SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. MICHAEL JACKSON, Defendant.	Case No.: 1133603 DECISION ON MOTION PURSUANT TO PENAL CODE § 995; FINDINGS AND ORDER SEALING GRAND JURY TRANSCRIPT AND PORTIONS OF DECISION **REDACTED VERSION**

On July 27, 2004, the Court heard the motion of Defendant Michael Jackson to dismiss the indictment pursuant to Penal Code § 995. The Court, having reviewed the entire transcript of the grand jury proceedings, having read the papers submitted by the parties, and having heard the oral argument of counsel, now denies the motion for the following reasons:

On April 21, 2004, the Santa Barbara County Grand Jury returned an indictment against Michael Jackson, an internationally prominent entertainer. A criminal action had already been brought against Mr. Jackson by the District Attorney. The indictment differed from the prior felony complaint principally by adding a charge of conspiracy to commit the

crimes of false imprisonment, extortion and child abduction. The defense has challenged the Indictment on several different theories.

There are two general grounds set forth in Penal Code § 995 under which an indictment may be set aside: " (A) Where it is not found, endorsed, and presented as prescribed in this code. (B) That the defendant has been indicted without reasonable or probable cause." The grand jury is viewed as part of the charging process rather than the adjudicative process. The standard under Section 995 is essentially the same for reviewing an indictment as for a holding order following a preliminary hearing on an information. Penal Code § 939.8 states: "The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury." In *Cummiskey v. Superior Court* (1992) 3 C4th 1018 the Supreme Court held that this does not at all imply that a trial-like standard of proof is appropriate. It regarded as analogous the standard for an information, quoting: "An information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it." (at 1027).

In the present motion, the defense asserts essentially three theories to set aside the indictment: 1) That misconduct and the presentation of inadmissible evidence by the prosecution tainted the proceeding; 2) That the grand jury was not correctly instructed on the law of conspiracy; and 3) That no evidence was presented that would serve to tie the defendant himself to the alleged conspiracy.

The misconduct by the prosecution, as charged by the defense, is that the order and tone of the presentation served improperly to bolster the credibility of the complaining witnesses and to diminish the significance of exculpatory evidence. A particular focus is the

early presentation of Mr. Feldman, the attorney who had represented a minor in a 1993 settlement with Mr. Jackson, and of Dr. Katz, a psychologist who counseled with the complaining witnesses and ultimately attempted to make a report of suspected child abuse. Mr. Feldman introduced references to the prior settlement suggesting it was for "multi-multi-millions," a phrase suggested by the prosecution. Dr. Katz was allowed to testify that he found the complaining witnesses credible, that he did not believe their mother was in the case for the money, and that he, as a professional, held a reasonable suspicion that child sexual abuse had occurred. Both of these witnesses were treated with evident respect and deference by the prosecution. In contrast, District Attorney Tom Sneddon butted heads with an attorney who represented the father of the children involved. The two challenged each other's recollection of their prior conversations and generated an atmosphere of undisguised hostility. Some hostility was displayed with the father himself. He was questioned about a misdemeanor conviction for violation of Penal Code § 273.5. None of this material was particularly probative of the crimes for which indictment was sought, and was justified only as rebuttal to presumptive defense theories that had been given currency in various news media. On more directly probative points regarding conspiracy allegations, the prosecution relied to a considerable extent upon testimony about the defendant's underlying motives or patterns of conduct from witnesses whose expertise, familiarity with Mr. Jackson, and specific knowledge of the events was not well established. The moving papers direct particular attention in this regard upon the testimony given by [redacted]. In an Appendix A to the 995 motion, objection is made to some 532 portions of the testimony. The contention is that the cumulative effect of these alleged errors along with the tone and misimpressions conveyed by the prosecution throughout the proceedings tainted the proceedings to the

extent that the result cannot be trusted and it cannot be said that the indictment was found as prescribed in the Penal Code.

The cumulative effect should be assessed once the further arguments are weighed that there was misinstruction on the law of conspiracy and that actual evidence of conspiracy on the part of Mr. Jackson was lacking. The Court has, however, independently assessed the concern that the specific evidentiary objections to the 532 identified portions of the testimony should be sustained. The vast majority of these objections are as to form or complain of hearsay without consideration of applicable exceptions. The District Attorney has done a fairly thorough analysis of each of the objections and defense counsel has not attempted a point-by-point rebuttal. The Court is in essential agreement with the District Attorney's analysis. Some instances remain where it appears that evidentiary objections might well have been sustained in a courtroom. These include, in particular, the references to the misdemeanor conviction of the father, and Mr. Feldman's references to opportunity to have achieved a civil settlement on the present claims. Nevertheless, these instances by themselves do not appear sufficient to have prejudiced the entire proceeding. They concern tangential points that make no genuine contribution to the fundamental inquiry. The testimony of witnesses [redacted] were properly considered for whatever weight they might possess. The testimony of [redacted] included foundational facts, which, if credited, would permit her testimony to be considered as well.

