NO. 18-____

In the Supreme Court of the United States

JEREMY J. GODWIN,

Petitioner,

v.

DAVID DAVEY, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARVIN H. WEISS, ESQ.
COUNSEL OF RECORD
74075 EL PASEO NO. A 15
PALM DESERT, CA 92260
(760) 340-2500
MHWESQ@ME.COM

DAVID D. L. HORTON, ESQ.
DAVID D. L. HORTON, ESQ. & ASSOCIATES
777 E. TAHQUITZ CANYON WAY
SUITE 200
PALM SPRINGS, CA 92262
(702) 364-5815
DAVID@ATTORNEYPALMSPRINGS.COM

APRIL 29, 2019 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Prior to a second trial on molestation charges involving his daughter, Petitioner offered to stipulate to the existence of a 1998 sex offense also involving his daughter, but requested that the court follow the previous trial court's ruling and exclude evidence of the facts underlying the conviction because they were unduly remote, highly inflammatory, and more prejudicial than probative. The trial court rejected Petitioner's request, finding the evidence was highly relevant to show the defendant had a propensity to molest his daughter and was not unduly remote or prejudicial. In addition, the police detective twice testified that Petitioner fit the "profile" of a child molester. Denying the defense motion for mistrial, the trial judge instructed the jury to disregard and struck the statement from the record.

The Federal District Judge determined under 28.U.S.C. § 2254 that relief was unavailable to the defendant because the California Appellate Court's decision upholding the conviction was not contrary to or did not involve an unreasonable application of clearly established Federal law, as determined by the Supreme Court. The District Judge also denied the Petitioner a Certificate of Appeal. Upon review, the Ninth Circuit did the same.

THE QUESTION PRESENTED IS:

Was the decision of the Ninth Circuit to deny a Certificate of Appeal pursuant to 28 U.S.C. § 2253(c) under the standards set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Slack v. McDaniel*, 529 U.S. 473 (2000) unreasonable because 1) the defendant made

a substantial showing that he was denied his constitutional right to a fair trial under the Fifth and Fourteenth Amendments, and 2) the Federal District Judge incorrectly ruled that the state court's decision allowing details of the prior sex offense into evidence was not contrary to or did not involve an unreasonable application of clearly established Supreme Court precedent under 28 U.S.C. § 2254

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Continued

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

JUDICIAL RULES

OTHER AUTHORITIES

OPINIONS BELOW

Petitioner Jeremy J. Godwin was convicted in Imperial County of two counts of aggravated sexual assault on a child, Cal. Penal Code § 269(a)(4); four counts of forcible lewd acts upon a child, Cal. Penal Code § 288(b)(1)), and one count of child molest with a prior conviction, Cal. Penal Code § 647.6(a)(1). Godwin was convicted of committing a lewd act upon a child, Cal. Penal Code § 667.51 nine years earlier. On November 1, 2013, the Imperial County Superior Court, of California, case JCF25781, sentenced Godwin to prison for a total term of 334 years to life.

The California Court of Appeal on November 1, 2013, affirmed the conviction. Direct review to the California Supreme Court was denied without comment on August 26, 2015.

Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 in the Southern District of California challenging his convictions raising seven claims for relief asserting, *inter alia*, violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights.

The United States Magistrate reviewing the matter filed her Report and Recommendations under 28 U.S.C. § 636(b)(1) on November 22, 2017, recommending the District Court deny the Writ of Habeas Corpus.

On February 16, 2018, the United States District Court for the Southern District of California approved the Report and Recommendations, denying the Petition

for Writ of Habeas Corpus and a Certificate of Appealability.

By Order filed on January 28, 2019, the United States Court of Appeals for the Ninth Circuit denied Petitioner a Certificate of Appeal.

JURISDICTION

Jurisdiction to review the Denial of the Certificate of Appeal is conferred upon this Court by 28 U.S.C. § 1254. *Hohn v. United States*, 524 U.S. 236 (1998). The order of the United States Court of Appeals for the Ninth Circuit was entered on January 28, 2019. This petition follows within 90 days. 28 U.S.C. § 2101(c); S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional Provisions

U.S. Const. amend. XIV

"No state shall . . . deprive any person of life, liberty, or property, without Due Process of law."

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be

deprived of life, liberty, or property, without Due Process of law . . . .

B. Statutory Provisions

28 U.S.C. § 2253(c)(2)

A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ."

Cal. Evid. Code § 1101

(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, 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.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some

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 or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Cal. Evid. Code § 1108

(a) In a criminal action in which 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 Section 1101, if the evidence is not inadmissible pursuant to Section 352.

Cal. Evid. Code § 352

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

STATEMENT OF THE CASE

The admission of facts, including the details of a confession, pertaining to a remote prior molestation pursuant to California Evidence Code sections 1108

and 352 through a detective who testified that the defendant fit the profile of a child molester violated petitioner's Fifth and Fourteenth Amendment Due Process rights to a fair trial.

