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CLERK OF SUPERIOR COURT
COUNTY OF STANISLAUS
BY *Cindy Clark* DEPUTY

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8 Attorneys for Subpoenaed Party

FILED BY FAX

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF STANISLAUS

12
13 THE PEOPLE OF THE STATE OF CALIFORNIA,

14 Plaintiff,

15 vs.

16 SCOTT LEE PETERSON,

17 Defendant

Case No. 1056770

NOTICE OF MOTION AND MOTION
TO QUASH SUBPOENA;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF SAME;
DECLARATION OF HOLLY PERA IN
SUPPORT OF SAME

Hearing Date: July 9, 2003

Time: 8:30 a.m.

Place: Dept. 8

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23 TO DEFENDANT AND HIS ATTORNEY OF RECORD: Please take notice that on
24 July 9, 2003 at 8:30 a.m., in Dept. 8, Stanislaus County Superior Court, 800 11th Street, Modesto,
25 California, or as soon thereafter as may be heard, the City and County of San Francisco will and
26 hereby does move for an order quashing the subpoena duces tecum issued to the San Francisco
27 Police Department on or about May 30, 2003. The subpoena requested disclosure of the criminal
28

1 investigation file in the homicide investigation of Evelyn Hernandez, and the testimony of
2 Inspector Holly Pera.

3 The grounds for the motion are that the file is confidential under California Evidence
4 Code Section 1040, that the subpoena is overbroad, and that other statutory privileges and the
5 constitutional right to privacy protect certain documents from disclosure.

6 Dated: June 19, 2003

7
8 DENNIS J. HERRERA
City Attorney
9 MARIAM MORLEY
Chief Attorney - Public Protection Unit
10 MARGARET W. BAUMGARTNER
Deputy City Attorney

11
12 By: 

13 MARGARET W. BAUMGARTNER
Attorneys for Defendants
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **INTRODUCTION**

3 The San Francisco Police Department has an open and active homicide investigation
4 regarding the death of Evelyn Hernandez. Defendant Scott Lee Peterson, without any showing
5 that the information in that matter would be relevant to his defense, has subpoenaed the entire
6 investigation file. Defendant's subpoena should be quashed on the grounds that the information
7 requested is confidential under California Evidence Code Section 1040. The subpoena is also
8 overbroad and requests documents protected by other statutory provisions.

9 **STATEMENT OF FACTS**

10 On July 24, 2002, a citizen discovered a body in San Francisco Bay, at the Embarcadero,
11 near Folsom Street. (Pera Decl'r, ¶ 4.) After DNA testing, it was determined that the body was
12 that of Evelyn Hernandez, a 24-year old woman who had disappeared three months previously
13 along with her five year old son. (Pera Decl'r ¶ 4.) Ms. Hernandez was eight months pregnant at
14 the time of her disappearance. (Pera Decl'r ¶ 4.)

15 The homicide investigation into Ms. Hernandez's death is open and active. (Pera Decl'r
16 ¶ 3.) The two San Francisco Police Department inspectors working on the matter are Inspector
17 Holly Pera and Inspector Joe Toomey. (Pera Decl'r ¶ 1.)

18 On May 30, 2003, defendant Scott Peterson served a subpoena on Inspector Pera,
19 requesting that she appear and produce "all records relating to the investigation of the
20 disappearance of Evelyn Hernandez, the finding of her body in the San Francisco Bay and the
21 autopsy report/coroner's report relating to Evelyn Hernandez." (Pera Decl'r Ex. A.)

22 All of the information in the file is confidential. None of these documents are subject to
23 disclosure. Therefore the court should quash the subpoena.

24 **ARGUMENT**

25 There is no provision in the penal code that specifically applies to a third-party subpoena.
26 However, the California Code of Civil Procedure § 1985 provides for a trial subpoena for
27 witnesses. That section states that "a copy of an affidavit shall be served with a subpoena duces
28 tecum issued before trial, showing good cause for the production of the matters and things

1 described in the subpoena, specifying the exact matters or things desired to be produced, setting
2 forth in full detail the materiality thereof to the issues involved in the case.” Section 1987.1
3 allows a party to move to quash and for the court to make any order “to protect the parties [and]
4 witnesses . . . from the unreasonable or oppressive demands.”

