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FILED

MAR 10 2022  
CLERK OF MENDOCINO COUNTY  
SUPERIOR COURT OF CALIFORNIA

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF MENDOCINO

10 THE PEOPLE OF THE STATE OF CALIFORNIA

11 Plaintiff,

12 v.

13 KEVIN PATRICK MURRAY

14 Defendant.

Case No. SCUJ-CRCR-21-37371

PEOPLE'S PRETRIAL MOTIONS &  
TRIAL BRIEF

Trial

Date: March 14, 2022

Time: 9:00 a.m.

Dept.: H

Motion Hearing

Date: March 10, 2022

Time: 1:30 p.m.

Dept.: H

19  
20 **I. CHARGES AND MAXIMUM EXPOSURE**

21 The defendant is charged by Information with the following crimes and allegations:

22 Count I Burglary in the First Degree, on or between November 25, 2021 in violation of Penal  
23 Code §459/460(a), a felony. This crime has a triad of 2/4/6 years in state prison. This crime is a  
24 serious felony within the meaning of Penal Code §1192.7(c).  
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1           First Special Allegation – It is further alleged that during the commission of the  
2           aforementioned burglary the motel room was occupied by S.Y., within the meaning of Penal Code  
3           section 667.5(c)(21).  
4

5           NOTICE: The First Special Allegation, if found true, converts the burglary charged in  
6           Count One to a violent felony, within the meaning of Penal Code section 667.5(c)(21).

7           Count II – Burglary in the First Degree, on or between November 25, 2021 in violation of  
8           Penal Code §459/460(a), a felony. This crime has a triad of 2/4/6 years in state prison. This crime  
9           is a serious felony within the meaning of Penal Code §1192.7(c).  
10

11           Second Special Allegation - It is further alleged that during the commission of the  
12           aforementioned burglary the motel room was occupied by S.Y., within the meaning of Penal Code  
13           section 667.5(c)(21).  
14

15           NOTICE: The First Special Allegation, if found true, converts the burglary charged in  
16           Count One to a violent felony, within the meaning of Penal Code section 667.5(c)(21).

17           Count III – Sexual Battery of S.Y. on or about November 25, 2021 in violation of Penal  
18           Code §243.4(d)(1), a felony. This crime has a triad of 2/3/4 years local prison.

19           Count IV – Possession of a controlled substance, to wit Methamphetamine, on or about  
20           December 1, 2021, a violation of Health and Safety Code 11377(a), a misdemeanor  
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22           Count V – Forcible Rape of Jane Doe #1 on or between June 1, 2014 and July 31, 2014 in  
23           violation of Penal Code §261(a)(2), a felony. This crime has a triad of 3/6/8 in state prison and is  
24           not probation eligible. This crime is a serious felony within the meaning of Penal Code  
25           §1192.7(c)(3) and violent felony within the meaning of Penal Code §667.5(c)(3).  
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1 THIRD SPECIAL ALLEGATION It is further alleged that during the commission of the above  
2 offense, the defendant was armed with a firearm, said arming not being an element of the above  
3 offense, within the meaning of Penal Code Section 12022(a)(1).  
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5 Count VI – Forcible Oral Copulation of Jane Doe #1 on/or about April 10, 2014, in violation  
6 of Penal Code §288a(c)(2)(A) the predecessor statute to Penal Code §287(c)(2), a felony. This  
7 crime has a triad of 3/6/8 in state prison and is not probation eligible. This crime is a serious felony  
8 within the meaning of Penal Code §1192.7(c)(3) and violent felony within the meaning of Penal  
9 Code §667.5(c)(3).  
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11 If convicted as charged, defendant faces an aggregate sentence of 97 years, 4 months to life  
12 in CDCR. Pursuant to Penal Code §1170.1(h), defendant is facing full-term stacking and  
13 enhancements are not limited. The crimes charged in Counts I through VII inclusive were  
14 committed against separate victims and/or the same victim on separate occasions within the  
15 meaning of Penal Code §667.6(d) making each of said counts subject to mandatory full-term  
16 consecutive sentencing. This sentencing scheme is not discretionary. *People v. DeSimone* (4<sup>th</sup> Dist.  
17 1998) 62 Cal.App.4<sup>th</sup> 693, 698; *People v. Murphy* (2<sup>nd</sup> Dist. 1998) 65 Cal.App.4<sup>th</sup> 35, 40-41; *People*  
18 *v. Andrade* (1<sup>st</sup> Dist. 2015) 238 Cal.App.4<sup>th</sup> 1274, 1305.  
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## 22 II. SCHEDULING ISSUES

23 The People estimate that it will take three full days to select a jury and litigate pre-trial  
24 evidentiary issues. If the Court allows the Defense to use a jury questionnaire the jury selection  
25 process will take a full court week. The People estimate that it will take at least 4 days to present  
26 their case in chief. If a questionnaire will be utilized the People request evidence to start 3/21/2022.  
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1 The People have several witnesses from out of the area and out of State. Other than that, the People  
2 do not anticipate any issues with witness availability in their case in chief.

