

1 DANIEL HOROWITZ State Bar No. 92400
Attorney at Law
2 P.O. Box 1547
Lafayette, California 94549
3 (925) 283-1863

4 Attorney for Oksana Grigorieva

5
6 ***SUPERIOR COURT FOR THE STATE OF CALIFORNIA***
7 ***COUNTY OF LOS ANGELES***
8

9
10
11 In re Return of Seized Property held by
12 Los Angeles County Sheriff's Department

13 OKSANA GRIGORIEVA,
14 Real Party In Interest,

15 vs.

16 LOS ANGELES COUNTY SHERIFF'S
DEPARTMENT, LEE BACA and
17 Does 1-100 inclusive
18 _____/

No.

Date: October 21, 2010
Time: 1:30 pm
Honorable Scott Gordon
Dept: 88

19
20 ***AUTHORITIES IN SUPPORT OF MOTION TO RETURN PROPERTY***

21
22 **RELIEF SOUGHT**

23
24 1. Narrow the Scope of the warrant to audio recordings of Mel Gibson, photographs of
25 Oksana Grigorieva's facial injuries, e-mails and/or text messages between Oksana Grigorieva
26 and Mel Gibson.
27

1 fashioning a reasonable set of search limitations.

2 The affidavit is the first clear glimpse into the basis for the extortion investigation and
3 this motion challenges the scope of the search warrant affidavit as overbroad such that it
4 functions as a “general warrant” prohibited under the United States Constitution.

5 Having reviewed the affidavit and now knowing the basis for the extortion investigation,
6 does **not** want the return of all materials as the materials relevant to the extortion investigation
7 are all exculpatory to her and reveal the complete absence of an extortion. (And in fact
8 demonstrate the opposite.)

9 Grigorieva does seek:

10 1. The return of private, personal and privileged items that are unrelated to this
11 investigation.

12 2. The establishment of a search protocol that will exclude private, personal and
13 privileged items but will allow the discovery of all items that relate to the (false)
14 extortion claims.

14 **RECORDS WHICH ESTABLISH THE ABSENCE OF AN EXTORTION**

15 The affidavit defines the scope of the alleged extortion. In searching for materials it is
16 important that exculpatory material be seized as well. The declaration and records attached
17 hereto focus on the heart of the extortion claim, the assertion that at a mediation with Mel
18 Gibson, Oksana Grigorieva obtained (or attempted to obtain) money by using threats to reveal
19 audio recordings of Mel Gibson and photographs of her injuries caused by Mel Gibson.

20 **1. “Term Sheet**

21 The “Term Sheet” containing the terms of that mediation demonstrate that Oksana
22 Grigorieva received less money in the mediation than she would have received in Family Court.
23 An analysis of the “Term Sheet” demonstrates that it does not have the \$ 15 million dollar value
24 that is often cited. Its value is in the range of \$ 1 to \$ 2 million dollars. The history of the
25 negotiation for these amounts is shown in Exhibits 1, 2 & 3. It is not a process of extortion but
26 simply discussion and mild negotiation.

27 A further analysis of the “Term Sheet” demonstrates that Lucia, was in fact given

1 benefits that could be valued at \$ 10 million dollars but in exchange, she was taken out of a
2 Gibson family trust that has a value that could be upwards of \$ 50 million dollars.

3 In the balance, the Gibson side gained the most significant financial benefit and in terms
4 of judging whether an “extortion” took place, the nature of the resulting agreement (or
5 agreement to agree) is a relevant factor that a court can consider.

6 7 **2. ‘E-Mail & Texts**

8 This motion includes several documents that establish the lack of any threats with respect
9 to the audio recordings. These are communications between Mel Gibson and Oksana Grigorieva
10 that are rather normal, civilized and reflect discussions between adults who are genuinely
11 attempting to provide for the financial welfare of their child.

12 13 **3. Marsy’s Law**

14 Under Marsy’s law, Article I, Section 28 (b)(1) a victim has the right:

15 (1) To be treated with fairness and respect for his or her privacy and dignity, and
16 to be free from intimidation, harassment, and abuse, throughout the criminal or
17 juvenile justice process.

