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IN THE SUPERIOR COURT OF CALIFORNIA
FRESNO COUNTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

NAME DELETED,

Defendant.

Case number: **[number deleted]**

MOTION TO ALLOW THE DEFENSE TO PUT ON A DEFENSE

SUMMARY OF ARGUMENTS

This motion is occasioned by the fact that the court has repeatedly complained about the speed with which the trial is, in the court's opinion, not moving. Although the prosecution's case has consumed nearly two weeks of time, the court, on the record, on December 17, XXXX – right after a prosecution witness was dismissed subject to recall – informed the defense that a) there will be no recall of the witness and b) the court expects testimony to be completed by the end of December 18, XXXX.

Due process of law requires a fair trial. A fair trial requires that the defense be allowed to put on a defense. It is understandable that the court yearns to see this trial end; the defense recognizes this desire and also yearns for the end, but is unwilling to sacrifice the right to put on a defense just to get there.

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As the court has noted, jurors have begun to suggest vacation conflicts as we head into Christmas and New Year's Holidays. Such concerns, however, cannot trump NAME DELETED'S right to a fair trial; they cannot trump his right to put on a defense.

Yet shortly after the prosecution case supposedly ended and NAME DELETED'S co-defendant's case was barely started, the prosecution was allowed to call another witness "out of order." The prosecutor offered WITNESS-1 NAME DELETED use immunity, forcing her to testify. She was kept on the stand for a significant portion of December 17, XXXX. NAME DELETED'S counsel has not even yet had an opportunity to give an opening statement, which was reserved for the start of the case.

And the court has declared that *all* testimony will be completed by close of business on December 18, XXXX.

Beyond that, even the cross-examination of WITNESS-1 NAME DELETED was precluded. The defense has significant evidence showing coercion of the witness by the prosecution team. The prosecution team has told WITNESS-1 NAME DELETED that if she does not testify consonant with the police reports concerning statements allegedly made by NAME DELETED and WITNESS-2 NAME DELETED, then she will go to jail. The court has given WITNESS-1 NAME DELETED cause to believe this by putting body attachments on her after she has passed out and been removed from the courtroom by EMS and after she passed out on the street once outside the courtroom and, again, was taken to the hospital by EMS. The prosecution had previously sent two detectives to WITNESS-1 NAME DELETED's home after they "did not like" her preliminary testimony. Those detectives threatened WITNESS-1 NAME DELETED with imprisonment and waited for Child Protective Services – which they had called – to come and take away WITNESS-1 NAME DELETED's younger brother and sister, for whom she was caring.

Despite these obvious attempts to manipulate and coerce WITNESS-1 NAME DELETED, defense attempts to cross-examine her on these facts have resulted in the court stopping questioning, calling for sidebars and telling the defense that these

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questions would not be allowed. The rationale for not allowing these questions is that the court had already made rulings indicating that the prior testimony of WITNESS-1 NAME DELETED and statements made by alleged co-conspirator WITNESS-2 NAME DELETED would not be allowed *because of defense motions to exclude*.

However, those defense motions to exclude were made on the basis of *Aranda-Bruton* and *Crawford* objections, because the witnesses had invoked their Fifth Amendment rights against self-incrimination. WITNESS-1 NAME DELETED has now been granted use immunity and has testified under oath. *Aranda-Bruton* and *Crawford* are no longer concerns and should not preclude NAME DELETED'S Sixth Amendment right to confront witnesses against him, nor his due process rights under the Fourteenth Amendment, which allow him to put on a defense.

I

NAME DELETED HAS A FUNDAMENTAL DUE PROCESS RIGHT TO PUT ON A DEFENSE, NOTWITHSTANDING THE COURT'S DESIRE FOR THIS FOUR-WEEK-OLD TRIAL TO END THE DAY THE DEFENSE STARTS ITS CASE

Defendants have due process rights to put on a defense. (*In re Burton* (2006) 40 Cal.4th 205, 227 [52 Cal. Rptr. 3d 86] (dis. opn. of Werdegar, J.); *Foxgate Homeowners Ass'n v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 15 [108 Cal.Rptr.2d 642].) These rights are protected under the Sixth Amendment to the United States Constitution. (*Faretta v. California* (1975) 422 U.S. 806, 819 [95 S. Ct. 2525; 45 L. Ed. 2d 562].) The Sixth Amendment was made applicable to the states by the Fourteenth Amendment. (*Maryland v. Craig* (1990) 497 U.S. 836, 844 [110 S.Ct. 3157; 111 L.Ed.2d 666].)

Here (e.g., in NAME DELETED'S case), the court at the end of the December 17, XXXX, court day told all attorneys that testimony would be completed by the end of the day on December 18, XXXX so that the case could go to the jury. The court indicated its concern that some jurors would be lost if the case dragged on too much longer.