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4 **III. TRIAL WITNESSES**

5 The People expect to call the following witnesses in their case in chief:

- 6 1. S.Y. Victim in Counts I, II, and III.
- 7 2. Jane Doe. Victim in Counts V and VI.
- 8 3. Cheryl Your.
- 9 4. Bachar Hammoudeh.
- 10 5. Jaqueline Vogel.
- 11 6. Meaghan Chapman.
- 12 7. Thomas Kiely. DAI.
- 13 8. Kevin Bailey DAI.
- 14 9. Andy Alvarado DAI.
- 15 10. Charlotte K.
- 16 11. Spencer R.
- 17 12. Cedric Crook. UPD
- 18 13. 911 Operator

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22 **IV. TENTATIVE EXHIBIT LIST**

- 23 1. Photos of Room 208 at Super 8 motel.
  - 24 2. Screen shots from S.Y.'s cell phone of text exchanges with defendant.
  - 25 3. Photos of defendant's locker.
  - 26 4. Super 8 surveillance footage.
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1 5. S.Y.'s email to Cedric Crook.

2 6. Photo of defendant's genitalia.

3 **V. FACTUAL SUMMARY**

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5 On November 25, 2020, S.Y. called 911 and reported that defendant had sexually assaulted  
6 her. After an article regarding the incident was posted on-line, Jane Doe contacted law enforcement  
7 to report that defendant had raped her and forced her to perform oral copulation in 2014.

8 **S.Y (Counts I, II, and III)**

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10 On November 25, 2020, S.Y. was a passenger in a vehicle that was stopped by defendant.  
11 During the stop defendant engaged S.Y. in conversation. He then drove her and the vehicle to the  
12 back of the Super 8 motel. Defendant asked S.Y. what room she was in and she gave him another  
13 room number. A short while later defendant knocked on S.Y's door and asked why she lied about  
14 the room number. He entered and removed her room key and said he would return at the end of his  
15 shift.  
16

17 In the early morning hours Defendant returned to the room and opened the lock. S.Y. had  
18 barricaded the door to keep him out. Defendant forced his way in. He then disrobed and told S.Y.  
19 to touch his penis. S.Y. complied against her will. S.Y. called 911 later in the morning and  
20 reported the incident.  
21

22 **Count IV**

23 During the investigation into the allegations made by S.Y., defendant's work locker was  
24 searched for evidence. Defendant told the officers that there was methamphetamine in his locker.  
25 Two separate amounts were located. The first was in a tied off rubber glove, the second was in a  
26 small tin. The gross weight of the substance was 3.3 grams, a useable amount. The substance also  
27 tested presumptively positive for methamphetamine.  
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**Jane Doe 1 (Counts V and VI)**

Jane Doe knew defendant through his ex-wife. On April 10, 2014, Jane Doe was home mourning the loss of her dog. At about 11:30 pm, defendant knocked on her door. She believed that he was there to console her over the loss of her dog and she let him in. While seated on the couch, defendant tried to touch Jane Doe's breast over her clothes. Jane Doe was frightened. She agreed to perform oral sex on defendant if he would leave afterward and he agreed. He grabbed Jane Doe's hair and pulled her face into his groin area. She performed oral sex on defendant and he left.

The second incident was a few months later. It was about 11 p.m. when defendant arrived at her residence drunk. Defendant entered approached Jane Doe from the back, pinned her arms behind her back and forced her into the bedroom. He pulled down her pants and his own. While removing his pants, defendant placed a knife and his firearm on the bed. She was face down on the bed and defendant proceeded to forcibly rape her. Defendant was wearing a condom and afterwards removed, tied it off and put it in his pocket.

Jane Doe's son arrived unexpectedly and defendant rushed out of the house. Defendant left behind the knife and firearm, which had fallen to the floor. Defendant approached Jane Doe's bedroom window several hours later and retrieved the weapons.

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**VI. APPLICABLE LAW**

**A. Burglary**

California Penal Code 459 PC defines burglary as entering any structure with the intent to commit grand theft, petty theft, or any other felony offense once inside. A person can be charged with burglary even if there is no forced entry.

1 A person who enters for a felonious purpose, however, may be found guilty of burglary even  
2 if he or she enters with the owner's or occupant's consent. (*People v. Frye* (1998) 18 Cal.4th 894,  
3 954 [77 Cal.Rptr.2d 25, 959 P.2d 183] [no evidence of unconditional possessory right to enter].)

4  
5 **B. Sexual Assault**

6 In the instant case, the sexual assault of S.Y. occurred while her liberty was restrained by  
7 the presence and authority of the defendant and he forced her to touch his bare genitals.

8 Someone is unlawfully restrained when his or her liberty is controlled by 679 words, acts, or  
9 authority of another and the restraint is against his or her will. Unlawful restraint requires more than  
10 just the physical force necessary to accomplish the sexual touching.

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12 **C. Possession of a Controlled Substance**

13 In order to prove a violation of Health and Safety Code §11377(a) the defendant must  
14 possess a controlled substance, knew it was there and knew that it is a controlled substance. It must  
15 also be a useable amount. A person does not have to actually hold or touch something, to possess it.  
16 It is enough if the person has control over it.