A. The First Trial

Petitioner's first trial ended with an acquittal on three counts, and a hung jury on the remaining charges. The primary difference between the first trial and the second, which resulted in quick verdicts on all counts, was the admission of testimony describing in detail the circumstances of Petitioner's prior conviction, which included a confession. App.43a. In the first trial, only the fact of a prior conviction was presented to the jury. App.111a. The victim in the prior incidents, also the complaining witness in the instant case, had no recollection of the previous incidents which occurred when she was five. At the time of trial, she was 20. App.98a.

B. The Evidence of Defendant's Prior Conviction-The Trial Court

The California Supreme Court has held that Evidence Code section 1108 generally is saved from unconstitutionality by "the trial court's discretion to exclude propensity evidence under section 352." *People v. Falsetta*, 21 Cal.4th 903, 917 (1999). Thus, the potential exclusion of evidence under Evidence Code section 352 is the "safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial." *People v. Fitch*, 55 Cal.App.4th 172, 183 (1997).

Although the court in *Falsetta* expressed confidence in the Evidence Code section 352 "safeguard," it also suggested that the trial court exercise discretion carefully by considering "the availability of less prejudicial alternatives to its outright admission, such as . . . excluding irrelevant though inflammatory details surrounding the offense." *Falsetta* at p.916, citing *People v. Balcom*, 7 Cal.4th 414 (1994). The trial court took such consideration in Petitioner's first trial, where the evidence was limited to the fact of the prior conviction. In his second trial, under a different judge, the floodgates were opened, and all details were presented without limitation. App.113a-115a.

The Judge, in a pre-trial hearing, ran the California Evidence Code section 352 analysis. His comments are summarized from the Magistrate's Report and Recommendations. App.44a-46a.

> "I don't see anything here that would be unduly prejudicial because the only reason it is being admitted is to show that he had this propensity or proclivity to touch the daughter in a sexual manner, and he admitted that".
>
> "I think the best way to prove it is the defendant—basically, he's telling the detective . . . what he did . . . in his own words. So, I don't think there's any question that that is the most accurate way of proving it is to let the defendant speak for himself."
>
> "And even though it is very harmful to the defense case, that is why it is admissible. And I think under the 352 analysis, I can't consider the fact that it just hurts the de-

> fense case. I have to look at undue prejudice, and I am not finding any significant undue prejudice in this case, and I don't think that the admission of the fact that he was convicted of it really wipes away the need for that type of evidence because the admission or the conviction doesn't really give details."
>
> "It just admits that he committed that crime. It could be a one-time touching. It could be less than that. So, my decision . . . is to allow that evidence to come in . . . using the defendant's words. In the probation report, he says things like "I couldn't help myself." And the reality is—and he says some similar things in the interview with Detective Crisp . . . he is saying that he has this propensity. He is admitting his propensity with reference to, at least, her. And that really makes it extremely probative, unfortunately, for your client. But that is the reality of it. And there's nothing unduly prejudicial about that . . . But I think I have to let it in, given the case law and the statutory law that requires it. App.46a."

C. The Profile Evidence

During his testimony the detective described, in graphic terms the statements made to him by the Petitioner over fifteen years earlier[1]. Also, the detect-

---

[1] App.12a; App.49a-52a; The detective recounted that Petitioner told him about "rubbing and caressing . . . down there", App.145a; that Petitioner could not "fight the urge", App.145a; that he would rub and caress and "place his p**** between J*****'s thighs",

ive twice stated the Petitioner fit the "profile" of a sexual predator and child molester." App.50a. The second time was in clear defiance of the court's ruling, as the detective stated, "I want to use the words that I used earlier that were thrown out, but he fit a profile". App.50a. The defense moved for a Mistrial and the trial court denied the request finding that the stricken comments did not affect the fairness of the trial. App.50a-51a; App.143a-144a.

D. The Defense

The defense presented testimony from several witnesses (including a sheriff's deputy, a social worker, and defendant's mother, brother, and girlfriend) who had contact with Doe during her childhood. These witnesses variously testified that Doe never mentioned, and on occasion denied, any further molestation after defendant's 1998 conviction, and they did not observe anything to suggest the defendant was continuing to molest Doe. The defense also called a psychiatrist who testified that unsubstantiated reports of child sexual abuse

---

App.147a; that he didn't need lubrication because "there was a lot of give in the thighs" and "it might cause his p**** to going somewhere where it shouldn't go", App.147a; that he molested her in the bathroom on the linoleum because it was easier to clean up "his ejaculations", App.147a; that he was prevented from doing it during his wife's pregnancy when she was home because "she was sick all the time". App.149a; that Petitioner could not resist his urges, App.149a; that Petitioner molested his daughter 4 times between June and July 1997. App.150a; that he inserted his pinky finger in her rectum using lotion, App.153a; that he would move away from her when he got close to ejaculating App.153a; that J**** referred to her "coochie" and his "Whaa-Whaa" and she wanted him to put it "into her coochie". App.154a-155a.

are more likely to occur when there are child custody disputes as there were between the defendant and Doe's mother. App.104a-105a.

