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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN DIEGO

10 THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

Ct. No. SCD189855
D.A. No. ABL797

11
12 v.

PEOPLE'S TRIAL BRIEF

13 DOUGLAS ALAN DOWSON,
14 Defendant.

Date: September 22, 2005
Time: 9:00 a.m.
Dept: 11

15 Comes now the plaintiff, the People of the State of California, by and through their attorneys,
16 BONNIE DUMANIS, District Attorney, GRETCHEN DAHLINGER MEANS, Deputy District
17 Attorney, and respectfully submits the following PEOPLE'S TRIAL BRIEF.

18
19 **I.**

STATEMENT OF THE CASE

20 Defendant is charged in the above information with violating Penal Code section 288a(c)(2)
21 Forcible Oral Copulation (Count 1), and section 286(c)(2) Forcible Sodomy (Counts 2 and 3). The
22 incident date for all charges is on or about November 19, 2004 and November 20, 2004.

23 Defendant was arrested on March 24, 2005, and arraigned on the complaint on April 1, 2005.
24 A preliminary hearing was held on May 6 in front of the Honorable Judge Thompson and defendant
25 was bound over on all counts.

26 The case is now before the court for trial.

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II.

STATEMENT OF FACTS

Charged Sex Crime

On November 19, 2004, Lieutenant Claire Wilkinson attended the Marine Corps Birthday Ball at the Manchester Grand Hyatt Hotel, One Market Place in San Diego with her cousin, Navy Lt. Tom Winkler. Lt. Wilkinson is an Intelligence Officer in the Marine Corps and had moved to San Diego after being stationed at Miramar just a few weeks prior to the ball. Lt. Winkler is a pilot and at the time was assigned to a joint command with defendant, a Captain in the Marines.

At around 4:45 p.m. that evening, the victim, her cousin, Lt. Erik Beilik, a friend of Lt. Winkler's, and Beilik's girlfriend, Wendy, took a taxi to the Hyatt from Winkler and Wilkinson's home in Pacific Beach. Before the ball, Claire Wilkinson drank a beer around 3:00 p.m. at a going away party and a Jack and Coke while getting ready for the ball. When the group got to the hotel, they went to the room of Lt. Brandon Sellars to take pictures with several other ball attendees. Wilkinson drank another Jack and Coke in the room before the group went to a cocktail hour at the bar at the top of the hotel.

The ball started at 6:00 p.m. and the victim and her cousin went to the ballroom for dinner and the ceremony. There was a cash bar in the ballroom and wine was served with dinner. Lts. Wilkinson and Winkler sat at a table with several other pilots stationed at Miramar. Being new to the area, Lt. Wilkinson was excited to meet new people and was introduced to several of her cousin's friends and colleagues by their call signs. The victim had several more drinks at dinner and through the ceremony.

At around 9:00 p.m. the ceremony ended and the guests began to socialize and dance in the ballroom area. Lt. Wilkinson was introduced to Captain Travis Russell, "Wallet," a fellow Marine and flight instructor at Miramar. While she was speaking with Captain Russell, she was introduced to defendant by his call sign, "Dirty." The victim did not learn defendant's true name until after she reported the attack. Lt. Wilkinson observed that defendant appeared preoccupied and spoke little to her; she believed he was waiting for a date to arrive. The three spoke with each other and several other attendees standing nearby. Lt. Wilkinson went to the dance floor and danced with a group of women and then returned to her table around which several people, including defendant, were milling. The victim continued to drink and brought Jack and Cokes for defendant and Wallet.

1 After purchasing drinks, the victim found her cousin, Lt. Winkler, and the two went outside
2 to smoke a cigarette. They took a picture at a picture booth and talked with several of the people who
3 had been sitting at their table. The victim had a least one other drink and then the group went back
4 upstairs to the bar at the top of the Hyatt sometime between 11:00 and 12:00 p.m.

5 At the bar, the victim continued to socialize and drink. It was during this time that the victim
6 began to talk with defendant again. He had arrived at the bar separately. The two made small talk
7 about the Marines and their current assignments. After about one hour, during which time defendant
8 served the victim at least one drink, Lt. Wilkinson stated she wanted to smoke a cigarette and left the
9 bar for the smoking area with which she was familiar, an area located several floors below near the
10 ballroom. Defendant followed Lt. Wilkinson and the two spoke with other ball guests while the
11 victim smoked one cigarette. Upon entering the hotel to return to the bar, defendant asked the victim
12 if she wanted to go to a room party where her cousin was sure to be. Lt. Wilkinson knew that there
13 were several room parties that evening and agreed to follow defendant to the room.

14 Lt. Wilkinson remembers that the elevator ride going up seemed shorter than the ride down
15 to the smoking area. The victim remembers walking down a hallway and defendant opening the
16 door to a room that was empty and only partially lit. The victim then lost consciousness.

17 Lt. Wilkinson's next memory is being fully dressed and crumpled on her knees on the bed.
18 Nude and positioned in front of her, defendant was gripping the victim's neck and hair, holding her
19 slightly erect, and forcing his penis down her throat. Vomit ran out and down the sides of her mouth
20 and onto her dress and the bed sheets. She was crying and trying to scratch at defendant. (Count 1).
21 Defendant let go of the victim and told her that she "smelled disgusting." After vomiting, Lt.
22 Wilkinson laid on the bed in a fetal position.

23 The victim next remembers being naked and standing in the shower with defendant's hand
24 and body pinning her against the wall. Defendant was forcing his erect penis into her anus. When
25 she became aware of what was going on, the victim repeatedly said "no!" and tried to block her anus
26 with her free hand. Defendant pushed her hand aside and continued to force his penis into her anus.
27 Despite her pleas to stop, defendant was able to penetrate her anus several times. (Count 2).

28 Lt. Wilkinson awoke lying on the bathroom floor with part of her body on a carpet or towel
and part of her body on the cool tile. Defendant was again forcefully penetrating her anus with his
erect penis. (Count 3). The victim could not fight any longer and laid prone as defendant sodomized

1 her.

2 Lt. Wilkinson awoke to the sound of her cellular phone ringing and got up off the bathroom
3 floor where she laid nude. She could not get to the phone in time and pressed the return call function
4 on the phone. The victim reached Lt. Brandon Sellars, who had called looking for her. She was
5 crying, confused, and disoriented and was not completely aware of where she was. She told him she
6 couldn't find her belongings. Lt. Sellars told her to take a taxi cab home. Lt. Wilkinson gathered
7 what clothes she could find, dressed and stumbled into the hall and out of the hotel room, leaving
8 defendant lying in the bed alone. The victim wandered around the hotel for some time looking for
9 her cousin before making it out a side door and hailing a taxi cab to take her home.

10 When the victim arrived at her home, she called her fiance, Lt. Josh Russo, and left several
11 messages before crawling into bed and going to sleep. The next morning, she felt significant pain in
12 her vaginal-anal area, her mouth, neck, scalp, back, and buttocks. Lt. Russo arrived after his night
13 shift at Camp Pendleton and found the victim standing in the shower crying. Lt. Wilkinson spent the
14 day with Lt. Russo but could say little more than "Dirty forced himself" upon her. She cried
15 throughout the day but would say no more. When Lt. Russo encouraged her to tell someone, at least
16 her cousin, but she refused. Lt. Wilkinson explained she could not handle an official investigation,
17 that she was scared for her career.

18 Later that afternoon, Lt. Winkler called the victim on her cell phone. She began to cry and
19 said she had had a bad experience with Dirty. She refused to tell him more, saying that she was
20 worried about the implications for her career and job. Lt. Winkler encouraged her to come home; he
21 then called his commanding officer and left a message. Lt. Winkler also called the defendant but did
22 not leave a message when defendant did not answer.

23 Lt. Wilkinson arrived home around 6:30 p.m. that evening. Upset and crying, she reluctantly
24 told her cousin about the assault. Lt. Winkler's command subsequently notified Naval Criminal
25 Investigative Service (hereinafter NCIS) of the assault. The victim did not personally report the
26 assault to law enforcement or her command.

27 22 hours after the assault, Lt. Wilkinson was examined by a Sexual Assault Response Team
28 (hereinafter SART) nurse with Palomar-Pomerado Hospital. She had bruises to her buttocks and
vaginal area, swelling to her mouth, a vertical laceration in the center of her lower lip, and several
significant lacerations on her anus and rectum. During the examination, her screams could be heard

1 throughout the SART area.

