

APR 11 2005

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SANTA BARBARA  
10 SANTA MARIA DIVISION

11  
12 THE PEOPLE OF THE STATE OF CALIFORNIA, ) No. 1133603  
13 Plaintiff, )  
14 v. ) PLAINTIFF'S MEMORANDUM  
15 MICHAEL JOE JACKSON, ) RE: COMMENT ON JANET  
16 Defendant. ) ARVIZO'S ASSERTION OF  
17 ) HER PRIVILEGE UNDER THE  
18 ) FIFTH AMENDMENT  
19 )  
20 ) DATE: TBA  
21 ) TIME: TBA.  
22 ) DEPT: SM-2 (Melville)

23 A. Introduction:

24 There is evidence that Janet Arvizo may have committed perjury in certain of her  
25 applications for welfare assistance in Los Angeles County. That fact so concerned the defense  
26 in this case that Carl Capozzola, one of the lawyers associated with the defense, submitted  
27 documents to the Los Angeles District Attorney's Office earlier this year, demanding her  
28 prosecution on various felony charges.

Plaintiff is informed that, in the circumstances, Ms. Arvizo will exercise her right  
under the Fifth Amendment and decline to testify concerning such matters. This memorandum  
briefly discusses the law setting out the preferred procedure for the exercise of that privilege

1 out of the hearing of the jury, and the restrictions imposed upon a party who may wish to  
2 comment, in the hearing of the jury, upon the witness' exercise of the privilege.

3 I

4 A WITNESS SHOULD BE ALLOWED TO EXERCISE THE  
5 PRIVILEGE AGAINST SELF-INCRIMINATION OUTSIDE  
6 THE PRESENCE AND HEARING OF THE JURY

7 In *People v. Mincey* (1992) 2 Cal.4th 408, our Supreme Court noted that "Evidence  
8 Code section 913, subdivision (a) prohibits the trial court and counsel from commenting on a  
9 witness' assertion of a privilege." (*Id.*, p. 441.) The court continued.

10 The statutory prohibition applies to witnesses as well as parties litigant.  
11 Defendant's request that the trial court compel Sandra B. to invoke the  
12 privilege in the presence of the jury was in direct violation of Evidence  
13 Code section 913. The court's refusal to do so was therefore proper.

14 . . . .

15 A person may invoke the constitutional privilege against self-  
16 incrimination for a reason other than guilt. . . . Thus, inferring guilt  
17 from the mere exercise of the privilege would be improper and is at best  
18 based on speculation, not evidence. [Citations.] To avoid the  
19 potentially prejudicial impact of having a witness assert the privilege  
20 against self-incrimination before the jury, we have in the past  
21 recommended that, in determining the propriety of the witness's  
22 invocation of the privilege, the trial court hold a pretestimonial hearing  
23 outside the presence of the jury. [Citation.] This was done here.

24 A defendant's rights to due process and to present a defense do not  
25 include a right to present to the jury a speculative, factually unfounded  
26 inference. [Citation.] If the trial court in this case had permitted  
27 defendant to compel Sandra B. to assert the privilege in front of the jury,  
28 it would have been required, on request, to instruct the jury not to draw  
the very inference defendant sought to present to the jury. (Evid. Code,  
§ 913, subd. (b).)

(*Ibid.*).

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II

ASSUMING MRS. ARVIZO EXERCISES HER FIFTH AMENDMENT PRIVILEGE WITH RESPECT TO CERTAIN EVENTS IN HER PAST, DEFENSE COUNSEL SHOULD BE INSTRUCTED, FIRMLY AND EXPLICITLY, NOT TO TOUCH ON THOSE EVENTS IN HIS CROSS-EXAMINATION OF THE WITNESS OR TO INTIMATE, IN ANY WAY, THAT SHE HAS ASSERTED A PRIVILEGE NOT TO TESTIFY CONCERNING THOSE EVENTS


Plaintiff has remarked, not without considerable justification, that defense counsel tries very hard to get before the jury, by leading questions or commentary, information that has been put out of bounds. Even timely objections are inadequate to unring a bell clanged with defense counsel's customary vigor.

If the defense has evidence that would tend to impeach a prosecution witness but that may not be raised or discussed with the witness in the course of cross-examination, it may introduce that evidence in the presentation of its own case to the jury if it so chooses.

Considerable experience dictates the necessity of an explicit admonition to counsel concerning the limits of a particular inquiry before those limits are exceeded by an improper question or comment, followed by an apology.

DATED: April 11, 2005

THOMAS W. SNEDDON, JR.  
District Attorney

By:   
Gerald McC. Franklin Senior Deputy District Attorney  
Attorneys for Plaintiff

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3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA  
5 COUNTY OF SANTA BARBARA } SS

6 I am a citizen of the United States and a resident of the County aforesaid; I am over  
7 the age of eighteen years and I am not a party to the within-entitled action. My business  
8 address is: District Attorney's Office; Courthouse; 1112 Santa Barbara Street, Santa Barbara,  
9 California 93101.

10 On April 11, 2005, I served the within PLAINTIFF'S MEMORANDUM RE:  
11 COMMENT ON JANET ARVIZO'S ASSERTION OF HER PRIVILEGE UNDER THE  
12 FIFTH AMENDMENT on Defendant, by THOMAS A. MESEREAU, JR., ROBERT  
13 SANGER and BRIAN OXMAN, by personally delivering a true copy thereof to defense  
14 counsel in open court. I declare under penalty of perjury that the foregoing is true and correct.

15 Executed at Santa Maria, California on this 11th day of April, 2005.

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