Innocence Legal Team
1600 S. Main St., Suite 195
Walnut Creek, CA 94596
Tel: 925 948-9000

Attorney for Defendant

**This motion should be run until the U.S. Supreme Court rules on this issue. California Supreme Court has already rule Ev.Code § 1108 to be constitutional.**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff,<br><br>Vs.<br><br>Defendant. | Case No.<br><br>MOTION RE UNCONSTITUTIONALITY OF EVIDENCE CODE §1108<br><br>Date:<br>Time:<br>Dept: |

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

Defendant contends that the use of Evidence Code §1108 as a basis for the admission of other sex crimes evidence for character or propensity purposes violates a variety of his constitutional rights. These include his federal and state constitutional rights to due process, equal protection and against ex-post facto legislation. (U.S. Constitution, 5th and 14th Amendments; California Constitution, Article 1, §s 7, 9 and 15.) Each of these points will be addressed in turn below.

**I**

**THE ADMISSION OF PRIOR CONDUCT PURSUANT EVIDENCE CODE §1108 VIOLATES DEFENDANT'S RIGHT TO DUE PROCESS.**

A defendant's federal constitutional right to a fundamentally fair trial is guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments. (Medina v. California (1992) 505 U.S.__; 120 L.Ed.2d 353, 363.) Due process prohibits the use of state procedures which offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental; (Snyder v. Massachusetts (1933) 291 U.S. 97, 105; and procedures which undermine "the ultimate integrity of the fact finding process." (Ohio v. Roberts (1980) 448 U.S. 56, 64.)

"[O]ur decisions exercising supervisory power over criminal trials... suggest that evidence of prior crimes, introduced for no purpose other than to show criminal disposition, would violate the Due Process Clause." (Spencer v. Texas (1967) 385 U.S. 554, 574-575, conc. and dis. opn. of Warren, C.J., emphasis added.) In Spencer, in a five to four decision, the Supreme Court held that a Texas habitual offender statute and procedure allowing a jury trying the issue of guilt to be informed of the defendant's prior convictions did not violate due process, because the statute also mandated that the

jury must be instructed that the prior convictions could not be considered on the question of guilt of the pending charge. (Id. at p. 561.) Four justices were of the opinion that, even with the protection of the limiting instruction, the statute violated due process. (Id. at pp. 587-588.) Other United States Supreme Court decisions that rule against the use of propensity evidence include Brinegar v. United States (1949) 338 U.S. 160, 173-174 [propensity evidence prevents a constitutionally fair trial, especially in sexual assault and child molestation cases]; Michaelson v. United States (1948) 335 U.S. 469, 475-476; Huddleston v. United States (1988) 485 U.S. 681, 685-687.

The due process clause requires conviction by proof beyond a reasonable doubt. (In re Winship (1970) 397 U.S. 358.) Recognition of the prejudicial effect of prior-conviction evidence has traditionally been related to the requirement of proof beyond a reasonable doubt. (Spencer v. Texas, supra, 385 U.S. at p. 575.) Federal appellate courts have therefore held that the admission of evidence of prior felony convictions, without a limiting instruction, violates due process. (Panzavecchia v. Wainwright (5th Cir. 1981) 658 F.2d 337.) In Panzavecchia, a Florida state prosecution for murder and possession of a firearm by a convicted felon, evidence of the prior conviction was admitted without instructions to the jury

not to consider it as evidence of the murder count. In reversing the conviction, the Fifth Circuit held:

> "In Florida, it is well established that evidence of unconnected prior crimes is inadmissible if the only purpose is to show bad character or propensity to commit crimes... The prejudice which Florida and the federal courts have proscribed clearly existed and this prejudice rose to such a level as to make petitioner's trial fundamentally unfair and in violation of the Fourteenth Amendment..." (Id. at pp. 341-342.)

