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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. MICHAEL JOSEPH JACKSON, Defendant.	Case No. 1133603 NOTICE OF MOTION AND MOTION TO SET ASIDE THE INDICTMENT (Penal Code § 995); MEMORANDUM OF POINTS AND AUTHORITIES ~~FILED UNDER SEAL~~ Honorable Rodney S. Melville Date: July 9, 2004 Time: 8:30 am. Dept: SM 2

ORIGINAL

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF SANTA BARBARA, TOM SNEDDON, AND DEPUTY DISTRICT ATTORNEYS RON ZONEN, GERALD FRANKLIN AND GORDON AUCHINCLOSS:

PLEASE TAKE NOTICE that Defendant Michael J. Jackson hereby moves and on July 9, 2004, at 8:30 a.m., or as soon thereafter as the matter may be heard, in the above-entitled court, will move the Court for an order setting aside the Indictment filed on April 30, 2004, or for such other and further relief as the Court may deem just and proper.[1] Relief is required because: (1) the lawful evidence presented to the grand jury was insufficient to show the requisite probable cause of the elements of the crime charged; (2) that the lawful evidence received by the grand jury did not create a strong suspicion that the crimes of conspiracy to commit child abduction, false imprisonment and extortion, lewd act upon a child, attempt to commit a lewd act upon a child, and administering an intoxicating agent to assist in commission of a felony occurred; and (3) the government's conduct before the grand jury proceedings and the introduction of testimony inadmissible over objection at trial was so prejudicial as to require the entire indictment to be set aside.

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[1]Petitioner makes this motion pursuant to Penal Code § 995 at the earliest time practicable given the timing of the arraignment on the indictment and the excessive length of the grand jury transcript. Mr. Jackson intends to address other issues pertaining to the government's conduct and to the proceedings before the grand jury at a subsequent time.

The motion will be based on this Notice of Motion, the Memorandum of Points and Authorities served and filed herewith, the grand jury transcript, such supplemental memoranda of points and authorities as hereafter may be filed with the court, all pleadings and documents heretofore filed with the Court and such oral argument as may be presented at the hearing on the motion.

Dated: June 29, 2004

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MICHAEL JOSEPH JACKSON

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The grand jury proceeding leading up to the indictment of Michael Jackson was remarkable. The transcripts reveal a complete disregard on the part of the prosecutor for his duties to present evidence fairly and accurately and to behave in a fashion that would have been approved by a judge.

Information was freely conveyed to the grand jurors without regard to the rules of evidence. The prosecutors bullied and argued with witnesses. The prosecutors became involved in what appeared to be personal arguments with other witnesses. At least once, the prosecutor vouched for his own version of events while not under oath and accused witnesses of lying. Witnesses were told not to provide information to the defense. Prosecutors suggested without foundation that Mr. Jackson's defense investigation is improper. The prosecutors ran the proceedings as if they employed the grand jurors. They proceeded by innuendo and sarcasm, impugning Mr. Jackson by ridiculing those allegedly associated with him and even those who sought to legally represent him.

Mr. Jackson is a celebrity, however, as this court has duly noted, he is entitled to due process and fundamental fairness like everyone else. He is entitled to no more, but no less consideration, than anyone else who stands accused by the government. Here, the prosecutors allowed themselves to act in a fashion that, one would hope, they would not act in any other case. It is up to the Court at this time to look critically and dispassionately at the manner in which this grand jury proceeding was conducted and call it for what it is.

Taking only one example from dozens, no Court has ever condoned the kind of grand jury decorum exhibited by Mr. Sneddon during an exchange with witness

> Q Did you at the time that you heard that these serious charges had been leveled against a worldwide known entertainer, ever come to the DA's office and say, "Hey, Mr. Sneddon, I've got these ." or, "I heard about these ," or, "You might want to know this." Did you ever do that before you went on national TV?
>
> A No. I found the DA's office to be hostile when I called. I found the head DA,

that being yourself, to be very uncooperative.
In fact, I called your office in the beginning to find out whether my client's son was the person who was charged with molestation. You initially refused to tell me. I asked you if my client's son was dying. You initially refused to tell me. It was only after I told you that I might have to tell the press of your reaction that you called back and then told me.
I found your attitude, conduct to be very hostile, and not a office that would be wanting to hear from me, period.
Now, I have other information. And if you want to ask me other information, I'll provide –

Q That is a total – that is not the way that conversation went and you know it.

A You know it too.

Q I explained to you why at that time we couldn't tell who the victim was. Because nobody knew the family at that time, did I not?

A No, you didn't.

Q And then you said, "Wouldn't you as the father want to know if the child was sick?" And I said to you, "Okay. I'm going to tell you." And I did tell you the child was fine, did I not?

A I'll tell you, I remember the conversation specifically because I took notes.

Q So do I.

(RT 715:19-716:25.)

The transcript reveals that Mr. Sneddon was personally upset by the fact that had embarrassed him by making public statements to the media. Mr. Sneddon, through bulling tactics, inadmissible evidence, and his own personal vouching for his version of events, wanted to destroy this witness and establish to the captive grand jurors that he, Tom Sneddon, was the victor. This was an outrageous display of power that would not be allowed before a judge in any open court.

There is no case in the history of the State of California that has condoned anything like the abuse of power demonstrated in this grand jury proceeding. It is a paradigm of what a prosecutor is not allowed to do behind closed doors and a case in which the indictment must be set aside.

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PROCEDURAL SUMMARY

The District Attorney officially commenced this action on November 18, 2003, with a massive, media-covered search conducted at Mr. Jackson's home and other locations.. On November 19, 2003, the District Attorney held a press conference to announce an arrest warrant alleging violations of Penal Code § 288 (a). Mr. Jackson voluntarily surrendered to the Santa Barbara County Sheriff on November 20, 2003.

The District Attorney filed a complaint on December 18, 2004. The complaint alleged seven counts of Penal Code § 288(a) and two counts of Penal Code § 222.

Mr. Jackson appeared for arraignment on the complaint on January 16, 2004 and entered pleas of not guilty. In March 2004 the prosecution convened a grand jury in lieu of a preliminary hearing. After hearing 12 days of evidence and a day of argument presented by the District Attorney, the grand jury returned an indictment on April 21, 2004. The indictment alleged violations of Penal Code §§ 182, 288(a), 664 and 222.

Mr. Jackson appeared for arraignment on the indictment on April 30, 2004. He entered a plea of not guilty to all counts.

THE SO-CALLED FACTS PRESENTED TO THE GRAND JURY

The grand jury proceedings in this matter spanned from March 29, 2004 to April 21, 2004, producing an eight-volume transcript of more than 1900 pages. Much of what was presented was inadmissible over objection at trial.

A. BACKGROUND

L. THE PERFUNCTORY PRESENTATION OF DEFENSE MATERIAL PROVIDED TO THE PROSECUTION

The District Attorney introduced exculpatory materials, provided by defense counsel, to the grand jury in a perfunctory manner that undermined the grand jury's obligation to independently evaluated those materials.

Mr. Zonen compared the presentation of those materials to a "grade school" assignment. (RT 835:12016.) He went on to inform the jurors that the statements of Mr. Jackson's counsel "were made by them in their role as partisan advocates for the accused, not as witnesses." (RT 837:7-9.) He commented to the grand jurors that "[m]uch of the material in the 61 exhibits contain hearsay statements, or refer to events that have already been testified to before the Grand Jury in this proceeding." (RT 837:22-25.) After commenting on the materials, he stated, "[t]he District Attorney submits the materials presented by the defense without commenting on its character, weight, importance, relevance, or materiality. (RT 838:11-16.) After claiming that the District Attorney would not comment on the defense evidence, Mr. Zonen stated, "[i]t is for you to decide what weight or significance, if any, should be given to those unsworn statements in determining whether additional witnesses or evidence should be produced." 838:17-20.) He stated "[y]ou are advised that the materials in the exhibits portion of the binder contain statements and information that were not made under oath." (RT 841:13-16.)

The District Attorney's improper commentary prevented the grand jurors from viewing the exculpatory evidence independently. Pointing out that statements are "unsworn" and "hearsay" to a grand jury made up of laypersons had the effect of asking the grand jury to discount exculpatory evidence as less valuable than the handpicked evidence presented by the prosecution.

The District Attorney encouraged the grand jurors to read through the material at a fast pace and belittled the value of the evidence by stating that it could be "figured out." In response to a question from a grand juror regarding whether the prosecution wanted them to "read the whole thing today", Mr. Zonen stated, "[y]ou'll figure this out fairly rapidly." (RT 843:24-844:4.)

Furthermore the District Attorney removed 9 of the 60 exhibits and obscured portions of 10 other exhibits. (RT 838:2-5.) So much of the evidence presented to the grand jurors was "blacked out" that it prompted one of the grand jurors to ask the prosecutors, "[d]id you guys get any sleep this weekend." (RT 839:15-16.)

