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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF [COUNTY]

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. [DEFENDANT'S NAME] Defendant	**CASE NO. [CASE NUMBER]** **DEFENSE TRIAL MANAGEMENT CONFERENCE PACKET** **Date:** **Time:** **Dept:** **Current Trial Date:** **Case Filed:**

Defendant, [DEFENDANT'S NAME] ("Defendant") presents the following documents for the jury trial:

Dated: May 6, 2020

_____

[NAME OF ATTORNEY]
Attorney for Defendant

WITNESS LIST

[INSERT WINTNESS LIST]

STATEMENT OF FACTS

[INSERT STATEMENT OF FACTS]

MOTIONS IN LIMINE

I. MOTION UNDER *EVIDENCE CODE* §782 TO ADMIT PRIOR SEXUAL KNOWLEDGE & ACTS OF VICTIM

A. Evidence Sought to be admitted is not "sexual conduct of the complaining witness" within the Meaning of *Evidence Code* §782

The hearing requirements of *Evidence Code* §782 apply only to "sexual conduct of the complaining witness." Here, the acts sought to be admitted by the Defense are [INSERT EVIDENCE TO BE ADMITTED].

Penal Code § 311 provides a broad definition of "sexual conduct," but still does not encompass the conduct of LC the Defense seeks to admit here:

> "sexual conduct" means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals or pubic or rectal area for the purpose of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288[1], or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.

The suggestive acts here are not overtly sexual, but they are substantially similar to the acts CG accuses Defendant of i.e. above the clothes touching of her genital area with his hand. They are thus directly relevant and at issue providing compelling evidence of CG lack of truthfulness and shedding light on what actually occurred.

Accordingly, the defense makes this motion only out of an abundance of caution.

B. Even if CG's Behavior is Deemed "Sexual Conduct" Within the Meaning of §782, It Should Nonetheless be Admitted

Evidence Code §782(a) provides for an *in camera* review when evidence of the "sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness

[1] The §288 definition of "lewd or lascivious sexual act" requires the act to be committed "willfully." The acts sought to be admitted here we all initiated by CG and were therefore not committed "willfully" by Defendant or anyone other than CG herself. Thus, the §288 definition would not apply to the acts in question here.

under Section 780....(4)... if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court."

Evidence Code §780 provides in relevant part "the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:...(e) His character for honesty or veracity or their opposites... (i) The existence or nonexistence of any fact testified to by him." The Defense seeks to admit CG's sexualized conduct precisely to attack her credibility and to demonstrate that her accusation of inappropriate touching against Defendant is false.

In *People v. Daggett* (1990) 225 Cal. App. 3d 751, 757, 275 Cal. Rptr. 287, 290, the appellate court reversed the defendant's conviction due to the trial court's failure to allow him to present evidence that the victim had been molested by older children when he was five. The court held:

> A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them.
>
> In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. [***8] Thus, if the acts involved in the prior molestation are similar to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted.
>
> Here, Daggett's offer of proof was that he learned, from an inspection of the prosecutor's file, Daryl told a mental health worker and Doctor Slaughter that he had been molested by two older children, ages eleven and eight, when he was five years old. This should have been sufficient for the court to have ordered a hearing to determine whether the acts of prior molestation were sufficiently similar to the acts alleged here. The court erred when it failed to do so.
>
> The error was compounded when the prosecutor argued to the jurors that if they believed Daryl molested other children, he must have learned that behavior from being molested by Daggett.

> This is the type of argument the excluded evidence was intended to refute.

Daggett, 225 Cal. App. 3d 757, 275 Cal. Rptr. 290.

The acts sought to be admitted are extremely similar to the acts LC accuses Defendant of. That is, in the first instance, Defendant extricating his hand palm down from between CG's legs after she climbed over him and straddled his arm and, in the second, the charged conduct of over the clothes touching of her genital area.

C. CG's Conduct is Admissible Evidence of Character Under *Evidence Code* §1101

The prior sexual conduct of the complaining witness, which is evidence of a person's character or trait of character, is admissible under Evidence Code §1101(c) to support or attack his or her credibility. The prohibition stated in subsection (a) applies to character evidence only when it is offered to prove the conduct of a complaining witness on a specified occasion.

In our case, the defense seeks to attack the alleged victim's credibility, and is thus entitled under §1101(c) to employ evidence of her prior sexual conduct (if indeed is it "sexual conduct") as evidence to attack her credibility and explain the truth of what occurred. *People v. Franklin* (1994) 25 Cal. App. 4th 328, 335, 30 Cal. Rptr. 2d 376, 380.

D. *Evidence Code* §1103(c) does not Bar Admission of the CG's Prior "Sexual Conduct" Because Such Evidence Will Not be Offered to Prove Her Consent

Evidence Code §1103(c)(1) states, as a general proposition, that "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness's sexual conduct...is not admissible by the defendant in order to prove consent by the complaining witness." However, *Evidence Code* §1103 does NOT bar evidence of a victim's sexual conduct (nor cross-examination of her concerning such conduct) when the evidence is offered to attack her credibility. *Evidence Code* §1103(c)(3) & (4); *People v. Chandler* (1997) 56 CA4th 703, 711; *People v. Blackburn* (1976) 56 CA3d 685, 689-690.

Once the defendant makes a sworn offer of proof concerning the relevance of the sexual conduct of the complaining witness to attack her credibility, the protections of §1103 give way to the procedural safeguards of §782. *People v. Rioz* (1984) 161 CA3d 905, 916.

E. *Evidence Code* § 352

Generally, cross examination to test the credibility of a prosecution witness should be given wide latitude. *People v. Belmontes* (1988) 45 Cal.3d 744, 780.) "[C]ross-examination is the principle means by which the believability of a witness and the truth of his testimony are tested." *Farrell L. v. Superior Court* (1988) 203 CA3d 521, 526. "In sex cases, broad cross-examination of the prosecuting witness on prior sexual experiences, fabrication and sexual fantasy should be allowed." *People v. Francis* (1970) 5 CA3d 414, 417.

In *People v. Reeder* (1978) 82 CA3d 543, 550, the court held that "in criminal cases, any evidence that tends to support or rebut the presumptions of innocence is relevant," since "it is fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be considered by the trier of fact." (*Id.*, at p. 552.) The court found that defendant had the right to show he believed what others had told him about the co-defendant and the proffered evidence supported his defense of such intense dislike for his co-defendant as to preclude him from engaging in a criminal conspiracy with him (*Reeder*, *supra*, at p. 550) and stated: "Evidence Code Section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. In *Chambers vs. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, it was held that the exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial in violation of constitutional due-process requirements.?" *Id.*, at p. 553.

F. Due Process Require that Evidence of Defendant's Alternative Explanations of CG's Knowledge of Sex be Admitted Before the Jury

In child molest cases, the conclusion is routinely drawn that the victim got his or her knowledge of sex from the defendant while being molested. We learned the hard way in the infamous McMartin case in Los Angeles that this conclusion is not always true. Children can be "taught" such matters by being repeatedly questioned using questions full of information about sexual acts. Children can "learn" such matters in a number of ways although this fact is often overlooked. If no alternative explanation is permitted by the court, juries will automatically presume that the defendant provided the child with knowledge of sex through the alleged illegal acts.

As quoted above, in *People v. Daggett, supra*, the appellate court recognized this presumption and its inherent dangers and found that the defense should have been allowed to elicit the victim's prior sexual history to refute it. The failure to allow the defendant to establish the victim's alternative source of knowledge compelled reversal. (225 CA3d at p. 758.)

II. DEFENSE MOVES TO EXCLUDE JUST DISCLOSED EVIDENCE THAT, AS A JUVENILE, DEFENDANT ALLEGEDLY MOLESTED "MG"

A. The Evidence to be Excluded has Significant Indicia of Falsehood

[INSERT EVIDENCE OF FALSEHOOD]

B. MG's Allegations do not Constitute a Crime

The report states under "Offense Description," "INFORMATION REPORT NO CRIME." (Bates 162). This is consistent with *Penal Code* §26 which provides in relevant part: "All persons are capable of committing crimes except those belonging to the following classes... Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." See *In re Michael B.* (1975) 44 Cal. App. 3d 443, 446, 118 Cal. Rptr. 685, 686 (statement to police by child of age nine accused of involuntary manslaughter that he understood the difference between right and wrong did not meet the standard).

