THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY 1 County of Santa Barbara
By: RONALD J. ZONEN (State Bar No. 85094) Senior Deputy District Attorney GORDON AUCHINCLOSS (State Bar No. 150251) 3 Senior Deputy District Attorney GERALD McC. FRANKLIN (State Bar No. 40171) JUL 23 2884 4 GARY M. BLAIR, Executive Officer Senior Deputy District Attorney BY CANNE & WAGNEY CHERK 1105 Santa Barbara Street Santa Barbara, CA 93101 Telephone: (805) 568-2300 5 6 FAX: (805) 568-2398 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA S FOR THE COUNTY OF SANTA BARBARA 9 SANTA MARIA DIVISION 10 11 12 THE PEOPLE OF THE STATE OF CALIFORNIA. Plaintiff. 13 OPPOSITION DEFENDANT'S MOTION TO SET ASIDE THE INDICTMENT (Pen. Code, § 995) 14 V. MICHAEL JOE JACKSON. 15 DATE: July 9, 2004 Defendant. TIME: 8:30 a.m. 16 DEPT: 9 (Melville) 17 18 Introduction 19 Defendant has moved, pursuant to Penal Code section 995, for an order setting aside 20 the indictment in this matter. This is Plaintiff's response. 21 Procedural Summary 22 Defendant's "Procedural Summary" is adopted by Plaintiff 23 Summary of the Evidence 24 Defendant's summary of the evidence (Motion 6-88), under the argumentative 25 heading, "The So-Called Facts Presented to the Grand Jury," is reasonably complete and 26 thoughtfully organized. It is adopted by Plaintiff, with such additions and corrections as are 27

appropriate in the discussion which follows.

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- 1. "The admissible evidence is insufficient to establish a strong suspicion of the elements necessary to show Mr. Jackson was part of a conspiracy." (Motion 91-94)
- 2. The evidence demonstrated merely defendant's association with his alleged coconspirators, not his knowing and intentional participation in a conspiracy. (Motion 94-96.)
- 3. "The evidence... that allegedly links Mr. Jackson to a supposed conspiracy... was not admissible at trial over objection of counsel." (Motion 96-101.)
- 4. "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." (Motion 101-102.)
- 5. "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." (Motion 102-121.)
- 6. "Mr. Jackson was denied his rights to due process and a fair grand jury proceeding due to improprieties in grand jury procedure." (Motion 122-123.)
- 7. "The prosecutor misstated the law of conspiracy when instructing the grand jurors and the misstatement of law cause the grand jury to return an indictment on less than reasonable or probable cause." (Motion 123-126.)

Plaintiff will address those issues, except Issue 6, in turn. (Defendant's argument that "IX Mr. Jackson Was Denied His Right To Due Process And A Fair Grand Jury Proceeding Due To Improprieties In Grand Jury Procedure," Motion 122-123, is not so much a substantive argument as a foot in the door. He states he "will be seeking other relief regarding the unfairness of the proceeding and the effect of the District Attorney failing to provide exculpatory evidence." We cannot address an argument that has not yet been made, but only hinted at.)

Penal Code section 995 declares, in pertinent part, that "(a)... the indictment... shall be set aside by the court in which the defendant is arraigned, upon his or her motion ... (1)...(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."

In considering a motion to dismiss under Penal Code section 995, the superior court sits as a reviewing court [citation], and it is the grand jury that is the factfinder. In a section 995 proceeding, the trial court may set aside the indictment only if the grand jury acted "without reasonable or probable cause." In the course of that determination, "[e]very legitimate inference that may be drawn from the evidence must be drawn in favor of the [indictment]." (People v. Hill (1971) 3 Cal.3d 992, 996.) "[A]n indictment will not be set aside if there is some rational ground for assuming the probability that an offense has been committed and the accused is guilty of it," [Citation.] (People v. Pic'l (1982) 31 Cal.3d 731, 737.) (Accord, People v. Hillhouse (2003) 109 Cal.App.4th 1612, 1622-1623 [motion to set aside information].)

Penal Code section 995 permits an attack upon an indictment only on two grounds: "Where it is not found, endorsed, and presented as prescribed in this code," or "that the defendant has been indicted without reasonable or probable cause." With one exception – viz, where, in some way, the proceedings denied the defendant due process (*People v. Backus* (1979) 23 Cal.3d 360, 392-393) – the court may not set aside an indictment on any grounds other than the two named in section 995. (See *People v. Van Randall* (1956) 140 Cal.App.2d 771, 774.)

See People v. Superior Court (Jurado) (1992) 4 Cal.App.4th 1217: "[A]n indictment or information should be set aside only where there is a total absence of evidence to support a necessary element of the offense charged. [Citations.]" (Id., p. 1226.) "[W]e reiterate we are not reviewing the sufficiency of evidence to support a jury verdict. Rather, we are only deciding it there is some evidence to support the alleged special circumstance allegation." (Id. p. 1227.)

THE EVIDENCE IS MORE THAN SUFFICIENT TO ESTABLISH A STRONG SUSPICION THAT DEFENDANT WAS PART OF A CONSPIRACY

A. Defendant's Argument. Summarized

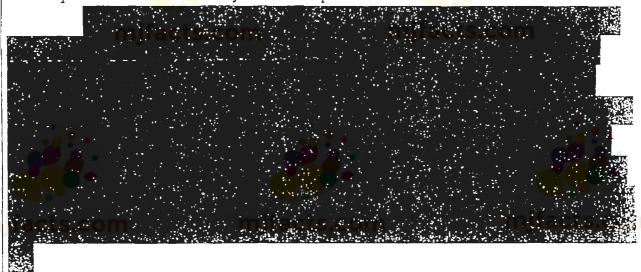
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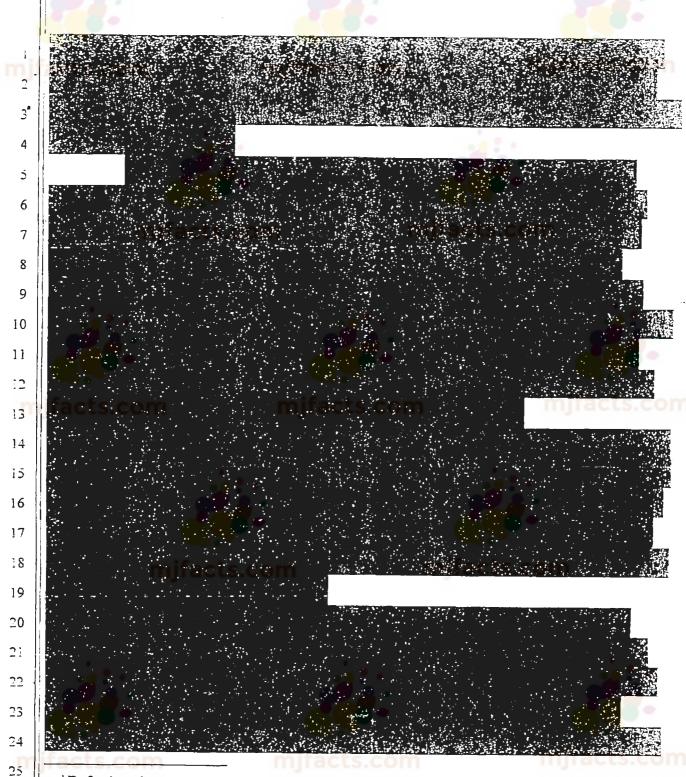
Defendant argues that "The admissible evidence is insufficient to establish a strong suspicion of the elements necessary to show Mr. Jackson was part of a conspiracy." (Motion 91-94.) "There is simply no evidence that Mr. Jackson had the specific intent to agree or conspire with anyone about anything." (*Id.*, 92:8-10.) And, "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." (*Id.*, 92:18-20.)

The People respectfully disagree.

B. Evidence Of Defendant's Intent To Conspire

Martin Bashir's documentary "Living with Michael Jackson" aired in the United Kingdom a few days before it was broadcast nationwide in the United States on February 6, 2003. Even before the program first aired, public relations professionals with knowledge of its content perceived the documentary would be a public relations disaster for Michael Jackson.





Defendant devotes three full pages (Motion 97:14 – 100:22) to the argument that there was no sufficient foundation for testimony that it was Michael Jackson – possessor of what surely is one of the most recognizable voices in America – with whom she spoke on the telephone before flying to Miami at his request and spending two days there in his company.

There is real desperation in that argument.

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C. Evidence Of Defendant's Specific Intent To Commit Specific Crimes

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Defendant does not claim the alleged crimes were not committed. Nor does he deny that the people who committed them worked together in a way that necessarily implied a preexisting plan, scheme and design. He simply argues that "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." (Motion 92:18-20.)

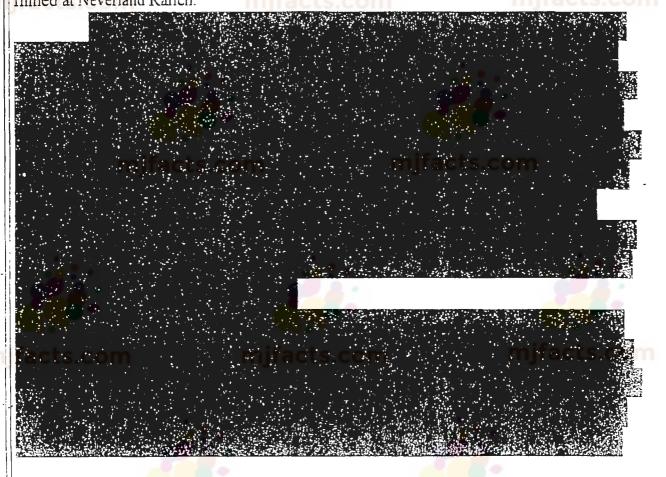
Each of the three crimes alleged as the objects of the conspiracy charged in Count

One of the indictment were committed in furtherance of Michael Jackson's evident and

personal concern to minimize the damage he brought upon himself by his ill-considered

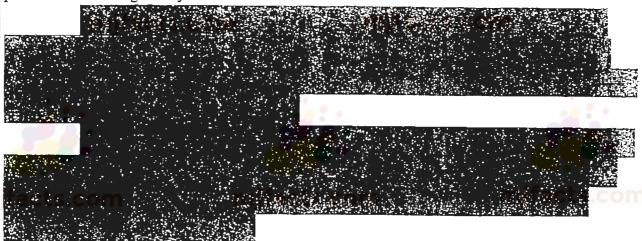
involvement of with him in the portions of "Living with Michael Jackson"

filmed at Neverland Ranch.

