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FILED
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA BARBARA

DEC 13 2004

GARY M. BLAIR, Executive Officer
BY *[Signature]*
CARRIE L. WAGNER, Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF SANTA BARBARA

10 SANTA MARIA DIVISION

11 REDACTED VERSION

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

13 Plaintiff,

14 v.

15 MICHAEL JOE JACKSON,

16 Defendant.

No. 1133603

17 PLAINTIFF'S MOTION FOR
18 ADMISSION OF EVIDENCE
19 OF DEFENDANT'S PRIOR
20 SEXUAL OFFENSES;
21 MEMORANDUM OF POINTS
22 AND AUTHORITIES
(Evid. Code, §§ 1108, 1101(b))

DATE: December 20, 2004

TIME: ~~8:30 a.m.~~ 9:30 A.M.

DEPT: SM 2 (Melville)

~~FILED UNDER SEAL~~

21 TO: DEFENDANT MICHAEL JOE JACKSON, AND TO THOMAS
22 MESEREAU, JR, ROBERT SANGER AND R. BRIAN OXMAN, HIS COUNSEL OF
23 RECORD:

24 PLEASE TAKE NOTICE that on December 20, 2004, at ^{9:30}~~8:30~~ a.m. or as soon
25 thereafter as the matter may be heard, the People will move the Court for its order authorizing
26 Plaintiff to put before the trial jury evidence of defendant's prior sexual offenses and certain
27 related conduct pursuant to Evidence Code sections 1108, subdivision (a) ("1108(a)") and
28 1101, subdivision (b) ("1101(b)").

1 As will be discussed in greater detail below, Plaintiff will seek the admission of the
2 following evidence:

3 -- [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 This motion will be based on the accompanying summaries of the anticipated
19 testimony of [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED], and upon the accompanying Memorandum of
2 Points and Authorities.

3
4 DATED: December 10, 2004

5 Respectfully submitted,

6 THOMAS W. SNEDDON, JR.
7 District Attorney

8 By: *[Signature]*
9 Gerald McC. Franklin, Senior Deputy
10

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 EVIDENCE CODE SECTIONS 1101(b) AND 1108 MAKE
4 EVIDENCE OF DEFENDANT'S PRIOR ACTS OF
5 [REDACTED] ADMISSIBLE TO PROVE
6 THAT HE HAD THE PROPENSITY TO COMMIT SUCH
7 ACTS, THAT HE HAD THE MOTIVE AND INTENT TO
8 [REDACTED], AND THAT HE CREATED THE
9 OPPORTUNITY TO [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 A. Introduction – An Overview

13 This Memorandum will discuss the decisional law that governs application of the
14 “other crimes” provisions of Evidence Code sections 1101(b) and 1108(a). Lawyers too often
15 approach the issue of the admissibility of “other crimes” evidence as though such evidence
16 would not be admissible but for sections 1101 and 1108. That is a mistaken notion.

17 “Except as otherwise provided by statute, all relevant evidence is admissible.”
18 (Evid. Code, § 351. Cf. Cal. Const., art. 1, § 28, subd. (d).) “No evidence is admissible
19 except relevant evidence.” (Evid. Code, § 350.)

20 Otherwise relevant evidence is generally “inadmissible” in a criminal case if it is
21 “evidence of a person’s character or a trait of his or her character . . . when offered to prove his
22 or her conduct on a specified occasion,” because Evidence Code section 1101, subdivision (a)
23 says so. In most cases, the proffered “bad character” evidence is evidence of the defendant’s
24 prior commission of certain crimes, the relevance of which is that the defendant’s track record
25 demonstrates his “disposition” to commit such crimes. So-called “propensity” evidence
26 (*People v. Kelley* (1967) 66 Cal.2d 232, 238-239) “. . . ‘is [deemed] objectionable, not because
27 it has no appreciable probative value, *but because it has too much.*’ . . . [Citations.]” (*People v.*
28 *Alcala* (1984) 36 Cal.3d 604, at p. 631, italics added.)

1 But the section 1101, subdivision (a) rule of exclusion is qualified by subdivision
2 (b): “Nothing in [subdivision (a)] prohibits the admission of evidence that a person committed
3 a crime . . . when relevant to prove some fact (such as motive, opportunity, intent, preparation,
4 plan, knowledge, identity, [or] absence of mistake or accident . . . other than his or her
5 disposition to commit such an act. (Evid. Code, § 1101, subd. (b).) Thus, where evidence of
6 the defendant’s provable prior crimes tends to identify him as the one who committed the
7 charged crime by reason of their similarity, that evidence may be admissible. And “Nothing in
8 this section affects the admissibility of evidence offered to support . . . the credibility of a
9 witness.” (*Id.*, subd. (c).)

10 Since 1995, an exception to section 1101(b)’s prohibition of “propensity” evidence
11 has been provided by section 1108 in the prosecution of accused sexual offenders: “In a
12 criminal action in which the defendant is accused of a sexual offense, evidence of the
13 defendant’s commission of another sexual offense or offenses is not made inadmissible by
14 Section 1101, if the evidence is not inadmissible pursuant to Section 352.” (Evid. Code, §
15 1108, subd. (a).)

16 The enactment of section 1108 did more than merely remove the section 1101(b)
17 bar to the use of “other crimes” evidence to “prove [a person’s] disposition to commit” the
18 charged offense. As will be shown below, section 1108 obliges courts to presume that such
19 evidence is admissible, may well be necessary in the circumstances of a given case and that an
20 unduly restrictive view of the admissibility of prior sexual offenses is inappropriate.

21 Evidence Code section 352, of course, serves as an overall limitation on otherwise
22 relevant evidence in all lawsuits, criminal or civil. It provides: “The court, in its discretion,
23 may exclude evidence if its probative value is substantially outweighed by the probability that
24 its admission will (a) necessitate undue consumption of time or (b) create substantial danger of
25 undue prejudice, of confusing the issues, or of misleading the jury.” But its limitations are to
26 be applied to “propensity” evidence by a court mindful of the Legislature’s stated preference
27 for the admissibility of that evidence in the prosecution of accused sexual offenders,
28 particularly where credibility is an important issue.

