1 2 3	Innocence Legal Team 1600 S. Main St., Suite 195 Walnut Creek, CA 94596 Tel: 925 948-9000		
4	Attorney for Defendant		
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6	SUPERIOR COURT OF CA	LIFORNIA, COUNTY OF	
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8	THE PEOPLE OF THE STATE OF) Case No.	
	CALIFORNIA,)	
10	Plaintiff,) MOTION TO EXCLUDE) EVIDENCE OF UNCHARGED) BAD ACTS PURSUANT	
12	VS.) TO EVIDENCE CODE) §1101	
13	Defendant.)) Date:	
14) Time:) Dept:	
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17	TO: All parties and to their attorneys of record, and to the		
18	Honorable Judge of the Superior Court.		
19	Defendant requests that any evidence concerning his commission of prior		
20	bad acts as described below be excluded pursuant to Evidence Code section 1101 and		
21	based on the following points and authorities.		
22	I		
23	THE PRIOR OFFENSE(S) AT ISSUE		
24	**Put a brief description of the prior offense or offenses the People		
25	intend to introduce into evidence**		

EVIDENCE CODE SECTION 1101

With the exception of certain specified prior sex offenses as set forth in Evidence Code section 1108, Evidence Code section 1101(a) prohibits the admission of evidence of a person's character, including instances of charged and uncharged misconduct, to prove that person's conduct on a particular occasion or to prove he or she has a propensity to commit crime in general. (People vs. Felix (1993) 14 Cal.App.4th 997, 1004-1005; People vs. Valentine (1988) 207 Cal.App.3d 697, 702.) Evidence Code section 1101(b) allows such evidence to be admitted if relevant to prove some relevant fact other than a disposition to commit the act, specifically motive, opportunity, intent, preparation, plan, knowledge, identity or absence of a mistake or accident. (People vs. Escobar (1996) 48 Cal.App.4th 999, 1023.)

"The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (Wigmore, Evidence (3d Ed. 1940) Sec. 194, pp. 646-647.)" (People vs. Alcala (1984) 36 Cal.3d 604, 630-631.) The grave danger inherent in uncharged bad acts evidence is that the jury will give excessive weight to it and convict the defendant regardless of the strength of the evidence of guilt on the charged act. (People vs. Thompson (1980) 27 Cal.3d 303, 317.) Because of its inherently prejudicial nature, evidence of other crimes must be excluded if not relevant to an issue expressly in dispute or if it is more prejudicial than probative under all the circumstances. (People vs. Nottingham (1985) 172 Cal.App.3d 484, 496.)

The admissibility of other crimes evidence is strictly limited by Evidence Code section 352 which mandates the exclusion of evidence the probative value of

which is substantially outweighed by its prejudicial impact. (**People vs. Ewoldt** (1994) 7 Cal.4th 404; **People vs. Garcia** (1995) 41 Cal.App.4th 1832, 1848.) In order to meet the relevancy requirement of Evidence Code section 1101(b) and pass the balancing test of Evidence Code section 352, the probative value of such evidence must be **substantial** on the theory under which it is tendered. (**People vs. Balcom** (1994) 7 Cal.4th 414, 422; **People vs. Thompson**, **supra**, 27 Cal.3d at p. 318.) To be admitted, the other acts evidence must (1) tend logically, naturally and by reasonable inference to prove the issue on which it is offered; (2) be offered on a material issue that will ultimately prove to be disputed; and (3) not be merely cumulative with respect to other evidence used to prove the same issue. (**People vs. Bigelow** (1984) 37 Cal.3d 731, 747.)

As will be argued below, defendant contends that the prior act(s) evidence is irrelevant to prove any disputed fact, including intent, common scheme or plan, identity, motive, plan knowledge, preparation or absence of mistake or accident, therefore its admission is proscribed by Evidence Code section 1101(a). Second, assuming such evidence is relevant to prove any **expressly** disputed fact other than disposition or propensity to commit the charged offense or crime in general, it still should be excluded under Evidence Code section 352.

Select from the following paragraphs that fit your case. These paragraphs are illustrative of the most common issues that arise when arguing against the admission of prior bad acts evidence

THE PRIOR BAD ACT(S) EVIDENCE IS INADMISSIBLE TO PROVE INTENT.

Defendant does not contest the intent element of the charged crime(s).

He denies the act(s), therefore inferentially admitting that if he did it he had the requisite intent.

"If an accused has not actually placed [an ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it. [Citations.] The fact that an accused has pleaded not guilty is not sufficient to place the elements of the crimes charged against him `in issue.' [Citation.]" (People vs. Thompson, supra, 27 Cal.3d at p. 315.)

