SUPERIOR COURT OF THE STATE OF CALIFORNIA,

IN AND FOR THE COUNTY OF SANTA BARBARA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MICHAEL JOE JACKSON, Defendant.	Case No.: 1133603 DECISION ON MOTION PURSUANT TO PENAL CODE § 1538.5 (PART 1)

On June 22, 2004, Defendant Michael Jackson filed a Motion to Suppress Evidence seized from the office of private investigator Bradley Miller and to consider other sanctions, including dismissal, for a claimed "invasion of the defense camp." The Court, having heard testimony from a number of witnesses, having read the papers submitted by the parties, and having heard the oral argument of counsel, now denies the motion for the following reasons:

The search of Bradley Miller's office took place on November 18, 2003 pursuant to a search warrant issued by Judge Thomas Adams. The search was conducted to find evidence in support of a prosecution for violation of Penal Code § 288(a), child molestation. Without finding that these are the facts as they may ultimately be determined, the Court notes that the search warrant reported that a BBC broadcast of a documentary entitled

"Living with Michael Jackson" had referenced a boy, referred to here as John Doe. Statements made in the film acknowledged that John Doe had slept in Mr. Jackson's bedroom. According to the search warrant affidavit, arrangements were made for John Doe and his family to join Mr. Jackson in Miami to aid in rebutting any suggestion of wrongdoing. The Doe family was then flown from Miami to the Jackson home at Neverland Ranch ostensibly for reasons of safety. As a result of the airing in the U.S. of the BBC documentary, a Los Angeles C.P.S. interview of the family was arranged for February 20, 2003. The filming of a rebuttal video utilizing the Doe family was completed only at 3:00 a.m. the morning of the C.P.S. interview. Mr. Miller was one of the persons the Doe family recalled as present at the filming. The day after the CPS interview Mr. Miller interviewed the family, recording the conversation on tape. The tape of the interview was one of the items seized in the execution of the November 18, 2003 search warrant.

The Doe family was reportedly encouraged to stay at Neverland and not to return to its apartment home in East Los Angeles. Mr. Miller is identified in the affidavit through the statements of Mrs. Doe as among the persons, described as "Michael's people," who led her to believe that "there were people that were going to kill her and the children" [Affidavit, page 30] and that for this reason a new apartment would be provided. Mr. Miller was among those persons involved in moving all the furniture and furnishings from the Doe apartment into a storage unit. Mrs. Doe was, reportedly, not told the location of the storage facility and when she finally left Neverland Ranch with the children, she engaged the assistance of an attorney to formally request that her stored possessions be returned to her. When the possessions were finally recovered, it was with the assistance of Mr. Miller, whose name had been on the storage unit. Mrs. Doe reported that notes received from Mr.

Jackson that she had placed with a potted plant were missing when she retrieved her belongings from storage.

These and other facts contained in the search warrant affidavit resulted in the issuance of the search warrant for Mr. Miller's office. When officers arrived to execute the warrant, Mr. Miller was not present. The officers were admitted by the building management into the suite of offices where Mr. Miller's office was located, but no key was available to open the office itself. The officers used a sledge hammer to obtain entry and began a search. A number of items were discovered and seized, including videotapes, audiotapes and computer records for later examination. A couple of hours after the search began Mr. Miller appeared at the office in the company of an attorney and asserted that attorney-client privilege and work-product protection applied to the items being seized. The executing officers accordingly sealed the items for eventual deposit with the court. A waiting period for examination of the computer records seems to have been a part of the intention from the beginning. The warrant affidavit described a plan to notify the owners of any computer seized that there would be a 10-day period within which to identify any computer information for which they might assert a privilege. [Affidavit at p. 80].

