

1 [Attorney Name], SBN []
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6 Attorney for Defendant
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF [COUNTY]**

10 THE PEOPLE OF THE STATE OF
CALIFORNIA
11 Plaintiff,
12 vs.
13 [DEFENDANT'S NAME]
14 Defendant
15

CASE NO. [CASE NUMBER]
**MOTION TO EXCLUDE EVIDENCE OF
DEFENDANT'S DRUG USE**
Trial Readiness:
Current Trial Date:
Case Filed:
In Custody Since:
Dept.:

16 PLEASE TAKE NOTICE that on [DATE] at [TIME] or as soon thereafter as the matter
17 may be heard, and in the above-designated department, [NAME OF DEFENDANT]
18 ("Defendant") will move this court for an order to exclude Defendant's prior use of intoxicants.

19 The motion will be made on the following grounds of relevance and prejudice. *Cal. Evid.*
20 *Code §§ 352, 786. :*
21

22 Dated: [DATE]
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[Attorney Name],
26 Attorney for Defendant
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1 evidence. *People vs. De La Plane* (1979) 88 Cal.App.3d 223, 242. Whether or not evidence is
2 relevant is a decision within the trial court's discretion. *People vs. Von Villas* (1992) 10
3 Cal.App.4th 201, 249. The trial court abuses its discretion in admitting evidence when it can be
4 shown under all the circumstances that it exceeded the bounds of reason. (*People vs. De Jesus*
5 (1995) 38 Cal.App.4th 1, 32.¹

6 **B. Court's Discretion**

7 "The court in its discretion may exclude evidence if its probative value is substantially
8 outweighed by the probability that its admission will (a) necessitate undue consumption of time,
9 or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the
10 jury." *Evidence Code* § 352. "Prejudicial" is not synonymous with "damaging," but refers
11 instead to evidence that "uniquely tends to evoke an emotional bias against defendant" without
12 regard to its relevance on material issues). *People v. Kipp* (2001) 26 Cal. 4th 1100, 113 Cal. Rptr.
13 2d 27, 33 P.3d 450.²

14 The balancing process requires consideration of the relationship between evidence and
15 relevant inferences to be drawn from it, whether evidence is relevant to main or only a collateral
16 issue, and necessity of evidence to proponent's case as well as reasons recited in statute for
17 exclusion. *Kessler v. Gray* (1978) 77 Cal. App. 3d 284, 143 Cal. Rptr. 496. Because evidence of
18 other, uncharged offenses can be highly prejudicial, trial courts should use particular care in
19 performing balancing analysis under Section 352. *People v. Millwee* (1998) 18 Cal. 4th 96, 74
20 Cal. Rptr. 2d 418, 954 P.2d 990, cert. denied.

21 For example, the trial court committed reversible error in rape and kidnapping trial by
22 admitting uncharged act evidence that defendant put his finger in the mouth of previous attempted

23 _____
24 ¹ Cal. Const., art. I, § 28, subd. (f)(2), the 1982 so called "truth in evidence" amendment to the
25 California constitution did not abrogate the requirement of relevancy the manner in which
26 relevancy is determined or the obligation of a trial court to exclude such evidence. *Evidence Code*
27 §§ 210, 350, *People v. Dalton* (2019) 7 Cal. 5th 166, 214, 247 Cal. Rptr. 3d 273, 319, 441 P.3d
28 283, 322.

27 ² Likewise, the so called "truth in evidence" amendment to the California constitution (Cal.
28 Const., art. I, § 28, subd. (f)(2)) did not abrogate the court's discretion to exclude evidence under
Evidence Code § 352. *People v. Dalton* (2019) 7 Cal. 5th 166, 214, 247 Cal. Rptr. 3d 273, 319,
441 P.3d 283, 322.

1 kidnapping victim; the jury could infer a sexual connotation to the prior offense, and the
2 prejudicial effect of the evidence exceeded its comparatively low probative value. *People v.*
3 *Jandres* (2014) 226 Cal. App. 4th 340, 171 Cal. Rptr. 3d 849. Similarly, in a prosecution for
4 committing a forcible lewd act upon a child, where the key issue was whether the defendant had
5 the intent to commit the act when he entered the victim’s house, the trial court erred in permitting
6 the court-appointed interpreter to testify that she had seen defendant moving his hands near his
7 groin during victim’s testimony; such testimony could confuse and inflame the jury. *People v.*
8 *Leon* (2001) 91 Cal. App. 4th 812, 110 Cal. Rptr. 2d 776.

9 By enacting this section 352, the legislature gave courts the means to facilitate judicial
10 economy. *DePalma v. Westland Software House* (1990) 225 Cal. App. 3d 1534, 276 Cal. Rptr.
11 214. The issue of judicial economy is served by the exclusion of adult on adult sexual contact
12 because it would require Defendant to call rebuttal witnesses on collateral issues of scant
13 relevance and possible enormous prejudice. See *People v. Morrison* (2011) 199 Cal. App. 4th
14 158, 131 Cal. Rptr. 3d 26 (Contrary to the common law rule and popular belief, a trial court has
15 substantial discretion to allow rebuttal witness to contradict testimony on direct examination,
16 even though the rebuttal is impeachment on a collateral fact).

