

IN THE SUPREME COURT OF THE UNITED
STATES SUPREME COURT NO. _____

WILLIAM MARTIN CRESHAM,)
Defendant and Petitioner,)
)
)
)
v.)
)
)
THE STATE OF CALIFORNIA,)
Plaintiff and Respondent.)
)
)
)

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF
CALIFORNIA, SECOND DISTRICT, DIVISION EIGHT

PETITION FOR WRIT OF CERTIORARI

ALEX COOLMAN
Attorney at Law
3268 Governor Drive #390
San Diego, CA 92122
coolmana@gmail.com
Tel: (619) 831-7129
Fax: (858) 408-9673

Counsel for Petitioner
William Cresham, Petitioner

Topical Index

Table of Authorities	3
Question Presented.....	6
Petition for a Writ of Certiorari	7
Opinions Below	7
Jurisdiction	7
Relevant Statutory And Constitutional Provisions	7
Statement of the Case.....	8
Argument	10
The admission of prior acts of domestic violence to establish petitioner's propensity to commit such crimes violated his right to due process.	10
Reasons for Granting the Writ.....	20
Conclusion	26
Appendix A — California Court of Appeal Opinion.....	27
Appendix B — California Supreme Court Denial of Petition for Review.....	28

Table of Authorities

Cases

<i>Allen v. State</i> , 945 P.2d 1233, 1237-1238 (Alaska Ct. App. 1997)	16
<i>Cooper v. Oklahoma</i> , 517 U.S.348 (1996).....	21
<i>Dowling v. United States</i> , 496 U.S. 342 (1997).....	11
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991).....	6, 20
<i>Fuzzard v. State</i> , 13 P. 3d 1163 (Alaska Ct. App. 2000)	16
<i>Hampden's Trial</i> , 9 How. St. Tr.1053 (K.B. 1684).....	10
<i>Harrison's Trial</i> , 12 How. St. Tr. 834 (Old Baily 1692)	10
<i>People v. Dabbs</i> (2010) 940 N.E. 2d 1088	19
<i>Michelson v. United States</i> , 335 U.S. 469 (1948)	11
<i>Montana v. Egelhoff</i> , 518 U.S. 37 (1996)	10, 20
<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	11
<i>People v. Alcala</i> (1984) 36 Cal.3d 604.....	15, 26
<i>People v. Brown</i> (2000) 77 Cal.App.4th 1324	19
<i>People v. Cabrera</i> (2007) 152 Cal.App.4th 695	24
<i>People v. Culbert</i> (2013) 218 Cal.App.4th 184	24
<i>People v. Disa</i> (2016) 1 Cal.App.5th 654	23, 24
<i>People v. Escobar</i> (2000) 82 Cal.App.4th 1085.....	19, 24
<i>People v. Falsetta</i> (1999) 21 Cal.4th 903	passim
<i>People v. Harris</i> (1998) 60 Cal.App.4th 727.....	24
<i>People v. Jennings</i> (2000) 81 Cal.App.4th 1301.....	19
<i>People v. Johnson</i> (2010) 185 Cal.App.4th 520	24
<i>People v. Linkenauger</i> (1995) 32 Cal.App.4th 1603.....	24
<i>People v. Molineaux</i> (61 N.E. 286).....	11
<i>People v. Poplar</i> (1999) 70 Cal.App.4th 1129.....	24
<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497	9
<i>People v. Watkins</i> (2012) 491 Mich. 450.....	20
<i>People v. Williams</i> (2008) 159 Cal.App.4th 141	24

<i>Schad v. Arizona</i> , 501 U.S. 624 (1991)	20, 21
<i>Spencer v. Texas</i> , 385 U.S. 554 (1967).....	12
<i>State v. Cox</i> , 781 N.W.2d 757 (Iowa 2010)	13, 14
<i>State v. Ellison</i> , 239 S.W. 3d 603 (Mo. 2007)	14
<i>United States v. Castillo</i> , 140 F.3d 874 (10th Cir. 1998)	11

Constitutional Provisions

Fourteenth Amendment	8, 12, 21, 26
----------------------------	---------------

Statutes

Federal Statutes

28 U.S.C. § 1257(A).....	7
--------------------------	---

California Evidence Code

section 352.....	7, 15, 17
section 1108.....	14, 15, 17, 21
section 1109.....	passim
section 1101.....	7, 14, 17, 23

California Penal Code

section 166, subd. (c)(1)	8
section 245, subd. (a)(4)	8
section 422, subd. (a)	8
section 667, subd. (d)	9
section 667, subds. (b)-(j)	9

Other State Statutes

Illinois Code of Criminal Procedure section 115-7.4.....	19
Iowa Code section 701.11	13
Michigan Code of Criminal Procedure section 768.27b.....	19
Missouri Revised Statutes section 566.025.....	14

Rules

Alaska Rules of Evidence, rule 404(b)(4)	16
Federal Rules of Evidence rule 413(a)	12, 13, 16
Federal Rules of Evidence, rule 414.....	13, 16

Treatises

1 John Henry Wigmore, A Treatise On The System Of Evidence In Trials At Common Law, §'s 193-194 (1 st Ed. 1904.)	10
--	----

IN THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT NO. _____

WILLIAM CRESHAM,)
Defendant and Petitioner,)
)
)
v.)
)
THE STATE OF CALIFORNIA,)
Plaintiff and Respondent.)
)
)

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
SECOND DISTRICT, DIVISION EIGHT

PETITION FOR WRIT OF CERTIORARI

Question Presented

This case presents the question this Court acknowledged was “left open” in *Estelle v. McGuire*, 502 U.S. 62, 75, fn. 5 (1991): “whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence [in this case domestic violence evidence] to show propensity to commit a charged crime.”

Petition for a Writ of Certiorari

Petitioner William Cresham respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal.

Opinions Below

The opinion of the Court of Appeal is attached. The California Supreme Court denied a petition for review and a copy of that order is attached as well.

Jurisdiction

The judgment of the California Supreme Court (denying the petition for review) was entered on August 25th, 2021. This court has jurisdiction pursuant to 28 U.S.C. § 1257(A).

