

12485

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SANTA BARBARA

3 SANTA MARIA BRANCH; COOK STREET DIVISION

4 DEPARTMENT SM-2 HON. RODNEY S. MELVILLE, JUDGE

5

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7 THE PEOPLE OF THE STATE OF)

8 CALIFORNIA,)

9 Plaintiff,)

10 -vs-) No. 1133603

11 MICHAEL JOE JACKSON,)

12 Defendant.)

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17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18

19 TUESDAY, MAY 31, 2005

20

21 9:15 A.M.

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23 (PAGES 12485 THROUGH 12503)

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27 REPORTED MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304

28 BY: Official Court Reporter 12485

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28 12486

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1 Santa Maria, California

2 Tuesday, May 31, 2005

3 9:15 a.m.

4

5 (The following proceedings were held in
6 open court outside the presence and hearing of the
7 jury:)

8

9 THE COURT: Good morning.

10 MR. SANGER: Good morning, Your Honor.

11 MR. SNEDDON: Good morning.

12 THE COURT: Let's see, I have a question for
13 the District Attorney. I've had a package of your
14 instructions for a while, and then I was given a
15 manila envelope with another set of them. Is that a
16 different set or is that just another copy of the
17 same ones?

18 MR. SNEDDON: Judge, that is a different
19 set. And the reason is, is that several of the
20 instructions we originally requested have been
21 withdrawn because they're no longer applicable based
22 on certain evidence that came in or didn't come in,
23 and that there are several others that were needed
24 to be added because, again, of the evidence the way
25 it came in in the case.

26 THE COURT: Well, I guess what I'm going to
27 do is -- you know, I've spent a considerable amount

28 of time analyzing the instructions given to me by 12487

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1 both sides before today. So I'm going to use the
2 set that I've worked with now for quite a while.

3 MR. SNEDDON: Right.

4 THE COURT: And to the extent that you want
5 to have me take copies out of the new set, you can
6 do that, but there's no way I could start again this
7 morning to figure out what you're doing.

8 MR. SNEDDON: Judge, I don't think you're
9 going to find this to be a problem, because I think
10 on your own you will discover that some of the ones
11 that we requested are not applicable. So I don't
12 think this is going to be a big thing.

13 And I want to let you know that the ones we
14 submitted this morning are ones that have all the
15 "his"es and the "her"s corrected out of it and the
16 applicable language inserted, so we thought that
17 might be helpful to the Court.

18 THE COURT: That would be helpful.

19 MR. SNEDDON: So I think you'll find those
20 to comport with what the actual instruction should
21 be so it can be read in an intelligent manner.

22 THE COURT: Okay. And I did get a few new
23 ones from the defense, their new suggested specials,
24 which I anticipated specials from both sides being
25 submitted.

26 MR. SANGER: As I understand it, Your Honor,
27 just so we're clear, we don't have any specials from

1 THE COURT: Other than what they'd already
2 submitted in their original package. Like 222,
3 222 Penal Code Section, which was the last
4 instruction they added.

5 MR. SANGER: Okay.

6 THE COURT: And I think they did during the
7 course of the trial at one point, although I can't
8 remember if -- maybe I did a special myself on the
9 Bashir tape.

10 MR. SNEDDON: We had requested the Court to
11 take judicial notice of certain things and you said
12 you would defer those until the time of the
13 instructions.

14 THE COURT: Right. You'll need to bring my
15 attention to those items.

16 Okay. I have made a list of the
17 instructions, comparing the ones that have been
18 given by both sides, and made some notes on which
19 ones need to be modified, which I think is what you
20 were addressing, Mr. Sneddon, that maybe the
21 modifications have already been given.

22 So if we start at 1.00, I showed that both
23 of you had requested that. And now I see that on
24 the new one from the D.A., you don't request that;
25 is that correct?

26 MR. FRANKLIN: No, Your Honor. We do
27 request that the -- apparently the program, the

28 CALJIC program we have, knocked off 1.00 in this 12489

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1 list. We have included it as a part of the
2 instructions and it should be given. I don't know
3 why -- I just noticed now that it was not at the top
4 of the list. It should have been.

5 THE COURT: Okay.

6 MR. SANGER: But I would think it should be,
7 yes, Your Honor.

8 THE COURT: I'll give that, then.

9 And then 1.01, I'll give that. Both of you
10 requested that.

11 MR. SANGER: I gather, since we're not
12 hearing anything, that the new packet of the
13 District Attorney from this morning does not have
14 changes to these so far.

15 THE COURT: Right.

16 1.02, and I think this is where you have --
17 there is a -- some selection had to be made at that
18 point, right? That's why the -- I just need to see
19 what it is.

20 MR. SNEDDON: Judge, we just -- since there
21 were stipulations, we removed the brackets on 1.02.
22 I think you'll see that in the one we proposed.
23 Other than that, I don't think there's any changes
24 to 1.02.

25 THE COURT: All right. The brackets are
26 removed as to the party making the objection; is
27 that right?

28 MR. SNEDDON: Your Honor, actually -- 12490

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1 THE COURT: I'm making the stipulation,

2 excuse me.

3 MR. SNEDDON: Yes, sir. Where it says,

4 "However, if the attorneys have stipulated or

5 agreed," the CALJIC has brackets, and we simply

6 removed that because there were stipulations during

7 the course of this case.

8 THE COURT: Okay. Do you understand that,

9 Mr. Sanger?

10 MR. SANGER: Yes. They had -- they left one

11 bracket in their original thing and they've taken

12 it out. So we'll take that. That's fine.

13 THE COURT: So that's fine. I'll give that.

14 1.03.

15 MR. SNEDDON: Again, Your Honor, we removed

16 the brackets because we have had witnesses testify

17 in Spanish.

18 THE COURT: Okay.

19 MR. SANGER: And I don't see any brackets in

20 their original version, so I take it it's the same.

21 THE COURT: That's true. So I'll give that.

22 1.20. 1.20 is okay. "Willfully defined,"

23 I'll give that.

24 MR. SANGER: Your Honor, you skipped over

25 1.05. The prosecution withdrew it.

26 THE COURT: Okay.

27 MR. SANGER: We did not. You've already

28 given that at the beginning of this case, but it's 12491

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1 such a long case that it might be good to give it
2 again.

3 THE COURT: We could give 1.05 minus the
4 first two paragraphs.

5 MR. SANGER: Yes.

6 THE COURT: Is that your request?

7 MR. SANGER: That would be my request, Your
8 Honor.

9 THE COURT: Okay. Modify that.

10 Jed, for purposes of preparing these, you're
11 going to take notes and send them over to Carrie?

12 MR. BEEBE: Yeah.

13 THE COURT: So the first two paragraphs of
14 1.05 would be deleted.

15 MR. BEEBE: Okay.

16 THE COURT: Then 1.06, it looks like that's a
17 correct statement that should be given.

18 You don't have that in your second group,
19 Mr. Sneddon?

20 MR. SNEDDON: No.

21 MR. SANGER: Um --

22 MR. SNEDDON: It seems to be -- I mean, I'm
23 not making an excuse, but it seems to be covered by
24 other instructions that are going to be given. If
25 the Court recalls, on the conspiracy instruction,
26 you actually even have to read the entire overt acts
27 and indictment again. And with regard to the other

28 offenses, it's -- since there's only one defendant 12492

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1 in this case, it seemed it would be covered, but we
2 have no problem if the Court wants to give it.

3 Seems to me this is more where you have multiple
4 defendants, but there would be no harm in doing it.

5 THE COURT: I really actually like the idea
6 of, right at the beginning, reminding them of
7 exactly what we're going to be talking about in
8 total, because the rest is all piecemeal.

9 Is there any objection --

10 MR. SNEDDON: None.

11 THE COURT: -- Mr. Sanger?

12 MR. SANGER: There's no objection to that.

13 I think the bracketed part at the bottom, there are
14 no lessers.

15 THE COURT: Well, there's a question on
16 that. And the -- do you want to just think for a
17 moment? Is there a lesser-included providing
18 intoxicating liquor to a minor? Isn't that a
19 lesser-included of the administering an intoxicating
20 agent to assist in the commission of a felony?

21 MR. SANGER: It probably is. We'd have to
22 look at the exact elements, but I believe that it
23 would be. However, we're not requesting the lesser.

24 THE COURT: Is it something that you have any
25 say about? I mean, isn't it mandatory for the Court
26 to do that?

27 MR. SANGER: I believe --

28 THE COURT: It's not something that the 12493

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1 defendant can waive, is it?

2 MR. SANGER: I believe the defendant can

3 waive it. But I believe the defendant has to waive

4 it. And -- I could be wrong. But I believe the law

5 right now -- it's changed, as Your Honor knows, over

6 a period of time. I believe that if the prosecution

7 requests the lesser, then -- that may be what the

8 Court is thinking of, that the defense can't waive

9 it. But I'm not conceding that, but just having a

10 discussion about it. I believe that may be true.

11 But I think if both sides waive the lessers, unless

12 the law changed again here, and I'm not positive,

13 but I believe we can waive it, if both sides do.

14 THE COURT: And is that your position, Mr.

15 Franklin?

16 MR. FRANKLIN: I don't have a position on

17 that, Your Honor.

18 THE COURT: They're waiving --

19 MR. SNEDDON: I think the reality is --

20 MR. SANGER: I should have said that. That

21 was a lot simpler, wasn't it?

22 MR. SNEDDON: We'd like to look at that

23 during the break, Your Honor.

24 THE COURT: I think that has to be resolved.

25 There's too many other issues that are tied to that,

26 that we have to resolve that after the first break.

27 I mean, I want to know that because we'll have to

28 change this instruction. We'll have to change other 12494

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1 instructions. This isn't something that we can
2 decide at the end of the day. It's something we
3 have to decide at the beginning.

4 MR. SANGER: Just one second. There is a
5 section in CALJIC itself that deals with lessers.
6 It's Appendix C, as the Court knows, and it may
7 answer the question right now as to the current
8 state of the law.

9 MR. SNEDDON: Which one?

10 I'm sorry, Your Honor, I didn't hear which
11 one he said. C or --

12 THE COURT: C.

13 MR. SANGER: It does appear that the
14 Breeverman case, 1998 case --

15 THE COURT: They can't hear you.

16 MR. SANGER: The Breeverman case, 1998 case,
17 from this, looks like it may be controlling. It
18 looks like the Court would have to make a
19 determination as to whether the evidence supports
20 the giving of a lesser.

21 THE COURT: And I have looked at all of the
22 charges. And this is the one charge that seemed, to
23 me, that the evidence does support the giving of
24 that lesser.

25 MR. SNEDDON: It does.

26 THE COURT: Which would then make it sua
27 sponte required instruction, and I don't see

28 anything in there that allows a waiver. 12495

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1 MR. SANGER: Yeah, just reading the
2 discussion and refreshing my recollection such as it
3 is on this, it seemed to me that we had an argument
4 at one point that if both sides agree, and there's a
5 stipulation and a waiver on the record by the
6 defendant personally, that the Court does not have
7 to give it where there's -- but, if -- because the
8 language was notwithstanding the waiver by one side
9 or the other. There was some -- there was some
10 language in the case that left the door open, not to
11 mention doors being opened to interpretation, that
12 if both sides actually agree and the defendant
13 waives it on the record.

14 But I'll submit it, unless the Court wants
15 to take the next break, and we can take a look at
16 the case itself.

17 THE COURT: What's your -- Mr. Sneddon,
18 what's your position? Mr. Franklin doesn't have
19 one, so I'll ask you what yours is.

20 MR. SNEDDON: Well, I'm --

21 THE COURT: You still want to wait a few
22 minutes?

23 MR. SNEDDON: No. I'm convinced that the
24 Court needs to give it.

25 THE COURT: That's what I thought. Okay.

26 So then that language at the bottom of 1.06
27 would be necessary.

28 MR. SANGER: And just for the record, 12496

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1 although I would suspect if the prosecution is not
2 joining, our position is fairly weak on this, but
3 for the record, we would object to the giving of an
4 instruction on the lesser.

5 THE COURT: Okay. Now, one of the questions
6 I have, which I think has to be decided, again we
7 have to discuss it early on, because it will come up
8 in other instructions, is in Count 6, the crime
9 alleged is an attempt to commit a lewd act upon a
10 child.

11 May I ask what -- what acts you're relying
12 on for that?

13 (Off-the-record discussion between the Court
14 and Court Research Attorney Jed Beebe.)

15 MR. SNEDDON: Does the Court want me to
16 respond to that, Your Honor?

17 THE COURT: Yeah, just a second. If you'll
18 wait just a second.

19 Okay. Yes.

20 MR. SNEDDON: Specifically, the testimony
21 from Gavin Arvizo that the defendant reached over
22 and grabbed his hand and moved his hand towards
23 Mr. Jackson's crotch area, and that the boy then
24 took his hand away and said he didn't want to do
25 that. I also believe that there's some testimony
26 that at that point Jackson said something to the
27 effect that it was natural and okay, but the boy

28 didn't want to do it. 12497

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1 THE COURT: All right. Thank you.

2 Additionally in 1.06, I think we should add
3 the language, "In Count 1, the crime alleged is
4 conspiracy." And then say, instead of moving right
5 to the date, "to commit the crimes of extortion,
6 false imprisonment or child abduction," to make the
7 statement to the jury clear at this point.

8 And then I'd like to add at the end of the
9 instruction, after the last paragraph, "In Counts 7
10 to 10, namely, administering an intoxicating agent
11 to assist in the commission of a felony, the lesser
12 crime is furnishing alcohol to a minor."

13 MR. SNEDDON: Your Honor, is the Court --
14 does the Court have in mind the "furnishing" aspect
15 being the violation of 272, contributing, or the
16 specific B&P Code Section --

17 THE COURT: The specific B&P Code Section.

18 MR. SNEDDON: Okay. I just wanted to know.

19 Thank you.

20 THE COURT: And that would be 16.010, we
21 would modify later to -- when we get to the specific
22 offenses, to have that -- use paragraph two of that,
23 furnishing liquor to a person under 21. The second
24 paragraph, "Every person who unlawfully sells,
25 furnishes, gives or causes to be sold, furnished or
26 given away any alcoholic beverage to any person
27 under the age of 21 is guilty of a violation of

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1 Subdivision (a), a misdemeanor."

2 And then it goes on, "In order to prove this
3 crime, each of the following elements must be
4 proved: One, the defendant, Michael Jackson,
5 furnished, gave or cause to be furnished or given
6 away an alcoholic beverage to Gavin Arvizo; and two,
7 Gavin Arvizo was under the age of 21. "

8 MR. SANGER: At the end of 1.06, Your Honor?

9 THE COURT: No, I'm going to put that at
10 1.06.

11 MR. SANGER: Oh.

12 THE COURT: I'm going to put it back where we
13 have a discussion of the crimes.

14 MR. SANGER: I agree with that. That's not
15 what I meant, I'm sorry. I was referring the
16 Court's attention to the end of 1.06. It says --
17 you indicated "the lesser crime is furnishing
18 alcohol to a minor," and I think that should say "a
19 misdemeanor." Is that correct?

20 THE COURT: It should. You can say that if
21 you want.

22 MR. SANGER: Well, it says that --

23 THE COURT: We will say that.

24 MR. SANGER: It says "a felony" elsewhere,
25 so I think we should say that.

26 THE COURT: Yes, I think you're right. Okay.

27 MR. SANGER: I think 1.12 was requested by

28 both sides and was withdrawn by both sides. If it 12499

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1 wasn't by us, it is now.

2 MR. SNEDDON: One point what?

3 MR. FRANKLIN: 12.

4 MR. SANGER: 1.12.

5 MR. SNEDDON: Oh, yeah.

6 THE COURT: Yes.

7 MR. SANGER: Now, in that regard, if the

8 Court is going to read the indictment at some point --

9 THE COURT: I don't think I need to read the

10 indictment.

11 MR. SANGER: I don't think you do. I heard

12 Mr. Sneddon say that.

13 MR. SNEDDON: No, I didn't say that. I said

14 that there's a CALJIC instruction which requires you

15 to read the conspiracy charges and the overt acts in

16 the 1600 series.

17 THE COURT: Which you've already prepared.

18 MR. SNEDDON: I have.

19 THE COURT: And the only problem with it, in

20 the old package - I haven't seen the new package -

21 was that the Doe names were used.

22 MR. FRANKLIN: The new package does, too.

23 THE COURT: So we want that instruction with

24 the names in it.

25 MR. SNEDDON: We can modify that.

26 THE COURT: We've used their names throughout

27 the trial.

28 MR. SNEDDON: We'll modify that for the 12500

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1 Court.

2 THE COURT: Yes. But will you modify it
3 quickly?

4 MR. SNEDDON: Well, how quickly would you
5 like it? By noon?

6 THE COURT: Yes.

7 MR. SNEDDON: You'll have it.

8 THE COURT: Thanks.

9 The reason I want to do this is -- I don't
10 know if I told you this or not, so I'll tell you, I
11 intend to give each of the 20 jurors a full package
12 of the instructions to read as I read them to them.
13 So I will have those prepared. So I have to have a
14 full package today so that I can have those
15 prepared. You know, usually we have overnight to
16 clean up any things like this. But we don't in this
17 case.

