Case No. S194107

Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

LEE V. COTTONE,
Defendant and Appellant.

SUPREME COURT
FILED

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Deputy

Court of Appeal Case No. G042923
Orange County Superior Court No. 06HF1734

APPELLANT'S ANSWER BRIEF ON THE MERITS

The Honorable M. Marc Kelly, Judge Presiding

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I.

ISSUE PRESENTED

Whether or not the trial judge can conclusively decide the question of the defendant's capacity to commit an alleged prior sex offense committed when he was under the age of 14 years old, alleged under Evidence Code Section 1108, and determine that the People have carried the statutory burden of rebutting the presumption against criminal capacity without submitting the question to the jury?

II.

INTRODUCTION

In the Superior Court, the Defendant was charged with child molestation, and the People alleged he committed an act of molestation when he was under the age of 14 years old (over 35 years before) and sought to prove it pursuant to Evidence Code Section 1108.

If the People present evidence the Defendant previously committed another sex offense (other than the charged crime), the People are entitled to an instruction. That instruction, given in this case, told the jury that based on the uncharged crime it could "conclude . . . the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit" the charged crime(s). See CALCRIM 1191.

However, before the jury was allowed to use the 1108 evidence to establish this propensity, it was instructed it must decide if the

People had proven "that the defendant in fact committed the uncharged offense." *Id.* Section 1108 in turn defines such an uncharged sex offense as "a crime." Section 1108, subdivision (d)(1).

Under Penal Code Section 26, ¶1, a defendant who is under 14 years old at the time of an act is presumed to not have the capacity to commit a crime, but this presumption can be rebutted by the People if they present clear and convincing evidence the defendant "knew of the wrongfulness" of the act at the time. Please see *In re Manuel L.* (1994) 7 Cal.4th 229.

A prior alleged sex offense (under Section 1108) is not a sex offense unless it was a "crime," and a person who does not have the capacity to commit a crime is not guilty of a crime. Penal Code Section 26, ¶1.

The trial court conducted a "preliminary fact" hearing on the issue of whether the People had established by clear and convincing evidence that at that time the defendant "knew the wrongfulness of his act."

At the conclusion of that hearing, the trial judge found that the People had established (to the satisfaction of the court) by "clear and convincing evidence" that Appellant did "know the wrongfulness" of the act at the time of the alleged Section 1108 prior sex offense.

At trial, however, the People did not offer any evidence on the question whether Appellant had knowledge of the wrongfulness of the act alleged to be another sexual offense pursuant to Section 1108, did not argue that he did have such knowledge when he was

under 14 years old, and the trial court did not instruct the jury that to be guilty of a crime (as alleged under Section 1108, or for the purpose of the jury instruction on propensity to commit sex offenses the defendant must be shown by clear and convincing evidence to have had knowledge of the wrongfulness of his act at the time of that alleged other offense.

The People contend that: (a) capacity to commit crime is a preliminary fact; (b) it is to be decided solely within the province of the trial judge, and never presented to the jury; (c) it was not error to advise the jury that the alleged prior was a sexual offense for the purposes of Section 1108 and the propensity jury instruction based on the alleged prior sex offense even without any evidence or finding on whether or not the defendant had the capacity to commit crime at that time, as defined in Penal Code Section 26, ¶1. The People further attempt to argue that even if this was an error, the evidence of guilt was "overwhelming" so this error was not prejudicial.

Appellant argues below that: (1) very little authority supports the People's contention that "capacity" to commit crime is a "preliminary fact" as shown by the fact that trial judges do not routinely acquit defendants in preliminary fact hearings whenever they find that defendants can produce enough evidence to persuade a reasonable jury that they lacked capacity to commit crime; (2) even the authority cited by the People supports the view that as to the issue of a defense to crime, such as capacity (or incapacity) is not a question to be determined by the judge in a preliminary fact hearing (See e.g., *People v. Lewis* (2001) 26 Cal.4th 334), or if in

some cases the issue of capacity *could* be decided initially as a preliminary fact, because lack of capacity is a defense, the judge does not conclusively decide the issue. See *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1157; (3) Because Section 1108 requires the People to prove and the jury to find the Defendant committed another "sexual offense" and because to be an offense, the defendant must have had the capacity to commit a crime at the time, the jury *is* required to consider and decide if the People have carried their Section 26 statutory burden of proving the defendant in this case (who was not yet 14 years old) had the capacity to commit crime, before it could find he committed a prior sex offense, and before they could apply the propensity instruction, which was argued vigorously by the trial prosecutor.

Finally, Appellant argues that as the Court of Appeal found, if it was error not to require the People to prove Appellant had the requisite capacity when the alleged Section 1108 act was committed, that error was prejudicial and entitles him to a new trial.

III.

STATEMENT OF FACTS

A.

Trial Testimony[1]

BRANDI C. testified that Appellant is her uncle. At the time of her testimony, she was 20 years old. She used to go and stay with him and her Aunt Jeanie starting around 1998, when she was about 8 years old. (Ex. 1) They lived in Irvine. They have two grown sons who were not living in the house at that time. Jeanie would call her mother and ask if Brandi could come over to visit. Brandi was excited to go. The first time was on a school break, which is when she had free time to go and visit. The first visit was 2-4 days. Before then she would see them at family functions, the holidays. The get togethers were large. She was close with both Appellant and Jeanie. Ex. 2 is their bedroom. On the first visit she slept with Jeanie because she (Brandi) was scared to sleep by herself. She slept in the middle of them. She indicated on Ex. 2. During the daytime she had Jeanie would do lots of things together. RT 1223-1229. Jeanie slept with earplugs. RT 1229.

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[1] Although the sufficiency of the evidence is not an issue on this appeal, it is necessary to address the direct evidence of guilt in sufficient detail to allow this Court to evaluate whether or not the admission of evidence about the alleged Linda C. event was prejudicial, as Appellant contends it is. Appellant will argue that the direct evidence of guilt is not so strong as to render the erroneous admission of the Linda C. evidence harmless error.

When she was asked if anything unusual happened on the first night, Brandi began to cry and asked to take a break. RT 1229-1230.

Brandi testified that Ex. 3 is a photograph of her in 4th grade. Ex. 4 was 4th or 5th grade. Ex. 5 was 6th grade. Ex. 6 is a photograph at a pool with her cousin Courtney. RT 1232-1236.

On the first visit, she slept in Appellant's and Jeanie's bed, in between them. She was sleeping and then awoken by Appellant. His hands were touching her vagina, butt and breasts. It was dark in the room. If she was wearing shorts he would creep under her and put his hands under her shorts and massage her vagina, skin to skin. She felt massaging and rubbing. It woke her up. It seemed like a long time. She thought he touched her vagina first, then her butt and breasts. It happened every night that she went out there. RT 1236-1238.

When she felt Appellant touching her vagina, she did not remember if she was laying on her side or back at the time. He slept on the right side, so she believed he used his left hand, but thought she was speculating. She indicated where he was on Ex. 2. After he stopped touching her, they would go back to sleep. While he touched her, she moved around because she was trying to signal to him to get off of her. She did not say anything because she acted as if she was asleep. She did not reach for her aunt or say anything to her. He did not touch her with any other body parts. Nothing happened the next morning. Appellant did not say anything about it. She acted normal like nothing happened. She was scared. She

did not know what was going on. She thought she was around 8. She did not tell anyone at that time. The same thing would happen every night that she was there. She did not ask to be moved to another room because she was scared to sleep by herself. RT 1239-1242.

The second time it happened she moved, but did not say anything or try to wake up her aunt because she was scared to tell anyone. She never told him to stop. She was scared, did not know, knew something was bad that was going on, but did not know what to do. She did not tell anyone, she was scared. The first visit was 2-4 days. She did not remember how she got home after the first incident. Every time she slept in between them, the same thing happened. RT 1242-1244.

Brandi testified that when she went home, she just acted like nothing happened. She did not tell her parents because she was scared. She went to their house every time there was a school break. It started in 1998. Three or four visits in 1998. She did not remember when the second visit was or what time of year it was. She probably stayed 2-4 days. She slept with them because she was afraid to sleep alone. She did not know if the bad thing Appellant had done would happen again. The same thing happened. He woke her up and massaged her vagina, butt and breasts. She did not attempt to wake up Jeanie. She did not say anything to Jeanie or anyone. Appellant never said anything about what he had done and she never said anything to him. RT 1244-1248.

