

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

FEB - 4 2005

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

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11 **MICHAEL JOSEPH JACKSON**

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

REDACTED

14 THE PEOPLE OF THE STATE OF)
15 CALIFORNIA,)

16)
17 Plaintiffs,)

18 vs.)

19 MICHAEL JOSEPH JACKSON,)

20 Defendant.)

Case No. 1133603

) NOTICE OF MOTION AND MOTION FOR
) RECUSAL OF THE SANTA BARBARA
) COUNTY DISTRICT ATTORNEY'S
) OFFICE (Penal Code, § 1424);
) MEMORANDUM OF POINTS AND
) AUTHORITIES; DECLARATION OF
) COUNSEL

~~UNDER SEAL~~

) Honorable Rodney S. Melville
) Date: ~~February 22, 2005~~
) Time: ~~9:30 a.m.~~
) Dept.: 8

FILED
FEB - 4 2005
CARRIE L. WAGNER
DEPUTY CLERK

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24 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO THE DISTRICT
25 ATTORNEY OF THE COUNTY OF SANTA BARBARA, TOM SNEDDON, AND DEPUTY
26 DISTRICT ATTORNEYS GERALD FRANKLIN, RON ZONEN AND GORDON AUCHINCLOSS:

27 Please take notice that on February 22, 2005, or as soon thereafter as the matter may be heard,
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1 before the Honorable Rodney Melville, defendant Michael Jackson, through his counsel, will and hereby
2 does move to recuse the Santa Barbara's District Attorney's office from this case, for the recusal of
3 District Attorney Thomas Sneddon and Deputy District Attorneys Ronald Zonen, Gordon Auchincloss
4 and Gerald McC. Franklin in the alternative, and for such other relief as the Court may deem just and
5 proper based on Penal Code Section 1424 and the fact that the above-mentioned prosecutors have an
6 actual conflict of interest with the prosecution of the defendant, Michael J. Jackson that is so grave as to
7 render it unlikely that Mr. Jackson will receive a fair trial. This conflict threatens to deprive Mr. Jackson
8 of his federal and state constitutional rights to a fair trial, due process of law, and equal protection
9 pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1,
10 Sections 7, 15 and 24 of the California Constitution.

11 The matter of recusal was previously heard and denied on November 4, 2004. Since that time,
12 however, the circumstances have changed. First, the District Attorney, through his deputy Gordon
13 Auchincloss, has announced that he intends to testify at trial. Second, the matters previously raised are
14 now further illustrated by the conduct of Mr. Auchincloss. Third, the cumulative effect of the other
15 matters, plus this matter, require the remedy of recusal.

16 This motion is based upon this notice, the attached memorandum of points and authorities, the
17 declaration of counsel, the exhibits and evidence lodged with this Court, the file and record herein and
18 any other information presented prior to a ruling hereon.

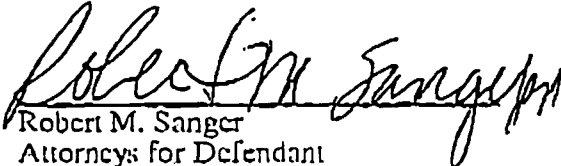
19 Dated: February 5, 2005

Respectfully submitted.

20 COLLINS, MESEREAU, REDDOCK & YU
21 Thomas A. Mesereau, Jr.
Susan C. Yu

22 SANGER & SWYSEN
23 Robert M. Sanger

24 OXMAN & JAROSCAK
25 Brian Oxman

26 By: 
27 Robert M. Sanger
28 Attorneys for Defendant
MICHAEL JOSEPH JACKSON

DECLARATION OF ROBERT M. SANGER

I, Robert M. Sanger, declare:

1. I am an attorney at law duly licensed to practice law in the courts of the State of California, a partner in the law firm of Sanger & Swysen, and co-counsel for Michael Jackson.

2. The matter of recusal was previously heard and denied on November 4, 2004. Since that time, however, the circumstances have changed. First, the District Attorney, through his deputy Gordon Auchincloss, has announced that he intends to testify at trial. Second, the matters previously raised are now further illustrated by the conduct of Mr. Auchincloss. Third, the cumulative effect of the other matters, plus this matter, require the remedy of recusal.

