In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **LEE V. COTTONE,** **Defendant and Appellant.**

Case No. S194107

Appellate District Division Three, Case No. G042923
Orange County Superior Court, Case No. 06HFI734
The Honorable M. Marc Kelly, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Does the inquiry of whether or not an act is an "offense," for purposes of qualifying as Evidence Code section 1108 propensity evidence, constitute a preliminary factual determination that must be made exclusively by the trial court, and not the jury, under Evidence Code section 405?

INTRODUCTION

Appellant molested his niece. At trial the prosecution produced evidence that in 1966 appellant similarly molested his sister. The trial court admitted the 1966 incident as Evidence Code section 1108 propensity evidence. As appellant was under the age of 14 when he molested his sister, before allowing the evidence, the trial court made the preliminary factual determination that appellant appreciated the wrongfulness of his conduct in 1966 such that he possessed capacity to have committed the crime. The Court of Appeal reversed the conviction based on its conclusion that the capacity question should have been decided by the jury.

The Court of Appeal's conclusion is incorrect because with questions governing the admissibility of evidence, such as this, preliminary factual determinations are to be resolved by the trial court and not the jury. But even assuming, arguendo, that the issue should have been submitted to the jury, the trial court had no sua sponte to instruct on capacity, and here, appellant did not request a pinpoint instruction as to capacity. Finally, even if there were error, it was harmless because even under the instructions given, the jury was required to determine that appellant possessed the criminal intent necessary to have committed the lewd act against his sister in 1966 before giving weight to that evidence. If the jury did not find such intent to gratify the sexual desires of himself or his sister, then it would not have credited this evidence. If, on the other hand, the jury found he was

mature enough to harbor this intent, then there was no likelihood the jury would have found he lacked capacity to appreciate the wrongfulness of his acts.

STATEMENT OF THE CASE

Appellant was charged with four counts of committing a lewd act upon a child under 14 in violation of Penal Code section 288, subdivision (a). (1 CT 51-52.) As to each count it was further alleged that substantial sexual contacted against the child, Brandi C., in violation of Penal Code section 1203.066, subdivision (a)(8). (1 CT 52.) At trial, Brandi C. testified as to the acts against her. (6 RT 1223-1226, 1237, 1242, 1248, 1253-1258.) The prosecution introduced, and the trial court admitted, pursuant to Evidence Code sections 1108 and 352, evidence that appellant had molested his five-year-old sister in 1966. (6 RT 1371-1375.) Before admitting the evidence, the trial court conducted an Evidence Code section 402 hearing. (4 RT 877.) During that hearing, appellant's sister, Linda, testified that in the fall of 1966, appellant touched her vagina. (4 RT 949-959.) While certain that the incident occurred no earlier than September 1966, Linda was unable to specifically state the precise date of the touching. (4 RT 949-951.) As appellant's date of birth was October 8, 1952, the evidence proved that at a minimum he was 13 years and 11 months old at the time of the touching. (4 RT 950-951, 973.)

Appellant's trial counsel argued that Evidence Code section 1108 propensity evidence is evidence of a prior sexual offense that constitutes a crime. And, under Penal Code section 26, it is presumed that the subject propensity evidence could not have constituted a crime because appellant was 13 years and 11 months of age when he committed the alleged act against his younger sister in 1966. Therefore, appellant's act against his sister could not be admissible under Evidence Code section 1108 unless the prosecution rebutted the section 26 presumption by showing appellant

appreciated the wrongfulness of his conduct when he committed it such that his conduct constituted a crime. (1 CT 284-287; 2 CT 302-303.)

After considering the evidence presented at the Evidence Code section 402 hearing, the trial court found that the preliminary fact – appellant's appreciation of the wrongfulness of his conduct as establishing capacity to commit crime – upon which the admissibility of the proffered Evidence Code section 1108 evidence relied, had been established. The trial court therefore ruled that appellant appreciated the wrongfulness of his conduct at the time of the touching such that, if it applied, the Penal Code section 26 capacity presumption had been rebutted by the prosecution. (4 RT 944, 973-995.) Therefore, as appellant's 1966 conduct constituted a crime, it was admitted under Evidence Code section 1108. (4 RT 994-995; 2 CT 305-306.) "It does not appear from the record [] that [appellant] requested the jury be instructed [as to capacity.]" (Slip. Opn. at p. 13.)

The jury subsequently convicted appellant of all four counts of committing a lewd act upon a child under 14 and found it to be true that each count involved substantial sexual contact with the child. (2 CT 387-390.)

On appeal, appellant argued that the trial court erred by failing to submit this preliminary capacity question to the jury. Specifically, he claimed that it was the responsibility of the jury to decide if he appreciated the wrongful nature of the act. The Court of Appeal agreed. It held that "the trial court should have submitted the issue to the jury" because, "the issue of whether a minor appreciates the wrongfulness of his conduct is a question for the trier of fact." (Opn. at pp. 11, 13.)

STATEMENT OF FACTS

In 1998, Brandi was eight years old and living with her family in Torrance, California. (6 RT 1223.) Appellant was Brandi's uncle. (6 RT 1225-1226.) Over the course of the five years, when Brandi would spend

the night at the home of appellant and her aunt, appellant would place his hands into Brandi's pajamas at night and rub her vagina, buttocks and chest. (6 RT 1253-1256, 1259.) The touching would occur over and under Brandi's underwear. (6 RT 1256.) The touching never included digital penetration and appellant never attempted to make Brandi touch his genitals. (6 RT 1256-1257.) Brandi testified that the molestations occurred "every night" that she stayed at the home. (6 RT 1257-1258.)

Brandi further testified that approximately ten of her overnight visits included her younger sister and her cousin. (6 RT 1249-1252.) During those visits, the three girls would sleep together in the same bed in the guest room. (6 RT 1251.) Because her sister was prone to falling out of the bed, she always slept between Brandi and her cousin. (6 RT 1251.) With this arrangement, appellant would enter the room at night, sit down on the side of the bed and then "do the same thing" to Brandi. (6 RT 1253.) Specifically, appellant would pull the covers back, place his hands into Brandi's pajamas and rub her vagina, buttocks and chest, after which he would get up and leave. (6 RT 1254-1255, 1257.) Brandi testified that this occurred "every night" that she slept with her sister and cousin. (6 RT 1258.)

Brandi never reported the molestation to her parents because she was afraid. (6 RT 1245.) She never attempted to wake her aunt, cousin or sister because she was afraid. (6 RT 1243, 1258.) She was too "scared to tell anyone." (6 RT 1258.) Brandi never ordered appellant to stop because she was afraid. (6 RT 1243.) She never asked to move to another room because she was scared to sleep alone. (6 RT 1242, 1247.)