18 Ms. Grigorieva’s declaration states that she believed that she would be arrested, deported
19 and lose Lucia if she did not sign the mediation agreement. The fact that extortion allegations
20 were submitted after she refused to sign a final version of the agreement is a factor that the court
21 can consider in determining whether the extortion investigation has a genuine chance of
22 revealing a crime or is a tactic to intimidate a crime victim. While the Sheriff’s department has
23 an obligation to be impartial and to investigate the charges, the scope of the investigation and the
24 impact on the Domestic Violence victim cannot be ignored.

25
26 **FRANK’S CHALLENGE RESERVED**

1 [to] the court's inherent power to control and prevent the abuse of its process. [citations]" 65 Cal.
2 App. 4th 1546

3 **3. This Motion is Separate From Any Pending Case and is a "Special Proceeding"**

4 Notice of motion should be directed to the Sheriff's Department but service has also been
5 directed to the office of the District Attorney. There is no criminal action pending and "[i]f no
6 criminal action is pending, an owner's motion for return of seized property is classified as a
7 special proceeding. [citation]" " 65 Cal. App. 4th 1546. A "special proceeding" is one which is
8 distinct from any underlying litigation. [citation]" " 65 Cal. App. 4th 1546

9 **4. The Motion May Be Made on Statutory & Non-Statutory Grounds**

10 Grigorieva may move for return of property on grounds that the property taken was not
11 the same as that described in the warrant, or that there was no probable cause to believe the
12 existence of the grounds on which the warrant was issued. 65 Cal. App. 4th 1547

13 **THE WARRANT WAS OVERBROAD**

14 The Fourth Amendment requires a search warrant to "particularly describ[e] the place to
15 be searched, and the persons or things to be seized." (U.S. Const., 4th Amend.; see also Cal.
16 Const., art. I, § 13; Pen. Code, § 1525.) "The requirement of particularity is designed to prevent
17 general exploratory searches which unreasonably interfere with a person's right to privacy.
18 (Marron v. United States (1927) 275 U.S. 192, 196 [72 L. Ed. 231, 237, 48 S. Ct. 74].) Nothing
19 in the affidavit justified the seizure of all contents of the personal computer of Oksana
20 Grigorieva. If the language of the warrant seemed to justify such a general search, the warrant
21 should be interpreted more narrowly to preserve the privacy of Oksana Grigorieva and to ensure
22 the constitutionality of the warrant.

23 "If the scope of the search exceeds that permitted by the terms of a validly issued warrant
24 ... , the subsequent seizure is unconstitutional without more." (Horton v. California (1990) 496
25 U.S. 128, 140 [110 L. Ed. 2d 112, 110 S. Ct. 2301].) No reasonable police officer would expect
26 to be able to seize photographs of Oksana Grigorieva while pregnant, breast feeding her infant,
27 her artwork, her music including unfinished projects, her songs being written or family videos. It

1 also includes communications with numerous attorneys and doctors. Unfettered, the search of
2 her computer will yield just such material.

3 The Penal Code [too] demands reasonable particularity (Pen. Code, § 1529), and this
4 requirement is held to be satisfied if the warrant imposes a meaningful restriction upon the
5 objects to be seized.” (Burrows v. Superior Court (1974) 13 Cal.3d 238, 249 [118 Cal. Rptr. 166,
6 529 P.2d 590]; accord, People v. Balint (2006) 138 Cal.App.4th 200, 205–206 [41 Cal. Rptr. 3d
7 211].) These reasonable restrictions may not have been crystal clear in the original warrant and
8 this court can both clarify and limit the scope of the items seized under the powers addressed in
9 this motion.

10 “The vice of an overbroad warrant is that it invites the police to treat it merely as an
11 excuse to conduct an unconstitutional general search.” (*People v. Frank* (1985) 38 Cal.3d 711,
12 726.) In the present case the entire hard drive of a computer has been seized. It was preserved
13 for Family Court proceedings but its seizure removes it from the control of the Family Court
14 which is empowered to place reasonable restrictions on access to the materials. Without those
15 (or other reasonable) restrictions, the warrant is a general warrant, which the Fourth Amendment
16 prohibits. [“General warrants, of course, are prohibited by the Fourth Amendment.” (*Andresen v.*
17 *Maryland* (1976) 427 U.S. 463, 480; “General searches have long been deemed to violate
18 fundamental rights. It is plain that the Amendment forbids them.” (*Marron v. United States*
19 (1927) 275 U.S. 192, 195.)]

