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Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF)	Case No.
CALIFORNIA,)	
)	
Plaintiff,)	EXCLUDING EVIDENCE OF
)	CHILD MOLESTER PROFILES
vs.)	
)	
)	Date:
)	Time:
Defendant.)	Dept:
_____)	

I

ISSUE

The defense moves to exclude expert testimony on the alleged profiles/characteristics of child molesters or pedophiles. This would include, but not be limited to, testimony that:

1. Child molesters or pedophiles receive sexual gratification and satisfaction from actual, physical contact with children and from fantasy involving use of pictures, other photographic or art mediums, and writings on or about sexual activity with children;
2. Child molesters or pedophiles collect sexually explicit materials consisting of photographs, magazines, motion pictures, video tapes, books, and slides which they use for their own sexual

gratification and fantasy;

3. Child molesters or pedophiles use sexually explicit materials, including those listed above for lowering the inhibitions of children, sexually stimulating children and themselves, and for demonstrating the desired sexual acts, before, during and after sexual activity with children;

4. Child molesters or pedophiles rarely, if ever, dispose of their sexually explicit materials, especially when it is used in the seduction of their victims, and those materials are treated as prized possessions;

5. Child molesters or pedophiles often correspond or meet with one another to share information and identities of their victims as a means of gaining status, trust, acceptance, and psychological support;

6. Child molesters or pedophiles rarely destroy correspondence received from other people with similar interests unless they are specifically requested to do so;

7. The majority of child molesters or pedophiles prefer contact with children of one sex, as well as in a particular age or developmental range peculiar to each individual;

8. Child molesters or pedophiles engage in activity or gravitate to programs which will be of interest to the type of victims they desire to attract and will provide them with easy access to these children;

9. Child molesters or pedophiles obtain, collect, and maintain photographs of the children they are or have been involved with. These photos may depict children fully clothed, in various states of undress or totally nude, in various activities, not necessarily sexually explicit. These photos are rarely, if ever, disposed of and are revered with such devotion that they are often kept upon the person's person in wallets and such. If a picture of a child is taken by such a person depicting the child in the nude, there is a high probability the child was molested before, during, or after the photo taking session, because the act of posing is such a great stimuli for the individual;

10. Child molesters or pedophiles use such photos as described above as a means of reliving fantasies or actual encounters with the depicted children. They also utilize the photos as keepsakes and as a means of gaining acceptance, status, trust, and psychological support by exchanging, trading, or selling them to other people with similar interests. These photos are carried and kept by these people as a constant threat to the child of blackmail and exposure;

11. Child molesters or pedophiles cut pictures of children out of magazines, newspapers, books and other publications which they use as a means of fantasy relationship. These "cutouts" help to identify the age and sexual preference of the person under investigation;

12. Child molesters or pedophiles collect books, magazines, newspapers, and other writings on the subject of sexual activities with children. They maintain these as a way of understanding their own feelings towards children;

13. Child molesters or pedophiles who are afraid of discovery often maintain and run their own photographic production and reproduction equipment. This may be as simple as the use of "instant" photo equipment such as Polaroid makes, video equipment, or as complex as a completely outfitted photo lab;

14. Child molesters or pedophiles go to great lengths to conceal and protect from discovery, theft, and damage, their collections of illicit materials. This often includes the rental or use of safe deposit boxes or other storage facilities outside their immediate residence;

15. Child molesters or pedophiles often collect, read, copy or maintain names, addresses or phone numbers or lists of persons who have similar sexual interests. These may have been collected by personal contact or through advertisements in various publications. These contacts are maintained as a means of personal referral, exchange, and commercial profit. These names may be maintained in the original publication, in phone or note books, or merely on scraps of paper;

16. Child molesters or pedophiles often keep the names of the children they are involved with or with whom they have had sexual

contact. They maintain these names in much the same manner as that described in the preceding paragraph and for much the same reasons;