18 MR. SNEDDON: Are they going to be allowed
19 to take their packet in with them to deliberate?

20 THE COURT: Yes.

21 MR. SNEDDON: Okay.

22 THE COURT: That's the purpose of giving it
23 to them.

24 MR. SNEDDON: That's fine.

25 MR. SANGER: All right. If we're keeping
26 track, that was my concern, that the name -- we
27 don't have "Does" showing up in the instructions

28 anyplace. 12501

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1 THE COURT: That's my intent here.

2 MR. SANGER: With that, we withdraw the

3 1.12.

4 THE COURT: Okay. 1.12 has been withdrawn by

5 both sides.

6 You know, it's break time. And we have

7 people in the audience that have been sitting even

8 though we've been not sitting here. So I will take

9 the break. That will give you a chance to catch up,

10 Counsel, on those items.

11 (Recess taken.)

12 --o0o--

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1 REPORTER'S CERTIFICATE

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4 THE PEOPLE OF THE STATE)

5 OF CALIFORNIA,)

6 Plaintiff,)

7 -vs-) No. 1133603

8 MICHAEL JOE JACKSON,)

9 Defendant.)

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12 I, MICHELE MATTSON McNEIL, RPR, CRR,

13 CSR #3304, Official Court Reporter, do hereby

14 certify:

15 That the foregoing pages 12487 through 12502

16 contain a true and correct transcript of the

17 proceedings had in the within and above-entitled

18 matter as by me taken down in shorthand writing at

19 said proceedings on May 31, 2005, and thereafter

20 reduced to typewriting by computer-aided

21 transcription under my direction.

22 DATED: Santa Maria, California,

23 May 31, 2005.

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27 MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304

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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE COUNTY OF SANTA BARBARA
3 SANTA MARIA BRANCH; COOK STREET DIVISION
4 DEPARTMENT SM-2 HON. RODNEY S. MELVILLE, JUDGE

5

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7 THE PEOPLE OF THE STATE OF)

8 CALIFORNIA,)

9 Plaintiff,)

10 -vs-) No. 1133603

11 MICHAEL JOE JACKSON,)

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19 TUESDAY, MAY 31, 2005

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23 (PAGES 12504 THROUGH 12608)

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1 MR. SANGER: I guess we're ready to begin,
2 but we're not going to have the benefit of Mr.
3 Franklin's opinion. A little humor, sorry.

4 THE COURT: I appreciated it.

5 It didn't call for a belly laugh.

6 MR. SANGER: No, no, it wasn't a real
7 knee-slapper, but I appreciate the smile.

8 THE COURT: 1.21.

9 MR. SANGER: I think you passed 1.20 without
10 saying you're giving it, but I believe it should be
11 given.

12 THE COURT: Well, let's see. You're right.

13 1.20, "willfully," I had marked that off as giving
14 it.

15 1.21 I will give. That's "knowingly."

16 And 1.22.

17 MR. SANGER: That's "malice." And "malice"
18 is used in false imprisonment, which is CALJIC 9.72.

19 MR. BEEBE: That's child abduction.

20 MR. SANGER: I'm sorry, child abduction.

21 MR. SNEDDON: Your Honor, it's defined in

22 9.72 in the sections under child abduction.

23 "Maliciously" is defined in that instruction.

24 THE COURT: So we don't need --

25 MR. SNEDDON: So we don't need the -- this
26 would be a repetition.

27 THE COURT: Okay.

28 MR. SANGER: If it's not on -- if it's not 12506

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1 used in any other instruction - and I couldn't find
2 it going through here quickly - then we'll submit
3 it.

4 THE COURT: All right. So I'm not going to
5 give 1.22, because it is in another instruction.
6 1.23, "Consent," I'll give that one.

7 1.25. That defines a minor.

8 MR. SNEDDON: I think we asked that, and we
9 withdrew that. That's one of the ones we withdrew
10 because the age limitation is actually 14 in this
11 case.

12 MR. SANGER: Well, the age limitation for
13 alcohol is 21, so you've got three different ages.

14 THE COURT: Yeah, for the lesser-included.

15 MR. SNEDDON: Well, that's defined, though.

16 In the B&P it says "21."

17 THE COURT: Under that code section?

18 MR. SNEDDON: I believe it does.

19 THE COURT: Let me see.

20 MR. SANGER: It was 16.010.

21 MR. SNEDDON: Yes, it does say "21."

22 THE COURT: Yeah, I think that's sufficient,
23 don't you?

24 The "furnishing," do you have that in front
25 of you, Mr. Sanger?

26 MR. SANGER: Yeah. 16.010, there's no
27 question that's covered. I'm just thinking is there

28 any other place where "minor" is used in this case, 12507

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1 and I don't think there is, because I think the
2 other is under the age of 14. So we would agree to
3 withdraw it based on that.

4 THE COURT: Okay. The next one is "Direct
5 and circumstantial evidence," 2.00. I'll give that.

6 The next one is 2.01, "Sufficiency of
7 circumstantial evidence," I'll give that.

8 The next one is "Sufficiency of
9 circumstantial evidence to prove specific intent or
10 mental state," I'll give that.

11 MR. SNEDDON: I believe, Your Honor, in the
12 ones that we submitted, that the bracketed
13 information is filled in and/or brackets taken off
14 where appropriate. I just wanted to direct the
15 Court's attention to that.

16 THE COURT: Okay. Thank you.

17 MR. SANGER: I think that's the same. I
18 think that was done in the original one.

19 THE COURT: Yes, I think so. But that's good
20 then.

21 MR. SANGER: Wait a second. There is
22 another change here. It's modified. Can we have
23 just one second, please?

24 THE COURT: Yes.

25 MR. SNEDDON: I can just indicate to the
26 Court, with regard to the originals that we
27 submitted, those were done by Mr. Nicola, but the

28 ones that we submitted this morning were done by Mr. 12508

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1 Franklin and I over the weekend, so I have a great
2 deal more confidence in the fact we -- they may be
3 the same in some cases, but I --

4 THE COURT: Looks okay.

5 MR. SNEDDON: Yeah.

6 THE COURT: But you're looking at something
7 that I don't see, Mr. --

8 MR. SANGER: There is a difference, and it
9 may not be a big difference, but it always worries
10 me when there's a modification and there's no
11 indication it's modified.

12 The original one just says --

13 MR. SNEDDON: Which one are we dealing with,
14 Counsel?

15 MR. SANGER: 2.20, the first one says, "You
16 may not find the defendant guilty of the crimes
17 charged unless the proved circumstances are not
18 only..." and then it says, in the second version,
19 "...guilty of any of the crimes charged in the
20 indictment unless the proved circumstances..."
21 which just causes me to wonder why we have different
22 language. And I don't think it's necessary to say
23 "indictment." "Crimes charged" is adequate. An
24 indictment is not evidence of a crime.

25 MR. SNEDDON: That's fine. Whatever. It
26 doesn't make any difference.

27 THE COURT: So we'll take out "in the

28 indictment" and just leave "charged crimes." 12509

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1 MR. SANGER: If you have your original one,

2 I think that's --

3 THE COURT: We can use that one.

4 MR. SANGER: You can use that one.

5 THE COURT: No change is necessary, Tracy,

6 because we're using --

7 MR. SNEDDON: 2.02 has that language there

8 for the lesser-included, but I believe the

9 lesser-included in this case are general intent

10 crimes, or a general intent crime.

11 THE COURT: It is a general intent crime.

12 MR. SNEDDON: So I just wanted to bring that

13 to the Court's attention.

14 THE COURT: Okay. All right. 2.03 is

15 "Consciousness of guilt, falsehood."

16 MR. SANGER: We originally requested that at

17 the beginning of the trial.

18 THE COURT: It is requested by both sides.

19 MR. SANGER: But I would withdraw our

20 request and object to it.

21 THE COURT: Okay. What evidence are you

22 relying on?

23 MR. SNEDDON: Your Honor, I'm specifically

24 relying on that portion of the Bashir video in which

25 the defendant was confronted with the statement

26 about a 40-year-old man sleeping with children, and

27 said it's not sexual, it's not sexual, and then went

28 on to portray the incidences being those of where 12510

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1 they eat cookies and drink milk, and things like
2 that. And I think that those are fabrications,
3 which I think, if the jury finds those to be not
4 true statements, can be used to reflect his
5 consciousness of guilt.

6 MR. SANGER: The only problem is that the
7 crimes charged in this case are alleged to have
8 occurred after that video. That video was done in
9 2002, the fall of 2002, and the crimes alleged here
10 are alleged to have occurred in February and March
11 of 2003. So it could not be a false statement
12 regarding the crimes for which he is now being
13 tried, which is the language of this --

14 MR. SNEDDON: I don't think there's any
15 requirement that it be during the time frame of the
16 charges. It can be a statement that's made before
17 that reflects on the charges that are currently
18 pending.

19 THE COURT: It says, actually,
20 "...deliberately misleading statement concerning the
21 charge for which he is now being tried." So he
22 can't be making a misleading statement about a crime
23 he hasn't committed; I mean, hold him to that, it
24 doesn't seem to me. I think Mr. Sanger is right.
25 Is there any other evidence that you can
26 think of that you --

27 MR. SNEDDON: No, that's what we had in

28 mind. 12511

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1 THE COURT: All right. I'll reject that, as
2 requested by the defense. It's rejected.

3 MR. SANGER: And for some reason, 2.04 was
4 in our packet early on. And we'd withdraw the
5 request for that and also object to it.

6 MR. SNEDDON: It can be withdrawn, Your
7 Honor, 2.04.

8 THE COURT: 2.04 is withdrawn.
9 2.05.

10 MR. SANGER: The same with 2.05.

11 MR. SNEDDON: Same.

12 THE COURT: 2.05 is withdrawn.

13 MR. SANGER: And 2.06.

14 THE COURT: 2.06 -- let's see, 2.05 --
15 2.04, that was withdrawn, is, "Efforts by a
16 defendant to fabricate evidence." And 2.05 is,
17 "Efforts other than by defendant to fabricate
18 evidence." And those have both been withdrawn.
19 2.06, "Efforts to suppress evidence."

20 MR. SANGER: I think I said this, but we
21 also withdraw our original request and object.

22 THE COURT: Do you have any evidence you're
23 relying on for that, Mr. Sneddon?

24 MR. SNEDDON: No, you can withdraw that,
25 Your Honor.

26 THE COURT: Okay. 2.06 is withdrawn.

27 2.09, "Evidence limited as to purpose," that

28 should be given. I'll give that. 12512

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1 MR. SANGER: We obviously have specials that
2 I take it the Court will come to at the end.

3 THE COURT: Yes. I was just thinking,
4 should there be something in 2.09 that says, "You
5 will be instructed further on that"?

6 MR. SANGER: Well, I was thinking the
7 special --

8 THE COURT: On one part we did not instruct
9 them at the time, the takeouts. I am going to give
10 a limiting instruction on that, but they didn't
11 receive it at the time.

12 MR. SANGER: Oh, I see. You're saying take
13 the words out "at the time"?

14 THE COURT: Yeah.

15 MR. SANGER: Well, I would suggest you leave
16 that in, and then follow this with the special
17 instructions regarding the various items. I don't
18 know whether the Court will entertain all of our
19 requests, but following the various -- I'm sorry,
20 following this with the specials relating to the
21 various specific items. And when you introduce the
22 outtake evidence, you can say at the time we did not
23 give a particular limiting instruction; however,
24 this is also subject.... So I think you should
25 alert them.

26 THE COURT: I think you're right. Because
27 there was -- all right. That's fine.

28 And you're suggesting that we put the 12513

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1 limiting instructions right after this instruction.

2 MR. SANGER: Yes, sir.

3 THE COURT: Well, I'll tell you, I'm willing
4 to do that as a placement, but I think I would like
5 to put off the discussion of those until later,
6 because it's going to be a little more intense
7 discussion, but --

8 MR. SANGER: We'll try not to disappoint you
9 at the given time.

10 MR. SNEDDON: Judge, can I point out that
11 there is still some other limiting instructions that
12 you give that are involving 1101 evidence that
13 probably -- that there are specific instructions on,
14 so you won't be able to line up all of those
15 limiting instructions under this one.

16 THE COURT: Yeah, that's why I want to look
17 at the whole --

18 MR. SNEDDON: Package before we get there.

19 THE COURT: Yeah. To where it all fits best.
20 I mean, I kind of like the idea of following the
21 general, but we'll see how it fits.

22 MR. SNEDDON: All right.

23 THE COURT: This is that change, Mr.
24 Franklin, in the overt instruction?

25 MR. FRANKLIN: Yes, Your Honor.

26 THE COURT: Thank you.

27 MR. FRANKLIN: The wonders of global search

28 made it faster. 12514

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1 THE COURT: Thank you.

2 Mr. Sanger made a joke about you in your
3 absence, but I'm not going to take the time to
4 explain it to you.

5 MR. FRANKLIN: I'll sweat it out of him
6 outside.

7 THE COURT: Yes.

8 MR. FRANKLIN: Thank you, Your Honor.

9 THE COURT: 2.11, "Production of all
10 available evidence not required," I'll give that.
11 2.11.5, I'll give that. That's "Unjoined
12 perpetrators of the same crime."

13 MR. SANGER: Yeah, just for the -- Your
14 Honor already ruled, so I'm not arguing, but just --
15 we would intend to withdraw our request for that and
16 object to it.

17 THE COURT: All right.

18 2.13, "Prior consistent or inconsistent
19 statements as evidence," I'll give that.
20 2.20, "The believability of witnesses." It
21 looks like you have removed the "conviction of a
22 felony." We don't have any convictions of a felony,
23 do we?

24 MR. SNEDDON: No. No.

25 THE COURT: And did you take anything else
26 out? "Character evidence"? That's out, right?

27 MR. SNEDDON: Correct. I believe we took

28 out the -- 12515

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1 THE COURT: Yes, you did. I'm just checking

2 the other one prior. Okay.

3 MR. SANGER: Well, but they also took out

4 "past criminal conduct of a witness amounting to a

5 misdemeanor" and "whether the witness is testifying

6 under a grant of immunity."

7 MR. SNEDDON: Right.

8 THE COURT: I think both of those should be

9 in.

10 MR. SNEDDON: Which is that, Your Honor?

11 THE COURT: "Past criminal conduct of a

12 witness amounting to a misdemeanor" and "whether the

13 witness is testifying under a grant of immunity."

14 MR. SNEDDON: What misdemeanor is that?

15 THE COURT: Possibly welfare fraud.

16 MR. SANGER: Actually, the law's a bit of an

17 anomaly, because it says "prior conviction of a

18 felony," and then you don't have to have -- or you

19 can't just use a conviction of a misdemeanor.

20 THE COURT: You have to have the facts.

21 MR. SANGER: You have to have the facts.

22 However, if you have the facts of a felony, that

23 also would count, where you don't have a conviction

24 for a felony, but you have the facts. So it really

25 should say, "past criminal conduct of a witness,"

26 period.

27 We don't have convictions of a felony, but

28 we have criminal conduct that amounts to a felony. 12516

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1 And possibly to both. Possibly a felony and a
2 misdemeanor.

3 THE COURT: I'm not sure that's correct. The
4 rule for impeachment with misdemeanors is that you
5 have to impeach by the actual conduct. And with a
6 felony you may impeach by a conviction.

7 MR. SANGER: I agree with that, but the
8 obverse of that is not necessarily true. In other
9 words, the fact that you don't have a conviction for
10 a felony does not preclude you from showing felony
11 conduct to show moral turpitude and lack of
12 truthfulness.

13 So the fact that perjury, for instance, is a
14 straight felony, it's not a wobbler, you could only
15 introduce -- if the other were -- the opposite were
16 true, you could only introduce evidence of a
17 conviction for perjury, but you couldn't introduce
18 evidence of underlying conduct, where you could
19 introduce evidence of welfare fraud because that
20 could be either a misdemeanor or a felony, so it
21 wouldn't make any sense.

22 I mean, in other words, I think the rule is
23 that if it's a felony, a conviction is sufficient.
24 If it's a misdemeanor, a conviction is not
25 sufficient. You have to show the conduct. But that
26 doesn't mean that you can't show the conduct of a
27 felony. The instruction is worded that way simply

28 because that's usually the case, I think, that you 12517

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1 have --

2 THE COURT: I'm going to use the instruction
3 as worded and add "the past criminal conduct of a
4 witness amounting to a misdemeanor" and the "whether
5 the witness testifying is under a grant of
6 immunity."

7 Do you have that, Tracy?

8 And 2.21.1, "Discrepancies in testimony,"

9 I'll give that.

10 2.21.2, I'll give that. That's "A witness
11 willfully false in their testimony."

12 2.22, "Weighing conflicting testimony," I'll
13 give that.

14 2.23, "Believability of a witness,
15 conviction of a felony," that's withdrawn.

16 MR. SNEDDON: I don't think we have any
17 evidence of that.

18 THE COURT: Is either side requesting that?

19 MR. SANGER: I don't believe there's any
20 evidence of that, actual conviction of a felony.

21 THE COURT: 2.23.1, "Believability of a
22 witness, commission of a misdemeanor."

23 The question there would be whose name goes
24 in there, or names? "Evidence has been introduced
25 for the purpose of showing that a witness...."

26 Do you want to leave the names out and just argue
27 it?

28 MR. SNEDDON: That's what I think ought to 12518

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1 be done.

