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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

JAN 10 2005

GARY M. BLAIR, Executive Officer
BY Carrie L. Wagner
CARRIE L. WAGNER, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

unsealed pursuant to 6/16/05 court order

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

MICHAEL JOE JACKSON,

Defendant.

No. 1133603

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S "EVIDENCE CODE § 1108" MOTION
(Evid. Code, §§ 1108, 1101(b))

DATE: January 12, 2005
TIME: 8:30 a.m.
DEPT: SM 2 (Melville)

~~FILED UNDER SEAL~~

A. Introduction:

On December 10, 2004, Plaintiff moved the Court for its order authorizing Plaintiff to put before the trial jury evidence of defendant's prior sexual offenses and certain related conduct pursuant to Evidence Code sections 1108, subdivision (a) ("1108(a)") and 1101, subdivision (b) ("1101(b)"). Hearing of that motion was continued from December 20, 2004 to January ~~13~~ 12, 2005 to allow Defendant more time to address the merits of the pending motion.

On January 3, 2005, Defendant timely served his Opposition to the pending motion. In it, he argues essentially two points:

-- (1) the proposed 1108(a) evidence is "implausible" (Opp. 2:1), "false" (*id.*, 2:7; 3:2),

1 "not credible" (*id.*, 2:15-16; 4:13-14), "incredible" (*id.*, 3:7), "flimsy" (*id.*, 4:4), "utterly
2 lacking in credibility" (*id.*, 4:7), and "without substance" (*id.*, 5:5). It comes from
3 "disgruntled" former employees and "tabloid informants" (*id.*, 2:4-5; 5:14; 5:22-24) with an
4 "ax to grind" (*id.*, 5:22) who are "inherently unbelievable" (*id.*, 5:12), and who "carefully
5 crafted their allegations" from "media accounts of the prosecution's theory" (*id.*, 5:6-9). "For
6 the past decade, anyone who wanted the District Attorney's ear could simply read the media
7 accounts and come up with a story that fit the prosecution's theory," he alleges. (*Id.*, 5:9-11.)
8 -- (2) "Mr Jackson is entitled to defend himself against the false charges in the 1108
9 motion if they are allowed to be introduced at trial." (Opp. 6:14-15 and ff.)
10 B. Summary of Plaintiff's Reply
11 Defendant is mistaken in the major premise of his argument. Most if not all of the
12 information summarized in our 1108 motion was provided to law enforcement before
13 previously confidential details were acquired and reported by the popular press. He certainly is
14 correct in his assertion that he is "entitled to defend himself" against the charges, but it is for
15 the trier of fact to determine whether those charges are "false."
16 C. Argument
17 I
18 DEFENDANT'S ASSERTIONS CONCERNING BOTH
19 THE MOTIVATION AND THE OPPORTUNITY FOR
20 THE PROPOSED § 1108 WITNESSES TO FABRICATE
THEIR REPORTS ARE MISTAKEN
21
22 A. The "Grand Juries Didn't Indict" Misstatements
23 Defendant asserts that the proposed 1108 evidence "has previously been presented
24 to two criminal grand juries and one civil jury, and . . . all three juries have rejected the
25 testimony as false." (Opp. 2:6-7.) "This is the same 'evidence' that left two separate grand
26 juries so unimpressed with the prosecution's 'case' that they did not return indictments." (*Id.*,
27 3:4-5.) "It follows that a defendant must be allowed to introduce evidence that a grand jury
28 heard the prior defense testimony and that an indictment was not returned, and that a civil jury

found these witnesses to be unconvincing." (*Id.*, 6:25 – 7:2.)

As defendant well knows, the two grand juries that considered evidence against him in 1994 (a standing grand jury in Los Angeles County; a specially-convened grand jury in Santa Barbara County) were functioning as *investigative* grand juries. They were not asked to return indictments or to make "findings." Jordan Chandler refused to testify before them following his multi-million dollar settlement with defendant in early 1994. That essentially put the investigation on "hold," and the Santa Barbara grand jury was discharged. The grand juries did not "reject" the testimony of <u>any</u> witness.

This is at least the third time defendant has asserted, in pleadings to this court,[1] the falsehood that "two prior grand juries failed to indict," with its implication that the grand juries had considered but rejected indictments. Counsel has been called on it each time in the past. In the circumstances, these particular false statements appear to have been made solely for public consumption.

We use the word "false" advisedly. Counsel for a party may vigorously advocate his position in the pleadings he files with the court, but he is ethically bound not to "seek to mislead the judge . . . by an artifice or false statement of fact or law." (Rules Prof. Conduct, rule 5-200(B).) Branding the prosecution's witnesses as 'disreputable," "incredible" and the "crafters" of "false charges" may perhaps be excused as mere "advocacy" on counsel's part and as evidence of his "warm zeal" on his client's behalf. Knowingly false statements of fact by that lawyer simply are inexcusable.

