

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF

	)	Case No.
	)	
	)	
Plaintiff,	)	MOTION TO EXCLUDE
	)	CROSS-EXAMINATION OF
Vs.	)	DEFENDANT AS TO
	)	VICTIM'S VERACITY
	)	
Defendant.	)	
	)	Dated:
_____	)	

TO: All parties and to their attorneys of record, and to the  
Honorable Judge of the Superior Court:

In the case at bar, the prosecution may seek to cross-examine  
Defendant concerning whether or not the alleged victim herein is  
truthful in his/her accusations against him. As will be more  
fully set forth below in the following memorandum of points and  
authorities, such cross-examination is wholly improper and must  
be excluded.

## MEMORANDUM OF POINTS AND AUTHORITIES

### **I IT IS IMPROPER TO CROSS-EXAMINE A WITNESS AS TO THE VERACITY OF ANOTHER WITNESS.**

Should Defendant testify in this case, he seeks to preclude cross-examination by the prosecutor as to the veracity of the alleged victim, whose testimony will be contrary to his. Specifically, Defendant seeks the exclusion of questions to him by the prosecutor that suggest that his testimony is that the child-victim-witness must be, or is a liar. Such questions are wholly improper.

It has long been the law in California that a witness cannot opine that another witness is telling or not telling the truth. For example, in People v. Sergill (1982) 138 Cal.App.3d , 39-40, the reviewing court reversed the defendant's conviction where a police officer was permitted to opine that the child victim was telling the truth. In People v. Melton (1988) 44 Cal.3d 713, 744-745, the prosecutor elicited testimony from a defense investigator that he had made no effort to find a particular person who had been mentioned a witness as possibly involved in the killing at issue. The purpose of said inquiry was to suggest that the investigator did not believe the potential witness. The Supreme Court found error in the admission of such testimony to indicate the investigator's assessment of the witness's credibility because the evidence was irrelevant and incompetent given that the investigator was not an expert on judging credibility and he knew nothing of the witness's reputation for veracity. Further, such testimony

invaded the province of the jury as the ultimate fact finder. (Id., at pp. 743-745.) In People v. Smith (1989) 214 Cal.App.3d 904, the testimony of a police officer as to his belief in the victim's dying declaration as to who killed him was found inadmissible. (Id., at p. 915.)<sup>1</sup>

The Ninth Circuit is in accord. In United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, the prosecutor's question to the defendant as to whether he was saying that another witness (a deputy marshal) had lied, was found to be error and improper cross-examination. In so concluding, the Sanchez court relied on cases from other circuits in which such questions were found to improperly infringe on the jury's right to make credibility determinations. More recently in United States v. Combs (9th Cir. 2004) 379 F.3d 564, the government conceded it was improper for the prosecutor to question the defendant about whether one of the investigating agents was lying. (Id., at p. 572.) The reviewing court found the error reversible, noting it was compounded by the trial court's placing upon it her "imprimatur" by chastising the defendant and instructing him to answer the question about the truthfulness of the agent's testimony. The court concluded:, "We cannot presume that the jury either did not notice the district court's reprimand or that it did not affect the verdict because the jury comprehended

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<sup>1</sup>Defendant notes that some courts have held that such questions may be appropriate when necessary to clarify a particular line of testimony. (People v. Smithey (1999) 20 Cal.4th 936, 960-961.)

that the district judge was insisting that Combs answer questions that were merely collateral, as the government contends." (Id., at p. 574.)

Thus, the prosecutor must not be permitted to ask the Defendant on cross-examination whether or not he thinks the child-victim herein is telling the truth or is a liar.

Dated:

Respectfully submitted,

By \_\_\_\_\_

Attorney for Defendant