

FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

JUL 23 2004

GARY M. BLAIR, Executive Officer
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

vs.

MICHAEL JACKSON, et al.

Defendant.

Case No.: 1133603

Order for Release of Redacted Documents

[Opposition to Motion to Set Aside
Indictment]

[Reply to Opposition to Motion to Set Aside
Indictment]

The People's Proposed Redacted form of their Opposition to Motion to Set Aside Indictment (Pen. C. § 995) shall be released and placed in the public file. The redacted form of the Defendant's Reply to the Opposition to Motion to Set Aside the Indictment (Pen. C. § 995) prepared by the court and attached to this order shall be released and placed in the public file. The unredacted originals shall be maintained conditionally under seal pending the hearing on July 27, 2004.

DATED: July 23, 2004

Rodney S. Melville

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Judge of the Superior Court

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26 FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

27 THE PEOPLE OF THE STATE OF
28 CALIFORNIA,

Plaintiffs,

vs.

MICHAEL JOSEPH JACKSON,

Defendant.

) Case No. 1133603

)
) REPLY TO PLAINTIFF'S OPPOSITION TO
) DEFENDANT'S MOTION TO SET ASIDE
) THE INDICTMENT (Pen. Code § 995)

) FILED UNDER SEAL

) Honorable Rodney S. Melville

) Date: July 27, 2004

) Time: 8:30 am.

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REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION TO SET ASIDE THE INDICTMENT (Pen. Code § 995)

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REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE THE
INDICTMENT (Penal Code § 995)

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

The District Attorney presented so much inadmissible information that it is not reasonable to believe that the grand jurors returned the indictment based on real evidence. We stated in our motion that there was no case in the history of the state of California where this type of prosecutorial behavior was tolerated. The District Attorney has conceded this point by failing to cite any such case or even defend its conduct.

On the first day of the grand jury proceeding the prosecution poisoned the well by calling [REDACTED], who provided inflammatory and irrelevant testimony that would never have been allowed over objection at trial. Tom Sneddon engaged in improper, if not sanctionable, conduct during the examinations of [REDACTED]. Encouraged by the prosecutor, [REDACTED] was allowed to repeat negative characterizations of Mr. Jackson and make obsequious personal appeals to the grand jurors.

Stripped of inadmissible innuendo, speculation, and deficient instructions on the law, the record contains insufficient evidence to support the charges. Under *People v. Backus* (1979) 23 Cal. 3d 360, 393, an indictment containing such innuendo, speculation and misconduct violates Mr. Jackson's right to due process and must be dismissed.

All of the charges in the indictment should be set aside by virtue of improprieties that permeate the record. In particular:

- The prosecution presented its theories by innuendo, without foundation or compliance with other principles of evidence;
- The prosecution's failure to adhere to judicial decorum renders the proceedings unfair.

The conspiracy count is especially vulnerable to § 995 relief. More specifically:

- Admissible evidence does not demonstrate that Mr. Jackson was party to an

1 illegal agreement;

- 2 • There is no evidence that Mr. Jackson intended to extort anyone;
- 3 • There is no evidence that Mr. Jackson intended to imprison anyone;
- 4 • There is no evidence that Mr. Jackson intended to abduct any child.

5 This is a unique situation where the record as a whole is laced with inadmissible material
6 and gratuitous remarks. This Court cannot conclude that Mr. Jackson should endure a trial on
7 the terrible and unfounded allegations in the indictment. This motion should be granted.

8 **II.**

9 **THE ENTIRE INDICTMENT SHOULD BE SET ASIDE FOR DISREGARD OF THE**
10 **RULES OF EVIDENCE AND IMPROPER DECORUM BEFORE THE GRAND JURY¹**

11 Remarkably, the District Attorney does not address his own misconduct or the
12 improprieties that occurred at the grand jury proceedings. Failure to address this point either
13 represents either a concession or an intention to avoid an issue squarely framed in the moving
14 papers. The issue raised presents a significant criticism of the basic fairness of the grand jury
15 proceeding. The remedy is 995 relief.

16 The same rights and rules apply to Mr. Jackson as they do to all other people who are the
17 targets of grand jury proceedings. There is no possible justification for the District Attorney's
18 conduct before the grand jury, and he offers none. His actions poisoned the grand jurors and
19 foreclosed any possibility that the grand jury would serve as an independent bulwark against the
20 actions of the overzealous prosecution.

21 The grand jury proceeding was non-adversarial, and the District Attorney had a

22 ¹ The Plaintiff's Opposition relies on references to information that is outside the record of the
23 grand jury proceeding which cannot be considered. Neither Penal Code Section 995 nor the law
24 permits such references. (*Stanton v. Superior Court* (1987) 193 Cal.App. 3d 265, 270; *People v.*
25 *Crudginton* (1979) 88 Cal.App. 3d 295, 299.) These references include quotation of statements
26 allegedly made by Mr. Geragos on television (Plaintiff's Opposition 30:17-32:21) and
27 correspondence between Mr. Geragos, Mr. Cochran and the District Attorney. (Plaintiff's
28 Opposition Exhibits A, B and C.). The District Attorney attempts to use these references to
justify his failure to present admissible evidence to the grand jury. Matters outside the record
cannot be considered in the determination of this motion.

1 heightened obligation to fairly and accurately present evidence. (See *Johnson v. Superior Court*
2 (1975) 15 Cal. 3d 248.) The District Attorney, however, failed to meet this obligation and
3 behaved in a manner that undermined the independence of the grand jury. No Court would have
4 ever approved such misconduct had it occurred in its presence.