Relevant Statutory And Constitutional Provisions

California Evidence Code section 1109(a)(1) provides:

“a) (1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the

evidence is not inadmissible pursuant to
Section 352.”

The Fourteenth Amendment states in relevant part that:

“No state shall ... deprive any person of life, liberty or
property, without due process of law.”

Statement of the Case

Petitioner was convicted by a jury of assault by means of force likely to produce great bodily injury (Cal. Pen. Code, § 245, subd. (a)(4), count 1),¹ criminal threats (§ 422, subd. (a), count 2), and two counts of misdemeanor contempt of court (§ 166, subd. (c)(1), count 3 & 4). (2CT 167-170, 189-191.) Petitioner was convicted of these offenses against his girlfriend, Lauren S., after the prosecution was permitted to present evidence under section 1109, that he had previously threatened and assaulted her, and the jurors were told they could use that evidence to assume he committed the charged acts against her. Here, the conviction was otherwise based upon statements Lauren S. had given to police, which at trial she said were not true but instead made up under circumstances where she was angry and upset at

¹ All future statutory references are to the Penal Code unless otherwise indicated.

petitioner for crashing her car.

The trial court sentenced petitioner to an aggregate term of 35 years to life, plus 8 years after denying his motion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.² Petitioner's direct appeal from this conviction was affirmed on June 11, 2021. His petition for discretionary review summarily denied by the California Supreme Court on August 25, 2021. (2CT 304-307; 3RT 2115, 2117.)

Petitioner argues the application of section 1109, violated his right to due process given that 1) no court has determined the factors used to justify a sex offense exception to the traditional no propensity evidence rule, apply to a defendant charged with domestic violence, 2) the section 352 weighing process has not been effective in its screening function, 3) the present facts show the impact such evidence can have on an innocent person — the exact reason that propensity evidence had been forbidden since the beginning of our recorded law. Petitioner is not presently arguing that the sex offense exception to the no propensity evidence rules violates due process.

² In a bifurcated proceeding, the trial court found true that appellant had suffered two prior strike convictions, two prior series felonies, and two prior prison terms (§§ 667, subds. (b)-(j), 1170.12, 667.5, subd. (b)). (2CT 192-193.)

Argument

The admission of prior acts of domestic violence to establish petitioner's propensity to commit such crimes violated his right to due process.

When challenging a state evidentiary rule on due process grounds, the defendant must show the rule 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, 43-44 (1996).)

The prohibition on propensity evidence has long been a bedrock principle of our jurisprudence and should be considered fundamental for the present purpose. John Henry Wigmore, one of the country's foremost authorities on evidence law, noted in his treatise that since the 1600's there has been "a general and absolute rule of exclusion" that forbids "showing that the defendant has not the good character which he affirms" by referring "to particular acts of misconduct against him."

(1 John Henry Wigmore, *A Treatise On The System Of Evidence In Trials At Common Law*, §'s 193-194 (1st Ed. 1904.)) In this regard, Wigmore cites cases from the 1600's, including *Harrison's Trial*, 12 How. St. Tr. 834 (Old Baily 1692), and *Hampden's Trial*, 9 How. St. Tr. 1053 (K.B. 1684); see also *United States v. Castillo*, 140 F.3d 874, 881

(10th Cir. 1998) “The ban on propensity evidence dates back to English cases of the seventeenth century.”

The tradition carried on through the beginning of the 20th Century. In *People v. Molineaux* (61 N.E. 286, 293-294), New York’s High Court emphasized “this [no propensity evidence rule] so universally recognized and so firmly established in all English speaking lands is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Carta.”

This court has reaffirmed the basic principle on several occasions.

In *Michelson v. United States*, 335 U.S. 469, 475 (1948), the court found that in determining guilt for the charged offense, prior acts admitted to consider propensity might be too persuasive and juries might give disproportionate weight to evidence of prior crimes. (And see *Old Chief v. United States*, 519 U.S. 172, 180-181 (1997), where the court reaffirmed its condemnation of the practice of using a defendant’s bad character to show he committed the charged crime.)

In *Dowling v. United States*, 496 U.S. 342, 345 (1997), the court found that prior misconduct evidence can properly be admitted as long as the defendant’s right not be convicted by improper propensity inferences can effectively be ensured. Implicit in this ruling is the

notion that conviction following the introduction of propensity evidence would violate a defendant's right to due process.

In *Spencer v. Texas*, 385 U.S. 554 (1967), the court found Texas's use of prior convictions in current criminal trials did not offend the due process clause of the Fourteenth Amendment in a case where the majority emphasized the evidence would likely have been admissible for a non-propensity purpose, and the admission of evidence was required to prove allegations under the state's recidivism statutory framework. (*Id.* at pp. 565-566.) But Chief Justice Warren warned in a partial dissent joined by three other justices, on a point not challenged in the majority opinion, that the introduction of prior act evidence purely for propensity purposes would violate federal due process. (*Id.* at pp. 572-574. Warren, C.J. concurring in part and dissenting in part.)

The Propensity Evidence Statutes Exceptions in sex cases

In 1994, Congress added three new rules to the Federal Rules of Evidence as part of the Violent Crime Control and Law Enforcement Act of 1994.

One was Rule 413(a), which provides that when a defendant is charged with a criminal assault, evidence of a prior offense or sexual

assault may be presented on the issue of guilt.³ Another was rule 414, which permits evidence of prior child molestation in a case where the defendant is charged with child molestation.⁴

After the change in the Federal Rules, various states abandoned the longstanding prohibition against propensity evidence, and agreed an exception exists in sex cases due to the unique and powerful nature of a sex offender's "lustful disposition," and the fact that sex crimes are usually committed in seclusion without third party corroborating evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.)

In 2003, Iowa passed section 701.11 of the Iowa Code, which permitted propensity evidence in sexual abuse cases. Thereafter, in *State v. Cox*, 781 N.W.2d 757 (Iowa 2010), the Iowa Supreme Court ruled the admission of prior molestation evidence under the new provision violated the due process clause of the Iowa Constitution. (*Id.*

³ Federal Rules of Evidence Rule 413(a) states: "In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses if sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

⁴ Rule 414 provides: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant."

at p. 761.) In evaluating the due process challenge, the court emphasized that it would only invalidate an evidentiary rule if it violated a fundamental concept of justice that was embedded in a community's sense of justice and fair play and noted the ban on propensity evidence had been a longstanding feature of the state's common law. (*Id.* at p. 764.)