3. On November 8, 2003, Mr. Sneddon met with [REDACTED] behind the Federal Building in Los Angeles for the purpose of securing her signature on victim compensation applications, picking up several items of evidence and showing her a photo lineup of suspects in this case. One of the photos he showed here was of [REDACTED]. Mr. Sneddon testified on August 26, 2004, that his meeting with [REDACTED] lasted approximately 10 minutes. He stated that the purpose of showing her the photograph of [REDACTED] was so see if she could confirm that he was the person in the picture.

4. On December 17, 2003, Mr. Sneddon met with Mark Geragos, Mr. Jackson's lawyer at the time. This meeting is documented in a police report dated December 21, 2003, written by Sergeant Steve Robel. The information regarding that meeting appears to be provided for background purposes, as the subject of the police report is an interview with [REDACTED]. There is no indication that a third party was present during the meeting between Mr. Sneddon and Mr. Geragos.

5. According to the police report account of the meeting, Mr. Geragos discussed the fact that [REDACTED] and her family asked for and received money from Mr. Jackson during January and February of 2003. Mr. Geragos allegedly told Mr. Sneddon that [REDACTED]

[REDACTED]

1 6. It is illogical to believe that there was no discussion of [REDACTED] during Mr. Sneddon's
 2 meeting with [REDACTED] [REDACTED] later testified, in essence, that [REDACTED] was a central player
 3 in a conspiracy against her and that he personally facilitated an effort to make her believe that her fiancé
 4 was in danger of being murdered and that she was in danger of having her children ripped away from
 5 her. Given her testimony, it does not make sense that she would have no response to being shown a
 6 picture of [REDACTED] other than to confirm his identity to [REDACTED] Sneddon.

7 7. A question exists as to when [REDACTED] first developed the allegations regarding [REDACTED]
 8 and reported them to law enforcement or the District Attorney. Based on the fact that the subject matter
 9 presented to the grand jury is not reflected in police reports prior to the proceeding, defense counsel is
 10 entitled to examine the people who conducted the investigation to determine when the allegations
 11 against [REDACTED] were made. Mr. Sneddon is one of those people. He is one of approximately six law
 12 enforcement officers to speak with [REDACTED] and is one of four people, including Sergeant Robel,
 13 Detective Paul Zelis and District Attorney investigator Chris Clement, who has met with [REDACTED]
 14 outside the presence of any third party, according to the police reports.

15 8. In a police report, Sergeant Robel reports that Mr. Sneddon stated that [REDACTED]
 16 [REDACTED] A true and
 17 correct copy of that report is attached to this declaration as Exhibit A. Mr. Geragos is expected to deny
 18 making certain of these statements to Mr. Sneddon. The statements in dispute pertain to the details of
 19 the [REDACTED] Unless Mr. Sneddon concedes the accuracy
 20 of Mr. Geragos' recollection, he will be the only witness who can testify contrary to Mr. Geragos. This
 21 Court will not permit him to offer rebuttal testimony in the guise of cross-examination.

22 9. The materials provided to defense counsel in discovery suggest that Mr. Sneddon may have had
 23 material to suggest that Mr. Geragos was a [REDACTED] Mr. Sneddon
 24 met with him. His meeting with Mr. Geragos was not simply a meeting between the District Attorney
 25 and a defense lawyer, it was a investigative meeting which resulted in a "police report" of the
 26 conversation.

27 10. [REDACTED]

28

1 [REDACTED]

2 [REDACTED] also has knowledge of the [REDACTED] and of the fact that

3 [REDACTED] will testify that he was aware of

4 the [REDACTED]

5 11. The District Attorney plans on defending [REDACTED] lack of credibility and bizarre behavior

6 by arguing that [REDACTED] As the lawyer that represented [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Furthermore, [REDACTED] will testify that [REDACTED]

10 [REDACTED] This testimony is relevant because it demonstrates a pattern and practice by the

11 [REDACTED] family of coaching their children to lie.

12 I declare under the penalty of perjury under the laws of the State of California that the foregoing is true

13 and correct this 4th day of February 2005, at Santa Maria, California.

