No. _____

In The

Supreme Court of the United States

CHRISTOPHER CHIQUILLO,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment permits the admission of propensity evidence against a defendant in a criminal trial.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Christopher Chiquillo respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, First District, Division One, in Case No. A140204.

RULING AND ORDERS BELOW

The order of the California Supreme Court denying review (App. 14) is unpublished. The opinion of the California Court of Appeal (App. 1) is unpublished but can be found at 2014 WL 5018832. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The California Supreme Court denied review on January 14, 2015. App. 14. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment states in relevant part:

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

STATEMENT OF THE CASE

1. On February 10, 2013 about 12:30 a.m. San Francisco police responded to a report of shots fired. Upon arrival, officers spoke with an upset and visibly shaken Vanessa Castro, who apprised the officers that her baby's father had shot off some rounds and fled in a car. Castro explained that she had heard a noise outside, walked out to investigate and saw petitioner across the street standing next to a car. When Castro asked him why he was with the young woman seated in the car, petitioner became angry, produced a silver handgun from his waistband and fired a few shots in the air. A friend of Castro, Elizabeth Alvarado, heard the gunshots while inside Castro's apartment, and ran outside. Alvarado positioned herself between Castro and petitioner. Petitioner leveled the gun at Alvarado's torso, then lowered the gun, pointed it at the street and fired off another shot. After petitioner put the gun away and advanced toward Alvarado, his companions restrained him. Petitioner and his friends drove off. Castro went inside and called 911. App. 2-4.

The next day, February 11, 2013, a San Francisco police officer who was stopped at a red light watched petitioner drive up in a car next to his. The officer saw petitioner open a vodka bottle and take a big sip. The officer conducted a traffic stop, and ultimately detained petitioner after detecting the odor of alcohol on his breath. A fellow officer searched petitioner and found seven bullets in his jacket pocket. A further search revealed a silver revolver in petitioner's

shorts. The gun was capable of firing the bullets found on him. Subsequent testing demonstrated that the gun was operable. Its serial number had been obliterated. Petitioner was not the owner of any registered firearms. App. 4.

2. Petitioner was charged with making criminal threats against Alvarado and Castro; assaulting both with a firearm; negligently discharging a firearm; carrying a loaded firearm; and carrying a concealed firearm, based on the February 10, 2013 incident. In addition, petitioner was charged with possession of a concealed firearm inside a vehicle and carrying a concealed firearm based on the events of the next day. Various firearm enhancements were appended to the criminal threats, carrying and possession counts. App. 1-2.

3. At petitioner's jury trial, the prosecution presented evidence of uncharged domestic violence pursuant to California Evidence Code section 1109, over petitioner's constitutional due process objection. App. 22. The jury heard a 911 tape relating to a November 4, 2011 incident on which Castro is heard telling the dispatcher that petitioner punched her three times on her head in front of their baby. A San Francisco police officer further testified that he met with Castro shortly after her call and observed redness to her forehead. The officer testified that Castro had told her that petitioner had struck her. While the officer was speaking with Castro, petitioner appeared on the property. Castro and a woman friend pointed him out to the officer as the one who assaulted

Castro. Petitioner then fled. The officer gave chase, caught up with petitioner some two to three blocks further and arrested him. App. 5.

4. In regard to the domestic violence propensity evidence, the trial court instructed the jury as follows:

> The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically: Punched Vanessa Castro on or about November 4, 2011.[¶] *Domestic violence* means abuse committed against an adult who is a person with whom the defendant has had a child. [¶] *Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was

> disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Assault with a Firearm, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Assault with a Firearm. The People must still prove each charge beyond a reasonable doubt.

App. 5-6.

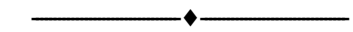
The court also instructed the jury regarding "Limited Purpose Evidence in General[:] [¶] During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." App. 7.

5. At the close of the prosecution's case-in-chief, the trial court granted a judgment of acquittal on both criminal threats charges. App. 5. The jury acquitted petitioner of both assault-with-a-firearm charges and its accompanying lesser-included charges of simple assault. The jury found petitioner guilty on all remaining charges and found true the special allegations associated with those counts. App. 7. Petitioner was sentenced to three years prison. App. 8.

6. Petitioner appealed. The California Court of Appeal rejected petitioner's challenge to the propensity evidence as having been already settled unfavorably to petitioner in the context of a similar state

statute permitting the introduction at trial of propensity evidence of prior sex offenses. *See People v. Falsetta*, 986 P.2d 182 (Cal. 1999) (holding that the admission of propensity evidence of other sexual offenses pursuant to California Evidence Code section 1108 does not offend due process), *cert. denied*, 529 U.S. 1089 (2000). The Court of Appeal affirmed the judgment. App. 1, 13.