More recent federal decisions holding the admission of propensity evidence in sexual assault cases violates due process include United States vs. Has No Horse (8th Cir. 1993) 11 F.3d 104, 105; United States vs. Fawbush (8th Cir. 1990) 900 F.2d 150, 151-152; Government of the Virgin Islands v. Archibald (3rd Cir. 1993) 987 F.2d 180, 185-186.)

The Ninth Circuit has recognized, in cases arising from California state prosecutions, that improperly admitted

"propensity" evidence violates the due process rights of the accused. Thus, in McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, a California state prosecution for murder, evidence of the defendant's possession of a weapon which could not have been the murder weapon was irrelevant to the charged crime and was therefore improperly admitted to prove his character as a person who had the propensity to own knives. The Ninth Circuit held that such evidence is not only barred under Evidence Code section 1101, but the prohibition of "other acts evidence" is so contrary to firmly established principles of Anglo-American jurisprudence that it is a component of "fundamental fairness" for due process purposes. (Id. at p. 1380.) In finding a due process violation by the admission of evidence only relevant to prove character, the McKinney court looked to the basis of the longstanding prohibition against it:

> "The gravamen of the historic attempt to exclude such character evidence is to force the jury, as much as humanly possible to put aside emotions and prejudices raised by [the other acts evidence], and consider the body of evidence, both testimonial and physical before them, in order to

decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty of the crime charged. The character rule is based on such a `fundamental conception of justice' and the `community's sense of fair play and decency' as concerned the Supreme Court in Dowling. After all, as shown above, courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt. The state may not show defendant's . . . [uncharged acts] . . . even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because

character evidence is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (Id., at p. 1384.)

Even more recently, in Crotts v. Smith (9th Cir. 1996) 73 F.3d 861, the Ninth Circuit reversed a California state conviction for assault upon a peace officers, where other crimes evidence was improperly introduced:

"The jury's likely inference that a person who has killed a police officer is the kind of person who would assault a police officer... is exactly the kind of propensity-based inference that [section] 1101(a) was designed to exclude." (Id. at p. 866; see also United States v. Bradley (9th Cir. 1993) 5 F.3d 1317, 1321.)

California courts have also long held that a defendant may not be tried on evidence of character, unless the defendant himself or herself puts character in issue. (People v. Alcala, supra, 36 Cal.3d at pp. 130-131.) "[I]t is well established that evidence of other crimes is inadmissible to prove the accused had the propensity or disposition to commit the crime charged." (People v. Terry (1970) 2 Cal.3d 362, 396; People v. Westek (1948) 31 Cal.3d 469, 476.) Thus, in People v. Henderson (1976) 58 Cal.App.3d 349, 360, the court of appeal held the admission of irrelevant evidence of the defendant's possession of a firearm not used in the crime was prejudicial error, stating:

> "Evidence of possession of a weapon not used it the crime charged... leads logically only to an inference that defendant is the kind of person who surrounds himself with weapons-- a fact of no relevant consequence to determination of the guilt or innocence of the defendant." (See also People v. Riser (1956) 47 Cal. 2d 566, 577.)

Further, in People v. Garceau (1994) 6 Cal.4th 140, 186, a majority of the California Supreme Court assumed without deciding that federal due process was violated by the giving of an instruction which authorized the jury to consider certain bad acts evidence for the purpose of establishing the defendant's propensity to commit murder.

That the admission of other crimes evidence to establish propensity to commit the crime charged violates due process is logical given the reason for the proscription against it, as well as the components of due process itself. As stated above in McKinney, supra, as well as in California cases, bad acts evidence is excluded essentially because it is too prejudicial. (People v. Schader (1969) 71 Cal.2d 761, 772-773, fn.6; People v. Walkey (1986) 177 Cal.App.3d 268, 279-280.) A denial of due process in a criminal trial "is the failure to observe that fundamental fairness essential to the concept of justice . . . the acts complained of must be of such quality as necessarily prevents a fair trial." (Lisenba v. California (1941) 314 U.S. 219, 236.) "It is clear that the assurance of a fair trial is constitutionally founded in due process." (People v. Sharp (1972) 7 Cal.3d 448, 459.) The California Supreme Court has equated prejudice with an unfair trial and hence a due process violation. (People v. Bean (1988) 46 Cal.3d 919, 940.)