Additionally, according to Defendant's mother, Gloria DeLap, she never discussed the wrongful nature of sexual contact with Defendant during childhood or at any other time. (See Declaration of Gloria DeLap to be filed under seal).

C. Delayed Disclosure of MG's Allegations Would Make Admission Unduly Prejudicial

The report is dated April 9, 2019 but was not disclosed to the Defense until May 11, 2020, more than a year later, practically on the eve of trial and in the middle of a pandemic making a defense investigation impracticable. This is exactly the kind of undue prejudice *Evidence Code* §352 is intended to prevent. (See below).

D. Purpose of Motion in Limine

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

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.

E. The Court has Discretion to Exclude Evidence Under *Evidence Code* §352

"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. [2]

"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

[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.

[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.

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 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).

Here, the events allegedly happened 40 years ago. Important witnesses are no longer available such a Defendant's father Cloyd who suffered a stroke more than ten years ago and now cannot even remember his best friends according to Gloria Delap, Cloyd's ex-wife and Defendant's mother.

Further, the Prosecutions delay of more than a year in disclosing the report makes any investigation a practical impossibility given the restrictions imposed by the Covid-19 epidemic and the nearness of trial.

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F. *Evidence Code* §1108 Does Not Make the Evidence of MG's Allegations Admissible

As noted above, the allegations made MG and her mother do not constitute a crime as set forth in *Penal Code* §26 and acknowledged in the police report itself. Even if those allegations did constitute a crime (which they don't), it would still be inadmissible.

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." (*Id.,* 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, 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)." The events n question here were committed when Defendant was between six and eight and never resulted in a conviction, juvenile or otherwise as *Penal Code* §26 precludes these allegations from constituting a crim because Defendant was under 14 and there is no evidence that he knew "knew its wrongfulness" of the acts at the time. The police report itself states under "Offense Description," "INFORMATION REPORT NO CRIME." (Bates 162). See also, *In re Michael B*. (1975) 44 Cal. App. 3d 443, 446, 118 Cal. Rptr. 685, 686 (statement to police by child of age nine accused of involuntary manslaughter that he understood the difference between right and wrong did not meet the standard).

Also significant is the fact that the report is dated April 9, 2019 but was not disclosed to

the Defense until May 11, 2020, more than a year later, practically on the eve of trial and in the middle of a pandemic making a defense investigation impracticable. This is exactly the kind of undue prejudice Evidence Code §352 is intended to prevent. (See below).

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. Further because of the untimely disclosure of these allegations (more than a year after the report and on the eve of trial during a pandemic), investigation by the Defense is a virtual impossibility.

Fifth, the allegations by MG are of acts 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 of admission, if any, would be slight while the potential prejudice great.

III. DEFENDANT MOVES TO EXCLUDE EVIDENCE OF LAWFUL ADULT SEXUAL CONDUCT

A. Introduction

[INSERT RELEVANT FACTS]

B. Evidence to be Excluded

Defendant moves the Court for an order excluding the following evidence of Adult Sexual Conduct including:

1. The prosecution be precluded from introducing any evidence of Defendant's adult with adult sexual conduct.

2. The prosecution be precluded from questioning Defendant (if he elects to testify) concerning his sexual conduct with other adult(s). This includes, but is not limited to affairs with other adults, adult sexual preference with adults, adults with adult types of sexual acts, and adult

with adult sexual frequencies.

3. The prosecution be precluded from questioning Defendant's spouse if she/he testifies concerning their adult sexual conduct.

4. The prosecution be precluded from arguing that the lack of adult with adult sexual conduct is the motive for adult with child sexual conduct.

The evidence to be excluded includes, but is not limited to all of the following: [INSERT EVIDENCE TO BE EXCLUDED]

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.[4]

C. Court's Discretion

Defendant incorporates by reference the above subsection by the same name.

D. 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*

[4] 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.

(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.

E. 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].

F. Conclusion

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.

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IV. DEFENDANT MOVES TO ADMIT CHARACTER OF NON-DEVIANT SEXUAL BEHAVIOR TOWARD MINORS

A. Evidence of the Accused's Character for Non-Deviant Sexual Behavior Towards Children is Admissible

In *People v. Stoll* (1989) 49 C.3d 1136, 265 Cal.Rptr. 111, the California Supreme Court ruled that a defendant could present of good character to show non-commission of a crime. The court found that the legislature implicitly endorsed lack of deviance as a relevant character trait in a lewd and lascivious conduct case.

The Absence of a "Disposition" Tends to Prove That Defendant Has Not Committed the Crime. Thus, criminal defendants may use character evidence to prove conduct in conformity with character as provided in *Evidence Code* §1102. *People v. Stoll*, supra at 1159. This is an exception to the general rule as set forth in *Evidence Code* §1101 prohibiting use of evidence of a person's s character (by opinion, reputation or specific instances) to prove conduct on a specified occasion. Defendants can offer lack of deviance as circumstantial evidence that a defendant is unlikely to have committed charged acts of molestation. *Ibid. Stoll* contemplates that the testimony is offered by the defendant to suggest that he did not commit the requisite act.

B. The Accused Can Introduce Lay Opinion Character Evidence Of His Non Deviant Sexual Behavior

Evidence Code Section 800 provides:

> If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:
> (a) Rationally based on the perception of the witness; and
> (b) Helpful to a clear understanding of his testimony.

Lay opinion evidence based on personal observation of defendant's conduct with children is a proper subject of lay opinion testimony and is relevant to a charge of child molest where the opinion is based on long term observation of defendant's consistently normal behavior around children. *People v. McAlpin* (1991) 53 C.3d 1289, 283 Cal.Rptr. 382.

Testimony of lay witnesses not based solely on specific instances in which the defendant

could have molested children, but based on long term personal observation of the defendant's consistently normal behavior with children is admissible. *Ibid.* Testimony that the defendant does not have a reputation for being sexually attracted to young girls is relevant and admissible character evidence in a charge of child molest. Ibid. The rationale behind this is that evidence that the defendant does not have a bad reputation for relevant character trait (sexual deviancy) is admissible as tending to show he has a good reputation for that trait. *Evidence Code* § 1102. *People v. McAlpin, supra*. Reputation evidence is the estimation in which an individual is held. It is the character imputed to an individual rather than what is actually known of him by the witness or others. Such testimony does not need to be based on personal observation of the witness. *Id.*

Testimony of character witnesses that the defendant has a reputation as a person of high moral sexual character is also relevant and admissible reputation opinion evidence. *Id.*

In the case of *Holland vs. Zollner* (1894) 102 C 633, 638, 36 P 930, the court first established the use of lay opinion to describe various mental and moral aspects of humanity. These included temper, fear, anger and excitement. "Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving to him the ultimate fact, and which for want of a more accurate expression, we call opinion." *Ibid.* at 638.

C. Conclusion

Lay witnesses who are familiar with the parties can testify as to their personal opinion as to the defendant's character for sexual non-deviancy toward children. Lay witnesses can testify as to the defendant's reputation for non-deviant sexual character.

V. DEFENDANT MOVES TO EXCLUDE ALL TESTIMONY CONCERNING STATISTICS REGARDING FALSE ALLEGATIONS (SUCH AS PERCENTAGES) AND TO DIRECTLY INSTRUCT PROSECUTION EXPERTS TO MAKE ANY MENTION THEREOF

A. Testimony on the statistical likelihood of false allegations is irrelevant and invades the province of the jury to determine the credibility of witnesses.