More recent Supreme Court authority reaches the same result via a different path. In **People vs. Balcom**, **supra**, a majority of the court rejected the prosecution's contention that a subsequent rape could have been properly admitted at trial in the current case to show the defendant possessed the necessary intent when raping the victim. The **Balcom** court explained:

"Defendant's plea of not guilty put in issue all of the elements of the offenses, including his intent [citation], and evidence that defendant committed uncharged similar offenses would have some relevance regarding defendant's intent in the present case. But, because the victim's testimony that defendant placed a gun

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to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue. [Citation.]" (7 Cal.4th at p. 422-423.)

The same is true here. Assuming Defendant's guilty plea puts his intent in issue, the description of the charged acts by (insert victim's name), which include (name the offenses) more than amply demonstrate the intent required for a violation of Penal Code § (insert sections with which defendant is charged). Thus, as in **Balcom**, further evidence of Defendant's intent in the form of the uncharged bad act(s) evidence would be strictly cumulative, its prejudicial effect thereby outweighing its limited probative value. (Also see **People vs. Harvey** (1984) 163 Cal.App.3d 90 [reversible error to admit prior robbery to show intent in a current robbery prosecution].)

IV

THE UNCHARGED ACT(S) EVIDENCE IS INADMISSIBLE TO PROVE COMMON PLAN OR SCHEME.

In **People vs. Ewoldt**, **supra**, 7 Cal.4th at pp. 401-402, the California Supreme Court explained, ". . . evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." To permit the admission of uncharged acts for the purpose of showing common plan, the evidence of such acts "must demonstrate 'not merely a similarity in the results,

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but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.' [Citations omitted.]" (Id., at p. 402.)

In the case at bar, there is insufficient similarity between the charged conduct and the uncharged conduct to authorize admission of the latter into evidence. (Concoct an appropriate argument depending upon the specific facts in your case.)

In sum, the charged and uncharged acts do not share sufficient common features with the charged acts to support an inference that they were part of a common plan or scheme and that Defendant committed them pursuant to that plan.

IV

THE UNCHARGED OFFENSE EVIDENCE IS INADMISSIBLE TO PROVE IDENTITY

As recently reiterated by the reviewing court in **People vs. Erving** (1998) 63 Cal.App.4th 652, 660, "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." The Erving court further observed:

> "'For identity to be established, the uncharged misconduct must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be

like a signature.' [Citation.]'" (**Id.**, at p. 660.)

The court in **People vs. Felix**, **supra**, similarly explained:

A modus operandi or criminal signature, creating an inference of identity, is demonstrated "when the marks common to the charged and uncharged offense, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offense." [Citations.]" (14 Cal.App.4th at p. 1005.)

In the instant case, the prior and currently charged conduct are not sufficiently similar or distinctive such that the commission of the former creates an inference of identity as to the latter. (Insert an argument geared to the particular facts of your case describing the differences between the prior bad acts or act and the current charge.)

IV

THE UNCHARGED OFFENSE EVIDENCE IS INADMISSIBLE TO PROVE MOTIVE

This will be totally factbound to your case, so you need to devise your own specific argument here

ADMISSION OF THE UNCHARGED ACT(S) EVIDENCE VIOLATES EVIDENCE CODE §352.

Assuming that this Court finds that prior bad act(s) evidence is admissible on the issue(s) of intent, common plan or scheme, identity or motive, it would still be an abuse of discretion pursuant to Evidence Code section 352 to admit it as its probative value is substantially outweighed by its prejudicial effect.

The California Supreme Court in leading case on the subject, **People vs. Ewoldt**, **supra**, considered four factors in determining whether the admission of prior bad act(s) evidence would be more prejudicial than probative within the meaning of Evidence Code section 352. These include the (1) strength of the evidence to demonstrate the purpose asserted by the prosecution for its admission; (2) whether the source of the prior bad act(s) evidence is independent of the currently charged offense; (3) whether the prior bad act(s) resulted in conviction, a lack of conviction weighing in favor of undue prejudice; and (4) the time span between prior misconduct and the currently charged offense. (**Ewoldt**, **supra**, 7 Cal.4th at pp. 404-405.)

Insert an argument where you assess your case for undue prejudice against the foregoing factors. This argument will be factbound to your particular case.

VI

CONCLUSION

1	Based on the foregoing, Defendant contends that the prior bad act(s)	
2	evidence sought to be admitted by the People must be excluded pursuant to Evidence	
3	Code §s 1101 and 352.	
4	Dated: Respectfully submitted,	
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9	Attorney for Defendant	
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