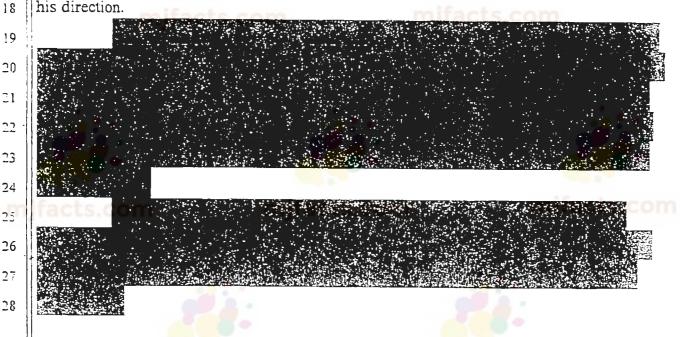


The charged offenses were committed in furtherance of that overarching agreement, and (the Grand Jury reasonably inferred) were each the consequence of a specific agreement by defendant and his henchmen between February 1st and March 31, 2003 to commit those crimes in furtherance of defendant's intense desire to salvage his reputation and preserve his earning ability.

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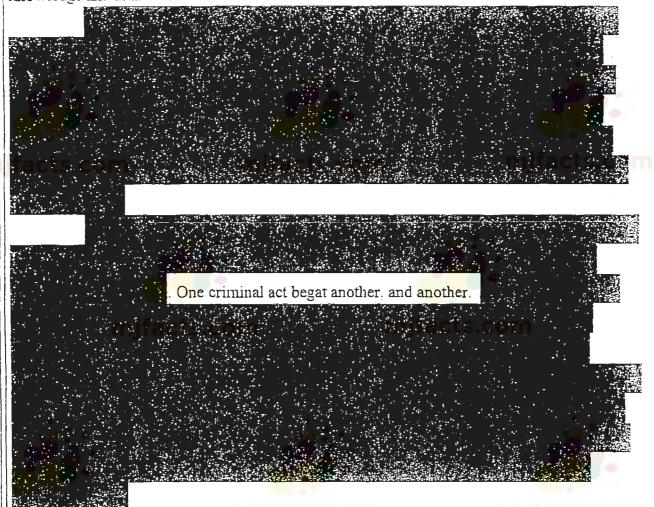


Defendant had the most to lose from the fallout of "Living with Michael Jackson." The Grand Jury could reasonably infer from the evidence of the well-coordinated activities of his associate and hirelings in February and March, 2003 that they acted for his benefit and at his direction.



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The Grand Jury could reasonably infer that when defendant's identified associates took coordinated action for his benefit to mitigate the fallout from the Bashir documentary, particularly with respect to the family members, it was with defendant's knowledge and at his direction.



"The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators" (CALJIC 6.11, in part), and defendant's vicarious liability for the acts of his co-conspirators extends to reasonably foreseeable crimes carried out to fulfill the criminal objective. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

DEFENDANT WAS NOT MERELY "ASSOCIATED" WITH THE THUGS WHO CARRIED OUT THE TARGET CRIMES. HE EMPLOYED MANY OF THEM, INSPIRED THEM ALL AND WAS OBSERVED TO SUPERVISE SOME OF THEIR EFFORTS ON HIS BEHALF

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Defendant argues that the evidence demonstrated merely defendant's association with his alleged co-conspirators, not his knowing and intentional participation in a conspiracy. (Motion 94-96.)

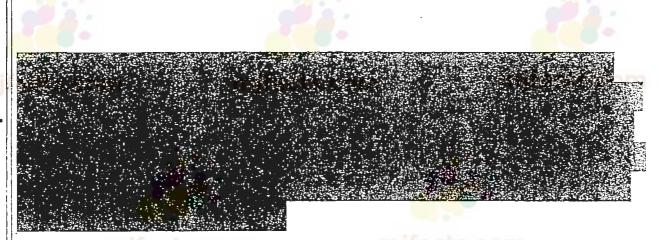
Conspiracies are rarely hatched in public, and direct evidence of their formation is seldom available. An intent to agree to commit a crime, like other elements of the inchoate crime of conspiracy, "may . . . "be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]" (People v. Rodrigues (1994) 8 Cal.4th 1060, 1135, quoting People v. Cooks (1983) 141 Cal.App.3d 224, 211." (People v. Herrera (2000) 83 Cal.App.4th 46, 64.)

In this case, the agreement itself is to be inferred from the participation of the named conspirators (defendant among them) in their coordinated efforts to keep the family away from public attention even before the February 6, 2003 broadcast of Martin Bashir's "Living with Michael Jackson" across the United States. It may be inferred from their efforts to

whatever help it might lend to lessening the public relations disaster the broadcast of Bashir's documentary had become.

The evidence demonstrates prompt, coordinated action by those most intimately associated with defendant in his business and professional life to mitigate the public relations catastrophe that had befallen him. Defendant helped initiate those efforts himself.

Who, if not defendant, authorized and guarterbacked the team effort on his behalf?



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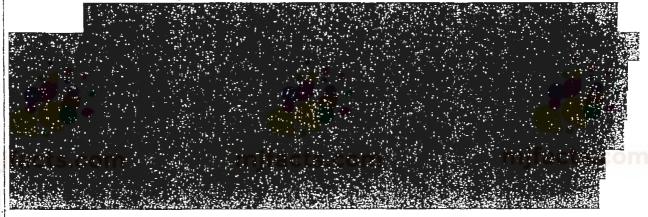
The Grand Jury was justified in inferring that defendant played an active if discreet role in the effort to isolate the family and secure the cooperation of its members.

IV

THE EVIDENCE UPON WHICH THE GRAND JURY RELIED IN FINDING PROBABLE CAUSE TO INDICT DEFENDANT ON THE CHARGES AGAINST HIM WAS. IN SUFFICIENT PART, ADMISSIBLE AGAINST HIM AT TRIAL

Defendant argues that "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 [sic] not admissible at trial over the objection of counsel." (Motion 96:16-18.) He focuses on the overt act allegations, and argues "The Overt Acts, Listed In The Indictment, Are Not Supported By The Admissible Evidence." (*Id.*, 97:14-15.)

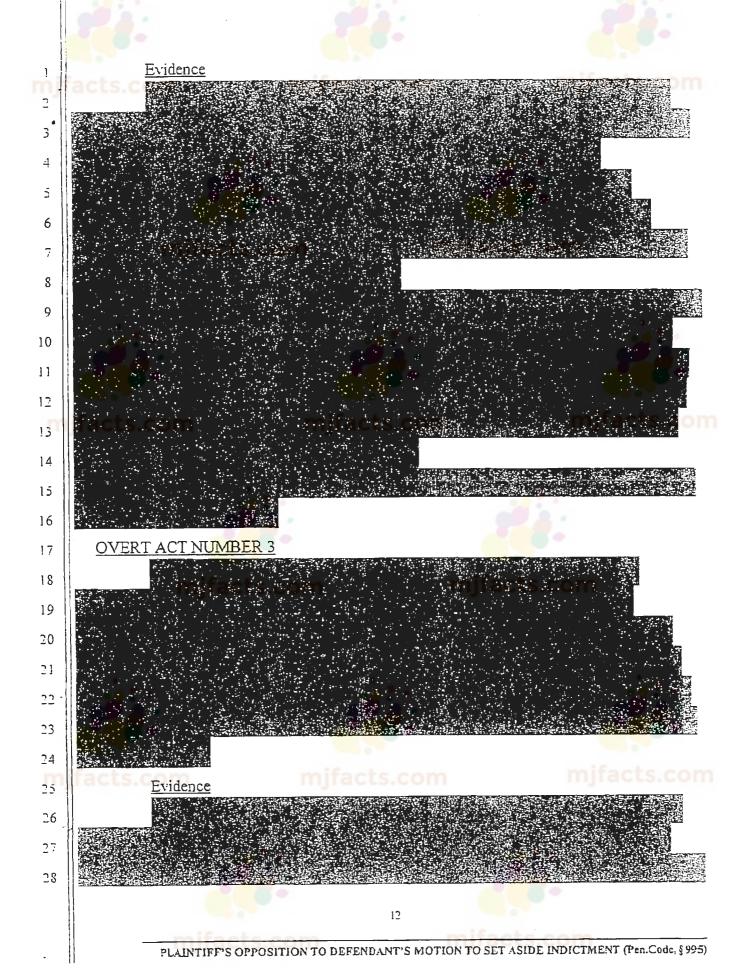
The Grand Jury considered 12 days of testimony and nearly 130 exhibits in finding at least one of the 24 alleged overt acts was committed in furtherance of the conspiracy.

