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7 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

8 SAN JOSE FACILITY

9

10 THE PEOPLE OF THE STATE OF )	Case No.	C9928325
CALIFORNIA, )		
	)	ADMISSIBILITY OF CHARACTER
11 Plaintiff, )		EVIDENCE FOR TRUTH AND VERACITY
	)	OF COMPLAINING WITNESS ROBERT G.
12 vs. )		
	)	Trial Date: 13 Dec 1999
13 ALBERTO JENARO POMAR, )	Time:	8:30 AM
	)	Dept. 24
14 Defendant. )		
	)	

15

16 I.

17 **INTRODUCTION**

18 It was revealed by the District Attorney at the Preliminary  
19 Examination that the complaining witness in this matter, ROBERT G. was  
20 being housed at a Juvenile Detention Facility in Oregon for forgery of  
21 a check in Oregon and attempted robbery, purportedly a misdemeanor  
22 under Oregon law . The complaining witness affirmed the issue upon  
23 questioning by the Court. ( See Preliminary Transcript, pg. 28, ln. 26  
24 - pg. 30, ln. 23. )

25 Also at the Preliminary Examination the complaining witness  
26 ROBERT G. testified that he took the defendant's car without the  
27 defendant's permission and that the police were called by the  
28 defendant and the complaining witness questioned about the matter by

1 the police.

2 ( Preliminary Transcript, pg. 34, ln. 23 - pg. 35, ln. 12. )

3 It is the intention of the defendant to introduce evidence  
4 relating to these bad acts by the complaining witness for the purpose  
5 of allowing the jury to determine the complaining witness's character  
6 for honesty and veracity.

7 **II.**

8 **PROPOSITION 8 AND ITS EFFECT ON THE ADMISSIBILITY**  
9 **OF CHARACTER EVIDENCE.**

10 Evidence Code section 780(e) provides that a court may consider  
11 in  
12 determining a witness's credibility his/her "character for honesty or  
13 veracity or their opposites."

14 Two sets of statutes govern the admissibility of character  
15 evidence: Evidence Code sections 786-790 preclude the introduction of  
16 certain types of evidence to attack or support a witness's truth or  
17 veracity while Evidence Code sections 1101-1103 preclude the  
18 introduction of various types of evidence to prove conduct. (**People**  
19 **vs. Harris** (1989) 47 Cal.3d 1047, 1081.)

20 In June of 1982 the electorate passed Proposition 8, the "Truth  
21 in Evidence" Proposition which added section 28(d) to the California  
22 Constitution. This section provides in pertinent part:

23 "Except as provided by statute hereafter enacted by a two-  
24 thirds vote of the membership in each house of the  
25 Legislature, relevant evidence shall not be excluded in any  
26 criminal proceeding...Nothing in this section shall affect  
any existing statutory rule of evidence relating to  
privilege or hearsay, or Evidence Code Sections 352, 782 or  
1103."

27 **Harris** holds that Proposition 8 effectively repealed Evidence  
28 Code sections 786-790 in criminal cases. (47 Cal.3d at p. 1081.)

1 (Also see **People vs. Taylor** (1986) 180 Cal.App.3d 622, 632  
2 [Proposition 8 had repealed Evidence Code section 790]; **People vs.**  
3 **Adams** (1988) 198 Cal.App.3d 10 [Evidence Code section 787 is no longer  
4 valid in criminal cases in the post-Proposition 8 world].) (If  
5 applicable to your case, add the following. The admissibility of the  
6 good character of a witness no longer depends upon the prior  
7 introduction of evidence of bad character. (**Taylor, supra.**))

8 **III.**

9 **EVIDENCE CODE SECTIONS 1101 AND 1103**  
10 **SURVIVE PROPOSITION 8.**

11 By the express terms of Proposition 8 quoted above, "section  
12 28(d) supersedes all California restrictions on the admission of  
13 relevant evidence except those preserved or permitted by the express  
14 words of section 28(d) itself." (**People vs. Wheeler** (1992) 4 Cal.4th  
15 284 291.) Those sections which Proposition 8 specifies as remaining  
16 in force in a criminal proceeding include Evidence Code sections 352,  
17 782, 1103 and any statute subsequently enacted by a two-thirds vote of  
18 the legislature.

19 Thus, Evidence Code section 1103, which deals with the allowance  
20 and exclusion of certain character evidence of a crime victim, is  
21 expressly preserved as an exception to Proposition 8. Evidence Code  
22 section 1101 also continues as a viable exception to Proposition 8  
23 because it was reenacted by the requisite majority of the Legislature  
24 in 1986. (**People vs. Ewoldt** (1994) 7 Cal.4th 380, 390-393.)