The tone set by the prosecutor in the exchanges with the referenced attorney and with his client does seem regrettable. The necessity of inquiring in the areas of their testimony was an apparent result of the obligation under Penal Code § 939.7 to present potentially exculpatory evidence to the grand jury. Some of the tone seems to owe to strong pre-existing sentiments on prior issues of custody and to genuine disagreements

over the appropriateness of public statements made by the attorney. At least on the printed page, the verbal exchanges would actually seem to favor the attorney, who appears to have strongly held his own. There is nothing about the exchanges, unpleasant as they may be, which would appear likely to intimidate the grand jury members themselves or deflect them from a consideration of the large volume of other evidence presented. None of the cited instances would, on their own, justify the setting aside of an otherwise valid indictment.

On the issue of instructions, it is, of course, the case that grand jurors are not themselves lawyers, that no judge is present, and that the integrity of the proceedings depends upon adequate instruction on the law from the prosecutors. The law of conspiracy is to a degree commonsensical in its broad outlines, but it is hedged about with difficulties that require some careful consideration. The particular objection to the instructions given in the present case is that the two kinds of specific intent required to establish a conspiracy were never clearly explained to the grand jury members. The standard instruction in the area is CALJIC 6.10:

"A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of [here, extortion, child abduction or false imprisonment] and with the further specific intent to commit that crime [or crimes], followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement."

When the grand jury was instructed initially on the law of conspiracy an element was left out. As read by Deputy District Attorney Zonen, this instruction left out the words "and with the further specific intent to commit those crimes." The partial instruction left for the moment the possibility that a mere agreement to commit a crime, without any actual

intent to commit that crime, coupled with an overt act, might complete the crime of conspiracy. This misapprehension would be of greatest importance in a case where no crime was actually committed. This was a potentially significant error, as the prosecution did not seek indictment on the actual crimes of extortion, child abduction or false imprisonment directly, but the effect was diluted by several later corrections. Almost immediately the grand jury was told that, "A member of a conspiracy is not only liable for the particular crime that to his knowledge he and his confederates agree[d] to and did commit, but is also liable for the natural and probable consequences of any crime or act of a co-conspirator, including the co-conspirator's commission of another crime to further the object of the conspiracy to commit the agreed upon crimes, even though that additional crime or act was not intended as part of the agreed upon objective, and even though he was not present at the time of the commission of that crime or act." This instruction – based on CALJIC 6:11 – references the understanding that there have been an intention to accomplish "the agreed upon objective." Much more directly, Deputy District Attorney Auchincloss told the grand jury that the elements of conspiracy included: "An agreement to commit a crime. Two or more people. Very simple term or element. Specific intent to commit that crime. There has to be an intent among those two people or more, to commit the crime that is the object of the conspiracy." [RT 1823]. Furthermore, he argued that the crimes had in fact been completed: "And you can look at those completed offenses and say, 'Of course, that was their intent. That's what they went out and did." Thus, both elements of specific intent were ultimately placed before the grand jury.

It was for some time understood to be the law that instructional error was not a basis for setting aside a grand jury indictment. This was the holding in *People v. Gordon*

(1975) 47 CA3d 465, 475-6. *Gordon* was cited with approval by the majority in *Cummiskey v. Superior Court* (1992) 3 C4th 1011, at 1034, however, the holding in *Cummiskey* recognized that a misinstruction on the minimum standard of proof required to indict was manifestly tantamount to a claim that the jury may have indicted on less than reasonable or probable cause. 3 C4th 1018, at 1022 fn. 1. The same concern would seem to exist where the grand jury is misinformed on the substantive requirements of the law of conspiracy, [despite *Cummiskey*'s further recognition that unlike a trial court a prosecutor before a grand jury has no obligation to instruct on lesser included offenses (at page 1036)]. As discussed above, however, there is no reason to believe that any misimpression created by the initial instructional ellipsis would not have been corrected in the later argument. This seems particularly true since there is little real distinction in most instances between participating in an agreement to commit a crime and having the specific intent to commit the crime.

