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sociated Press; *Los Angeles Times*; The New
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Agence France-Presse

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

FEB 01 2005

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

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10 SUPERIOR COURT, STATE OF CALIFORNIA
11 FOR THE COUNTY OF SANTA BARBARA

12
13 THE PEOPLE OF THE STATE OF
CALIFORNIA,

14 Plaintiff,

15 vs.

16 MICHAEL JOE JACKSON,

17 Defendant.

Case No.: 1133603

ACCESS PROPONENTS' NOTICE OF
MOTION AND MOTION REQUESTING
IMMEDIATE PUBLIC ACCESS TO BLANK
JURY QUESTIONNAIRE FORMS AND TO
THE COMPLETED FORMS SUBMITTED
BY PROSPECTIVE JURORS;
MEMORANDUM OF POINTS AND
AUTHORITIES; REQUEST TO SHORTEN
TIME FOR RESPONSES TO THIS
MOTION

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20 Date: ~~Not set~~ 2/17/05
Time: ~~Not set~~ 8:30 AM
21 Place: Department SM-8,
Judge Rodney S. Melville

22 [VIA FACSIMILE]

23
24 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

25 PLEASE TAKE NOTICE that at 1:30 p.m. on February 2, 2005, or as soon before or after
26 that time as the matter may be heard before the above-entitled Court, located at 312-C East Cook
27 Street, Santa Maria, California 93456-5369, NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News

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ACCESS PROPONENTS' NOTICE OF MOTION AND MOTION REQUESTING IMMEDIATE PUBLIC ACCESS TO
BLANK JURY QUESTIONNAIRE FORMS AND TO THE COMPLETED FORMS SUBMITTED BY
PROSPECTIVE JURORS; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST TO
SHORTEN TIME FOR RESPONSES TO THIS MOTION

1 Network L.L.C.; ABC, Inc.; Cable News Network LP, LLLP; The Associated Press; *Los Angeles*
2 *Times*; The New York Times Company, *USA Today*; and Agence France-Presse (collectively, the
3 "Access Proponents") will, and hereby do, move this Court to grant immediate public access to the
4 jury questionnaire forms the Court is using for voir dire in this case and also to grant access to the
5 completed forms (redacted if necessary) once they have been submitted by prospective jurors.

6 This Motion is made pursuant to the First Amendment of the United States Constitution, Article I
7 section 2 of the California Constitution, and Rules 243.1 and 243.2 of the California Rules of Court.

8 Because time is of the essence, the Access Proponents *respectfully suggest that the Court*
9 *hear this matter at 1:30 p.m. on Wednesday, February 2, 2005, or as soon thereafter or before as*
10 *practicable, and that any responses be filed and served by facsimile on or before 10:00 a.m. on*
11 *February 2, 2005.*

12 This Motion is based upon this Notice, the attached Memorandum of Points and Authorities,
13 all pleadings, records and papers on file herein, all matters of which the Court may properly take ju-
14 dicial notice, and upon such further argument and evidence as may be presented at the hearing on this
15 Motion.

16 DATED: February 1, 2005

GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutros, Jr.
Michael H. Dore

19
20 By: _____


Theodore J. Boutros, Jr.

21 Attorneys for NBC Universal, Inc.; CBS Broadcasting
22 Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News
23 Network LP, LLLP; The Associated Press; *Los Angeles*
24 *Times*; The New York Times Company; *USA Today*;
25 and Agence France-Presse

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MEMORANDUM OF POINTS AND AUTHORITIES

I INTRODUCTION

The Access Proponents, a group of news organizations,¹ respectfully move this Court pursuant to the First Amendment to the United States Constitution and California law to grant immediate public access to the blank jury questionnaire forms the Court is using to conduct voir dire and to the completed forms, with any identifying personal information redacted, once they have been submitted by the prospective jurors. Because the restrictions on First Amendment freedoms is ongoing and substantial, the Access Proponents respectfully request that the Court hold a hearing at the earliest possible time, and order that any responses to the Access Proponents' Motion be filed on shortened time. The Access Proponents respectfully suggest that the Court hear this matter at 1:30 p.m. on Wednesday, February 2, 2005, or as soon thereafter or before as practicable, and that any responses be filed and served by facsimile on or before 10:00 a.m. on February 2, 2005.

