Thomas A. Mesereau, Jr. (SBN 91182)
Susan C. Yu (SBN 195640)
COLLINS, MESEREAU, REDDOCK & YU
1875 Century Park East, 7th Floor
Los Angeles, CA 90067
Telephone: 310-284-3120
Facsimile: 310-284-3133

Robert M. Sanger (SBN 58214)
SANGER & SWYSEN
233 E. Carrillo Street, Suite C
Santa Barbara, California 93101
Telephone: 805-962-4887
Facsimile: 805-963-7311

Brian Oxman (SBN 072172)
Oxman & Jaroscak
14126 East Rosecrans
Santa Fe Springs, CA 90670
Telephone: 562-921-5058
Facsimile: 562-921-2298

Attorneys for Defendant
MICHAEL JOSEPH JACKSON

* unsealed pursuant to 6/16/05 Court order

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

MICHAEL JOSEPH JACKSON

Defendant.

CASE NO. 1133603

MR. JACKSON'S MOTION IN LIMINE TO LIMIT UNCHARGED CONSPIRATOR HEARSAY AND ACCOMPANYING DOCUMENTS

TIME: 9:30 a.m.
DATE: January 28, 2005
PLACE: Department SM-2

FILED UNDER SEAL

A. Introduction.

Mr. Michael Jackson submits this Memorandum in support of his Motion in Limine to Limit Uncharged Conspirator Hearsay. Mr. Jackson requests the court make the following orders in limine:

(1) An order prohibiting the attorneys for plaintiff from offering ay evidence of and prohibiting plaintiff's attorneys and witnesses from making any reference in the presence of jurors or prospective jurors of any uncharged conspirator hearsay statements, unless and until plaintiff establishes by independent evidence the existence of the alleged conspiracy to the trier of fact, the jury, by non-hearsay evidence as a preliminary fact under Evidence Code section 402;

(2) An order requiring the attorneys for plaintiff to instruct their witnesses of the court's exclusionary order on this motion; or in the alternative,

(3) An order requiring the attorney for the plaintiffs, prior to making any reference, comment, or assertions concerning uncharged conspirator hearsay, to approach the bench and make an offer of proof to the court so that the court, prior to any presentation of the above-referenced evidence to the jury, can make a preliminary determination of the relevancy, admissibility, and foundation thereof.

Mr. Jackson's Motion is based on the following grounds:

(1) These orders are necessary to insure Mr. Jackson will be accorded a fair trial and the trial record of this case will not be tainted with reversible error to Mr. Jackson;

(2) Use of uncharged conspirator hearsay should not be permitted to establish the existence of the alleged conspiracy, and plaintiff may only utilize independent non-hearsay evidence sufficient to establish the existence of the alleged conspiracy as a preliminary fact shown by a preponderance of the evidence before such hearsay may be brought before the trier of fact;

(3) Mr. Jackson would be deprived of a fair trial and the right to cross-examine hearsay declarants should plaintiff be allowed to introduce uncharged conspirator hearsay prior to establishing the preliminary fact of the existence of the alleged conspiracy.[1/]

1/ Allowing these materials into evidence would result in a violation of Mr. Jackson's right to a fair trial, due process of law, a fair and impartial jury, and violate the constitutional guarantees of the 4th, 5th, 6th, and 14th Amendments to the United States Constitution and the California Constitution. Plaintiff is offering these items only because of the public nature of these proceedings and Mr. Jackson's notoriety. The effort to inflame the jury deprives Mr. Jackson of equal protection of the laws and the privileges and

B. Uncharged Conspirator Hearsay Should Not Be Permitted Unless and Until Plaintiff Establishes by Independent Evidence the Existence of the Alleged Conspiracy.

1. Plaintiff's Allegations.

Plaintiff filed this action on December 18, 2003, charging Mr. Jackson with seven (7) counts of Lewd Acts Upon a Child in violation of Penal Code section 288a and two (2) counts of administering an intoxicant to a minor in violation of Penal Code section 222. The Complaint was based on interviews from three (3) complaining witnesses: Janet Arvizo, then age 35, who is the mother of the two (2) minor complaining witnesses, Gavin Arvizo, then age 14, and Star Arvizo, then age 13. The charges alleged Mr. Jackson manually masturbated Gavin Arvizo while he was unconscious and unable to recall any of the events from alcohol consumption, and he improperly touched Star Arvizo's leg over his clothes.

Mr. Jackson voluntarily surrendered to the Santa Barbara Sheriff's Office on November 20, 2003, and was arraigned on the original charges on January 16, 2004. Mr. Jackson pleaded not guilty. However, the prosecution soon abandoned the December 18, 2003, Complaint and convened a Grand Jury to return an Indictment against Mr. Jackson.