Thus, evidence which is too prejudicial, such as that admitted for pure propensity purposes, leads to an unfair trial and violates due process.

Evidence Code section 1108, authorizing the use of propensity evidence to prove the charged crimes therefore violated defendant's federal and state constitutional rights to due process and a fundamentally fair trial.

The Third District Court of Appeal recently found to the contrary in People v. Fitch (1997) 55 Cal.App.4th 172, 63 Cal.Rptr.2d 753. The constitutionality of Evidence Code §1108 is presently pending in the California Supreme Court. (People v. Falsetta S071521; People v. Ritson S071200, also see People v. Hoover S072374 [dealing with the constitutionality of Evidence Code §1109, identical to §1108 but dealing with evidence of prior instances of domestic violence].)

Defendant respectfully submits that Fitch, the only remaining published decision on point, was wrongly decided and should not be followed by this court. In finding no due process violation, the Fitch court reasoned that under "historical practice" the admission of propensity evidence "does not offend a fundamental principle of justice rooted in the traditions and conscience of our people." (63 Cal.Rptr.2d at p. 758.) Such analysis of "historical practice" is fatally flawed.

The bar against admitting propensity evidence is well established in "historical practice." The Fitch court noted there was "confusion and ambivalence" in this area. (63 Cal.Rptr. 2d at p. 759.) Defendant submits that the only possible confusion has resulted from the court's own blurring of the distinction between the admission of character evidence for character and non-character purposes, such as common plan or identity.

Fitch quoted Marshall v. Lonberger (1983) 459 U.S. 422, 438, fn. 6 to support its claim that the question of whether character evidence has been admissible historically is "far more ambivalent." (63 Cal.Rptr.2d 758.) Viewing the quote in context with its preceding sentence, however, it is clear the author was delineating character versus non-character evidence:

> "Justice Stevens' dissent appears to rest on a view that the common law regarded the admission of prior convictions as grossly unfair and subject to some sort of blanket prohibition. In fact, the common law was far more ambivalent. [Citation.] Alongside the general principle that prior convictions are

> inadmissible, despite their relevance to guilt, [citation], the common law developed broad, vaguely defined exceptions -- such as proof of intent, identity, malice, motive, and plan -- whose application is left largely to the discretion of the trial judge [citation]. (Marshall v. Lonberger, supra, 459 U.S. at p. 438, fn.6.)

Thus, the Supreme Court was saying that non-character uses of prior crimes evidence have resulted in ambivalent rulings, not that character evidence has ever been admissible to prove propensity to commit an offense.[0/]

Fitch also found that the "ambivalence about prohibiting character evidence is greatest in sex offenses," quoting Wigmore in support of this. (63 Cal.Rptr.2d 758.)

---

[0] 1/ Defendant notes that in any event, Marshall, supra, is inapposite in that it involved the admissibility of prior convictions for sentencing, not for the determination of guilt or innocence.

Placing the quote in context, clearly Wigmore is disapproving the use of prior crimes evidence to prove "intent" in sex offense cases, finding it is dishonest and effectively permits such evidence to be used as character evidence. Further Wigmore unambiguously states that prior crimes evidence has "universally" been excluded from proving character: "The rule then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character." (1A Wigmore, Evidence (Tillers rev. 1940) Sec. 57, p. 1186.)

Finally, the Fitch court found that Evidence Code section 1108 has a safety net against a fundamentally unfair trial by subjecting the evidence of prior sexual misconduct to the Evidence Code section 352 weighing process. (63 Cal.Rptr.2d at p. 760.) Defendant urges that said section is no cure, as the nature and extent of potential prejudice to a defendant generated by character evidence renders it inadmissible.

In sum, Fitch's analysis on "historical practice" does not hold. In considering the use of prior crimes evidence, it failed to distinguish between character and non-character purposes. It also failed to adequately distinguish the case law discussed above which acknowledges the historical bar on propensity evidence.