ARGUMENT

I.

THE GRAND JURY PROCESS IS DESIGNED TO PROTECT THE ACCUSED FROM UNWARRANTED PROSECUTION

The grand jury process in California is a real, not perfunctory, safeguard to a person accused. In *Johnson v. Superior Court* (1975) 15 Cal. 3d 248, 253-254, the Supreme Court emphasized the importance of the grand jury in our system of justice:

> The grand jury's historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor is as well-established in California as it is in the federal system.

The Supreme Court has enumerated four components to the grand jury process:

First, the prosecutor must not abuse his or her trust in the secret grand jury room. The prosecutor has a duty to present the case fairly both as to the facts and the law. (*Johnson v. Superior Court* (1975) 15 Cal. 3d 248; *Cummiskey v. Superior Court* (1992) 3 Cal. 4th 1018.)

Second, the grand jury must deliberate in a fair and impartial fashion, untainted by bias, prejudice, public opinion or inflammatory evidence. (*People v. Backus* (1979) 23 Cal. 3d 360.)

Third, the grand jury must determine if "a man of ordinary caution or prudence could entertain a strong suspicion of guilt of the accused, and if some rational ground exists for an assumption of guilt the indictment will not be set aside." (*People v. Backus* (1979) 23 Cal. 3d 360, 387.)

Fourth, the matter is then submitted to the trial court which must determine under Penal Code Section 995 whether or not the defendant has been indicted without probable cause. (Penal Code § 995; *Greenberg v. Superior Court* (1942) 19 Cal. 2d 319.)

In the case of this indictment, the first three protections failed and it is now up to the

Court to protect Mr. Jackson against an overzealous prosecutor and an improperly returned indictment. As argued below, the prosecutors abused the grand jury process. They bullied witnesses, they allowed extremely prejudicial material to freely come before the grand jurors, they gave short shrift to the law, they vouched for their version of facts over that of sworn witnesses, they argued improper inferences and the grand jurors succumbed to their influence.

One has only to think about how these proceedings would have been different if the accused's attorney were there to object or if a judge had heard the proceeding in open court. How much of what went on to influence and prejudice this jury would have been admissible over objection at trial? That legal question pursuant to Penal Code Section 939.6 must now be answered by this court. The court then must not only excise the inadmissible material but must also determine whether or not the prejudicial effect of the inadmissible material and the conduct of the prosecutors caused prejudice to the grand juror's ultimate decision.

II.

THE TRIAL COURT THAT MUST DETERMINE UNDER PENAL CODE SECTION 995 WHETHER OR NOT THE GRAND JURY ABUSED ITS POWER IN RETURNING THE INDICTMENT

Penal Code Section 995 provides that an in indictment must be set aside when:

> (a) Subject to subdivision (b) of Section 995a, the indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:
> (1) If it is an indictment:
> (A) Where it is not found, endorsed, and presented as prescribed in this code.
> (B) That the defendant has been indicted without reasonable or probable cause.

The court in *People v. Boehm*, (1969) 270 Cal.App. 2d 13, stated that the trial court, in reviewing the indictment, must look to the quality of the evidence as well as the correctness of the procedures leading up to the indictment:

> The law gives an indicted defendant protection against abuse of a grand jury's power. The superior court is empowered to set aside an indictment when it is not based upon the required quality of evidence, or is otherwise not found, endorsed or presented as required by law.

Under *People v. Morris* (1988) 46 Cal.3d 1, a finding of fact must "be an inference drawn

from evidence rather than . . . a mere speculation as to probabilities without evidence" (*ibid.*) – and must logically flow from other facts established in the action. (*Id.*, at 21; Evidence Code, § 600, subd. (b).) While a court "may speculate about any number of scenarios that may have occurred," a reasonable inference "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work." (*People v. Morris, supra*, 46 Cal.3d at 21.)

A grand jury transcript must contain some evidence to support each element of the charged offense or clause. (*Garabedian v. Superior Court* (1963) 59 Cal. 2d 124; *Barber v. Superior Court* (1991) Cal.App. 4th 793, 795.)

The inferences drawn from the evidence must be reasonable. If they are "speculative," it is the reviewing judges's duty to discard those inferences that "derive their substance from guesswork, speculation, or conjecture." (*Birt v. Superior Court* (1973) 34 Cal.App. 3d 934, 938.) The Court has the duty to "resolve the issue in light of the whole record" and "may not limit [its] appraisal to isolated bits of evidence" selected by the prosecution. (*People v. Johnson* (1980) 26 Cal. 3d 557, 577.)

As will be argued below, this indictment is not supported by evidence or reasonable inferences. It must be set aside, particularly the conspiracy count with regard to which there is no proof of the elements of conspiracy.

As will also be shown below, the prosecution abused its power and violated its duty to go into the grand jury room and present the evidence fairly and accurately. They offered and allowed evidence extremely prejudicial to Mr. Jackson which would have never been allowed over objection at trial. In fact, much of the most prejudicial prosecutorial conduct and evidence probably would have been excluded by a trial judge *sua sponte*. Had a trial jury heard even portions of it, a mistrial would have been the only remedy. Here the only remedy now is to set aside the indictment.

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III.

THE ADMISSIBLE EVIDENCE IS INSUFFICIENT TO ESTABLISH A STRONG SUSPICION OF THE ELEMENTS NECESSARY TO SHOW MR. JACKSON WAS PART OF A CONSPIRACY

Although this indictment must be set aside due to the prejudicial effect of the misconduct of the prosecution, it is also the case that the elements of the crimes charged are not supported by the evidence which was presented which would have been admissible over objection at trial (Penal Code Section 939.6.) The elements of conspiracy are specific and require proof that the accused, himself, is actually guilty. In this case, there was innuendo, guilt by association and a tremendous amount of inflammatory and prejudicial material. There is no way for this court to guess how the grand jurors might have reacted overall if they had been properly presented with just the evidence. However, for the purpose of this analysis, it is clear that there was no rational basis to find that Mr. Jackson was a conspirator based on the law of conspiracy itself.

CALJIC 6.10 defines conspiracy as:

> A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit a crime and with the further specific intent to commit that crime, followed by an overt act committed in this state by one [or more] of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.
>
> In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the indictment to be [an] overt act[s] and that the act committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when the alleged overt act was committed.
>
> The term "overt act" means any step taken or act committed by one [or more] of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act", the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that the step or act, in and of itself, be a criminal or an unlawful act.

Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 390.) Accordingly, to prove a particular person committed a particular offense, the prosecution must show not only that that person intended to agree with his co-conspirators but also that he and they intended to commit the elements of that offense. (*People v. Horn* (1974),12 Cal.3d 290, 296.)

A. Proof of Intent to Agree or Conspire

There is simply no evidence that Mr. Jackson had the specific intent to agree or conspire with anyone about anything. The prosecution called witnesses who lacked personal knowledge as to the nature of Mr. Jackson's relationships with the alleged co-conspirators. In particular, were asked to testify regarding Mr. Jackson's personal and business affairs. Despite their lack of personal knowledge, these witnesses were allowed to speculate regarding Mr. Jackson's involvement with the people named as co-conspirators in the indictment. Furthermore, none of this evidence established probable cause to believe that Mr. Jackson had the specific intent to agree or to conspire with the alleged co-conspirators.

B. Proof of Specific Intent to Commit Specific Crimes

The indictment must be set aside because the grand jury was not presented with admissible evidence that established Mr. Jackson had the specific intent to commit the particular crimes that are alleged as the object of the conspiracy. The prosecution presented the grand jury with speculation and innuendo to suggest that Mr. Jackson was involved in a criminal conspiracy. Nothing presented to the grand jury established that Mr. Jackson had the specific intent to commit the elements of the alleged conspiracy's three target crimes of false imprisonment, child abduction and extortion.

CALJIC 9.70 states that a conviction for child abduction requires proof of the following elements:

1. A person took, enticed away, kept, withheld, or concealed a child;
2. That person did not have a right of custody of the child;
3. That person acted maliciously; and

4. With the specific intent to detain or conceal the child from a lawful custodian.

No evidence was presented to establish that Mr. Jackson intended to commit any of the elements of child abduction. In particular, no evidence was presented that would establish that he specifically intended to act maliciously or that he specifically intended to separate children from their lawful custodian.

The testimony that Mr. Jackson was aware was inadmissible over objection at trial because it was utterly lacking in foundation. There was no admissible evidence that Mr. Jackson had any personal knowledge of such an alleged crime and certainly no evidence that he had the specific intent that such a crime be committed.

CALJIC 16.135 states that a conviction for false imprisonment requires proof of the following elements:

1. A person intentionally and unlawfully restrained, confined or detained another person, compelling him or her to stay or go somewhere;
2. The other person did not consent to this restraint, confinement or detention.