In 1994, Missouri enacted Missouri Revised Statutes section 566.025, which permitted the introduction in child molestation cases of evidence that the defendant had previously molested children under 14 years of age. In *State v. Ellison*, 239 S.W. 3d 603 (Mo. 2007), the Missouri Supreme Court found that admitting prior act evidence for the sole purpose of proving propensity violated the state constitution's due process right to be tried for the offense for which the defendant was indicted. (*Id.* at p. 607.)

In 1995, California enacted Evidence Code section 1108, which permitted for the first time, the admission of disposition or propensity evidence in sex offense cases. The law provides that: "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 [which prohibits character evidence], if the evidence is not inadmissible pursuant to section 352

[permitting a court to exclude evidence on weighing probative value and prejudicial impact].”

In *People v. Falsetta, supra*, 21 Cal.4th 903, the California Supreme Court rejected the argument that section 1108 violates a defendant’s federal due process rights. The court confirmed the rule against admitting propensity evidence was one of longstanding application — nearly three hundred years old. (*Id.* at p. 913, citing *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) Nevertheless, it found that in some cases sex crimes had been treated differently where needed to show the defendant’s “lustful disposition,” and so it was “unclear whether the rule against ‘propensity’ evidence in *sex offense cases* should be deemed a fundamental historical principle of justice.” (*Id.* at p. 914, italics in original.)

The court thereafter determined that the law was saved from the defendant’s due process challenge because evidence allowed under section 1108 would still be limited by California Evidence Code section 352, which prohibited the introduction of unduly prejudicial evidence. (*Id.* at p. 917.)

Extending the exception to domestic violence cases

While some states have enacted statutes allowing the admission of propensity evidence in *sex offense* cases following the enactment of

rules 413 and 414, fewer states, Alaska, California, Illinois and Michigan among them, have crafted similar rules where a defendant is charged with *domestic violence* rather than a sex offense.

In 1997, the Alaska legislature passed Alaska Rules of Evidence, rule 404(b)(4), which provides that in “a prosecution for a crime involving domestic violence... evidence of other crimes involving domestic violence by the defendant against the same or another person... is admissible.” In *Fuzzard v. State*, 13 P. 3d 1163 (Alaska Ct. App. 2000), the Alaska Court of Appeals held that in enacting rule 404(b)(4), the state legislature intended to expand the use of propensity evidence in domestic violence cases to “resolve the difficult proof problems posed by conflicting accounts of domestic violence.” (*Id.* at p. 1167; see also, *Allen v. State*, 945 P.2d 1233, 1237-1238 (Alaska Ct. App. 1997), where the court found rule 404(b)(4) does not violate due process because the trial court retains the authority to exclude evidence that is more prejudicial than probative.)

The Alaska Supreme Court has not ruled on the issue of whether rule 404(b)(4) violates a defendant’s right to due process.

In 1997, California enacted Evidence Code section 1109, which allows for the introduction of propensity evidence in domestic violence cases. It is something of a companion statute to the earlier enacted

section 1108, and expanded the long-held exception to the no propensity evidence rule to include domestic violence as well as sexual abuse cases.

Section 1109 provides:

“a) (1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.”⁵

⁵ The full text of section 1109 provides:

“(a) (1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(2) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant’s commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

(3) Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant’s commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352. Nothing in this paragraph prohibits or limits the admission of evidence pursuant to subdivision (b) of Section 1101.

(b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in compliance with the provisions of Section 1054.7 of the

When presented with due process challenges to the application of section 1109, the state appellate courts have adopted the reasoning of the California Supreme Court in *Falsetta, supra*, where it the ruled the

Penal Code.

(c) This section shall not be construed to limit or preclude the admission orconsideration of evidence under any other statute or case law.

(d) As used in this section:

(1) “Abuse of an elder or dependent person” means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment thatresults in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering.

(2) “Child abuse” means an act proscribed by Section 273d of the Penal Code.

(3) “Domestic violence” has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, “domestic violence” has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission ofthis evidence is in the interest of justice.

(f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Healthand Safety Code is inadmissible under this section.”

(Amended by Stats. 2005, Ch. 464, Sec. 1. Effective January 1, 2006.)

sex offense exception to the historical rule was justified by factors unique to sex offense prosecutions, and due process was saved by the requirement that the trial court weigh probative value versus prejudice before admitting the evidence under this provision. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1097; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1309-1310; *People v. Brown* (2000) 77 Cal.App.4th 1324,1332-1334.)

In 2007, Illinois enacted section 115-7.4 of the Illinois Code of Criminal Procedure, which provides for the admission of evidence of prior acts of domestic violence where the defendant is charged with domestic violence, and the prior act evidence “may be considered for its bearing on any matter to which it is relevant.” (Section 115.74, subd.(a).) In *People v. Dabbs* (2010) 940 N.E. 2d 1088, the Illinois Supreme Court found the provision does not violate due process given the requirement that the trial court weigh probative value of the evidence versus its prejudicial impact. (*Id.* at p. 1104.)

In 2006, Michigan added Code of Criminal Procedure section 768.27b, which similarly provides for the admission of evidence of prior acts of domestic violence where the defendant has been charged with an act involving domestic violence. While the Michigan Supreme Court has not ruled on the question of whether the provision violates a

defendant's due process rights, the court ruled more generally in *People v. Watkins* (2012) 491 Mich. 450, 470; 813 N.W. 2d 296, that propensity evidence in sex offense cases comports with due process in light of the probative value versus prejudicial impact-weighing requirement.

Reasons for Granting the Writ

In *Estelle v. McGuire, supra*, 502 U.S. at p. 75, fn.5, this Court noted that it has left open the question of “whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime.” This court should decide the issue of whether the admission of prior acts of domestic violence can be used to show the defendant’s disposition to commit the act charged.

