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County of Santa Barbara
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FILED
SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

APR 12 2005

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

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.) PLAINIFF'S REPLY TO
15) DEFENDANT'S RESPONSE
MICHAEL JOE JACKSON.) TO PLAINTIFF'S MEMORANDUM
16 Defendant.) RE: COMMENT ON JANET
17) ARVIZO'S ASSERTION OF HER
FIFTH AMENDMENT PRIVILEGE
18)
19) DATE: TBA
20) TIME: TBA.
21) DEPT: SM-2 (Melville)

22 A. Introduction.

23 The People filed a memorandum with the Court on Monday morning, April 11th,
24 alerting the Court that Janet Arvizo likely would assert her privilege under the Fifth
25 Amendment concerning certain reported acts of perjury committed by her within the past few
26 years. Our memorandum directed the Court's attention to Evidence Code section 913 and the
27 Supreme Court's decision in *People v. Mincey* (1992) 2 Cal.4th 408, to the effect that it would
28 be improper for opposing counsel to comment on a witness's claim of any privilege, and in
particular the privilege against self-incrimination.

Defendant filed a response later the same day. It is remarkable in several respects.

1 First, it asserts that Mrs. Arvizo's claim of the privilege betrays an attempt by the
2 prosecution to "sanitize Mrs. Arvizo's testimony" (Response 2:7-13); a "strategic decision on
3 the part of the government," (*id.*, 4:11-13) and "yet another example of the District Attorney
4 acting in the role of Mrs. Arvizo's attorney, rather than as a representative of the taxpayers that
5 she defrauded" (*id.*, 4:26-27, fn. 3). For the court to "allow" such a stratagem to succeed
6 would deprive defendant of his right to confront and cross-examine the witnesses against him.
7 (*Id.* 2:7-13.)

8 Secondly, defendant notes that "The Carl Capozzola referred to by the government
9 in their memorandum is not associated with the defense of *People v. Michael Joseph Jackson.*"
10 (Response 4:25-26, n. 2.)

11 Thirdly, defendant cites *Government of the Virgin Islands v. Smith* (3d. cir. 1980)
12 615 F.2d 964 as authority for his allegation that "The government's strategic decision to not
13 grant immunity to Janet Arvizo is an attempt to deliberately distort the fact finding process."
14 (Response 4:11-14.)

15 Defendant's response is, by turns, mistaken in its factual premise, deliberately false
16 in one of its factual assertions and misleading in its citation to relevant authority.

17 I

18 JANET ARVIZO'S DECISION TO ASSERT HER RIGHT AGAINST
19 SELF-INCRIMINATION IS HER OWN, AND SHE ARRIVED AT IT
20 UPON CONSULTATION WITH HER OWN COUNSEL

21 Defendant's allegation that the "government" made a "strategic decision not to grant
22 immunity to Janet Arvizo" is unsupported by fact, and is at least mistaken. Mrs. Arvizo has
23 consulted with her own counsel and has heeded his advice.¹

24 Defendant's counsel would be well advised not to make allegations about
25 prosecutorial misconduct it is not fully prepared to back up with facts.

26 ////

27 _____
28 ¹ It appears to be good advice into the bargain, judging from the pained response it promptly evoked.

1
2 DEFENDANT FALSELY ASSERTS THAT CARL CAPOZZOLA
3 IS NOT ASSOCIATED WITH THE DEFENSE OF MICHAEL
4 JOSEPH JACKSON IN THIS MATTER

5 In a footnote to the statement, "the government has informed defense counsel that
6 Janet Arvizo will assert a Fifth Amendment privilege not to incriminate herself with regard to
7 her welfare frauds, defendant states: "The Carl Capozzola referred to by the government in
8 their memorandum is not associated with the defense of *People v. Michael Joseph Jackson*."
9 (Response 4:5-6 and fn. 2.)

