
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

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Bill No: SB 230 **Hearing Date:** April 25, 2017
Author: Atkins
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Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Evidence: Sexual Offenses*

HISTORY

Source: California District Attorneys Association
San Diego County District Attorney

Prior Legislation: AB 114 (Cohn) Chapter 464, Stats. 2005
AB 141 (Cohn) Chapter 116, Stats. 2004
AB 2499 (Frommer) Chapter 828, Stats. 2002
AB 2252(Cohn) Chapter 194, Stats. 2002
AB 380 (Wright) Chapter 517, Stats. 2001
AB 2063 (Zettel) Chapter 97, Stats. 1999
SB 1682 (Solis) Chapter 261, Stats. 1998
SB 1876 (Solis) Chapter 261, Stats. 1996
AB 882 (Rogan) Chapter 439, Stats. 1995

Support: California Police Chiefs Association; County of San Diego; Crime Victims United of California; Los Angeles County Professional Peace Officers Association; Peace Officers Research Association of California; State Coalition of Probation Organizations

Opposition: American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders Association

Analysis reflects author's amendments to be offered in Committee. (See Comment 4)

PURPOSE

The purpose of this bill, as proposed to be amended, is to create a new evidence code section which will provide that evidence of a past commercial sexual offense is not inadmissible to prove conduct in in a current commercial sexual offense.

Existing law provides that a court may in its discretion exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evidence Code § 352.)

Existing law provides that, with certain exceptions, evidence of a person's character or a trait of his or her character, whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct, is inadmissible when offered to prove his or her conduct on a specified occasion. (Evidence Code § 1101.)

Existing law provides that except as specified, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. (Evidence Code § 1101(a).)

Existing law provides for the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act did not reasonably and in good faith believe that the victim consented. (Evidence Code § 1101(b).)

Existing law provides that, with certain exceptions, in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by the Evidence Code provision set forth directly above if the evidence is not inadmissible under the general balancing test weighing probative value against the probability that admission of the evidence will necessitate undue consumption of time or will create substantial danger of undue prejudice, confusion, or misleading the jury. (Evidence Code § 1109.)

Existing law provides that in a criminal action in which the defendant is accused of a sexual offense, as specified, evidence of the defendant's commission of another sexual offense or offenses is admissible to prove the disposition of the defendant if the probative value of the evidence is not outweighed by a substantial danger of undue prejudice. (Evidence Code § 1108(a).)

Existing law, for the purposes of Evidence Code Section 1108 defines a sexual offense as a crime that involved any of the following:

- Sexual battery
- Rape
- Statutory rape
- Spousal rape
- Rape in concert
- Commission of a sexual act through fear
- Aggravated sexual assault of a child
- Sodomy
- Child sexual abuse
- Oral copulation
- Sending harmful matter to a child
- Continuous sexual abuse of a child
- Bringing obscene matter into the state
- Developing, duplicating, exchanging child pornography
- Using a child to assist in obscene matter
- Distributing child pornography
- Possession of child pornography

- Indecent exposure
- Child molestation
- Assault with intent to commit rape, sodomy or oral copulation
- Contact, without consent, of any part of defendant’s body or an object and the genitals or anus of another.
- Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body.
- Deriving sexual pleasure from the infliction of death, bodily injury or physical pain on another person.
- An attempt or conspiracy to engage in any of the above. (Penal Code § 1108 (d)(1))

This bill, as proposed to be amended, creates a new evidence code section that provides that in a criminal action in which the defendant is accused of a commercial sexual offense, evidence of the defendant’s commission of another commercial sexual offense or offense is not made inadmissible by Section 1101, if the evidence is not made inadmissible pursuant to Section 352.

This bill, as proposed to be amended, defines “commercial sexual offense” as pimping, pandering, and human trafficking for sexual purposes.

COMMENTS

1. Need for This Bill

According to the author:

California is home to three cities on the FBI’s list of the top 13 cities for sex trafficking – San Diego, Los Angeles, and San Francisco. For example, researchers at the University of San Diego and Point Loma Nazarene University have estimated that as many as 8,000 people in the San Diego region alone could be victimized each year.

Evidence Code Section 1101 generally provides that evidence of a person’s character, which includes specific incidents of past conduct, is inadmissible at trial. Yet, existing law recognizes the difficulties in prosecuting sex crimes and crimes of domestic violence, and creates exceptions to this rule in those cases. Currently, under Evidence Code Sections 1108 and 1109, the court has the discretion to allow evidence of prior acts to be considered in the prosecution of sexual offense crimes and crimes of domestic violence.

Cases of human trafficking, pimping, and pandering are notoriously difficult to prosecute due to the nature of both the victims and the traffickers.

Many victims of sex trafficking have been groomed, controlled, and even brainwashed by their traffickers, and do not see themselves as victims – at least not initially. Additionally, many victims are threatened with violence by their traffickers if they agree to come forward to testify at trial. Some of these victims live in the same community as their trafficker and their trafficker’s fellow gang members, which adds credibility to these threats. Thus, securing victim testimony

in human trafficking trials is difficult, and many victims recant their statements before a case reaches trial.