The third visit was at the next school break. When she was a little older, but did not remember at what age, her cousin Courtney and Brandi's sister stayed over there with her and they slept in the guest room. Brandi was maybe 11 or 12. RT 1248-1249,

Brandi was not 100% sure if she was 11 or 12 when her sister and cousin stayed over. (RT 1250)

Brandi did not know how many visits there were between when she started to go over and when her sister and cousin started to go over and they stayed in the guest room. It was more than two. Ex. 7 is the guest room. Her sister would be in the middle because she moves when she sleeps and they put her there so she would not roll off the bed. The other two went to Appellant's house more than once and maybe less than 10. <u>When all three were in the bed, Appellant would go into the guest room and do the same thing to Brandi</u>. The room was dark. She never saw him come into the room because she was asleep. He would do the same things, massage her vagina, butt and chest. She was under the covers and he would pull them back and it would wake her up. She did not say anything to him. She would always be wearing long or short pajamas and he would pull her pants down. She did not say anything. She would usually sleep on her stomach and did not remember what position she was in when he pulled them down. He touched her skin to skin. It was a long time. He never attempted to place his finger into her vagina or to have her touch any of his private parts. None of his private parts ever touched any of her private parts. Then he would just go back to sleep. <u>He went into the guest room every time that</u>

Brandi's sister and cousin stayed there with her. Maybe 10, 15 times. It happened every night. RT 1250-1258.

Appellant never turned on the light. She was always sleeping. She never tried to wake up her sister or cousin. She was scared to tell anyone. Neither of them ever woke up during the events. She never told them what happened. She stopped going to Appellant's house after he moved to a new house. It was 2003, 2004. RT 1258-1259.

At some point when Appellant still lived at the old house, she told her mother she did not want to continue going over there, but did not remember when she told her. Her mother said Jeanie was expecting her, so she went. She never told her mother why she did not want to go. She was scared and did not want it to keep happening to her. She was still close with Jeanie at the time. She did not have any fights with Jeanie. She continued to go to the house, and the molests continued. She remembered going to the new house for family get togethers, but did not remember any more sleep overs. RT 1260-1262.

Approximately eight years after the first alleged event, in May 2006, Brandi was in the car with her mother headed to a family event, a bridal shower, at Appellant's house. Appellant's youngest son was getting married. She and her mother were talking about Appellant and how he would always make fun of Brandi's brother. She told her mother if she thought that was bad, she did not know what Appellant had done to her, and she told her mother what he

had done. It just came out. She had not said anything before then. RT 1262-1263.

Brandi told her mother that Appellant massaged her private parts – vagina, butt and breasts. She thought her mother started to cry and was very upset. Brandi did not remember if she, herself, cried. She was about 16. They attended the bridal shower. Her mother wanted Brandi and her sister to stay with her at all times while there. Brandi did not attend the wedding, and neither did her parents. RT 1264-1265.

Brandi only knows that she went to the house every time she had a school break. RT 1266.

Brandi looked at photographs with her mother to piece together the time frames of when this had taken place and they were helpful in recalling the events and the time frames. She does not have exact dates or times. RT 1267.

Joanne Cottone, Brandi C.'s mother, testified that in 1998 she made arrangements with Jeanie for Brandi to visit. She arranged for Brandi to visit several days in 1998. The first visit was when she was in the third grade and was 8 years old. She did not remember the time of year. RT 1335-1336.

Ex. 6 is the photograph of Brandi and Courtney at the swimming pool where Appellant lived in 1998. (RT 1336-1337)

The first visit lasted more than one day. Joanne did not know how many times Brandi visited in 1998 but she estimated 10 times. After Joanne was asked to read from a statement she gave to Det. Quiroz at the Irvine PD, she said she did not know if it refreshed

her memory of how many times Brandi visited Appellant's home. When asked if she told the officer that between 1998 and 2001 that she visited 2-3 times per year, Joanne said yes, and Brandi would spend 2-4 nights. They were on school breaks. The visits went on for roughly four years. Brandi never told her about inappropriate touching. Brandi did at some point say that she did not want to go, but did not say why. She just said she did not want to go when Joanne would ask why. Joanne told her that it would really hurt Jeanie's feelings if she did not go, so Brandi went. RT 1337-1340. At some point the visits stopped. RT 1340-1341.

The visits stopped because of an illness that Appellant had. Appellant was living at the old house. Brandi first told her what happened on 5/13/06. They were on the way to Priscilla's shower, Appellant's son's fiancé. She and Brandi were talking about Appellant's inappropriate behavior toward Joanne's son, Robert, and Brandi said "Mom, you would not believe what Uncle Lee has done to me." "He's touched my vagina. He's rubbed my chest, and he's rubbed my bottom." She told Brandi that he molested her. Brandi (then 16 years old) testified that she did not know what that was. RT 1342-1344.

Brandi told her this right about the time they were arriving at the shower. Joanne decided they should go because Jeanie was expecting them. She did not call the police right away. RT 1344-1345.

Joanne was upset. It was hard to deal with while at the bridal shower. She did not say anything to Jeanie or anyone else

that day. As they walked to the shower, Appellant came out of the house and said "Brandi, don't you look nice today. I think you'll be my date." They did not respond. Appellant was present for the shower. RT 1345-1347.

Joanne kept an eye on Brandi. She did not confront Appellant at the shower. RT 1347.

Joanne felt very shocked and very hurt. They had a great relationship with Appellant and Jeanie. RT 1347.

Joanne's family did not attend the wedding. To determine when the events happened Joanne looked at photographs. Ex. 7 was at the pool. She looked at Brandi's school pictures. Ex. 1 was from 1997-1998. There is writing on the back. RT 1348-1349.

Dr. Laura Brodie, a clinical and forensic psychologist, testified that she does not know any of the facts of this case. She has not read any reports or spoken with anyone in this case. It is not at all unusual, based on the syndrome, to delay a reporting of five years, in her expert opinion. RT 1366-1367.

The entire premise is based on a presumption of guilt as opposed to innocence. It is not that these five things show that a child was abused. If she presumed guilt, then one could say this is a way of dealing with the problem. If she presumed innocence, she would draw different conclusions because nothing happened. Dr. Summit, an authority she is familiar with has written that if we presume innocence you will have a conclusion that is the exact opposite if they presume guilt. It is just a way of explaining conduct through that presumption of guilt. RT 1367-1368.

Not all five factors have to be present in every case. Dr. Summit found some factors existed in some cases and others did not. You could have accommodation but not recantation necessarily. RT 1369.

She does not look at the five things to decide the child was molested. She was looking to see if any of them are there and presume guilt, and then it is explainable through the syndrome. The five things are not checked off a list. RT 1370.

(1)

1108 Evidence Received Over Objection

Linda Cottone, Appellant's sister, testified that Appellant is 8 to 9 years older. When she was 5 or 6 years old, she was in the kitchen with a friend and he asked if they wanted to go downstairs to the basement to play a game. Her friend said no, and went home. Appellant picked up Linda and carried her downstairs. He did not describe the game, but called it "Giggy Giggy." She had never heard of it, and he did not describe it to her. She wanted to play a game. She did not recall anyone else at home at the time. RT 1370-1374.

She just remembered being on his shoulders and he took his finger and put it in her underwear and touched her vagina area. She did not recall him placing his finger inside her vagina. He was rubbing the vagina area. She did not remember how long it lasted. she did not remember her exact age, but she met her friend in kindergarten, so did not know if it was kindergarten or first grade. It could have been when she was between 5 and 6. RT 1374-1375.

The prosecution rested. All exhibits were received into evidence without objection. RT 1375-1376.

(2)

Defense Case

Courtney Cottone, who is 14 years old and going into 9th grade, testified that Appellant is her grandfather. There was a time several years back when she would spend the night at his home on Wheeler. She stayed there many times a year. Brandi and Kimberly would also be there. Courtney was shown Ex. A and identified the bedroom (bedroom #3) that the three girls would sleep in. They did not always stay in that bedroom. If her great-grandmother was there, she would stay in bedroom #3 and the girls would sleep in the hallway or downstairs on the sofa. She was shown a photograph of her great-grandmother sleeping in bedroom #3. Either she or Kimberly took the photograph. It was during one of the times she stayed there, and it is 12/27/02. RT 1384-1387.