2 Special Agent Zach Paton of NCIS interviewed defendant on November 22, 2004.
3 Defendant was advised of his Article 31(b) rights (UCMJ) which are inclusive of the Miranda
4 admonishment and defendant chose to waive his rights; defendant gave an oral statement and then
5 provided a sworn written statement which he personally typed. The interview of defendant was
6 observed by Special Agent Kurokawa of NCIS and Officer Kathy Fabregas of the Harbor Police
7 Department (hereinafter HPD).

8 Defendant first stated that he had a room at the Hyatt the night of the ball. He was expecting
9 to attend the ball with a date, a woman whom he met on the internet, who was arriving from Texas at
10 around 9:00 p.m. Defendant stated he met Lt. Wilkinson at the bar at the top of the Hyatt before the
11 ball. He stated that he interacted and spoke with Lt. Wilkinson for an extended period of time over
12 the evening and admitted to serving her at least one drink. At around 1:00 a.m., he and the victim
13 went to his room and started "hooking up." They may have had vaginal sex. The victim went into
14 the bathroom and he got into bed. Lt. Wilkinson then came out of the bathroom and left the room
15 stating she was going to go find her cousin. Defendant got up and found the victim in the lobby. He
16 invited her back to a room party but when they arrived at the room, no one was there. He and the
17 victim then returned to his room and "hooked up" again. She took a shower and left. At around
18 3:00 a.m., defendant received a call from his date who told him that she was stuck in Los Angeles.
19 Defendant stated that he had 1-2 beers before dinner and 12 vodka and sodas after dinner.

20 Special Agent Paton asked defendant to repeat the story with more detail regarding the sexual
21 encounters.

22 Defendant's second story provided a more detailed account. Defendant explained that after
23 he and the victim returned from the lobby, they began to have oral sex and then sexual intercourse
24 on the bed. Lt. Wilkinson vomited and she got up and went to the shower. Defendant followed her
25 into the bathroom to help her and she pulled him into the shower with her. In the shower, defendant
26 and the victim had vaginal sex and then he jumped out of the shower and got into bed. It was then
27 that he received the call from his date.

28 Special Agent Paton asked defendant to repeat the story.

This third time, defendant stated that he heard his electric toothbrush after the victim had
gone into the bathroom to clean up after she vomited. He stated that he climaxed in the shower

1 during the intercourse and ejaculated either on her back or into the shower. He did not ejaculate
2 inside the victim. He stated that he clearly recalled having intercourse and that when they were
3 having intercourse on the bed, they were in the missionary position with her legs on his shoulders.
4 Defendant described the incident as being aggressive at some points and that during the oral sex she
5 was “going down pretty far.” He continued that he intended to contact Lt. Winkler that day to make
6 sure that the victim was okay for he knew that she had been inebriated. He also stated that he had in
7 his car the victim’s necklace which was left in the room that evening but that he had thrown her
8 panties away before leaving the hotel.

9 Special Agent Paton asked defendant about his definition of inebriated. Defendant stated that
10 both he and the victim were about a 5 or 6 on a scale of 1 to 10 (10 being extremely inebriated). He
11 stated that he did not think that she was more intoxicated than he was but perhaps she could not
12 handle her alcohol as well.

13 Defendant was asked to go into further detail about the night and defendant provided a fourth
14 version of the assault.

15 This time, defendant stated that when he was in the lobby looking for the victim, he met two
16 civilian women who followed him and Wilkinson back to the room where the party was supposed to
17 be and then back to defendant’s room. The women left the room soon after arriving when they
18 realized that something was going on between him and the victim. He stated that the first time he
19 and the victim were in his room for about 30 minutes and that they had mutually started making out
20 in the main part of the room. He was unsure if they had intercourse at this time or the second time.
21 Defendant stated that he put on jeans after the victim left and neatly hung his uniform in the closet.

22 A fifth version of the assault then emerged. Defendant stated that when the victim was
23 performing oral sex on him, she was only wearing underwear. He stated that they had been making
24 out in the bathroom when the victim tugged up her dress as of trying to pull it off. The dress came
25 off, he went to bed, and then she left. This surprised him because he had expected her to come to
26 bed too. When they returned to the room, they began to make out again. The victim took off her
27 dress in the bathroom and they both went to the bed. On the bed, the victim performed oral sex but
28 he did not climax. Defendant was very specific about the positions and sexual acts, which included
intercourse and oral copulation that ensued for the next 5-10 minutes on the bed. He stated that Lt.
Wilkinson was “participating” and “into it” and that the whole thing was “pretty racy” and “very

1 erotic.” On a scale of 1 to 10, 1 being soft and 10 being very rough, defendant stated their sexual
2 activity was a 6 or a 7. When the victim was orally copulating defendant a second time, defendant
3 noticed “a couple of chunks” of vomit on the bed. He commented that it was “gross” and they
4 stripped the sheets and went into the bathroom to clean up. Defendant stated that he recalled seeing
5 chunks of vomit on the bathroom floor as well.

6 At this point in the interview, Special Agent Paton told defendant that the victim had a spilt
7 and swollen lower lip. Defendant added that when they went into the bathroom, Lt. Wilkinson
8 laughed and said she was going to brush her teeth. It was then that she got into the shower and
9 started performing oral sex on him again as he was standing next to the shower and helping her with
10 the faucet. Lt. Wilkinson then pulled defendant into the shower. Defendant did not believe that they
11 engaged in intercourse in the shower because he looked down and saw blood in her vagina.
12 Defendant then turned the victim around and they engaged in anal sex. At first, she tensed up but he
13 relaxed her by kissing her back and “slowly worked his way in.” The anal intercourse lasted for
14 several minutes and was “pretty slow.” After the anal sex, defendant cleaned up briefly and was out
15 of the bathroom for a couple of minutes when the phone rang.

16 Defendant told Special Agent Paton that the next day he told his best friend, Captain Travis
17 Russell, that he hooked up with the victim and that she had gotten sick. He stated that he told
18 Captain Russell more detail about the encounter than he would have with another person because it
19 was a “weird situation.”

20 Defendant then typed a statement which included aspects of all of the statements above.

21 After the interview, defendant accompanied NCIS agents to his apartment. His clothing
22 worn on the evening and his toothbrush allegedly used by the victim were retrieved. Defendant was
23 also examined by SART personnel at Palomar-Pomerado Hospital on November 22, 2004. Injuries
24 were observed on his body: 1) small scabs in a vertical line centered on the head of his penis; 2)
25 redness to the right eyebrow area; 3) a small scratch on the back of defendant’s head; and 4) redness
26 on the right ear. General areas of redness on defendant’s body were also observed.

27 Forensic analysis was performed on the SART kits of both the victim and defendant.
28 Analysis was also performed on the victim’s clothing and defendant’s toothbrush. No DNA from
defendant was identified in or on the victim or her clothing. No DNA from the victim was identified
on defendant’s toothbrush. Chemicals consistent with vomit were found on the victim’s dress as

1 well as reddish stains.

2 On March 24, 2004, two search warrants were served on defendant's residence at 5051 La
3 Jolla Blvd, #209, San Diego, California, County of San Diego, 92109. Cameras, 2 computers,
4 electronic media storage, a cellular telephone, CDs, videos, steroids and two syringes were
5 recovered. Defendant's work computer located at Miramar was seized on a later date.

6 Most of the bottles of recovered steroids are prohibited by UCMJ (Article 112A) and the
7 California Penal Code. Most of the DVDs and CDs recovered contained commercial and homemade
8 pornography. Unauthorized video taken by defendant from the cockpit of his airplane was also
9 seized. Three computers, 2 personal and one from work, and a cellular phone were sent to the
10 Regional Computer Forensic Laboratory and analyzed. A large amount of data was retrieved
11 including hundreds of pornographic images and video, emails, and text messages.

12 The cellular telephone records of defendant and Lt. Winkler, whose telephone the victim was
13 using the night of the attack, were subpoenaed. The records have been released to both parties by
14 stipulation and the originals returned to the court.