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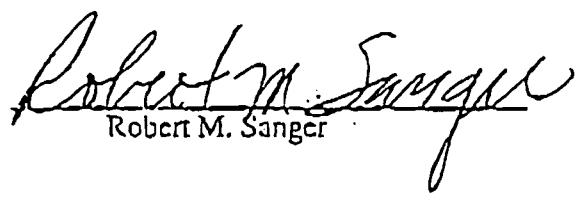
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Robert M. Sanger

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 STATEMENT OF FACTS

3 A. MR. SNEDDON'S THREAT TO TESTIFY AT TRIAL

4 The District Attorney has declared himself to be a witness in this case. The prosecution filed a
5 motion titled "Plaintiff's Motion in Limine Re: Evidence Code Section 402 Issues," on January 17,
6 2005, in which they threatened that, at trial, Mr. Sneddon will testify to "everything he knows about this
7 defendant," if Mr. Jackson calls Mr. Sneddon's motives for prosecuting this case into question. The
8 District Attorney further threatened that this information "[redacted]"

9 [redacted]
10 [redacted]." This threat was accentuated by the statement that, "[t]he defense does not want to go there."
11 The District Attorney, on page 5 of his Reply to Mr. Jackson's "Opposition to the District Attorney's
12 Motion in Limine Re: Section 402 Issues," filed on January 24, 2005, states that "Mr. Sneddon's
13 complete knowledge of defendant" would be made relevant at trial if Mr. Jackson makes an issue of Mr.
14 Sneddon's motivations at trial.

15 B. MR. SNEDDON'S ROLE AS A WITNESS TO STATEMENTS OF [redacted]

16 On November 8, 2003, Mr. Sneddon met with [redacted] behind the Federal Building in Los
17 Angeles for the purpose of securing her signature on victim compensation applications, picking up
18 several items of evidence and showing her a photo lineup of suspects in this case. One of the photos he
19 showed here was of [redacted]. Mr. Sneddon testified on August 26, 2004, that his meeting with [redacted]
20 [redacted] lasted approximately 10 minutes. He stated that the purpose of showing her the photograph of
21 [redacted] was so see if she could confirm that he was the person in the picture. (Declaration of Robert
22 M. Sanger.)

23 C. MR. SNEDDON'S ROLE AS A MATERIAL WITNESS TO A MEETING WITH MARK
24 GERAGOS

25 On December 17, 2003, Mr. Sneddon met with Mark Geragos, Mr. Jackson's lawyer at the time.
26 This meeting is documented in a police report dated December 21, 2003, written by Sergeant Steve
27 Robel. The information regarding that meeting appears to be provided for background purposes, as the
28

1 subject of the police report is an interview with [REDACTED]. There is no indication that a third party
2 was present during the meeting between Mr. Sneddon and Mr. Geragos. (Declaration of Robert M.
3 Sanger.)

4 According to the police report account of the meeting, Mr. Geragos discussed the fact that [REDACTED]
5 [REDACTED]

6 [REDACTED] Mr. Geragos allegedly told Mr. Sneddon that [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 [REDACTED] Mr. Sneddon is the person in this case who has interviewed
10 Mr. Geragos. (Declaration of Robert M. Sanger.)

11 **D. MR. SNEDDON'S ROLE AS A WITNESS TO A CONVERSATION WITH [REDACTED]**

12 [REDACTED]
13 [REDACTED]
14 [REDACTED] is a witness regarding [REDACTED] claims that she suffers from [REDACTED]
15 [REDACTED] also has knowledge of the [REDACTED]
16 [REDACTED]
17 [REDACTED] (Declaration of Robert M. Sanger.)

18 At the grand jury proceeding, Mr. Sneddon attempted to humiliate [REDACTED] Mr. Sneddon
19 stated, through cross-examination questions that amounted to testimony, that [REDACTED] was lying
20 regarding his account of a telephone conversation that occurred between the two men. (RT
21 715:19-717:6.)

22 **E. THE DISTRICT ATTORNEY'S CONDUCT RAISED IN THE PRIOR RECUSAL
23 MOTION**

24 Mr. Jackson previously outlined the following evidence of bias in the original recusal motion:
25 • Prior to issuing the arrest warrant, Mr. Sneddon actively participated in the investigation
26 into Mr. Jackson. Through these actions, he has made himself a witness and, has, indeed, has already
27 testified in one pre-trial hearing.