Courtney was shown Exs. E2 and E3, from 6/02 and 12/02. She, Brandi and Kimberly are in E2 and they are sleeping. It is one of the places they slept if her great-grandmother was in bedroom #3. Ex. E3 is another photograph of the girls sleeping on the couch downstairs. Wheeler. In Ex. E5, dated 12/28/02, Brandi is sleeping on the couch. RT 1387-1389.

If Courtney was sleeping in bedroom 3, she would use bathroom #2. The bedroom door was left open and the bathroom door was open with the light on in the bathroom, if she had to find her way there from the bedroom. She and Brandi would sleep on

the outside of the bed and Kimberly would sleep in the middle. In all the times she spent there, Appellant never touched her or tried to touch her in any inappropriate way. Brandi never told her or said anything to her about Appellant touching or trying or touch her in any inappropriate way. RT 1389-1390.

Courtney lived in the same city as Appellant and whenever she wanted to come over she could just call and they would let her come over. Brandi came over a lot. RT 1390.

Courtney testified in a prior hearing. She reviewed her testimony. Her testimony today was that Brandi slept at the house frequently, several times a month. She did not know an exact year when Brandi started to go there. Courtney was very little, like 4 or 5. She guessed maybe 1999. RT 1391-1393.

Courtney testified that Brandi did not tell her of any specific date or something that she stayed there. RT 1393.

Courtney testified that it was fair to say that as far as she could remember, from the time she was 4 until the time in the Wheeler house when they moved, Brandi would spend the night with her and Brandi's little sister, several times a month. RT 1393-1394.

Courtney testified that Brandi would come over during holidays, sometimes weekends, and breaks in school. Brandi lived in Torrance. On several occasions the three girls spent the night in the guest room. It happened most of the time. RT 1396-1397.

Laura Rakestraw was 24 years old when she testified. Appellant is her cousin. When she was younger she spent the night

at his house on many occasions. She slept in the guest room and sometimes the bed at the Wheeler house. She was probably 6-10 years old. Appellant never did anything to make her uncomfortable or touch her improperly. She probably slept over about 30 times between the ages of 6 and 10. She stopped going there when she was about 10. Her sister would also go over to the house. RT 1398-1400.

Laura's sister, Mary Rakestraw, testified that Appellant is her cousin. Mary is 27. She spent overnights at his house when she was younger. She stayed there a lot, probably every other weekend. She stayed in the guest bedroom. Appellant never made her uncomfortable or touched her in a bad way. RT 1401-1402.

Mary did not spend every weekend. Every other weekend or maybe skip a few weekends. They were close. They went to the same church. She probably went for a few years, maybe five years. She would spend the night maybe two to three weekends a month. Maybe a total of 150 visits in 5 years. RT 1402-1404.

However many times she was there, nothing ever happened. RT 1404.

IV.

ARGUMENT

A.

THE ISSUE OF A 13 YEAR OLD'S CAPACITY TO COMMIT CRIME IS NOT A QUESTION OF LAW OR AN ISSUE TO BE EXCLUSIVELY DETERMINED BY A TRIAL JUDGE PRE-TRIAL, BUT MUST BE SUBMITTED TO THE JURY TO DETERMINE IF THE PEOPLE HAVE CARRIED THEIR BURDEN OF PROOF THAT THE ACCUSED HAD KNOWLEDGE OF THE WRONGFULNESS OF THE ACT AT THE TIME

1.

Summary of Argument

In this case the defendant was charged with four counts of child molestation allegedly part of a series of 50-200 acts of molesting his niece, Brandi C., in his home when she slept over during 1998-2001. The allegations were inherently difficult to believe because the victim alleged that these activities took place when she, at the age of 8, or so, slept either between the Appellant and his wife, or between two other girls sleeping over, and despite the number of times and the length of the alleged molestations, no one ever woke up but Brandi C., and she remained silent about these events for the entire time, and did not report them until much later.

Because Brandi's credibility was itself weak, the People proffered evidence under Evidence Code Section 1108 from Linda C.,

the younger sister of Appellant, who alleged that Appellant once, when she was 5 and he was 13 years old, while playing a game with her in which she rode on his shoulders, put his finger on her vagina. That was in 1966, more than 32 years before the allegations of Brandi C.

The trial court also ruled that the 1966 allegation was admissible, but only after ruling that because the evidence did not establish that Appellant had reached the age of 14, the People had the burden of proving he knew the wrongfulness of his conduct (in 1966 with his sister Linda) by clear and convincing evidence, pursuant to Penal Code Section 26.

Based on virtually no evidence on that issue, the trial court did find that Appellant knew it was wrong by clear and convincing evidence and admitted Linda C.'s testimony.

Appellant was denied the right to a jury trial and due process by the failure of the trial court to submit the issue of his knowledge of the wrongfulness of his alleged act in 1966 to the jury, or to instruct the jury on the People's burden to prove that by clear and convincing evidence before the jury could conclude he committed another sexual offense under Section 1108 or apply the propensity jury instruction.

2.

Response to People's Argument

The People argue that "capacity" to commit crimes is a "preliminary fact" (Respondent's Opening Brief on the Merits "ROB"), pp. 6-22.

However, the Attorney General cites no case law holding that the defendant's capacity to commit a crime is a preliminary fact which the trial judge can decide and then remove that issue from the jury to determine.

Respondent cites *People v. Galambos* (2002) 104 Cal.App.4th 1147 under its heading, "**Capacity to Commit a Crime Is a Preliminary Question**." ROB, pp. 6-7.

However, *Galambos* does not deal with the issue of capacity. It does, however, deal with preliminary fact determinations on the admissibility of other affirmative defenses. In *Galambos*, the Court of Appeal held that before a defendant was allowed to offer a particular affirmative defense to the crime charged, the trial court could properly require him to show in a preliminary fact hearing that he could produce evidence of each element of that defense to a jury.

The case does not stand for the proposition that *if* the trial judge found the preliminary fact to be true (as the trial judge found in this case as to the question of capacity to commit crime), that determination is binding on the jury. Rather, the case stands for the proposition that if the trial judge finds the fact not to be

supported by sufficient evidence, the defense is not given a chance to persuade the jury.

The case is nothing more than a correct application of the substantial evidence rule enunciated by this Court in *People v. Breverman* (1998) 19 Cal.4th 142, 157 [if the defense is supported by substantial evidence and it is not inconsistent with the defendant's theory of the case, the defense is entitled to instructions on it, if not, he is not entitled to such instructions, or to offer evidence of the defense.] Sufficient evidence is evidence which, if believed, would be sufficient for a reasonable jury to find that the defense has been proven.

So too, here, if the question of 'capacity' were a preliminary fact, it would be a fact on which the People must offer sufficient evidence which, if believed, would persuade a reasonable jury that the presumption of incapacity was proven by clear and convincing evidence.

There is, however, nothing in Evidence Code Section 405, or 1108, or in Penal Code Section 26, ¶1, suggesting either that the defendant's capacity to commit an alleged prior crime is a fact on which the admissibility of evidence of that prior crime depends, or that the question of capacity can or must be decided by the trial judge, but not by the trial jury.

But here, the People are approaching the preliminary fact question *as though the defense has been given the burden of proving he did not have the capacity to commit crime*. But, as the law

clearly states, the presumption is against that capacity, and the People bear the burden of proving he had that capacity.

By contending that the trial judge can determine not only that the preliminary fact (i.e., capacity) is shown by sufficient evidence to go to the jury, but also that the trial judge conclusively determines that fact, the People are attempting to avoid the statutory obligation the Legislature has placed with the People to prove a fact by clear and convincing evidence. Obviously, a "fact" which must be proven before a jury can conclude the defendant has committed a prior sex offense is not a preliminary fact regarding the *admissibility* of the evidence of that sex offense, but rather is a fact which the jury must find has been proven before the jury can use that evidence (once admitted) to find the defendant has committed a prior sex offense, and thus that he has a propensity to commit sex offenses.

If this Court were to find that judges, rather than juries, have the power to determine, conclusively, that the People have proven by clear and convincing evidence that an alleged prior sex crime, was, in fact a crime, then it would not merely be determining that judges can decide a preliminary fact leading to the admissibility of evidence of a prior sex crime, but it would also be deciding, as a matter of fact, that the alleged prior sex offense was actually a sex crime. In this case, the Court of Appeal's essential holding was that before a jury can use an alleged prior sex offense as 1108 evidence, it must be proven as a matter of fact to have been a crime (which includes proof by clear and convincing evidence that the defendant

had the capacity to commit crime at the time). *That* is not a question of admissibility or a "preliminary fact," but rather it is a question of fact which must be proven to the jury under Penal Code Section 26.

