

COPY FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
JOSHUA TREE DISTRICT
SEP 28 2023

BY *Nadine Golden*
NADINE GOLDEN, DEPUTY

1 LAW OFFICES OF IAN WALLACH, P.C.
2 IAN M. WALLACH (SBN 237849)
3 iwallach@wallachlegal.com
4 5777 W. Century Blvd., Ste. 750
5 Los Angeles, CA 90045
6 Telephone: (213) 375-0000
7 Facsimile: (213) 402-5516

8 KAEDIAN LLP
9 KATHERINE C. MCBROOM (SBN 223559)
10 kmcbroom@kaedianllp.com
11 8383 Wilshire Blvd., Ste. 210
12 Beverly Hills, CA 90211
13 Telephone: (310) 893-3372
14 Facsimile: (310) 893-3191

15 Attorneys for Defendant
16 PEDRO MARTINEZ

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
18 **FOR THE COUNTY OF SAN BERNARDINO**

19 THE PEOPLE OF THE STATE OF
20 CALIFORNIA,

21 Plaintiff,

22 v.

23 PEDRO MARTINEZ,

24 Defendant.

Case No.: FVI19000218

**DEFENDANT PEDRO MARTINEZ'
POINTS AND AUTHORITIES
CONCERNING PROSECUTORIAL
STATUTORY IMMUNITY FOR
DEFENSE WITNESSES**

Date: September 28, 2023

Time: 8:30 a.m.

Dept.: M2

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELEVANT FACTS

Magdalena Serna (“Ms. Serna”) instigated the present action. She took the alleged first disclosure by Complaining Witness Ismael R. (“Ismael”) over a 7-hour period, provided detailed statements to Los Angeles County Sheriff’s Department (“LASD”) and San Bernardino County Sheriff’s Department (“SBSD”) regarding complaining Ismael’s alleged statements (Ismael did not provide any statements to law enforcement), instigated the parallel civil action against Defendant Pedro Martinez (“Mr. Martinez”) and Hesperia Unified School District (“HUSD”), previously alleged sexual assault on Ismael by Complaining Witness Xzavier M. (“Xzavier”), previously alleged sexual assault by Ismael on his 3 years old brother and purported to interview the 3 year old about the abuse, identified Xzavier and others to law enforcement as an alleged victim of abuse (Ismael has never made this allegation), and provides the nexus between Ismael and Xzavier.

The Court has inquired specifically about Ms. Serna’s connection with Xzavier’s allegations to law enforcement and social workers at the Children’s Assessment Center (“CAC”). The connection is clear. SBSD Deputy Womelsdorf interviewed Ms. Serna at length, and *not* Ismael, after receiving a courtesy report from LASD wherein Ismael did not make any statements, only Ms. Serna. Deputy Womelsdorf learned from Ms. Serna that Xzavier, who she had previously accused of sexually abusing Ismael, was allegedly also a victim of sexual abuse by Mr. Martinez.

Using the information provided by Ms. Serna, including allegations of oral sex and sodomy (which Ismael has never alleged), Deputy Womelsdorf questioned Xzavier at Maple Elementary school. The defense maintains that the interview was leading and suggestive and that Deputy Womelsdorf sought to confirm the allegations relayed to him by Ms. Serna.

Ms. Serna’s statements to LASD and SBSD Deputy Womelsdorf were relied on by Detective Arias and Sergeant Tracy when they took the initial three-part interview of Mr. Martinez. They made specific references to her allegations (allegations the children never made).

1 Ms. Serna's allegations form the basis of each search warrant affidavit issued in this
2 matter. *See* Search Warrant Affidavit of Deputy Jonathan Womelsdorf (related to residence
3 and work of Pedro Martinez) dated January 22, 2019; Search Warrant Affidavit of Detective
4 Brian Arias (related to electronic data stored on the email account of Pedro Martinez) dated
5 January 25, 2019; Search Warrant Affidavit of David Rayenhartz (related to work records of
6 Pedro Martinez and school proctor employee and work schedules) (undated).

7 Additional facts relayed by and concerning Ms. Serna are set forth in the previously
8 filed Motion to Admit Prior Sex Acts Pursuant to Penal Code Section 782 with the
9 accompanying Under Seal Declaration in support thereof, defense Motion in Limine No. 14,
10 and the Supplemental Brief Concerning Mr. Martinez' Motion in Limine No. 14 regarding
11 Magdalena Serna's Prior Allegations and Influence Over Complaining Witness Ismael R and
12 the Criminal Investigation and Mr. Martinez' Motion Pursuant to Penal Code Section 782,
13 which are incorporated herein by reference.