1 • He announced the issuance of the arrest warrant in a nationally televised press
2 conference, joking with the reporters and acting jovially throughout the conference. The unprofessional
3 way in which he conducted himself drew such criticism that he granted an exclusive interview to CNN,
4 during which he apologized for his behavior.

5 • Rather than proceed with a preliminary hearing, Mr. Sneddon opted to convene a Grand
6 Jury. The prosecution's presentation to the Grand Jury was unprecedented in its disregard for basic
7 evidentiary principles and utter lack of courtroom decorum. Such prosecutorial misconduct would have
8 never been permitted in open court.

9 • The District Attorney has permitted one of its former agents to violate the protective
10 order in this matter and leak information under seal in an attempt to influence the public and jury pool.
11 (See Motion for Recusal of Santa Barbara District Attorney's Office.)

12 ARGUMENT

13 I.

14 THE LAW ON RECUSAL

15 Penal Code, section 1424 (hereinafter, "Section 1424") codifies the defendant's right to have a
16 district attorney recused when the district attorney has a conflict of interest that makes it unlikely that the
17 defendant will receive a fair trial. (Cal. Pen. Code Section 1424(a)(1).) The California Supreme Court
18 has interpreted Section 1424 to require a two pronged analysis: (1) a conflict of interests exists and; (2)
19 the conflict is "so grave as to render it unlikely that [the] defendant will receive fair treatment during all
20 portions of the criminal proceedings." (*People v. Griffin*, (2004) 33 Cal.4th 536, 569.) The crucial issue
21 is whether a conflict exists "such as would render it unlikely that the defendant would receive a fair
22 trial," and that this inquiry makes it unnecessary for the court "to determine whether a conflict is
23 'actual,' or only gives the 'appearance' of a conflict." (*People v. Conner* (1983) 34 Cal. 3d 141, 147-
24 148.)

25 A conflict arises "whenever the circumstances of a case evidence a reasonable possibility that the
26 District Attorneys' office may not exercise its discretionary function in an evenhanded manner." (*People*
27 *v. Griffin* (2004) 33 Cal.4th 536, 569; *People v. Conner* (1983) 34 Cal.3d 141, 148.) "The prosecutorial
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1 discretion goes beyond the decision of what charges to file and the trial itself; it extends to all portions of
2 the proceedings." (*People v. Eubanks* (1996) 14 Cal. 4th 580, 593, *opn. mod.* 14 Cal.4th 1282D (1997).)

3 There is a reasonable possibility that the prosecutor will not exercise his or her discretionary function in
4 an evenhanded manner where:

5 in the course of his official duties [the prosecutor] acquires a conflicting 'personal
6 interest,' or 'emotional stake' in the case [], or where there is "intense personal
7 involvement" in his public duties [], or where there is "personal, as opposed to purely
8 professional ... involvement," or "the prosecutor is improperly utilizing the criminal
9 proceedings as a vehicle to aid" his personal or fiduciary interests [].
(*People v. Superior Court (Martin)* (1979) 98 Cal. App. 3d 515 quoting *People v. Greer* (1977) 19 Cal.
3d 255, 267, n. 8, 269, 270.)

9 "A public prosecutor must not be in a position of 'attempting at once to serve two masters,' the
10 People at large and a private person or entity with its own particular interests in the prosecution."
11 (*People v. Choi* (2000) 80 Cal. App. 4th 476, 483 [district attorney's belief the defendant was responsible
12 for the death of a personal friend created an actual conflict].)

13 Under the second prong of Section 1424, recusal is warranted where the prosecutor's conflict
14 "renders it unlikely that defendant will receive fair treatment during all portions of the criminal
15 proceedings." (*People v. Conner, supra*, 34 Cal. 3d at 148.) This discretion extends:

16 over the entire course of the criminal proceedings, from the investigation and gathering of
17 evidence, through the decisions of whom to charge and what charges to bring, to the
18 numeric choices at trial to access, oppose, or challenge judicial rulings.
(*People v. Hambarian, supra*, 27 Cal. 4th at 840.)

19 When deciding whether the prosecutor's conflict warrants recusal, the court must consider "the
20 entire complex of facts" when making this assessment. (*Id.* at 834.) The decision to prosecute a weak
21 case is one such factor. (*Id.* at 844.)