1 In the case at bar, evidence will be offered to show that [REDACTED]

2 [REDACTED] facts.com mjfacts.com mjfacts.com
3 [REDACTED]
4 [REDACTED]
5 [REDACTED] As will be discussed below, the
6 relevance of that evidence is that it demonstrates defendant's "disposition" (i.e., his
7 "propensity") [REDACTED] (see § 1108; cf. § 1101, subd. (b)) and so will allow the
8 jury to infer that [REDACTED] It will demonstrate defendant's motive and intent
9 by the similarity of [REDACTED] before him.
10 It will demonstrate how defendant created the opportunities to achieve his goal [REDACTED]
11 [REDACTED] (See § 1101(b).) And it will not only
12 support [REDACTED] credibility in relating acts that took place in private, but also the
13 credibility of other members of his family in relating the circumstances leading up to those
14 private acts. (See § 1101, subd. (c).)

15 B Statement Of The Current Case

16 [REDACTED]
17 [REDACTED]
18 [REDACTED] facts.com mjfacts.com
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
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[REDACTED]

C. Summary Of Anticipated "Other Crimes" Evidence

Through this motion, the People seek to introduce evidence of uncharged acts between about [REDACTED]

[REDACTED]

The current pending criminal proceeding was initiated by a report that [REDACTED]

[REDACTED]

The testimony of these witnesses will show [REDACTED]

[REDACTED]

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2 facts.com mjfacts.com mjfacts.com
3 [REDACTED]
4 [REDACTED]

5 Jackson's home at Neverland Valley Ranch is a veritable paradise. To children it
6 was a limitless wonderland of fun and entertainment. [REDACTED]

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27 [REDACTED]
28 [REDACTED]

[REDACTED]

The following are summaries of the proposed testimony of several witnesses, offered as evidence [REDACTED] pursuant to Evidence Code sections 1101, subdivision (b) and 1108, subdivision (a).

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II

EVIDENCE OF DEFENDANT'S

A. Evidence Of Prior Offenses Which Would Be Excluded
By § 1101(a) In A Non-Sexual Offense Prosecution May
Be Admissible In The Prosecution Of A Sexual Offense
Pursuant To §§ 1101(b) And 1108

As noted above, if there is relevant evidence that tends to prove a disputed issue in this lawsuit, that evidence is admissible unless there is a rule of evidence that excludes it: Evidence Code section 1101, subdivision (b) offers a non-exclusive list of "facts" ("such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident"), for the proof which, evidence of the defendant's commission of another crime will be relevant.

One "fact" that cannot be proved in most criminal cases by such "other crimes" evidence is the defendant's "disposition" to commit the charged crime. Section 1108 eliminates that rule of exclusion in the prosecution of sexual offenses.

B. Evidence of Defendant's Prior Offenses Tends
To Prove Several Disputed (i.e., Material)
Issues In The Trial Of The Defendant

To be admissible at trial, given evidence must be relevant to prove a disputed issue. In this case, the importantly disputed issue to which the "other crimes" evidence relates is whether defendant sexually molested [REDACTED] as alleged in Counts Two through Eight of

1 the Indictment. The significance of defendant's public relationship with [REDACTED]
2 [REDACTED] will likewise be disputed. Relevant evidence on those material
3 issues is therefore admissible.

4 In the present case, defendant is charged with multiple counts of child molestation
5 against [REDACTED]. The People are requesting that the court admit evidence regarding
6 [REDACTED]

7 [REDACTED]. This evidence will be offered to prove the material, relevant issues of
8 defendant's intent, motive, opportunity and common plan or scheme to commit the charged
9 offenses. In addition, this evidence will be offered to rebut defendant's stated defense that
10 the charged offenses were fabricated by the victim and his family for financial gain.

11 "Other crimes" evidence is circumstantial evidence of one or more disputed issues
12 in the trial of new offenses. "[A]s with other types of circumstantial evidence, . . .
13 admissibility [of "other crimes" evidence] depends upon three principal factors: (1) the
14 materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged
15 crime to prove or disprove the material fact; and (3) the existence of any rule or policy
16 requiring the exclusion of relevant evidence." [Citation.]" (*People v. Robbins* (1988) 45 Cal.
17 3d 867, 879; emphasis the court's.)

18 C. "Other Crimes" Evidence Is Evidence Of A Material Fact

19 "In order to satisfy the requirement of *materiality*, the fact sought to be proved may
20 be either an ultimate fact in the proceeding or an intermediate fact 'from which such ultimate
21 fact[] may be presumed or inferred. Further, the ultimate fact to be proved must be 'actually
22 in dispute.'" (*People v. Thompson* (1980) 27 Cal.3d 303, 315; emphasis the court's; fns.
23 omitted.²)

24
25 ² As noted by the Supreme Court in *People v. Rowland* (1992) 4 Cal.4th 238, *Thompson's*
26 further holding that a defendant's "not guilty" plea does not "place the elements of the crimes
27 charged against him in issue" (27 Cal.3d at p. 315) was "all but expressly disapproved" by the
28 court in *People v. Williams* (1988) 44 Cal.3d 883, 907, fn. 7, which held to the contrary. (4
Cal.4th at p. 260.)

1 "Motive, opportunity, plan, scheme, design and method of operation are examples
2 of intermediate facts" (*People v. Thompson, supra*, 23 Cal.3d 303, 315, n. 14.) Defendant's
3 plea of not guilty places all of the elements of the charged offense in issue for the purpose of
4 deciding the admissibility of evidence of uncharged misconduct, unless the defendant has
5 taken some action to narrow the prosecution's burden of proof. (*People v. Daniels* (1991) 52
6 Cal.3d 815, 857; *People v. Ewoldt* (7 Cal.4th 380, 400 fn. 4.) If the fact sought to be proved is
7 an element of the offense, it is an ultimate fact and is absolutely material. (*People v. Nible*
8 (1988) 200 Cal.App.3d 838, 847.)