**II**

## EVIDENCE CODE §1108 VIOLATES EQUAL PROTECTION

The Fourteenth Amendment to the United States Constitution, and Article I, section 7 of the California Constitution, guarantee all citizens the equal protection of the laws. (Serrano v. Priest (1971) 5 Cal.3d 584, 596.) A meritorious claim under the equal protection clause requires a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (In re Eric J. (1979) 25 Cal.3d 522, 530.)

Whenever a state law infringes a constitutionally protected and fundamental right, that law is subject to strict scrutiny under the equal protection clause. (Eisenstadt v. Baird (1972) 405 U.S. 438, 447.) Personal liberty is recognized as among the fundamental interests requiring application of the strict scrutiny test in a claim arising under the equal protection doctrine. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions." (In re Roger S. (1977) 19 Cal.3d 921, 927.) Application of the strict scrutiny standard requires the state to show a compelling state interest justifying the discrimination. (Serrano v. Priest, supra, 5 Cal.3d at p. 604.)

Evidence Code section 1108 treats criminal defendants accused of sex offenses differently from all other criminal defendants by allowing evidence of prior sex offenses to be admitted for all purposes, including showing a propensity to commit the charged crime, thereby gutting traditional character evidence rules. It cannot seriously be contested that criminal defendants constitute a class of similarly situated persons within the state of California. In People v. Olivas, supra, the California Supreme Court struck down a statute which permitted greater incarceration for youthful adult offenders because "such persons have been prosecuted as adults, adjudged by the same standards which apply to any competent adult, and convicted as adults in adult courts..." and therefore cannot be subject to greater punishment "despite the fact that they are treated in the same manner as any competent adult during the process which results in their convictions..." (Id. at pp. 242-243; see also People v. Mills (1992) 6 Cal.App.4th 1278, 1287; convicted felons constitute a "uniform class of persons" and therefore a law which "acts uniformly on all persons in the affected class" did not violate equal protection.)

Persons charged with sex offenses are subject to the same rules of criminal procedure and evidence as all other defendants during the process which results in a criminal conviction. Thus a procedural rule which permits only those

defendants charged with sex offenses to be convicted upon proof of their propensity to commit such crimes creates a classification that affects two similarly situated groups in an unequal manner. (In re Eric J., supra, 25 Cal.3d at p. 530.) Because the fundamental right of freedom is affected by the classification, it cannot be justified absent a compelling state interest. Sex offenses neither represent the most serious, nor the most frequently committed criminal offense. If murder cannot be proved through the use of propensity evidence, then no compelling state interest justifies the use of such evidence in a less serious offense. Nor are sex offenses uniquely difficult crimes to prove. While sex offenses often involve no witnesses other than the accused and the alleged victim, other crimes must also be proven through the testimony of a single eyewitness or victim, without any independent corroboration. Thus the nature of the offense which the prosecution seeks to prove does not demonstrate any compelling state interest in allowing the use of propensity evidence. Nor is the rate of recidivism uniquely high in sex offenses which might justify disparate treatment.[2/]

---

2 "The available date on recidivism do not support a unique rule for sex crimes. It is unclear whether the recidivism rate for sex crimes is

A state evidentiary rule which permits the jury to consider otherwise inadmissible and highly prejudicial propensity evidence, effectively lowering the prosecution's burden of proof, only in cases involving sex offenses is an unlawful discrimination which violates the federal and state guarantee of equal protection of the laws.

**III**

**ADMISSION OF PRIOR CONDUCT PURSUANT TO EVIDENCE CODE §1108 VIOLATES THE PROHIBITION AGAINST EX-POST FACTO LEGISLATION.**

---

higher than for other crimes. In a 1989 Bureau of Justice Statistics study that followed 100,000 prisoners for three years after release, the recidivism rate was lower for sex offenders than for most other criminals." (Byrden and Clark, Other Crimes Evidence in Sex Offense Cases (1994) 78 Minnesota Law Review 529, at pp. 572-573.)