A historical and modern consensus establishes the due process violation.

In due process cases, this Court has explained that “our primary guide in determining whether the principle is fundamental is, of course, historical practice.” (*Montana v. Egelhoff*, 518 U.S. 37, 43 (1996); see also *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J. concurring) “It is precisely the historical practices that define what is ‘due.’”)

Modern consensus is also probative of whether a state’s law

violates the Fourteenth Amendment. In due process terms, “the near-uniform application of a given rule can show that contravening the rule would “offend a principle of justice that is deeply rooted in the traditions and conscience of our people.” (*Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996) see also *Schad*, 501 U.S. at 640 (“[W]e have often found it useful to refer both to history and to the current practice of other States.”)

In the present case, the unequivocal evidence of history, modern practice and policy dictate that Evidence Code section 1109’s rule allowing the admission of propensity evidence in domestic violence cases violates the Due Process Clause. The rule departs from hundreds of years of uniform jurisprudence prohibiting the admission of evidence suggesting that a defendant’s prior acts can be used to infer his guilt in the charged case.

The federal rules provided for an exception in sex offense cases for reasons unique to sex crimes, and several states followed with similar rules. However, the Supreme Courts in Iowa and Missouri later ruled the new rules to be violative of due process under their state constitutions. The California Supreme Court, on the other hand, found its new rule presented in Evidence Code section 1108, complied with federal due process given the unique factors involved in sex offense

cases. (See *People v. Falsetta, supra*, 21 Cal.4th at p. 915.)

But there have been very few states, including California, Alaska, Illinois and Michigan, that have extended the sex offense exception to the no propensity evidence rule to domestic violence cases. These states are outliers for the present purpose. Because of the near-uniform consensus indicating their departure from the accepted practice offends a fundamental principle of justice, this Court should decide the issue.

Sex crimes and domestic violence are different.

In the 1990's, Congress and several state legislatures enacted laws contravening hundreds of years of accepted Anglo-American jurisprudence, which allowed for the admission of prior sex acts to show a defendant's propensity to commit a sex crime. While Iowa and Missouri struck down the statutes as violative of due process under their state constitutions, the California Supreme Court upheld the exception for sex offenses in *Falsetta*.

The California legislature thereafter expanded the exception to include domestic violence cases, and section 1109 was found to meet the due process standard by the appellate courts who made no effort to distinguish between sex offenses and domestic violence. Unlike the "lustful disposition" concept that had been recognized over the years

when questioning the propensity prohibition in sex cases, and the fact that sex cases take place in private, there was no similar rationale for allowing the exception in domestic violence cases.

The only viable rationale for a domestic violence exception to the traditional rule was that society should seek to protect victims of domestic violence. While this has a certain emotional appeal, there is no legitimate way to argue that domestic-violence defendants are less entitled to due process, than say those charged with murder or other serious crimes. California law had long permitted prior acts of domestic violence and other crimes for purposes other than propensity, and so prior act evidence was admitted when appropriately restricted.

(Evidence Code section 1101(b).) Allowing this expansion of the law would do profound damage to our commitment to due process for those charged with crimes.

**The Evidence Code section 352 requirement
has failed as a safeguard.**

Since the enactment of section 1109 in 1997, there is a single published opinion in California, where an appellate court found admitting prior domestic violence evidence to be erroneous.

In that case, *People v. Disa* (2016) 1 Cal.App.5th 654, the court found the trial court would not have abused its discretion under

section 352, if it had simply admitted the prior acts of domestic violence to establish the defendant's propensity, but the court erred by allowing extensive inflammatory evidence that was unnecessary to prove the point. (*Id.* atp. 674.)

In all other published (and unpublished) cases found by petitioner's research, the courts have rejected the defendant's claims that the admission of prior acts of domestic violence was unduly prejudicial. (See, e.g., *People v. Culbert* (2013) 218 Cal.App.4th 184; *People v. Johnson* (2010) 185 Cal.App.4th 520; *People v. Williams* (2008) 159 Cal.App.4th 141; *People v. Cabrera* (2007) 152 Cal.App.4th 695; *People v. Escobar* (2000) 82 Cal.App.4th 1085; *People v. Poplar* (1999) 70 Cal.App.4th 1129.)

Noteworthy here is the standard of appellate review in California, which provides that a trial court's ruling under Evidence Code section 352 will only be reversed upon a showing of an abuse of the court's discretion. (*People v. Harris* (1998) 60 Cal.App.4th 727, 736-737.) Under that standard, the trial court's ruling will be reversed only if it was "arbitrary, whimsical, or capricious as a matter of law." (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1614.)

So even where the court's decision to allow the evidence was plainly wrong, its ruling under section 352 can only be reversed upon a

showing that it was arbitrary or whimsical, a finding that would be rare. Viewed in this light, section 352 is not an effective filter, and cannot be used to justify the admission of propensity evidence that has been otherwise forbidden since the founding of our justice system.

This Court should grant this writ to examine the due process violations posed by the use of propensity evidence in domestic violence trials.

This petition raises the threats to due process brought on by the use of prior domestic violence evidence to establish propensity. While respondent will likely refer to the need to protect the victims of domestic violence (a laudable goal), this case shows the ease in which a defendant can be convicted even where the alleged victim testifies that the acts never happened and that she had made the whole thing up.

The California Supreme Court once recognized that evidence of a defendant's prior bad acts is "inherently prejudicial" and has an "inflammatory impact" on the jury. (*People v. Alcala, supra*, Cal.3d at p. 631.) Unfortunately, that court has allowed the erosion of that protective standard. (See *People v. Falsetta, supra*, 21 Cal.4th 903.)

The jury's evaluation of petitioner's character and credibility, was of the utmost importance in this case, which came down to a credibility contest between him and what his girlfriend had earlier told law enforcement investigators when she had been upset with him for

crashing her car. Under the circumstances in this case, had the jury not been exposed to the highly prejudicial and minimally probative domestic violence evidence, it is reasonably likely the jury would have acquitted petitioner or have been unable to reach verdicts on the assault by means of force likely to produce great bodily injury and criminal threats counts.