20 Even assuming that probable cause for the seizure of some items had been established,
21 there must be a reasonable restriction on the things to be seized (*Burrows v. Superior Court*
22 (1974) 13 Cal.3d 238, 249), so that nothing is left to the officers’ discretion. (*Marron v. United*
23 *States* (1927) 275 U.S. 192, 196; *Andresen v. Maryland* (1976) 427 U.S. 463, 479-482; see also
24 *Thompson v. Superior Court* (1977) 70 Cal. App. 3d 101, 107-108; *Aday v. Superior Court*
25 (1961) 55 Cal. 2d 789, 793-796.

26 The particularity requirement of the Fourth Amendment is violated where a warrant is
27 vague or excessive in its scope, and the warrant fails to impose a meaningful restriction upon the
28

1 objects to be seized.. (*People v. Frank* (1985) 38 Cal. 3d 711, 722-726; *Burrows v. Superior*
2 *Court* (1974) 13 Cal. 3d 238, 249-250.)

3 The United States Supreme Court has explained that the particularity requirement
4 eliminates the discretion of the officer in deciding what to seize:

5 The requirement that warrants shall particularly describe the things to be seized
6 makes general searches under them impossible and prevents the seizure of one
7 thing under a warrant describing another. As to what is to be taken, nothing is left
8 to the discretion of the officer executing the warrant.

9 (*Marron v. United States* (1927) 275 U.S. 192, 196.)

10 The request in this motion is that the court use the information provided herein plus any
11 information submitted at the hearing or by the Sheriff, to fashion limits that are fair and
12 reasonable.

13
14
15
16 **THE COURT CAN PROTECT ATTORNEY-CLIENT**
17 **PRIVILEGED MATERIALS**

18 Pursuant to *Penal Code* § 1536, “a trial court has the authority to hold an in camera
19 hearing to determine the validity of the assertion of the attorney-client privilege by an attorney
20 suspected of criminal activity...” *People v. Superior Court* (Bauman & Rose), 37 Cal. App. 4th
21 1757, 1767 (Cal. App. 2d Dist. 1995) “The probable cause showing for the warrant does not
22 obviate the need for an in camera hearing on whether the privilege applies...” 37 Cal. App. 4th
23 1767.

24 **THE LEGITIMATE SCOPE OF THE INVESTIGATION**

25
26 **1. The Criminal Investigation’s Proper Focus**

1 The Sheriff did not make the initial allegations of extortion and they have an obligation
2 to make some reasonable investigation to see if the charges have merit. A good investigation
3 will clear the innocent. It is not uncommon in Domestic Violence cases, to see attempts at
4 shifting the blame to the victim. It is the role of law enforcement to investigate all sides of an
5 incident but in doing so, law enforcement should not forget California Constitution, Article I,
6 Section 28 (b)(1) which states a victim has the right:

7 (1) To be treated with fairness and respect for his or her privacy and dignity, and
8 to be free from intimidation, harassment, and abuse, throughout the criminal or
9 juvenile justice process.

10 **2. Lawyer's Prepared a Document Calling for the Destruction of Evidence**

11 There is a provision of the "Term Sheet" that calls for the surrender of "evidence" by
12 Grigorieva to the Gibson side. That provision calls for the destruction of that evidence. There is
13 a provision for payment of money once the "evidence" is destroyed. Such an agreement is
14 potentially illegal on the part of those representing the criminal perpetrator.¹ While
15 misdemeanors can be civilly compromised, an assault with great bodily injury is a felony. Also,
16 Domestic Violence cases are statutorily excluded from civil compromise. The verbal threats on
17 the audio tapes may have been subject to compromise but the destruction of evidence of
18 Domestic Violence as it relates to custody issues is also not something that can be compromised,
19 civilly. In addition, the destruction of evidence relevant to a DCFS investigation is also ethically
20 questionable (at best).