No evidence was presented that Mr. Jackson had any knowledge that anyone intended to confine or detain Further, no evidence was presented that established that Mr. Jackson himself specifically intended to restrain, confine or detain

CALJIC 14.70 states that a conviction for extortion requires proof of the following elements:

1. A person obtained property from the alleged victim;
2. The property was obtained with the consent of the alleged victim;
3. The alleged victim's consent was induced by the wrongful use of force or fear; and
4. The person who wrongfully used force or fear did so with the specific intent to induce the alleged victim to consent to the giving up of his or her property.

There was no evidence that anyone intended to commit extortion and no evidence was presented to show that Mr. Jackson specifically intended to commit any of the elements of that

crime.

IV.

MERE ASSOCIATION WITH THE PERPETRATOR OF A CRIME IS NOT SUFFICIENT EVIDENCE TO ESTABLISH PARTICIPATION IN A CRIMINAL CONSPIRACY

> [S]o many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided.

(*Krulwitch v. United States* (1949) 336 U.S. 440, Justice Jackson concurring.)

Mr. Jackson is the only alleged co-conspirator who has been indicted despite the fact that, even under the prosecution's version of facts, based on inadmissible evidence, he was the least involved in the conspiracy of any of the alleged co-conspirators. While the government may consider Mr. Jackson to be the most attractive target of their investigation, it is notable that the evidence linking him to an alleged conspiracy is inadmissible innuendo and speculation that he participated in a conspiracy based on his association with the alleged co-conspirators.

Mere association with the perpetrator of a crime is not sufficient to prove a criminal conspiracy and there must be evidence of some participation in the commission of the offense. (*People v. Manson* (1976) 61 Cal.App. 3d 102, 126; *Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153, 158.) Indeed, "[c]onspiracies cannot be established by suspicions." (*Dong Haw* at 158.) Evidence of an act which furthered another's illegal purpose is not, in itself, sufficient to prove the person doing the act was a member of a conspiracy to accomplish the illegal purpose. (*People v. Samarjian* (1966) 240 Cal.App.2d 13, 17; *People v. Villa* (1957) 156 Cal.App.2d 128, 134; see CALJIC No. 6.18.)

The prosecution attempted to establish Mr. Jackson's participation in a conspiracy by showing his association with the alleged co-conspirators.

was asked to speculate on

Mr. Jackson's association with others, as well. The following is an example of testimony regarding Mr. Jackson's relationship with which would not have been admissible at trial over objection that a sufficient foundation was not established and that his answer is speculative:

325:22-28
Q Okay. And what is his position at Neverland?
A Honestly I'm not sure what his position was. I mean, I know that he would just come to the place, I mean, Neverland Valley. And he was also, I guess, trying to become part of Mr. Jackson's business, or trying to run his business or his traveling tours, that kind of stuff. That's all I know. I mean –

testified to Mr. Jackson's business relationship with and others. (RT 495-504.) The following are examples of inadmissible testimony used by the District Attorney to link Mr. Jackson to a conspiracy:

502:3-12
Q What is ?
A A business that set up to produce Michael Jackson projects, I assume.
Q Okay. Who are the principals in that business?
A If there's any principal other than , then I'm not aware of it.
Q Do you know if Michael Jackson is involved in that company?
A I would assume he would have been. Absolutely. But –

533:12-22
A I think worked with Michael, from what I understand. I don't think he was paid –
Q They were partners in something?
A Yeah, exactly.
Q Partners in what?
A I don't know exactly. Let me think about that. and Michael – has a merchandising contract with Michael that I don't think he's done much with. But I think that's one thing they were developing. And I think he was sort of an advisor to Michael.

testified regarding Mr. Jackson's business and personal relationships with some of the alleged co-conspirators, and to the fact that Mr. Jackson may have used cell phone to speak with some of theses people at various points in time. (RT 1611-1631.) Much of this testimony was based on speculation and lacked any foundation.

had little personal knowledge of Mr. Jackson's association with the supposed co-conspirators, yet the prosecution allowed them to speculate as

to the nature of those relationships. None of the witnesses presented the grand jury with admissible testimony that Mr. Jackson had any involvement in a criminal conspiracy. The prosecution argued that Mr. Jackson must have participated in the alleged conspiracy because he was the reason the other alleged co-conspirators knew each other. (RT 1836.) This is precisely the kind of unreasonable inference that is insufficient to support a finding of probable cause. As argued above, conspiracy is a specific intent crime that requires not only the intent to agree but also the specific intent to commit the elements of the target offenses. The fact that Mr. Jackson has some type of relationship with most of the alleged co-conspirators is not evidence that he had the necessary intent to participate in a conspiracy.

V.

THE EVIDENCE THAT ALLEGEDLY TIES MR. JACKSON TO A CRIMINAL CONSPIRACY IS INADMISSIBLE OVER OBJECTION AT TRIAL

A. "An Indictment Based Solely On Hearsay Or Otherwise Incompetent Evidence Is Unauthorized And Must Be Set Aside On A Motion Under Penal Code Section 995." (*People v. Backus* (1979) 23 Cal. 3d 360, 387.)

The evidence presented to the grand jury that allegedly links Mr. Jackson to a supposed criminal conspiracy to commit child abduction, false imprisonment and extortion is was not admissible at trial over the objection of counsel. As discussed above, conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. (*People v. Backus* (1979) 23 Cal.3d 360, 390.) None of the admissible evidence presented to the grand jury established that Mr. Jackson had either the intent to agree or the intent to commit the offense which is the object of the conspiracy.

The Penal Code states:

> Except as provided in subdivision (c)[3], the grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action, but the fact that evidence that would have been excluded at trial was received does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury.

(California Penal Code section 939.6(3)(b).)

Furthermore, illegally obtained evidence as sole basis of indictment or information does not constitute reasonable or probable cause. (*People v Valenti* (1957) 49 Cal 2d 199, 316 P2d 633.)

The Court of Appeal held, in *People v. Byars* (1961) Cal.App. 2d 794, 795-796, that:

> While all that is required by way of evidence to support an indictment is a reasonable probability of defendant's guilt, the evidence upon which it is found must be competent and admissible; thus, when the only evidence produced against a defendant is incompetent and inadmissible, there exists no reasonable or probable cause to hold him. The proof which will authorize a magistrate in holding an accused for trial must consist of legal, competent evidence. No other type of evidence may be considered by the magistrate. The rules of evidence require the production of legal evidence and the exclusion of whatever is not legal. The same applies to evidence received before the grand jury to support the indictment and if the competency of the evidence is challenged, then it becomes a matter reviewable on a motion to set aside the indictment under section 995, Penal Code.

B. The Overt Acts, Listed In The Indictment, Are Not Supported By The Admissible Evidence.

The District Attorney presented inadmissible evidence in an attempt to show that Mr. Jackson participated in overt acts that supposedly furthered a conspiracy. For example, the first overt act was supported only by an alleged phone call for which there was no adequate foundation.

Overt Act Number 1 states:

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[3] Penal Code section 939.6(3)(c) allows for certain hearsay statements to be admitted at a grand jury proceeding upon the "sworn testimony of a law enforcement officer relating the statement of a declarant made out of court and offered for the truth of the matter asserted." Such statements are admissible only when the officer has "either five years of law enforcement experience or have completed a training course certified by the Commission of Peace Officer Standards and Training that includes training in the investigation and reporting of cases and testifying at preliminary hearings." (Penal Code section 939.6(3)(c).)

The only evidence of this was the disjointed testimony of Her testimony about the telephone call, however, was not admissible over objection at trial because there was no foundation to establish that she was speaking with Mr. Jackson on the telephone. Without that foundation, the evidence has to be excised and there is no basis for this particular Overt Act.

Admissible evidence of the identity of a person answering the telephone arises under the following circumstances: the person's number, as listed in the telephone book, is dialed, the person listed is asked for, and the person who answered identifies himself as the person sought. (See *Union Const. Co. V. Western Union Tel. Co.* (1912) 163 Cal. 298, 305; *People v. Horace* (1954) 127 Cal.App. 2d 366, 369.)

Mr. Zonen attempted to lay the foundation to establish that the person claims to have talked with was Mr. Jackson. but 's answers to his questions were non-responsive and vague. They failed to establish the foundation necessary for the admission of this testimony:

951:15- 957:11

Q At some point in time did you get a personal call from Michael Jackson?
A Yeah.
Q Did Michael Jackson talk to you on a regular basis or was this a unique event?
A This was a unique event.
Q Had you ever spoken with him prior to that?
A Huh-uh.
Q Not really?
A No.
Q You'd met him?
A Yup.
Q And you had seen him—
A On that time initially.
Q The very first time?
A Yeah.
Q You never spoke with him since then?
A Uh-huh. Because I felt as long as I stayed an outsider, I could see clear. Those were my feelings.
...
Q All right. Martin Bashir. When Michael Jackson called you and had this conversation with you, what was the subject matter of the conversation? What did he say to you?