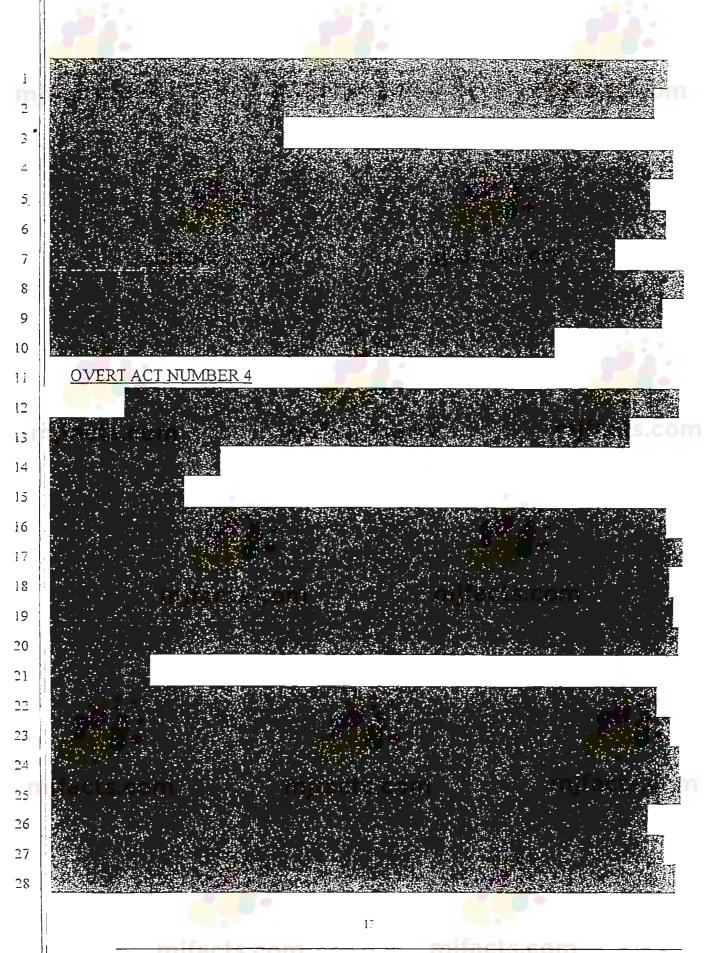


Out of an abundance of caution, the People set out each alleged overt act, followed by a brief summary of the evidence that supports that act. All but Overt Act No. 16 is

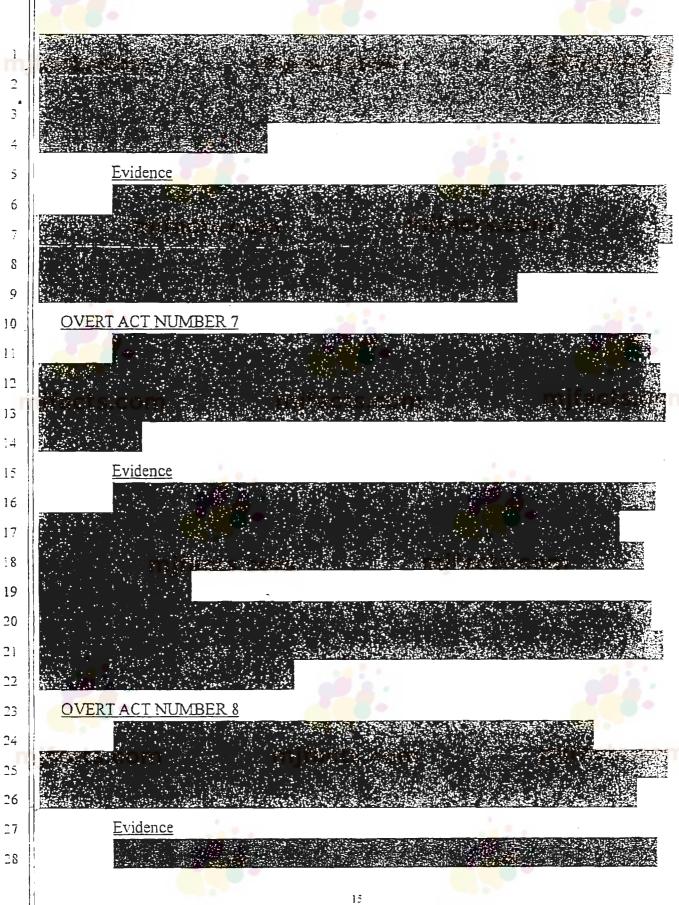
supported by testimonial or documentary evidence, or by both testimony and documents.

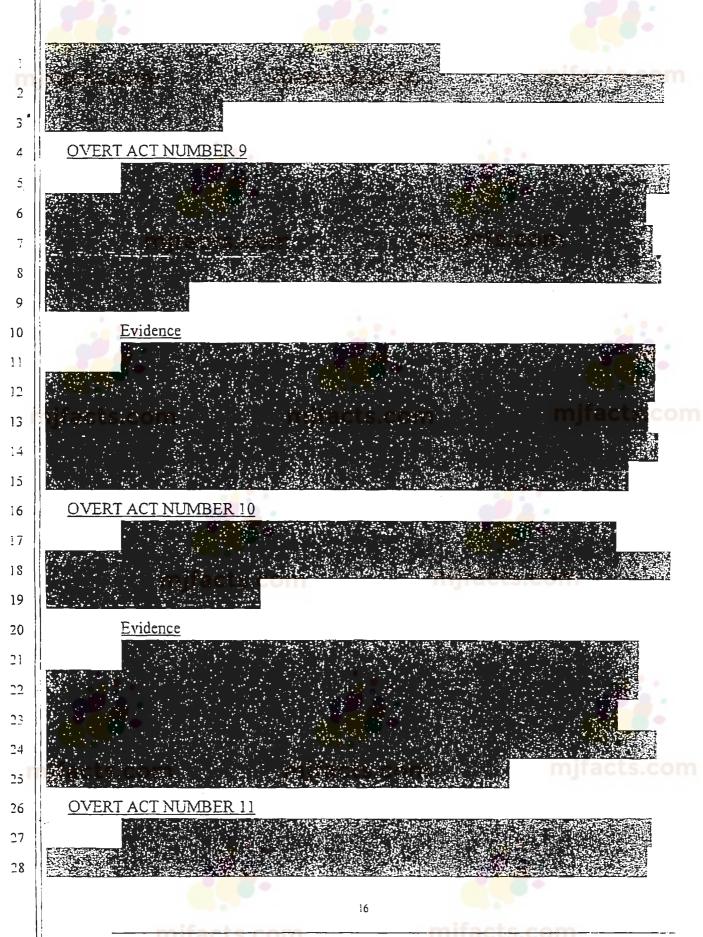
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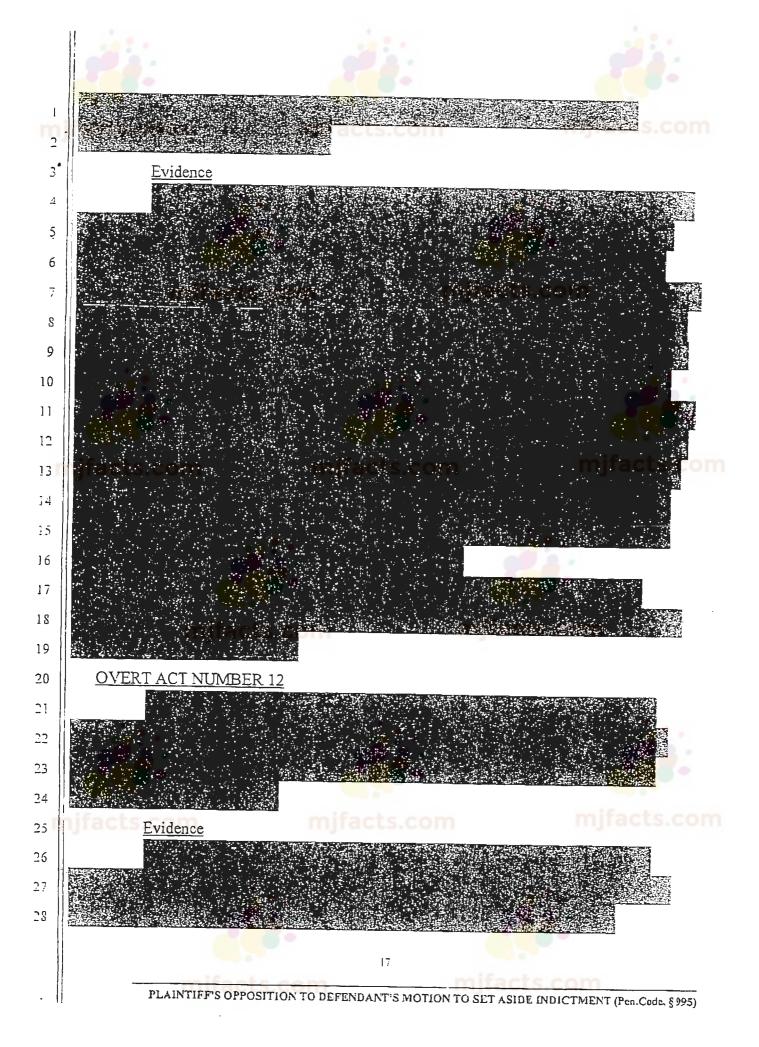