15 Lt. Wilkinson was separated from her husband, Michael Love, in December of 2003 and has
16 since filed for divorce.

17 Uncharged Sex Crime

18 Captain Naomi Boyum is a pilot in the Marine Corps and is currently stationed in Cherry
19 Point, North Carolina.

20 In April of 2004, she was temporarily stationed in Iwakuni, Japan. Defendant was in Japan
21 on WESTPAC. On April 3, Captain Boyum was at a military bar on base with a fellow marine.
22 Captain Boyum had several drinks and she and defendant began to flirt. Defendant asked Capt.
23 Boyum to come back to his room and she initially agreed; defendant asked her to follow him 15
24 minutes after he left. While waiting, Capt. Boyum changed her mind and returned to her own room
25 instead. A fellow marine, Dave Frek, walked her to her room and the two sat down to watch a
26 movie.

27 Defendant showed up at the victim's room about 30 minutes after he left the bar, wondering
28 where Capt. Boyum was. His arrival caused a significant amount of tension, and within minutes,
Frek left.

1 The victim awoke hours later. She was lying naked in her bed next to defendant who was
2 also naked. The victim was still intoxicated and she and defendant engaged in consensual kissing;
3 defendant guided the victim to his penis and she orally copulated him to the point of ejaculation.
4 During this sexual activity, the victim noticed that her digital camera was on the nightstand next to
5 defendant. This struck her as odd for she had left the camera in the kitchen with the batteries out and
6 recharging the night before. Defendant left after the sexual activity and the victim went back to
7 sleep.

8 Capt. Boyum awoke several hours later and took a shower. She remembered defendant,
9 naked, lying on top of her while she lay on her back with her knees bent and her feet flat on the bed.
10 She remembered light coming from the bathroom door behind defendant. This was *not* the
11 consensual sexual activity she had engaged in earlier. She believed that defendant had sexual
12 intercourse with her during the night while she lay intoxicated and unable to give lawful consent.

13 Capt. Boyum noticed that her camera was on the kitchen table and the batteries were no
14 longer charging. She turned the camera on and the digital prompt read “No Memory Stick.” Frantic,
15 she searched her apartment but could not find it. She did not remember the room number of
16 defendant and went to the room of David Frek who stated he did not have the memory stick and told
17 Capt. Boyum where defendant’s apartment was.

18 Capt. Boyum confronted defendant at his apartment. He initially denied having the stick,
19 claiming he *did not* know what the victim was talking about. When the victim repeated the question
20 with more emotion, defendant laughed and said he *did* have the stick. Defendant retrieved the stick
21 from his computer area and said there were no pictures on it. He stated that the camera was set on a
22 function that could not take pictures. When asked why he took the stick, defendant stated he wanted
23 to erase the pictures. Defendant also denied engaging in sexual activity with the victim the night
24 before, saying that they had both passed out. Defendant repeated that he did not have any pictures
25 and asked that the victim check the stick herself.

26 The victim returned to her room and checked her camera. It could take pictures from all the
27 functions and specifically the function the defendant stated he attempted to use. She checked the
28 memory stick and discovered that it was empty. As she thought about her confrontation with

1 defendant, she grew more and more uneasy with his explanation about the memory stick and his
2 denial of sexual activity.

3 Capt. Boyum returned to defendant's room and again asked him if there were any pictures;
4 defendant repeatedly said no. The victim then demonstrated that his theory about the camera
5 function was wrong, that the camera could take pictures on the function defendant had stated he
6 used. Defendant grew agitated but denied he had taken any pictures.

7 The victim left his room still unsatisfied. To her, it made no sense that he had stolen her
8 memory to erase pictures he denied taking. Capt. Boyum went to the senior Captain in her squadron
9 and repeated the incident without the sexual assault portion and without naming defendant. She and
10 the Captain then went to their commanding officer and told him of the incident – again, minus the
11 assault and defendant's name. Capt. Boyum told them that she did not want an investigation. She
12 just wanted confirmation that there were no pictures; she eventually revealed defendant's name.

13 Later that night, defendant came to Capt. Boyum's room. Defendant was agitated that the
14 victim had spoken to her command. Defendant finally confessed that he had taken pictures of the
15 victim and that he erased them in his room because they were only of "blurry body parts." He stated
16 that she was awake for some of the pictures and *unconscious* for others. He apologized and stated
17 that he didn't know how he was going to return the memory stick after he had taken it. He said he
18 feared that Capt. Boyum was going to be mad when she realized that he had taken pictures of her
19 and that he had contemplated erasing the pictures while she was in the bathroom earlier that
20 morning.

21 Capt. Boyum felt some resolution with defendant's confession and told her command that
22 she did not want to pursue the situation any further. Capt. Boyum wrote a statement for her command
23 that outlined the events. In the last paragraph, the victim wrote: "I strongly believe that I was not
24 taken advantage of sexually. I do feel violated that he did take pictures of me and lied about the
25 existence of the pictures. All I care about is that the pictures are no longer in existence. I do not
26 want to pursue this matter any further."

27 Capt. Boyum was located by NCIS in late June of 2005 and interviewed on July 15, 2005.
28 Her first concern was to clarify her earlier statement to command. Capt. Boyum stated that due to

1 embarrassment and fear of the repercussions from peer perception, she chose not to pursue action
2 against defendant. She stated that defendant *had* sexually assaulted her during the evening while she
3 lay intoxicated and unable to give legal consent. She stated that had she told her command this,
4 they would have been obligated to pursue an investigation and she was not comfortable with that at
5 the time. Capt. Boyum stated that she is truly embarrassed about becoming so intoxicated but deeply
6 regrets not pursuing the matter.

7 **III.**
8 **TRIAL**

9 **A. Witness List**

10 The following individuals may be called as part of the People's case-in-chief and/or in
11 rebuttal:

- 12 1) Lt. Claire Wilkinson, USMC
- 13 2) Lt. Thomas Winkler, USN
- 14 3) Lt. Joshua Russo, USMC
- 15 4) Lt. Brandon Sellars, USN
- 16 5) Lt. Daniel Taylor, USN
- 17 6) Lt. Brett Pugsley, USN
- 18 7) Lt. Erik Bielik, USN
- 19 8) Capt. Naomi Boyum, USMC
- 20 9) Amy Carney, R.N., SART Nurse
- 21 10) Beverly LeBlanc, R.N., SART Nurse
- 22 11) Special Agent Zachary Paton, NCIS
- 23 12) Special Agent Tristy Walters, NCIS
- 24 13) Special Agent Derrick Rowe, NCIS
- 25 14) Catherine Garcia, District Attorney Investigator
- 26 15) Officer Katherine Fabregas, HPD
- 27 16) Captain Sheila Weibert, USMC
- 28 17) Tina De la Roche, Criminalist, United States Army Criminal Investigation Laboratory

- 1 18) Rebecca Admiri, Forensic Analyst RCFL
- 2 19) Patrick Lim, Forensic Analyst, RCFL
- 3 20) Terry Spahr Nelson, MSSW, ACSW
- 4 21) Colonel Peter Devlin
- 5 22) Major Jack Reese
- 6 23) Lt. Colonel Anne Weinberg

7 **B. Exhibit List**

8 The People may introduce the following items:

- 9 1) Pictures and diagram of the interior of room 1754, Manchester Grand Hyatt.
- 10 2) Pictures of the (interior and exterior) of the Manchester Grand Hyatt.
- 11 3) Pictures of trauma to mouth, anus, rectum, and vagina of victim.
- 12 4) Diagram of female and male genitalia.
- 13 5) Pictures of clothing worn by victim prior to attack.
- 14 6) Broken necklace worn by victim prior to attack.
- 15 7) Cellular phone records of defendant and Tom Winkler.

16 Additional exhibits may be introduced.

17 **C. In Limine Motions**

18 **1) To Prohibit Questioning or Evidence of the Victim's Prior Sexual Conduct.**

19 The Legislature has mandated the humane treatment of victims of sexual assault in courts of
20 law. Enshrined in two Evidence Code sections and numerous court decisions, the mandate limits
21 and prohibits the introduction of a victim's sexual history with people other than the defendant.

