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24 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
25 **FOR THE COUNTY OF SAN BERNARDINO**

26 THE PEOPLE OF THE STATE OF
27 CALIFORNIA,

28 v.

Plaintiff,

PEDRO MARTINEZ,

Defendant.

Case: FVI19000218

**DEFENDANT PEDRO MARTINEZ'S
MOTION FOR COURT TO INFORM
JURY THAT THE OPINION THAT THE
IMAGES ARE OFFENSIVE OR
INDICATIVE OF A PROPENSITY TO DO
HARM IS NOT AN OPINION OF LAW
OR OF THE COURT**

FILED
NOV 29 2023

By: *[Signature]*
SAN BERNARDINO COUNTY
SUPERIOR COURT, JOSHUA TREE DISTRICT

1
2 “[T]o expect the Court to roam in the field of morals may indicate a failure to take into
3 account the limitations placed upon the Court both by our federal system and by the division of
4 powers.”

5 Samuel E. Stumpf, *The Moral Element in Supreme Court Decisions*.¹

6
7 I. INTRODUCTION

8 Today, in Court, the Prosecutor took a photograph of an image of cartoon pornography,
9 that had been viewed for mere seconds at a time not related to the charged offenses. The
10 Prosecutor placed it in front of the defendant who was testifying. The Prosecutor asked the
11 accused “what is funny about this?”

12 The defendant is accused of child molestation.

13 The Prosecution has not presented any expert witness testimony establishing a link
14 between the viewing of these lawful images and a propensity to commit child molestation.

15 The *only* rational interpretation of the prosecutor’s question “what is funny about this?”
16 is that one who finds the images funny is disposed to commit child molestation. There is no
17 other rational interpretation.

18 By allowing this question to stand, the Court, cloaked in the authority of the judiciary,
19 has endorsed the Prosecutor’s opinion that one who finds these lawful images funny is
20 disposed to commit child molestation.

21 This is dangerous. It is not the Prosecutor’s role to insert a moral position into a
22 criminal case. This is especially true as, when here, the moral position could easily be
23 interpreted as (a) a national standard; (b) expert testimony; or, even worse, (c) the law, or a
24 position endorsed by the Court.

25 This is wrong and dangerous.
26

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28 ¹ 6 *Vanderbilt Law Review* 41 (1952) (Available at:
<https://scholarship.law.vanderbilt.edu/vlr/vol6/iss1/3>) (last accessed November 28, 2023)

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II. ARGUMENT

The Court should not allow the People to suggest to the jury that these images are offensive. Or even “not funny.” Or allowing for the implication that a failure find these images offense is evidence of sexual deviance. This is the case here.

While the Prosecutor may deny this, *there is no other reason provided by the People regarding the probative value of the photos.*

There are several severe dangers with this. First, the weight of the Prosecutor’s opinion is bolstered by their status as a representative of the State of California. Members of the jury will likely believe that the opinions offered by the Prosecutor are endorsed by the State.

The weight of the Prosecutor’s opinion is further bolstered by the Court’s willingness to let the jury hear and consider that opinion. Members of the jury will likely believe that the opinions offered by the Prosecutor are endorsed by the Court.

It is the Court’s function to assure the orderly function of its proceedings. It is not within the Court’s role to allow a jury to believe that the Court has a moral opinion regarding the matter.

Nor is it the Prosecutor’s rule to assert a moral opinion. “Prosecutors play a dual role in the criminal justice system; they are advocates, but they are also administrators of justice. It is their sworn duty to see that the defendant has a fair and impartial trial” *Polanski v. Superior Court* (2009), 180 Cal.App.4th 507, 557.

The undersigned counsel tried, unsuccessfully, to convey gravity of the Court’s conduct at sidebar in the afternoon of November 28, 2023. The undersigned failed. The Court did not have an issue when the prosecutor asked the defendant “why did you find these funny?”

But there are two problems, at least, that will exist if the Court does not address the Prosecutor’s question of “why do you find this funny?”. First, millions of Americans find

1 these images funny.² It is fair to assume that a juror might find them funny as well. These
2 jurors have given months of their lives and their time to perform this crucial civic duty. *And*
3 *these jurors are now being told that this opinion is offensive and indicative of criminal*
4 *behavior.*

5 Second, there may be jurors who share the opinion that viewing these images is
6 offensive. In this case, the Court is allowing an appeal to the juror's emotions, rather than
7 seeking reliance on evidence.

8 In either case, unless the Court takes some action to inform the jury that the
9 Prosecutor's opinion is not evidence, members of the jury will certainly think it is so. Even
10 worse, they will believe that the Court endorses that opinion.

11 And the Prosecution *is offering that opinion as evidence.* Otherwise the Prosecutor
12 would just be making irrelevant commentary which would be improper.

13 The Court should not allow the People to suggest that there is a link between finding
14 the photos funny and having a propensity to commit the crimes charged. The People could not
15 or did not locate an expert witness would do so.

16 The Court should not allow the People to shame a juror for believing that the images
17 are funny.

18 The Court should not allow an appeal to the emotions of jurors who share the belief that
19 viewing the images is offensive, *especially if coupled with an implicit representation that it is*
20 *evidence of a propensity to commit the acts charged.*

21 The Court should not allow the People to suggest *to a juror* that one who finds these
22 images funny has a propensity to commit the crimes charged.

23 The Court should not shame a juror for having an opinion inconsistent with that of the
24 prosecutor. And the Court *is* doing so by allowing the jury to consider the People's assertion
25 that viewing the images is offensive or indicative of one who can commit child molestation --

26
27 ² See Newsweek, "Pornhub's Most Commonly Searched-For Fictional Characters
28 Revealed", Dec. 14, 2021) (available at <https://www.newsweek.com/pornhub-year-review-2021-search-cartoon-fictional-characters-1659156>).

1 suggesting that the Prosecutor's moral position is the status of the law or a moral position
2 shared by the Court.

3
4 III. CONCLUSION

5 Based on the above, the Court should consider informing the jury that they are entitled to
6 their opinion that the images are funny or offensive, but that opinion is not relevant to their task
7 of objectively viewing the evidence and applying the law, and is not the opinion of the Court or
8 the State of California.

9 Respectfully Submitted,

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11
12 DATED: November 28, 2023

LAW OFFICES OF IAN WALLACH, P.C.

13
14 By: _____



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16 Attorney for Defendant
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 5777 West Century Blvd., Suite 750, Los Angeles, CA 90045

On November 19, 2023, I served the following document(s) described as: **DEFENDANT PEDRO MARTINEZ'S MOTION FOR CLARIFICATION** in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Deputy District Attorney Deena Pribble
DPribble@sbcda.org

- BY MAIL:** I deposited such envelope in the mail at 8383 Wilshire Blvd. Suite 210, Beverly Hills, CA 90211. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.
- BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to California Rules of Court. The telephone number of the sending facsimile machine was (310) 893-3191. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list.
- BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the above addressee(s).
- BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles, California, I caused each such document to be transmitted electronically to the party(ies) at the e-mail address(es) indicated above. To the best of my knowledge, the transmission was reported as complete, and no error was reported that the electronic transmission was not completed.
- STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 29, 2023 at Los Angeles, California.



IAN WALLACH