Petitioner asks this Court to protect the constitutional rights of defendants in domestic violence cases by standing by the holding of *People v. Alcala, supra*, Cal.3d 604 and the centuries of jurisprudence preceding it.

Conclusion

Petitioner respectfully requests that this Court rule on the question of whether the admission of prior acts of domestic violence to establish propensity violates the due process clause of the Fourteenth Amendment.

/s/ Alex Coolman
Alex Coolman,
Attorney at for
WILLIAM CRESHAM

Appendix A — California Court of Appeal Opinion

FILED

Jun 11, 2021

DANIEL P. POTTER, Clerk

mfigueroa

Deputy Clerk

Filed 6/11/21

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

B303803

Plaintiff and Respondent,

(Los Angeles County
Super. Ct. No. MA075346)

v.

WILLIAM MARTIN CRESHAM,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Affirmed.

Eileen Manning-Villar, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Scott A. Taryle and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

William Cresham beat his girlfriend and threatened to kill her, for which a jury convicted him of assault by means of force likely to produce great bodily injury, criminal threats, and violation of two criminal protective orders. On appeal, he argues the trial court erred by admitting evidence of two prior incidents of domestic violence, instructing the jury with CALJIC No. 2.50.02, and imposing fines and fees without conducting an ability-to-pay hearing. He also argues the criminal threats statute is unconstitutional. We reject his arguments and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Cresham and Lauren S.¹ began dating in 2008. In November 2018, Lauren contacted police and reported that Cresham had severely beat her about two weeks earlier. An officer who interviewed her noticed yellow bruising on the left side of her face.

Lauren told police officers that she and Cresham had an argument while in a car. Cresham took Lauren's keys and phone and told her he would strangle her if she left. Lauren got out of the car and started running towards her parents' house, which was nearby. Cresham chased her and tackled her. He slammed her on the ground, hit her in the back of the head, flipped her over, and mounted her. Cresham then wrapped his hand around Lauren's throat and strangled her to the point that she could not breathe. He punched her in the face with such force that she began to see stars and lost consciousness for a few seconds. Cresham said if Lauren tried something like that again, he would

¹ We refer to the victim by her first name and last initial in order to protect her privacy interests. (See Cal. Rules of Court, rule 8.90(b)(4).)

beat her and kill her. Lauren was terrified that Cresham would kill her.

Lauren and Cresham eventually got back in the car. They drove around over the next few days, and Lauren felt like she was being held hostage. Cresham continued to threaten that if Lauren tried to run away, he would catch and beat her. Lauren told Cresham she was in pain and asked to go to a hospital, but he refused.

Cresham was charged with assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4); count 1),² criminal threats (§ 422, subd. (a); count 2), and two counts of contempt of court for violating a criminal protective order (§ 166, subd. (c)(1); counts 3 & 4). The information further alleged that Cresham had suffered two prior serious felony convictions (§ 667, subd. (a)(1)) that qualified as strikes (§§ 667, subd. (d), 1170.12, subd. (b)).

At trial, the prosecution presented evidence consistent with the facts summarized above. The prosecution also presented evidence showing Cresham knowingly had contact with Lauren in violation of two criminal protective orders. Further, the prosecution presented evidence of two prior incidents of domestic violence between Cresham and Lauren, which we discuss in more detail below.

Lauren testified at trial and denied that Cresham attacked her. She claimed she fabricated her police report because she was upset that Cresham recently crashed her car.

² All further undesignated statutory references are to the Penal Code.

Cresham testified in his own defense. He denied assaulting or threatening Lauren. According to Cresham, Lauren lied to police because she was worried her father would be upset if he found out Cresham crashed her car.

The jury found Cresham guilty of the substantive offenses as charged. In a bifurcated trial, the court found true the prior conviction allegations.

The court sentenced Cresham to an aggregate term of 18 years plus 25 years to life, consisting of the following: on count 1, the high term of four years, doubled because of the prior strikes; on count 2, 25 years to life, plus 10 years for the prior serious felony convictions³; and on counts 3 and 4, 364 days in jail, to be served concurrent to the other sentences. The court also imposed various fines and fees.

Cresham appealed.

DISCUSSION

I. The Court Did Not Err in Admitting Evidence of Prior Incidents of Domestic Violence

Cresham contends the trial court erred in admitting evidence of prior incidents of domestic violence between him and Lauren. We disagree.

A. Background

Before trial, Cresham moved to exclude evidence of two uncharged acts of domestic violence he committed against Lauren in 2015 and 2017. The court ruled the evidence was admissible

³ The abstract of judgment mistakenly reflects that the two five-year terms were imposed under section 667.6, subdivision (b). We order the trial court to issue a new abstract that correctly reflects they were imposed pursuant to section 667, subdivision (a).

under Evidence Code section 1109 and declined to exclude it under Evidence Code section 352. The court noted the evidence was highly probative given the prior incidents were recent, and there was a risk the victim would recant. The court further determined the evidence was not likely to inflame the passions and prejudices of the jury.

At trial, the prosecutor presented evidence that in November 2015, Lauren and Cresham had an argument, and Lauren went to her parents' home to get away from him. Cresham repeatedly called Lauren and sent her approximately 100 text messages. In some of the messages, Cresham threatened to kill Lauren, make her mother suffer, and force her to watch as he killed her family.

The prosecutor also presented evidence that in July 2017, Cresham became upset after Lauren told him she was hungry. Cresham pulled Lauren's hair, put her in a headlock, and punched her in the face. Lauren began bleeding from her nose. Cresham demanded Lauren drive them to the desert, which she did. He then threatened to kill her. Lauren had bruising around her eyes and on her thighs.

The jury learned that Cresham was convicted of crimes arising out of both incidents.

B. Relevant Legal Authority

Evidence Code section 1101, subdivision (a), sets forth the general rule that propensity evidence, including evidence of specific instances of prior conduct, is not admissible to prove a defendant's conduct on a specific occasion. (*People v. Jackson* (2016) 1 Cal.5th 269, 299.) Evidence Code section 1109 (section 1109) provides an exception to Evidence Code section 1101's general exclusion of propensity evidence. It permits in "a

criminal action in which the defendant is accused of an offense involving domestic violence, [admission of] evidence of the defendant's commission of other domestic violence . . . if the evidence is not inadmissible pursuant to [Evidence Code section 352.]" (§ 1109, subd. (a)(1).)