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18 **D. Forcible Rape**

19 "Rape is an act of sexual intercourse accomplished with a person not the spouse of the  
20 perpetrator ... [w]here it is accomplished against a person's will by means of force, violence,  
21 duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (Pen.  
22 Code, § 261, subd. (a)(2); see also, *People v. Lee* (2011) 51 Cal.4th 620, 633.)

23  
24 " 'Force' for purposes of forcible rape or sodomy is the degree of physical force sufficient to  
25 support a finding the sexual activity was against the victim's will. (*People v. Griffin* (2004) 33  
26 Cal.4th 1015, 1023-1024; *People v. Hale* (2012) 204 Cal.App.4th 961, 978.)" (*People v. Rowe*  
27 (2014) 225 Cal.App.4th 310, 321.) "It need not be substantially different or substantially greater  
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1 than the force inherent in consensual sexual activity.” (*People v. Rowe, supra*, 225 Cal.App.4th at p.  
2 321, citing *People v. Griffin, supra* 33 Cal.4th at p. 1023.) “ ‘ ‘ ‘The kind of physical force is  
3 immaterial ; ... it may consist in the taking of indecent liberties with a woman, or laying hold of and  
4 kissing her against her will.’ ” ’ ” (*People v. Griffin, supra*, 33 Cal.4th. at p. 1024.) “The ultimate  
5 question is whether the force accomplished the sexual activity against the victim’s will, not whether  
6 the force overcame the victim’s physical strength or ability to resist.” (*People v. Rowe, supra*, 225  
7 Cal.App.4th at p. 324, citing *People v. Griffin, supra* 33 Cal.4th at p. 1028.)

8  
9 “Lack of consent is an element of the crime of rape. Consent is defined in section 261.6 as  
10 ‘positive cooperation in act or attitude pursuant to an exercise of free will. The person must act  
11 freely and voluntarily and have knowledge of the nature of the act or transaction involved.’  
12 [Citation.]” (*People v. Ireland* (2010) 188 Cal.App.4th 328, 336.) Thus, it is proper to instruct a jury  
13 that “ ‘against one’s will’ means ‘without the consent of the alleged victim.’ ” (*People v. Lee* (2011)  
14 51 Cal.4th 620, 634, fn. 10.)

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17 In 1981 the Legislature eliminated proof of resistance as a prerequisite to a forcible rape  
18 conviction to “release rape complainants from the potentially dangerous burden of resisting an  
19 assailant in order to substantiate allegations of forcible rape.” (*People v. Barnes* (1986) 42 Cal.3d  
20 284, 302; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1024-1025.) Now evidence of fear is  
21 directly linked to the overbearing of the victim’s will—the act of sexual intercourse must have been  
22 accomplished against the victim’s will by means of force, violence or fear of immediate and  
23 unlawful injury. (*People v. Iniguez* (1994) 7 Cal.4th 847, 855-856.)

24  
25 Although resistance is no longer the touchstone of the element of force, the  
26 reviewing court still looks to the circumstances of the case, including the presence of  
27 verbal or nonverbal threats, or the kind of force that might reasonably induce fear in  
28 the mind of the victim, to ascertain sufficiency of the evidence of a conviction under  
section 261, subdivision (a)(2). Additionally, the complainant’s conduct must be



1 measured against the degree of force manifested or in light of whether her fears were  
2 genuine and reasonably grounded.

3 (*People v. Barnes, supra*, 42 Cal.3d at p. 304, citations omitted.)

4 Rape is a general intent crime. It only requires the perpetrator's criminal intent to commit  
5 sexual intercourse without the partner's consent. *People v. Griffin* (2004) 33 Cal.4<sup>th</sup> 1015, 1022;  
6 *People v. Linwood* (4<sup>th</sup> Dist. 2003) 105 Cal.App.4<sup>th</sup> 59, 70; *People v. Burnham* (5<sup>th</sup> Dist. 1986) 176  
7 Cal.App.3d 1134, 1140.  
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## 9 10 **VII. ANTICIPATED LEGAL ISSUES**

### 11 12 **A. The Court should permit evidence of Defendant's charged and uncharged sex** 13 **offenses in this case pursuant to Evidence Code §1108.** 14

