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9 THE HONORABLE WRAY LADINE,
10 Judge of the Superior Court of California,
11 County Of Stanislaus

FILED
SAN MATEO COUNTY

FEB 23 2004

Clerk of the Superior Court
By *Sharyn Smith*
DEPUTY CLERK

12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF SAN MATEO

14 PEOPLE OF THE STATE OF
15 CALIFORNIA,

16 Plaintiff,

17 vs.

18 SCOTT LEE PETERSON,

19 Defendant.

Se 55500-
NO. 1056770 (STANISLAUS)

NOTICE OF MOTION AND MOTION TO
QUASH SUBPOENA; MEMORANDUM OF
POINTS AND AUTHORITIES

DATE: February 23, 2004
TIME: 9:30 a.m.
DEPT: 2M

20 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

21 PLEASE TAKE NOTICE that on the 23rd day of February,
22 2004, at 9:30 a.m., in Department 2M of the above-entitled Court,
23 located at 400 County Center, Redwood City, California, Subpoenaed
24 Witness, THE HONORABLE WRAY LADINE, Judge of the Superior Court
25 of California, County Of Stanislaus (hereinafter "JUDGE LADINE")
26 will and hereby does move this Court for an Order Quashing
27 Subpoena served by Defendant SCOTT LEE PETERSON (hereinafter
28 "PETERSON") attempting to force JUDGE LADINE to appear and testify
at a hearing in this matter on February 23, 2004 at 1:30 p.m.

The Motion to Quash Subpoena will be based on the

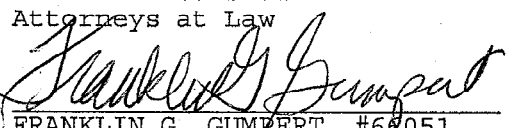
1 grounds that JUDGE LADINE is disqualified from testifying as to
2 events and his thought processes related to this matter, as the
3 Legislature has mandated that judges are statutorily incompetent
4 to testify as witnesses, a prohibition which is not subject to
5 waiver. In addition, JUDGE LADINE cannot be called to testify in
6 the absence of compelling reasons and an inability to obtain
7 identical testimony and evidence from other sources which do not
8 intrude upon the offices of high government officials, and as a
9 matter of public policy, failure to quash the subpoena will
10 subject judges throughout the state to unreasonable and oppressive
11 demands for testimony to the detriment of the conduct of judicial
12 business, and allow parties to circumvent the standards for
13 recusal of a judicial officer.

14 The Motion will be made and based upon this Notice, the
15 Memorandum of Points and Authorities, the pleadings and papers on
16 file herein, and such other and further oral and documentary
17 evidence as may be presented at the time of the hearing.

18 DATED: February 22, 2004

BARKETT & GUMPERT
Attorneys at Law

19
20 BY:


FRANKLIN G. GUMPERT, #68051
Attorneys for Subpoenaed Witness,
THE HONORABLE WRAY LADINE, Judge of
the Superior Court of California,
County Of Stanislaus

21
22
23
24 MEMORANDUM OF POINTS AND AUTHORITIES

25 FACTS

26 THE HONORABLE WRAY LADINE, Judge of the Superior Court
27 of California, County Of Stanislaus ("JUDGE LADINE") was served
28 with a subpoena by Mark Geragos, counsel for SCOTT LEE PETERSON,

1 seeking to compel JUDGE LADINE to attend and participate as a
2 witness in a hearing in Department 2M on February 23, 2004, when
3 motions in limine are argued related to evidence obtained from
4 wiretaps authorized by a Court Order by JUDGE LADINE..

5 THIS COURT MUST QUASH THE SUBPOENA SERVED UPON JUDGE LADINE

6 Code of Civil Procedure § 1987.1 provides, in pertinent
7 part:

8 "When a subpoena requires the attendance of
9 a witness ... before a court, or at the trial
10 of an issue therein, ... the court, upon
11 motion reasonably made by the party, the
12 witness ... or upon the court's own motion
13 after giving counsel notice and an
14 opportunity to be heard, may make an order
15 quashing the subpoena entirely, modifying it,
16 or directing compliance with it upon such
17 terms or conditions as the court shall
18 declare. In addition, the court may make any
19 other order as may be appropriate to protect
20 ... the witness ... from unreasonable or
21 oppressive demands..."

22 The Court's power to quash subpoenas extends to criminal
23 as well as civil action. In re Finn (1960) 54 Cal.2d 807, 813.