Without the benefit of witness cross-examination, the Grand Jury issued an indictment on April 26, 2004, consisting of one (1) count of conspiracy with five (5) other unindicted individuals in violation of Penal Code section 182, four (4) counts of Lewd Acts Upon a Child in violation of Penal Code section 288a, one (1) count of Attempted Lewd Act Upon a Child in violation of Penal Code sections 664 and 288a, and four (4) counts of Administering an Intoxicant in the Commission of a Felony in violation of Penal Code section 222.

2. The witnesses changed the dates and facts for the Indictment.

The Indictment was markedly different from the December 18, 2003, Complaint. The Complaint contained seven (7) counts of Lewd Acts Upon a Child, where the Indictment contained only four (4), plus one of Attempted Lewd Act Upon a Child. Somewhere, the perception of the facts in this case was significantly altered, and the Indictment no longer followed the details and chronology recounted by Psychologist Katz.

---

immunities guaranteed others. Plaintiff's effort to introduce them will deprive Mr. Jackson of the right to adequately prepare for trial, along with destroying his rights to a fair tril.

In addition, the Complaint alleged two (2) counts of Administration of an Intoxicant, where the Indictment alleged four (4). In view of repeated interviews and witness statements, the change in facts, counts, and dates has created an irreconcilable inconsistency with no explanation.

The dates of the alleged crimes also changed. The Complaint said five (5) of the seven (7) "lewd acts" allegedly occurred "on or between February 7, 2003, and March 10, 2003," and all the other counts occurred between February 20 and March 10, 2003. But the Indictment now says that all but the new conspiracy charges occurred between February 20, and March 12, 2003. Now it is a conspiracy starting February 7, but no lewd act until February 20. This was not just a narrowing of the time period, but it was also a lengthening of the time period . Suddenly, something happened on March 12 that was not included in the Complaint.

In the Indictment, Mr. Jackson was charged with conspiracy to engage in Child Abduction, False Imprisonment, and Extortion. He was not indicted on the actual objects of the conspiracy itself, nor were these acts charged as stand-alone crimes or attempted crimes. Not even the alleged co-conspirators are charged with the crimes.

3. Plaintiff should be required to prove the alleged conspiracy independent of uncharged conspirator hearsay statements.

The five (5) uncharged co-conspirators are alleged to have engaged in the primary acts of child abduction, extortion, and false imprisonment. The allegations are so bizarre that when it comes time for plaintiff to make these assertions to the jury, they will be presented through a long recital of hearsay statement from the complaining witnesses. The inherent untrustworthiness of hearsay should alarm this court as to the nature of these claims and the mental condition, including paranoid schizophrenia with delusions, of the person making the claims.

Evidence Code section 1200 defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code § 1200, subd. (b).) None of the hearsay statements plaintiff seeks to proffer will would be admissible in evidence unless they come within the exception of co-conspirator hearsay contained in Evidence Code section 1223.

However, plaintiff should be required to make an independent showing of conspiracy to the jury, the trier of fact, before plaintiff is permitted to present evidence of uncharged conspirator hearsay. That showing should be without reference to any of the hearsay plaintiff seeks to introduce in this case, and without the benefit of claimed statements from uncharged conspirators heard by third persons who might testify as witnesses. This proof should be required by a preponderance of the evidence as a preliminary fact necessary and as a prerequisite to permitting any uncharged conspirator hearsay to come before the jury.

B. Uncharged Conspirator Hearsay Should Not Be Considered Until the Preliminary Fact of the Alleged Conspiracy is Independently Established to the Trier of Fact

Evidence Code section 1223 provides an exception to the hearsay rule as to statements made during the existence of a conspiracy that are in furtherance of its objective:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
> (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b), or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Originally, courts held that the conspiracy "need be proved only to the extent of establishing prima facie evidence of the fact," and need not be established by a preponderance of the evidence or beyond a reasonable doubt. (*People v. Talbott* (1944) 65 Cal.App.2d 654, 663; *People v. Jourdain* (1980) 111 Cal.App.3d 396, 404; *People v. Earnest* (1975) 53 Cal.App.3d 734, 741.) Such cases held that any evidence received by virtue of this rule is necessarily received conditionally, since the jury must first pass judgment on the question as to whether the asserted conspiracy has been proved. (*People v. Talbott*, *supra*, 65 Cal.App.2d at 663.)

In *People v. Herrera* (2000) 83 Cal.App.4th 46, however, the court held that the proponent of a hearsay statement offered under this exception must as a foundational matter offer evidence sufficient for the trier of fact to determine that the preliminary fact (namely, *the conspiracy*) is established – *and must do so by a preponderance of the evidence standard.* (*Id.*, at 62.) In so holding, the court relied on the following rationale.

