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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA BARBARA

SANTA MARIA DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MICHEAEL JOE JACKSON, Defendant.	No. 1133603 PLAINTIFF'S REQUEST THAT COURT LIMIT DEFENSE COUNSEL IN "EXPLAINING" WHY HIS CLIENT ELECTED NOT TO TESTIFY IN HIS OWN DEFENSE DATE: May 31, 2005 TIME: TBA DEPT: SM-2 (Melville)

1. Introduction:

Defendant elected not to testify in his own defense, notwithstanding defense counsel's suggestion in his opening statement that the jury would hear defendant "tell" them certain things.

This Memorandum argues that defense counsel, like plaintiff's counsel, must avoid discussing the reasons why defendant made that election.

2. Discussion:

Defendant has an absolute right, guaranteed by the Fifth, Sixth and Fourteenth Amendments, not to testify in his own behalf (*Rock v. Arkansas* (1987) 483 U.S. 41, 51-52 [97

L.Ed.2d 37]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1232). The right to testify belongs to the defendant alone, and if a conflict between the defendant and his counsel exists, it is defendant's desire that must prevail. (*People v. Robles* (1970) 2 Cal.3d 205, 215.) " 'When the decision is whether to testify [citation] . . .it is only in case of an express conflict arising between the defendant and counsel that the defendant's desires must prevail. In the latter situation, there is no duty to admonish and secure an on the record waiver unless the conflict comes to the court's attention. [Citation.]' [Citations.]" (*People v. Bradford, supra*, 15 Cal.4th 1229 at p. 1332.)

"Under the rule of *Griffin* [*v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106]], error is committed whenever the prosecutor comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina* (1995) 11 Cal.4th 694, 755; see *People v. Guzman* (2000) 80 Cal.App.4th 1282, 1288.)

Recent experience has suggested an increasing enthusiasm on the part of defense counsel during final argument in criminal cases to offer the jury an explanation for the defendant's decision not to testify in his own defense, beyond noting that it is the defendant's constitutional right not to do so. Statements like, "He wanted to testify, but I advised him that the prosecution's case is so flimsy, there was no need for him to testify" have been heard.

CALJIC 2.60 informs the jury that "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in way." And CALJIC 2.61 explains:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential element.

Whether it is error to give these instructions without a request by the defendant that they be given may be an open question, though *People v. Mendoza* (1987) 192 Cal.App.3d 667

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concluded upon a review of the authorities that it is *not* error to give CALJIC 2.60 sua sponte. (*Id.*, at pp. 676-678.)

It is one thing for the trial judge to instruct the jury that a criminal defendant "may choose to rely on the state of the evidence" in "deciding whether or not to testify," and quite another thing for defense counsel to intimate that the perceived weakness of the prosecution's evidence is *the* reason for *his client's* decision not to testify. Obviously, other factors may have had a bearing on the decision in a given case.

One factor may be the likelihood that evidence would come to light in the course of vigorous cross-examination that would not otherwise have surfaced to the jury's attention. Another may be the defendant's "character for honesty or veracity or their opposites," among the several matters listed in Evidence Code section 780 that would be opened up for the jury's consideration merely by the fact that the defendant chose to testify.

The point here is that any statement or suggestion by defense counsel in *this* case concerning why *this* defendant exercised *his* right not to testify is, necessarily, a statement or intimation of *fact* concerning which there is no supporting evidence in the record. Would defense counsel agree that the prosecutor could respond to his suggestion that his client relied solely upon the supposed weakness of the evidence against him with a list of other likely reasons Mr. Jackson chose not to testify?

Probably not. And *if* not, defense counsel should be instructed to say nothing concerning the reasons – either in the abstract or as related to the circumstances of this case – for defendant's decision not to testify in his own defense.

DATED: May 31, 2005

Respectfully submitted

THOMAS W. SNEDDON, JR.
District Attorney

By: _____
Gerald McC. Franklin, Senior Deputy District Attorney

Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS
COUNTY OF SANTA BARBARA)

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 May 31, 2005, I served the within PLAINTIFF'S REQUEST THAT COURT LIMIT DEFENSE COUNSEL IN "EXPLAINING" WHY HIS CLIENT ELECTED NOT TO TESTIFY IN HIS OWN DEFENSE on Defendant, by THOMAS A. MESEREAU, JR. and ROBERT SANGER, his counsel in this matter, 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 31st day of May, 2005.