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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF NEVADA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. MICHAEL O'DELL, Defendant	**CASE NO. F18-000314** **MOTION TO EXCLUDE UNCHARGED ACTS (*Evidence Code* Sections 1108 and 352)** **Trial Readiness:** **May 28, 2020** **Current Trial Date:** **June 16, 2020** **Case Filed:** **October 31, 2018** **In Custody Since:** **December 11, 2018** **Dept.:** **1&2**

PLEASE TAKE NOTICE that on May 28, 2020 at 9:30 a.m. or as soon thereafter as the matter may be heard, and in the above-designated department, Michael O'Dell ("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 specifically, allegations disclosed to the Defense n May 8, 2020 contained in Incident Report, Case No. 11900785, CAD Event Number 1903210059 by 3990 - Haack, Dennis dated March 30, 2019 regarding alleged victim, MG.

This motion will be based upon this notice, the following points and authorities and any other relevant documentation and evidence in this case.

Dated: May 6, 2020

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Patrick Clancy
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUPPORTING FACTS AND CONTENTIONS[1]

A. Introduction

Defendant is charged with:

- Count 1: Continue Sexual Abuse in violation of *Penal Code* § 288.5(a) against CG, a child under the age of 14 between January 1, 2013 and December 31, 2014.
- Count 2: Continue Sexual Abuse in violation of *Penal Code* § 288.5(a) against RC, a child under the age of 14 between January 1, 2013 and December 31, 2014.
- Count 3: Forcible Rape in violation of *Penal Code* § 1203.065(a) against LC between November 1, 2014 and November 27, 2014.
- Count 4: Forcible Rape of Unconscious Person in violation of *Penal Code* § 261(a)(a) against LC between November 1, 2014 and November 27, 2014 (the same act as in count 3).

(See First Amended Complaint filed February 5, 2019).

CG, born in 2008, is Defendant's the first cousin once removed (the grandchild of his cousin, Carli G. ("Carlie").

Jodi O'Dell ("Jodi") is Defendant's spouse. RC, born in 2006, is Jodi's niece, the child of her sister, LC.

B. Factual Summary

LC, a known alcoholic and drug abuser with a history mental illness, was admittedly intoxicated and suffering a "black out" at the time she reported that Defendant had raped her. She admitted these facts during her police interviews. She also admitted that through repeated suggestive questioning of ger daughter, RC, she may have "planted the idea of the abuse by Michael in R.C.'s head."[2] Subsequently, LC told a defense investigator: "I believe it is less

[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).

[2] Repeated questioning over time, especially by an authoritative figure, such as a parent, is well known as a highly suggestive technique which has been demonstrated as leading to false memories and equally false

likely it was rape, but more likely I was a willing participant and I am not even sure if there was sexual intercourse." LC also stated: O'Dell has never been sexually inappropriate in the past around or towards her. Campbell stated she did tell this to law enforcement when she made gave them her statement."

LC in turn repeated those suggestions to CG who she lived with at the time in Defendant's home. [3] Years after the alleged incidents, RC and CG, in a not too surprising coincidence, LC and CG both came forward with similar allegations at almost exactly the same time. However, the stories were inconsistent in particularly significant and revealing ways. RC claimed Defendant did not get under the sheets but was between the two girls on a narrow bunk bed intended for only a single. CG remembered Defendant first went to the top bunk to sit with his back against the wall with RC and then came down and got under the blankets with her. RC maintained that she never discussed what Defendant did to her with CG, but that they bust that "we just both know." LC was just as unequivocal that RC specifically told her that Defendant "had crawled underneath her blankets and had cuffed her private parts."

On the other hand, defendant has consistently and adamantly maintained his innocence through the pretext phone and multiple interviews.

Finally, there is no corroboration of the victim's allegations other than their own "Group

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accusations. See: The Suggestibility of Children: Scientific Research and Legal Implications (200) 86 Cornell L. Rev. 33, 52 by Stephen J. Ceci and Richard D. Friedman, Helen L. Carr Professor of Developmental Psychology, Department of Human Development, Cornell University, Ralph W. Aigler Professor of Law, University of Michigan Law School, citing Debra Ann Poole & Lawrence T. White, Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults, in Memory and Testimony in the Child Witness 24 (Maria S. Zaragoza et al. eds., 1995) (reporting on the effects of question repetition in test subjects); Debra A. Poole & Lawrence T. White, Two Years Later: Effects of Question Repetition and Retention Interval on the Eyewitness Testimony of Children and Adults, 29 Developmental Psychol. 844 (1993).

