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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

vs.

ANDREW SUH,

Defendant

CASE NO. C1902494

MOTION TO EXCLUDE UNCHARGED ACTS (*Evidence Code* Sections 1108 and 352.)

Date: **May 11, 2020**
Time: **8:30 a.m.**
Dept: **24**

Trial: **April 13, 2020**

PLEASE TAKE NOTICE that on the above date and time and in the above-designated department, Andrew Suh ("Defendant") will move this court for an order that any evidence concerning the commission of prior sex acts be excluded pursuant to Evidence Code Sections 1108 and 352 based on the following points and authorities.

Dated: March 30, 2022

Patrick Clancy
Attorney for Defendant

I.

SUPPORTING FACTS AND CONTENTIONS[1]

Defendant is a martial arts (Taekwondo) instructor. Jane Doe ("JD") was his student who he was training for the Youth Olympics. There is no allegation that Defendant ever touched JD in any overtly sexual manner. Indeed, at the preliminary hearing (PX), JD testified that the extent of the touching was as follows:

- Kissed on the face, not on the mouth. Tr 18 ln 14-23
- Touched thigh. Tr 19 ln 2-7
- cuddle me. Tr 32 ln 3-6
- Touched butt one time accidently. Px 50 ln 18-20

The allegations came one year after Defendant told JD that would no longer be able to train her because she was distracted by a romantic interest and not giving 100% dedication to the training as she had agreed. (Tr 48:9-49:14). As a result, Defendant is charged with five counts of Lewd Act Charges on a Child 14 or 15 in violation of Penal Code §288(c)(1).

Defendant is charged with

Marianna:

- "have his hand on my thigh." Px 58 ln 3-5.
- "Head on my butt or spooning me from behind. Px 64 ln 2-3
- "napping and holding me." Px 64 ln 4-5
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I.

INTRODUCTION

[1] Factual allegations herein are made on information and belief as permitted in motions of this nature. (See *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 CA3d 162, 167; *People v. Schmies* (1996) 44 CA4th 38, 53; *Star Motor Imports, Inc. v. Superior Court* (1979) 88 CA3d 201, 204 (offer of proof sufficient).

A. Purpose of Motion in Limine

The central cases on "in limine motions" are Amtower v. Photon Dynamics, Inc., 158 Cal.App.4th 1582 (2008); Kelly v. New West Federal Savings, 49 Cal.App.4th 659 (1996); and R *& B Auto Center, Inc.* v. *Farmers Group, Inc.*, 140 Cal.App.4th 327 (2006) (Rylaarsdam, Acting P .J., concurring).

The key function of these motions is to ensure juries do not hear inadmissible evidence, and in particular inadmissible evidence which may prejudice the jury. "The advantage of such motions is to avoid the obviously futile attempt to un-ring the bell in the event a motion to strike is granted in the proceedings before the jury." *Amtower,* 158 Cal.App.4th at 1593, quoting *Hyatt* v. *Sierra Boat Co.,* 79 Cal.App.3d 325, 337 (I 978). Secondly, "*in limine* motions" can help speed the trial and allow for a more considered decision on difficult evidentiary issues. *Kelly,* 49 Cal.App.4th at 669-70.

B. Relevance

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 vs. De Jesus* (1995) 38 Cal.App.4th 1, 32.[2]

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

C. Court's Discretion

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." *Evidence Code* § 352. "Prejudicial" is not synonymous with "damaging," but refers instead to evidence that "uniquely tends to evoke an emotional bias against defendant" without regard to its relevance on material issues). *People v. Kipp* (2001) 26 Cal. 4th 1100, 113 Cal. Rptr. 2d 27, 33 P.3d 450.[3]

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

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

[3] Likewise, the so called "truth in evidence" amendment to the California constitution (Cal. 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.