In *People* v. *Wilson* (2019) 33 Cal.App.5th 559, the prosecution called Dr. Anthony Urquiza to offer evidence about CSAAS and false allegations of child sexual abuse. Urquiza

testified that research on the topic of false allegations of child sexual abuse shows that false allegations happen "very infrequently or rarely." He referred to a Canadian study that found a false allegation rate of "about 4% of cases," and that in those cases where a false allegation occurred it was not the child who made the false allegation. Dr. Urquiza testified that there were 12 to 15 other studies on the subject which found the false allegation rate to be between one and six percent of cases. (*Id.* at p. 568.) On appeal, defendant contended that the numerical evidence improperly amounted to testimony that 96% (or between 94 and 99%) of children accusing a person of child sexual abuse are telling the truth. (*Ibid.*)

The *Wilson* Court agreed with the "clear weight of authority in our sister states, the federal courts, and the military courts" that evidence of the rate of false allegations of child sexual assault is inadmissible. (*Id.* at p. 570.) The use of such statistical evidence bolsters the credibility of the complainant thereby depriving the defendant of his constitutional right to have the jury make credibility determinations. (*Id.* at p. 570.) Even more fundamentally, *Wilson* determined that statistical evidence regarding false allegations is irrelevant "because it tells the jury nothing about whether *this particular allegation is false*." (*Id.* at p. 571.) As such, testimony regarding statistical evidence of false allegations is more prejudicial than probative because it confuses the issues and distracts the jury from its function of determining credibility. (*Ibid.*)

In *People* v. *Julian* (2019) 34 Cal.App.5th 878, the prosecution once again called upon Dr. Anthony Urquiza to testify about the CSAAS theory and the statistical percentage of false allegation by child sexual abuse victims. Dr. Urquiza testified that the "range of false allegations that are known to law enforcement of [Child Protective Services] . . . is about as low as one percent of cases to a high of maybe 6, 7, 8 percent of cases that appear to be false allegations." (*Id.* at p. 883.) He added that the research bears out that false allegations are "very infrequent, or rare." (*Ibid.*) Defense counsel did not object to Dr. Urquiza's testimony. On cross-examination, defense counsel questioned Dr. Urquiza about the studies that were the foundation of his testimony. However, Dr. Urquiza simply "used the opportunity to repeatedly reassert his claim that statistics show children do not lie about being sexually abused." (*Id.* at pp. 888-889.)

The *Julian* Court agreed with the defendant that his trial attorney was ineffective in failing

to object to Dr. Urquiza's statistical evidence on false allegations and that counsel's omission deprived him of a fair trial. *Julian* noted that the fact that such evidence is inadmissible is dictated by existing authority that precludes an expert from using syndrome evidence, such as CSAAS or rape trauma syndrome, to make "predictive conclusions" about whether a particular child or child abuse victims in general "should be believed" or that "abused children give inconsistent accounts and are credible nonetheless." (*Id*. at p. 886, citing *People* v. *Collins* (1968) 68 Cal.2d 319, 327; *People* v. *Bowker* (1988) 203 Cal.App.3d 385, 393.)

Wilson and *Julian* require the exclusion of statistical evidence on false allegations. These cases also preclude any expert from making "predicative conclusions" regarding the verity of a child's account of abuse. Thus, Dr. Urquiza should be admonished to refrain from discussing research on the statistical probability of false allegations and to avoid making predictive conclusions about the credibility of child abuse victims based upon CSAAS theory (e.g., "children who make inconsistent statements about child abuse should be believed anyway," or "children sexually abused by a family member normally delay disclosure.")

B. Admission of testimony about the rate of false allegations violates the defendant's federal and state constitutional rights.

In *Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, the court reversed an order denying a habeas corpus petition because, it held, defendant's due process rights were violated by expert testimony that 99.5% of children tell the truth about sexual abuse, and that the expert had not personally encountered any instances where a child had invented a lie about sexual abuse. (*Id.* at pp. 737-739.)

Julian, supra, agrees with *Snowden* that the admission of prejudicial statistical data deprives the defendant of his due process right to a fair trial. (*People* v. *Julian*, *supra*, 34 Cal.App.5th at p. 887.) While such evidence "may not be prejudicial where it occurs in a slight passing reference by the expert," it cannot be deemed harmless when the expert is called upon to pontificate on the issue of the rate of false allegations and recites empirical studies in support of his opinion. In such circumstances, the error is "prejudicial by any standard." (*Id*. at p. 890, citing *Chapman* v. *California* (1967) 386 U.S. 18, 87 S.Ct. 824; *People* v. *Watson* (1956) 46

Cal.2d 818; see also *People* v. *Partida* (2005) 37 Cal.4th 428, 435-439 [defendant may argue that the admission of unobjected to gang evidence violates federal due process if it deprives the defendant of a fair trial]; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 15 & 16.)

A criminal defendant is entitled to be tried on the relevant evidence against him, not on statistics and probabilities that bear no relation to the particular acts he is accused of. (U.S. Const., 14th Amend.; *Collins, supra,* 68 Cal.2d at p. 320 [statistical testimony "distorted the jury's traditional role of determining guilt or innocence according to long-settled rules"]; *Jammal* v. *Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *Snowden, supra,* 135 F.3d at pp. 737-739; *Lisenba* v. *People of the State of California* (1941) 314 U.S. 219, 235-237 [62 S.Ct. 280].) Given that the prosecution of a child sexual abuse case normally turns on the respective credibility of the complainant and the defendant, the admission of expert opinion that improperly bolsters the credibility of the victim deprives the defendant of due process of law. (*Snowden, supra,* 135 F.3d at p. 737.)

Dr. Urquiza's opinion regarding the low incidence of false allegations usurps the jury function and substitutes his own biased opinion for a jury determination of guilt beyond a reasonable doubt. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Dillon v. United States* (2010) 560 U.S. 817, 828 [referring to the "Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt"]; *Snowden, supra,* 135 F.3d at pp. 737-739; *United States* v. *Brooks* (C.A.A.F. 2007) 64 M.J. 325, 330 [defendant had substantial right to have fact finder decide ultimate issue without viewing alleged victim's credibility through the filter of expert testimony]; *Powell* v. *State* (Del. 1987) 527 A.2d 276, 279-280 [expert's percentage testimony deprived defendant of his right to have jury make credibility determinations]; see *United States ex rel. Toth v. Quarles* (1955) 350 U.S. 11, 16-18; U.S. v. *Scheffer* (1998) 523 U.S. 303, 313 [118 S.Ct. 1261].)

Such testimony would also violate Petitioner's right to present a defense. (U.S. Const., 6th & 14th Amends.; see *Collins, supra,* 68 Cal.2d at pp. 327, 331 [statistical testimony "foreclosed the possibility of an effective defense by an attorney apparently unschooled in mathematical refinements, and placed the jurors and defense counsel at a disadvantage in sifting

relevant fact from inapplicable theory"]; Cal. Const., art. I, §§ 15 & 16.)

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Last, but far from least, such testimony would also undermine defendant's right to the presumption of innocence and reduce the prosecution's burden of proof beyond a reasonable doubt. Dr. Urquiza's statistics inform jurors that, even before any evidence relevant to this particular case is considered, that there is a well above a 90% chance the defendant is guilty. (See *Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488, 490 [jury was improperly invited to consider petitioner's status as a defendant and permitted to draw inferences of guilt from fact of arrest and indictment]; *In re Winship* (1970) 397 U.S. 358, 363; *Estelle v. Williams* (1976) 425 U.S.501, 503; U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.) In effect, such statistics convert the fact that an accusation had been made to a probability of guilt; from such testimony, jurors could conclude, without considering any evidence specific to this case, that there is a 92 to 99 percent chance that the defendant was guilty. (See generally Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1360-1361, 1368-1372 (1971) [statistical evidence undermines the presumption of innocence].)

For the above reasons the defense requests the court to order the prosecution, and Dr. Urquiza not to present or discuss the studies and their percentages of false allegations before the jury or make predictive conclusions about the credibility of child abuse victims in general based upon research studies or his own observations of the characteristics of child abuse victims.

VI. DEFENDANT MOVES TO EXCLUDE WITNESS OPINIONS THAT ALLEGED VICTIM(S) ARE BEING TRUTHFUL

A. Orders Requested by Defendant

Defendant moves for a protective order that:

1. Parents of the alleged victim(s), police officer(s), psychiatrist(s), psychologist(s), Child Protective Services worker(s), counselor(s), or any other witness (hereinafter referred to as "witnesses") shall not be asked by the District Attorney their opinion on the truthfulness of the alleged victim(s)' allegations.

