

NOV 04 2004

GARY M. BLAIS, Executive Officer
By *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

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

11 REDACTED VERSION

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 v.

15 MICHAEL JOE JACKSON,

16 Defendant.

No. 1133603

MEMORANDUM REGARDING
DEFENDANT'S OBLIGATION,
PURSUANT TO *PEOPLE v.*
SANCHEZ, TO LODGE WITH
THE COURT CERTAIN TAPE
CASSETTES OF INTERVIEWS
OF [REDACTED]

DATE: November 4, 2004
TIME: 8:30 a.m.
DEPT: SM 2 (Melville)

~~UNDER SEAL~~

17 A. Introduction:

18 On October 27, 2004, someone from Mr. Sanger's office hand-delivered an
19 envelope containing a tape cassette and a cover letter. The letter stated the enclosed cassette is
20 "a copy of the interview tape of [REDACTED] and her children conducted by Brad Miller. The
21 tape from which we made this copy is retained by present defense counsel. We are providing
22 you with a copy of this tape on the grounds that we have offered a transcript of this
23 conversation in evidence in the motion proceedings. We are not conceding that we are required
24 to turn this over for any other reason."
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1 Mr. Sanger continued, "We have also come into possession of a copy of what
2 appears to be a telephone conversation of [REDACTED]. We believe you
3 already have a copy of this tape but are sending you a copy."¹ He stated that both tapes would
4 be made available to the District Attorney's office "for inspection."

5 A copy of Mr. Sanger's letter is appended to this Memorandum as Exhibit A.

6 The language of Mr. Sanger's letter suggests rather clearly that the Court's original
7 approach to the People's request for what we termed "*Sanchez*" evidence – to assume that the
8 defense understood the scope of its legal obligation under *Sanchez* and would act accordingly –
9 isn't working. It is not a matter of ethical standards: the prosecution does not challenge Mr.
10 Sanger's ethics or the ethics of any other member of the defense team. It is a matter of defense
11 counsel's interpretation and application of *Sanchez's* rule with respect to the tapes in question
12 and, by reasonable extension, other physical evidence which may happen to come into the
13 defense's possession.

14 Secondly, the defense's contention that it is not required to disclose the source of
15 either tape deprives the People of vital "chain-of-custody" information – information that may
16 seriously affect our ability to demonstrate the relevance of the evidence to the theory of the
17 prosecution of the defendant on Count One of the Indictment.

18 The dilemma posed by the Court's approach is that though Mr. Sanger's letter
19 clearly demonstrates that the prosecution and defense have a serious legal dispute concerning
20 *Sanchez's* scope, there is presently no avenue open to us to litigate whether any one or more of
21 the items listed in our original motion are (a) in the constructive possession of the defense and
22 (b) if so, whether they come within the scope of *Sanchez's* rule, properly understood. We wish
23 to emphasize that the dispute is one of law, not of ethics, and it needs to be resolved by the
24 Court.

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28 ¹ This may be the "one other item that we are trying to track down" to which Mr. Sanger alluded in his
responsive argument on October 14th. (Unofficial TX 68.)

1 B. Discussion

2 1. The Defense Position

3 In the "meet-and-confer" meeting on Tuesday afternoon, Mr. Sanger met "face-to-
4 face" with the District Attorney and two of his deputies. Mr. Mescreau, Ms. Yu and Mr.
5 Oxman "appeared" by telephone. Two hours were devoted to a frank and constructive
6 discussion of the defense's list of items it sought by discovery. Mr. Auchincloss then brought
7 up the matter of the defense production of the original of the "Bradley" tape. Mr. Mescreau
8 replied, rather shortly, that the defense was aware of its ethical responsibilities, and stated,
9 twice, that "the Court denied your *Sanchez* motion." Mr. Sanger allowed that the defense
10 would provide a copy of the "Bradly" tape but not the original. When Mr. Auchincloss
11 continued to press the issue of discovery by the defense to the prosecution, Mr. Mescreau
12 declared the "meeting" at an end and the telephone conference was abruptly terminated.

13 As Mr. Sanger makes very apparent in his letter to the District Attorney, the defense
14 is of the view that the original of each of the two tapes in question belongs to the defense, and
15 that the only reason the prosecution is entitled to a copy of the "Miller" tape is because the
16 defense disclosed its contents in the course of arguing an earlier discovery motion.

17 2. The Court's Ruling On The "*Sanchez*" Motion

18 On October 14, 2004, after the prosecution argued its *Sanchez* motion, the court
19 noted that "there is an issue of the time that's not clear in the law; of how much time an
20 attorney can keep evidence of a crime that would allow that attorney the option to investigate,
21 do forensic work, whatever necessary. There are ethical issues. Attorneys could actually
22 commit crimes by not turning over certain evidence." But the court expressed its full
23 confidence in the ethics of the lawyers on both sides of this lawsuit: "I couldn't ask for a better
24 group of lawyers on either side. So I am going to decline to grant any motion. I just have total
25 confidence that the defense understands their duties, and will fulfill them." (Unofficial TX, pp.
26 72-73.)