Following the execution of the search warrant, a criminal complaint was filed on December 18, 2003. During the period from the earliest law enforcement involvement until approximately April 25, 2004, attorney Mark Geragos was the lead attorney for the Michael Jackson defense team. On January 16, 2004, the Court ordered an in-camera hearing, at the request of the defense team headed by Mr. Geragos, on the application of attorney-client privilege and/or work product protection. This hearing was limited to items numbered 811 through 820 on the search warrant inventory for Mr. Miller's office. Mr. Geragos stated that Bradley Miller was a private investigator working for him. The

argument advanced at that time by Mr. Geragos focused on work product protection and attacked the idea of discovery by search warrant, claiming that the items seized were impeachment materials that would not be discoverable. No claim of attorney-client privilege or that an invasion of the defense camp had occurred was made, and it was agreed that the court should examine the items seized to confirm application of work product protection. The items seized from Mr. Miller's office were lodged with the court on January 21, 2004 pursuant to a January 20, 2004 order of the court.

The court's review determined that none of the items reviewed qualified for absolute work product protection as the impressions or legal theories of an attorney. Upon examination, Item 818 was discovered to be an audio recording of the Bradley Miller interview with the Doe family on February 21, 2003. Mr. Miller clearly identified himself at the beginning and at the end of the tape recording as a private investigator working for attorney Mark Geragos, of the law firm of Geragos and Geragos. The court's initial determination as to Item 818 was that it alone, among the items under consideration, would be entitled to qualified work product protection. The material it contained was of a general nature and was obtained from witnesses equally available to the prosecution. The particular efforts of a defense investigator to gather the information seemed worthy of some protection. However, on a People's motion for reconsideration, the court concluded that the prosecution was correct in asserting that qualified work product protection was not available in criminal search warrant proceedings, and that tape also was ordered disclosed. [See Order dated April 9, 2004]. The issues of possible privilege or work product protection as to the other items seized from Bradley Miller's office, including the computer records, remained to be resolved. The issue involved the preparation of a privilege log, which was in turn complicated by the change of attorneys.

Following the substitution of attorneys, the defense asserted for the first time that to have executed a search warrant upon Mr. Miller's office was an improper "invasion of the defense camp" by the prosecution, and violated constitutional guarantees for the effective assistance of counsel. The argument presented was that the prosecution knew or should have known in drafting the search warrant affidavit that Mr. Miller was employed as a private investigator for Mr. Geragos, and should either have refrained from seeking a warrant to search his office or should have employed the assistance of a special master.

The principal evidence in support of the contention that the prosecution knew of the Geragos/Miller relationship was twofold. First, the prosecution had in hand the correspondence between Mark Geragos and attorney William Dickerman, who represented Mrs. Doe in seeking the return of her belongings placed in storage. The correspondence plainly indicated that Mr. Geragos was acting as attorney for Mr. Jackson. Mr. Geragos indicated that Mr. Miller would assist in the recovery of the stored items, and when Mr. Miller wrote to Mr. Dickerman he copied Mr. Geragos, expressly noting in the correspondence that he was doing so. It is contended that this surely signaled, as was evidently actually the case, that Mr. Miller, a licensed private investigator often hired by attorneys, was working for Mr. Geragos. The impression gains strength from Mrs. Doe's statement that Mr. Geragos was thought to be calling the shots in the area of "damage control" on behalf of Mr. Jackson.

The prosecution, however, interpreted this evidence very differently. It could not imagine that Mr. Geragos would have directed Mr. Miller to keep Mrs. Doe's belongings from her. The correspondence seemed to confirm that he in fact did not personally know where the items were, but would have to inquire. The correspondence at no point directly stated there was any relationship between Mr. Geragos and Mr. Miller. All the events were

fully consistent with the viewpoint that Mr. Miller was acting at the direction of Mr. Jackson, or of Mr. Jackson's associates. Mrs. Doe's description of Mr. Miller to investigators, as reported in the affidavit, was as one of "Michael's people."