2. Said individuals not be permitted to testify that the alleged victim appeared to be

truthful.

3. The District Attorney shall be instructed to caution all witnesses prior to their testimony that the witnesses shall not volunteer their opinion on the truthfulness or the appearance of the alleged victim(s)' allegations.

B. Police Officers May Not Testify as to their Opinion Whether a Victim Reported A Crime Truthfully or Appeared to be Truthful

A police officer's testimony regarding the truth or veracity of a complainant is not admissible. This is because the officer's statements do not qualify as either character evidence or as lay or expert opinion. (*People vs. Sergill* (1982) 138 Cal.App.3d 34, 187 Cal. Rptr. 497 [case involving a prosecution for oral copulation with a minor].)

In *Sergill*, the trial court permitted two police officers to testify to the effect that the eight-year-old victim was telling the truth when she reported that defendant, her uncle, had sexually molested her. Defendant's conviction was reversed because the testimony of the two officers has been improperly admitted. (Id., at p. 41.)

The *Sergill* court found that the officers were not qualified to testify to the victim's reputation for honesty since they did not know her and were unaware of any such reputation. There was no basis to admit their testimony as to her truthfulness as expert opinion because nothing in the record established the officers as experts in judging truthfulness. Their testimony was not admissible as lay opinion because they had described their interview with her in detail and their opinions as to her truthfulness did not meet the statutory requirement of being helpful to a clear understanding of her testimony. Further, the court found such testimony irrelevant as it did not fall within any of the categories set forth in Evidence Code section 780, enumerating factors bearing on credibility. (Id., at pp. 38040.) For the same reasons, any police officer's opinion of the victim's testimony herein is inadmissible. The holding of *Sergill* has been endorsed by other courts. (See e.g., *People vs. Melton* (1988) 44 Cal.3d 713, 744; *People vs. Smith* (1989) 214 Cal.App.3d 904, 915.)

A lay witness may "describe [his] interviews with [the witness] in detail, leaving the factfinder free to decide. . .credibility for itself, based on such factors as his demeanor or motives,

his background, his consistent or inconsistent statements on other occasions, and whether his statements. . . had the essential ring of truth." (*People v. Melton*, supra, 44 Cal.3d at pp. 744-745.) Thus, a lay witness may state that a witness appeared fearful or sincere. However, for a lay witness to testify that the alleged victim "appeared to be" telling the truth is the ultimate conclusion to be drawn from all the circumstances, including his conduct and demeanor and is thus inadmissible lay opinion pursuant to *Melton* and *Sergill*.

C. A Psychiatrist's Testimony on the Credibility of a Witness is also Inadmissible for the Above Reasons and, More Importantly, Because the Jury May Place too Much Reliance on it

People vs. Manson (1976) 61 Cal.App.3d 102, 132 Cal. Rptr. 265, discussed the question whether a psychiatrist should be allowed to give his opinion concerning the veracity of a witness. Manson and his co-defendants relied on *Ballard vs. Superior Court* (1966) 64 Cal.2d 159, 49 Cal.Rptr. 302, 410 P.d 838, to demand that Kasabian, a prosecution witness, be examined by a court-appointed psychiatrist to determine her competency and credibility. The court in finding no necessity for such examination discussed the Ballard provision for appointment of a psychiatrist to examine a prosecution witness in a sex offense case concerning the veracity of the witness. The court noted:

> While we do not suggest that *Ballard* is necessarily limited to cases involving sex offenses, we here accept the admonition that a psychiatrist's testimony on the credibility of a witness may involve many dangers; the psychiatrist's testimony may not be relevant; the techniques used and theories advanced may not be generally accepted; the psychiatrist may not be in any better position to evaluate credibility than the juror; difficulties may arise in communication between a psychiatrist and a jury; too much reliance may be placed upon the testimony of the psychiatrist; partisan psychiatrists may cloud rather than clarify issues; the testimony may be distracting, time consuming, and costly. *People vs. Russell* (1968) 69 Cal.2d 187, 195, 70 Cal.Rptr. 210, 443 P.2d 794, Cert.Denied 393 U.S. 864, 89 Sup.Ct. 145, 21 L.Ed.2d 132."

People vs. Manson, supra, 61 Cal.App. 3d at pp. 137-138.

Since *Ballard* and its progeny have since been overruled by *Penal Code Section 1112* and the sound logical reasons for not accepting a psychiatrist's testimony on the credibility of a witness still stand, psychiatrists and other like experts must not be allowed to give an opinion as to whether an alleged victim is telling the truth.

Applicable case law is in accord. For example, in *People v. Coffman and Marlowe* (2004)

34 Cal.4th 1, 82, a psychologist's opinion that she believed a child abuse victim told the truth during an interview was inadmissible. In *People vs. Willoughby* (1985) 164 Cal.App.3d 1054 at p. 1070, 210 Cal. Rptr. 880 at 890, in which the defendant's conviction was reversed, the court held that on retrial, evidence of a sexual trauma expert on the subject of the victim's truthfulness about the alleged act would be inadmissible. In *People vs. Ainsworth* (1988) 45 Cal.3d 984, a psychiatrist who testified in a co-defendant's case as to that individual's capacity to form the requisite mental state for the crime charged was permitted to testify that he found no evidence of premeditation and deliberation and that he felt that the co-defendant had been forthright in relating the events to him and was feigning or trying to cover up anything. (Id., at p. 1011.) The reviewing court found such testimony relevant to the reliability of the doctor's conclusions and distinguished it from the situation where a psychiatrist is asked to assess a witness's ability to testify truthfully, "We agree that, in such cases, where the sole purpose of the psychiatric examination and testimony relates to the credibility of a witness, the psychiatrist may not testify to the ultimate question of whether the witness is telling the truth on a particular occasion." (Id., at p. 1012.) Ainsworth was cited with approval in *People vs. Castro* (1994) 30 Cal.App.4th 390, 396, in which the appellate court upheld the trial court's refusal to allow the defense to elicit testimony from the victim's psychologist that the victim had stated her claim that the defendant had molested her was false. As the court stated, "Because defendant's offer of proof was narrowly directed at the truth of Sarah's molestation allegation, the trial court had no discretion to admit the proffered evidence." (Id., at p. 396.).

There has been no case allowing expert testimony or lay opinion that the victim is truthful about the alleged act. *People vs. Stoll* (1990) 49 Cal.3d 1136, 265 Cal.Rptr. 111 dealt with the personality profiles of defendants, under *Evidence Code § 1102*. In that case, a psychologist's opinion testimony, based upon interviews and standardized tests, was competent but disputable "expert opinion," rather than new "scientific" evidence that had to be proven reliable before it was admitted, was permitted. As indicated however, Stoll pertained to defendants, not victims, and thus it does not disturb the settled area of law on which this motion is based.

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VII. DEFENDANT MOVES TO EXCLUDE ANY AND ALL POLYGRAPH REFERENCES

A. Evidence to Be Excluded

Defendant moves to exclude any reference to polygraphs or lie detectors including, but not limited to the following : [INSERT EVIDENCE TO BE EXCLUDED] Transcript of October 30, 2018 Interview of Defendant by Detective Diller at page 10. Also see Incident Report, Bates 28).

As they apply to polygraph evidence, Defendant incorporates by reference the above discussions of relevance, *Evidence Code* § 352, Court's Discretion and accidental/incidental mention not opening the door for admission.

B. Polygraph Evidence is Inadmissible

Evidence Code § *351.1* regarding polygraph Examinations, provides:

> a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.
>
> b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible**.**

Since polygraph evidence is itself inadmissible per *Evidence Code* § *351.1,* it follows that any reference thereto is inadmissible as irrelevant and should be excluded.

