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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF MONTEREY

THE STATE OF CALIFORNIA,

Plaintiff,

vs.

PAUL RUBEN FLORES,

Defendant.

Case No. 22CR003712

CONDITIONALLY UNDER SEAL

SUPPLEMENTAL BRIEF REGARDING 1108 AND OTHER PROFFERED EVIDENCE

Date: June 10, 2022
Time: 9:00
Dept.: 4 (BY VIDEO)

[Subject to application to file under seal]

Hon. Jennifer J. O'Keefe

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I. WE WOULD RESPECTFULLY REQUEST THAT THE COURT RECONSIDER ITS TENTATIVE RULING REGARDING THE ADMISSION OF EVIDENCE OF OTHER ACTS UNDER EVIDENCE CODE SECTION 1108.

The primary concern is that there is NO evidence of a sex offense in this case, unlike the leading California Supreme Court case of *People v. Story* (2009) 45 Cal.4th 1282. Like here the prosecution did not charge rape but did charge first degree murder under Penal Code section 189 which could include burglary or rape. The difference is that, in Story, there was evidence of a murder **and evidence of a rape**. The is no evidence as to how or why Ms. Smart went missing and there is NO evidence of a rape.

Looked at another way, Story could have been charged with rape – there was evidence that the decedent was raped. Here, there is no way that the Mr. Flores could be charged with rape because there is nothing but speculation as to what happened to Ms. Smart after Mr. Flores last saw her.

Since there is NO evidence of rape, attempted rape or any other sex offense, in this particular case, 1108 does not apply. Furthermore, even if there was some basis – which there is not – the court would have to perform an analysis under Evidence Code section 352. (Evid. Code sect. 1108(a) ["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."]) A 352 analysis is a mandatory part of the constitutional application of section 1108. *People v. Falsetta* (1999) 21 Cal.4th 903.

> "By reason of section 1108, trial courts may no longer deem "propensity" evidence unduly prejudicial per se, but must engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness,

> the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." People v. Falsetta (1999) 21 Cal.4th 903, 916–917.

In *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105, the Court of Appeal discussed the standard of 352 as applied in the 1108 context. "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.] (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)"

In *Dejourney*, while the trial Court was upheld on appeal, the appellate court stated:

> "Since there is no evidence of rape in the current case, the only effect would be prejudicial. Here, the record affirmatively reflects the trial court carefully considered Dejourney's prior conduct and conviction, its nature and similarity to the charged offenses, and weighed its prejudice against its probative value, finding in the end that its prejudicial effect was outweighed by its probative value. Essentially, the court found the prior sexual acts evidence to be the precise type of evidence anticipated by the Legislature in enacting Evidence Code section 1108, that it revealed conduct which, though appearing to be slightly more inflammatory than the conduct for which the defendant was currently on trial, was not more prejudicial considering the circumstances of the instant case (see *Harris*, supra, 60 Cal.App.4th at pp. 737–738, 70 Cal.Rptr.2d 689) and it was highly probative as propensity evidence. (See *People v. Waples* (2000) 79 Cal.App.4th 1389, 1392–1395, 95 Cal.Rptr.2d 45.)" *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105.

Another way to look at it is that 1108 does not allow that proof "that

appellant committed prior sexual offenses, may act as proxy or substitute for proof of the ultimate fact, i.e., appellant's guilt of the currently charged offenses." *People v. Vichroy* (1999) 76 Cal.App.4th 92, 99, as modified on denial of reh'g (Nov. 15, 1999). *Vichroy* was based on instructional error but the underlying constitutional point is made that there has to be proof beyond a reasonable doubt of the current sex offense and conviction CANNOT be based only on propensity.

Here there is no basis to compare the "evidence which uniquely tends to evoke an emotional bias against defendant as an individual" with probative value since there is NO evidence of a sex offense in the present case. In addition, most of the other acts evidence is remote in time and none of it resulted in prior adjudications. Therefore, its only effect is that which **tends to evoke an emotional bias** against the defendant as an individual and violates the interpretation of 1108 required in *Falsetta* and other cases. Admission in this case would violate the defendant's right to Due Process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II. PURPORTED EVIDENCE OF DOG MEDICATION PRESCRIBED AND LOCATED OVER 20 YEARS LATER IS INADMISSIBLE

The prosecution brought up its intention to introduce some left-over medication that had been prescribed for the defendant's dog over twenty years after the disappearance of Kristin Smart which was located in the defendant's home. There is no probative value and, if there were, it is outweighed by the prejudicial effect under Evidence Code section 352 and the defendant's right to Due Process and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

First, in the current case, there is NO evidence of a drugging offense

and NO evidence that anyone drugged Kristin Smart. Even if she had taken some substance other than alcohol, there is no evidence that Paul Flores had anything to do with it. In fact, the evidence is to the contrary. Ms. Smart was involved with a number of other people at the party, including going into the bathroom with Ted Boelter. In addition, according to witnesses, she was lying in the front yard "waiting for someone" for some time before the party ended and a number of people, including Mr. Flores, started walking with her to the dorms.

Second, the possession of these pills was for a lawful purpose as established by law enforcement. They had been prescribed by a veterinarian for Mr. Flores' dog which had passed away. There is no probative value to having prescribed medication at a remote time over 20 years after the disappearance of Ms. Smart. In addition, law enforcement who executed the search warrant would testify (with pictures to demonstrate) that Mr. Flores appeared to never throw anything away and might be considered a "hoarder."

Third, if there was probative value – which there is not – the effect of using this kind of inuendo where there is no proof of a crime is extremely prejudicial in the sense that, if not avoided, would not only run afoul of the statute but would violate the client's rights to due process and a fair trial.

This case is "high profile" but is weak to the point of non-existent. This appears to be why the prosecution is attempting to get things into evidence that they would never try in a normal case.

III. WE WOULD RESPECTFULLY REQUEST THAT THE COURT RECONSIDER ITS RULING ON THE EXCLUSION OF THIRD-PARTY CULPABILITY, ESPECIALLY SHAHN WHITTED.

While the prosecution is asking the jurors to speculate that there must have been a sex offense based on remote 1108 evidence, there is actual evidence of a felony arson being committed on Ms. Smart's doorstep by an

angry suitor. There is also evidence that law enforcement simply ignored that evidence and early on committed itself to a course of action that involves classic confirmation bias. They decided that everything that moved related to Paul Flores' guilt while all the other possible leads and theories were irrelevant.

Whitted is a viable suspect. He only ceased to be one when law enforcement accepted his explanation that they had made up -- nothing to see here. It is unknown what would have been found, such as the contents of the note, or what else he did. They took his word because confirmation bias filtered out anything that did not correspond with Mr. Flore's guilt.

We conceded that some other people of interest, such as Scott Peterson, may not qualify as third-party suspects even though they cannot be ruled out. Peterson was enough of a suspect based on his contemporaneous statement to his father, that they searched the ponds on his property. However, even if the jury does not hear about Petersen, they should be allowed to know that there were people, like Whitted, who had motive, opportunity and who had committed actual felony conduct toward Ms. Smart who was the intended victim of his arson. That is not speculation, he admitted it.

IV. CONCLUSION

Thank you for considering the arguments.

Dated: June 9, 2022

Respectfully submitted,

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