At some point after these incidents had been occurring for "several years," Brandi began objecting to her mother that she no longer wished to visit appellant's home. (6 RT 1259-1260.) Although she told her mother that she did not wish to go, Brandi did not explain why. (6 RT 1260.)

Brandi's mother responded that her aunt was expecting her and that she needed to go. (6 RT 1260.) Therefore, Brandi continued to go and appellant continued to molest her. (6 RT 1261.) Brandi's aunt testified that she recalled Brandi's pleas. Eventually, due to the fact that appellant fell ill, the regular visits ceased. (6 RT 1343.)

A number of years later, as Brandi and her mother were en route to a wedding shower at appellant's home, the two were discussed the mother's dissatisfaction with some comments that appellant had made regarding Brandi's brother, Brandi asserted, "well, if you think that's bad, you should - - you don't know what he has done to me." (6 RT 1262-1263, 1343-1344.) Brandi subsequently disclosed the specific acts that appellant had committed against her. (6 RT 1344.) Shortly thereafter, the matter was referred to law enforcement. (6 RT 1348.)

Laura Brodie, a clinical and forensic psychologist, testified on behalf of the prosecution. (6 RT 1361.) Brodie testified that she was familiar with child sexual abuse accommodation syndrome and its effect on the reporting tendencies of sexually abused children. (6 RT 1363-1365.) Based on the syndrome, Brodie opined that it would not be unusual for a sexually abused child to delay reporting for five years. (6 RT 1367.)

A. Evidence Code Section 1108 Evidence

Appellant's younger sister, Linda Cottone, testified that she was five or six years old when appellant touched her vagina. (6 RT 1372.) Linda was in the kitchen of the family home with a friend, when appellant approached and asked the girls if they would like to play a game that Linda had never heard of. (6 RT 1372-1373.) Linda testified that she did not recall anyone else being present in the home. (6 RT 1373.) After Linda's friend departed, appellant picked Linda up and carried her to the downstairs basement area of the home. (6 RT 1373-1374.) As appellant held Linda, he moved his fingers inside her underwear and rubbed her vagina. (6 RT

1374.) Appellant was at a minimum 13 years an 11 months old at the time. (4 RT 973.)

ARGUMENT

I. PRELIMINARY FACTUAL DETERMINATIONS UPON WHICH THE ADMISSIBILITY OF PROFFERED EVIDENCE RESTS, INCLUDING CAPACITY TO COMMIT A CRIME, ARE LEFT TO THE SOUND DISCRETION OF THE TRIAL COURTS

The Court of Appeal's conclusion that the trial court is required to resubmit a preliminary factual question to the jury is at odds with the plain language of Evidence Code section 405 and the legislative history supporting it. The lower court's conclusion further conflicts with a long line of California court decisions, as well as those of the federal courts, holding that the duty to determine preliminary factual questions lies exclusively with the trial court. The Court of Appeal's radical departure from the manner in which evidentiary determinations are currently resolved would inevitably entitle a criminal defendant to countless mini-trials and the opportunity for a "second crack" to re-litigate a wide variety of preliminary issues from hearsay exceptions to Fourth and Fifth Amendment issues within his or her trial. Further, as will be shown, the Court of Appeal's conclusion improperly allows for an absurd result.

A. Capacity to Commit Crime is a Preliminary Question

Evidence Code section 1108 allows for the introduction of the defendant's other criminal sexual offenses as propensity evidence. (Evid. Code, § 1108, subds. (a) & (d)(1).) The Court of Appeal found that the plain language of Evidence Code section 1108 "mandates that for evidence of a prior sexual offense to be admissible in a case involving a sexual offense, the prior sexual offense must be a crime." (Opn. at p. 9, italics in original.) Assuming that the Court of Appeal is correct that section 1108 only allows for the introduction of acts that constitute a "crime," that

preliminary factual determination hinged on appellant's capacity in 1966 as a person capable of committing a crime under Penal Code section 26.

In 1966, as it does today, Penal Code section 26 provided: "All persons are capable of committing crimes except those belonging to the following classes: ¶ One – Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." (*In re Gladys R.* (1970) 1 Cal.3d 855, 862; Pen. Code, § 26, ¶ 1.) Section 26 provides a rebuttable presumption that a child under 14 years of age cannot commit a crime unless it is shown by clear and convincing proof that the child understood the wrongfulness of his conduct at the time he engaged in it. (*In re Manuel L.* (1994) 7 Cal.4th 229, 238; *People v. Lewis* (2001) 26 Cal.4th 334, 378.) The ability of a 13-year-old child to commit a crime presents an issue of capacity because children "cannot entertain general criminal intent, and therefore cannot commit criminal acts." (See *In re M.* (1978) 22 Cal.3d 419, 424; Pen. Code, § 26.) Accordingly, appellant's appreciation of the wrongfulness of his 1966 conduct constituted a preliminary fact that was a prerequisite to introduction of the 1966 conduct as section 1108 propensity evidence. (See Evid. Code, § 400; *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1156 ["[A] 'preliminary fact' is broadly defined as 'a fact upon the existence or nonexistence of which depends the admissiblity or inadmissibility of evidence.'"].)

As discussed below, the Court of Appeal's conclusion that this preliminary fact must have been submitted to the jury creates a conflict in the law and would result in a radical departure from the manner in which evidentiary issues are currently decided.

B. The Express Language And Legislative History of Evidence Code Section 405 Demonstrate That Disputes Regarding Preliminary Facts, Including Capacity, Upon Which the Admissibility of Proffered Evidence Rests, Shall Be Determined Exclusively by the Trial Court

The Court of Appeal's conclusion that criminal defendants are entitled to a "second crack" at unfavorable evidentiary rulings fundamentally redefines the duties of the trial court and the jury in an manner that will manifestly burden the judicial system and that is entirely inconsistent with the plain language of Evidence Code section 405 as well as the legislative history supporting it.

The Evidence Code makes clear that disputes regarding preliminary facts – including capacity – upon which the admissibility of proffered evidence rests, shall be determined exclusively by the trial courts. As a threshold matter, through Evidence Code section 310[1], subdivision (a), the Legislature directs that "the admissibility of evidence" is to be "decided by the court[,]" and, "[d]etermination of issues of fact preliminary to the admission of evidence are to be decided by the court[.]" (*Ibid.*) As to the determination of disputed preliminary facts, Evidence Code section 405 similarly states:

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[1] In its entirety, Evidence Code section 310, subdivision (a) provides:

> All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence) are to be decided by the court. Determination of issues of fact preliminary to the admission of evidence are to be decided by the court as provided in Article 2 (commencing with Section 400) of Chapter 4.