5 The testimony of [REDACTED] was outrageous, highly inflammatory and
6 irrelevant. [REDACTED] made outlandish hypothetical statements alleging that he could have
7 made a large settlement with [REDACTED]. He even testified that the 1993 case settled for
8 "multi-multi-millions." (RT 64:19.) This testimony was highly prejudicial and completely
9 inadmissible, yet the District Attorney failed to promptly limit the scope and impact of this
10 testimony.

11 The testimony of [REDACTED] was likewise improper and inadmissible. [REDACTED]
12 testimony consisted almost entirely of inadmissible hearsay. He was improperly allowed to
13 opine on ultimate conclusions of law and fact (RT 101:21-24), and to make conclusions
14 regarding the credibility of witnesses before the grand jury. (RT 100:20-21.) "[T]he psychiatrist
15 may not testify to the ultimate question of whether the witness is telling the truth on a particular
16 occasion." (*People v. Ainsworth* (1988) 45 Cal. 3d 984, 1012; *People v. Castro* (1994) 30 Cal.
17 App. 4th 390, 396.)

18 The District Attorney concedes that the purpose of [REDACTED]'s testimony was to bolster
19 the credibility of [REDACTED]. (Plaintiff's Opposition, 37:17-20.) Deputy District
20 Attorney Zonen improperly argued [REDACTED]'s conclusions of "credibility" before the
21 Grand Jury by stating arguments that [REDACTED] found the complaining witness's
22 statements "credible." Mr. Zonen argued:

23 There was enough information that [REDACTED] had received at that point that he
24 believed he was under an obligation as a mandatory reporter to contact Child
25 Protective Services in Los Angeles or the police. A mandatory reporter is a
26 category for certain professionals who, if they receive information, credible
27 information, where they believe that the potential of child sexual abuse takes
28 place, they're obligated to report it. And psychologists are on that list.
(RT 36:18-26)(emphasis added).

1 The prosecution attempts to cite statements that are not part of the record to justify its
2 decision to invite [REDACTED] to render inadmissible and prejudicial testimony
3 before the grand jury. Evidence not in the record must not be considered for Penal Code Section
4 995 review. Further, the prosecution uses the *Johnson* materials that were provided to the
5 prosecution by Mr. Jackson's counsel to justify its decision to admit [REDACTED]'s inadmissible
6 testimony. (Plaintiff's Opposition 34:8-11.) The *Johnson* materials, however, were presented to
7 the prosecution *after* [REDACTED] had already testified.

8 The District Attorney treated witnesses he perceived to be adverse in a wholly different
9 manner than he treated witnesses he perceived to be favorable. Witnesses such as [REDACTED],
10 [REDACTED] were subjected to undue bullying from the
11 moment they reached the witness stand and were bombarded with rude remarks and
12 argumentative questioning. They were cut off by the prosecutor when they attempted to give
13 answers. Witnesses such as [REDACTED], on the other hand, were
14 allowed to give lengthy narrative answers, which were replete with highly inflammatory and
15 irrelevant statements.² No justification exists for treating witnesses this way in any proceeding,
16 particularly when the proceeding is non-adversarial.

17 The District Attorney improperly impeached [REDACTED] using a misdemeanor
18 conviction. (RT 667-668.) The District Attorney asked [REDACTED] about the conviction itself,
19 not just the underlying conduct. [REDACTED] were also asked about [REDACTED]
20 [REDACTED]'s conviction. (RT 921:15-22; RT 1444:8-12) In his opening statement to the grand jury,
21 the prosecutor stated:

22 Toward the end of 2001 that relationship reached the stage where it resulted in a
23 prosecution against [REDACTED] for [REDACTED] and a
24 separate case involving [REDACTED]. He was prosecuted for

25 ² The prosecution repeatedly referred to [REDACTED] during the grand jury
26 proceedings (i.e. RT 1791:3; 1793:15; 1794:12) and in their Opposition. It is inappropriate to
27 refer to adult witnesses by their first names and can be construed as an attempt to curry favor
28 with the trier of fact. (*Hawk v. Superior Court In and For Solano County*) (1974) 42 Cal.App.3d
29 108, cert. den. 421 U.S. 1012.

1 both of those matters and convicted. [REDACTED]
2 [REDACTED]
3 [REDACTED] (RT 30:25-31:9).

4 The California Supreme Court, in *People v. Wheeler* (1992) 4 Cal. 4th 284, held that a
5 misdemeanor conviction cannot be used for impeachment.

6 Furthermore, the underlying conduct does not involve moral turpitude. [REDACTED]
7 misdemeanor conviction [REDACTED] has no logical relationship to his credibility
8 before the grand jury. The District Attorney's questions and [REDACTED] answers regarding his
9 conviction would never have been allowed at trial, over objection.

10 The District Attorney claims that [REDACTED] calling Mr. Jackson "the Devil" was
11 "rather tame" and that it "obviously was a spontaneous characterization by an understandably
12 upset witness." (Plaintiff's Opposition 28:20-26.) The District Attorney further claims that it is
13 "not likely that the use of the word 'devil' would have any inappropriate effect upon this grand
14 jury." (Plaintiff's Opposition 28:20-26.) The prosecution misses the point here. The prosecution
15 allowed witnesses to try to persuade the jurors with impassioned and prejudicial remarks without
16 even attempting to limit the impact of the inadmissible testimony. This includes derogatory
17 characterizations of Mr. Jackson that lacked any relevance or foundation³, as well as obsequious
18 remarks to the grand jurors.

