

1 THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY  
County of Santa Barbara  
2 By: RONALD J. ZONEN (State Bar No. 85094)  
Senior Deputy District Attorney  
3 J. GORDON AUCHINCLOSS (State Bar No. 150251)  
Senior Deputy District Attorney  
4 GERALD McC. FRANKLIN (State Bar No. 40171)  
Senior Deputy District Attorney  
5 1105 Santa Barbara Street  
Santa Barbara, CA 93101  
6 Telephone: (805) 568-2300  
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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA BARBARA

SEP 16 2004

GARY M. BLAIR, Executive Officer  
CARRIE L. WILSON, Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SANTA BARBARA  
10 SANTA MARIA DIVISION

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 v.

15 MICHAEL JOE JACKSON,

16 Defendant.

No. 1133603

17 NOTICE OF MOTION AND  
18 MOTION FOR ORDER  
19 DIRECTING THAT SEARCH  
20 WARRANT NO. SW 5112,  
21 THE DECLARATION IN  
22 SUPPORT THEREOF AND THE  
23 RETURN MADE TO IT BE  
24 CONDITIONALLY SEALED  
25 AND REMAIN UNDER SEAL  
26 UNTIL FURTHER ORDER OF  
27 COURT; DECLARATION OF  
28 GERALD McC. FRANKLIN IN  
SUPPORT THEREOF;  
MEMORANDUM OF POINTS  
AND AUTHORITIES

DATE: Sept. 16, 2004  
TIME: 8:30 a.m.  
DEPT: SM 2 (Melville)

24 TO: MICHAEL JOE JACKSON, AND TO THOMAS A. MESEREAU, STEVE  
25 COCHRAN, and ROBERT SANGER, HIS ATTORNEYS OF RECORD, AND TO  
26 THEODORE J. BOUTROUS, JR., ESQ., GIBSON, DUNN & CRUTCHER, LLP:

27 PLEASE TAKE NOTICE that on September 16, 2004, at 8:30 a.m. or as soon  
28

1 thereafter as the matter may be heard, in Department SM 2, Plaintiff will, and hereby does,  
2 move for an order directing that the following records be maintained under conditional seal  
3 until further order of court, pursuant to California Rules of Court, rule 243.1 et seq:

4 Warrant No. **SW 5112** for the search of the records of **NEXTEL**  
5 **COMMUNICATIONS**

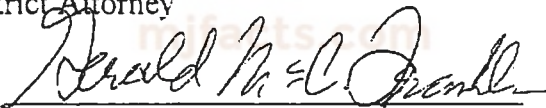
6 which warrant was issued on August 20, 2004, together with its supporting affidavit and the  
7 return, if any, on said warrant.

8 The motion will be made on the ground that the facts, as established by the  
9 accompanying declaration of Gerald McC. Franklin, are sufficient to justify sealing the  
10 specified records pursuant to California Rules of Court, rule 243.1 et seq.

11 The motion will be based on this notice of motion, on the declaration of Gerald  
12 McC. Franklin and the memorandum of points and authorities served and filed herewith, on the  
13 records and the file herein, and on such evidence as may be presented at the hearing of the  
14 motion.

15 DATED: August 27, 2004

16 THOMAS W. SNEDDON, JR.  
17 District Attorney

18 By:   
19 Gerald McC. Franklin, Senior Deputy

20 Attorneys for Plaintiff  
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1 DECLARATION OF GERALD McC. FRANKLIN

2 I, Gerald McC. Franklin, say:

3 1. I am a lawyer admitted to practice in the State of California. I am a Senior  
4 Deputy of the District Attorney of Santa Barbara County. I am one of the lawyers of record for  
5 the People, Plaintiff in this action.

6 2. This motion to seal records pertains to warrant no. **SW 5112** for the search of the  
7 records of **NEXTEL COMMUNICATIONS**, together with the supporting affidavit and the  
8 return, if any, on the each such warrant. The warrant was issued on August 20, 2004. The  
9 return on the warrant has not yet been filed with the court. The warrant, its supporting  
10 affidavit and the return thereto, by statute, are not open to public inspection until the return to  
11 the warrant has been filed or within 10 days after the warrant was issued.

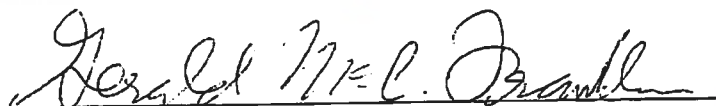
12 3. The information set out in the affidavit in support of **SW 5112** expands upon the  
13 confidential information gained by investigators in the course of the ongoing investigation, set  
14 out in the original warrant for the search of Neverland Ranch, most of which was sealed by  
15 order of this Court pending trial in order to preserve the right of both parties to a fair trial, and  
16 in subsequent warrants issued in furtherance of that investigation. In addition, the affidavit  
17 makes reference to information gathered by investigators following execution of the warrant  
18 for the Neverland Ranch search, which they regard as confidential and which would be  
19 prejudicial to defendant's right to a fair trial if disclosed to the public prior to trial and while  
20 the investigation itself is still underway.

21 4. I believe the information set out in the affidavit for each warrant is privileged  
22 information within the meaning of Evidence Code sections 1040, subdivision (a) and 1042,  
23 subdivision (b), and as information relating to the investigation of alleged child molestation  
24 offenses, it may also be privileged pursuant to the Child Abuse and Neglect Reporting Act,  
25 Penal Code sections 11164 through 1117.4. I hereby claim and assert that privilege.