> With respect to preliminary fact determinations not governed by Section 403[[2]] or 404[[3]]:
>
> (a) When the existence of a preliminary fact is disputed, the court shall indicate which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises. The court *shall* determine the existence or nonexistence of the preliminary fact and *shall* admit or exclude the proffered evidence as required by the rule of law under which the question arises.
>
> (b) If a preliminary fact is also a fact in issue in the action:
>
> (1) The jury shall not be informed of the court's determination as to existence or nonexistence of the preliminary fact.
>
> (2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

(Emphasis added.)

Initially, the plain language of Evidence Code section 405, subdivision (a), is clear and therefore controlling. A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387, citing *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294.) In construing a statute, the reviewing court's first task is to look to the language of the statute itself. (*Ibid.*) When the language is clear and there is no uncertainty

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[2] Evidence Code section 403 involves the "[d]etermination of foundational and other preliminary facts where relevancy, person knowledge, or authenticity is disputed"

[3] Evidence Code section 404 involves the "[d]etermination of whether proffered evidence is incriminatory."

as to the legislative intent, the court looks no further and simply enforces the statute according to its terms. (*DuBois, supra*, at pp. 387-388, citing *Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456, 464.) Here, Evidence Code section 405 directs that it is the trial court that "shall determine the existence or nonexistence of the preliminary fact[.]" (Evid. Code, § 405, subd. (a); see also Evid. Code, § 310 [questions of law, including "the admissibility of evidence" are to be decided by the court]; *People v. Chapman* (1975) 50 Cal.App.3d 872, 879 ["section 405 vests the court with the authority to make certain determinations as to the existence or nonexistence of preliminary facts and admit or exclude proffered evidence on the basis of those determinations"].) If the statutory language is clear and unambiguous the inquiry ends. Because the plain language of section 405 is clear, it must govern. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1394 [if there is no ambiguity in the language, the reviewing court presumes the Legislature meant what it said and the plain meaning of the statute governs].)

The legislative history provides further, albeit unnecessary, confirmation. As stated in the Comment of the Assembly Committee on the Judiciary to Evidence Code section 405, "[s]ection 405 requires the judge to determine the existence or nonexistence of disputed preliminary facts except in certain situations covered by Sections 403 and 404." (1 Assem. J. (1965 Reg. Sess.) p. 1722[4].) Further, "[i]f the judge is persuaded" that the preliminary fact has been established, he or she "either admits or excludes the proffered evidence as required by the rule of law

[4] The Comment of the Assembly Committee on Judiciary is also provided in the annotations following Evidence Code section 405. (See Assem. Com., West's Ann. Evid. Code, § 405 (2011 desktop ed.) pp. 33-36.) Respondent has attached these materials in its request for judicial notice, filed in support of its opening brief on the merits.

under which the question arises." (1 Assem. J. at p. 1723.) Indeed, the Committee, observing that section 405 was "generally consistent with existing law[,]" discussed instances where section 405 would "substantially change the law" because in those instances, the trial court was formerly permitted to submit preliminary factual issues to the jury. (*Id.* at pp. 1723-1726.) These instances included the voluntariness of confessions and the existence of foundations supporting certain hearsay exceptions. (*Id.* at p. 1726.) The Committee provided, "[u]nder Section 405, the judge's rulings on these questions are final; the jury does not have an opportunity to redetermine the issue." (*Ibid.*) It characterized the practice of providing a litigant with a "second crack," by way of resubmitting such preliminary factual determinations to the jury, as "unsatisfactory." (*Id.* at p. 1727.)

Notably, comments made in the Assembly Interim Committee on Judiciary, discussing the subject legislation, reveal that Evidence Code section 405 acts to protect the rights of the criminally accused. In the context of the admissibility of a confession, Committee witness John H. DeMoully, Executive Secretary of the California Law Revision Commission, testified:

> On a confession the judge has to determine whether it is voluntary or not, and if it is, it comes in, and the defendant can then put in evidence showing that it is unlikely to be true. We think this rule will operate to the benefit of the criminal defendant rather than to his detriment, because right now the judge is in a position where, if it is a tough case, he can say: "Well, I will let the confession in and the jury can decide whether it is voluntary." But as a practical matter, if you get the confession in and combine it with all the other circumstances and facts, a jury isn't going to disregard that confession, even though they find it's involuntary; they are going to convict the defendant.

(Assem. Interim Com. on Judiciary, Analysis of Assem. Bill No. 333 (1965 Reg. Sess.) December 16 and 17, 1964, pp. 152-153, 179.) This protection

would appear to apply equally to a criminal defendant in appellant's position. Specifically, the Court of Appeal's conclusion directs that if the trial court finds that the prosecution's proposed Evidence Code section 1108 evidence is credible and that the defendant possessed the capacity to have committed the section 1108 crime, the court should then submit all of the section 1108 evidence to the jury with the instruction that if the jury first finds that the defendant possessed the capacity to commit crime then it must secondly decide if the defendant did in fact commit the uncharged Evidence Code section 1108 crime. Such an approach, giving the jury a "second crack" at the trial court's capacity decision, assumes the jury capable of un-ringing the bell in an unrealistic manner. (*Id.* at pp. 179-180.)

Accordingly, the Court of Appeal's conclusion that the disputed preliminary fact regarding appellant's capacity "should have [been] submitted to the jury," ignores Evidence Code section 405 and the legislative history supporting it. Moreover, the court's conclusion offers no principled basis to limit such determinations to matters involving capacity for purposes of allowing Evidence Code section 1108 propensity evidence.

Such an approach, allowing juries to reconsider any preliminary factual dispute, would severely tax the judicial economy by opening the floodgates for countless mini-trials because it effectively unwinds the mandate of Evidence Code section 405 that trial courts refrain from "pass[ing] the buck" to the jury when presented with "difficult factual questions." (1 Assem. J. (1965 Reg. Sess.) p. 1726.) For example, as noted by the Assembly Committee on Judiciary, all hearsay evidence presents two preliminary factual questions: The first relates to authenticity and the second to trustworthiness. (*Id.* at p. 1724.) The Court of Appeal's reasoning suggests that every criminal defendant facing trial may be entitled to a jury determination as to these two preliminary factual

questions as they may arise with every hearsay objection. Certainly the same would hold true in the *Miranda*[5] context where trial courts are tasked with determining the critical preliminary question of whether a waiver was given knowingly and intelligently. (See *People v. Williams* (2010) 49 Cal.4th 405, 425; cf. *People v. Aguilar* (1996) 48 Cal.App.4th 632, 639 [discussing court's duty to decide issues of voluntariness of consent to search].)

