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* unsealed pursuant to 01/06/05 court order

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiffs, vs. MICHAEL JOSEPH JACKSON, Defendant.	Case No. 1133603 OPPOSITION TO DISTRICT ATTORNEY'S MOTION FOR ORDER ALLOWING USE OF EXPERT TESTIMONY ON THE SUBJECT OF CHILD ABUSE TRAUMA ~~UNDER SEAL~~ Honorable Rodney S. Melville Date: January 21, 2005 Time: 9:30 a.m. Dept.: 8

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The prosecution asks this Court to allow Kenneth Lanning and Dr. Anthony Urquiza to

testify "that there are many misconceptions about how children react to having been molested, among them that children will immediately disclose the molestation to their closest relative, that children will disclose without hesitation all that occurred and that children who were molested will not have feelings of love or affection for those who molested them." (Motion, page 3.) The prosecution also seeks to introduce the testimony of Mr. Lanning regarding the "'grooming process,' the process by which children accept as normal the reality of their own molestation and how it affects their behavior thereafter." (Motion, page 3.)

Mr. Jackson submits that this testimony should not be allowed into evidence because the prosecution has not met its burden of demonstrating that the so-called misconceptions are actually misconceptions, and that, if they are commonly held misconceptions, that the proffered testimony will assist the jury.

Moreover, the proffered testimony is not supported by an adequate foundation of fact in this case. The stories of the complaining witness, and his family, are less than credible, not because the jurors need to be educated about child abuse, but because the stories are false. The prosecution is not seeking to introduce the expert testimony to educate the jury about child abuse. Instead, the prosecution is seeking to ask the jurors to suppress their common sense reactions to hearing incredible evidence.

To allow such proffered testimony without an adequate foundation would deprive Mr. Jackson of his rights to a fair trial, due process of law, and right to a reliable verdict and sentence pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 1, Sections 7, 15, 17 and 24 of the California Constitution.

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ARGUMENT

I.

THE COURT SHOULD NOT ALLOW THE PROSECUTION TO INTRODUCE THE EQUIVALENT OF A PROFILE OF A VICTIM OF CHILD MOLESTATION OR A PROFILE OF A CHILD MOLESTER UNDER THE GUISE OF DISPELLING MYTHS ABOUT CHILD MOLESTATION

The prosecution seeks to introduce testimony that will allow the prosecution to argue, either explicitly or implicitly, that there is a profile for sexually abused children and for child abusers and that the complaining witness and Mr. Jackson fit those profiles, respectively. This testimony is not admissible. As the prosecution concedes in the motion, the experts are not allowed to testify, based on interviews with the complaining witness or information provided by the prosecution, that a particular complaining witness is credible or that he or she in fact has been molested. (Motion, page 9.) It is also error, however, to allow "general" expert testimony "describing the components of the syndrome in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude the child was sexually abused." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 393.) "There more be even more danger where the application is left to the jury because the jurors' education and training may not have sensitized them to the dangers of drawing predictive conclusions." (*Ibid.*)

Numerous Court of Appeal decisions, relying on the Supreme Court's opinion in *People v. Bledsoe* (1984) 36 Cal.3d 236, have held that experts are precluded from testifying, based on CSAAS, that a particular complaining witnesses' report of alleged abuse is credible because the complaining witness manifests certain defined characteristics which are generally exhibited by abused children. (See, *In re Sara M.* (1987) 194 Cal.App.3d 585, 593; *Seering v. Dept. Of Social Services* (1987) 194 Cal.App.3de 298, 310-311, 313; *People v. Roscoe* (1985) 158 Cal.App.3d 1093, 1099; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1069.) In *Bowker*, the Court of Appeal stated:

> Fundamentally, *Bledsoe* must be read to reject the use of CSAAS evidence as a predictor of child abuse. It is one thing to say that child abuse victims often exhibit a certain characteristic or that a particular behavior is not inconsistent with a child having been molested. It is quite another to conclude that where a child meets a certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused. The former may be appropriate in some circumstances; the latter - - given the current state of scientific knowledge - - clearly is not.

(*People v. Bowker, supra*, 203 Cal.App.3d 385, 393.)

The reason the complaining witness's credibility and the credibility of his family will be in question at trial, is not that jurors believe certain myths regarding child molestation, it is that the complaining witness and his family's story is so outlandish and contains so many inconsistencies that it is inherently incredible on its face. The fact that the complaining witness did not disclose the alleged molestation until after he met with not one, but two, plaintiffs lawyers, including Larry Feldman, is not something that can be explained to the jury by general testimony on commonly held misconceptions regarding delayed disclosure. The fact that the complaining witness, his mother and siblings met with numerous people and over and over denied mistreatment only to have a revelation when talking to Mr. Feldman's forensic pathologist, is beyond the realm of the expertise of any honest experts experience. The fact that the complaining witness' mother claims to have seen Mr. Jackson lick the complaining witnesses head with his "long white tongue," and that she did not report this incident to anyone because she thought she imagined it, is not something that can be cleared up by the testimony of a former FBI agent. The fact that the dates of the alleged molestations have been altered to neatly fit into a time line that avoids having to explain why the complaining witness and his family made several independent, exculpatory statements that were recorded, after the alleged molestations had started to occur, is not something that can be reconciled by general testimony about how typical victims react to abuse.