9 10 D. Evidence of Motive

11 Motive is not an element of any crime, and as noted, it is therefore an intermediate
12 fact. But "because a motive is ordinarily the incentive for criminal behavior, its probative value
13 generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of
14 its existence." (*People v. Lopez* (1969) 1 Cal.App.3d 78, 85. Accord, *People v. Pertsoni*
15 (1985) 172 Cal.App.3d 369, 375.) Evidence of motive is material if it "tends logically and
16 reasonably to prove an ultimate fact which is in dispute. (*People v. Thompson, supra*, 27
17 Cal.3d at p. 316, n. 14.)

18 Evidence of a defendant's commission of an uncharged criminal act or acts is
19 admissible to establish his motive to commit a charged offense, his intent to do so and his state
20 of mind during the commission of that offense. (*People v. Thompson, supra*, 27 Cal.3d 303,
21 315, fns. 13, 14.)

22 There is no requirement that both the charged and uncharged acts be identical or
23 nearly identical to demonstrate defendant's motive in the charged offense. (*People v.*
24 *Thompson, supra*, 27 Cal.3d at p. 319; *People v. Harvey* (1984) 163 Cal.App.3d 90, 104-105.)
25 Rather, only substantial similarity is necessary to provide the required "link" in the inference-
26 drawing process. (*People v. Thompson, supra*, at pp. 319-320, fn. 23; *People v. Nible, supra*,
27 200 Cal.App.3d 838, 848-850.)

28 The motive for both the charged and uncharged offenses is obvious: [REDACTED]

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4 E. Evidence of Intent

5 The defendant is charged in Counts Two through Six with violations or an
6 attempted violation of Penal Code section 288, subdivision (a) (lewd act upon a child). The
7 legislative history of this section makes it clear that this section prohibits all forms of sexually
8 motivated physical contact with underage children. The gist of the offense has always been the
9 defendant's intent to sexually exploit the child, not the particular nature of the offending act.
10 (*People v. McCurdy* (1923) 60 Cal.App. 499.) The lewd purpose of the touching is the
11 controlling factor and sexual gratification must be presently intended at the time the touching
12 occurs. (*People v. Martinez* (1995) 11 Cal.4th 434, 444-445.)

13 Hence, it has been held that evidence of prior criminal activities by an accused is
14 admissible if such evidence provides circumstantial proof of the actor's mental state at the time
15 of the charged offense. (*People v. Durham* (1969) 70 Cal.2d 172.)

16 As the court enunciated in the *Ewoldt* decision, admission of other acts evidence on
17 the issue of intent requires the least degree of similarity. Indeed, it only need be sufficiently
18 similar to support the inference that the defendant probably harbored the same intent in each
19 instance. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.)

20 *People v. Lewis* (2001) 25 Cal.4th 610 is illustrative of this standard of similarity
21 where intent is the issue. In *Lewis*, a robbery conviction was upheld even though an uncharged
22 robbery demonstrated only a minimal similarity to the charged robbery. The similarity
23 amounted to a "good Samaritan ploy" to rob and attempt to kidnap stranded female motorists.
24 The court found that sole similarity sufficient to support the inference that the defendant
25 probably harbored a similar intent with regard to the victims in the charged and uncharged
26 offenses.

27 In *People v. Branch* (2001) 91 Cal.App.4th 274, the court explicitly upheld the
28 admission of evidence of other child-molesting incidents involving the defendant because they

1 were particularly probative to show that defendant's touching of his victim in the charged
2 offense was for sexual gratification. (*Id.*, at p. 281.)

3 A lewd and lascivious intent is an element of the charges in the present case
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 The uncharged acts sought to be admitted against the defendant
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 *People v. Robbins, supra*, 45 Cal.3d 867 concerning the inferences a reasonable
15 person may draw from repetitive behavior, is instructive. Robbins was charged with the
16 murder of a six-year-old Santa Barbara child, whose badly decomposed body was found in a
17 lagoon area near the University of California at Santa Barbara approximately six months after
18 his murder. The prosecution sought to use evidence of Robbins' murder of another young
19 child in Dallas to establish that it was the defendant's intent to engage in lewd and lascivious
20 conduct with the victim in the Santa Barbara case, and that the homicide was intentional rather
21 than accidental. The Supreme Court upheld Robbins' conviction, noting that the similarity of
22 the circumstances of the earlier murder was a compelling probative fact on the issue of
23 Robbins' intent.

24
25 F. Evidence Of A Common Design Or Plan

26 "Evidence of a **common design or plan** is admissible to establish that the
27 defendant committed the *act* alleged." (*People v. Ewoldt, supra*, 7 Cal.4th 380, 394, fn. 2;
28 bold emphasis added; italics in original.) In *Ewoldt*, the Supreme Court "overrule[d] *People v.*

1 *Tassell* [(1984)] 36 Cal.3d 77 and *People v. Ogunmola* [(1985)] 39 Cal.3d 120 to the extent
2 they hold that evidence of a defendant's uncharged similar misconduct is admissible to
3 establish a common design or plan only where the charged and uncharged acts are part of a
4 single, continuing conception or plot. We hold instead that evidence of a defendant's
5 uncharged misconduct is relevant where the uncharged misconduct and the charged offense are
6 sufficiently similar to support the inference that they are manifestations of a common design or
7 plan." (7 Cal.4th 380, at p. 401; fn. omitted.)

8 If proved, such a plan permits the trier of fact to infer that defendant was working to
9 achieve a similar result, with a similar intent, in the case for which he is on trial. Evidence that
10 defendant has committed uncharged criminal acts that are similar to the charged offense are
11 relevant if these acts demonstrate circumstantially that defendant committed the charged
12 offense pursuant to the same design or plan he used in committing the uncharged acts. *People*
13 *v. Ewoldt*, *supra*, 7 Cal.4th 380, 402-404.