19 As argued elsewhere, the grand jury proceedings were full of improprieties that would
20 have never been allowed over objection by any judge. The atmosphere was poisoned by
21 incompetent and inadmissible evidence from witnesses who lacked personal knowledge of the
22 substance of their testimony and by others who were called to serve as punching bags for the
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24
25 This pattern extended to other witnesses who were eager to be helpful to the prosecutors. For
26 instance, the so-called testimony of [REDACTED] is replete with opinion about Mr. Jackson's style
27 of "crisis management," his financial interests and whether [REDACTED] was caged like an
28 animal. There is no foundation for any of [REDACTED]'s opinions. She never met [REDACTED] or
29 Mr. Jackson.

1 District Attorney.

2 III.

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

6 The District Attorney attempts to pluck out pieces of evidence to support the indictment
7 from the mountain of inadmissible evidence presented to the grand jury. However, the Court
8 has a duty to "resolve the issue in light of the whole record" and "may not limit [its] appraisal to
9 isolated bits of evidence" selected by the prosecution. (*People v. Johnson* (1980) 26 Cal. 3d 557,
10 577.) The prosecution's presentation to the grand jury was so unfair that the indictment must be
11 set aside.

12 IV.

13 ADMISSIBLE EVIDENCE PRESENTED TO THE GRAND JURY IS INSUFFICIENT
14 TO SHOW PROBABLE CAUSE THAT MR. JACKSON CONSPIRED WITH ANYONE
15 OR HAD INTENT TO COMMIT THE ALLEGED OFFENSES

16 Lack of probable cause exists when there is no rational ground, based on evidence before
17 the magistrate, for assuming the possibility that an offense has been committed and that the
18 defendant is connected with the charged crime. (*Williams v. Superior Court* (1969) 71 Cal. 2d
19 1144, 1147-1148.) The inferences drawn from the evidence must be reasonable. If they are
20 "speculative," it is the reviewing judges's duty to discard those inferences that "derive their
21 substance from guesswork, speculation, or conjecture." (*Birt v. Superior Court* (1973) 34
22 Cal.App. 3d 934, 938.)

23 The District Attorney asserts that "[i]t is evident that defendant misunderstands the
24 essential purpose of this conspiracy." (Plaintiff's Opposition 28:19.) This assertion is not
25 meritorious. Mr. Jackson had nothing to do with the alleged conspiracy, and the prosecution has
26 failed to demonstrate otherwise.

1 A. The Formation Of The Conspiracy

2 The District Attorney asserts that Mr. Jackson became a participant in the alleged
3 conspiracy when he allegedly reinitiated contact with [REDACTED]
4 [REDACTED] (Plaintiff's Opposition 5:20-23.) The prosecution, however, fails to establish that an
5 illicit agreement was formed, that Mr. Jackson agreed to participate in the supposed conspiracy
6 or that he intended to commit child abduction, extortion, and false imprisonment.

7 Traditionally, participation in a conspiracy is established by statements of objectives by
8 the conspirators or concerted activity that supports the conclusion that a conspiracy existed.
9 Such evidence is conspicuously absent.

10 B. The Prosecution Fails To Establish That Mr. Jackson Specifically Intended To
11 Participate In a Conspiracy

12 The District Attorney points to [REDACTED] as the key witness who established Mr.
13 Jackson's intent to participate in a conspiracy. (Plaintiff's Opposition 4:18-26.) [REDACTED] had
14 no personal knowledge regarding Mr. Jackson's specific intent to do anything. She worked for
15 [REDACTED] for 3 weeks before she was terminated. (RT 1453:26; 1470:23-24.) [REDACTED]
16 never even met Mr. Jackson. (RT 1465:23-24.) [REDACTED] was a peripheral bit player who,
17 after the fact was willing to give testimony about anything to be important.

18 [REDACTED]'s testimony lacked foundation and was based on hearsay, speculation and
19 conjecture. Even if it was admissible, [REDACTED]'s testimony fails to support the prosecution's
20 inference that Mr. Jackson had the specific intent to participate in a conspiracy. [REDACTED]
21 testimony, at best, is conjecture and speculation, and thus, cannot be considered.

22 The District Attorney presented [REDACTED]'s testimony also in an attempt to show
23 economic loss and damage to client's image. (RT 1456-1457; 1461-1463.) She talked about
24 revenue from the cell tone rings without any foundation and even estimated that the ring tones

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26 ' Even Deputy District Attorney Zonen was taken aback by her casual reference to tabloid
27 television personalities. He asked her if she had ever met those people, and she had to say no.
(RT 1490:17-1491:22.)

1 alone could be worth \$500-700 million dollars. (RT 1464-1465.) No foundation was laid to
2 establish how [REDACTED] developed this opinion or what facts, if any, she based it on. Ms.
3 [REDACTED] also was not qualified as an expert to offer an opinion regarding the economic impact of
4 the release of "Living with Michael Jackson," let alone Mr. Jackson's personal views of the film.
5 Her brief career in "crisis management" under her professional name,⁵ and her experience
6 working "in some way shape or form" in public relations, hardly established that she was an
7 expert in any field relevant to her testimony. There was no foundation for her to testify to the
8 amount of any potential loss, and certainly no foundation for her to testify to Mr. Jackson's state
9 of mind.

10 Yet, from this unfounded speculation the prosecution makes a quantum leap to claim that
11 "Living with Michael Jackson" "galvanized defendant himself and his trusted associates to do
12 something to mitigate the disastrous effect it promised to have on defendant's personal reputation
13 and financial future." (Plaintiff's Opposition 4:27-5:1.) Nothing close to this can be found in the
14 record. No foundation was established for this conclusion. [REDACTED] has never met Michael
15 Jackson and has no personal knowledge of Mr. Jackson's intent to do anything.