Meanwhile, many human traffickers and pimps often move their victims from jurisdiction to jurisdiction (“the circuit”) or secure new victims in order to thwart detection by law enforcement. Once in a new jurisdiction, or having secured a new victim, the prosecution can be precluded from using the trafficker’s prior activities to prove up his current ones. This gives a distinct advantage to the most egregious traffickers, the ones who operate across jurisdictions with multiple victims.

SB 230 adds the crimes of sex trafficking, pimping, and pandering to the list of “sexual offenses” that constitute exceptions to the rule against character evidence at trial. These long overdue amendments to the Evidence Code acknowledge that the challenges with prosecuting crimes of human trafficking are similar to the challenges of prosecuting other sex and domestic violence crimes.

SB 230 does not mandate that these prior acts be admitted in any defendant’s trial. Rather, it gives judges the discretion to allow prosecutors to present such evidence in appropriate cases, just as they can in other sex and domestic violence cases.

Specifically, under Evidence Code Section 352, the court can exclude this evidence where its -- “probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or misleading the jury.”

2. History of Evidence Code Section 1108

In general California common law has always excluded evidence of a person's character or a trait of his/her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his/her conduct) when offered to prove conduct on a specified occasion. This provision is codified in Evidence Code section 1101(a). "The general theory for excluding this type of evidence is twofold. First, while the evidence is relevant under the general meaning of relevancy, it tends to distract the trier of fact from focusing on the facts at issue. Second, disposition evidence can be very inflammatory and prejudicial. In the classic phrase, this evidence is generally inadmissible precisely because it shows that he/she did it before, he/she did it again." (See also generally 1 *Within California Evidence* 3d ed. section 334.) In criminal actions, there are some exceptions to the general prohibition on the introduction of character evidence. Character evidence is admissible if it is initially introduced by the defense either to prove conduct in conformity with his/her own conduct or with the victim's conduct. Once character evidence is introduced by the defense, then the prosecution can use character evidence to rebut the defense testimony. (Evidence Code sections 1102 and 1103.) Common law and Evidence Code 1101(b) have allowed the admissibility of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact other than his or her disposition of committing such an act, i.e., motive, intent, opportunity, preparation, plan, knowledge, etc.

In 1995, the Legislature created an additional exception to the inadmissibility character evidence by enacting Evidence Code section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases. In 1996, the Legislature added a similar provision to allow the admission of evidence that the defendant committed other acts of domestic violence in domestic violence cases. (See Evidence Code section 1109.)

The legislative history indicates Evidence Code section 1108 was intended in sex offense cases to relax the evidentiary restraints Evidence Code section 1101, subdivision (a), imposed to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. Evidence Code section 1108 was modeled on Rule 413 of the Federal Rules of Evidence, adopted in 1994, which provided in pertinent part that "(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."

California courts have upheld the validity of both Evidence Code sections 1108 and 1109. (See: *People v. Falsetta* (1999) 21 Cal. 4th 903, *People v. Fitch* (1997) 55 Cal. App. 4th 753.)

3. New Character Evidence Exception

This bill, as proposed to be amended, creates a new character evidence exception by providing that in a criminal action in which the defendant is accused of a commercial sexual offense, evidence of the defendant's commission of another commercial sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not made inadmissible pursuant to Section 352.

Are commercial sexual offenses, defined as pimping, pandering, or human trafficking for sexual purposes, offenses similar to those of domestic violence or sex offenses so that character evidence of past behavior should be admissible in a current offense of a similar nature?

4. Author's amendments

In the Committee the author intends to offer amendments that will gut the current bill and create a new section that will state:

- (a) In a criminal action in which the defendant is accused of a commercial sexual offense, evidence of the defendant's commission of another commercial sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not made inadmissible pursuant to Section 352.
- (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.
- (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.
- (d) As used in this section, "commercial sexual offense" means conduct proscribed by Penal Code sections 266h, 266i, subdivisions (b), or (c) of section 236.1, or any conduct under the law of a state or of the United States that, if committed under the law of this state, would constitute a violation of the enumerated California statutes.

5. Argument in Support

According to the co-sponsor the San Diego District Attorney:

Cases of human trafficking, pimping, pandering can be notoriously difficult to prosecute because the victims often do not, at least initially, see themselves as such. These victims have been brainwashed by their traffickers and many times recant their previous statements by the time their trafficker's case reaches court.

Existing law recognizes the difficulties in prosecuting domestic violence and other sex crimes. While Evidence Code section 1101 ordinarily precludes prosecutors from using a prior incident of conduct to prove the charged crime, Evidence Code sections 1108 and 1109 remove this barrier to the prosecution of sex crimes and domestic violence crimes. In doing so, the Evidence Code recognizes that when it comes to sex crimes and domestic violence, the perpetrators often have been operating in the dark, long before their charged crimes were brought to light. Sections 1108 and 1109 give the court the discretion to allow evidence of these prior acts to be considered in the prosecution of charges sex and domestic violence crimes.