17. Child molesters or pedophiles use sexual aides such as dildos fashioned after a man's penis of various sizes and shapes in addition to other sexual aides in the seduction of their victims. They often utilize these as a means of exciting their victims and of arousing the curiosity of the children;

18. Child molesters or pedophiles maintain diaries of their sexual encounters with children. These accounts of their sexual experiences are used as a means of reliving the encounter when the offender has no children to molest. Such diaries might consist of a notebook, scraps of paper, or a formal diary; depending upon the resources available to the offender, they may be contained on audio tape or computer entries in a "home computer";

19. Child molesters or pedophiles collect and maintain books, magazines, articles, and other various writings on the subject of sexual activity. These books and materials may be on the topics of human sexuality, sexual education, or consist of sex manuals discussing or showing various sexual acts, positions, or sexual activities. These books and materials are used as a means of seduction of the victim by arousing curiosity, demonstration of propriety of the acts desired, explaining or demonstrating what the offender desires to be done, and as a means of sexual arousal on the part of the offender - particularly when naked children are

shown or depicted in the materials;

20. Child molesters or pedophiles often use drugs as a means of inducement to get a child to a particular location such as the offender's home. Alcohol is also used in this fashion. Both drugs and alcohol are used as a means of seduction reducing the child's inhibitions and for sexual excitement;

21. Child molesters or pedophiles often collect and maintain artifacts, statues, paintings or other media which depict children or young persons in nude poses or sexual acts. These are kept or "left" in places where the victims can find or "discover" them;

22. Child molesters or pedophiles obtain and keep things of interest to their victims. These may consist of magazines, books, and toys for the age level of the victims they desire to attract and may be as complicated as video games, toy train sets, and computers;

23. Child molesters or pedophiles often keep mementos of their relationships with specific children as a means of remembrance. These may consist of underwear or other garments or things which are unique to the relationship they had with the child;

24. Child molesters or pedophiles have relationships with more than one child;

25. Child molesters or pedophiles use planned attempts, repeated attempts, and high risk attempts, including in the

presence of third parties, at molestation of children;

26. Child molesters' or pedophiles' homes or workplaces are a magnet for neighborhood or friends' children;

27. Child molesters or pedophiles invite children to use hot tubs or pools;

28. Child molesters or pedophiles don't sustain good sexual relationships with their peer group;

29. Child molesters or pedophiles have an identifiable gender and age target;

30. Child molesters or pedophiles can better identify with children than their own peer group;

31. Child molesters or pedophiles hold parties or social functions to bring parents to seemingly legitimate functions in order to secure access to children;

32. Child molesters or pedophiles attempt to seduce children with attention, affection, and providing them with gifts;

33. Child molesters or pedophiles use seduction techniques, competition, peer pressure, child and group psychology, motivation techniques, threats, and blackmail;

34. Child molesters or pedophiles have hobbies and interests which appeal to children;

35. Child molesters or pedophiles use material items to appeal to children such as computers, video games, athletic equipment, swimming pools, hot tubs, or toys;

36. Child molesters or pedophiles use tickling and horseplay to lower reluctance of children to be touched;

37. Child molesters or pedophiles show sexually explicit materials to children to lower their inhibitions;

38. Child molesters or pedophiles collect both adult and child pornography for fantasy and sexual arousal;

39. Child molesters or pedophiles consider their pornography collection one of the most important things in their life;

40. Child molesters or pedophiles spend a lot of time with their collection;

41. Child molesters or pedophiles rarely discard their collection.

II

PROFILES AND COMMON CHARACTERISTICS OF CHILD MOLESTERS ARE INADMISSIBLE BECAUSE THEY ARE IRRELEVANT, LACKING IN FOUNDATION, AND ARE MORE PREJUDICIAL THAN PROBATIVE, PLUS CONSTITUTE INADMISSIBLE CHARACTER EVIDENCE

"Profiles are a collection of conduct and characteristics commonly displayed by those who commit a certain crime. One court has described profile evidence as a 'listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.'" (**People vs. Robbie** (2001) 92 Cal.App.4th 1075, 1084.) Such evidence is inadmissible to prove guilt. (**Robbie, supra**, 92 Cal.App.4th 1075.) Such evidence can take the form of the prosecutor's incorporation of the

victim's description of the defendant's conduct into hypothetical questions based upon which an expert witness then opines is typical of a particular type of offender, e.g. rapist, drug trafficker, etc.