16 Furthermore, conspiracy requires a specific intent to agree to conspire and the specific
17 intent to commit the underlying crimes, not to do "something." This is classic innuendo. The
18 District Attorney relies on [REDACTED] testimony to assert that the making of the "rebuttal
19 video" was so important that Mr. Jackson must have wanted to do "something." The unfounded
20 speculation on [REDACTED] does not support such a contention, and, even her speculation falls far
21 short of establishing that Mr. Jackson intended to participate in a conspiracy.

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26 ⁵ [REDACTED] was allowed to testify under her "professional name," [REDACTED], even
27 though her real name was [REDACTED] (RT 1450:16-18.)

28
REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION TO SET ASIDE THE INDICTMENT (Fed. Code § 995)

1 C. The Evidence Before The Grand Jury Was Insufficient To Establish That Mr.
2 Jackson Had The Specific Intent To Commit Child Abduction, False Imprisonment
3 or Extortion

4 The District Attorney claims that Mr. Jackson had "personal concern to minimize the
5 damage" (Plaintiff's Opposition 6:9-13) and an "intense desire to salvage his reputation and
6 preserve his earning ability." (Plaintiff's Opposition 7:5-6.) The assertion that Mr. Jackson had
7 an "intense desire" has no support in the record. The grand jury did not hear any testimony from
8 witnesses who were in a position to testify regarding Mr. Jackson's state of mind. As argued
9 above, no admissible evidence was presented regarding any economic loss that may have
10 occurred as a result of Martin Basbir's film.

11 Furthermore, the prosecution is apparently asking the Court to infer that this supposed
12 "intense desire" is evidence that Mr. Jackson had the specific intent to commit criminal acts.
13 Even if such a desire to minimize economic loss and damage to reputation did exist, it does not
14 establish probable cause that Mr. Jackson intended to commit child abduction, false,
15 imprisonment and extortion, nor that he intended to join a conspiracy. Such an inference is not
16 reasonable and is not supported by the record. There must be some evidence to support each
17 element in the indictment. (*Garabedian v. Superior Court* (1963) 59 Cal.2d 124.)

18 The District Attorney states that "[t]he Grand Jury could reasonably infer from the
19 evidence of the well-coordinated activities of his associate and hirelings in February and March,
20 2003 that they acted for his benefit and at his direction." (Plaintiff's Opposition 7:15-18.) This
21 is a cavalier assertion without any evidentiary support. The record does not show any "well
22 coordinated activities." The use of the term "his associate and hirelings," (Id.) while pejorative,
23 does not refer to any evidence to support the contention that these supposed activities were at the
24 direction of Mr. Jackson.

25 The District Attorney asserts that the testimony of [REDACTED]
26 [REDACTED] established that Mr. Jackson would have directed the activities of the
27 alleged co-conspirators. (Plaintiff's Opposition 7:19-8:7.) No foundation was established so that
28

1 these witnesses would have been allowed to testify regarding Mr. Jackson's relationships with
2 anyone over objection at trial.

3 The prosecution asserts that [REDACTED] "was personally qualified to testify to what he
4 personally observed about defendant's relationship" with [REDACTED]
5 [REDACTED] and the relations of the latter individuals with one another. (Plaintiff's
6 Opposition 7:19-24.) The grand jury transcript reveals, however, the prosecution is relying on
7 speculation from [REDACTED] and the unsworn testimony of Mr. Sneddon, in the form of leading
8 questions, to support its argument.

9 [REDACTED] wasn't asked about actual events that he witnessed. He was asked to speculate
10 about the nature of relationships without any foundation to establish what he personally
11 witnessed. [REDACTED] himself said that he was guessing about the nature of Mr. Jackson's
12 relationship to [REDACTED]. (RT 567:11-12.) He stated that he did not listen in when Mr.
13 Jackson was on the telephone and had no specific recollections about any of Mr. Jackson's
14 telephone conversations. (RT 1620:25-1621:5.)

15 The District Attorney drew unfounded conclusions and put them into his questions during
16 [REDACTED] testimony. Mr. Sneddon said, without any foundation, "you've described [REDACTED]
17 relationship to Mr. Jackson as one of basically being told what to do and then doing it." (RT
18 564:25-28.) This "question" was not only leading, but was also not supported by [REDACTED]
19 testimony. Mr. Sneddon further stated, without any foundation from [REDACTED] testimony, that
20 [REDACTED] and Mr. Jackson "used to consult often" regarding business affairs. (RT 566:4-5.)

21 The District Attorney relies on [REDACTED] testimony that Mr. Jackson was a "delegator"
22 who "called the shots" as "evidence" that Mr. Jackson was in control of the alleged conspiracy.
23 (Plaintiff's Opposition 9:22-10:6.) [REDACTED] testimony, however, is classic innuendo because
24 it lacked any personal knowledge particularly as it related to Mr. Jackson's alleged involvement
25 in the alleged conspiracy. [REDACTED] did not state that he believed, let alone knew, Mr. Jackson
26 delegated authority to undertake a conspiracy. This inference is not reasonable. Furthermore, the
27 term "delegator" was first used by Mr. Sneddon, not [REDACTED] (RT 585:8-9.)

1 The prosecution points out that [REDACTED] responsibility was to "pretty much" stay with
2 Mr. Jackson 24 hours a day. (Plaintiff's Opposition 7:15-18.) Given this fact, it is remarkable
3 that [REDACTED] provided no evidence of Mr. Jackson's "intense desire" to participate in the
4 conspiracy, no evidence that Mr. Jackson or the alleged co-conspirators had the intent to conspire
5 or the intent to commit the crimes, and no evidence of any actions in concert that would give rise
6 to the inference that a conspiracy must have existed.

