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

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs,

vs.

MICHAEL JOSEPH JACKSON,

Defendant.

) Case No. 1133603

) MR. JACKSON'S REPLY IN SUPPORT OF
) MOTION IN LIMINE TO LIMIT
) UNCHARGED CONSPIRATOR HEARSAY
) AND ACCOMPANYING DOCUMENTS

) Honorable Rodney S. Melville

) Date: January 28, 2005

) Time: 9:30 a.m.

) Dept: SM 2

) ~~FILED UNDER SEAL~~

REPLY IN SUPP OF MOTION IN LIMINE TO PRECLUDE REFERENCE TO MATLS AS [REDACTED]

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

JAN 27 2005

GARY M. CLARK, Executive Officer

BY *Carnie L. Wagner*
CARNIE L. WAGNER, Deputy Clerk

1 **A. Introduction**

2 Mr. Michael Jackson submits this Reply in support of his Motion in Limine to Preclude Reference
3 to Co-Conspirator Hearsay. Mr. Jackson's Motion in Limine seeks to exclude any reference to hearsay
4 statements from unindicted co-conspirators unless and until plaintiff establishes by independent evidence
5 the existence of the alleged conspiracy. That showing, while made to the jury, must be approved by the
6 court as sufficient to establish the preliminary fact of the conspiracy by a preponderance of the evidence
7 standard. In the alternative, the court may hold a section 402 preliminary fact hearing to establish the
8 existence of the conspiracy by independent evidence sufficient to sustain a finding by a preponderance of
9 evidence.

10 **B. Uncharged Conspirator Hearsay Should Not Be Permitted Unless and Until Plaintiff**
11 **Establishes by Independent Evidence the Existence of the Alleged Conspiracy.**

12 Plaintiff states that it cannot determine what the "required procedure should be to obtain a
13 determination that sufficient evidence exists to support a finding by the trier of fact by a preponderance of
14 the evidence that a conspiracy was afoot." (Plaintiff's Memo, p. 2, lines 8-10). However, People v.
15 Herrera, 83 Cal. App. 4th 46 (2000), provides the evidence of conspiracy should be presented to the jury
16 independent of any hearsay, and no hearsay may be introduced until the court determines that sufficient
17 evidence of the hearsay has been presented to the jury to sustain the preliminary fact of the conspiracy by a
18 preponderance of the evidence. *Id.* at 62. The procedure is both simple and easily followed because no
19 hearsay is permitted unless and until such a determination is reached by the court.

20 Plaintiff acknowledges Mr. Jackson has the right to request an Evidence Code section 402 hearing
21 as a prerequisite to admission of co-conspirator hearsay. (Plaintiff's Memo, p. 3, lines 9-10). Indeed,
22 Herrera sets forth the proper procedure where the independent evidence needs to be presented to the trier of
23 fact, and then the court makes its section 402 determination based on that presentation and before co-
24 conspirator hearsay can be admitted. Should the court wish a hearing outside the presence of the jury, the
25 court certainly has the discretion to order it, and under the circumstances of this case, such a procedure
26 would not be inappropriate.

27 Plaintiff cites People v. Perez, 83 Cal. App. 3d 718 (1978), for the proposition the court has
28 discretion to admit the co-conspirator hearsay either prior to or following the establishment of the

1 preliminary fact. (Plaintiff's Memo, p. 4, lines 17-21). However, Perez was decided prior to Herrera where
2 the court identified the importance of establishing the alleged conspiracy by independent evidence. That
3 preliminary fact should not be confused with the hearsay, nor should a weak case be bolstered by the
4 hearsay in question. While the court has the discretion to control the order of proof, the preliminary fact
5 should be determined first in order to prevent prejudice from a weak or non-existent conspiracy. Herrera,
6 83 Cal. app. 4th at 62-64.

7 **C. Uncharged Conspirator Hearsay Should Not Be Considered Until the Preliminary Fact of**
8 **the Alleged Conspiracy is Independently Established to the Trier of Fact.**

9 Plaintiff states:

10 "The People will make a formal offer of proof concerning the evidence that, in their view,
11 demonstrate the existence of a conspiracy independent of statements by one or more alleged
12 conspirators that do not come within other exceptions to the hearsay rule (e.g. 'verbal acts' [Evid.
13 Code, sec. 1241]). Plaintiff will ask the court to exercise its discretion regarding the order of proof
14 before the jury and to allow evidence of certain of the co-conspirators' statements to be put before
15 the jury before all of the evidence of the conspiracy independent of those statements has been
16 received." (Plaintiff's Memo, p. 4, line 24 to p. 5, line 4).

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18 However, an offer of proof is not enough to sustain a finding of the preliminary fact, nor in view of
19 the inherently [REDACTED] and [REDACTED] nature of the alleged conspiracy, should this Court determine such a
20 critical fact by an offer of proof. This case is too serious, the repercussions too great, and the danger of
21 [REDACTED] far to [REDACTED] for an offer of proof to suffice. California courts require that the existence of
22 the conspiracy be established by evidence independent to the trier of fact by a preponderance of evidence
23 sufficient to sustain the finding.. People v. Leach, 15 Cal. 3d 419, 430 (1975); People v. Hardy, 2 Cal. 4th
24 86, 139-40 (1992); People v. Herrera, 83 Cal. App. 4th 46, 62-64 (2000).
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1 **C. There is No Prima Facie Evidence of A Conspiracy in This Case.**

2 Mr. Jackson requests the court to remember and to take judicial notice of his Motion for Mental
3 Examination filed November 19, 2004, and the exhibits attached to the motion, including the mental
4 reports of the examinations of [REDACTED]. This complaining mother is a [REDACTED] with
5 [REDACTED] who infuses those [REDACTED] on her children. Plaintiff's suggestion that it will make an
6 "offer of evidence" amounts to the adoption of a [REDACTED].
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8 In People v. Reber, 177 Cal. App.3d 523, 530-31 (1986), the court stated:

9 "The capacity of a witness to observe, recollect and narrate an occurrence is a proper
10 subject of inquiry on cross-examination. If as a result of a [REDACTED] condition such capacity has been
11 substantially diminished, evidence of that condition before, at and after the occurrence ... is
12 ordinarily admissible for use by the trier in passing on the credibility of the witness.' Certain types
13 of [REDACTED] are highly probative on the issue of a witness' credibility. For example, the
14 veracity of one afflicted with a psychosis such as [REDACTED] may be impaired by
15 [REDACTED] in his ability to perceive and recall events; a [REDACTED] who suffers [REDACTED] and
16 [REDACTED] may have difficulty distinguishing fact from [REDACTED]. Where [REDACTED] records
17 contain evidence of such [REDACTED] especially probative of the ability of an important prosecution
18 witness to comprehend and accurately relate the subject of his testimony, the constitutional
19 confrontation clause has been held to prevail over a statutory privilege."
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23 While plaintiff has had no compunction to adopt the [REDACTED] of the [REDACTED] in this case,
24 this court should be more circumspect. A section 402 preliminary fact hearing is mandatory in this case,
25 and in the absence of such a hearing, plaintiff should be prohibited from offering any evidence of co-
26 conspirator hearsay unless and until sufficient independent evidence is presented to the jury to sustain a
27 finding of conspiracy as determined by the court.
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1 **D. Conclusion.**

2 For the foregoing reasons, Mr. Jackson requests his Motion in Limine to Limit Uncharged
3 Conspirator Hearsay be granted.
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5 DATED: January 26, 2005

Respectfully submitted,

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13 By: 

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