As will be addressed below in respondent's discussion of the relevant case law, preliminary factual determinations, including, but not limited to, application of hearsay exceptions, capacity, expert witness qualifications, sanity, privilege and opinion, may not be submitted to and litigated by the jury. Such an approach, which would effectively entitle a criminal defendant to countless mini-trials within his or her trial and would lead to juror confusion, should be deemed contrary to existing law and rejected.

C. Courts Have Historically Found That the Determination of Preliminary Factual Disputes is a Function of the Trial Court

Beyond the Court of Appeal's conflict with the plain language of Evidence Code section 405 and the legislative history supporting it, the approach taken by the Court of Appeal is further at odds with the manner in which numerous other courts have historically addressed the respective duties of the trial court and jury concerning the determination of preliminary factual disputes which precede the introduction of proffered evidence.

For example, in the context of hearsay evidence, courts have long ruled that it is the duty of the trial court to decide the preliminary factual question of whether a statement offered as a dying declaration was made

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602].

under a sense of impending death. (*People v. Keelin* (1955) 136 Cal.App.2d 860, 873 ["It was error for the trial court to submit to the jury the issue as to whether or not the statements admitted in evidence constituted dying declarations of Etherton"]; *People v. Pullock* (1939) 31 Cal.App.2d 747, 753-754 ["It is the province of the trial judge to determine the sufficiency of the foundation proof which will entitle dying statements to be admitted in evidence"].) In the context of a spontaneous statement, "the spontaneity of the statement [is] a legal question for the court to resolve." (*People v. Blacksher* (2011) 52 Cal.4th 769, 834-835.) Similarly, the trial court is required to decide the preliminary factual question of whether a trial witness possesses the mental capacity to testify. (*People v. Lewis, supra*, 26 Cal.4th at p. 360 [unlike a witness's personal knowledge, "a witness's competency to testify is determined exclusively by the court"]; *People v. Craig* (1896) 111 Cal. 460, 469 [issues of capacity are "to be determined by the trial judge"]; *People v. Tyree* (1913) 21 Cal.App. 701, 706 [the question of a witness's competency is for the court to determine], disapproved on other grounds in *People v. McCaughan* (1957) 49 Cal.2d 409, 420.)

In the context of opinion evidence, courts have held that the preliminary factual determination as to "who is an 'intimate acquaintance'" for purposes of determining sanity, is a matter to be determined by the trial court. (*In re Estate of Budan* (1909) 156 Cal. 230, 233 ["the matter is necessarily left under the authorities to the discretion of the trial court"].) It is similarly the trial court's decision to determine if a writing is genuine by comparing it to an exemplar. (*People v. Creegan* (1898) 121 Cal. 554, 559 ["The object of introducing the writing was for a comparison with other alleged writings of the defendant, and the judge was required to be satisfied that the writing was genuine before he was authorized to admit it for this purpose."]; *Marshall v. Hancock* (1889) 80 Cal. 82, 85 ["there was positive

evidence to that effect which we must presume was proof to the satisfaction of the judge that it was genuine"].) Indeed, this Court has stated that it is error for the judge to submit the preliminary question regarding the qualification of an expert to the jury. (*Fairbanks v. Hughson* (1881) 58 Cal. 314, 315 ["This was error. Whether one offered as an expert is qualified to speak as such, is a fact preliminary to his testifying as such, to be determined by the court at the trial. It cannot be referred to the jury"].) It has also been found that the existence of privilege in a defamation case ordinarily presents a question of law for the trial court. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 108, citing *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 915 ["The existence of the privilege is ordinarily a question of law for the court"].)

In *People v. Betts* (2005) 34 Cal.4th 1039, this Court addressed the fundamental distinction between questions of law and questions of fact. Citing *People v. Posey* (2004) 32 Cal.4th 193, 206, *Betts* provided:

> [In *Posey*, we] further explained that "[f]undamentally, the distinction between questions of fact for the jury and questions of law for the court (see § 1126; Evid. Code, §§ 310, 312) turns on whether the issue presented relates to the substantive matter of guilt or innocence to be determined at trial or, instead, concerns a procedural matter that does not itself determine guilt or innocence but either precedes the trial (such as whether to change venue), *affects the conduct of the trial (such as whether to admit certain evidence*), or follows the trial (such as whether to order a new trial)."

(*People v. Betts, supra*, 34 Cal.4th at pp. 1048-1049, emphasis added.) The Court rejected Betts's argument that territorial jurisdiction must be a factual question left to the jury because it inherently involves the defendant's guilt or innocence because "without proof that a defendant's conduct is punishable under California law, there is no proof that the defendant's acts constituted a crime." (*Id.* at p. 1052.) The Court reasoned that territorial jurisdiction is not an element of a crime and therefore Betts had no right to

have a jury decide the issue. (*Id.* at pp. 1053-1054.) As the Court of Appeal's conclusion here requires that the jury determine such a preliminary matter which "does not itself determine guilt or innocence" and which it has created an unfounded conflict within the law.

The federal approach to the resolution of preliminary matters is similar to the rule in California. Federal Rule of Evidence 104(a) states broadly that the trial court is to determine preliminary questions. (*United States v Matlock* (1974) 415 US 164, 173-175 [94 S.Ct. 988, 39 L.Ed.2d 242].) This rule embraces the "orthodox position that the judge alone decides preliminary questions as to competence of evidence[.]" (*United States v James* (5th Cir. 1979) 590 F2d 575, 579.) "Thus, subsection (a) governs questions concerning the competency of evidence, i.e., evidence which is relevant but may be subject to exclusion by virtue of some principle of the law of evidence, leaving it for the judge to resolve factual issues in connection with these principles." (*United States v. Sliker* (2nd Cir. 1984) 751 F.2d 477, 498.) "Removing factual issues related to determining whether evidence is competent from the jury is based on recognition that the typical juror is intent mainly on reaching a verdict in accord with what he believes to be true in the case he is called upon to decide, and is not concerned with the long term policies of evidence law." (*Ibid.*)

For example, in *United States v Lang* (5th Cir. 1993) 8 F3d 268, the reviewing court determined that the lower court erred in having the jury decide whether cocaine was admissible under the plain view exception to the search warrant requirement because that preliminary question was within the sole province of the district court; the cocaine's relevancy did not depend upon fulfillment of a condition of fact because it would have been relevant to show defendant's guilt of charged offense notwithstanding whether the officer saw it in plain view. (*Id.* at pp. 270-271.) Similarly, in

United States v. Bethurum (5th Cir. 2003) 343 F.3d 712, the reviewing court found that the lower court erred in ruling that the burden fell on the government to prove to the jury that the defendant had knowingly and intelligently waived his rights at time of his prior domestic violence conviction because the question of effectiveness of waivers should have been determined as matter of law by trial judge pursuant to Federal Rules of Evidence, rule 104. (*Id.* at p. 717.)