E. The Review of Defendant's Prior Conviction; The Appeals Court

Petitioner argued on appeal that the trial court deprived him of his Due Process right to a fair trial by failing to limit the evidence to the fact of the prior conviction as in his first trial. App.111a. The Court of Appeal disagreed, with defendant's claim that "the details of his prior sex offense conviction were highly inflammatory; of stronger evidentiary weight than the evidence of the current charges; unduly remote, and likely to cause the jury to want to punish him for the prior offense . . . " App.113a-114a.

The prosecution provided a detailed description of defendant's recorded statements admitting to molestation, describing how it occurred, and explaining the difficulty the defendant had in controlling his sexual urges towards his daughter through a retired Detective App.104a. The appeals court found that "if the jury was merely told that the defendant had previously been convicted of molesting his daughter, without the details concerning the extent of the molestation and defendant's overpowering pedophilic feelings towards his daughter, it would have been deprived of compelling evidence that supported the prosecution's charges that the molestation resumed . . . ". App.114a. The court explained that "undue prejudice does not exist merely because highly probative evidence is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of

the issues based on extraneous factors.". App.114a-115a. Notwithstanding that the events supporting the crime were 14 years past when presented to the jury, the appeals court decided that "the evidence was not unduly remote". App.115a.

F. The Federal Magistrate's Report and Recommendation

With respect to the issue of propensity, the Magistrate characterized the Federal Court's role as being "limited to determining whether the admission of evidence rendered the trial so fundamentally unfair as to violate due process". App.47a. She then determined that "no clearly established Supreme Court precedent has held that admission of propensity evidence violates the Constitution" positing that "the Supreme Court expressly left the issue open regarding whether the admission of propensity evidence constitutes a Due Process Clause violation." *Estelle*, 502 U.S. 62, 75 n.5. App.43a. She did not address whether the admission of the details of the prior conviction, independent of the conviction itself, rendered the trial so fundamentally unfair that it violated due process, ignoring that portion of *Estelle* that spoke to evidence that "so infused the trial with unfairness as to deny Due Process of law". *Id.* at 75.

With respect to the detective's characterization of the defendant as fitting the profile of a child molester, the Magistrate found that the instruction to the jury to disregard the statement was enough protection of the defendant's fair trial right to overcome the prejudice from the inadmissible statements by the detective. The Magistrate observed that "there are circumstances in which the potential for prejudice is so great that

the practical and human limitations of the jury system cannot be ignored" but then decided the detective's statement did not rise to the level contemplated in Supreme Court precedent. App.57a-59a.

G. The Federal District Judge's Review of Objections to the Magistrates R&R

The Federal District Judge adopted the Report and Recommendations of the Magistrate finding that the state court's decision with respect to the admission of the details of the prior conviction "forecloses the conclusion that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law" because *Estelle* "reserved the question" of whether propensity evidence violated Due Process. App.11a. The judge ignored the language in *Estelle* that spoke to evidence that "so infused the trial with unfairness as to deny Due Process of law". *Id.* at 75.

With respect to the detective's characterization that defendant "fit the profile" of a child molester, the Court merely found that "the general rule remains that juries are presumed to follow their instructions" and that citation of *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 523 U.S. 185 (1997) were inapposite for the proposition that jurors sometimes cannot ignore the prejudice that looms through the incantation of a jury instruction. App.14a.

Finally, the Federal District Judge denied the Defendant his request for a Certificate of Appeal finding that "the Petitioner failed to make a substantial showing of the denial of a federal constitutional right" and that reasonable jurists could not find debatable

the Court's assessment of the claims raised by the Petitioner. App.3/13.

REASONS FOR GRANTING THE WRIT

I. SUMMARY

This Court should GRANT the writ because jurists of reason could conclude under the standards evoked in *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 and *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) that it is well-settled that a state prisoner can obtain independent federal review of the admission of bad act testimony by alleging violations of Due Process. (*See Henry v. Estelle*, (9th Cir. 1993) 993 F.2d 1423, 1427; *Dowling v. United States*, (1990) 493 U.S. 342, 353. It is also well settled that there is a class of U.S. Supreme Court cases, recognized in *Estelle v. McGuire*, 502 U.S. 62 (and others cited herein), that give rise to the danger that some types of evidence can so excite the passions that Due Process is threatened because of a fundamental unfairness imposed by the admitted evidence.