2 MR. SANGER: Well, there's Janet Arvizo and
3 Rudy Provencio.

4 MR. SNEDDON: Rudy Provencio?

5 MR. SANGER: Manufacturing evidence, false
6 evidence.

7 THE COURT: What --

8 MR. SANGER: And I'm still troubled by this
9 felony, that you can --

10 THE COURT: Well, let's just move on. Be
11 troubled elsewhere.

12 MR. SANGER: It has to do with this
13 instruction, though, that's -- and the prior
14 instruction as well.

15 THE COURT: Let's just deal with the question
16 at hand, please.

17 MR. SNEDDON: I think it should be left
18 blank and argued.

19 MR. SANGER: I suppose, because there's more
20 than those two witnesses that could arguably fall
21 into that category. Cindy Montgomery and -- so I'll
22 submit it.

23 THE COURT: It seems better to do it that
24 way, I think, and leave each side to whatever crimes
25 they think have been shown.

26 Is there any -- on this issue that you're
27 worrying about, Mr. Sanger, is there anything in the

28 supplements? I mean, these are instructions that 12519

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1 have been used for years.

2 Is there anything in the supplements that
3 shows that the language of the CALJIC official
4 instructions shouldn't be followed? I'll come back
5 to it if you want.

6 MR. SANGER: Yes, if I could. We'll try to --

7 THE COURT: Some authority would help.

8 MR. SANGER: -- at a break, see if we can.

9 I was just looking at the use note to see if -- it
10 doesn't say to the contrary either, which surprises
11 me, if there's a rule to the contrary. It doesn't
12 say only a felony conviction may be used. It talks
13 about the fact that there's -- a conviction is
14 adequate proof, and that shows there's moral
15 turpitude, and that's the basis for impeachment.
16 So we'll see if we can take a look on the
17 break at that.

18 THE COURT: Yeah, I thought that to some
19 extent. Well, do you think we should change 2.23.1
20 to say, "Evidence has been introduced for the
21 purpose of showing that a witness" -- "or to show" --
22 "Evidence has been introduced for the purpose of
23 showing witnesses have engaged in past criminal
24 conduct"?

25 MR. SANGER: Period. That would be my
26 request.

27 THE COURT: It's changing it, though, from

28 "a" to "witnesses." 12520

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1 MR. SANGER: Yes.

2 THE COURT: Is that okay?

3 MR. SANGER: That would be correct, yes.

4 MR. SNEDDON: Well, I would prefer that you
5 put "witness" and then bracket, "e-s," paren, so
6 that the Court doesn't appear to be editorializing
7 that there really are, because this is a jury
8 decision.

9 By putting more in, it's an indication that
10 there is some lack of discretion in this area, and,
11 quite frankly, it is up to the jury to make that
12 decision. Or to put "witness or witnesses."

13 But I think to say "witnesses" tends to
14 imply that there has been some misconduct done, and
15 I don't think that's really -- I think that
16 infringes upon the jury's fact-finding process.

17 MR. SANGER: There's definitely more than
18 one witness. I mean, I said Rudy Provencio and I
19 got an argument on that, but --

20 THE COURT: The rest of the instruction
21 talks about a witness.

22 MR. SNEDDON: It would have to be modified
23 throughout, I think.

24 MR. FRANKLIN: "The" to "a."

25 THE COURT: Do you have an opinion on this,
26 Mr. Franklin?

27 MR. FRANKLIN: Change "the" to "a" where it

28 appears. The third sentence, "The fact that a 12521

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1 witness engaged in...." Other than that, with
2 respect to policy decisions, I defer to my senior
3 lead counsel.

4 THE COURT: I'm not sure where you're saying
5 change "the" to "a."

6 MR. FRANKLIN: The second sentence
7 commences, "The fact that the witness engaged in" --

8 THE COURT: Oh.

9 MR. FRANKLIN: -- I'd suggest we change
10 "the" to "a" to keep it sort of noncommittal. And I
11 think there's merit to the notion of "witness or
12 witnesses."

13 THE COURT: "Witness or witnesses."

14 Is that okay, Mr. Sanger?

15 MR. SANGER: Yes, Your Honor.

16 THE COURT: Then I think I'll just leave
17 "the" alone.

18 MR. FRANKLIN: Your Honor, are we going to
19 leave in "amounting to a misdemeanor" or strike
20 that?

21 MR. SNEDDON: No, that stays in.

22 THE COURT: Right now it's staying in.

23 MR. FRANKLIN: Very well.

24 THE COURT: And I'm allowing Mr. Sanger to
25 show me a reason to go along with his approach,
26 which would be just to put in "a crime" as opposed
27 to "a misdemeanor." What's your position on that?

28 MR. FRANKLIN: If we -- I think if you 12522

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1 either specify -- if you specify a misdemeanor, then
2 you have to define what crimes are misdemeanors.
3 The jury won't know. So there may be some merit to
4 leaving out either specification of a misdemeanor or
5 felony and leave it just "crimes." Although it
6 could be argued, of course, by either side as to
7 what crime is a misdemeanor.

8 THE COURT: So neither side is advocating
9 that we just follow the "misdemeanor" language then;
10 is that correct?

11 MR. SANGER: That's correct.

12 THE COURT: In that case, we'll follow the
13 "crime" language. "Has engaged in criminal
14 conduct," that's where that would stop, right? On
15 2.23.1?

16 MR. SANGER: Yes. And then, depending on
17 which version you have, three or four lines down
18 says "amounting to a misdemeanor" should be left
19 out.

20 THE COURT: Yeah, we cross out "amounting to
21 a misdemeanor," and then again that repeats itself.
22 And then the heading on this instruction should be
23 changed to "Commission of a crime," right?

24 MR. SANGER: Yes.

25 Would it be appropriate to then revisit 2.20
26 and take "amounting to a misdemeanor" out of that?

27 THE COURT: Yes. Okay. And that's where it

28 would say, "Past criminal conduct by a witness 12523

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1 amounting to" -- that's all. Just "past criminal
2 conduct of a witness," huh?

3 MR. SANGER: Yes. Period.

4 THE COURT: Period. Okay.

5 Okay. 2.24, "Believability of a witness."

6 What character testimony has been
7 introduced?

8 MR. SANGER: I don't think there is, and we
9 would withdraw the request and object to it.

10 MR. SNEDDON: That's fine.

11 THE COURT: Okay. It's withdrawn by both
12 sides, 2.24.

13 2.25: "Refusal of witness to testify," when
14 a witness refuses to testify to any matter based on
15 the privilege against self-incrimination.

16 MR. SANGER: We've submitted a special
17 instruction that tries to grapple with the situation
18 I think we're in here. I don't think 2.25
19 adequately addresses it. And I know the Court ruled
20 otherwise previously and gave an instruction, but
21 the more I've thought about it, the more it seemed
22 that we have the right-of-confrontation issue when
23 it's a prosecution witness and that that should be
24 acknowledged.

25 So I wonder if the Court would want to hold
26 this, tab it or something, until we get to the
27 specials.

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1 MR. SANGER: And, actually, the same would
2 go for 2.26. Just hold that, too, because I think
3 there's a special that tries to grapple with all of
4 those.

5 THE COURT: Neither of those were in the
6 original packages, so I'll hold ruling on 2.25 and
7 2.26 until we look at the specials at the same time.
8 2.27, I'll give that. That's "the
9 sufficiency of the testimony of one witness."

10 2.40, "Traits of character of defendant."

11 MR. SANGER: Excuse me one second.

12 Well, there was a 2.29, but I take it that
13 was withdrawn. That was a witness in custody, so --
14 I'm sorry.

15 THE COURT: I don't have that.

16 MR. SANGER: I had a note that the
17 prosecution asked for it. It doesn't matter. If
18 the Court doesn't have it, we don't want it, nobody
19 wants it.

20 THE COURT: Okay. 2.40. I don't think that
21 the --

22 MR. SNEDDON: Your Honor, are we on 2.29?

23 THE COURT: Well, yes.

24 MR. SNEDDON: Yeah, I think in light of the
25 Court's ruling that we couldn't ask any
26 have-you-heard questions, that this instruction
27 should not be given.

28 MR. SANGER: 2.29? 12525

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1 THE COURT: 2.40.

2 MR. SNEDDON: Yes, I'm sorry. And we're on
3 2.29 now?

4 THE COURT: There is no 2.29. I don't have
5 one.

6 MR. SNEDDON: That's a mistake.

7 THE COURT: Okay. 2.40, which is "The traits
8 of character of defendant," so you're right. You're
9 not asking for this. Nobody's asking for 2.40 at
10 this point.

11 MR. SNEDDON: All right.

12 MR. SANGER: I think we asked for it, but I --
13 I think the Court ruled that there was -- that there
14 was not character evidence during the course of the
15 trial.

16 THE COURT: Yes. Which is exactly what you
17 wanted me to rule.

18 MR. SANGER: Right. Except for the 1108,
19 which was not character, but it was --

20 THE COURT: Right.

21 MR. SANGER: So I think in light of that,
22 we'd have to withdraw it.

23 THE COURT: Okay. Both sides withdraw 2.40.

24 MR. SANGER: And 4. -- 2.42 would go as
25 well.

26 THE COURT: Yes. That's "Cross-examination
27 of a character witness," so that's gone also.

28 Do you agree, Mr. Sneddon? 12526

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1 MR. SNEDDON: Yes, that would have been one
2 of the ones we would have withdrawn, Your Honor.

3 THE COURT: Okay. 2.50, "Evidence of other
4 crimes."

5 MR. SANGER: We have two versions from the
6 prosecution. We got the earlier one, and the more
7 recent one, which is the one we have this morning, I
8 haven't had a chance to compare it and see which
9 brackets were eliminated.

10 MR. FRANKLIN: We'll eliminate the "he/she"
11 on line 5.

12 MR. SANGER: Well, that would be a good
13 point right there.

14 THE COURT: This is evidence that the
15 defendant committed other crimes.

16 MR. SNEDDON: Right.

17 THE COURT: So you're going to submit a new
18 one with "he" in it?

19 MR. FRANKLIN: Yes.

20 MR. SNEDDON: Just going to take out the
21 word "she."

22 MR. SANGER: It's -- doing this on the fly,
23 it's a little hard to tell which brackets have been
24 taken out here, so --

25 THE COURT: I know.

26 MR. SANGER: I see in the new one there's --
27 inexplicably the word "certain" shows up at the

28 beginning of the instruction. I suppose it doesn't 12527

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1 hurt anything, but that causes me to have concern
2 about the rest of the instruction.

3 I have some observations, if the Court is
4 ready.

5 THE COURT: Yes. Just a moment.

6 Did you want to say something?

7 (Off-the-record discussion between the Court
8 and Court Research Attorney Jed Beebe.)

9 MR. FRANKLIN: Which one, Bob?

10 MR. SANGER: We're on 2.50. At least I am.

11 I think the Court is.

12 THE COURT: Yes.

13 MR. SANGER: I have objections to the new
14 version, and I think the new version eliminated some
15 of what was in the old version that clearly does not
16 apply, so I think we could work with the new
17 version, if that's all right with the Court.

18 THE COURT: Okay.

19 MR. SANGER: We're already eliminating the
20 word "she" up there in the second paragraph. I
21 don't know why the word "certain" is there. I don't
22 know why that really matters, but that's not part of
23 the instruction at the very beginning.

24 THE COURT: Okay. We'll take out "certain."

25 MR. SANGER: Now, I have really two
26 objections to this. After the words "Counts 2
27 through 10," the bracketed material, "or a clear

28 connection between the other offenses and the one of 12528

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1 which the defendant is accused so that it may be
2 inferred that if defendant committed the other
3 offenses, defendant also committed the crimes
4 charged in this case," which is 1101(b), this is an
5 1101(b) instruction, and under the facts of this
6 case, that sounds like propensity, which is not what
7 1101(b) was designed to do. And I take it there's
8 an 1108 as a separate instruction.

9 The other thing, and I'll just defer to
10 counsel to comment on whatever, but just let me
11 indicate there's -- this instruction apparently is
12 related to the alleged sex offenses. It's not
13 related to the conspiracy. There is no conspiracy
14 with regard to Counts 2 through 10. So the two
15 paragraphs at the bottom of page one that pertain to
16 part of a larger continuing plan, scheme or
17 conspiracy, and existence of conspiracy, that should
18 be eliminated. That would not apply to the 1101(b)
19 evidence.

20 MR. SNEDDON: I disagree with both those
21 comments. But, first of all, the comment above is
22 the direct language taken from the 2.50, which was
23 bracketed, and it does refer to the inferences which
24 the jury is allowed to draw with regard to this type
25 of evidence.

26 And secondly, there are -- there is evidence
27 before the Court, before the jury, that involves

28 1108 type of conduct on the issue of the conspiracy. 12529

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1 So it seems to me that this instruction
2 applies not only to the events and testimony
3 directed at the 1101, but also directed to the
4 conspiracy.

5 MR. SANGER: May I just have a moment, Your
6 Honor, please?

7 MR. SNEDDON: Judge, just to make it clear
8 with regard to the 1101(b) on the sexual part, this
9 is a situation where the jury is allowed to draw
10 inferences from the conduct involved in that
11 evidence for certain limited purposes under 1101,
12 and then those same acts of conduct are allowed to
13 be expanded on in 1108.

14 But that's not to mean that the inferences
15 that are traditional 1101 types of things for modus
16 operandi, scheme, motive and intent are not -- that
17 those other offenses, just because they're allowed
18 on the grounds of 1108, are not useful under 1101
19 for the purposes that 1101 authorizes. I think
20 that's why that language should be kept in.

21 THE COURT: But I thought the 1101 evidence
22 was limited to the method, the characteristic
23 method. Isn't that why we introduced that?

24 MR. SNEDDON: No, I think in our moving
25 papers we actually delineated five separate reasons
26 why it was admissible under 1108 -- 1101. And each
27 one of these are reasons that we set forth, along

28 with the factual recitation as to why they would be 12530

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1 admissible under the traditional 1101 approach.

2 MR. SANGER: Well, the way I see it, there's
3 a separate instruction and then we requested a
4 special on 1108. And I understand this is a 2005
5 revision, and that doesn't mean that the jury --
6 that the commission that proposes these instructions
7 got it right.

8 In 2.50, they basically talk about common
9 plan or scheme, intent, motive, knowledge, and those
10 are the issues for 1101(b). And that's what 2.50
11 should address. They throw in a sentence at the end
12 of the third full paragraph there, or a portion of
13 the sentence, right after the word "10." It says,
14 "or a clear connection between the offenses so that
15 it may be inferred that if a defendant committed the
16 other offenses, the defendant also committed the
17 crimes charged in this case."
18 That's clearly 1108. That's clearly not
19 1101. There's no reason to put 1108 language in the
20 1101(b) instruction. So I think that should be --
21 that should be taken out.

22 And the use note also says if you have 1108,
23 you should be using 2.50.01. And once again, the
24 conspiracy is -- the existence of a conspiracy has
25 nothing to do with this prior sexual acts, so that
26 should go out.

27 And I think, if you take that last sentence

28 out after the Counts 2 through 10, starting with -- 12531

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1 or the portion of the sentence starting with "or a
2 clear connection" to the end of the paragraph, if
3 you take that out, then it stands on its own as an
4 1101(b) instruction. And then you go to 2.50.01,
5 and that covers the 1108. So to the extent it's not
6 coterminous, I think some of the evidence was
7 1101(b) and some of it was 1108.

8 MR. SNEDDON: Judge, I think that counsel's
9 making two mistakes. One, I think that the 12 --
10 the revisions to 2.50 are the insertion of the gang
11 enhancement ones, which were previously not in
12 there. I don't think it changes the basic language
13 of the instruction 2.50.

14 And I think what counsel's preoccupied with
15 is the fact that 1101(b) does not have to be used
16 only in sexual assault cases. It can be used in
17 burglaries. It can be used in robberies. It can be
18 used in murders. It can be used in virtually any
19 type of a crime.

20 And in this particular case, I think we have
21 evidence that not only relates to issues involved in
22 the molestation of Gavin Arvizo, but also to the
23 conspiracy. And particularly motive evidence. And
24 some of the other acts are acts that are alleged in
25 the overt acts from which the jury is entitled to
26 draw inferences.

27 MR. SANGER: Well, now, if Mr. Sneddon is

28 now saying that 2.50 is just a straight 1101(b) 12532

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1 instruction, then that's all the more reason that
2 you would have to take out that 1108 language,
3 because if he's claiming that it pertains to all of
4 the counts, then it should just be a generic 1101(b)
5 instruction.

6 MR. SNEDDON: No, that's --

7 THE COURT: This is how I'm going to give the
8 instruction, then. Do you want to --

9 MR. SANGER: Yeah.

10 THE COURT: -- get your materials?

11 "Evidence" -- I'm not going to use the word
12 "certain."

13 "Evidence has been introduced for the
14 purpose of showing that the defendant committed
15 crimes other than that for which he is on trial."

16 So that sentence has one change, right?

17 And then the next one, "Except as you will
18 otherwise be instructed, this evidence, if believed,
19 may be considered by you only for the limited
20 purpose of determining if it tends to show," colon,
21 "A," the next paragraph, "A characteristic method,
22 plan or scheme in the commission of criminal acts
23 similar to the method, plan or scheme used in the
24 commission of the offense in this case which would
25 further tend to show the existence of the intent
26 which is a necessary element of the crime charged."

