

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

Plaintiff and Respondent,

v.

**JUAN JOSE VILLATORO,**

Defendant and Appellant.

Case No. S192531

SUPREME COURT  
FILED

NOV 29 2011

Frederick M. Chinaglia, Clerk

Second Appellate District, Division Eight, Case No. B222214  
Los Angeles County Superior Court, Case No. BA339453  
The Honorable William Sterling, Judge

**RESPONDENT'S MOTION FOR JUDICIAL NOTICE**

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Respondent respectfully moves this Court, pursuant to Evidence Code sections 452 and 459 and California Rules of Court, rule 8.252, to take judicial notice of the relevant legislative history of Assembly Bill 882 of the 1995-1996 Regular Session and Assembly Bill 2252 of the 2001-2002 Regular Session.

These relevant documents, which are appended to this motion, include the following:

A. Senate Committee on Criminal Procedure, Analysis of Assembly Bill No. 882 (1995-1996 Reg. Sess.) as amended May 14, 1995 (Exhibit A);

B. Office of Assembly Floor Analyses, 3d reading analysis of Assembly Bill No. 882 (1995-1996 Reg. Sess.) May 17, 1995 (Exhibit B);

C. Senate Committee on Judiciary, Analysis of Assembly Bill No. 882 (1995-1996 Reg. Sess.) as amended June 27, 1995 (Exhibit C);

D. Office of Senate Floor Analyses, 3d reading analysis of Assembly Bill No. 882 (1995-1996 Reg. Sess.) as amended July 18, 1995 (Exhibit D);

E. Office of Assembly Floor Analyses, Analysis of Assembly Bill No. 882 (1995-1996 Reg. Sess.) as amended July 30, 1995 (Exhibit E); and

F. Assembly Committee on Public Safety, Analysis of Assembly Bill No. 2252 (2001-2002 Reg. Sess.) May 7, 2002 (Exhibit F).

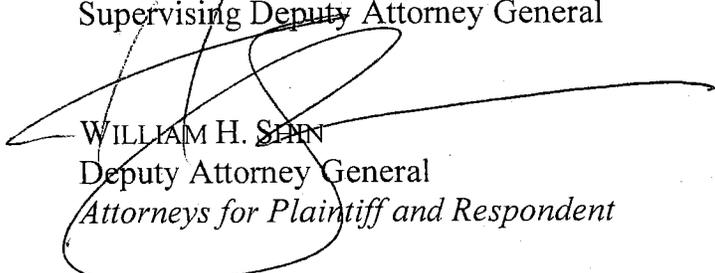
Each of the attached exhibits is the proper subject of judicial notice under Evidence Code section 452. Subdivision (c) of that provision provides that judicial notice may be taken of “Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (See *People v. Snyder* (2000) 22 Cal.4th 304, 309 [judicial notice of senate committee analysis]; *People v. Ledesma* (1997) 16 Cal.4th 90, 98 [judicial notice of assembly bill analysis]; *Jevne v.*

*Superior Court* (2005) 35 Cal.4th 935, 948 [“In determining legislative intent, we may also consider a senate floor analysis”].)

For the reasons stated above, respondent respectfully requests that this Court take judicial notice of the documents attached in Exhibits A through F.

Dated: November 28, 2011      Respectfully submitted,

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# **Exhibit A**

SENATE COMMITTEE ON CRIMINAL PROCEDURE

Senator Milton Marks, Chair

1995-96 Regular Session

A

B

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AB 882 (Rogan)

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As amended May 15, 1995

Hearing date: June 20, 1995

Evidence Code

MLK:js

Evidence: Character Traits

HISTORY

Source: California Attorney General

Prior Legislation: None

Support: Doris Tate Crime Victims Bureau; Adam Walsh Center; California Attorneys for

Criminal Justice; Mothers Against Sexual Abuse; Protect Our Children; Sacramento

County District Attorney; Citizens for Law and Order Inc.; 7 individuals

Opposition: Judicial Council; Edward J. Imwinkelried (UC Davis Law Prof.; former chair

evidence Section of the American Association Law School; author Uncharged

Misconduct Evidence); California Attorneys for Criminal Justice; American

Civil Liberties Union

Assembly Floor Vote: Ayes 66 - Noes 2

KEY ISSUE

UNDER CURRENT LAW EVIDENCE THAT A DEFENDANT HAS COMMITTED OTHER UNCHARGED CRIMES,

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FOR WHICH THE DEFENDANT HAS NOT BEEN CONVICTED, IS GENERALLY INADMISSIBLE TO PROVE A SPECIFIC CRIME.

SHOULD AN EXCEPTION TO THAT RULE BE MADE TO ALLOW THE INTRODUCTION OF EVIDENCE OF UNCHARGED SEXUAL ACTS TO SHOW THAT THE DEFENDANT COMMITTED THE SEXUAL OFFENSE IN QUESTION?

#### PURPOSE

Existing law provides that with certain exceptions, evidence of a person's character or trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. However, it may be admissible if it is found to be relevant to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. (Evidence Code section 1101.)

In criminal actions the exceptions to this general rule are: character of the defendant or victim may be proved when (1) it is offered by the defendant to prove his/her conduct in conformity with such character or trait of character; or, (2) it is offered by the prosecution to rebut evidence adduced by the defendant. (Evidence Code sections 1102 and 1103.)

Existing law provides that a court may exclude otherwise admissible evidence if the probative value of the evidence is outweighed by the probability that its admission will create substantial danger of undue prejudice to the defendant. (Evidence Code section 352.)

This bill would make an additional exception to section 1101 allowing evidence of the defendant's commission of another sexual offense when a defendant is being charged with a sexual offense or, in a civil action, being sued for damages arising from a sexual offense.

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The purpose of this bill is to allow in evidence that the defendant committed another sexual offense when the defendant is being prosecuted or sued for a sexual offense.

#### COMMENTS

1. Need for the Bill.

According to the author:

Under current law, evidence that a particular defendant has committed rape, acts of child molestation, or other sexual offenses against other victims is not necessarily admissible in a trial where the defendant is being accused of a subsequent sexual offense. The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony. This proposal will amend the Evidence Code so as to establish, in sexual offense actions, a presumption of admissibility for evidence that the defendant has committed similar crimes on other occasions.

2. Background.

a. General rule in California

Since the earliest days of statehood, California, has generally excluded evidence of a person's character or a trait of his/her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his/her conduct) when offered to prove conduct on a specified occasion.

This provision is codified in Evidence Code section

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1101(a). The general theory for excluding this type of evidence is twofold. First, while the evidence is relevant under the general meaning of relevancy, it tends to distract the trier of fact from focusing on the facts at issue. Second, disposition evidence can be very inflammatory and prejudicial. In the classic phrase, this evidence is generally inadmissible precisely because it shows that he/she did it before, he/she did it again. (See also generally 1 Witkin California Evidence 3d ed. section 334.)

Character evidence is never admissible in a civil action to prove conduct and it is generally inadmissible in a criminal action for that purpose.

Character evidence is also inadmissible to trash the victim. For example, character evidence is generally not admissible on the issue of consent in sexual

assault actions. (Evidence Code section 1106.)

b. Exceptions to the general rule

In criminal actions, there are some exceptions to the general prohibition on the introduction of character evidence.