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1 3. The Defense Persists In Refusing To Recognize
2 Its Obligations With Respect To These Tapes

3 The "[REDACTED]" tape is, perhaps self-evidently, the product of Mr. [REDACTED]
4 commission of the crime of secretly recording a telephone conversation without Mrs. [REDACTED]
5 knowledge or permission, on behalf of Michael Jackson. (See Indictment, Count 1, Overt Act
6 No. 6; see Pen. Code, § 632, subd. (a).) So, too, the *provenance* of that tape and the history of
7 its travels likely is relevant evidence of the role of one or more of the coconspirators in
8 sequestering the [REDACTED]s and extorting them, and in concealing the involvement of a given co-
9 conspirator in the criminal agreement. If [REDACTED] made the tape, to whom did he give it,
10 and when? Where did the tape go from there?

11 Mr. Sanger's phrase, "We have also come into possession of a copy of" the
12 [REDACTED] tape suggests the defense knows where the original is, and how the copy came
13 to be made.

14 Under quite settled law, the [REDACTED] tape, as the product of a criminal act and
15 as evidence of other crimes, may not be regarded by the defense as its property. The defense is
16 obligated to turn that tape over to the court and, if it came from a third party, to disclose how it
17 came into their possession. That is so where defense counsel or his agent removes the evidence
18 from its incriminating context (*People v. Meredith* (1981) 29 Cal.3d 682), or where the
19 evidence is delivered to counsel by a third party (*People v. Sanchez, supra*, (1994) 24
20 Cal.App.4th 1012). The *Sanchez* court discussed defense counsel's obligation in either case:

21 Justice Tobriner also referred [in *Meredith*] to an attorney's
22 responsibility when given evidence not by his client but by third parties.
23 He stated, "Two decisions, *People v. Lee* (1970) 3 Cal.App.3d 514 and
24 *Morrell v. State* (Alaska 1978) 575 P.2d 1200, held that an attorney must
25 not only turn over evidence given him by *third parties*, but also testify as
26 to the source of that evidence. Both decisions emphasize that the
27 attorney-client privilege was inapplicable because the third party was not
28 acting as an agent of the attorney or the client." (29 Cal.3d at p. 693, fn.
 5, original italics.)

(*People v. Sanchez, supra*, 24 Cal.App.4th at p. 1019.)

1 Mr. Sanger's letter demonstrates that the defense does not fully understand its legal
2 obligation with respect to the tapes in question and to other physical evidence which may come
3 into its possession. We respectfully suggest that an order directing the defense to submit to the
4 Court, in camera, a list of each item of physical evidence relevant to the interaction of the co-
5 conspirators, one with another and with the [REDACTED] family – evidence that is not the work
6 product of counsel – together with a statement of its provenance, may be required at this
7 juncture. A claim mid-trial that “We didn’t understand that evidence came within *Sanchez’s*
8 rule” will come too late.

9 DATED: October 29, 2004

10 Respectfully submitted,

11 THOMAS W. SNEDDON, JR.
12 District Attorney

13 By: /s/
14 Gerald McC. Franklin, Senior Deputy
15 Attorneys for Plaintiff

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PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SANTA BARBARA } SS

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; 1112 Santa Barbara Street, Santa Barbara, California 93101.

On October 29, 2004, I served the within PLAINTIFF'S MEMORANDUM REGARDING DEFENDANT'S OBLIGATION, PURSUANT TO *PEOPLE v. SANCHEZ*, TO LODGE WITH THE COURT CERTAIN TAPE CASSETTES OF INTERVIEWS OF [REDACTED] on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by delivering a true copy thereof to Mr. Sanger at his office, and by faxing a true copy to Mr. Mesereau at the facsimile number shown with his address on the attached Service List, and then by causing to be mailed a true copy to him.

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

Executed at Santa Barbara, California on this 29th day of October, 2004.

Bl
Gerald McC. Franklin

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THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

October 27, 2004

Via Hand Delivery

Tom Sneddon
Gerry Franklin
Ron Zonen
Gordon Auchincloss
Santa Barbara County District Attorney's Office
1112 Santa Barbara Street
Santa Barbara, CA 93101

Re: People v. Michael Joseph Jackson
Santa Barbara Superior Court
Case No. 1133603

Dear Messrs Sneddon, Franklin, Zonen and Auchincloss:

I am enclosing a copy of the interview tape [REDACTED] and her children conducted by Brad Miller. The tape from which we made this copy is retained by present defense counsel. We are providing you with a copy of this tape on the grounds that we had offered a transcript of this conversation in evidence in the motion proceedings. We are not conceding that we are required to turn this over for any other reason.

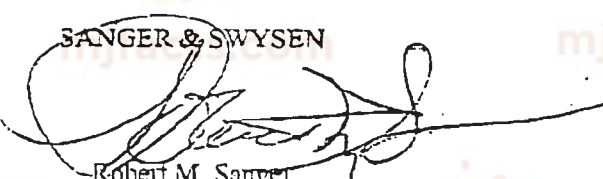
The tape we have retained will be made available to your office for inspection on the same basis that you will agree to make original tapes available for inspection by the defense. We will be happy to meet and confer regarding these procedures.

We have also come into possession of a copy of what appears to be a telephone conversation of [REDACTED]. We believe you already have a copy of this tape but are sending you a copy. We will be happy to make arrangements for the inspection of this tape as well.

Please call if you have any questions.

Very truly yours,

SANGER & SWYSEN


Robert M. Sanger

/hjt