14 A good analysis of the necessary degree of similarity for admission of uncharged
15 acts of child molestation to show a common plan or scheme may be found in the case of
16 *People v. Dancer* (1996) 45 Cal. App.4th 1677. In *Dancer*, the court admitted evidence of a
17 child molestation involving a separate victim that occurred twelve years before the charged
18 offense. In finding that the prior incident was admissible as evidence of a common plan or
19 scheme the court noted the eight similarities:

- 20 1) Defendant resided near the victims
- 21 2) Defendant was acquainted with the victim's parents.
- 22 3) Defendant selected very young girls as victims.
- 23 4) Defendant had a history of unsupervised access to the victims and played or
- 24 babysat with them.
- 25 5) The victims knew and trusted defendant.
- 26 6) In committing the molestations, defendant selected locations out of public view
- 27 where mattresses were located.
- 28 7) The sexual conduct defendant had with each victim was similar in that in each

case defendant exposed his penis through his clothing, the victims had contact with it, and he tried to have both orally copulate him.

8) When confronted by adults about the molestations defendant responded calmly.

In finding the uncharged conduct admissible the court noted: "[T]hese common features reasonable supported an inference that that each incident was a manifestation of a common design or plan rather than two unrelated spontaneous acts. Indeed, the inference, in our view, is strong." (45 Cal.App.4th 1677, at p. 1690.) The court was unimpressed with differences between the two incidents and went on to find the uncharged act had strong probative value and was admissible under Evidence Code Section 352.

In the present case

In both the charged and uncharged offenses:

[REDACTED]

Numerous cases have found a critical similarity to be either the age, sex or acquaintance with the victim. (See *People v. Catlin* (2001) 26 Cal.4th 81 [victim close female relative of the defendant]; *People v. Soto* (1998) 64 Cal.App.4th 966 [victims all young female relatives]; *People v. Bradford* (1997) 15 Cal.4th 1229 [young White females]; *People v. Kraft* (2000) 23 Cal.4th 978 [all White males between the ages of 18-25]; *People v. Maury* (2003) 30 Cal.4th 342 [small, petite women acquainted with the defendant]; *People v. Branch, supra*, 91 Cal.App.4th 274 [two twelve-year-old children].)

[REDACTED]

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[REDACTED]

Also noteworthy is the

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[REDACTED]

[REDACTED]

[REDACTED]

1 Our Supreme Court in *People v. Robbins*, *supra*, 45 Cal.3d 867 discussed “the
2 doctrine of chances” as it tended to negate the likelihood that the death of the Santa Barbara
3 child in that case was accidental applies equally to the issue in this case [REDACTED]

4 [REDACTED] The
5 Supreme Court noted:

6 We are also satisfied that the evidence in question was relevant to
7 those material intent issues. To be relevant, an uncharged offense must
8 tend logically, naturally and by reasonable inference to prove the
9 issue(s) on which it is offered. (*People v. Guerrero* (1976) 16 Cal.3d
10 719, 724, and cases cited; *Thompson* [(1980)], 27 Cal.3d [303] at p.
11 316.) **We have long recognized “that if a person acts similarly in
12 similar situations, he probably harbors the same intent in each
13 instance”** (*Thompson, supra*, 27 Cal.3d at p. 319; *People v. Pendleton*
14 (1979) 25 Cal.3d 371, 376-378; *People v. Schader* (1959) 71 Cal.2d
15 761, 777; *Kelley* [(1967)] 66 Cal.2d 232, 242-243), and that such prior
16 conduct may be relevant circumstantial evidence of the actor's most
17 recent intent. The inference to be drawn is not that the actor is *disposed*
18 to commit such acts; instead, the inference to be drawn is that, in light of
19 the first event, the actor, at the time of the second event, must had the
20 intent attributed to him by the prosecution. (See *Schader, supra*, 71
21 Cal.2d 761, 777; *Imwinkelried*, Uncharged Misconduct Evidence (1984)
22 § 4:01.)

23 The reasoning underlying use of an actor's prior acts as
24 circumstantial evidence of that actor's later intent is well explained by
25 Wigmore. It is based on “the doctrine of chances – the instinctive
26 recognition of that logical process which eliminates the element of
27 innocent intent by multiplying instances of the same result until it is
28 perceived that this element cannot explain them all. Without
formulating any accurate test, and without attempting by numerous
instances to secure absolute certainty of inference, the mind applies this
rough and instinctive process of reasoning, namely, that an unusual and
abnormal element might perhaps be present in one instance, but that the
oftener similar instances occur with similar results, the less likely is the
the

1 abnormal element likely to be the true explanation of them. [¶] . . . In
2 short, similar results do not usually occur through abnormal causes; and
3 the recurrence of a similar result (here in the shape of an unlawful act)
4 tends (increasingly with each instance) to negative accident or
5 inadvertence or self-defense or good faith or other innocent mental state,
6 and tends to establish (provisionally, at least, though not certainly) the
7 presence of the normal, i.e., criminal, intent accompanying such an act;
8 and the force of each additional instance will vary in each kind of
9 offense according to the probability that the act could be repeated,
10 within a limited time and under given circumstances, with an innocent
11 intent.” (2 Wigmore, Evidence (Chadbourn rev. 1979) § 302, at p. 241;
12 see also Wydick, *Character Evidence: A Guided Tour of the Grotesque*
13 *Structure* (1987) 21 U.C. Davis L.Rev. 123, 166-169; Imwinkelried,
14 *supra*, § 4:01.)

15 Given the similarities of [REDACTED]

16 [REDACTED], and no
17 policy considerations set forth in Evidence Code section 352 (see discussion, *infra*) would bar
18 the admission of the proposed evidence of the uncharged offenses.

19 OPPORTUNITY

20 A common denominator [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

III

SECTION 1108 SPECIFICALLY PROVIDES FOR THE ADMISSION OF EVIDENCE OF AN ACCUSED SEX OFFENDER'S "DISPOSITION" TO COMMIT SUCH OFFENSES. SECTION 1108 IS CONSTITUTIONAL. IT SHOULD BE APPLIED CONSISTENTLY WITH THE LEGISLATURE'S INTENT THAT HIGHLY PROBATIVE EVIDENCE OF AN ACCUSED'S DISPOSITION TO COMMIT SEXUAL OFFENSES BE MADE AVAILABLE TO THE TRIER OF FACT ON THE ISSUES OF CREDIBILITY AND THE GUILT OR INNOCENCE OF THE ACCUSED

A. Evidence Code section 1108

Evidence Code Section 1108 governs the admissibility of evidence of the defendant's commission of other sexual offenses to demonstrate his *propensity* to commit such offenses.