22 Evidence Code section 782 reads as follows:

23 (a) In any prosecution under Section 261, 264.1, 286, 288, 288a, 288.5,
24 or 289 of the Penal Code, or for assault with intent to commit, attempt
25 to commit, or conspiracy to commit any crime defined in any of those
26 sections, except where the crime is alleged to have occurred in a local
27 detention facility, as defined in Section 6031.4, or in a state prison, as
28 defined in Section 4504, if evidence of sexual conduct of the
complaining witness is offered to attack the credibility of the
complaining witness under Section 780, the following procedure shall
be followed:

(1) A written motion shall be made by the defendant to the court and

1 prosecutor stating that the defense has an offer of proof of the
2 relevancy of evidence of the sexual conduct of the complaining witness
3 proposed to be presented and its relevancy in attacking the credibility
4 of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which
the offer of proof shall be stated.

(3) If the court finds that the offer of proof is sufficient, the court shall
order a hearing out of the presence of the jury, if any, and at such
hearing allow the questioning of the complaining witness regarding the
offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence
proposed to be offered by the defendant regarding the sexual conduct
of the complaining witness is relevant pursuant to Section 780, and is
not inadmissible pursuant to Section 352 of this code, the court may
make an order stating what evidence may be introduced by the
defendant, and the nature of the questions to be permitted. The
defendant may then offer evidence pursuant to the order of the court.

(b) As used in this section, 'complaining witness' means the alleged
victim of the crime charged, the prosecution of which is subject to this
section. (Evidence Code section 782, West's 2002).

12 Section 782 seeks to restrain attacks on the credibility of the complaining witness by
13 establishing a procedural framework. Thus, the defendant must bear the burden of offering to prove,
14 under oath, the relevance of the complaining witness' sexual conduct to attack her credibility in some
15 way other than by attacking her character. Section 782 applies only when the credibility of the
16 complaining witness is attacked and the procedural requirements of that section must be strictly
17 enforced.

18 Section 782 is frequently misconstrued with Evidence Code section 1103. Section 1103(c)
19 reads in pertinent part:

(c)(1) . . . [O]pinion evidence, reputation evidence, and evidence of specific
instances of the complaining witnesses' sexual conduct, or any of that
evidence, is not admissible by the defendant to prove consent by the
complaining witness. . .

(3) Paragraph (1) shall not be applicable to evidence of the complaining
witness' sexual conduct with the defendant.

(4) If the prosecutor introduces evidence, including testimony of a witness, or
the complaining witness as a witness gives testimony, and that evidence or
testimony relates to the complaining witness' sexual conduct, the defendant
may cross-examine the witness who gives the testimony and offer relevant
evidence *limited specifically to the rebuttal of the evidence* introduced by the
prosecutor or given by the complaining witness. (Evidence Code section
1103(c), West's 2002, emphasis added).

1
2 Like section 782, Section 1103 seeks to restrain attacks on the character of the victim.
3 However, unlike section 782 it does more than establish a procedural framework. *Section 1103(c)*
4 *expressly prohibits evidence of the victim's prior sexual conduct with others.* “The relevance of past
5 sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of
6 consent to a particular act of sexual intercourse with the defendant is slight at best.” (People v.
7 Guthreau (1980) 102 Cal.App.3d 436). In sum, if prior sexual conduct is offered to attack a victim's
8 credibility, the court should apply the strictures of section 782; if offered to prove consent, the court
9 should apply section 1103.

10 In balancing potential conflicts between Evidence Code sections 1103 and 782 concerning
11 evidence bearing on the issue of consent, the Legislature has specifically authorized the trial courts to
12 exercise discretion under Evidence Code section 352 to exclude evidence of prior sexual conduct by a
13 complaining witness. Moreover, the trial court has broad discretion to rule on evidence of this type and
14 its ruling will be upheld on appeal absent a showing of abuse of that discretion. (People v. Karis (1988)
15 46 Cal.3d 612, 637; People v. Preyer (1985) 164 Cal.App.3d 568, 573-574; People v. Randle (1982)
16 130 Cal.App.3d 286, 294.) The prohibition of Evidence Code section 1103 will only be overcome
17 where the proffered evidence clearly relates to issues of *credibility* as set forth in Evidence Code section
18 780.

19 As explained in People v. Rioz (1984) 161 Cal.App.3d 905, 916-917, a trial court is not required
20 to admit evidence of a rape victim's previous conviction for prostitution merely because it will help the
21 defendant convince a jury the victim consented to sexual relations. (See also People v. Varona (1983)
22 143 Cal.App.3d 566, 569.) Rioz involved an offer by a defendant to prove the victim had previously
23 been convicted of prostitution. The trial court refused to admit evidence of the conviction and the Court
24 of Appeal upheld that ruling, commenting:

25
26 Given the potentially prejudicial impact of a prostitution conviction on
27 the victim's testimony that she did not consent, the trial court, in the
28 exercise of its discretion, may determine that the injuries suffered by
the victim are wholly inconsistent with the defendant's offer of proof
and either reject the sufficiency of the offer of proof in the first instance

1 or exclude evidence of the prostitution conviction, after a hearing,
2 pursuant to Evidence Code section 352. (People v. Rioz, supra, 161
Cal.App.3d at 916-917.)

3 In exploring the tensions between Evidence Code sections 1103 and 782, the Rioz court
4 recognized the overlap between the issues of credibility and consent in rape cases. It cautioned:

5 . . . Evidence Code section 782 applies only when the credibility of the
6 complaining witness is attacked. Great care must be taken to insure
7 that this exception to the general rule barring evidence of a complaining
8 witness' prior sexual conduct, i.e., Evidence Code section 1103,
subdivision (b)(1), does not impermissibly encroach upon the rule itself
and become a 'back door' for admitting otherwise inadmissible
evidence. (Id., at 918-919.)

9 In the instant case, defendant will likely claim that no assault occurred because the sex acts
10 were consensual. Prior sexual conduct of the victim is not admissible pursuant to Evidence Code
11 section 1103 and there is no basis for any exception under section 782. To permit detailed
12 questioning of victim's sexual history with others is irrelevant and prejudicial. Therefore, the court
13 should carefully limit and prohibit any cross-examination or evidence of the victims' prior sexual
14 conduct offered by the defense.

15 **2) To Limit Questioning or Evidence Regarding the Victim's Marital Status.**

16 An element of the crimes charged is the non-marital relationship of the victim and defendant.
17 There must, by necessity, be evidence of that kind. However, questioning or evidence beyond that
18 should not be allowed.

19 The victim is in the process of divorcing Michael Love, her husband. They were separated in
20 December of 2003 and have not lived in the same state since then. Both parties are in romantic
21 relationships with other people. Evidence of the victim's relationship with Josh Russo, a fellow
22 Marine, will be a natural and obvious disclosure during testimony for he was a percipient witness to
23 her demeanor that evening and the next day. However, it is likely that the defense will use the
victim's marital status and her relationship with Lt. Russo in an attempt to impeach her credibility.

24 While "adultery" may be considered a crime under the UCMJ, it is not a crime under the
25 California Penal Code and the People have found no case law considering it a crime of moral
26 turpitude. As a crime, it is rarely, if ever enforced by the military. The military culture surrounding
27 adultery has changed over the last decade, not unlike the changes in the culture surrounding sexual
28 assault. Moreover, the separation between the victim and her husband was significant –

1 geographically and temporally. This was a marriage in name only.

2 Additionally, evidence of this nature fits within the prohibitions of 782 and 1103.

3 Questioning regarding the victim's marital status creates, intentionally and unintentionally, the
4 presumption that if she committed adultery with Josh Russo, she is likely to commit it again - in
5 essence, putting consent at issue through the victim's prior sexual activity.

6 The defense will likely argue that it is relevant for it provides the victim motive to lie about
7 the rape. Even a brief glance at the facts involved disproves that claim. Lt. Wilkinson was not
8 caught in the throws of passion by her husband and cried rape to cover her indiscretion. She was
9 raped by defendant without witness and revealed it through her own intentional action. She could
10 have chosen the softer path of silence. However, Lt. Wilkinson risked respect, dignity, and her career
11 to report the crime. To suggest that she reported the rape to save a dead marriage is preposterous.

12 Evidence or questioning about the victim's marital status serves no relevant or material issue
13 and should not be allowed.