10 The State Bar's membership record reflect only one "Carl Capozzola" (SBN 44441)
11 currently listed as an active member of the Bar. (See Exhibit A.) It was that Carl Capozzola,
12 not some other "Carl Capozzola," who submitted a request for the prosecution of Mrs. Arvizo
13 to the Los Angeles District Attorney's Office on January 24, 2005. (See Exhibit B, attached,
14 the cover letter that accompanied Lawyer Capozzola's lengthy submission to Curt Livesay, the
15 Chief Deputy District Attorney for District Attorney Steve Cooley, the District Attorney.) And
16 it was that Carl Capozzola who, on March 2, 2005, dispatched a Petition for Writ of Mandate
17 captioned "Michael Joseph Jackson, Petitioner v. The People of the State of California, Etc.,
18 referencing "Superior Court No. 1133603" on its cover (Exhibit C, attached) and noting
19 thereon that "Trial in Progress In Cook Division, SM-2 Judge Rodney Melville."

20 Rule 5-200 of the Rules of Professional Conduct cautions California lawyers that
21 "In presenting a matter to a tribunal, a member: . . . (B) Shall not seek to mislead the judge . . .
22 by an artifice or false statement of fact or law . . ."

23 It is conceivable that there are facts that would satisfy the Court that defense
24 counsel's assertion - that "the Carl Capozzola" referred to by plaintiff in their earlier
25 memorandum is not "the" Carl Capozzola who has been waging vigorous if unsuccessful
26 efforts on behalf of defendant in the appellate courts to have this very case dismissed - does
27 not confront defense counsel with the business end of rule 5-200.

28 The Court may wish to inquire.

DEFENDANT RELIES ON ONE CASE THAT HAS BEEN
QUESTIONED AND DISTINGUISHED MOST OF THE CALIFORNIA
CASES THAT HAVE CONSIDERED IT

Appended to his accusation that “the government is attempting to conceal the truth about Janet Arvizo from the jury” and to “deliberately distort the fact finding process” is defendant’s suggestion that the Court “See *Government of the Virgin Islands v. Smith* (1980) 615 F.2d 964)” (“*Smith*”). *Smith* is the only authority offered by defendant in the whole of his splenetic “Response.”

It should be noted at the outset that since Mrs. Arvizo’s decision to avail herself of the privilege not to incriminate herself was prompted, in part, by Lawyer Capozzola’s energetic effort on defendant’s behalf to have her prosecuted in Los Angeles County on charges that are still within relevant statutes of limitations, defendant is not well-positioned to complain about it.

Be that as it may, defendant’s trial counsel presumably know how to put competent and at least arguably impeaching evidence in their possession before the jury when it is defendant’s turn to present his case. Indeed, the availability to defendant of such evidence makes his reliance on *Smith* footless.

Smith, like most if not all of the later cases that discuss and distinguish it, involved a defense witness who, by reason of his association with Smith in the activities that led to Mr. Smith’s own prosecution, had good reason to be concerned he might incriminate himself if he testified without some protection. The prosecution in that case was unwilling to offer that witness, one Sanchez, use immunity so that he could testify for the defense. The trial court declined to grant Sanchez “judicial immunity.” Smith and his codefendants were convicted. They appealed.

The issue on appeal was whether the trial court should have granted Sanchez immunity notwithstanding the government’s refusal to do so.

The Court of Appeals for the Third Circuit, discussing its earlier decision in *United*

1 *States v. Herman* (3d Cir. 1978) 589 F.2d 1191, observed that *Herman*

2 recognized two possible situations in which the due process clause
3 might compel the granting of immunity to defense witnesses. First, it
4 noted that in cases where government actions denying use immunity to
5 defense witnesses were undertaken with the "deliberate intention of
6 distorting the judicial fact finding process," the court has the remedial
7 power to order acquittal unless on retrial the government grants statutory
8 immunity. [Citation.] Secondly, it noted that in certain cases a court
9 may have "inherent authority to effectuate the defendant's compulsory
process right by conferring a judicially fashioned immunity upon a
witness whose testimony is essential to an effective defense." *Id.*

10 (*Smith, supra*, 615 F.2d 964 at p. 966.)

