

JUN 20 2005

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8 SUPERIOR COURT, STATE OF CALIFORNIA
9 FOR THE COUNTY OF SANTA BARBARA

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,
14 vs.

15 MICHAEL JOE JACKSON,
16 Defendant.

Case No.: 1133603

**ACCESS PROPONENTS' MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT OF REQUEST TO INSPECT
AND COPY EXHIBITS INTRODUCED AS
EVIDENCE THROUGHOUT COURT
PROCEEDINGS, INCLUDING
VIDEOTAPES PLAYED IN OPEN COURT**

[VIA FACSIMILE]

**ACCESS PROPONENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST TO INSPECT
AND COPY EXHIBITS INTRODUCED AS EVIDENCE THROUGHOUT COURT PROCEEDINGS, INCLUDING
VIDEOTAPES PLAYED IN OPEN COURT**

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I INTRODUCTION

Pursuant to the Court's request during the June 16, 2005 hearing, Access Proponents, a group of media organizations,¹ submit this memorandum of points and authorities in support of their request for access to inspect and copy exhibits introduced as evidence during the trial, including videotapes played in open court.²

"The existence of the common law right to inspect *and copy* judicial records is beyond dispute." *In re Application of National Broad. Co.*, 635 F.2d 945, 949 (2d Cir. 1980) (noting that common law right includes right to copy videotapes played in open court) (emphasis added); *see also KNSD Channels 7/39 v. Superior Court*, 63 Cal. App. 4th 1200, 1203 (1998) (issuing a writ of mandate directing the superior court "to vacate its order denying reasonable access to the audiotape for copying and broadcast and enter a new order permitting such access"); *Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1293 (9th Cir. 1986) (recognizing right to copy exhibits, including videotapes); *see generally Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) (recognizing "a general right to inspect *and copy* public . . . judicial records and documents") (emphasis added, footnote omitted).

The "fundamental nature" of the common law right "gives rise to a 'presumption' in favor of public access." *KNSD*, 63 Cal. App. 4th at 1203. Courts describe in different ways the limited circumstances under which this presumption can be overcome. But, especially where fair trial rights are not at issue, it is generally accepted that the standard for doing so is extremely high. *See, e.g., id.* at 1204 (requiring "significant risk of impairment of the integrity of the evidence"); *In re Application of National Broad. Co.*, 635 F.2d at 952 ("When physical evidence is in a form that permits inspection and copying without any significant risk of impairing the integrity of the evidence or interfering with

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¹ NBC Universal, Inc.; Fox News Network L.L.C.; ABC, Inc.; and Cable News Network LP, LLLP.

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² Access Proponents made such requests in motions filed before and during trial and reiterated this request post-trial during the June 16 hearing.

1 the orderly conduct of the trial, only the most compelling circumstances should prevent contempora-
2 neous public access to it.") (internal footnote omitted).

3 Absent such a showing as to a particular exhibit (or part thereof), and now that the trial is over
4 and Mr. Jackson has been acquitted, the Court should allow public access for the purpose of inspect-
5 ing and copying exhibits prior to returning the exhibits to the parties. Otherwise, there will be no his-
6 torical public record in this case regarding the evidence submitted to the jury.

7
8 **II**
ARGUMENT

9 **A. The Public's Right to Obtain Copies of Judicial Records Entered Into Evidence is**
10 **Well-Established**

11 The public has a presumptive common-law right to inspect and copy exhibits, including
12 videotapes played in open court. *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) ("It is
13 clear that the courts of this country recognize a general right to inspect *and copy* public records and
14 documents, including judicial records and documents.") (emphasis added, footnote omitted).³

15 Thus, for example, in *KNSD Channels 7/39 v. Superior Court*, 63 Cal. App. 4th 1200 (1998),
16 the Court of Appeal for the Fourth Appellate District held that "absent a showing that providing ac-
17 cess would create a significant risk of impairment of the integrity of the evidence, the court must
18 make evidence previously presented to a jury in open court reasonably available to the public." *Id.* at
19 1205. The basis for this holding was "the common law right to inspect and copy judicial records."
20 *Id.* at 1203. Moreover, the court clearly associated the ability to inspect the tape with the ability to
21 copy it, issuing a writ of mandate directing the superior court "to vacate its order denying reasonable
22 access to the audiotape for copying and broadcast and enter a new order permitting such access." *Id.*
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25 ³ While the *Nixon* Court ultimately rejected public copying of the Watergate tapes, it did so be-
26 cause Congress had modified the right to copy these materials with legislation specifically re-
27 stricting public access to the Watergate tapes. See *Nixon*, 435 U.S. at 603-04; see also *In re Ap-*
28 *plication of National Broadcasting Co.*, 635 F.2d at 950 (discussing this aspect of *Nixon* and fur-
ther noting that "[t]he existence of the common law right to inspect and copy judicial records is
beyond dispute").