"[T]he obvious intention of the Legislature [in enacting section 1109] was to provide a mechanism for allowing evidence of . . . acts of domestic violence to be used by a jury to prove that the defendant committed the charged offense of the same type; recidivist conduct the Legislature has determined is probative because of its repetitive nature. Furthermore, it is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333–1334 (*Brown*)).

C. Analysis

1. Section 1109 Does Not Violate Due Process

Cresham first contends the admission of propensity evidence under section 1109 violated his constitutional rights to due process and a fair trial. According to Cresham, the constitution categorically forbids the admission of propensity evidence. We disagree.

In *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), the California Supreme Court rejected a nearly identical challenge to Evidence Code section 1108, which mirrors section 1109, except it permits the admission of evidence of uncharged sexual misconduct when the defendant is accused of a sexual offense. The high court reasoned that "'[b]y 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 a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (. . . § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence.

[Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.’*” (*Falsetta, supra*, 21 Cal.4th at pp. 917–918.) Courts of Appeal have uniformly held the reasoning in *Falsetta* is equally applicable to section 1109, and defeats similar due process challenges to that statute. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 529 (*Johnson*) [listing cases].)

Cresham does not dispute that the reasoning in *Falsetta* defeats his due process argument. Instead, he insists *Falsetta* was wrongly decided. We are bound by the California Supreme Court’s decision (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456), and we agree with the numerous Courts of Appeal that have applied *Falsetta* in the context of challenges to section 1109. Accordingly, we reject Cresham’s contention that section 1109 violated his rights to due process and a fair trial.

2. Section 1109 Does Not Violate Equal Protection

Cresham next contends section 1109 violates the equal protection clause because it impermissibly treats defendants charged with domestic violence offenses differently from otherwise similarly situated defendants. We disagree.⁴

⁴ We reject the Attorney General’s argument that Cresham forfeited this issue by failing to raise it in the trial court. (See

As Cresham recognizes, courts have repeatedly rejected equal protection challenges to section 1109. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310–1313 (*Jennings*); *People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233, fn. 14.) In *Jennings*, for example, the court found there is a rational basis for permitting propensity evidence in domestic violence cases, but not in others. Specifically, “domestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment and ambivalence on the part of the victim, as well as intimacy with and intimidation by the perpetrator. . . . Although all criminal trials are credibility contests to some extent, this is unusually—even inevitably—so in domestic . . . abuse cases, specifically with respect to the issue of victim credibility. The Legislature could rationally distinguish between [this kind of case] and all other criminal offenses in permitting the admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused.” (*Jennings, supra*, at p. 1313.)

Cresham contends the *Jennings* court erred by applying rational basis review, rather than strict scrutiny. His argument, however, presupposes that section 1109 violates due process, a contention we have already rejected. We agree with the reasoning in *Jennings* and reject Cresham’s equal protection argument on the same grounds.

People v. Yeoman (2003) 31 Cal.4th 93, 118 [it is a well-established principle that a reviewing court may consider for the first time a claim raising a pure question of law on undisputed facts]; *People v. Delacy* (2011) 192 Cal.App.4th 1481, 1493 [defendant did not forfeit an equal protection challenge to a statute by failing to raise it in the trial court].)

3. The Trial Court Did Not Abuse its Discretion

Finally, Cresham contends the trial court abused its discretion by refusing to exclude the prior domestic violence evidence under Evidence Code section 352. Once again, we disagree.

Although generally admissible under section 1109, evidence of an uncharged act of domestic violence remains subject to exclusion under section 352. (§ 1109, subd. (a).) Evidence Code section 352 states: “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.”

When deciding whether to admit evidence of an uncharged act of domestic violence, trial courts “must engage in a careful weighing process. . . . [and] consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and 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, such as admitting some but not all of the defendant’s other [] offense, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]” (*Falsetta, supra*, 21 Cal.4th at pp. 916–917.) “‘ ‘The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.’ ’ [Citation.]” (*People v. Johnson, supra*, 185 Cal.App.4th at p. 531.)

We review a trial court’s admission of evidence of an uncharged act of domestic violence for an abuse of discretion. (*Johnson, supra*, 185 Cal.App.4th at p. 531.) “A court abuses its discretion when its rulings fall ‘outside the bounds of reason.’” (*People v. Ochoa* (1998) 19 Cal.4th 353, 408.) We will uphold the court’s decision “unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner. [Citations.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 806.)

Here, there are substantial similarities between the two prior acts of domestic violence and the present offenses. All three incidents involved the same victim (Lauren) and occurred in close temporal proximity (roughly three years apart). In both the 2015 incident and the incident giving rise to the present charges, Cresham became enraged and threatened to kill Lauren after she left him. In the 2017 incident, like the present incident, Cresham became upset with Lauren, physically struck her with enough force to cause bruising, threatened to kill her, and took her to an area where she could not obtain help.

Moreover, like many domestic violence cases, there were no witnesses to the current crimes other than Cresham and the victim. As a result, the trial was essentially a credibility contest between the two, a situation in which propensity evidence is particularly probative. (See *Jennings, supra*, 81 Cal.App.4th at p. 1313; *Brown, supra*, 77 Cal.App.4th at pp. 1333–1334.)

Several other factors also weigh in favor of admission of the evidence. The degree of likelihood that the prior incidents took place is high given Cresham was convicted of offenses arising out of each. The jurors also learned of that fact, which lessened the probability that they would try to punish Cresham for his prior transgressions. (See *People v. Rucker* (2005) 126 Cal.App.4th

1107, 1119.) Further, the record shows the prosecutor presented the evidence relatively quickly and in a manner that was not overly confusing, distracting, or misleading for the jury.

Cresham contends the court could have decreased any potential prejudice by permitting the prosecutor to introduce evidence that he suffered the prior convictions, while omitting the specific facts underlying those convictions. Cresham, however, overlooks that the probative value of the evidence arises out of the factual similarities with the present offenses. Simply noting that Cresham suffered prior offenses would not serve the same purpose.