26 5. I therefore believe that the interest in a fair trial overrides the public's prompt  
27 access to the search warrant records and supports the sealing of those records until the  
28 investigation has been concluded.

1 6. I believe an order maintaining those records under seal in the interim would avert  
2 the probability of prejudice, and that no more narrowly tailored order with respect to those  
3 records could be drafted to achieve the overriding interest in a fair trial.

4 I declare under penalty of perjury under the laws of California that the foregoing is  
5 true and correct, except as to matters stated upon my information and belief, and as to such  
6 matters I believe it to be true. I execute this declaration at Santa Barbara, California on August  
7 27, 2004.

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9 Gerald McC. Franklin

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MEMORANDUM OF POINTS AND AUTHORITIES

Penal Code section 1534, subdivision (a) provides:

(a) A search warrant shall be executed and returned within 10 days after date of issuance. A warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made. After the expiration of 10 days, the warrant, unless executed, is void. The documents and records of the court relating to the warrant need not be open to the public until the execution and return of the warrant or the expiration of the 10-day period after issuance. Thereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record.

In *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.4th 1697, our Supreme Court noted:

“Section 1534 provides that the documents associated with the warrant are public documents 10 days after its execution. Typically after the search, arrests are made. There is no exception in the statute for instances, such as that here, where the search is used to further an ongoing investigation. Such information, however, may be privileged as official information under Evidence Code sections 1040, subdivision (a) and 1042, subdivision (b).” (*Id.*, at p. 1714.)

Evidence Code section 1040, subdivision (a) provides: “As used in this section, ‘official information’ means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.”

Evidence Code section 1042, subdivision (b) provides: “Notwithstanding subdivision (a) [requiring a court to make adverse findings adverse to the public entity upon any issue in a court proceeding to which privileged information is material], where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant *official information* or the identity of an informer in

1 order to establish the legality of the search or the admissibility of any evidence obtained as a  
2 result of it.” (Emphasis added.)

3 The procedure for sealing records under California Rules of Court, rule 243.1 et seq.  
4 applies only to records that are deemed public. (*Id.*, rule 243.1(a)(2).) Search warrants, their  
5 supporting affidavits and the returns thereto are open to the public within 10 days of issuance  
6 or until the warrant is executed and returned, whichever is earlier. (Pen. Code, § 1534, subd.  
7 (a).)

8 Rule 243.1(d) provides that

9 The court may order that a record be filed under seal only if it  
10 expressly finds facts that establish:

- 11 (1) There exists an overriding interest that overcomes the right of  
12 public access to the record;
- 13 (2) The overriding interest supports sealing the record;
- 14 (3) A substantial probability exists that the overriding interest will  
15 be prejudiced if the record is not sealed;
- 16 (4) The proposed sealing is narrowly tailored; and
- 17 (5) No less restrictive means exist to achieve the overriding interest.

18 Rule 243.1(e) provides, in pertinent part:

19 (1) An order sealing the record must (i) specifically set forth the  
20 facts findings that support the findings and (ii) direct the sealing of  
21 only those documents and pages, or, if reasonably practicable,  
22 portions of those documents and pages, that contain the material that  
23 needs to be placed under seal. All other portions of each documents  
or page must be included in the public file.

24 Rule 243.2(b) provides, in pertinent part, that “Pending the determination of the  
25 motion [of a party to file a record under seal], the lodged record will be conditionally under  
26 seal.”

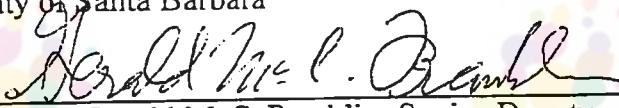
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1 DATED: August 27, 2004

2 Respectfully submitted.

3 THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY  
4 County of Santa Barbara

5 By:   
6 Gerald McC. Franklin, Senior Deputy

7 Attorneys for Plaintiff

1 facts.com mifacts.com mjfacts.com  
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4 **PROOF OF SERVICE**  
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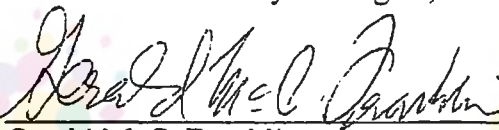
6 STATE OF CALIFORNIA }  
7 COUNTY OF SANTA BARBARA } SS  
8

9 I am a citizen of the United States and a resident of the County aforesaid; I am over  
10 the age of eighteen years and I am not a party to the within-entitled action. My business  
11 address is: District Attorney's Office; Courthouse; 1105 Santa Barbara Street, Santa Barbara,  
12 California 93101.

13 On August 27, 2004, I served the within NOTICE OF MOTION AND MOTION  
14 FOR ORDER DIRECTING THAT SEARCH WARRANT NOS. SW 5110 through 5128,  
15 THE SUPPORTING AFFIDAVITS AND ANY RETURNS TO BE FILED AND  
16 MAINTAINED UNDER CONDITIONAL SEAL UNTIL FURTHER ORDER OF COURT;  
17 DECLARATION OF GERALD McC. FRANKLIN; MEMORANDUM OF POINTS AND  
18 AUTHORITIES and PROPOSED ORDER on Media's counsel, and on Defendant, by  
19 THOMAS A. MESEREAU, JR., STEVE COCHRAN, and ROBERT SANGER, by causing to  
20 be mailed a true copy to each counsel at the address shown on the attached Service List (except  
21 Robert Sanger, to whom personal service was made).

22 I declare under penalty of perjury that the foregoing is true and correct.

23 Executed at Santa Barbara, California on this 27th day of August, 2004.

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25 \_\_\_\_\_  
26 Gerald McC. Franklin  
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