

1 THOMAS W. SNEDDON, JR., DISTRICT ATTORNEY
County of Santa Barbara
2 By: RONALD J. ZONEN (State Bar No. 85094)
Senior Deputy District Attorney
3 J. GORDON AUCHINCLOSS (State Bar No. 150251)
Senior Deputy District Attorney
4 GERALD McC. FRANKLIN (State Bar No. 40171)
Senior Deputy District Attorney
5 1112 Santa Barbara Street
Santa Barbara, CA 93101
6 Telephone: (805) 568-2300
7 FAX: (805) 568-2398

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA BARBARA

APR 20 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)
14 Plaintiff,)
15)
16 v.)
17)
18 MICHAEL JOE JACKSON,)
19)
20 Defendant.)
21)
22)
23)
24)
25)
26)
27)
28)
DATE: April 22, 2005
TIME: 8:30 a.m.
DEPT: TBA (Melville)

1. Introduction:

Chris Carter worked for defendant as one of his closest security employees. He testified before the Grand Jury concerning certain of his observations of defendant and others during times relevant to the pending prosecution.

Since leaving defendant's employ, Mr. Carter allegedly committed a series of serious felonies in the Las Vegas area, including armed robbery and kidnapping. He is charged with various crimes in both the Nevada state court in Clark County and in the United States District Court. He has pleaded not guilty and currently is in custody awaiting trial or other disposition of those charges. Mr. Carter presently is lodged in the Santa Barbara County Jail

1 and is expected to testify for the prosecution.

2 There will be competent evidence that Mr. Carter has made no deals and has
3 reached no agreement or "understanding" with anyone – not in Santa Barbara County, the State
4 of California, Clark County, Nevada, the State of Nevada or the United States government, nor
5 anywhere else – in exchange for his testimony. Mr. Carter intends to assert his Fifth
6 Amendment right against self-incrimination with respect to the facts underlying the charges
7 pending against him. He, and his Nevada counsel, who will be present in court, will ask to do
8 so out of the presence of the jury and before he commences his testimony

9 It may safely be assumed that the defense will, nevertheless, attempt to impeach Mr.
10 Carter's credibility by evidence of his current predicament. The question is presented whether
11 defendant may do so after Mr. Carter asserts his right not to incriminate himself, and if so, by
12 what means.

13 This Memorandum addresses those issues.

14
15 I

16 MR. CARTER MAY INVOKE THE PROTECTION OF THE
17 FIFTH AMENDMENT OUT OF THE PRESENCE OF THE
18 JURY, AND THE FACT THAT HE DID SO MAY NOT
19 THEN BE COMMENTED UPON BY THE DEFENSE
20 OR THE TRIAL COURT

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

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

28

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

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

17 (*People v. Mincey, supra*, 2 Cal.4th 408, at p. 441.).

18 II

19 EVIDENCE OF THE FACT THAT MR. CARTER WAS
20 ARRESTED FOR THE COMMISSION OF FELONIES,
21 AND OF THE PENDENCY OF FELONY CHARGES
22 AGAINST HIM, IS NOT ADMISSIBLE WITHOUT
23 MORE TO IMPEACH HIS CREDIBILITY AS A
24 WITNESS IN THIS CASE

25 **A. Evidence of Prior Arrest, Without More**

26 Evidence that a witness has been arrested in the past is generally inadmissible to
27 impeach the witness. See *People v. Medina* (1995) 11 Cal.4th 694, 769: "Defendant correctly
28 observes that mere arrests are usually inadmissible, whether as proof of guilt or impeachment
(see *People v. Anderson* (1978) 20 Cal.3d 647, 650-651) or as aggravating penalty phase
evidence [citation]."

////

////

1 **B. Evidence of Prior Criminal Offenses Involving Moral Turpitude**

2 Evidence of specific past criminal conduct by a witness involving moral turpitude
3 (as distinct from his arrest for that conduct) may be admissible to impeach the witness: “Past
4 criminal conduct involving moral turpitude that has some logical bearing on the veracity of a
5 witness in a criminal proceeding is admissible to impeach the witness, subject to the trial
6 court’s discretion under Ev. C. § 352.” (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at
7 Trial, § 314, p. 394, citing *People v. Wheeler* (1992) 4 Cal.4th 284, 288, 295; *People v. Lepolo*
8 (1997) 55 Cal.App.4th 85, 89.)

9 If Mr. Carter invokes the protection of the Fifth Amendment in timely fashion, the
10 defense may not put evidence of his commission of crimes of moral turpitude before the jury
11 by asking him about them on cross-examination.

12 **C. Pending Charges Involving Moral Turpitude**

13 A witness may be impeached by evidence of felony charges pending against him, if
14 the pendency of the charges reasonably suggests that the witness may have cut himself a deal
15 in exchange for his testimony.

16 “‘It is long-standing law that ‘a prosecution witness can be impeached by the mere
17 fact of pending charges. (See *People v. Coyer* [(1983)] 142 Cal.App.3d [839] at 842.) Such a
18 situation is a “circumstance to show that he . . . may, by testifying, be seeking favor or
19 leniency. [Citations.]” (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 271,
20 p.343.)” (*People v. Martinez* (2002) 103 Cal.App.4th 1071, 1080.)