The First Amendment to the United States Constitution ensures a right of public access to jury voir dire in a criminal trial. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-10 (1984); see also *Lasher Communications, Inc. v. Superior Court*, 224 Cal. App. 3d 774, 777 (1990) (noting that *Press-Enterprise* held that "the First Amendment to the United States Constitution affords a right of access to jury voir dire examination in a criminal trial"). And "jury questionnaires . . . are a part of the voir dire process." *Lasher*, 224 Cal. App. 3d at 776. Indeed, there is no constitutional difference between questions asked on paper and those asked orally during the voir dire. See *id.* at 778 ("It follows that the public access mandate of *Press-Enterprise* applies to voir dire questionnaires as well as to oral questioning.").

The questionnaires themselves are judicial records subject to the presumption of openness and access established by the First Amendment and Rules 243.1 and 243.2 of the California Rules of

¹ NBC Universal, Inc.; CBS Broadcasting Inc.; Fox News Network L.L.C.; ABC, Inc.; Cable News Network LP, LLLP; The Associated Press; *Los Angeles Times*; The New York Times Company, *USA Today*; and Agence France-Presse.

1 Court. See Advisory Committee Comment to Cal. R. Ct. 243.1 (2004) ("This rule and rule 243.2
2 provide a standard and procedures for courts to use when a request is made to seal a record. The
3 standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal. 4th 1178.").

4 The written questions posed to prospective jurors, therefore, must be disclosed to the public
5 absent "a compelling governmental interest" justifying secrecy, and any secrecy must be "narrowly
6 tailored to serve that interest." *Press-Enterprise*, 464 U.S. at 510. But no purpose at all is served by
7 barring the public from knowing what criteria are being used to select the decision-makers in this
8 high-profile case, and access to these forms is essential to permit the public and press to fully follow
9 the proceedings. Thus, the Court should immediately release a copy of the blank jury questionnaire.

10 Likewise, it is also well established that "upon completion, [jury questionnaires] will become
11 public records accessible to anyone." *Bellas v. Superior Court*, 85 Cal. App. 4th 636, 639 (2000); see
12 also *Copley Press, Inc. v. Superior Court*, 228 Cal. App. 3d 77, 90 (1991) (noting that "the written
13 responses are not confidential, i.e., the questionnaires are public records"). Once the jury question-
14 naires are completed, therefore, the Court should release the prospective jurors' responses to the pub-
15 lic, because of "the constitutional mandate requiring public access to most information about the pri-
16 vate lives of potential jurors." *Bellas*, 85 Cal. App. 4th at 652. To the extent necessary, the Court
17 may adequately protect the privacy interests of the prospective jurors by redacting certain personal
18 identifying information. See *Copley Press*, 228 Cal. App. 3d at 88 (noting that only information "that
19 is essential for the determination of juror qualification and management of the jury system," such as
20 telephone number and social security number, "should be segregated from the other questions and not
21 released to the public").² All other information contained in the completed juror questionnaires
22 should be open to public view. And because of "the critical importance of contemporaneous ac-
23 cess . . . to the public's role as overseer of the criminal justice process," *Washington Post v. Robin-*

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² The Access Proponents reserve the right to contest the redaction of any information but are not presently seeking access to personal identifying information.

1 son, 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis in original), the public should be afforded such
2 access *during* the voir dire proceedings.