27 Then the rest of that paragraph goes out.

28 Next paragraph: "The existence of the 12533

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1 intent which is a necessary element of the crime
2 charged."

3 The next paragraph I will use would be, "A
4 motive for the commission of the crime charged."

5 And the next paragraph I would use would be,
6 "For the limited purpose for which you may consider
7 such evidence, you must weigh it in the same manner
8 as you do all other evidence in this case."

9 Okay. 2.50.1 -- 2.50.01, "Evidence of other
10 sexual offenses, Evidence Code 1108."

11 Is there any reason -- going back to 2.50
12 for a minute, is there any reason that the heading
13 on that shouldn't at least cite Penal Code Section
14 1101?

15 MR. SANGER: Evidence Code Section 1101?

16 THE COURT: Excuse me. Yeah.

17 MR. SANGER: That would make sense.

18 THE COURT: So would you add that, Tracy?

19 Evidence Code -- just like the next -- the
20 way I picked that up is the next one, 2.50.01, cites

21 Evidence Code 1108. And I think -- the reason I
22 think that's important is that, to some extent, my
23 instructions to the jurors might have used the
24 numbers "1101" and "1108." I can't remember. To
25 the extent that it does, that would be clarifying
26 help, right?

27 MR. SANGER: I don't think it hurts.

1 MR. SANGER: I say, I don't think it hurts.

2 THE COURT: Okay.

3 MR. SANGER: I do have a question about the
4 interrelation between 2.50 and 2.50.01.

5 THE COURT: Yes.

6 MR. SANGER: Your Honor excluded the
7 portion -- the traditional portion of 1101(b), which
8 is that the evidence cannot be considered to prove
9 that a defendant is a person of bad character or
10 that he has a disposition to commit crimes.

11 Now, I understand that the reason the Court
12 did that, I suppose, is that 2.50.01 is going to,
13 you know, say, "But you can consider the disposition
14 to commit crimes"; however, there is 1101(b)
15 evidence that wasn't 1108, so you're not making that
16 distinction. And in case we have anybody who's got
17 an advanced degree in philosophy, they might pick up
18 on that at some point in the instruction.

19 Would it be possible to say at the end,
20 "You're not permitted to consider such evidence for
21 any other purpose, and except for the evidence
22 referred to in the next instruction, you may not
23 consider this evidence to prove the defendant is a
24 bad person" -- "is a person of bad character or that
25 he has a disposition to commit crimes"?

26 THE COURT: Well, I think there is -- the
27 sentence in the second paragraph states that, "It

28 may be considered only by you" -- or, "may be 12535

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1 considered by you only for the limited purpose of
2 determining if it tends to show...." so it tells
3 exactly what the limitations are.

4 MR. SANGER: I suppose -- I realize 1108
5 turned the law on its head here, but one of the
6 things that jurors were always warned of in 1101(b)
7 was that very delicate matter that they're not
8 supposed to consider it for proof of the fact that
9 the person is of bad character or has a disposition.
10 And to the extent there's 1101(b) that's not 1108,
11 we're not giving them that admonition.

12 THE COURT: I think it's clearer if the one
13 instruction, 2.50, tells them it can only be
14 considered for certain purposes, and the next
15 instruction tells them that they can consider it for
16 a disposition. I think it's more confusing to do it
17 the way you're suggesting.

18 Okay. 2.50.01.

19 MR. SANGER: We once again have a new one,
20 which is fine. It removes some brackets.

21 MR. SNEDDON: We just took out the ones that
22 didn't apply in this case, which were the --

23 THE COURT: Right. So you left --

24 MR. SNEDDON: -- force and violence.

25 THE COURT: You left in A and took put B, C,
26 D, E and F, which I think is appropriate, and then
27 you took out "she" in the next paragraph.

28 MR. SANGER: We do have a special on 1108, 12536

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1 but I don't think it's going to impact this --

2 THE COURT: Okay.

3 MR. SANGER: -- so much.

4 And the only objection I'd -- I don't want
5 to be too picky here, but since "any of the
6 following" is one --

7 THE COURT: Is only one.

8 MR. SANGER: -- it should just say, "Sexual
9 offense means a crime under the laws of the state or
10 of the United States that involves..." and then
11 just take out "any of the following," "any conduct
12 made criminal by...."

13 MR. FRANKLIN: Striking "any of"?

14 MR. SANGER: Strike "any of the following,"
15 and then it will just read "involves any conduct
16 made criminal by...."

17 THE COURT: Okay. You stop at "the United
18 States"; is that right?

19 MR. SANGER: No. You just say "that
20 involves..." and it's just one sentence. "Sexual
21 offense means a crime under the laws of the state or
22 of the United States that involves any conduct made
23 criminal by Penal Code Section 288."

24 THE COURT: All right. And just keep the
25 sentence running.

26 MR. SANGER: Yeah. And actually, as I think
27 about it -- I mean, I understand there could be

28 conduct outside the state. 12537

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1 THE COURT: Yeah.

2 MR. SANGER: But there's no definition of
3 the laws of other states or the United States, so
4 how would a jury know if something violated a
5 federal law or a state law of another state?

6 THE COURT: Because it has to involve conduct
7 made criminal by Penal Code Section 288. I mean,
8 that's what the real subject matter is.

9 MR. SANGER: That's right. "Sexual offense
10 means a crime that involves conduct made criminal
11 by" -- it's not a big thing. It's just a thing.

12 THE COURT: Okay. So I do think I'll accept
13 your change there and take out the words "any of the
14 following," and the second paragraph at the end,
15 colon, and go straight. "Conduct" becomes part of
16 the sentence. "Any conduct," okay?

17 And the next one is 2.50.1, "Evidence of the
18 other crimes must be proved by a preponderance of
19 the evidence," I'll give that.

20 And then 2.50 -- 2.50.2, "Definition of
21 preponderance of the evidence," I'll give that.

22 MR. SANGER: Yes. So 2.50.1 and 2.50. --

23 THE COURT: 2.

24 MR. SANGER: -- 2. Excuse me one second.

25 Okay. So on 2.50.1, we have proposed a
26 Special Jury Instruction No. 4 that I think would
27 basically be a suggestion to modify 2.50.1 with some

28 or all of the language of that. Could we come back 12538

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1 to that, or --

2 THE COURT: Yes.

3 The next one's 2.51. 2.51, "Motive." I'll

4 give that.

5 The next one is 2.60, "Defendant not

6 testifying. No inference of guilt," I'll give that.

7 2.61, "Relying on the state of the evidence,

8 defendant may..." I'll give that. 2.61.

9 MR. SANGER: I think 2.70 is withdrawn by

10 both parties. Put it this way: I believe it was

11 withdrawn by the People in their latest set, and we

12 would also withdraw any request for it.

13 THE COURT: Okay. And that leaves 2.71,

14 "Admission defined."

15 MR. SANGER: Yes. And the People's latest

16 version has the bracketed gender issues resolved.

17 THE COURT: That's okay. I'll give that.

18 2.71.5, "Adoptive admission."

19 MR. SANGER: We would withdraw -- excuse me.

20 We would withdraw any request for that and object to

21 that being given.

22 MR. SNEDDON: This will pretty much rise and

23 fall on the basis of your previous decision as to

24 the failure to respond to the accusation on the

25 program, so that's the theory we had. So I would

26 guess that this would be one that you would refuse.

27 We're not withdrawing it, but I think -- to be

28 consistent, I think that I need to point out that 12539

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1 the Court will probably refuse it.

2 THE COURT: Yes, that's correct, I will

3 refuse it.

4 Then 2.71.7.

5 MR. SANGER: And we would -- at the

6 beginning of the trial we submitted a bunch of

7 these, obviously not knowing exactly what was going

8 to happen, but this is one we would withdraw and

9 object to it being given.

10 MR. SNEDDON: And it seems to me this is one

11 that specifically applies, because it says it's a

12 pre-offense statement. And we're talking about the

13 admissions.

14 MR. SANGER: But this is designed -- I'm not

15 looking at the use notes, but I will. I mean, this

16 is designed for a situation where somebody's talking

17 about, "I'm trying to rob the bank," or "I got a gun

18 in case I want to rob a bank," something like that.

19 It doesn't add anything to the --

20 THE COURT: What did you have in mind?

21 MR. SNEDDON: Hearsay statements about

22 sleeping with teenaged boys.

23 THE COURT: So you've listed, "Evidence has

24 been received from which you may find that an oral

25 statement of intent, plan, motive or design...."

26 You used all of the words in the instruction. What

27 words were you thinking of?

28 MR. SNEDDON: Well, I think -- I think all 12540

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1 four of them apply. But that's his intention, that
2 he plans to do that, and it's a motive for the crime
3 in this case, and he has a design on young teenaged
4 boys.

5 MR. SANGER: That's not the way the word's
6 used. That was clever, though.

7 MR. SNEDDON: It's not what?

8 MR. SANGER: You know, it's actually
9 interesting, because 2.71 may not even apply.

10 However, 2.71.7, basically I think what the
11 prosecution is saying is that there's statements
12 that were made that the admissions, under 2.71,
13 would be statements that were made that would be
14 admissions of something that might pertain to the
15 1108 evidence. It's not admissions as to the future
16 conduct.

17 And 2.71.7 I believe pertains to the kind of
18 pre-offense statements that I referred to, like "I'm
19 going to go out and buy the gun because I might want
20 to rob a bank some day," and then the person robs a
21 bank, and then you say, "Well, he said he was going
22 to do that."

23 MR. SNEDDON: And our contention is that
24 these statements indicate a predisposition and his
25 intention to continue in this kind of conduct from
26 which the jury can draw a reasonable inference that
27 this conduct occurred with regard to Gavin Arvizo.

28 MR. SANGER: Well, then, so that's 1108. 12541

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1 MR. SNEDDON: No, it's not 1108. It's an
2 admission. It's an admission on his part. It's his
3 statement. 1108 is conduct that was viewed with
4 regard to other individuals.

5 MR. SANGER: Well, I don't mean to get
6 involved in a direct argument with Mr. Sneddon, but
7 addressing the Court, the predisposition -- the word
8 "predisposition" is -- evidence pertaining to
9 predisposition is inadmissible unless it comes in
10 under 1108. So this can only be talking about 1108,
11 in which case it's redundant. It doesn't make any
12 sense the way it's worded. 2.71 would be the
13 admission that would pertain to 1108. It's
14 something that was said after the fact that the
15 prosecution wants to argue bears on 1108 events
16 having occurred.

17 2.71.7, there is no -- despite the creative
18 use of the word "design," there is no predisposition
19 issue under 2.71.7. If you say somebody has -- you
20 know, we're talking about robbing a bank, I suppose
21 they're talking about robbing a bank, it's not a
22 predisposition. It would go to intent or something.
23 So I think for purposes of argument -- I
24 mean, nobody's going to understand this unless it's
25 argued by the lawyers. So for purpose of argument,
26 2.71 gives the prosecution the opportunity to argue
27 that things that were said on the tape -- and the

28 only statements that came in by Mr. Jackson are 12542

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1 pre-offense statements. So the things said on the
2 tape they could argue were an admission of some sort
3 that pertains in some way to the 1108 evidence.

4 MR. SNEDDON: That is not --

5 MR. SANGER: 1108 evidence --

6 MR. SNEDDON: -- what we're saying.

7 MR. SANGER: Excuse me one second.

8 1108 evidence, then, is offered for the
9 purpose of showing there's some predisposition,
10 which are propensity. But 2.71.7 doesn't advance
11 the ball for anybody.

12 THE COURT: This requires -- in your mind, it
13 requires some statement that shows at that time he's
14 contemplating a crime of some sort.

15 MR. SANGER: That he's --

16 THE COURT: So his statements --

17 MR. SANGER: -- subsequently charged with.

18 THE COURT: -- that he allows young boys to
19 sleep in his room doesn't show a crime. That's what
20 you're saying?

21 MR. SANGER: Well, that's correct. But it
22 doesn't show the intent, plan, motive or design.
23 It -- he's talking historically at that time. If
24 you remember, the statements that were selected were
25 statements with regard to Gavin Arvizo that occurred
26 prior to 2003, and then also a remark -- we have it
27 here someplace, but a remark to the effect that he

28 has allowed other children to sleep in his bed. 12543

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1 THE COURT: I guess I'll have to go back to
2 exactly what statements you're relying on for this
3 instruction.

4 MR. SNEDDON: I'm relying on the statements
5 that the Court allowed to be admissible as
6 admissions on the part of the defendant. And that
7 is those admissions in the Bashir video. And I
8 think I provided the Court with a copy of what I
9 believe to be consistent with the Court's ruling
10 earlier before the trial started, and I believe
11 those statements apply.

12 You know, I think the problem here is that,
13 you know, an admission is something from which the
14 jury draws an inference. Whereas a confession would
15 be a complete -- would be a completed statement as
16 to all elements of the crime. And -- and the reason
17 that the Court ruled that those admissions were to
18 come before the jury is because it does indicate
19 that he has a motive and intent to sleep with young
20 teenaged boys, and he has admitted to doing so,
21 which allows the jury to draw an inference that he
22 did so with Gavin under circumstances which are
23 directly related to the crimes alleged in this
24 count.

25 MR. SANGER: Actually, I'm looking at what
26 was submitted this morning by the prosecution, and
27 it's a document that doesn't have anybody's name on

28 it. And I think Your Honor asked your clerk to 12544

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1 check. That's the one that was filed by the
2 prosecution and --

3 THE COURT: Yes, I have it.

4 MR. SANGER: I'm just looking at it now,
5 again having received it this morning. I'm certain
6 these are not the correct excerpts.

7 MR. SNEDDON: Well --

8 THE COURT: "The correct excerpts" meaning
9 what?

10 MR. SANGER: Well, Your Honor ruled earlier
11 that certain statements could come in if they laid
12 the foundation and got the tape in, and they got --
13 they introduced the Bashir tape that had some
14 statements. They also sought to introduce another
15 tape that never came into evidence.

16 But, for instance, page two here, it says,
17 on page 41, there's a discussion between Gavin and
18 Bashir. You know, I just look at that, and I know
19 that wasn't one of the parts that the Court
20 approved.

21 We could go back and figure it out, but
22 aside from that, the general proposition is that
23 what they wanted to introduce were statements of
24 Michael Jackson that could be construed as --

25 THE COURT: Admissions.

26 MR. SANGER: -- admissions that of course
27 would have to be admissions as to prior conduct, not

28 future conduct, because there's no future conduct 12545

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1 yet by definition. That would come in under 2.71.

2 We are proposing in a special instruction
3 that the Court not delineate the exact paragraphs,
4 and instead, with both the Bashir tape and the
5 outtakes, the Court categorize it as statements by
6 Michael Jackson that pertain to his relationship
7 with children.

8 THE COURT: I know that. But I can't see you
9 getting anywhere with that one, so --

10 MR. SANGER: Oh, you can't. Well, it just
11 seemed to be an easier way to do it. But the point
12 of the story is, whether we do it that way or not,
13 that's what it was about. The Court was ruling that
14 statements --

15 THE COURT: But what I had ruled was that
16 certain statements, if the jury determined that they
17 were admissions, could be used for the truth of the
18 matter asserted. And I asked Mr. Sneddon to give me
19 a list of the statements that he thought he would be
20 relying on to submit to them for admissions.

21 And the purpose of that was that I needed to
22 know what statements I might allow you to put in for
23 the truth of the matter asserted which were
24 connected to the admissions and not generally
25 connected to everything he said about children.

26 MR. SANGER: Okay.

27 THE COURT: Which is what you threw in in

28 your instruction. 12546

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1 So let's take a break.

2 (Recess taken.)

3 THE COURT: Okay. On 2.71.7, I will go
4 ahead and give that, but I'll just, I think, limit
5 it to "intent." Take out "plan, motive and design."

6 MR. SANGER: And I believe this is correct,
7 Your Honor, but just so I'm clear on the record, we
8 did withdraw our request and we object to this.

9 THE COURT: All right. It's clear now.

10 MR. SANGER: Okay. Thank you.

11 THE COURT: 2.72, we don't need that anymore,
12 do we?

13 MR. SNEDDON: I think that's a sua sponte
14 instruction.

15 THE COURT: Okay. 2. -- all right. I'll
16 give that.

17 2.80, that's expert testimony, I'll give
18 that.

19 2.81 --

20 MR. SANGER: Could you slow down one second,
21 Your Honor, please? There's two issues here.

22 Okay. On 2.80, you're giving their newer
23 version?

24 THE COURT: Yes.

25 MR. SANGER: Okay.

26 THE COURT: 2.81. Actually, 2.81 is the one
27 that you originally had requested, right?

28 MR. SANGER: We had requested, well, yes, in 12547

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1 advance of the trial.

2 THE COURT: So that's given.

3 MR. SANGER: Yes. I think there was some
4 such testimony.

5 THE COURT: And then 2.82, "Hypothetical
6 questions," we'll give.

7 MR. SANGER: Yes.

8 THE COURT: And 2.83, "Resolution of
9 conflicting expert testimony," I'll give.

10 2.90, "Presumption of innocence," I'll give.