7. Petitioner sought review in the California Supreme Court. App. 15. As is pertinent here, he renewed his argument that the admission of the domestic violence propensity evidence violated the federal constitutional due process protection. Pet. for Review at App. 15-26. The California Supreme Court denied review without comment. App. 14.



REASONS FOR GRANTING THE WRIT

This Court has not yet decided the question of whether propensity evidence is admissible in a criminal trial over a defendant's constitutional due process objection. *See Estelle v. McGuire*, 502 U.S. 62, 75 n. 5 (1991) ("Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime.") Even though this Court has not ruled on the issue, the Court has stated that "[t]here is . . . no question that propensity would be an 'improper basis' for conviction." *Old Chief v. United States*, 519 U.S. 172, 182 (1997); *see also Michelson v. United States*, 335 U.S. 469, 475-476 (1948).

I. Admission Of Propensity Evidence Violates Our Nation's Fundamental Conception Of Justice

A state evidence code provision does not violate the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Montana v. Egelhoff*, 518 U.S. 37, 47 (1996). "Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice." *Id.* at 43. The historical aversion to propensity evidence has been described by California Supreme Court Associate Justice Carol Corrigan, who noted that for at least three centuries the common law has prohibited propensity evidence. In California, the common law rule of evidentiary exclusion was codified as California Evidence Code section 1101(a), which provides that evidence of a person's character, otherwise known as propensity evidence, is inadmissible to prove conduct in conformity with that character trait. *People v. Villatoro*, 281 P.3d 390, 402-403 (Cal. 2012) (Corrigan, J., concurring and dissenting opinion). Justice Corrigan noted that the rule "has been enforced throughout our nation's history." *Id.* at 402; citing *Boyd v. United States*, 142 U.S. 450, 458 (1892) (admission of defendant's prior crimes was prejudicial error).

The Ninth Circuit Court of Appeals stated that the "rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence" that

has persisted since at least 1648 and by 1993 had been codified by 38 states and adopted through case law in the remaining 12 states and the District of Columbia. *McKinney v. Rees*, 993 F.2d 1378, 1381 and n. 2 (9th Cir. 1993).

The prohibition against propensity evidence can be traced back to the era before the independence of our nation. *See Marshall v. Lonberger*, 459 U.S. 422, 448 n. 1 (1983) (Stevens, J., dissenting) ("The common law has long deemed it unfair to argue that, because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime.")

In England, courts prohibited the introduction of such evidence nearly a century before the American Revolution. In *Hampden's Trial*, for instance, the English court observed that "a person was indicted of forgery, [but] we would not let them give evidence of any other forgeries, but that for which he was indicted." 9 How. St. Tr. 1053, 1103 (K.B. 1684). In 1692, an English court rejected the admission of propensity evidence in *Harrison's Trial*, 12 How. St. Tr. 833 (H. & L. 1692). The prosecution intended to present other misconduct evidence during the murder case. Lord Chief Justice Holt excluded the evidence, proclaiming, "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id.* at 864.

American jurists have commonly traced the exclusion of propensity evidence to *Harrison's Trial*

and England's Glorious Revolution of the late seventeenth century. *See Anderson v. State*, 549 So.2d 807, 813 n. 8 (Fla. Ct. App. 1989) (Cowart, J., dissenting); *State v. Spreigl*, 139 N.W.2d 167, 169 n. 1 (Minn. 1965) ("Dean Wigmore concludes that the general exclusionary rule was first applied after the year 1680 and calls attention to Harrison's Trial . . . , where in a prosecution for murder evidence of prior felonious conduct was excluded . . . (1 Wigmore, Evidence (3 ed.) s 194").

The criminal propensity prohibition was adopted in the New World and has long since been a principle of the American criminal justice system. Before the American Revolution, the exclusion of propensity evidence was embraced by colonial courts. In one Massachusetts case, the state attempted to offer evidence of the defendant's prior acts of lasciviousness to bolster its allegations that the defendant was operating a bawdy house. The highest court of Massachusetts excluded the evidence. *Rex v. Doaks*, Quincy's Mass. 90, 90-91 (Mass. Super. Ct. 1763).