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

II

ADULT SEXUAL CONDUCT IS INADMISSIBLE

A. Defendant's Non-Criminal Sexual Contacts with Other Adults is Irrelevant to the Present Charges.

In *People vs. Kelley* (1967) 66 C2d 232 (disapproved on another ground, *People v. Alcala* (1984) 36 Cal.3d 604, 624), decided when oral copulation and anal sex between consenting adults was an illegal act, the defendant was charged with having orally copulated and masturbated an eight-year-old boy. Over objection, the prosecution introduced evidence that twenty-four years before defendant was orally copulated by a male and that he committed acts of oral copulation with his first and second wife. The California Supreme Court reversed the conviction because of the erroneous admission into evidence of the prior sexual acts between consenting adults:

> It is not the law that other offenses are admissible whenever a specific intent is required to be proved. Such a rule should particularly be avoided in 288 cases where evidence of the lewd and lascivious acts themselves normally carry a strong inference that they were done with the specific intent of arousing sexual desires. [¶] Moreover, in the present case, the other offenses here involved are not, as required by Coltrin and as existed in Malloy and Honaker, "of a similar nature" to the crime charged. The prior offenses were committed with consenting adults and with persons

> quite dissimilar to the prosecuting witness and involved distinctly different conduct on the part of the defendant. The experience with the man 24 years ago, in addition to being too remote in time to have any reasonable bearing on the act charged, did not involve oral conduct on the part of the defendant, and the experience with his wives, occurring between consenting adults of the opposite sex in the privacy of the marriage bed, certainly cannot be relevant enough to the seduction of an 8-year-old boy to outweigh its prejudicial effect upon the jury.

Kelley, 244-45, 957.

This ruling is stronger today in light of the decriminalization of all types of sex between consenting adults. *People vs. Thomas* (1978) 20 C3d 457 at 466 (overruled on other grounds in *People v. Tassell* (1984) 36 Cal.3d 77, 87-88 and fn. 8) reaffirmed the California Supreme Court's ruling that adult with adult sexual acts are inadmissible in child molest cases because the persons are quite dissimilar. It also acknowledging that "although alleged sex offenses committed with persons other than the prosecuting witness are often unreliable and difficult to prove, nevertheless such evidence is admissible to show a common design or plan where the prior offenses (1) are not too remote in time, (2) are similar to the offenses charged, and (3) are committed upon persons similar to the prosecuting witness."

Similarly, in *United States vs. Gillespie* 852 F2d 475 (9th Cir. 1988) the defendant was charged with child molestation. The prosecution introduced evidence that the defendant (an adult) and his adoptive father (an adult) had a homosexual relationship. The prosecution introduced the evidence on the theory that it showed appellant's motive, intent, plan and design to bring the child victim into the U.S. for molestation purposes. The defendant's conviction was reversed because of the introduction of evidence of his homosexual contact with another adult. The court explained: "The evidence neither proved nor disproved that the appellant molested the child. It was offered to show that the men differed from what they held themselves out to be, but none of the testimony about their sexual relationship helped the trier of fact decide whether the

appellant was guilty of the offense." (Id., at p. 478.)

In short, Defendant's non-criminal sexual contacts with other adults are not relevant to establish that committed the charged offense(s) and are therefore inadmissible.

Adults are not "persons similar to the prosecuting witness" in a child molest case, thus all evidence of Defendant's non-criminal sexual conduct with adults should be excluded as irrelevant.

B. The Accidental/Incidental Mention by a Defense Witness of the Defendant's Sexual Contacts with Adults Does not Open the Door to Further Evidence on That Subject

If any witness accidentally/incidentally mentions the defendant's sexual activities with adults, the door to further evidence on that subject has not "opened." "By allowing objectionable evidence to go in without objection, the non-objecting party gains no right to the admission of related or additional otherwise inadmissible testimony. The so-called 'open the door' or 'open the gates argument is a 'popular fallacy.' (Citation Omitted)." *People vs. Gambos* (1970) 5 Cal.App.3d 187; *People vs. Williams* (1989) 213 Cal.App.3d 1186, 1189, fn. 1; *People vs. Valentine* (1988) 207 Cal.App.3d 697, 705 [government's purported impeachment of defendant was an improper rebuttal to a collateral matter improperly raised on cross-examination].

