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Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF)	Case No.
CALIFORNIA,)	
)	MOTION IN LIMINE TO
Plaintiff,)	EXCLUDE EVIDENCE OF
)	PRIOR SEX OFFENSE
Vs.)	PURSUANT TO EVIDENCE
)	CODE SECTION 352
)	
Defendant.)	Date:
)	Time:
_____))	Dept:

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

The defense requests that any evidence concerning his/her commission of
prior sex offense(s) be excluded pursuant to Evidence Code §352 based on the
following points and authorities.

I

THE PRIOR OFFENSE(S) AT ISSUE

****Put a brief description of the prior offense(s) the People propose to introduce
into evidence****

II

1 **ADMISSION OF OTHER SEXUAL OFFENSE EVIDENCE IN**
2 **THIS CASE PURSUANT TO EVIDENCE CODE §1108**
3 **VIOLATES EVIDENCE CODE §352.**

4
5 Evidence Code section 1108 provides in pertinent part:

6 "(a) In a criminal action in which the defendant
7 is accused of a sexual offense, evidence of the
8 defendant's commission of another sexual offense
9 or offenses is not made inadmissible by Section
10 1101, if the evidence is not inadmissible
11 pursuant to Evidence Code section 352."

12
13 The reviewing court in **People vs. Fitch** (1997) 55 Cal.App.4th 172 held this section did
14 not violate a defendant's right to due process and equal protection, finding that other
15 sex acts evidence is still subject to exclusion pursuant to Evidence Code §352 which
16 provides "a safeguard against the use of uncharged sex offenses in cases where the
17 admission of such evidence could result in a fundamentally unfair trial." (**Id.**, at p. 183.)

18 The constitutionality of Evidence Code §1108 is presently pending in the California
19 Supreme Court. (**People vs. Ritson** S071200; **People vs. Falsetta** S071521.)

20 Defendant has waged a constitutional attack on this section in a separate motion, and
21 will assume for purposes of this motion that §1108 passes constitutional muster.

22 In **People vs. Harris** (1998) 60 Cal.App4th 727, the appellate court set
23 forth the manner in which the balancing test of §352 should be applied to other sex
24 crimes evidence sought to be admitted under §1108. In recognition that all cases
25

1 discussing the application of §352 to other crimes evidence predated §1108, the **Harris**
2 court emphasized that §352 "preserves the accused's right to be tried for the current
3 offense," i.e. for what he did, not who he is. (**Id.**, at p. 737.) The court determined:

4 "The factors we consider are derived from
5 the text of section 352 and the cases which
6 have arisen in the context of the use of
7 prior conduct admitted under section 1101.
8 We recognize that different considerations
9 may apply in the context of section 1108.
10 However, section 1108 functions as another
11 albeit much broader exception to the general
12 rule of exclusion of other crimes evidence."
13 (**Id.**, at p. 737.) (Also see **People vs. Soto**
14 (1998) 64 Cal.App.4th 966, 75 Cal.Rptr.2d
15 605, 617.)

16
17 **Harris** then considered essentially the same §352 balancing factors that the California
18 Supreme Court enumerated in **People vs. Ewoldt** (1994) 7 Cal.4th 380. These factors,
19 as described in **Harris** include:

- 20 1. The inflammatory nature of the evidence;
- 21 2. The probability of confusion if the defendant's prior sex offense did not result
22 in a criminal conviction;
- 23 3. The remoteness in time of the uncharged act from the charged offenses;
- 24 4. The consumption of time of evidence pertaining to the uncharged offense;
- 25

1 5. The probative value of the evidence which can include "consideration [of] the
2 degree of similarity of the prior and current offenses, as similarity would tend to bolster
3 the probative force of the evidence." (**Harris, supra**, 60 Cal.App.4th at p. 740; **Ewoldt,**
4 **supra**, 7 Cal.4th at pp. 404-405.)

5 Application of the factors enumerated in **Harris** compel the conclusion that
6 admission of the prior offense evidence in the case at bar would be contrary to
7 Evidence Code §352. ****Now you have to argue the Harris factors in conjunction with
8 the particular facts in your case. Review Harris to see how the Court of Appeal
9 concluded that admission of the prior sex crimes in that case violated 352.****

11 CONCLUSION

12 The California Supreme Court observed in **People vs. Zapien** (1993) 4
13 Cal.4th 929, 958:

14 "The prejudice which [section 352] is
15 designed to avoid is not the prejudice or
16 damage to a defense that naturally flows
17 from relevant, highly probative evidence.'
18 [Citations.] 'Rather, the statute uses the
19 word in its etymological sense of "prejudging"
20 a person or cause on the basis of extraneous
21 factors.'"

22
23 In the instant case, as more fully set forth above, the evidence of Defendant's prior sex
24 offense(s) is clearly more prejudicial than probative and results in the proscribed
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1 prejudgment of him/**her** based on extraneous factors. Defendant therefore urges that
2 such evidence must be excluded.

3 Dated:

Respectfully submitted,

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7 _____

8 Attorney for Defendant
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