The support that the Court of Appeal cited for its conclusion is unavailing. Acknowledging that no published case has discussed the specific issue of whether the trial court should have submitted the preliminary capacity issue to the jury, the Court of Appeal relied solely on *People v. Lewis, supra*, 26 Cal.4th 334. (See Slip Opn. at pp. 10-13.) In *Lewis*, this Court noted that the jury in the penalty phase of a capital case was required under Penal Code section 190.3 to determine the presence or absence of prior criminal activity that Lewis had committed. (*Id.* at pp. 376-377.) The prosecution presented evidence that when Lewis was 13 years and 9 months old he committed a murder. (*Ibid.*) The *Lewis* court rejected Lewis's claim that it was prejudicial error for the trial court to submit to the jury the question of whether Lewis possessed the Penal Code section 26 capacity to commit murder. (*Ibid.*)

The Court of Appeal here characterized *Lewis* as instructive to the question of whether the subject Penal Code section 26 capacity issue should have been decided by court or jury because *Lewis* concluded that "the trial court was not required to find as a preliminary fact that defendant appreciated the wrongfulness of his conduct before submitting the issue to the jury." (Opn. at p. 13.) The Court of Appeal's conclusion is erroneous because the *Lewis* court simply rejected the defendant's argument that submission of the section 26 issue to the jury caused Lewis to be denied a fair trial:

> Contrary to defendant's suggestion, the trial court ensured that defendant received a fair hearing on this matter. The trial court submitted the question to the jury and also imposed a reasonable doubt standard, which is more stringent than a clear proof standard under section 26. (citation) The trial court itself also determined it was 'satisfied beyond a reasonable doubt' that defendant knew the wrongfulness of his conduct.

(*People v. Lewis, supra*, 26 Cal.4th at pp. 379-380.)

Lewis does not stand for the conclusion that the trial court was "clearly" required to submit the Penal Code section 26 capacity question to the jury. (Opn. at p. 13.) At most, it holds that a defendant is not prejudiced when given a "second crack" to have the jury re-decide the issue. In relying on *Lewis*, the Court of Appeal did not address Evidence Code sections 405 or 310. Indeed, *Lewis* reasonably implies that the issue may be satisfactorily determined by the trial court employing a "clear proof" standard.

That the Legislature did not regard the jury as the only competent trier of fact is shown by the acceptance over many years of the practice of the court determining fact issues in such matters as admitting or excluding evidence, the court's jurisdiction, sufficiency of pleadings and interpretation of documents and in such proceedings as equity, admiralty, probate, divorce, bankruptcy and administrative actions. (*Jehl v. Southern Pacific Co.* (1967) 66 Cal 2d 821, 830.) The trial court's duty to resolve issues, including capacity, that govern the admissibility of evidence, must be preserved.

D. Appellant's Capacity to Have Committed the Uncharged Crime Was Not "a Fact In Issue In the Action"

As discussed above, Evidence Code sections 310 and 405, as well as the legislative history of section 405, support the conclusion that the existence or nonexistence of a preliminary fact upon which the

admissibility of the proffered evidence rests, is a question for the trial court. An exception to this rule appears to exist in subdivision (b) of section 405. As will be shown, that exception is inapplicable here.

Evidence Code section 405, subdivision (b), addresses instances where a disputed preliminary fact is simultaneously a "fact in issue" in the case that must be submitted to the jury. The subdivision provides:

> If a preliminary fact *is also a fact in issue in the action*: (1) the jury shall not be informed of the court's determination as to the existence or nonexistence of the preliminary fact. (2) If the proffered evidence is admitted, the jury shall not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact.

(Emphasis added.)

Initially, the preliminary question regarding capacity, upon which the admissibility of Evidence Code section 1108 propensity evidence is premised, cannot be considered "a fact in issue in the action" because resolution of this preliminary question was not a condition precedent to the jury's resolution of the "merits of the case." In *People v. Blacksher* (2011) 52 Cal.4th 769, discussing "[w]hether the requirements of the spontaneous statement exception [to the hearsay rule had been] satisfied[,]" this Court observed that Evidence Code section 405 vests the determination of the preliminary factual question of spontaneity with the court and *not* the jury. (*Id.* at p. 834, citing *People v. Poggi* (1988) 45 Cal.3d 306, 318.) Significantly, the *Blacksher* Court commented that, "[t]he only exception to this rule is where the preliminary fact establishing the admissibility of the evidence is also 'a fact in issue in the action' because 'it would be prejudicial to the parties for the judge to inform the jury how he had decided *the same factual question that it must decide in determining the merits of the case.*'" (*People v. Blacksher, supra*, 52 Cal.4th at pp. 834-

835, emphasis added [quoting Evid. Code, § 405, subd. (b) and the legislative history supporting it].)

Here, neither the preliminary fact of appellant's capacity to commit the 1966 uncharged crime, nor even the proffered Evidence Code section 1108 propensity evidence itself, was a "fact in issue in the action," because the jury was not required to resolve the Evidence Code section 1108 evidence in order to render a verdict. It is well settled that section 1108 propensity evidence is solely relevant to the issue of a criminal defendant's disposition or propensity to commit the charged sex offenses. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012, citing *People v. Falsetta* (1999) 21 Cal.4th 903, 915.) Such evidence "may support an inference" that the defendant is predisposed to commit sex offenses. (*People v. Reliford, supra*, 29 Cal.4th at p. 1013.)

The jury was specifically cautioned that the Evidence Code section 1108 propensity evidence was relevant for the sole purpose of its circumstantial "inference," if one existed at all, that appellant had the propensity to commit the charged sex crimes. (See 2 CT 345 [CALCRIM 1191].) The jury was further instructed that the uncharged crime evidence constituted "only one factor to consider along with all the other evidence." (2 CT 345.) Finally, the jury was instructed that even if it believed that appellant had committed the uncharged propensity crime, it was nevertheless entitled to disregard that evidence when determining the merits of the case - appellant's guilt of the charged crimes. (2 CT 345.) Accordingly, as the uncharged crime evidence was not an issue that the jury was *required* to resolve in order to render a verdict, the evidence should not be considered "a fact in issue in the action" for purposes of Evidence Code section 405, subdivision (b).