7 The prosecution alleges that [REDACTED] was "closely associated with [REDACTED]
8 [REDACTED] and worked for defendant in the production of videos as a result of that association" and
9 that this establishes that [REDACTED] was "qualified to testify about defendant's business and
10 personal relationships from his own observations." (Plaintiff's Opposition 7:25-28.) There is no
11 foundation in the record that establishes [REDACTED] was qualified to testify about Mr.
12 Jackson's relationships. [REDACTED] himself stated that he was basing his testimony on
13 assumptions and that he did not have personal knowledge of the nature of Mr. Jackson's
14 relationships. (RT 502:3-12; 553:12-22.)

15 The District Attorney asserts that [REDACTED] testimony regarding "defendant's attention
16 to detail and demanding nature" allows for a reasonable inference that Mr. Jackson had
17 knowledge and direction of the supposed conspiracy. (Plaintiff's Opposition 8:1-7.) [REDACTED]
18 testimony is not evidence of Mr. Jackson being involved or directing a conspiracy. It is simply
19 not reasonable to infer that Mr. Jackson's alleged preference for a well run household (RT
20 317:19-20) demonstrates the specific intent to commit crimes. Evidence that Mr. Jackson would
21 complain to his staff when household chores were not done properly is not evidence that he was
22 directing a criminal conspiracy. This is classic innuendo and does not support probable cause
23 that Mr. Jackson participated in a conspiracy.

24 **D. The Prosecution Failed To Establish Adequate Foundation For [REDACTED]
25 Testimony Regarding An Alleged Telephone Conversation With Mr. Jackson.**

26 The District Attorney asserts that "[t]here is real desperation" in Mr. Jackson's argument
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28

1 that the prosecution failed to lay adequate foundation for [REDACTED] testimony about a
2 telephone conversation with Mr. Jackson. (Plaintiff's Opposition 5, fn. 1.) Mr. Zonen either laid
3 a proper foundation for this testimony or he did not. If he did not lay the proper foundation so
4 that the testimony regarding the phone call was admissible over objection at trial, then [REDACTED]
5 [REDACTED] testimony should not have been presented to the grand jury.

6 Notably, the prosecution does not even attempt to argue that proper foundation was laid.
7 Instead they assert that Mr. Jackson is the "possessor of what surely is one of the most
8 recognizable voices in America" (Ibid.) The prosecution offers no support for this bald
9 contention and it is probably false.⁶ Mr. Jackson's celebrity status does not change the rules of
10 evidence. Mr. Zonen was apparently aware of this because he attempted to lay foundation.
11 However, [REDACTED] thwarted his efforts by not answering his questions. Instead, she generally
12 stated that it was unique that Mr. Jackson would call her and that she had not previously met him.
13 (RT 951:15- 957:11.)

14 In the end, it was unclear whether [REDACTED] testified that she, in fact, talked to Mr.
15 Jackson at all or if she really was talking to [REDACTED] (RT 951:15- 957:11.) The fact that
16 the prosecutor allowed her to continue testifying without ever laying the proper foundation
17 cannot be explained away by a footnote in the Plaintiff's Opposition. This is a textbook case of
18 inadmissible evidence that would never have been allowed over the objection of defense counsel.

19 V.

20 THE SUPPOSED EVIDENCE CITED BY THE PROSECUTION TO ESTABLISH THE
21 OVERT ACTS DOES NOT PROVE THE OVERT ACTS, LET ALONE THAT MR.
22 JACKSON PARTICIPATED IN A CONSPIRACY

23 The District Attorney cites the testimony of [REDACTED] to show Overt Act 7, that [REDACTED]

24
25 ⁶ One thinks of the voices of John F. Kennedy, Louis Armstrong, Franklin D. Roosevelt, Richard
26 Nixon, Jack Benny, Muhammad Ali, Bob Hope, Ed Sullivan, Cary Grant or a number of others
27 before claiming that the "voice" of Mr. Jackson is the "most recognizable." The District
28 Attorney's claim would be valid if he was referring to musical genius instead of speaking voice.
But alas, as to both, imitators abound.

1 [REDACTED] allegedly told [REDACTED] (Plaintiff's
2 Opposition 15:20-22.) This testimony is double hearsay and would never have been allowed to
3 be presented to a jury over objection.

4 Furthermore, the prosecution claims that [REDACTED] testimony was not offered for truth
5 of the matter asserted and that the grand jurors were admonished not to consider his testimony
6 for this purpose. (Plaintiff's Opposition 37:11-16.) Incredibly, the prosecution then turns around
7 and offers this very testimony to show that this overt act occurred. This demonstrates the
8 ineffectiveness of the limiting instruction. The prosecution could not effectively unring the bell
9 of this inadmissible testimony in their own minds, let alone in the minds of the grand jurors.

10 The prosecution cites [REDACTED] testimony to support Overt Act 10, that in "February
11 2003," Mr. Jackson's "personal security staff" was directed [REDACTED]
12 [REDACTED]. (Plaintiff's Opposition 16:21-25.) The record does not support this
13 overt act. [REDACTED] is not a member of Mr. Jackson's personal security staff. (RT 1378:22-28.)
14 The District Attorney acknowledges that he was a part-time employee. (Plaintiff's Opposition
15 16:21-22.) Furthermore, there is no evidence in the record that this Overt Act occurred during
16 the month of February 2003 or had anything to do with anything other than properly protecting
17 the welfare of a high profile guest.

18 The District Attorney asserts that [REDACTED] testimony
19 supports Overt Act 11, that [REDACTED]
20 [REDACTED] during the filming of the "rebuttal video."
21 (Plaintiff's Opposition 17:4-20.) There was no evidence to show that [REDACTED] was an agent
22 of Mr. Jackson or that he had even met with Mr. Jackson. Yet, the prosecution allowed him to
23 testify that the situation was a "nightmare" for Mr. Jackson. There was no foundation established
24 to justify [REDACTED] testimony regarding Mr. Jackson's supposed views regarding the
25 Bashir tape.

