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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
20 FOR THE COUNTY OF SANTA BARBARA, COOK DIVISION

21 THE PEOPLE OF THE STATE OF  
22 CALIFORNIA,

23 Plaintiffs,

24 vs.

25 MICHAEL JOSEPH JACKSON,

26 Defendant.

) Case No. 1133603

) MEMORANDUM OF POINTS AND  
) AUTHORITIES IN SUPPORT OF MOTION  
) FOR A MISTRIAL

) Honorable Rodney S. Melville  
) Date: March 18, 2005  
) Time: 8:30 am  
) Dept: SM 8

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28 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A  
MISTRIAL

FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA BARBARA

MAR 18 2005

GARY M. BLAIR, Executive Officer  
*Carrie C. Wagner*  
CARRIE C. WAGNER, Deputy Clerk

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

3 I.

4 THE DISTRICT ATTORNEY SPECIFICALLY VIOLATED THE COURT'S ORDER  
5 THAT HE NOT MAKE ANY REFERENCE TO THE 1993 MATTERS UNLESS AND  
6 UNTIL THE COURT RULES ON THE 1108 MOTION, AFTER HOLDING A 402  
7 HEARING

8 Mr. Auchincloss specifically elicited the heart of their 1108 evidence. Mr. Auchincloss  
9 himself, by leading questions, named the very people that the prosecution claims to be victims of  
10 prior offenses. Furthermore, he attempted to elicit the very theory of the 1108 motion. Mr.  
11 Auchincloss specifically asked Kiki Fournier about Mr. Jackson's relationships with MacCauley  
12 Culkin, Brett Barnes, Jimmy Safechuck, Wade Robson, and Jordan Chandler. He then used  
13 leading questions to imply that those relationships were improper.

14 Remember that it was Mr. Auchincloss who asked the witness leading questions with the  
15 names of Jordan Chandler and Jimmy Safechuck. He cannot claim that he did not know that the  
16 witness would give an unexpected answer. She did not give those names, he did.

17 This is exactly the same evidence that the prosecution is seeking to introduce via the still  
18 pending Section 1108 motion. (1108 Motion, page 2.)

19 Mr. Mesereau made an objection, pursuant to the Court's ruling on the Section 1108  
20 motion when Mr. Auchincloss mentioned Mr. Safechuck and Mr. Chandler. (RT: 2539:19-20.)  
21 The Court sustained the objection. Mr. Auchincloss continued his improper line of questioning,  
22 despite the sustained objection. Mr. Auchincloss asked Ms. Fournier what Mr. Safechuck's age  
23 was at the time of the "special relationship."<sup>1</sup> Mr. Mesereau again objected and the Court  
24 overruled the objection. (2541:3-9.) Mr. Auchincloss asked about Wade Robson (RT 2640:3)

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26 <sup>1</sup> The phrases "special relationship" and "special friends" were introduced to the jury by  
27 Mr. Auchincloss, not the witness. The record demonstrates that Ms. Fournier did not use either  
28 phrase during her testimony.

1 and Mr. Mesereau objected. (RT 2640:4.) This time the Court sustained the objection. (RT  
2 2640:5.)

3 This is precisely the type of willful misconduct which necessitates the granting of a  
4 mistrial. It is true that there has been a substantial investment of time and money by the Court  
5 and by the defense.<sup>2</sup> However, it is not tolerable to allow the prosecution to benefit from its own  
6 willful misconduct on the grounds of economy. This was a calculated move. Mr. Auchincloss  
7 not only knew what was coming but actually was the one who asked about the individuals by  
8 name. If he jeopardized the substantial investment of the court and others, he did so with his  
9 eyes wide open.

10 In light of this blatant misconduct the only remedy is to grant a mistrial.

11 II.

12 THE COURT SHOULD NOT REWARD INTENTIONAL MISCONDUCT BY MR.

13 AUCHINCLOSS

14 It may also be that the prosecution seeks to force the Court into granting the 1108 motion  
15 so that they can claim that there was no harm, therefore, a mistrial is not granted. It appears that  
16 the prosecution has intentionally put the Court in the position of having to either grant a mistrial  
17 or grant the prosecution's Section 1108 motion. This type of calculated behavior through the use  
18 of leading questions should not be rewarded.

19 However, in the event that the motion for mistrial is not granted, we respectfully request  
20 that the Court summarily deny the 1108 motion as a sanction. Although we maintain that the  
21 motion should be denied on the merits, it is an appropriate to deny it as a sanction for the willful  
22 disregard of the Court's order and taking whatever other remedy the court may deem just and  
23 proper.

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26 <sup>2</sup> It is possible that Mr. Auchincloss was counting on the Court to be reluctant to grant a  
27 mistrial when he took a calculated risk to directly violate an order of this Court.

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III.

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

The government's case is weak and their own witnesses have not met the promises of the government's opening statement. It appears that the government is deliberately trying to provoke a mistrial so that they can start again. Nevertheless, under the circumstances, the defense has no choice but to move for a mistrial because the prejudice to continuing in light of the misconduct by the prosecution is too great. Notwithstanding the defense request for a mistrial, this type of willful misconduct in order to gain another otherwise jeopardy barred bite at the apple should not result in the government getting that bite. When the prosecution acts in bad faith in an attempt to goad the defense into requesting a mistrial, then principles of former jeopardy may preclude any retrial of defendant. (See *Oregon v. Kennedy* (1982) 456 U.S. 667; *People v. Batts* (2003) 30 Cal.4th 660, 695-696.)

However, the Court must decide the motion for mistrial on the merits. The legal consequences will fall where they may.

IV.

CONCLUSION

Therefore, the Court should grant a mistrial.

Dated: March 18, 2005

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