Cresham also argues the evidence was unduly prejudicial because some of the prior acts were significantly more inflammatory than the charged crimes. In particular, he points to evidence that he threatened to make Lauren watch as he killed her family, which displayed an “enhanced level of psychological cruelty.”

While we agree the prior domestic violence was reprehensible—particularly Cresham’s threat to make Lauren watch as he killed her family—we disagree that it was significantly more inflammatory than the charged offenses. The evidence in this case shows that when Lauren tried to run from Cresham, he chased her down, choked her, and hit her with such force that she saw stars and briefly lost consciousness. Cresham then threatened to kill Lauren if she tried to escape and essentially held her hostage for several days. During that time, he prevented her from receiving medical treatment for the injuries he inflicted on her. Given the terrible nature of all three incidents, we cannot say one was significantly more inflammatory than the others.

Considering all the relevant factors, the court's admission of the prior domestic violence evidence was not arbitrary, capricious, patently absurd, or unduly prejudicial. The trial court did not abuse its discretion.

II. CALJIC No. 2.50.02 is Not Unconstitutional

Cresham contends the trial court erred by instructing the jury with CALJIC No. 2.50.02 because the instruction is unconstitutional.⁵ We disagree.

The court instructed the jury with a modified version of CALJIC No. 2.50.02, as follows: "If you find by a preponderance of the evidence that the defendant committed any such uncharged offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is accused. However, even though you find by a preponderance of the evidence that the defendant committed another uncharged crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the offense that you are determining. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider along with all the other evidence in determining whether the defendant have [sic] been proved guilty beyond a

⁵ We reject the Attorney General's contention that Cresham forfeited this issue by failing to object to the instruction in the trial court. (See *People v. Hudson* (2006) 38 Cal.4th 1002, 1012 [the forfeiture rule does not apply when the trial court gives an instruction that is an incorrect statement of the law].)

reasonable doubt of the charged crimes that you are determining.”

Cresham insists this instruction was constitutionally infirm because it permitted the jury to infer guilt and convict him based on a standard of proof less than beyond a reasonable doubt. However, as Cresham recognizes, in *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the California Supreme Court rejected these same arguments in the context of a jury instruction pertaining to propensity evidence in sex offense cases (former CALJIC No. 2.50.01). (*Reliford, supra*, at p. 1016.) As Cresham further recognizes, CALJIC Nos. 2.50.01 and 2.50.02 are identical in all material respects, and the reasoning in *Reliford* is equally applicable to CALJIC No. 2.50.02. (See *People v. Pescador* (2004) 119 Cal.App.4th 252, 261–262 [applying *Reliford* to deny challenge to CALJIC No. 2.50.02]; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1097 [noting cases decided with respect to CALJIC Nos. 2.50.01 and 2.50.02 are generally interchangeable]; see also *People v. Reyes* (2008) 160 Cal.App.4th 246, 253 [applying *Reliford* to deny challenge to CALCRIM No. 852, which is materially the same as CALJIC No. 2.50.02].)

We are bound by the Supreme Court’s guidance in *Reliford* (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 456), and we agree with our fellow Courts of Appeal that it compels us to conclude that CALJIC No. 2.50.02 is not constitutionally infirm on the grounds Cresham cites. Accordingly, we reject Cresham’s arguments.

III. Penal Code Section 422 is Not Unconstitutionally Vague

Chesham contends we must reverse his conviction for violating section 422 because the statute is unconstitutionally vague. We disagree.

Due process of law is violated by “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” (*Connally v. General Construction Co.* (1926) 269 U.S. 385, 391 (*Connally*).) A statute will pass constitutional muster only “if it (1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement.” (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 702 (*Fisher*); *Connally, supra*, at p. 391.) Fair notice requires that the statute’s terms be described with a reasonable degree of certainty so that an ordinary person can understand what conduct is required of her. (*Fisher, supra*, at p. 702.) Further, the statute must provide sufficient standards of enforcement so there is no threat of arbitrary application. (*Id.* at p. 703.) A statute is presumed to be valid and must be upheld unless its unconstitutionality “‘ ‘clearly, positively and unmistakably appears.’ ’ [Citations.]” (*Patel v. City of Gilroy* (2002) 97 Cal.App.4th 483, 488–489.)

Section 422 makes it an offense to “willfully threaten[] to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person

threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety” (§ 422, subd. (a).)

Cresham argues section 422 is unconstitutionally vague because it is unclear what crimes will result in death or great bodily injury, making it difficult for an individual to know if his threats are unlawful. Further, according to Cresham, the statute gives law enforcement unfettered discretion to determine whether a threatened crime will result in great bodily injury or death.

The court in *People v. Maciel* (2003) 113 Cal.App.4th 679 (*Maciel*), rejected nearly identical arguments to those Cresham advances here. In holding section 422 is not unconstitutionally vague, the court explained that the statute “does not criminalize all threats of crimes that will result in death or great bodily injury, leaving to law enforcement to determine those threats that will result in arrest. Instead, the statute criminalizes only those threats that are ‘so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.’ . . . One who willfully threatens violence against another, intending that the victim take the threat seriously and be fearful, cannot reasonably claim to be unaware that the conduct was prohibited.” (*Maciel, supra*, 113 Cal.App.4th at p. 685.)

The court further held the phrase “‘will result in great bodily injury’” is not vague, even when viewed in isolation. The court explained that the phrase “means objectively, i.e., to a

reasonable person, likely to result in great bodily injury based on all the surrounding circumstances. [Citations.] . . . An objective standard of reasonableness provides a sufficiently reliable guide to individuals and law enforcement.” (*Maciel, supra*, 113 Cal.App.4th at pp. 685–686.) Moreover, the term ““great bodily injury” has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration.’ [Citation.] The phrase ‘great bodily injury’ means ‘a significant or substantial physical injury.’ [Citation.] The phrase ‘great bodily injury’ is ‘sufficiently certain and definite to meet the constitutional requirements’ and avoid vagueness.” (*Id.* at p. 686.) We agree with the *Maciel* court’s analysis of the issue.

