

1 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR
2 MISTRIAL

3 I.

4 THE DISTRICT ATTORNEY COMMITTED PROSECUTORIAL MISCONDUCT BY
5 FAILING TO ADMONISH AND CONTROL HIS WITNESSES

6 The testimony of several witnesses for the government revealed that the witnesses
7 violated the Court's Order and discussed their testimony with one another. This Court ordered.
8 on January 23, 2004, that witnesses not "[m]ake any statement outside of court as to the content,
9 nature, substance or effect of any statements or testimony that have been given, or is expected to
10 be given, in any proceeding or relating to this matter." It is the duty of the party who intends on
11 calling a witness to admonish that witness of the Court's Order. The Order states that "a copy of
12 this Order shall be provided to any prospective witness that a party intends to call for any
13 proceeding in this action." The Order states that "[a]ny violation of this Order will result in a
14 contempt action for any offender within the jurisdiction of this Court."

15 At the beginning of this trial, and, again, just before the testimony started, both the
16 prosecution and defense asked that witnesses be excluded. In addition, the question of witnesses
17 discussing their testimony had been revisited on numerous occasions, including the conduct of
18 Martin Bashir and Jay Leno, as well as more recent press conferences by Louise Palanker and
19 George Lopez. The prosecution cannot claim they were unaware that their witnesses were
20 precluded from discussing their testimony - particularly the testimony just given in court - with
21 their witnesses.

22 The District Attorney failed to admonish and control his witnesses, and, as a result, the
23 witnesses have violated the Court's Order. Jamie Masada testified that Louise Palanker called
24 him after she testified and discussed the case with him. (RT 4128:22-4130:16.) Mr. Feldman
25 testified that he spoke to Stan Katz, about this case, before and after Katz testified. (RT 4563:27-
26 4565:9.) Mr. Feldman also testified that he discussed the case with Bill Dickerman while Mr.

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1 Dickerman was waiting to testify. (RT 4564:24-26.)

2 Of particular concern are the witnesses, Palanker and Katz, who tainted the subsequent
3 witnesses by talking to them immediately after their testimony. Mr. Masada and Mr. Feldman
4 had the benefit of being prepared by hearing about the examination and cross-examination of the
5 previous witnesses who had just been examined on the same or related subject matter.

6 Mr. Jackson has been deprived of his right to confront and cross-examine witnesses.
7 pursuant to the Sixth Amendment to the United States Constitution and Article 1, Section 15 of
8 the California Constitution, by the District Attorney's failure to ensure that his witnesses comply
9 with this Court's Order. This failure has resulted in prejudice to Mr. Jackson. The testimony of
10 Jamie Masada, William Dickerman, Stan Katz and Larry Feldman was tainted by the discussions
11 that occurred among the witnesses. In particular, the testimony of Jamie Masada and Larry
12 Feldman was informed by their respective discussions with Louise Palanker and Stan Katz.

13 We are aware that we could ask the Court to hold the particular witnesses in contempt.
14 However, we are in the middle of trial and our primary concern is the fairness of the trial itself.
15 Contempt may or may not deter the individual witnesses in the future and may or may not send a
16 message. Contempt does not address the prejudice to Mr. Jackson and to the trial process where
17 the prosecution has neglected a basic duty to follow the Court's orders.

18 The District Attorney has more than ample means to admonish his witnesses. There are
19 at least four deputy district attorneys, witness coordinators, and numerous law enforcement
20 officers assigned to this case. The Court made it clear that the parties are responsible for
21 admonishing their witnesses with the Court's Order. The District Attorney's failure to follow the
22 Court's orders has resulted in prejudice to Mr. Jackson and is inexcusable.

23 The Court should grant a mistrial, because no other remedy will unring the bell of the
24 tainted testimony. That taint was caused by the District Attorney's failure to properly admonish
25 his witnesses.

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1 II.

2 IF THIS MOTION IS DENIED, MR. JACKSON REQUESTS A CURATIVE JURY
3 INSTRUCTION

4 A curative instruction does not restore Mr. Jackson's right to confront and cross-examine
5 tainted witnesses. If, however, the Court denies the mistrial motion, Mr. Jackson requests the
6 following curative instruction:

7 The jury is advised that the parties who call witnesses have a duty to
8 admonish those witnesses to follow the Court's rules. Those rules include a rule
9 that witnesses not discuss their testimony with other witnesses.

10 You have heard evidence that certain witnesses have discussed their
11 testimony with other witnesses both before and after taking the stand. You may
12 consider this conduct, if you find it to have occurred, as evidence that the
13 testimony of such witnesses has been tainted. You may give such evidence of
14 taint such weight as you may find to be appropriate and you may find that the taint
15 of such misconduct to be such that the testimony of said witnesses should be
16 disregarded in its entirety unless the remaining evidence supports such testimony.

13 III.

14 WE RESERVE THE RIGHT TO ARGUE THAT A RE-TRIAL SHOULD NOT BE
15 PERMITTED

16 When the prosecution acts in bad faith in an attempt to goad the defense into requesting a
17 mistrial, then principles of former jeopardy may preclude any retrial of defendant. (See *Oregon v.*
18 *Kennedy* (1982) 456 U.S. 667; *People v. Batts* (2003) 30 Cal.4th 660, 695-696.)

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IV.

CONCLUSION

Therefore, the Court should grant a mistrial and, if denied, grant whatever further relief the Court may deem just and proper.

Dated: April 4, 2005

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