1 Similarly, the Second Circuit held in *In re Application of National Broadcasting Co.*, 635
2 F.2d 945 (2d Cir. 1980), that "there is a presumption in favor of public inspection *and copying* of any
3 item entered into evidence at a public session of a trial." *Id.* at 952 (emphasis added). In that case,
4 relating to the "Abscam" scandal of the early 1980s, the court affirmed a decision allowing news or-
5 ganizations to have copies of audio and videotapes aired in open court showing the defendants, in-
6 cluding members of Congress, accepting alleged bribes from undercover operatives. *Id.* at 947-48.
7 According to the court, "[o]nce the evidence has become known to the members of the public, includ-
8 ing representatives of the press, through their attendance at a public session of court, it would take the
9 most extraordinary circumstances to justify restrictions on the opportunity of those not physically in
10 attendance at the courtroom to see and hear the evidence" *Id.* The court held that the public's
11 common law right to inspect and copy could be defeated only under "the most compelling circum-
12 stances," *id.* at 952, which were not evident even though others facing trial on ABSCAM indictments
13 had not yet been tried. *Id.* at 953. The court thus affirmed the district court's order and, "[s]ince the
14 passage of time erodes to some extent the vindication of the public access right the networks have
15 asserted, direct[ed] that the mandate issue forthwith." *Id.* at 954.

16 The Ninth Circuit also has squarely held that "the public's common law right to copy and in-
17 spect public records and documents includes the right to copy audio and videotape exhibits as they
18 are received in evidence during a criminal trial." *Valley Broad Co. v. United States Dist. Court*,
19 798 F.2d 1289, 1290 (9th Cir. 1986). The court followed the view that there is "*a strong presump-*
20 *tion in favor of access, to be overcome only on the basis of articulable facts known to the court, not*
21 *on the basis of unsupported hypothesis or conjecture.*" *Id.* at 1293, 1294 (emphasis added) (internal
22 quotations omitted). "Such factors as promoting the public's understanding of the judicial process
23 and of significant public events justify creating a 'strong presumption' in favor of copying access."
24 *Id.* at 1294.

25 Mr. Jackson's counsel nonetheless has incorrectly argued that the public has no such right,
26 contending that if a "bloody hatchet" were introduced in a murder case, the public would have no
27 right to come to court and inspect and handle of that piece of evidence. But that argument confuses
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1 the rules governing physical evidence – like a murder weapon – and judicial records, like documents
2 and videotapes, that are introduced as exhibits during trial and which do not face the same threats to
3 their integrity by copying. See *KNSD*, 63 Cal. App. 4th at 1204 (requiring access absent “significant
4 risk of impairment of the integrity of the evidence”). The public clearly has a presumptive common
5 law right to inspect and copy such judicial records, even though the public may not have the right to
6 handle physical evidence in a murder trial.

7 **B. Now That The Trial Is Over, And Mr. Jackson Has Been Acquitted, The Court
8 Should Allow Access For Purposes Of Copying Exhibits, Absent A Showing Suf-
9 ficient To Defeat The Strong Presumption Established By The Common Law.**

10 Accordingly, the Court should allow public access for purposes of inspecting and copying ex-
11 hibits entered into evidence during the pre-trial proceedings and trial in this case, including the search
12 warrant videos and the so-called “rebuttal video,” absent a sufficient showing defeating this presump-
13 tive right. Now that the evidence has been introduced in court, the trial is over, and Mr. Jackson has
14 been acquitted, such access poses no threat to Mr. Jackson’s fair trial rights. *KNSD*, 63 Cal. App. 4th
15 at 1204 (“[W]here the evidence to which access is sought has already been presented to the jury, a
16 defendant’s interest in precluding access to it is diminished, if not ameliorated altogether.”).

17 Mr. Jackson’s counsel argued during the June 16 hearing that Mr. Jackson’s privacy rights
18 might be jeopardized by allowing copying of exhibits depicting Neverland Ranch. But such general-
19 ized claims are not sufficient to defeat the public’s common law rights as to *every single exhibit* in
20 the record, even if the public’s presumptive right as to some exhibits (or portions of exhibits) can be
21 defeated. *Valley Broadcasting Co.*, 798 F.2d at 1296 (preventing copying of one tape but allowing
22 copying of all others because there were “no other instances in which exhibits sought to be copied”
23 had “any significant relationship to untried matters”). Moreover, Mr. Jackson himself, and many
24 other news organizations and television programs, have widely broadcast footage of Neverland
25 Ranch. And Neverland Ranch – including its physical layout and atmosphere – were at the center of
26 both Mr. Jackson’s and the District Attorney’s presentations during trial.

27 Especially now that the trial is over, the court should allow access for purposes of inspecting
28 and copying exhibits. In the event the court returns the exhibits to the parties, without permitting

1 such copying, that would mean that there would be no historical record of the evidence introduced
2 during the trial that produced the acquittal and that garnered such intense public scrutiny.

3
4 **III.
CONCLUSION**

5 For all of these reasons, the Access Proponents request to obtain copies of the materials intro-
6 duced into evidence during court proceedings in this case should be granted.

7 DATED: June 20, 2005

Respectfully submitted,

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

11 By: *Theodore J. Boutros, Jr.* (MD)
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ble News Network LP, LLLP

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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 a member of the bar of this Court, and on June 20, 2005, I served the following:

ACCESS PROPONENTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST TO INSPECT AND COPY EXHIBITS INTRODUCED AS EVIDENCE THROUGHOUT COURT PROCEEDINGS, INCLUDING VIDEOTAPES PLAYED IN OPEN COURT

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

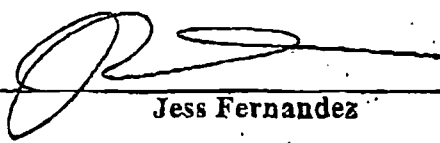
BY MAIL: I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. 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.

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

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that the foregoing document(s), and all copies made from same, were printed on recycled paper, and that this Certificate of Service was executed by me on June 20, 2005, at Los Angeles, California.



Jess Fernandez

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