VIII. DEFENDANT MOVES TO EXCLUDE POST MOLESTATION SYMPTOMS OF ALLEGED VICTIM (VICTIM IMPACT EVIDENCE)

A. The Prosecution May Not Introduce Victim Post-Molestation Behavior and Statements to Prove an Alleged Molestation Actually Occurred

Opinion testimony on rape trauma syndrome and Child Abuse Accommodation Syndrome is inadmissible to prove that an alleged victim was sexually attacked but may, in keeping with

certain narrow parameters, be admitted to support the credibility of a witness. (*People vs. Bledsoe* (1984) 36 Cal.3d 236, 203 Cal. Rptr. 450; *In re Sara M.* (1987) 194 Cal.App.3d 585. Thus, it is improper to prove that a crime had occurred based on symptoms that the alleged victim exhibited post-crime.

These symptoms include but are not limited to: 1) Disorientation; Stress; Agitation; Fear; Anxiety; Subdued; Controlled; Flashbacks; Denial; Relives incident; Insecurity; Nightmares; Trauma; Mistrust. *Bledsoe, supra*, 36 Cal.3d at p. 242-243 and: 2) Consistency of story; Denial; Unusual sexual knowledge; Feeling of loss of control; Anger; Depression; Behavioral problems; Sleep disturbances; Nightmares; Eating disorders; False sense of maturity; Trust too much; Trust too little; Fear; Details given over time. *In re Sara M.*, 194 Cal.App.3d at p. 589.

People vs. Jeff (1988) 204 Cal.App.3d 309, 251 Cal. Rptr. 135 is controlling. In that case the prosecution presented one expert witness who described the alleged complainant's post-molest symptoms, including nightmares, crying, depression, low self-esteem, and helplessness. The prosecution then presented a second witness to explain these symptoms as evidence of child molest. Neither witness was called for the purpose of rehabilitating the complaining witness. (Id., at p. 338.) The defense objected to the first witness on the ground that it was evidence of post-molest emotions used to prove that the molestation had occurred and objected to the second witness testimony as improper opinion testimony under *People vs. Bledsoe, supra* and *In re Sara M., supra*. The trial court held each witnesses' testimony was admissible with respect to the symptoms exhibited by the complaining victim, but that neither witness would be allowed to state her opinion regarding whether a molestation had in fact occurred. The Court of Appeal found the admission of such testimony and the trial court's attempt to limit its import ran afoul of the proscriptions set forth in Bledsoe, supra, and its progeny and reversed the defendant's conviction:

> It is not significant the prosecutor told the jury Susan Holland would merely describe symptom she observed and "[a]ny conclusion that is to be drawn will be yours." In effect and result, the prosecutor, by what he apparently believed was a brilliant subterfuge, engaged in the exact conduct, here condoned by the trial court, that was proscribed in Bledsoe, Gray and In re Sara M. The challenged testimony was not offered to rehabilitate a wavering or equivocal Gypsy. Rather, it told the jury that they should accept

> gypsy's version of these events as true, that she was a victim, molested over a three-year period by defendant, because here is now typical child molest victims act and Gypsy fits the mold perfectly.

People vs. Jeff, supra, 204 Cal.App.3d at p. 340.

That the testimony concerning a complaining witness's post molest symptoms does not come from an expert does not make it admissible. In *In re Christie D.* (1988) 206 Cal.App.3d 469, 253 Cal. Rptr. 619, the court held that the non-expert status of witness opinion concerning the sex play with anatomical dolls did not make the play admissible. (*Id.*, at pp. 478-480.) The play with anatomical dolls was not relevant to establish a molestation had occurred since there was no study showing its reliability as a predictor whether the opinions interpreting the play were formed by the expert or the trier of fact. Therefore, since experts cannot form opinion interpreting post-molest symptoms as a predictor of molest, the non-expert status of the witness does not cure the problem.

B. Alleged Post-Molestation Symptoms are Inadmissible as Improper Victim Impact Evidence Absent a Theory of Relevance

Victim impact evidence, i.e., post-molest symptoms, is inadmissible at the guilt phase of a trial unless relevant to a specific disputed issue in the case. For example, in *People v. Redd* (2010) 48 Cal.4th 691, the victim's testimony concerning the permanency of his injuries was deemed relevant to a charged great bodily injury enhancement. (*Id*., at p. 731-732.) In *People v. Taylor* (2001) 26 Cal.4th 1155, 1171, a doctor's testimony about the victim's injuries and loss of bodily functions was held relevant to show the extent of said injuries and confirm he could accurately recall the incident.

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Generally, victim impact evidence (or victim impact argument by the prosecution) at the guilt phase is inadmissible as having little probative value and great prejudicial effect. *In People v. Vance* (2010) 188 Cal.App.4th 1182, the defendant's murder conviction was reversed where the prosecutor made a victim impact argument during his argument to the jury. The court noted that such argument is banned at the guilt phase, stating, "The justification for both of these

exclusionary policies is that they deal with subjects that are inherently emotional, possessing an unusually potent power to sway juries, and that their use must therefore be rigidly confined and controlled." (Id., at 1193.)

Other jurisdictions are in accord. See *Colon v. Georgia* (2005) 619 S.Ed.2d 773 [victim impact evidence in child molest case admissible to rebut defendant's attack on credibility of child victim]; *United States v. Copple* (3rd Cir. 1994) 24 F.3d 535, 546 [error to admit victims' testimony about negative effects of defendant's fraud on their health and savings, such testimony was more prejudicial than probative]; *Sager v. Maass* (D.C. Ore. 1995) 907 F. Supp. 1412, 1419-1420 [ineffective assistance of trial counsel for said counsel to introduce at guilt phase victim's entire written victim impact statement, which was a "prejudicial piece of evidence"]; *Armstrong v. State* (Wyo. 1992) 826 P.2d 1106, 1116 ["Consideration of victim-impact testimony or argument remains inappropriate during proceedings determining the guilt of an accused"]; *Miller-El v. State* (Tex. Crim. App. 1990) [in an attempted murder case, a victim's paraplegic disability hardship held inadmissible in the guilt phase: "We cannot agree, however, that [Dr.] Harrison's testimony regarding Hall's future hardship as a paraplegic had any tendency to make more or less probably the existence of any fact of consequence at the guilt stage of trial"].

Based on these authorities, victim impact evidence in this case must be excluded unless the prosecution can articulate a theory of relevance and this Court conducts the necessary balancing of interests under Evidence Code section 352.

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C. *Evidence Code* § 352 Precludes Testimony of Post-Molest Symptoms (Victim Impact Testimony), Further, the Admission of Such Evidence Would Violate Defendant's Federal Constitutional Right to Due Process and a Fair Trial

Evidence Code § 352 permits the trial court in its discretion to exclude evidence if its probative value is substantially outweighed by its prejudicial impact, if it will consume an undue amount of time, confuse the issues or mislead the jury. "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]. *People vs. Harris* (1998) 60 Cal.App.4th727 (internal quotation marks omitted).

Testimony of a victim's post-molest symptoms cannot be used to establish the molestation occurred, is extraneous to the case, highly prejudicial and will engender undue sympathy for her and hence antipathy for the defendant. In finding that such evidence had been erroneously admitted, the Third Circuit Court of Appeals in *Copple, supra*, explained:

> Testimony such as this had either no, or very little probative value and was unfairly prejudicial. We believe that it was irrelevant either for the purposes of proving that Copple had failed to make up the loss to the funeral directors or for any other reason. Even if there had been some marginal relevance to the testimony about the particular personal or professional impact the losses had on the funeral directors, its principal effect, by far, was to highlight the personal tragedy they had suffered as victims of the scheme. The testimony was designed to generate feelings of sympathy for the victims and outrage toward Copple for reasons not relevant to the charges Copple faced. It arguably created a significant risk that the jury would be swayed to convict Copple as a way of compensating these victims wholly without regard to the evidence of Copple's guilt.

United States v. Copple, supra, 24 F.3d at 546.

Further, such evidence may result in an undue consumption of time. For example, if the victim were to testify to having nightmares or to being withdrawn, the defense on cross-examination will have the right to search for alternate explanations which would include everything that ever happened to the child that could cause these symptoms making for an endless trial.