A I don't know why either.
...
Q
wi
A
Q
A
Q
A
Q Okay.
A And that is a quote.
Q All right. Okay. And he told you that specifically?
A Yes.
Q All right. Do you remember where this phone call was received? Where were you at the time? Were you at home? Were you with your parents? Where were you at the time?
A Well, he had left messages with my mom's house. At the time I didn't have a phone. My phone had been disconnected.
And so I told– told him that I would return– my mom gave me a phone number that they had given her.
Q Okay.
A And so I called that number, and that was phone number.
Q Okay.
A I don't know. I don't know. All I know,
Q You don't know her last name?
A
Q Do that one more time more slowly, the name?
A I know because I've– when I returned the computer I put her last name.
Q something like that?
A I've heard her– I've heard it said.
Q Have you ever met her before?
A Never met her.
Q But you've talked with her?
A Many times.
Q She works for whom?
A Michael. She says she was Michael's secretary.
Q All right. All right. And you had this conversation with Michael. It was how long a conversation?
A With
Q No, with Michael. The one you finally had with Michael.
A Oh, well, as long as it took to convince me to say yes to the press conference.
Q Okay. Give me a sense of it? Was it ten minutes, an hour–
A Oh, you know--

Q – something in between?
A I don't know. I don't know. I don't know.
Q Hard to remember at this point?
A (Nods head up and down.)
Q All right. What did Michael Jackson want you to do, or what did he want

Q All right. Did you agree to do that?
A Yes.

No evidence was presented that called Mr. Jackson's phone number. No evidence was presented that the person she spoke with identified himself as Mr. Jackson. No evidence was presented that when she called that she asked for or talked to Mr. Jackson. At certain points in testimony she implies that it was that she actually spoke with about the trip No foundation was established that was able to identify the voice on the telephone as Mr. Jackson's by voice or other circumstances that would give rise to a strong inference that Mr. Jackson was on the other end of the telephone. Nothing that was allegedly said would satisfactorily indicate that the identity of the person on the other end of the line was Mr. Jackson. No evidence was presented that had heard Mr. Jackson speak on any occasion, in person or on the telephone.

There was no foundation to believe that actually spoke to Mr. Jackson on the telephone. This testimony is inadmissible. testimony, regarding the phone call, would never have been allowed to be presented at trial, over the objection of defense counsel. Thus, her testimony regarding the call must be excised.

C. Once The Inadmissible Evidence Is Properly Excised, There Is Nothing That Connects Mr. Jackson To The Overt Acts Or To The Conspiracy Itself.

The admissible evidence presented to the grand jury does not permit a rational inference that Mr. Jackson participated in any overt act that furthered a criminal conspiracy. The inferences drawn from the admissible evidence must be reasonable. If they are "speculative," it

is the reviewing judges's duty to discard those inferences that "derive their substance from guesswork, speculation, or conjecture." (*Birt v. Superior Court* (1973) 34 Cal.App. 3d 934, 938.) The Court has the duty to "resolve the issue in light of the whole record" and "may not limit [its] appraisal to isolated bits of evidence" selected by the prosecution. (*People v. Johnson* (1980) 26 Cal. 3d 557, 577.) Once the innuendo, speculation and testimony lacking foundation is removed from the grand jury transcripts, the admissible evidence does not support a finding of probable cause.

VI.

MANY OF THE OVERT ACTS THAT MR. JACKSON IS ALLEGED TO HAVE PARTICIPATED IN PERSONALLY DO NOT HAVE ANY RATIONAL CONNECTION TO A CONSPIRACY TO COMMIT CHILD ABDUCTION, FALSE IMPRISONMENT AND EXTORTION

The Overt Acts that Mr. Jackson is alleged to have personally participated in are not acts traditionally associated with furthering a conspiracy to commit false imprisonment, child abduction and extortion.

The first Overt Act alleges that Mr. Jackson told Even if it were a fact that had a telephone call with Michael Jackson and he said , this act did not further any conspiracy. This Overt Act is irrelevant to committing child abduction, false imprisonment, and extortion.

Mr. Jackson is accused of personally preventing from viewing a television program during their stay at , providing an alcoholic beverage and a valuable watch to a minor and bringing the to stay as guests at his home (Mr. Jackson is accused of having providing guest accommodations to

, drinking alcoholic beverages in the presence of and providing alcoholic beverages to

These supposed overt acts cannot be rationally inferred to have furthered a conspiracy to commit child abduction, false imprisonment and extortion.

VII.

THE INDICTMENT MUST BE SET ASIDE BECAUSE THE DISTRICT ATTORNEY PRESENTED THE GRAND JURY WITH SO MUCH INCOMPETENT AND IRRELEVANT EVIDENCE THAT IT WOULD BE UNREASONABLE TO EXPECT THAT THE GRAND JURY COULD LIMIT ITS CONSIDERATION TO THE ADMISSIBLE, RELEVANT EVIDENCE

A. The Prosecution Presented The Grand Jury With A Tremendous Amount Of Inadmissible And Irrelevant Evidence.

A selection of evidence which would not be admissible over objection at trial is attached hereto as Appendix A. The sheer quantity of inadmissible evidence is overwhelming. The prosecutors used little or no discipline in regulating what was to come before the grand jury. It is impossible to excise this material after the fact and conclude that the grand jurors would have come to the same conclusion.

The fact that the prosecutors introduced inadmissible evidence, bullied witnesses, allowed extremely prejudicial material to come in, gave short shrift to the law, vouched for their version of facts over that of sworn witnesses, and argued improper inferences, among other things, is an additional basis to set aside the indictment in this case. The extent of this inadmissible evidence was such that it would have been impossible for the grand jury to limit its consideration to admissible and relevant evidence, despite any instructions or advice by the prosecution. The Supreme Court of California, in *People v. Backus* (1979) 23 Cal. 3d 360, 393, held:

> If the grand jury cannot fulfill its obligation to act independently and to protect citizens from unfounded obligations (*In re Tyler* (1884) 64 Cal. 434, 437 [1 P. 884]) when not advised of relevant exculpatory evidence, neither can it do so if it

is invited to indict on the basis of incompetent and irrelevant evidence. It follows therefore that when the extent of incompetent and irrelevant evidence before the grand jury is such that, under the instructions and advice given by the prosecutor, it is unreasonable to expect that the grand jury could limit its consideration to the admissible, relevant evidence (see *People v. Aranda* (1965) 63 Cal.2d 518, 528-529 [47 Cal.Rptr. 353, 407 P.2d 265]), the defendants have been denied due process and the indictment must be dismissed notwithstanding Penal Code section 939.6.

1. Poisoning the Well with the

The District Attorney called many witnesses whose testimony would not have been allowed over objection at trial. The District Attorney eliminated any chance that the grand jury could limit its consideration to admissible and relevant evidence when he chose to call as witnesses on the first day of testimony. Both witnesses proceeded to testify to a large amount of incompetent and irrelevant evidence that poisoned the entire proceeding with highly inflammatory and prejudicial testimony that was inadmissible over objection at trial.

The District Attorney focused s testimony on inflammatory and irrelevant areas from the very beginning of [illegible] about the 1993 lawsuit against Mr. Jackson and prompted to inform the grand jury that the lawsuit resulted in a settlement. Mr. Sneddon asked Mr. [illegible] represented Mr. Jackson in that lawsuit. (RT 64:5-13.) These types of questions and answers violated Mr. Jackson's right to due process from the moment the grand jury began to hear testimony and guaranteed that the grand jury would not be able to function as an independent body with the obligation to protect citizens from unfounded allegations. Any limiting instructions later provided by the prosecution (RT 227) could not unring the bell. By the time the jurors heard these instructions it was too late. This is demonstrated that the grand jurors continued to ask about the 1993 case after they had heard the instructions. (RT 492.)

Additional examples of inadmissible and irrelevant evidence that was heard by the grand jury as a result of testimony includes, but is not limited to the following:

66:11-20 Hearsay
Q And at least in the initial stages when you were contacted, the -- the subject under consideration were all the areas involving in that Bashir tape?
A It was -- it was the Bashir tape, and it was that allegedly Michael Jackson had not, him or his staff had

And, you know, there were vague things. But very vague about, maybe something happened. But very, very vague.

70:28-71:6 Hearsay
A I decided -- well, we had a problem, that is that believed that he had sufficient information to inform what is called

And they -- started to make the report. And the question -- the only question they asked us in this whole thing was, "Do you believe the child was in imminent danger at the present time?" And said, "No, I don't, because the child's with the mother. And he's removed from Michael Jackson. And I don't think there's any risk that he'll be involved with Michael Jackson again." And they said, "Then what are you doing here?"

