

JUL - 3 2003

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SUPERIOR COURT  
COUNTY OF STANISLAUS

BY *[Signature]* DEPUTY

FILED BY FAX

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON,

Defendant.

Case No. 1056770

OPPOSITION TO CITY AND COUNTY OF SAN FRANCISCO'S MOTION TO QUASH SUBPOENA

DATE: July 9, 2003  
TIME: 8:30 a.m.  
PLACE: Dept. 2

Defendant Scott Lee Peterson ("Mr. Peterson") hereby opposes the Motion to Quash. This Opposition is based upon the grounds that: (1) Inspector Pera failed to comply with Mr. Peterson's May 29, 2003 subpoena and also violated Judge Beauchesne's May 29, 2003 Ex Parte Order Shortening Time For Production Pursuant to Subpoena Duces Tecum in which Judge Beauchesne ordered inspector Pera to comply with the subpoena; (2) Movants have waived any privilege that may have ever attached to the requested information; and (3) Movants fail to set forth any legal or factual basis justifying the quashing of Mr. Peterson's subpoena.

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I.

**INTRODUCTION**

The City and County of San Francisco ("movants") concede that on May 30, 2003 Mr. Peterson, "served a subpoena on Inspector Pera, requesting that she appear and produce 'all records relating to the investigation of the disappearance of Evelyn Hernandez, the finding of her body in the San Francisco Bay and the autopsy report/coroner's report relating to Evelyn Hernandez.'" (Motion to Quash at 3:18-21.) Movants also concede that Inspector Pera was properly served with Judge Beauchesne's May 29, 2003 order commanding Inspector Pera to appear in court with the requested records on June 6, 2003. (Declaration of Inspector Holly Pera at paragraph 2.)

Inspector Pera failed to comply with the subpoena and failed to object until June 19, 2003 - - nearly two weeks after Mr. Peterson's June 6, 2003 hearing. Therefore, the Motion to Quash ("Motion") should be dismissed out of hand as untimely. Furthermore, the Motion is replete with misstatements of law and fact. Most importantly, the Motion fails to advise the Court that not only did Movants initiate contact with the Modesto Police Department in order to provide information from the Hernandez file (San Francisco Police Department case number 02-0549157) but that in addition, the prosecution in this matter has also requested the Hernandez file<sup>1</sup>. The Motion also makes the incredible and inaccurate assertion that "[t]here is no provision in the Penal Code that specifically applies to a third-party subpoena." (Motion at 3:25.)

II.

**MOVANTS WAIVED ANY PRIVILEGE TO WHICH THEY MIGHT BE ENTITLED UNDER EVIDENCE CODE SECTION 1040**

Movants rely almost solely on Evidence Code section 1040 which states "[a] public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person

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<sup>1</sup> The Defense would prefer to proffer this information *in camera* in the company of the prosecution so that there is no dispute on this issue.

1 authorized by the public entity to do so.” (Evidence Code section 1040, Motion at 4:17-  
 2 19.) However, Movants fail to provide the Court with the following relevant portion of  
 3 Section 1040 regarding waiver:

4 [B]ut no privilege may be claimed under this paragraph if any  
 5 person authorized to do so has consented that the information  
 6 be disclosed in the proceeding.

7 (Section 1040(b)(2).)

8 On January 6, 2003 Movants contacted the Modesto Police Department in  
 9 connection with the Laci Peterson investigation and provided information concerning the  
 10 Hernandez case. (Page 1980 of discovery provided by the Stanislaus County District  
 11 Attorney<sup>2/</sup>.) The defense believes that the limited discovery that has been produced thus  
 12 far includes other examples of waiver by Movants, however, due to the urgent need to  
 13 compel Inspector Pera’s compliance with the subpoena a full search therefor is  
 14 impractical. Since Movants have waived any privilege they might have under Section  
 15 1040, the Motion to Quash should be summarily denied.<sup>3/</sup>

### 16 III.

#### 17 PENAL CODE SECTIONS 1326 AND 1327 ARE APPLICABLE

18 Movants’ assertion that the Penal Code fails to address third-party subpoenas is  
 19 woefully inaccurate:

20 [Penal Code] Sections 1326 and 1327 set forth the procedure  
 21 for either the prosecutor or the defendant to obtain discovery  
 22 records possessed by third parties. A subpoena duces tecum  
 23 does not require the party subpoenaed to provide the

24  
 25 <sup>2</sup>Out of an abundance of caution, in light of the protective order in this matter, Bates number  
 26 page 1980 is not attached, but Mr. Peterson will gladly provide it at the Court’s request.