14 DDA Pribble maintains that given what the defense has raised concerning Ms. Serna (as
15 well as her wife, Ismael's mother Alba Rosa), the People believe that Ms. Serna (as well as
16 Alba Rosa) might have exposure to criminal prosecution in Los Angeles County and that an
17 assertion of the Fifth Amendment Privilege would render the witnesses unavailable for trial.
18 The People have requested and been granted a 402 hearing on this issue.

19 In anticipation of the 402 hearing on this issue scheduled for Thursday, September 28,
20 2023, Mr. Martinez submits these points and authorities concerning statutory immunity where
21 an essential witness is rendered unavailable by assertion of the Fifth Amendment privilege
22 against self-incrimination.

23 As set forth in detail below, where an essential defense witness is rendered unavailable
24 due to the prosecution's threat or contemplation of possible criminal liability, and the
25 prosecution refuses to grant the witness immunity, the Court must either order the Government
26 to issue prosecutorial immunity or order the defendant acquitted.

1 **II. MAGDALENA SERNA’S TESTIMONY IS CLEARLY EXCULPATORY**

2 Facts related to Ms. Serna are set forth in the previously-filed Motion to Admit Prior
3 Sex Acts Pursuant to Penal Code Section 782 with the accompanying Under Seal Declaration
4 in support thereof, defense Motion in Limine No. 14, and the Supplemental Brief Concerning
5 Mr. Martinez’ Motion in Limine No. 14 regarding Magdalena Serna’s Prior Allegations and
6 Influence Over Complaining Witness Ismael R and the Criminal Investigation and Mr.
7 Martinez’ Motion Pursuant to Penal Code Section 782, which are incorporated herein by
8 reference.

9 The facts related to Ms. Serna include, *inter alia*, that she is a self-professed expert on
10 pedophilia/sexual assault and a survivor of molestation who made allegations of sexual assault
11 against family members and colleagues spanning from her childhood to present; she alleged
12 that her then 4-year old son was sexually molested by a family friend; she alleged that Ismael
13 sexually assaulted his 3 year old brother and that he confessed; she alleged that Ismael was
14 sexually assaulted by Xzavier and other boys at Maple Elementary School, and now alleges
15 that Mr. Martinez has sexually molested Ismael. Each claim mentioned herein concerns acts
16 of sodomy or concerning (in her words) the butt/anus.

17 If what Ms. Serna reported happened never actually did (as to Ismael or Xzavier) or if
18 her conduct substantially contaminated the statements of the complaining witnesses (by herself
19 or through Deputy Womelsdorf when he relied on her allegations as the sole basis of
20 information for the initial interview of Xzavier), Ms. Serna’s actions and testimony are the
21 heart of the credibility and reliability of Ismael’s and Xzavier’s statements to both law
22 enforcement and social workers thereafter as well as their anticipated trial testimony.

23 **III. WITNESS IMMUNITY**

24 **A. Should the Prosecution Refuse to Grant Immunity to an Essential Defense**
25 **Witness, a Retrial Is Necessary Wherein the Prosecutor Can Be Ordered to**
26 **Grant Immunity or Face a Judgment of Acquittal**

27 In *People v. Masters* (2016) 62 Cal.4th 1019, 1052, our Supreme Court stated as follows:

28 [*Government of the Virgin Islands v. Smith* (3d Cir. 1980) 615 F.2d 964] []
described another theory by which due process may compel a defense witness to
be immunized: If a defendant can show that the prosecutor refused to grant

1 immunity “with the deliberate intention of distorting the factfinding process,” a
2 retrial is necessary. (*Smith, supra*, 615 F.2d at p. 968.) When the prosecutor is
3 found have committed misconduct by withholding immunity, the remedy is to set
4 aside the conviction and permit a new trial, at which the prosecutor can be ordered
5 “to grant statutory use immunity,” so that the witness can testify, or else face “a
6 judgment of acquittal.” (*Id.* at p. 969.)