III.

CONCLUSION

Jodi O'Dell is the wife of Michael O'Dell. Her brother Lance was married to Anna. Lance discovered that Anna has sent videos to numerous men of herself masturbating. When Lance found out about this, he threw her out. In retaliation Anna stated that she had affairs with numerous men, including Michael O'Dell. Anna later admitted that she had not had an affair with Michael O'Dell to Lance and to Michael O'Dell's daughter, Madison Belliuonini. Further, she admitted to Madison that she had tried to have an affair with Michael O'Dell but that he had rejected her.

It is the defense's belief that other than hearsay to Lindsey Campbell, who has no firsthand information, there is not witness claiming such an affair happened.

Defendant respectfully requests to exclude all references to any and all lawful adult sexual

conduct by Defendant as it relates to Defendant as all such evidences is because **adults are a different class of individuals when it comes to sexual conduct as stated in the case law** and adult with adult affairs are irrelevant, an undue waste of time and/or substantially more prejudicial than probative. *Evidence Code* §§ 210, 350, 350.1, 352.

II.

EVIDENCE OF ALLEGED UNCHARGED ABUSE SHOULD BE EXCLUDED UNDER *EVIDENCE CODE* §352

While it is not entirely clear whether or not the alleged "abuse" in the case of Defendant's daughter was sexual in nature, as explained, it should, in any event, be excluded.

Evidence Code § 1108 provides for the admission of prior convictions for specified sex offenses for use as propensity evidence so long as such evidence is not subject to exclusion pursuant to §352. The incorporation of §352 into section §1108 provides "a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial." *People v. Falsetta* (1998) 21 Ca1.4th 908 at pp. 917-918.

The reviewing court in *People v. Harris* (1998) 60 Cal.App.4th 727 set forth the manner in which the balancing test of §352 should be applied to other sex crimes evidence sought to be admitted under §1108. In recognition that all cases discussing the application of §352 to other crimes evidence predated §1108, the *Harris* court emphasized that §352 "preserves the accused's right to be tried for the current offense," i.e. for what he did, not who he is. (*Id*., at p. 737.) The court determined: "The factors we consider are derived from the text of section 352 and the cases which have arisen in the context of the use of prior conduct admitted under section 1101. We recognize that different considerations may apply in the context of section 1108. However, section 1108 functions as another albeit much broader exception to the general rule of exclusion of other crimes evidence." (*ld.,* at p. 737.) (Also see *People vs. Soto* (1998) 64 CalApp4th 966, 75 Cal.Rptr.2d605,617.)

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

1. The inflammatory nature of the evidence;

2. The probability of confusion if the defendant's prior sex offense did not result in a criminal conviction;

3. The remoteness in time of the uncharged act from the charged offenses;

4. The consumption of time of evidence pertaining to the uncharged offense;

5. The probative value of the evidence which can include "consideration [of] the degree of similarity of the prior and current offenses, as similarity would tend to bolster the probative force of the evidence."

Harris, supra, 60 Cal.AppAth at p. 740; *Ewoldt*, supra, 7 Ca1.4th at pp. 404-405; *Falsetta*, supra, 21 Cal4th at p.917.

First, any evidence of abuse against Shawnee would be particularly "inflammatory," given the fact that she is deceased. Indeed, any mention of Shawnee should be excluded for this reason.

Second, as explained in *People v. Branch* (200 I) 91 CaLApp.4th 274, at p. 284: "In *Ewoldt*, the Supreme Court discussed confusion of the issues in terms of whether or not a defendant has been convicted of the uncharged prior offense. (*Ewoldt, supra*, 7 Cal.4th at p. 405, 27 Cal.Rpt.2d 646, 867 P.2d 757.) If the prior offense did not result in a conviction, that fact increases the likelihood of confusing the issues 'because the jury [has] to determine whether the uncharged offenses [in fact] occurred.' (Ibid)." Here, it is unclear if there is any evidence at all of any crime committed by Defendant against his deceased daughter, let alone a sex crime.