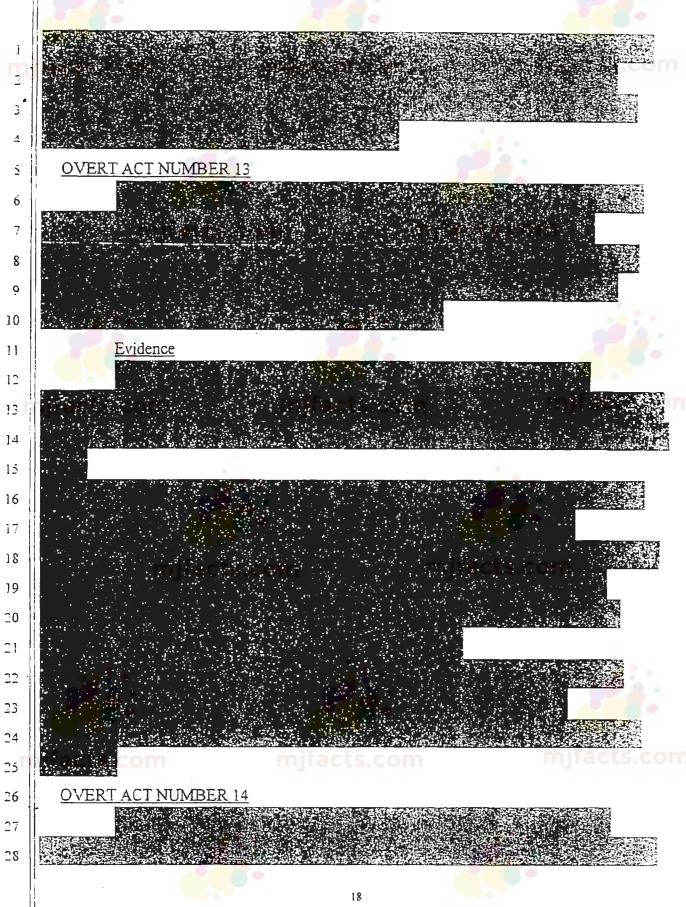


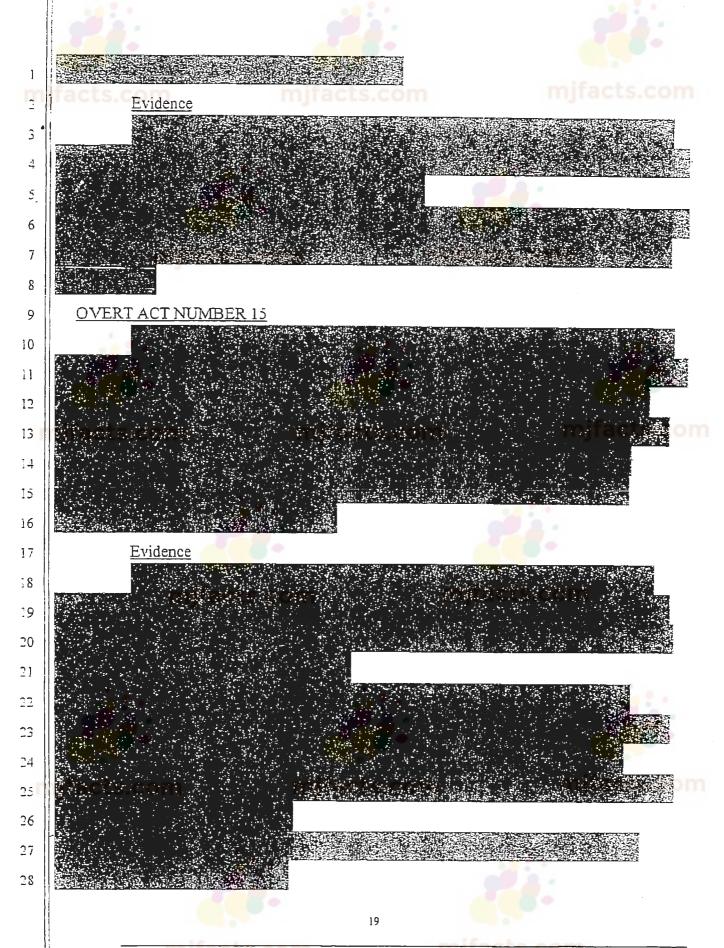
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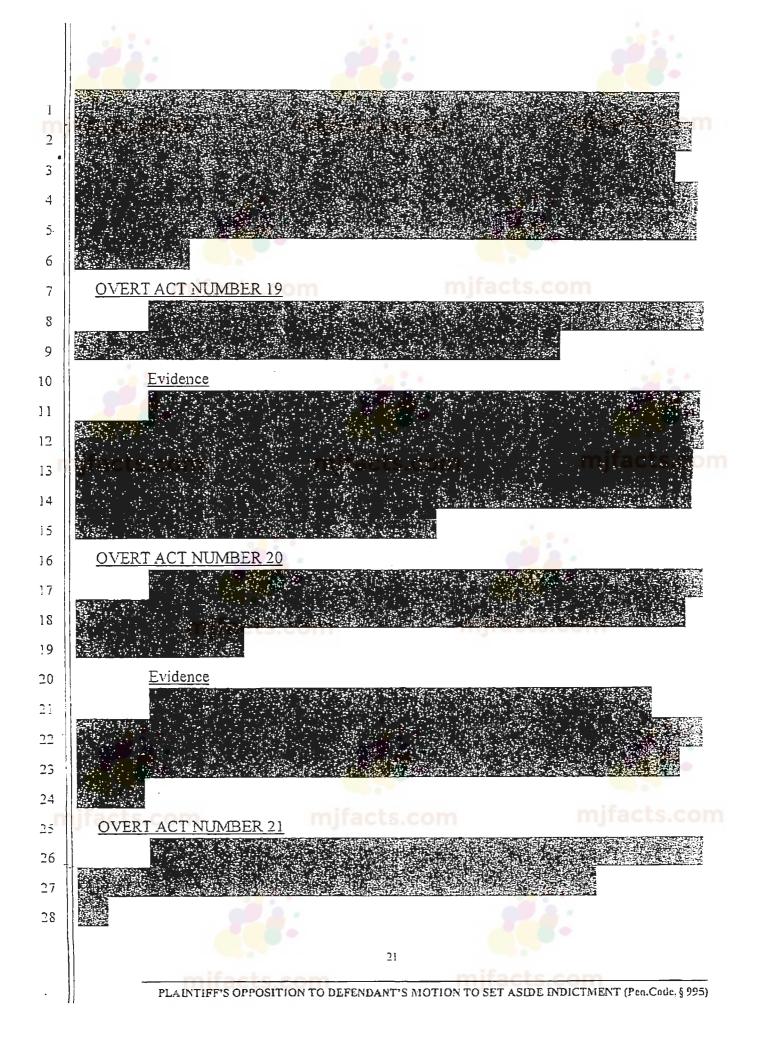