Character evidence is admissible if it is initially introduced by the defense either to prove conduct in conformity with his/her own conduct or with the victim's conduct. Once character evidence is introduced by the defense, then the prosecution can use character evidence to rebut the defense testimony. (Evidence Code sections 1102 and 1103.)

c. Uncharged misconduct

As opposed to character evidence, the common law and Evidence Code section 1101(b) have allowed the admissibility of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his or her disposition of committing such an act, i.e., motive, intent,

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opportunity, preparation, plan, knowledge, etc.

Given its highly inflammatory nature, uncharged misconduct is admissible after various safeguards are met. This is done in recognition that when this type of evidence is admitted, the odds of a conviction increase dramatically.

The hurdles which must be met before uncharged misconduct evidence may be admitted are: first, the evidence to be admitted must bear on an issue genuinely in dispute; and, secondly, in the action of prior crimes of the same type, the evidence must relate primarily to identity such that the methodology of committing the crime are so close as to be the signature of the same person, i.e., the same person committed both crimes. (See generally 1 Witkin California Evidence 3d ed. sections 357, 370 and 374.)

3. This Bill.

This bill provides evidence of the defendant's commission--not conviction--of another sexual offense is admissible and may be considered for its bearing on any matter to which it is relevant in a criminal action in which the defendant is accused of a sexual offense and in a civil action in which a claim for damages or other relief is

predicated on the defendant's alleged commission of a sexual assault.

This bill requires the district attorney, or in a civil action the plaintiff, to disclose this evidence to the defendant, including statements or witnesses or a summary of the substance of any testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at such later time as the court may allow for good cause.

4. Federal Rule.

a. Federal rule changes

As part of the 1994 federal crime bill, Congresswoman

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Susan Molinari ((r) N.Y.) succeeded in gaining acceptance of an amendment to the Federal Rules of Evidence (Rules 413 to 415) that allows in federal sexual assault or child molesting prosecution the defendant's prior commission of a sexual assault to child molestation.

Some of the considerations that motivated the adoption of the federal rules include difficulties of proof arising from the typically secretive nature of sexual offenses, and the difficulty of stopping rapists and child molesters because of the reluctance of many victims to report the crime or testify. In child molestation actions a history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant -- a sexual or sado-sexual interest in children-- that simply does not exist in ordinary people. (Written statement of David J. Knapp, senior counsel, Office of Policy Development, U.S. Dept. of Justice, before the Assembly Committee on Public Safety on AB 822.)

b. Judicial Conference of the United States opposition to federal rules

The Advisory Committee on Evidence Rules, and the Advisory Committees on Criminal and Civil Rules of the Judicial Conference of the United States each reviewed the proposed Federal Evidence Rules on which this bill is based and each committee came up with a unanimous recommendation, with the exception of the Department of Justice representatives, that the rules should not be adopted. The report submitted by the Conference states:

It is important to note the highly unusual

unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives

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of the Department of Justice. (oReport of the Judicial Conference on Admission of Character Evidence in Certain Sexual Misconduct Caseso BNA The Criminal Law Reporter, Vol. 56, No. 19, Feb. 15, 1995.)

The advisory committee on evidence specifically noted that Congresso concerns were already adequately addressed in Rule of Evidence 404, which is substantially the same as Californiaos 1101, 1102 and 1103. (oReporto supra.)

The Advisory Committee also notes that because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. (oReporto supra.)

will mini-trials within the trial result when prior bad acts are admitted and the defendant then rebuts such evidence?

#### 5. Recidivism Rates.

One of the stated purposes of this bill and the federal legislation is that evidence of the commission of other acts because the nature of sex crimes is such that it is not a common attribute among the general public. According to Professor Imwinkelried, o[i]n a 1989 study, the Bureau of Justice Statistics tracked 100,000 prisoners to assess their recidivism. Bryden & Park, oOther Crimes Evidence in Sex Offense Caseso 78 Minnesota Law Review 529, 572 (1994). Three researches used rearrest rates as a measure of recidivism. In this study, the recidivism for rape was the second lowest.o

what is the recidivism for the listed crimes compared to other crimes?

#### 6. Constitutional Issue.

Although the U.S. Supreme Court has never ruled directly on

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the constitutionality of broad rule of admissibility of character evidence, commentators on the Molinari Amendment have noted that it could be unconstitutional under the Eighth Amendment by virtue of *Robinson v. California* (1992) 370 U.S. 660. In *Robinson*, the Court held that the Eight Amendment precludes convicting an individual of a status offense. The status offense in this case could be having a prior criminal conviction for similar conduct charged in the case in question.

will this violate the eighth amendment guarantees against cruel and unusual punishment?

#### 7. Probative Value vs. Prejudice.

A court may exclude otherwise admissible evidence if the probative value of the evidence is outweighed by the probability that its admission will create substantial danger of undue prejudice to the defendant. (Evidence Code section 352.)

The ACLU, CACJ and Prof. Imwinkelried all express concern over the prejudice that the evidence admissible will have against the defendant.

The ACLU believes that:

Evidence of past sexual offenses is highly prejudicial and will encourage the jury to convict a defendant simply because they conclude s/he is the sort of person who is predisposed to commit the current crime. In addition, there is a significant likelihood that the defendant will be found guilty, not for the crime which s/he is charged, but instead because the jury concludes s/he should be punished for the other earlier conduct.

Prof. Imwinkelried notes:

In 1984, The Justice Department's research arm, the Bureau of Justice Statistics, released the

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results of a survey of 60,000 citizens of the  
Severity of Crime, Bureau of Justice Statistics  
Bulletin (Jan. 1984). The researchers attempted  
to determine how the general public perceives the  
relative seriousness of various crimes. Although  
homicide received the highest rating, the next  
two highest ratings went to the offenses of child  
abuse. Introducing such evidence creates a grave  
risk that the jury will find the accused  
repulsive and convict on that basis. As Justice  
Cardoza wrote years ago, character evidence poses  
a peril to the innocent. *People v. Zackowitz*,  
254 N.Y. 192, 172 N.E. 466 (1992).

SHOULD this bill explicitly state that Evidence code section  
352 applies to evidence in this section?

will the jury use character evidence of the commission of  
other acts to convict the defendant of the act in question?

will the prejudice to the defendant be so great so as to deny  
the DEFENDANT a fair TRIAL IF the commission of other acts  
are admitted?

#### 8. Necessity of the Bill.

CACJ notes that this bill is not necessary because under  
existing law evidence of prior sex offenses is broadly  
admissible. The only purpose for which such evidence is not  
admissible is to show that the defendant acted in accordance  
with the character shown by such evidence in committing the  
crime.

To further this point, Prof. Imwinkelried notes that in  
*People v. Ewoldt* (1984) 36 Cal. 3d 77, a sex offense  
prosecution, the California Supreme Court expanded the scope  
of the plan theory for admitting evidence of an accused's  
uncharged misconduct. Furthermore he states that in a  
recent article, three federal prosecutors asserted that the  
practical effects of the character evidence prohibition are  
minor because the standards for admitting uncharged  
misconduct on noncharacter theories are now so liberal that

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the most relevant evidence of a person's bad character is  
still presented to the jury. Lynn A. Helland et. al., *An  
Asymmetrical Approach to the Problem of Peremptories: A  
Rebuttal*, 30 Criminal Law Bulletin 242, 250 n.13 (1994).  
Given the California court's endorsement of the doctrine of  
chances and their expansion of the plan theory, the same can  
be said of California Law.

in light of the expanding admissibility of uncharged misconduct for noncharacter purposes, is this bill necessary?