7 *Masters* continued:

8 [U.S. v. *Quinn* (3d Cir. 2013) 728 F.3d 243] adopted this theory as well as the five
9 factors outlined in *Smith* to evaluate claims of prosecutorial misconduct: whether
10 “ ‘[1] [witness immunity was] properly sought in the district court; [2] the defense
11 witness [is] available to testify; [3] the proffered testimony [is] clearly
12 exculpatory; [4] the testimony [is] essential¹; and [5] there [are] no strong
13 governmental interests which countervail against a grant of immunity.’ ”
14 (*Quinn, supra*, 728 F.3d at p. 251, quoting *Smith, supra*, 615 F.2d at p. 972.) If the
15 test is satisfied, the remedy is for the court to set aside the conviction and put the
16 prosecution to the choice of granting immunity or facing dismissal of the
17 charges. *Quinn* emphasized that the remedy is not for the court itself to grant
18 immunity. (*Quinn, supra*, 728 F.3d at pp. 259–260.)

19 (*Masters, supra*, 62 Cal.4th at pp. 1051-52.)

20 In California, the law regarding prosecutorial misconduct is settled: “When a
21 prosecutor's intemperate behavior is sufficiently egregious that it infects the trial
22 with such a degree of unfairness as to render the subsequent conviction a denial
23 of due process, the federal Constitution is violated. Prosecutorial misconduct that
24 falls short of rendering the trial fundamentally unfair may still constitute

25 ¹ The term “essential witness” has not yet been defined by California courts. The term is defined in
26 federal courts as follows:

27 “In the absence of a statutory definition, the D.C. Circuit has held that an “essential witness” is
28 one ‘whose testimony would be extremely important to the proceeding, perhaps providing proof
29 that was not otherwise attainable’—in other words, ‘a witness so essential to the proceeding that
30 continuation without the witness would either be impossible or would likely result in a
31 miscarriage of justice.’” *United States v. McNeil*, 911 F.2d 768 (D.C. Cir. 1990) (per curiam)
32 (internal quotation marks omitted); accord *United States v. Ortiz*, 687 F.3d 660, 663 (5th Cir.
33 2012); *United States v. Hamilton*, 46 F.3d 271, 277 (3d Cir. 1995); *United States v. Eagle Hawk*,
34 815 F.2d 1213, 1218 (8th Cir. 1987); *United States v. Marrero*, 705 F.2d 652, 656 (2d Cir.
35 1983). To prove a witness is “essential,” the Government “must show [*9] how the testimony
36 that it expects a particular witness will give fits within the overall framework of its case, and
37 why that witness's testimony would be not only useful, but essential.” *McNeil*, 911 F.2d at 774.

38 *United States v. Cox* (N.D.Ind. Oct. 30, 2020, No. 1:18-CR-83-HAB) 2020 U.S. Dist. LEXIS 202266, at
39 *8-9.)

1 misconduct under state law if it involves the use of deceptive or
2 reprehensible methods to persuade the trial court or the jury.” (*People v.*
Panah (2005) 35 Cal.4th 395, 462)

3 (*Masters, supra*, 62 Cal. 4th at p. 1052.)

4 Similarly, in *People v. Hull* (2019) 31 Cal.App.5th 1003, 1023-1024, the Court stated:

5 While judicial immunity has been foreclosed, our high court in *Masters*
6 recognized that prosecutorial immunity could be compelled as a requirement of
7 due process if the prosecutor's refusal to grant immunity amounts to prosecutorial
8 misconduct. (*Masters, supra*, 62 Cal.4th at 1024 at pp.1051–1052.) The *Masters*
9 court noted the Third Circuit in *Smith* reasoned that “due process may compel a
10 defense witness to be immunized: If a defendant can show that the prosecutor
11 refused to grant immunity “with the deliberate intention of distorting the judicial
12 factfinding process,” a retrial is necessary. [Citation.] When the prosecutor is
13 found to have committed misconduct by withholding immunity, the remedy is to
14 set aside the conviction and permit a new trial, at which the prosecutor can be
15 ordered ‘to grant statutory use immunity,’ so that the witness can testify, or else
16 face ‘a judgment of acquittal.’” (*Masters*, at p. 1051, citing *Smith, supra*, 615 F.2d
17 at p. 969.)

18 The *Masters* court then noted the test for prosecutorial misconduct in California
19 is well settled. “When a prosecutor's intemperate behavior is sufficiently
20 egregious that it infects the trial with such a degree of unfairness as to render the
21 subsequent conviction a denial of due process, the federal Constitution is violated.
22 Prosecutorial misconduct that falls short of rendering the trial fundamentally
23 unfair may still constitute misconduct under state law if it involves the use of
24 deceptive or reprehensible methods to persuade the trial court or the jury.”
25 (*Masters, supra*, 62 Cal.4th at p. 1052.)