The most critical inquiry on this Penal Code § 995 motion is whether there is sufficient evidence to believe that Michael Jackson committed the crimes with which he is charged. Again, of course, the inquiry is not whether he is actually guilty of any offense, but whether there is a rational basis to believe that a crime was committed and that it may have been committed by the accused. In this respect, it is important to note that there is no significant attack made upon the indictment, except with respect to the crime of conspiracy. The alleged victim of the charges of Penal Code § 288 and § 222 appeared and testified that these events occurred. His testimony alone, if believed, by the grand jury, would supply all the evidence needed to support the indictment on those points. The defense does not argue otherwise. To support the claim of conspiracy, however, there must be evidence of direct participation by Michael Jackson in an agreement to extort,

falsely imprison and abduct and a specific intention on his part to actually commit such crimes. It is not necessary that he have been the organizer of such a conspiracy, or that he himself have committed any overt act in furtherance of the objectives of the conspiracy, only that he have been an actual participant in the agreement and have had the specific intent that at least one of the listed crimes be committed.

The theory of the prosecution appears to be that in the wake of a television documentary in which Mr. Jackson seeks to explain and justify having unrelated children sleep in his bedroom, he and his advisors determined to prepare a rebuttal video in which it was made clear that no inappropriate conduct had occurred. They wished to utilize for this purpose the young, cancer patient who had appeared in the original documentary. It was also useful in order to be able to sue the parties responsible for the first documentary to enlist the cancer patient and his family, who had apparently given no written consent to the use of his image and comments in the production. Mr. Jackson, himself, telephonically extended an invitation to the patient and his family to attend a press conference in Miami, Florida. While some question has been raised as to the ability of the family's mother to identify Mr. Jackson on this occasion, there was additional testimony that the minor himself had spoken with Mr. Jackson and asked to be allowed to have his siblings come with him. Mr. Jackson agreed and alluded in the conversation to the flight arrangements that had been worked out. The family arrived in accordance with the plan. No press conference occurred. Mr. Jackson personally explained to the mother that her children were in danger and that to deal with the threats she should cooperate with the filmmakers, who later requested she sign the documents authorizing suit against the BBC. In the succeeding days, the family was flown to the Jackson home at Neverland Ranch in Santa Barbara County and the boys were invited to sleep in the Jackson bedroom. The family's

movements were arguably constrained. They were not permitted to see the original documentary when it aired and they understood their phone calls were monitored. The rebuttal video was filmed in West Hills, and passports and visas were obtained for travel to Brazil. Their apartment was vacated and emptied, and their belongings were placed in storage. When at one point the family left the Ranch, they were strongly encouraged to return. They did so, but when the mother subsequently left, her children remained behind, and she did not manage to see them again until she concocted the ruse that their grandfather was ill and needed to see them. It is reported that a written directive that one of the children should not leave Neverland Ranch was distributed to the security personnel.

These circumstances would support the view that the crimes were committed: extortion (i.e. wrongfully obtaining the family's participation in the rebuttal video and the right of action against the BBC by use of reported death threats and other misrepresentations); false imprisonment (restraints on the family's personal liberty by making it difficult for them to leave the ranch and intimidating them with threats); and child abduction (separating the children from their mother at the end of the Neverland stay). The actions of a number of persons were involved in accomplishing these crimes: persons communicating threats, making travel and housing arrangements, obtaining visas and passports, monitoring phone calls, moving and storing household belongings, and the like. It is not necessary to suppose that every person assuming a role was a part of an express agreement to commit a crime. But it appears that Mr. Jackson himself extended the invitation to the family to go first to Miami and then to Neverland Ranch, that he communicated what is alleged to be misinformation about press conferences and death threats, that it was his associates who thereafter repeated and emphasized these threats. Mr. Jackson was aware of the family's continued presence and purpose in his home as he

had daily interactions with them and permitted the boys to sleep in his bedroom. All of the benefits attendant upon the family's participation in the rebuttal video would ultimately be his. He was the person who owned Neverland Ranch, who paid the salaries of those who worked there. It is not a difficult inference that he was in control of the situation in which the family found itself. The unindicted co-conspirators are persons whom he was paying for their services, or with whom he had close personal ties.

None of this testimony suffices to establish conclusively at this stage that crimes actually occurred or that a conspiracy actually existed or that Mr. Jackson had any direct involvement or did anything wrong. Innocent explanations are entirely possible, and controverting evidence may exist. Those questions remain to be resolved at trial. The only issue on this § 995 motion is whether it is reasonable to entertain the belief on the evidence presented that the stated crimes did occur and that the defendant was in some manner responsible for their occurrence. The evidence is sufficient for that purpose.

The final question on this motion is whether, cumulatively, these issues should result in setting aside the indictment. It is argued that the instructional errors, combined with the thin evidence of conspiracy evidence, combined with the patterns of dominating behavior and presentation of inadmissible evidence should collectively compel setting aside the indictment even if no single element on its own would dictate the action. In this Court's judgment, having concluded that there was no significant instructional error, and given sufficient evidence of the crimes upon which the indictment was presented, the effect of the brief episodes of concern in the record is not such as to justify setting aside the indictment.