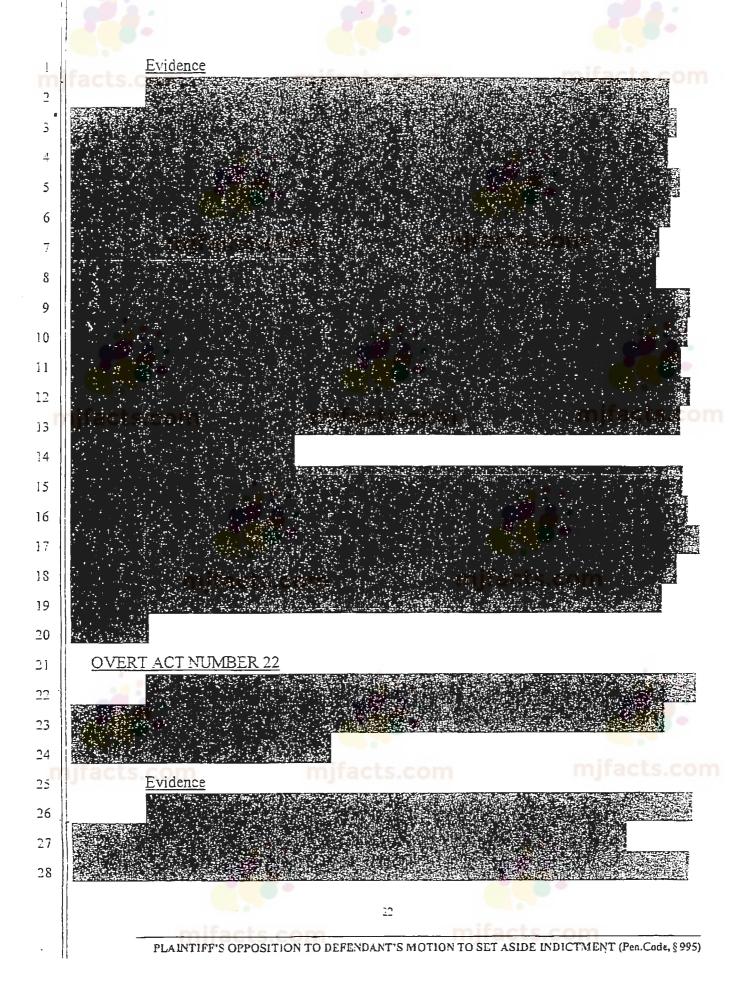


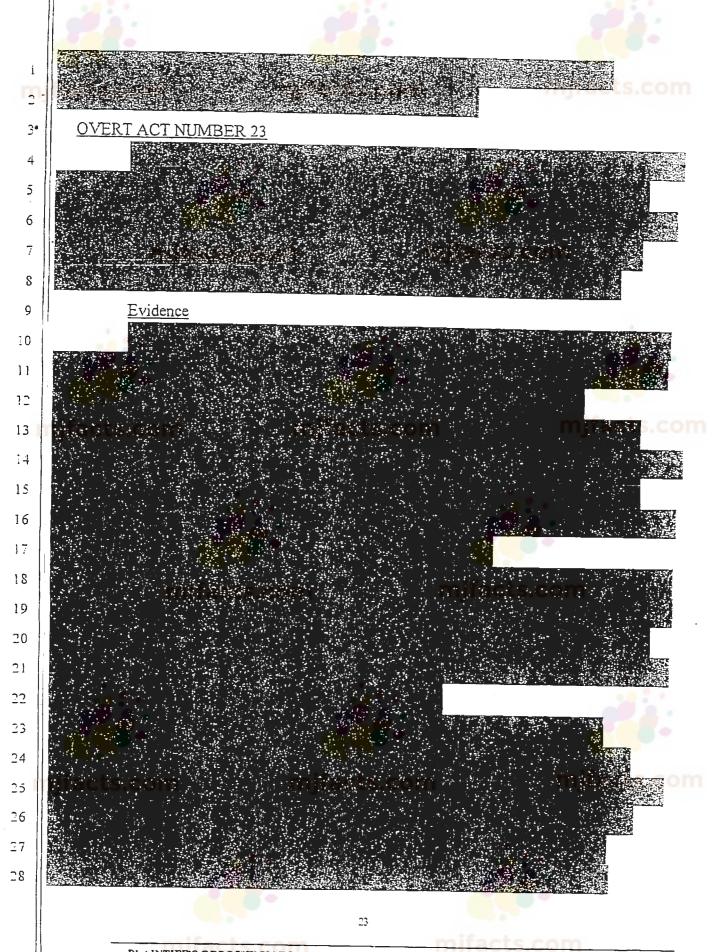


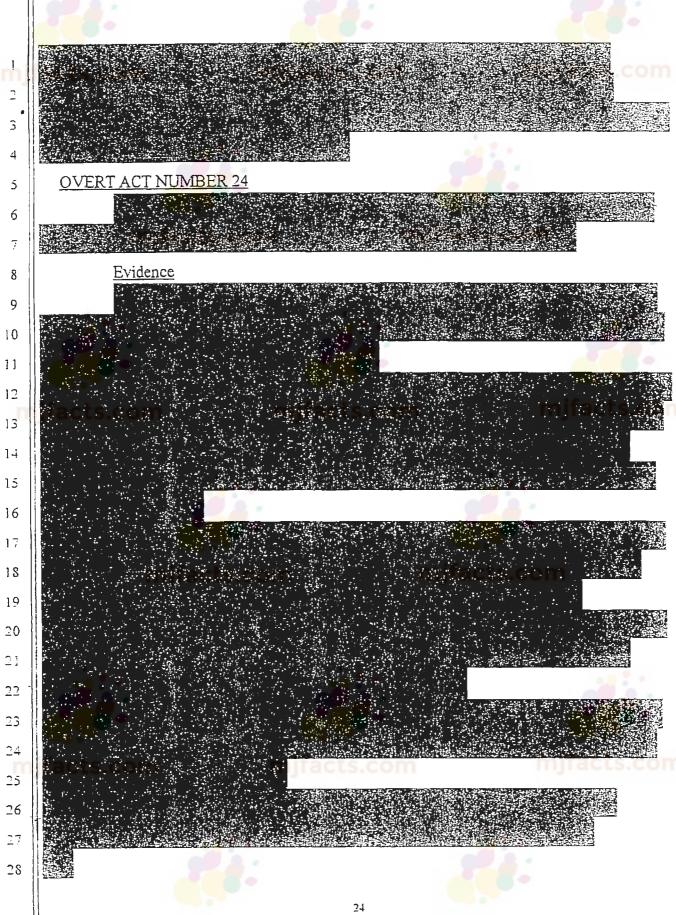
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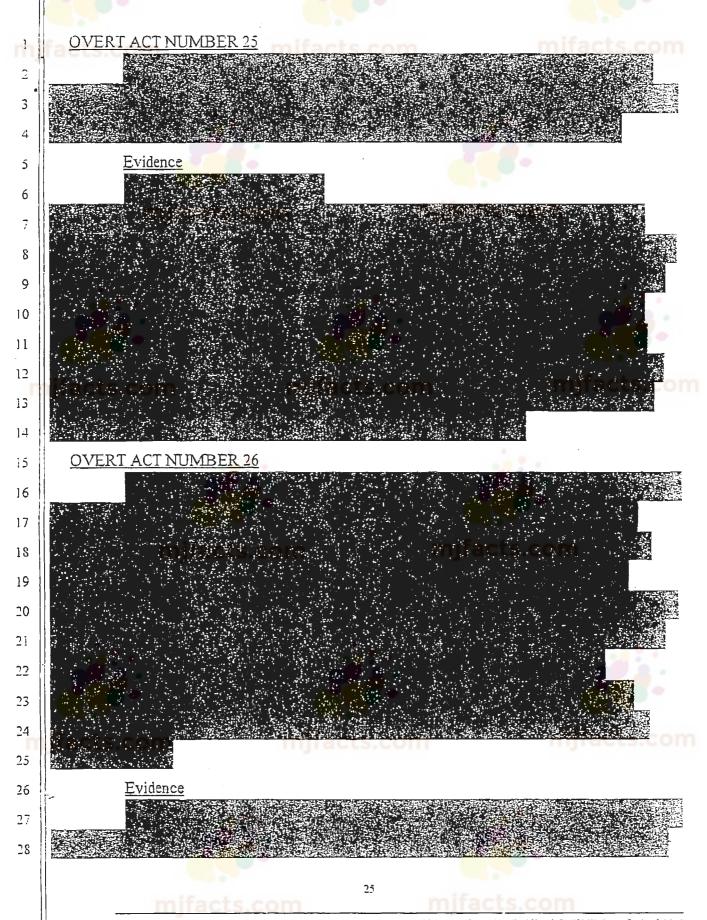
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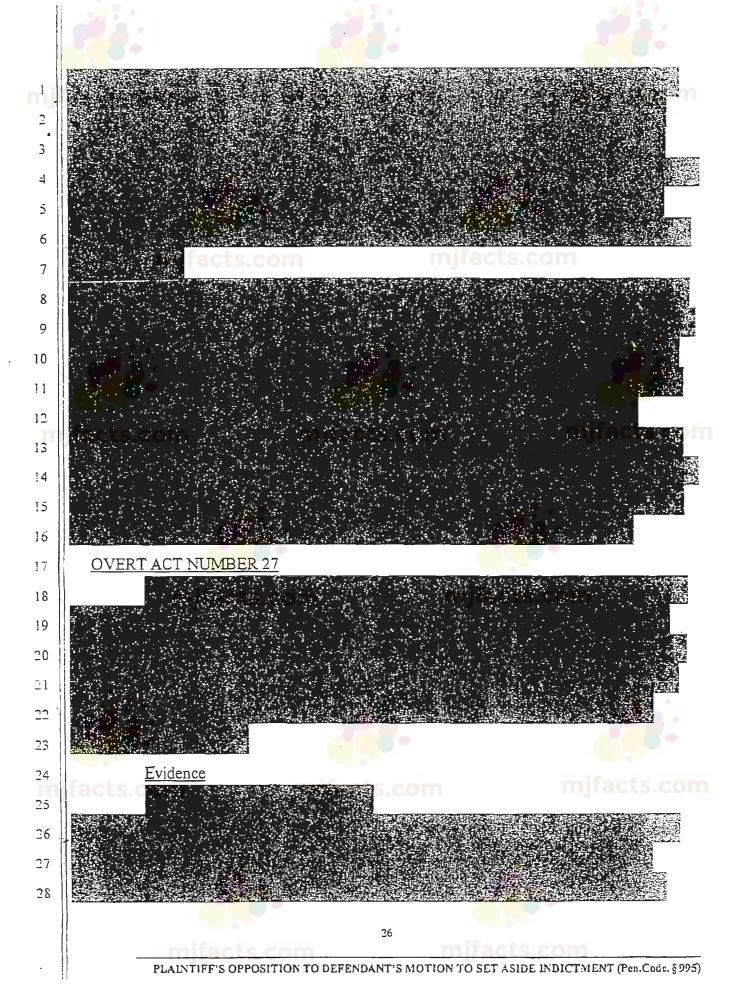


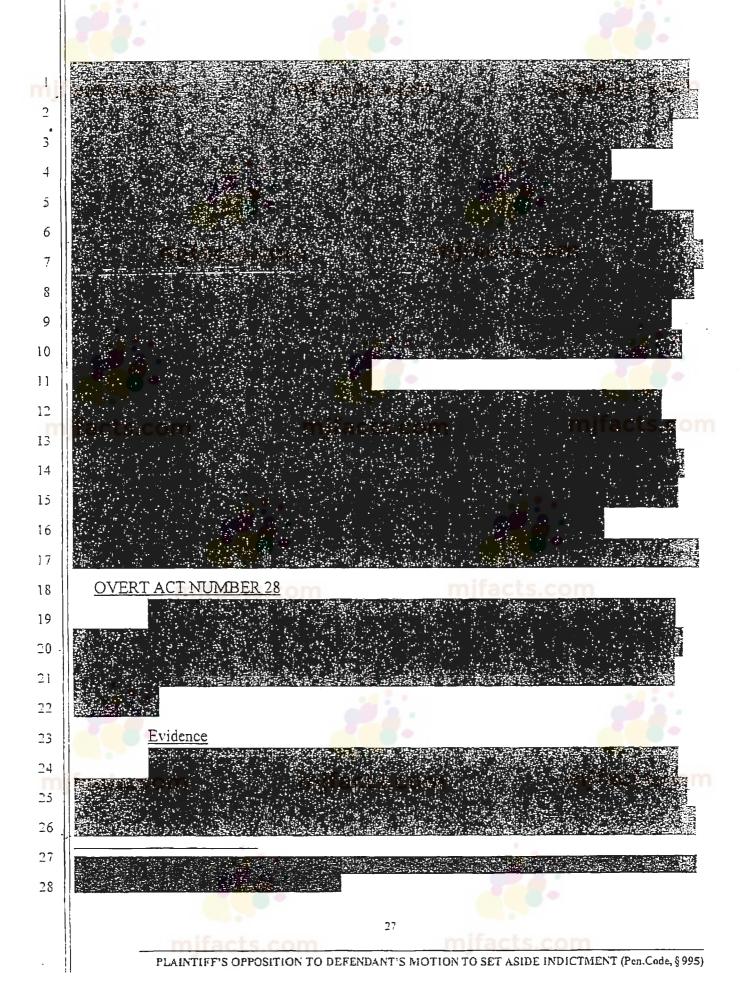


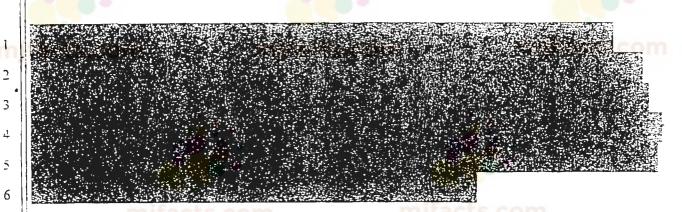












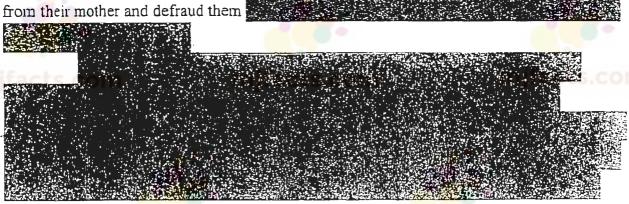
V EACH OF THE OVERT ACTS HAS A DIRECT CONNECTION TO THE CONSPIRACY ALLEGED IN COUNT ONE

The stated object of the conspiracy to commit false imprisonment, child abduction and extortion alleged in count one was to unlawfully control, withhold, isolate, conceal, entice, and threaten, and her children. Each of the 24 alleged overt acts was done in furtherance of the criminal objectives of this conspiracy.

Defendant asserts that overt acts nos. 1, 2, 3, 4, 19, 20, 21, 22 and 26 do not have a rational connection to the alleged conspiracy. Since defendant makes no challenge to the remaining overt acts, it is assumed that defendant concedes the remaining 15 overt acts do have a rational connection to the conspiracy. Because only one overt act is necessary to preserve the integrity of count one, defendant's censure does not impact he legitimacy of the indictment.

It is evident that defendant misunderstands the essential purpose of this conspiracy.

Every overt act alleged in count one evinces an overall scheme to manipulate and control the family which enabled defendant to falsely imprison the family, separate the children



and to manipulate and control the children in a manner which would then control

It was this control that allowed defendant to falsely imprison the family, abduct the children from their mother and extort property from the family.

VI

IF SOME "INCOMPETENT AND IRRELEVANT EVIDENCE" WAS PUT BEFORE THE GRAND JURY IN THE COURSE OF A 12-DAY HEARING, IT DID NOT PREVENT THE GRAND JURY FROM FAIRLY CONSIDERING THE ADMISSIBLE EVIDENCE IN FINDING THE INDICTMENT

A. Introduction

In the bold-cap caption for his Argument VII, defendant argues that "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." (Motion 102:7-11.) He offers several specifications in support of that charge, which will be considered in turn.

