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6
7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

8 THE PEOPLE OF THE STATE OF) Case No.
9 CALIFORNIA,)
) NOTICE AND MOTION
10 UNDER)
Plaintiff,) EVIDENCE CODE 782 TO
11) ADMIT PRIOR SEXUAL
vs.) KNOWLEDGE & ACTS OF
12 VICTIM)
)
13) Date:
) Time:
14 Defendant.) Dept:
)
-----)

15 TO THE DISTRICT ATTORNEY OF _____ COUNTY:

16 PLEASE TAKE NOTICE that on the date and time
17 indicated above the Defendant will move the court
18 pursuant to Evidence Code § 782 to admit the testimony of
19 (Insert name of witness). Said motion will be based upon
20 the attached Memorandum of Points and Authorities and the
21 attached Declaration of (Insert name of declarant).
22

23 Dated:

24 _____
25 Attorney for Defendant
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1 context, must be based on personal knowledge. Star Motor
2 Imports, Inc. v. Superior Court (1979) 88 CA3d 201, 204.

3
4 However, a declaration in support of a Evidence Code
5 section 782 motion need only be made upon "information and
6 belief." The reasoning is that (1) there is a longstanding
7 judicial acceptance that motions in support of "probable
8 cause" to admit or discover evidence require only
9 information and belief; and (2) the statute controlling the
10 motion does not demand a higher standard of proof. (City of
11 Santa Cruz v. Municipal Court (1990) 49 C3d 74, 86-88,
12 Jalilie v. Superior Court (1988) 195 CA3d 487, 489-490;
13 People v. Memro (1985) 38 C3d 658, 676.) The above-cited
14 cases involved "Pitchess" motions under Evidence Code
15 section 1043(b). Each attorney for the defendant sought an
16 order to inspect an arresting officer's personnel file for
17 evidence of citizen complaints and excessive force. All
18 three cases held that good cause for discovery and a
19 judicial in camera inspection (which is nearly identical to
20 the section 782 procedure at issue here) can be established
21 upon a written declaration based on information and belief,
22 provided that the requested evidence is shown to be
23 relevant and material.

24 As stated in City of Santa Cruz, supra:

25 "Of course, it is true that an affidavit is
26 normally presumed to state matters personally
27 known to the affiant and lacks evidentiary
28 value, in a variety of civil contexts, when

1 based on information and belief or hearsay.
2 [Citations omitted.]

3 It is decidedly not true, however, that an
4 an affidavit upon information and belief is an
5 anomaly in the law, bereft of legal significance.
6 On the contrary, as the United States Supreme
7 Court has stated, "the value of averments on
8 information and belief in the procedure of the law
9 is recognized." [Citation omitted.] Indeed, there
10 are numerous exceptions to the general rule
11 prohibiting affidavits on information and
12 belief either where the facts to be established
13 are incapable of positive averment, or where
14 expressly prohibited by statute. [Citations
15 omitted.]

16 Thus, courts have long held that affidavits on
17 information and belief may be sufficient in
18 a variety of contexts where the facts would
19 otherwise be difficult or impossible to
20 establish. (49 C3d at p. 87.)

21 The City of Santa Cruz court went on to list these
22 situations, which include: disqualification of a trial
23 judge, change of venue, quashing service, and issuance of
24 a search warrant. In the context of supporting evidence
25 for petitions for writ of habeas corpus, our state high
26 court has similarly held, "where access to critical
27 information is denied to one party, where it is
28 unreasonable to expect a party to obtain information at the
pleading stage. . .the general rule requiring pleading of
facts should not be enforced in a draconian fashion to
defeat the ends of justice." (People v. Duvall (1995) 9
C4th 464, 485.) In the instant case, at this stage, it is
impossible for Defendant to establish the facts set forth
in counsel's declaration in any other manner. **State why,

1 e.g., the information is contained in a police report or
2 CPS report, the authors of which have refused to sign
3 declarations**

4 No specific standard of proof was required by the
5 drafters of the so-called "rape shield" law in section 782,
6 which simply requires that the written motion called for be
7 supported by an affidavit containing "an offer of proof".
8 The court should decline to redraft the statute to impose
9 a more burdensome requirement of "personal knowledge",
10 where the Legislature has conspicuously failed to do so.
11 (Id., at p. 88.) Had the legislature "intended to abrogate
12 the use of affidavits on information and belief and to
13 require affidavits based on personal knowledge, it is
14 reasonable to assume that it would have done so
15 explicitly." (Id., at p. 88.)

