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FILED
 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF SANTA BARBARA

FEB 25 2016

GARY M. SLANE, 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

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 v.

17 MICHAEL JOE JACKSON,

18 Defendant.

No. 1133603

13 PLAINTIFF'S IN LIMINE
 MOTION TO FORBID
 14 DISPARAGEMENT OF
 OPPOSING COUNSEL,
 15 INCLUDING REFERENCES TO
 16 SUPPOSED MOTIVE FOR THE
 PROSECUTION OF DEFENDANT;
 17 MEMORANDUM OF POINTS
 AND AUTHORITIES

18 DATE: TBA
 19 TIME: ~~9:30 am~~
 DEPT: TBA (Melville)

20 **UNDER SEAL**

22 TO: THE CLERK OF THE SUPERIOR COURT AND TO DEFENDANT AND
 23 HIS COUNSEL:

24 PLEASE TAKE NOTICE that on a date to be assigned by the Court, Plaintiff will
 25 move the Court for its order directing counsel for both parties to refrain from disparaging
 26 opposing counsel in the presence of the jury, during opening statements and throughout the
 27 trial. In particular, the People respectfully request that defense counsel make no reference in
 28 their opening statement to what they claim to believe is the District Attorney's motive for

1 seeking an indictment of defendant and bringing the charges found by the Grand Jury to trial.

2 This motion will be based on this notice, the accompanying memorandum of points
3 and authorities, and the pleadings, records and evidence in the Court's file in this matter.

4 DATED: February 25, 2005

5 Respectfully submitted,

6 THOMAS W. SNEDDON, JR.
District Attorney

7
8 By: 
9 Gerald McC. Franklin, Senior Deputy

10 Attorneys for Plaintiff

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 IT IS GENERALLY INAPPROPRIATE FOR COUNSEL FOR
4 ONE PARTY IN A LAWSUIT TO DISPARAGE OPPOSING
5 COUNSEL IN THE PRESENCE OF THE TRIER OF FACT

6 There are many reported decisions addressing the allegedly prejudicial effect, on the
7 defendant's right to a fair trial, of a prosecutor's disparagement of opposing counsel. (See,
8 e.g., the cases collected and discussed in *People v. Gionis* (1995) 9 Cal.4th 1196, 1214-1220.)
9 There is rarely if ever an occasion for a court to comment of a defense lawyer's disparagement
10 the motive of the prosecutor. Not surprisingly; if he succeeds in raising a doubt in the mind of
11 even one juror by that tactic, the jury hangs or the defendant is acquitted. In either event, there
12 will be no occasion for an appellate court to comment on defense counsel's behavior.

13 The People have a right to try *The People v. Michael Joe Jackson* before an
14 unbiased jury. In this case, plaintiff's counsel are confronted by opposing counsel whose
15 consistent tactic prior to trial has been to press the limits set by the court on what may and may
16 not be discussed by them regarding the facts of this case and the evidence that may be
17 presented in the course of argument on the various legal issues that have been raised by one
18 side or the other. It has not escaped their notice that arguments to the Court in this case are
19 made before an audience with its share of journalists. Tidbits of asserted fact having no
20 particular relevance to the particular issue before the court but which serve nicely to smut an
21 adverse witness are regularly woven into those arguments.

22 Plaintiff has no reason to anticipate that defense counsel will suddenly err on the
23 side of caution during voir dire and in opening statement. Plainly, defense counsel do not
24 regard plaintiff's concern for a fair trial as their concern, though they are quick to note,
25 correctly enough, that the prosecutor, for his part, must concern himself with the right of the
26 defendant to a fair trial.

27 If, as an entirely practical matter, plaintiff may not rely on defense counsels' own
28 concern for plaintiff's right to a fair trial to inhibit their extravagant advocacy, plaintiff

1 performce must rely on the court to set the limits and enforce them.

2 There may be some issues where the line between what is permissible comment and
3 what is not is difficult to draw. The motive of the Santa Barbara District Attorney for seeking
4 an indictment and bringing to trial the charges set out in that indictment is not one of those gray
5 areas. Comment on the prosecutor's motive is simply inappropriate. The Court may draw that
6 line with confidence. Plaintiff respectfully submits that the Court must do so in this case
7 because defense counsel will be constrained by nothing less than an order precisely demarking
8 black and white.

9 II

10 IN A CRIMINAL PROSECUTION, AN ALLEGEDLY
11 INAPPROPRIATE MOTIVE FOR COMMENCING A
12 PROSECUTION MUST BE ASSERTED AS A GROUND
13 FOR DISQUALIFYING THE PROSECUTOR IF IT IS
14 TO BE ASSERTED AT ALL

15 A given prosecutor's alleged bias against a defendant may be asserted by the
16 defendant as a ground for recusing the prosecutor. (Pen. Code, § 1424.) A bias so strong that
17 it presents "a reasonable possibility that the District Attorney's office may not exercise its
18 discretionary function in an evenhanded manner" may warrant recusal. (*People v. Maury*
19 (2003) 30 Cal.4th 342, 437, fn. 23.)

20 If a factual basis sufficient to support a good-faith allegation that a prosecutor
21 harbors a crippling bias against the accused is known to the defendant prior to trial, a motion to
22 recuse the prosecutor on that ground is not merely an appropriate way of asserting that
23 supposed bias. A recusal motion is the only procedure that affords the prosecutor the means of
24 responding to such an allegation with evidence of his own.