California courts have consistently found inadmissible evidence that a defendant shares a characteristic or fits the same profile as others who have been convicted of a similar crime. (See **People vs. Castenada** (1997) 55 Cal.App.4th 1067 [testimony that defendant perfectly fit a police officer's profile of the typical heroin dealer in northern San Diego County inadmissible in a trial for possession of heroin]; **People vs. Hernandez** (1997) 55 Cal.App.4th 225 [evidence from a police sex crimes data base inadmissible at trial for two assaults included in the data base]; **People vs. Martinez** (1992) 10 Cal.App.4th 1001 [expert testimony on auto theft and smuggling rings inadmissible to prove defendant knew a car he bought was stolen].) The reason such evidence is inadmissible is explained in **People vs. Erving** (1998) 63 Cal.App.4th 652, 663-664:

"Profile evidence is inadmissible because 'every defendant has the right to be tried on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile.' (Citation omitted.) Moreover, such evidence encourages the jury to engage in circular reasoning. (Citation omitted.) As the court reasoned in *People v. Long*, circumstantial evidence of uncharged acts not tied to the defendant may not be used in such a way that "'proof of the crime charged is used to bolster up the theory. . .

that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle.'" (Citations omitted.)"

Stated another way, profile evidence is inadmissible because it suggests that the defendant is guilty not necessarily because of what he has done but because police think he is similar to other criminals. (**Martinez, supra**, 10 Cal.App.4th at pp. 1006-1007.) Further, such evidence wrongfully conveys that "[t]he People's expert [] gave [his or her] imprimatur" to the idea that evidence that satisfies a police investigator should satisfy a jury. (**People vs. Pensinger** (1991) 52 Cal.3d 1210, 1281, **Robbie, supra**, 92 Cal.App.4th at p. 1085.)

In **Robbie**, wherein the reviewing court found the trial court's admission of evidence concerning the characteristics of rapists reversible error, the court explained (92 Cal.App.4th at p. 1085:

". . .profile evidence is inherently prejudicial because it requires the jury to accept an erroneous starting point in its consideration of the evidence. We illustrate the problem by examining the syllogism underlying profile evidence: criminals act in a certain way; the defendant acted that way; therefore the defendant is a criminal. Guilt flows ineluctably from the major premise through the minor one to the conclusion. The problem is the major premise is faulty. It implies that criminals, and only criminals, act in a given way. In fact, certain behavior may be consistent with both innocent and illegal behavior, as the People's expert conceded here.

This flawed syllogism lay at the heart of Pagaling's testimony. She was asked hypothetical questions assuming certain behavior that had been attributed to the defendant and was allowed to opine that it was the most prevalent kind of sex offender conduct. The jury was invited to conclude that if defendant engaged in the conduct described, he was indeed a sex offender."

****Add if appropriate to your case: Such testimony is particularly prejudicial where the case, such as this one, boils down to a credibility contest between the defendant and his accuser. In such a case, the improper profile evidence will unfairly bolster the accuser's testimony. (See, e.g., *Robbie*, *supra*, 92 Cal.App.4th at p. 1088; *People vs. Housely* (1992) 6 Cal.App.4th 947, 958.)**

In **United States vs. Gillespie** (9th Cir. 1988) 852 F2d 475, the court specifically found evidence of characteristics of a child molester to be inadmissible character evidence warranting reversal. It further held that introduction of the defendant's general background does not put his character into evidence:

"The appellant contends the district court erred in admitting the testimony of clinical psychologist Dr. Maloney on characteristics common to child molesters. The appellant contends he did not put his general character at issue and did not assert his character was such the he could not sexually abuse a child. He argues that under such circumstances Dr. Maloney's testimony was irrelevant except for the unpermitted purpose of showing he had a propensity to molest the child because his background matched that of a typical child molester.