That section provides as follows:

!!!!

(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to section 352.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.

(c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.

(d) As used in this section, the following definitions shall apply:

(1) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:

(A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266(c), 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6 of the Penal Code.

1 (B) Any conduct proscribed by Section 220 of the Penal Code, except assault
2 with intent to commit mayhem.

3 (C) Contact, without consent, between any part of the defendant's body or an
4 object and the genitals or anus of another person.

5 (D) Contact, without consent, between the genitals or anus of the defendant and
6 any part of another person's body.

7 (E) Deriving sexual pleasure or gratification from the infliction of death, bodily
8 injury, or physical pain on another person.

9 (F) An attempt or conspiracy to engage in conduct described in this paragraph.

10 (2) "Consent" shall have the same meaning as provided in Section 261.6 of the
11 Penal Code, except that it does not include consent which is legally ineffective
12 because of the age, mental disorder, or developmental or physical disability of the
13 victim.

14 (Bold emphasis added.)

15 Please note that Evidence Code section 1101, subdivision (a) was amended to
16 exclude the special rules of Section 1108 from its general prohibition by the legislation that
17 added section 1108 to the Evidence Code.

18 B. Section 1108 Is Constitutional

19 Evidence Code section 1108 has been upheld against attack on the grounds that it
20 violates a defendant's constitutional rights to equal protection (*People v. Fitch* (1997) 55
21 Cal.App.4th 172, 186 (*Fitch*) and due process (*People v. Falsetta* (1999) 21 Cal.4th 903
22 (*Falsetta*), approving *Fitch*), and that it is an ex post facto provision. (*Fitch, supra*, at pp. 185-
23 186.)

24 C. The Legislature's Primary Purpose In Enacting Section 25 1108 – To Allow Admission Of Evidence Highly Probative 26 Of The Propensity Of A Defendant To Commit Acts Of 27 Molestation Of Trusting Young Victims In Private To 28 Support The Credibility Of Those Victims At Trial – Is Manifest

People v. Falsetta, supra, 21 Cal.4th 903 discussed the legislative history of section
1108 at length:

1 Available legislative history indicates section 1108 was intended
2 in sex offense cases to relax the evidentiary restraints section 1101,
3 subdivision (a), imposed, to assure that the trier of fact would be made
4 aware of the defendant's other sex offenses in evaluating the victim's
5 and the defendant's credibility. In this regard, section 1108 implicitly
6 abrogates prior decisions of this court indicating that "propensity"
7 evidence is per se unduly prejudicial to the defense. (See, e.g., *People*
8 *v. Alcala* (1984) 36 Cal.3d 604, 630-631 (*Alcala*).)

9 As the Court of Appeal stated in one earlier case, "Our elected
10 Legislature has determined that the policy considerations favoring the
11 exclusion of evidence of uncharged sexual offenses are outweighed in
12 criminal sexual offense cases by the policy considerations favoring the
13 admission of such evidence. The Legislature has determined the need
14 for this evidence is 'critical' given the serious and secretive nature of
15 sex crimes and the often resulting credibility contest at trial. (Lungren,
16 *Stopping Rapists and Child Molesters by Giving Juries All the Facts--*
17 *Reforms in Federal and California Law* (1995) 17 Prosecutor's Brief
18 13, 13-14, 23.)" (*People v. Fitch* (1997) 55 Cal. App. 4th 172, 181-
19 182, fn. omitted (*Fitch*); see also *People v. Soto* (1998) 64 Cal. App.
20 4th 966, 983-984 (*Soto*) [quoting from the legislative history of section
21 1108, 29B pt. 3 West's Ann. Evid. Code (1999 pocket supp.) foll. §
22 1108, pp. 40-41]; *Review of Selected 1995 Cal. Legislation* (1996) 27
23 Pacific L.J. 761, 762 [The Legislature "declared that the willingness to
24 commit a sexual offense is not common to most individuals; thus,
25 evidence of any prior sexual offenses is particularly probative and
26 necessary for determining the credibility of the witness."].)

27 As a letter by the author of the legislation, contained in the
28 Assembly Journal, states, section 1108 "'permits courts to admit such
evidence on a common sense basis--without a precondition of finding
a 'non-character' purpose for which it is relevant--and permits rational
assessment by juries of evidence so admitted. This includes
consideration of the other sexual offenses as evidence of the
defendant's disposition to commit such crimes, and for its bearing on
the probability or improbability that the defendant has been falsely or
mistakenly accused of such an offense.'" (Letter by Assemblyman
Rogan regarding Assem. Bill No. 882 (1995-1996 Reg. Sess.)
published in 2 Assem. J. (1995-1996 Reg. Sess.) p. 3278 (Assembly

Journal), reprinted at 29B pt. 3 West's Ann. Evid. Code, *supra*, foll. § 1108, at pp. 40-41.)

Section 1108 was modeled on rule 413 of the Federal Rules of Evidence, (28 U.S.C.) adopted in 1994, which provides in pertinent part that "(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

Federal rule 414 allows similar "propensity" evidence in child molestation cases. (See *Soto, supra*, 64 Cal. App. 4th at pp. 980, 982; see also 2 Assem. J., *supra*, at p. 3277, reprinted at 29B pt. 3 West's Ann. Evid. Code, *supra*, foll. § 1108, at p. 40; *Review of Selected 1995 Cal. Legislation, supra*, 27 Pacific L.J. at p. 762; see generally, 23 Wright & Graham, Federal Practice and Procedure (1999 supp.) § 5411-5417A, pp. 287-374.) As we discuss below (*post*, p. 921), the federal circuit courts have rejected constitutional challenges to these new rules.

(*People v. Falsetta, supra*, 21 Cal.4th 903, at pp. 911-912; fn. omitted.)