The second very suggestive fact was that Mr. Miller was heard on tape telling Mrs. Doe and her family that he was a private investigator hired by Mr. Geragos. While Mrs. Doe's interviews with law enforcement had been recorded and the transcripts contained no communication of this information to investigators, she had also met privately with District Attorney Thomas Sneddon himself on an occasion when he was in Los Angles taking the opportunity to identify the location of Mr. Miller's office and to have Mrs. Doe identify a picture of Mr. Miller. While Mr. Sneddon's memorandum to law enforcement on the details of his meeting made no mention of Mr. Miller having a connection to Mr. Geragos, it was necessary to exclude the possibility that direct knowledge of the connection did in fact exist.

The effort to confirm that such knowledge did not exist hit a significant snag when Mr. Sneddon himself, in a self-described state of vexation that his office's opposition papers had been prepared late, reacted to the statement he found contained there that he did not know Mr. Miller worked for Mr. Geragos. He called defense counsel and informed them that he did in fact know of the relationship and would so stipulate. He eventually had to take the stand to testify that in doing so he had made a mistake and that he did not in fact know of the relationship until after execution of the warrant.

The defense was, not surprisingly, skeptical of the change of position and as a result an evidentiary hearing was held and a significant number of witnesses were examined, including Mr. Sneddon, the principal investigators from the sheriff's office, attorney Dickerman and Dr. Katz. The testimony was unanimous that no one knew of the

relationship in drafting the affidavit. The Court finds that each of those witnesses testified credibly and the Court is accordingly fully convinced that neither the prosecutor's office nor the sheriff's department had knowledge that Mr. Geragos had hired Mr. Miller.

Mrs. Doe herself testified that she had never paid any attention to the fact that Mr. Miller had told her he worked for Mr. Geragos. The defense sought to attack her credibility in testifying on these points. While Mrs. Doe was fully cross-examined on her statements, the Court significantly curtailed cross-examination for general impeachment purposes because it had no significant probative value. It was the burden of the defense to establish that the prosecution and/or law enforcement was aware of the Geragos/Miller relationship. Mrs. Doe testified she did not know of the relationship and neither could nor did disclose it to Mr. Sneddon or any other investigator. No amount of cross-examination attacking her credibility as a witness on unrelated points could operate to prove that the prosecution had knowledge of the relationship at issue. Given the limitations imposed on cross-examination the court refrains from reliance upon the testimony of Mrs. Doe, even though it seems fully consistent with the testimony of all other witnesses, and it seems entirely understandable that the relationship would not have seemed to her an important fact either when she heard it or when she talked with investigators.

The defense argues that the prosecutor's office and the search warrant affiant should have known of the relationship, even if no one had actual knowledge. The Court cannot require miracles of intuition from agents of law enforcement. Even on the present state of the evidence it would be possible to wonder to what extent the actions of Mr. Miller were in the service of Mr. Geragos rather than Mr. Jackson, or other persons. All direct evidence of the Geragos/Miller relationship surfaced after execution of the warrant. The

Court has no fault to find with the failure to conclude that Mr. Miller worked for Mr. Geragos.

It seems worthwhile observing that even if the Court did entertain a suspicion that a full disclosure of Mr. Miller's connection to Mr. Geragos was not made in the affidavit for the warrant, it would be necessary to decide if prejudice resulted. In *People v. Zapien* (1993) 4 C4th 929, a prosecutor and sheriff's officer traveling in a county car found a sealed envelope containing a defense strategy tape. The prosecutor reportedly asked the officer to listen to it and report to him on the contents, but the officer destroyed the tape without listening to it. This action, though strongly criticized, was not found to have compromised the fairness of the trial or the right to counsel. In *Zapien* it was determined that the intentional destruction of the tape was misconduct. The Supreme Court states: "Where it appears that the state has engaged in misconduct, the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct." (at 967). In *Zapien* it was established that the tape had not been listened to, and the defense had a transcript. The prosecution gained nothing and the defendant lost nothing.[1]