11 The *Smith* court concluded that "the record reveals sufficient evidence to constitute
12 a prima facie showing under either of these due process theories. Accordingly, we remand to
13 the district court for an evidentiary hearing under the *Herman* guidelines to determine whether
14 due process requires that defense witness immunity be granted." (*Ibid.*)

15 The *Smith* court also took cognizance of the United States Supreme Court's decision
16 in *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297], which
17 reversed Chambers' conviction because Mississippi's rule of evidence that prevented a
18 defendant from impeaching his own witness prevented Chambers from "introducing
19 trustworthy, exculpatory evidence" in his defense and so denied him a fair trial and due
20 process.

21 In this case the prima facie due process violation revealed by the record,
22 i.e., the denial of exculpatory evidence to which Sanchez could testify, is
23 not different in substance than the violation found in *Chambers*. For
24 paraphrasing *Chambers* by substituting the names of the principals in
25 this case, it is apparent that "(t)o the extent that McDonald's sworn
26 confession (Sanchez's police statement) tended to incriminate him
(Sanchez and Elvis Smith), it tended to exculpate Chambers (Glen
Riara and Georges)." 410 U.S. at 297, 93 S.Ct. at 1047.

27 (616 F.2d, at p. 970.)

28 ////

1 Note that *Smith* held that

2 before a court can grant immunity to a defense witness, it must be clear
3 that an application has been made to the district court naming the
4 proposed witness and specifying the particulars of the witness'
5 testimony. In addition, the witness must be available and the defendant
6 must make a convincing showing sufficient to satisfy the court that the
7 testimony which will be forthcoming is both clearly exculpatory and
8 essential to the defendant's case. Immunity will be denied if the
9 proffered testimony is found to be ambiguous, not clearly exculpatory,
10 cumulative or if it is found to relate only to the credibility of the
11 government's witnesses. Once the court determines that the defendant
has satisfied this threshold burden, the focus then shifts to consideration
of the state's countervailing interests, if any.

12 (615 F.2d 964, at pp. 972-973; underlined emphasis added; fn. omitted.)

13 If, in the usual case, immunity will be denied if the evidence of the defendant's
14 proposed witness will "relate only to the credibility of the government's witnesses," judicial
15 immunity for a government witness must be denied if it is sought for no better reason than to
16 allow the defendant to impeach that very witness based upon his or her immunized testimony
17 on collateral matters.

18 *Smith* has not been treated cordially by other courts. "Notwithstanding the Third
19 Circuit's pronouncement, the effective defense theory has been roundly rejected by other
20 courts, most of which have agreed that the power to grant immunity properly belongs to the
21 Executive Branch. [Citations.]" (*Curtis v. Duval* (1st Cir. 1997) 124 F.3d 1, 9.)

22 *Smith* was discussed in *People v. Hunter* (1989) 49 Cal.3d 957. *Hunter*, like *Smith*,
23 involved a request for immunity of a proposed defense witness. Our Supreme Court held
24 "unavailing" *Hunter's* contention that "the defendant in a criminal action should be entitled to
25 request that the court grant use immunity to a defense witness who has knowledge of essential,
26 exculpatory evidence. (*Id.*, p. 973.) The Supreme Court observed, "As the Attorney General
27 points out, the Courts of Appeal of this state have uniformly rejected the notion that a trial
28 court has the inherent power, in such circumstances, to confer use immunity upon a witness

1 called by the defense. [Citations.]” (*Ibid.*),

2 The Supreme Court continued: “Though it is possibly to hypothesize cases where a
3 judicially conferred use immunity might possibly be necessary to vindicate a criminal
4 defendant’s rights to compulsory process and a fair trial [citation], that is not a question we
5 need here decide. For defendant’s offer of proof at trial in support of his request fell well short
6 of the standards set forth in the once case which has clearly recognized such a right,
7 *Government of Virgin Islands v. Smith . . .*” (*Id.*, p. 974.)