11 Now we come to the principals and
12 accessories. My take on this is that we shouldn't
13 be giving that at all, 3.00, 3.01, 3.02. In this
14 case we're dealing with -- on one crime we're
15 dealing with conspiracy, and that has all the
16 instructions that relate to the relationship between
17 co-conspirators, which are different than principal
18 and agent.

19 MR. SANGER: And we would -- I'm sorry, we
20 would withdraw 3.00, .01 and .02, and object to them
21 being given.

22 MR. SNEDDON: We agree.

23 THE COURT: Okay. So I'll withdraw 3.00,
24 3.02 -- 3.01, 3.02.

25 3.10 withdrawn? This is the definition of
26 an accomplice.

27 MR. SANGER: Well, it appears that the

28 prosecution has withdrawn 3.11 and .12, but not .10. 12548

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1 MR. SNEDDON: There was some method in our
2 madness in that, Judge. And the method was -- or
3 the madness was perhaps that we felt that the
4 conspiracy instructions adequately covered any
5 liability issue, and we wanted to make sure that if
6 there was going to be a discussion as to whether
7 these accomplice instructions need to be done, there
8 at least be one left in to make it a conscious
9 ruling on the record.

10 And our feeling is the same as the Court's,
11 and that is the conspiracy instructions adequately
12 have addressed the involvement of other participants
13 in this crime, but we just felt that it should be
14 discussed and either withdrawn or objected to on the
15 record by the defense, and that's the reason we left
16 the one in and took the others out.

17 THE COURT: Okay.

18 MR. SANGER: Well, there's a difference
19 between the aiding, abetting and principal
20 instructions, which we agree should go out, and the
21 accomplice instructions, because those have to do
22 with the testimony of the accomplice as opposed to
23 criminal liability.

24 In other words, I agree that the conspiracy
25 instruction covers the liability of individuals
26 involved in the offense for substantive law
27 purposes, but the accomplice instructions pertain to

28 whether or not corroboration is necessary for an 12549

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1 accomplice witness. That's a different issue.

2 THE COURT: I think the accomplice

3 instructions don't apply either, so let's take them

4 one at a time.

5 I'm not going to give 3.10. And do you want

6 to object to that?

7 MR. SANGER: Yeah, we're requesting that the

8 accomplice -- all the accomplice instructions be

9 given. So starting with 3.10, yes, we request it.

10 THE COURT: I'm not going to give 3.11. I'm

11 not going to give 3.12. I'm not going to give 3.13.

12 I'm not going to give 3.14. I'm not going to give

13 3.16. I'm not going to give 3.18. I'm not going to

14 give 3.19. And all of those were relating to

15 accomplices.

16 3.31, "Concurrence of act and specific

17 intent."

18 MR. SANGER: Now, the prosecution has

19 provided, this morning, a fuller version of 3.31.

20 THE COURT: That's correct. I'm looking at

21 that.

22 Tell me when you've had time to read it.

23 MR. SANGER: I've had time to read it, and I

24 have a question so far, two questions.

25 One, I'm not sure that the specific intent

26 on conspiracy is exactly right. But let me look at

27 that.

28 The other one is the attempted lewd act 12550

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1 requires the specific intent to commit the lewd act,
2 but it also requires the specific intent to arouse
3 or appeal to or to gratify, I think.

4 So an attempt, you have to have the specific
5 intent to commit the actual crime, plus the specific
6 intent that's -- I'm sorry, that's required --

7 THE COURT: Is the same.

8 MR. SANGER: -- in the definition, yes. And
9 then you also have to specifically intend to commit
10 that crime. It's an attempt.

11 THE COURT: Do you want to respond to that?

12 MR. SNEDDON: If they want to put it in,
13 that's fine, Judge. I think what we envisioned
14 there was that there is going to be another
15 instruction as to what that crime envisions and
16 entails, but I see no harm in just dropping down
17 that section from above and adding it on there.
18 Actually, I'm not sure that that's even --
19 I mean, it's a little redundant because that's what
20 the crime is. I'm not so sure you just couldn't
21 take out "the specific intent to commit a lewd act"
22 and just put in "the specific intent to arouse,
23 appeal to, or gratify the lusts or passions or
24 sexual desires of the perpetrator or the child."
25 That's really what it is.

26 THE COURT: Are you conferencing on this?

27 MR. SNEDDON: No, I think there was some

28 confusion on -- 12551

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1 MR. FRANKLIN: Can I have just a moment to
2 confer with Mr. Sanger?

3 Bob?

4 (Off-the-record discussion held at counsel
5 table.)

6 MR. SNEDDON: No, I think I was on the right
7 page.

8 THE COURT: Okay. So how do you want to
9 change that, then?

10 MR. SNEDDON: Well, I would suggest that
11 what we do is simply start with the word where it
12 says "specific intent," and then just take out
13 "commit a lewd act with a child under the age of
14 14," and just put in "requires a specific intent to
15 arouse, appeal to, gratify the lusts and passions or
16 sexual desires of the perpetrator or the child." In
17 other words, take the same exact language --

18 THE COURT: Okay.

19 MR. SNEDDON: -- for the crime above and
20 just drop that down.

21 THE COURT: Okay.

22 MR. SANGER: Well, I would propose that,
23 instead, say, "requires the specific intent to
24 commit the" -- "a lewd act with a child, with the
25 further specific intent to appeal to, gratify" --
26 "or gratify the lusts or passions or sexual
27 desires." Because technically in an attempt, you

28 have to have the specific intent to commit the act. 12552

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1 And then in order for it to be an attempted 288,
2 it's got to be with the further specific intent of
3 arousing passions and so on.
4 The way the prosecutor suggested it, it
5 eliminates the specific intent to commit the act,
6 and it could be interpreted as just, you know, some
7 intent to arouse passions on the part of the
8 individual.

9 MR. SNEDDON: Just add them both in. That's
10 fine with me. I don't really care.

11 THE COURT: Okay.

12 We don't have 3.31.5 in your new set, right?

13 MR. SANGER: They withdrew it. But before
14 we get there, is the Court giving 3.31 with that
15 modification? Was that the final ruling?

16 THE COURT: Yes.

17 MR. SANGER: All right.

18 MR. SNEDDON: Judge, it occurs to me that --

19 THE COURT: Why wouldn't you give 31 --
20 3.31.5?

21 MR. SNEDDON: With regard to what crime?

22 It occurs to me that 3.30 needs to be given because
23 of the general intent crime on the lesser, according
24 to the use note.

25 THE COURT: I know we have to give a general
26 intent instruction on the lesser and --

27 MR. SNEDDON: That would be 3.30, I think,

28 which we didn't request because we didn't see the 12553

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1 lesser at the time. But I agree with the Court, it
2 has to be given, so --

3 THE COURT: Well, there's another place that
4 the general intent applies, isn't there, in the
5 false imprisonment, when we get to the definition
6 describing the conspiracy?

7 MR. SNEDDON: You're correct. According to
8 the use note, that's correct.

9 THE COURT: So when we are thinking of giving
10 the 3.30, it seems to me maybe we should put that
11 with the definition of the lesser-included at the
12 time we give the instruction on the lesser-included.

13 And then because of the complications of the
14 specific intent in the conspiracy instructions and
15 specific intent to commit -- this is similar to what
16 you were just saying, the specific intent to commit
17 a crime, specific intent to commit false
18 imprisonment, which has a general intent, we need to
19 be very cautious about how we instruct the jury on
20 that issue. And I don't want to mix up the two.

21 Even though we're dealing with a general intent on
22 both of those crimes, they're going to treat the
23 approach to the general intent separately on each
24 crime.

25 So I think what we should do is give 3.30
26 separately at each point, at the right point. So --

27 MR. SNEDDON: I think that's the safest

28 thing to do. That way it doesn't confuse it. 12554

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1 THE COURT: If we're careful, it won't.

2 Even then we could. But we'll work on that.

3 MR. SANGER: There is a problem, I think,

4 with conspiracy, getting that confused and saying --

5 THE COURT: I know.

6 MR. SANGER: Yeah.

7 THE COURT: That's what I was bringing up.

8 That's why I want to be careful about how we deal

9 with giving the general intent instruction here.

10 MR. SANGER: Okay. And, I mean, we all

11 agree it has to be given with regard to the lesser.

12 THE COURT: Yeah.

13 MR. SANGER: But does it have to be given in

14 conjunction with the underlying offense for

15 conspiracy?

16 THE COURT: I think so. Because since it's a

17 general intent crime, all they have to do is intend

18 to do the acts that, in effect, are false

19 imprisonment.

20 MR. SANGER: I understand. I'm just

21 thinking --

22 THE COURT: If they intend to do those acts

23 and they agree to do those acts, specifically they

24 intended to do those acts, they intended --

25 specifically intended to agree, then you have a

26 conspiracy within the law.

27 MR. SANGER: So you have the specific intent

28 to agree. We've got that. And then the next is a 12555

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1 specific intent to commit the crime. And if you
2 have a specific intent to commit a general intent
3 crime, don't you have to have a specific intent to
4 commit that crime?

5 THE COURT: Yes. But -- but to get to
6 committing the crime itself, that's not enough. You
7 know, the law is, you have to not only have the
8 intent, you have to commit the crime. You have to
9 do the act. And the act is a general intent --

10 MR. SANGER: I'm with you on all of that.

11 What I was going to say is, in the instruction 9.60,
12 it says, "In order to prove this crime, each of the
13 following elements must be proven." The first is,
14 "A person intentionally restrained...,"

15 dah-dah-dah-dah-dah.

16 Isn't that enough? The reason you give a
17 general intent instruction is to eliminate -- seems
18 to me, is to eliminate the situation where somebody,
19 for instance, would be convicted of breaking and
20 entering when somebody -- they're walking down the
21 sidewalk and somebody pushed them through the door.
22 They didn't have the general intent to commit the
23 act. Otherwise, I mean, the instruction protects
24 defendants against being convicted of an act that
25 was not -- was not intentional in a general sense.

26 Okay?

27 How would the defendant be protected here

28 where you have to have the specific intent to commit 12556

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1 the crime and the crime is to intentionally do
2 something? In other words, I don't know that you're --
3 that we're furthering the purpose of the general
4 intent instruction. It doesn't really help or hurt
5 the prosecution. Generally an instruction that
6 would give a defense to the defense.

7 But my concern is, in giving -- in talking
8 about this, if it's not necessary, and I understand
9 the Court thinks it is --

10 THE COURT: It could hurt the prosecution if
11 the jury thinks that they have to have the specific
12 intent to have false imprisonment. In fact, it --

13 MR. SANGER: But you do. You have to have
14 the specific intent.

15 THE COURT: No, you can just have specific
16 intent to do the acts.

17 MR. SANGER: Right. Specific intent to do
18 the act.

19 MR. SNEDDON: Intent to do the act.

20 THE COURT: What are you saying?

21 MR. SNEDDON: It's the intent to do the act.
22 I think it needs to be given.

23 THE COURT: I think it needs to be given,
24 too. It was the question of giving it correctly in
25 a way that's not -- you know, that is helpful and
26 not confusing.

27 MR. SNEDDON: Well, it seems to me the only

28 logical place to give it would be when you give the 12557

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1 other instructions on defining false imprisonment.

2 If you do it anywhere else, I think it could be

3 misleading.

4 THE COURT: Right. That's what I think, too.

5 And I think that we should give 3.30

6 probably twice, at two different places, so that

7 we're careful as to how it relates to each of those

8 two crimes.

9 MR. SNEDDON: Exactly.

10 MR. SANGER: I would agree -- if you're

11 going to do it, I would agree that that's -- that

12 would be the way to do it.

13 THE COURT: Okay.

14 MR. SANGER: My only objection is to the

15 second one, which is giving it in conjunction with

16 the --

17 THE COURT: Well, when we get to that, we'll

18 try to work through that.

19 So we are now -- we're at 3.30, so we need a

20 3.30 prepared, but we're not going to give it at

21 this point.

22 MR. SANGER: And you need two 3.30s prepared

23 based on what the Court just said.

24 THE COURT: Yeah, but we may tie -- yeah.

25 MR. SANGER: I'd ask, just while we're on

26 that subject, perhaps the second 3.30 could be

27 worded to the effect that, "You were already

28 instructed that conspiracy requires the specific 12558

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1 intent to agree and the specific intent to commit an
2 underlying offense. One of those underlying
3 offenses is a general intent crime," something like
4 that. So it makes sense otherwise.

5 THE COURT: I think so.

6 MR. SANGER: It's going to be a sea of words
7 and they're never going to figure it out.

8 THE COURT: Yeah. I think so. So we
9 can....

10 The next one we're on here is 4 --

11 MR. SANGER: 3.31.5. Did you rule on that?

12 MR. SNEDDON: No. And I have a -- oh, go
13 ahead.

14 THE COURT: I think what we should do with
15 3.31 -- 3.31.5 is to say, "In the crimes charged in
16 Counts 1 through 10," and for --

17 MR. SNEDDON: Judge, could I be heard on
18 that?

19 THE COURT: Yes. Just a second.

20 I think it should say, "In the crimes
21 charged in Counts 1 through 10, and in the lesser
22 crimes, there must exist a union or joint operation
23 of act or conduct and a certain mental state in the
24 mind of the perpetrator. Unless the mental state
25 exists, the crime to which it relates is not
26 committed. The mental states required are included
27 in the definitions of the crimes set forth

28 elsewhere." 12559

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1 MR. SNEDDON: Judge, I believe that this
2 instruction is actually directed when there's a
3 mental state other than specific intent. And I
4 believe that this instruction ought to be limited to
5 those portions of the child molestations that
6 requires the mental state of the arousal part of it.
7 This is like for second-degree murder, where you
8 have malice and some of the other mental state
9 degrees, like if it was knowingly and things like
10 that.

11 So I think it would -- that the part that
12 you just talked about really is covered by 3.31.
13 And this is when there's a special mental state
14 that's different from the specific intent. And the
15 only one I can think of here would be the arousal
16 part of the 288 offense. Now, there could be
17 others, but --

18 THE COURT: Do you agree with that?

19 MR. SANGER: No. I was just reading the use
20 note, which is singularly unhelpful. It seems to me
21 that there are other mental states. I think the
22 arousal, that's a specific intent. So I disagree
23 with Mr. Sneddon, respectfully, that that is a
24 mental state other than specific intent. But there
25 are references to "willful, knowing, malicious."
26 Those are mental states, I suppose.

27 THE COURT: Mr. Dunkle, what do you think?

28 MR. DUNKLE: I agree with Mr. Sanger on 12560

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1 that.

2 MR. SNEDDON: Just for the record, to make
3 it complete, Mr. Franklin disagrees with me and he
4 agrees with Mr. Sanger, so it looks like I'm on the
5 short end of this one.

6 MR. DUNKLE: It does say, "specific intent
7 for 288, to arouse." It says "specific intent."

8 MR. SNEDDON: Then it shouldn't be given.

9 MR. SANGER: I think it should be given. I
10 think it should be given the way the Court
11 indicated.

12 THE COURT: All right. We'll give it that
13 way.

14 I think, though, Mr. Dunkle, the first time
15 you ever spoke in here, you conceded to your boss.
16 That was a bad start right there.

17 The next one is 4.51. The D.A. doesn't have
18 that. Let's see, "Alibi." We don't need that.

19 MR. SANGER: That's withdrawn.

20 THE COURT: Do you agree?

21 MR. SNEDDON: Yes.

22 THE COURT: 4.71, "Proof need not show exact
23 time of crime."

24 MR. SANGER: I think both sides would
25 withdraw that. The prosecutor has withdrawn it, and
26 we would also.

27 THE COURT: Withdrawn.

28 4.71.5, "When proof must show specific act 12561

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1 or acts within time alleged.”

2 MR. SANGER: This was a new instruction that
3 was presented this morning by the prosecution. We
4 do not object to it, except for the last sentence.
5 And as to that last sentence, perhaps the Court
6 could just put a Post-it on that, because we do have
7 a special.

8 THE COURT: That you submitted for the first
9 time this morning.

10 MR. SANGER: Yes. Yes. I'm not faulting
11 the D.A.

12 MR. DUNKLE: That one we submitted on the
13 28th.

14 MR. SANGER: Wait a second. Mr. Dunkle has
15 something to say.

16 MR. DUNKLE: I think that one was submitted
17 on the initial proposed jury instructions on the
18 28th of February.

19 MR. SANGER: There you go. That's why he's
20 here.

21 So if we could, we would agree with all of
22 it except for the last sentence, and if the Court
23 could just hold up on the last sentence until we
24 determine what we are doing on that subject.

25 THE COURT: Okay. I do think that this
26 correctly states the law in that regard, though.

27 MR. SANGER: Well, there's an issue under

28 Blakely as to whether or not there has to be 12562

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1 unanimity on the specific acts, and there is a
2 question as to whether or not it has to be reflected
3 in the verdict forms. So we aren't there yet and I
4 think we need to discuss that, because I don't
5 necessarily think everything has to be put --
6 specified in the verdict forms, but it does have to
7 be dealt with.

8 THE COURT: Okay. So it may be that this
9 last sentence is just fine, but it just depends on
10 how we handle the Blakely issue.