5 Penal Code Section 1054.6, which governs discovery in criminal cases, acknowledges
6 that privileges that apply in civil case may also apply in criminal cases. It states that documents
7 need not be disclosed in a criminal matter if they are “privileged pursuant to an express statutory
8 provision or are privileged as provided by the Constitution of the United States.”

9 Here, defendant has failed to comply with the basic requirements of a subpoena in that
10 the declaration attached to the subpoena in this case requests the entire open homicide file for a
11 case in which defendant is *not* a suspect. Defendant has not articulated any basis for believing
12 that the matters are related in any way, much less set forth “in full detail the materiality thereof
13 to the issues involved.” He simply states that “identification of the actual perpetrators will serve
14 to exonerate Scott Lee Peterson.” Furthermore, the subpoena does not specify “the exact matters
15 or things desired to be produced,” rather, it demands the entire file. Thus, the subpoena should be
16 quashed as overbroad and burdensome.

17 Moreover, Evidence Code Section 1040 states “[a] public entity has a privilege to refuse
18 to disclose official information, and to prevent another from disclosing official information, if
19 the privilege is claimed by a person authorized by the public entity to do so.” This provision
20 makes confidential *the entire contents* of an ongoing criminal investigation file. *County of*
21 *Orange v. Superior Court of Orange County (Wu)* (2000) 79 Cal.App.4th 759, 764 [refusing to
22 disclose any of the contents of a three-year old homicide file on the basis that all of the
23 information in the file was protected by Evidence Code § 1040].)

24 For a criminal defendant to overcome the privilege set forth in Evidence Code § 1040, the
25 criminal defendant must show that the information requested is material to the defense. (*See*
26 *People v. Garza* (1995) 32 Cal.App.4th 148, 153-54 [denying criminal defendant’s request to
27 disclose surveillance location under Evidence Code Section 1040].) “The test of materiality is
28 not simple relevance; it is whether non-disclosure might deprive defendant of his or her due

1 process right to a fair trial.” (*Id.*; citing *People v. Walker* (1991) 230 Cal.App.3d 230, 236.) In
2 *Garza*, the criminal defendant requested surveillance information, on the grounds that the
3 surveilling officer could not have seen the drug transaction at issue. The court refused, because
4 although relevant, the location was not “material” to the defense.

5 Here, revealing the information in the file could result in the perpetrator of the crime
6 avoiding detection. (Pera Decl’r ¶¶ 5-13.) The defendant here has not made any showing
7 whatsoever regarding the materiality of the investigation to his defense, nor even set forth the
8 specific issue to which it is relevant.

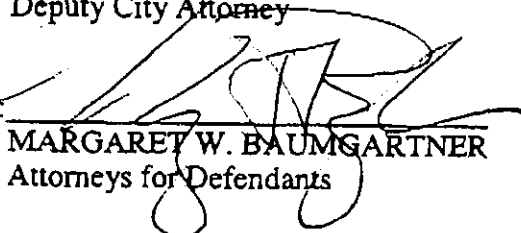
9 Additionally, there are other specific documents contained in the file that are privileged
10 under other provisions of law. For example, some of the documents are criminal history
11 information that may not be disclosed to defendant or his counsel under California Penal Code
12 Section 13300. Other documents were obtained pursuant to a search warrant, and disclosure is
13 therefore limited by the court order. Other documents reveal private information, and would be
14 protected by the right to privacy.

15 CONCLUSION

16 For the foregoing reasons, the court should grant the motion to quash the subpoena in its
17 entirety.

18
19 Dated: June 19, 2003

20 DENNIS J. HERRERA
21 City Attorney
22 MARIAM MORLEY
23 Chief Attorney – Public Protection Unit
24 MARGARET W. BAUMGARTNER
25 Deputy City Attorney

26 By: 
27 MARGARET W. BAUMGARTNER
28 Attorneys for Defendants

1 DENNIS J. HERRERA, State Bar #139669
 City Attorney
 2 MARIAM MORLEY, State Bar # 104732
 Chief Attorney - Public Protection Unit
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8 Attorneys for Subpoenaed Party

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 10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 COUNTY OF STANISLAUS

FILED BY FAX

13 THE PEOPLE OF THE STATE OF CALIFORNIA,

14 Plaintiff,

15 vs.

16 SCOTT LEE PETERSON,

17 Defendant.

Case No. 1056770

DECLARATION OF HOLLY PERA IN SUPPORT OF MOTION TO QUASH SUBPOENA DUCES TECUM

Hearing Date: July 9, 2003

Time: 8:30 a.m.