Ironically, the authority cited by the People on the workings of preliminary facts do not actually address the issue of capacity to commit crime, but rather deal with *other* facts which clearly are preliminary facts that disappear once they have been found to be true.

For example, in *Galambos*, the preliminary fact to be proven *before the defense was permitted to offer his medical necessity defense*, was held to be an affirmative defense.

The other cases cited by the People under the heading, "capacity to commit crime is a preliminary question" are: *In re Gladys R.*(1970) 1 Cal.3d 855, 962; Pen. Code § 26 ¶1; *People v. Lewis* (2001) 26 Cal.4th 334, 378; *In re Manuel L.* (1994) 7 Cal.4th 229, 238, and *In re Ramon M.* (1978) 22 Cal.3d 419, 424.

None of them hold that the judge, rather than the jury, is permitted to decide whether or not the defendant had the legal capacity to commit crime where the People bear the burden or proof on that question, as they do in this case.

Specifically, in *In re Gladys R., supra,* 1 Cal.3d at 862, this Court did not hold that the court is empowered to remove the question of the defendant's capacity to commit crime from the jury by finding that the People bore its burden of proof on that issue away from the jury. Rather, in *Gladys R.*, this Court never

discusses, at all, the term "preliminary fact," and the question of "admissibility" of evidence of the child's capacity was not before this court.

What *was* decided in *Gladys R.* was that: (1) the trial court (i.e., the juvenile judge) commits reversible error by reviewing the social study report before adjudicating the petition in the jurisdictional hearing; (2) before a child can be found to be a ward of the court based on an allegation of lewd conduct, the court must first find that the child (under the age of 14) knows the wrongfulness of the conduct; and (3) *if* a child engages in lewd conduct, that is an adequate basis for declaring them a ward of the court.

To compare *Gladys R.* to the present case, the jurisdictional hearing, which is where this Court held the finder of fact must determine if the child knows the wrongfulness of her acts, is the equivalent of the jury trial in this case. Clearly, in *Gladys R.*, the judge was sitting as the finder of fact, and just as clearly, this Court did not hold that there must be a preliminary fact determination before evidence of the child's capacity to commit crime could be presented to the finder of fact. Rather, the juvenile court simply cannot consider evidence roughly equivalent to sentencing material, in deciding whether or not to sustain a petition at the jurisdictional hearing.

While *Gladys R.* did involve application of the Penal Code Section 26, ¶1 presumption against capacity, it in no way supports the People's argument in this case that a judge sitting without a

jury can, in a jury trial situation, decide that the People have carried their burden on a fact that the Legislature has determine the People must prove *before* the jury can consider a prior sex act to be an 1108 sex offense.

In *Lewis*, this Court found that "the trier of fact" was appropriate for deciding the question of whether the defendant knew the wrongfulness of his conduct when he was under 14 years old and also rejected the identical argument being made by the People here – that such a determination is a "preliminary fact."

> "We reject defendant's unsupported claim that determining a minor's capacity under Penal Code section 26 should be considered the same as determining the admissibility of a confession as a foundational or preliminary fact. (Evid. Code, § 402, subd. (b) [upon a party's request, a court must first determine the admissibility of a confession or admission outside the presence and hearing of the jury].)"

In *Lewis*, the "trier of fact" was the jury, and there, this Court stated that the "trier of fact making a section 26 determination does not attempt to read the mind of the minor, . . . to determine whether the minor understood the wrongfulness of his or her conduct. (In re Tony C., supra, 21 Cal.3d at p. 900.) 'Reliance on circumstantial evidence is often inevitable when, as here, the issue is a state of mind such as knowledge.' (Ibid.)" *People v. Lewis, supra*, 26 Cal.4th at 379.

This discussion clearly envisions a jury deciding if the defendant has the requisite knowledge to have capacity to commit

crime when he committed a prior act when he was under the age of 14.

Nor did this Court hold in *People v. Lewis, supra*, that "the trial court should have determined that defendant's knowledge of wrongfulness was a preliminary fact." Rather, on the defendant's argument there that the capacity of a defendant to commit crime under Section 26, ¶1, is a "preliminary fact" that the judge, rather than the jury must decided, this Court rejected the argument, saying:

> "We also reject defendant's related argument that the trial court should have determined that defendant's knowledge of wrongfulness was a preliminary fact that the trial court should have decided before submitting evidence of Rogers's murder to the jury." *Id.*, 26 Cal.4th at p. 380.

From *Lewis*, cited by the People in support of their sub-argument that "capacity to commit a crime is a preliminary question" it can be concluded that the opposite is true – this Court so declared ten years ago it is not a preliminary fact that the "trial court should have decided before submitting evidence" of the prior alleged crime to the jury.

Once again, in *In re Manuel L., supra*, 7 Cal.4th 229, 238 also cited by the People for the proposition that determining if the defendant had the knowledge required by Penal Code Section 26 is a "preliminary fact" to be determined by the trial judge, this Court did not use the term "preliminary fact" and never addressed whether or not the jury should decide if the People have proven the

defendant had that knowledge. In *Manuel L.*, this Court held that the standard by which that fact must be proven is "clear and convincing evidence," not that it was a "preliminary fact" to be decided by the judge rather than the "finder of fact."

Finally, in *In re Ramon M.* (1978) 22 Cal.3d 419, *erroneously cited as In re M.* (1978) 22 Cal.3d 419, 424, this Court did not say or hold, as the People contend, that the capacity to commit a crime, when under Penal Code Section 26, ¶1 the People must prove the defendant knew the wrongfulness of his or her conduct, is a "preliminary fact" relevant to the admissibility of evidence.

Rather, in *Ramon M.*, the only discussion of Penal Code 26 was the holding that Section 26's presumption of lack of capacity applies to children of a chronological age of under 14, not to older persons with a mental age under 14. In *Ramon M.*, the defendant had a mental age of 5 years old, and this Court reversed the adjudication of the juvenile court because it applied the wrong definition of the defense of "idiocy" also set forth in Section 26.

It is ironic that all of the cases cited by the People are either juvenile court cases, in which there was no jury, and thus no discussion of the issue present in this case, or are cases with statements directly opposed to the People's argument in this case.

The only case from this Court cited by the People to even address the "preliminary fact" procedure, is *People v. Lewis*, and in that case, "the manner in which the" capacity to commit crime issue was decided was by submitting it to the jury, as the Court of Appeal held should have been done in the present case. It is therefore

somewhat ironic that the People argue, citing the above cases, that "the Court of Appeal's conclusion that the preliminary fact must have been presented 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."

The logical flaws in the People's argument are: (1) ten years ago this Court approved submitting the question of capacity of a person under 14 years old to the jury; (2) whether or not the defendant has the capacity to commit crime is not an "evidentiary issue" under Evidence Code Section 405; and (3) because it is a significant question of fact on which the People must bear the burden of proof by clear and convincing evidence, the defendant's capacity to commit a crime when he was under 14 must be presented to the jury to decide, because *the jury* must, under Section 1108, decide if the defendant committed any other or prior sex offense.

The Court of Appeal opinion would neither "create a conflict in the law" nor "result in a radical departure" from anything.

Simply put, requiring the jury to decide whether or not the People have carried the burden of proving by clear and convincing evidence that at the time of the act the defendant knew the wrongfulness of his conduct would give effect both the Evidence Code Section 1108, requirement for juries to decide if the defendant previously committed a sex "offense" and to Penal Code Section 26, imposing a burden on the People to prove that conduct engaged in

prior to the age of 14 was "criminal" or was done with the capacity to commit crime.

Contrary to the People's position, it would create a conflict in the law if in this one instance, the judge alone, without submitting the question to the jury, were empowered to decide that one fact, necessary to a determination whether the prior act was or was not a crime, giving rise to the ability of the prosecution to take advantage of the propensity instruction which they employed with such effectiveness in the present case.

B.

EVIDENCE CODE SECTION 405 DOES NOT SUPPORT UPHOLDING THE JUDGMENT IN THIS CASE, EVEN IF THE TRIAL COURT WAS EMPOWERED TO CONDUCT A PRELIMINARY FACT DETERMINATION BECAUSE THE MOST THAT COULD HAVE RESULTED FROM SUCH A DETERMINATION WAS A DECISION ON ADMISSIBILITY - NOT A FINDING THAT WOULD SATISFY PENAL CODE SECTION 26

Without any authority to support the statement, the People argue at p. 8 of their brief:

> "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."

