

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

Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF)	Case No.
CALIFORNIA,)	
)	
Plaintiff,)	EXCLUDING DEFENDANT'S
)	ADULT SEXUAL CONDUCT
)	WITH
vs.)	OTHER ADULTS
)	
)	Date:
)	Time:
Defendant.)	Dept:
_____)	

The defense moves for a protective order that:

1. The prosecution not be allowed to introduce any evidence of adult with adult sexual conduct of the defendant.
2. The prosecution not be allowed to question the defendant (if **she/he** elects to testify) concerning **his/her** sexual conduct with other adult(s). This includes, but is not limited to adult sexual preference with adults, adults with adult types of sexual acts, and adult with adult sexual frequencies.
3. The prosecution not be allowed to question the defendant's spouse if **she/he** testifies concerning their adult sexual

conduct.

I

**DEFENDANT'S NON-CRIMINAL SEXUAL CONTACTS WITH OTHER
ADULTS ARE IRRELEVANT TO THE PRESENT CHARGES.**

Only relevant evidence is admissible at trial. (Evidence Code § 350.) "Relevant evidence" means testimony or physical objects, including evidence bearing on the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of an action. (Evidence Code § 210; **People vs. Scheid** (1997) 16 Cal.4th 1.) A court has no discretion to admit irrelevant evidence. (**People vs. Crittenden** (1994) 9 Cal.4th 83, 132.) Evidence which produces only speculative inferences is irrelevant evidence. (**People vs. De La Plane** (1979) 88 Cal.App.3d 223, 242.) Whether or not evidence is relevant is a decision within the trial court's discretion. (**People vs. Von Villas** (1992) 10 Cal.App.4th 201, 249.) The trial court abuses its discretion in admitting evidence when it can be shown under all the circumstances that it exceeded the bounds of reason. (**People vs. De Jesus** (1995) 38 Cal.App.4th 1, 32.)

In **People vs. Kelley** (1967) 66 C2d 232 (disapproved on another

ground, People v. Alcala (1984) 36 Cal.3d 604, 624), decided when oral copulation and anal sex between consenting adults was an illegal act, the defendant was charged with having orally copulated and masturbated an eight year old boy. Over objection, the prosecution introduced evidence that twenty four years before defendant was orally copulated by a male and that he committed acts of oral copulation with his first and second wife. The California Supreme Court reversed the conviction because of the erroneous admission into evidence of the prior sexual acts between consenting adults:

"It is not the law that other offenses are admissible whenever a specific intent is required to be proved. Such a rule should particularly be avoided in 288 cases where evidence that they were done with the specific intent of arousing sexual desires. Moreover, in the present case, the other offenses here involved are not, as required by Coltrin and as existed in Malloy and Honaker, 'of a similar nature' to the crime charged. The prior offenses were committed with consenting adults and with persons quite dissimilar to the prosecuting witness and involved distinctly different conduct on the part of the defendant. . . and the experience with his wives, occurring between consenting adults of the opposite sex in the privacy of the marriage bed, certainly cannot be relevant enough to the seduction of an 8-year-old boy to outweigh its prejudicial effect upon the jury." (Id., at p. 244-245.)

This ruling is stronger today in light of the decriminalization of all types of sex between consenting adults.

In 1978 the California Supreme Court reaffirmed its ruling that adult with adult sexual acts are inadmissible in child molest cases because the persons are quite dissimilar. See **People vs. Thomas** (1978) 20 C3d 457 at 466 (overruled on other grounds in People v. Tassell (1984) 36 Cal.3d 77, 87-88 and fn. 8):

"Ordinarily, evidence of a common design or plan would bear either on the issue of the defendant's identity as the perpetrator of the charged offense, or the defendant's intent to commit that offense...

Our decisions in Cramer and Kelley are helpful in pinpointing the rationale underlying the common design or plan exception. Both cases recognize that although alleged sex offenses committed with persons other than the prosecuting witness are often unreliable and difficult to prove, nevertheless such evidence is admissible to show a common design or plan where the prior offenses (1) are not too remote in time, (2) are similar to the offenses charged, and (3) are committed upon persons similar to the prosecuting witness..." (*Id.*, at p. 465, emphasis added.)

Similarly, in **United States vs. Gillespie** 852 F2d 475 (9th Cir. 1988) the defendant was charged with child molestation. The prosecution introduced evidence that the defendant (an adult) and his adoptive father (an adult) had a homosexual relationship. The prosecution introduced the evidence on the theory that it showed appellant's motive, intent, plan and design to bring the child victim into the U.S. for molestation purposes. The defendant's conviction was reversed because of the introduction of evidence of his homosexual contact with another adult. The court explained:

"The evidence neither proved nor disproved that the appellant molested the child. It was offered to show that the men differed from what they held themselves out to be, but none of the testimony about their sexual relationship helped the trier of fact decide whether the appellant was guilty of the offense. (*Id.*, at p. 478.)

In short, Defendant's non-criminal sexual contacts with other adults are not relevant to establish that committed the charged offense(s) and are therefore inadmissible.

II

THE ACCIDENTAL MENTION BY A WITNESS OF THE DEFENDANT'S SEXUAL CONTACTS WITH ADULTS DOES NOT OPEN THE DOOR TO FURTHER EVIDENCE ON THAT SUBJECT.

If any witness accidentally mentions the defendant's sexual activities with adults, the door to further evidence on that subject has not "opened". "By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called 'open the door' or 'open the gates' argument is a 'popular fallacy.' (Citation Omitted.)" (**People vs. Gambos** (1970) 5 Cal.App.3d 187; **People vs. Williams** (1989) 213 Cal.App.3d 1186, 1189, fn. 1; **People vs. Valentine** (1988) 207 Cal.App.3d 697, 705 [government's purported impeachment of defendant was an improper rebuttal to a collateral matter improperly raised on cross-examination].)

CONCLUSION

Adults are not "persons similar to the prosecuting witness" in a child molest case, thus all evidence of Defendant's non-criminal sexual conduct with adults should be excluded as irrelevant.

Dated:

Respectfully submitted,

Attorney for Defendant