By the beginning of the twentieth century, the prohibition against the use of propensity evidence to establish guilt was a settled principle of Anglo-American jurisprudence. Even though the lengthy excerpt that follows flouts the usual rules of quotation, it is restated in full to give credit to the elaboration on the concept by New York's highest appellate court:

The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged. 1 Bish. New Cr. Proc. § 1120. This rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt. This rule, and the reasons upon which it rests, are so familiar to every student of our law that they need be referred to for no other purpose than to point out the exceptions thereto. The rule itself has been stated and discussed in this court in a number of cases, but we will cite only a few. In *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319, it was said: 'The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded.' In *Coleman v. People*, 55 N.Y. 81, it is laid down

as follows: 'The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he commited another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one.' In *People v. Shea*, 147 N.Y. 78, 41 N.E. 505, the rule is thus stated: 'The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in

France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question.' The highest court in Massachusetts has said: 'The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him.' *Com. v. Jackson*, 132 Mass. 16. The court of last resort in Pennsylvania thus states the rule: 'It is the general rule that a distinct crime unconnected with that laid in the indictment cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it

> exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which, he is charged. It therefor predisposes the mind of the juror to believe the prisoner guilty.' *Shaffner v. Com.*, 72 Pa. 60. The exceptions to the rule cannot be stated with categorical precision. Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. Whart. Cr. Ev. (9th Ed.) § 48; Underh. Ev. § 58; Abb. Tr. Brief, Cr. § 598.

People v. Molineux, 61 N.E. 286, 293-294 (N.Y. 1901).

Admitting propensity evidence "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *See Dowling v. United States*, 493 U.S. 342, 353 (1990).

II. This Court Has Commented Negatively On The Admission Of Propensity Evidence Against Criminal Defendants

In the late nineteenth century, this Court first prohibited the admission of prior crimes evidence, without basing the prohibition on constitutional due process. *Boyd v. United States, supra*, 142 U.S. at 458 ("Proof of them [other robberies] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death.")

"Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." *Michelson v. United States, supra*, 335 U.S. at 475. This Court explained the reasoning behind the prohibition:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as

> to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Id. at 475-476.

One year after *Michelson*, in 1949, this Court noted that:

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Brinegar v. United States, 338 U.S. 160, 174 (1949).

Almost fifty years later, this Court reaffirmed its condemnation of "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." *Old Chief v. United States, supra*, 519 U.S. at 180-181.

This Court should grant the petition to establish the constitutional due process footing of the prohibition on propensity evidence, especially now that many legislative bodies have statutorily given fiat to the admission of this type of evidence against defendants in criminal trials.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER CHIQUILLO, Defendant and Appellant.	A140204 (San Francisco County Super. Ct. No. 219701) (Filed Oct. 7, 2014)

INTRODUCTION

Defendant and appellant Christopher Chiquillo contends his jury trial convictions for weapons offenses committed on February 10 and 11, 2013, should be reversed because the trial court erred by admitting evidence of his uncharged prior conduct involving domestic violence. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 27, 2013, the San Francisco County District Attorney (DA) filed a second amended information accusing defendant of making criminal threats against Elizabeth Alvarado and Vanessa

Castro (Pen. Code, § 422; counts I & II).[1] The DA also accused defendant of assaulting both Castro and Alvarado with a firearm (§ 245, subd. (a)(2); counts III & IV), as well as negligently discharging a firearm (§ 246.3, subd. (a); count V), carrying a loaded firearm (§ 25850, subd. (a); count VI), and carrying a concealed firearm (§ 25400, subd. (a)(2); count VII). The DA alleged defendant committed these offenses on February 10, 2013.

In addition, the DA accused defendant of committing the following offenses on February 11, 2013: possession of a concealed firearm inside a vehicle (§ 25400, subd. (a)(1); count VIII) and carrying a concealed firearm (§ 25400, subd. (a)(2); count IX). Further, the DA alleged firearm use enhancements on the charges of making criminal threats (§ 12022.5, subd. (a)) and that defendant was not the registered owner of the firearm in regard to the carrying and possession counts (§§ 25850, subd. (c)(6), 25400, subds. (c)(6)(A) & (B)). Also, in regard to the concealed firearm counts, the DA alleged the firearm was loaded. (§ 25400, subd. (c)(6)(A) & (B).)