B. <u>The "Witnesses Repeated Information Already Public" Misstatement</u>

To deal with the fact that all those "disgruntled" witnesses listed in the pending 1108 motion separately reported strikingly similar conduct by defendant, his counsel simply makes up an explanation: "the prosecution's Section 1108 witnesses had media accounts of the prosecution's theory at their disposal when they carefully crafted their allegations . . . ." (Opp. 5:6-9.)

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[1] See defendant's motions for to reduce bail and to recuse the district attorney.

That isn't so. There weren't "media accounts of the prosecution's theory" available to the "section 1108 witnesses" at the time most of them were interviewed by investigators in this case, and most of them were first contacted by investigators rather than themselves searching out someone to tell their story to. Between September 4th and November 19, 1993, Orieta Murdock, Charli Michaels, Blanca Francia, Jolie Levine, Jason Francia, Phillipe LeMarque and Charmayne Sternberg were interviewed by Los Angeles Police Department and Santa Barbara Sheriff's investigators.

Ralph Chacon and Kassim Abdool were both interviewed by Santa Barbara Sheriff's investigator Russ Birchim on May 5, 1994. Mr. Abdool testified to the Los Angeles Grand Jury on May 9th, and Mr. Chacon testified to the Santa Barbara Grand Jury on May 10th, while both were still employed at Neverland Ranch. They and Adrian McManus continued their employment with defendant until mid-1994.

Jordan Chandler filed his lawsuit under seal on September 14, 1993. The compromise agreement that settled the lawsuit was filed under seal on January 25, 1994. Though the pleadings were under seal, the fact the lawsuit was filed was the focus of public speculation and comment.

Mr. Chacon, Ms. McManus and others filed a civil suit for wrongful termination of their employment in February, 1995.

Of course, even if every detail of the Chandler lawsuit had become public the day it was filed, it does not follow as a matter of logic that individuals with similar stories to tell are making them up. On the other hand, if the various accounts summarized in the pending 1108 motion were given separately, independently and without prior access to the details of young Chandler's complaint, that is strong evidence of their separate and collective credibility. Branding the reporting individuals as greedy and "disgruntled" doesn't impeach the substance of their reports.

The individual accounts of the several proposed section 1108 witnesses relate the particularized observations of each of them, gained from their extraordinary access to defendant. The theme common to most of them is the extraordinary attention defendant paid to

one after another of his several "special friends." His unusual focus on young boys had also caught the attention of reporters and rumor-mongers in the popular press, which certainly was sharpened by the Chandler lawsuit. While that fact says something about Mr. Jackson's heedlessness in his public appearances, it is scarcely a credible basis for the allegation that the proposed 1108 witnesses all made up their accounts from information published in the tabloid press. Nor does it reduce the persuasive effect of the overall similarity of their accounts.

Defendant alleges that

> this is a situation in which the Arvizos' stories conformed to other stories only because they met with Larry Feldman, the attorney for Jordan Chandler, prior to making their allegations. He then sent them to his forensic psychiatrist, Stan Katz. The Arvizos never made any of these allegations prior to meeting with Mr. Feldman and Dr. Katz, despite the fact that they were represented by counsel and had numerous opportunities to make the allegations. They not only did not make the so-called "similar" allegations before they saw Larry Feldman and Stan Katz, they didn't make any allegations at all. Therefore, any alleged similarity with claims made by Mr. Feldman and Dr. Katz's prior client is not coincidental.

(Opp. 6:5-12.)[2]

No one – least of all the plaintiff in this prosecution – asserts that the similarity of the allegations by Jordan Chandler and Gavin Arvizo is "coincidental." That similarity is due entirely to defendant's time-tested method of seducing young boys attracted to him by his celebrity and "Peter Pan" persona and then treated by him as his "special friends."

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[2] Jordan Chandler was Attorney Feldman's "prior client"; he was not Dr. Katz's patient, ever. And Gavin Arvizo first disclosed the fact of his molestation to Dr. Katz (a psychologist, not a psychiatrist), not Attorney Feldman.

II

DEFENDANT OFFERS NO SUPPORT FOR HIS REQUEST THAT THE COURT "FIND THAT THE PROSECUTION'S 'EVIDENCE' IS SO LACKING IN CREDIBILITY THAT IT SHOULD NOT BE ALLOWED AT TRIAL"

A. Name-Calling Is Not Evidence

As noted above, defendant's opposition is long on his conclusory characterization of the proposed 1108 evidence as "implausible," "flimsy" and "utterly lacking in credibility" and on the explicit suggestion that any witness who claims to have observed defendant engage in inappropriate, sexually-motivated conduct with young boys fabricates his or her claim out of whole cloth.