3
4 II
ARGUMENT

5 A. The Public Has The Right To Access the Blank Questionnaire Form Provided to
Prospective Jurors As Part Of The Voir Dire Process

6 Voir dire is "a matter of importance, not simply to the adversaries but to the criminal justice
7 system." *Press-Enterprise*, 464 U.S. at 505. Indeed, "[o]penness . . . enhances both the basic fair-
8 ness of the criminal trial and the appearance of fairness so essential to public confidence in the sys-
9 tem." *Id.* at 508. Thus, "since the development of trial by jury, the process of selection of jurors has
10 presumptively been a public process with exceptions only for good cause shown." *Id.* at 505;
11 *see also Leshner*, 224 Cal. App. 3d at 777 (noting that *Press-Enterprise* held that "the First Amend-
12 ment to the United States Constitution affords a right of access to jury voir dire examination in a
13 criminal trial"); *ABC, Inc. v. Stewart*, 360 F.3d 90, 102 (2d Cir. 2004) (overturning jury voir dire clo-
14 sure order in high-profile case based on finding that the First Amendment "guarantee of open public
15 proceedings in criminal trials extends to the *voir dire* examination of potential jurors").

16 The written questions posed to jurors, and the responses thereto, "are a part of the voir dire
17 process." *Leshner*, 224 Cal. App. 3d at 776 (holding that newspaper publisher was entitled to inspect
18 completed juror questionnaires in a triple murder trial).³ Indeed, both "the distribution and comple-
19 tion of questionnaires constitute part of jury selection, or voir dire." *Bellas*, 85 Cal. App. 4th at 645
20 n.6; *see also Copley Press*, 228 Cal. App. 3d at 89 ("It is clear that when the court distributed the
21 questionnaires to the venirepersons with instructions to fill them out, venire had begun.");⁴

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24 ³ In *Leshner*, the newspaper publisher requested, prior to oral examination of prospective jurors, that
25 the jury questionnaires be made public. 224 Cal. App. 3d at 776-77. After the trial court rejected
26 the request, the Court of Appeal stayed the trial while it considered the issue of whether the ques-
27 tionnaires had to be disclosed. *See id.* at 777.

28 ⁴ Like *Leshner*, *Copley Press* involved a newspaper publisher's attempt to obtain completed jury
questionnaires prepared in conjunction with a prosecution for murder. *See Copley Press*, 228 Cal.

[Footnote continued on next page]

1 Thus, denying access to these written questions is tantamount to closing the courtroom while oral
2 questions are posed to prospective jurors. See *Copley Press*, 228 Cal. App. 3d at 89 ("The fact that
3 the questioning of jurors was largely done in written form rather than orally is of no constitutional
4 import."); *Leshner*, 224 Cal. App. 3d at 778 ("It follows that the public access mandate of
5 *Press-Enterprise* applies to voir dire questionnaires as well as to oral questioning."). Releasing the
6 jury questionnaire, therefore, is integral to enforcing the First Amendment right of public access to
7 voir dire.

8 To restrict access to the questionnaire effects a closure that must overcome the rigorous con-
9 stitutional standards that safeguard the public's right of openness to criminal trials.
10 See *Press-Enterprise*, 464 U.S. at 510 ("The presumption of openness may be overcome only by an
11 overriding interest based on findings that closure is essential to preserve higher values and is nar-
12 rowly tailored to serve that interest."); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal.
13 4th 1178, 1204 (1999) (same); Cal. Code Civ. Proc. § 124 (stating that "the sittings of every court
14 shall be public"); Cal. R. Ct. 243.1. But here, there is no possible justification for denying public ac-
15 cess to this fundamental portion of the criminal proceedings. See *Press-Enterprise*, 464 U.S. at 513
16 ("The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity
17 of the individuals sought to be protected."). The questions reflect only the information sought by the
18 Court and parties in making the determination of who will be empanelled to decide this case. Thus,
19 here there is no interest at issue sufficient to undermine the centuries-old tradition of public access to
20

21 [Footnote continued from previous page]

22 App. 3d at 81. The Court of Appeal followed the constitutional principles articulated in *Press-*
23 *Enterprise*, holding that "the written responses are not confidential, i.e., the questionnaires are
24 public records." *Id.* at 83, 90. *Bellas* involved a contempt order issued against a public defender
25 who refused to return to the court defense copies of juror questionnaires. 85 Cal. App. 4th at 638.
26 *Bellas* was slightly unique in that it further considered the right of a criminal defendant to access
27 jury questionnaires. *Id.* at 647. Nevertheless, the court discussed and applied cases like *Leshner*
28 and *Copley*, which involved the public's right of access and were "imperative to our analysis."
Id. at 646; see also *id.* at 647 ("Therefore, apart from the question of public access, which itself
barred the action taken below, the defendant and defense counsel had a separate and independent
right both to know the content of the questionnaires and to preserve them in their confidential
files.").

