

1 (2) Vinnie Amen and Mark Schaffel used the word "killers"; (3) Mr. Amen "informed Mr.
2 Provencio that a tape recorder had secretly been used at the interview by Los Angeles County
3 DCFS investigators with the Arvizo family; and (4) that Mr. Schaffel informed Mr. Provencio
4 that Janet Arvizo didn't want to go to Brazil, wanted to leave Neverland, did leave Neverland,
5 and that it was an "escape." Once again, the proffered testimony has been provided to the Court
6 without a proper showing of proof in the form of a declaration.¹ As argued below, these
7 statements are not subject to Evidence Code Section 1223 because they were not made in
8 furtherance of the alleged conspiracy, nor are they subject to any other exception to the hearsay
9 rule.

10 II.

11 THESE STATEMENTS DO NOT FALL UNDER EVIDENCE CODE SECTION 1223
12 BECAUSE THEY WERE NOT MADE IN FURTHERANCE OF THE ALLEGED
13 CONSPIRACY

14 The plain language of Evidence Code Section 1223 requires that conspirator hearsay
15 statements be made "in furtherance of the conspiracy." The issue before the Court is whether the
16 statements allegedly heard by Mr. Provencio were, in fact, made in furtherance of the alleged
17 conspiracy.

18 It is up to the government to demonstrate how these alleged statements could have
19 furthered the alleged conspiracy. "[N]o rigid rules exist in this area and that whether statements
20 made are in furtherance of a conspiracy depends on an analysis of the totality of the facts and
21 circumstances in the case." (*People v. Hardy* (1992) 2 Cal.4th 86, 146.) Here, the alleged
22 statements to Mr. Provencio amounted to recitations of past events that could not have possibly
23 advanced any conspiracy.

24 Statements that "merely narrate past events are not deemed to be made in furtherance of

25 ¹ Of course, no one will be surprised if Mr. Provencio's testimony does not meet the
26 prosecution's unsworn proffer since the prosecution has failed to predict the testimony of other
27 prosecution witnesses.

1 the conspiracy." (*People v. Smith* (1907) 151 Cal. 619, 625--626.) "Declarations showing past
2 acts, or expressing merely the opinion or desire of the conspirator making them, are not binding
3 upon any one except himself, or those in whose presence they are made." (*Ibid.*; see also *People*
4 *v. Saling* (1972) 7 Cal.3d 844, 852, Fn. 8.)

5 The burden is on the prosecution, as the party seeking to introduce the testimony, to
6 establish that the statement is in furtherance and is not merely a recitation of past facts. They
7 have failed to make the case that Mr. Schaffel or Mr. Amen made the alleged statements for the
8 purpose of furthering the alleged conspiracy. The proffer does not include any evidence that Mr.
9 Provencio was an unwitting participant in the alleged conspiracy or that he was told that
10 statements in question for any purpose other than "idol chit-chat."²

11 Instead, the prosecution argues that "[i]t appears that any statement that relates to the
12 objects of the conspiracy and, e.g., serves to keep other conspirators apprised of the progress of
13 matters or set-backs or problems also qualify." This is not the law. Evidence Code Section 1223
14 does not equate a statement that "relates to the objects of a conspiracy" with a statement that
15 furthers a conspiracy. *Saling* and *Perez*, the cases cited by the prosecution, did not eliminate
16 1223's requirement of a preliminary showing that the statement in question was made in
17 furtherance of the conspiracy. "*Saling* was in no way contrary to the explicit language of
18 Evidence Code section 1223 and its three-fold requirement of independent proof of preliminary
19 facts." (*People v. Leach* (1975) 15 Cal.3d 419, 432.)

20 Furthermore, the prosecution does not even attempt to explain how statements made to
21 Mr. Provencio, a non-alleged-conspirator, could have furthered the conspiracy. He is not alleged
22 to be a conspirator. In fact, he spent months working as a police agent.

23 The prosecution has not made the required preliminary showing that the statements were
24 made in furtherance of a conspiracy. Therefore, they should be excluded as hearsay.

25
26 ² The prosecution's example of "idol chit-chat" ("I see that the Dodgers are leading the
27 league by three games") misses the point. The issue is not whether the statements relate to a
crime or the activities of the conspiracy, it is whether the statement furthers the conspiracy.

1 III.

2 THE STATEMENTS DO NOT QUALIFY AS NON-HEARSAY

3 The District Attorney argues that some of these statements are offered, not for truth, but
4 to give contemporaneous context or to explain the state of mind of the declarants.

5 The District Attorney argues that statements regarding "killers" should be admitted
6 pursuant to Evidence Code Section 1241 as a contemporaneous statement to explain "their
7 collective efforts to isolate the Arvizo family." The problem with this theory is that the alleged
8 statements to Mr. Provencio were not contemporaneous to the events in question. In other
9 words, the proffer is not that Mr. Provencio overheard Mr. Schaffel telling Janet Arvizo about
10 "killers." Instead, the proffer is that they allegedly used the words in response to Mr. Provencio's
11 questions after the alleged events in question. In particular, the use of the word "killer" by
12 Vincent Amen, based on the prosecution's proffer, was in response to Rudy Provencio
13 introducing the word "killers" into the conversation and was in no way part of the transaction in
14 question.

15 Similarly, the District Attorney's argument that Evidence Code Section 1250 covers these
16 statements as demonstrating "state of mind and intent" is flawed because the proffer is that Mr.
17 Schaffel and Mr. Amen discussed events after they occurred, not as they occurred.

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IV.

CONCLUSION

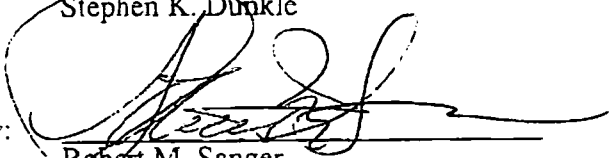
For the reasons stated above the Court should not allow the proffered statements into evidence.

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