8 In *People v. Stewart* (2004) 33 Cal.4th 425, a capital prosecution in which
9 defendant was convicted of multiple murders and sentenced to death, the trial court denied
10 defendant’s request that the court grant a defense witness immunity. The Supreme Court
11 affirmed his conviction but remanded for resentencing because of instructional error. The
12 Supreme Court upheld the trial court’s denial of defendant’s motion for judicial immunity for
13 his witness. It noted its earlier decision in *Hunter*, in which it had reviewed the *Smith* decision
14 and had “highlighted two “clearly limited”” circumstances (both articulated in *Smith*) in which
15 judicially conferred use immunity might be conditionally necessary.” (*Hunter, supra*, 49
16 Cal.3d at p. 974.)

17 The first of the two tests outlined in *Hunter* . . . would recognize the
18 authority of a trial court to confer immunity upon a witness when each
19 of the following three elements is met: (1) “the proffered testimony [is]
20 clearly exculpatory; [(2)] the testimony [is] essential; and [(3)] there [is]
21 no strong governmental interest[] which countervail[s] against a grant of
immunity.” (*Id.*, citing *Smith, supra*, 615 F.2d 964, 972.)

22 (*People v. Stewart, id.*, 33 Cal.4th 425 at p. 469.)

23 The second of the two tests referred to in *Hunter, supra*, . . . as
24 authorizing a trial court to grant immunity to a defense witness, would
25 recognize such authority when “the prosecutor intentionally refused to
26 grant immunity to a key defense witness for the purpose of suppressing
27 essential, noncumulative exculpatory evidence,” thereby distorting the
judicial factfinding function. [Citation.]

28 (*Id.*, p. 470.)

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CONCLUSION

Defendant ignores our Supreme Court's decision in *People v. Mincey, supra*, 2 Cal.4th 408 and Evidence Code section 913 in favor of a factually inapposite decision of the Court of Appeals for the Third Circuit that has been questioned and limited by the courts of this state. More importantly, he has failed utterly to suggest – let alone demonstrate – how, with all the evidence at his command, he will be denied a fair trial unless this Court judicially grants Mrs. Arvizo use immunity so that he may undertake to impeach her by reference to collateral matters on cross examination.

The Court should resist defendant's invitation to grant Mrs. Arvizo use immunity without the plaintiff's concurrence and over her objection.

DATED: April 11, 2005

Respectfully submitted,

THOMAS W. SNEDDON, JR.
District Attorney

By: 

Gerald McC. Franklin, Senior Deputy

Attorneys for Plaintiff

1
2
3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA
5 }
6 COUNTY OF SANTA BARBARA } SS

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

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

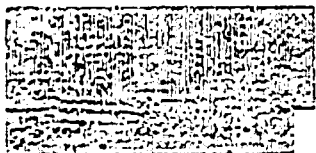
17 Executed at Santa Maria, California on this 12th day of April, 2005.

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EXHIBIT "A"

LOCATION: 305 560 1073

EX TIME 04/12 '05 07:31



THE STATE BAR OF CALIFORNIA

Tuesday, April 12, 2005

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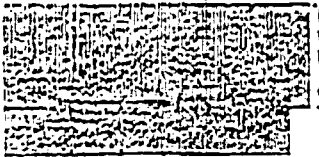
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Your search for **CAPOZZOLA** returned 4 results.

Sort By:

Name	Status	Number	City	Admission Date
Capozzola, Carl Anthony	Active	44441	Redondo Beach	June 1969
Capozzola, Damian Dominick	Active	185412	Los Angeles	December 1996
Capozzola, Dominick Cameron	Active	217361	Los Angeles	December 2001
Capozzola, Jennifer Nix	Active	232273	Los Angeles	November 2004

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THE STATE BAR OF CALIFORNIA

Monday, April 11, 2005

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ATTORNEY SEARCH

Carl Anthony Capozzola

Membership Info

CA Bar Number	44441
Current Status	Active — explanation of "Active" status
CA Admission Date	June 27, 1969
District	District 7
County	Los Angeles

Contact Info

Address	1811 S Catalina Ave #300 Redondo Beach, CA 90277
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Fax Number	Not Available
e-mail	Not Available

Education Info

Undergraduate School	Univ of Colorado; CO USA
Law School	Univ of West Los Angeles; Los Angeles CA USA

Actions

Copies of official attorney discipline records are available upon request.