First, as the court noted, section 1223 "clearly states" evidence of a coconspirator's statement is admissible if supported by the "admission of evidence sufficient to sustain a finding" it was made by the declarant, while participating in the conspiracy, in furtherance of the objective of the conspiracy and made prior to or during the time that the party was participating in the conspiracy. (*Ibid.*, quoting Evid. Code, § 1223, subd. (c).) It necessarily follows that the existence of a conspiracy at the time the statement is made is the preliminary fact to the admissibility of the alleged coconspirator's statement. (*People v. Herrera*, *supra*, 83 Cal.App.4th at 62.)

Second, as the court further noted, sections 400 through 405 define the terms and set forth the procedures to be utilized where the admissibility of evidence is dependent upon the existence of a preliminary fact. (*People v. Herrera*, *supra*, 83 Cal.App.4th at 61; Evid. Code §§ 400-405.) As used in these sections, a "'preliminary fact' means a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence." (Evid. Code, § 400.) So defined, section 402 provides:

> (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.
>
> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.
>
> (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

Section 403 further states:

> "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:
>
> "(1) The relevance of the proffered evidence depends on the existence of the preliminary fact; [¶] ... [¶] (b) Subject to Section 702 [(personal knowledge of a witness)], the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.
>
> "....
>
> "(c) If the court admits the proffered evidence under this section, the court:
>
> "(1) May, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.
>
> "(2) Shall instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists."

Although section 403, subdivision (c) does not indicate by what standard of proof the jury must be satisfied of the existence of the preliminary fact, section 115 states that "[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115.) Accordingly, the *Herrera* concluded the correct standard of proof for a preliminary fact under 403 is evidence sufficient to support a finding by a preponderance of the evidence. (*People v. Herrera*, *supra*, 83 Cal.App.4th at 62; *People v. Marshall* (1996) 13 Cal.4th 799, 832-833; *People v. Simon* (1986) 184 Cal.App.3d 125, 134.) In other words, there must be sufficient evidence to enable a reasonable jury to conclude that it is more probable than not that the fact exists. (*People v. Herrera*, *supra*, 83 Cal.App.4th at 62; *People v. Simon*, *supra*, 184 Cal.App.3d at 132.)

Based on the foregoing, the *Herrera* court concluded the proponent must offer evidence sufficient for the trier of fact to determine that the preliminary fact, the conspiracy, is more likely than not to have existed. (*People v. Herrera*, *supra*, 83 Cal.App.4th at 62.) The judge is to make the determination of whether a reasonable jury could find, by a preponderance of the evidence, that the preliminary fact has been established. This, the court added, was in effect a statutory application of the standard set forth in section 403 to the foundational requirement of a conspiracy for the purposes of admission of a coconspirator's statement. (*Ibid.*)

C. There Is No Prima Facie Evidence Of A Conspiracy In This Case.

Plaintiff should be required to present to the jury independent evidence to the jury sufficient to allow the judge to determine that a reasonable jury could conclude, by a preponderance of the evidence, that a conspiracy exists before plaintiff is permitted to present evidence of uncharged conspirator hearsay. Plaintiff may not present any uncharged conspirator hearsay prior to making that showing to the jury and the determination by the judge that a reasonable jury could so find. This proof should be required as a preliminary fact necessary and as a prerequisite to permitting any uncharged conspirator hearsay to come before the jury.

Once independent proof of a conspiracy has been shown, three preliminary facts must be established: (1) the declarant was participating in a conspiracy at the time of the declaration; (2) the declaration was in furtherance of the objective of that conspiracy; and (3) at the time of the declaration, the party against whom the evidence is offered was participating or would later participate in the conspiracy.

(*People v. Leach* (1975) 15 Cal.3d 419, 430-431, fn 10.)

Whether statements are made "in furtherance of a conspiracy" depends upon an analysis of the totality of the facts and circumstances. (*People v. Hardy* (1992) 2 Cal.4th 86, 146.) Statements made after the original objective of the conspiracy has been attained or abandoned are inadmissible unless there is sufficient independent evidence to establish prima facie that the conspiracy continued in existence at the time the statements were made. (*People v. Leach, supra*, 15 Cal.3d at 431-433.)

In this case, Mr. Jackson will not second guess the bizarre nature of the testimony plaintiff wishes to offer to support its far fetched conspiracy theories. Rather, the important point for this court to recognize is that the conspiracy must be established as a preliminary fact independent of any uncharged conspirator hearsay before the jury is permitted to hear such hearsay. In addition, the existence of the conspiracy needs to be established by a preponderance of the evidence to the jury before any uncharged conspirator hearsay may come before the jury.

D. Conclusion.

For the foregoing reasons, Mr. Michael Jackson requests his Motion in Limine to Limit Uncharged Conspirator Hearsay.

DATED: January 18, 2005

Respectfully submitted,
Thomas A. Mesereau, Jr.
Susan Yu
COLLINS, MESEREAU, REDDOCK & YU

Robert M. Sanger
SANGER & SWYSEN

Brian Oxman
OXMAN & JAROSCAK

By: _____

R. Brian Oxman
Attorneys for defendant
Mr. Michael Jackson