5. Admit Evidence of Consciousness of Innocence

TO THE COURT AND THE PROSECUTION, PLEASE TAKE NOTICE that Defendant moves the Court for an order allowing the Defense to admit evidence of his consciousness of innocence.

Date:

_____
Attorney for Defendant

POINTS, AUTHORITIES, AND ARGUMENT

Defendant seeks to introduce evidence indicative of his "consciousness of innocence." Specifically, he seeks to introduce:

A. The fact that he continued about his normal daily routines, attended work as usual, resided in the same home, and otherwise acted in his normal habit.

B. The fact that he learned of the warrant for his arrest and immediately thereafter reported to the police station to inquire about the matter.

C. The fact that he voluntarily consented to an interview with law enforcement.

D. The fact that he voluntarily allowed a search of his home, vehicle, cellular telephone, and other property.

E. The fact that he refused a plea bargain in which the Prosecution agreed to no custody even though he was fully aware at the time he refused that statute under which he is charged carries a penalty of up to six years in prison.

F. The fact that he requested a polygraph examination.

G. The fact that he requested DNA testing.

H. The fact that he asked law enforcement to seize relevant video recordings.

Many things may be used to show consciousness of guilt, including:

A. False or misleading statements by a defendant (*People v. Beyah* (2009) 170 Cal App 4th 1241)

B. Flight by a defendant (*People v. London* (1988) 206 Cal App 3rd 896)

C. Witness intimidation (*People v. Williams* (1997) 16 Cal. 4th 153)

D. Destruction of evidence (*People v. Fitzpatrick* (1992) 2 Cal App 4th 1285)

"Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we have not hesitated to order a new trial." (*U.S. v. Biaggi* (2nd Cir. 1990) 909 F. 2nd 662). The court went on to note that Dean Wigmore has written:

> Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations.
>
> (id. at 690, quoting 2 Wigmore on Evidence § 293, at 232 (J. Chadbourn rev. ed. 1979)).

"Just as flight or other evidence of "consciousness of guilt" may sometimes be relevant, on some occasions evidence of "consciousness of innocence" may also be relevant to the central issue at trial." (*U.S. v. Scheffer* (1998) 523 U.S. 303, 331, J. Stevens, dissenting)

"In Dean Wigmore's view, both "conduct" and "utterances" may constitute factual evidence of a "consciousness of innocence. [fn]" As the Second Circuit has held, when there is a serious factual dispute over the "basic defense [that defendant] was unaware of any criminal wrongdoing," evidence of his innocent state of mind is "critical to a fair adjudication of criminal charges. [fn]" (id. at 331)

Numerous federal courts have noted that evidence of the defendant's failure to flee is evidence of consciousness of innocence (See, e.g., *United States v. McQuarry* (8th Cir. 1984) 726 F. 2nd 401; *United States v. Telfaire* (DC Cir. 1971) 469 F. 2nd 552, 558; *United States v. Scott* (9th Cir. 1972) 446 F. 2nd 509). Nonetheless, evidence of consciousness of innocence is not limited to "failure to flee" cases.

The Second Circuit's decision in *Biaggi, supra,* is instructive. In *Biaggi*, the Second Circuit held that it was reversible error for a district court to reject the defendant's efforts "to prove that the Government had offered him immunity if he would give what the Government regarded as truthful information regarding wrongdoing by other[s], and that [the defendant], in response to this offer, denied knowledge of any such wrongdoing, thereby 'rejecting' immunity." *Biaggi, supra* at 690 (explaining that the rules prohibiting use of plea discussions only prohibit the admission of discussions against the defendant).

Because the Second Circuit was dealing with an offer of immunity in *Biaggi*, not a proposed plea bargain, it declined to resolve the issue of "whether a defendant is entitled to have admitted a rejected plea bargain." (id at 691). However, the Court noted that "[r]ejection of an offer to plead guilty to reduced charges could also evidence an innocent state of mind." (id.)

If flight is indicative of "consciousness of guilt," the fact that Defendant remained in town, continued his normal routine, and approached law enforcement about the pending charges before even being contacted is indicative of their "consciousness of innocence" as is the fact that Defendant consented to searches and the fact that Defendant voluntarily subjected himself to interrogation by law enforcement.

Common sense, due process, and fundamental fairness requires that Defendant be allowed to present this evidence to the jury.

In *People v. Cartier* (1968) 51 Cal. 2nd 590, 598, the court considered the destruction of some recorded interviews and noted in dictum that the:

> "recorded interviews contained… evidence that would have been of material benefit to defendant and his counsel in preparation of his defense. [because] *It showed a lack of consciousness of guilt* on the part of defendant, which fact would have been material to the jury in determining

the weight to be given [the arresting officer's] testimony. It appears that although the interviews took place only a couple of hours after defendant's arrest, defendant had been sleeping in his cell until called to the interrogation room; and that up to that point in the interrogation defendant had not been too alert and bright. It also appears that when the interrogator asked defendant if he would then like to see his wife, defendant answered, 'Yes.'

The facts that defendant was asleep in his cell and desired to see his wife are *inconsistent with a consciousness of guilt* on the part of defendant for the mutilated condition of the victim and would tend to substantiate his defense of a 'blackout' or intoxication sufficient to render him incapable of forming the intent necessary to constitute premeditation. These matters were known to the prosecution and the trial judge but were not known to defendant or his counsel. Obviously, under these circumstances the error was prejudicial, and defendant was improperly deprived of his right to inspect relevant and material evidence in the hands of the prosecution.

(*Cartier, supra* at 598, emphasis added)