In this case, the wholesale admission of the details of the prior offense of sexual assault against the same victim, who was also the defendant's daughter, under California Evidence Code 1108, so infected the fundamental fairness of the proceedings against the defendant that he was deprived of a fair trial. The details of the sex crime, independent of the fact of conviction, gave rise to substantial prejudice that far outweighed the probative value of the detail sur-

rounding the conviction, resulting in a fundamentally unfair trial which no amount of parsing under California Evidence Code 352 could cure.

For these reasons the decision of the Federal District Court and the Ninth Circuit denying a Certificate of Appeal was contrary to the standards set forth in *Slack v. McDaniel* and *Miller-El v. Cockrell*, because jurists of reason could fairly debate whether the petition could have been resolved differently and that relying solely on note 5 in *Estelle* while ignoring other Supreme Court precedent involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States.

II. PROTECTING DEFENDANT'S AGAINST THE IMPACT OF UNDULY PREJUDICIAL PROPENSITY EVIDENCE IS WELL ESTABLISHED IN SUPREME COURT PRECEDENT

A. *Estelle v. Mcguire* Is Not a Bar to Habeas Relief

The Federal District Judge observed that a defendant may not "transform a state-law issue into a federal one merely by asserting a violation of Due Process" but also qualified that general proscription by stating that "the admission of certain evidence may entitle a petitioner to relief only where the evidence so infected the entire trial that the resulting conviction violates Due Process." (citing *Estelle v. McGuire*, 502 U.S. 62 (1991).) App.11a.

Having recited that mantra the District Judge determined that the state court's determination of no Due Process violation cannot be an "unreasonable application of clearly established law as set forth by the Supreme Court", citing *Estelle v. McGuire*, 503 U.S.

at 72 again. App.11a-12a. But it is respectfully suggested that *Estelle v. McGuire* is not a bar to a determination on the merits in this case because it is at least debatable by jurists of reason that introducing evidence of the prior sex crime, along with all the descriptive details, falls squarely into that narrow specie of cases that rise to the level of infusing the trial with an overwhelming prejudice, and that to decide otherwise is "unreasonable" in this instance. *Estelle v. McGuire*, 503 U.S. at 75; *Miller-El v. Cockrell*, 537 U.S. 322, 327. (whether "jurists of reason could disagree with the district court's resolution of his constitutional claims or . . . could conclude the issues presented are adequate to deserve encouragement to proceed further.")

In a little cited statement in *Estelle v. McGuire* the Supreme Court has affirmed that "it is well established that the instruction (allowing into evidence a prior conviction in support of propensity) may not be judged in artificial isolation," but must be considered in the context of the instructions as a whole and the trial record. *Id.* at 502 U.S. at 72, citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). [I]t must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some [constitutional right]" *Estelle v. McGuire*, 502 U.S. at 72.

In *People v. Gibson*, (1976) 56 Cal.App.3d 119, the court analyzed prejudice resulting from the admission of uncharged crimes concluding: "It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its

limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals . . . We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner."

B. The Court's Historical Distrust of Propensity Evidence

The prohibition against propensity evidence can be traced back to the era before the independence of our nation. *See Marshall v. Lonberger*, 459 U.S. 422, 448 n.1 (1983) (Stevens, J., dissenting) ("The common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime.")

In one Massachusetts case, the state attempted to offer evidence of the defendant's prior acts of lasciviousness to bolster its allegations that the defendant was operating a bawdy house. The highest court of Massachusetts excluded the evidence. *Rex v. Doaks*, Quincy's Mass. 90, 90-91 (Mass. Super. Ct. 1763).

An early United States Supreme Court case explained that the common law rejects prior bad acts as evidence because [p]roof of them only tended to prejudice the defendants with the jurors . . . However, depraved in character, and however full of crime past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged. *Boyd v. United States*, 142 U.S. 450, 458 (1892).

The Court has explained that Courts that follow the common law tradition have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of guilt. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. *Michelson v. United States*, 335 U.S. 469, 475-476 (1948).

Similarly, in *Old Chief v. United States*, 519 U.S. 172, 191 (1997), the Supreme Court held a trial court abused its discretion by admitting the name and factual circumstances of a previous conviction, even though a prior felony conviction was an element of the crime charged. The court, citing *Michelson*, held the evidence was unfairly prejudicial, explaining, "[t]here is, accordingly, no question that propensity would be an 'improper basis' for conviction." *Old Chief*, 519 U.S. at 181-82 (1997).

This Court has recognized that admitting propensity evidence "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *See Dowling v. United States*, 493 U.S. 342, 353 (1990). The question, however, is whether it is acceptable to deal with the potential for abuse through non-constitutional sources like the Federal Rules of Evidence, (or in the California Evidence Code) or whether the introduction of this type of evidence is so extremely unfair that its admission violates "fundamental conceptions

of justice." *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

A state evidence code provision does not violate the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996). "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Id.* at 43.