17 II

18 DEFENDANT’S PRIOR DRUG USE IS INADMISSIBLE

19 Generally, “[e]vidence of traits of...character other than honesty or veracity, or their
20 opposites, is inadmissible to attack or support the credibility of a witness.” Cal. Evid. Code § 786.
21 As noted above, Defendant’s recreational use of drugs ended years ago and is of no relevance
22 currently (or even back then) to “honesty or veracity, or their opposites.”

23 *Evidence Code* § 1101(a) provides that evidence of a person's character or trait is
24 inadmissible when offered to prove his conduct on a specific occasion. Admissibility requires the
25 act to be “relevant to prove some fact (such as motive, opportunity, intent, preparation, plan,
26 knowledge, identity, or absence of mistake or accident) other than his disposition to commit such
27 acts.” *Evidence Code* § 1101(b). Defendant’s prior drug use is not relevant to any of these issues.

28 In *People v. Reid*, 133 Cal. App. 3d 354, evidence of a defendant’s prior drug abuse was

1 found to have been improperly admitted. “[T]he admissibility of other crimes evidence must be
2 scrutinized with great care because of its highly inflammatory and prejudicial effect on the trier of
3 fact. *People v. Thompson* (1980) 27 Cal.3d 303, 314 [165 Cal.Rptr. 289, 611 P.2d 883].

4 Accordingly, when such evidence is proffered by the prosecution, its admissibility depends on
5 three principal factors: ‘(1) the materiality of the facts sought to be proved or disproved; (2) the
6 tendency of the uncharged crime to prove or disprove the material fact; and(3) the existence of
7 any rule or policy requiring exclusion of relevant evidence.’ (*Id.*, at p. 315.)” *People v. Reid*, 133
8 Cal. App. 3d 354, 361-62, 184 Cal. Rptr. 186, 190 (1982).

9 In *People v. Thompson* (1980) 27 Cal.3d 303, 314; 165 Cal.Rptr. 289, 611 P.2d 883,
10 because the prosecution did not establish how that drug abuse resulted in appellant's motive for
11 committing the robberies, the evidence of drug abuse alone did not have a tendency to prove a
12 motive for the robberies. Further, because of the substantial prejudicial effect inherent in other
13 crimes evidence, uncharged offenses are admissible only where they had substantial probative
14 value, and if there is any doubt as to that value, the evidence should be excluded. Cal.Evid 352,

15 In *People v. Tuggles* (2009)179 Cal. App. 4th 339, 100 Cal. Rptr. 3d 820, the trial court
16 was fond not to have abused its discretion or violate any federal constitutional rights by restricting
17 cross-examination of an accomplice about his drug abuse and mental health issues based on
18 undue consumption of time. *Evidence Code* § 352. See also *People v. Rodriguez* (1986) 42 Cal.
19 3d 730, 230 Cal. Rptr. 667, 726 P.2d 113, reh’g denied (Evidence regarding state witness’s
20 history of drug abuse and psychiatric treatment five and six years before trial did not have
21 sufficient bearing upon credibility of her testimony at trial to make its exclusion an abuse of
22 discretion).

23 III

24 **The Accidental/Incidental Mention by a Defense Witness of the Defendant's Prior Drug** 25 **Usage Does Not Open the Door to Further Evidence on That Subject**

26 If any witness accidentally/incidentally mentions the defendant’s prior drug usage, the
27 door to further evidence on that subject has not “opened.” “By allowing objectionable evidence
28 to go in without objection, the non-objecting party gains no right to the admission of related or

1 additional otherwise inadmissible testimony. The so-called ‘open the door’ or ‘open the gates
2 argument is a ‘popular fallacy.’ (Citation Omitted).” *People vs. Gambos* (1970) 5 Cal.App.3d
3 187; *People vs. Williams* (1989) 213 Cal.App.3d 1186, 1189, fn. 1; *People vs. Valentine* (1988)
4 207 Cal.App.3d 697, 705 [government's purported impeachment of defendant was an improper
5 rebuttal to a collateral matter improperly raised on cross-examination].

6 **IV.**

7 **CONCLUSION**

8 Defendant respectfully requests to exclude all references to past drug use by defendant as
9 all such evidences is irrelevant, an undue waste of time and/or substantially more prejudicial than
10 probative. *Evidence Code* §§ 210, 350, 350.1, 352.

11 Dated this __ day of ____, 20__

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DECLARATION OF [ATTORNEY'S NAME]

I, [ATTORNEY'S NAME] declare:

1. I am an attorney duly licensed to practice law in the State of California. I am a Certified Criminal Law Specialist. I am the attorney for the defendant in this matter. This matter is set for trial on April 13, 2020.

2. I represent [NAME OF DEFENDANT] (“Defendant”) who is accused of

I declare the above under penalty of perjury except as to those matters based upon information and belief and as to those matters, I believe them to be true.

Executed in Pleasant Hill, CA on March 16, 2022.

[ATTORNEY'S NAME], SBN