15 The People will seek to introduce evidence of both charged and uncharged acts of sexual  
16 violence in this case. Character or disposition evidence is generally inadmissible to prove a  
17 defendant's conduct on a specified occasion. (Evid. Code, § 1101, subs. (a), (b).) Evidence Code  
18 section 1108 creates an exception: "In a criminal action in which the defendant is accused of a  
19 sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not  
20 made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code]  
21 Section 352." (Evid. Code, § 1108, subd. (a); see also *People v. Soto* (1998) 64 Cal.App.4<sup>th</sup> 966,  
22 982-983; *People v. Nguyen* (2010) 184 Cal.App.4<sup>th</sup> 1096, 1115-1116.)  
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25 In enacting section 1108 the Legislature recognized the " 'serious and secretive nature of sex  
26 crimes and the often resulting credibility contest at trial, ' " and intended in sex offense cases to relax  
27 the evidentiary restraints imposed by section 1101 "to assure that the trier of fact would be made  
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1 aware of the defendant's other sex offenses in evaluating the victim's and the defendant's  
2 credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911; see also *People v. Jones* (2012) 54  
3 Cal.4th 1, 49.) "By its terms, section 1108 requires a trial court to engage in a section 352 analysis  
4 before admitting evidence of prior sex offenses." (*People v. Hernandez* (2011) 200 Cal.App.4th  
5 953, 965; see also *People v. Christensen* (2014) 229 Cal.App.4th 781, 796, 800-801.) "It follows  
6 that if evidence satisfies the requirements of section 1108, including that it is not inadmissible under  
7 section 352, then the admission of that evidence does not violate section 1101." (*People v.*  
8 *Daveggio & Michaud* (2018) 4 Cal.5th 790, 823.)

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11 "Nearly every published opinion interpreting section 1108 (including some from this court)  
12 has recognized that this provision allows, when proper, evidence of prior uncharged sexual offenses  
13 to prove propensity. [Citations.]" (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1160.) "[I]n  
14 authorizing the jury's use of propensity evidence in sex offense cases, section 1108 necessarily  
15 extends to evidence of *both* charged and uncharged sex offenses, affirming that such evidence is not  
16 'made inadmissible by Section 1101.'" (*Id.* at p. 1162, italics in original.) "In short, we conclude  
17 nothing in the language of section 1108 restricts its application to uncharged offenses." (*Id.* at p.  
18 1164.) "[E]vidence of charged sex offenses, like evidence of uncharged sex offenses, may give rise  
19 to an inference of propensity to commit similar crimes, but the trial court's decision to permit the  
20 jury to consider the evidence for that purpose is properly guided by a section 352 weighing  
21 analysis." (*People v. Daveggio & Michaud, supra*, 4 Cal.5th at p. 829.)

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24 Similarly, the admission of uncharged sexual offenses under section 1108 can come from  
25 any sources, including the victim of the charged sexual offense or offenses. (*People v. Gonzalez*  
26 (2017) 16 Cal.App.5th 494, 502.) "Nothing in section 1108 limits its effect to the testimony of third  
27 parties. Instead, the statute allows the admission of evidence of uncharged sexual offenses from any  
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1 witness subject to section 352. (See *People v. Ennis* (2010) 190 Cal.App.4th 721, 733, [upholding  
2 trial court's ruling under section 352 that evidence of uncharged crimes from same witness who  
3 testified to charged crimes is admissible].)" (*People v. Gonzalez, supra*, 16 Cal.App.5th at p. 502.)  
4

5 "A trial court's rulings admitting evidence under Evidence Code sections 1101 and 1108 are  
6 reviewed for abuse of discretion." (*People v. Daveggio & Michaud, supra*, 4 Cal.5th at p. 824.)

7 In *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*) the California Supreme Court  
8 upheld the constitutionality of Evidence Code section 1108 against a due process challenge,  
9 concluding that the weighing process of Evidence Code section 352 would be a sufficient safeguard  
10 against undue prejudice from such propensity evidence. (*Id.*, at pp. 916-917; see also *People v.*  
11 *Williams* (2016) 1 Cal.5th 1166, 1196.) In reaching this conclusion, the court established the criteria  
12 for trial courts to consider when ruling on the admissibility of evidence of prior sexual offenses.  
13 (*Falsetta, supra*, 21 Cal.4th at pp. 916-917.) The factors to be considered in conducting the analysis  
14 depend on the unique facts and issues of each case. (*Ibid.*; *People v. Nguyen* (2010) 184 Cal.App.4th  
15 1096, 1116.) Several factors, nevertheless, are particularly significant under section 1108. (*People v.*  
16 *Hernandez* (2011) 200 Cal.App.4th 953, 965 (*Hernandez*).)  
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19 These factors are (1) whether the propensity evidence has probative value,  
20 e.g., whether the uncharged conduct is similar enough to the charged behavior to tend  
21 to show the defendant did in fact commit the charged offense; (2) whether the  
22 propensity evidence is stronger and more inflammatory than evidence of the  
23 defendant's charged acts; (3) whether the uncharged conduct is remote or stale;  
24 (4) whether the propensity evidence is likely to confuse or distract the jurors from  
25 their main inquiry, e.g., whether the jury might be tempted to punish the defendant  
26 for his uncharged, unpunished conduct; and (5) whether admission of the propensity  
27 evidence will require an undue consumption of time. [Citation.] A trial court  
28 balances this first factor, i.e., the propensity evidence's probative value, against the  
evidence's prejudicial and time-consuming effects, as measured by the second  
through fifth factors.

1 (*People v. Nguyen, supra*, 184 Cal.App.4th at p. 1117; see also *People v. Avila* (2014) 59 Cal.4th  
2 496, 515; *People v. Shorts* (2017) 9 Cal.App.5th 350, 356; *People v. Branch* (2001) 91 Cal.App.4th  
3 274, 282 (*Branch*.)