The part of this statement that is wrong is the phrase "including capacity" and the logic of the statement that assumes

that "capacity" is a preliminary fact upon which the admissibility of evidence rests. The People cite no authority for either proposition, and both are erroneous.

In fact, in numerous cases in which the defendant is seeking to establish the admissibility of his defense of incapacity, the law is clear that once he persuades the trial court he has sufficient evidence of incapacity to commit a crime to go to the jury, he must *still* persuade the jury of that factual conclusion before he is entitled to an acquittal. The judge does not acquit a defendant once he offers sufficient evidence to go to the jury on the issue of incapacity, and the judge does not remove the issue of capacity from the jury just because the judge concludes the People have presented sufficient evidence to allow the jury to conclude the defendant had the capacity to commit crime when he was under 14 years old. The issues of "admissibility" and capacity are two different legal and factual questions, and clearly, under Evidence Code Section 1108, the question of capacity is one for the jury – assuming the judge allows the People to introduce evidence of a prior sex act committed when the defendant was under 14.

By focusing on questions of fact that actually relate to admissibility of evidence, the People's argument distorts what is going on in this case. There is no statute or rule of evidence that states that the defendant's capacity to commit crime is "a preliminary fact" affecting admissibility of the proffered 1108 evidence. The People cite no authority in the form of case law or otherwise even saying that the trial judge must or even should

conduct a preliminary fact determination of capacity before admitting evidence of an alleged 1108 prior crime.

The People have argued that "capacity to commit crime" is a preliminary fact question, and cited only cases that hold that *admissibility of evidence* can be a preliminary fact question. But their arguments are also flawed insofar as the People argue that once the trial judge determined a preliminary fact, the issue was not to be presented to the jury.

In the situations in which a preliminary fact properly to be decided by the trial judge, it is question of "sufficiency" of evidence on a fact, not a conclusive determination of that fact. See *People v. Galambos*, *supra*, 104 Cal.App.4th at p. 1157.

So, in the cases cited at pp. 8-13 of the People's brief, the issues which were held to be "preliminary fact questions" were those foundational issues that led to a determination of admissibility, not to a conclusive determination of a fact in issue on a matter submitted to the jury - such as whether or not the prior act of the Defendant was a crime, as required by Section 1108.

Here, however, Penal Code Section 26, ¶1 creates a presumption that a person under 14 years old cannot commit a crime unless the People prove by clear and convincing evidence that such person knew the wrongfulness of his conduct. *In re Manuel L.* (1994) 7 Cal.4th 229. Evidence Code Section 1108 allows the People to present evidence that the defendant has previously committed a sex offense. To be an "offense" the perpetrator must have had the capacity to commit crime at the time of the act

involved. If the person was under 14 (as was Appellant in this case), the People had the burden of proving the defendant "knew the wrongfulness of his conduct" at that time of the prior act, <u>as a part of their burden of proving he committed a prior sex offense</u>. Since whether or not the defendant committed a prior sex offense is a question which Evidence Code Section 1108 requires the jury to determine, the question of the defendant's capacity to commit crime is not a "preliminary fact" question in this context.

The People might be able to persuade this Court that it is a preliminary fact question whether there is sufficient evidence for any jury to conclude by clear and convincing evidence that the defendant was aware of the wrongfulness of his conduct at the time of the alleged prior sex act, but even if the judge concluded that the People could produce sufficient evidence for the jury to so find, the judge's decision to admit evidence of the prior act would not be a determination of the ultimate question – i.e., whether or not the defendant *did* have that capacity. Rather, it would be a preliminary determination that there is enough evidence supporting the conclusion he did, to go to the jury.

Indeed, this is precisely what the Court held on the preliminary fact question in *People v. Galambos, supra*, 104 Cal.App.4th 1147, cited by the People in their first argument. In that case, the Court of Appeal held the trial court properly fulfilled its gate keeping function to exclude evidence which is insufficient to support a jury finding of an affirmative defense, by conducting a preliminary fact hearing and excluding the evidence of the

defense. But, in *Galambos*, if the trial Court had concluded there *was* sufficient evidence the defendant there had a medical marijuana defense, and if the Court of Appeal had upheld that determination, the result would have been that the evidence (i.e., of medical necessity) was admissible, and that then the jury would decide the ultimate fact – whether or not the defense was proven.

In this case, the result of the trial judge's decision that the People had offered sufficient evidence to prove to the jury that Appellant had knowledge of the wrongfulness of his conduct when he was under 14 years old, and when the alleged prior sex act took place, that would not end the matter, but would then require the jury to determine the ultimate fact – whether or not the defendant's conduct was a prior sex <u>offense</u>, which would have required the People to prove to the jury, by clear and convincing evidence, that at the time of the prior act, he had the requisite knowledge of the wrongfulness of his conduct.

People v. Betts (2005) 34 Cal.4th 1039 and *People v. Posey* (2004) 32 Cal.4th 192, cited by the People at pp. 15-16 of their brief for the proposition that this Court "addressed the fundamental distinction between questions of law and questions of fact," is misleading.

In *People v. Betts, supra*, this Court was concerned with the jurisdiction of the court to hear the case – not with whether or not the prior act alleged was a crime. In *Posey*, as explained in *Betts*, the distinction at issue was between *procedural* questions and substantive questions. The "substantive matter of guilt or

innocence" is to be determined by the jury and the procedural matters are to be determined by the judge.

The examples in the passage quoted by the People is helpful. A "procedural matter" is one that does not itself determine guilt or innocence, but "either precedes the trial (such as whether to admit certain evidence), or follows the trial (such as whether to order a new trial.)." *Id.*, *People v. Betts*, quoting *Posey* at p. 206. The People emphasize the phrase "such as to admit certain evidence" without explaining why "capacity to commit" a prior allege crime is a fact affecting admissibility of the evidence of that prior crime.

No case holds it is an admissibility question.

Moreover, as Justice Kennard pointed out in her dissent in *In re Manuel L.* (1994) 7 Cal.4th 229, on a point not disputed by the majority, Penal Code Section 26 allocates burdens of proof on various forms of capacity to commit crime.

> "Except for subdivision One, all of the subdivisions of section 26 created affirmative defenses; that is, they place on the defendant the burden of establishing facts essential to the defense. (*In re Ramon M.* (1978) 22 Cal.3d 419, 422 [149 Cal.Rptr. 387, 584 P.2d 524] [idiocy]; *People v. Tewksbury* (1976) 15 Cal.3d 953, 963, 964, fn. 9, 127 Cal.Rptr. 135, 544 P.2d 1335] [unconsciousness and duress]; *People v. Lopez* (1986) 188 Cal.App.3d 592, 599 [233 Cal.Rptr. 207] [mistake of fact]; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 871 [221 Cal.Rptr. 292] [misfortune or accident].) Thus, in stating in subdivision One of section 26 that a child under the age of 14 is presumed incapable of committing a crime 'in the absence of clear proof' of the child's knowledge of the wrongfulness of his or her acts, the Legislature simply intended to clarify that the

> burden of proving that knowledge remained with the prosecution." *Id.*, at pp. 243-244.

In this case, the People are suggesting, without any authority at all, that this burden of proof is not a fact the People must prove to the jury, but rather is one the People can prove to the satisfaction of the trial judge, alone.

If this Court rules that the prosecution can carry its burden of proof on the presence in a 13 year old of capacity to commit crime by convincing the trial judge of the fact which Penal Code Section requires the People to prove (i.e., knowledge of the wrongfulness of the act), then it would necessarily also need to rule that any defendant who claims mental incapacity under the other subdivisions of Penal Code Section 26 can win an acquittal merely by establishing (by a preponderance of the evidence) to the satisfaction of the trial judge that the defendant lacks capacity.

However, no case has ever so held, and it is beyond reasonable dispute that even if the defense can persuade the trial judge that he has sufficient evidence to convince a jury that he lacks mental capacity on those capacity issues on which the defense had the burden of proof, that fact must be proved to the trial jury, not merely to the trial judge.

CALCRIM has a full set of jury instructions advising the jury on how to evaluate evidence of these affirmative defenses that the defendant must prove by a preponderance of the evidence, and yet the People's argument here is that capacity is merely a preliminary

fact, and that once the judge has determined that preliminary fact, the jury need not decide it at all.