Explanation of common actions

Effective Date	Description	Case Number
4/20/1990	Status changed to: Active	
4/20/1998	Discipline w/actual suspension	64-C-10970
5/18/1984	Status changed to: Not Entitled	
5/18/1984	Interim suspension after conviction	
6/27/1969	Admitted to the Bar	

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EXHIBIT "B"

LOCATION:805 560 1070

EX TIME 04/12 '05 07:31



CLARA SHORTRIDGE FOLTZ
CRIMINAL JUSTICE CENTER
210 W. TEMPLE STREET
LOS ANGELES, CA 90012-2110
PH (213) 974-3505
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CURT LIVESAY, Chief Deputy District Attorney
LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE

FAX

To:	Jerry Franklin, Senior DDA	From:	Curt Livesay, Chief Deputy District Attorney
Fax:	805.560.1077	Pages:	2 - Including cover sheet
Phone:	805.566.2425	Date:	Monday, April 11, 2005
Re:		Time:	3:55 PM

COMMENTS:

As requested.

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL(S) OR ENTITY(IES) TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, NOTIFY US IMMEDIATELY BY CALLING (213) 974-3505.

JAN 26 2005

LAW OFFICES
CARL A. CAPOZZOLA
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SUITE 300 PLAZA CIVICA BUILDING
1611 SOUTH CATALINA AVENUE
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January 24, 2005

Mr. Curt Livesay
Chief Deputy District Attorney
Los Angeles County District Attorney's Office
Clara Shortridge Foltz Center
210 West Temple, 18th Floor
Los Angeles, California 90012

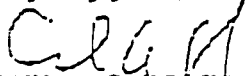
Via Facsimile (213) 628-6352 and First Class Mail

Dear Mr. Livesay:

Pursuant to our earlier conversation please find enclosed package confirming what I believe to be prima facie case of massive welfare fraud perpetrated upon the County of Los Angeles and the State of California.

It is with confidence in you, Steve Cooley and the office of the District Attorney that I am referring this matter to you for prosecution because I am fully confident that if prosecution is justified, it will be undertaken notwithstanding any political situation which may be present. Thank you for your attention and professional courtesy which you have extended on this occasion.

Very truly yours,


CARL A. CAPOZZOLA

CAC:jb
Uvaylzc

Enclosures

EXHIBIT "C"

LOCATION:805 560 1079

RE TIME 04/12 '05 07:31

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL JOSEPH JACKSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA, THE SUPERIOR COURT
FOR THE COUNTY OF SANTA
BARBARA, THE SANTA BARBARA
DISTRICT ATTORNEY'S OFFICE,
DISTRICT ATTORNEY THOMAS W.
SNEDDON, JR., ESQ., ET AL.,

Respondent.

No. **S131863**

Superior Court No. 1133603

PETITION FOR WRIT OF
MANDATE, OR IN THE
ALTERNATIVE PROHIBITION
OR HABEAS CORPUS AND
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT THEREOF

STAY REQUESTED.

TRIAL IN PROGRESS IN
COOK DIVISION, SM-2,
JUDGE RODNEY MELVILLE,
TELEPHONE NO. (805) 346-
7678

CARLA CAPOZZOLA, ESQ.
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Telephone: (310) 316-6055
Facsimile: (310) 316-2306

Attorney for Petitioner
Michael Joseph Jackson

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SANTA BARBARA } SS

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

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

Executed at Santa Maria, California on this 12th day of April, 2005:
