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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 24 2005

GARY M. BLAIR, Executive Officer
By: *Carrie L. Wagner*
CARRIE L. WAGNER, Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SANTA BARBARA
10 SANTA MARIA DIVISION

11
12 THE PEOPLE OF THE STATE OF CALIFORNIA,)

No. 1133603

13 Plaintiff,)

PLAINTIFF'S RESPONSE TO
MOTION IN LIMINE TO LIMIT
UNCHARGED CONSPIRATOR
HEARSAY

14
15 v.

16 MICHAEL JOE JACKSON,

17 Defendant.)

DATE: January ²⁸, 2005
TIME: 9:30 AM
DEPT.: SM2 (Melville)

UNDER SEAL

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21 Introduction:

22 Defendant moves for "an order prohibiting . . . plaintiff from offering any evidence
23 of and prohibiting plaintiff . . . and witnesses from making any reference in the presence of
24 jurors or prospective jurors of any uncharged conspirator statements, unless and until plaintiff
25 establishes by independent evidence the existence of the alleged conspiracy to the trier of fact,
26 the jury, by non-hearsay evidence as a preliminary fact under Evidence Code section 402."
27 (Motion 1:6-8; emphasis added.) "Plaintiff should be required to present to the jury
28 independent evidence to the jury sufficient to allow the judge to determine that a reasonable

1 jury could conclude, by a preponderance of the evidence, that a conspiracy exists before
2 plaintiff is permitted to present evidence of uncharged conspirator hearsay. Plaintiff may not
3 present any uncharged conspirator hearsay prior to making that showing to the jury and the
4 determination by the judge that a reasonable jury could so find. This proof should be
5 required as a preliminary fact necessary and as a prerequisite to permitting any uncharged
6 conspirator hearsay to come before the jury." (Motion 6:19-24; emphasis added.)

7 It cannot be determined with any certainty from the foregoing what defendant's
8 counsel believes the required procedure should be to obtain a determination that sufficient
9 evidence exists to support a finding by the trier of fact by a preponderance of the evidence that
10 a conspiracy was afoot when alleged co-conspirators made what otherwise would be hearsay
11 statements. But to the extent defendant insists that "the existence of the conspiracy needs to be
12 established by a preponderance of the evidence to the jury before any uncharged conspirator
13 hearsay may come before the jury" (Motion 7:11-13), he is mistaken.

14 Rather than argue that defense counsel seems not to understand the pertinent statutes
15 and decisional law, plaintiff will describe what it understands the required procedure to be and
16 invite defendant to challenge the accuracy of our summary.

17 1. Evidence of an out-of-court statement made other than by a witness while testifying at
18 a hearing and that is offered for the truth of the matter asserted is hearsay. (Evid. Code, §
19 1200, subd. (a).)

20 2. There are several exceptions to the hearsay rule. One of them is for statements of co-
21 conspirators, made in the course of the conspiracy and in furtherance of the objectives of the
22 conspiracy. (Evid. Code, § 1223.)

23 3. Count One of the indictment in this case alleges a conspiracy by defendant and others,
24 named and unnamed, to commit certain crimes;

25 4. As an abstract matter, statements of defendant and any of his alleged co-conspirators
26 that were made in furtherance of the alleged conspiracy are admissible against defendant;

27 5. As a distinctly more concrete matter, in its deliberations the trier of fact may not
28 consider evidence of out-of-court statements by alleged conspirators unless it first finds, by a

1 preponderance of the evidence (*People v. Herrera* (2000) 83 Cal.App.4th 46, 61), that a
2 conspiracy existed, and that the speaker was a member of the conspiracy. (See CALJIC 6.24);

3 6. The defendant may contest the allegation that a conspiracy was up and running, and
4 that he was a member of the alleged conspiracy. If he contests the "preliminary fact" that a
5 conspiratorial agreement had been reached and that one or more steps had been taken to
6 achieve its objects, he may request that the court make a preliminary finding of that fact out of
7 the presence of the jury as a condition for the admission of evidence of statements by an
8 alleged co-conspirator over a hearsay objection. (Evid. Code, § 402);

9 7. In the requested "402 hearing," the court may consider the proponent's "proffer" of
10 the foundational evidence of the existence of an ongoing conspiracy. Evidence Code section
11 403 defines the procedure:

12 (a) The proponent of the proffered evidence has the burden of
13 producing evidence as to the existence of the preliminary fact, and the
14 proffered evidence is inadmissible unless the court finds that there is
15 sufficient evidence to sustain a finding of the existence of the
16 preliminary fact; when:

17 (1) The relevance of the proffered evidence depends on the existence
18 of the preliminary fact;

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20 (b) Subject to Section 702 [personal knowledge of the witness], the
21 court may admit conditionally the proffered evidence under this section,
22 subject to evidence of the preliminary fact being supplied later in the
23 course of the trial.

