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DAVID M. YAMASAKI  
Clerk/Deputy Clerk  
Superior Court of CA County of Santa Clara  
BY \_\_\_\_\_ DEPUTY

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9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **IN AND FOR THE COUNTY OF SANTA CLARA**  
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12 PEOPLE OF THE STATE OF CALIFORNIA,

NO. 213515

13  
14 Plaintiff,

Trial Motion No.10

15 vs.

MOTION TO EXCLUDE EVIDENCE  
RELATED TO EC1101(b) and 1108

16 ANTOLIN GARCIA-TORRES,

17 Defendant.

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19 TO THE CLERK OF THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY  
OF SANTA CLARA COUNTY:

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21 Mr. Garcia-Torres is charged with four unrelated counts, which occurred at different  
22 times with different alleged victims. Despite the Court's denial of the severance motion brought  
23 by the defense, the jury must consider all the charges independently of each other. The  
24 government may be intending to prove the charges by unfairly relying on the charges  
25 themselves and not evidence to prove them independently of each other beyond a reasonable  
26 doubt. We will not brief the facts in depth in light of the briefing regarding cross-admissibility  
27 brought in the severance motions.  
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1 The facts of the Safeway counts and the missing person case do not qualify as sexual  
2 offenses under Evidence Code section 1108 because there is no creditable evidence to support  
3 such a theory. Section 1108 authorizes the consideration of a defendant's propensity to commit  
4 a defined sexual offense on the question of whether defendant is guilty of a charged sexual  
5 offense. (*People v. Loy* (2011) 52 Cal.4th 46, 60.) In other words, the government has the  
6 burden of proving that the Safeway assaults were sexual offenses and so was the missing person  
7 case. The limitations of Evidence Code section 1108 were most recently applied in *People v.*  
8 *Jandres* (2014) 226 Cal.App.4th 340, where the Court of Appeal held that the trial judge  
9 committed reversible error in admitting evidence of uncharged sex offenses that were offered  
10 under Evidence Code section 1108, and in improperly instructing the jury concerning such  
11 evidence. First, the appellate court observed that evidence authorized by section 1108 is limited  
12 to sexual offenses, which excludes attempted kidnapping such as the Safeway incidents.  
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15 The Safeway incidents lack the similarity necessary under EC1101 (b) to show a  
16 common scheme or plan. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 394.) As explained in  
17 *Ewoldt*, "Evidence of a common design or plan is admissible to establish that the defendant  
18 committed the act alleged. Unlike evidence used to prove intent, where the act is conceded or  
19 assumed, '[i]n proving design, the act is still undetermined . . .'" (*Id.* at p. 394, fn. 2.) The  
20 Supreme Court described the requisite degree of similarity to prove a common scheme or plan  
21 as follows:  
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24 in establishing a common design or plan, evidence of uncharged misconduct must  
25 demonstrate 'not merely a similarity in the results, but such a concurrence of  
26 common features that the various acts are naturally to be explained as caused by a  
27 general plan of which they are the individual manifestations.' (2 Wigmore,  
28 *supra*, (Chadbourn rev. ed. 1979) § 304, p. 249, italics omitted.) '[T]he  
difference between requiring similarity, for acts negating innocent intent, and

1 requiring common features indicating common design, for acts showing design, is  
2 a difference of degree rather than of kind; for to be similar involves having  
3 common features, and to have common features is merely to have a high degree  
4 of similarity.’ (*Id.* at pp. 250-251, italics omitted; see also 1 McCormick, *supra*, §  
5 190, p. 805.)

6 To establish the existence of a common design or plan, the common features must indicate the  
7 existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed  
8 need not be distinctive or unusual. (*Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

9 As a matter of law, the evidence herein fails to remotely approach the requisite degree of  
10 similarity among the Safeway incidents themselves and with the disappearance of Ms. Lamar.  
11 The charge against Cynthia Lundy fails to prove that a crime was even committed. The suspect  
12 simply tried to open her car door at the Safeway store on Dunne. While Annette Walters was  
13 assaulted in her car later that night at a different Safeway, it is unknown if the suspect was the  
14 same person. The assault on Mrs. Walters ceased once a nearby car flashed his lights. The  
15 motive of Mrs. Walters’ assailant is unknown, whether it was to rob Mrs. Walters or something  
16 else was not known because the assault was interrupted. The assault on Eva Orozco occurred  
17 about one week later at the Safeway on Dunne. She was also assaulted by a suspect who entered  
18 her rear door but she struggled with the suspect for a knife she possessed. After telling the  
19 suspect that she was pregnant the suspect fled. Because the suspect ceased his assault, it is  
20 unknown if the assault was an attempted robbery or something else. The Safeway incidents fail  
21 to establish a common scheme or plan among themselves or that they were even committed by  
22 the same person.

23 The disappearance of Ms. Lamar is far different than the assaults at the Safeway stores in  
24 almost all regards. The Safeway incidents occurred at night at a Safeway that was open for  
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1 business. It is unknown where and exactly when Ms. Lamar went missing other than being seen  
2 by her mother around 6:00 a.m. in her house. Unlike the Safeway incidents, Ms. Lamar did not  
3 drive or have a car so she could not have been assaulted in her car. The government's theory  
4 that Ms. Lamar was abducted by being dragged on the roadway as she went to her bus stop in  
5 the morning and transported away in Mr. Garcia-Torres' car presents facts drastically opposed  
6 to those in the Safeway incidents. To argue a common scheme or plan among the Safeway  
7 incidents and the disappearance of Ms. Lamar is a huge stretch of the imagination.

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9 Further, the tremendous dissimilarity between the Safeway incidents and the disappearance of  
10 Ms. Lamar prevents any consideration of the Safeway incidents for any purpose, even on the  
11 kidnap-murder special circumstance. *People v. Earle* (2009) 172 Cal.App.4th 372 reversed a  
12 Santa Clara County sexual assault conviction because of the erroneous admission of evidence  
13 of other sexual assaults under Evidence Code section 1108. As in *Earle*, the lack of similarity  
14 herein *compels* exclusion of the Safeway incidents because drawing any inference from the  
15 Safeway incidents that Mr. Garcia-Torres killed Ms. Lamar would be wholly speculative,  
16 especially since the evidence fails to prove Ms. Lamar was killed.

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19 The government claims that the Safeway incidents and the disappearance of Ms. Lamar  
20 are admissible under EC1101 (b) to prove motive or intent. However, in the Safeway incidents  
21 the motive and intent of the suspect is unknown. The Safeway assaults are charged as attempts  
22 because the commission of the crime was never completed. Moreover, any evidence of motive  
23 or intent is lacking from the government's evidence in the Safeway incidents. There is no  
24 evidence that the Safeway assailant was planning to kidnap the alleged Safeway victims or that  
25 he was going to car-jack them. To claim that the Safeway incidents are cross-admissible to  
26 prove intent or motive in Ms. Lamar's disappearance ignores the fact that there is no evidence  
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