4  
5 “[T]here is no requirement that the charged and uncharged offenses be so similar that  
6 evidence of the prior acts would be admissible under section 1101.” (*Hernandez, supra*, 200  
7 Cal.App.4th at p. 966; see also *People v. Jones* (2012) 54 Cal.4th 1, 50.) If such strict similarities  
8 were required, “section 1108 would serve no purpose. It is enough the charged and uncharged  
9 offenses are sex offenses as defined in section 1108.” (*People v. Frazier* (2001) 89 Cal.App.4th 30,  
10 40-41, fn. omitted.) “Nevertheless, it follows that uncharged prior offenses that are very similar in  
11 nature to the charged crime logically will have more probative value in proving propensity to  
12 commit the charged offense. (*Branch, supra*, 91 Cal.App.4th at p. 285.)” (*Hernandez, supra*, at p.  
13 966.) “In any event, any dissimilarities in the alleged incidents relate only to the weight of the  
14 evidence, not its admissibility. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)” (*Hernandez,*  
15 *supra*, at p. 967; but see *People v. Jandres* (2014) 226 Cal.App.4th 340, 356 [trial court erred by not  
16 using Evid. Code, § 352, to exclude prior conduct that was so dissimilar to current offense that its  
17 probative value did not substantially outweigh its prejudicial effect].)

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19  
20 Similarly, “the passage of time generally goes to the weight of the evidence, not its  
21 admissibility. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1173.)” (*Hernandez, supra*, 200  
22 Cal.App.4th at p. 968.)

23  
24 Moreover, as the court explained in affirming the conviction in *Branch*, “significant  
25 similarities between the prior and the charged offenses may ‘balance[] out the  
26 remoteness.’ [Citation.]” (*Branch, supra*, 91 Cal.App.4th at p. 285 [30-year gap  
27 between offenses not too remote where prior and current offenses were ‘remarkably  
28 similar’].) In other words, if the uncharged crimes “are very similar in nature to the  
charged offenses, the prior offenses have greater probative value in proving  
propensity to commit the charged offenses.” (*Ibid.*; see also *People v. Waples* (2000)

1 79 Cal.App.4th 1389, 1395 [gap of up to 20 years not too remote given similarity of  
2 prior and current acts]; [*People v.*] *Soto* [(1998)] 64 Cal.App.4th [966] at pp. 977-  
3 978, 992 [passage of 20 to 30 years does not automatically render prior incidents  
4 prejudicial when uncharged and charged sexual offenses are similar].)

5 (*Hernandez, supra*, at p. 968; see also; *People v. Robertson* (2012) 208 Cal.App.4th 965, 989-994  
6 [admission of 1974 kidnapping and rape did not violate Evid. Code § 352].) “Defendant does not  
7 point to any evidence that his character changed over the relevant time period or offer any reason  
8 that such a change might have occurred. Moreover, evidence of subsequent crimes may bear on a  
9 defendant’s character at the time of the charged offense.” (*People v. Cordova* (2015) 62 Cal.4th 104,  
10 132-133 [sex crimes against children committed 13 and 18 years after charged rape-murder of child  
11 properly admitted].)

12  
13 There are other factors to consider related to Evidence Code section 352:

14 Among the factors to consider are the “ ‘nature, relevance, and possible remoteness  
15 [of the evidence], the degree of certainty of its commission and the likelihood of  
16 confusing, misleading, or distracting the jurors from their main inquiry, its similarity  
17 to the charged offense, its likely prejudicial impact on the jurors, the burden on the  
18 defendant in defending against the uncharged offense, and the availability of less  
19 prejudicial alternatives to its outright admission, such as admitting some but not all  
20 of the defendant’s other sex offenses.’ ” [Citations.]

21 (*People v. Erskine* (2019) 7 Cal.5th 279, 296.)

22 It is clear that Evidence Code §1108 permits evidence of uncharged sex offenses to come  
23 into evidence to show the accused’s propensity to have committed the charged crime. In such a  
24 case, the jury is given CALCRIM 1191A that allows them to find that the prior or subsequent sex  
25 act true by a preponderance of the evidence and then consider the accused’s propensity to have  
26 committed the charged offense. Evidence Code §1108 is not, however, limited to uncharged sex  
27 crimes.  
28