24 (c) If the court admits the proffered evidence under this section the
25 court:

26 (1) May, and on request shall, instruct the jury to determine whether
27 the preliminary fact exists and to disregard the proffered evidence unless
28 the jury finds that the preliminary fact does exist.

(2) Shall instruct the jury to disregard the proffered evidence if the
court subsequently determines that a jury could not reasonably find that
the preliminary fact exists."

1 A "proffer" is "an offer made; something proposed for acceptance by another; a
2 tender" (Webster's Dictionary, 1913.) In legal parlance, a "proffer" is an "offer of proof"
3 by a lawyer, an officer of the court who has a professional obligation to speak the truth as he
4 knows it in his representations of fact to a judicial officer,¹ as to the substance of the
5 testimonial or documentary evidence he believes will demonstrate the preliminary fact by a
6 preponderance of the evidence. A "proffer" is the "offer of proof" referred to in Evidence Code
7 section 352, which provides that an "offer of proof" conveying "the substance, purpose, and
8 relevance of the excluded evidence" will preserve the question whether the trial court's
9 exclusion of that evidence was an abuse of discretion. "The substance of evidence to be set
10 forth in a valid offer of proof means the testimony of specific witnesses, writings, material
11 objects, or other things presented to the senses, to be introduced to prove the existence or
12 nonexistence of a fact in issue." (*United Savings & Loan Assn. v. Reeder Dev. Corp.* (1976) 57
13 Cal.App.3d 282, 292; see 3 Witkin Cal. Evidence (4th ed. 2000), Presentation at Trial, § 402, p.
14 492.)

15 "Except as otherwise provided by law, the court in its discretion shall regulate the
16 order of proof." (Evid. Code, § 320.)

17 "In the discretion of the trial court, evidence of the declarant's statements, alleged to
18 come within [the "coconspirator statement"] exception, may be admitted before receipt of the
19 evidence that the declarant and the party were engaged in a conspiracy, or subsequent to the
20 introduction of evidence to establish the preliminary fact. (See Evid. Code, §§ 403, 1223,
21 subd. (c).)" (*People v. Perez* (1978) 83 Cal.App.3d 718, 728.)

22 23 CONCLUSION

24 The People will make a formal offer of proof concerning the evidence that, in their
25 view, demonstrate the existence of a conspiracy independent of statements by one or more
26 alleged conspirators that do not come within other exceptions to the hearsay rule (e.g., "verbal
27

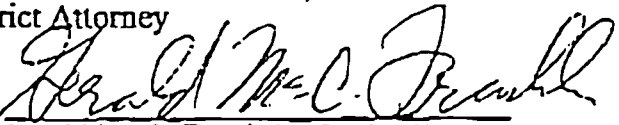
28 ¹ See Rules of Professional Conduct, rule 5-200(B).

1 acts" (Evid. Code, § 1241)). Plaintiff will ask the court to exercise its discretion regarding the
2 order of proof before the jury and to allow evidence of certain of the co-conspirators'
3 statements to be put before the jury before all of the evidence of the conspiracy independent of
4 those statements has been received. ((*People v. Perez, supra*, 83 Cal.App.3d 718, 728.)

5 DATED: January 24, 2005

6 Respectfully submitted,

7 THOMAS W. SNEDDON, JR.
8 District Attorney

9 By: 
10 Gerald McC. Franklin, Senior Deputy

11 Attorneys for Plaintiff
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3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA }
5 COUNTY OF SANTA BARBARA } SS

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

10 On January 24, 2005, I served the within PLAINTIFF'S RESPONSE TO
11 DEFENDANT'S MOTION IN LIMINE TO LIMIT UNCHARGED CONSPIRATOR
12 HEARSAY on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER and
13 BRIAN OXMAN, by personally delivering a true copy to Mr. Sanger's office and a true copy
14 to be transmitted to Mr. Mesereau at the confidential facsimile number given us for their Santa
15 Maria branch office, and then causing that copy to be mailed to Mr. Mesereau at the address
16 shown on the Service List.

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

18 Executed at Santa Barbara, California on this 24th day of January, 2005.

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21 Gerald McC. Franklin

SERVICE LIST

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