25 **IV.**

26 **THE LAW APPLICABLE IN CRIMINAL CASES TO**  
27 **CHARACTER EVIDENCE IS FOUND IN**  
28 **EVIDENCE CODE SECTION 1101 ET. SEQ.**

**A.**

1 **THE LAW**

2 "§1101. Evidence of character to prove conduct  
3 (a) Except as provided in this section and in Sections 1102,  
4 1103, 1108, and 1109, evidence of a person's character or  
5 trait of his or her character (whether in the form of an  
6 opinion, evidence of reputation, or evidence of specific  
7 instances of his or her conduct) is inadmissible when  
8 offered to prove his or her conduct on a specified occasion.  
9 (b) Nothing in this section prohibits the admission of  
10 evidence that a person committed a crime, civil wrong, or  
11 other act when relevant to prove some fact (such as motive,  
12 opportunity, intent, preparation, plan, knowledge, identity,  
13 absence of mistake or accident, or whether a defendant in a  
14 prosecution for an unlawful sexual act or attempted unlawful  
15 sexual act did not reasonably and in good faith believe that  
16 the victim consented) other than his or her disposition to  
17 commit such an act.  
18 (c) Nothing in this section affects the admissibility of  
19 evidence offered to support or attack the credibility of a  
20 witness."

21 "1103(a) In a criminal action, evidence of the character  
22 or a trait of character (in the form of opinion, evidence  
23 of reputation, or evidence of specific instances of  
24 conduct) of the victim of the crime for which the  
25 defendant is being prosecuted is not made inadmissible  
26 by Section 1101 if the evidence is: (1) Offered by the  
27 defendant to prove conduct of the victim in conformity  
28 with the character or trait of character. (2) Offered  
by the prosecution to rebut evidence adduced by the  
defendant under paragraph (1)."

**B.**

**DISCUSSION**

Character is not admissible in the form of opinion, reputation or  
specific acts, and is not admissible generally to prove or disprove a  
witness's conduct on a specific occasion. (**Evidence Code section**  
**1101**) Contained within that section are specific and limited  
exceptions to this basic rule. One such exception is **Evidence Code**  
**section 1103**, which allows a defendant in a criminal action to offer  
evidence in the form of opinion, reputation or specific acts of  
conduct of the victim to prove conformity with the character trait.  
It further allows the prosecution to offer rebuttal evidence as to

1 that character trait. If a defendant offers such evidence, the  
2 prosecutor is then authorized to offer rebuttal evidence respecting  
3 that character trait. (**People vs. Walkey** (1986) 177 Cal.App.3d 268.)

#### 4 **What is a Character Trait?**

5 A person's character or character trait is an emotional, mental  
6 or personality fact constituting a disposition or propensity to engage  
7 in a certain type of conduct. Jefferson, Benchbook 3<sup>rd</sup> Edition Vol. 2  
8 Section 33.1. An example would be a person's character trait for  
9 truth or veracity.

#### 10 **How may a character trait be shown?**

11 Section 1103 delineates the methods for a defendant to show a  
12 character trait. The first is by opinion evidence, the second is by  
13 evidence of the victim's reputation, the third is by specific  
14 instances of conduct. (**People vs. Franklin (1994) 25 Cal.App.4th 328,**  
15 **355** [victim's prior false accusation of molest admissible per Evidence  
16 Code section 1103(a)(1), but harmless error, also see **Franklin vs.**  
17 **Henry (1997) 122 F.3d 1270** [error in excluding victim's prior false  
18 accusation of molest in previously cited **Franklin** case required  
19 reversal]; **People vs. Burrell-Hart (1987) 192 Cal.App.3d 593** [prior  
20 false claim of rape admissible as a specific instance of conduct  
21 tending to disprove truthfulness of complainant's testimony].)  
22 Witnesses may testify about their opinion of a person's truthfulness  
23 or lack thereof, or the reputation the person has in the community for  
24 truthfulness. (**People vs. McAlpin** (1991) 53 Cal.3d 1289, 1304; **People**  
25 **vs. White** (1971) 18 Cal.App.3d 44, 48.)

#### 26 **Who may introduce evidence of a victim's character trait?**

27 The Defendant may introduce evidence of a victim's character  
28 trait. The prosecution may only offer evidence in the form of

1 opinion, reputation, or specific acts to rebut the evidence adduced by  
2 the Defendant.

3

4 v

5 **DEFENDANT TO INTRODUCE SPECIFIC ACTS**

6 The complaining witness, by his own previous admission at the  
7 preliminary examination, has indicated he engaged in forgery and  
8 misdemeanor robbery. He has also admitted that he took the defendant's  
9 car without the defendant's permission.

10 Forgery and robbery are clearly two crimes of moral turpitude and  
11 a prior felony conviction involving a crime of moral turpitude may be  
12 used to impeach a witness in a criminal proceeding, subject to a  
13 **Evidence Code section 352** balancing test. **People v. Castro** (1985) 38  
14 Cal.3d 301, 306 211 Cal.Rptr. 719, 696 P.2d 111.