Cresham does not seriously challenge the above-quoted reasoning from *Maciel*. Instead, he urges us to follow a decades-old decision by the Nebraska Supreme Court holding a somewhat similar statute to be unconstitutionally vague. (See *State v. Hamilton* (1983) 215 Neb. 694, 695 (*Hamilton*).) The statute at issue in that case made it an offense to threaten to commit “any crime likely to result in death or serious physical injury to another person” (*Id.* at p. 695.) The Nebraska court held this to be unconstitutionally vague because it lacked a specific intent requirement and used the term “likely,” which the court thought was inherently problematic when included in a criminal statute. (*Id.* at pp. 697–699.) Section 422 suffers neither problem: it includes a specific intent requirement and does not use the term “likely.”⁶ Accordingly, even if we agreed with the holding in *Hamilton*, it would be of no help to Cresham.

⁶ Even if the term “likely” were implicit in section 422, as the *Maciel* court suggested, we would not find the statute

IV. Cresham Forfeited His Arguments Regarding Fines and Fees

Cresham contends the trial court erred by imposing fines and fees without first conducting an ability-to-pay hearing. We find the issue forfeited.

Prior to sentencing, Cresham's public defender filed a request that the court waive all fees and restitution, or alternatively conduct an ability-to-pay hearing. Cresham subsequently retained private counsel.

At the sentencing hearing, the court noted that it received Cresham's request for an ability-to-pay hearing. The court then stated that it intended to impose the minimum fines and fees because it thought Cresham could afford to pay them during his incarceration. The court asked Cresham if he wanted to be heard on the issue, and counsel submitted without argument. The court then imposed a \$300 restitution fine (§ 1202.4), a stayed \$300 parole revocation fine (§ 1202.45), \$160 in court operations assessments (§ 1465.8), and \$120 in criminal conviction assessments (Gov. Code, § 70373).

On appeal, Cresham contends the court erred by imposing the fines and fees without conducting an ability-to-pay hearing. The Attorney General insists Cresham forfeited the issue by

unconstitutionally vague. As the *Maciel* court observed, California courts have held statutes with similar language pass constitutional muster. (See, e.g., *People v. Covino* (1980) 100 Cal.App.3d 660, 668 [holding “assault by means of force likely to produce great bodily injury” is not unconstitutionally vague]; *People v. Basuta* (2001) 94 Cal.App.4th 370, 397–398 [holding assault on a child “‘by means of force that to a reasonable person would be likely to produce great bodily injury’” is not unconstitutionally vague].)

failing to object at sentencing. For the reasons set out in *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155 (*Frandsen*), we find the issue forfeited and decline to exercise our discretion to consider it. (See also *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1031–1033 [finding forfeiture where defendant failed to object to fines and fees under §§ 1202.4, 1465.8 & 290.3, and Gov. Code, §§ 70373 & 29550.1, based on inability to pay]; *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [citing *Frandsen* to find fines and fees issue forfeited for failure to object in trial court].)

Cresham seems to concede that his counsel did not raise a timely objection to the fines and fees. Nonetheless, he insists the issue was not forfeited because it presents a pure question of law: whether the court violated his constitutional rights by imposing fines and fees without conducting an ability-to-pay hearing. We are not persuaded. Regardless of his framing, Cresham is essentially arguing that the court exercised its otherwise lawful authority in an erroneous manner under the particular facts of his case; such a claim encompasses factual matters and is subject to forfeiture. (*People v. McCullough* (2013) 56 Cal.4th 589, 597; see *People v. Welch* (1993) 5 Cal.4th 228, 236.) Cresham, moreover, “may not ‘transform . . . a factual claim into a legal one by asserting the record’s deficiency as a legal error.’ [Citation.]” (*People v. McCullough*, *supra*, at p. 597.)

Cresham further argues he may raise the issue for the first time on appeal because it implicates his fundamental constitutional rights. In support, he cites *People v. Vera* (1997) 15 Cal.4th 269 (*Vera*), for the proposition that a “defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.” (*Id.* at p. 276.) “[T]he dictum in *Vera* on which defendant

relies ‘was not intended to provide defendants with an “end run” around the forfeiture rule,’ but was limited to a narrow class of constitutional rights,” none of which are involved here. (*People v. Linton* (2013) 56 Cal.4th 1146, 1166, quoting *People v. Tully* (2012) 54 Cal.4th 952, 980, fn. 9.)

Cresham alternatively argues that, to the extent the issue was forfeited, he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel a defendant must establish two elements: (1) counsel’s representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s errors or omissions, a determination more favorable to the defendant would have resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 690, 694; see *People v. Holt* (1997) 15 Cal.4th 619, 703.) If the record fails to disclose why trial counsel acted or failed to act in the manner challenged, the ineffective assistance of counsel claim must be rejected unless counsel was asked for, and failed to provide, an explanation or there could be no plausible explanation. (*People v. Pope* (1979) 23 Cal.3d 412, 426, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

Here, the record does not disclose why counsel declined to object to the fines and fees, and counsel was not asked to provide an explanation. Moreover, we can conceive at least one plausible explanation for counsel’s failure to object: he may have been aware that Cresham had the ability to pay the relatively modest fines and fees. Cresham, after all, had recently retained private counsel to represent him at sentencing. Because we can conceive a plausible explanation for counsel’s failure to object, we reject

Cresham's claim that he received ineffective assistance of counsel.

DISPOSITION

We affirm the judgment.

BIGELOW, P. J.

We Concur:

GRIMES, J.

STRATTON, J.

**Appendix B — California Supreme Court Denial of Petition for
Review**

SUPREME COURT
FILED

AUG 25 2021

Court of Appeal, Second Appellate District, Division Eight - No. B303803

Jorge Navarrete Clerk

S269993

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

WILLIAM MARTIN CRESHAM, Defendant and Appellant.

The petition for review is denied without prejudice to any relief to which defendant might be entitled after this court decides *People v. Kopp*, S257844.

Cantil-Sakauye, C.J., was absent and did not participate.

Kruger
Acting Chief Justice