16 Adjudged against the offer of proof held sufficient to
17 have required the trial court to hold an Evidence Code §782
18 hearing in People v. Daggett (1990) 225 CA3d 751, the offer
19 of proof in this case triggers such a hearing as well. In
20 Daggett, the defendant made an offer of proof that the
21 victim had been molested at age five by two older children
22 and that he had pending juvenile charges against him. In
23 finding the trial court had erred in refusing to hold a
24 hearing based on such an offer, the reviewing court stated:

25 "Here Daggett's offer of proof was that he
26 learned from an inspection of the prosecutor's
27 file Daryl told a mental health worker and
28 Doctor Slaughter that he had been molested

1 by two older children, ages eleven and eight,
2 when he was five years old. This should have
3 been sufficient for the court to have ordered
4 a hearing to determine whether the acts of
5 prior molestation were sufficiently similar
6 to the acts alleged here. The court erred when
7 it failed to do so." (Id., at p. 757.)

8 Inferentially, such an offer of proof could only have been
9 based on the information and belief of defense counsel who
10 could not possibly have had any personal knowledge of what
11 Daryl had told a mental worker. Thus, based on Daggett and
12 City of Santa Cruz, the offer of proof herein which states
13 on counsel's information and belief that ****give a brief
14 summary of the offer of proof**** is sufficient to warrant an
15 Evidence Code § 782 hearing.

16 **B**

17 **EVIDENCE OF CHARACTER**
18 **UNDER EVIDENCE CODE SECTION 1101**

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

26 In our case, the defense seeks to attack the alleged
27 victim's credibility, and is thus entitled under section
28 1101(c) to employ evidence of **her prior sexual conduct, her
prior acts of deceit, her prior false allegations and her**

1 prior lying as evidence to attack her credibility. **Use
2 what is appropriate**

3 C

4 **EVIDENCE CODE SECTION 1103(c) DOES NOT BAR ADMISSION**
5 **OF THE ALLEGED VICTIM'S PRIOR SEXUAL CONDUCT BECAUSE**
6 **SUCH EVIDENCE WILL NOT BE OFFERED TO PROVE HER CONSENT.**

7 Evidence Code §1103(c)(1) states, as a general
8 proposition, that "opinion evidence, reputation evidence,
9 and evidence of specific instances of the complaining
10 witness's sexual conduct ... is not admissible by the
11 defendant in order to prove consent by the complaining
12 witness." However, Evidence Code §1103 does NOT bar
13 evidence of a victim's sexual conduct (nor cross-
14 examination of her concerning such conduct) when the
15 evidence is offered to attack her credibility. [Evidence
16 Code §1103(c)(3) & (4); People v. Chandler (1997) 56 CA4th
17 703, 711; People v. Blackburn (1976) 56 CA3d 685, 689-690.)

18 Once the defendant makes a sworn offer of proof
19 concerning the relevance of the sexual conduct of the
20 complaining witness to attack her credibility, the
21 protections of section 1103 give way to the procedural
22 safeguards of section 782. This is so, even though it is
23 the underlying issue of capacity to consent which is being
24 challenged. People v. Rioz (1984) 161 CA3d 905, 916.

24 D

25 **EVIDENCE CODE SECTION 352**

26 Generally, cross examination to test the credibility
27

1 of a prosecution witness should be given wide latitude.
2 (People v. Belmontes (1988) 45 Cal.3d 744, 780.)
3 "'[C]ross-examination is the principle means by which the
4 believability of a witness and the truth of his testimony
5 are tested.'" (Farrell L. v. Superior Court (1988) 203 CA3d
6 521, 526.) "In sex cases, broad cross-examination of the
7 prosecuting witness on prior sexual experiences,
8 fabrication and sexual fantasy should be allowed." (People
9 v. Francis (1970) 5 CA3d 414, 417.)

10 In People v. Reeder (1978) 82 CA3d 543, 550 the
11 court held that "in criminal cases, any evidence that tends
12 to support or rebut the presumptions of innocence is
13 relevant", since "it is fundamental in our system of
14 jurisprudence that all of a defendant's pertinent evidence
15 should be considered by the trier of fact." (Id., at p.
16 552.) The court found that defendant had the right to show
17 he believed what others had told him about the co-defendant
18 and the proffered evidence supported his defense of such
19 intense dislike for his co-defendant as to preclude him
20 from engaging in a criminal conspiracy with him (Reeder,
21 supra, at p. 550) and stated:

22 "Evidence Code Section 352 must bow to the due
23 process right of a defendant to a fair trial and
24 to his right to present all relevant evidence of
25 significant probative value to his defense. In
26 Chambers vs. Mississippi (1973) 410 U.S. 284, 93
27 S.Ct. 1038, 35 L.Ed.2d 297, it was held that the
28 exclusion of evidence, vital to a defendant's
defense, constituted a denial of a fair trial in
violation of constitutional due-process
requirements." (Id., at p. 553.)