22 Recusal may also be proper where the District Attorney is a witness. (*People v. Conner, supra*,
23 80 Cal. App. 4th at 148.)

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II.

THE DISTRICT ATTORNEY'S THREAT TO TESTIFY REGARDING "EVERYTHING HE KNOWS ABOUT THIS DEFENDANT" DEMONSTRATES THAT: (1) HE IS ACTUALLY BIASED AGAINST MR. JACKSON; (2) THAT HE IS INCAPABLE OF EXERCISING THE PROPER DISCRETION OF HIS OFFICE; AND (3) THAT HE PLANS TO SMEAR MR. JACKSON AT TRIAL USING INADMISSIBLE EVIDENCE

The District Attorney's threat to unveil irrelevant and inadmissible evidence and opinion to the jury if Mr. Jackson raises questions regarding his motivation is nothing short of extortion. The schoolyard taunt that "[t]he defense does not want to go there," in the "Plaintiff's Motion in Limine Re: Evidence Code Section 402 Issues," demonstrates that the prosecution's threat that Mr. Sneddon will testify is an attempt to restrict Mr. Jackson's ability to defend himself. It is unseemly for the District Attorney to attempt to bully a defendant in this manner. It is remarkable that the District Attorney of Santa Barbara County would issue a threat to the defendant in a pleading filed in this Court. This type of threat goes far beyond a passing comment under one's breath, in the heat of the moment, in the hallway of the courthouse. Mr. Sneddon and his deputy wanted this threat to be seen, not only by Mr. Jackson and his counsel, but also by the Court. It is hard to imagine such an occurrence in any other case and it is indicative of the District Attorney's total lack of perspective when it comes to this case.

Mr. Sneddon's proffered testimony is inadmissible. The testimony would contain personal belief, hearsay and innuendo. There is no exception to the rules of evidence for a situation where the motives of an overzealous prosecutor are at issue. The fact that Mr. Sneddon, and his deputies, are incapable of using proper discretion to determine whether or not such testimony is admissible at trial is illustrative of the fact that they are incapable, and have been incapable from the moment this prosecution began in 1993, of treating the prosecution of Mr. Jackson like a proper criminal prosecution. Instead, this case has always been treated differently by Mr. Sneddon and his deputies.

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III

THE DISTRICT ATTORNEY IS A MATERIAL WITNESS TO A MEETING WITH [REDACTED]

The defense has not been provided with any report, prior to the grand jury proceeding, in which [REDACTED] made the kind of detailed allegations regarding [REDACTED] that she made in front of the grand jury. [REDACTED] told the grand jurors that she was told that the reason [REDACTED] did not mention [REDACTED] presence on the record during the interview of the [REDACTED] family on February 16, 2003, is so that [REDACTED]. (RT 1074:23-1074:4.) [REDACTED] said that [REDACTED] was the person who handed her the phone prior to the conversation with attorney [REDACTED] during which she claims that [REDACTED] (RT 1076:8-1078:3.) [REDACTED] (RT 1081:15-16.) This testimony was critical at the grand jury proceeding and was highlighted by the prosecution during their closing argument. (i.e. RT 1797:26-1798:15; 1863:7-1864:1.)

It is illogical to believe that there was no discussion of [REDACTED] during Mr. Sneddon's meeting with [REDACTED]. [REDACTED] later testified, in essence, that [REDACTED] was a central player in a conspiracy [REDACTED]

[REDACTED] Either that testimony was a later fabrication or it would have to be discussed with law enforcement or Mr. Sneddon earlier. It does not make sense that she would have no response to being shown a picture of [REDACTED], other than to confirm his identity to Mr. Sneddon if these things occurred. In other words, either her response or lack thereof when Mr. Sneddon showed her the picture is evidence bearing on the credibility of her wild accusations.