11 THE COURT: Okay. The next one is 6.00,
12 "Attempt."

13 MR. SANGER: Don't have an objection to it.
14 However, I think it should be given just before the
15 instruction on the count, whatever count it is
16 that's the attempt count.

17 THE COURT: Put it in a different order.
18 6.01, "Conspiracy and overt act defined."
19 Looks like the same. You didn't change it. You
20 just put it double-spaced, in a different format.

21 MR. SANGER: Look the same to me, but I
22 don't know. I read it quickly.

23 THE COURT: It looks the same. Is it the
24 same?

25 MR. SNEDDON: As far as I know it is.

26 THE COURT: Okay. I'll give that one.

27 And 6.11, any problem with that? Just took

28 out the parentheticals. Left the words in. 12563

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1 MR. FRANKLIN: Added "Count 1."

2 THE COURT: Added "Count 1."

3 MR. SANGER: Actually, it just said "count"

4 in the other one.

5 THE COURT: Okay. We'll give that one.

6 MR. SANGER: Can I -- before you do that --

7 I'm sorry, I didn't speak quickly enough, I suppose,

8 on the substance.

9 What "natural and probable" consequences are

10 involved here, other than what is alleged to have

11 been agreed to to start with? I suppose in giving a

12 full definition of conspiracy to the jury, this does

13 it. But this isn't a typical thing where a bank

14 robbery goes wrong and somebody gets shot, and then

15 the question is, is that a natural and probable

16 consequence of agreeing to do a bank robbery? The

17 People's theory is Michael Jackson intended all of

18 this. Obviously we dispute that, but that's their

19 theory.

20 MR. SNEDDON: Well, that they intended to

21 isolate and control the family, and it's a natural

22 and probable consequence of that that they took them

23 to the Calabasas Inn and held them there against

24 their will. And that would be something that, even

25 though he didn't know about it, the jury could

26 construe as being a natural and probable consequence

27 from the agreement to control and isolate them, or

28 to falsely imprison them. 12564

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1 MR. SANGER: But -- sorry.

2 MR. SNEDDON: So it should be given.

3 MR. SANGER: An agreement to control and

4 isolate is not --

5 MR. SNEDDON: I used the wrong words,

6 Counsel.

7 MR. SANGER: Yeah, it would have to be the

8 agreement to -- the specific intent to commit these

9 crimes.

10 THE COURT: Okay. I'll give it as prepared.

11 6.12.

12 MR. SANGER: And we would withdraw our

13 request for that, for 6.12, and object.

14 THE COURT: On what basis do you object?

15 MR. SANGER: I think it's -- it unduly

16 emphasizes one aspect of the People's case. It's

17 already covered in general terms. I understand it's

18 a CALJIC instruction, and I'll submit it.

19 THE COURT: All right. I'll give 6.12.

20 THE COURT: 6.13, "Association alone does not

21 prove membership in the conspiracy."

22 MR. SANGER: That's requested by both sides.

23 THE COURT: I'll give that.

24 6.14, "Acquaintance with all co-conspirators

25 not necessary," I'll give that.

26 MR. SANGER: We would withdraw our consent

27 to that and object. I'm speaking a little bit

28 behind here. Your Honor already ruled, but -- 12565

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1 THE COURT: 6.16, "When conspirators not
2 liable for act or a declaration of co-conspirator,"
3 I'll give that.

4 6.17, "Conspirators not bound by act or
5 declaration of non-conspirator," I'll give that.

6 6.18, "Commission of act in furtherance of a
7 conspiracy does not itself prove membership in the
8 conspiracy," I'll give that.

9 6.19, "Joining conspiracy after its
10 formation," I'll give that. Oh, wait. I don't have
11 that in the new form.

12 MR. SANGER: That was apparently withdrawn
13 by the prosecution, but I think it's -- I think it's
14 appropriate. We requested it.

15 THE COURT: Okay. I'll give that.

16 6.20, "Withdrawal from a conspiracy," I'll
17 give that.

18 6.21. 6.21, "Liability for acts committed
19 after termination of conspiracy," I'll give that.

20 6.22, "Conspiracy" --

21 MR. SANGER: There's a revised version.

22 THE COURT: Yeah, "Case must be considered
23 as to each defendant."

24 MR. SANGER: Okay. I have two objections to
25 6.22. And I do not object to the amendment at the
26 beginning to say "the defendant" rather than "each
27 defendant," since we only have one person accused of

28 this conspiracy, or accused in the indictment of 12566

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1 this conspiracy. So that's okay.

2 The two problems I have are, one, this

3 misstates the elements of the offense. And it's

4 somewhat beyond me. I know this is CALJIC once

5 again, but why it's being restated and why

6 "conspiracy" is being restated in different terms.

7 It says, "There was a conspiracy to commit one or

8 more of the crimes of...", and this leaves out the

9 specific intent to agree.

10 And the second part of that, or the second

11 objection to this, is that the last two sentences

12 violate Blakely, that there has to be a jury

13 determination as to the underlying facts, and it has

14 to be unanimous, beyond a reasonable doubt. And I

15 think we've addressed that in a special.

16 I would take the position that, under

17 Blakely and the U.S. Supreme Court decisions

18 following that, that any instruction that says that

19 you are not required to unanimously agree as to who

20 committed an overt act or which overt act was

21 committed so long as each of you finds beyond a

22 reasonable a doubt that one of the conspirators

23 committed one of the acts, that would violate the

24 unanimity and proof-beyond-a-reasonable-doubt

25 requirements of Blakely.

26 THE COURT: Do you want to say anything?

27 MR. SNEDDON: Well, we're going to take this

28 up, I guess, later, but Blakely doesn't have 12567

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1 anything to do with this case. Blakely is a
2 sentencing allegation finding. This is not a
3 sentencing allegation finding. This is the law of
4 conspiracy that's been in effect for years and years
5 and years in California. It doesn't have anything
6 to do with Blakely.

7 MR. SANGER: It obviously does. I mean,
8 Blakely doesn't just talk about sentencing. And the
9 cases that have construed Blakely since it came down
10 make it clear that it applies to anything that has
11 to do with imposing criminal liability on a
12 defendant.

13 THE COURT: Okay. I'll accept it as it is at
14 this point. We'll see if it changes as we discuss
15 the others. But I have read the others.

16 6.23 --

17 MR. FRANKLIN: Judge, our version on 6.22, I
18 see that I, down -- in the fourth line down on the
19 second paragraph, I spelled "false imprisonment" and
20 left off the "ment," if that could be noted.

21 MR. SANGER: Where?

22 MR. FRANKLIN: On 6.22, the fourth line down
23 in the second paragraph, where it lists the crime.
24 "Extortion, child abduction, and false" -- it says
25 "false imprison."

26 THE COURT: Not mine.

27 MR. SANGER: Not on mine.

28 MR. FRANKLIN: Then I've got an earlier 12568

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1 version and I do apologize.

2 THE COURT: You've got -- you've got an
3 erratic computer.

4 6.23.

5 MR. SANGER: Okay. Now we have -- this is
6 the brand-new one.

7 THE COURT: Ahh, yes. Now I need to put this
8 in and take this out.

9 Is there any problem with that that you see,
10 Mr. Sanger?

11 MR. SANGER: I haven't had a chance to
12 really look at it. This was more recent, so could I
13 have just a moment, please?

14 The only thing I would object to so far, and
15 I'm up to Overt Act No. 9, is that they've
16 capitalized all of the names of the people they
17 chose to capitalize and not capitalized the other
18 people. And I looked up and Your Honor was gone,
19 and I'm glad to see you've returned.

20 THE COURT: I've got all this trash I was
21 throwing on the floor. I was taking an opportunity --

22 MR. SANGER: I thought it was something I
23 said. All of a sudden you were gone.

24 In other words, they capitalize Ronald
25 Konitzer, Dieter Weizner. They capitalize Frank
26 Tyson and Marc Schaffel, Vinnie Amen, but they don't
27 capitalize Janet Arvizo or anybody else 's name.

28 MR. FRANKLIN: Judge, there was a reason. 12569

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1 This language was simply copied from the language of
2 the indictment itself. And it was thought
3 appropriate in the indictment to capitalize the
4 names of -- the person's name as conspirators, or
5 co-conspirators.

6 MR. SANGER: That doesn't mean it's right in
7 a jury instruction. Seems to me you capitalize
8 everybody's names or you don't capitalize anybody's
9 names. This is an instruction by the Court. And to
10 make it look like the Court is emphasizing one group
11 of people over another I think would be
12 inappropriate. And I'm sure, as Mr. Franklin
13 mentioned, due to whatever he called it, the modern
14 wonders of the computer, you can search these names
15 and you can change them fairly instantaneously.

16 THE COURT: Well, since we are going to give
17 all the jurors copies of it, I think they should be
18 the same.

19 MR. FRANKLIN: I'll do that.

20 THE COURT: Just let me finish picking up
21 this paper.

22 Okay. The next one is 6.24.

23 MR. SANGER: I'm sorry, I'm still reading
24 this instruction. Can I have just another minute?

25 THE COURT: Okay.

26 MR. SANGER: Thank you.

27 Maybe one way to do this, I was just

28 conferring with Mr. Dunkle on this, Overt Acts 19, 12570

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1 21 and 22, let's just stick with those three for the
2 moment, we would renew our 1118.1 motion, I think is
3 procedurally the way to get to it.

4 And we could renew our 1118.1 motion as to
5 all matters, but just specifically looking at those
6 overt acts, based on the evidence in this case, they
7 don't seem to have anything to do with the alleged
8 conspiracy. They may or may not have something to
9 do with the alleged other acts, and so under
10 whatever appropriate code section, 1118.1 or some
11 other code section or some other procedure, we would
12 move to strike those from the jury instructions and
13 to have the Court, as a matter of law, finding that
14 those are not relevant to the conspiracy count.

15 THE COURT: I'm not really willing to
16 entertain such a motion while we're trying to do
17 jury instructions. It's untimely, and it's not --
18 doesn't really solve problems. It just creates
19 them, so --

20 MR. SANGER: Okay.

21 THE COURT: But have you read the rest of
22 the --

23 MR. SANGER: I was going to say, based on
24 the Court's ruling on that, other than correcting
25 the font or the caps, the lower case, whatever we're
26 doing, I don't have any further objection to 6.23.

27 THE COURT: Okay. So there's no

28 misunderstanding, I think what you should do is 12571

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1 leave the "Michael Joe Jackson" in all caps, and
2 then put the rest of the names that are involved
3 other than Mr. Jackson's in lower cap, you know,
4 with the proper capitalization.

5 MR. SANGER: Could I be heard on that?

6 There's no other instruction where "Michael
7 Joe Jackson" is in all caps. This is a jury
8 instruction. I think it should just be regular
9 lower case.

10 THE COURT: No, I think it puts the right
11 emphasis on each of the allegations, so you
12 understand, when you read the allegation, it's
13 "Michael Joe Jackson did this," and "Michael Joe
14 Jackson..." I don't think it's at all harmful to
15 you as you think.

16 The 6.24. Okay. No objection? I'll give
17 that.

18 MR. SANGER: I'm just looking at it quickly
19 here in the book. Just one more second, please.

20 All right. Thank you.

21 THE COURT: 6.25.

22 MR. SANGER: The revised version.

23 Subject to the verdict forms, working that
24 out, if that's the way the Court ultimately rules
25 the verdict form should look, then this will be
26 acceptable.

27 THE COURT: Okay. And then the next one,

28 let's see, I have in the old stack is 6.26. 12572

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1 MR. FRANKLIN: That's the -- essentially

2 it's a guide for the jury verdict form.

3 THE COURT: So we don't need that.

4 MR. FRANKLIN: No.

5 THE COURT: And then 9.60, "False

6 imprisonment."

7 MR. SANGER: And this is the one general

8 intent underlying offense.

9 THE COURT: Yes. And the question, I guess,

10 is the 9.60 -- CALJIC 9.60 is what? Is it a felony

11 that they're reporting?

12 MR. SNEDDON: Yes.

13 MR. SANGER: False imprisonment, 236.

14 MR. SNEDDON: The misdemeanor instruction

15 for false imprisonment is back in the 10.00 series,

16 I believe.

17 THE COURT: 16.00.

18 MR. SNEDDON: Or 16.00 series, yeah. This

19 is the felony one, which is the appropriate one.

20 THE COURT: And do you agree with that?

21 MR. SANGER: That the felony instruction

22 should be given rather than the misdemeanor? Yes.

23 THE COURT: You said "yes"?

24 MR. SANGER: Yes, sir. I was just

25 clarifying the question, but --

26 THE COURT: Okay. Have you looked at this

27 one, 9.60? Is that okay?

28 MR. SANGER: Yes, that seems to be the 9.60 12573

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1 from the book.

2 THE COURT: Okay.

3 MR. SANGER: And I hear Mr. Franklin saying

4 something. Is it not?

5 MR. FRANKLIN: There's only an introductory

6 phrase indicating that he is accused of that in the

7 conspiracy count. Otherwise, it's from the book.

8 THE COURT: Where it says, "Defendant is

9 accused in Count 1"?

10 MR. FRANKLIN: Yes.

11 THE COURT: That's the introductory phrase?

12 MR. FRANKLIN: "Of having conspired to

13 commit."

14 MR. SANGER: That's fine.

15 THE COURT: And then the next one is 9.70.

16 MR. SNEDDON: Judge, can we hold on for a

17 second, raise an issue with the Court that just

18 occurred to me?

19 THE COURT: Yes.

20 MR. SNEDDON: I'm wondering if we need to

21 give -- probably not, but I just want to bring it

22 up. Inasmuch as this is not a lesser-included, it

23 doesn't seem like we need to give the misdemeanor

24 false imprisonment instruction, because -- although

25 conspiring to commit a misdemeanor is a felony.

26 THE COURT: Right.

27 MR. SNEDDON: So maybe it needs to be stated

28 in the alternative. Misdemeanor is no force or 12574

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1 violence. In other words, the -- as alleged in the
2 indictment, it's alleged as a felony. I think it's
3 pretty clear.

4 THE COURT: Well, it says "a felony" in the
5 indictment.

6 MR. SNEDDON: Yes, sir.

7 THE COURT: But the language is not felony
8 language in the indictment.

9 MR. SNEDDON: Oh.

10 THE COURT: So it's not pretty clear.

11 MR. SNEDDON: Okay. I think the working
12 assumption has been, from both sides, that it was a
13 felony. But I understand what the Court's saying,
14 and it occurs to me that perhaps they need to be
15 instructed under both theories and --

16 MR. SANGER: Well, the indictment is a
17 felony and the language of "by violence or menace"
18 is the language of the felony. I mean, whether you
19 say it's a felony or you say why it's a felony, he
20 was indicted for --

21 THE COURT: A felony.

22 MR. SANGER: -- conspiracy to commit this
23 felony. I don't think that --

24 THE COURT: You just think the language of
25 the felony would be sufficient.

26 MR. SANGER: Yes, I think it would be
27 probably required, but it would certainly be

28 sufficient. 12575

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1 THE COURT: Well, let's see. A misdemeanor
2 is not a necessarily-included of the felony, so I
3 guess we'll go with the felony instruction.
4 That being the case, then that language is
5 okay.

6 And then 9.70 is "Child abduction."

7 MR. SANGER: They've changed 9.70 to put in
8 an introductory paragraph in the latest version, and
9 I think that's probably a good addition.

10 THE COURT: All right.

11 9.72?

12 MR. SANGER: That appears to be a correct
13 statement directly from CALJIC. And the bracketed
14 material that was removed is appropriately removed.

15 THE COURT: That they took out "right to
16 custody" and "abduct." "Abandonment," I mean.

17 MR. SANGER: That's correct.

18 THE COURT: And that's good. You agree with
19 that?

20 MR. SANGER: Yes.

21 THE COURT: Okay.

22 And then 9.73? Okay. I'll give that.

23 MR. SANGER: That is according to CALJIC,
24 9.73. I withdraw any consent to it if we did, and I
25 would object to it on the grounds that it's
26 misleading. And it's misleading because it doesn't
27 say it's not a defense if the other elements are

28 met. 12576

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1 THE COURT: Okay. I'll give that.

2 10.41, "Lewd act with a child under 14."

3 That looks like it's the same, doesn't it? You

4 didn't change that, Mr. Franklin?

5 MR. FRANKLIN: No, Your Honor.

6 MR. SNEDDON: Just removed the brackets.

7 THE COURT: Okay. I'll give that.

8 10.60 -- did you take out 10.43 for some

9 reason?

10 MR. SANGER: They withdrew .43 and .44.

11 THE COURT: So they're withdrawn.

12 MR. SNEDDON: May I have a second, Your

13 Honor?

14 Right, those don't apply to the facts of our

15 case. I'm sorry. Those don't apply to the facts of

16 our case.

17 THE COURT: 10.43 and 10.44 are withdrawn.

18 10.60, "Sexual crimes - Corroboration not

19 necessary," I'll give that.

20 10 --

21 MR. SANGER: Can I indicate that we

22 withdraw -- I'm sorry to be just a step behind you,

23 but it's hard to keep up. I'm trying to compare

24 both of these.

25 On 10.60, we would withdraw our request and

26 object to that.

27 THE COURT: 10.61, I don't have that. Did I

28 have that? 12577

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1 MR. SANGER: It was withdrawn by the

2 prosecution in the latest set.