The proposed testimony of Kenneth Lanning is an obvious attempt to suggest to the jury that Mr. Jackson fits the profile of a child molester. The District Attorney has made it quite clear that he plans to argue that Mr. Jackson is a classic pedophile and that Mr. Jackson's residence

was designed as a "Pleasure Island" to entice young boys into being molested. The Court should recognize that bolstering the argument that Mr. Jackson fits a pedophile profile is not an admissible use of expert testimony. It is improper to admit expert testimony to establish a stereotype and then condemn the defendant for fitting it. (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1087.) In *People v. Robbie*, the Court of Appeal stated that:

> [P]rofile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence. We illustrate the problem by examining the syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior, as the People's expert conceded here.

(*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1085.)

Here, the prosecution is seeking to introduce the type of expert testimony that was found to be impermissible in *People v. Robbie*. As was the case in *Robbie*, the prosecution intends to introduce expert testimony, not to address commonly held misconceptions by explaining that "there is no 'typical sex offender,' but to instead present the jury with "another image: an offender whose behavioral pattern exactly matched the defendant's." (*People v. Robbie*, *supra*, 92 Cal.App.4th 1075, 1087.) This type of testimony is inadmissible.

II.

THE COURT SHOULD HOLD A HEARING OUTSIDE THE PRESENCE OF THE JURY TO DETERMINE WHETHER THE MYTHS RAISED BY THE PROSECUTION ARE ACTUALLY MYTHS AND WHETHER THEY ARE RELEVANT, BASED ON THE EVIDENCE AT TRIAL

The prosecution has not demonstrated that the proposed testimony will assist the trier of fact. The Court of Appeal stated that:

> In the typical criminal case, however, it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony.

(*People v. Bowker* (1988) 203 Cal.App.3d 385, 394, citing *People v. Bledsoe* (1984) 36 Cal.3d. 236, 248.)

The evidence in this case is not confusing. There are inconsistencies in the stories of the complaining witness and his family, but those inconsistencies are not based on misconceptions.

Under the prosecution's theory of the admissibility of Child Sexual Abuse Accommodation Syndrome (CSAAS) testimony, the prosecution is allowed to introduce more CSAAS expert testimony in a case where on its face, the testimony of the complaining witness is less credible. This is true, because, based on the prosecution's argument, the more a jury would believe that the complaining witness is a liar, based on common sense, the more it is necessary to rehabilitate his testimony with the testimony of experts. It is not surprising, based on that theory, that the prosecution is seeking to introduce the testimony of two child abuse trauma experts.

In other words, simply saying that the complaining witness' testimony may not be believed is not enough. The prosecution has to show that there are specific facts regarding which the expert can assist the jury in understanding. This is not like any other set of allegations the undersigned has ever seen and one suspects not like any the experts have seen. If the prosecution cannot establish specific facts, the expert is doing nothing other than telling the jury that the alleged victims ought to be believed no matter what they say. That is not evidence. That is argument.

The Court should hold hearings, outside the presence of the jury, to determine if the so-called misconceptions suggested by the prosecution are actually present, based on the evidence at trial, and to determine if the testimony of Dr. Urquiza and Mr. Lanning will actually assist the jurors in doing their job.

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III.

CONCLUSION

For the above stated reasons, Mr. Jackson objects to the introduction of the prosecution's proposed expert testimony on the subject of child abuse trauma.

Dated: January 18, 2005

COLLINS, MESEREAU, REDDOCK & YU
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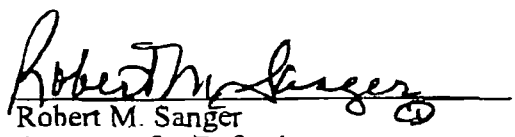
By: 
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MICHAEL JOSEPH JACKSON

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 January 18, 2005, I served the foregoing documents on the interested parties in this action by depositing a true copy thereof as follows: OPPOSITION TO DISTRICT ATTORNEY'S MOTION FOR ORDER ALLOWING USE OF EXPERT TESTIMONY ON THE SUBJECT OF CHILD ABUSE TRAUMA on the interested parties in this action by depositing a true copy thereof as follows:

Tom Sneddon
Gerald Franklin
Ron Zonen
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District Attorney
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___ **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.

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

___ **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 January 18, 2005, at Santa Barbara, California.

Carol Dowling