13 **3) To Prohibit Questioning or Evidence About Adultery and the UCMJ.**

14 Defendant has stated that he intends to offer evidence that the relationship between the victim
15 and Lt. Russo violated several directives of the UCMJ. Again, while adultery may still be considered
16 a crime under the UCMJ, it is infrequently enforced; in practice, a "don't ask, don't tell" policy.
17 More importantly, this is not a military court and the UCMJ has no place here. Adultery is not
18 against the law and is not a crime of moral turpitude. While there may be overlap between state law
19 and the UCMJ, equating the UCMJ to the law of this court is overly broad and morally troublesome.
20 For instance, within these walls, we do not consider homosexuality a crime. Moreover, the
21 introduction of multiple sets of rules dressed as law, needlessly threatens juror confusion when there
22 is no question that the California Penal Code applies here. Lastly and most importantly, it is
23 prohibited character evidence – flat out.

24 Defendant should be wary that he is subject to the very same regulations and stands as
25 equally "culpable."

25 **4) To Include Expert Opinion Testimony by the SART Nurse Regarding Injuries.**

26 The People seek to introduce evidence of Lt. Wilkinson's injuries observed by licensed
27 Sexual Assault Nurse Examiner (S.A.N.E.) and Registered Nurse Amy Carney on November 20,
28 2004. Nurse Carney is qualified to testify as an expert based on her education, training, and

1 experience. Likewise, the People seek to introduce evidence of injuries to defendant observed by
2 licensed Sexual Assault Nurse Examiner (S.A.N.E.) and Registered Nurse Beverly LeBlanc on
3 November 22, 2004. Nurse LeBlanc is similarly qualified.

4 In San Diego County, all reporting adult rape victims are referred to one of two SART
5 (Sexual Assault Response Team) units for evidentiary examinations. One is at Pomerado Hospital,
6 the other is at University Hospital. (Victims under 18 are examined at Children’s Hospital.) Both
7 Pomerado Hospital and University Hospital retain a staff of trained on-call S.A.N.E.s who are
8 supervised by a licensed physician.

9 The protocol at each of the two SART units is the same: A police officer calls ahead to the
10 hospital. The hospital pages a licensed, on-call S.A.N.E. to the hospital. The officer transports the
11 victim to the hospital and meets the S.A.N.E. there. The S.A.N.E. meets with the victim and
12 explains the evidentiary exam process. If the victim consents to the exam, then the nurse obtains a
13 medical history from the victim using a seven-page form called an OCJP 923 form. After that, the
14 victim strips down and is examined and photographed by the nurse examiner. This process generally
15 takes two to three hours.

16 The San Diego county protocol was developed under guidelines by the Office of Criminal
17 Justice and Planning (OCJP). The guidelines themselves are set out in Penal Code sections 13823.5
18 et seq.. The rules provide that the “qualified health care professionals” who conduct evidentiary
19 examinations on sexual assault victims include “a physician and surgeon currently licensed pursuant
20 to ... the Business and Professions Code, *or a nurse currently licensed* pursuant to ... the Business
21 and Professions Code and working in consultation with a physician and surgeon who conducts
22 examinations.” (Penal Code section 13823.5(e) (emphasis added), West’s 2003.)

23 The question of whether a nurse may testify as an expert on certain medical matters was
24 answered in the affirmative in People v. Rance (1980) 106 Cal.App.3d 245. Rance was a sexual
25 assault prosecution in which a registered emergency room nurse testified as an expert regarding the
26 likely cause of the victim’s bruising. Specifically, the nurse was allowed to testify that based on the
27 bruises she observed it was her opinion that the victim in the case had been the subject of physical
28 violence. The reviewing court upheld the ruling, noting that the nurse in question “had sufficient
experience in observing wounds and bruises of victims of trauma to be capable of rendering an
opinion[.]” (Id. at 255.)

1 In San Diego County, virtually 100% of adult sexual assault evidentiary exams are performed
2 by nurses, not doctors. Nurse Carney has been a nurse since 1984. She holds a Master's degree in
3 Nursing and a Master's degree in Forensic Science. She has been qualified to conduct sexual assault
4 examinations since 2001. In addition to her work as a S.A.N.E., Nurse Carney works as a Family
5 Nurse Practitioner at Neighborhood HealthCare in Escondido and with American Medical Response
6 and San Diego Medical Services Enterprise. She has published scholarly articles and presented
7 topics in the field of nursing, forensics, and domestic violence. She both performs SART
8 examinations and supervises other S.A.N.E.s. Nurse Carney has previously qualified as an expert in
9 this area and has given opinion testimony of the kind sought to be elicited here. Should the court
10 wish to conduct a 402 hearing on this nurse's qualifications, the People would be happy to make her
11 available.

12 Nurse Le Blanc is likewise qualified to testify. She has an Associates Degree in Nursing and
13 is currently pursuing her bachelors; she has worked in the field of nursing since 1997. The court
14 should note that the type of testimony offered by Nurse Le Blanc is substantially different from that
15 offered by Nurse Carney due to the difference in SART examinations between a victim and a
16 suspect. The suspect SART examination performed by Nurse Le Blanc was limited to the
17 documentation of injuries and the collection of evidence. It was predominantly observational with
18 only a limited medical history being taken from the suspect before the exam. No finding or opinion
19 will be rendered by Le Blanc.

20 The People ask that the court limit questioning of both nurses to avoid inappropriate
21 conclusions. Both rape and consent are legal principles, not medical diagnoses. The nurses can
22 verify the presence of findings and whether the findings are consistent with the history of the assault
23 given by the victim, consistent with recent trauma, and consistent with recent sexual contact.
24 However, the jury has the responsibility to assess the credibility of the victim and her testimony, and
25 to determine the legal principles in question. Therefore, as neither rape nor consent can be
26 diagnosed from the examination, no matter how qualified the examiner or how severe the injuries,
27 the People ask the court to prohibit questioning on either legal principle – whether in regard to the
28 specific injuries sustained by the victim and defendant, or in a “comparison” questions using consent
in opposite.

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5) To Include the Presence of a Support Person of the Victim’s Choice.

The People will call the victim to the stand during their case-in-chief. Penal Code section 868.5 states that a prosecuting witness in a sexual assault case is entitled to have 2 support persons of their choosing present when they testify. The section entitles the witness to choose a person even if he or she is also a witness in the trial and further permits one support person to sit with the victim at the witness stand.

6) To Exclude Comment on Previous Employment or Military Experience of Attorneys.

The prior employment or military experience of the lawyers in this action is not relevant or material. There is no reason for such comment except to unlawfully persuade and unduly influence the jury. Comment of that nature is an attempt to color their case with credibility not based on fact or merit, but on their personal experience. In essence, it is vouching for the defendant.

The People ask that counsel be admonished not to comment on their previous employment or military experience.

7) To Include the Victim’s Statements to Josh Russo and Tom Winkler Pursuant to the “Fresh-Complaint Rule.”

Under the fresh-complaint rule statements made by a sexual assault victim are offered for the purpose of showing that a complaint was made and the circumstances surrounding the making of the complaint. In originally crafting the fresh-complaint doctrine, courts adhered to the prevailing assumption that it was natural for a woman to confide in someone immediately after a rape and that the absence of such a complaint meant that no offense was committed. (People v. Brown (1994) 8 Cal.4th 746, 757.) This historic premise has been substantially discredited in contemporary times. (Id. at 759.) However, although society’s perception and understanding of rape is changing, the subtle and overt bias against women victims of rape has not been eradicated. (Id. at 760, agreeing with the reasoning of the New Jersey Supreme Court in State v. Hill (1990) 121 N.J. 150.)

Our supreme court has steadfastly refused to discard of the rule permitting testimony of a fresh-complaint. (Id. at 760-761.) Evidence of a sexual assault victim’s fresh-complaint is admissible and relevant to establish the circumstances under which the victim reported the offense:

1 “evidence of a victim’s conduct following the alleged commission of a crime, including
2 circumstances under which he or she did (*or did not*) promptly report the crime, frequently will help
3 place the incident in context, and may assist the jury in arriving at a more reliable determination as
4 to whether the offense occurred.” (*Id.*, emphasis added.) Furthermore, introduction of such
5 testimony will “eliminate the risk that the jury, if not apprised of the fact, erroneously will infer that
6 no such complaint was promptly made.” (*Id.* at 762.) Lastly, unlike a Spontaneous Statement
7 offered under Evidence Code section 1240, the statements are not offered for the truth of the matter
8 asserted and their admissibility does not turn on whether the complaint was made immediately
9 following the assault or after some delay, nor does it turn on the statement’s voluntariness. (*Id.* at
10 751, 763.) Rather, those are factors to be considered alongside the other circumstances of
11 disclosure. (*Id.*)

12 Here, Lt. Wilkinson reluctantly disclosed the attack to Lt. Russo and her cousin, Lt. Winkler
13 the day after the attack. At each instance, she was crying and distraught and spoke of the assault
14 only after significant encouragement. The victim’s behavior places the incident within the larger
15 context of her immediate reality – being new to San Diego, having a limited support structure, being
16 new to the military and her position, and fearing the consequences of disclosing the assault by a
17 senior officer. Moreover, the circumstances of disclosure help to explain the delay in reporting. The
18 People do not intend on offering cumulative evidence of the fresh-complaint and will limit testimony
19 from the two witnesses to non-duplicative evidence.

