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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:
Plaintiff,	)	TO EXCLUDE EVIDENCE OF SEXUAL
	)	PARAPHERNALIA DUE TO LACK OF
vs.	)	RELEVANCE, UNDUE PREJUDICE,
	)	AND IMPROPER USE AS CHARACTER
	)	EVIDENCE TO PROVE CONDUCT
	)	[EVIDENCE CODE §§ 350, 352,
	)	1101]
	)	Date:
Defendant.	)	Time:
_____	)	Dept:

TO: The District Attorney, County of _____:

NOTICE IS HEREBY GIVEN that on the date and time assigned for trial, defendant _____ will move for an order excluding as evidence the physical objects of sexual paraphernalia belonging to the defendant that are now held by the prosecution.

This motion will be made on the grounds that:

(1) all paraphernalia which is not an instrumentality of the alleged offenses for which defendant is being tried is irrelevant;

(2) said objects which are not instrumentalities of the alleged crimes are impermissible character evidence of a character trait of sexual immorality; and

(3) the admission of paraphernalia which is not an

instrumentality of the crimes would result in undue prejudice to the defendant in light of its minimal probative value.

The motion is based on this notice, the attached points and authorities, the attached declaration of defendant's counsel, the pleadings and records on file in this action, and all evidence to be presented at the hearing on this motion.

Dated:

Attorney for Defendant

POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO EXCLUDE SEXUAL PARAPHERNALIA

I.

FACTUAL BACKGROUND OF THIS CASE.

(Add in factual background here, i.e. what types of paraphernalia are involved.)

II.

LAW

A.

NON-INSTRUMENTALITY ITEMS OF SEXUAL PARAPHERNALIA ARE NOT RELEVANT TO THE CRIMES WITH WHICH DEFENDANT IS CHARGED AND ARE THUS INADMISSIBLE PER EVIDENCE CODE § 350.

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 v De Jesus** (1995) 38 Cal.App.4th 1, 32.)

In the instant case, only those items which the complaining witness can recall and identify should be shown to the jury .

If no foundation can be established that each of these items was an instrumentality of the crime, then each of those items are irrelevant. (**United States vs. Yazzie** (9th Cir. 1995) 59 F.3d 807, 810-811 [penis enlargement pump and pornographic magazines were relevant and properly admitted into evidence when the victim testified these items were used during the alleged sex acts charged].)

The recent Ninth Circuit decision in **People vs. Shymanovitz** (1998) 157 F.3d 1154 compels the conclusion that the **adult** sexual paraphernalia the People seek to admit in this case fails the test of relevance. The appellate court in **Shymanovitz** reversed the defendant's conviction for unlawful sexual activity with minors based on the wrongful admission into evidence of sexually explicit magazines that portrayed men having various forms of sex with other men and young boys that the average person could view as "deviant." In finding the evidence irrelevant, the court observed:

"The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401. . . Specifically, in this case, neither the defendant's possession of the 'Stroke' magazines, nor of any of the articles contained therein, was probative of whether the touching of the alleged victims' genitals was intentional or whether the touching actually was or could be construed as being for sexual purposes. At the very most, Shymanovitz's

possession of the sexually-explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and not that he actually engaged in, or even had a propensity to engage in, any sexual conduct of any kind. In any event, propensity evidence is contrary to the 'underlying premise of our criminal system, that the defendant must be tried for what he did, not who he is.' (Citation omitted.)" **Shymanovitz**, supra, 157 F.3d at p.98.)

Thus, all other items seized, especially the sexual paraphernalia (or even the mere mention thereof) should be held inadmissible, because they are not relevant. Simple possession of **adult sexual books, tapes, disks, or "toys"** does not prove that one has committed a sexual crime against children--unless the items were used by any party during the commission of such crime. (**Alter the preceding sentence to fit the facts of the case you have.**) The prosecution is not permitted to offer the sexual paraphernalia on any speculative theory of relevance. People v. Babbitt (1988) 45 Cal3d 660, 681-683, 248 CR 69.

For the above reasons, the defense requests that a hearing under Evidence Code Section 402 be held outside the presence of the jury where the alleged victim would be asked to identify exactly which **photos, tapes, books, disks, or vibrators--if any---she** recognizes as actual instrumentalities of the alleged offenses before such items may be admitted into evidence.****Make the proper selection of paraphernalia and the sex of the victim in the preceding sentence****

Any items not so identified should be subject to this

motion in limine and excluded by the court.

B.

**ADMISSION OF NON-INSTRUMENTALITY ITEMS OF SEXUAL
PARAPHERNALIA CONSTITUTES IMPROPER CHARACTER EVIDENCE
IN VIOLATION OF EVIDENCE CODE § 1101.**

Non-instrumentality sexual paraphernalia is character evidence. The paraphernalia does not prove the Defendant molested the alleged victim, unless she/he identifies a specific object as an instrumentality of the crime. Therefore, what purpose could the bulk of such objects serve in this case, other than to degrade defendant's character in the eyes of the jury?

Evidence Code § 1101(a) states:

"...evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Two exceptions to this rule permit evidence of character, but they do not apply in our case. First, the defendant has denied the charged acts, and thus no issue (such as motive, intent, plan, lack of accident, or consent by the victim) arises under Evidence Code § 1101(b). As stated in **People vs. Thompson** (1980) 27 Cal.3d 303, 315:

"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.]"