The Ninth Circuit Court of Appeals stated that the "rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence" that has persisted since at least 1648 and by 1993 had been codified by 38 states and adopted through case law in the remaining 12 states and the District of Columbia. *McKinney v. Rees*, 993 F.2d 1378, 1381 and n.2 (9th Cir. 1993). State courts have pointed to the fundamental principle excluding propensity evidence: "'there are few principles of American criminal jurisprudence more universally accepted than the rule that evidence which tends to show that the accused committed another crime independent of that for which he is on trial, even one of the same type, is inadmissible.'" *Hurst v. State*, 400 Md. 397, 929 A.2d 157, 162 (2007).

The historical aversion to propensity evidence was codified as California Evidence Code section 1101(a), which provides that evidence of a person's character, otherwise known as propensity evidence, is inadmissible to prove conduct in conformity with that character trait. *People v. Villatoro*, 281 P.3d 390, 402-403 (Cal. 2012). The California Supreme Court has noted

that the rule "has been enforced throughout our nation's history." *Id.* at 402; citing *Boyd v. United States*, 142 U.S. 450, 458 (1892) (admission of defendant's prior crimes was prejudicial error).

Here, the Petitioner's grievance is the "wholesale admission" of the details of the previous crime iterated by the original investigating officer who twice opined that the defendant "fit the profile of a child molester". App.31a.

Tying these threads together, the decision of the Federal District Judge that relies solely on note 5 in *Estelle*, ignores all the other Supreme Court precedent that guards against circumstances in which the potential for prejudice is so great that the practical and human limitations of the jury system cannot be ignored and that, as applied in this case, the admission of the perverse details of the previous offense, as opposed to the fact of the conviction itself, was unnecessary and so infused the trial with unfairness as to deny Due Process of law. Such unnecessary blandishment of the government's case against the defendant surely weighs too much with the jury and risk over persuasion to the point that they prejudge one with a bad general record and deny him a fair opportunity to defend against the particular charge, making the trial fundamentally unfair.

III. THE ADMISSION OF THE PRIOR SEXUAL MISCONDUCT EVIDENCE VIOLATED PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

"In the event that evidence [as in the instant case] is introduced that is so unduly prejudicial that

it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne v. Tennessee*, 501 U.S. 808 (1991).

The prior sexual misconduct evidence was admitted under Evidence Code sections 1101, subdivision (b) and Evidence Code section 1108 to show Petitioner's propensity to commit sexual acts against his daughter. The evidence was more probative than prejudicial under Evidence Code section 352 according to the trial judge. App.43a-46a. The general presumption against the admission of propensity evidence is turned on its head under Evidence Code section 1108 when the charges involve a sex crime, except where "its admission could result in a fundamentally unfair trial". App.10a.

The California Court of Appeal rejected the Defendant's argument that "the details of his prior sex offense conviction were highly inflammatory; of stronger evidentiary weight than the evidence of the current charges; unduly remote; and unlikely to cause the jury to want to punish him for the prior offense . . . ". App.113a. The court so ruled despite lip service to the principle that "evidence should not be admitted in cases where its admission would result in a fundamentally unfair trial". App.112a.

California Evidence Code section 1108 allows the admission of evidence of other sex offenses subject to the trial court's discretion to exclude it under California Evidence Code 352 which nevertheless cautions that the evidence should not be admitted if it will "create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury". App.44a.

The California Appeals Court explains the safeguards that must be weighed as the "nature, relevance, and possible remoteness, the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission". App.113a.

The trial judge remarked that the evidence was "extremely probative" "unfortunate" for the defendant, but not "unduly prejudicial". App.46a. The Appeals Court concluded the judge's discretion was not "arbitrary, capricious, or patently absurd"[2]. App.113a. It

---

[2] Although there are no published federal opinions addressing the constitutionality of California Evidence Code § 1108, the Ninth Circuit (along with other federal circuits) has held that Federal Rules of Evidence 414, which is similar to section 1108, does not violate due process. *United States v. LeMay*, 260 F.3d 1018, 1027 (2001). Federal Rules of Evidence 414 provides that, "[i]n a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense . . . of child molestation is admissible . . . " Fed. R. Evid. 414(a); *LeMay*, 260 F.3d at 1024-1025. The operation of Federal Rules of Evidence 414 is subject to the requirements of Federal Rules of Evidence 403, which provides that relevant evidence be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403; *LeMay*, 260 F.3d at 1026, 1028. The Ninth Circuit noted that the admission of such propensity evidence "can amount to a constitutional violation only if its prejudicial effect far outweighs its probative value" and "only sometimes violate the constitutional right to a fair trial, if it is of no relevance, or if its potential for prejudice far outweighs what little relevance it might have." *Id.* at 1026-27. In *United States v Enjady*, 134 F.3d 1427 (10th Cir. 1998) the Tenth Circuit commented on the due process arguments against Federal Rule of Evidence 413: (1) the

is not clear the judge considered whether there was "substantial danger" of undue prejudice, or the risk of "misleading" the jury, while he concluded there was no undue prejudice.