This conclusion, that the preliminary question of whether appellant was legally capable of committing the 1966 uncharged crime should not be

considered a "fact in issue in the action," finds further support in the legislative history supporting, and court opinions discussing, section 405, as well as Evidence Code sections 310 [questions of for court law] and 312 [jury as trier of fact].) As discussed above, those bodies direct that factual determinations upon which the admissibility of evidence rests are to be decided by the trial court. As such, subdivision (b) of section 405 would conflict with the aforementioned authorities if every factual dispute involving a preliminary factual determination in the trial were considered a "fact in issue in the action" and therefore had to be resubmitted to the jury in order for the jury to determine if the preliminary fact had been proven in the first instance, such that the proffered evidence was correctly admitted. Simply put, trial courts admit evidence and juries decide what weight, if any, to attach to that evidence. (See Evid. Code, §§ 310 & 312.)

Finally, the language of Evidence Code section 405 reasonably implies that a preliminary factual determination upon which the admission of evidence rests cannot be considered a "fact in issue in the action." As discussed, Evidence Code section 405, subdivision (a), provides that it is the duty of the trial court to resolve preliminary facts in order to admit evidence. Significantly, section 405, subdivision (b)(2), provides that "[i]f the proffered evidence is admitted, the jury shall not be instructed to *disregard* the evidence if its determination of the fact differs from the court's determination of the preliminary fact." (Evid. Code, § 405, subd. (b)(2), emphasis added.) The fact that the jury cannot be instructed to *disregard* the evidence if it concludes that the preliminary fact has *not* been proven suggests that its job (consistent with Evid. Code, § 312) is to assign weight to the evidence as opposed to determining the admissibility of evidence.

Applying the above constraints to the facts here, in order for the uncharged crime evidence to reach the jury for its consideration, the trial

court must, as a threshold matter, conclude that substantial evidence establishes that the uncharged crime occurred, and presumably that appellant possessed capacity to have committed the crime. (See Evid. Code, §§ 352 & 1108.) Therefore, assuming that the preliminary capacity fact is a "fact in issue in the action" for purposes of invoking subdivision (b), if the jury decides the preliminary question of capacity *differently* than the trial court, determining that appellant *lacked* capacity to commit the uncharged act, then the jury is placed in an impossible position because Evidence Code section 405, subdivision (b)(2), prohibits it from "disreg[arding] the evidence." This conflicting position supports the conclusion that the preliminary question of capacity, as supporting the introduction of section 1108 propensity evidence, is not a "fact in issue in the action" for purposes of section 405, subdivision (b)(2).

E. The Court of Appeal's Conclusion Allows For An Absurd Result

The Court of Appeal's conclusion further allows for an absurd result. Specifically, taking the facts of the instant matter, the Court of Appeal's conclusion reasonably allows for the jury to be tasked with determining the subject preliminary capacity question for purposes of deciding whether or not it should accept and consider the 1966 evidence as Evidence Code section 1108 propensity evidence, while simultaneously being instructed by the trial court to consider the uncharged conduct evidence as probative of intent, common design or plan, as Evidence Code section 1101, subsection (b)[6] evidence.

Unlike Evidence Code section 1108, which is limited to the admissibility of certain prior crimes, Evidence Code section 1101,

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[6]In the instant case, for unknown reasons, the prosecution did not rely on Evidence Code section 1101.

subdivision (b), includes the admission of prior acts not amounting to a crime. (Evid. Code § 1101, subd. (b) [allowing evidence of "a crime, civil wrong, or other act" to prove some fact other than the defendant's disposition to commit such an act].) Consequently, under Evidence Code section 1101, subdivision (b), there is no preliminary fact regarding the defendant's capacity.

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 404, this Court provided that in a prosecution for lewd acts committed against a child under the age of 14 years, the trial court did not abuse its discretion by admitting evidence the defendant had committed other, uncharged lewd acts against the victim and her sister. Although the evidence was prejudicial to the defendant, it was also probative, strongly suggesting a common design or plan under Evidence Code, section 1101, subdivision (b). (*Ibid.*)

Taking the facts of the instant matter, it would be absurd to instruct the jury to consider the evidence in the context of section 1101, subdivision (b), which allows for the introduction of prior acts as opposed to simply prior offenses, while simultaneously instructing it to evaluate the evidence for purposes of determining whether or not it should consider it in the context of section 1108. Such an approach is impermissible as it would lead to an absurd result and likely jury confusion. (See *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [statutory interpretation that produces absurd results must be avoided]; see also *People v. Federico* (2011) 191 Cal.App.4th 1418, 1426 [statutes should be harmonized to avoid absurd results].)

II. TO THE EXTENT THE JURY MAY RE-DETERMINE A TRIAL COURT'S FINDING OF CAPACITY FOR PURPOSES OF AN UNCHARGED EVIDENCE CODE SECTION 1108 CRIME, THERE IS NO SUA SPONTE DUTY TO INSTRUCT THE JURY AS TO CAPACITY

The Court of Appeal's conclusion that the trial court had a sua sponte duty to instruct the jury that it was required to determine that appellant possessed capacity to commit the uncharged crime should be rejected because, as discussed above, preliminary factual determinations such as capacity should be resolved by the trial courts. And, as a matter of public policy, if a criminal defendant, as here, wishes for the court to instruct the jury as to his or her capacity to commit an uncharged crime, the defense should be required to request it.

A. General Principles of Law Regarding the Trial Court's Sua Sponte Instructional Duties

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.

(*People v. St. Martin* (1970) 1 Cal.3d 524, 531, see also *People v. Carter* (2003) 30 Cal.4th 1166, 1219 ["the trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case[]"].)

> The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses ... and on the relationship of these defenses to the elements of the charged offense.

(*People v. Sedeno* (1974) 10 Cal.3d 703, 716, italics omitted, overruled in part on a different ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10.) It is a "familiar rule that a trial court has a sua sponte duty to give instructions relating a recognized defense to elements of a charged offense." (*People v. Saille* (1991) 54 Cal.3d 1103, 1117, citing *People v. Sedeno, supra*, at p. 716.) A trial court's duty to instruct, sua sponte, on particular defenses is more limited, arising "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Barton* (1995) 12 Cal.4th 186, 195, quoting *People v. Sedeno, supra*, at p. 716.)

Conversely, a trial court does not have a sua sponte duty to give a pinpoint instruction. (*People v. Saille, supra*, 54 Cal.3d at p. 1117.) Such instructions "are required to be given upon request when there is evidence supportive of the theory[.]" (*Id.* at p. 1119.) A pinpoint instruction relates evidence to the elements of the charged offense and to the jury's duty to acquit if the evidence produces a reasonable doubt. (*Id.* at p. 1117.) Upon request, a defendant is entitled to an instruction relating particular facts to any legal issues, for purposes of directing attention to that evidence from which a reasonable doubt of his guilt could be engendered. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Eckert* (1862) 19 Cal. 603, 605.)

> Such a requested instruction may, in appropriate circumstances, relate the reasonable doubt standard for proof of guilt to particular elements of the crime charged or may "pinpoint" the crux of a defendant's case ....