[3] There are at least three relevant studies demonstrating that suggestions or misleading information may be planted by peers. Binet (1900) found that children will change their answers to be consistent with those of their peer group even when it is clear that the answer is inaccurate. Binet (1900) found that children will change their answers to be consistent with those of their peer group even when it is clear that the answer is inaccurate. Also, Pettit, Fegan and Howie (1990) and Pynoos and Nader (1989). The Suggestibility of Children: Evaluation by Social Scientists (From the Amicus Brief for the Case of *State of New Jersey v. Michaels* (1994),
Presented by Committee of Concerned Social Scientists).
http://law2.umkc.edu/faculty/projects/ftrials/mcmartin/suggestibility.html

Hysteria" or "Group Think"[4] tainted statements which have LC's intoxicated stupor as their origin.

In a telephone interview with Detective Liller, LC explained: "I was very unstable. I've been divorced three times, and I've had some relationships in between that lasted about a year, a year and a half at the most...due to my instability and various mental illnesses...my daughter would...be with my sister during the week..." (LC Interview Phone Call Transcript at page 2 - 4:16). She also stated that Defendant, "was the guy that you would trust your children with." (*Id.* at page 8 - 08:55).

C. EVIDENCE TO BE EXCLUDED

According to the March 30, 2019 Incident Report (11900785), Defendant sexually molested MG numerous times over a two-year period when MG was 3-4 years old Defendant around eight (8) and their families were neighbors between 1981 and 1990. The report states, Defendant "was 6-8 years old when [MG] was 3-4 years old." Since Defendant was born February 24, 1974 and is now 46, these events apparently happened approximately forty (40) years ago in or around 1980.

The report also contains an account of an interview with MG's mother, TA who states that Michael's father, Cloyd is married to her sister Valerie and that Cloud "has a history of sexual abuse including raping and molesting her Aunt" also referred to TA "little sister." It is unclear whether this refers to Cloyd's wife Valerie or another sister. The report further recounts that "When (VI)MG was in the third grade she told her mother about the sexual abuse. She woke up crying in the middle of the night which woke her mother up."

II. PURPOSE OF MOTION IN LIMINE

The purpose of the motion is to avoid the obviously futile attempt to "unring the bell" in

[4] The term has been in use since 1952. It is generally defined as "a pattern of thought characterized by self-deception, forced manufacture of consent, and conformity to group values and ethics." (https://www.merriam-webster.com/dictionary /groupthink.) It is also defined as "the practice of thinking or making decisions as a group in a way that discourages creativity or individual responsibility." There are scattered references to the term in judicial decisions. (See, e.g., *Dahl* v. *Bain Capital Partners, LLC* (D. Mass. 2013) 937 F.Supp.2d 119, 126 [referring to "group think" mentality].)

the event a motion to strike is granted in the proceedings before the jury. *Kelly v. New West Federal Savings* (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803; *Hyatt v. Sierra Boat Co.* (1978) 79 Cal. App. 3d 325, 337, 145 Cal. Rptr. 47. Trial courts have the inherent power to use motions in limine to control the litigation and to adopt any suitable method of practice, even if not specified by statute or court rules. *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal. App. 4th 1582, 1594–1595, 71 Cal. Rptr. 3d 361. Further, "*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.

III. 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.[5]

IV. 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

[5] 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.

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.[6]

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.

By enacting §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 the long known by the DA, but just disclosed evidence to the Defense of the allegations against the Defendant by MG because it would require Defendant to call rebuttal witnesses on collateral issues of scant relevance and

[6] 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.

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

EVIDENCE CODE 1108 DOES NOT MAKE THE EVIDENCE OF MG'S ALLEGATIONS ADMISSIBLE

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.)

The *Harris* Court 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 MG would be particularly "inflammatory," given their very nature fact. As noted in *People v. Karis (*1988) 46 Ca1.3d 612, 638, 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 the case here.

Second, these events were committed when Defendant was between six and eight and never resulted in an conviction, juvenile or otherwise and, as the report stipulates, were never before reported. As explained in *People v. Branch* (2001) 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, the alleged acts are very remote, over 40 years ago subject to fading memory and unavailability of witnesses to either rebut or corroborate.

Fourth, if MG's allegations are admitted, Defendant would then be compelled to rebut it with testimony from witnesses who were in a position to know the facts of what actually took place at that time. This would essentially require a trial within a trial almost certainly resulting in an "undue consumption of time." Moreover, the likelihood of unavailability of such witnesses

after the passage of 40 years, would also likely result in exactly the kind of prejudice §352 is intended to prevent.

Fifth, the report provides minimal information regarding MG's actual allegations. Whatever they may be though, they were between two very young juveniles whereas the current acts allege above the clothes touching of an adult male and two juveniles. Thus, the probative value, if any, would be slight.

V. 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 shDated:

Respectfully submit

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Patrick E. Clancy
Attorney for Defendant