In the present case, it strongly appears that Judge Adams or any other magistrate would have approved the search warrant even if Mr. Miller had been identified as associated with Mr. Geragos. Even the offices of attorneys may be subject to a warranted search provided there is probable cause to believe that evidence of felonious criminal activity may be discovered. Penal Code § 1524 provides that for a search warrant to issue

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[1] The People contend that Mr. Jackson had no reasonable expectation of privacy sufficient to permit him to litigate the search of Mr. Miller's office. But as the *Zapien* case illustrates a defendant may litigate eavesdropping or other invasions of communications between himself and his attorney even where the communication takes place through intermediaries. See also *United States v. Seale* (9th Cir., 1972) 462 F.2d 345, at 364.

for documents in the possession of an attorney where the attorney is not personally suspected of criminal activity, a special master procedure must be followed. Thus, even assuming that Mr. Miller were himself defense counsel, a search warrant could have issued. This does not necessarily mean, however, that law enforcement would have access to the documents found. In *People v. Superior Court (Bauman & Rose)* (1995) 37 CA4th 1757 it was held that an attorney suspected of criminal conduct has a right to a judicial hearing to determine the applicability of claims of privilege to materials seized. This rule was reaffirmed in *People v. Superior Court (Laff)* (2001) 25 C4th 703. The Court held that attorney-client privilege is not limited to pending proceedings, and even before any charges have been filed an attorney suspected of criminal conduct may assert attorney-client privilege with regard to materials seized under a search warrant. The Superior Court, it held, has authority to conduct a hearing to decide this issue. It may choose to appoint a special master in exercise of its inherent authority to assist in review of such documents, or may perform the task itself.

It is doubtful in the first instance that a defense investigator occupies the same status as an attorney for purposes of Penal Code § 1524. See *PSC Geothermal Services Co. v. Superior Court* (1994) 25 CA4th 1697, 1703-5. But assuming this is the case, the requirement for appointment of a special master under that section would seem to depend upon whether the custodian of the records is or is not suspected of criminal activity. Mr. Miller was implicated in the possible theft of correspondence and in the alleged efforts to falsely imprison the Doe family by placing the contents of their apartment in storage. He was suspected of this involvement as a paid agent of Michael Jackson. On the other hand, there was apparently no claim of conspiracy at the time. No accusations of criminal conduct have been made against Mr. Geragos, and if Mr. Miller is seen as a sort of branch

office of the Geragos firm, there is arguably no reasonable suspicion of wrongdoing on the part of the document custodian. Thus, the special master provisions of Section 1524 would apply. This section contemplates appointment of a neutral attorney who would ask the party served to provide the items requested. Only if they not were provided would the special master then search, accompanied by the serving party (who is not permitted to participate in the search). If any claims of privilege are made the items at issue are sealed and an expedited hearing is provided to hear such claims in the superior court.

The difference between the special master procedure and the actual procedure utilized here does not seem greatly significant, at least as to Mr. Jackson. Mr. Miller was not directly given an opportunity to provide the information sought, but he was present at the conclusion of the search with his attorney, Mr. Nixon. He asserted claims of attorney-client privilege and work product protection and it appears that all items in question were sealed and deposited with the court. Audiotapes, videotapes, and computer records were not reviewed (and presumably could not have been) before this occurred. Penal Code § 1524 provides that the serving party may conduct the search as a special master would where a special master is unavailable. Given that Mr. Miller was not in fact an attorney, that probable cause existed for a valid search warrant, that Mr. Miller was implicated in possible criminal activity himself, and that items as to which claims of privilege exist were deposited with the court, it does not appear that any substantial prejudice resulted to the defense from the failure to determine that Mr. Miller was an investigator for Mr. Geragos, even if it could somehow be held that the prosecution should have divined that fact.