9. Ex Post Facto Clause.

Under the ex post facto clause, the United States Supreme Court has repeatedly held that evidentiary changes which expands the type of evidence which may be admitted against an accused is not admissible against a person for crimes committed prior to the change in the law.

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should this bill specify that the changes set forth in this section may not be used where the acts alleged occurred prior to the effective date of the legislation?

10. Technical Amendments.

In order to be consistent with the terminology in the Evidence Code, the terms ocriminal caseo and ocivil caseo should be replaced with ocriminal actiono and ocivil action.o

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# **Exhibit B**

BILL ANALYSIS

AB 882

## ASSEMBLY THIRD READING

AB 882 (Rogan) - As Amended: May 15, 1995

## ASSEMBLY ACTIONS:

COMMITTEE	PUB. S.	VOTE	S-2COMMITTEE	VOTE
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Ayes: Boland, Bowler, Kuehl,  
Rainey, Rogan

Nays: Villaraigosa, K. Murray

## DIGEST

## Existing law:

- 1) Statutory and case law standards substantially restrict the admissibility of evidence of similar crimes. Current law in part bars the admission of evidence of other crimes or acts committed by the defendant when offered to show that the defendant has a disposition to commit sexual offenses, including child molestation.
- 2) Evidence of this type is admissible only if it is found to be relevant for some other noncharacter purpose such as a "common design or plan" or as proof of the perpetrator's identity on a "signature crime" theory.
- 3) Evidence of similar offenses became admissible in federal sexual offense cases for its bearing on any matter to which it is relevant, as part of the 1994 Federal Crime Bill.

## This bill:

- 1) Establishes a general rule of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions. The new section would be a permissive rule of evidence, and not a

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mandatory rule of admission. Evidence admitted under this new section would be subject to rational assessment by a jury as evidence of the defendant's disposition to commit such crimes, and as evidence concerning the probability or improbability that the defendant has been falsely or mistakenly implicated in the commission of charged offense.

- 2) Requires the people, or in a civil case, the plaintiff, to disclose this evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at such later time as the court may allow for good cause.

## FISCAL EFFECT

None

## COMMENTS

- 1) According to the author:

This proposal amends the Evidence Code so as to establish, in sexual offense cases, a presumption of admissibility for evidence that the defendant has committed similar crimes on other occasions. Under current law, evidence that a particular defendant has committed rape, acts of child molestation, or other sexual offenses on other occasions is not necessarily admissible. The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony.

- 2) Appropriate protections would remain for the defendant under the general standards of the Evidence Code, including restrictions on hearsay, and the court's authority to exclude evidence in particular cases based on a probability that the probative value of the evidence is substantially outweighed by

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Page 2

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its prejudicial effect. In addition, timely disclosure of the evidence to the defendant would be required to avoid unfair surprise and to provide the defendant an opportunity to prepare any response or rebuttal.

- 3) For purposes of this bill, "sexual offense" would be defined as a crime under the law of a state or of the United States that involves any of the following:
- a) Certain specified sexual offenses.
  - b) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another.
  - c) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body.
  - d) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.
  - e) An attempt or conspiracy to engage in conduct described above.
- 4) The practical effect of this legislation would be to put evidence of similar crimes in sexual offense assault and child molestation cases on the same footing as other types of relevant evidence that are not subject to a special exclusionary rule of evidence.

FN 015126

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# **Exhibit C**

BILL ANALYSIS

SENATE JUDICIARY COMMITTEE	A
Charles M. Calderon, Chairman	B
1995-96 Regular Session	
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AB 882 (Rogan)  
 As amended June 27, 1995  
 Hearing date: July 11, 1995  
 Penal Code  
 GWW:md

EVIDENCE IN CIVIL TRIALS  
 -ADMISSIBILITY OF A CRIMINAL CONVICTION BASED UPON EVIDENCE  
 WHICH IS INADMISSIBLE IN A IN CIVIL PROCEEDING-

HISTORY

Source: Department of Justice

Related Pending Legislation: None Known

Senate Committee on Criminal Procedure Vote: 5 - 0  
 Assembly Floor Vote: 66 - 2  
 Assembly Committee on Public Safety Vote: 5 - 2

KEY ISSUE

1. IN A CIVIL TRIAL FOR DAMAGES FOR A SEXUAL OFFENSE COMMITTED BY THE DEFENDANT, SHOULD THE FACT OF A CRIMINAL CONVICTION FOR THAT SEXUAL OFFENSE BE ADMISSIBLE IN THE CIVIL TRIAL TO PROVE THE FACT OF THE OFFENSE CONCLUSIVELY, EVEN IF THE CRIMINAL CONVICTION IS BASED

(more)

ON EVIDENCE WHICH IS NOT ADMISSIBLE IN THE CIVIL PROCEEDING?

SHOULD THAT CRIMINAL CONVICTION BE GIVEN RES JUDICATA AND COLLATERAL ESTOPPEL EFFECT?

2. IS IT NECESSARY TO GIVE FELONY CONVICTIONS OBTAINED UNDER AB 882 CONCLUSIVE RES JUDICATA EFFECT WHEN THE CONVICTION IS ALSO ADMISSIBLE UNDER EVIDENCE CODE SECTION TO PROVE ANY FACT ESSENTIAL TO THE JUDGMENT?

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3. SHOULD THE PROPOSED USE OF CHARACTER EVIDENCE OF THE DEFENDANT'S COMMISSION OF ANOTHER SEXUAL OFFENSE TO PROVE THE COMMISSION OF THE CHARGED SEXUAL OFFENSE, BE LIMITED TO OTHER SIMILAR SEXUAL OFFENSES?
4. SHOULD THE PROPOSED DEFINITION OF "SEXUAL OFFENSE" BE NARROWED TO ELIMINATE REDUNDANCY AND POSSIBLE OVERBREADTH?

PURPOSE

Evidence Code section 352 generally provides that a court may exclude otherwise admissible evidence if the probative value of the evidence is outweighed by the probability that its admission will create substantial danger of undue prejudice to the defendant.

Evidence Code section 1101 provides that with certain exceptions, evidence of a person's character or trait of his character, whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct, is inadmissible when offered to prove his or her conduct on a specified occasion. A limited exception is made to allow the admissibility of evidence that a person committed a crime, civil wrong, or other act if it is found to be relevant to prove some fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, other than his or her disposition to commit the act. Evidence Code section 1102 provides that in a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is admissible when (1) it is offered by the defendant to prove his/her conduct in conformity with such character or trait of character; or, (2) it is offered by the prosecution to rebut evidence adduced by the defendant.

Evidence Code section 1103(a) provides that in a criminal action, evidence of the victim's character or a trait of his or her character in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct, is admissible when (1) it is offered by the defendant to prove the conduct of the victim in conformity with the character or trait of character; or, (2) it is

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offered by the prosecution to rebut the defendant's evidence. Under Section 1103(b), evidence of the defendant character for violence or a trait of character for violence, in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct, is admissible when it is offered by the prosecution to prove the conduct of the defendant in conformity with the character or trait of character and is offered after the defendant has introduced evidence under Section 1103(a) that "the victim had a character for violence or a trait of character tending to show violence."

