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FILED
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SANTA BARBARA

NOV 24 2004

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,)
 13)
 14) Plaintiff,)
 15)
 16) v.)
 17)
 18) MICHAEL JOE JACKSON,)
 19)
 20) Defendant.)

~~PROPOSED~~ REDACTED

No. 1133603

PLAINTIFF'S OPPOSITION TO
 DEFENDANT'S MOTION FOR
 MENTAL EXAMINATIONS FOR

[REDACTED]

DATE: November 29, 2004
 TIME: 10:00 a.m.
 DEPT: TBA (Melville)

~~UNDER SEAL~~

21 A. Introduction:

22 Defendant has moved the Court to order "a mental examinations for the
 23 complaining witnesses [REDACTED]" on the grounds that

24 -- "(1) The prosecution opened the door to permit a mental examination of the
 25 complaining witnesses by offering its own mental examination and expert testimony
 26 concerning their mental condition, and the complaining witnesses have waived the provisions
 27 of Penal Code section 1112 by employing an expert psychologist to examine the witnesses'
 28 mental status and provide expert testimony of mental condition;

-- "(2) Mr. Jackson cannot cross-examine and confront expert witness Psychologist

1 Stanley Katz unless he is permitted equal access to the subject matter of the expert's mental
2 examination . . ." and denial of such access will prejudice his "Sixth Amendment rights to
3 confront and cross-examine expert witnesses against him";

4 -- "(3) Mr Jackson seeks a mental examination of the witnesses [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 In other words, "to
10 determine their competence to testify." (P&A 22:20-21.)

11 Plaintiff will address the grounds for the pending motion in that order.

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PLAINTIFF DID NOT "OPEN THE DOOR" TO AN
UNCONSENTED-TO COURT-ORDERED MENTAL
EXAMINATION OF MEMBERS OF THE
[REDACTED] FAMILY

A. Introduction

The point of defendant's "the-prosecution-opened-the-door" argument is not
entirely clear. Defendant acknowledges that "Ordinarily, mental examinations are not
permitted of complaining witnesses under Penal Code section 1112" for the purpose of
assessing credibility (P&A 18:23-24), and seems at some pains to insist, repeatedly, that he
seeks a mental examination of the witnesses not to assess their credibility, but [REDACTED]

[REDACTED] . . ."
(Motion 2:13; P&A 1:15 [emphasis added]; P&A 19:22 - 20:3; 20:9-10; 20:20-24.)

Possibly sensing that "seeking a mental examination . . . because [REDACTED]
[REDACTED] sounds an awful lot
like expressing a desire to impeach the witness's credibility [REDACTED]

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1 [REDACTED]¹ defendant cites *People v. Ayala* (2000) 23 Cal.4th 225, 263 for the proposition, "trial
2 courts have broad discretion to permit psychiatric examinations of witnesses to determine their
3 competence to testify." (P&A 22:20-22; emphasis added.) "The prosecution placed the
4 complaining witnesses['] mental condition in issue by tendering two (2)² experts who testified
5 about the complaining witnesses['] competency" (*Id.*, 24:16-17.)

6 As it happens, the Supreme Court said no such thing in *Ayala* (see 23 Cal.4th at
7 pp.264-265³), and the competency of the complaining witnesses to testify was never suggested
8 as an issue, let alone was it the subject of expert testimony before the Grand Jury. But out of
9 caution, the People will address the "right to examine to determine competency to testify"
10 theory below.

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12 B. "Open The Door"/ "Waiver Of § 1112"

13 Defendant argues that the prosecution "opened the door" to "permit a mental
14 examination of the complaining witnesses by offering its own mental examination and expert
15 testimony concerning their mental condition, and the complaining witnesses have waived the
16 provisions of Penal Code section 1112 by employing an expert psychologist to examine the
17 witnesses' mental status and provide expert testimony of mental condition" (Motion 2:5-8;
18 P&A 1:6-9).

