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6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF

7
8 THE PEOPLE OF THE STATE OF) Case No.
CALIFORNIA,)
9) MOTION IN LIMINE TO
Plaintiff,) EXCLUDE ANY REFERENCE
10) TO DEFENDANT'S
vs.) HOMOSEXUALITY
11)
12) Date:
Defendant.) Time:
13) Dept:

14 Defendant moves to exclude all references by the People and
15 all witnesses **and any exhibits** to the fact that defendant is
16 homosexual and participates in a gay life style. All witnesses
17 should be admonished prior to taking the stand not to incorporate
18 in their testimony any reference indicating that the defendant is
19 gay or homosexual.

20 **I**

21 **INTRODUCTION OF EVIDENCE OF THE DEFENDANT'S**
22 **HOMOSEXUALITY IS PREJUDICIAL**
IMPERMISSIBLE CHARACTER EVIDENCE.

23 Introducing a person's sexual preference is an attempt to
24 besmirch the character of defendant by categorizing him with a
25 group which is generally perceived as perverted and unpopular.
26 In rejecting an attempt to introduce the homosexual preference of
27 a witness, the California Supreme Court in People vs. DeSantos
28 (1992) 2 C4th 1198, 1249 explained:

1 "Moreover, defendant's inquiry would have led to the
2 introduction of impermissible character evidence by
3 portraying the inmate as a person to whom the jury
4 should accord less respect or less believability
because of his homosexuality--an attempt to cater to
the possibility of popular prejudice. (Citations
omitted.)"

5 In People vs. McAlpin (1991) 53 C3d 1289, 1302-1303, the
6 same court acknowledged the prejudice displayed by the general
7 population to homosexuals as a class:

8 "The layperson imagines the child offender to be a
9 stranger, an old man, insane, [812 P.2d 571] alcohol or
10 drug addicted, sexually frustrated and impotent or
sexually jaded, and looking for 'kicks'. He is 'gay'
11 and recruiting little boys into homosexuality or he is
'straight' and responding to the [53 Cal.3d 1303]
12 advances of a sexually provocative little girl.... He
is sometimes regarded as a brutal sex fiend or as a
13 shy, passive, sexually inexperienced person. He is
oversexed or he is undersexed; and so on. These are
14 popular notions appealing in their simplicity--even if
they are self-contradicting--and they offer the
15 advantage of making the child offender as different and
unlike the ordinary person--ourselves, our parents, our
16 children, our relatives, friends, and teachers--as
possible." (Groth, Patterns of Sexual Assault Against
17 Children and Adolescents, in Sexual Assault of Children
and Adolescents (Burgess et al. edits. 1978) pp. 3-4
18 (hereafter Groth); accord, Cerkovnik, The Sexual Abuse
of Children: Myths, Research, and Policy Implications
(1985) 89 Dick.L.Rev. 691, 692-694.)"

19 As recently as 1998, the Ninth Circuit acknowledged that
20 homosexuality is "often equated with indecency, perversion, and
21 immorality, and gay persons are often greeted with distrust and
22 suspicion, particularly in their interactions with children. . ."
23 (People vs. Shymanovitz (1998) 157 F.3d 1154, 1161.)

24 Numerous federal court decisions have ruled that evidence of
25 a defendant's homosexuality is impermissible character evidence
26 and highly prejudicial. (See United States vs. Birrell (9th Cir.
27 1970) 421 F.2d 665, 666 [theft conviction reversed where trial
28 court admitted evidence of defendant's homosexuality]; Cohn vs.

1 Papke (9th Cir. 1981) 655 F.2d 191, 194 [new trial required in
2 §1983 action where evidence of prior homosexual relationships had
3 been improperly allowed]; United States vs. Gillespie (9th Cir.
4 1988) 852 F.2d 475, 479 [defendant's conviction for transporting
5 a person in interstate and foreign commerce for illegal sexual
6 purposes reversed where prejudicial evidence of his homosexuality
7 admitted]; United States vs. Ham (4th Cir. 1993) 998 F.2d 1247,
8 1251-1252 [in conspiracy to violate RICO, conspiracy to commit
9 murder and mail fraud, defendants' convictions were reversed due
10 to improperly admitted evidence of child molestation and
11 homosexual conduct].)

12 Most recently, the Ninth Circuit reversed a conviction for
13 multiple counts of the sexual abuse of minors in People vs.
14 Shymanovitz, supra, owing to the wrongful admission of sexually
15 explicit magazines that portrayed homosexual activity from which
16 the jury could have inferred that the defendant was a gay man.
17 The court found such evidence crossed into the realm of
18 impermissible character evidence which prejudiced the outcome of
19 the case:

20 "Evidence implicating Shymanovitz's
21 sexual orientation was particularly
22 prejudicial because he was being tried
23 on numerous sex offense charges: the jury's
24 inference that Shymanovitz was gay could in
25 all likelihood have caused it also to
infer that he deviated from traditional
sexual norms in other ways, specifically that he
engaged in illegal sexual conduct with minors."
(Id., at p. 1160.)

26 A limiting instruction is ineffective in curing the
27 prejudice resulting from the wrongful admission of evidence
28 relating to a defendant's homosexuality. (Shymanovitz, 157 F.3d

1 at p. 1161; Gillespie, 852 F.2d at p. 479; Ham, 998 F.2d at p.
2 1254.)

3 **ADMISSION OF EVIDENCE OF DEFENDANT'S**
4 **HOMOSEXUALITY WILL VIOLATE HIS FEDERAL**
5 **CONSTITUTIONAL RIGHTS TO DUE PROCESS**
6 **AND A FAIR TRIAL.**

7 The admission into evidence of irrelevant and highly
8 inflammatory evidence of Defendant's homosexuality would be so
9 fundamentally unfair as to deprive him/her of his/her federal
10 constitutional rights to due process and a fair trial. (McKinney
11 v. Rees (9th Cir. 1993) 993 F.2d 1378 [reversing murder
12 conviction because "other crimes" evidence of the defendant's
13 knife collection and fascination with knives violated federal due
14 process where that evidence was irrelevant to the crime charged];
15 see also Clark v. Duckworth (7th Cir. 1990) 906 F.2d 1174 [the
16 defendant has a federal constitutional right to a trial free of
17 irrelevant and prejudicial evidence].)

18 **CONCLUSION**

19 To allow reference to Defendant's homosexuality either
20 directly or inferentially would prejudice him/her and allow
21 impermissible character evidence to be admitted.

22 Dated:

23 Respectfully submitted,

24 _____

25 Attorney for Defendant
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