The evidentiary phase of the trial began on September 9, 2013. Evidence presented by the prosecution showed police officers arrived at 1227 Hampshire Street in San Francisco on February 10, 2013 about 12:30 a.m. in response to a report of shots fired.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

Upon arrival, the officers spoke with Vanessa Castro outside the building; Castro was scared, visibly shaken, and upset, and displayed no symptoms of intoxication. Referring to defendant, Castro stated: "My baby's father . . . just shot off some rounds and fled in a car." Castro told officers she and defendant had been in a relationship, had a two-year-old son, still lived together, but had stopped dating some time ago. Before the shooting, Castro heard a noise at the front door of the apartment, went to investigate, and saw defendant across the street standing adjacent to a vehicle she described as a grey, four-door sedan, possibly a Honda. He was talking with a young woman who was sitting in the back seat of the sedan. Castro asked defendant why he was with the girl. Defendant became angry and yelled, "You're crazy." Defendant then produced a silver handgun from his waistband and fired a few shots into the air. Castro's friend, Elizabeth Alvarado, who was inside the residence, heard the gunshots and ran outside to see what was happening. Alvarado saw defendant holding the gun so she positioned herself between defendant and Castro to protect Castro. Defendant leveled the gun at Alvarado's torso; he then lowered the gun, pointed it at the street, and fired off another shot. Defendant put the gun away and advanced towards Alvarado. At that point, defendant's companions got out of their vehicle and physically restrained defendant. Castro went back inside the apartment to call

911 and defendant and his companions drove off in the sedan.[2]

The next day, February 11, 2013, Officer Ali Misaghi was stopped at a traffic light while on vehicle patrol in the area of Third Street and Oakdale Avenue in San Francisco. A silver VW sedan driven by defendant pulled to a stop alongside the police car. Misaghi saw defendant open a bottle of vodka and take "a big sip." Misaghi conducted a traffic stop, detained defendant, and detected the odor of alcohol on his breath. Officer Haro joined Misaghi at the scene. Haro searched defendant and located seven bullets in his jacket pocket. Misaghi assisted Haro in searching defendant further. Inside the right-front pocket of a pair of shorts defendant was wearing underneath his jeans the officers found a silver revolver capable of firing the bullets found on defendant. Subsequent testing and inspection of the weapon demonstrated it was in operable condition and the serial number had been obliterated. A search of the California Department of Justice's automated firearms system database revealed defendant owned no registered firearms.

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[2] The evidence also showed two residents of neighboring properties called 911 to report shots fired around this time, and the video tape from the security camera located outside the main entrance of the apartments at 1227 Hampshire Street shows a "silver type of sedan" arriving between 12:15 a.m. and 12:25 a.m. and defendant exiting the vehicle.

The prosecution also presented evidence of uncharged domestic violence admitted pursuant to Evidence Code section 1109 (section 1109). In this regard, the jury heard a 911 tape relating to an incident on November 4, 2011, at around 11:30 p.m. On the tape, the caller (Castro) tells the dispatcher defendant "punched me three times in front of the baby on my head." Castro also relates she had locked herself in the bathroom and did not want to go outside. In addition, Sergeant Scott Edwards testified he responded to the 911 call, spoke to Castro and another woman, and observed Castro had redness to her forehead. Castro told Edwards defendant struck her. As Edwards was speaking to the two women, defendant opened the gate behind them and started to enter the property. Both women yelled, "There he is" – identifying defendant as the individual who had assaulted Castro. At that point, defendant fled. Edwards gave chase and after two or three blocks caught up with defendant and arrested him.

At the close of the prosecution's case-in-chief, the trial court granted defense counsel's motion for a judgment of acquittal on both counts of making criminal threats in violation of section 422 (counts I & II). However, the court denied defense counsel's motion for judgment of acquittal on the assault-with-a-firearm charges.

In regard to the section 1109 evidence, the trial court specifically instructed the jury as follows: "The People presented evidence that the defendant committed domestic violence that was not charged in this

case, specifically: Punched Vanessa Castro on or about November 4, 2011. [¶] *Domestic violence* means abuse committed against an adult who is a person with whom the defendant has had a child. [¶] *Abuse* means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable fear of imminent serious bodily injury to himself or herself or to someone else. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit and did commit Assault with a Firearm, as charged here. If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Assault with a Firearm. The People must still prove each charge of every charge beyond a reasonable doubt." (CALCRIM No. 852.)

The court also instructed the jury as follows regarding "Limited Purpose Evidence in General[:] [¶] During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." (CALCRIM No. 303.)

The jury was provided with a copy of the jury instructions for use during deliberations.

The jury delivered its verdicts on September 17, 2013. The jury acquitted defendant of both assault-with-a-firearm charges (counts III & IV) and also returned not guilty verdicts on the lesser-included charges of simple assault. The jury returned guilty verdicts on all remaining counts and found true the special allegations associated with those counts.