26 Furthermore, there was no evidence to establish that [REDACTED] was qualified to testify
27
28

1 to the public reaction to Mr. Bashir's film. No foundation was presented to establish that Mr.
2 [REDACTED] was an expert on public opinion or that he had conducted a poll to support his baseless
3 opinion.

4 The prosecution suggests that [REDACTED] testimony provides factual support for
5 Overt Act 12, that [REDACTED] transported [REDACTED] to [REDACTED] and that
6 [REDACTED] transported [REDACTED] to the same home. (Plaintiff's Opposition 17:26-28.)
7 There was no foundation to establish that [REDACTED] had personal knowledge that [REDACTED]
8 [REDACTED] (Plaintiff's Opposition 17:26-28.) This evidence
9 would not have been admissible over objection.

10 The District Attorney argues that [REDACTED] testimony supports Overt Act 14,
11 that [REDACTED] transported [REDACTED]. (Plaintiff's Opposition
12 19:6-8.) There was no foundation presented to the grand jury to establish that [REDACTED] had
13 personal knowledge of what [REDACTED] was or was not doing.

14 The prosecution asserts that [REDACTED] testimony supports Overt Act 20, that Mr.
15 Jackson [REDACTED]
16 [REDACTED] (Plaintiff's Opposition 21:17-24.) There is no evidence that Mr. Jackson
17 directed where they stayed. The evidence offered by the prosecution itself does not demonstrate
18 that Mr. Jackson had any input on where [REDACTED] slept.

19 The District Attorney claims that the testimony of [REDACTED]
20 [REDACTED] support Overt Act 23, that Mr. Jackson "did monitor and maintain control over the
21 activities of Neverland Ranch" and that Mr. Jackson [REDACTED]
22 [REDACTED] (Plaintiff's Opposition 23:3-24:4.) The evidence in the record does
23 not support a finding that [REDACTED] The witnesses
24 do not say they saw him actually monitoring any particular calls. Statements regarding [REDACTED]
25 [REDACTED] do not show Mr. Jackson's involvement [REDACTED] The
26 District Attorney's allegation amounts to an assertion that Mr. Jackson COULD HAVE
27
28

1 [REDACTED] Detective Bonner said there is some [REDACTED] in house. This
2 does not come close to supporting what is alleged in the overt act.

3 The prosecution alleges that [REDACTED] testimony supports Overt Act 26,
4 that [REDACTED]

5 [REDACTED] (Plaintiff's Opposition 25:15-26:16.) The evidence presented
6 by the District Attorney did not establish that [REDACTED]

7 [REDACTED]
8 The District Attorney asserts that items seized at [REDACTED] house support Overt
9 Act 28, that [REDACTED]

10 [REDACTED] (Plaintiff's Opposition 27:18-28:6.) There is no authentication of any documents seized
11 from [REDACTED]. There is no authentication of Mr. Jackson's signature. This evidence would not
12 have been allowed over the objection of defense counsel. Furthermore, there is no evidence that

13 [REDACTED] [REDACTED] [REDACTED]

14 [REDACTED]

15 VI

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

18 The record demonstrates that the District Attorney undermined the independence of the
19 grand jury by dictating what witnesses would be called, what questions could be asked and when
20 breaks would be allowed. The grand jurors were not free to independently call witnesses or
21 autonomously conduct their own examination of the facts.

22 This problem was exacerbated by the dual role of [REDACTED] as both a significant
23 witness and someone responsible for the security of the grand jurors and witnesses. (RT 825.)

24 The grand jurors were explicitly told that he was both "involved in this investigation since its
25 [REDACTED]"

26 ⁷ This is, by the way, no different than most people's homes. It is commonplace for people to
27 have more than one phone in the home, commonly known as extension phones, [REDACTED]
28 [REDACTED]

1 inception" and responsible for their security. (RT 824-825.) The United States Supreme Court,
2 in *Gonzales v. Beto* (1972) 405 U.S. 1052, 1055 held:

3 When a key witness against a defendant doubles as the officer of the court
4 specifically charged with the care and protection of jurors, associating with them
5 on both a personal and an official basis while simultaneously testifying for the
6 prosecution, the adversary system of justice is perverted.

7 In *Gonzales*, the Supreme Court reversed a murder conviction based on the fact that the
8 county sheriff played a dual role as a key prosecution witness and the bailiff of the jury. The
9 Court held that impropriety of a key prosecution witness serving as a bailiff in *Gonzales* was
10 governed by the holding in *Turner v. Louisiana* (1965) 379 U.S. 466, a case in which the Court
11 found that the contact between two sheriff's deputies, who also testified in the trial, with the
12 jurors, undermined the basic guarantees of a trial by jury. The trial in *Gonzales* lasted one day
13 and the jury was not sequestered. The Supreme Court noted that the contact between the sheriff
14 and the jury was somewhat less extensive and less intense than the contact in *Turner*, where the
15 trial lasted three days and the jury was sequestered. (*Gonzales, supra*, 405 U.S. at 1054.)
16 Nevertheless, the Supreme Court found that the fact that a key witness for the prosecution also
17 served as "the guardian of the jury, associating extensively with the jurors during the trial," was
18 enough to put *Gonzales* "within the four corners of *Turner*." (*Gonzales, supra*, 405 U.S. at 1056.)