Second, the credibility of the defendant is not issue at this stage of the proceedings simply by reason of his denial of

the charges, so Evidence Code § 1101(c) does not apply either.

Likewise, since the defendant has not as of yet placed his character in issue to prove any conduct, the prosecution has no evidence to rebut under Evidence Code § 1102(b).

Again, **Shymanovitz** compels the exclusion of the sexual paraphernalia the People seek to admit in this case as improper character evidence. The mere possession of such evidence "fails to qualify as a bad act." (**Shymanovitz**, supra, 157 F.3d at p. 1159.) Further:

"While certain types of conduct generally condemned by society may constitute bad acts [citation omitted], possession of lawful reading material is simply not the type of conduct contemplated by Rule 404(b) [identical to Evidence Code section 1101(b)]. . . . Further, the government's reliance on Rule 404(b) ignores the 'similarity' requirement, which is closely related to the relevancy issue: if introduced to show 'knowledge' or 'intent,' the prior bad act must be similar to the offense of which the defendant is charged. (Citation omitted.) Here there is simply no doubt that a wide gulf separates the act of possessing written descriptions or stories about criminal conduct from the act of committing the offenses described." (**Id.**, at p. 1159.)

Similarly, in the case at bar, the evidence in question not only does not constitute a bad act within the meaning of Evidence Code section 1101(b), but it is not sufficiently similar to the crime charged to show knowledge or intent. It is thus inadmissible character evidence not within any exception set forth in Evidence Code section 1101. The admission into evidence of any item not specifically identified by the complaining witness as an instrumentality

would impermissibly suggest to the trier of fact that defendant possesses a character trait of sexual immorality and that he therefore committed the charged offenses. This result is exactly what Evidence Code section 1101(b) was designed to protect against.

C.

NON-INSTRUMENTALITY ITEMS OF SEXUAL PARAPHERNALIA SHOULD BE EXCLUDED BECAUSE THEIR PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE PROBABILITY THAT THEIR ADMISSION WOULD CREATE SUBSTANTIAL DANGER OF UNDUE PREJUDICE AND MISLEAD THE JURY.

Assuming, arguendo, that the court found the bulk of the seized sexual paraphernalia to be relevant, or admissible as character evidence, or under any other prosecution theory, defendant contends that the court should still exercise its discretion under Evidence Code § 352 to exclude such items, because the significant prejudicial effect of such evidence outweighs what minimal, if any, probative value it may have. The reviewing court in **People vs. Harris** (1998) 60 Cal.App.4th 727 restated the meaning of "prejudice" within the context of Evidence Code section 352:

"'The prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors.'" [Citation omitted.]" (**Id.**, at p. 737.)

The **Shymanovitz** court found that the prejudicial effect of the magazines (relating to gay male sex) greatly outweighed any probative value it may have had and that such prejudice

was not and could not have been cured by the limiting instruction the jury was given as to the use they could make of such evidence. The effect of such evidence was to suggest wrongfully that Shymanovitz was somehow sexually deviant and therefore a probable child molester. (**Shymanovitz**, supra, 157 F.3d at p. 1160.)

In the instant case the prosecution should not be able to display to a jury a mountain of defendant's sexually-related possessions, and thereby imply (with or without words) that he committed the offenses in question. Not only would such evidence be unnecessarily cumulative and time-consuming, but it would impermissibly bias the jury against the defendant through the commonly-recognized factor known as "guilt by association."

The probative value of any item not specifically identified before trial by the child is be nil. The fact that the defendant **reads pornography or possesses sexual "toys" and videotapes** has no tendency in reason to prove whether or not he assaulted the complaining witness at a certain time and place.

Conversely, the admission of the disputed sexual paraphernalia would very likely mislead the jury and prejudice them against the defendant. The jury would probably assume, after seeing such items that the prosecution was displaying them in order to prove that a person who possess such items must have committed the charged crimes. A jury would be led to assume a cause and effect relationship

between evidence and the criminal allegations--even if no rational connection exists.

D.

**ADMISSION INTO EVIDENCE OF THE SEXUAL PARAPHERNALIA
AT ISSUE IN THIS CASE WOULD VIOLATE DEFENDANT'S
FIRST AMENDMENT RIGHTS.**

None of the sexual paraphernalia sought to be admitted in this case is unlawful to possess. As such, its use against Defendant in this trial would violate his First Amendment rights under the United States Constitution. In **Delaware vs. Dawson** (1992) 503 U.S. 159, 112 S.Ct. 1093, the United States Supreme Court found in a capital sentencing case that the admission into evidence of the fact that the defendant was a member of the Aryan Brotherhood when such membership was irrelevant to any issue being decided in that proceeding violated his First Amendment right to association . (503 U.S. at p. 160.) Similarly, the use against the Defendant of sexually oriented material he is constitutionally entitled to possess is proscribed by the First Amendment.

CONCLUSION

For the aforementioned reasons, the court should exclude each and every piece of evidence seized from defendant which the complaining witness can not identify as being an instrumentality of the alleged crimes.

Dated:

Respectfully submitted,

Attorney for Defendant