(*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885, citations omitted.)

Accordingly, "the duty to instruct sua sponte always extends to certain fundamentals: elements of the charged offense, any required specific intent, the prosecution's burden of proof." (*People v. Prettyman* (1996) 14 Cal.4th 248, 285.)

B. The Trial Court Did Not Have a Sua Sponte Duty to Instruct the Jury That It Was Required to Find That Appellant Possessed Capacity to Commit the Uncharged Crime

As discussed above, preliminary factual determinations governing the admissibility of evidence are properly resolved by the trial court. Here, once the court determined, as a preliminary factual determination, that appellant possessed the capacity to commit the propensity evidence, it admitted the evidence of the uncharged crime to the jury and instructed the jury with the standardized CALCRIM instruction governing the jury's use of that evidence. (2 CT 345 [CALCRIM 1191].) As a matter of public policy, if appellant wished for an instruction requiring more than that which the standardized instruction provided, he should be required to have asked for it. Similar holdings support this conclusion. Appellant did not request such an instruction and therefore should not be permitted to "scream foul" on appeal.

The jury here was instructed with the following standardized version of CALCRIM 1191, Evidence Of Uncharged Sex Offense,

> The People presented evidence that the defendant committed the crime of PC 288(a) that was not charged in this case. This crime is defined for you in these instructions.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit

> sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit PC 288(a) , as charged here. If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of PC 288(a). The People must still prove each charge beyond a reasonable doubt.
>
> Do not consider this evidence for any other purpose.

(2 CT 345, brackets omitted.) As written by the Judicial Counsel, this standardized instruction does not require that the jury find that the accused possessed capacity to commit the uncharged crime. As said, appellant did not ask the trial court to provide such an instruction. (See Slip. Opn. at p. 13.)

Initially, as a matter of public policy, appellant should not be permitted to assert for the first time on appeal that that the trial court should have added to the standardized CALCRIM instruction. In general, "'[a] defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions.'" (*People v. Valentine* (2001) 93 Cal.App.4th 1241, 1246-1247; accord *People v. Daya* (1994) 29 Cal.App.4th 697, 714.) Moreover, other authority supports a finding that the trial court did not have a sua sponte duty to instruct as to appellant's capacity to commit the *uncharged* crime.

In the context of the penalty phase of a capital case, this Court has provided that it is well settled that the "trial court has no sua sponte duty to instruct on the elements of 'other crimes' offered under section 190.3, factor (b)." (*People v. Gonzales* (2011) 52 Cal.4th 254, 324, citing *People v. Carter, supra*, 30 Cal.4th at p. 1220.) If the defendant wishes such an

instruction, he or she must request it. (*People v. Phillips* (1985) 41 Cal.3d 29, 72, fn. 25.)[7]

Penal Code section 26, ¶ 1, lists young age as a statutory defense. (Pen. Code, § 26, ¶ 1 [children under the age of 14 are presumed incapable of committing crime].) With regard to other enumerated Penal Code section 26 "statutory defenses," this Court has held that when evidence is introduced at trial relevant to such a statutory defense, specific instructions must be requested. Most recently, in *People v. Anderson* (2011) 51 Cal.4th 989, discussing the Penal Code section 26 "statutory defense" of accident, the Court held that that instructions that "'"[relate] the evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt ... must be given only upon request."' [Citation.]") (*Id.* at pp. 996-997.) Similarly, discussing the Penal Code section 26 statutory defense of "consciousness," reasoning that consciousness is not an element of an offense, this Court provided that it was not improper for the defendant to bear the burden of proving that he lacked consciousness. (*People v. Babbitt* (1988) 45 Cal.3d 660, 691-693.) So, too, here, if the defense wished to prove lack of capacity, he should have requested an instruction and demonstrated to the jury that he lacked capacity.

In *People v. Simon* (2001) 25 Cal.4th 1082, discussing the defendant's compliant that the jury should have been tasked with determining the question of venue, this Court stated that because defendant "failed at trial to

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[7] Respondent notes that this Court stated that "[t]his rule recognizes that a defendant for tactical considerations may not want the penalty phase instructions overloaded with a series of lengthy instructions on the elements of alleged other crimes, perhaps because he fears that such instructions could result in the jury placing undue significance on such other crimes rather than on the central question of whether he should live or die." (*People v. Phillips, supra*, 41 Cal.3d at p. 72, fn. 25.)

provide an appropriate jury instruction or authority supporting the giving of such an instruction[,]" the Court would not consider the issue on appeal. (*Simon, supra*, at p. 1110, fn. 18.) If appellant here wished for an instruction greater that that provided by the standardized instruction he should have requested it. Because he did not, he may not be heard to complain on appeal.

III. EVEN IF ERROR OCCURRED, IT WAS HARMLESS

Assuming the trial court erred when it admitted the uncharged propensity crime evidence, any error was harmless. Initially, respondent submits that the *People v. Watson* (1956) 46 Cal.2d 818, standard of review should apply. The Court of Appeal, stating that "no published case addresses the applicable standard of review[,]" applied the *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]) standard of review in support of its conclusion that "the instructional error" caused appellant to suffer prejudice. (Slip Opn. at pp. 14-15.) As discussed above, respondent respectfully disagrees that the trial court here had a sua sponte duty to instruct the jury as to capacity because capacity involves a pinpoint instruction. However, even if the court did have a duty to instruct as to capacity, the *Chapman* standard should not apply because, as discussed, capacity is not an element of the crime, and need not be shown beyond a reasonable doubt even as to a charged offense. (See *In re Manuel L. surpa,* 7 Cal.4th at p. 238.) And, the *Chapman* standard has not been applied in analogous situations. As such, even if error had occurred, it is not reasonably probable that without the error a result more favorable to appellant would have been reached.

A. Standard of Review

The *Watson* standard should apply here. Capacity is not an element of a crime. (*In re Manuel L. surpa,* 7 Cal.4th at p. 238 [criminal capacity is

not an element of the offense].) As capacity does not need to be proven by a reasonable doubt, the *Chapman* reasonable doubt standard should not apply here. Therefore, assuming as the Court of Appeal held, that the trial court's error to instruct the jury as to capacity constituted instructional failure, it is unreasonable for the rule of law to be that when instructing as to a charged crime the trial court's failure to instruct on capacity demands the *Watson* standard of review (See *People v. Earp* (1999) 20 Cal.4th 826, 886 [discussing pinpoint instructions]), but while instructing as to an uncharged crime, the court's failure to instruct on capacity demands the *Chapman* standard of review.