It should be noted as well, that the Court has delayed the release of its findings on this motion brought under Penal Code § 995 in order to consider whether suppression of

any of the evidence deriving from execution of search warrants would require reconsideration of the sufficiency of the evidence. Having now completed the hearings on the motions brought pursuant to Penal Code § 1538.5, it is clear that the items of evidence to be suppressed do not bear in any significant fashion upon the merits of the present question.

The § 995 motion is denied.

The Court is simultaneously issuing its decisions on the two portions of the Penal Code § 1538.5 motions. Those orders have been drafted in a manner that does not require redaction. This order, however, necessarily discusses some witness names and testimony and does require some minor redaction. The Court has previously entertained argument on the sealing of the grand jury testimony, and has also issued an order with regard to the sealing of the overt act portions of the indictment, which would have operated essentially as a summary of the greater part of the grand jury testimony. The minor redactions made in this document are in the service of the same concerns that have led the court to seal the grand jury transcript. The Court acknowledges that there is a presumption of openness to court records generally, and that grand jury transcripts are typically released when an indictment has been returned. However, Penal Code § 938.1(b) specifically authorizes the court on its own motion to seal portions of a transcript when it determines that there is a reasonable likelihood that making all or any part of the transcript public may prejudice a defendant's right to a fair trial. This sealing is effective only until the defendant's trial has been completed.

The Court does hereby determine, not for the first time, that there is a substantial probability that the defendant's right to a fair trial would be prejudiced by release of the grand jury transcript prior to trial. Few cases generate the national and even international

attention that this case has. The Court has taken extraordinary measures over the several months in which the case has been pending to protect the fair trial rights of both defense and prosecution. These actions have included a protective order against public discussion of evidence by witnesses and attorneys in the case, and a series of sealing orders providing for the redaction of the more detailed discussion of witness names and testimony. While this has had the effect of clouding to some degree public understanding of all this case involves, it is, in the court's view, precisely such uncertainty that will aid in preserving a jury pool containing sufficient numbers of persons who do not arrive for voir dire with fixed opinions of guilt or innocence, and who will have had minimal exposure to evidence that may ultimately not be admitted at trial and who recognize that they have not yet heard the evidence on which the case is to be decided. The Court is also concerned to protect the identity as far as possible of the minors who are alleged to have been involved in the events in the question.

The important public interest in open proceedings has been, and will be, accommodated to the greatest extent possible with these goals. Argument and evidence is being heard in open court and has been widely reported. Redactions of documents are being undertaken, at very considerable effort from all involved, in order to permit as full a disclosure of issues as is consistent with the protection of fair trial rights. In the particular case of the grand jury transcripts and the section 995 motion, substantial portions of the grand jury testimony have been released, and are available to the media on the court's web site. As ongoing issues implicate portions of the grand jury testimony, further pre-trial

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redactions will be permitted. The Court orders therefore that the grand jury transcript shall remain sealed and that an appropriately redacted edition of this order shall be made publicly available.

DATED: OCT. 14 2004

Rodney S. Melville

RODNEY S. MELVILLE
Judge of the Superior Court

PROOF OF SERVICE

1013A(1)(3), 1013(c) CCP

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA:

I am a citizen of the United States of America and a resident of the county aforesaid. I am employed by the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action. My business address is 312-H East Cook Street, Santa Maria, California.

On OCTOBER 14, 20 04, I served a copy of the attached DECISION ON MOTION PURSUANT TO PENAL CODE § 995; FINDINGS AND ORDER SEALING GRAND JURY TRANSCRIPT AND PORTIONS OF DECISION addressed as follows:

THOMAS W. SNEDDON, DISTRICT ATTORNEY
DISTRICT ATTORNEY'S OFFICE
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___ FAX

By faxing true copies thereof to the receiving fax numbers of: _____. Said transmission was reported complete and without error. Pursuant to California Rules of Court 2005(l), a transmission report was properly issued by the transmitting facsimile machine and is attached hereto.

___ MAIL

By placing true copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States Postal Service mail box in the City of Santa Maria, County of Santa Barbara, addressed as above. That there is delivery service by the United States Postal Service at the place so addressed or that there is a regular communication by mail between the place of mailing and the place so addressed.

_X_ PERSONAL SERVICE

By leaving a true copy thereof at their office with the person having charge thereof or by hand delivery to the above mentioned parties.

____ EXPRESS MAIL

By depositing such envelope in a post office, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of Express Mail, in a sealed envelope, with express mail postage paid.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 14TH day of OCTOBER, 20 04, at Santa Maria, California.

Carrie L Wagner

CARRIE L. WAGNER