In a confused sort of logic the California courts, in this case, have determined that in circumstances where a defendant is charged with the horrific crime of molesting his young daughter and the details of his confession to a previous crime are expounded to the jury, he is not likely to have his fundamental right to a fair trial impugned. Can one think of a more likely set of facts to horrify a jury into thinking, what kind of man is this? No instruction is likely to overcome the visceral disdain that the detailed confession would universally evoke.

IV. THE DETECTIVE'S TESTIMONY THAT DEFENDANT FIT THE PROFILE OF A CHILD MOLESTER EXACERBATED THE INHERENT PREJUDICE PROVIDED BY THE ADMISSION OF THE DETAILS OF DEFENDANT'S CONFESSION

Twice the testifying detective offered his inexpert opinion that defendant fit the profile of a child molester. App.31a. The comments about fitting a profile would not have been admissible even through expert testimony. *People v. Robbie*, 92 Cal.App.4th 1075, 1084

---

ban against propensity evidence has been honored by the courts for a long period of time, (2) such evidence creates a presumption of guilt undermining the prosecution's burden, and (3) the evidence licenses the jury to punish a defendant for past acts which erodes the fundamental presumption of innocence. *Enjady*, 134 F.3d at 1432 (citing *Hurtado v. California*, 110 U.S. 516, 528, 4 S.Ct. 111, 117, 28 L.Ed. 232, 236 (1884); *Estelle*, 502 U.S. at 78, 112 S.Ct. at 485, 116 L.Ed.2d at 403.

(2001). For example, "drug courier profiles have been held to be 'inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers . . . . Every defendant has a right to be tried based on the evidence against him or her . . . and drug courier profile evidence is nothing more than the opinion of those officers conducting an investigation.'" (*Robbie* at p.1084, quoting *U.S. v. Beltran-Rio*, 878 F.2d 1208, 1210 (9th Cir. 1989). The *Robbie* court found reversible error in the testimony of a so-called expert with respect to profile evidence.

Similarly, with respect to a "child molester profile," in *People v. McAlpin*, 53 Cal.3d 1289 (1991) the court upheld the admission of an expert's testimony that "there is no profile of a typical child molester." The evidence was properly admitted as "it served to refute a commonly held stereotype." *Robbie* at p.1086, citing *McAlpin*, at p.1303.)

The Court of Appeal did not condone the detective's behavior, App.118a, but found the detective's "passing references to defendant fitting a child molester profile did not undermine the fairness of defendant's trial." *Id.* However, people, including jurors, do commonly believe in the myth of a "typical" child molester, and with the detective's gratuitous comments, they heard all they needed to assume Petitioner's guilt in the current case, arising from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors., violating Petitioner's right to Due Process under the Fifth and Fourteenth Amendment.

The Appeals Court when denying defendant's motion for a mistrial found the instruction to disregard

the detective's remarks about fitting the profile of a child molester enough protection for the defendant remarking that "We presume the jurors followed these repeated admonitions to disregard stricken testimony". App.118a.

This Court recognized in *Krulewitch v. United States*, 336 U.S. 440, 45 (1949), Jackson, J., conc. "the naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.".[3]

What is not clear is why it is presumed jurors are immune from fear and prejudice when it comes to judging a sex offender.[4]

---

[3] The excitement of the passions would be at its apex because it involved a sexual assault against the defendant's five-year-old daughter. "In the law of evidence, which one would expect—from the name—to be very evidence-based, we have an important fiction which we deploy. The fiction is that when jurors are given an instruction that defies common sense, the jurors will nonetheless be both capable of following and willing to follow the instruction as given to them by the judge. Studies have shown that this is truly fiction. In one study, researchers discovered that jurors ignore instructions to consider a criminal defendant's prior convictions only on credibility and not as evidence of guilt, with jurors openly admitting that they did not consider the convictions on the credibility question but did consider the evidence of guilt. The effect was especially strong when the prior conviction was for a crime like that being tried. Colb, Sherry F., *VERDICT, Legal Analysis and Commentary from Judicia*, April 6, 2017.

[4] The United States has witnessed a plethora of anti-sex offender laws reflecting a pervasive fear and prejudice among the public. Even the United States Supreme Court has fed into this when it has remarked that recidivism rates of sex offenders are "frightening and high" approaching 80%. This piece of dicta found in *McKune v. Lile*, 536 U.S. 24, 34, 122 S.Ct. 2017, 153

In *People v. Harris*, 60 Cal.App.4th 730) the court was very concerned that, the information about the priors "increased the danger that the jury might have been inclined to punish defendant for the [other] offenses and increased the likelihood of 'confusing the issues.'" (*People v. Harris*, 60 Cal.App.4th 730, 738-739, citing *People v. Ewoldt*, (1994) 7 Cal.4th 380, 405.) But the Harris court found comfort in California Evidence Code 352 suggesting that by subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create