Defendant further submits that the admission of post-molest symptoms/victim impact evidence in this case would violate his constitutional rights to due process and a fair trial under the 5th, 6th and 14th Amendments to the U.S. Constitution and article 1, sections 7 and 15 of the California Constitution. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [reversal of murder conviction because of other crimes evidence of the defendant's knife collection and fascination with knives violated federal due process where that evidence was irrelevant to the crime charged]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 887 [same]; *Clark v. Duckworth* (7th Cir. 1990)

906 F.2d 1174 [the defendant has a federal constitutional right to a trial free of irrelevant and prejudicial evidence].)

D. If This Court Permits the Prosecution to Admit Evidence of The Victim's Post-Molest Symptoms, Then it Must Allow the Defense To Offer Evidence Of Alternative Explanations for Those Symptoms.

Should this court allow the prosecution to admit evidence of the complaining witness's alleged post-molest symptoms as a valid predictor of a crime, due process compels it to allow the defense to present evidence of alternative explanations for those symptoms. (People vs. Reeder (1978) 82 Cal.App.3d 543, 550; People vs. Burrell-Hart (1987) 192 Cal.App.3d 593, 599.) As stated in Reeder:

> Evidence Code Section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. In Chambers vs. Mississippi (1973) 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297, it was held that the exclusion of evidence, vital to a defendant's defense, constituted a denial of a fair trial in violation of constitutional due process requirements.

Reeder, supra at p. 553, emphasis added.

Depending on what symptoms are presented there may be many alternative explanations in this case. For example, LC is known to have a host of mental issues. RC has a known learning disability. CG has a known serious heart condition

E. Conclusion

Based on the foregoing, the prosecution should be excluded from presenting evidence of the alleged complainant's post-molest symptoms as a predictor that a molestation in fact occurred and because such evidence constitutes improper victim impact evidence inadmissible at the guilt phase. If the court allows such evidence, it must allow the defense to admit evidence of alternative explanations for the existence of such symptoms.

IX. DEFENDANT MOVES TO EXCLUDE ALLEGED VICTIM'S STATUS AS "IN THERAPY"

A. In Limine Orders Requested

The defense moves for orders in limine that the prosecution be precluded from introducing evidence:

1. That alleged victims are receiving therapy due to Defendant's charged conduct (child molestation, etc.)

2. Alleged victims are in need of psychological counseling due to Defendant's charged conduct (child molestation, etc.).

B. ***A Victim's Alleged participation in or need for therapy is Irrelevant***

It is fundamental that only evidence relevant to prove or disprove a material fact is admissible. *Evidence Code* §§210, 350-351.

Expert opinion testimony that an alleged victim suffers from rape trauma syndrome or child molest syndrome is inadmissible to prove that any rape or molest/abuse occurred. (*People vs. Bledsoe* (1984) 36 Cal.3d 236, 238; *People vs. Roscoe* (1985) 168 Cal.App. 1093, 1099-1100.)

Evidence Code §352 requires the trial court to balance any asserted probative value of a particular piece of evidence against its prejudice and exclude evidence the prejudice of which outweighs its probative value or has a substantial danger of confusing the issues or misleading the jury. Here, the fact that the alleged victim may be in therapy would only serve to create undue sympathy for her at the defendant's expense and would confuse the issues. Such evidence must therefore be excluded.

X. DEFENDANT MOVES TO EXCLUDE EVIDENCE OF DEFENDANT'S PRIOR DRUG USE

A. Evidence to be Excluded

During her January 8, 2019 interview, LC told Detective Liller: "[Defendant has] been clean. He did drugs when – in his 20s...He was a methamphetamine user and he ended up quitting and becoming this upstanding family guy...He wasn't using anything." (January 8, 2019 Interview Transcript at page 12 - 10:09).

B. Defendant's prior drug use is Irrelevant

As they apply to drug use evidence, Defendant incorporates by reference the above discussions of relevance, *Evidence Code* § 352, Court's Discretion and accidental/incidental mention not opening the door for admission.

Defendant's drug use does not relate to any material disputed fact in this litigation.

C. Defendant's prior drug use is Inadmissible Character Evidence

Generally, "[e]vidence of traits of…character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness." Cal. Evid. Code § 786. As noted above, Defendant's recreational use of drugs ended when he was twenty and he is currently years 44 years old , (DOB: 2-24-1974) and is of no relevance currently (or even back then) to "honesty or veracity, or their opposites."

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

In *People v. Reid*, 133 Cal. App. 3d 354, evidence of a defendant's prior drug abuse was found to have been improperly admitted. "[T]he admissibility of other crimes evidence must be scrutinized with great care because of its highly inflammatory and prejudicial effect on the trier of fact. *People v. Thompson* (1980) 27 Cal.3d 303, 314 [165 Cal.Rptr. 289, 611 P.2d 883]. Accordingly, when such evidence is proffered by the prosecution, its admissibility depends on three principal factors: '(1) the materiality of the facts sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and(3) the existence of any rule or policy requiring exclusion of relevant evidence.' (*Id.,* at p. 315.)." *People v. Reid*, 133 Cal. App. 3d 354, 361-62, 184 Cal. Rptr. 186, 190 (1982).

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

In *People v. Tuggles* (2009)179 Cal. App. 4th 339, 100 Cal. Rptr. 3d 820, the trial court was fond not to have abused its discretion or violate any federal constitutional rights by restricting

cross-examination of an accomplice about his drug abuse and mental health issues based on undue consumption of time. *Evidence Code* § 352. See also *People v. Rodriguez* (1986) 42 Cal. 3d 730, 230 Cal. Rptr. 667, 726 P.2d 113, reh'g denied (Evidence regarding state witness's history of drug abuse and psychiatric treatment five and six years before trial did not have sufficient bearing upon credibility of her testimony at trial to make its exclusion an abuse of discretion).

XI. DEFENDANT MOVES TO EXCLUDE SUBTERFUGE AROUND BLEDSOE, THE INTRODUCTION OF PROFILE EVIDENCE, AND THE INTRODUCTIONS OF STATISTICAL EVIDENCE AS TO THE FREQUENCY OF FALSE ACCUSATIONS IN LIMINE ORDERS REQUESTED

A. In Limine Orders Requested

The defense moves for orders in limine that the prosecution be precluded from introducing expert testimony to dispel alleged myths regarding sex/sex crimes/molestation (and the like) unless and until:

a. There be a hearing outside the presence of the jury for the prosecution to specify the alleged myth and a contested hearing as to whether it is actually a myth.

b. The testimony be narrowly limited to only those items found by the court to actually be myths.

c. That the testimony to dispel a myth be limited to victims as a class.

d. That testimony as to profiles of child molesters be excluded; and

e. That testimony as to the percentage of false allegations of molestation be excluded (as set forth above).

B. Use of Expert Testimony to Dispel Myths Should be Sharply Limited

In *People vs. Bledsoe* (1984) 36 Cal.3dd 236, 249, the California Supreme Court held that rape trauma syndrome was inadmissible to show a rape had actually occurred, but could be admissible to "disabus[e] the jury of some widely held misconceptions about rape and rape trauma victims so that it may evaluate the evidence free of the constraints of popular myths."

Subsequently, reviewing courts have held valid the use of expert testimony to dispel myths about child molest victims. However, the testimony is limited to victims as a class and not

a particular alleged victim. *People vs. Roscoe* (1985) 168 Cal.App.3d 1093, 1098-1100; *People vs. Gray* (1986) 187 Cal.App.3d 213, 218; *People vs. Coleman* (1989) 48 Cal.3d 112, 144; and *People vs. Stark* (1989) 213 Cal.App.3d 107, 116-117. In addition, testimony not properly limited is excludable pursuant to Evidence Code section 352. (*Roscoe*, supra, at p. 1100.)

In *People vs. Bowker* (1988) 203 Cal.App.3d 385, 394, 249 Cal. Rptr. 886, 891, the court considered whether or not the testimony of a child abuse accommodation syndrome expert fell within the Bledsoe exception permitting such testimony for the narrow purpose "of disabusing the jury of misconceptions as to how child victims react to abuse." (*Id.*, at p. 392.) The court reaffirmed that "Bledsoe must be read to reject the use of CSAAS evidence as a predictor of child abuse," and found the expert's testimony had exceeded the Bledsoe exception holding that "at a minimum the evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*Id.*, at pp. 393-394.) The court further held:

"In the typical criminal case, however, it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony." (*Id*., at p. 394.)