21 But the reasonable likelihood that favorable treatment may be accorded the witness
22 down the road because of his testimony in another matter appears to be a condition precedent
23 to the use of pending charges to impeach the witness.

24 Witkin’s discussion, cited by the *Martinez* court, is instructive:

25 (1) *Proper Impeachment*. . . .

26
27

28 In a *criminal case*, it is proper for the defense to ask a prosecution
witness whether he or she has been promised immunity from punishment

1 for criminal charges brought against him or her; and it is also permissible to
2 inquire into the mere fact that charges are pending against the witness as a
3 circumstances to show that he or she may, by testifying, be seeking favor or
4 leniency. (*People v. Pantages* (1931) 212 C. 27 . . . , *People v. Sweeney*
5 (1960) 55 C.2d 27 . . . ,*infra*, § 344; *People v. Phillips* (1985) 41 C.3d 29,
6 45 . . . [inquiry into any agreement affecting witness' credibility is proper,
7 even if terms of agreement are not communicated to witness]; *People v.*
8 *Blackwell* (1927) 81 C.A. 417, 419 . . . [charge pending]; *People v. Allen*
9 (1978) 77 C.A.3d 924,931 . . . , citing the text

10 (2) *Distinction: Exclusion on Relevance Grounds*: The trial judge has
11 wide discretion to limit cross-examination on the grounds of marginal
12 relevance. Although the defense is entitled to elicit evidence that a witness
13 is motivated by an expectation of leniency or immunity, if there is no
14 evidence of an agreement that might furnish a bias or motive to testify
15 against the defendant, limitation for lack of relevance may be proper.
16 (*People v. Bento* (1998) 65 C.A.4th 179, 194, 195 . . . [following *People v.*
17 *Dyer* (1988) 45 C.3d 26 . . . ; denial of request to cross-examine prosecution
18 witness concerning four crimes he was involved in was proper, where there
19 was no evidence that witness might receive some benefit for testifying, and
20 there was large amount of other evidence defendant could use to impeach
21 him].)

22 (3 Witkin, Cal. Evidence (4th ed. 2000), Presentation at Trial, § 271, pp. 343-344.)

23 **D. The Mere Fact Of The Pending Charges, Like The**
24 **Fact Of A Prior Arrest, Affords An Insufficient**
25 **Basis For Impeachment In The Circumstances Of**
26 **This Case**

27 Neither of the two conditions that, according to Witkin, would make evidence of
28 pending felony charges against a witness relevant to impeach that witness exists in this case:

– The subject matter of Mr. Carter's testimony in this case would not incriminate
him. For that reason there is no reason to suppose he would ask for use immunity as a
condition to testifying concerning events that took place prior to the advent of his present
difficulties, and there would be no ground for granting him immunity if he made such a
request. It follows that it would be inappropriate for the defense to ask him if he has been

1 granted immunity prior to testifying in this matter;

2 - If the Court is satisfied by the evidence of Mr. Carter's Nevada counsel that
3 neither Clark County, Nevada, nor the U.S. Attorney, nor anyone else has offered Mr. Carter
4 any promise, assurance or suggestion that he would be treated more leniently in their cases if
5 he testifies truthfully concerning relevant issues in this case, then any suggestion by the
6 defense in the course of cross-examination that he might receive such leniency down the road
7 would be unsupported speculation and improper.


8 CONCLUSION

9 Evidence merely of the fact that Chris Carter had been arrested for the alleged
10 commission of impeachable felonies, and that complaints alleging such offenses have been
11 filed in Nevada, is inadmissible to impeach Mr. Carter as a witness in this proceeding. If the
12 Court concurs, it should make it crystal-clear to defense counsel that the fact of Mr. Carter's
13 recent arrest and the pendency of felony charges against him is "out of bounds" and that
14 attempted impeachment of the witness by any reference to such matters, however oblique, will
15 be dealt with sternly.

16 DATED: April 20, 2005

17 Respectfully submitted,

18 THOMAS W. SNEDDON, JR.
19 District Attorney

20 By: 
21 Gerald McC. Franklin, Senior Deputy

22 Attorneys for Plaintiff
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

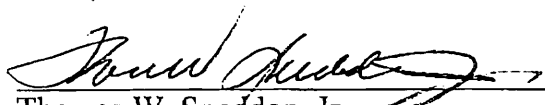
STATE OF CALIFORNIA
COUNTY OF SANTA BARBARA } SS

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 20, 2005, I served the within **PLAINTIFF'S MEMORANDUM REGARDING ADMISSIBILITY OF EVIDENCE OF CRIMINAL CHARGES PENDING AGAINST WITNESS CHRIS CARTER** on Defendant, by **THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN** by personally delivering a true copy thereof to Mr. Mesereau in Santa Maria, California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California on this 20th day of April, 2005.



Thomas W. Sneddon, Jr.
District Attorney