(3) Generally, we review the trial court's admission of evidence for abuse of discretion. *United States vs. Hernandez-Cuartas*, 717 F.2d 5522, 554-55 (9th Cir. 1983). Rule 404(a)(1) provides:

Evidence of a person's character or a trait of character

is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same. Fed.R.Evid. 404(a)(2).

(4) A defendant put his character at issue when he offers testimony as to honesty or his good reputation. *Michelson vs. United States*, 335 U.S. 469, 479, 483-84, 69 S.Ct. 213, 220, 222, 93 L.Ed. 168 (1948). In *Michelson*, the court held that the defendant in a trial for bribery put his general character at issue when he called five witnesses who testified that he had a good reputation and was honest, truthful, and law abiding. *Id.* at 483-84, 69 S.Ct. at 222. Testimony limited to the defendant's background, however, is not sufficient to put the defendant's general character at issue. See *United States vs. McLister*, 608 F.2d 785, 790 (9th Cir.1979). In *McLister*, the court held that the defendant did not put his general character at issue in his drug trial when his counsel told the jury the defendant was well-off, from a privileged background, had no need to enter into an illegal business, and intended to go into a legitimate business. *Id.*

(5) The government called Dr. Maloney allegedly to rebut what it termed the appellant's testimony he could not have molested the child. Mr. Maloney testified that the characteristics of a molester include an early disruption of the family environment, often with one parent missing: a relationship with the parent of the opposite sex who is dominant; unsuccessful relationships with women; a poor self-concept; and general instability in the background.

The trial court's admission of the testimony was an abuse of discretion. Neither the appellant, his witnesses, nor his lawyer put his general character at issue or testified he had any specific character traits that rendered him incapable of molesting a female child. The appellant's testimony as to his childhood was general background information, which did not put his character at issue. See *McLister*, 608 F.2d at 789.

We have stated in dictum that testimony of criminal profiles is highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial. See *Hernandez*, 717 F.2d at 554-55

(testimony of the profile of a drug courier ordinarily inadmissible as substantive evidence of guilt). The jury's perception of the appellant's character and credibility are crucial to the outcome of this case; therefore, admission of Dr. Maloney's testimony was not harmless error." (**Id.**, at pp. 479-480.)

No published California case has specifically held child molester profile evidence inadmissible. However, courts in other jurisdictions have not hesitated to so hold. See e.g., **State vs. Braham** (1992) 67 Wash.App.930, [841 P.2d 785, 789-790; **Haakanson vs. State** (Alaska App. 1988) 760 P.2d 1030, 1037; **Buzzard vs. State** (Ind.App. 1996) 669 N.Ed.2d 996, 1000; **People v. Berrios** (1991) 150 Misc.2d 229, 568 N.Y.S. 2d 512, 515; **State vs. Floray** (Del.Super.1997) 715 A.2d 855, 859-860; **State vs. Clements** (1989) 244 Kan.77 [770 P.2d 447, 453-454].)

IV.

THERE IS NO "TYPICAL" CHILD MOLESTER

In **People vs. McAlphin** (1991) 53 Cal3d 1289, 283 Cal.Rptr. 382, the Supreme Court held it was proper to admit expert testimony that, under the current state of scientific knowledge, there was no profile of a "typical" child molester, and that such persons are instead found in all walks of life.

CONCLUSION

Based on the foregoing, Defendant submits that child molester profile evidence is inadmissible in this case.

Dated:

Respectfully submitted,

Attorney for Defendant