Place: Dept. 8

21 I, Holly Pera, declare as follows:

- 22
 23 1. I am an Inspector with the Homicide Unit of the San Francisco Police Department. Inspector
 24 Joe Toomey and I are assigned to the investigation into the death of Evelyn Hernandez. I
 25 have personal knowledge of the facts contained herein, except for those facts stated on
 26 information and belief, and as to those facts I believe them to be true. If called upon to
 27 testify, I could and would testify competently hereto.

- 1 2. I received a subpoena duces tecum for the entire investigative file of the death of Ms.
2 Hernandez. A copy of the subpoena is attached hereto as Exhibit A.
- 3 3. The homicide investigation into Ms. Hernandez's death is an open and active investigation.
- 4 4. There are limited items of information regarding this case that are already public knowledge.
5 These include that Ms. Hernandez's body was found by a citizen in San Francisco Bay, near
6 The Embarcadero and Folsom Streets; that she was identified only after DNA testing; that
7 she and her five-year old son had disappeared three months prior to her body being found,
8 and that she was eight months pregnant at the time of her disappearance. It also includes the
9 name of her boyfriend, the location where her wallet was found and general information as to
10 what the wallet contained.
- 11 5. Revealing any additional items of information would interfere with this investigation. Any
12 leak of the non-public facts would make it more difficult to identify the perpetrator.
- 13 6. I do not believe that there is any information in the file that could link the death of Ms.
14 Hernandez with the death of Laci Peterson.
- 15 7. This file contains various categories of documents. First, the file contains personal and
16 private information concerning the victim, including the autopsy report, lab workups and
17 photographs. Revealing any of these documents could interfere with this investigation.
18 Some of the information could possibly be known only to the perpetrator. If the information
19 is made public, the perpetrator could possibly avoid detection.
- 20 8. Second, the file contains criminal history information. I am informed and believe that state
21 law prohibits me from providing this information to another criminal defendant.
22 Furthermore, I do not believe that providing criminal history information regarding the
23 suspects in this matter would be relevant to the Peterson case.
- 24 9. Third, the file contains personal records obtained by search warrant and subpoena. Pursuant
25 to the terms applicable to obtaining those documents, I cannot disclose them to a third party
26 for use in a case other than the one for which they were obtained.
- 27
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1 10. Fourth, the file contains incident reports. Again, disclosing these documents could reveal
 2 information that would allow the perpetrator to escape detection, or otherwise influence
 3 witnesses in a manner that would interfere with the investigation.

4 11. Fifth, the file contains the Inspector's Chronological Summary. This document would reveal
 5 the investigatory techniques and leads. Disclosure of this information would interfere in the
 6 investigation by allowing the perpetrator to delve into the mind of the investigating officer,
 7 and possibly avoid detection.

8 12. The file also contains witness statements. Revealing these statements, and who was
 9 interviewed, could reveal our investigation strategy. It could also disclose information that
 10 we have not released to the public. Also, contacting of witnesses could frighten the
 11 witnesses from speaking to the police department.

12 13. I cannot reveal additional specifics about the information in the file without compromising
 13 the investigation.

14 14. For the information obtained pursuant to search warrants and subpoenas, those items are
 15 disclosed only for the purpose of the investigation for which they are provided.

16 15. I will be out of the office from June 19, 2003 until June 30, 2003.

17 I declare under the penalty of perjury under the laws of the State of California that the
 18 foregoing is true and correct.

19
 20 DATED: June 18, 2003

21 Inspector Holly Pera

22 Inspector Holly Pera

Kirt W. McAllister (Bar # 47524) McAllister & McAllister, Inc. 1012 - 11th Street, Ste. 100 Modesto, California 95354 TELEPHONE NO. (209) 575-4844		FOR COURT USE ONLY Home 11/23/03 2:35 RECEIVED Superior Court Modesto, CA
ATTORNEY FOR: Scott Lee Peterson Stanislaus County Superior Court, Criminal Division 800 - 11th Street Modesto, CA 95354		CASE NUMBER 1056770
Title of case: The People of the State of California v. Scott Lee Peterson SUBPENA (CRIMINAL OR JUVENILE)		
<input checked="" type="checkbox"/> DUCES TECUM THE PEOPLE OF THE STATE OF CALIFORNIA, TO (NAME): San Francisco Police Department, Homicide Inspector Holly Pera #1937		