24 The Court has the power to quash a subpoena in a
25 criminal case in order to preclude an abuse of the right to
26 subpoena witnesses. People v. Fernandez (1963) 222 Cal.App.2d 760,
27 769; People v. Rhone (1968) 267 Cal.App.2d 652, 657.

28 Where, as here, a judge is required to step off-the
bench, to be compelled to testify or to produce documents at a
criminal hearing involving a defendant where no request to recuse
or disqualify the subpoenaed judge has been filed, and where no
justification exists for the subpoena, this Court not only has the
power but the obligation to quash the subpoena to prevent present
and future abuse of the subpoenaing power.

1 JUDGE LADINE IS STATUTORILY INCOMPETENT TO SERVE AS A WITNESS

2 Penal Code § 1321 specifically identifies who is and who
3 is not competent to testify in a pending criminal proceeding:

4 "The rules for determining the competency of
5 witnesses in civil actions are applicable
6 also in criminal actions and proceedings,
except as otherwise provided in this code."

7 Subject to extremely narrow exceptions not relevant
8 herein, Evidence Code § 703.5 specifically renders judicial
9 officers incompetent to testify in civil proceeding and, by the
10 language of Penal Code § 1321, a criminal proceeding as well:

11 "No person presiding at any judicial or
12 quasi-judicial proceeding, and no arbitrator
13 or mediator, shall be competent to testify,
14 in any subsequent civil proceeding, as to any
15 statement, conduct, decision, or ruling,
16 occurring at or in conjunction with the prior
17 proceeding, except as to a statement or
conduct that could (a) give rise to civil or
18 criminal contempt, (b) constitute a crime, (c)
be the subject of an investigation by the
19 State Bar or Commission on Judicial
20 Performance, or (d) give rise to
21 disqualification proceedings..."

22 Where the Legislature expressly provides that a witness
23 is statutorily deemed incompetent to testify, he or she cannot
24 testify at all. People v Lonzelman (1994) 33 Cal.App.4th Supp. 6
25 [Vehicle Code § 40804(a) rendering a witness incompetent to
26 testify in a speeding prosecution if based upon or obtain from use
27 of a speed trap cannot testify as to observations of speed
28 either].

29 The Legislature's ban on testimony from judicial and
30 quasi-judicial officials regarding conversations during prior
31 proceedings applies even where the area of proposed inquiry
32 relates to discussions taking place "off the record;" the written

1 orders and findings must stand on their own. Magness Petroleum Co.
2 V. Warren Resources of California, Inc. (2002) 103 Cal.App.4th
3 901, 911-912.

4 Deference to the Legislature's established evidentiary
5 privileges precludes the Courts from implying unwritten exceptions
6 to clear statutory pronouncements. Roberts v. City of Palmdale
7 (1993) 5 Cal.4th 363, 373.

8 It is error for the Court to even reach so far as to
9 hold an *in camera* hearing to assess the potential testimony of a
10 judicial or quasi-judicial official, as regardless of its content,
11 the testimony is barred under Evidence Code § 703.5. Eisendrath
12 v. Superior Court (2003) 109 Cal.App.4th 351, 363.

13 Legislative pronouncements declaring certain witnesses
14 incompetent to testify are not subject to waiver by the intended
15 witness, precluding JUDGE LADINE from volunteering to testify even
16 if he desired to do so. The question is also not one of relevant
17 to a specific area of inquiry, but of Legislative mandate
18 excluding JUDGE LADINE's testimony. As the subpoena at issue
19 herein relates to a criminal proceeding, conduct, decision or
20 ruling involving judicial or quasi-judicial proceedings previously
21 pending before JUDGE LADINE. As such, and with no exception to
22 the rule of witness incompetency applicable, there is no basis
23 upon which JUDGE LADINE should be compelled to appear at the
24 judicial hearing or to produce documents there, as he is
25 statutorily deemed to be incompetent to testify. For that reason,
26 the motion to quash should be granted.

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1 JUDGE LADINE SHOULD NOT BE COMPELLED TO APPEAR AS A WITNESS
2 BECAUSE THERE ARE NO EXTRAORDINARY CIRCUMSTANCES JUSTIFYING
3 INTERFERING WITH THE DUTIES OF A HIGH GOVERNMENT OFFICIAL
AND NO SHOWING THAT EVIDENCE DESIRED FROM HIM IS
NOT OTHERWISE AVAILABLE TO THE COURT AND PARTIES

4 Article 6, §16 of the California Constitution recognizes
5 that Judges of the Superior Court of the State of California are
6 elected and appointed officials. It has long been established
7 that high government officials are subject to special
8 consideration when confronted with efforts by litigants to compel
9 their participation as witnesses in trial and pre-trial
10 proceedings. United States v Morgan 313 U.S. 409, 421-422 (1941).