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D. In Deciding Whether To Exercise Its Discretion To Exclude Evidence Pursuant To Evidence Code Section 352, The Court Should Be Mindful Of The Legislature's Purpose In Enacting Section 1108

"The relevancy of evidence that may be offered upon an issue of fact depends upon the nature of the issue to sustain which or against which it is offered, and a wide discretion is left to the trial judge in determining whether it is admissible or not." (*People v. Hess* (1951) 104 Cal.App.642, 676.) "Where the evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not as directly support the same inference, the testimony must be received over a section 352 objection absent highly unusual circumstances." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

"... [S]ection 1108 affects the practical operation of section 352

balancing “because admission and consideration of evidence of other sexual offenses to show character or disposition would be no longer treated as intrinsically prejudicial or impermissible. Hence, evidence offered under [section] 1108 could not be excluded on the basis of [section] 352 unless ‘the probability that its admission will . . . create substantial danger of undue prejudice’ . . . substantially outweighed its probative value concerning the defendant’s disposition to commit the sexual offense or offenses with which he is charged and other matters relevant to the determination of the charge. As with other forms of relevant evidence that are not subject to any exclusionary principle, the presumption will be in favor of admission.” (Historical Note, 29B pt. 3, West’s Ann. Evid. Code, *supra*, foll. § 1108, p. 31.) Section 1108 does not require “more exacting requirements of similarity between the charged offense and the defendant’s other offenses . . .” (*Ibid.*) Such a requirement was not added to the statute because ‘doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not ‘specialists’, and commit a variety of offenses which differ in specific character.” (*Id.* at pp. 31-32.)”

(*People v. Callahan* (1999) 74 Cal.App.4th 356, 368, quoting *People v. Soto*, *supra*, 64 Cal.App.4th 966, 984; bold emphasis added.)

As noted, “The Legislature has determined the need for this evidence is ‘critical’ given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.” (*Fitch*, *supra*, 55 Cal.4th at p.182.) Evidence regarding a defendant’s propensity to commit a sex act may be used by the trier of fact to evaluate the victim’s and the defendant’s credibility without violating Due Process. (*People v. Branch*, *supra*, 91 Cal.App.4th 274, 281, citing *People v. Falsetta*, *supra*, 21 Cal.4th 903, 910-911, 922.)

[REDACTED]

E. Specific Similarity Of The Other Offenses And
The Charged Offenses Is Not Required To
Prove "Propensity"

With respect to the similarity of the prior offenses to the charged offenses,
Section 1108 does not require "more exacting requirements of
similarity between the charged offense and the defendant's other
offenses" (*Ibid.*) Such a requirement was not added to the statute
because 'doing so would tend to reintroduce the excessive requirements
of specific similarity under prior law which [section 1108] is designed to
overcome, . . . and could often prevent the admission and consideration
of evidence of other sexual offenses in circumstances where it is
rationally probative. Many sex offenders are not 'specialists,' and
commit a variety of offenses which differ in specific character.'" (*Id.* at
pp. 31-32.)

(*People v. Soto, supra*, 64 Cal.App.4th 966, 984, quoting Hist. Note, West's Ann. Evid. Code,.
§ 1108, p. 31.)

Thus, for admissibility to show a "common plan or scheme," there is no
requirement under section 1108 for close similarity. (See also *People v. Frazier* (2001) 89
Cal.App.4th 30, 40-41 [uncharged offenses admissible under § 1108, in general, and need not
be sufficiently similar to be admissible under § 1101(b)].)

[REDACTED]

1 THE ADMISSIBILITY OF PRIOR ACTS OF [REDACTED]
2 PURSUANT TO EVIDENCE CODE § 1108 IS SUBJECT TO
3 THE LIMITATIONS OF § 352, WHICH MUST BE APPLIED
4 WITH A VIEW TO FURTHER AND NOT DEFEAT THE
5 LEGISLATIVE INTENT IN ENACTING SECTION 1108

6 “In *Harris*, the Third District applied [Evidence Code section 352’s] criteria to
7 admission of evidence proffered under section 1108. (*Harris*, *supra*, 60 Cal.App.4th at pp. 737-
8 741.) As cast by the *Harris* court, the probative value of the evidence must be balanced against
9 four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of
10 confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time
11 involved in introducing and refuting the evidence of uncharged offenses. (*Ibid.*)” (*People v.*
12 *Branch*, *supra*, 91 Cal.App.4th 274, 282.)

13 In *People v. Falsetta*, *supra*, 21 Cal.4th 903, our Supreme Court upheld Evidence
14 Code section 1108 against challenge on constitutional grounds. The court noted the
15 interrelation of Evidence Code sections 1108 and 352:

16 By reason of section 1108, trial courts may no longer deem “propensity”
17 evidence unduly prejudicial per se, but must engage in a careful

18 weighing process under section 352. Rather than admit or exclude every
19 sex offense a defendant commits, trial judges must consider such factors
20 as its nature, relevance, and possible remoteness, the degree of certainty
21 of its commission and the likelihood of confusing, misleading, or
22 distracting the jurors from their main inquiry, its similarity to the
23 charged offense, its likely prejudicial impact on the jurors, the burden on
24 the defendant in defending against the uncharged offense, and the
25 availability of less prejudicial alternatives to its outright admission, such
26 as admitting some but not all of the defendant’s other sex offenses, or
27 excluding irrelevant though inflammatory details surrounding the
28 offense. [Citations.]

(21 Cal.4th 903, at pp 916-017.)

Those considerations will be discussed next.

1 A. "Nature and Relevance of Prior Offenses"

2 The *Falsetta* court did not expand on what it meant by the "nature and relevance" of
3 the prior offenses, evidence of may be offered in a sexual molestation prosecution pursuant to
4 Evidence Code section 1108. Presumably, there was no need for discussion of the threshold
5 requirement that only relevant evidence is admissible in a criminal prosecution, and that only
6 prior sex offenses come within section 1108's express limitations.

7 B. Possible Remoteness

8 "Remoteness," in terms of the time that has elapsed between the earlier, uncharged
9 offenses and the charged offenses, is of greater concern where the earlier offenses are
10 dissimilar. But as the court noted in *People v. Waples* (2000) 79 Cal.App.4th 1389, involving
11 prior offenses committed more than 20 years earlier for which the defendant had never been
12 prosecuted, "the similarities between the prior and current acts, a matter which Waples does
13 not here dispute, balanced out the remoteness." (*Id.*, at p. 1395.)