Merely labeling the proposed testimony of an adverse witness as "incredible" doesn't make it so. Branding a potential witness as a slanderer and an incipient perjurer without evidence to back up that calumny says far more about the accuser than the witness.

B. The Proposed 1108 Evidence Is Not "Demonstrably False," So Assessment Of The Credibility Of A Given Witness And His Or Her Evidence Is Peculiarly The Jury's Function

Defendant is understandably eager to head off presentation to the jury of evidence of his prior acts of sexual misconduct. He tacitly acknowledges that as an abstract matter the proposed evidence comes squarely within Evidence Code section 1108's ambit if it is not so "incredible" as to warrant its exclusion at the threshold, because it tends to prove his disposition to commit such acts and allows the jury to infer that he committed the acts for which he was indicted.

To be sure, defendant argues that every bit of the proposed evidence is "implausible" and "incredible." He does not attempt to demonstrate that the proposed testimony of even one of the witnesses, considered on the face of the summary of that

proposed testimony, is "incredible." But that is his burden.

In *People v. Cudjo* (1993) 6 Cal.4th 585, the California Supreme Court dealt with the admissibility of evidence of certain out-of-court statements by defendant's brother Gregory, in which he confessed to one Culver that he had committed the murder for which defendant was on trial. Culver was prepared to testify to his jailhouse conversation with Gregory, but the trial court excluded his testimony on the ground Culver was not himself a reliable witness.

The Supreme Court reversed Cudjo's conviction, holding that the trial court abused its discretion in excluding Culver as a witness on defendant's behalf pursuant to Evidence Code section 352.

> [T]he trial court did not focus exclusively, or even primarily, on whether Gregory's *hearsay statement* might be false. Instead, the court apparently accepted the prosecution's contention that *Culver* was probably a liar who should therefore be excluded as a *live witness*. In so doing, the court erred.

(*People v. Cudjo*, *supra*, 6 Cal.4th at p. 608.)

The Supreme Court noted:

> As with other facts, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent "without resorting to inferences or deductions." [Citations.] Except in those rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; such doubts do not afford a ground for refusing to admit evidence under the hearsay exception for statements against penal interest. [Citations.]"

(*Id.*, at pp. 608-609.)

The Supreme Court discussed the limits of a trial court's discretion to exclude what it perceives to be "unreliable" testimony pursuant to Evidence Code section 352.

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> As noted, the trial court apparently concluded that the evidence was more prejudicial than probative because Culver was not a reliable witness. However, such doubts, however legitimate, do not constitute "prejudice" under Evidence Code section 352. (See *People v. Alcala* (1992) 4 Cal.4th 742, 791.)

(*Id.*, p.610.)

As with statements admissible as an exception to the hearsay rule, so with testimony offered to prove defendant's disposition to sexually molest young boys. That evidence may not be excluded because <u>defendant</u> deems it "incredible," or even if the court has its own reservations concerning a given witness's credibility.

<u>CONCLUSION</u>

Defendant does not disagree that Evidence Code section 1108 was enacted for precisely the reasons discussed in the pending motion: to allow evidence of an accused sex offender's prior sexual offenses to demonstrate his disposition to commit such offenses, from which the jury may be asked to infer that he committed the charged offenses even though the credibility of the most recent alleged victim is attacked. Defendant does not disagree that the proposed evidence, if credible, is acutely pertinent to the issue whether he has a propensity to commit unlawful sexual acts with pubescent young boys. His <u>only</u> argument is that the proposed evidence is "incredible," and his only support for <u>that</u> argument is his ipsi dixit.

The credibility of a witness whose evidence is admissible and relevant is for the jury to assess. The pending motion for the admission of evidence the Legislature has deemed especially probative in the prosecution of sex offenses committed in private should be granted.

DATED: January 10, 2005

Respectfully submitted,

THOMAS W. SNEDDON, JR.
District Attorney

By: ______________________
Gerald McC. Franklin, Senior Deputy

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PROOF OF SERVICE

STATE OF CALIFORNIA) SS
COUNTY OF SANTA BARBARA)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and I am not a party to the within-entitled action. My business address is: District Attorney's Office; Courthouse; 1112 Santa Barbara Street, Santa Barbara, California 93101.

On January 10, 2005, I served the within PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR SEXUAL OFFENSES (Evid. Code, § 1108) on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by personally delivering a true copy thereof to Mr. Sanger's office in Santa Barbara, by transmitting a facsimile copy thereof to Attorney Mesereau, and by causing a true copy thereof to be mailed to Mr. Mesereau, first class postage prepaid, at the addresses shown on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California on this 10th day of January, 2005.

Gerald McC. Franklin

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