27 <sup>3</sup>Mr. Peterson notes that Movants also rely on a civil case, *County of Orange v. Superior*  
 28 *Court of Orange County (Wu)* (1995) Cal.App.4th 148. *Wu* is easily distinguishable because *Wu*  
 does not address a capital defendant’s need for discovery, nor does *Wu* address the situation where,  
 as here, the government has entirely waived any and all privilege.

1 defendant with a copy of the materials sought, but does  
2 require that person or entity to produce the information in  
3 court for the defendant's inspection.

4 (*People v. Superior Court (Barrett)* (4<sup>th</sup> Dist. 2000) 80  
5 Cal.App.4th 1305, 1315.)

6 It is well-established that a criminal defendant has a right to discovery by a  
7 subpoena duces tecum of third party records by showing that the requested information  
8 will facilitate the ascertainment of the facts and a fair trial. (See *People v. Superior Court*  
9 (*Barrett*), *supra*, 80 Cal.App.4th at 1316.) The Court of Appeal in *Barrett* also reaffirmed  
10 the longstanding proposition that, "[a]llowing an accused the right to discover is based on  
11 the fundamental proposition that he is entitled to a fair trial and an intelligent defense in  
12 light of all relevant and reasonably accessible information." (*Barrett* at 1316, quoting  
13 *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, 535.) In this death penalty case,  
14 Movants initiated contact with the Modesto P.D.. Movants themselves were the ones who  
15 noted similarities between the Peterson and Hernandez cases. To now claim otherwise is  
16 disingenuous at best. Especially when both the defense and prosecution have requested  
17 the file to further investigate the obvious similarities between the two cases.

#### 18 IV.

19 **EVEN IF THE COURT DETERMINES THAT EVIDENCE CODE**  
20 **SECTION 1040 IS APPLICABLE AND HAS NOT BEEN WAIVED,**  
21 **AN *IN CAMERA* HEARING MUST BE CONDUCTED**

22 When a governmental entity asserts the privilege under Evidence Code section  
23 1040, "the court should hold an in camera hearing," and, "[t]he burden is on the  
24 governmental agency to demonstrate the privilege." (*People v. Superior Court (Barrett)*,  
25 *supra*, 80 Cal.App.4th at 1317.) Therefore, rather than permitting Movants' to ignore a  
26 subpoena and court order or wait nearly two weeks after compliance was due to raise, *for*  
27 *the first time*, the claim of privilege, this Court should *at a minimum* conduct an *in*  
28

1 camera inspection of the subpoenaed records.<sup>4</sup> During the hearing the City of San  
 2 Francisco will have a full and fair opportunity to demonstrate why Mr. Peterson is not  
 3 entitled to discovery concerning a nearly identical crime - - discovery that may very well  
 4 exonerate him.

V.

5  
 6 **MR. PETERSON'S DUE PROCESS WILL BE VIOLATED**  
 7 **IF THIS COURT QUASHES THE SUBPOENA**

8 When a defendant in a criminal case is denied subpoenaed information upon a  
 9 claim of privilege, a due process violation may result.

10 The due process requirements of the 5<sup>th</sup> Amendment to the  
 11 United States Constitution, and article I, section 15 of the  
 12 California Constitution, guarantee a defendant in a criminal  
 13 prosecution the right to present relevant exculpatory evidence.

14 (1c) In the instant case, a state statute was utilized to prevent  
 15 the accused from gaining access to evidence of possible  
 16 benefit to his defense. The manner in which this was  
 17 accomplished constitutes a denial of due process. . . .

18 (*People v. Ansbro* (1984) 153 Cal.App.3d 273, 277.)

19 Evidence Code section 1040 provides as follows:

20 "(a) As used in this section, "official information" means  
 21 information acquired in confidence by a public employee in  
 22 the course of his or her duty and not open, or officially  
 23 disclosed, to the public prior to the time the claim of privilege  
 24 is made.

25 (b) A public entity has a privilege to refuse to disclose  
 26 official information, and to prevent another from disclosing

27 \_\_\_\_\_  
 28 <sup>4</sup>This may necessarily entail the issuance of a bench warrant to compel Inspector Pera's appearance.

1 official information, if the privilege is claimed by a person  
2 authorized by the public entity to do so and:

3 (1) Disclosure is forbidden by an act of the  
4 Congress of the United States or a Statute of  
5 this state; or

6 (2) Disclosure of the information is against the  
7 public interest because there is a necessity for  
8 preserving the confidentiality of the information  
9 that outweighs the necessity for disclosure in  
10 the interest of justice; but no privilege may be  
11 claimed under this paragraph if any person  
12 authorized to do so has consented that the  
13 information be disclosed in the proceeding. In  
14 determining whether disclosure of the  
15 information is against the public interest, the  
16 interest of the public entity as a party in the  
17 outcome of the proceeding may not be  
18 considered.