B. The Amount of "Inadmissible and Irrelevant Evidence"

Under the subheading "A. The Prosecution Presented The Grand Jury With A Tremendous Amount Of Inadmissible And Irrelevant Evidence." (Motion 102:12 – 103:4) Defendant refers the court to "a selection of evidence which would not be admissible over objection at trial," which he attached as Appendix A to his motion.

Plaintiff respectfully attaches as Appendix A to this Opposition our analysis of defendant's Appendix A.

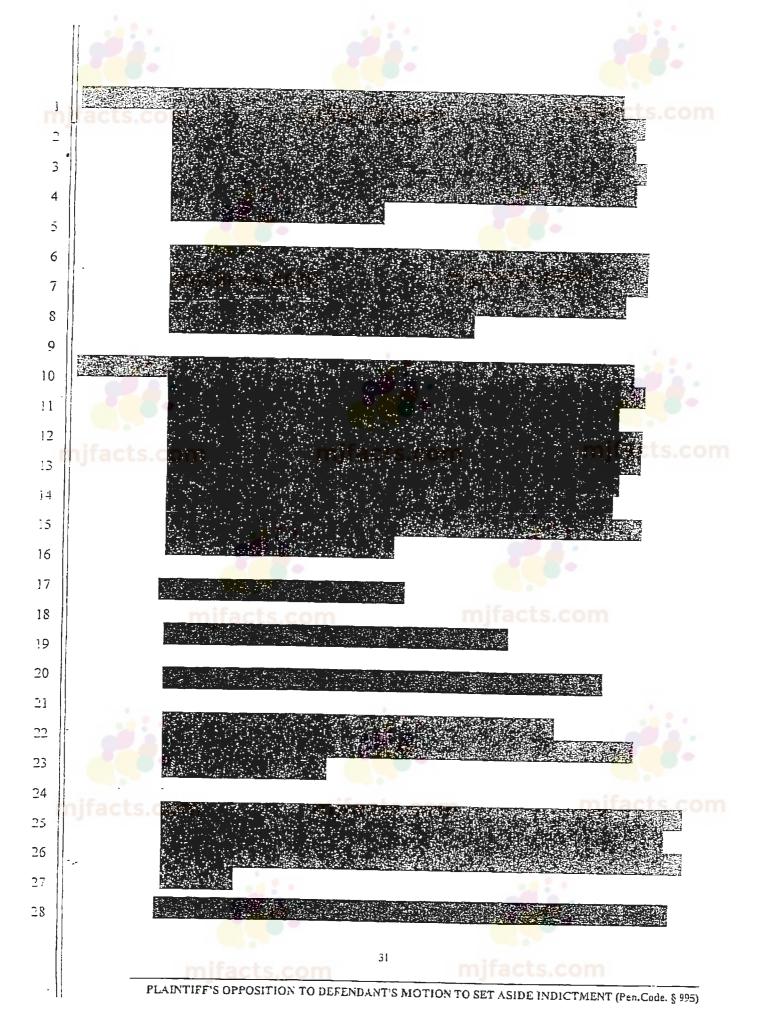
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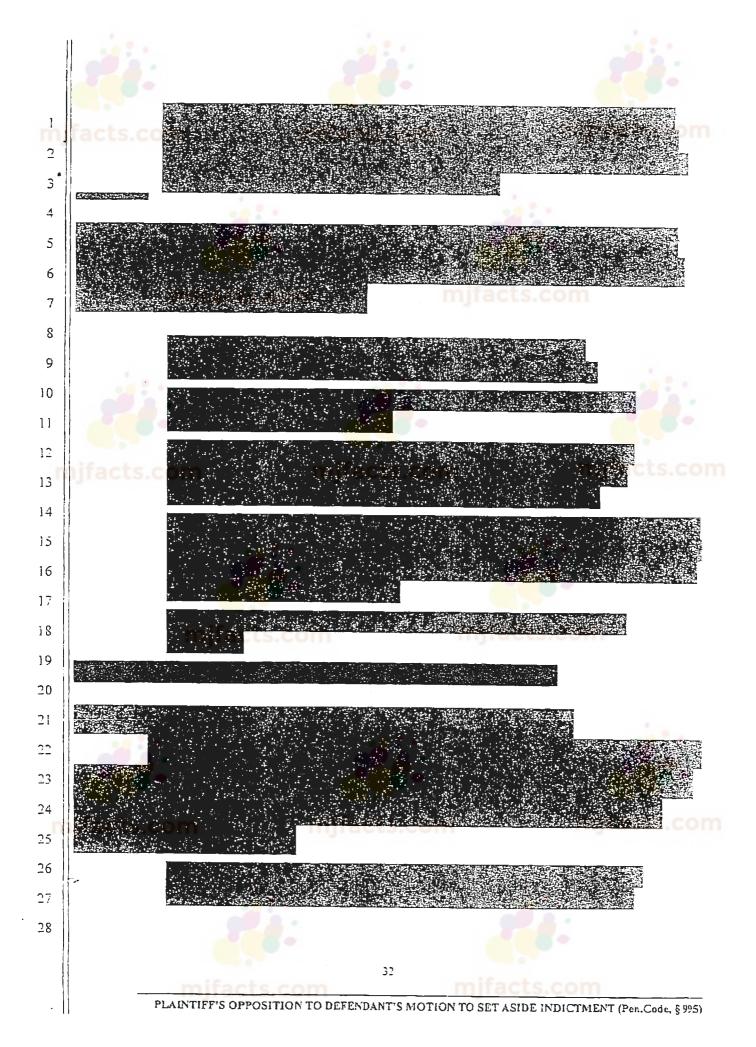
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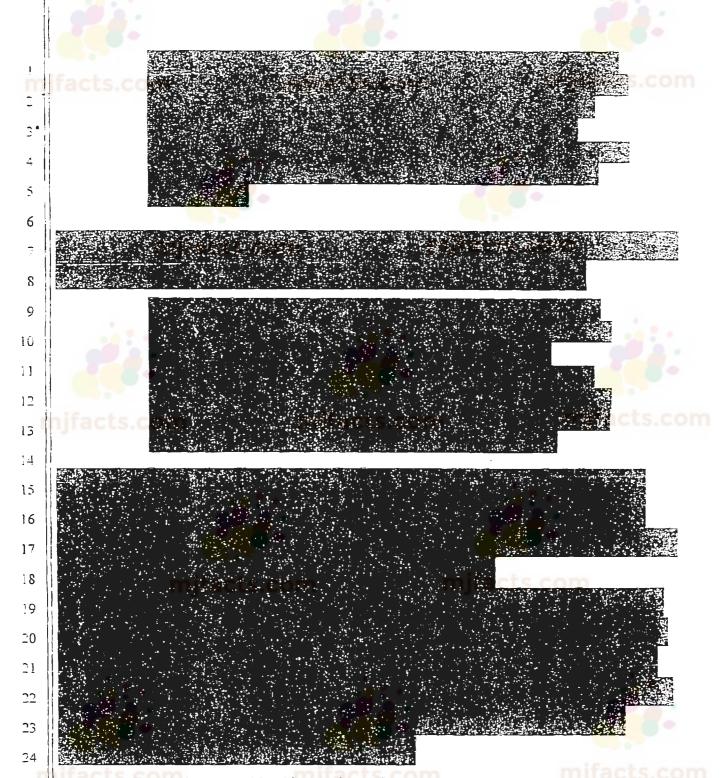
Under subheading "B. Poisoning the Well with the (sic; Motion 103:6), defendant complains bitterly about evidence that it was not only the prosecutor's obligation to put before the grand jury, but evidence that, for the most part, he insisted the prosecutor provide that body.

It is no mystery what defendant will urge as a defense when this matter comes to mal.

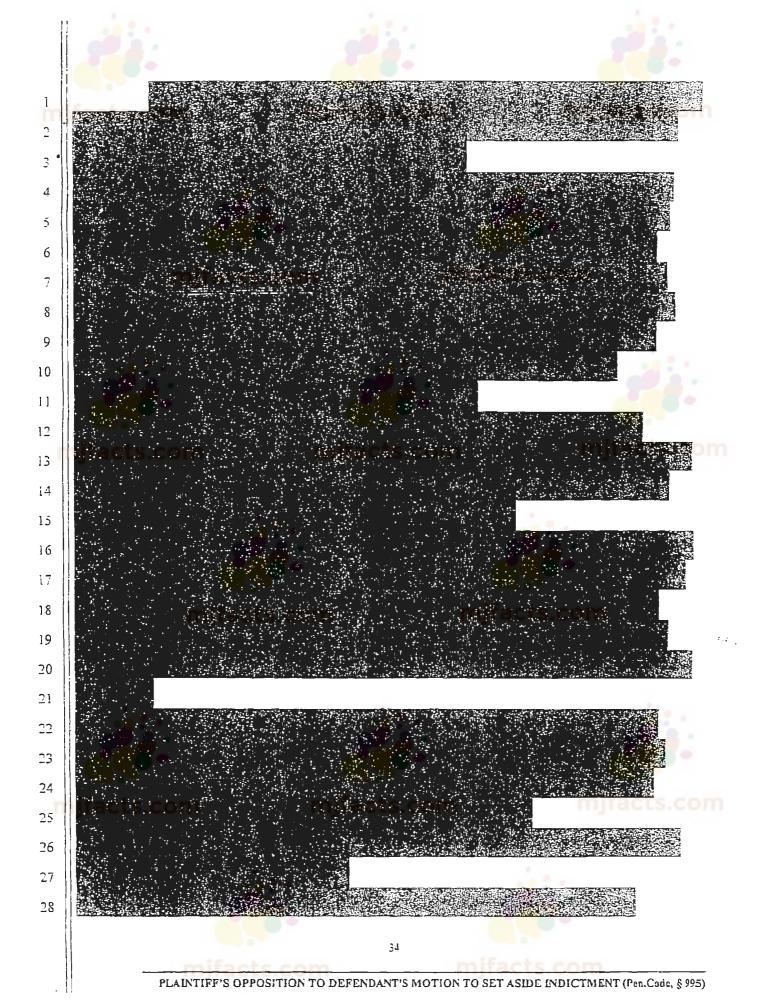
A transcript of the King-Geragos interview was attached as an exhibit to the People's request, dated January 6, 2004, for a gag order in this matter.