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E

CASES ADMITTING SEXUAL HISTORY

The following cases permitted a defendant to delve into the prior sexual conduct of the alleged victim.

People v. Hernandez (1964) 61 CA2d 529, 535 involved the crime of statutory rape and a trial court which prevented the defendant from developing an offer of proof as to a reasonable belief that the prosecutrix had reached the age of legal consent. The appellate court spoke about the relationship between the defense of "honest and reasonable mistake of fact," and Penal Code section 20, which requires the joint operation of act and intent before a crime can be committed. The court held that the accused was permitted to present evidence as to why he held a good faith belief that the complainant appeared to be over 18 years of age. Presumably, such evidence would have included the prior sexual conduct of the complainant.

People v. Dolly (1966) 239 CA2d 143, 146, involved a rape charge where the complainant allegedly lacked mental competency. The court acknowledged that the accused may present evidence of his non-criminal intent based on an honest and reasonable belief that the victim did not lack capacity to give consent. The defendant's evidence would presumably have included the prior sexual conduct of the complainant--however the defendant in Dolly declined to testify and presented no defense before the trial court.

1 People v. Varona (1983) 143 CA3d 566, 569, involved
2 charges of rape and oral copulation. The trial court
3 committed reversible error by not admitting evidence of the
4 complaining witness's prior sexual conduct. There, the
5 disputed evidence was that the alleged victim was on
6 probation for prostitution and typically plied her trade in
7 the area where the crimes were supposedly committed. Such
8 evidence should have been admitted to prove consent on the
9 part of the complainant.

10 In People v. Rioz (1984) 161 CA3d 905, one of the
11 defendants testified that he was told by the victim that
12 the cost for the sex act would be a certain sum. He agreed
13 to pay her at a later time. At trial he wanted to admit
14 her statements to him about the request for payment, as
15 bearing on his belief that the sex act was consensual. The
16 reviewing court made a clear distinction between the
17 evidence that the victim was a prostitute to impeach her
18 credibility and evidence that she had made statements of
19 price for certain acts. The first was viewed as
20 impermissible character evidence, the second was viewed as
21 permissible impeachment of the complaining witness denial
22 of consent. The court said:

23 "We emphasize again the necessity that a
24 defendant advancing a defense of consent bears
25 the burden of affirmatively offering to prove,
26 under oath, the relevance of the complaining
27 witness' sexual conduct to attack her
28 credibility in some way other than by deprecating
her character. It is not enough that a defendant
alleges the complaining witness is a prostitute,

1 has been convicted of prostitution, or engages
2 in any particularized aspects of that profession
3 unless the complaining witness has testified she
4 did not consent to sex with that defendant and
5 the defendant had presented evidence by his own
6 testimony or otherwise which directly challenges
7 the complaining witness' denial of consent and
8 the defendant offers to prove, by sworn
9 affidavit, that her prior sexual conduct is
10 sufficient to attack her credibility as
11 distinguished from her character." (Id., at p.
12 918.)

13 In Daggett, supra, as noted above, the appellate court
14 reversed the defendant's conviction due to the trial
15 court's failure to allow him to present evidence that the
16 victim had been molested by older children when he was
17 five. The court held:

18 "A child's testimony in a molestation case
19 involving oral copulation and sodomy can be given an aura
20 of veracity by his accurate description of the
21 acts. This is because knowledge of such acts may
22 be unexpected in a child who had not been
23 subjected to them. In such a case it is relevant for the
24 defendant to show that the complaining witness
25 had been subjected to similar acts by others in
26 order to cast doubt upon the conclusion that the
27 child must have learned of these acts through
28 the defendant. Thus, if the acts involved in the
prior molestation are similar to the acts of which
the defendant stands accused, evidence of the
prior molestation is relevant to the credibility
of the complaining witness and should be
admitted." (225 CA3d at p. 757.)

Finally, in Chandler, supra, the reviewing court found
error in the trial court's ruling disallowing an attack on
the victim's credibility with the testimony of two
witnesses who testified at the Evidence Code §782 hearing
that they had previously traded drugs for sex with her.

1 (56 CA4th at p. 711.)

2 II

3 THE DEFENSE MAY INTRODUCE ALTERNATIVE
4 EXPLANATIONS OF A VICTIM'S SEXUAL KNOWLEDGE WHEN
5 THE PROSECUTION INFERS THE VICTIM MUST HAVE
6 GAINED THAT SEXUAL KNOWLEDGE FROM BEING
7 MOLESTED BY DEFENDANT.