In determining that the expert's testimony erroneously exceeded the permissible limits of the Bledsoe exception, the Bowker court found that the expert's testimony was tailored to fit the children in that particular case, asked for sympathy, asked that children be believed and by describing each aspect of CSAAS theory provided a scientific framework the jury could use to predict a molest occurred. The court ruled that this evidence should have been excluded. (Id., at pp. 394-395.)

Synonyms are also inadmissible. Some expert have used the "trick" of using synonyms to the word "profile". These synonyms should be excluded for the same reason. The main synonym that is used is "patterns". This is a different word without a distinction. Both "profiles" and "patterns" should be excluded under the case of *People v. Bledsoe, supra*.

Requirement of Jury instruction. When testimony is introduced to dispel a myth, the jury must be instructed not to use that evidence to predict a molestation has been committed.

Beyond the tailoring of the evidence itself, the jury must be

> instructed simply and directly that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claims is true. The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS assumes a molestation has occurred and seeks to describe and explain common reactions of children to the experience. (See *In re Sara M.*, supra, 194 Cal.App.3d at p. 593, 239 Cal. Rptr. 605.) The evidence is admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested.

Bowker, supra, at p. 394; *People vs. Housley* (1992) 6 Cal.App.4th 947, 958-959 (instruction required *sua sponte*).

C. Expert Testimony Concerning About the Characteristics and Conduct Typical of Child Sex Offenders and About Categories of Child Sex Offenders and their Treatment Prognosis Must be Excluded as Profile Evidence

1. Profile evidence is inadmissible.

"A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084.) A profile may include "*any information or data*" that places the defendant "in an alleged 'group' of persons who have committed offenses in the past." (*United States v. Banks* (C.M.A. 1992) 36 M.J. 150, 163.) Profile evidence is generally inadmissible to prove guilt; every defendant has the right to be tried based on the evidence implicating him in the particular crimes charged, and not on facts accumulated regarding a particular criminal profile. (*Robbie, supra,* 92 Cal.App.4th at p. 1084.)

Profile evidence is inherently prejudicial because it proceeds from an erroneous starting point. (*Robbie, supra,* 92 Cal.App.4th at p. 1085.) The syllogism underlying profile evidence is: criminals act in a certain way; the defendant acted that way; therefore, the defendant is a criminal. (*Ibid.*) The problem is that the major premise is faulty; it implies that criminals, and only criminals act in a given way. (*Ibid.*) In fact, certain behavior may be consistent with both innocent and illegal behavior. (*Ibid*.)

As the Supreme Court has put it, if profile evidence lacks foundation, is irrelevant, or is more prejudicial than probative, it is inadmissible; "[p]rofile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent with innocence as guilt." (*People v. Smith* (2005) 35 Cal.4th 334, 358.)

In *Robbie*, the prosecution presented testimony of an expert "in the area of the behaviors and conduct of persons who commit sexual assaults." (*id.* at p. 1082.) The state may not justify the admission of this testimony as necessary "to disabuse the jury of common misperceptions about conduct [sic] of a rapist," claiming that "[a] common citizen, inexperienced in rape and rapists, could be understood naturally to believe that a rape is a harsh, violent, threatening, and unrelentingly brutal experience." (*Id.* at pp. 1082-1083, 1085-1086.) The *Robbie* prosecutor further contended that the evidence was akin to evidence the Supreme Court had approved in *McAlpin*, to rebut the common assumption that child molesters were "old [men] in shabby clothes who loiter[] in playgrounds and schoolyards and lure[] unsuspecting children into sexual contact by offering them candy or money." (*Robbie, supra,* 92 Cal.App.4th at p. 1086.)

The *Robbie* court rejected these arguments. It distinguished the evidence from that approved in *McAlpin*, noting that the expert properly could have testified that rapists behave in a variety of ways and that there is no typical rapist. (*Robbie, supra,* 92 Cal.App.4th at p. 1087.) In *Robbie*, by contrast, the expert "did not merely attack the stereotype by explaining that there is no 'typical sex offender.' Instead, she replaced the brutal rapist archetype with another image: an offender whose behavioral pattern exactly matched defendant's." (*Ibid.*)

Robbie is in accord with precedent across the state and across the country. (See, e.g., *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006 [court erred in admitting profile evidence; expert testified about operations of auto theft rings, including type of car, route of travel, and fact that most of those arrested denied knowing the vehicle they drove was stolen]; *People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072 [testimony that defendant fit the profile of typical Northern San Diego County heroin dealer was inadmissible]; *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 16 [drug courier profile evidence is inadmissible]; *United States v. Pineda-Torres* (9th Cir. 2002) 287 F.3d 860, 865 [expert provided testimony about the structure of drug trafficking organizations, thus "attribut[ing] knowledge to the defendant by attempting to connect him to an international drug conspiracy . . . ."]; *Haakanson v. State* (Ct. App. Alaska 1988) 760 P.2d 1030, 1035-1036 [profile testimony, which identified otherwise innocent characteristics and behavior as evidence of guilt, was inadmissible under Alaska law]; *Sloan v. State* (Ct. Special

App. Md. 1987) 522 A.2d 1364, 1369 [reversal where expert testified about "classic indicators of child abuse"]; *Kansas v. Clements* (1989) 244 Kan. 411, 420 [evidence that describes the characteristics of the typical offender has no relevance to whether the defendant committed the crime in question]; *Banks, supra,* 36 M.J. at pp. 155-157, 160-164, 170-171 [reversing for cumulative error including court's admission of evidence that defendant and his family fit a profile of child sex abuse because defendant was a stepfather who did not have a good marital sexual relationship]; *Kirby v. State* (Ct. App. Tex.2006) 208 S.W.3d 568, 573-574 [profile evidence inadmissible to prove guilt]; *Commonwealth v. LaCaprucia* (App. Ct. Mass. 1996) 671 N.E.2d 984, 986-987, 989 [expert profile testimony that presented defendant's family situation as one prone to sexual abuse was erroneously admitted and, along with other erroneously-admitted evidence, required reversal]; *Ryan v. State* (Wyo. 1999) 988 P.2d 46, 55 ["Those jurisdictions that have considered profiles of battering parents, pedophiles, rapists, and drug couriers unanimously agree that the prosecution may not offer such evidence in its case-in-chief as substantive evidence of guilt."].)

Even if the expert frames her opinions cautiously — indeed, in *Robbie*, the expert apparently admitted that the behavior she described may be consistent with both innocent and illegal behavior (*Robbie, supra,* 92 Cal.App.4th at pp. 1083, 1085) — profile evidence is dangerously misleading. As the court explained in *Raymond, supra,* 700 F.Supp.2d at p. 150, while the expert him or herself may be very careful in using profiles, "a jury may make the quick and unjustified leap from his expert testimony about <u>behavioral patterns</u> to guilt in a particular case that shows <u>similar patterns</u>."

Finally, that an expert does not specifically opine that a defendant shares the characteristics of a typical child molester does not render the testimony any less improper and prejudicial. In *Robbie*, the expert testified by way of hypothetical, without directly opining that the defendant fit the profile she had drawn. (*Robbie, supra,* 92 Cal.App.4th at pp. 1082-1084.) In *Buzzard v. State* (Ct. App. Ind. 1996) 669 N.E.2d 996, 1000. (14RT 2872 [prosecutor: "Mr. Martin's got a sickness. It's not his fault. Didn't choose to be this way. He's struggling with it."]; see *People v. Walkey* (1986) 177 Cal.App.3d 268, 279 [although expert never expressly

concluded defendant fit the profile, his testimony clearly tended to associate defendant with a group who, in the expert's opinion, are often child abusers].)

In *People v. Bradley* (Ill. 4th Dist. 1988) 526 N.E.2d 916, the court reversed where the prosecution's expert listed characteristics said to be typical of perpetrators of child sexual abuse, noting that while the trial court had prohibited the parties from specifically connecting these characteristics to the defendant, that only exacerbated the problem, leaving the jury to speculate as to whether the defendant fit the very general profile described by the expert. (*Id.* at p. 921.)