20 **8) To Include Expert Testimony on Common Reactions to Sexual Assault and the**
21 **Context of Disclosure Within the Military.**

22 The People intend to call Terry Spahr Nelson as an expert on victim reaction to sexual
23 assault. Terry Spahr Nelson is a psychotherapist specializing in sexual trauma recovery. She was in
24 the Army for four years and was twice awarded the Army Commendation medal. She has served on
25 several civilian panels and in organizations addressing sexual assault and harassment both legally
26 and socially. She also served as Principal Investigator for an international study on rape and sexual
27 harassment in the United States military. Moreover, Mrs. Nelson has worked extensively with the
28 Department of Defense in revising sexual assault and harassment protocols and guidelines for all the
branches. Mrs. Nelson authored For Love of Country, Confronting Rape and Sexual Harassment in

1 the U.S. Military. Her testimony will aid the jury in evaluating the evidence within its proper context
2 and free of the constraints of popular myths.

3 The California Supreme Court has recognized that expert testimony on a victim's reaction to
4 sexual assault and the context of disclosure plays a particularly useful role in trial by disabusing the
5 jury of widely held misconceptions about rape and rape victims allowing the jury to evaluate the
6 evidence free of constraints of popular myth. (People v. Bledsoe (1984) 36 Cal.3d 236, 247-248
7 (affirmed use of *Rape Trauma Syndrome* to explain post-assault behavior of victim).) The rationale
8 for this type of expert testimony is analogous to that of the fresh-complaint doctrine explained
9 above.

10 Courts now routinely permit expert testimony on common reactions to sexual abuse and the
11 context of disclosure to rehabilitate the credibility of the victim or other witnesses when it is
12 suggested that their conduct after the incident, usually a delay in reporting, is inconsistent with his or
13 her own testimony claiming abuse. (People v. McAlpin (1991) 53 Cal.3d 1289; People v. Patino
14 (1994) 26 Cal.App.4th 1737. Delia S. v. Torres (1982) 134 Cal.App.3d 471; People v. Bowker (1988)
15 203 Cal.App.3d 385, 390-394; People v. Gray (1986) 187 Cal.App.3d 213, 217-220).

16 Courts also routinely allow the People to introduce expert testimony in their case-in-chief
17 rather than waiting for rebuttal. (Patino, 26th Cal.App. 4th at 1745; People v. Harlan (1990) 222
18 Cal.App.3d 439, 449-450; People v. Sanchez (1989) 208 Cal.App.3d 721, 735-736). In Patino,
19 defendant was convicted of lewd and lascivious acts on a child, false imprisonment, and forcible oral
20 copulation. On appeal, defendant claimed that the admission of expert testimony on Child Sexual
21 Abuse Accomodation Syndrome (CSAAS) to explain a delay in reporting *before* defendant cross-
22 examined the victim violated both evidentiary rules and his constitutional right to confrontation.
23 The court rejected his claim and upheld his conviction. (Id.)

24 Using the same reasoning as our supreme court in Bledsoe, the Patino court found that
25 admission of evidence like CSAAS is relevant to disabuse the jury of misconceptions it might hold
26 about how a victim reacts to sexual abuse. (Id. at 1744). The court stated that the People *need not*
27 identify a “myth” or “misconception” or expressly state on the record the evidence which is
28 inconsistent with the finding of assault before offering expert testimony. (Id.) It is sufficient if the

1 victim's credibility is placed at issue due to paradoxical behavior, including a delay in reporting. (Id.)
2 The court reasoned that if it were a requirement for admissibility that the defense first identify and
3 focus on the behavior before admission of expert testimony, the defense would simply wait until
4 closing to accentuate the juror's misconceptions. (Id. at 1745.) To eliminate this "absurd result," the
5 People are permitted to introduce properly limited credibility evidence if the issue of a specific
6 misconception is suggested by the evidence. (Id.)

7 Paradoxes and inconsistencies are apparent at first glance. The victim did not report the
8 crime for almost 24 hours. She was sexually assaulted causing significant injury but did not tell Lt.
9 Sellars when he called on the telephone, nor her boyfriend, nor her cousin, nor the police. In fact, it
10 was her cousin who disclosed the assault to law enforcement, not the victim.¹ Moreover, the day
11 after the attack, the victim expressed concern for her career, not justice, if she reported. This concern
12 alone may not be easily understood by jurors. Expert testimony on barriers to reporting help to
13 explain her late and reluctant report and place into context her concerns for her career.

14 In addition to the traditional paradoxes of sexual assault, there is a pervasive military
15 overtone that constructs barriers to understanding and lends itself to juror misconception. While the
16 crime occurred on county jurisdiction, both the defendant and the victim are military personnel. The
17 crime was reported to the military and investigated by the military. Almost all of the witnesses are
18 in the military. The effects of this military overlay to sexual assault are not commonly understood by
19 a jury and are demanding of expert attention. For instance, most jurors have likely been spared the
20 experience of being a sexual assault victim while serving in the military. Lacking that experience,
21 jurors can only rely on their intuition or on the evidence introduced at trial. It is reasonable to
22 conclude that based on their intuition alone, jurors would tend to believe that a victim of sexual
23 assault in the military would be more likely than a civilian victim to report an attack given the
24 military's emphasis on structure, protocol, and rules. A jury may also believe that given the recent
25 sex abuse and harassment scandals plaguing the military, the military is vigilant and non-tolerant of
26 abusers. These misconceptions affect the jury's ability to evaluate the evidence freely and fairly.

27
28 ¹ This has already been presented as an issue at the preliminary hearing.

1 In For Love of Country: Confronting Rape and Sexual Harassment in the U.S. Military (The
2 Haworth Press 2002), Terry Spahr Nelson explores the reactions of sexual assault victims in the
3 military and military context of disclosure. There are common reactions and obstacles shared with
4 civilian victims – guilt and shame – and barriers unique to the military experience: fear of
5 repercussions and lack of response, secondary victimization, harassment, career and job interference,
6 disciplinary action, transfer and/or removal, psychiatric referrals, and discharge. In all, Ms. Nelson
7 describes a “climate of non tolerance” – not for abuse, but for allegations of abuse. *It is this climate*
8 *that informed Lt. Wilkinson’s choices and behavior after the assault and it is not commonly*
9 *understood by the jury.*

10 To be clear, the People do not intend to offer this evidence to prove the charges against
11 defendant. Instead, this evidence is offered to assist the jury in placing the victim’s testimony and
12 the impeachment arguments of defendant in proper perspective. The People will make Ms. Nelson
13 available for a 402 hearing prior to her testimony should the court desire.

14 **8) To Include Defendant’s Statements to Special Agent Paton Pursuant to Evidence**
15 **Code Section 1220.**

16 Section 1220 permits the admission of an out of court statement offered for the truth of the
17 matter asserted when offered *against* the declarant in an action in which he is a party.

18 Here, after defendant waived his *Miranda* rights, he made a series of oral statements to Agent
19 Paton. Defendant then wrote a version of events in which he denied that the victim was unconscious
20 and denied the use of force. Defendant’s statements stand in stark contrast to the victim’s statement,
21 statements from his own witnesses, and the physical evidence. Defendant’s denials are affirmative
22 evidence of his guilt. Moreover, *how* he reported his story is as important as what he said. He was
23 not forthcoming and repeatedly contradicted himself.

24 Defendant’s statements will be offered by the *People* against defendant and are admissible
25 under Evidence Code section 1220. Moreover, should the court or defendant desire, the People can
26 make Special Agent Paton available for a 402 hearing prior to admission.