---

L.Ed.2d 47 (2002), has been debunked as without a foundation, finding its origin in an obscure article in a popular psychology magazine authored by a therapist who was speaking anecdotally. "Most untreated sex offenders released from prison go on to commit more offenses–indeed, as many as 80% do." Freeman-Longo, R., & Wall, R, *Changing a lifetime of sexual crime*, Psychology Today (1986). It has been widely quoted in subsequent lower state and federal court cases and legislators frequently cite it when enacting more restrictive sex offender laws (perhaps influencing the enactment of Evidence Code 1108). In fact, studies suggest that sex offender recidivism is lower than other categories of crime. *See DOES v. Snyder*, 834 F.3d 696 (6th Cir. 2018) (discussing public misconception and fears surrounding sex offender regulation and law noting "sex offenders are widely feared and disdained by the general public". *Id.* at 705. Legislative initiatives since the early 1990s have included sex offender registration, community notification, civil commitment, residence restrictions, enhanced sentencing guidelines, and electronic monitoring. Such laws are popular with lawmakers and their constituents but satisfy the public despite little data supporting the effectiveness of the measures. Levenson, Jill S., *"Public Perceptions about Sex Offenders and Community Protection Policies" The Society for the Psychological Study of Social Issues*, 2007, Page 2.

a substantial danger of undue prejudice, confusion of issues, or misleading the jury. . . . This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence." (*People v. Fitch*, (1997) 55 Cal.App.4th 172, 183 (63 Cal.Rptr.2d 753).

The Court of Appeals, as it is required to do, did not address the fact that the prosecution, in this case, did not need the evidence of prior sexual misconduct by the defendant to prove its case by exploring the availability of less prejudicial alternatives to its outright admission. *People v. Falsetta*, 21 Cal.4th 903, 917 (1999). In contrast, the trial court in the original trial allowed the fact of conviction without the details of the confession. There was ample corroborative evidence, which if believed, would have been plenty to sustain a conviction of the defendant. Jane Doe's mom, her cousin, and her boyfriend all gave supporting evidence. App.27a. The admission of the confession on top of the fact of conviction was a piling on that suffocated any chance for fairness in the trial of this defendant.

"The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Karis*, (1988) 46 Cal.3d 612, 638 [250 Cal.Rptr. 659, 758 P.2d 1189]; *see Vorse v. Sarasy*, (1997)] 53 Cal.App.4th [998,] 1009 [62 Cal.Rptr.2d 164].)" (*People v. Escudero*, (2010) 183 Cal.App.4th 302, 312, 107 Cal.Rptr.3d 758).

Evidence is not inadmissible under section Evidence Code section 352 unless the probative value is

"substantially" outweighed by the probability of a "substantial danger" of undue prejudice or other statutory counterweights. The California Supreme Court has emphasized the word "substantial" in section 352. (*People v. Tran*, (2011) 51 Cal.4th 1040, 1047, 126 Cal.Rptr.3d 65. ("Evidence Code section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect"); *cf. People v. Geier*, (2007) 41 Cal.4th 555, 585, 61 Cal.Rptr.3d 580).

It is undisputed that other, proven crimes have an inflammatory and prejudicial effect on juries. (*People v. Thompson*, (1980) 27 Cal.3d 303, 314.) The prejudicial effect of prior sex crimes is even greater. (*People v. Ewoldt*, 7 Cal.4th 380,404, 27 Cal.Rptr.2d 646 (1994). Prior sex crimes clearly "evokes an emotional bias". It is beyond cavil that the risk of undue prejudice is substantial when details, as opposed to the fact of conviction, are introduced.

There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of the failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. *Bruton v. United States*, 391 U.S. 123, 125 (1968). This is one of those cases.

While the evidence of the prior sex offense may have been admissible pursuant to section Evidence Code section 1108, the details of the defendant's confession should have been excluded pursuant to Evidence Code section 352 because it was highly inflammatory.

V. THE DEFENDANT IS ENTITLED TO A CERTIFICATE OF APPEAL

In *Slack v. McDaniel*, 529 U.S. 473, 482 (2000), this Court held: "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy section 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 482. To that end, *Slack* held that a COA does not require a showing that the appeal will succeed.

Recently in *Welch v. United States*, 578 U.S. ___ (2016) 136 S.Ct. 1257, this principle was iterated anew when this Court granted certiorari to a petitioner who had been denied a COA. The Court decided the COA was erroneously denied and remanded the matter to the Court of Appeals for a decision on the merits of Welch's constitutional claim. Repeating its earlier holdings that a petitioner need not convince the panel he will prevail, Welch states that the standard is met when "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473 (2000).