Section 1103(c) provides that in a prosecution for rape, rape in concert, sodomy, oral copulation or child molestation, or for an assault to commit any one of the sex offenses, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct with other persons is not admissible by the defendant to prove consent by the victim.

Evidence Code Section 1106 provides that in a civil action for damages resulting from sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct with other persons is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff. However, if the plaintiff introduces evidence or testimony relating to the plaintiff's sexual conduct, then the defendant may cross-examine the witness and offer relevant evidence limited specifically to the rebuttal of the evidence introduced or given by the plaintiff.

This bill would make an additional exception to section 1101 to allow the introduction of evidence in a criminal action of the defendant's commission of another sexual offense when a defendant is being charged with a sexual offense. As defined, the term sexual offense would include the following offense, some of which are misdemeanors and wobblers:

- Sexual battery - Section 243.4
- Rape - Section 261

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- Unlawful sexual intercourse, a wobbler - Sec. 261.5
- Spousal rape - Section 262
- Rape in concert - Section 264.1
- Inducing consent to intercourse through false representations creating fear, a wobbler - Section 266c
- Sodomy - Section 286
- Child molestation - Section 288
- Oral copulation - Section 288a
- Distribution of lewd material to a minor, a wobbler - Sec. 288.2
- Three or more acts of substantial conduct with child under age 14 - Section 288.5
- Foreign object rape - Section 289
- Knowing possession or production of child pornography to distribute for commercial consideration - Sec. 311.2(b)
- Knowing possession or production of child pornography to distribute for non-commercial consideration, a wobbler - Sec. 311.2(c)
- Knowing development, duplication, or exchange of any video or photograph depicting sexual conduct by a minor, a misdemeanor - Sec. 311.3
- Using minor in commission of Section 311.2, a misdemeanor - Sec. 314(a)
- Using minor to pose for child pornography - Sec. 311.4(b)
- Advertising for sale of distributing child pornography, a wobbler - Section 311.10
- Possession or matter depicting sexual conduct by minors, a misdemeanor (first offense) - Section 311.11
- Indecent exposure, a misdemeanor - Section 314
- Annoying or molesting child under 18, a misdemeanor - Section 647.6

The term would also be defined to include:

- "Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person."
- "Contact, without consent, between the genitals or anus of the defendant and any part of another person's body."
- "Deriving sexual pleasure or gratification from the infliction of

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- death, bodily injury, or physical pain on another person."
- Any attempt or conspiracy to engage in any conduct listed above.
- The purpose of this bill is to permit evidence to be admitted that the defendant committed one of a list of other sexual offenses when the defendant is being prosecuted for a sexual offense.

#### COMMENT

1. Should the fact of a criminal conviction for a sexual offense be admissible in a civil trial to prove the fact of the offense conclusively under the doctrines of res judicata and collateral estoppel, even if the criminal conviction was based on character evidence which is not admissible in the civil proceeding?

The doctrine of res judicata gives certain conclusive effect to an earlier judgment in subsequent litigation involving the same controversy. The doctrine seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial resources. The doctrine is well-established in common law and is codified in California in Code of Civil Procedure sections 1908, 1908.5, and 1911.

In the context of criminal convictions which may be introduced to prove a fact in a civil lawsuit, the doctrine operates to collaterally estop the parties from re-litigating issues actually litigated and determined in the former action. The former judgment (conviction) is conclusive between the parties in the former action.

In *Teitelbaum Furs v. Dominion Insurance Co.*, (1962) 58 Cal.2d 601, the California Supreme Court established the present rule applying the doctrine to give conclusive effect in a civil action to a felony conviction for the same act. It was reasoned that if the jury in a criminal case finds the accused guilty of wrongdoing, by proof beyond a reasonable doubt, that finding can properly be considered conclusive on the issue in a later civil action.

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Thus, under Teitelbaum, a felony conviction for a sexual offense will be given binding effect in a civil damages action for that offense, even if character evidence which is not admissible in the civil action was used to obtain the felony conviction. Opponents contend that application of res judicata principles to a felony conviction based on civilly inadmissible character evidence unfairly prejudices the defendant.

SHOULD RES JUDICATA AND COLLATERAL ESTOPPEL APPLY TO MAKE THESE FELONY CONVICTIONS BINDING IN A SUBSEQUENT CIVIL ACTION?

DOES NOT THE BILL SIGNIFICANTLY EASE THE PLAINTIFF'S BURDEN OF OBTAINING A CIVIL JUDGMENT?

The proponents respond that trial judge retains the discretion under Section 352 to bar the admissibility of the evidence if it is too prejudicial. Opponents respond that judges who must face re-election may exercise that discretion sparingly.

Until recently, the rule of Teitelbaum Furs has not been applied to misdemeanor convictions. "Practical considerations make this undesirable. Frequently, defendants do not appear, accepting a fine without contest, so the issue may not be litigated. And even if the charge is contested, there is grave danger in permitting a conviction for minor misdemeanors to lay an irrefutable foundation for recovery of substantial damages." Witkin, California Procedure, 3d Ed., "Judgments", at pp. 674, 675.

In Mueller v. J.C. Penney Co. (1985) 173 Cal.App.3d 713, the court held that collateral estoppel may be applied in appropriate cases such as where the misdemeanor case was thoroughly litigated. In Leader v. California (1986) 182 Cal.App.3d 1079, the court cited the trend towards broader use of misdemeanor convictions for purposes of collateral estoppel, took notes of cases in other jurisdictions which have held that the collateral estoppel effect of a misdemeanor conviction should be determined on a case-by-case basis, and held that

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collateral estoppel may be given where the prior conviction was for a "serious offense" which the defendant was fully motivated to litigate and where there was a full and fair misdemeanor trial.

Several of AB 882's listed sexual offenses are misdemeanors or misdemeanor/felony wobblers.

2. Conviction obtained by use of character evidence to prove conduct would also be admissible hearsay

Generally, a judgment in a prior action which is offered as substantive evidence of the matters determined by the judgment is "hearsay" evidence. In effect, it is a statement of the court that decided the prior action which is offered to prove the truth of the matters stated. Under Evidence Code Section 1300, a final judgment adjudicating a person guilty of an offense punishable by a felony is admissible to prove any fact essential to the judgment. The Comment to the section deems evidence of a prior felony conviction to be "peculiarly reliable" and notes that the seriousness of the charge "assures the facts will be thoroughly litigated."

This evidentiary use of the felony conviction is distinguishable from the substantive use of the conviction to conclusively establish certain facts against a party under principles of res judicata and collateral estoppel.

The same issue of fairness arises as to whether these convictions should be admissible in the civil action when they were based on evidence which is itself inadmissible in the civil action. However, as an evidentiary use rather than a conclusion determination, the consequences are less severe, to an extent.

IS IT NECESSARY TO ALSO GIVE FELONY CONVICTIONS OBTAINED UNDER AB 882 CONCLUSIVE RES JUDICATA EFFECT WHEN THE CONVICTION IS ADMISSIBLE TO PROVE ANY FACT ESSENTIAL TO THE JUDGMENT?