21 It is highly unlikely that a group of the most experienced and respected attorneys in Los
22

23 ¹

24 1. Section 32 provides that: "*Every person who, after a felony has been committed, harbors,*
25 *conceals or aids a principal in such felony, with the intent that said principal may avoid or*
26 *escape from arrest, trial, conviction or punishment, having knowledge that said principal has*
27 *committed such felony or has been charged with such felony or convicted thereof, is an*
28 *accessory to such felony.*" (Italics added.)

1 Angeles are going to state that the agreement was criminal and caused by extortion. Unless they
2 do, the agreement, although ill advised and ethically questionable, is not criminal.

3 As this court determines what aspects of the mediation (and communications both before
4 and after the mediation) are relevant to an investigative inquiry, the court can consider the “Term
5 Sheet” itself. This document, on its face, demonstrates that the Gibson side gained a major
6 economic benefit from the agreement and that Oksana Grigorieva and Lucia suffered economic
7 detriment. While it could be simply that this is the result of failed extortion, the economic
8 benefit to the alleged victim is also a significant factor to consider in balancing investigative
9 needs against the privacy rights of Ms. Grigorieva.

10 **WHAT THE ATTACHED DOCUMENTS DEMONSTRATE**

11 As shown by Exhibit 1, the concept of financial protection for Lucia and Oksana
12 Grigorieva was articulated by Mel Gibson in November of 2009. This was at the time that he was
13 asking Oksana Grigorieva to sign a cohabitation agreement that gave her no money if there was a
14 breakup. He says that they should not “let this shitty agreement be a stumbling block” [to their
15 relationship] and that they can change “what needs to be changed”.

16 Exhibit 2 shows that as they are approaching the mediation, Ms. Grigorieva’s
17 disagreement with Mr. Gibson is not about money for her but for Lucia.

18 “That was very unfare to ur daughter. I don’t care about me.”

19 Exhibit 3 is an e-mail that addresses the playing of the audio recordings. It starts with a
20 very painful recount of how the loved each other and how their relationship was lost. She adds,

21 “Im going to the church with Lucia and I'm praying evryday to ur healing and to
22 mine.”

23 Even the reference to the audio is apologetic and follows her statement about her love for
24 him.

25 I loved u so much, I couldn't even look at another man. Why was there so much gelousy and anger.

26
27 “As far as the tapes go. I only played one to my lawyer, becouse on march 15
28

1 Michelle proposed on ur behalf not a very generous gift for our daughter and there
2 was nothing for me.”

3 The reference to Michelle is a reference to Exhibit 3 where Ms. Grigorieva states with
4 reference to Mr. Gibson’s offer:

5 “That was very unfare to ur daughter. I don’t care about me.”

6 This is simply two parents who were in love (and at that time may still have been in love),
7 trying to work things through in a very tragic and imperfect way. The entire extortion debacle is
8 a distraction from the real issues in the family case. It is also distraction from the real issues in
9 the Domestic Violence case where the courts work **with** families to try to repair them, once the
10 offender takes responsibility for his actions.

11 Unfortunately, as part of his defense to the Domestic Violence allegations, Mel Gibson
12 has filed extortion charges that (as shown above) are without any merit. The Sheriff needs to
13 investigate as an objective party but in doing so, it must respect the rights of the Domestic
14 Violence victim.

17 **CONCLUSION**

18
19 The affidavit was very thin and contained no meaningful explanation as to what law
20 enforcement expected to find on Ms. Grigorieva’s computer. There are serious questions about a
21 mediation where a crime victim is being asked to provide evidence of the crime for destruction
22 but no one is accusing the attorneys involved of intending to commit a crime. The agreement was
23 ill advised by a Russian born, Ukraine raised person who is advised by several highly experienced
24 attorneys could not be expected to know the technicalities of the law. Certainly none of the
25 lawyers or retired judges participating seemed to think the agreement was illegal.

26 As an extortion claim has been made, it needs to be investigated. However, the court can
27 limit the scope of the warrant to materials responsive to the very small window of possible facts

1 that would support an extortion charge. (To protect the sealed nature of the affidavit, no further
2 information is provided in writing). To the extent that a crime/fraud exception is urged in terms
3 of scope, a special master should be appointed.

4
5 Dated: October 11, 2010

6 _____
7 Daniel Horowitz
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28