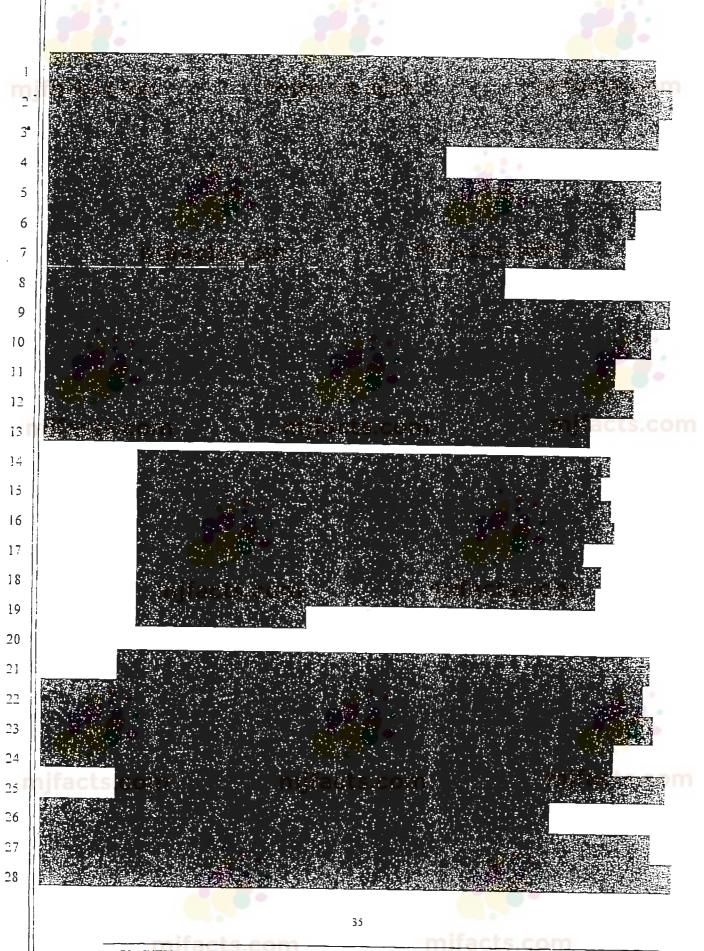


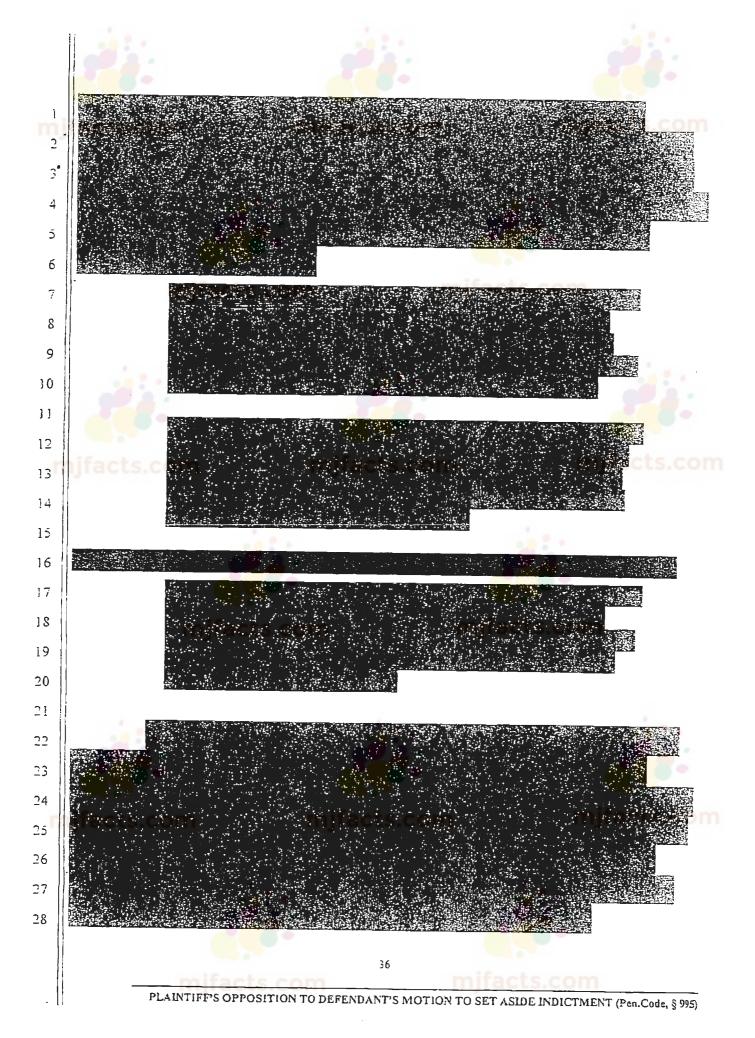




The binders were identified in front of the press as containing documents revealing "one hundred" items of exonerating material for presentation to the Grand Jury. Subject to some deletions (to be discussed later) the binders and their contents were turned over to the grand jurors as defense counsel requested.







A witness's prior statement that is consistent with his testimony at trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is generally admissible, however, only to rehabilitate the witness – to support his credibility —

and not as evidence of the truth of the matter stated. (*People v. Kynetie* (1940) 15 Cal.2d 731. 753-754.)

We respectfully suggest that where the testimony of a prospective witness at a preliminary hearing or grand jury proceeding and the trial itself has been anticipated by the accused and damned on national television by him and his retained counsel in advance of the first evidentiary proceeding in the case against him, he is not well-positioned to complain that the preliminary trier of fact was acquainted with evidence corroborating the truth of the complaining witnesses against him.

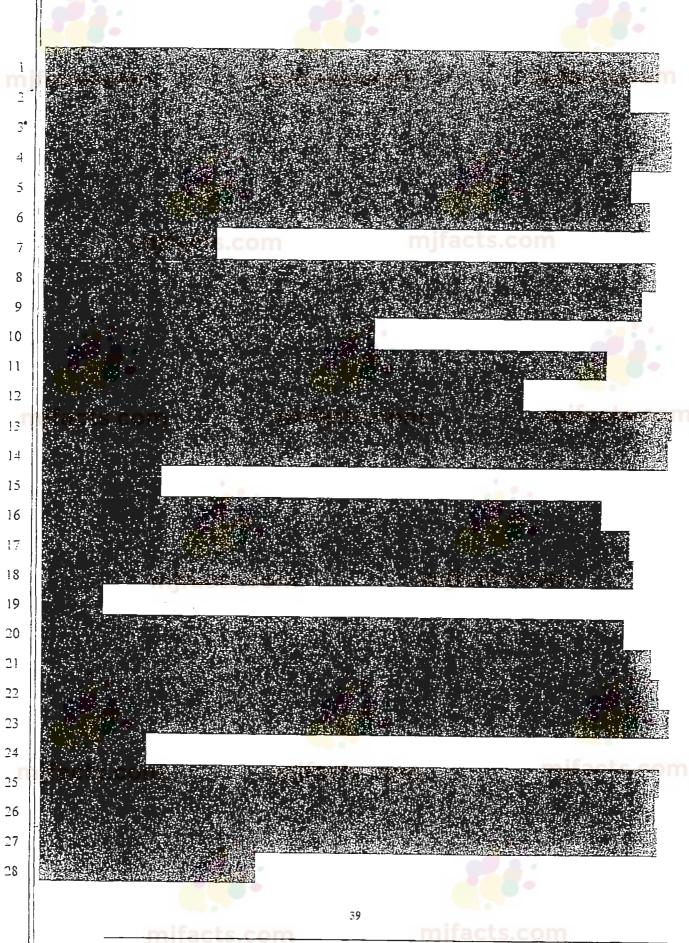
C. The Allegation That Testimony Was Prejudicial To The Grand Jury

Defendant complains that references to him as "the Devil," and her belief that his money is "the Devil's money" ("devil" capitalized in defendant's motion for effect) must be considered in context. was asked if she intended to sue the defendant. Her answer was candid and to the point: "I don't want the devil's money."

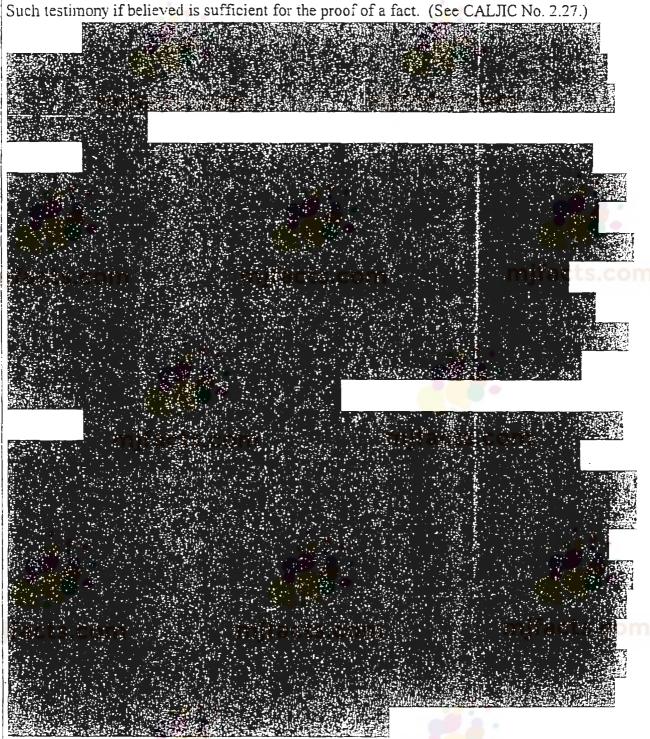
trusted Michael Jackson. She allowed her children to stay with him.