19 ¹ Sec, e.g., *People v. LaRue* (1923) 62 Cal.App. 276, 284: "It is admissible . . . in order to
20 affect the credibility of the witness, to prove that he was or is subject to insane delusions; that
21 his mind and memory are impaired by disease." (Wharton's Criminal Evidence, 10th ed., sec.
22 370a.)"

23 ² Counsel would do all concerned a favor by relying on the ability of the reader of his
24 pleadings to immediately grasp what, e.g, the letters "t-w-o" mean when combined together,
25 without the fussy and distracting "(2)" next to them. Motions are neither contracts nor
26 commercial paper, in which use of that tiresome style may be justified.

27 ³ *Ayala* sought psychiatric tests of an adverse witness "in order to ascertain whether
28 Castillo was competent to testify. . . . [¶] The Trial court denied the motion without comment.
[¶] There was no error. . . . Defendant bore the burden of showing Castillo's incompetence.
[Citation.] He failed to meet that burden." (23 Cal.4th, at pp. 265-266.)

1 Penal Code section 1112 provides:

2 Notwithstanding the provisions of subdivision (d) of Section 28 of
3 Article I of the California Constitution, the trial court shall not order any
4 prosecuting witnesses, complaining witness, or any other witness or
5 victim in any sexual assault prosecution to submit to a psychiatric or
6 psychological examination for the purpose of assessing his or her
7 credibility.

8 Since section 1112's prohibition is expressly limited to examinations undertaken to
9 "assess credibility" – a point recognized by defendant (see P&A 22:14-21) – presumably
10 defendant's theory of "waiver" is to be understood as an argument that he may indeed seek
11 mental examinations of the [REDACTED] precisely in order to impeach their credibility, his
12 protestations to the contrary notwithstanding.

13 C. The Testimony At The Grand Jury Proceedings

14 Defendant reasons that since testimony by Dr. Katz and Attorney Feldman
15 encompassed references to Dr. Katz's [REDACTED] and [REDACTED]
16 [REDACTED] "somehow that "opened the door" to a court-ordered examination of them
17 on that issue prior to trial.

18 Dr. Katz did not testify before the Grand Jury to any interview or examination by
19 him of [REDACTED] whose mental state is, quite evidently, the primary focus of the pending
20 motion. To be sure, Dr. Katz testified that he [REDACTED] " But he
21 did so [REDACTED]

22 [REDACTED]
23 Attorney Feldman [REDACTED]
24 [REDACTED]
25 [REDACTED] Mr.

26 Feldman related his clients' concern that [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 The only opinion Mr. Feldman expressed [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 More importantly and relevantly to the pending motion, the prosecution does not
5 anticipate offering "expert evidence" at trial on the subject of [REDACTED] mental state or
6 that of her children. Perhaps self-evidently, the defense cannot demand court-ordered mental
7 examinations to counter evidence put before the grand jury some months ago. That proceeding
8 is over and done with.

9
10 D. [REDACTED] Did Not "Waive" The Protection Of Penal Code § 1112

11 [REDACTED] didn't "employ" Dr. Katz, ever, and the prosecution didn't "employ"
12 him "to give expert testimony concerning his examination of the witnesses."

13 Dr Katz [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED] " [REDACTED] was interviewed by Dr. Katz but [REDACTED]
17 [REDACTED] She was in no position to "waive" the protection of
18 Penal Code section 1112, even assuming that statute's prohibition can be "waived" other than
19 by the prosecution's own act of introducing evidence of the complaining witnesses' mental
20 state at trial on the issue of her credibility.

21 II

22 THERE IS MERIT TO THE ARGUMENT THAT THE
23 DEFENSE SHOULD BE PERMITTED EQUAL ACCESS
24 TO THE SUBJECT OF AN EXPERT WITNESS'S MENTAL
25 EXAMINATION, IF THAT WITNESS TESTIFIES TO HIS
26 OPINION OF THE SUBJECT'S MENTAL STATE GAINED
27 FROM THAT EXAMINATION. NO SUCH EVIDENCE
28 WILL BE OFFERED IN THIS CASE.