1 In short, we conclude nothing in the language of section 1108 restricts its  
2 application to uncharged offenses. Indeed, the clear purpose of section 1108 is to  
3 permit the jury's consideration of evidence of a defendant's propensity to commit  
4 sexual offenses. "The propensity to commit sexual offenses is not a common  
5 attribute among the general public. Therefore, evidence that a particular defendant  
6 has such a propensity is especially probative and should be considered by the trier of  
7 fact when determining the credibility of a victim's testimony." (Assem. Com.  
8 analysis, *supra*, p. 1 [purpose according to bill's author]; Sen. Com. on Crim. Proc.,  
9 Analysis of Assem. Bill No. 882 (1995–1996 Reg. Sess.) as amended May 15, 1995,  
10 p. 2 (Senate Committee analysis) [same]; Sen. Com. on Judiciary, Analysis of  
11 Assem. Bill No. 882 (1995–1996 Reg. Sess.) as amended June 27, 1995, p. 9 [same];  
12 Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No.  
13 882 (1995–1996 Reg. Sess.) as amended July 18, 1995, p. 5 [same].) "[C]ase law  
14 clearly shows that evidence that [a defendant] committed other sex offenses is at  
15 least circumstantially *relevant* to the issue of his disposition or propensity to commit  
16 these offenses." (*Falsetta, supra*, 21 Cal.4th at p. 915, 89 Cal.Rptr.2d 847, 986 P.2d  
17 182; see *People v. Jones* (1954) 42 Cal.2d 219, 223, 266 P.2d 38 ["In the  
18 determination of probabilities of guilt, evidence of character is relevant."].) In light  
19 of this clear purpose, we perceive no reason why the Legislature would exclude  
20 charged sexual offenses from section 1108's purview, and no indication that it did so  
21 in either the text of section 1108 or its legislative history. Whether an offense is  
22 charged or uncharged in the current prosecution does not affect in any way its  
23 relevance as propensity evidence. Indeed, section 1108's legislative history explains  
24 that " 'admission *and consideration* of evidence of other sexual offenses to show  
25 character or disposition would be no longer treated as intrinsically prejudicial or  
26 impermissible.' " (Rogan letter, *supra*, 29B pt. 3B West's Ann. Evid.Code, p. 352,  
27 italics added; see *ibid.* [" 'This includes consideration of the other sexual offenses as  
28 evidence of the defendant's disposition to commit such crimes ....' "].)

*People v. Villatoro* (2012) 54 Cal.4<sup>th</sup> 1152, 1164.

Procedurally, "the admissibility of uncharged conduct pursuant to [Evidence Code]  
section 1108 turns on the existence of a preliminary fact—namely, that the uncharged conduct  
constitutes a statutorily-enumerated 'sexual offense.' (See *People v. Lucas* (1995) 12 Cal.4th 415,  
466 ["Sometimes the relevance of evidence depends on the existence of a preliminary fact."].)"  
(*People v. Jandres* (2014) 226 Cal.App.4th 340, 353.) "The trial court must make a preliminary  
determination of whether the proffered evidence is sufficient for the jury to find, by a preponderance  
of the evidence, that the defendant committed an enumerated offense." (*Ibid.*) However, there need

1 not be “independent evidence” that the currently charged sex crime actually involves a sex crime, as  
2 opposed to an attempted sex crime. (*People v. Spicer* (2015) 235 Cal.App.4th 1359, 1384.)

3  
4 In laying the foundation for admissibility, the prosecution must demonstrate that  
5 previously unadjudicated conduct amounts to a crime. That showing presents a  
6 mixed question of law and fact. The trial court rules on the legal issues relating to  
7 admissibility and resolves the preliminary factual question of capacity under  
8 [Evidence Code] section 405, subdivision (a). Once the evidence is admitted, the jury  
9 does not reassess these determinations. The jury does determine if the act occurred,  
10 as well as the weight and significance of the evidence. To that end, the jury may take  
11 into account the defendant’s age in considering whether the evidence demonstrates  
12 his propensity to commit the charged offenses. The trial court, however, need not  
13 instruct the jury on that point absent a request.

14 (*People v. Cottone* (2013) 57 Cal.4th 269, 276.)

15 The burden of proof for a jury considering uncharged sexual offense is by a preponderance  
16 of evidence. (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1185.) CALCRIM 1191A. But when  
17 instructing a jury they can use currently charged crimes to determine a defendant’s propensity to  
18 commit other charged crimes in the same case, the burden of proof is beyond a reasonable doubt.  
19 (*Id.* at pp. 1185-1186.) CALCRIM 1191B.

20 **B. The evidence in this case will not support a *Mayberry* instruction.**

21 The California Supreme Court in *People v. Mayberry* (1975) 15 Cal.3d 143 (*Mayberry*) held  
22 that a defendant’s reasonable and good faith mistake of fact regarding a woman’s consent to sexual  
23 intercourse is a defense to rape. (*Id.* at p. 155.) In *People v. Williams* (1992) 4 Cal.4th 354  
24 (*Williams*), the court explained the circumstances in which a court is required to give a *Mayberry*  
25 instruction in a case in which the defendant is charged with rape:

26  
27 *Mayberry* is predicated on the notion that under [Pen. Code] section 26, reasonable  
28 mistake of fact regarding consent is incompatible with the existence of wrongful  
intent. [Citations.] [¶] The *Mayberry* defense has two components, one subjective,

1 and one objective. The subjective component asks whether the defendant honestly  
2 and in good faith, albeit mistakenly, believed that the victim consented to sexual  
3 intercourse. In order to satisfy this component, a defendant must adduce evidence of  
4 the victim's equivocal conduct on the basis of which he erroneously believed there  
5 was consent.