In the past few years we have learned a great deal about human trafficking. According to the groundbreaking 2013 study, by Point Loma Nazarene University, we know that human trafficking is the second largest underground economy after drug trafficking, estimated at \$810-million. *In San Diego, more than 100 gangs are involved in the commercial exploitation of people, and eight-percent of pimps/sex trafficking facilitators interviewed were involved in gangs.* And sadly, the average age of entry into child commercial sexual exploitation is 16 years of age. SB 230 simply brings the crimes of human trafficking, pimping, and pandering into conformity with the practice of allowing this prior acts evidence to be considered in a sex crime prosecution.

SB 230 does not mandate that these prior acts be admitted in any defendant's trial, it simply give judicial officers the discretion to allow prosecutors to present such testimony in appropriate cases, just as they currently can in other sex and domestic violence cases....

6. Argument in Opposition

The American Civil Liberties Union opposes this bill stating:

Current law prohibits the use of character evidence, including prior "bad acts," for the purpose of proving propensity to commit a crime, with the narrow exception that such evidence is allowed in cases charging sexual or intimate family violence. (See Evidence Code section 1101, 1108, and 1109.) SB 230 would allow the use of propensity evidence to prove the charges of human trafficking, pimping and pandering, for the first time allowing propensity evidence to prove a crime motivated by money.

SB 230 proposes a sharp break from long-standing legal practice. As the California Supreme Court has stated:

From the standpoint of historical practice, unquestionably the general rule against admitting [character] evidence is one of long-standing application. [...] The rule excluding evidence of criminal propensity is nearly three centuries old in the common law.

(*People v. Falsetta* (1999) 21 Cal.4th 903, 915.)

Likewise, the Ninth Circuit stated “it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status.” (*United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1025.) Any change from this long-standing practice raises serious due process concerns.

The U.S. Supreme Court has not decided whether allowing propensity evidence in sexual assault and intimate family violence cases is constitutional. The California Supreme Court and the Ninth Circuit Court of Appeals have found this to be constitutional, given that the historical record actually supports the conclusion that a “lustful exception” to the rule against admitting propensity evidence was long recognized. The Ninth Circuit observed:

courts have routinely allowed propensity evidence in sex-offense cases, even while disallowing it in other criminal prosecutions. [...] As early as 1858, the Michigan Supreme Court noted that “courts in several of the States have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists of illicit intercourse between the sexes.” Today, state courts that [do not have an explicit rule allowing admission do so] by resorting to the so-called “lustful disposition” exception, which, in its purest form, is a rule allowing for propensity inferences in sex crime cases.

(*Id.* at pp. 1025-26.)

The theory behind allowing propensity evidence in sexual assault and intimate family violence cases is, in part, based on the belief that the nature of these offenses makes propensity evidence more relevant. (*See Id.* at p. 915.) The California Supreme Court noted that in the legislative history of the bill allowing the use of propensity evidence in sexual assault cases, “[t]he Legislature ‘declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.’” (*Ibid.*) Similarly, in assessing the constitutionality of the rule allowing propensity evidence in cases of intimate family violence, the California Courts of Appeal noted, “evidence of other acts is important in domestic violence cases because of the typically repetitive nature of domestic violence crimes.” (*People v. Brown* (2000) 77 Cal.App.4th 1327, 1333.)

Similar reasoning does not apply to allowing propensity evidence in the types of cases proposed by SB 230. We can find no historical evidence that propensity evidence has been permitted to prove human trafficking, pimping or pandering in

the past 300 years. The bill seeks to permit the use of propensity evidence to prove crimes motivated purely by the desire to make money, where there is no evidence of character-based compulsion behind the offense. Indeed, the fact sheet in support of SB 230 states, “more than 100 gangs in San Diego County are engaged in human trafficking, making it the second largest underground economy in the County, estimated at \$810 million per year.” Criminal gangs make calculated, financial choices about which criminal enterprise to engage in, pursuing human trafficking and prostitution alongside drug sales and other illegal enterprises. These criminal, commercial enterprises are not pursuing these offenses because they have a particular drive or propensity to engage in sexual exploitation. Rather, they do so purely to make money.

It is important to note that while current law prevents the use of uncharged acts to prove propensity, it does not preclude prosecutors from presenting other “prior bad acts” evidence for other purposes. One guide for prosecutors working on human trafficking cases advises:

While evidence of a defendant’s other “bad acts” or criminal activity is not admissible to show actions in conformity with that behavior, competent evidence can be admissible to show motive, identity, intent, absence of mistake or accident, planning, common plan or scheme.¹

Prosecutors thus can continue to present character evidence to prove many elements of their case. While we understand the desire to make it even easier for prosecutors to prove these cases, we cannot allow the core principles of due process to be abrogated, no matter how good the intentions.

-- END --

¹ Jennifer Gentile Long and Teresa Garvey (November 2012) *No Victim? Don't Give Up: Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing and Other Evidence-Based Techniques*, Strategies: The Prosecutors' Newsletter on Violence Against Women Act, available at http://www.aequitasresource.org/S_Issue_7_No_Victim-Dont_Give_Up.pdf