In the context of errantly admitted Evidence Code section 1101, subdivision (b), other bad acts evidence, this Court has provided that reviewing courts should apply the *Watson* standard of review. (See *People v. Malone* (1988) 47 Cal.3d 1, 22.) Accordingly, even where evidence should have been entirely excluded, *Watson* applies. There is no reason to reach a different conclusion where the propensity evidence was properly admitted to the jury but perhaps should have been subsequently excluded by that jury.

Even applying the Ninth Circuit's directive that a wayward evidentiary ruling may be so prejudicial as to violate a defendant's federal due process rights, here, the facts show that no constitutional violation occurred. (*Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 530; *Bueno v. Hallahan* (9th Cir. 1993) 988 F.2d 86, 87.) As to wrongly admitted evidence, the questioned evidence must render the trial "so fundamentally unfair as to violate federal due process." (*Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1192.) "Only if there are no permissible inferences the jury can draw from the evidence can its admission violate due process." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Where the challenged evidence is relevant to an issue in the case, its admission cannot

be said to have violated the defendant's due process rights. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385].) Here, the evidence was relevant to an issue in the case. Even assuming that appellant lacked capacity to have committed the 1966 uncharged crime, such that the evidence could not have been relevant as Evidence Code section 1108 propensity evidence, the fact remains that the 1966 evidence was still relevant as Evidence Code section 1101, subdivision (b) prior bad acts evidence. (See Evid. Code, § 1101, subd. (b) [evidence of character to prove conduct including, inter alia, intent, knowledge or plan].)

B. Under Any Standard, the Error Was Harmless

Regardless of the standard employed, any error was harmless. The prosecution's evidence of the charged crimes against appellant was strong. Further, the jury instructions required the jury to find, before considering the Evidence Code section 1108 propensity evidence, that when appellant committed the touching against his sister, he possessed a very specific type of criminal intent that circumstantially proved his appreciation of wrongfulness. Finally, the facts of the 1966 uncharged crime evidenced a level of sophistication from which an appreciation of wrongfulness could reasonably be inferred.

1. Overwhelming evidence of guilt of the charged crimes was presented

Brandi testified as to the years of abuse by appellant. (6 RT 1242, 1257-1258.) Her mother, Joanne, testified that although Brandi did not disclose the molestation during the time period it was occurring, Brandi resisted Joanne's efforts to leave her at appellant's home. (6 RT 1340.) Joanne testified that Brandi objected that she did not wish to go, refused to explain why, and only relented when Joanne "press[ed] her to do so." (6 RT 1340.) The prosecution's expert, Laura Brodie, testifying as to Sexual Assault Accommodation Syndrome, opined that child sexual abuse victims

often keep the abuse a "secret." (6 RT 1363, 1365.) Despite the fact that the jury was entitled to accept Brandi's testimony, by itself, as proving appellant's guilt (2 CT 337 [CALCRIM 301, Single Witness's Testimony]), it was also reasonably entitled to conclude that Joanne's and Brodie's aforementioned testimony corroborated Brandi's testimony.

2. The jury instructions given reasonably required the jury to consider appreciation of wrongfulness

Setting aside the strength of the evidence, although the jury was not permitted to determine the admissibility of the Evidence Code section 1108 evidence by first resolving the capacity question, it was entitled to determine what weight, if any, should be attached to that evidence. The trial court specifically instructed the jury that if it believed the uncharged conduct as against appellant's sister to be true, it could, but was not required to consider that evidence as relevant to appellant's propensity to commit the charged offense. (2 CT 345 [CALCRIM 1191, Evidence Of Uncharged Offense].) Appellant's trial counsel reiterated to the jury that appellant was only 13 years of age when the touching of Linda was alleged to have occurred. (7 RT 1514.)

Significantly, the jury was further instructed that in order to find that appellant perpetrated the specific uncharged offense of committing a lewd or lascivious act against his sister, a child under 14 years of age, in violation of Penal Code section 288, subdivision (a), it was first required to find that when appellant touched his sister in 1966, he "committed the act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires" of himself or his sister. (2 CT 343 [CALCRIM 1110, Lewd Or Lascivious Act: Child Under 14 Years (Pen. Code, § 288, subd.(a))], 345 [CALCRIM 1191, Evidence Of Uncharged Offense].) Accordingly, although the jury was not instructed to determine if appellant possessed the mental capacity to commit crime, it was instructed that in order to consider

the Evidence Code section 1108 evidence, it was first required to find that appellant possessed a very specific criminal intent - willful touching with the intent to sexually arouse himself or his younger sister - when he committed 1966 act against his sister.

In light of the instructions given, there are two potential possibilities: either the jury found that appellant harbored the criminal intent to commit the uncharged sex crime such that he, ipso facto, possessed criminal capacity; or, on the other hand, the jury rejected the assertion that the 13 year and 11 month old appellant did not commit the 1966 act with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or his sister, in which case the jury would have rejected the evidence and assigned no weight to it. In either case there was no prejudice.

3. Evidence was presented that appellant appreciated the wrongfulness of the 1966 uncharged crime against his sister

Evidence was presented from which the jury could reasonably conclude that appellant understood the wrongful nature of his conduct when he touched his younger sister. Linda Cottone, testified that she was five or six years old when the touching occurred. (6 RT 1372.) Linda was in the kitchen of the family home with a playmate, when appellant approached and asked the girls if they would like to play a game that Linda had never heard of. (6 RT 1372-1373.) Linda testified that she did not recall anyone else being present in the home. (6 RT 1373.) After Linda's friend stated that she had to go, and departed, appellant picked Linda up and carried her to the downstairs basement area of the home. (6 RT 1373-1374.) As appellant carried Linda, he moved his fingers inside her underwear and rubbed her vagina. (6 RT 1374.) Given the evidence, the jury could reasonably conclude that appellant used a game as a ruse to entice his much

younger victim. After doing so, he physically carried her from the kitchen and down into a basement presumably where they would not be discovered. From this evidence, the jury could reasonably conclude that appellant utilized a sophisticated plan that evidenced he knew that what he was doing was wrong.

Given the evidence and the instructions, coupled with the argument of counsel, even if the trial court erred by failing to instruct the jury that it must only consider appellant's 1966 act against his sister if the jury first found that appellant possessed the capacity to commit the crime in 1966, any error may be deemed harmless.

CONCLUSION

For the reasons stated above, respondent respectfully requests that this Court reverse the judgment below and affirm the jury's verdict.

Dated: October 17, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10,557 words.

Dated: October 17, 2011

KAMALA D. HARRIS
Attorney General of California

JAMES H. FLAHERTY III
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Lee V. Cottone** No.: **S194107**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 17, 2011, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **October 17, 2011** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 17, 2011, at San Diego, California.

Bonnie Peak
Declarant

Bonnie Peak
Signature

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