6 (*Id.* at pp. 360-361, fn. omitted.)

7 To satisfy the subjective component, there must be evidence, either direct or circumstantial,  
8 of the defendant's state of mind when he committed the offense. (*People v. Maury* (2003) 30  
9 Cal.4th 342, 425 (*Maury*)). Secondly:

10 [T]he defendant must satisfy the objective component, which asks whether the  
11 defendant's mistake regarding consent was reasonable under the circumstances.  
12 Thus, regardless of how strongly a defendant may subjectively believe a person has  
13 consented to sexual intercourse, that belief must be formed under circumstances  
14 society will tolerate as reasonable in order for the defendant to have adduced  
15 substantial evidence giving rise to a *Mayberry* instruction. [Citations.]

16 (*Williams, supra*, 4 Cal.4th at p. 361.)

17 The California Supreme Court further instructed: “[I]n determining whether the *Mayberry*  
18 instruction should be given, the trial court must examine whether there is substantial evidence that  
19 the defendant honestly and reasonably, but mistakenly, believed that the victim consented to sexual  
20 intercourse.” (*Williams, supra*, 4 Cal.4th at p. 361; see also *Mayberry, supra*, 15 Cal.3d at p. 157  
21 [instruction must be given “when ‘some evidence “deserving of ... consideration” ’ existed to  
22 support that contention”].) And, as with other defenses, “[a] trial court’s duty to instruct, sua sponte,  
23 ... arises ‘ “only if it appears that the defendant is relying on such a defense, or if there is substantial  
24 evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory  
25 of the case.” ’ [Citations.]” (*Maury, supra*, 30 Cal.4th at p. 424; see also *People v. Andrade* (2015)  
26 238 Cal.App.4th 1274, 1300.)  
27  
28



1 The *Mayberry* defense has been applied to many crimes. (*People v. Lee* (2011) 51 Cal.4th  
2 620, 641-642 [forcible rape under § 261, subd. (a)(2) ]; *Mayberry, supra*, 15 Cal.3d at pp. 153-157  
3 [rape, kidnapping]; *People v. Andrews* (2015) 234 Cal.App.4th 590, 603 [sexual battery]; *People v.*  
4 *Sojka* (2011) 196 Cal.App.4th 733, 737-739 [attempted rape]; *People v. King* (2010) 183  
5 Cal.App.4th 1281, 1317-1318 [forcible sexual penetration with foreign object under § 289, subd.  
6 (a)]; *People v. Leal* (2009) 180 Cal.App.4th 782, 790-791 [assault with intent to commit rape under  
7 § 220]; *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1383-1384 [forcible sexual penetration with  
8 a foreign object, and assault with intent to commit sexual penetration with a foreign object]; *People*  
9 *v. Rivera* (1984) 157 Cal.App.3d 736, 741-743 [assault with intent to commit rape]; *People v.*  
10 *Harris* (1979) 93 Cal.App.3d 103, 114 [kidnapping under § 207].) But it does not apply when the  
11 charged crime involves the use of means to incapacitate the victim to overcome their ability to  
12 resist. (*People v. Lujano* (2017) 15 Cal.App.5th 187, 194-195 [sodomy of intoxicated person];  
13 *People v. Giardino* (2000) 82 Cal.App.4th 454, 471 [rape and oral copulation by intoxication].)  
14  
15  
16

## 17 VIII. IN LIMINE MOTIONS

18  
19  
20 The People submit the following motions *in limine*. The People do not believe that any of  
21 them require a special hearing.  
22

### 23 **1. Defendant may not introduce his own statements.**

24 The rule of admissibility of the defendant's out-of-court statements is quite clear. It is  
25 hearsay and inadmissible pursuant to Evidence Code §1200 except when offered as an admission  
26 pursuant to Evidence Code §1220. Thus, the defendant, his counsel, and their witnesses should be  
27 ordered not to comment on the defendant's out-of-court statements until they are or have been  
28

1 introduced by the plaintiff, the People of the State of California, or after permission has been  
2 granted by this court after a hearing in which a legal theory of admissibility is determined by the  
3 court.

4  
5 Granted \_\_\_\_\_ Denied \_\_\_\_\_ Modified \_\_\_\_\_

6  
7 **2. Defendant may not introduce improper evidence or argument regarding punishment.**

8 The People of the State of California move this Court for an in limine order excluding any  
9 reference by any of the parties and any witness to the fact that defendant is charged with a felony  
10 and the possible punishment the Defendant may suffer if convicted. *People v. Shannon* (1956) 147  
11 Cal.App.2d 300, 306. CALCRIM 3550 states: “You must reach your verdict without any  
12 consideration of punishment.” Any reference to penalty or punishment would be an improper  
13 attempt to manipulate the jury.  
14

15 Defense counsel should also not make any reference to whether the charge is or is not a  
16 “strike” or any possible consequence. The People request a specific admonition that defendant,  
17 should he testify or choose to speak, be prohibited from mentioning any possible consequences.  
18