Third, while it is not clear when the supposed events referred to by AC took place, Shawnon Jetter died more than ten years ago on November 27, 2009. Thus, the alleged acts (whatever they may be) referred to by AC would have to be more remote than that.

Fourth, at a minimum, Defendant would be unfairly forced to explain the circumstances of his daughter's passing which would be both time consuming and irrelevant. Then there would practically have to be a trial within a trial on those allegations (again, whatever they may be). Accordingly, if admitted, it would potentially require a significant amount of time.

Fifth, since the nature of the allegations are not known, there would be no probative value of which the Defense is aware.

Further, the "prejudice" referred to in *Evidence Code* §352 "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues," as is apparently the case here. People v. Karis *(*1988) 46 Ca1.3d 612, 638.

III.

CONCLUSION

It is therefore respectfully requested that the court order any mention of Defendant's deceased daughter and or any alleged abuse by Defendant towards her.

Respectfully submitted,

Dated:

_____

Patrick Clancy
Attorney for Defendant

I, PATRICK E. CLANCY 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 Sean Jetter ("Defendant") who is accused of

a. Intercourse or Sodomy with John Doe, a Child 10 or Under in violation of PC288.7(a);

b. Continuous Sexual Abuse of John Doe in violation of PC288.5(a);

3. Factual allegations herein are made on information and belief as permitted in motions of this nature. (See *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 CA3d 162, 167; *People v. Schmies* (1996) 44 CA4th 38, 53; *Star Motor Imports, Inc. v. Superior Court* (1979) 88 CA3d 201, 204 (offer of proof sufficient).

4. Facts and contentions regarding John Doe's allegations:

a. John Doe was born in 2001 and is currently an adult.

b. Defendant met AC, the mother of John Doe, in 2004.

c. Defendant met John Doe in 2005.

d. Defendant married AC in 2006.

e. In or around 2012, Defendant and AC were called to Johns Doe's elementary school to meet with principal Naomi Watts and a school psychologist. Defendant and AC were told that John Doe was touching other students' penises and having them touch his and/or requesting such contact.

f. On June 2, 2104, AC and John Doe were interviewed by police regarding physical abuse allegations against Defendant. There was no mention or allegation of any abuse of either a physical or a sexual nature only that "He is mostly upset about how Sean talks to him and calls him names. [John Doe] had no injuries nor did he complain of pain." (¶6f).

g. On January 22, 2015, AC filed for divorce against Defendant.

h. At or around the same time, AC filed for a domestic violence restraining order

against Defendant. In a supporting declaration dated February 9, 2015, John Doe made detailed allegations of alleged physical abuse against Defendant. The declaration makes no mention of any abuse of a sexual nature whatsoever. A true and correct copy of the declaration is attached hereto as Exhibit 1.

i. On April 20, 2017, John Doe ingested a marijuana laced brownie or other marijuana edible. He was thereafter taken to Eden Hospital after having a "reaction" thereto. During the July 19, 2019 Preliminary Hearing, John Doe explained: "at My school they sell chips and stuff like that and snacks. I bought a brownie, but it was laced, and then I got extremely intoxicated on marijuana. So then I was telling people everything [about allegedly being sexually abused by Defendant]. And they took me in an ambulance over to the hospital and I told everything, apparently." Remarkably, John Doe testified that he did not know the brownie was laced with marijuana and that he did not know who he got it from, only that he bought it from "random kids."

j. On April 21, 2017, Asha Jetter and John Doe appeared at the Hayward Police Department and accused Defendant of sexual abuse "10 years ago." In an interview the same day, John Doe told police, "the sexual was only a few times" when he was five years old. He stated that he had come to the police because, "[m]y mom wanted me to talk about abuse from my step-dad." During this interview, John Doe did not allege that Defendant had sodomized him only that he had "grabbed my hand and placed it there [on Defendant's penis] and make me fondle it." John Doe explained that he had not reported this sooner because Defendant had "threaten[ed] to like spank me or whatever." John Doe then stated that the first person he told about the sexual abuse was his mother in the hospital even though this contradicted his earlier statement that he began "telling people everything" about alleged sexual abuse shortly after ingesting the marijuana laced brownie.