19 (c) Notwithstanding any other provision of law, the  
20 Employment development department shall disclose to law  
21 enforcement agencies, in accordance with the provisions of  
22 subdivision (k) of Section 1095 and subdivision (b) of Section  
23 2714 of the Unemployment Insurance Code, information in its  
24 possession relating to any person if an arrest warrant has been  
25 issued for the person for a commission of a felony".  
26 (Deering's California Evidence Code section 1040.)

27 Whether Evidence Code section 1040 establishes an absolute privilege or a  
28 conditional privilege is determined by which underlying statute is relied upon.

1 Section 1040 of the Evidence Code "represents *the exclusive*  
2 *means* by which a public entity may assert a claim of  
3 governmental privilege based on the necessity for secrecy."  
4 (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 540 [113  
5 Cal.Rptr. 897, 522 P.2d 305].) (Italics added.) It essentially  
6 establishes two different privileges—an absolute privilege if  
7 disclosure is forbidden by a federal or state statute (subd.  
8 (b)(1)), and a conditional privilege in all other cases pursuant  
9 to which privilege attaches when the court determines, in  
10 accordance with precise statutory standards, that disclosure is  
11 against the public interest (subd. (b)(2)). (See generally  
12 comment—Assem. Com. on Judiciary.) Citation omitted.  
13 (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 123.)

14 Although not articulated in its brief, the Subpoenaed Party must rely upon  
15 Government Code section 6254(f). However, it is well established that Government Code  
16 section 6254 cannot support a claim of absolute privilege. *Shepherd v. Superior Court*,  
17 *supra*, 17 Cal.3d at page 124; *Rubin v. City of Los Angeles* (1987) 190 Cal.App.3d 560,  
18 585.

19 The approved procedure for evaluating a claim of privilege is to hold an in  
20 camera hearing followed by a "full scale adversary hearing".

21 The *Shepherd* court's directives are a clear command  
22 for a particularized assessment of the applicability of  
23 the privilege as to *each* item a public entity seeks to  
24 keep confidential in the face of a litigant's request for  
25 disclosure. Subsequent decisions by courts of appeal  
26 have further delineated the procedures required for a  
27 proper determination of the applicability of the section  
28 1040(b)(2) conditional privilege. (See *People v.*

1 *Superior Court* (1971) 19 Cal.App.3d 522, 530-531  
2 [97 Cal.Rptr. 118]; *People v. Montgomery, supra*, 205  
3 Cal.App.3d at pp. 1021-1022.) These include an in  
4 camera review pursuant to Evidence Code section 915  
5 subdivision (b), attended by the party claiming the  
6 privilege, and an ensuing full-scale adversary hearing  
7 at which the strength of the parties' competing interests  
8 are explored, along with "the possibility of reasonable  
9 alternatives" to outright disclosure of the information  
10 sought. (*People v. Superior Court, supra*, 19  
11 Cal.App.3d at pp. 530-531; *People v. Montgomery,*  
12 *supra*, 205 Cal.App.3d at pp. 1021-1022.) As the court  
13 noted in *People v. Superior Court, supra*, 19  
14 Cal.App.3d at page 530, "A government claim of  
15 privilege would be impregnable without some probing  
16 by a neutral tribunal."  
17 (*Michael P. v. Superior Court* (2001) 92 Cal.App.4<sup>th</sup> 1036, 1043.)

18 When a government entity asserts a privilege, it must prove that the claimed  
19 danger is not illusory. "If the government asserts disclosure of certain information  
20 will compromise the murder investigation, it must show the risk of harm is real."  
21 *Michael P. v. Superior Court, supra*, 92 Cal.App.4<sup>th</sup> at page 1046.

22 VI.

23 **MR. PETERSON HAS DEMONSTRATED BOTH NECESSITY AND**  
24 **GOOD CAUSE FOR PRODUCTION**

25 As set forth in the May 29, 2003 Declaration of Kirk W. McAllister, "[t]he  
26 information sought in the Subpoena Duces Tecum directly relates to identifying  
27 the actual perpetrators in the abduction and killing of Laci Peterson and her unborn  
28 son. Obtaining the items requested in this Subpoena Duces Tecum is critical and



1 necessary to the defense of defendant SCOTT LEE PETERSON because  
2 identification of the actual perpetrators will serve to exonerate SCOTT LEE  
3 PETERSON." (See Motion to Quash, Exhibit A, Declaration of Kirk W.  
4 McAllister, paragraph 3.)