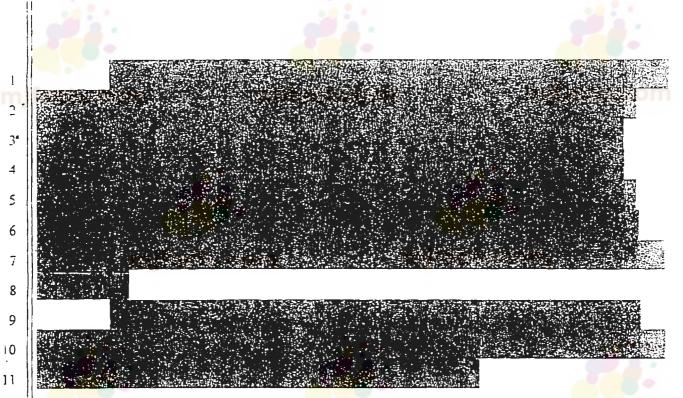
She believed he wanted to help her.

Under the circumstances, "devil" seems rather tame. In any event, it obviously was a spontaneous characterization by an understandably upset witness, and it could not have created undue prejudice in a grand jury composed of individuals of normal intelligence, maturity and sensibilities. The grand jury in this case must be deemed to have understood how a woman who had discovered her children had been abused would be angry at the abuser. It is not likely that use of the word "devil" would have had any inappropriate effect upon this grand jury.



Defendant advances no authority for the proposition that the uncorroborated testimony of a single witness on such a matter is, per se, inadmissible. The contrary is true; a jury may give uncorroborated testimony whatever weight it thinks that evidence deserves.





D. The District Attorney Did Not "Run The Grand Jury"

Defendant claims the District Attorney "ran the grand jury" by dictating when the grand jury would take breaks. While the prosecutors did suggest break times throughout the proceedings, the notion that this in some way influenced the grand jury proceedings is nothing short of ridiculous. Contrary to defendant's assertion, the grand jury was frequently asked when and if they wanted to take breaks (see RT 39:25-28; 330:12-21; 398:4-7; 487:21-23; 558: 27-28; 987:10-15; 1251:5-6; 1322:4-7; 1189:24-27). The record reflects that the prosecutors were at all times courteous and considerate to the members of the grand jury, the foreperson and its secretary.

Next, defendant complains, ironically, that the district attorney did not ask a question regarding

This question would have elicited an incriminating response that could have constituted inadmissible character evidence. The prosecutor properly did not ask questions concerning defendant's illegal conduct with other children to the benefit of the defendant.

E. The Grand Jury Was Not Under The Control Of The Lead Detective

Contrary to defendant's assertions, the grand jury was never sequestered for their safety. The grand jury was convened at a special location to preserve the secrecy of the

proceedings from the prying eyes of the media. "[T]he right and duty of the grand jury proceedings to conduct their investigations, deliberations and voting in secret, which were won and established in England, are substantially the same for modern California grand jurors."

(McClatchy Newspapers v. Superior Court (1988) 4 Cal.3d 1162, 1173.) The Sheriff's Department, in cooperation with the Santa Barbara Superior Court, took special care to preserve the secrecy of grand jury in this unusual high publicity case.

Contrary to defendant's assertion, Santa Barbara Sheriff's Captain Don Patterson was in charge of the security for the grand jurors, *not* the lead detective. Lieutenant Jeff Klapakis' peripheral involvement in security of witnesses and the grand jury in no way affected the grand jury's independent evaluation in this case, and the record is bereft of any evidence to the contrary.

F. Presentation Of Defense Exculpatory Evidence

As noted, on April 2, 2004 Attorney Ben Brafinan presented twenty identical black binders of exonerating materials to the prosecution to be presented to the grand jury. The cover letter will be found in the binder the defense deposited with the Court. In the letter the defense requested that the grand jury be given the information of one hundred separate matters of exonerating evidence supported by sixty one separate exhibits, mostly segments of law enforcement investigative reports.

On April 5, 2004 District Attorney Tom Sneddon wrote Attorney Geragos and indicated we were willing to submit the binders to the jury subject to clarification on 11 of the 100 items of exoneration. (See Exhibit A, attached.) Of those 11 items, Mr. Sneddon indicated that the prosecution would submit 10 if the defense wished us to do so upon further reflection, but that he did not think it would serve defendant's interests. The eleventh item (No.21 in the binder) was unsupported by documentation and the prosecution concluded it would not submit that item to the grand jury.

The defense responded with a letter from Steve Cockran on April 8th, and finally a letter from Mark Geragos on April 19th. (Both are attached, as Exhibits Nos. B and C.)

Although the defense is critical of the prosecution's "perfunctory" presentation of

their binder in their statement of facts they do not include a discussion in the argument section of their brief of what was redacted, why it was redacted, or whether it was done so with the concurrence of the defense given the ongoing negotiations. In the absence of any argument from the defense that any particular item of exonerating evidence, or combination of items, was withheld from the grand jury without their agreement and to the detriment of the defendant, we must assume the defense has waived the issue.

VII

THE WRITTEN INSTRUCTION ON THE ELEMENTS OF THE CRIME OF CONSPIRACY WAS INCOMPLETE, BUT THE OMITTED ELEMENT WAS DISCUSSED BY THE PROSECUTOR IN THE COURSE OF HIS SUMMATION. NO CONFUSION WAS LIKELY A ND HENCE, NO PREJUDICE FLOWED FROM IT

Defendant argues, "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. (Motion 124:4-5; his emphasis.)

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. (Motion 124:27 – 125:5.)

Actually, Mr. Zonen read the instructions to the Grand Jury. (See RT 1751 – 1770). Mr. Auchineloss' role in the argument was to summarize and discuss the evidence in support of Count One (the conspiracy count), in the course of which he discussed portions of the instructions that earlier had been read to the Grand Jury by Mr. Zonen.

The conspiracy instruction Mr. Zonen read to the Grand Jury informed it, in part, that "A conspiracy is an agreement entered into between two or more persons with the specific

 intent to agree to commit a particular crime or 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." (RT 1751:10-15; emphasis added.)

The articulated premise of defendant's argument is, therefore, mistaken.

As the court will note, that particular conspiracy instruction was nevertheless deficient, in that the phrase "and with the further specific intent to commit [those] crimes" which should have followed the emphasized phrase (see CALJIC 6.10) was inadvertently deleted.

But Mr. Zonen further instructed the grand jury that "A member of a conspiracy is not only liable for the particular crime that to his knowedge he and his confederates agree[d] to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator, including the co-conspirator's commission of another crime to further the object of the conspiracy to commit the agreed-upon crimes, even though that additional crime or act was not intended as a part of the agreed upon objective, and even though he was not present at the time of the commission of that crime or act." (CALJIC 6.11; RT 1752:18-28.)

And Mr. Auchineloss, in his argument, noted that "basically a conspiracy is simply an agreement among two or more people to commit a crime, intentionally commit that crime, with an overt act done in furtherance or in the direction of that agreement." (RT 1823:1-5: emphasis added.)

There's only three elements . . . 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. (RT 1823:6-16; emphasis added.)

Mr. Auchincloss argued that the evidence proved that the three target crimes actually were committed, and that fact was evidence of the conspirators' intent to commit those crimes. He asked rhetorically "Why did we put on all this evidence? To provide you with the

 circumstantial evidence you need so that you can make the reasonable inferences that are necessary to determine two things. That an agreement occurred, and what was their intent.

That's the beauty of this case. Because many conspiracies we don't have completed offenses. Here we have an abundance of completed offenses. And you can look at those completed offenses and say. Of course that was their intent. That's what they went out and did." (RT 1832:4-14; emphasis added..)

Instructional error in the course of a grand jury proceeding, the purpose of which is to determine if there is probable cause to believe the charged crime was committed, is not as serious a problem as it is in a criminal trial, in which each element of the charged offense must be proved beyond a reasonable doubt and the jury receives the applicable law from the judge.

Penal Code section 995 permits an attack upon an indictment only on two grounds: "Where it is not found, endorsed, and presented as prescribed in this code," or "that the defendant has been indicted without reasonable or probable cause." With one exception – viz. where, in some way, the proceedings denied the defendant due process (*People v. Backus* (1979) 23 Cal.3d 360, 392-393 — the court may not set aside an indictment on any grounds other than the two named in secti1 on 995. (In *Backus*, the court concluded "the nature and extent of the inadmissible evidence was not such that it may have compromised the independence of the grand jury and contributed to the decision to indict." *Id.*, at p. 393. And see *People v. Van Randall* (1956) 140 Cal.App.2d 771, 774.)

Instructional error does not warrant setting aside an indictment unless the court concludes that the defective instruction was "likely to have caused the grand jury to return an indictment on less than reasonable or probable cause. (*Cummiskey*, supra, 3 Cal.4th at p. 1022, fn. 1.)" (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1313.)

Here, the grand jury was informed that an element of the conspiracy count is a specific intent by the conspirators to commit the crime or crimes they had agreed to commit, albeit not by the first of the written instructions concerning the elements of conspiracy. (Again, see RT 1823.) This, then, is not a case like *Gnass*, in which the grand jury "knew nothing" about a part of the law (the mental state necessary for a criminal conflict of interest under

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Government Code section 1097) that was central to an informed decision whether Gnass had violated section 1090.

The grand jury had evidence before it that the agreed-upon crimes were, in fact, committed by one or more of the conspirators. Two of those crimes (child abduction and extortion) are specific intent crimes. It simply is not reasonable to suppose that defendant, as one of the conspirators, specifically intended to agree to commit those crimes but may not have specifically intended that he and/or his co-conspirators commit the very crimes they had agreed to commit and that were then committed. This court may "consider the instructional error along with the evidence and the manner in which the prosecutor conducted the proceedings, to determine whether the grand jury found the indictment on something less than reasonable or probable cause." (Gnass, supra, 101 Cal.App.4th at p. 1314.)

CONCLUSION

The admissible evidence put before the grand jury amply established a "strong

suspicion" that defendant conspired with others (most of them,) to commit the target crimes of false imprisonment, child abuction and extortion, and specifically intended that those crimes be committed. The flawed jury instruction did not mislead the grand jury in its finding that defendant intended to conspire and to commit the target crimes. Defendant does not challenge the evidence in support of Counts Two through Ten. His motion to set aside the indicument should be denied.

DATED: July 6, 2004 Respectfully submitted, 3. THOMAS W. SNEDDON, JR. District Attorney Ву: Gerald McC. Franklin, Senior Deputy Ronald Zonen, Senior Deputy J. Gordon Auchincloss, Senior Deputy Margaret O'Malley, Deputy