And either he or I, I can't remember who, spoke up and said, "We are making the report. I'm a mandatory child reporter. I need to make a report. I'm making the report."

And the question is, again, what -- "Do you believe he's -- the child is in any imminent danger?" And, again, the answer was, "No. I just told you this. We don't think the child's in imminent danger because he's with his mother. We're making the report. You do what you want to do with this report."

73:24-25 Leading
Q Okay. So at some point after all of that, just -- you contacted someone, right?

74:10 Leading
Q And that's what happened, correct?

75:3-7 Leading
Q Eventually you had another contact with the Department and Family Services in Los Angeles as a result of their failure to incorporate some information to a report that was leaked to the media, correct?
A Yes.

75:8-76:6 Non-responsive
Q And did you express -- in other words, the information that was leaked did not [illegible] you had tried to contact them and report this case?
A Well, I was astounded, number one, that the department leaked anything after I went to the trouble that I went to to keep this secret. And then to leak a report like they did that was created after Michael Jackson was arrested.

NOTICE OF MOTION AND MOTION TO SET ASIDE INDICTMENT
(Penal Code § 995)

76:7-12 Assumes Facts not in Evidence, Leading
Q Let me conclude with this question to you. Since the charges have been filed against Mr. Jackson back in November, or December, actually, of 2002, there's been extensive media coverage, and that coverage is focused upon your client, correct?

76:14-19 Assumes Facts not in Evidence
Q And you've heard media reports, and especially from Mr. Geragos who represents Michael Jackson, making statements to the public that the mother, is greedy and is after Mr. Jackson's money. I want to ask you a question.
A All right.

78:1-9 Speculation

[illegible] regarding the alleged statements [illegible] was inadmissible hearsay that was not admissible over objection at trial. The hearsay exception in Evidence Code Section 1360 does not apply because the alleged victim is over 12 years of age. Furthermore, [illegible] testimony regarding was also irrelevant to the matter before the grand jury. The District Attorney's presentation of inadmissible testimony poisoned the well with incompetent and irrelevant evidence.

2. Bullying Witnesses and Vouching by the District Attorney

Still early on in the proceedings, The District Attorney called certain witnesses and attacked them in front of the grand jury in a way that would never be permitted in court. During this formative period in the relationship of the prosecutor to the grand jurors, Mr. Sneddon made

it clear that he was to be personally believed and that the witnesses were not.[4] His behavior was outrageous.

These witnesses included Mr. Sneddon made it very clear that these witnesses would be treated as hostile from the moment [illegible] to personal attacks and outrageous tactics in an attempt to discredit their testimony. The grand jury transcripts demonstrate that he subjected Mr. to bullying tactics and to improper cross-examination style questioning, while favored prosecution witnesses such as were treated with a "kid gloves" approach[5], designed to bolster their credibility in front of the jurors.

The District Attorney's examination of was improper and resulted in a large amount of inadmissible and irrelevant evidence being put in front of the grand jury. Furthermore, the substance and tone of the questions directed at Mr. was confrontational and hostile from the start of their appearances in front of the grand jury. The vast majority of the evidence presented in the form of their testimony was wholly irrelevant to the grand jury proceeding and served no purpose other than to put inflammatory and prejudicial material in front of the grand jury, distracting them from their role

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[4] Mr. Sneddon's motivation for his behavior and that of his deputies is not relevant. Any experienced prosecutor, were he thinking clearly, would have known that his behavior was inappropriate. This Court will never know what caused this behavior: the fact that this is a career opportunity to indict a famous celebrity, the fact that Mr. Sneddon had been boastful in the media months earlier, the fact that Mr. Sneddon had been embarrassed by criticism of his prior conduct in the media by people like Gloria Allred for not getting an indictment in 1993, the fact that some of the witnesses before this grand jury, like had also gone on television to criticize the investigation – it is not within the purview of a 995 motion to so determine. The fact is that there is no case of which the undersigned is aware in which a prosecutor has been allowed to conduct himself in anything approaching this fashion before a grand jury.

[5] For example, Mr. Sneddon bolstered 's testimony by asking him about his educational background. (RT 608.) stated that he received an undergraduate degree from UC Berkeley and attended law school at USC, where he served on law review. (RT 608.) Mr. Sneddon joked that law review is "where all the smart people got to be on" and asked him to "[j]ust tell us you were in the top ten percent." The next witness, also received an undergraduate degree from UC Berkeley and attended law school at USC, yet, she was never asked to tell the grand jury about her educational background. We respectfully request that the Court take judicial notice of official information listed on the State Bar website. (www.calbar.ca.gov.)

as an independent body charged with the responsibility to protect citizens from unfounded obligations.

It is almost incomprehensible that an experienced prosecutor would get into a personal argument with a witness and, without being sworn, "testify" to his version of events contrary to that of the witness. Not only would this not be admissible over objection at trial but would have resulted in a mistrial had it occurred in the presence of a judge and trial jury.

Q That is a total – that is not the way that conversation went and you know it.

A You know it too.

Q I explained to you why at that time we couldn't tell who the victim was. Because nobody knew the family at that time, did I not?

A No, you didn't.

Q And then you said, "Wouldn't you as the father want to know if the child was sick?" And I said to you, "Okay. I'm going to tell you." And I did tell you the child was fine, did I not?

A I'll tell you, I remember the conversation specifically because I took notes.

Q So do I.

(RT 715:19-716:25.)

Remember that this occurred early on in the proceedings and helped set the tone for the grand jurors. The only people in the room who were symbols of authority, the District Attorneys, made it clear that they were running the show and that their version of events was the one to be followed. After this display with how could any grand jury be expected to be detached and neutral?

3. Bullying and Improper Questions

The District Attorney engaged in bullying and improper questioning that compromised the grand jury's ability to function independently. In a grand jury proceeding, like any other courtroom setting, prosecutors are required to balance their personal desire to win their cases with the interests of justice. The California Supreme Court, in *People v. Hill* (1998) 17 Cal. 4th 800, 819-820, held:

Prosecutors, however, are held to an elevated standard of conduct. It is the duty of

every member of the bar to maintain the respect due to the courts and to abstain from all offensive personality. A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. As the United States Supreme Court has explained, the prosecutor represents a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve.

Given the non-adversarial nature of a grand jury proceeding, it is even more imperative that prosecutors resist the temptation to engage in rude or intemperate behavior when their own witnesses are answering questions in a manner that displeases them. This type of behavior not only demeans the office of the District Attorney, but in a grand jury setting, makes it impossible for grand jurors to remain impartial and perform their duty as an independent body. Representative examples of questions asked of that would not be admissible over objection at trial are not limited to but include the following:

673:22-24 Argumentative

Q That's not the question, This is going to be a long afternoon unless you listen to what I have to say and answer my questions.

675:20-28 Argumentative

Q During the course of dinner on either the first or second evening, did the subject matter of

A I don't know if it was at dinner.

Q All right. Did it come up at any time?

A Not a – had a –

Q Just – I'm asking you a specific question. And I'm going to ask you –

677:27-678:6 Leading, Relevance

Q during -- you were at some point in time charged with

A Yeah, correct. I pleaded -- yeah. I was charged with that.

Q I'll get to what you did. I'll give you a fair chance to say what you want to say about it, okay.

A Uh-huh.

678:14-19 Leading, Argumentative
Q And in fact, it ended up being two criminal cases.

A Correct.

679:4-10 Leading, Argumentative

679:14-17 Leading, Argumentative, Lack of Foundation, Relevance
Q Did you strike her?
A No. Of course not.
Q You've never struck
A No.
Q All right. So that's what the photo's all about?

679:25-680: Leading, Argumentative, Relevance, Hearsay
A Yes. I presented it to the District Attorney in L.A.
Q And the DA wasn't impressed by it?

680:7-28 Leading, Argumentative, Lack of Foundation, Relevance, 352
Q You gave those photos to
A Yes, sir.
Q And those photos -- were you responsible for selling them
A No. I didn't sell any photos.
Q Did you authorize them to be sold
A No. I did not.

Q Do you have any idea how got them?
A I have no idea.

A I seen it once, you know. And I pretty much stayed away from everything because it's pretty upsetting.
Q the question was.
correct?
A I don't remember.
Q Did you authorize your attorney, to sell those photographs

681:20- Leading, Argumentative, Relevance, Hearsay
Q

A I wasn't –
Q Is that true or false?
A I didn't want him to take any interviews. And I wasn't paying attention –
Q is that true or is that false?
A I told him about how she did the case.
Q Did you produce him – listen to the question again. Did you produce – Mr. listen to me now. I'm not trying to be unfair.