3 THE COURT: Okay.

4 MR. SANGER: And we would object to it.

5 THE COURT: So I won't give that.

6 MR. SNEDDON: Yeah, I don't think it

7 applies.

8 THE COURT: 10.64, "Cautionary instruction -

9 Child abuse/rape trauma syndrome," I'll give that.

10 MR. FRANKLIN: Your Honor, we don't remove

11 the "rape trauma syndrome" language in the heading.

12 The Court might want to consider doing that.

13 THE COURT: All right. Would you do that?

14 MR. SANGER: And we do object -- I'm just

15 trying to keep track, Your Honor, I'm sorry, here.

16 We would -- no, never mind. We'll submit it.

17 THE COURT: Okay. I'll give that.

18 And it's in the heading, just what they're

19 talking about.

20 MR. BEEBE: All right.

21 THE COURT: 10. -- or 14.70, "Extortion."

22 MR. SNEDDON: Judge, I think the Court needs

23 to know ahead of time that the last paragraph of

24 that instruction was added. It's language that was

25 similar to an instruction given to the grand jury

26 defining what a thing of value is, but that is not

27 part of the standard instruction in 14.70.

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28 MR. FRANKLIN: Your Honor, I believe that 12578

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1 part of the grand jury record includes not only that
2 instruction, but also the authority that we had
3 mustered for that particular language. If that's
4 not a part of it or not available to you, I can make
5 that available to you promptly.

6 MR. SANGER: Well, we'd object to the
7 addition of the paragraph. As I'm reading it
8 here --

9 THE COURT: Well, let's do this: I'll give
10 14.70 on -- No. 2, "In order to prove this crime,
11 the following elements must be proved: One, a
12 person obtained property from the alleged victim.
13 And two, the property" -- let's put "the thing of
14 value" or "something of value." Let's put
15 "something of value" there. The "something of
16 value" -- well, let's see. "A person obtained
17 something of value from the alleged victim." And
18 then the second one, "The something of value was
19 obtained with the consent of the alleged victim."
20 And then the final sentence, No. 4, "Victim
21 to consent to the giving up of his or her thing of
22 value."
23 Then if you want to submit a special on that
24 other issue, with authorities attached, we're going
25 to take a break now, and I'll give you ten minutes
26 to go do that. But I won't put it in as part of
27 this instruction. Okay?

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1 THE COURT: Okay. 16 point -- or 10.64, I
2 think we agreed to give that one, right?

3 MR. SANGER: Okay.

4 THE COURT: I changed it. Yeah, I just
5 changed it, and then there was going to be a
6 possible addition.

7 MR. SANGER: I'm sorry, I'm completely lost.
8 We're on 14.70, and you went back to 10-something.

9 THE COURT: No, I misspoke, and then I said
10 14.70.

11 MR. SANGER: I'm sorry, I didn't hear you.

12 THE COURT: I did go -- I mis...

13 All right. 14.71, I'll give that.

14 MR. SANGER: That's the new one?

15 THE COURT: Yes.

16 MR. SANGER: The one line. The one
17 sentence.

18 THE COURT: Yes. I'm going by his new ones
19 as best I can.

20 14.72, "Unlawful injury," I'll give that.

21 And now I have 14.73.

22 MR. SANGER: Submit it.

23 THE COURT: Which I didn't have before, I
24 guess.

25 MR. SANGER: We did.

26 THE COURT: Did you?

27 MR. SANGER: But the new one looks

28 appropriate. 12580

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1 THE COURT: Is it okay?

2 MR. SANGER: Yes, sir.

3 THE COURT: All right. And then I have

4 14.74.

5 MR. SANGER: I can see there's a typo.

6 There's a number of brackets eliminated and so

7 forth. We need a minute to figure that out, if we

8 could, please.

9 THE COURT: Yeah. "...threatened ora third

10 person"?

11 MR. SANGER: "Ora."

12 THE COURT: "Ora."

13 MR. SANGER: And I guess the number "1"

14 should be removed, since --

15 THE COURT: Yeah. So take out the number "1"

16 and the -- put a space in, "...or a third person."

17 And then it appears to be all right. I'll give that

18 with those corrections.

19 16.135?

20 MR. SNEDDON: That's withdrawn.

21 THE COURT: Withdrawn.

22 17.02.

23 MR. SANGER: Yes.

24 THE COURT: That's withdrawn? Or that's the

25 new one. There was a 17.03.

26 MR. SANGER: Well, 17.02 was not requested

27 originally, but --

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1 MR. SANGER: -- but it is now.

2 MR. SNEDDON: It needs to be given.

3 MR. SANGER: It is now and it should be
4 given, right.

5 THE COURT: Okay. And 17.03 should not be
6 given, right?

7 MR. SNEDDON: Correct.

8 MR. SANGER: I believe that's true, yes.

9 THE COURT: So that's withdrawn.

10 MR. SANGER: 17.10, do we have a -- 17.10
11 was submitted originally and then it's been
12 withdrawn.

13 THE COURT: Is that correct?

14 MR. SNEDDON: It should be given, though.

15 MR. SANGER: But I think it should be given,
16 and it should be tailored to meet the particular
17 lesser.

18 THE COURT: Okay. What we'll put on that,
19 17.10, is - and this has to be filled out - "If you
20 are not satisfied beyond a reasonable doubt that the
21 defendant is guilty of the crime charged, you may
22 nevertheless convict him of any lesser crime if you
23 are convinced beyond a reasonable doubt that the
24 defendant is guilty of the lesser crime."

25 MR. SANGER: It should say "a" lesser crime.

26 But it's not a big deal. Oops.

27 THE COURT: "The crime of furnishing alcohol

28 to a minor is lesser to that of administering an 12582

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1 intoxicating agent to a minor charged in Counts
2 7 through 10."

3 And then down at the bottom, we'll reiterate
4 the Counts 7 through 10.

5 The next one is --

6 MR. SANGER: And we agree to that, without
7 waiving the objection to the lesser, but we agree
8 that that's otherwise correct.

9 THE COURT: 17.12, that hasn't been filled
10 in. Does that have to be given now?

11 Mr. Sneddon, does 17.12 have to be given
12 now?

13 MR. SNEDDON: I think it does, Your Honor.

14 And I do not believe, in the packet of the verdict
15 forms, there was a lesser-included, so I'll have to
16 do that.

17 THE COURT: Okay. Do you want to get
18 somebody working on that?

19 MR. SNEDDON: Well, as soon as Mr. Franklin
20 comes back from the other thing, I'll send him up to
21 start on that one.

22 THE COURT: Okay. And then there's 17.24.1.
23 17.24.1 is the enhancement allegation, substantial
24 sexual conduct.

25 MR. SANGER: That's under 1203.066 --

26 THE COURT: Yeah.

27 MR. SANGER: -- I take it.

28 THE COURT: I think that's the proper -- but 12583

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1 there will be a finding included in the form for
2 that.

3 Then 17.30, "Jury not to take a cue from the
4 judge," we'll give that.

5 17.31, "All instructions not necessarily
6 applicable," we'll give that.

7 17.32 --

8 MR. SANGER: That should not be given. I
9 guess both sides thought Your Honor was going to be
10 more vociferous.

11 THE COURT: Don't you think this would be a
12 good case for me to --

13 MR. SANGER: Maybe.

14 THE COURT: All right. I'll reject that.

15 MR. SANGER: Your Honor, you realize we're
16 all speaking in code to the extent that nobody in
17 the court knows what we're talking about.

18 THE COURT: Oh, yes. The instruction 17.32
19 is an instruction that the judge may comment on the
20 evidence, which in England is done regularly by
21 judges, and in the United States is not done very
22 often by judges. In fact, in my career I only had
23 one judge do that, and he was reversed for doing it.
24 So it's not something I would have ever done or
25 intend to do this time.

26 MR. SANGER: I did remark, Your Honor, that
27 if we had televised today's proceedings, we could

28 have deterred an entire generation of kids from 12584

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1 going to law school.

2 THE COURT: Okay. And 17.31, "All
3 instructions" -- oh, 17. -- 17.31, "All instructions
4 not necessarily applicable."

5 MR. SANGER: That was already in there.

6 THE COURT: Okay. And then 17.40.

7 MR. SANGER: 17.40.

8 Oh, wait, 17.32 we did do, which is --

9 MR. SANGER: That's the one you're not
10 giving.

11 THE COURT: When the judge does not comment
12 on the evidence. And then --

13 MR. SANGER: I'm sorry, Your Honor, maybe
14 I'm losing it, here.

15 THE COURT: They didn't put it in their
16 new --

17 MR. SNEDDON: Which one, Judge?

18 MR. SANGER: .30 you gave. .31 you gave.
19 .32 you're not giving, I believe.

20 THE COURT: No. .31 I'm giving.

21 MR. SANGER: Yes.

22 THE COURT: 17.32 is -- I have not --

23 MR. SANGER: This is the one you're not
24 giving.

25 THE COURT: All right. You're right.

26 17.40. There is one that I did that says I
27 am not --

28 MR. SANGER: That's .30. 12585

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1 THE COURT: That's .30. Okay.

2 17.40 --

3 MR. SANGER: I think that's correct.

4 THE COURT: -- I'm giving. 17.41 I'm giving.

5 17.42 I'm giving. 17.43 I'm giving.

6 MR. SNEDDON: Judge, we didn't know -- on

7 the second paragraph there, on 17.45, we didn't know

8 exactly what format the Court was going to be giving

9 these in, but that may be that that should be

10 deleted, because it looks like the Court's going to

11 be giving clean copies to all the jurors.

12 MR. SANGER: Well, actually, the whole thing

13 should be changed, given the Court's proposed course

14 of action.

15 THE COURT: Yeah.

16 MR. SANGER: I think we should say the

17 jurors will each be given their own copy of the jury

18 instructions which they may mark on if they wish.

19 There will be one official copy of the jury

20 instructions which shall not be defaced in any way.

21 That's what you have to tell them, I think.

22 THE COURT: Yeah, I think you're right. This

23 we should give at the beginning of the instructions,

24 though, instead of the end.

25 MR. SANGER: Yes, that's a good idea.

26 THE COURT: Let's come back. We'll modify

27 that a little bit.

28 And 17.47, "Admonition against disclosure of 12586

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1 jury balloting."

2 Are they going to receive a separate verdict
3 form on each of the crimes? I guess. So I'll give
4 17.49.

5 And 17.50 I'll give, "Concluding instruction
6 on selecting a jury foreperson."

7 MR. SANGER: 17.49, I didn't see -- where's
8 .49? Let me just see, here.

9 I'm sorry to go backwards, Your Honor, but
10 on 17.49, the one currently submitted by the
11 prosecution does not take into account the lesser-
12 included, and I think that language has to be put
13 back in there.

14 THE COURT: I think it's all right, though,
15 as long as the return of the -- the one we still
16 have to have, the partial verdict form instruction,
17 is complete.

18 MR. SANGER: Maybe it's because it's the end
19 of the day, but does that cover --

20 MR. SNEDDON: I think this needs to be
21 given, because what will happen is if, on the lesser
22 part, if you don't give it, they may sign it
23 thinking that if they've convicted on the larger,
24 they're supposed to sign on the smaller also, and
25 it's a matter of clarification for them in terms of
26 what their role is in terms of the lesser and the
27 larger.

28 THE COURT: Do you mean -- you're talking 12587

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1 about 17 --

2 MR. SNEDDON: .49. I thought that's what

3 Mr. Sanger was talking about.

4 MR. SANGER: Yeah, 17.49.

5 THE COURT: He just wondered if there should
6 be a statement of the lesser-included in that
7 paragraph. It says, "You've been charged with one
8 count of conspiracy, four counts of lewd act upon a
9 child, one count of attempted lewd act and four
10 counts of administering an intoxicating agent."

11 MR. SNEDDON: Well, I understood that he was
12 also suggesting that the second larger paragraph be
13 reinserted, because it was not in there.

14 THE COURT: Oh. I don't have that.

15 MR. SNEDDON: No, sir. That's because we
16 didn't envision lessers at the point in time.

17 THE COURT: So you think it should go in now?

18 MR. SNEDDON: I do, Your Honor. I think
19 that's what counsel was talking about, and I do
20 agree with him. The language is, "Since a lesser
21 offense is included in the greater, you are
22 instructed that if you find the defendant guilty of
23 the greater offense, you should not complete the
24 verdicts on the corresponding lesser offense."

25 THE COURT: Okay.

26 MR. SNEDDON: "And those should be returned
27 to the Court unsigned." I think that's important.

28 Otherwise, they may misconstrue the way the verdicts 12588

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1 operate.

2 And I'm not suggesting the last paragraph be
3 left out. I'm just trying to direct them where --

4 MR. SANGER: The last paragraph would be
5 more beneficial to the defendant, so there's one for
6 each side there, and both should be in.

7 MR. SNEDDON: I agree. I just wasn't going
8 to read the whole thing.

9 THE COURT: So now you want us to put in the
10 entire instruction as it appears in the book?

11 MR. SANGER: I think if we have a lesser, I
12 think you should do that. That's what he's saying.

13 THE COURT: "Separation admonition."

14 "The admonition to alternate jurors" I'll
15 give, 17.53.

16 MR. SANGER: You're way ahead. You said
17 17.50?

18 THE COURT: Yes.

19 MR. SANGER: That's where I was, 17.50. Did
20 you go beyond that, Your Honor?

21 THE COURT: Yes. 17.52.

22 MR. SANGER: Okay.

23 THE COURT: And 17.53. And then there's this
24 post-verdict admonition, which I won't give to them
25 in their package now.

26 MR. SANGER: Right.

27 MR. SNEDDON: Judge, this is sort of a new

28 CALJIC, CALJIC 17.54. I didn't request it. I just 12589

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1 happened to notice it, but the basics of it is that
2 people not take cell phones into the jury
3 deliberation room.

4 THE COURT: They're not allowed to bring in
5 cell phones now.

6 MR. SNEDDON: Okay. This is a new
7 instruction. I mean, I just didn't know whether --
8 it looks like the problem's taken care of. We don't
9 need to give it.

10 THE COURT: What number is it?

11 MR. SNEDDON: 17.54. And they cite a case,
12 but --

13 MR. SANGER: It replaced the old one that
14 had to do with bringing Ouija boards in.
15 I don't think it's mandatory. In fact, it
16 says if you're going to do it, you should do it as
17 part of the preinstruction back in the beginning of
18 the case under 0.50. But if the court staff and the
19 bailiffs are not allowing the jurors to have cell
20 phones to start with I think saves the problem.
21 Whatever the Court wants to do.

22 THE COURT: That's the case, isn't it,
23 Leslie?

24 THE BAILIFF: It is. They do not have cell
25 phones.

26 THE COURT: I should give 17.47, too. Did I
27 give that? Yeah, I did. Okay.

28 CALJIC 16.0.10 -- .010? 12590

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1 MR. SNEDDON: We withdrew that.

2 THE COURT: Well, but where we were -- where
3 are we going to put it in the --

4 MR. SNEDDON: Oh, is that the B&P one?

5 THE COURT: I read it earlier.

6 MR. SNEDDON: Is that the B&P one, Your
7 Honor?

8 MR. SANGER: Yes.

9 MR. SNEDDON: Oh, I'm sorry. I was thinking
10 of another one.

11 THE COURT: I read to you what I would do,
12 and then we needed the -- that should go, what,
13 right next to the other charges? What number are
14 they?

15 MR. SNEDDON: Well, you could put it right
16 after your instruction on the lesser-included
17 offense.

18 MR. SANGER: Do you mention --

19 THE COURT: Well, we had -- there's 222,
20 which is a special also.

21 MR. SANGER: Yeah, I'm not seeing 222.

22 That's the problem.

23 THE COURT: That's where it goes. Did you
24 see it? Did you not get it?

25 MR. SANGER: I can't say I didn't. I cannot
26 say I did not get it, but I do not have it.

27 THE COURT: It was in your original package,

28 but it's not in your new package, Mr. Sneddon. 12591

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1 MR. SNEDDON: I'm sorry, Your Honor, what

2 section is that?

3 THE COURT: 222, which is the Penal Code

4 Section 222 special, "...administers to another any

5 intoxicating agent with intent to...", and that's

6 the one that this lesser should be with.

7 I'm going to put it right after -- both of

8 those right after the extortion, but I don't

9 understand. Your instruction has "Elements," and

10 then nothing after that. Have you seen it?

11 Do you both want to approach?

12 MR. SANGER: Yes.

13 (Discussion held off the record at sidebar.)

14 THE COURT: Tracy?

15 And then the furnishing, that goes behind

16 it.

17 MR. SANGER: In between those two, would you

18 not put 17.10?

19 THE COURT: Put what?

20 MR. SANGER: 17.10, in between the --

21 THE COURT: Do you mean 17.12?

22 MR. SANGER: No, 17.10.

23 THE COURT: Lesser-included. Okay.

24 MR. SANGER: Now, did that 222 start out

25 with, "In the crimes charged in Counts 7 to 10"?

26 THE COURT: No, it says, "Any person who

27 administers to another any" --

28 MR. SANGER: I think it should start out -- 12592

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1 because that was the typical introductory paragraph.

2 Just a paragraph that says, "In the crimes
3 charged...." How does it start out in the other
4 ones? Not the conspiracy ones, but the others?