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3. Stated need for admissibility of prior acts in criminal proceedings

According to the author:

"Under current law, evidence that a particular defendant has committed rape, acts of child molestation, or other sexual offenses against other victims is not necessarily admissible in a trial where the defendant is being accused of a subsequent sexual offense. The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony. This proposal will amend the Evidence Code so as to establish, in sexual offense actions, a presumption of admissibility for evidence that the defendant has committed similar crimes on other occasions. (Emphasis added.)

The text of the measure itself, however, does not restrict the introduction into evidence of "similar" crimes. Rather, it would allow the introduction of evidence alleging the commission of any one of 20 felonies or misdemeanors to prove the defendant character in a prosecution for one of listed sexual offenses. The measure makes the value judgment that an alleged misdemeanor indecent exposure incident is evidence of

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the character of a defendant who is charged with spousal rape or sodomy.

SHOULD NOT THE MEASURE BE NARROWED TO ALLOW THE ADMISSIBILITY OF SIMILAR SEXUAL OFFENSES?

4. Definition of sexual offense may be overly broad

AB 882 would define "sexual offense" to mean 21 listed offenses, some of which are misdemeanors and wobblers.

SHOULD THE TERM ONLY INCLUDE FELONY OFFENSES?

In addition to the list of 21 offenses, the term "sexual offense" is also defined to include:

- "Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person."
- "Contact, without consent, between the genitals or anus of the defendant and any part of another person's body."

The inclusion of these acts are already covered under sexual battery and therefore seems redundant.

The term is also defined to mean:

- "Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person."
- Any attempt or conspiracy to engage in any conduct listed above.

IS THE DEFINITION INTENDED TO COVER "TORTURE"?

5. Law evolving to allow misconduct evidence to prove plan or motive

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a) General rule in California

Since the earliest days of statehood, California, has generally excluded evidence of a person's character or a trait of the person's character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of the person's conduct) when offered to prove conduct on a specified occasion.

This provision flows from common law origins and is codified in Evidence Code section 1101(a). In McCormick on Evidence 2d Ed., it is stated:

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The disfavor for receiving proof of the character of a person as evidence that on a particular occasion he acted in keeping with his disposition is strongly felt when the state seeks to show that the accused is a bad man and thus more likely to have committed the crime. The long-established rule, accordingly, forbids the prosecution, unless and until the accused gives evidence of his good character, to introduce initially evidence of the bad character of the accused. It is not irrelevant, but in the setting of jury trial the danger of prejudice outweighs the probative value.

This danger is at its highest when character is shown by other criminal acts.... (Id., at page 447.)

- b) Trend to admit uncharged misconduct admissible to show plan or motive

As opposed to character evidence, the common law and Evidence Code section 1101(b) allows the admissibility of evidence that a person committed a crime, civil wrong or other act when relevant to prove some fact other than his or her disposition of committing such an act, i.e., motive, intent, opportunity, preparation, plan, knowledge, etc. given its highly inflammatory nature, uncharged misconduct is admissible after various safeguards are met. This is done in recognition that when this type of evidence is admitted, the odds of a conviction increase dramatically.

The hurdles which must be met before uncharged misconduct evidence may be admitted are: first, the evidence to be admitted must bear on an issue genuinely in dispute; and, secondly, in the action of prior crimes of the same type,

the evidence must relate primarily to identity such that the methodology of committing the crime are so close as to be the signature of the same person, i.e., the same person committed both crimes. (See generally 1 Witkin, California Evidence, 3d Ed., Sections 357, 370 and 374.)

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CACJ, in opposition, contends that AB 882 is not necessary because evidence of prior sex offenses is broadly admissible under existing law. It states:

"The only purpose for which such evidence is not admissible is for use as evidence of the defendant's character, in order further to prove that defendant acted in accordance with that character in committing the charged crime.

"Thus, for example, a prosecutor may bring in evidence of prior sex offenses where the uncharged offenses and the charged offense can be shown to be part of one "plan." The plan theory has been interpreted broadly by the California Supreme Court to allow in evidence of prior offense in nearly any situation in which might be helpful."

To confirm this point, Prof. Imwinkelried (of UC Davis) notes that in *People v. Ewoldt* (1984) 36 Cal.3d 77, a sex offense prosecution, the California Supreme Court expanded the scope of the "plan" theory for admitting evidence of an accused's uncharged misconduct. Furthermore he states that "[i]n a recent article, three federal prosecutors asserted that the 'practical effects' of the character evidence prohibition are 'minor' because the standards for admitting uncharged misconduct on noncharacter theories are now so liberal that other most relevant evidence of a person's bad character is still presented to the jury."

Support: Doris Tate Crime Victims Bureau; Adam Walsh Center; California Attorneys for Criminal Justice; Mothers Against Sexual Abuse; Protect Our Children; Sacramento County District Attorney; Citizens for Law and Order Inc.; Los Angeles County District Attorney

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Opposition: ACLU; CACJ; Judicial Council; Edward J. Imwinkelried (UC Davis Law Prof.; former Chair, Evidence Section of the American Association of Law Schools

Prior legislation: None Known

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# **Exhibit D**

## BILL ANALYSIS

SENATE RULES COMMITTEE  
Office of Senate Floor Analyses  
1020 N Street, Suite 524  
(916) 445-6614 Fax: (916) 327-4478

## THIRD READING

Bill No: AB 882  
Author: Rogan (R)  
Amended: 7/18/95 in Senate  
Vote: 21

SENATE CRIMINAL PROCEDURE COMMITTEE: 5-0, 6/20/95  
AYES: Johnson, Kopp, Polanco, Boatwright, Marks  
NOT VOTING: Campbell, Watson

SENATE JUDICIARY COMMITTEE: 7-1, 7/11/95  
AYES: Campbell, Mello, O'Connell, Solis, Wright, Leslie,  
Calderon  
NOES: Petris  
NOT VOTING: Lockyer

ASSEMBLY FLOOR: 66-2, 5/22/95- See last page for vote

SUBJECT: Evidence  
SOURCE: Department of Justice

DIGEST: This bill allows specified evidence of another sexual offense to be introduced in a similar criminal action.

ANALYSIS: Evidence Code Section 352 generally provides that a court may exclude otherwise admissible evidence if the probative value of the evidence is outweighed by the probability that its admission will create substantial danger of undue prejudice to the defendant.

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Evidence Code Section 1101 provides that with certain exceptions, evidence

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of a person's character or trait of his character, whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his conduct, is inadmissible when offered to prove his or her conduct on a specified occasion. A limited exception is made to allow the admissibility of evidence that a person committed a crime, civil wrong, or other act if it is found to be relevant to prove some fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, other than his or her disposition to commit the act.

Evidence Code Section 1102 provides that in a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is admissible when (1) it is offered by the defendant to prove his/her conduct in conformity with such character or trait of character; or (2) it is offered by the prosecution to rebut evidence adduced by the defendant.

Evidence Code Section 1103(a) provides that in a criminal action, evidence of the victim's character or a trait of his or her character in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct, is admissible when (1) it is offered by the defendant to prove the conduct of the victim in conformity with the character or trait of character; or (2) it is offered by the prosecution to rebut the defendant's evidence.