25 An asserted bias on the part of the prosecutor that is insufficient to mandate his
26 recusal is surely insufficient as a legitimate basis for defense counsel to allege the bias in the
27 course of the trial itself, either by way of his opening statement or later, in offering evidence on
28 behalf of the defendant.

1 Defendant has twice moved to recuse the prosecutor in this case. His first motion
2 was denied. His second motion is pending. If it, too, is denied, defendant should be
3 admonished to “give it a rest.”

4 III

5 IF EFFORTS TO RECUSE THE PROSECUTOR FOR
6 BIAS ARE UNAVAILING, A “BACK-DOOR” ATTACK
7 ON THE PROSECUTOR’S MOTIVES IS INAPPROPRIATE,
8 IF ONLY BECAUSE THE PROSECUTOR’S ABILITY TO
9 RESPOND TO SUCH A COLLATERAL ATTACK
10 IS VIRTUALLY NONEXISTANT

11 An opening statement by either side of a criminal prosecution is limited to an
12 unargumentative statement of the evidence that side expects to present. “The defendant’s
13 opening statement should be limited to a preview of his or her own evidence; counsel should
14 not at this stage attempt an argument on the prosecution’s case. (See *People v. Goldenson*
15 (1888) 76 C. 328, 349, 19 P. 16 [no error to require defense counsel to limit opening statement
16 to ‘a statement of the facts, the effect thereof, and his conclusions therefrom, without any
17 argument upon the evidence introduced by the prosecution’].)” (5 Witkin & Epstein, Cal.
18 Criminal Law (3d ed. 2000), Criminal Trial, § 520, p. 742.) It follows that defense counsel
19 may not share with the jury his own opinion of the prosecutor’s alleged motive in bringing the
20 defendant to trial as part of his opening statement.

21 In other of our submissions to the Court, we have argued that a defense effort to
22 “prove” that the prosecutor has an improper “motive” for prosecuting defendant necessarily
23 would open the door to all of the information in the possession of the prosecutor – much of it
24 not otherwise admissible against the defendant – that undergirded his decision to seek an
25 indictment in this case. Plaintiff suggested, commonsensically, that the defense “does not want
26 to go there.” Defendant responded that, to the contrary, he not only “wants” to go there, he has
27 a “right” to “go there.”

28 Defendant’s “right” to explore the prosecutor’s motive for seeking and obtaining an
indictment in this case will be argued to the Court and ruled on by it presently. If the Court

1 concludes that the prosecutor's motive is not an appropriate concern of the jury's, it should
2 instruct counsel to say nothing on the subject of the prosecutor's alleged bias or motive in his
3 opening statement.

4 IV

5 ANY COMMENT BY DEFENSE COUNSEL IN HIS
6 OPENING STATEMENT TO THE JURY CONCERNING
7 THE PROSECUTOR'S SUPPOSED MOTIVE FOR BRINGING
8 AND MAINTAINING THE PROSECUTION IS OUT OF
9 BOUNDS. DEFENSE COUNSEL MUST BE DIRECTED,
10 SPECIFICALLY AND UNAMBIGUOUSLY, NOT TO
11 COMMENT ON WHAT HE SUPPOSES IS THE DISTRICT
12 ATTORNEY'S MOTIVE FOR PROSECUTING DEFENDANT

13 Scarcely a pretrial hearing has gone by in which defense counsel have not used
14 "argument" as an opportunity to slander the prosecutors and the primary witnesses Plaintiff
15 proposes to call in the prosecution of this matter. There is every reason to suppose there will be
16 much more of the same when lead defense counsel makes his opening statement about what he
17 expects the evidence to prove.

18 The jury's determination of Defendant's guilt or innocence ought to depend entirely
19 upon the quality of the evidence put before it. If the jury regards it as a weak case, their verdict
20 will reflect it, and the prosecutor's motive is irrelevant. If they find the evidence on persuades
21 them of the defendant's guilt beyond a reasonable doubt, the prosecutor's motive in putting that
22 evidence before them is likewise irrelevant.

23 CONCLUSION

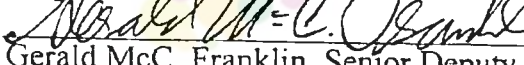
24 At the risk of repeating ourselves, the prosecutor's motive is irrelevant unless the
25 court is persuaded that it is a proper issue for the jury's consideration. If the court rules the
26 defense may explore that issue, it must then consider the limitations on the scope of the
27 evidence that may be presented by both sides on the issue. If it concludes that the prosecutor's
28 motive is not properly an issue for the jury's consideration, defense counsel must be cautioned
to say nothing at all, directly or by innuendo, in his opening statement or in the course of the

1 trial.

2 DATED: February 24, 2005

3 Respectfully submitted,

4 THOMAS W. SNEDDON, JR.
5 District Attorney

6 By: 
7 Gerald McC. Franklin, Senior Deputy
8 Attorneys for Plaintiff

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 February 25, 2005, I served the within PLAINTIFF'S IN LIMINE MOTION TO FORBID DISPARAGEMENT OF OPPOSING COUNSEL, ETC. on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER and BRIAN OXMAN, by personally delivering a true copy thereof to Mr. Mesereau in open court.

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

Executed at Santa Maria, California on this 25th day of February, 2005.

Gerald McC. Franklin