14 *Waples, supra*, was cited and discussed approvingly by the Court of Appeal in
15 *People v. Branch, supra*, 91 Cal.App.4th 274. In *Branch*, evidence of a prior offense
16 committed by Branch some 30 years earlier, for which he was never prosecuted, was admitted
17 against him pursuant to Evidence Code section 1008. His conviction was affirmed on appeal,
18 the Court of Appeal noting that while, "[c]ertainly, a 30-year gap between the offenses . . . is a
19 substantial one," it is also true that "[n]o specific time limits have been established for
20 determining when an uncharged offense is so remote as to be inadmissible." *Branch*
21 distinguished *People v. Harris* (1998) 60 Cal. App.4th 727 by noting that in *Harris*, "the prior
22 offense involved a brutal rape, in which Harris beat his victim and stabbed her," whereas the
23 offenses for which he was tried and convicted – acts of sexual intercourse, while employed as a
24 mental health nurse, with two women who were "vulnerable due to their mental condition."
25 (60 Cal.App.4th at pp. 730-732.) *Branch* noted that "[T]he *Harris* court noted the striking
26 dissimilarities between the 23-year-old prior offense and the charged offenses and concluded
27 that the prior offense had no significant probative value' on any disputed issue. (*Id.* at pp. 740-
28 741.)" (*People v. Branch, supra*, 91 Cal.App.4th 274, at pp. 284-285.)

1 For other decisions holding that remoteness of the prior offense or offenses was not
2 an obstacle to their admissibility, see *People v. Frazier* (2001) 89 Cal.App.4th 30 (uncharged
3 sexual assaults on young children 15 to 16 years earlier) and *People v. Pierce* (2002) 104
4 Cal.App.4th 893 (priors over 23 years old).

5
6 C. Degree of Certainty of Defendant's Commission
7 Of The Prior Offense

8 While it is true that a prior offense that resulted in a conviction and prison offense
9 presents fewer problems of proof in a later prosecution, it is also true that a prior conviction
10 has never been regarded as a necessary condition to the use of prior offenses where evidence of
11 those priors is relevant to establishing an element of the charged offense. The serial offenses
12 of sexual predators who prey on young children with whom they have developed a relationship
13 of trust are much less frequently reported in timely fashion. For that reason, among others,
14 those offenses are less frequently prosecuted. Reviewing courts regularly affirm convictions in
15 cases involving sexual offenders who were not strangers to their victims, in which evidence of
16 earlier uncharged offenses that were committed well beyond the statute of limitations was
17 admitted pursuant to Evidence Code section 1108. (See, e.g., *People v. Branch*, *supra*, 91
18 Cal.App.4th 274; *People v. Soto*, *supra*, 64 Cal.App.3d 966; and see *People v. Frazier*, *supra*,
19 89 Cal.App.4th 30 [conviction reversed for instructional error] [evidence of prior act of
20 sodomy and oral copulation 16 years earlier not inadmissible on that account]; *People v.*
21 *Ewoldt*, *supra*, 7 Cal.4th 380 [12-year lapse of time not remote under Section 1101 where
22 evidence of prior offense otherwise is admissible] .

23
24 D. The Similarity To The Charged Offense

25 As noted above in our discussion of "Common Plan or Design" evidence, [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 facts.com mjfacts.com mjfacts.com
3
4 E. The Burden On Defendant Of Defending
5 Against The Uncharged Offenses

6 No doubt, in every child molestation prosecution in which the plaintiff proposes to
7 introduce evidence of prior uncharged sex offenses pursuant to Evidence Code section 1108,
8 the defendant complains that he will unfairly be subjected to a “trial within a trial” and that the
9 time necessarily consumed in rebutting those prior offenses will “unduly” prolong his trial on
10 the charged offenses. [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 If the proceedings to date in this case make one thing clear, it is that [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 “The Legislature has determined the need for this evidence is “critical” given the serious and
18 secretive nature of sex crimes and the often resulting credibility contest at trial. [Citation.]’
19 (*People v. Fitch* (1997) 55 Cal. App. 4th 172, 181-182, fn. omitted)” (*People v. Falsetta*,
20 *supra*, 21 Cal.4th 903, 911-912.) “The Legislature “declared that the willingness to commit a
21 sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses
22 is particularly probative and necessary for determining the credibility of the witness.” (*Id.*, p.
23 912, citing and quoting *Review of Selected 1995 Cal. Legislation* (1996) 27 Pacific L.J. 761,
24 762.)

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26 F. “The Availability Of Less Prejudicial Alternatives”

27 As noted, *Falsetta* requires trial courts to consider “the availability of less
28 prejudicial alternatives to . . . outright admission [of “propensity” evidence], such as admitting

1 some but not all of the defendant's other sex offenses, or excluding irrelevant though
2 inflammatory details surrounding the offense. [Citations.]" (21 Cal.4th 903, at 917.)

3 The evidence of defendant's

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] (People v. Branch,
7 supra; People v. Waples, supra, 79 Cal.App.4th 1389, 1395; People v. Callahan, supra, 74
8 Cal.App.4th 356, 371; People v. Yavanov, supra, 69 Cal.App.4th 392, 406.)
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 (People v. Branch, supra, 91 Cal.App.4th at pp. 283-284.)

13 In any event, "Prejudicial evidence [is evidence that] "uniquely tends to evoke an
14 emotional bias against . . . [one party] as an individual and . . . has very little effect on the
15 issues." [Citation.]' [Citation.]" (People v. Harlan (1990) 222 Cal.App.3d 439, 445.) In
16 contrast, uncharged sex offenses are "uniquely probative" in sex crimes prosecutions. (People
17 v. Yavanov, supra, 69 Cal.App.4th 392, 405.) "The prejudice which exclusion of evidence
18 under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a
19 defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather,
20 the statute uses the word in its etymological sense of "prejudging" a person or cause on the
21 basis of extraneous factors. [Citation.]' [Citation.]" (People v. Zapien (1993) 4 Cal.4th 929,
22 958.)