26 But the *Masters* court went on to note the Third Circuit continues to use the five
27 factors discussed in the *Smith* test to evaluate claims of prosecutorial misconduct
28 based on the refusal to grant immunity to a witness. Those factors are: ““[1]
[witness immunity was] properly sought in the [trial] court; [2] the ... witness [is]
available to testify; [3] the proffered testimony [is] *clearly exculpatory*; [4] the
testimony [is] *essential*; and [5] there [are] no strong governmental interests which
countervail against a grant of immunity.”” (*Masters, supra*, 62 Cal.4th at pp.
1051–1052, italics added, quoting *Quinn, supra*, 728 F.3d at p. 251 & *Smith,*
supra, 615 F.2d at p. 972.)

Similarly, in *People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1551-1552, the Court stated:

The courts have “recognized that the power to confer immunity is granted by
statute to the executive, that is, to the prosecution (see [Pen. Code.] § 1324), and
have questioned whether a trial court possesses inherent authority
to grant such immunity.” (*People v. Stewart* (2004) 33 Cal.4th 425, 468). In fact,

1 the California Supreme Court has definitively declared: “The grant of immunity
2 is an executive function, and prosecutors are not under a general obligation to
3 provide immunity to witnesses in order to assist a defendant. [Citations.]
4 Similarly, we have expressed reservations concerning claims that trial courts
5 possess inherent authority to grant immunity [citation], and even assuming the
6 court possesses such authority, it has been recognized only when the defense has
7 made a showing that a defense witness should be afforded immunity in order to
8 provide clearly exculpatory testimony.” (*People v. Williams, supra*, 43 Cal.4th
9 584, 622–623.)

7 The federal due process test, which essentially mirrors the California standard
8 delineated in section 240, subdivision (b), also recognizes the “exclusive
9 authority and absolute discretion” vested in the prosecution to grant immunity to
10 a witness, and intrudes upon that discretion only where the prosecution violates
11 the defendant's right to a fair trial by refusing to grant use immunity to a witness
12 whose testimony would have been relevant “with the deliberate intention of
13 distorting the fact-finding process.” (*U.S. v. Straub* (9th Cir. 2008) 538 F.3d
14 1147, 1156, italics omitted; see also *Williams v. Woodford* (9th Cir. 2004) 384
15 F.3d 567, 600; *Woods v. Adams* (C.D.Cal. 2009) 631 F.Supp.2d 1261, 1279–
16 1280.) *Intentional* distortion of the factfinding process requires government
17 action that amounts “to something akin to prosecutorial misconduct.” (*U.S. v.*
18 *Straub, supra*, at p. 1157.)

15 Here, the People have raised the potential criminal prosecution of Ms. Serna (and
16 Ms. Rosa) and on that basis the Court has ordered a 402 hearing to evaluate the People’s
17 assertion. The People have not asserted any other compelling government interest that
18 would interfere with a grant of immunity.

19 It has not yet been determined whether Ms. Serna (or Ms. Rosa) has a viable Fifth
20 Amendment privilege. Should this Court determine there is a viable Fifth Amendment
21 privilege, the defense shall request prosecutorial immunity so that an essential fact
22 witness may testify at trial. Pursuant to *Masters*, in the absence of a compelling
23 government interest, the prosecution’s refusal to grant immunity to an essential defense
24 constitutes misconduct, the result of which is a retrial wherein the Court can order the
25 prosecutor to grant immunity or render judgment of acquittal.²

26
27
28 ² The Court has cautioned the defense to refrain from asserting claims of “prosecutorial
misconduct,” stating that such claims are not well received and denigrate the judicial process.
The defense is not asserting prosecutorial misconduct in this pleading, but rather providing

1 **B. Should the Court Determine That There is a Fifth Amendment Privilege, The**
2 **Defense Will Satisfy the Five-Part Test And Prosecutorial Immunity is**
3 **Warranted**

4 1. The Defense Will Request Immunity

5 The People have brought to the attention to the Court that they believe the Fifth
6 Amendment could preclude Ms. Serna's (and possible Ms. Rosa's) testimony. If the Court
7 determines there is a valid Fifth Amendment assertion, Mr. Martinez is hereby requesting the
8 Court compel the District Attorney to grant prosecutorial immunity.

9 2. The Defense Witness is Available to Testify

10 Both Ms. Serna and Ms. Rosa are included on the People's witness list. As of the date
11 of this brief, the People represent that they do not intend to call either witness. The defense
12 does intend to call these witnesses. Ms. Serna has appeared to testify at trial pursuant to a
13 defense trial subpoena and has been ordered by the Court to appear on Thursday, September
14 28, 2023.