k. John Doe gave a second police interview on February 5, 2018 in which he alleged for the first time that Defendant had sodomized him causing him to bleed anally and had forced him to orally copulate him. Contrary to his April 21, 2017 statement that

the alleged sexual abuse occurred on "only a few times," John Doe stated that the sexual abuse occurred "[a]lmost every night when my mom went to work." John Doe explained these inconsistencies stating, "I wasn't ready to admit it. My first time saying anything, it was unwillingly because I was intoxicated, like I told you, with marijuana." John Doe also explained that he changed his mind about forgiving Defendant "for justice."

l. During the July 19, 2019 Preliminary Hearing, John Doe testified:

i. The very first occasion of abuse occurred at age four and included anal penetration to completion causing anal bleeding. John Doe testified that he was primarily "confused," by this, not in pain.

ii. Under cross examination John Doe testified that he experienced anal bleeding from penetration between 10 and 20 times, yet no blood was ever discovered on his clothing and he received no medical attention.

iii. John Doe explained that he did not report this because Defendant had threatened "[t]hat he was going to kill me or her, family." John Doe testified these threats would occur "every time" sexual abuse occurred. This is at odds with John Doe's April 21, 2017 statement that the threat was that Defendant would "spank me or whatever."

iv. Despite these supposed death threats, in 2010 when he was in third grade, John Doe somehow mustered the courage to threaten Defendant that if the sexual abuse didn't stop, he would expose Defendant's conduct by telling his mother. However, John Doe apparently lacked the courage to actually report it. According to John Doe, this is what ended the sexual abuse.

m. John Doe's SART exam revealed, "Anus normal tone. normal folds, no injury present."

n. No corroborating evidence for any of John Does accusations has ever been provided to the Defense.

5. Facts and contentions regarding unsubstantiated allegations by John Doe's mother,

AC:

a. AC Habitually files retraining orders. The Defense was able to locate ten such cases (including renewals against Defendant and her previous ex-husband). The list includes two cases against neighbors and another against a teacher of one of AC's children for making a DCS report. A list of these cases is available upon request but not attached here due to concerns regarding John Doe's identity.

b. During the May 16, 2018 hearing on AC's petition to renew the domestic violence restraining order against Defendant, AC asked the following questions of various witnesses regarding Defendant's deceased daughter, Shawnon:

i. "So [Defendant] was fighting with them because they all supported the daughter who accused him of various forms of abuse." (Page 65)[4].

ii. "She expressed strong opinions that I shouldn't be with a man that is abusing his daughter." (Page 65).

iii. "Do you recall when your -- when Sean's daughter was removed by CPS in 2006?" (Page 81).

iv. "Do you remember falling into bad terms with your brother Sean Jetter because you felt that he had been abusing his daughter?" (Page 82).

v. "Do you recall being angry at me because you felt I was supporting your brother Sean against his daughter who had made allegations of abuse?" (Pages 81-82).

vi. "Do you recall saying to me that I wasn't in a position to defend your brother against his daughter Shawnon because you had raised her and changed her diapers and I didn't know anything about her?"

c. During the hearing, no evidence was adduced substantiating any misconduct by Defendant against his deceased daughter Shawnon and Defense has never been presented with any.

[4] Citations in this form refer to the transcript of May 16, 2018. The transcript is available upon request, but not attached here to protect the privacy of John Doe.

d. With respect to the allegations regarding Defendant's deceased daughter, Shawnon, the DA has never disclosed "evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the requirements of Section 1054.7 of the Penal Code," as required under *Evidence Code* §1108(b).

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 30, 2022.

Patrick E. Clancy, SBN 60805

EXHIBIT LIST

1. February 9, 2015 declaration of John Doe;