The People's argument would also mean that if a defendant were accused of an other act or prior crime (otherwise admissible under Section 1101), the People would be precluded from offering evidence of that prior crime if the trial judge concluded that the defense had evidence sufficient to raise a reasonable doubt about the defense (e.g., of duress [See *People v. Salas* (2006) 37 Cal.4th 967, 982-984; CALCRIM 3401).

The defense of "legal necessity" is also instructive. Assuming the People allege a prior conviction or an admissible other crime, but the Defendant claims that in that prior [previously unadjudicated] crime he acted out of legal necessity.

But case law holds that the jury must be instructed on this defense and the defendant's burden of proving the elements of this defense by a preponderance of the evidence. See CALCRIM 3404, and cases cited therein. If the People are correct, this issue could be conclusively decided by the trial judge prior to trial, in the event the defense convinces the trial judge by a preponderance of the evidence that he established the defense of legal necessity. Clearly, however, the People would contend that this is a question of fact for the jury to decide, and that if the jury rejected it, the jury would be free to use the alleged prior crime for any permissible Section 1101 purpose.

Similarly, the defense bears the burden of proving mental incapacity by a preponderance of the evidence, and the jury is so instructed. See CALCRIM 3455; and see *In re Ramon M., supra.*

Finally, although the People contend the case law they cite establishes that capacity is a "preliminary fact" and further argue that *because* the 1108 crime alleged in this case was not a charged crime, but merely an item of evidence that may have born on the jury's decision whether to convict on the charged crime, the question of "capacity" was not an issue in the action.

However, as shown above, all but two of the cases cited by the People establish *neither* that capacity is a preliminary fact question, nor that it is an issue to be decided by the trial judge (not the jury). And, the other two cases support the decision of the Court of Appeal, because in one of them (*People v. Galambos, supra*, this Court held it was not error to require the jury to decide the capacity question even without a preliminary fact hearing, and in the other the Court correctly applied the preliminary fact procedure to exclude an affirmative defense.

No cases hold that a judge can conclusively decide whether or not a defendant had capacity to commit crime, regardless of which party bears the burden of proof on the issue.

Moreover, in the one case that this Court has decided that *addressed* the preliminary fact issue, the capacity question applied not to the charged crimes, but to an item of evidence – an alleged prior crime. And in that case, this Court did not rule that the question of capacity was not "an issue in the action" but rather

ruled that the trial judge correctly submitted the question to the "trier of fact." See *People v. Lewis, supra,* 26 Cal.4th at pp. 378-380. See also *In re Ramon M., supra,* 22 Cal.3d 419, remanding the affirmative defense issue for a new trial.[2]

If the capacity of the defendant in *Lewis* was not an "issue in the action" why would this Court rule it was correct to have the jury decided his capacity and to place the burden on the People to prove that capacity. Clearly the crime alleged was not a charged crime in that case.

Appellant submits that if the issue of capacity to commit the uncharged crime in *Lewis* was properly submitted to the jury (as this Court ruled it was), then the Court of Appeal was correct that the identical issue should have been submitted to the jury in this case, even though the Section 1108 alleged crime was not "charged" and thus not automatically dispositive of the outcome of the trial.

Just as clearly, however, the issue of Appellant's "guilt" or not of the 1108 alleged "crime" was an issue for the jury to decide and the mere fact that it was not a charged crime does not distinguish this case from *Lewis*, or render Appellant's capacity to commit crime when he was 13 a "question of law" as the People submit.

The People's citation of *People v. Galambos* (2002) 104 Cal.App.4th 1147 betrays the proper purpose of a preliminary fact hearing in a case of this type. There, the Court of Appeal discusses

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[2] See 22 Cal.3d at p. 431 "Disposition of the Appeal" where the majority refers to what happened "at trial" not in some pre-trial hearing.

the use of a preliminary fact hearing to determine the *admissibility* of a defense.

> "a 'preliminary fact' is broadly defined as 'a fact upon the existence or nonexistence of which depends the admissibility or inadmissibility of evidence.' (Evid. Code, § 400.) And '[t]he phrase "the admissibility or inadmissibility of evidence" includes the qualification or disqualification of a person to be a witness and the existence or nonexistence of a privilege.' (*Ibid.*) Accordingly, the existence of facts constituting an element of a defense literally falls within the definition of 'preliminary fact' because the admissibility of the evidence comprising the entire defense depends on it.

There is no citation for this conclusion, and it is not clear that the admissibility of the evidence comprising a defense "depends on" the existence of facts constituting the elements of that defense. In Section 402, itself, the Legislature states that the Court "may hear and determine the question of the admissibility of evidence outside the presence of the jury . . ." and in Section 405, the Legislature states the Court "shall determine the existence or non-existence of a preliminary fact." But neither states that the existence of every element of an affirmative defense is a preliminary fact, and that is likely because that statement would only be true if, as in *Galambos*, the party proffering the defense has the burden of establishing every element of the affirmative defense.

In the present case, the defendant did not have the burden of proving the "elements" of a defense of incapacity. Rather, the People have the burden of proving the existence of capacity – and no case cited by the People even comes close to holding that: (1)

capacity is a preliminary fact; or (2) is a fact on which the admissibility of evidence depends.

Certainly, *People v. Galambos, supra*, 104 Cal.App.4th 1147 is not only not dispositive on *that* question, it is not even helpful to the People.

For there, the Court of Appeal stated:

> "The primary difference [between a privilege and a defense] is that successfully making out the elements of the privilege excludes the evidence, whereas successfully making out the elements of the defense admits it. [FN4] But in both cases, the admissibility of the proffered evidence depends upon the sufficiency of the evidence to sustain a finding of each element of the privilege or defense. (See Evid. Code, § 403, subd. (a)(1).) And in both cases, the purpose of the preliminary hearing is to avoid the prejudice associated with the introduction of inadmissible evidence." *People v. Galambos, supra*, 104 Cal.App.4th at 1157.

The People here are advocating for the proposition that once the trial judge rules for the People on the capacity question, that issue evaporates from the case.

However in *People v. Galambos, supra*, 104 Cal.App.4th 1147 the Court stated in the footnote omitted from the above quote:

> "There is admittedly a more subtle difference. In the case of a privilege, the court will determine the *existence* of the preliminary fact (Evid. Code, § 405), whereas in the case of a relevant defense, the court only finds that there is *sufficient evidence to sustain a finding* of the existence of the preliminary fact (Evid. Code, § 403). But the procedure for holding preliminary hearings expressly recognizes and authorizes this distinction depending upon the right of the jury to make

> the ultimate finding of the existence of the preliminary fact." *People v. Galambos, supra*, 104 Cal.App.4th, n. 4 at p. 1157.

The People's authority supports the conclusion that *the jury* decides if the issue is proven by the relevant standard, after the judge decides that "there is sufficient evidence to sustain a finding of the existence of the preliminary fact." Clearly, lack of capacity is a defense, and just as clearly, the defendant is entitled to have the jury instructed that to find he committed a prior sex crime, the jury must decide that whatever he did when he was under the age of 14 was "a crime" (i.e., that it was done with knowledge of the wrongfulness of the act.

C.

A JURY INSTRUCTION WAS REQUIRED ON THE PEOPLE'S BURDEN TO PROVE APPELLANT HAD THE CAPACITY TO COMMIT CRIME WHEN HE WAS 13 BECAUSE IT WAS NECESSARY THAT HE BE PROVEN TO HAVE THAT CAPACITY FOR THE ALLEGED 1108 EVIDENCE TO BE A PRIOR SEXUAL OFFENSE

Respondent has an elaborate argument for why the trial court was not required to instruct the jury that to find Appellant had committed a prior sexual offense, it must have also found he had the capacity to commit a crime.

None of the authority cited has anything to do with this issue.

The closest the People come is a case in which the defense had the burden to raise an affirmative defense, *People v. Anderson* (2011) 51 Cal.4th 989, but no cases involve an affirmative statutory

duty on the part of the People to prove by clear and convincing evidence that the defendant had that capacity in order to be guilty of the alleged crime.

Since it was part of the People's burden to prove Appellant was guilty of a prior crime for Section 1108 or the propensity concept to be applied in this case, it clearly was a question closely connected with the law and facts of this case on which the trial court was required to instruct, sua sponte.

A trial court must instruct the jury, *sua sponte*, on the general issues of the law which are relevant to the case before it, as borne out by the evidence presented. *People v. Breverman, supra*, 19 Cal.4th 142, 154. 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. This *sua sponte* duty includes instructing the jury on the theories of defense as presented by the evidence, or upon which the defendant is relying, provided they are supported by substantial evidence. *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12; *People v. Tufunga* (1999) 21 Cal.4th 935, 944-945.

