

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 ARGUMENT

3 I.

4 THE COURT SHOULD EXCLUDE THE TESTIMONY OF JANET ARVIZO ON THE
5 GROUND THAT SHE IS REFUSING, IN ADVANCE, TO SUBMIT TO CROSS-
6 EXAMINATION REGARDING A MATERIAL ISSUE

7 The District Attorney has announced that Janet Arvizo will invoke the privilege not to
8 testify, pursuant to the Fifth Amendment, with regard to the material issue that she committed
9 welfare fraud. The law is clear that the Court should exclude her testimony if she is unwilling to
10 submit to cross-examination on a material issue. The California Supreme Court held that the
11 trial court may exclude the testimony of a witness when, as is the case here, it is known in
12 advance that the witness will refuse to answer questions regarding a material issue:

13 If a witness frustrates cross-examination by declining to answer some or all of the
14 questions, the court may strike all or part of the witness's testimony. (*People v.*
15 *Daggett* (1990) 225 Cal.App.3d 751, 760, 275 Cal.Rptr. 287.) From this rule it
16 follows logically that if, as here, the court determines in advance that the witness
17 will refuse to answer such questions, the court may decline to admit the testimony
18 in the first instance.
19 (*People v. Price* (1991) 1 Cal. 4th 324.)

20 It is clear that Mrs. Arvizo is going to avoid cross-examination by taking the Fifth. Therefore,
21 the Court should exclude her testimony.

22 II.

23 MRS. ARVIZO'S WELFARE FRAUD IS A MATERIAL ISSUE

24 This evidence is material to the case against Mr. Jackson. Janet Arvizo is a critical
25 witness to the conspiracy charges against Mr. Jackson under both the prosecution and defense
26 theories of the case. The District Attorney has also offered her as a witness to the alleged head-
27 licking. (RT 86:1-8.) Under the defense theory of the case, Mrs. Arvizo is also a critical witness
28 to the molestation charges, because, we believe we can prove that, consistent with her modus
operandi, she used her children to seek financial gain at Mr. Jackson's expense.

The District Attorney also claimed, in his opening statement, that Janet Arvizo only

1 committed perjury in her J.C. Penney deposition to avoid a beating. This explanation is
2 inherently flawed since it does not explain her need to fabricate incredible stories of being
3 sexually molested simply to cover up spousal battery. As weak as this explanation is, it makes
4 the clear perjury committed in the welfare application all the more relevant.

5 The fact that Mrs. Arvizo committed perjury on numerous welfare applications is material
6 in several regards: (1) it demonstrates a pattern and practice of using her children to commit
7 frauds; (2) it shows that she has committed perjury and fraud which is crucial to the jury's
8 determination of her credibility; and (3) this fraud and perjury occurred during the same time
9 period in which she now claims to have been held captive by Mr. Jackson..

10 In addition, acts committed in furtherance of the fraud are also relevant to rebut the
11 prosecution's theory that Mrs. Arvizo was held captive. The fact that she was able to fax a letter
12 to the welfare authorities asking to cancel her welfare in March of 2003 is relevant to her claim
13 that she was unable to contact the police to inform them that she was being held captive during
14 that same time.

15 III.

16 THE REMEDY OF INDEPENDENTLY PROVING JANET ARVIZO'S WELFARE

17 FRAUD IS NOT ADEQUATE

18 The prosecution concedes that Mr. Jackson is entitled to present evidence of Mrs.
19 Arvizo's welfare fraud in the case in chief. Independently proving Mrs. Arvizo's frauds,
20 however, does not adequately address the denial of Mr. Jackson's Sixth and Fourteenth
21 Amendment right to confront an cross-examine his accuser. The importance of this right was
22 recently re-affirmed by the United States Supreme Court in *Crawford v. Washington* (2004) 541
23 U.S. 36.¹ Mr. Jackson's defense will be prejudiced if his counsel is not allowed to effectively
24 cross-examine Janet Arvizo with regard to her credibility. Cross-examination is "the greatest
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26 ¹ The prosecution may not introduce the grand jury testimony in lieu of the testimony of
27 Janet Arvizo because those statements are clearly testimonial hearsay that is inadmissible
28 pursuant to the Confrontation Clause. (*Crawford v. Washington* (2004) 541 U.S. 36.)

1 legal engine ever invented for the discovery of truth." (*People v. Reynolds* (1984) 152
2 Cal.App.3d 42, quoting 5 Wigmore Evidence (3d ed.1940).) The presentation of records and
3 other materials after the prosecution rests is not an adequate substitute for cross-examination.
4 Moreover, it will be difficult to authenticate the documents without being able to question Mrs.
5 Arvizo regarding her signature. Mr. Jackson will be deprived of his right to confrontation, due
6 process and a fair trial if defense counsel is prevented from cross-examining Mrs. Arvizo
7 regarding these material issues.