1 the jury selection process. *See id.* at 505-08 (recounting history of public access to voir dire and pro-
2 viding a historical account suggesting that "beginning in the 16th century, jurors were selected in
3 public").

4 **B. The Completed Jury Questionnaires Must Be Provided To The Public During**
5 **The Voir Dire Proceedings**

6 Quite simply, "[t]he First Amendment of the United States Constitution guaranteeing public
7 access to judicial proceedings overwhelms any countervailing privacy interests of prospective jurors
8 as to the content of questionnaires they complete." *Bellas*, 85 Cal. App. 4th at 638-39; *see also Copley*
9 *Press*, 228 Cal. App. 3d at 81 (holding, in a capital case, that "the press is constitutionally entitled
10 to have access to such questionnaires"). The prospective jurors' written responses "are not confiden-
11 tial." *Copley Press*, 228 Cal. App. 3d at 90. Rather, "*the questionnaires are public records.*" *Id.*
12 (emphasis added).

13 And it is "*upon completion*" that these completed forms "become public records accessible to
14 anyone." *Bellas*, 85 Cal. App. 4th at 639 (emphasis added). The questionnaires here, therefore, must
15 be made available to the public *immediately*. Indeed, any delay will unjustly interfere with the open-
16 ness prescribed by the Constitution, because of "the critical importance of *contemporaneous ac-*
17 *cess . . . to the public's role as overseer of the criminal justice process*" *Washington Post v. Robinson*,
18 935 F.2d 282, 287 (D.C. Cir. 1991) (emphasis in original); *see also, e.g., NBC Subsidiary*, 20 Cal. 4th
19 at 1211, 1219 (emphasizing right to "contemporaneous access" and rejecting argument that delayed
20 release of transcripts could remedy improper closure of hearings); *Associated Press v. United States*
21 *Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (noting that even a 48-hour delay in unsealing judi-
22 cial records "is a total restraint on the public's first amendment right of access even though the re-
23 straint is limited in time").

24 To the extent necessary, the Court can respect privacy concerns of the prospective jurors by
25 redacting certain personal identifying information from their responses if justified. *See Copley Press*,
26 228 Cal. App. 3d at 88 (noting that only information "that is essential for the determination of juror
27 qualification and management of the jury system," such as telephone number and social security
28

1 number, "should be segregated from the other questions and not released to the public"). The re-
2 maining information contained in the questionnaires should be open to the public, however, because
3 of "the constitutional mandate requiring public access to most information about the private lives of
4 potential jurors." *Bellas*, 85 Cal. App. 4th at 652.⁵

5 The Access Proponents and media pool coordinator can work with the Court and its staff to
6 address the logistics of affording such access during voir dire in a manner that minimizes the burdens
7 on the Court, that ensures the maximum public access, and that strikes the proper balance among the
8 interests involved.

9 III 10 CONCLUSION

11 The First Amendment to the United States Constitution and California law mandate contem-
12 poraneous access to voir dire proceedings in a criminal trial. The jury questionnaire is a judicial re-
13 cord that is subject to the presumption of openness and an integral part of this voir dire process.
14 Likewise, the responses to those questions must be made available to the public with only limited re-
15 dactions. Accordingly, this Court should grant this motion.