5 Additionally, on May 29, 2003, Judge Roger M. Beauchesne ordered  
6 Inspector Pera to comply with the subpoena upon a finding of good cause. (See  
7 Motion to Quash, Exhibit A, Ex Parte Order Shortening Time for Production  
8 Pursuant to Subpoena Duces Tecum.) Indeed, Movants, *on their own initiative*,  
9 contacted the Modesto Police Department and provided information regarding the  
10 Hernandez case.

11 In light of these three factors (Mr. Peterson's showing, a judicial finding,  
12 and admission by Movants), Movants' cannot contend that Mr. Peterson has failed  
13 to make an adequate showing of necessity. Indeed, common sense alone dictates  
14 that the unique factual circumstances surrounding the Peterson and Hernandez  
15 cases demonstrates good cause in and of itself.

#### 16 VII.

#### 17 THE SUBPOENA IS NOT OVERBROAD OR BURDENSOME

18 The Subpoena requests a case file. Mr. Peterson could not fashion a request  
19 with which compliance would be easier. All Movants are required to do is put the  
20 Hernandez file into an automobile (or truck or plane) with Inspector Pera and go to  
21 Modesto. Movants need not even copy or review the file since there would be an  
22 *in camera* hearing during which inspection would occur. The assertion of  
23 overbreadth and burden is not well-taken.

#### 24 VIII.

#### 25 MOVANTS ALLEGE NO OTHER PRIVILEGE

26 Movants state that the grounds for their Motion include "that other statutory  
27 privileges and the constitutional right to privacy protect certain documents from  
28 disclosure." (Motion at 2:3-5.) However, Movants' Points and Authorities fail to

1 discuss these grounds whatsoever, so Mr. Peterson need not address them at this  
 2 time. In any event, Movants have waived all privilege by providing, *on their own*  
 3 *initiative*, the Modesto Police Department with all or portions of the Hernandez.

IX.

CONCLUSION

6 WHEREFORE, Mr. Peterson respectfully requests that the relief requested  
 7 herein be granted.

8 Dated: July 3, 2003

Respectfully submitted,

GERAGOS & GERAGOS

By: \_\_\_\_\_

  
 MARK J. GERAGOS  
 Attorney for Defendant  
 SCOTT LEE PETERSON

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**PROOF OF SERVICE**

I am a citizen of the United States and am employed in Stanislaus County; I am over the age of eighteen (18) years and not a party to the within action; my business address is 1012 - 11<sup>th</sup> Street, Suite 100, Modesto, California, 95354.

On July 3, 2003, I served the following document(s):

**OPPOSITION TO MOTION TO QUASH**

by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as follows:

Stanislaus County District Attorney  
1100 I Street, Room 200  
Modesto, CA 95354

McALLISTER & McALLISTER  
1012 - 11<sup>th</sup> Street, Suite 100  
Modesto, CA 95354  
Tel: (209) 575-4844

**BY MAIL:** I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with McAllister & McAllister's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

**BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the address(es) designated.


**EXPRESS SERVICE CARRIER:** I caused such envelope(s) to be delivered by an authorized courier or driver authorized by XXX, an express service carrier to receive documents, with delivery fees paid or provided for, to the addressee(s) designated.

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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.

Executed at Modesto, California on July 3, 2003

  
\_\_\_\_\_  
Kelly Parina

PROOF OF SERVICE BY FAX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

OPPOSITION TO CITY AND COUNTY OF SAN FRANCISCO'S MOTION TO QUASH SUBPOENA

\_\_\_\_\_ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

X transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

\_\_\_\_\_ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

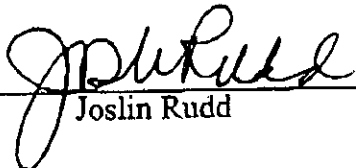
PARTIES SERVED BY FAX:

Rick Disatso, DDA  
David P. Harris, DDA  
Fax No.: 209-525-5545

City Attorney Margaret Baumgartner  
Fax No: 415-554-4763

Executed on July 3, 2003, at Los Angeles, California.

I declare under penalty of perjury that the above is true and correct.

  
\_\_\_\_\_  
Joslin Rudd

TRANSMISSION VERIFICATION REPORT

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## FAX COVER SHEET

**From:** Mark J. Geragos  
**Client/Matter:** People v. Peterson  
**Date:** July 3, 2003  
**Pages:** (INCLUDING COVER)

RECIPIENT	FACSIMILE NUMBER
City Attorney Margaret Baumgartner	415-554-4763

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TEL : 2136253900  
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## FAX COVER SHEET

**From:** Mark J. Geragos  
**Client/Matter:** Peterson  
**Date:** July 3, 2003  
**Pages:** (INCLUDING COVER)

RECIPIENT	FACSIMILE NUMBER
Deputy District Attorneys Rick Distaso or David P. Harris	(209) 525-5545