Under Section 1103(b), evidence of the defendant character for violence or a trait of character for violence, in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct, is admissible when it is offered by the prosecution to prove the conduct of the defendant in conformity with the character or trait of character and is offered after the defendant has introduced evidence under Section 1103(a) that "the victim had a character for violence or a trait of character tending to show violence."

Section 1103(c) provides that in a prosecution for rape, rape in concert, sodomy, oral copulation or child molestation, or for an assault to commit any one of the sex offenses, opinion evidence, reputation evidence, and

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evidence of specific instances of the complaining witness' sexual conduct with other persons is not admissible by the defendant to prove consent by the victim.

Evidence Code Section 1106 provides that in a civil action for damages

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resulting from sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct with other persons is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff. However, if the plaintiff introduces evidence or testimony relating to the plaintiff's sexual conduct, then the defendant may cross-examine the witness and offer relevant evidence limited specifically to the rebuttal of the evidence introduced or given by the plaintiff.

This bill would make an additional exception to Section 1101 to allow the introduction of evidence in a criminal action of the defendant's commission of another sexual offense when a defendant is being charged with a sexual offense if the evidence is not admissible under Section 352 (above). As defined, the term sexual offense would include the following offense, some of which are misdemeanors and wobblers:

1. Sexual battery - Section 243.4.
2. Rape - Section 261.
3. Unlawful sexual intercourse, a wobbler - Sec. 261.5.
4. Spousal rape - Section 262.
5. Rape in concert - Section 264.1.
6. Inducing consent to intercourse through false representations creating fear, a wobbler - Section 266c.
7. Sodomy - Section 286.
8. Child molestation - Section 288.
9. Oral copulation - Section 288a.
10. Distribution of lewd material to a minor, a wobbler - Sec. 288.2.
11. Three or more acts of substantial conduct with child under age 14 - Section 288.5.
12. Foreign object rape - Section 289.
13. Knowing possession or production of child pornography to distribute for commercial consideration - Sec. 311.2(B).
14. Knowing possession or production of child pornography to distribute for non-commercial consideration, a wobbler - Sec. 311.2(C).
15. Knowing development, duplication, or exchange of any video or photograph depicting sexual conduct by a minor,

CONTINUED

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- a misdemeanor - Sec. 311.3.
16. Using minor in commission of Section 311.2, a misdemeanor - Sec. 314(A).

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17. Using minor to pose for child pornography - Sec. 311.4(B).
18. Advertising for sale of distributing child pornography, a wobbler - Section 311.10.
19. Possession or matter depicting sexual conduct by minors, a misdemeanor (first offense) - Section 311.11.
20. Indecent exposure, a misdemeanor - Section 314.
21. Annoying or molesting child under 18, a misdemeanor - Section 647.6.

The term would also be defined to include:

1. "Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person."
2. "Contact, without consent, between the genitals or anus of the defendant and any part of another person's body."
3. "Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person."
4. Any attempt or conspiracy to engage in any conduct listed above.

The purpose of this bill is to permit evidence to be admitted that the defendant committed one of a list of other sexual offenses when the defendant is being prosecuted for a sexual offense.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No  
Local: No

SUPPORT: (Verified 7/18/95)

Department of Justice (source)  
Doris Tate Crime Victims Bureau  
Adam Walsh Center  
California Attorneys for Criminal Justice  
Mothers Against Sexual Abuse  
Protect Our Children  
Sacramento County District Attorney  
Citizens for Law and Order Inc.  
Los Angeles County District Attorney

OPPOSITION: (Verified 7/18/95)

CONTINUED

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California Attorneys for Criminal Justice  
American Civil Liberties Union  
Judicial Council  
Edward J. Imwinkelried (UC Davis Law Prof.; former Chair,  
Evidence  
Section of the American Association of Law Schools)

ARGUMENTS IN SUPPORT: According to the author, "Under current law, evidence that a particular defendant has committed rape, acts of child molestation, or other sexual offenses against other victims is not necessarily admissible in a trial where the defendant is being accused of a subsequent sexual offense. The propensity to commit sexual offenses is not a common attribute among the general public. Therefore, evidence that a particular defendant has such a propensity is especially probative and should be considered by the trier of fact when determining the credibility of a victim's testimony. This proposal will amend the Evidence Code so as to establish, in sexual offense actions, a presumption of admissibility for evidence that the defendant has committed similar crimes on other occasions."

ARGUMENTS IN OPPOSITION: The American Civil Liberties Union states that this bill "creates a drastic change in the rules of evidence requiring a different set of rules to apply in cases involving sex offenses. This provision would admit evidence of a defendant's past similar acts -- not convictions -- in criminal sexual assault cases, regardless of how attenuated in time the charges or accusations may have been.

"Evidence of past sexual offenses is highly prejudicial and will encourage the jury to convict a defendant simply because they conclude s/he is the 'sort of person' who is

predisposed to commit the current crime. In addition, there is a significant likelihood that the defendant will be found guilty, not for the crime for which s/he is charged, but instead because the jury concludes s/he should be punished for the other earlier conduct."

## ASSEMBLY FLOOR:

AYES: Aguiar, Allen, Alpert, Archie-Hudson, Baca, Baldwin,

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Battin, Boland, Bordonaro, Bowen, Bowler, Brewer, V. Brown, Brulte, Burton, Bustamante, Caldera, Cannella, Conroy, Cortese, Cunneen, Davis, Figueroa, Friedman, Frusetta, Gallegos, Goldsmith, Granlund, Hannigan, Harvey, Hauser, Hawkins, Hoge, House, Kaloogian, Katz, Knight, Kuehl, Kuykendall, Lee, Machado, Martinez, Mazzoni, McDonald, McPherson, Miller, Morrissey, Morrow, W. Murray, Napolitano, Olberg, Foochigian, Pringle, Rainey, Richter, Rogan, Setencich, Sher, Speier, Sweeney, Takasugi, Thompson, Tucker, Weggeland, Woods, W. Brown

NOES: K. Murray, Villaraigosa

NOT VOTING: Alby, Bates, Campbell, Ducheny, Escutia,

Firestone, Isenberg, Knowles, Knox, Vasconcellos

CONTINUED

RJG:ctl 7/18/95 Senate Floor Analyses  
SUPPORT/OPPPOSITION: SEE ABOVE  
\*\*\*\* END \*\*\*\*



# **Exhibit E**

AB 882

Page 1

## CONCURRENCE IN SENATE AMENDMENTS

AB 882 (Rogan) - As Amended: July 18, 1995

ASSEMBLY VOTE: 66-2 (May 22, 1995) SENATE VOTE: 33-1 (July 29, 1995)

Original Committee Reference: PUB. S.

## DIGEST

Existing law:

- 1) Statutory and case law standards substantially restrict the admissibility of evidence of similar crimes. Current law in part bars the admission of evidence of other crimes or acts committed by the defendant when offered to show that the defendant has a disposition to commit sexual offenses, including child molestation.
- 2) Evidence of this type is admissible only if it is found to be relevant for some other noncharacter purpose such as a "common design or plan" or as proof of the perpetrator's identity on a "signature crime" theory.
- 3) Evidence of similar offenses became admissible in federal sexual offense cases for its bearing on any matter to which it is relevant, as part of the 1994 Federal Crime Bill.