Appellant is entitled to a reversal for a new trial because he was denied a jury trial on whether or not the People presented sufficient evidence to carry their burden to establish that the alleged act against Linda C., in 1966, was a "crime" within the meaning of Evidence Code Section 1108. This violated his federal

Constitutional and state statutory and Constitutional rights to a jury trial.

Denial of the right to a jury trial violates the Sixth Amendment and the California Constitution. Depending on the circumstances, it is either a "structural error" which is reversible error *per se*, under *Sullivan v. Louisiana* (1993) 508 U.S. 275 [holding that a defective reasonable doubt instruction entirely denies the defendant a jury trial and is a structural defect] or a constitutional error tested under the harmless error standard.

Due process entitles a defendant to reversal of a state conviction where the state arbitrarily denies him a state guaranteed right to a jury trial. See *Hicks v. Oklahoma* (1980) 447 U.S. 343. In *Hicks v. Oklahoma, supra*, 447 U.S. 343, 346, the Supreme Court held that the arbitrary deprivation of a state law jury determination - in that case a jury sentence - abridged the defendant's Fourteenth Amendment right to substantive due process. Here, the trial court arbitrarily deprived Appellant of his state law right under Article I, sec. 15 of the California Constitution and Evidence Code Section 1108 to a jury determination on the question of whether or not the Defendant has previously committed a sex offense.

Most of the subdivisions of Penal Code Section 26 have been held to create defenses which require the accused to raise a reasonable doubt whether he has that capacity. See e.g., *People v. Lara* (1996) 44 Cal.App.4th 102, 110 ["[A]ccident or misfortune requires the defendant to prove three negatives: he did not act with an evil design; he did not act with intent; and, he did not act with

'culpable negligence.' "; *People v. Thurmond* (1985) 175 Cal.App.3d 865, 873 ["[T]he burden is on the defendant to establish the absence of evil design, intention and culpable negligence."] *Id.*, at p. 871.

In that situation, the defendant is only entitled to an instruction on the Penal Code Section 26 defense if *he* adduces adequate evidence to establish a reasonable doubt whether the defense was present.

However, unlike the other sub-divisions of Penal Code Section 26, subdivision One places the burden of disproving the defense squarely upon the prosecution. *In re Manuel L., supra*, 7 Cal.4th 229, 234.[3]

Lewis clearly supports Appellant's view that he was entitled to have the issue submitted to the jury, and to have the jury instructed that the People must prove by clear and convincing evidence that he had the capacity to commit the crime alleged by Linda C.

Because no instructions were given to the jury informing the jury that before it could consider the defendant to be guilty of a prior sex crime, it must determine whether, by clear and convincing evidence, he knew the wrongfulness of the conduct alleged from

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[3] In the context of a juvenile prosecution, the Supreme Court there held, "the prosecution must present <u>clear and convincing evidence</u> that the minor knows the wrongfulness of his conduct . . .."

1966, the trial court did not ensure that Appellant received a fair trial on this matter.[4]

Unlike the other Penal Code Section 26 issues, the burden is on the People to prove a defendant under the age of 14 has the capacity to commit a crime, and this must be proved to the jury when the jury is asked to find that he committed that crime in the past as a part of the People's overall case.

Here, the jury was never required to determine that Appellant had the capacity to commit a crime in 1966 when he was alleged to have touched Linda C. and he was thus deprived of a jury trial on the alleged prior sex crime.

D.

THE ERROR IN THIS CASE WAS CLEARLY PREJUDICIAL AND REQUIRES A NEW TRIAL

By any standard, the failure to require proof of capacity to commit the 1108 evidence was prejudicial and reversible error. To the extent the total denial of the right to a jury trial on the alleged prior sex crime is structural error, it is reversible error per se under *Sullivan v. Louisiana, supra.*

However, judged under the harmless beyond a reasonable doubt, or less demanding "miscarriage of justice" standard, the error

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[4] Cf., *People v. Lewis*, 26 Cal.4th at 380, where the Supreme Court further held that instructing the jury in the language of Penal Code Section 26, subdivision one was adequate.

is still prejudicial. As noted, when the jury was not required to determine a fact essential to the sentencing determination in a federal crime in *Neder v. United States* (1999) 527 U.S. 1, 7-15, the Supreme Court applied a harmless beyond a reasonable doubt standard of review, and determined that unless the trial record contained overwhelming evidence on the fact or element omitted from the instructions, the error could not be harmless.

Here, the People presented <u>no evidence</u> on the issue of the Defendant's knowledge of the wrongfulness of the touching Linda C. claimed he engaged in. Rather the trial evidence was limited Linda C.'s recitation of the fact that Appellant asked her if she wanted to play a game, he took her downstairs, put her on his shoulder, and sometime while on his shoulder put his finger inside her pants and touched the "area" of her vagina and rubbed that "area." RT 1370-1375.

There was no effort to establish any surrounding circumstances relevant to prove knowledge that this alleged act was wrong. The prosecutor did not even offer the evidence he relied on in the pre-trial hearing on the issue of knowledge of wrongfulness, such as whether the area downstairs was "secluded."

Nor was the evidence of Appellant's guilt on the charge crime "overwhelming" or even particularly strong.

The judgment in this case must be reversed because Appellant was deprived of the right to a jury trial on the Penal Code Section 26 requirement of capacity to commit the crime alleged under Evidence Code Section 1108.

In addition, the evidence presented on that issue to the jury was legally insufficient to establish he had knowledge of the wrongfulness of the act Linda C. claimed he committed against her in 1966 when he was 13 and she was 5.

Further, the 1108 evidence was prejudicial, in light of the weakness of the testimony of the complaining witness in the charged counts, and that prejudice was realized in the prosecutor's argument to the jury.

Admitting Evidence of Linda C.'s Allegation of Another Sex Offense Was Clearly Prejudicial To Appellant

There are two categories of reasons that admitting the uncharged sex crime alleged by Linda C. was prejudicial: (a) the victim named in the Information, Brandi C., was effectively and thoroughly impeached; and (b) the prosecutor repeatedly relied on the Linda C. incident to corroborate and shore up Brandi C.'s credibility.

The record of the cross-examination and impeachment of Brandi C. is lengthy, but because it is alluded to in the argument of counsel, no overly long reference to it is necessary here. Appellant will detail that cross-examination in his reply brief if Respondent questions that it was effective.

In argument, however, it was clear that the prosecutor was very concerned that the skilled defense attorney had severely damaged the credibility of his complaining witness.

This is demonstrated by the fact that: (1) in his opening statement he attempted to tell the jury that if the jury believes his victim, that is sufficient to convict; (2) he tried to persuade the trial court not to include the phrase "beyond a reasonable doubt" in the jury instructions, saying that the testimony of a complaining witness alone is sufficient to convict;[5] and (3) during his own argument to the jury the prosecutor emphasized the fact that this case turns entirely on the credibility of Brandi C., which, he contended, was amply corroborated by the "propensity" instruction for which Linda C.'s testimony was the only predicate.

Specifically, in his argument, the prosecutor quoted CALCRIM 1190, as modified by the court on Appellant's motion, to include the language "conviction of the -- of a sexual assault may be based on the testimony of the complaining witness alone if proved beyond a reasonable doubt." RT 1489:4-12.

He immediately thereafter told the jury that "that's really <u>the central issue in this case</u>," i.e., whether or not the jury should or could believe the complaining witness beyond a reasonable doubt. RT 1489:13-13.

The prosecutor then attempted to anticipate the defense arguments about Brandi C.'s credibility, and to refute them. See generally, RT 1489-1490. In doing so, the prosecutor virtually conceded that she "is mistaken" about how many visits there were. *Id.*, 1490:1-3.

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[5] See discussion of CALCRIM 1190, RT 1464-1467.

The prosecutor then told the jury to ask if there was "something in her testimony" that made the jury distrust her. *Id.*, 1490:24-25.

He stated, "you needn't have any more facts than the essence of truth." RT 1491:5-6.

Referring to it as "icing on the cake," the prosecutor told the jury the judge would allow them to consider "evidence of uncharged acts" and referenced "the testimony of Linda C." if the jury believed "that it is more likely than not that she was also a victim of the defendant." RT 1491:10-11. But his later arguments belied the "icing on the cake" analogy.