Obtaining a certificate of appealability "does not require a showing that the appeal will succeed," and "a court of appeals should not decline the application . . . merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336. Any doubt about whether a peti-

tioner is entitled to a Certificate of Appeal is resolved in favor of the request. *Sonner v Johnson*, 161 F.3d 941, 944 (5th Cir. 1998)

Here, on February 16, 2018, the district court adopted the Magistrate-Judge's R&R that the petition should be denied with prejudice and denied Petitioner a COA. The Ninth Circuit then determined in a terse Order that "appellant has not made a substantial showing of the denial of a constitutional right". App. 1a. The Court did so, finding that the introduction did not result in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." App.11a. In so finding the District Court and the Ninth Circuit Court of Appeals ignored clearly established Supreme Court precedent requiring exclusion of such evidence when the probative value of the evidence was substantially outweighed by the risk of prejudice that was apparent. App.112a. This finding was grounded in a narrow interpretation of *Estelle* (while ignoring other Supreme Court precedent) that failed to recognize its underlying principle that this evidence could be excluded when it "so infected the entire trial that the resulting conviction violates Due Process". *Estelle v. McGuire*, 503 U.S. at 72. App.10a, 47a. In making that narrow interpretation of the principles espoused in *Estelle* the District Court's decision was contrary to and involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

When the details of the prior charge, independent of the fact of conviction are admitted, Evidence Code

section 1108 impinges upon the right of a person to a fair trial and equal protection of laws when he is accused of a sexual offense, and Evidence Code section 352 is an inadequate safeguard when the Court admits into evidence the details of the prior offense, in addition to the fact of conviction, which would normally by itself be sufficient to prove propensity without infecting the fairness of the entire trial.

CONCLUSION

A man is charged with a heinous crime; the repeated sexual assault of his young daughter from the age of nine until 14. The case came to trial when she was 20. The problem is that this same man was accused of assaulting the same daughter when she was five. He confessed to that crime, went to jail for a year, attended sex therapy, and returned home.

In the pending trial the government says we want the jury to know about the previous sexual offense against this little girl. And we want them to know the details of the defendant's confession.

It is difficult for a court, when confronted with a prior sex crime, to give a defendant a fair trial. The victim is entitled to justice. The defendant is entitled to due process. The balance is a delicate and nuanced one.

The laws of the State of California say that the prior crime presented to the jury is admissible on the issue of propensity. The judge will instruct the jury that the old crime is not evidence of the new crime.

Most jurors will attempt to follow the court's instructions and convict only upon proof beyond a reasonable doubt. That is the aspiration of the law.

Yet the law recognizes that some prejudices harbored by the most diligent jurors are impossible to overcome. The defendant was not just an accused child molester. He was the father of the little girl.

Society ostracizes the sex offender. They fear him. A sex offender is incorrigible. A sex offender is a repeat offender. A sex offender will always do it again. It is not always true, but that is how it is.

The disclosure of the prior conviction comes with the facts and circumstances surrounding it; all the perverse details coming from the defendant in the form of a transcribed confession; told to the jury by a detective, who tells them his inadmissible opinion that the defendant fit the profile of a child molester. No problem. The jury is admonished to strike from their consideration the detective's articulation of what they all must feel viscerally; how could a father do this to his little girl?

The government's case needed no further excitement of the passions to assist the jury in evaluating the evidence against the defendant. The mother testified about Jane Doe's complaints to her. Doe's boyfriend testified about her revelations to him about her father. A cousin recalled that Doe complained years ago about the assaults. And Jane Doe testified about the new charges. Plenty of evidence, if believed, to convict, for sure.

The defense, which if believed, may have exonerated the defendant, was all but smothered by

overwhelming prejudice against him. Who cares? He is a sex offender. He fit the profile. The nations historical proscription against propensity evidence has been discarded when it comes to sex crimes and fundamental fairness is lost when weighing prejudice and whether it is undue.

Reasonable jurists could disagree about whether a court allowing propensity evidence in the form of a conviction to reach the jury should also give teeth to that portion of the law requiring fairness and avoidance of visceral prejudice, by proscribing the publication of the inflammatory details of the prior crime; avoiding the unfairness that inevitably attaches to a defendant at trial in a case like this.

WHEREAS, for the reasons stated herein, Petitioner respectfully requests this Honorable Court GRANT his petition for Writ of Certiorari and effectuate the issuance of a Certificate of Appeal for a merits-based review of his constitutional claims to the Ninth Circuit.

Respectfully submitted,

MARVIN H. WEISS, ESQ.
COUNSEL OF RECORD
74075 EL PASEO NO. A 15
PALM DESERT, CA 92260
(760) 340-2500
MHWESQ@ME.COM

DAVID D. L. HORTON, ESQ.
DAVID D. L. HORTON, ESQ. &
ASSOCIATES
777 E. TAHQUITZ CANYON WAY
SUITE 200
PALM SPRINGS, CA 92262
(702) 364-5815
DAVID@ATTORNEYPALMSPRINGS.COM

COUNSEL FOR PETITIONER

APRIL 29, 2019