683:20-27 Leading, Argumentative
Q It was what you wrote?
A I was what I wrote with, you know, misspellings corrected and –
Q Yeah, I understand. But the essence of it was you not her?
A Yes.
Q That was true of all the others, you assumed?
A Yeah, I don't know. I assume, yes.

684:8-11 Argumentative, Relevance
Q All right. That's fine. Now, with regard to the incident that caused.

...

A Yes. And since then, when I've tried to ask for -- you know, they've been interrupted by your letters for, you suggesting that I don't see them.

687:2-20 Argumentative, Leading, Bullying, Relevance

Q Does it say my name on it? Have you read the letter?

A I didn't get through the letter.

Q Did you read the letter?

A No. I didn't get to read it.

Q So you don't have any idea what the letter says, do you?

A I'm not arguing with you.

Q So you don't know that that letter simply says that you were questioning --

A Because that's the first time I was able to find out officially how he was.

Q All right. So -- so before you say things, you ought to stop and think about it as to what was really in the letter, okay. Now --

A I'm not upset, it's just -- you know.

Q It's okay. But I'm just telling you, let's just answer the question.

687:27-688:3 Attorney-Client Privilege

Q -- correct? And you had reconciled yourself to that to be the situation until this whole thing with Michael Jackson occurred, right? When the allegations against Michael Jackson occurred contacted you and said he wanted to use this as leverage?

689:3-11 Argumentative, Leading, Bullying, Relevance

Q Okay. Now, you didn't answer my question. So I'm going to ask it again. We'll just stay here 'til you answer it, okay. It's a simple question. I'm going to get an answer.

690:3-26 Argumentative, Leading, Attorney-Client Privilege

Q I didn't ask you whether you wanted to see them. I asked you, did you go to court and file any documents?

A I couldn't.

...

692:5-696:24 Argumentative, Relevance, Bullying, 352

Q You missed a lot of work, right?

A I did.

...

Q Yes, she did. And the judge said he believed her.

A Poor thing.

699:5-16 Argumentative, Relevance, Bullying

Mr. Sneddon: You can talk to your attorney if it's in the course of something he needs to represent you about. But your attorney, whose coming in next, I'll take care of the next part of it, cannot disclose it to anybody.

The Witness: So forget it. I won't talk to him about nothing. Can't trust him–

Mr. Sneddon: Maybe you can tell him how I was so mean–

The Witness: You weren't mean. I just – it's ongoing for three years, sir. And,

Representative examples of questions asked that would not be admissible over objection at trial are not limited to but include the following:

703:4-9 Compound, Attorney-Client Privilege

Q Between the time of December of 2001 and November of 2003, before the Michael Jackson investigation, did approach you with the purpose of and allege that you still owed him money from the prior case to finance it?

703:27-704:6 Argumentative, Relevance, Attorney-Client Privilege, 352

Q All right. Well, you got half the question. It's not bad. That'll get you in the hall of fame in baseball.

A I don't play baseball. Racquetball.

Q What I asked you was, between December of 2001 and November of 2003, did come to you and ask you to do something about his

704:20-23 Attorney-Client Privilege

Q Yeah. Did come to you or any member of your firm and ask you to change those orders during that two-year period, after they'd been put in place, not while they're put in place?

705:14-19 Argumentative, Leading, Relevance, Attorney-Client Privilege

Q First of all, I'm not confusing anything. It's a very clear question. Very simple, At a certain point in time you indicated to the ladies and gentlemen of the Grand Jury, at 2000, somebody who used to be associated with you stopped representing is that correct?

706:14-24 Argumentative

Q Yeah. It answers my question to the extent that I was right the first time. So let me try again.

From the point in 2002 when stopped representing okay --

A (Nods head up and down.)

Q You got that part of it?

A Well, you --

Q As a beginning point?

A Okay. And 2002 is now the new beginning point?

Q It is. It was the beginning point from the beginning.

706:26-707:2 Attorney-Client Privilege

Q In 2002 when stopped representing to the time in November, prior to the Michael Jackson case going public, did ever approach you, you, to represent him?

708:2-709:4 Attorney-Client Privilege

A I don't believe I can discuss what I -- what arrangements we had, or what our discussions between he and I, and what I received or did not receive from him due to the attorney-client privilege.

Q Well, your client already told us about it.

...

Q Now, the fact that you may have showed those photographs to the attorney would waive whatever privilege whatever was there, wouldn't it? Because now it's no longer a confidential communication.

709:13-18 Argumentative

Q You don't know? Your client knew about it.
You never spoke --

A Pardon me?

Q Your client knew about it. You didn't know that those photographs were in

709:26-27 Attorney-Client Privilege

Q So as far as you know, they're still in your file in your office?

710:9-10 Threatening the Witness for Asserting the Attorney-Client Privilege

Q All right. We'll have you come back in front of the Judge and have that litigated.

710:28-711:3 Argumentative, Attorney-Client Privilege

A You know, come to think of it, if I did say something of that nature, it could have been a waiver of the client -- attorney-client privilege.

Q Yeah. It really could, couldn't it?

712:15-20 Attorney-Client Privilege

A ... So at this time I'm actually not sure whether I actually had them in my hand or whether I just was told of them. But I definitely was told

Q By your client ?

A Yes. And also by -- I think other people, family members.

713:17-22 Improper Question, Argumentative, Relevance

Q I intimidated him into an answer?

A Pardon me?

Q I intimidated him into an answer?

A Are we arguing? Is --

Q I'm asking you a question. Do you feel I intimidated him into an answer?

714:13-25 Argumentative, Leading, Bullying, Vouching, Relevance

Q Now, your client, one of the things that he was very forthcoming in, described what occurred.

A No.

Q And that's not consistent with , is it?

Those don't seem to be consistent?

715:19-24 Argumentative, Bullying, Relevance

Q Did you at the time that you heard that these serious charges had been leveled

against a worldwide known entertainer, ever come to the DA's office and say, "Hey, Mr. Sneddon, I've got these [redacted] or, "I heard about these [redacted] or, "You might want to know this." Did you ever do that before you went on national TV?

716:12-719:20: Argumentative, Bullying, DA Testifying, Relevance, Calls for Legal Conclusion

Q That is a total -- that is not the way that conversation went and you know it.

...

Q So we now have two imprudent things that you may have said.

722:6-723:20 Argumentative, Relevance, 352

Q Well, I have a transcript, so I don't have to rely on your recollection, okay.

...

Q Yes. [redacted] Do you recall that?

730:1-11 DA Testifying, Vouching

Q You mean he?

A He be placed in custody. I believe that they -- the city attorney was attempting to have his bail revoked at that point and have him placed in custody, if my recollection is correct.

Q I think you're correct.

A Pardon me?

Q I think you're correct.

737:13-16 Relevance, D.A. Testifying

Q You said that you were going on TV because you were a sole practitioner and you needed all the publicity you could get.

A That's an absolute lie sir.

The prosecutor's examination of [redacted] was improper and presented a large amount of incompetent and irrelevant evidence to the jury. As discussed above, the prosecution asked him to speculate about matters of which he had no personal knowledge and asked him

improper questions about Mr. Jackson's business and personal relationships that lacked foundation. At the conclusion of testimony he was admonished by the foreperson. (RT 556:18-557:3.) asked if he could consult with an attorney or speak with the attorneys for Mr. Jackson. (RT 557:5-7.) Mr. Auchincloss told that it would be illegal to discuss the substance of his testimony. (RT 557:8-9.) Mr. Sneddon asked if anyone had contacted him regarding his testimony before the grand jury. (RT 557:13-17.) informed Mr. Sneddon that he talked to defense investigator and that wanted to further talk with him. (RT 557:18-558:4.) stated that wanted to go to lunch with him and Mr. Sneddon responded, "I bet he does."[6] (RT 558:2-5.) asked if it would be legal for him to make a statment that "MJ is innocent." (RT 558:16-17.) Mr. Sneddon informed him that such a statement would violate the gag order. (RT 558:18-19.) Representative examples of questions asked of Mr. that would not be admissible over objection at trial are not limited to but include the following:

505:4-9 Hearsay

Q Did you talk at all about the fact that you were going to be testifying in this case?

A I asked him if he had been contacted. Yeah, he knows that -- he knows --

Q So the answer to that would be?

A Yes.

515:7-8 Calls for Speculation

Q So what would have happened if didn't say something good about Mr. Jackson?

---

[6] The District Attorney improperly asked witnesses before the grand jury if they had spoken with defense investigator (RT 557-558; 589:32-590:6.) The District Attorney's questions disparaged the defense function by suggesting that 's role as a defense investigator was improper and illegal. This tactic apparently succeeded in convincing the grand jurors that it was inappropriate for to have contact with witnesses, because it prompted grand jurors to submit questions to witnesses regarding their contacts with (RT 668:22-669:14.)