After the court discharged the jury, the court informed counsel there was "an issue" with regard to the verdict form for count eight because it erroneously specified the alleged crime as concealed firearm "on the person," rather than concealed weapon "in the vehicle."[3] Noting the jury "brought in a verdict on count eight that was . . . possessing a gun on the person," the same offense as alleged in count nine,

[3] The jury was properly instructed in accordance with the charging document that "defendant is charged in Count 8 with unlawfully carrying a concealed firearm within a vehicle. . . ." (CALCRIM No. 2521.) Also, the verdict form for count VIII correctly referenced section 25400, subdivision (a)(1), concealment within vehicle, but erroneously identified the alleged crime as "concealed firearm on person."

the court stated count eight "is going to have to get thrown out," adding, "I don't think it means much in the scope of things." The minute order dated September 17, 2013, states: "The Court orders the count 8 guilty verdict STRICKEN."

On October 21, 2013, the court sentenced defendant to a prison term of three years, the upper-term for negligent discharge of a firearm (§ 246.3, subd. (a); count V) and to concurrent sentences of three years on each of the three firearm carrying convictions (counts VI, VII, & IX). Defendant filed a timely notice of appeal on October 29, 2013. The People did not file a notice of appeal.

DISCUSSION

Defendant contends the admission of evidence of his uncharged prior conduct involving domestic violence should have been excluded, requiring reversal of the convictions for weapons offenses he committed on February 10, 2013. First, defendant asserts the admission of propensity evidence pursuant to section 1109 violates the due process clause. However, in *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court held that section 1108 of the Evidence Code (section 1108), governing the admission of propensity evidence of other sexual offenses, "does not offend due process." (*Id.* at p. 916.) And our sister appellate courts have uniformly held *Falsetta* applies equally to section 1109, because section 1108 is a "parallel statute which addresses prior 'sexual offenses' rather

than prior 'domestic violence.'" (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; *see also People v. Johnson* (2010) 185 Cal.App.4th 520, 528-529 [collecting cases and concluding "Courts of Appeal . . . have uniformly followed the reasoning of *Falsetta* in holding section 1109 does not offend due process"].) Accordingly, we reject defendant's challenge to section 1109 under the due process clause "as having already been settled unfavorably to him." (*People v. Johnson, supra,* 185 Cal.App.4th at p. 529.)

Second, defendant contends the admission of section 1109 evidence was unduly prejudicial under Evidence Code section 352 (section 352).[4] Section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "Trial courts enjoy '"broad discretion"' in deciding whether the probability of a substantial danger of prejudice substantially outweighs probative value. [Citations.] A trial court's exercise of discretion 'will not be disturbed except on a showing the trial

[4] Section 1109 states in pertinent part: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 167-168.)

Assuming defendant properly preserved this issue for appeal (*see People v. Holford, supra,* 203 Cal.App.4th at p. 169 ["requirement of a specific objection under section 353 applies to claims seeking exclusion under section 352"]), he has failed to show the trial court abused its discretion by admitting evidence he committed an act of domestic violence against Castro on November 4, 2011. For purposes of section 352, the *Falsetta* factors (*see Falsetta, supra,* 21 Cal.4th at p. 917) weigh in favor of the admission of the challenged propensity evidence.[5] Specifically, the section 1109 evidence was relevant as it involved the same victim and demonstrated defendant's propensity to act violently towards the mother of his

[5] Regarding the admission of section 1108 evidence, the Supreme Court in *Falsetta* instructed courts to "engage in a careful weighing process under section 352[,] . . . consider[ing] such factors as [the] nature, relevance, and possible remoteness [of the evidence], the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta, supra,* 21 Cal.4th at p. 917.)

child, and the evidence was not remote, as the prior incident of domestic violence occurred only 15 months before the offense in question took place. Also, the section 1109 evidence was not inflammatory in comparison to the conduct underlying the charge to which it was deemed relevant – assault with a firearm. Moreover, the trial judge eliminated the main potential inflammatory effect of the 911 tape played to the jury by carefully instructing the jury as follows: "I heard the tape. So it sounds like people are fighting or – just a lot of noise in the background. Don't consider that. That is not part of the evidence in this case. Only consider the actual conversation between the caller and the operator, okay. [¶] The background noise has nothing to do with this case." In sum, defendant's contention that the admission of the section 1109 evidence was unduly prejudicial under Evidence Code section 352 is without merit.[6]

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[6] Additionally, even if the trial court erred by admitting the section 1109 evidence, the error was harmless by any standard. (*see People v. Partida* (2005) 37 Cal.4th 428, 439 ["admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"]; *Chapman v. California* (1967) 386 U.S. 18, 24 ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].) Because the court specifically instructed the jury to consider the section 1109 evidence only for the assault-with-a-firearm charges and the jury found defendant not guilty on those charges, the section 1109 evidence had no bearing whatsoever on the jury's guilty verdicts for the offenses committed on February 10, 2013: negligently discharging a firearm (§ 246.3, subd. (a); count V); carrying a loaded firearm (§ 25850, subd. (a);