The People agree with the substance of defendant's "equal access" argument, to the

1 effect that a defendant cannot confront and cross-examine an expert witness on the issue of the
2 mental state of a person the expert has examined unless defendant is permitted equal access to
3 the subject of the expert's examination.

4 The short and sufficient answer to that argument, repeated by defendant some 20
5 times, is that the prosecution does not intend to offer expert evidence concerning the mental
6 status of [REDACTED].

7
8 III

9 [REDACTED] COMPETENCY TO TESTIFY
10 IS NOT AN ISSUE IN THIS CASE

11 As our California Supreme Court noted in *People v. Ayala*, *supra*, 23 Cal.4th 225,
12 at pages 265-265, the Evidence Code defines the qualifications of a person to testify in a
13 matter: "Except as otherwise provided by statute, every person, irrespective of age, is qualified
14 to be a witness and no person is disqualified to testify to any matter." That statute appears
15 under the heading "General rule as to competency." "Competency" is not the same thing as
16 "credibility": "A degraded character may be a competent witness though not credible.
17 [Citations.]" (*Langer v. Langer* (1948) 84 Cal.App.2d 806, 809.)

18 Section 701 of the Evidence Code – "Disqualification of Witness" – provides:

19 (a) A person is disqualified to be a witness if he or she is:

20 (1) Incapable of expressing himself or herself concerning the matter so
21 as to be understood, either directly or through interpretation by one who
22 can understand him; or

23 (2) Incapable of understanding the duty of a witness to tell the truth.

24 (b) In any proceeding held outside the presence of a jury, the court may
25 reserve challenges to the competency of a witness until the conclusion of
26 the direct examination of that witness.

27 In *People v. Lewis* (2001) 26 Cal.4th 334, our Supreme Court considered
28 appellant's claim that one Pridgon, an eye-witness to defendant's robbery and murder of a
woman, was incompetent to testify and that the trial court erred in ruling otherwise. Lewis

1 called several defense expert witnesses "who testified regarding Pridgon's mental disorders,
 2 including his psychosis, paranoia, and 'schizophreniform disorder'" and "auditory
 3 hallucinations." (26 Cal.4th at p. 354.) A rebuttal expert testified that "notwithstanding
 4 Pridgon's diagnosed mental disorders and low intellect, '[t]here is nothing that would lead me
 5 to believe that he would be incapable of reporting an account of an act of this nature,' though
 6 Pridgon's degree of accuracy would be that of a seven year old." (*Id.*, p. 355.)

7 "['I]f there is evidence that the witness has [the capacity to perceive
 8 and recollect], the determination whether [he] in fact perceived and does
 9 recollect is left to the trier of fact.' [Citations.]" (*People v. Dennis*,
 10 *supra*, 17 Cal.4th at p. 526; 2 Witkin, Cal. Evidence (4th ed. 2000)
 11 Witnesses, § 46, p. 297 [the capacity to perceive and recollect is "only
 12 preliminarily determined by the trial judge, and ultimately redetermined
 13 by the jury"].) A trial court should allow a witness's testimony unless
 14 "no jury could reasonably find that he has such [personal] knowledge."
 15 (Cal. Law Revision Com. com., reprinted at 29B pt. 2 West's Ann. Evid.
 16 Code, *supra*, foll. § 701, p. 284.) "The fact that a witness has made
 17 inconsistent and exaggerated statements does not indicate an inability to
 18 perceive [or] recollect . . ." (*People v. Willard* (1983) 155 Cal. App. 3d
 19 237, 240.) Nor does a witness's mental defect or insane delusions
 20 necessarily reflect that the witness lacks the capacity to perceive or
 21 recollect. (*People v. McCaughan* (1957) 49 Cal. 2d 409, 420; *People v.*
 22 *La Rue* (1923) 62 Cal. App.. 276, 284) A witness's uncertainty
 23 about his or her recollection of events does not preclude admitting his or
 24 her testimony. (*People v. Avery* (1950) 35 Cal. 2d 487, 492 [uncertainty
 25 of recollection goes to the weight and not admissibility of a witness's
 26 testimony].)