The prosecutor continued on the importance of the Linda C. uncharged act testimony, telling the jury that the "instruction says" Appellant is "predisposed or inclined to commit sexual offenses" and "that, Ladies and Gentlemen, is powerful evidence." RT 1491:14-24.

Still referring to this "propensity" rule, the prosecutor told the jury that without it, "it's his word against her word" but "when you think about it, when you think about it, a man comes here, a grown man comes into court charged with an offense of this nature and you look at the evidence in this case and you must consider yourself pondering the significance of it." RT 1492:1-5. Clearly, in context, "it" was the uncharged Linda C. evidence, and the jury instruction allowing the jury to draw the inference of a propensity to commit the charged crime from that uncharged act.

The prosecutor then told the jury that the Defendant is "either extraordinarily unlucky or he is guilty" arguing:

"I mean, you know, his five-year-old, six-year-old sister comes into court and testifies that her older brother molests her and then 30 years later he is touching another young girl, who's also a family member. How unlucky is that? He is guilty." RT 1492:6-11.

The prosecutor himself admitted this case turned on credibility of Brandi C.

"This is a case where the facts are going to show that you're going to have to make a credibility determination with parties and determine whether or not Brandi C. is telling the truth in light of all the evidence, and <u>it's really a case of it happened or it didn't happen</u>." RT 1492:13-19. See similar statement at RT 1506:17-18.[6]

He emphasized an instruction telling the jury not to "reject testimony just because of inconsistency if you believe that they're unimportant." *Id.*, 1495:15-16. The prosecutor then repeated that the complaining witness' lack of accurate memory regarding "number of times" or "whether the light is on" are not important. *Id.*, 17-22.

He then addressed prior inconsistent statements by Brandi C. to the effect that when she was interviewed by the police she said she did not sleep in the bed and/or did not recall being touched. RT 1496:2-12.

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[6] There the prosecutor told the jury, "She is either telling the truth or she is not."

He argued that because she repeated a more incriminating statement three times, and later remembered that she was touched in another room with two other young girls in the same bed, that this was evidence of her credibility (RT 1496:13-1497:3), and argued that "that's corroboration. You can take that as the truth." *Id.*, 1497:1-2.

The prosecutor even argued that the fact that she repeated the accusation to the wife of Appellant "corroborates her testimony. It's a crime." in pressing on the issue of credibility. RT 1497:11-16.

The prosecutor made the statement that "reasonable doubt" "has to be based on the evidence," which is a misstatement of the law.[7] But then added a highly prejudicial and legally erroneous claim, that reasonable doubt is "not speculation or conjecture, <u>not a mere conflict in the evidence</u>." RT 1498:1498.

In telling the jurors their duties, the prosecutor told them they can't have sympathy for the defendant, but did not mention that they should not base their verdict on sympathy for the victim. RT 1498:21-26.

In returning to inconsistencies in Brandi C.'s testimony regarding how many times Brandi C. visited Defendant and his wife, the prosecutor repeated that "it doesn't really matter how many times it was. What's important for you is to realize that Brandi doesn't have a calendar. She is not keeping track of everything." RT 1499-1500.

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[7] Because obviously, it can be based on the *absence* of evidence to convince the jury.

After arguing that Brandi's mother "corroborated Brandi's testimony" (RT 1500:17), the prosecutor admitted that she was "cross-examined and discredited" and asked the jury to consider how "devastated as a mother she must have been," without referencing the issue of not deciding the case based on any sympathy. RT 1500:25-1501:3.

Near the end of his argument, the prosecutor returned to the testimony of uncharged acts and the 1108 instruction regarding the allegations of Linda C., describing her testimony in some detail. RT 1502-1503.

After describing her testimony, the prosecutor again argued that the jury "should" [not can] find that Defendant has a propensity to touch little girls, as follows:

> ". . .[H]er older brother manipulates the vagina of his five-year-old sister. Huh. Perhaps he has an inclination for young girls. Who does that? Who touches their little sister like that? Hm, somebody who has a sexual interest in little girls does. [¶] And why are we here today? Because the defendant's been accused of touching a little girl. <u>This shows propensity</u>. The law allows us to do that and <u>you should follow the law</u>." RT 1503:16-24. [Underlining supplied.]

In winding up his argument, the prosecutor described the alleged crimes as "the defendant took advantage of a vulnerable young family member who didn't say no, who was scared to say anything. After the first time, it was game on. She did not say

anything. It was an easy mark. She didn't say no. [¶] The defendant molested his younger sister by rubbing her vagina in a similar fashion." RT 1505:1-7.

Just before discussing the verdict forms, the prosecutor argued:

> "Look at the testimony of Brandi C. It's enough to prove the case if you believe her beyond a reasonable doubt. Corroboration through the prior statements and what we call 1108 evidence or the testimony of Linda C." RT 1506:9-12.

The prosecutor concluded his opening argument:

> "At the end of the day you're going to come back with guilty findings because you're going to find that the testimony of Brandi C. on the essential elements of what she's testified to, her demeanor, her character, together with the testimony of Linda C. is going to show you beyond a reasonable doubt that the defendant did in fact commit these acts . . .." RT 1506:19-26.

Besides the heavy reliance on this evidence by the prosecutor in argument, there are other factors supporting the notion that this error was prejudicial.

For example, the case was tried previously, and the jury was deadlocked, suggesting that it was a close case, and that virtually any error bearing significantly on the credibility of the complaining witness would be prejudicial.

The error concerning the 1108 evidence was a miscarriage of justice under a *People v. Watson* (1956) 46 Cal.2d 818, 836, standard (see *People v. Cahill* (1993) 5 Cal.4th 478, 501; and *People v. Breverman, supra,* 19 Cal.4th 142, 173-174), and where, as here, the inadmissible evidence went to the credibility of the People's witness, it may be reviewed under the *Chapman v. California* (1967) 386 U.S. 18, harmless beyond a reasonable doubt standard. (See *People* v. *Woodward* (1979) 23 Cal.3d 329, 341 [erroneously received prior used by prosecutor in final argument]; *People v. Oracalles* (1948) 32 Cal.2d 562, 573 [This Court reversed because it could not conclude that the jury's verdict rested solely on admissible evidence]; and *People* v. *Davis* (1965) 63 Cal.2d 648, 656-657.]

On this record it is clear that this case turned entirely upon the credibility of the severely impeached complaining witness Brandi C., and that the prosecutor knew that he would win or lose depending on how the jury evaluated her credibility.

Moreover, because the prosecutor repeatedly relied almost exclusively on the Section 1108 "other act" evidence and the propensity jury instruction that allowed the jury to find comfort in giving Brandi C. credibility, despite the inconsistencies in her testimony, *because*, according to the prosecutor they had to "follow the law" and find that Appellant had a propensity to touch little girls in his family, based entirely on the allegations of Linda C., this Court is urged to conclude that if the Linda C. 1108 unadjudicated sex offense was erroneously admitted, or found true without proof

of capacity to commit crime, or instructions thereon, that error was prejudicial.

V.

CONCLUSION

For all the foregoing reasons, the judgment must be reversed with directions for a new trial, in which the alleged 1108 evidence from 1966 is excluded.

Dated: December 29, 2011

Respectfully submitted,

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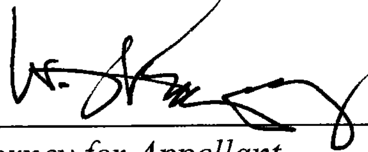
Certificate of Counsel RE: Word Count
Pursuant to California Rules of Court, Rules 8.520(c)(1)

Appellant's Answer Brief - People v. Cottone, Case No. S194107

I certify that the number of words of the Appellant's Answer Brief on the Merits in the above matter, exclusive of headings, tables, covers and attachments, as counted by my word processor (WordPerfect 5X), is 13,780 words, and that the font is NewCenturySchoolbook (Roman) 13. point.

Executed this 29th day of December, 2011 at Irvine, California.

WILLIAM J. KOPENY



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PROOF OF SERVICE

I hereby declare:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 8001 Irvine Center Drive, Suite 400, Irvine, California, 92618.

On December 29, 2011, I served a true and correct copy of the **APPELLANT'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action by placing a copy thereof in a sealed envelope with postage prepaid thereon in the United States Mail at Irvine, California, addressed as follows:

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Lee Vincente Cottone, Appellant

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of December, 2011, at Irvine, California.

Kelly Russell