8 A

9 DUE PROCESS REQUIRE THAT EVIDENCE OF
10 DEFENDANT'S ALTERNATIVE EXPLANATIONS OF
11 THE CHILD'S KNOWLEDGE OF SEX BE ADMITTED BEFORE THE JURY.

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

25 As quoted above, in People v. Daggett, supra, the
26 appellate court recognized this presumption and its
27 inherent dangers and found that the defense should have
28 been allowed to elicit the victim's prior sexual history
to refute it. The failure to allow the defendant to

1 establish the victim's alternative source of knowledge
2 compelled reversal. (225 CA3d at p. 758.)

3
4 **add whichever following sections apply to your
5 case**

6 **B**

7 **A CHILD WHO WATCHES OR LISTENS TO**
8 **PORNOGRAPHIC MATERIAL OUT OF SHEER CURIOSITY IS**
9 **NOT ENGAGING IN "SEXUAL CONDUCT" WITHIN THE**
10 **MEANING OF PENAL CODE § 782, AND THUS THE**
11 **SOURCE OF THE CHILD'S KNOWLEDGE IS NOT**
12 **PRIVILEGED.**

13 Evidence Code § 782 limits the admissibility of a
14 complaining witness's prior sexual conduct. It requires
15 a detailed offer of proof by the defendant as to
16 necessity and relevancy. The Code requires support by a
17 formal affidavit, and provides for an in camera hearing
18 to question the witness with regard to such offer of
19 proof before the jury is permitted to hear the evidence.

20 Defendant contends that Evidence Code § 782 does not
21 apply, since the prior sexual conduct of the alleged
22 victim is not the subject of his inquiry. He only wants
23 to show that complainants' sexual knowledge came from a
24 source other than the criminal acts the defendant is
25 alleged to have committed with her.

26 By watching a video, reading a book or listening to
27 phone message services, a person such as the complaining
28 witness is simply engaged in an educational process. The
subject matter of those media is irrelevant. If the

1 topic happens to be sexual, then that person is simply
2 educating him or herself about sex.

3 Learning is a neutral act which does not become
4 sexual in nature until one turns to physical activity
5 with the intent of arousing the passions of self or
6 others.

7 As a neutral act, complainants's viewing of a
8 pornographic videos or seeing sexual acts are not "sexual
9 conduct" within the meaning of Evidence Code § 782.
10 Therefore such evidence is not protected and should be
11 admitted if not otherwise prohibited by objections as to
12 relevancy (Evidence Code § 350) or time consumption and
13 undue prejudice (Evidence Code § 352).

14 In Rubio v. Superior Court of Orange County (1988)
15 202 CA3d 1343, 1348 the court ruled that, where a child
16 had watched a videotape of her parents making love prior
17 to allegedly being molested by a third party, the
18 defendant was entitled to in camera viewing of the tape
19 before an admissibility ruling to determine whether his
20 right to due process outweighed the parents'
21 constitutional privacy interests and their marital
22 privilege.

23 The defendant in Rubio was trying to show the jury
24 that a young child's knowledge of sexual acts and
25 techniques came from a source other than the charged
26 criminal acts.

1 Rape shield laws such as California's Penal Code §
2 782 often conflict with a defendant's Due Process and
3 Confrontation Clause rights. Where a rape shield law
4 curtails the defendant's effort to generate doubt as to
5 his participation in the abuse of children, Sixth and
6 Fourteenth Amendment rights should outweigh any competing
7 concerns.

8 **C**

9 **MOTHER'S OBSESSIVE BEHAVIOR**
10 **AROUND ISSUE OF MOLESTATION IS ADMISSIBLE**
11 **TO SHOW ALTERNATE SOURCE OF SEXUAL KNOWLEDGE.**

12 What about the situation where a mother constantly
13 is checking her daughter/son for evidence of molestation.
14 This could be a beginning of a false accusation or a
15 source of knowledge for the child. This issue was ruled
16 upon in the case of People v. Scholl (1964) 225 CA2d 558,
17 where the court held that it was improper to not allow
18 cross examination on the possible existence of a morbid
19 fear of sexual acts in the mind of the mother as to make
20 the charge a creature of that morbidity.

21 Since this does not entail sexual conduct of the
22 minor, it does not have to comply with Evidence Code §
23 782.

24 **III**

25 **EVIDENCE OF PRIOR FALSE ALLEGATIONS**
26 **IS ADMISSIBLE TO IMPEACH COMPLAINANT.**

27 It has been repeatedly held that a victim's prior
28 false charges of sexual assault are admissible on the

1 issue of his/her credibility.