15 In **People v. Parrish** (1985) 170 Cal.App.3d 336, 349, the Fifth  
16 District Court of Appeals held that forgery is a crime of moral  
17 turpitude:

18 Clearly, forgery involves elements that go to honesty and  
19 truthfulness. In our view, all priors which necessarily involve  
20 dishonesty under the pre-Castro standards ipso facto involve  
21 moral turpitude under Castro. ( **People v. Castro**, supra., 38  
22 Cal.3d at pp. 315-316.) We construe Castro by necessary  
23 implication to so hold.

24 In **People v. Rodriguez**, (1985) 177 Cal.App.3d 174, 177-178, the  
25 Fifth District Court of Appeals held that robbery was a crime of moral  
26 turpitude:

27 "Moral turpitude" means a general "readiness to do evil." ( *Id.*,  
28 at p. 314.) The determination of whether a given felony involves  
"moral turpitude" is not a matter of extrinsic proof. Rather, "a  
witness' prior conviction should only be admissible for  
impeachment if the least adjudicated elements of the conviction  
necessarily involve moral turpitude." ( *Id.*, at p. 317.)

1  
2 Once it is determined the prior felony involves moral turpitude,  
3 the trial court must affirmatively show on the record that it did  
4 in fact weigh prejudice against probative value. ( People v.  
5 Green (1980) 27 Cal.3d 1, 25 [164 Cal.Rptr. 1, 609 P.2d 468].) If  
6 the trial court fails to exercise its discretion, error occurs.  
7 Appellate courts will then reverse only if the record discloses  
8 that it is reasonably probable that a result more favorable to  
9 appellant would have occurred absent the error. ( People v.  
10 Castro, supra., 38 Cal.3d at p. 319, citing §Cal. Const., art.  
11 VI, 13; People v. Watson, supra., 46 Cal.2d at p. 836.)

12  
13 The threshold question is whether the prior felonies in this case  
14 necessarily involve moral turpitude. Since robbery and burglary  
15 each necessarily involve a specific intention to commit a theft,  
16 or in the case of burglary, a theft or a felony within a  
17 protected structure, each involves elements of dishonesty and a  
18 readiness to do evil. Several post-Castro opinions have so held.  
19 ( People v. Boyd (1985) 167 Cal.App.3d 36, 44 [212 Cal.Rptr. 873]  
20 [burglary]; People v. Hunt (1985) 169 Cal.App.3d 668, 675 [215  
21 Cal.Rptr. 429] [burglary]; People v. Brown (1985) 169 Cal.App.3d  
22 800, 805 [215 Cal.Rptr. 494] [robbery]; People v. Stewart (1985)  
23 171 Cal.App.3d 59, 66 [215 Cal.Rptr. 716] [robbery].)

24 Misdemeanor **People v. Wheeler** (1992) 4 Cal.4th 284,, 841  
25 P.2d 938, 14 Cal.Rptr. 2d 418, at pg. 295 We therefore conclude  
26 that if past criminal conduct amounting to a misdemeanor has some  
27 logical bearing upon the veracity of a witness in a criminal  
28 proceeding, that conduct is admissible, subject to trial court  
discretion, as "relevant" evidence under section 28(d).

29 The voters have expressly removed most statutory  
30 restrictions on the admission of relevant credibility evidence in  
31 criminal cases, including the rule that felony convictions are  
32 the only form of conduct evidence admissible for impeachment.  
33 Hence, they have decreed at the least that in proper cases,  
34 nonfelony conduct involving moral turpitude should be admissible  
35 to impeach a criminal witness.

36  
37 Hearsay pg. 300 FN14. Our holding is a narrow one, confined  
38 to the specific issue whether under current law a misdemeanor

1 conviction is admissible as direct evidence of criminal conduct.  
2 Nothing in the hearsay rule precludes proof of impeaching  
3 misdemeanor misconduct by other, more direct means, including a  
4 witness's admission on direct or cross-examination that he or she  
5 committed such conduct.

6

7

8 Several post-Castro cases have also held that the felony of automobile  
9 theft necessarily involves moral turpitude. [FN9] Since attempted  
10 automobile theft requires a specific intent to steal and a direct but  
11 ineffectual act done toward its commission (§ 664; Witkin, Cal. Crimes  
12 (1963) §§ 93, 94, pp. 90-91), it follows that the "least adjudicated  
13 elements" of the crime of attempted automobile theft also necessarily  
14 involves moral turpitude.

15

16 Juvenile

17

18

19

20 **CONCLUSION**

21 Based on the foregoing, Defendant requests (insert what ruling  
22 you want from the trial court, which will be fact specific to your  
23 case.)

24 Dated:

Respectfully submitted,

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26

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28

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Attorney for Defendant