515:12-15 Leading

Q Okay. But wasn't it planned that – wasn't it perceived or understood between you and that were going to say positive things about Michael Jackson? Yes or no?

516:8-9 Calls for Speculation

Q Was that perception, that they wanted to say something positive?

516:10-12 Argumentative, Improper Question

Q Okay. That's an example, just so you know, that's an example of an answer to a question I didn't ask, okay.

A Well, I feel like I need to explain myself instead of saying yes or no sometimes.

Q Well, but that's – let me interrupt you. As the attorney in the case I am allowed to control the examination.

518:2-5 Calls for Legal Conclusion

Q Okay. And if you lie – tell a lie to a tabloid about Michael Jackson, wouldn't you be at risk for a major lawsuit?

530:19-20 Hearsay

A I'd heard, you know. I'd heard. Like I say, I don't know how.

546:8-12 Relevance, Hearsay

Q How did you know he had tax documents that he needed to have access to?

A Because he told me. He told me. I said, "Are you worried about your house getting searched?" you know.

546:13-14 Leading

Q Okay. And so it was your idea to put these documents in a safe deposit box; is that right?

548:5-26 Leading, Relevance, Hearsay

Q And did they specifically tell you that you could get in trouble for obstruction of justice?

A They actually mentioned that when they arrived to my apartment. So, they said that was part of the reason they were at my apartment.

Q Did they tell you that?

A Did they tell me that I could get in trouble for obstruction of justice?

Q Yes.

A If I -- if I had done anything wrong. I don't know.

Q I'm just asking you a question.

A I don't know.

Q Did they tell you you could get in trouble for obstruction of justice if you tampered with witnesses or evidence, or anything of that nature?

A Yeah. They warned me of that.

Q All right. And did you tell them that there were documents that you had concealed . . . in a safe deposit box under your name? Did you tell them that?

A I told them.

550:8-9 Calls for Speculation; Vague

Q Okay. As far as the video goes, at the end of the day did . . . perform as anticipated?

4. **The District Attorney Allowed Witnesses to Prejudice the Grand Jury.**

The grand jury is the worst nightmare of a person facing unfounded allegations and an overzealous prosecution. Accusations are made in secret. The person accused has only the prosecutors' willingness to follow the rules to protect him. Here, unfortunately, the prosecutors not only willfully violated the rules of evidence and grand jury decorum but also allowed witnesses to try to persuade the jurors with impassioned and prejudicial remarks.

For instance, the District Attorneys allowed to call Mr. Jackson "the Devil." The prosecutor stated that "[p]erhaps the biggest and most vicious accusation is the one that you have made this all up." She stated that she didn't want to take "the devil's money." The prosecutor asked if she was "clear about that." She stated that Mr. Jackson is "the Devil." The District Attorney made no effort to stop or limit the harmful impact of this inadmissible testimony. (RT 1152.)

At the same time the prosecution allowed witnesses to disparage Mr. Jackson and his associates, they allowed witnesses to bolster their testimony by making improper obsequious remarks to the grand jury. The District Attorney allowed to state that "this room is filled with good, honest, decent people, ."

(RT 1016.)

Witnesses whose credibility would not withstand even the most gentle cross-examination were allowed to make self-serving statements to bolster their testimony. was allowed to testify to a highly improbable version of events in regard to her lawsuit

Furthermore, the District Attorney allowed to prejudice the grand jury with wild tales of "killers".(i.e. RT 1139; 1148) and secret conversations in "code" (RT 1133) despite a total lack of support for this version of events by other witnesses,

Other witnesses, such as were called whose testimony consisted almost entirely of hearsay.

5. **The District Attorney Ran the Grand Jury.**

Throughout the proceedings, the District Attorneys made it clear that they were running the grand jury. They did not show respect or deference to the foreperson. They did not ask or suggest but, instead, told the grand jurors when breaks would occur, when to give admonitions and what to do. They deprecated the serious function of the foreperson with remarks trivializing her admonitions.

The grand jury was discouraged from exercising their power to conduct an independent investigation. The grand jury wanted to ask. if she had observed other children drinking alcohol (RT 466.) Mr. Auchincloss informed the grand jurors that "the issue of Mr. Jackson and other children is not before you." (RT 490.) The grand jurors requested that the prosecutors call back certain witnesses and Mr. Auchincloss stated that in order to call witnesses they must first submit a written request for the approval of the prosecution. (RT 1250:25-1251:41.)

Mr. Auchincloss and Mr. Zonen instructed to review the school records so that he could be recalled to testify to what he reveiwed. (RT 913-914.)

Mr. Sneddon directed the jurors to take a lunch break, arranged for sandwiches to be brought to the grand jurors, and told them what time they should come back from lunch. (RT 80.) Mr. Zonen told the grand jurors to "stay in place" while the district attorney stepped outside for a moment. (RT 94.) The prosecutors decided when the grand jury would take breaks and when it would adjourn without asking the foreperson. (RT157-158; 220; 298; 398; 833; 846; 891; 986.) The grand jurors believed that they had to ask the prosecutors for permission to use the restroom. (RT 844:8-10.)

The foreperson asked Mr. Sneddon whether she had to admonish everyone. (RT 158.) Mr. Sneddon told the foreperson that she did not have to take roll call. (RT 338.) Mr. Sneddon gave the grand jury two choices of how to proceed and told them of his preferred choice. (RT 450.)

The grand jury was utterly dependent on the prosecution in every way. The grand jury never had a chance of being independent because prosecutors trained the grand jurors to follow their lead by demonstrating their control over the grand jury from the start of the proceedings.

6. The Grand Jury was Sequestered and Under Control of the Lead Detective

It was not possible for the grand jury to remain independent because the lead detective investigating the case against Mr. Jackson was also responsible for the safety of the grand jurors during the grand jury proceeding. The District Attorney went out of his way to explain that was not only the lead detective for the Sheriff's Department in this case but that he was responsible for the grand jury's security. The prosecutor commented to that "we have noticed you in the vicinity of this temporary courthouse since the beginning of the Grand Jury." (RT 824:28-825:2.) was asked if he was "involved in, as part of your responsibilities, with maintaining security here and for the witnesses as well." (RT 825.)

B. The Appearance Of Bias In And Of Itself, Requires That The Entire Indictment Be Set Aside.

As argued above, the District Attorney conducted himself in a manner that would never have been allowed over the objection of defense counsel at trial in front of any judge. The District Attorney bullied witnesses and gave his own unsworn testimony to rebut the sworn testimony of witnesses. The District Attorney's conduct in the grand jury proceeding created, at the very least, the appearance of bias. Under *People v. Eubanks* (1996) 14 Cal. 4th 580, 592 n.4, the Supreme Court of California left open the issue of whether for the purposes of setting aside an indictment under Penal Code Section 995 the mere appearance of impropriety may be sufficient.

The District Attorney's flagrant misconduct before this grand jury certainly created the appearance of bias and; in and of itself, that is sufficient to set aside the indictment. Of course, here the bias and misconduct go far beyond mere appearance.

C. The Individual Instances Of Misconduct Discussed Above Are Enough To Require That The Indictment Be Set Aside and, When Taken As A Whole, The Cumulative Effect is Overwhelming.

Should the Court determine that the individual instances of misconduct are not sufficient grounds for overturning the indictment, Mr. Jackson submits that the cumulative effect of these instances of misconduct sabotaged the grand jury's ability to perform its function as a bulwark protecting an ordinary citizen against the actions of an overzealous prosecution.

VIII.

SHOULD THE COURT GRANT MR. JACKSON'S CONCURRENTLY FILED MOTION TO TRAVERSE, QUASH, AND SUPPRESS IS GRANTED, MR. JACKSON MUST RECEIVE A NEW DETERMINATION OF PROBABLE CAUSE WITH THE ILLEGALLY OBTAINED EVIDENCE EXCISED FROM THE EVIDENCE

PRESENTED TO THE GRAND JURY

Mr. Jackson is concurrently filing a motion to motion to traverse the affidavits, quash the search warrants and suppress the illegally obtained evidence. Should the Court grant this motion is granted, Mr. Jackson "must have an opportunity to receive a determination whether the indictment rests upon competent legally obtained evidence." (*People v. Sherwin* (2000) 82 Cal.App. 4th 1404, 1409.) In *Sherwin*, the Court of Appeal held that the suppression of evidence, as a result of the defendants' motions to suppress, resulted in a sufficient change of circumstances to warrant renewal of the motions under section 995. (*Sherwin* at 1411.)

As argued elsewhere, the Court must also consider the prejudicial effect of the presentation of the illegally obtained evidence. The indictment must be set aside if the extent of the incompetent and irrelevant evidence is such that the grand jury cannot fulfill its obligation to protect citizens from unfounded allegations. (*People v. Backus* (1979) 23 Cal. 3d 360.) Here, the amount of illegally obtained evidence, including physical evidence and the testimony of officers who participated in the search, was so extensive that it necessarily tainted and prejudiced the grand jurors to the point where they could no longer act independently.