19 [REDACTED] in his role as lead detective, provided the grand jurors with a timeline of all
20 of the key events in the District Attorney's version of the facts. (RT 824-835.) To the grand
21 jury, made up of laypersons who are unfamiliar with the rules of evidence, his testimony
22 essentially vouched for the chronology of the prosecution's case. He testified without foundation
23 regarding his opinion of the Los Angeles County DCFS investigation. (RT 1500-1501.) Lt.
24 [REDACTED] also testified that he began the criminal investigation in this case after speaking with
25 [REDACTED] (RT 1501-1502.) He testified that he was "in charge"
26 of the search of Neverland (RT 1502), which produced many of the materials presented to the
27 grand jurors as exhibits.

1 Here, the grand jury proceeding lasted twelve days, considerably longer than the trials in
2 either *Gonzales* or *Turner*. [REDACTED] inevitably had contacts with the grand jurors during this
3 time period. Furthermore, there is a much greater chance that justice was perverted by the
4 association of [REDACTED] with the grand jurors than in *Gonzales* and *Turner* because, unlike a
5 trial, this was a non-adversarial proceeding.

6 The District Attorney claims that Captain [REDACTED] was actually in charge of the
7 security for the grand jurors and that [REDACTED] had a "peripheral involvement" in the security
8 of witnesses and the grand jury. (Plaintiff's Opposition 42:7-11.) This claim has no basis in the
9 record.¹ To the contrary, the record for this 995 Motion shows that Mr. Zonen asked [REDACTED]
10 [REDACTED] if part of his responsibilities included "maintaining security here and for the witnesses
11 as well" and Lt. Klapatkis answered in the affirmative. (RT 825.)

12 VII.

13 THE INDICTMENT MUST BE SET ASIDE BECAUSE THE PROSECUTOR DID NOT
14 PROPERLY INSTRUCT THE GRAND JURY ON THE LAW OF CONSPIRACY

15 The prosecution admits that the conspiracy instructions from Mr. Zonen were "deficient"
16 in that they did not state all of the elements of conspiracy. (Plaintiff's Opposition 44:5-8.)
17 However, the prosecution contends that Mr. Auchincloss' closing argument sufficiently informed
18 the grand jurors of the elements of conspiracy. (Plaintiff's Opposition 45:24-27.)

19 The grand jurors received the instructions regarding the law of conspiracy from both Mr.
20 Zonen and Mr. Auchincloss. Mr. Zonen read jury instructions that omitted the phrase "and with
21 the further specific intent to commit [those] crimes." (Plaintiff's Opposition 5-8.) At the
22 conclusion of his instructions, Mr. Zonen acknowledged that the law of conspiracy is
23 complicated (RT 1771:15-17) and told the grand jury that "[y]ou may find at the conclusion of
24

25 ¹Once again, the prosecution attempts to influence this Court with information outside the record.
26 Other than judicial notice of commonly known facts, this Court cannot be referred to anything
27 other than what is within the four corners of the transcript. (*Stanton v. Superior Court* (1987)
193 Cal.App. 3d 265, 270; *People v. Crudginton* (1979) 88 Cal.App. 3d 295, 299.)

1 closing arguments that some of the more confusing instructions have been explained." (RT
2 1171:15-16.) In his closing argument, Mr. Auchincloss attempted to clarify the "complicated"
3 law of conspiracy. He did so by offering the grand jurors a "simple" definition of conspiracy that
4 omitted the essential element of specific intent to agree. (RT 1823:10-16.) The prosecution is
5 now asking the Court to infer that the grand jurors, as laypersons, were able to connect the dots
6 between the deficient instructions provided by Mr. Zonen and the deficient explanation of those
7 instructions provided by Mr. Auchincloss, in order to assemble the proper definition of
8 conspiracy.

9 The prosecution asserts that because "[t]he grand jury had evidence before it that the
10 agreed-upon crimes were, in fact, committed by one or more of the conspirators" (Plaintiff's
11 Opposition 46:3-4) that "[i]t is simply not reasonable to suppose that defendant, as one of the
12 conspirators, specifically intended to agree to commit those crimes but may not have specifically
13 intended that he and/or his co-conspirators commit the very crimes they had agreed to commit
14 and that were then committed." (Plaintiff's Opposition 46:5-8.) The prosecution is essentially
15 arguing, without any citation of authority, that, contrary to the holdings of the California
16 Supreme Court in *People v. Swain* (1996) 12 Cal. 4th 593, 600, *People v. Morante* (1999) Cal. 4th
17 403, 416, and *People v. Horn* (1974) 12 Cal. 3d 290, 296, conspiracy does not require proof of
18 both specific intent to agree and specific intent to commit the underlying crimes.

19 The district attorney argues that the grand jury was informed "that an element of the
20 conspiracy count is a specific intent by the conspirators to commit the crime or crimes they had
21 agreed to commit, albeit not by the first of the written instructions concerning the elements of
22 conspiracy." (RT 45:24-27.) It is unreasonable to expect that the grand jurors understood that
23 conspiracy requires both the specific intent to agree and the specific intent to commit the
24 criminal acts, in light of the improper instructions. Unlike a judge presiding over a preliminary
25 hearing, it cannot be inferred that the grand jurors had the legal knowledge to correct the
26 prosecution's errors when reviewing the evidence. The indictment must be set aside because the
27

1 grand jurors could not have found probable cause for each element of conspiracy because they
2 were not aware of all of the elements.

3 VIII

4 THE COURT MUST DETERMINE IF THE OBJECTIONS IN APPENDIX A WOULD
5 HAVE BEEN SUSTAINED AT TRIAL

6 The prosecution has attached a lengthy response to Mr. Jackson's lengthy Appendix A.
7 The fact of the matter is that the Court has to resolve the issues by reading the transcript with an
8 eye for what is objectionable by competent defense counsel. The Court then has to determine if
9 the objection would have been sustained to the question as phrased.