(Continued on following page)

Finally, the People contend the trial court erred when it dismissed defendant's conviction on count eight due to an error on the jury verdict form. Respondent acknowledges the prosecution did not file an appeal challenging the order. (*See People v. Chacon* (2007) 40 Cal.4th 558, 564 ["The prosecution's right to appeal in a criminal case is strictly limited by statute. [Citation.] . . . The circumstances allowing a People's appeal are enumerated in section 1238"].) Nevertheless, respondent asserts we may consider the issue under the authority of *People v. Bonnetta* (2009) 46 Cal.4th 143 (*Bonnetta*), holding that because the requirements of section 1385 are mandatory, not directory, a trial court must provide written reasons in its minute orders for dismissing an action or part thereof (*id.* at pp. 149-151), and that a violation of the requirement to state reasons for dismissal in writing may not be deemed harmless, even if it appears evident from the record why the court entered the dismissal (*id.* at pp. 151-152).

However, the passage in *Bonnetta* that respondent relies upon is not a source of appellate jurisdiction; rather, the *Bonnetta* court ruled only that a trial court's error in failing to state its reasons for dismissal as required under section 1385 could not be waived "by failing to remind the court of the necessity of a written order and later failing to take corrective action." (46 Cal.4th at p. 152.) Here, we do not face an

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count VI); and carrying a concealed firearm (§ 25400, subd. (a)(2); count VII).

issue of waiver but rather the fundamental question of whether we have appellate jurisdiction to review the error asserted by respondent. In *Bonnetta,* "[t]he People appealed" the trial court's striking of the enhancement in question. (*Id.* at p. 148.) However, because respondent failed to file a notice of appeal in this case, we conclude we lack appellate jurisdiction to consider respondent's assertion of error. (*See People v. Denham* (2014) 222 Cal.App.4th 1210, 1213 ["'[A] notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.' (Cal. Rules of Court, rule 8.406(a)(1).) '[T]he filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." [Citations.]' [Citation.]".)

DISPOSITION

The judgment is affirmed.

Dondero, J.

We concur:

Humes, P.J.

Margulies, J.

Court of Appeal, First Appellate District,
Division One – No. A140204

S222599

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CHRISTOPHER CHIQUILLO,
Defendant and Appellant.

(Filed Jan. 14, 2015)

The petition for review is denied.

Frank A. McGuire Clerk
Deputy

CANTIL-SAKAUYE
Chief Justice

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent, vs. CHRISTOPHER CHIQUILLO, Petitioner-Appellant. /	No. _____ Court of Appeal No. A140204 (First Dist. Division One) San Francisco Co. Superior Court No. 219701

PETITION FOR REVIEW

(Filed Nov. 17, 2014)

Following the October 7, 2014, Court of Appeal Decision Affirming the Judgment

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Under the First District Appellate
Project Independent Case System

PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner CHRISTOPHER CHIQUILLO petitions this Court for review following the filing of the Court of Appeal's unpublished opinion on October 7, 2014 (see Appendix).

Issue Presented for Review

Does the admission of propensity evidence pursuant to Evidence Code section 1109 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

Necessity for Review

Review is necessary to settle an important question of law on the admission of propensity evidence against a defendant in a criminal case. (See Cal. Rules of Ct., rule 8.500(b)(1).) Evidence Code section 1109 provides that "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid.Code, § 1109(a)(1).)

Petitioner is aware that this Court has held that a parallel statute, Evidence Code section 1108, governing the admission of propensity evidence of other sexual offenses, "does not offend due process." (*People v. Falsetta* (1999) 21 Cal.4th 903, 916.)

However, the United States Supreme Court has not yet decided this question. (*See Estelle v. McGuire*

(1991) 502 U.S. 62, 75 n. 5 ["Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime"].) This Court noted that in *Falsetta.* (*People v. Falsetta, supra,* 21 Cal.4th at 913.)

Even though our nation's highest court has not ruled on the issue, it must be borne in mind that the Court has stated that "[t]here is . . . no question that propensity would be an 'improper basis' for conviction." (*Old Chief v. United States* (1997) 519 U.S. 172, 182; see also *Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

Justice Corrigan has noted that for at least three centuries the common law has prohibited propensity evidence. In California, the common law rule of evidentiary exclusion was codified as Evidence Code section 1101(a), which provides that evidence of a person's character, otherwise known as propensity evidence, is inadmissible to prove conduct in conformity with that character trait. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1170-1171 (Corrigan, J., concurring and dissenting opinion).)