21 ⁵ *Copley Press* and *Leshner* held that access is only required for questionnaires submitted by pro-
22 spective jurors who are actually called to the jury box for oral voir dire. See *Copley Press*, 228
23 Cal. App. 3d at 87; *Leshner*, 224 Cal. App. 3d at 779. *Bellas*, however, which was decided in 2000
24 almost ten years after these decisions, questioned this distinction and found that *Leshner*, for ex-
25 ample, "fail[ed] to offer any persuasive analysis in support of [it]." 85 Cal. App. 4th at 645 n.6.
26 Nevertheless, even if public access is required for only those veniremen selected for oral ques-
27 tioning, *Copley Press* made clear that "the superior court shall provide access to the question-
28 naires of individual jurors when the individual juror is called to the jury box for oral voir dire."
228 Cal. App. 3d at 87 (emphasis added). The public, therefore, must be provided with question-
naires for those people called to the jury box at the time they are called. It would, however, be far
simpler logistically—and would avoid any constitutional issue—simply to release all of the ques-
tionnaires in advance.

1 DATED: February 1, 2005

Respectfully submitted,

2 GIBSON, DUNN & CRUTCHER LLP

Theodore J. Boutros, Jr.

3 Michael H. Dore

4 By:


Theodore J. Boutros, Jr.

5 Attorneys for NBC Universal, Inc.; CBS
6 Broadcasting Inc.; Fox News Network
7 L.L.C.; ABC, Inc.; Cable News Network
8 LP, LLLP; The Associated Press;
9 *Los Angeles Times*; The New York Times
Company, *USA Today*; and Agence
France-Press

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**CERTIFICATE OF SERVICE
BY FAX AND REGULAR MAIL**

I, Jess Fernandez, hereby certify as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed in the office of Michael H. Dore, a member of the bar of this Court, and on February 1, 2005, I served the following:

ACCESS PROPONENTS' NOTICE OF MOTION AND MOTION REQUESTING IMMEDIATE PUBLIC ACCESS TO BLANK JURY QUESTIONNAIRE FORMS AND TO THE COMPLETED FORMS SUBMITTED BY PROSPECTIVE JURORS; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST TO SHORTEN TIME FOR RESPONSES TO THIS MOTION

on the interested parties in this action, by the following means of service:

BY MAIL: I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Thomas W. Sneddon District Attorney Santa Barbara County 1105 Santa Barbara Street Santa Barbara, CA 93101-2007 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
Thomas A. Mesereau, Jr. Collins, Mesereau, Reddock & Yu LLP 1875 Century Park East, 7th Floor Los Angeles, CA 90067 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
Robert Sanger Sanger & Swysen, Lawyers 233 E. Carrillo Street, Suite C Santa Barbara, CA 93001 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

1 **BY FACSIMILE:** From facsimile number (213) 229-7520, I caused each such document to be
2 transmitted by facsimile machine, to the parties and numbers indicated below, pursuant to
3 Rule 2008. The facsimile machine I used complied with Rule 2003(3) and no error was reported
4 by the machine. Pursuant to Rule 2008(c)(4), I caused the machine to print a transmission record
5 of the transmission, a copy of which is attached to the original of this declaration.

6 Thomas W. Sneddon 7 District Attorney 8 Santa Barbara County 9 1105 Santa Barbara Street 10 Santa Barbara, CA 93101-2007 11 Attorneys for Plaintiffs	Tel.: (805) 568-2300 Fax: (805) 568-2398
12 Thomas A. Mescreau, Jr. 13 Collins, Mescreau, Reddock & Yu LLP 14 1875 Century Park East, 7th Floor 15 Los Angeles, CA 90067 16 Attorneys for Defendant Michael Jackson	Tel.: (310) 284-3120 Fax:
17 Robert Sanger 18 Sanger & Swysen, Lawyers 19 233 E. Carrillo Street, Suite C 20 Santa Barbara, CA 93001 21 Co-Counsel for Defendant Michael Jackson	Tel.: (805) 962-4887 Fax: (805) 963-7311

22 I certify under penalty of perjury under the laws of the State of California that the foregoing is
23 true and correct, that the foregoing document(s), and all copies made from same, were printed on re-
24 cycled paper, and that this Certificate of Service was executed by me on February 1, 2005, at
25 Los Angeles, California.

26 
27 _____
28 Jess Fernandez

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