YOU ARE ORDERED TO APPEAR AS A WITNESS in this action at the date, time, and place shown in the box below UNLESS you make a special agreement with the person named in item 2:

a. Date: June 6, 2003	Time: 8:30 a.m.	<input checked="" type="checkbox"/> Dept. 8	<input type="checkbox"/> Div.:	<input type="checkbox"/> Room:
b. Address: 800 - 11th Street Modesto, CA 95354				

2. AND YOU ARE


- a. ordered to appear in person.
- b. not required to appear in person if you produce the records described in the accompanying affidavit and a completed declaration of custodian of records in compliance with Evidence Code sections 1580, 1581, 1582, and 1587. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number, your name and date, time, and place from item 1 (the box above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the clerk of the court at the address in item 1. (4) Mail a copy of your declaration to the attorney or party shown at the top of this form.
- c. ordered to appear in person and to produce the records described in the accompanying affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1580, and sections 1581 and 1582, of the Evidence Code will not be deemed sufficient compliance with this subpoena.
- d. ordered to make the original business records described in the accompanying affidavit available for inspection at your business address by the attorney's representative and to permit copying at your business address under reasonable conditions during normal business hours.

3. IF YOU HAVE ANY QUESTIONS ABOUT THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

- a. Name: Kirk W. McAllister
- b. Telephone number: (209) 575-4844

4. WITNESS FEES: You may be entitled to witness fees, mileage, or both, in the discretion of the court. Contact the person named in item 3 AFTER your appearance.

DISOBEDIENCE OF THIS SUBPENA MAY BE PUNISHED BY A FINE, IMPRISONMENT, OR BOTH. A WARRANT MAY ISSUE FOR YOUR ARREST IF YOU FAIL TO APPEAR.

FOR COURT USE ONLY	Date: 5/29/03	
		(SIGNATURE OF PERSON ISSUING SUBPENA)
		Kirk W. McAllister (TYPE OR PRINT NAME)
		Attorney for Defendant

(See reverse for proof of service)

Form Approved by Rule 612
Mandatory Form
Adopted Court Form # 60200

SUBPENA
(CRIMINAL OR JUVENILE)

Form Code: 1125 (Rev. 1/97)
Version and Amendment Code: 00001, 0001, 1/97

EXHIBIT A

1. I served this subpoena by personally delivering a copy to the person, and as follows:

a. PERSON SERVED (Name):

b. ADDRESS WHERE SERVED:

c. DATE OF DELIVERY:

d. TIME OF DELIVERY:

2. I received this subpoena for service on (date):

3. NON-SERVICE RETURN OF SUBPOENA

After due search, careful inquiry, and diligent at the dwelling house or usual place of abode or usual place of business, I have been unable to make personal delivery of this subpoena in this county on the following person:

b. REASON:

(1) Unknown address

(4) Out-of-county address

(2) Moved, forwarding address unknown

(3) Unable to serve by hearing date

(3) No such address

(5) Other reasons (explain)

4. Person serving:

a. Not a registered Calif. Process server

e. Exempt from registration

b. Calif. Sheriff, marshal, constable

2&P Code Section 21330(e)

c. Registered Calif process server

f. Name, address, and telephone

d. Employee or independent contractor of a registered Calif. Process server

number and, if applicable, county of registration and number

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

(For Calif. sheriff, marshal, or constable use only)

I certify that the foregoing is true and correct.

DATE:

DATE:

(Signature)

(Signature)

PROOF OF SERVICE OF SUBPOENA

(Criminal or Juvenile)

1 Kirk W. McAllister, State Bar No. 47324
2 McALLISTER & McALLISTER
3 1012 - 11th Street, Suite 100
4 Modesto, CA 95354
5 Tel: (209) 575-8844

6 Attorney for Defendant Scott Lee Peterson

7
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS
9

10 THE PEOPLE OF THE STATE OF
11 CALIFORNIA,

12 Plaintiff,

13 vs.