At the time that the court's pronouncement was made, another prosecution witness had just left the stand. While that witness was taken out of order, after co-

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defendant CO-DEFENDANT NAME DELETED'S defense had begun, CO-DEFENDANT NAME DELETED'S defense was interrupted for that prosecution witness. And NAME DELETED'S defense had not begun. Indeed, NAME DELETED'S opening statement which had been reserved, has yet to be given. Possibly, if the prosecution – which has already expressed a desire to bring witnesses to impeach its witness who testified December 17 – completes its examination and CO-DEFENDANT NAME DELETED completes his defense, NAME DELETED'S opening statement may be given sometime before the time the court has stated the trial will end. If the court sticks to its statement, NAME DELETED'S opening statement will never be given, nor will the defense that should follow that statement.

NAME DELETED'S counsel does not believe that the court will really *eliminate* his right to put on a defense. However, unless NAME DELETED'S counsel *ignores* the proclamations of the court, the defense will be rushed. NAME DELETED'S defense is prejudiced by the court's apparent eagerness to endorse alacrity as a primary virtue in this trial. The court has already (see Arguments II and III below) limited cross-examination of witnesses. The court's impatience is demonstrated further by the fact that the prosecution no longer really needs to make objections to certain questions because the court has begun making them instead.[1]

And the court has informed counsel that the jury instruction conference will be "truncated"; the preference is to have objections and recommendations already done in writing to speed things up and permit a minimal need for conferencing. The court has complained that these instructions have still not been provided by NAME DELETED. Defense counsel has tried to point out that with the dynamics of this trial, the discovery violations which have been recognized along the way and without knowing to what degree a defense case will be permitted (e.g., termination of avenues of cross-

[1] This raises another issue entirely: the court should remain a neutral party, requiring the prosecution to make its objections. If the prosecution does not object, the evidence should be admitted. (See *People v. Pineda* (1967) 253 Cal.App.2d 443, 465 [62 Cal.Rptr. 144].) By handling the objections on behalf of the prosecution,

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examination) and the need to provide frequent briefs to the court in order to hopefully persuade, or, minimally, make a record, the ability to go through jury instructions and provide written objections requires untenable choices: defend the case, or meet the court's request for what is essentially a detailed brief, anticipating prosecution (and court) arguments to counter in a defense brief to accompany instructions.

Yet, as noted, the prosecution was not only given more than a week for the initial presentation of its case-in-chief, it has now been permitted to bring a witness out-of-order during CO-DEFENDANT NAME DELETED'S defense. Being dissatisfied with the testimony of this witness, the prosecution proposes – and the court has agreed to make time for – the presentation of further prosecution witnesses to attack the credibility of the witness and testify that *their* version of what she said is true, while hers is not. Although the law permits this under the doctrine of "prior inconsistent statement" exceptions to hearsay, the point is that while the court expects NAME DELETED'S defense to be completed by the end of business on December 18, XXXX, *neither CO-DEFENDANT NAME DELETED nor the prosecutor will have yet closed <u>their</u> cases on December 18!*

Oral objections to these limitations have not stopped the court's proclamations.

NAME DELETED is, nevertheless, constitutionally entitled to put on a defense. (*In re Burton, supra,* 40 Cal.4th at 227 (dis. opn. of Werdegar, J.); *Foxgate Homeowners Ass'n, supra,* 26 Cal.4th at 15.) The entire trial should not consist, over NAME DELETED'S objections, of time given over primarily to the prosecution, with whatever time NAME DELETED can beg the court for as his only opportunity for a defense. To deny NAME DELETED the opportunity for defense would create a structural defect in this trial.

the court jeopardizes its neutrality before the jury. NAME DELETED is prejudiced by having to face *two* prosecutors who stand ready to limit testimony. Where the one fails, the other will jump in.

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II

THE COURT'S REFUSAL TO PERMIT CROSS-EXAMINATION VIOLATES NAME DELETED'S DUE PROCESS RIGHTS BECAUSE CROSS-EXAMINATION IS THE PRINCIPLE MEANS FOR TESTING THE BELIEVABILITY OF A WITNESS AND THE TRUTH OF THE TESTIMONY

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [94 S. Ct. 1105; 39 L. Ed. 2d 347].) The right of cross-examination is a fundamental constitutional right inherent in the Sixth Amendment. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." (*Id*. at 315 (alteration in the original).)

As the United States Supreme Court has further noted, one of the primary purposes of cross-examination is to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 19 [106 S. Ct. 292; 88 L. Ed. 2d 15].)