Beyond the claims for a Constitutional or statutory violation, a further contention of significance is that the search of computer records was overbroad, as the affidavit did not specifically suggest that Mr. Miller's computer systems were implicated in any of his

activities. But it takes little imagination to suppose that records of Mr. Miller's activities, in connection with the storage unit for example, would be located in a computer if he had one. Federal authorities in particular seem clear that so long as the warrant is sufficiently specific as to the evidence sought it will generally be necessary to seize and then search the entire computer for that evidence. *U.S. v. Wong* (9th Cir., 2003) 334 F.3d 831. While specific issues of privilege or work product protection may exist as to individual items on Mr. Miller's computer, no reason appears to suppress the evidence seized from any defect of overbreadth in the warrant or supporting affidavit generally.

Finally, there is the question of plain view. Audiotapes and videotapes were not included in the list of items to be seized in the warrant. The investigators came upon audiotapes and videotapes that were labeled in a way that connected them with the Doe family. The defense contends that the label is not sufficient to establish that the items in question are either contraband or obviously incriminating. If the mere possibility of relevance is sufficient to justify examination of otherwise unavailable contents, it is argued, the scope of the search becomes impermissibly general. The plain view doctrine permits the examination by a police officer, otherwise lawfully in position to observe an item, if initial inspection shows probable cause to believe that the item would aid in securing a conviction on a criminal offense. Penal Code § 1524(a)(4) specifically authorizes seizure pursuant to warrant of "any evidence that tends to show a felony has been committed, or tends to show that a particular person has committed a felony." As noted by Chief Justice Traynor in *People v. Thayer* (1965) 63 C2d 635, at 637: "The asserted rule that mere evidence cannot be seized under a warrant or otherwise is condemned as unsound by

virtually all the modern writers."[2] Mr. Miller had been identified as involved in the various aspects of the Doe family interactions with Michael Jackson described above, but the nature of his involvement, particularly the extent to which he may have been acting at the direction of Mr. Jackson, remained in need of clarification. There was probable cause to believe from the labels alone that the items seized were evidence of the involvement of Mr. Miller as well as some corroboration of the Doe family reports of their involvement with both Mr. Miller and Mr. Jackson. Seizure for further examination, after claims of privilege and other protections had been resolved, was appropriate.

The motion to suppress is denied.

Dated: OCT 14 2004

RODNEY S. MELVILLE
Judge of the Superior Court

[2] The U.S. Supreme Court cited *Thayer* in coming to the same conclusion in *Warden v. Hayden* 387 U.S. 294 (1967). Inadvertent discovery is a common but not a necessary element of a plain view seizure. *Horton v. California* 496 U.S. 128 (1990). Discovery in the course of a search otherwise authorized by a valid search warrant leaves only probable cause (as opposed to mere reasonable suspicion) to believe the item has evidentiary value as an issue.

PROOF OF SERVICE

1013A(1)(3), 1013(c) CCP

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA:

I am a citizen of the United States of America and a resident of the county aforesaid. I am employed by the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 312-H East Cook Street, Santa Maria, California.

On OCTOBER 14, 20 04, I served a copy of the attached DECISION ON MOTION PURSUANT TO PENAL CODE § 1538.5 (PART 1) addressed as follows:

THOMAS W. SNEDDON, DISTRICT ATTORNEY
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___ FAX

By faxing true copies thereof to the receiving fax numbers of: _____. Said transmission was reported complete and without error. Pursuant to California Rules of Court 2005(l), a transmission report was properly issued by the transmitting facsimile machine and is attached hereto.

___ MAIL

By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Santa Maria, County of Santa Barbara, addressed as above. That there is delivery service by the United States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

_X_ PERSONAL SERVICE

By leaving a true copy thereof at their office with the person having charge thereof or by hand delivery to the above mentioned parties.

___ EXPRESS MAIL

By depositing such envelope in a post office, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail, in a sealed envelope, with express mail postage paid.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 14TH day of OCTOBER, 20 04, at Santa Maria, California.

Carrie L Wagner

CARRIE L. WAGNER