In sum, because an expert's testimony does not merely refute the purported stereotype of a typical child molester, but replaces that stereotype with a new type of offender, whose conduct and attributes matched those the prosecution attributes to the defendant, — and which were as consistent with innocence as with guilt — the evidence is inadmissible.

2. Admission of such testimony would violate Defendant's right to a fair trial and to due process of law

The erroneous admission of such testimony violates due process by rendering the trial fundamentally unfair. (See *Partida*, *supra,* 37 Cal.4th at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564; *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *Duncan v. Henry* (1995) 513 U.S. 364, 366; see also *Lisenba v. California* (1941) 314 U.S. 219, 236 ["The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."]; U.S. Const., 14th Amend.)

When there are no permissible inferences to be drawn from the evidence, and it is of "such quality as necessarily prevents a fair trial," due process is violated. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229-232.) Such evidence violates due process when it "'is material in the sense of a crucial, critical, highly significant factor.' [Citation.]" (*Snowden v. Singletary* (11th Cir. 1998) 135 F.3d 732, 737.)

No permissible inference can be drawn from testimony about a particular type of sex offender whose conduct and characteristics matches those attributed to the defendant. Indeed, "[t]he only inference which can be drawn from such evidence, namely that a defendant who

matches the profile must be guilty, is an impermissible one." (*Clements, supra,* 244 Kan. at p. 420.)

Similarly, no permissible inference can be drawn from evidence that two to five percent of men are sexually attracted to children, and that that attraction is innate, immutable, and untreatable. Such evidence only invites speculation about the likelihood that the defendant is one of those men, and about whether he would go on to abuse children if not convicted, and risks conviction because jurors believe that the defendant is a pedophile, not because they believe the elements of the crimes charged have been proven beyond a reasonable doubt. (Cf. *Collins, supra,* 68 Cal.2d at p. 329 [statistical evidence "could only lead to wild conjecture without demonstrated relevancy to the issues presented"].)

XII. DEFENDANT MOVES TO EXCLUDE COUNSEL ARGUING CONSEQUENCES OF AN ACQUITTAL

A. In Limine Orders Requested

The defense moves for orders in limine that the prosecution be precluded from arguing:

1. That an acquittal would allow Defendant to resume teaching children at Bible Studies again;

2. That an acquittal would put Defendant on the streets and as a consequence, put children at risk of molestation;

3. That the jurors should consider the reaction of neighbors to a verdict of not guilty.

/ / /

B. It Would be Improper for the Prosecution to Argue Consequences of an Acquittal

It is improper for a prosecutor to urge the jury to convict because of the possible consequences of a failure to do so. Such probable consequences which would be inappropriate to argue would include arguments to the effect that an acquittal would permit the defendant to resume teaching and consequently might put other children " at risk of molestation. " Caselaw is clear that while commentary on a defendant's future dangerousness may be proper in the sentencing context, it has no place at the guilt phase of a trial. (*People v. Hayes* (1990) 52 Cal.3d

577, 635; *Com. Of Northern Mariana Islands v. Mendiola* (9th Cir. 1992) 976 F.2d 475, 487 [conviction reversed where prosecutor urged that defendant could go out and kill again if acquitted because gun was still out there]; *United States v. Cunningham* (7th Cir. 1995) 54 F.3d 295, 300 ["The government may not attempt to obtain a conviction by appealing to jurors to prevent future crimes by finding present guilt."].)

In *People v. Mendoza* (1974) 37 Cal.App.3d 717,727, the defendant was charged with committing a lewd act upon a child under 14 years of age. During closing argument, the prosecutor asked the jury to 'take the defendant off the streets.' The Court of Appeal reversed the conviction, finding that said comment by the prosecutor coupled with several other objectionable ones was not harmless error. In finding the prosecutor's exhortation to the jurors to take the defendant off the streets error, the Court explained that "California law gives the responsibility for determining punishment in criminal cases to the judge and the Adult Authority. The jury's responsibility is limited to the determination of the defendant's guilt or innocence of the charge against him." (*Id*., at p. 726.) Similarly, in *People v. Duckworth* (1984) 162 Cal.App.3d 1115, 1123-1124, the prosecutor's argument during the sanity phase of trial which implied that the defendant would be on the streets and would thus pose a danger to society if he were found insane was reversible error.

It is likewise improper for the prosecution to argue that the jury has a moral obligation to protect society from the defendant, or that if the defendant is acquitted, he will commit more crimes. In *People v. Whitehead* (1957) 148 Cal.App.2d 701, the prosecution argued improperly in a child molest trial that men of the defendant's age commit offenses of this character and his [the prosecutor's] office's experience is that if such men are acquitted, they will repeat the same character of offense. (*Id*., at p. 705.) The reviewing court found such argument "highly inflammatory" and reversed the defendant's conviction. (*Id*., at p. 705-706.)

Furthermore, it is improper for the prosecution to argue that the jury should consider what the reaction of their neighbors would be if they were to acquit the defendant. In *People v. Purvis* (1963) 60 Cal.2d 323, 342, (overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631) the court reversed a first degree murder conviction based on prosecutorial misconduct which

included a comment from the prosecutor following trial publicity in the Oakland Tribune newspaper which "threatened the jury with the statement that 'those outside that are not part of this jury have their eyes focused upon you just to see what you are going to do * * *.' The court held "A warning of probable consequences of failure to convict, and of the unfavorable reactions of neighbors is improper (48 Cal.Jur.2d, Trial, s 439, p. 446).

DEFENDANTS OPPOSITIONS TO THE PEOPLE'S MOTIONS IN LIMINE

I. DEFENDANT'S OPPOSITIONS TO THE PEOPLE'S MOTION IN LIMINE REGARDING VICTIM'S PRIOR SEXUAL CONDUCT

Defendant opposes the Prosecution's Motion in limine regarding victim's prior sexual conduct on the same grounds that the Defense makes the above motion for admitting such evidence under *Evidence Code* § 782 which is hereby incorporated by reference at this point.

II. DEFENDANT'S OPPOSITIONS TO THE PEOPLE'S MOTION IN LIMINE REGARDING REGARDING REFERENCES TO STANDARDS OF PROOF.

The People motion in limine to preclude the defense from making any comparisons or references to any standards other than reasonable doubt is misplaced and not supported by any applicable law. In support, the People cite *People v. Katzenberger* (2009)178 Cal. App. 4th 1260, 1266, 101 Cal. Rptr. 3d 122, 126. However, the case is inapposite. *Katzenberger* precludes the prosecution from attempting to confuse the jury regarding standards of proof, ie. Suggesting that a conviction for example could be by either "clear and convincing" or a "preponderance" of evidence. Here, counsel for Defense may wish during closing to compare the standard to clarify to the jury what "beyond a reasonable doubt" means. Accordingly, the People's motion in limine in this regard should be denied.

DEFENDANTS PROPOSED JURY INSTRUCTIONS

Defendant joins the People's jury instruction except as to:

1. CALCRIM 315 as to Eyewitness Identification because there is no issue as to identification in this case; and
2. CALCRIM 1193 Testimony on Child Sexual Abuse Accommodation Syndrome, states:

Testimony on Child Sexual Abuse Accommodation Syndrome You

> have heard testimony from <insert name of expert>regarding child sexual abuse accommodation syndrome's <insert name of expert> testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against (him/her).You may consider this evidence only in deciding whether or not's <insert name of alleged victim of abuse> conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of (his/her) testimony.

New January 2006; Revised August 2016.

Defendant respectfully submits that CALJIC 10.69 provides a clearer and more accurate statement of the law. It states as follows:

> Evidence has been presented to you concerning child sexual abuse accommodation syndrome. This evidence is not received and must not be considered by you as proof that the alleged victim's molestation claim is true.
>
> Child sexual abuse accommodation syndrome research is based upon an approach that is completely different from that which you must take to this case. The syndrome research begins with the assumption that a molestation has occurred, and seeks to describe and explain common reactions of children to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt.

DATE:

Respectfully submitted,

_____

[ATTORNEY NAME]
Attorney for Defendant