11 Courts frequently quash subpoenas that attempt to compel
12 elected state officials to testify in trial or related
13 proceedings. State Board of Pharmacy v Superior Court (1978) 78
14 Cal.App.3d 641 [elected State Attorney General], Deukmejian v
15 Superior Court (1983) 143 Cal.App.3d 632 [elected State Governor
16 and former Attorney General], Civiletti v Municipal Court (1981)
17 116 Cal.App.3d 105 [appointed United States Attorney General], and
18 In re United States 985 F.2d 510 (11th Cir. 1993), cert. den. 510
19 U.S. 989 [appointed Commissioner of Food and Drug Administration].
20 In each instance, these elected or appointed officers have all
21 been deemed busy public officials who should not be required to
22 give evidence in his or her official capacity in the absence of
23 "compelling reasons."

24 Even where the subpoenaed high government official is
25 named as a party in a lawsuit, courts have quashed subpoenas
26 absent a showing that the information requested cannot be made
27 available through any other source. Kyle Engineering Co. v Kleppe
28 600 F.2d 226, 231 (9th Cir. 1979), cited with approval in Nagle

1 v Superior Court (1994) 28 Cal.App.4th 1465, 1468, acknowledging
2 that the basic rule recognizes that an official's time and the
3 exigencies of his or her official governmental duties would be
4 severely impeded if they were subjected to compelled testimony,
5 expressed as "contrary to the public interest..." Ibid.

6 Here, the subpoenaing party cannot articulate any
7 extraordinary circumstances which warrant JUDGE LADINE abandoning
8 his official judicial duties at the Stanislaus County Superior
9 Court, so that he can testify as to events previously presented
10 to him as a judicial officer. Though the subpoena itself provides
11 absolutely no guidance as to what constitutes the area of
12 anticipated inquiry from JUDGE LADINE, the pending criminal
13 proceeding is one in which JUDGE LADINE served as the judicial
14 officer involved in issuing the order authorizing limited wiretaps
15 subject to conditions already the subject of Declarations of Rick
16 Distaso and Steven Jacobsen, as is clear from this Court's review
17 of its own records in the instant action , maintained in the
18 regular course of business of the Courts. Any anticipated
19 testimony from JUDGE LADINE or documents that he might produce at
20 the hearing necessarily relate to those proceedings or are
21 irrelevant as a matter of law.

22 If judges could be compelled to testify based upon
23 subpoenas relating to the presence or absence of any individual
24 from any judicial proceeding, the ability of judges to handle ever
25 increasing workloads would be destroyed. Any effort to obey the
26 subpoena would subject JUDGE LADINE and the Stanislaus County
27 Superior Court to unreasonable and oppressive demands detrimental
28 to the system of justice in that community, and contrary to the

1 public interest. Moreover, as a matter of strong public policy,
2 should this Court condone or sanction the practice of allowing
3 criminal prosecutors or defense counsel to subpoena judges to
4 testify as to any or all matters with which they were involved in
5 pretrial issuances of search warrants, wiretaps or other orders,
6 the floodgates will not only be opened but arguments will be
7 presented in all future criminal cases that the standards of care
8 for prosecutors and criminal defense counsel will mandate that
9 judges be subpoenaed out of their respective courthouses and off
10 the bench, into distant courtrooms and onto witness stands to
11 explain their thought process and observations in relation to
12 every prior warrant and order. This will inevitably result in the
13 cessation of orderly legal proceedings as they are currently
14 known.

15 The subpoena upon JUDGE LADINE must be quashed.

16 CONCLUSION

17 Based upon the foregoing, it is respectfully requested
18 this Court issue an Order Quashing Subpoena served by Mark Geragos
19 attempting to force THE HONORABLE WRAY LADINE, Judge of the
20 Superior Court of California to appear and to testify at the
21 hearing in this matter on February 23, 2004 at 9:30 a.m.

22 DATED: February 22, 2004

BARKETT & GUMPERT
Attorneys at Law

23
24 BY: 

FRANKLIN G. GUMPERT, #66051,
Attorneys for Subpoenaed Witness
THE HONORABLE WRAY LADINE, Judge of
the Superior Court of California,
County of Stanislaus