IX.

MR. JACKSON WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR GRAND JURY PROCEEDING DUE TO IMPROPRIETIES IN GRAND JURY PROCEDURE

In *Johnson v. Superior Court* (1975) 15 Cal. 3d 248, 253-254, Justice Clark said that the grand jury is a real, not perfunctory, safeguard to a person accused:

> The grand jury's historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor is as well-established in California as it is in the federal system. If exculpatory evidence exists, and the grand jury have reason to believe that it is within their reach, they may request it to be produced, and for that purpose may order the district attorney to issue process for the witnesses, to the end that the citizen may be protected from the trouble, expense, and disgrace of being arraigned and tried in public on a criminal charge for which there is no sufficient cause. A grand jury should never forget that it sits as the great inquest between the State and the citizen, to make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded

accusation, whether from the government, from partisan passion, or private malice.

Mr. Jackson will be seeking other relief regarding the unfairness of the proceeding and the effect of the District Attorney failing to provide exculpatory information. However, the failure to follow the procedure as demonstrated by the record is a violation of due process and the right to a fair grand jury.

X.

THE INDICTMENT MUST BE SET ASIDE BECAUSE THE PROSECUTOR MISSTATED THE LAW OF CONSPIRACY WHEN INSTRUCTING THE GRAND JURORS AND THE MISSTATEMENT OF LAW CAUSED THE GRAND JURY TO RETURN AN INDICTMENT ON LESS THAN REASONABLE OR PROBABLE CAUSE

Grand jurors must be properly instructed on the law. (*Cummiskey v. Superior Court, supra*, 3 Cal.4th 1018, 1022, fn.1.) Grand jurors must decide based on evidence of each element of the charged crime. (Penal Code § 939.8; *Williams v. Superior Court* (1969) 71 Cal.2d. 1144; *People v. Fisk* (1975) 50 Cal.App.3d 64.) Grand jurors must decide based on evidence of each element of the charged crime. (Penal Code § 939.8. *Williams v. Superior Court* (1969) 71 Cal.App.2d 1144.)

> Although a prosecutor does not have the same duty to instruct a grand jury as a trial judge does a petit jury (e.g., there is no duty to instruct sua sponte on lesser included offenses), an indictment may be set aside under Penal Code section 995, subdivision (a)(1)(B) based on the nature and extent of the evidence and the manner in which the proceedings were conducted by the district attorney, including instructional error likely to have caused the grand jury to return an indictment on less than reasonable or probable cause.

(*People v. Gnass* (2002) 101 Cal.App. 4th 1271, 1313.)

> ...the Supreme Court's opinions in *Backus* and *Cummiskey* acknowledge that an indicted defendant is entitled to bring a motion to dismiss the indictment under section 995 for lack of probable cause, not only on the basis of the testimony received but also based on the manner in which the district attorney has conducted the proceedings, including asserted error regarding advisements or instructions given or withheld.

(*People v. Superior Court (Mouchaourab)* (2000) 78 Cal.App. 4th 403, 429.)

A. The Prosecution Misstated The Law Regarding The Required Elements Of Conspiracy.

Mr. Auchincloss failed to instruct the grand jury that a conviction of conspiracy requires not only the specific intent to commit an offense, but also the *specific intent to agree or conspire.* "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy." (*People v. Morante* (1999) Cal. 4th 403, 416.) "Conspiracy is a 'specific intent' crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense.*" (*People v. Swain* (1996) 12 Cal. 4th 593, 600.)

Even if the defendant knowingly and voluntarily commits an act which furthers the purpose of a conspiracy the defendant is not guilty of conspiracy absent a specific intent to enter into an agreement with the other conspirators and a specific intent to commit the crime which is the object of the conspiracy. (*People v. Horn* (1974) 12 Cal. 3d 290, 296.)

Mr. Auchincloss instructed the jury that there are only three elements required to show a criminal conspiracy. (RT 1823:6.) He stated that a conspiracy requires:

> An agreement to commit a crime. Two or more people. Very simple term or element. Specific intent to commit that crime. There has to be an intent among those two people, or more, to commit the crime that is the object of the conspiracy. And three, an overt act in furtherance of that crime.

(RT 1823:10-16.)

Mr. Auchincloss failed to instruct the jury that a conviction for conspiracy requires proof

that the defendant and another person had the specific intent to agree or conspire to commit an offense. Mr. Jackson was prejudiced because the grand jury never considered an essential element of conspiracy when determining that a strong suspicion of conspiracy existed. The grand jury returned the indictment on less than reasonable or probable cause because they were never instructed to consider this essential element.

B. The Misstatement Of Law Was Prejudicial Because The Grand Jury Was Not In A Position To Correct The District Attorney's Misstatement Of Law.

The grand jurors, as laypersons, would have no reason to consider the essential element of "specific intent to agree or conspire" unless the prosecution chose to inform them of such an element. In *Gnass*, the Court of Appeal held, "But, as we discussed above in connection with the Supreme Court's decision in *Johnson*, the jury cannot be expected to have asked for an instruction on a part of the law about which they knew nothing." (*People v. Gnass* (2002) 101 Cal.App. 4th 1271, 1313.)

> It seems to follow that a prosecutor, at least if he or she undertakes to instruct the grand jury on the elements of the offense to be charged, must instruct on *all* the elements. Each is akin to an exculpatory defense in that there can be no criminal liability unless all have been proven.

(*People v. Gnass* (2002) 101 Cal.App. 4th 1271, 1312.)

It cannot be inferred that the grand jurors found probable cause that a specific intent to agree or conspire occurred because they were never instructed to consider whether the evidence supported a strong suspicion that a specific intent to agree or conspire existed. The indictment must be set aside because it was returned on less than reasonable or probable cause.

C. The Trial Judge Cannot Correct Instructional Error By Attempting To Make Its Own Determination Of Sufficiency Of The Evidence.

"Unless so informed by the district attorney, the grand jury ordinarily has no "reason to believe that other evidence within its reach will explain away the charge." (*Johnson v. Superior Court* (1975) 15 Cal. 3d 248, 254.)

The view that it is up to the trial judge who hears the Penal Code section 995 motion to determine whether the evidence was sufficient to support the indictment has been rejected by the California Supreme Court in *Cummiskey*. (*People v. Gnass* (2002) 101 Cal.App. 4th 1271, 1314.) In *Cummiskey*, the California Supreme Court considered the petitioner's claims of instructional error "although the transcript of the testimony before the grand jury, on which the indictment was based, contains substantial evidence supporting a finding of probable cause that petitioner committed the crimes as charged against her." (*Cummiskey*, supra, at p.1022.)

Cummiskey demonstrates that the trial court cannot correct instructional error by attempting to make its own determination of the sufficiency of the evidence. Such an attempt would render the grand jury meaningless and perfunctory.

XI

CONCLUSION

For the reasons stated above, Defendant's motion to set aside the indictment must be granted.

Dated: June 29, 2004

COLLINS, MESEREAU, REDDOCK & YU
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PROOF OF SERVICE
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STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA:

I am a citizen of the United States of America and a resident of the county aforesaid. I am employed by the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 312-H East Cook Street, Santa Maria, California.

On JULY 7, 20 04, I served a copy of the attached NOTICE OF MOTION AND MOTION TO SET ASIDE THE INDICTMENT (PENAL CODE § 995); MEMORANDUM OF POINTS AND AUTHORITIES **(REDACTED VERSION)** addressed as follows:

THOMAS W. SNEDDON, DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
1105 SANTA BARBARA STREET
SANTA BARBARA, CA 93101

THOMAS A. MESEREAU, JR.
COLLINS, MESEREAU, REDDOCK & YU, LLP
1875 CENTURY PARK EAST. 7TH FLOOR
LOS ANGELES, CA 90067

X FAX

By faxing true copies thereof to the receiving fax numbers of: 805-568-2398 (DISTRICT ATTORNEY); 310-861-1007 (THOMAS A. MESEREAU, JR) . Said transmission was reported complete and without error. Pursuant to California Rules of Court 2005(i), a transmission report was properly issued by the transmitting facsimile machine and is attached hereto.

___ MAIL

By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Santa Maria, County of Santa Barbara, addressed as above. That there is delivery service by the United States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

___ PERSONAL SERVICE

By leaving a true copy thereof at their office with their clerk therein or the person having charge thereof.

___ EXPRESS MAIL

By depositing such envelope in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail, in a sealed envelope, with express mail postage paid.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 7TH day of JULY , 20 04 , at Santa Maria, California.

Carrie L Wagner
CARRIE L. WAGNER