A question exists as to when [REDACTED] first developed the allegations regarding [REDACTED] and reported them to law enforcement or the District Attorney. Based on the fact that the subject matter presented to the grand jury is not reflected in police reports prior to the proceeding, defense counsel is entitled to examine the people who conducted the investigation to determine when the allegations against [REDACTED] were made. Mr. Sneddon is one of those people. He is one of approximately six law

1 enforcement officers to speak with [REDACTED] and is one of four people, including Sergeant Robel,
2 Detective Paul Zelis and District Attorney investigator Chris Clement, who has met with [REDACTED]
3 outside the presence of any third party, according to the police reports. (Declaration of Robert M.
4 Sanger.)

5 IV.

6 THE DISTRICT ATTORNEY IS A MATERIAL WITNESS TO A MEETING WITH [REDACTED]

7 [REDACTED] MARK GERAGOS

8 Mr. Sneddon is the only witness, other than Mark Geragos, who was present at a meeting that
9 occurred on December 17, 2003, between Mr. Sneddon and Mr. Geragos. According to the District
10 Attorney, Mr. Geragos is a [REDACTED] (District Attorney's Sanchez Motion,
11 pages 8-9.) He is listed on both the prosecution and defense witness lists.

12 In a police report, Sergeant Robel reports that Mr. Sneddon stated that Mr. Geragos made certain
13 claims regarding demands made by the [REDACTED] family in January and February of 2003. A true and
14 correct copy of that report is attached as Exhibit A to the Declaration of Robert M. Sanger. Mr. Geragos
15 is expected to deny making certain of these statements to Mr. Sneddon. The statements in dispute
16 pertain to the details of the [REDACTED] Unless Mr. Sneddon
17 concedes the accuracy of Mr. Geragos' recollection, he will be the only witness who can testify contrary
18 to Mr. Geragos. This Court will not permit him to offer rebuttal testimony in the guise of cross-
19 examination. (Declaration of Robert M. Sanger.)

20 The materials provided to defense counsel in discovery suggest that Mr. Sneddon may have had
21 material to suggest that Mr. Geragos was a [REDACTED]
22 [REDACTED] His meeting with Mr. Geragos was not simply a meeting between the District Attorney
23 and a defense lawyer, it was an investigative meeting which resulted in a "police report" of the
24 conversation. (Declaration of Robert M. Sanger.)

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V.

MR. SNEDDON IS A MATERIAL WITNESS TO A TELEPHONE CONVERSATION WITH

The District Attorney plans on defending [REDACTED] lack of credibility and bizarre behavior by arguing that she suffers from [REDACTED]. As the lawyer that represented [REDACTED]

Furthermore [REDACTED]

[REDACTED] This testimony is relevant because it demonstrates a pattern and practice by the [REDACTED] family of coaching their children to lie. (Declaration of Robert M. Sanger.)

Mr. Sneddon offered testimony to rebut the testimony of [REDACTED] before the grand jury. At trial, the Court will not allow him to testify under the guise of cross-examining [REDACTED]

VI.

MR. SNEDDON SHOULD NOT BE ALLOWED TO SERVE AS BOTH ADVOCATE AND WITNESS

Mr. Auchincloss, speaking for his boss, Tom Sneddon, says "Mr. Sneddon's complete knowledge of defendant" would be made relevant at trial if Mr. Jackson makes an issue of Mr. Sneddon's motivations at trial. (Reply to Opposition to the District Attorney's Motion in Limine Re: Section 402 Issues.) This newly announced intention to serve a dual role as advocate and witness is directly in conflict with the law. In *People v. Donaldson* (2001) 93 Cal.App.4th 916, the Court of Appeal stated:

The prohibition against a lawyer acting as a both advocate and witness "is a necessary corollary to the more fundamental tenet of our adversarial system that juries are to ground their decisions on the facts of a case and not on the integrity or credibility of the advocates." (*United States v. Prantil* (9th Cir. 1985) 764 F.2d 548, 553.) The enforcement of that prohibition "is more than just an ethical obligation of individual counsel" but rather "a matter of institutional concern implicating the basic foundations of our system of justice." (*Id.*)

The prohibition against an attorney serving as both witness and advocate is even more necessary in a criminal case. The Court of Appeal stated:

1 Within the criminal justice system, the prohibition against a prosecutor's acting as both
2 advocate and witness addresses "the concern that jurors will be unduly influenced by the
3 prestige and prominence of the prosecutor's office and will base their credibility
4 determinations on improper factors." (*United States v. Edwards* (9th Cir. 1998) 154 F.3d
5 915, 921.) "That counsel should avoid appearing both as advocate and witness except
6 under special circumstances is beyond question." (*United States v. Morris* (7th Cir. 1983)
7 714 F.2d.669, 671.) The maxim "justice must satisfy the appearance of justice" reflects
8 the "especially acute" need for public confidence in the administration of justice where
9 the testifying attorney represents the "prosecuting arm" of government. Judicial
10 condemnation of the "practice of serving as both prosecutor and witness" has deep roots
11 not only in English and American law but also in Roman law. (*United States v. Birdman*
12 (3d Cir. 1979) 602 F.2d 547, 551.)
13 (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 928-929.)

14 The prosecution has threatened to unleash Mr. Sneddon's testimony regarding his belief that Mr.
15 Jackson was guilty in 1993. This testimony is inadmissible. In *People v. Donaldson* (2001) 93
16 Cal.App.4th 916, 931, the Court of Appeal stated:

17 In neither testimony nor argument should a prosecutor express a personal belief in a
18 witness's credibility or in an accused's guilt. (*United States v. McKoy* (9th Cir. 1985) 771
19 F.2d 1207, 1210-1211.) Especially if witness credibility is crucial, a prosecutor's
20 expression of a personal belief in a witness's credibility or in an accused's guilt can
21 jeopardize the fundamental fairness of the trial. (See *United States v. Molina* (9th Cir.
22 1991) 934 F.2d 1440, 1445.)

23 The issues of whether Mr. Sneddon's testimony is perceived to help the prosecution or the
24 defense, has no bearing on the question of whether he may serve as both witness and advocate. The
25 Ninth Circuit Court of Appeals, in *United States v. Edwards* (9th Cir 1998) 154 F.3d 915, 923, stated
26 that:

27 It is irrelevant whether a prosecutor is a crucial witness in a matter that favors the defense
28 or in a matter that favors the prosecution, and it is irrelevant which side raises the
question as to which his testimony is important. The advocate-witness rule applies in all
such instances.

The rule that a prosecutor is not allowed to serve both an advocate and a witness is not
affected by the fact that the testimony in question "was elicited in the first instance by defense counsel."
(*United States v. Edwards* (9th 1998) 154 F.3d 915, 922.) In other words, it doesn't matter if it is the
defense who "opens the door" to Mr. Sneddon's testimony.

Doubts regarding a prosecutor's dual role as an advocate and a witness "should be resolved in
favor of the lawyer testifying and against his becoming or continuing as an advocate." (*People v.*

1 *Donaldson, supra*, 93 Cal.App.4th 916, 930.)

2 Although acting as both advocate and witness 'is a situation to be avoided if possible,' a
3 prosecutor can do so 'in extraordinary circumstances and for compelling reasons, usually
4 where the evidence is not otherwise available.' (*United States v. Johnston, supra*, 690
5 F.2d at p. 644) After testifying, however, the prosecutor should 'withdraw from any
6 further participation' in the case.
7 (*People v. Donaldson, supra*, 93 Cal.App.4th 916, 930.)

8 VII.

9 THE CUMULATIVE EFFECT OF THIS NEW THREAT, COUPLED WITH THE INSIGHT IT
10 GIVES INTO THE DISTRICT ATTORNEY'S PRIOR CONDUCT, NOW REQUIRES
11 RECUSAL

12 Mr. Sneddon and his deputies have demonstrated bias against Mr. Jackson throughout the course
13 of this prosecution. This new remarkable paragraph by Mr. Auchincloss is an additional demonstration
14 of the bias that has infected the Office of the District Attorney. The comments made by Mr. Auchincloss
15 exacerbated the prior conduct of the District Attorney and his office. They also illustrate the depth of the
16 condition previously called to the Court's attention.