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1 **9) To Admit Evidence of the Uncharged Sexual Crime Pursuant to Evidence Code**
2 **Section 1108.**

3 The People intend to introduce defendant’s sexual assault on the intoxicated Captain Naomi
4 Boyum in April of 2004. This evidence falls precisely within the class of evidence sanctioned by the
5 Code and is clearly probative in this case.

6 The courts have recognized that evidence of prior sexual offenses is indisputably relevant in
7 the prosecution of another sex related offense. In fact the prior rationale for excluding such evidence
8 is not that it lacked probative value but that it was too relevant. (People v. Fitch (1997) 55
9 Cal.App.4th 172, 179.) Evidence Code section 1108 recognizes this relevancy and provides for
10 admission of this critically important circumstantial evidence.

11 Pursuant to Evidence Code section 1108, evidence that a defendant committed prior sexual
12 assaults is presumptively admissible. (People v. Falsetta (1999) 21 Cal.4th 903; People v. Soto
13 (1998) 64 Cal.App.4th 966.) Evidence Code section 1108 states in pertinent part: “In a criminal
14 action in which the defendant is accused of a sexual offense, evidence of the defendant’s
15 commission of another sexual offense or offenses is not made inadmissible by section 1101, if the
16 evidence is not inadmissible pursuant to section 352.” (Evidence Code section 1108, West’s, 2002.)

17 Evidence Code section 1108 defines sexual offense in subsection (d)(1) as:

- 18 (A) Any conduct proscribed by Sections 243.4, 261, 261.5, 262, 264.1, 266c,
19 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of section
20 311.2 or 311.3, 311.4, 311.10, 311.11, 314, or 647.6 of the Penal Code.
21 (B) Contact, without consent, between any part of the defendant’s body or an
22 object the genital or anus of another person.
23 (C) Contact, without consent, between the genitals or anus of the defendant and
24 any part of another person’s body.
25 (D) Deriving sexual pleasure or gratification from the infliction of death,
26 bodily injury, or physical pain on another.
27 (E) An attempt or conspiracy to engage in conduct described in this paragraph.
28 (Id.)

29 Passed in 1995, section 1108 is a relatively new statute; however, the use of prior sexual
30 offenses against a defendant at trial is not a new or novel idea. In fact, California’s section 1108
31 reads almost verbatim with the Federal Rules of Evidence 413 and 414 which were passed in 1994.

32 According to the statute’s author, the need for the bill was unequivocal. Under Evidence

1 Code section 1101(b), the traditional character evidence caveat, evidence that a defendant committed
2 an uncharged sexual act would not necessarily be admissible at trial in which the defendant is being
3 charged with a sexual offense. **Yet the propensity to commit a sexual offense is not a common**
4 **attribute among the general public.** Therefore, evidence that a particular defendant has such a
5 propensity is probative and will aid the trier of fact in its search for the truth. (Senate Bill hearings
6 No. AB882, July 20, 1995, California Senate Committee.)

7 Evidence of other sex crime conduct is not only highly probative but it is also of great
8 assistance to the trier of fact in resolving the inevitable evidentiary conflict in a sexual assault case.
9 Rarely are there witnesses to a sexual assault leaving prosecutions to become swearing matches
10 between the defendant and victim. Also, because of the prejudice, stigma, and suspicion that
11 attaches to the victim of a sex crime, the jury may be unwilling to accept the testimony of the victim
12 for the ironic reason that she is in fact, a victim of a sex crime. Evidence of uncharged acts typically
13 corroborates the victim's testimony, resolving the inevitable swearing match and bridging the gap
14 caused by social prejudice. Bolstering a witness's credibility is an appropriate purpose for admitting
15 evidence, especially when the credibility is placed at issue by the defense. (People v. Sheid (1997)
16 16 Cal.4th 1.)

17 Furthermore, admission of uncharged sexual conduct does not violate the tenet of Evidence
18 Code section 352. There is little possibility that other sex crime evidence will necessitate undue
19 consumption of time or create an undue danger of prejudicing, misleading or confusing the jury.
20 Unlike evidence offered under 1101(b) and identical to evidence offered under section 1109,
21 **evidence admitted pursuant to 1108 is propensity evidence.** Until now, judges were required to
22 give limiting instructions to clarify that the jury may use the uncharged offense only on the theory
23 for which it was admitted, i.e. intent, identity, common scheme or plan; judges would further instruct
24 the jury that they could not use the evidence for propensity or character. Pursuant to 1108, there is
25 no longer a need for a limiting instruction to be given since the information is character or
26 propensity evidence.

27 The constitutional dimensions of the 352 argument were addressed in People v. Fitch (1997)
28 55 Cal.App.4th 172 which held that Evidence Code section 1108 withstood constitutional scrutiny.
In Fitch, the trial court allowed the prosecution to introduce evidence of a prior uncharged attack on
a woman in which the defendant had taken her to a secluded place on a ruse and raped her; the

1 defendant asserted a consent defense. The defendant was convicted of forcible rape and the jury
2 found true two prior serious felony allegations. The Appellate court specifically held that the
3 admission of the prior act did not violate the due process clause because it did not lessen the
4 prosecution's burden to prove guilt beyond a reasonable doubt, or offend any fundamental principle
5 of justice. Nor did the admission of the prior act violate the equal protection clause or the
6 prohibition against ex post facto laws.

7 The Court rejected a due process clause challenge to the statute, emphasizing;

8 . . . section 1108 has a safeguard against the use of uncharged sex offenses in
9 cases where the such evidence could result in a fundamentally unfair trial.
10 Such evidence is still subject to exclusion under Evidence Code section
11 352.... By subjecting evidence of uncharged sexual misconduct to the
12 weighing process of section 352, the Legislature has ensured that such
13 evidence cannot be used in cases where its probative value is substantially
14 outweighed by the possibility that it will consume an undue amount of time
15 or create a substantial danger of undue prejudice, confusion of issues, or
16 misleading the jury. This determination is entrusted to the sound discretion
17 of the trial judge who is in the best position to evaluate the evidence. (Id. at
18 183.)

19 In sum, Fitch is based on the assumption that section 352 provides a realistic safeguard that
20 ensures that the presumption of innocence and other characteristics of due process are not weakened
21 by an unfair use of evidence of past acts.

22 Almost every court of appeal decision has upheld the 352 analysis of the trial court in the
23 context of 1108 evidence. For instance, in People v. Soto (1998) 64 Cal.App.4th 966, the court
24 upheld appellant's child molest conviction and validated the trial court's 352 analysis. The charged
25 case involved appellant molesting his 14-year-old niece in 1996. The two prior uncharged acts of
26 molestation involved appellant molesting two other female relatives between 1969-1973. Those
27 relatives (age 37 and 26 at the time of the trial) testified. The court stated that the propensity
28 evidence was highly probative of defendant's sexual misconduct when left alone with young female
relatives and the passage of such a substantial length of time does not automatically render
uncharged acts prejudicial. (Id. at 991-992.) The court added that, of course, the uncharged acts
were prejudicial, but that is the nature of such evidence. "The prejudice presented by this evidence
is the type inherent in all propensity evidence and does not render the evidence inadmissible." (Id.)

In People v. Yovanov (1999) 69 Cal.App.4th 392 the charged crime involved appellant

1 molesting a young girl in 1994. The uncharged act involved appellant molesting that same girl in
2 1986, which resulted in a conviction. In upholding the trial court's 352 analysis the Yovanov court
3 noted that the conduct underlying the charged offenses was as graphic as the uncharged acts, and
4 that the uncharged acts had great probative value given their close resemblance and closeness in time
5 to the charged offenses. Finally the court noted that since the jury knew the appellant had been
6 convicted of many of the uncharged acts, it would be not disinclined to hold them against the
7 defendant in the current trial.

8 In People v. Callahan (1999) 74 Cal.App.4th 356 the court upheld the trial court's 352
9 analysis. The charged crime involved appellant fondling his 9-year-old daughter's vaginal area. The
10 uncharged acts involved appellant fondling a 12-year-old girl's breast and vaginal areas about 10
11 years before the charged offense. The court noted that there was no undue consumption of time and
12 stated there was no substantial danger of undue prejudice because the circumstances of the
13 uncharged act were no more inflammatory than the charged incident.