5 THE COURT: No, it doesn't.

6 MR. SANGER: Well, for instance, 10.41, "The
7 defendant's accused in Counts so and so" --

8 THE COURT: 9.70 just says, "Defendant is
9 accused in Count 1 of...." Is that what you're
10 talking about?

11 MR. SANGER: Yeah. So we need to say, "The
12 defendant is accused in Counts 7 through 10 of" --

13 THE COURT: Okay.

14 MR. SANGER: -- whatever it's called.

15 THE COURT: Did you get that?

16 Look at the extortion one, or the child
17 abduction one, and you'll get the opening sentence
18 to it.

19 MR. SANGER: Not quite, because that says
20 "conspiracy to commit," I think.

21 THE COURT: Okay.

22 MR. SANGER: So it should just be "the crime
23 of." I was looking at 10.41 as being a good
24 example. "The defendant's accused in Counts 2, 3, 4
25 and 5." Here it should be, "The defendant's accused
26 in Counts 7, 8, 9 and 10."

27 THE COURT: Now, I think what we have left

28 are the specials; is that right? 12593

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1 MR. SANGER: Yes, sir. And then also --
2 those also may or may not have an impact on a few of
3 the instructions we tabbed.

4 THE COURT: Okay.

5 MR. SANGER: We have Special No. 1.

6 MR. SNEDDON: Which ones?

7 MR. SANGER: Those are your original
8 instructions, and I think the Court considered that
9 way back when, when the thing was played.

10 THE COURT: And we did a -- do you have the
11 transcript, Tracy or Jed, of the instruction I
12 actually gave when it was played?

13 MR. BEEBE: Yes.

14 THE COURT: I had it this morning. Because
15 we took part of yours and part of the district
16 attorney's at that time.

17 MR. SANGER: When the Court's ready, I would
18 like to be heard briefly on this theory that I think
19 Your Honor was rejecting, but we --

20 THE COURT: Wait till we get to it. We
21 haven't done it. I was just indicating my feelings.

22 MR. SANGER: Okay.

23 THE COURT: Okay. On Special Jury
24 Instruction No. 1, I'm willing to give that
25 instruction, without the middle paragraph, in this
26 form: "The video of 'Living with Michael Jackson'
27 is not offered for the truth of anything said or

28 shown in the program, with the exception of certain 12594

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1 identified passages. You will receive additional
2 instructions with regard to those identified
3 passages. The rest of the contents of the video is
4 hearsay and cannot be considered by you to prove
5 anything other than the fact that the program aired
6 in February of 2003 and its likely impact on Mr.
7 Jackson's state of mind."

8 And then skip the middle paragraph, and
9 then, "You should not be biased, prejudiced or
10 influenced in any way by the content of the video or
11 by its commercial packaging. Except for the limited
12 specific statements that the Court will instruct
13 you" -- "Except for the limited specific statements
14 that the Court will instruct you may be considered,
15 the remainder of the program should only be
16 considered for the fact that it aired and its impact
17 on Mr. Jackson."

18 MR. SANGER: Can we say "its impact, if
19 any," on Mr. Jackson?

20 THE COURT: Yes.

21 MR. SNEDDON: Judge, may I make a comment?

22 THE COURT: Yes.

23 MR. SNEDDON: I thought the additional
24 circumstantial basis for the admission of it was to
25 show the motive for the crime, of the conspiracy.
26 And that goes a little bit beyond merely Mr.
27 Jackson's -- any impact, if any, on Mr. Jackson's

28 state of mind. It goes to the actual motive for 12595

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1 forming or need to form the conspiracy. So maybe
2 something like "any relevance it may provide, if
3 any, on the motive for the conspiracy," or something
4 like that.

5 MR. SANGER: Well, one way to accommodate
6 it, just to try to accommodate it at the end of the
7 day here, you could say, "its impact, if any, on Mr.
8 Jackson or on other individuals mentioned in the
9 course of the trial."

10 But then if you say that, then we should
11 say, "It is up to you to determine what
12 significance, if any, to place on this evidence."

13 THE COURT: Isn't there somewhere else in the
14 instructions that we discussed the motive as --

15 MR. SNEDDON: Yeah, there's a general
16 instruction on motive, which is, I think, 2.51, but
17 you're actually -- in this one, you're being very
18 specific about this piece of evidence and what the
19 limited purpose of it is.

20 THE COURT: When I say "its likely impact on
21 Mr. Jackson's state of mind," aren't we saying that
22 then you can argue that the impact is motive? I
23 mean, should I have "motive" in the instruction if
24 I'm saying that it was introduced to show the impact
25 on him?

26 MR. SNEDDON: I just didn't want to get in
27 the position, Your Honor, of having someone stand up

28 and make an argument and start talking about motive 12596

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1 in this connection and then saying, you know, it's
2 really for his state of mind in terms of whether he
3 was angry or upset about the production.

4 THE COURT: No, I think that's one of the
5 states of mind. That's what we're talking about is
6 in his state of mind of whether or not that was a
7 motive to do certain things that you allege he did
8 based on that video.

9 MR. SNEDDON: Well, I'm comfortable with
10 what the Court's saying as long as everybody
11 understands that. I just didn't want to have to
12 argue an objection on that, because I think that was
13 one of the underlying reasons.

14 THE COURT: Okay.

15 MR. SANGER: All right. I under -- I think
16 that -- I think that's sufficient and it can be
17 argued.

18 THE COURT: Okay.

19 MR. SANGER: Do you want to have our office
20 retype this?

21 THE COURT: No, I think we'll do it.

22 (To Mr. Beebe) Do you have a problem?

23 MR. BEEBE: We're not clear what the
24 language is now.

25 THE COURT: It's exactly what's here except
26 where I wrote in "if any" in red.

27 MS. SPLITGERBER: Okay.

28 MR. SNEDDON: Judge, when you say "exactly 12597

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1 what's here," that's different from the defense
2 instruction, correct?

3 THE COURT: Right. It's what I just read.

4 MR. SNEDDON: Yeah. Thank you.

5 THE COURT: Now, the second instruction
6 was --

7 MR. SANGER: It might be helpful to look at
8 proposed Instruction No. 5 because I think that --

9 Special Instruction No. 5 would follow this
10 instruction.

11 THE COURT: Well, okay. I'm just going to
12 reject Special Instruction No. 2. So I'm giving No. 1.
13 as modified. Reject 2. Refuse 2.

14 And then we go to the ones you filed this
15 morning. No. 3, I'll give No. 3.

16 MR. SNEDDON: Your Honor, may I be heard on
17 that?

18 THE COURT: Yes.

19 MR. SNEDDON: Judge, I think that's a
20 misstatement of the law. And I'll tell you -- first
21 of all, I object to the use of the word
22 "government." Second of all -- I mean, I don't see
23 one CALJIC instruction that uses the word
24 "government" anywhere in it.

25 But second of all, I don't believe that it's
26 the law that the jury necessarily has to agree to
27 the particular set of facts that make up the

28 charges. For instance, let me just give you an 12598

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1 example. If all the jurors agree that Mr. Jackson
2 placed his hands inside of the child's pants, it's
3 not necessary for the jury to agree that he had
4 underpants on at that time or he had pajamas on at
5 that time, or he had a shirt on at that time or he
6 didn't have a shirt on at that time, or that Mr.
7 Jackson had his socks on at that time or he didn't
8 have his socks on at that time.

9 And I think that's what's misleading about
10 this, and that's what happens when you stray from
11 the standard instructions, and this is a very
12 misleading instruction.

13 MR. SANGER: Well, nothing happens if you
14 stray from the standard instructions if they don't
15 cover the law. If they don't cover the law it's
16 reversible, so we have to do something in light of
17 Blakely and Apendi and the cases after it that
18 there has to be unanimity, particularly when the
19 charges are alleged in such a broad fashion. So the
20 prosecution has to, in essence, opt for a set of
21 facts.

22 I would agree with Mr. Sneddon, of course,
23 it doesn't, you know, matter -- the details don't
24 matter as to whether or not the jury agrees on the
25 set of facts that make up the elements. But you
26 can't have one -- you know, six jurors agreeing to
27 one occurrence, and another six jurors agreeing to

28 another occurrence, and particularly in a case like 12599

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1 this where you've had a lot of descriptions. You
2 haven't had consistent descriptions for these
3 various offenses. You can't have, say, one set of
4 jurors saying, "Well, let's see, I believe that
5 Star's story was correct and I don't believe
6 Gavin's," and the other saying the other way around.
7 Either it's -- so we have to accommodate that
8 somehow.

9 MR. SNEDDON: Well, I think the standard
10 instruction does that. It tells them they have to
11 deliberate on each -- each count separately and
12 arrive at a decision on each count separately.

13 MR. SANGER: It says, "...particular set of
14 facts as alleged in a particular count," so, I mean,
15 that is saying it's the facts alleged in the count.

16 THE COURT: Let me -- no one say anything.
17 We're off the record.

18 MR. SNEDDON: Oh, okay.

19 (Discussion held off the record at sidebar
20 between the Court and the court reporter.)

21 THE COURT: Where's a -- Commander? If I
22 take a ten-minute break and go for another half hour
23 after that, what's it going to do to you?

24 COMMANDER MEYER: No problem.

25 THE COURT: We can do it?

26 Okay. I just want to take ten minutes. And
27 this is a pretty serious part where we are, the last

28 six instructions. I don't want to rush them, and 12600

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1 the court reporter's consented to work. She's the
2 one that's the most affected by this, next to
3 security. So let's take ten, and a short break, and
4 then we'll come back and deal with the -- and maybe
5 you'll have your things by then.

6 MR. SNEDDON: I've got the verdicts already.

7 I'll give them to you.

8 THE COURT: And the changed instructions?

9 MR. SNEDDON: Jerry's working on it.

10 (Recess taken.)

11 THE COURT: What I'm feeling is I can't
12 really finish the instructions the way I want to do
13 it, and I don't like working under the pressure of
14 worrying about other people here and myself. I'm
15 not satisfied with any of the specials proffered by
16 the defense. But I feel that we have not -- none of
17 us have put together a good jury instruction on the
18 tapes, all of the tapes.
19 We have four tapes that they have watched,
20 and there's some very limited uses that each of
21 those tapes can be used for, and there's no
22 instruction here that adequately guards against
23 misuse. So I'm not -- I'm not going to proceed.
24 I'm not going to go all this distance and then try
25 to rush, in half an hour, to get something done that
26 needs to be done.

27 MR. SANGER: Can I add something to the

28 Court's concern? 12601

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1 THE COURT: Yeah.

2 MR. SANGER: And I hate to be the bearer of
3 these tidings. We were looking at the lesser-
4 included, which we objected to. And since we
5 objected, I suppose I could just leave it on the
6 record like that, but as I was talking to Mr.
7 Dunkle, he had the added observation that actually
8 222 doesn't have the same elements, because 222
9 doesn't require a minor.

10 And remembering case law on lessers, where
11 it has to be exactly the same elements, minus one or
12 two, it's -- that's an issue. And then furnishing
13 is not the same as administering.

14 So I want to give the Court a fair
15 opportunity on that. I didn't want to not mention
16 it, but if we are going to have to change that,
17 that's something that's going to be more than a two-
18 minute change to go back.

19 THE COURT: Yeah. Well, and I haven't also
20 got to review the materials that you typed in a
21 hurry and brought down, and the verdict forms, and
22 since I'm putting packages together for the whole
23 jury, I don't want to be doing it at the last
24 minute.

25 I think what I should do is continue the
26 jury instruction conference until tomorrow morning
27 at our regular time. Then the question becomes,

28 when do I have the jury come back in? And I could 12602

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1 have them come in at noon, at our normal noon
2 recess. That would give me an hour. If I
3 instructed from, you know, around 10:00 to 12:00
4 till -- reading these instructions is probably going
5 to take over an hour. So that would put me at one
6 o'clock or so.

7 And then that would start Mr. Sneddon with
8 his argument. Or I could have you come back in and
9 do your argument on Thursday morning. But it seems
10 to me even bringing the jury in just to instruct
11 them is worth it, considering trying to get the case
12 out by Friday, late Friday, that it would be a wise
13 thing for me to at least instruct tomorrow.

14 MR. SANGER: That seems like a good idea,
15 and it does seem that there's probably nothing wrong
16 with the jury just getting the instructions on the
17 law one day. It has --

18 THE COURT: It's not a very good use of time,
19 but considering that we want to do this right and
20 not be rushed into decisions that are not good ones,
21 I think that's what we'll do.

22 MR. SNEDDON: Judge, my preference would be
23 to have us not start argument after you give the
24 jury instructions tomorrow, and I guess part of that
25 still has to do with what -- whether there is or is
26 not any time limitations that might drive that
27 decision, too, which we have not decided, and which

28 we really need to come to grips on, but I don't 12603

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1 think we need to keep all the staff here to do that.

2 THE COURT: No.

3 Well, we can -- I think what we'll do is
4 recess and let everyone go. I'll have one attorney
5 from each side come back and we'll discuss time
6 limitations on your argument, and then I'll work on
7 the rest of these instructions. And we'll start at
8 8:30 tomorrow morning.

9 MR. SANGER: Just before you break, on the
10 issue of the -- what comes in for the truth of the
11 matter on the tapes --

12 THE COURT: Yes.

13 MR. SANGER: -- could I just be heard on
14 that very briefly? And I know it's keeping staff.
15 I'm sorry.

16 But we did try to go through and outline
17 what would be relevant. The problem with doing that
18 is that even if we were to agree - or it doesn't
19 matter if we don't agree, the Court decides - then
20 the Court has to sit there and read that to the
21 jury, which then has the effect of unduly
22 emphasizing both sides. I mean, it's -- you know,
23 you're reading specific statements of Mr. Jackson
24 either from the Bashir tape or from the outtakes.
25 And that's why -- it was not out of
26 laziness. It was after reflecting on it, that if
27 you can do it generically, what ultimately in this

28 case would be the harm? I mean, there's very 12604

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1 limited statements in the Bashir tape that pertain
2 to Mr. Jackson's relationship with children, which
3 is what the prosecution wants to bring in, and it
4 has to be statements of Mr. Jackson and relating to
5 children, and there are pretty much identifying
6 statements in the outtakes.

7 I don't think there's a big danger in doing
8 it that way, and what it really avoids is the Court,
9 you know, having to read from both tapes and unduly
10 emphasizing the text. So I just wanted the Court to
11 understand that was our theory behind it.

12 Now, if the Court wanted to have the parts
13 that we believe should be read by the Court from the
14 outtakes, we could --

15 THE COURT: I never asked to have the
16 material given to me so that I could read it to
17 anybody.

18 MR. SANGER: Okay.

19 THE COURT: It never was my intent. It was
20 so that I could see what the District Attorney was
21 going to argue were admissions so that I would have
22 a sense of what I could allow you to put in, to show
23 the complete context of those statements, which is
24 what you're -- I think you're allowed to do, but I
25 never thought you were lazy either. I thought you
26 were -- you thought it over and you thought, "Well,
27 it would be good if everything he ever said about

28 children could be taken for the truth of the matter 12605

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1 asserted," and I just didn't think that was a good
2 way to approach it.

3 MR. SNEDDON: Judge -- well, I do need to
4 make a statement about that. The reason I think
5 it's very important for us to have some agreement
6 and consensus on what statements do constitute the
7 admissions part is that so, during the course of the
8 arguments, if the defense attempts to use something
9 for the truth of the matter, there is some
10 guidelines as to what it is the Court recognizes is
11 hearsay and not hearsay.

12 So there's another reason for us -- for you
13 to decide that, not to read to the jury, but that
14 both sides know what the boundaries are, so --

15 THE COURT: I agree.

16 MR. SNEDDON: Okay. Thank you.

17 THE COURT: There's a preliminary
18 determination that is not binding on the jury,
19 because ultimately whether something is an admission
20 or not is up to them.

21 MR. SNEDDON: Correct.

22 THE COURT: But the Court has the duty of
23 making a preliminary look at the material and not
24 allow them to be considering admissions that aren't
25 admissions.

26 So then we'll see -- well, first of all, two
27 of you come back on the time issue, and other than

28 that, we're through for the day. 12606

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1 THE BAILIFF: 12:00 for the jury.

2 THE COURT: That's what time they're in the

3 courtroom, not when they're supposed to get there.

4 So having them here at 11:30 might be the right time

5 to have them.

6 (The proceedings adjourned at 2:55 p.m.)

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1 REPORTER'S CERTIFICATE

2

3

4 THE PEOPLE OF THE STATE OF)

5 CALIFORNIA,)

6 Plaintiff,)

7 -vs-) No. 1133603

8 MICHAEL JOE JACKSON,)

9 Defendant.)

10

11

12 I, MICHELE MATTSON McNEIL, RPR, CRR, CSR

13 #3304, Official Court Reporter, do hereby certify:

14 That the foregoing pages 12506 through 12607

15 contain a true and correct transcript of the

16 proceedings had in the within and above-entitled

17 matter as by me taken down in shorthand writing at

18 said proceedings on May 31, 2005, and thereafter

19 reduced to typewriting by computer-aided

20 transcription under my direction.

21 DATED: Santa Maria, California,

22 May 31, 2005.

23

24

25

26

27 MICHELE MATTSON McNEIL, RPR, CRR, CSR #3304

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