19 Granted \_\_\_\_\_ Denied \_\_\_\_\_ Modified \_\_\_\_\_

20  
21 **4. Defense counsel should not be permitted to argue lesser standards of proof applicable in civil cases or use visual imagery depicting the same.**

22 “The case law is replete with innovative but ill-fated attempts to explain the reasonable doubt  
23 standard.” *People v. Centeno* (2017) 30 Cal.4<sup>th</sup> 659, 667. Prosecutors have been scolded by courts  
24 for using “what state is this?” arguments *Centeno* and *People v. Otero* (2012) 210 Cal.App.4<sup>th</sup> 865  
25 and missing puzzle pieces from the Statue of Liberty (*People v. Katzenberger* (2009) 178  
26 Cal.App.4<sup>th</sup> 1260) among others. This rationale should apply equally to both sides. To permit  
27 defense counsel to argue other legal standards not applicable to this case and/or use visual aids such  
28 as pyramids and staircases would serve to confuse the jury about the legal burden of proof that

1 applies to this case within the meaning of Evidence Code §352. Instructing the jury on their duties  
2 and the burden of proof is up to the court.

3  
4 Granted \_\_\_\_\_ Denied \_\_\_\_\_ Modified \_\_\_\_\_

5  
6 **5. Defendant should not be permitted to elicit any testimony or offer any other**  
7 **form of evidence regarding the opinion, reputation or specific instances of**  
8 **either S.Y. or Jane Doe 1's sexual conduct to attempt to prove consent or to**  
9 **attack their credibility.**

10 The Rape Shield Laws, codified at Evidence Code §1103(c)(1) and 782, detail the very  
11 limited exceptions that would allow such evidence to come in and the process that would be  
12 required prior to the admission of the same. Defendant has not made the requisite showing to  
13 permit inquiry into this area.

14 Granted \_\_\_\_\_ Denied \_\_\_\_\_ Modified \_\_\_\_\_

15 **IX. JURY INSTRUCTIONS**

16  
17 The People request the Court give the following instructions from California Jury  
18 Instructions, CALCRIM edition, to the jury:

19 **General Instructions – Pretrial**

20 100 Trial Process

21 101 Cautionary Admonitions

22 102 Note Taking

23 103 Reasonable Doubt

24 104 Evidence

25 105 Witnesses

26 124 Separation Admonition  
27  
28

1 Post-Trial Introductory – A. Introductory Instructions & Admonitions

2 200 Duties Judge and Jury

3 201 Do Not Investigate

4 202 Note-Taking and Reading Back of Testimony

5 207 Proof Need Not Show Actual Date

6 208 Witness Identified as John or Jane Doe

7 Post-Trial Introductory – B. General Legal Concepts

8 220 Reasonable Doubt

9 222 Evidence

10 223 Direct and Circumstantial Evidence: Defined

11 224 Circumstantial Evidence: Sufficiency of Evidence

12 226 Witnesses

13 Post-Trial Introductory – D. Union of Act and Intent

14 252 Union of Act and Intent: General and Specific Intent Together

15 Evidence – A. General Instructions

16 300 All Evidence

17 301 Single Witness's Testimony

18 302 Conflicting Evidence

19 303 Limited Purpose Evidence

1 Evidence – B. Witnesses – (i) Regarding Specific Testimony

2 318 Prior Statement as Evidence

4  
5 Evidence – B. Witnesses – (ii) Particular Types of Witnesses

6 333 Opinion Testimony of Lay Witnesses

8 Evidence – D. Defendant’s Testimony and Statements

9 355 Defendant’s Right Not to Testify

10 358 Evidence of Defendant’s Statements

11 359 Corpus Delicti: Independent Evidence of a Charged Crime

12 Burglary

13 1700 Burglary

14 1701 Degrees of Burglary

15  
16  
17  
18 Sex Offenses – D. Evidence

19 1190 Other Evidence Not Required to Support Testimony in Sex Offense Case

20 1191A Evidence of Uncharged Sex Offense

21 1191B Evidence of Charged Sex Offense

22  
23  
24 Sex Offenses – A. Against Adult or Minor – (i) Rape

25 935 Sexual Battery

26 1000 Rape or Spousal Rape by Force, Fear or Threats

27 1015 Oral Copulation by Force

1 Arming Allegation PC 12022.1

2 3115 Armed with Firearm

3  
4  
5 Possession of a Controlled Substance

6 2304 Simple Possession of a Controlled Substance

7  
8 Post-Trial – Concluding – Concluding Instruction on Submission to Jury

9 3550 Pre-Deliberation Instructions

10  
11  
12 Post-Trial – Concluding – Alternates

13 3577 Instructions to Alternate

14  
15  
16 Post-Trial – Concluding – Final Instruction on Discharge of Jury

17 3590 Final Instructions on Discharge

18 **XI. VERDICT FORMS**

19 The People's proposed verdict forms will be prepared for the court and counsel's review on  
20 the morning of trial.

21  
22 Dated: March 10, 2022

Respectfully Submitted,

23  
24 

25 Heidi C. Larson  
26 Deputy District Attorney