17 As raised in the previous motion to recuse:

- 18 1. Mr. Sneddon kicked off the formal proceedings against Mr. Jackson with a press
19 conference in which he ridiculed Mr. Jackson and his music.
- 20 2. Mr. Sneddon made himself a witness in this case. The recent statements by Mr.
21 Auchincloss demonstrate an attempt to distract from the fact that Mr. Sneddon made
22 himself a material witness in this case. Mr. Sneddon has himself to blame for his
23 untenable position in this case. It is impossible for him to exercise sound discretion when
24 he is a material witness in the case.
- 25 3. Mr. Sneddon is not merely a witness to technical matters. He is a material witness. Here,
26 the District Attorney states that if the defense calls Mr. Sneddon as a witness he will
27 testify as a percipient witness which will help the prosecution win its case on the merits.
28 We are then told that the "defense does not want to go there." The defense not only
wants to "go there," we are entitled to "go there" under the law.

1 4. Mr. Sneddon's behavior in front of the grand jury demonstrated his bias against Mr.
2 Jackson and these latest comments only serve to exacerbate that behavior. The Court
3 referred to Mr. Sneddon's performance before the grand jury as "regrettable." His cross-
4 examination of [REDACTED] and [REDACTED] included bullying, improper
5 questions, and testimony from Mr. Sneddon himself. Mr. Auchincloss promises, in the
6 recent comments, that should Mr. Jackson dare to question the motives of the District
7 Attorney, Mr. Sneddon will put on a performance that will go far beyond being
8 "regrettable." It is important to note that the District Attorney has not learned his lesson.

9 Even under Mr. Auchincloss's description for Mr. Sneddon's feelings regarding this case, it
10 appears that Mr. Sneddon's conduct in this case stems from his belief that Mr. Jackson was guilty of the
11 uncharged conduct in the 1993-1994 case. The District Attorney argues, essentially, that if Mr. Jackson
12 asks the jury to consider that the District Attorney is prosecuting a weak case, despite a lack of credible
13 evidence, the District Attorney will respond by testifying that there is strong evidence to believe that Mr.
14 Jackson was guilty of the crimes he was investigated for in 1993-1994. This is evidence that Mr.
15 Sneddon is not capable of handling this case in an even-handed fashion.

16 The District Attorney's position is that, if Mr. Jackson were to "attempt to open that door at trial"
17 (Plaintiff's Motion in Limine Re: Evidence Code Section 402 Issues, page 6) by presenting evidence to
18 the jury that there are improprieties in the way this case has been prosecuted, Mr. Sneddon would
19 allowed to take on the dual role of prosecutor and material witness. The fact that the District Attorney
20 would thereafter take the stand and provide inadmissible testimony about a previous case speaks
21 volumes about the prosecution's ability to exercise its discretion.

22 VIII.

23 THE CONTENT AND THE BULLYING TONE OF MR. AUCHINCLOSS' MOTION
24 DEMONSTRATE THAT MR. SNEDDON'S DEPUTIES SHOULD ALSO BE RECUSED

25 The fact that the motion and the reply, containing the threat that Mr. Sneddon will give
26 inadmissible testimony, were drafted by Senior Deputy District Attorney Gordon Auchincloss makes it
27 clear that Mr. Sneddon's deputies have been affected by with the same invectiveness as the District
28

1 Attorney, himself. The tone of the motion and particularly the phrase, "[t]he defense does not want to go
2 there," is indicative of the attitude of the District Attorney's office regarding the prosecution of Mr.
3 Jackson: This case is different than any other case and the regular rules do not apply.

4 As noted above, Deputy District Attorney Auchincloss has demonstrated an utter lack of
5 discretion by threatening to poison the trial with inadmissible evidence related to Mr. Sneddon's
6 personal beliefs regarding the 1993-1994 investigation of Mr. Jackson. The fact that he apparently did
7 not even consider that such testimony would be wholly inadmissible and that his threat to use such
8 testimony constitutes extortion demonstrates that Mr. Sneddon's deputies are incapable of proceeding in
9 an evenhanded manner.

10 IX.

11 CONCLUSION

12 For the reasons stated above, Mr. Jackson submits that this Court should rule that Mr. Sneddon
13 be recused on the grounds that he cannot serve as both witness and advocate. No other remedy will give
14 Mr. Jackson a chance at a fair trial.

15 Dated: February 5, 2005

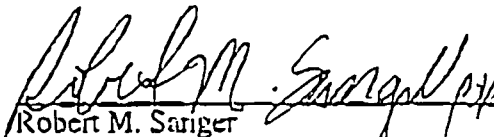
Respectfully submitted,

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EXHIBITS REDACTED :