Justice Corrigan noted that the rule "has been enforced throughout our nation's history." (*Id.* at 1171; citing *Boyd v. United States* (1892) 142 U.S. 450, 458 [admission of defendant's prior crimes was prejudicial error].) "Courts that follow the common-law tradition almost unanimously have come to disallow resort by

the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." (*Michelson v. United States, supra,* 335 U.S. at 475.) One year after *Michelson,* the United States Supreme Court noted that

> Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

(*Brinegar v. United States* (1949) 338 U.S. 160, 174.)

The federal Ninth Circuit Court of Appeals stated that the "rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence" that has persisted since at least 1648 and by 1993 had been codified by 38 states and adopted through case law in the remaining 12 states and the District of Columbia. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1381 and n. 2.)

Hence, admitting propensity evidence "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and

decency." (*Dowling v. United States* (1990) 493 U.S. 342, 353.) A state evidence code provision does not violate the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 47.)

The Court of Appeal rejected petitioner's due process challenge to the admission of propensity evidence because the issue had been settled unfavorably to petitioner. (Slip opn., at 6.) Of course, the Court of Appeal was not at liberty to transgress the requirements of *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, and appropriately pointed to the *Falsetta* decision. (Slip opn., at 6.)

But the issue is not truly settled until the United States Supreme Court has exercised the final say, which it has not in this area. (See *Riley v. California* (2014) 134 S.Ct. 2473, *Cunningham v. California* (2007) 549 U.S. 270, and *Stogner v. California* (2003) 539 U.S. 607 for examples where so-called "settled law" pronouncements by California courts were upended in the nation's highest court.)

"Moreover, counsel serves both the court and his client by advocating changes in the law if argument can be made supporting change." (*People v. Feggans* (1967) 67 Cal.2d 444, 447.)

Review is particularly appropriate in light of the historical aversion to propensity evidence, as further elaborated in the argument section below, precisely

because "[o]ur primary guide in determining whether the principle in question is fundamental is, of course, historical practice." (*Montana v. Egelhoff, supra,* 518 U.S. at 43.)

* * *

ARGUMENT

I. FEDERAL DUE PROCESS IS VIOLATED BY THE ADMISSION OF PROPENSITY EVIDENCE

A. Introduction

"Criminal propensity" refers to the use of evidence of a criminal defendant's character or prior acts to persuade a jury that the defendant acted in conformity with his character or disposition during the alleged incident. California law permits the use of propensity evidence in cases of sexual assault and domestic violence. (Ev. Code, §§ 1108-1109.)

These two statutes tread on the constitutional due process rights of defendants in contravention of several bedrock principles of Anglo-American jurisprudence.

B. Litigation of the Propensity Issue at Trial

At trial, the prosecution sought the admission into evidence of a prior domestic violence act allegedly committed by Chiquillo against Vanessa Castro on November 4, 2011 pursuant to Evidence Code section 1109. (CT 92-95.)

1. The *In Limine* Hearing

The prosecution offered the November 4, 2011 911 call and Castro's statements to police made at that time into evidence. The admissibility of the 911 call was the subject of *in limine* proceedings at the outset of the trial at which San Francisco Police Sergeant Scott Edwards testified. Edwards told the court that on November 4, 2011, at about 11:30 p.m., he had been dispatched to the location of 1127 Hampshire Street on a report of a domestic violence assault that had just occurred. Edwards arrived on scene within five to ten minutes of the dispatch call. He was met by Castro and her mother. Castro told him that she had been hit in the head by her son's father. Castro appeared to Edwards to have been "relatively calm" and "a little upset." Castro appeared "agitated but not . . . immensely so." (RT 524-527.)

While Edwards was talking to Castro, Chiquillo appeared on scene. Castro pointed him out: "[a]nd there he is." The two men made eye contact, after which Chiquillo fled, only to be apprehended by Edwards some two blocks away. (RT 527-530.)

San Francisco Police Officer Daniel Kroos testified that Castro had told him that the suspect was her boyfriend Christopher Chiquillo. Castro further stated that the battery incident involving Chiquillo had occurred at about 11:30 p.m. on November 4, 2011. Police reports about the incident noted that Castro's demeanor was "calm." (RT 531, 533-534, 537.)