27 (*People v. Lewis*, *supra*, 26 Cal.4th 334, at pp. 356-357.)

28 "The challenging party must establish a witness's incompetency by a preponderance
 of the evidence. [Citations.] Unlike a witness's personal knowledge, a witness's competency
 to testify is determined exclusively by the court. [Citations.]" (*People v. Lewis*, *supra*, 26
 Cal.4th at p. 360.)

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1 Consistent with Pridgon's diagnosis of having the intellect of a seven
2 year old, he expressed difficulty with complex questions and often
3 responded in incomplete, sometimes nonsensical, sentences. Mere
4 difficulty in understanding a witness, however, does not disqualify that
5 witness under Evidence Code section 701, subdivision (a). To the
6 extent defendant contends Pridgon's responses were unbelievable –
7 including his testimony that he 'heard' blood and knew how money
8 'sounds' – this was an issue of credibility for the jury and not relevant to
9 the issue of Pridgon's competency. [Citation.]” (*Id.*, at p. 361.)

10 This Court has the transcript of the Grand Jury proceedings in which every member
11 of the [REDACTED] testified. It was able to observed [REDACTED] during her testimony in the
12 hearing of one of defendant's suppression motions. It need take no further evidence on the
13 issue of the competency of any of the witnesses who appeared before the Grand Jury to testify
14 at trial. “An unsubstantial challenge does not require a voir dire examination; the granting or
15 denial of a motion to voir dire a witness on competency is within the sound discretion of the
16 trial judge.” (2 Witkin, Cal. Evid. (4th ed. 2000) § 48; p. 300.)

17 CONCLUSION

18 By statutory decree, the Court is barred from ordering any person likely to testify in
19 this case to submit to a psychological or psychiatric examination of his or her credibility. (Pen.
20 Code. § 1112.) [REDACTED]

21 [REDACTED]

22 There is no evidence that any of the complaining witnesses in this matter are not
23 competent to testify at trial. Defendant's motion for an order compelling the [REDACTED]
24 members to submit to mental examination is without merit.

25 Given the number of pages devoted to the alleged facts offered in support of the
26 pending motion, it is not unreasonable to suppose defense counsel will be eager to rehearse all
27 of those “facts” in their oral argument in support of the motion, in the presence of media
28 representatives. Most of the “facts” upon which defendant relies likely would not get before

1 the jury that considers defendant's guilt or innocence. In any event, defendant's recital of
 2 those "facts" is extremely prejudicial, as it was intended to be. All of it comes within the
 3 Court's Protective Order and should not be aired in public prior to trial.

4 Defendant has demonstrated by his sealing motion that he does not perceive any of
 5 matters he discusses at length in his moving papers as coming within the Protective Order. It
 6 therefore appears that the Court must caution counsel in the plainest of words that he is not to
 7 discuss ANY of those facts in the course of his argument, and that sanctions for disobedience
 8 of the Court's caution will be swift in their coming and biblical in their severity.

9 DATED: November 24, 2004

10 Respectfully submitted,

11 THOMAS W. SNEDDON, JR.
 12 District Attorney

13 By: LS/
 14 Gerald McC. Franklin, Senior Deputy

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PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SANTA BARBARA } SS

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

On November 24, 2004, I served the within PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR MENTAL EXAMINATIONS FOR JANET ARVIZO, GAVIN ARVIZO AND STAR ARVIZO on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by personally delivering a true copy thereof to Mr. Sanger's office in Santa Barbara, by transmitting a facsimile copy thereof to Attorneys Mescreau and Oxman, and by causing a true copy thereof to be mailed to each of them (Mr. Sanger excepted), first class postage prepaid, at the addresses shown on the attached Service List.

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

Executed at Santa Barbara, California on this 24th day of November, 2004.

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Gerald McC. Franklin

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