23 24 G. Undue Consumption of Time

25 Evidence Code section 352 declares that "The court in its discretion may exclude
26 evidence if its probative value is substantially outweighed by the probability that its admission
27 will (a) necessitate undue consumption of time or (b) create substantial danger of undue
28 prejudice, of confusing the issues, or of misleading the jury." (Emphasis added.)

1 It is conceivable that "a case could arise in which the time consumed trying the
2 uncharged offenses so dwarfed the trial on the current charge as to unfairly prejudice the
3 defendant." (*People v. Frazier, supra*, 89 Cal.App.4th 30, 42.) However, no published
4 decision addressing the issue of whether § 1108 evidence should be admitted has found this to
5 be the case.

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 V

12 THE PROFFERED EVIDENCE IN THIS CASE IS
13 MORE PROBATIVE THAN PREJUDICIAL AND
14 SHOULD NOT BE EXCLUDED UNDER
15 EVIDENCE CODE § 352

16 Evidence Code section 352 provides:

17 The court in its discretion may exclude evidence if its probative value is
18 substantially outweighed by the probability that its admission will (a) necessitate undue
19 consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or
20 of misleading the jury. (Emphasis added.)

21 There may be a temptation simply to use standard section 1101(b) analysis in
22 evaluating probative value and prejudicial effect of proposed section 1108 "propensity"
23 evidence pursuant to Evidence Code section 352. But Evidence Code section 1108 affords a
24 "much broader exception to the general rule of exclusion of "other crimes" evidence." (*People*
25 *v. Soto, supra* 64 Cal.App.4th 966, 985-986, quoting *People v. Harris, supra*, 60 Cal.App.4th
26 727, at 737.) The greatest concern expressed in case law applying Section 1101, subdivision
27 (b) is that the jury will consider such character evidence to prove predisposition. But evidence
28 of a "predisposition" to commit sex offenses is precisely what is made admissible by section

1 1108. In assessing whether to admit 1108 evidence under section 352, it must be kept in mind
2 that "Our elected Legislature has determined that the policy considerations favoring the
3 exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense
4 cases by the policy considerations favoring the admission of such evidence." (*People v.*
5 *Falsetta*, *supra*, 21 Cal.4th 903, 911, quoting *People v. Fitch*, *supra*, 55 Cal.App.4th at pp.
6 181-182.)

7 Given that a predisposition to commit sex offenses may now be proved in a sex-
8 offense prosecution, what traditionally would have been viewed as unfairly prejudicial is now
9 in fact probative as a matter of law. (*Falsetta*, *id.*, at pp. 916-917.) To the extent that evidence
10 of prior bad acts has any tendency in reason to prove that the defendant is a child molester it is
11 probative and should weigh in favor of admission, regardless of whether it bears sufficient
12 earmarks of similarity under any other traditional 1101(b) analysis. In this regard the more acts
13 of prior sexual assault the stronger the probative value; as a matter of logic, the best way to
14 prove that a man is a sex offender is to prove that he has sexually offended again and again.
15 (See the discussion of the "Doctrine of Chances" in *People v. Robbins*, *supra*, 45 Cal.3d 867,
16 879-889, cited in *People v. Erving* (1998) 63 Cal.App.4th 652, 661-663 and *People v. Burnett*,
17 *supra*, 110 Cal.App.4th 868, 880. That doctrine is set out above, in our discussion of the
18 admissibility of evidence of a "common plan" pursuant to Evidence Code section 1101,
19 subdivision (b).)

20 With the enactment of Evidence Code section 1108, the Legislature "'declared that the
21 willingness to commit a sexual offense is not common to most individual; thus, evidence of
22 any prior sexual offenses is particularly probative and necessary for determining the credibility
23 of the witness.'" (*People v. Falsetta*, *supra*, 21 Cal.4th 903, 912. [Citation omitted].) See also
24 *People v. Trujillo Garcia* (2001) 89 Cal.App.4th 1321, 1331; *People v. Callahan*, *supra*, 74
25 Cal.App.4th 356, 367; *People v. Soto*, *supra*, 64 Cal.App.4th 966, 983; *People v. Yavanov*,
26 *supra*, 69 Cal.App.4th 392, 405 [uncharged sexual offenses are "uniquely probative" in sex
27 crimes prosecutions; our emphasis]; *People v. Harris*, *supra*, 60 Cal.App.4th 727, 739 ["often
28 predisposition evidence is extremely probative"; our emphasis].

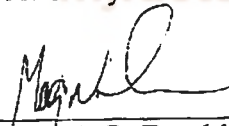
CONCLUSION

Upon the authorities discussed above, Plaintiff respectfully moves for an order of this Court allowing Plaintiff to introduce evidence of [REDACTED] as outlined above.

DATED: December 10, 2004

Respectfully submitted,

THOMAS W. SNEDDON, JR.
District Attorney

By: 
Gerald/McC. Franklin, Senior Deputy

PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF SANTA BARBARA } SS

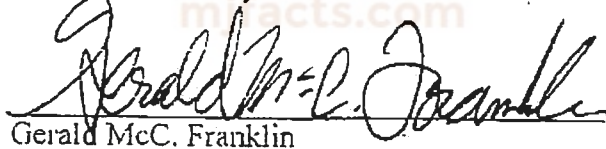
I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and I am not a party to the within-entitled action. My business address is: District Attorney's Office: Courthouse: 1112 Santa Barbara Street, Santa Barbara, California 93101.

On December 11, 2004, I served the within REDACTED VERSION OF PLAINTIFF'S MOTION FOR ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR SEXUAL OFFENSES; MEMORANDUM OF POINTS AND AUTHORITIES (Evid. Code, § 1108) on Defendant, by THOMAS A. MESEREAU, JR., ROBERT SANGER, and BRIAN OXMAN by transmitting a facsimile copy thereof to Attorney Mesereau.

On December 13, I personally delivered a true copy thereof to Mr. Sanger's office in Santa Barbara and caused a true copy thereof to be mailed to Mr. Mesereau, first class postage prepaid, at the addresses shown on the attached Service List.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California on this 13 day of December, 2004.


Gerald McC. Franklin

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