Chiquillo objected to admission into evidence of the 911 call and Castro's statements to police, based on the Confrontation and Due Process Clauses of respectively the Sixth and Fourteenth (fair trial right) Amendments. The court admitted both the audio and transcript[4] of the call into evidence as well as Castro's statements to Edwards. The court excluded any statements Castro made to Kroos. (RT 541-542, 548.)

2. The Issue Revisited

The court revisited the issue after Chiquillo pointed out that background sounds heard on the 2011 call to 911 might be construed as Chiquillo banging on the door when in fact Chiquillo was being beaten by his father. (RT 568-569.)

Ninoska Monico, Chiquillo's mother, testified at an Evidence Code section 402 hearing outside the presence of the jury. On November 4, 2011, both Chiquillo and Castro were living with Monico at 1227 Hampshire Street. At the hearing, Monico listened to the 911 call tape made that night. Monico remembered the details of that night clearly. (RT 569-571, 574.)

When Chiquillo had come home drunk that evening and passed out – a repeat occurrence – Monico

[4] The transcript of the 2011 call is part of the record on appeal as exhibit 16A. (CT 114, 129-135, 152.)

asked his father to throw her son out of the home. Castro also wanted Chiquillo out. The father reacted by getting up and telling Castro to get in the bathroom and to call 911. He then grabbed Chiquillo, held him above his own head and then slammed Chiquillo to the floor. The dad then kicked his son in the stomach. Monico tried to stop her ex-husband as the commotion moved from one room to the hallway. Doors were broken. Monico was screaming as she feared her son's dad might kill him. She told her son to get out of the house because the police were coming and his dad was beating him. (RT 571-572, 576-577.)

After hearing from the witness and replaying the 911 call tape multiple times, the court confirmed its earlier ruling that the tape was admissible. (RT 586-589, 592.)

3. Trial Evidence

Sergeant Chambers testified that when he responded to the incident scene on February 10, 2013, he asked Castro about any history of domestic violence between her and Chiquillo. Castro replied that a couple such incidents had been reported to police but that two or three had not. Castro described one of the incidents in which Chiquillo had struck Castro with a closed fist. (RT 648-649.)

Sergeant Edwards testified about the November 4, 2011 incident. The audio tape of Castro's call to 911 was played at the outset of his testimony. The jury was admonished that the background noise on the

tape was not part of the evidence in this case and to consider only the actual conversation between the caller and the operator. Edwards's testimony before the jury was consistent with his section 402 hearing testimony. (RT 764-773.)

The prosecutor cross-examined Chiquillo's sister about the November 4, 2011 incident. Stephanie was not aware of the prior incident that led to her brother's arrest. (RT 814-815.)

Castro testified as a defense witness. Castro and Ciquillo were living together on November 4, 2011. Chiquillo had come home drunk and passed out on the bed. Castro did not want him home because he was drunk. The two started arguing and Chiquillo hit her. Chiquillo's dad had seen that as he had walked into the room. His dad told Castro to go to the bathroom and call the cops. Castro called 911 and reported what happened. The tape was played again during Castro's cross-examination. (RT 827-828, 844-846, 911.)

Castro testified that she did not remember telling Sergeant Wendy Bear that Chiquillo gets crazy when he is drunk or that there had been prior incidents of domestic violence between the two. Castro denied that there had been any prior domestic violence incidents involving Chiquillo other than the November 4, 2011 incident. Castro could not remember telling the officers anything different. (RT 867-869.)

4. Jury Instructions

The jury was instructed that if they found that Chiquillo had committed domestic violence on November 4, 2011, then they could conclude from that evidence that Chiquillo was disposed or inclined to commit not only domestic violence but also assault with a firearm. The instruction was not limited to the assault charge involving Castro. The assault reference must therefore be construed as having applied to the assault count involving Alvarado. (RT 992-993.)

5. Closing Argument

The prosecutor mentioned the November 4, 2011 uncharged domestic violence incident in closing, calling it "another piece of evidence that you have to consider." (RT 1013.) He later referred to Castro being angry on February 10, 2013. "Who wouldn't be angry? Four-year relationship with the defendant, prior history of domestic violence. Coming out to see what's going on, and you're – the father of your child, in front of your house, pulling out a gun, trying to scare you. Who wouldn't be angry about that?" (RT 1017.)

The prosecutor then elaborated on the 2011 incident at length, stating along the way, "you may conclude from that evidence in and of itself that the defendant is disposed of or inclined to commit the act of assault on February 10th, 2013." (RT 1020-1023.)

C. Standard of Review

Constitutional issues are always reviewed de novo. (*State of Ohio v. Barron* (1997) 52 Cal.App.4th 62, 67.)

* * *