14 In People v. Regalado (2000) 78 Cal.App.4th 1056, the court affirmed the introduction of
15 1108 evidence. The charged act involved the anal-digital penetration of a 5-year old boy. The
16 uncharged act involved the exact same conduct to a separate boy 5 years earlier. The trial court
17 conducted a 352 balancing test, explaining that the uncharged offense was not too remote, and
18 because the offenses were virtually identical, the probative value far exceeded any possible
19 prejudicial effect. The appellate court found no problem with the trial court's analysis, stating that
20 the analysis was "completely true to the purpose of [Evidence Code section 1108]." (Id. at 1060.)

21 In People v. Waples (2000) 79 Cal.App.4th 1389, the charged crime involved appellant
22 molesting 3 girls ages 7-10. Appellant would digitally penetrate the girls with his hands, and attempt
23 sexual intercourse with them. He would also require the girls to touch his penis and orally copulate
24 him. The uncharged acts involved appellant molesting a girl 18-25 years prior to the charged act.
25 Those molests involved digital penetration, forced oral copulation (him on her, and her on him) and
26 attempted sexual intercourse. Appellant was never punished for the prior uncharged acts, and the
27 jury was never informed of this fact. The appellate court was not concerned with the fact the
28 uncharged acts were 18-25 years old. The court noted the similarities between the prior and current

1 acts balanced out the remoteness of the prior acts and the fact that the jury was never informed that
2 appellant was not punished for those acts.

3 In People v. Frazier (2001) 89 Cal.App.4th 30, the court affirmed admission of appellant’s
4 uncharged sex acts with children. The charged incident involved appellant fondling a 9-year-old
5 niece. The uncharged incident involved appellant molesting three other young girl family members
6 15-years earlier. The court determined that the evidence was probative and not confusing for the
7 jury. The fact that the uncharged incidents happened 15-years-ago did not render the evidence
8 irrelevant. Nor was appellant prejudiced by the fact that 27% of the total trial time was spent on
9 presenting evidence of the uncharged crimes.

10 In People v. Branch (2001) 91 Cal.App.4th 274, the court affirmed appellant’s child molest
11 conviction and validated the lower court’s 352 analysis. The current offense involved appellant
12 digitally penetrating a 12-year-old girl in 1997. The uncharged acts involved molests occurring
13 between 1958-1981, 30 years prior to the charged crime. In upholding the trial court’s 352 analysis,
14 the Branch court noted both the charged and uncharged acts were equally similar and inflammatory
15 and therefore no undue prejudice would arise by admitting the prior acts. The court noted that
16 despite the jury not learning whether appellant was punished for the uncharged acts, the record did
17 not reflect any confusion in this area. The court admitted the 30-year gap was “substantial” but
18 balanced the remoteness with the similarity between the charged and uncharged acts. The court felt
19 that the striking similarities raised the probative value of the uncharged acts, and, on balance,
20 supported admission of the evidence. Finally, the court noted the uncharged act evidence took 71
21 minutes to present, and was therefore, not unduly time consuming. The court discussed the concept
22 of “undue prejudice” within Evidence Code section 352. The court said that “prejudicial is not
23 synonymous with damaging...the prejudice referred to in 352 applies to evidence which uniquely
24 tends to evoke an emotional bias against the defendant as an individual and which has very little
25 effect on the issues.” (Id. at 286.)

26 In People v. Britt (2002) 104 Cal.App.4th 500, the court addressed admission of evidence
27 pursuant to 1108 and 1101(b). In Britt, defendant was charged with burglary, indecent exposure and
28 annoying or molesting a child. Defense presented an alibi. On appeal defendant argued that the trial

1 court abused its discretion in admitting the other sexual offenses because the jury may have used the
2 “propensity evidence” for the contested issue of identity. In rejecting that argument the Britt court
3 emphasized that 1108 permits the jury to consider evidence of the prior offenses for any relevant
4 purpose including the identity of the perpetrator. (Id. at 505-506.) Therefore the more stringent
5 analysis of admission for identity for identity is no longer applicable when evidence is offered under
6 1108. Put another way, “...in a sex crime prosecution, the ‘signature test’ is no longer the yardstick
7 for admission of uncharged sexual misconduct to prove identity.” (Id. at 506.)

8 This Court should note that only one case has reversed a conviction where Evidence Code
9 section 1108 evidence was used. In People v. Harris (1998) 60 Cal.App.4th 727, the Appellate
10 Court reversed and found that the trial court abused it’s discretion by allowing prior conduct which
11 was twenty three years old and redacting the facts of the prior conduct to a point where the jury was
12 misled by the evidence. (Id. at 733.) More importantly, the facts of the case at trial were
13 significantly less serious than the prior.

14 Here, defense counsel is aware of defendant’s prior crimes and has been in possession of this
15 knowledge in advance of thirty days before trial. Indeed, the prior victim was contacted by defense
16 counsel before discovery being generated or provided on the incident. Defense counsel has received
17 copies of all reports done in connection with the current and prior offenses. Evidence of the prior
18 offense will come through the brief testimony of the victim, Captain Boyum and will be subject to
19 the rigors of cross-examination. The uncharged sexual assault is similar to the charged conduct and
20 is neither more egregious, nor more violent. Indeed, the uncharged offense can reasonably be
21 characterized as less inflammatory than the charged crime for it involves instances of consensual
22 sexual conduct between the victim and defendant. Lastly, the temporal proximity of the two
23 offenses greatly increases the relevance of the uncharged offense.

24 The fact that the defendant has such a propensity to commit sexual offenses is probative and
25 must be considered by the trier of fact in determining defendant’s guilt in the case at hand. The
26 evidence may be revealing and even damaging, but nonetheless clearly relevant, especially regarding
27 his use of physical force. Applying the factors set forth in People v. Falsetta (1999) 21 Cal. 4th 905,
28 the evidence of the uncharged acts survives a 352 analysis.

The defendant may contend that section 1108 only permits introduction of evidence of

1 crimes committed in the United States. This argument is unpersuasive. While the section itself
2 speaks to “..a crime under the law of a state or of the United States...” there is no question that given
3 the legislative intent of Evidence Code section 1108, if the conduct would constitute a crime in this
4 state or another state it may be admissible .

5 The statute does not require that the uncharged offense be committed in California or in one
6 of the other states. Had the legislature intended to place this limitation on the evidence it certainly
7 could have done so. The statute requires only that the uncharged sexual conduct be of a type that
8 would constitute a state or federal crime involving one of the categories of conduct. Any attempt to
9 read a jurisdictional requirement into the statute is unsupported by the language of the statutory
10 provisions. Conduct falling within the definition of “sexual offense” is equally probative of a
11 propensity to commit such a sexual offense whether the conduct occurred in San Diego, or Mexico
12 or Iwakuni. Most persuasively, the prior sexual assault occurred on an American military base by an
13 American on an American. The law controlling defendant in April of 2004 was that of the United
14 States. Thus, the assault falls squarely within section 1108.

15 Captain Boyum currently resides in North Carolina. While the People expect to litigate
16 introduction of the previous assault in limine, we are aware that a final ruling will unlikely be
17 forthcoming until a 402 hearing is held. The People will not speak of the previous assault or
18 introduce it in any way during opening statement or through the testimony of another witness and
19 request that the court order the same from defense.

20 **10) To Instruct the Jury That They Cannot Consider or Speculate About Possible**
21 **Military Consequences to Defendant.**

22 The significant military aspect in this case is likely to create many questions for the jury.
23 Specifically, jurors are likely to wonder whether defendant has been or will be punished for the
24 assault by the military. Military consequences are not at issue, nor a fact to be found by the jury. To
25 avoid this improper speculation, the People request that the court instruct the jurors at the beginning
26 of the trial and again prior to deliberation, that the jury cannot consider whether or not defendant has
27 received or will receive consequences or punishment from the military as a result of the assault. The
28 requested admonishment is almost identical to 17.42 and should focus the jury on the matters truly at

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issue.

Attached please find a proposed instruction which reads:

The jury should not discuss or consider the subject of penalty or punishment by the military, nor speculate as to whether or not the defendant has received a penalty or punishment from the military. That subject must in no way affect your verdict.

Anticipated Trial Length:

15 days

Respectfully Submitted,
BONNIE DUMANIS
District Attorney

By:

GRETCHEN DAHLINGER MEANS
Deputy District Attorney