2 See People v. Wall (1979) 95 CA3d 978, 987-989
3 [reversible error to exclude testimony of victim's ex-
4 boyfriend that she had threatened to make a false
5 accusation of rape against him where her credibility was
6 the sole issue for the jury to determine]; People v.
7 Randle (1982) 130 CA3d 286, 294 [error in denial of
8 motion for new trial based on newly discovered evidence
9 that on two prior occasions at same location as charged
10 offense, alleged victim had falsely claimed to be the
11 victim of purse snatch and kidnap]; People v. Varona
12 (1983) 143 CA3d 566, 569-570 [reversible error in rape
13 and oral copulation prosecution where trial court
14 excluded evidence that victim was on probation for
15 prostitution]; People v. Adams (1988) 198 CA3d 10, 18
16 [error to exclude evidence that rape victim falsely
17 accused others of rape]; People v. Burrell-Hart (1987)
18 192 CA3d 593, 597-599 [same]; People v. Franklin, supra,
19 25 CA4th at p. 335 [same].

20 IV

21 **THE USE OF VICTIM'S UNCHARGED ALLEGATIONS** 22 **FOR THE PURPOSE OF IMPEACHMENT IS AN ISSUE** **OF WEIGHT, NOT ADMISSIBILITY.**

23 The People may question whether the prior
24 allegations made by complainant are false, and whether
25 can they be introduced until so proven. In Andrews v.
26 City and County of San Francisco (1988) 205 CA3d 938, the
27

1 plaintiff sued the city because he was beaten up by an
2 Officer Ramirez. During the trial the officer testified
3 that he was a patient man and performed his duties in a
4 calm and straight forward manner. The defense knew of
5 four instances involving persons in custody whose
6 testimony about their specific instance would reasonably
7 and logically tend to disprove Officer Ramirez's
8 characterization of himself.

9 The trial court excluded the evidence. It was
10 concerned about a series of "mini trials" that would have
11 to be conducted in order to establish that each and every
12 one of the incidents were true. The Court of Appeal held
13 that, while it appreciated the trial judge's time-
14 pressure concerns, it did not perceive them as
15 "...constituting sufficient justification for keeping out
16 all of the misconduct incidents." (Id., at p. 947.) The
17 court further stated:

18 "In every case where prior similar misconduct
19 is admitted, the defendant may be expected to
20 bring forth a contrary version of the events.
21 However, the fact that the jury must resolve
22 conflicting versions cannot justify the
23 exclusion of all such evidence on this ground
24 alone." Id., at 987.

25 The Court of Appeal recognized that whether they
26 were true or false, complaints of police brutality were a
27 question for the jury. Similarly, in the case at
28 bar, it is not for the trial court to determine whether a
prior allegation of sexual misconduct is true or false.

1 That is a jury question.

2 In People v. Lankford (1989) 210 CA3d 227, 233-234
3 the State was permitted to introduce evidence that the
4 defendant had a pending trial for robbery. This evidence
5 tended in reason to impeach the defendant's statement
6 that he had not had any "incidents" since his release
7 from parole.

8 If the pending charge was false, then the
9 defendant's statement about having no "incidents" was
10 true. If there were to past incidents, such evidence
11 would not be relevant because it could not impeach his
12 testimony. However, if the pending charge was true, then
13 the defendant's claim about having no "incidents" was
14 false. In that case, such evidence would be relevant
15 because it could directly impeach his testimony. It is
16 not for purpose of showing propensity to commit a crime,
17 just impeachment.

18 Although the veracity of the pending charge was
19 still in litigation, the fact that it existed was
20 admitted into evidence by the Lankford court. It was
21 for the jury to resolve whether or not the defendant was
22 impeached by it.

23 **IV. CONCLUSION**

24 Based on the above discussion, no section of the
25 Evidence Code is a bar to the admissibility of the
26 complaining witness's sexual conduct for the purposes
27

1 requested.

2 [The defendant has the right to prove an alternative
3 source of knowledge of sexual matter to rebut an
4 inference that the child must have been molested, how
5 else could the child have known about these types of
6 matters.]

7 [The defendant has a right to show that the mother's
8 fears of molestation are a possible source of the
9 allegation and a possible source of the child's knowledge
10 concerning molestation.]

11 [The defendant has the right to prove, by use of
12 specific instances, a trait or character trait of making
13 false accusations about being sexually abused.]

14 [The issue of whether the prior allegations are true
15 or false is a jury issue.] **Use appropriate conclusion**

16 Dated:

17 Respectfully submitted,

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21 Attorney for Defendant
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