As passed by the Assembly, this bill:

- 1) Established a general rule of admissibility in sexual assault and child molestation cases for evidence that the defendant has committed offenses of the same type on other occasions. The new section would be a permissive rule of evidence, and not a mandatory rule of admission. Evidence admitted under this new section would be subject to rational assessment by a jury as evidence of the defendant's disposition to commit such crimes, and as evidence concerning the probability or improbability that the defendant has been falsely or mistakenly implicated in

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the commission of charged offense.

- 2) Required the people, or in a civil case, the plaintiff, to disclose this evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at such later time as the court may allow for good cause.

The Senate amendments:

- 1) Delete the provisions of the bill that would allow evidence of the defendant's commission of another sexual offense, or offenses, to be used in a civil case in which a claim for damages or other relief is predicated upon the defendant's commission of the sexual offense(s).
- 2) Clarify that in a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of a another sexual offense or offenses is not made inadmissible, provided that the offered evidence would not be excluded because its probative value is substantially outweighed by the probability that its admission will result in the undue consumption of time, creates a substantial danger of undue prejudice, or of confusing the issues, or of misleading the jury.
- 3) Make technical modifications.

## FISCAL EFFECT

None

## COMMENTS

None

Analysis prepared by: David R. Shaw / apubs / 445-3268

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FN 018316

# **Exhibit F**

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Page 1

Date of Hearing: May 7, 2002  
Chief Counsel: Bruce E. Chan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Carl Washington, Chair

AB 2252 (Cohn) - As Amended: April 1, 2002  
As Proposed to be Amended in Committee

SUMMARY : Adds assault with the intent to commit specified sex crimes to the list of prior sex offenses that may be admitted in a trial of a sexual offense to prove the character of the defendant. Eliminates the requirement that the territorial jurisdiction of the court for specified sex crimes is where the offense occurred. Specifically, this bill :

- 1) Expands the definition of "sexual offense" for purposes of the exception to the rule against the admission of character evidence to include any conduct prohibited by Penal Code Section 220, except assault with intent to commit mayhem. The additional sexual offenses would be assault with intent to commit rape, sodomy, oral copulation, rape in concert, lewd act upon a child, or forcible sexual penetration.
- 2) Eliminates the requirement in cases involving multiple sex crimes that the defendant and the victim are the same for a court to exercise jurisdiction in any jurisdiction where at least one of the offenses occurred.
- 3) Provides that when more than one offense involving assault with intent to commit specified sex crimes, rape, spousal rape, rape in concert, aggravated sexual assault of a child, sodomy, child molestation, oral copulation, continuous sexual abuse of a child, or sexual penetration occurs in more than one jurisdictional territory, the jurisdiction of any of those offenses, and for any offenses properly joinable with that offense, is any jurisdiction where at least one of the offenses occurred.
- 4) Requires a court, before exercising jurisdiction over specified sex offenses and other properly joinable offenses that occurred outside of its jurisdictional territory to conduct a hearing pursuant to Penal Code Section 954.

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Page 2

- 5) Limits the application of the current law that requires the same defendant and victim for a court to exercise jurisdiction in any jurisdiction where at least one of the offenses occurred to cases involving multiple domestic violence, stalking, or child abuse/endangerment.

EXISTING LAW :

SEX CRIMES EVIDENCE

- 1) Provides that except as specified, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [Evidence Code Section 1101(a).]
- 2) Provides for the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act did not reasonably and in good faith believe that the victim consented. [Evidence Code Section 1101(b).]
- 3) Provides that in a criminal case where 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 Evidence Code Section 1101. [Evidence Code Section 1108(a).]
- 4) Defines "sexual offense" as a crime that involved any of the following conduct: sexual battery, rape, unlawful intercourse, spousal rape, rape in concert, sodomy, a lewd act upon a child, oral copulation, aggravated sexual assault of a child, continuous sexual abuse of a child, forcible sexual penetration, child pornography, indecent exposure, and child annoying or molesting. [Evidence Code Section 1108(d).]
- 5) Provides that any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, rape in concert,

lewd act upon a child, or forcible sexual penetration is guilty of a felony, punishable by two, four, or six years in state prison. (Penal Code Section 220.)

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Page 3

#### JURISDICTION

- 5) Provides that when a crime is committed in part in one jurisdiction and in part in another jurisdiction, the trial can occur in either jurisdiction. (Penal Code Section 781.)
- 6) Provides that when more than one violation of rape, child abuse, spousal abuse, sexual acts with children, or stalking occurs in more than one jurisdiction involving the same defendant and victim, the jurisdiction of any of those offenses is in any jurisdiction where at least one of the crimes occurred. (Penal Code Section 784.7.)
- 7) Provides when property taken in one jurisdiction by burglary, carjacking, robbery, theft, or embezzlement is brought or received in another jurisdiction, the trial can be held in either jurisdiction. The trial can also be tried in a contiguous jurisdiction if the defendant is arrested in that jurisdiction, the prosecution secures on the record the defendant's knowing, voluntary, and intelligent waiver of the right of vicinage, and the defendant is charged with one or more property crimes in the arresting territory. (Penal Code Section 786.)
- 8) States that the jurisdiction for a trial for murder or manslaughter is either in the county where the fatal wound was inflicted, the county in which the victim died, or the county in which the body is found. (Penal Code Section 790(a).)
- 9) Provides if a defendant is charged with the special circumstance of multiple murders, the jurisdiction for any of the murders, and any other crimes joinable with that murder, shall be in any appropriate jurisdiction if the murders are connected together in their commission and after a hearing in the jurisdiction where the prosecution is attempting to consolidate the charged murders. If the charged murders are not joined or consolidated, the murder that was charged outside of the county that has jurisdiction shall be returned to that county. (Penal Code Section 790(b).)
- 10) Two or more offenses connected together in their commission or in the same class of crimes or offenses may be joined in one accusatory pleading. (Penal Code Section 954.)

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FISCAL EFFECT : None

COMMENTS :

1) Author's Statement: According to the author, "This bill makes two changes to the law. First, it adds several crimes of assault to the list of sexual offenses that can be used to prove that a defendant who is charged with a sexual offense has the predisposition to commit such offenses. Second, it changes the law that determines where serial sexual assault cases involving crimes in more than one county can be tried. All the victims in a serial sexual assault case could have their cases tried together in one county where one or more of the crimes took place. One trial helps the victims testify just once and saves time and expense to the courts and the state."

2) A Trial Consolidating Charges from other Jurisdictions does not Violate the Constitution if it Involves the Same Victim :  
The general rule in California is that the district attorney prosecutes an offense in the jurisdiction where the crime occurred. If part of the commission of the crime occurs in one county, but the crime is completed in another county, the proper jurisdiction is in either of the counties. Penal Code Section 784.7 provides that multiple charges of rape, child abuse, spousal abuse, sexual acts with children, or stalking involving the same defendant and victim, which occurred in multiple jurisdictions, can be tried in any jurisdiction in which one of the acts occurred. The California Supreme Court ruled in Price v. Superior Court (2001) 25 Cal 4th 1046, that Penal Code Section 784.7 did not violate the right to a fair trial contained in the United States or California Constitution. The court emphasized that the statute serves the purpose of preventing a victim from having to testify at separate trials. The court reasoned, "The right to a trial by a jury of the vicinage, as guaranteed by the California

Constitution, is not violated by trial in county having a reasonable relationship to the offense or to other crimes committed by the defendant against the same victim. We do not hold here that a crime may be tried anywhere. The Legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense. Repeated abuse of the same child or spouse in more than one county creates

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that nexus. The venue authorized by Penal Code Section 784.7 is not arbitrary. It is reasonable for the Legislature to conclude that this pattern of conduct is akin to a continuing offense and to conclude that the victim and other witnesses should not be burdened with having to testify in multiple trials in different counties." (Emphasis added.)