14 SCOTT LEE PETERSON,

15 Defendant.

Case No.: 1056770

**EX PARTE ORDER SHORTENING TIME
FOR PRODUCTION PURSUANT TO
SUBPOENA DUCES TECUM**

Date: June 6, 2003
Time: 8:30 a.m.
Dept: 8

McALLISTER & McALLISTER
1012 - 11th Street, Suite 100
Modesto, CA 95354
Tel: (209) 575-8844

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18 Application having been made by defendant SCOTT LEE PETERSON, with proof
19 having been made to the satisfaction of the Court, and good cause appearing therefor,

20 IT IS ORDERED, that the application of defendant SCOTT LEE PETERSON, for an ex
21 parte order shortening time for production pursuant to Subpoena Duces Tecum is granted and
22 the time for production is shortened so that production is ordered in court on June 6, 2003, at
23 8:30 a.m., in Department 8.
24

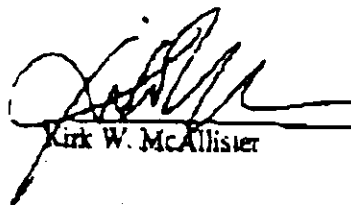
25
26 Dated: May 29, 2003

27 
28 Judge of the Superior Court

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

Dated: May 29, 2003


Kirk W. McAllister

MICHAEL McALLISTER
1012 - 71st Street, Suite 100
Alhambra, CA 91804
Tel: 281-373-8249

DECLARATION

I, Kirk W. McAllister, declare:

1. I am an active member of the State Bar of California and am an attorney duly licensed to practice before all courts in the State of California. I am a lawyer in the law firm of McAllister & McAllister, Inc., and an attorney of record for defendant SCOTT LEE PETERSON.

2. I make this declaration in support of defendant PETERSON's application for ex parte order shortening time for production of documents pursuant to Subpoena Duces Tecum.

3. The information sought in the Subpoena Duces Tecum directly relates to identifying the actual perpetrators in the abduction and killing of Laci Peterson and her unborn son. Obtaining the items requested in this Subpoena Duces Tecum is critical and necessary to the defense of defendant SCOTT LEE PETERSON because identification of the actual perpetrators will serve to exonerate SCOTT LEE PETERSON.

4. Time is of the essence in identifying the actual perpetrators in the killing of Laci Peterson and her unborn son, lest critical evidence be destroyed waiting for the statutory time limit.

5. It is further believed that the actual perpetrators are now ignorant that the defense investigation is aware of their involvement in this crime, but they may soon become aware of this fact and attempt to conceal or destroy evidence critical to the case.

6. It is thereby requested that the statutory time provisions of Code of Civil Procedure §1987 and any other time limitations be waived and that the court order production in a shorter time. Specifically, it is requested that time be shortened so that the requested information be produced in court by personal appearance on Friday, June 6, 2003, at 8:30 a.m., in Department 8.

///

KIRK W. McALLISTER
1011 11th Street, Suite 1011
San Jose, CA 95128
Tel: 408.255.1234

1 **PROOF OF SERVICE**

2 I, Amelia C. Wong, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall,
5 1 Dr. Carlton B. Goodlett Place, Suite 234, San Francisco, CA 94102-4682.

6 On June 19, 2003, I served the attached:

7 **NOTICE OF MOTION AND MOTION TO QUASH; MEMORANDUM OF POINTS
8 AND AUTHORITIES IN SUPPORT OF SAME**

9 on the interested parties in said action, by placing a true copy thereof in sealed envelope(s)
10 addressed as follows:

11 Kirk W. McAllister, Esq.
12 McAllister & McAllister
13 1012 - 11th Street, Suite 100
14 Modesto, CA 95354

15 and served the named document in the manner indicated below:

16 **BY MAIL:** I caused true and correct copies of the above documents, by following ordinary business
17 practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office
18 of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Suite 234, San Francisco, CA 94102-4682, for
19 collection and mailing with the United States Postal Service, and in the ordinary course of business,
20 correspondence placed for collection on a particular day is deposited with the United States Postal Service
21 that same day.

22 **BY PERSONAL SERVICE:** I caused true and correct copies of the above documents to be placed
23 and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by
24 hand on the office(s) of the addressee(s).

25 **BY EXPRESS SERVICES OVERNITE:** I caused true and correct copies of the above
26 documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such
27 envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the
28 office(s) of the addressee(s).

BY FACSIMILE: I caused a copy(ies) of such document(s) to be transmitted via facsimile machine.
The fax number of the machine from which the document was transmitted was Fax #'. The fax number(s) of
the machine(s) to which the document(s) were transmitted are listed above. The fax transmission was
reported as complete and without error. I caused the transmitting facsimile machine to print a transmission
record of the transmission, a copy of which is attached to this declaration.

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

Executed June 19, 2003, at San Francisco, California.



AMELIA C. WONG