10 Mr. Jackson's Appendix A set forth some, but not all, of the objectionable questions.
11 The prosecution, in its Opposition, pretends that this is an exhaustive rather than representative
12 list. The prosecution then contends that their questions were acceptable. They are not. It is
13 simply up to the Court to determine whether or not any of it would have seen the light of day if
14 this had occurred at trial.

15 Furthermore, we respectfully remind the Court that some of the questions and answers,
16 and some of the conduct of the prosecutors and witnesses, were so prejudicial that they would
17 have resulted in a motion for mistrial which, at several junctures in the proceedings, would have
18 been granted. This is the phenomenon, in the grand jury context, addressed by the court in
19 *Backus*.

20 IX

21 THE CUMULATIVE EFFECT OF THE DISTRICT ATTORNEYS' ERRORS AND
22 MISCONDUCT REQUIRES THE INDICTMENT TO BE SET ASIDE IN ITS
23 ENTIRETY

24 Even though the District Attorney addressed (and admitted) some of his errors, he did not
25 even bother to address the overarching misconduct which infected these proceedings from the
26 beginning. The effectiveness of this tactic before the Court remains to be seen. However, we
27

1 respectfully submit that this Court has to confront the outrageous conduct of the District Attorney
2 in presenting [REDACTED] in the manner in which he did, in allowing [REDACTED]
3 [REDACTED] to influence the grand jurors and in allowing the chief prosecutor, Tom Sneddon, to
4 engage in a remarkable lack of restraint.

5 Individually, each of these instances requires that the indictment be set aside. How can
6 this Court conclude that each instance, standing alone, did not prejudice the grand jury?

7 Cumulatively, the combination of these instances, along with the manner in which the
8 grand jurors were treated, must require that the indictment be set aside. Add to that the fact that
9 the chief investigating officer was also responsible for the security of the grand jury. Add to that
10 the barrage of inadmissible evidence and innuendo, particularly as it was used to try to link Mr.
11 Jackson to the alleged conspiracy. Add to that the conceded defective instructions and argument
12 on the law.

13 This is a high profile "celebrity" case. Mr. Jackson, celebrity or not, is entitled to the
14 same protection of the law as anyone else. Most likely it is because he is a celebrity that District
15 Attorney, himself, has taken on an unorthodox personal role in this case. Because Mr. Jackson is
16 a celebrity, the prosecutor has pursued Mr. Jackson in a manner usually reserved for murder
17 cases involving the death penalty or \$500 million security fraud cases.

18 Moreover, it is likely that, because Mr. Jackson is a celebrity, the prosecution has
19 attempted to make a case where none exists. They used inexcusable tactics before the grand jury
20 and do not even attempt to excuse these before this Court. They pursue this celebrity where no
21 admissible evidence exists. They fail to use the self-discipline necessary to present the evidence
22 and the law accurately to a grand jury without judicial supervision.

23 The cumulative result is inescapable. The indictment against Mr. Jackson must be set aside.

24 ///

25 ///

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REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S
MOTION TO SET ASIDE THE INDICTMENT (Pen. Code § 995)

1 X

2 CONCLUSION

3 For the reasons stated above, Mr. Jackson's motion to set aside the indictment must be
4 granted.

5 Dated: July 12, 2004

6 COLLINS, MESEREAU, REDDOCK & YU
7 Thomas A. Mesereau, Jr.
Susan C. Yu.

8 KATTEN MUCHIN ZAVIS ROSENMAN
9 Steve Cochran
Stacey McKee Knight

10 SANGER & SWYSEN
11 Robert M. Sanger

12 OXMAN & VAROSCAK
Brian Oxman

13 By: 

14 Robert M. Sanger
15 Attorneys for
MICHAEL JOSEPH JACKSON

PROOF OF SERVICE

I, the undersigned declare:

I am over the age of 18 years and not a party to the within action. I am employed in the County of Santa Barbara. My business address is 233 East Carrillo Street, Suite C, Santa Barbara, California, 93101.

On July 12, 2004, I served the foregoing document **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT** (Pen. Code § 995); on the interested parties in this action by depositing a true copy thereof as follows:

Tom Sneddon
Gerald Franklin
Ron Zonen
Gordon Auchincloss
District Attorney
1105 Santa Barbara Street
Santa Barbara, CA 93101
568-2398

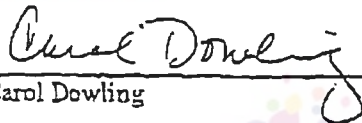
— BY U.S. MAIL - I am readily familiar with the firm's practice for collection of mail and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited daily with the United States Postal Service in a sealed envelope with postage thereon fully prepaid and deposited during the ordinary course of business. Service made pursuant to this paragraph, upon motion of a party, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit.

— BY FACSIMILE - I caused the above-referenced document(s) to be transmitted via facsimile to the interested parties at

X BY HAND - I caused the document to be hand delivered to the interested parties at the address above.

X STATE - I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed July 12, 2004, at Santa Barbara, California.


Carol Dowling

PROOF OF SERVICE
1013A(1)(3), 1013(c) CCP

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 23, 20 04, I served a copy of the attached ORDER FOR RELEASE OF REDACTED DOCUMENTS (OPPOSITION TO MOTION TO SET ASIDE INDICTMENT) (REPLY TO OPPOSITION TO MOTION TO SET ASIDE INDICTMENT) 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(1), 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 23RD day of JULY, 20 04, at Santa Maria, California.

Carrie L. Wagner

CARRIE L. WAGNER