The ex post facto clause prohibits legislation which (1) punishes as a crime an act previously committed, which was innocent when done; (2) makes more burdensome the punishment for a crime after its commission; or (3) deprives one charged with crime of any defense available according to law at the time when the act was committed. (United States Constitution, article I, section 10; Collins v. Youngblood (1990) 497 U.S. 37; California Constitution, article I, section 9; People v. McVickers (1992) 4 Cal.4th 81.) The California Supreme Court has held that the protection of the ex post facto clause of the California Constitution is coextensive with and is to be analyzed identically to the federal constitutional prohibition. (Tapia v. Superior Court (1991) 53 Cal.3d 282, 296.)

There is a longstanding presumption in both federal and California constitutional jurisprudence that new nondecisional law operates prospectively only. (United States v. Security Industrial Bank (1987) 459 U.S. 70, 79; Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1205; see also Penal Code section 3, no part of the Penal Code is retroactive "unless expressly so declared.") Prospective operation means that the measure in question applies only to conduct or conditions that arise on or after the effective date of the legislation. (Russell v., Superior Court (1986) 185 Cal.App.3d 810, 814.) The presumption of prospective operation is not only based upon

the ex post facto clause, but upon policy considerations of fairness and due process. "Retroactive laws are generally disfavored because the parties affected have no notice of the new law affecting past conduct. Such laws disturb feelings of security in past transactions." (Id. at p. 814.)

The presumption extends to procedural as well as substantive law. (Aetna Casualty & Surety Co. v. Ind. Acc. Com. (1947) 38 Cal.2d 388, 393; Evangelatos v. Superior Court, supra, 44 Cal.3d at p. 1205.) The presumption is not automatically satisfied whenever procedural law is applied to proceedings after the effective date of the law. Such application may nevertheless affect conduct or conditions in the past. (People v. Hayes (1989) 49 Cal.3d 1260, 1274.) Thus in Collins v. Youngblood, supra, 497 U.S. 37, the United States Supreme Court held that the ex post facto clause is violated by laws which fall into four categories including (1) a law that makes an action done before the passing of the law, and which was innocent when done, criminal; (2) a law that aggravates a crime, or makes it greater than it was, when committed; (3) a law that increases punishment; and (4) a law that alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of commission of the offense, in order to convict the offender. (Id. at p. 42.) The fourth category involves the amount or degree of proof essential to conviction.

(Id. at p. 43, fn. 3; citing Hopt v. Utah (1884) 110 U.S. 574, 590.) The Collins court explained that a state may not escape the prohibition against ex post facto laws merely by labeling a law procedural:

> "[W]e have said that a procedural change may constitute an ex post facto violation if it affect(s) matters of substance ... by depriving a defendant of "substantial protections with which the existing law surrounds the person accused of crime... or arbitrarily infringing upon substantial personal rights." (Collins v. Youngblood, supra, 497 U.S. at pp. 45; citations omitted.)

Evidence Code section 1108, authorizing the use of "propensity evidence" as substantive proof of charged sex offenses, deprives a defendant of one of the most "substantial protections" afforded under long-standing principles of due process. It is a deprivation of such magnitude as to be essentially substantive rather than merely procedural.

> "If... propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must first be declared away. Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one." (People v. Zachowitz (1930) 172 N.E. 466, 468.)

See also Brinegar v. United States, supra 338 U.S. at p. 174 [the prohibition against "other crimes evidence" is so contrary to firmly established principles of Anglo-American jurisprudence that it is a component of "fundamental fairness" under the Due Process Clause.]) Application of Evidence Code section 1108 to allow evidence of defendant's other crimes evidence as proof of the charged crimes therefore violated the prohibition against ex post facto legislation.

**CONCLUSION**

Based on the foregoing, Defendant respectfully submits that Evidence Code §1108 is unconstitutional and cannot be applied in his/her case to authorize the admission of prior crimes evidence for character purposes.

Dated: Respectfully submitted,

_____

Attorney For Defendant