15 3. The Proffered Testimony is Clearly Exculpatory

16 As shown above and in the incorporated pleadings, Ms. Serna's testimony is clearly
17 exculpatory.

18 4. The Testimony is Essential

19 Without Ms. Serna as a witness, the jury will be precluded from hearing how the
20 investigation was initiated, any affect her 7 hour questioning (and 3-4 months of conditioning
21 by way of weekly conversations about pedophilia that took place before that) had on Ismael's
22 subsequent statements to CAC, any affect her detailed allegations of oral sex and sodomy
23 (never alleged by Ismael to any law enforcement officer or forensic interviewer) had on
24 Deputy Womelsdorf prior to during Xzavier's first disclosure interview, and how her
25 statements framed the interrogation of Mr. Martinez by Detective Arias and Sergeant Tracy.

26
27
28 _____ points and authorities as to the issue of prosecutorial immunity when an essential defense
 witness asserts a valid Fifth Amendment privilege. No such determination has been made.

1 Ms. Serna had tremendous influence over the criminal investigation as well as the
2 parallel civil case initiated withing days of Mr. Martinez' arrest. Ms. Serna's involvement in
3 this case and her influence over the statements and interviews are essential considerations for
4 the jury to determine the reliability of the allegations at issue. Precluding jurors from her
5 testimony clearly interferes with and distorts the fact-finding process.

6 5. There Are No Strong Governmental Interests Which Countervail Against a
7 Grant of Immunity

8 The Government has provided no strong governmental interests which countervail
9 against a grant of immunity. First, Ms. Serna has already been prosecuted in connection with
10 her physical abuse against Ismael and his little brother. Second, the statute of limitations for all
11 crimes other than sexual abuse has passed. Third, the People contend that the allegations
12 against Ms. Serna as to sexual abuse included in the redacted DCFS records acquired by the
13 defense are based on conjecture and hearsay.

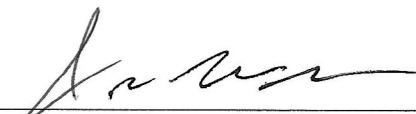
14 **IV. CONCLUSION**

15 Should the Court determine that Ms. Serna, an essential defense witness, has a valid
16 Fifth Amendment privilege, Mr. Martinez requests that the People issue Ms. Serna (and if
17 necessary, Ms. Rosa) prosecutorial immunity. If the People refuse, Mr. Martinez shall request
18 that the Court order the People to issue a grant of prosecutorial immunity to these two essential
19 witnesses.

20 Should the People refuse to comply with such a court order, Mr. Martinez shall request
21 the Court issue a judgment of acquittal.

22 DATED: September 27, 2023

LAW OFFICES OF IAN WALLACH, P.C.

23
24 By: 
25 IAN WALLACH
26 Attorney for Defendant
27 PEDRO MARTINEZ
28

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am over the age of
4 eighteen years and not a party to the within action. My business address is 5777 West Century
Blvd. Suite 750, Los Angeles, CA 90045.

5 On September 28, 2023, I served the following document(s) described as:
6 **DEFENDANT PEDRO MARTINEZ'S REQUEST FOR PROSECUTORIAL
IMMUNITY** in this action by placing true copies thereof enclosed in sealed envelopes and/or
7 packages addressed as follows:

8 Deputy District Attorney Deena Pribble

9 **BY MAIL:** I deposited such envelope in the mail at 5777 West Century Blvd. Suite 750,
10 Los Angeles, CA 90045. The envelope was mailed with postage thereon fully prepaid.
11 I am "readily familiar" with the firm's practice of collection and processing
12 correspondence for mailing. It is deposited with the U.S. Postal Service on that same
day in the ordinary course of business. I am aware that on motion of the party served,
service is presumed invalid if postal cancellation date or postage meter date is more
than one (1) day after date of deposit for mailing in affidavit.

13 **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant
14 to California Rules of Court. The telephone number of the sending facsimile machine
15 was (213) 402-5516. The name(s) and facsimile machine telephone number(s) of the
person(s) served are set forth in the service list.

16 **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the
above addressee(s).

17 **BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles,
18 California, I caused each such document to be transmitted electronically to the
19 party(ies) at the e-mail address(es) indicated above. To the best of my knowledge, the
transmission was reported as complete, and no error was reported that the electronic
transmission was not completed.

20 **STATE:** I declare under penalty of perjury under the laws of the State of California
21 that the foregoing is true and correct.

22 Executed on September 28, 2023 at Los Angeles, California.

23 
24 _____
25 IAN WALLACH