8 IV.

9 **HOWEVER, IF JANET ARVIZO'S TESTIMONY IS EXCLUDED MR. JACKSON**
10 **WILL BE FORCED TO MOVE FOR A MISTRIAL BASED ON PREJUDICE**

11 The District Attorney addressed Janet Arvizo's welfare fraud in his opening statement.
12 Mr. Sneddon attempted to minimize her perjury and fraud by telling the jury that they would hear
13 that the dollar amount was insignificant and that Mrs. Arvizo knows what she did was wrong. In
14 response, Mr. Mesereau addressed the issue of the welfare fraud in his opening statement and
15 proffered to the jury that the defense would prove that she was engaged in perjury and fraud
16 during the relevant time periods. Prejudice will result if Mrs. Arvizo's testimony is excluded.
17 because defense counsel will be barred from fulfilling its promise to the jury and the jury will be
18 left to infer that the fraud never occurred.

19 Furthermore, co-conspirator hearsay has been conditionally admitted based on a proffer
20 that Mrs. Arvizo would testify. If the Court now strikes some or all of that testimony the bell
21 cannot be unring. Even if the defense were to prevail on an 1118.1 motion as to the conspiracy
22 count, the co-conspirator hearsay has already tainted the jury as to the remaining counts.

23 The only way to avoid the incurable prejudice of the exclusion of Mrs. Arvizo's
24 testimony is a mistrial. (See *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736 at fn. 6.)

V.

**THE OTHER ADEQUATE REMEDY, IF A MISTRIAL IS NOT GRANTED, IS TO
INFORM THE JURY THAT JANET ARVIZO IS REFUSING TO TESTIFY
REGARDING HER FRAUDS PURSUANT TO HER FIFTH AMENDMENT PRIVILEGE**

The prosecution argues that Mrs. Arvizo should be allowed to invoke the Fifth Amendment privilege to testify outside of the presence of the jury. This would prejudice Mr. Jackson by allowing the prosecution to present Mrs. Arvizo as a poor battered women who would only lie to protect herself from a beating. Allowing the prosecution to sanitize their most problematic and most important witness would undermine Mr. Jackson's right to a fair trial.

In *People v. Mincey* (1992) 2 Cal.4th 408, the case cited by the prosecution, the witness in question was subpoenaed by the defense who stated, at a 402 hearing, that she would take the Fifth in response to every question from defense counsel on direct. In other words, the defense's sole purpose in having the witness testify would have been so that the jury would see the witness take the Fifth. The holding that the trial court was not required to compel the witness to take the Fifth in front of the jury is distinguishable from the present case, where the prosecution is asking that the witness be allowed to take the Fifth and still testify regarding other areas.

The District Attorney promised this evidence and defense counsel made a proffer of rebuttal evidence. The correct remedy is to preclude her testimony. However, preclusion, given the prejudice demonstrated above, would necessitate a mistrial. If the Court decided not to grant a mistrial, the only other imperfect remedy is to allow Janet Arvizo to testify while invoking her Fifth Amendment privilege with regard to her welfare fraud, but to compel her to do so in front of the jury so that the jury understands why the evidence is so different than what was proffered in the opening statements, by both counsel. This does no harm to Mrs. Arvizo, who should have no stake in the outcome of the case but does something to redress some of the prejudice to the defendant.

1 VI.

2 THE PROSECUTION'S MOTION DOES NOT CONTAIN A DECLARATION

3 The prosecution asks this Court and defense counsel to rely on its unsupported factual
4 assertions without a supporting declaration or even a police report documenting the purported
5 facts. The Court should consider the facts alleged in the prosecution's motion without an
6 affidavit under oath or a declaration made under penalty of perjury.

7 VII.

8 THE PROSECUTION HAS ONCE AGAIN FAILED TO PROVIDE DISCOVERY
9 PURSUANT TO PENAL CODE 1054 ET SEQ.

10 The District Attorney claims that he has been "informed that, in the circumstances, Ms.
11 Arvizo will exercise her right under the Fifth Amendment and decline to testify concerning such
12 matters." (Memorandum, page 1.) The prosecution has not provided any discovery regarding this
13 interview with Mrs. Arvizo. Defense counsel is entitled to discovery regarding this
14 communication. (See *Roland v. Superior Court* (2004) 124 Cal.App.4th 154.) The
15 circumstances of the disclosure of the intention to assert the privilege may have a bearing on the
16 position taken by the defense or on the outcome of these proceedings.

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VIII.

CONCLUSION

The Court should preclude the testimony of Janet Arvizo and then grant a mistrial and/or grant such other and further relief as the Court may deem just and proper.

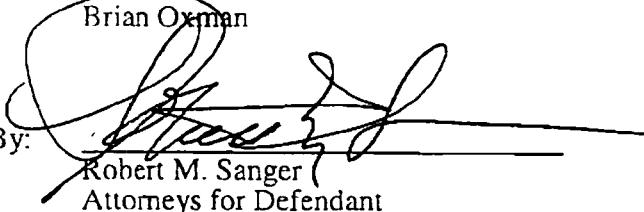
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