jackson the items seized and the observations of the officers must be suppressed because the search of these other areas constituted an illegal warrantless search. It is the prosecution's burden to demonstrate otherwise.

VI.

THE SEARCH WAS INVALID BECAUSE THERE WAS NO KNOCK AND NOTICE

As was candidly pointed out by Mr. Jackson in his Supplemental 1538.5 brief, there is a split in authority as to whether "knock and notice" for interior doors. The District Attorney cites only one line of authority. (Opposition, 25:18-20.) To the extent that law enforcement did not comply with the knock and notice requirement when searching Mr. Jackson's private suite, this Court must make a determination as to the state of the law.

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VII.

CONCLUSION

For all of the reasons set forth above, Mr. Jackson requests that this Court find the conclusions, omissions and speculations in statements discussed above to be made in reckless disregard for the truth, or find that there were material omissions in the affidavits which renders what remains in the affidavits insufficient to support a finding of probable cause and that this Court quash both warrants, and suppress all evidence seized under the authority of those warrants.

Dated: August 11, 2004

Respectfully submitted,

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

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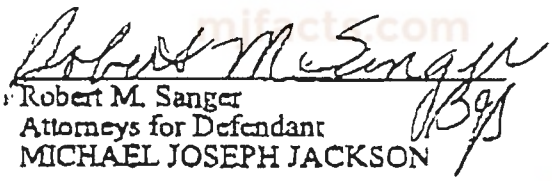
By: 
Robert M. Sanger
Attorneys for Defendant
MICHAEL JOSEPH JACKSON

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On August 11, 2004, I served the foregoing document **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO TRAVERSE AFFIDAVITS, TO QUASH WARRANTS AND TO SUPPRESS EVIDENCE; DECLARATION OF ROBERT M. SANGER** on the interested parties in this action by depositing a true copy thereof as follows:

Tom Sneddon
Gerald Franklin
Ron Zonen
Gordon Auchincloss
District Attorney
1105 Santa Barbara Street
Santa Barbara, CA 93101
568-2398

___ **BY U.S. MAIL** - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

_X_ **BY FACSIMILE** -I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at 568-2398.

_X_ **BY HAND** - I caused the document to be hand delivered to the interested parties at the address above.

_X_ **STATE** - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed August 11, 2004, at Santa Barbara, California.

Carol Dowling
Carol Dowling