It is well-settled that "[e]vidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible." (*People v. Sanchez* (1997) 58 Cal. App. 4th 1435, 1449 [69 Cal.Rptr.2d 15].) Why, except for the fact that it is the prosecution team making the threats, should the rule be different in this case?

WITNESS-1 NAME DELETED has told defense investigators that she was directly threatened by the prosecution team. According to WITNESS-1 NAME DELETED, if her testimony did not match up with police reports containing statements allegedly made by NAME DELETED and WITNESS-2 NAME DELETED, which the prosecution "knew was the truth," she would be prosecuted for perjury and her children would be taken away from her. WITNESS-1 NAME DELETED had reason to believe such statements by the prosecution team *because they had previously called Child Protective Services to remove her children* after indicating they were unhappy about her testimony during the preliminary examination. As evidence that WITNESS-1 NAME

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DELETED felt the impact of this threat, the record will demonstrate that the first time she was called to the stand and told that she *had* to testify, she passed out and had to be removed by Emergency Medical Services, who found her blood pressure significantly elevated and took her to a hospital for treatment.

Thus, cross-examining WITNESS-1 NAME DELETED regarding these threats and, particularly, this prior incident which convince her to give these threats credence is highly relevant. And "all relevant evidence is admissible." (Evid. Code § 351.) The trial court, however, has precluded the defense from cross-examination on these circumstances.

The believability and truth of WITNESS-1 NAME DELETED's testimony can *only* be brought out through cross-examination. Certainly, the prosecution has no interest in eliciting testimony concerning its attempts to coerce the witness. By precluding NAME DELETED'S defense from cross-examining the witness with regards to the threats which the defense investigation has uncovered, the court also precludes the ability to put "the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness" before those jurors. (*Delaware v. Fensterer, supra,* 474 U.S. at 19.)

This violates NAME DELETED'S right to put on a defense and it violates his Sixth Amendment right to confront the witnesses against him.

III

THE ORIGINAL *ARANDA-BRUTON* AND *CRAWFORD* GROUNDS FOR PRECLUDING ADMISSION OF THIS TESTIMONY NO LONGER EXIST

The original reason for excluding *prior* testimony of WITNESS-1 NAME DELETED (and that of WITNESS-2 NAME DELETED) was primarily based upon their unavailability for cross-examination. (See, in particular, NAME DELETED'S Notice of Motion to Exclude Statements of Non-Testifying Alleged Co-Conspirators, or Sever; Points & Authorities in Support Thereof (hereafter "Motion to Exclude Statements"), particularly Argument II. The brief on that was filed with this court November 26,

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XXXX.) Ironically, WITNESS-1 NAME DELETED is now *available* for cross-examination, but the court has precluded cross-examination regarding what happened to her after her testimony at the preliminary examination on the basis of its previous ruling that evidence concerning her prior testimony was inadmissible.

As noted, evidence concerning her preliminary examination testimony *was – past* tense – inadmissible: She was unavailable as a witness due to having invoked her Fifth Amendment rights. Now that she has been given use immunity and forced to testify, she *is – present* tense – available for cross-examination. The rationale behind the prior ruling no longer applies; the issue of unavailability no longer exists; it is moot.

The contributing, concomitant, or foundational reason for excluding her prior testimony is also mooted. Since there have been continuous discovery violations by the prosecution even during the current trial, NAME DELETED had argued that "counsel at the preliminary hearing was not similarly situated to current counsel and could not have adequately cross-examined WITNESS-1 NAME DELETED." (Motion to Exclude Statements at 9.) However, *current* counsel (we hope) *has* finally been given most, if not all, of the discovery due in this case. Certainly, counsel has adequate discovery to make a significant cross-examination of WITNESS-1 NAME DELETED, if not for the court's continued unnecessary preclusion of such evidence.

Finally, even if the court somehow believed that there is reason to exclude evidence of the preliminary examination testimony itself, there is *no* reason to exclude evidence concerning what the prosecution team did to WITNESS-1 NAME DELETED following her providing the testimony. The two areas of inquiry are not the same. In the one area, there is the content of her testimony; in the other, there is the evidence of retaliation from the prosecution for WITNESS-1 NAME DELETED's having provided that testimony – *whatever* it may have been.

The prior ruling should be vacated, because WITNESS-1 NAME DELETED is now available to testify and be meaningfully cross-examined. Even if it is not vacated,

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the defense should not be precluded from inquiring into the coercive acts of the prosecution team regarding WITNESS-1 NAME DELETED's testimony.

CONCLUSION

Refusal to allow complete cross examination of WITNESS-1 NAME DELETED by the defense violates NAME DELETED'S Fourteenth Amendment due process and Sixth Amendment confrontation clause rights. The court's prior ruling is inapplicable now that WITNESS-1 NAME DELETED is available as a witness.

Dated: December 18, XXXX

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