3) Purpose of This Bill: This bill amends Penal Code Section 784.7 by eliminating the same defendant/same victim requirement in cases involving multiple sex crimes where a public prosecutor seeks to consolidate prosecution in one jurisdiction. The same defendant/same victim requirement still applies to cases involving multiple incidents of domestic violence, stalking, or child abuse.

According to the sponsors of this bill, the purpose is to limit the number of court appearances for victims in serial sexual assault cases involving multiple counties. The sponsor states if a defendant is charged with multiple sex crimes involving different victims in a number of different counties, the ability to introduce propensity evidence pursuant to Evidence Code Section 1108 virtually ensures that multiple victims will testify in any county that chooses to prosecute the defendant. Thus, if a defendant raped different victims in San Mateo, Santa Clara, and San Francisco, a prosecutor in Santa Clara would charge the defendant with committing rape and most likely introduce evidence of the other rapes in the adjoining counties to support the inference that the defendant was guilty. Thereafter, there could be separate trials in the adjoining counties relating to the offenses committed within their territorial jurisdiction. Unless the other cases were resolved by way of a guilty plea, the victims who testified in the first trial would be required to testify in the other counties' courts.

As discussed above, the California Supreme Court has commented that the Legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense. The Court upheld the validity of Penal Code Section 784.7 by holding that the repeated abuse of the same child or spouse in more than one county created that nexus. The sponsors of this bill contend that the unique difficulties experienced by victims of sexual assault who must testify in court justify a

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departure from traditional venue and vicinage requirements. Thus, this bill is narrowly drafted to only apply to assault with intent to commit specified sex crimes, rape, spousal rape, rape in concert, aggravated sexual assault of a child, sodomy, child molestation, oral copulation, continuous sexual abuse of a child, or sexual penetration, and any other properly joinable offenses. Indeed, this bill retains the requirement of existing law that the defendant and the victim are the same in cases involving domestic violence, stalking, or child abuse/endorsement before a court may exercise jurisdiction over offenses committed in other territorial jurisdictions.

As the California Supreme Court stated in Price, "Most California venue statutes serve a similar purpose in reducing the potential burden on a defendant who might otherwise be required to stand trial in a distant location that is not reasonably related to the alleged criminal conduct." Except as described above, this bill does not change other provisions of existing law relating to venue, the location where a trial may be held.

4) Jurisdictional Hearing: After discussions with Committee staff, the sponsors of this bill drafted an additional requirement that before a court may exercise jurisdiction over specified sex offenses that occurred outside of its jurisdictional territory, the court shall first conduct a hearing pursuant to Penal Code Section 954. The proposed amendment is similar to the requirements of Penal Code Section 790(b) and is intended to ensure that the joinder of offenses

contemplated by this bill does not unfairly prejudice either the defendant or the prosecution.

5) Adding Assault with the Intent to Commit Specified Sex Crimes to Evidence Code Section 1108 : Adding Penal Code Section 220, with the exception of assault with the intent to commit mayhem, appears consistent with the intent of the Legislature in enacting Evidence Section 1108. The conduct proscribed in Penal Code Section 220, assault with intent to commit rape, sodomy, oral copulation, rape in concert, lewd act upon a child, or forcible sexual penetration, is the type of information that the statutory scheme states a jury should be made aware of in a sexual assault prosecution.

6) Statement in Support: The California District Attorneys

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Association states, "This bill will allow certain sex crimes to be tried along with other existing sex and domestic violence crimes that may be combined and tried in any jurisdiction where at least one of the offenses occurred. Consolidating charges on certain crimes that occurred in different jurisdictions into a single trial will provide for a judicious use of public resources and will reduce the burden and hardship imposed on victims and witnesses who otherwise must testify repeatedly about the same crime in separate trials."

7) Statement in Opposition: California Attorneys for Criminal Justice (CACJ) states, "CACJ is opposed to this bill because it permits prosecutors to exert jurisdiction over a criminal case that has absolutely nothing to do with their county other than that the defendant is accused of an entirely separate crime within their county. This bill does not require the same victim, a common scheme or plan, or any of the other traditional elements associated with allowing one county to preside over criminal matters that occur in other counties. This will cause tremendous inconvenience to victims and their families who may want to attend a trial that occurs in San Diego, for example, even though the crime took place and the victim lives in Shasta County." \_

8) Similar Legislation : AB 299 (Rod Pacheco), pending a hearing in the Senate Committee on Public Safety, provides that when a trial in one jurisdiction combines charges of rape, child abuse, spousal abuse, sexual acts with children, or stalking from multiple jurisdictions involving the same defendant and victim, other offenses involving the same parties that are properly joinable with these offenses may be heard at the trial.

REGISTERED SUPPORT / OPPOSITION :

Support

Santa Clara County District Attorney (Sponsor)  
Antelope Valley Hospital  
California Coalition Against Sexual Assault  
California District Attorneys Association  
California Medical Training Center  
Casa de Esperanza  
Lassen Family Services, Inc.

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Office of the Attorney General  
Peace Officers Research Association of California  
Rape Crisis and Child Protection Center  
San Bernardino County Sexual Assault Services, Inc.  
Santa Barbara Rape Crisis Center  
The Harvest of Wellness Foundation  
United Against Sexual Assault of Sonoma County  
West Fresno Crisis Center

Opposition

California Attorneys for Criminal Justice

Analysis Prepared by : Bruce Chan / PUB. S. / (916) 319-3744



**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: *People v. Juan Jose Villatoro*  
No.: **S192531**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 28, 2011, I served the attached **RESPONDENT'S MOTION FOR JUDICIAL NOTICE AND EXHIBITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Edward J. Haggerty  
Attorney at Law  
20955 Pathfinder Road, Suite 100  
Diamond Bar, CA 91765

Anne Marie Wise  
Deputy District Attorney  
Los Angeles County District Attorney's  
Office  
210 West Temple Street, 17th Floor  
Los Angeles, CA 90012

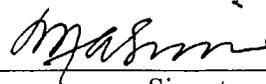
The Honorable William Sterling, Judge  
Los Angeles County Superior Court  
Central District  
East Los Angeles Courthouse  
214 South Fetterly Ave., Department 4  
Los Angeles, CA 90022

Court of Appeal of the State of California  
Second Appellate District  
300 South Spring St.  
2nd Fl., North Tower  
Los Angeles, CA 90013

California Appellate Project  
520 S. Grand Ave., 4th Fl.  
Los Angeles, CA 90071-2600

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 28, 2011, at Los Angeles, California.

Marianne A. Siacunco  
Declarant

  
Signature