LAW OFFICES OF IAN WALLACH, P.C.
IAN M. WALLACH (SBN 237849)
iwallach@wallachlegal.com
5777 W. Century Blvd., Ste. 750
Los Angeles, CA 90045
Telephone: (213) 375-0000
Facsimile: (213) 402-5516

KAEDIAN LLP
KATHERINE C. MCBROOM (SBN 223559)
kmcbroom@kaedianllp.com
8383 Wilshire Blvd., Ste. 210
Beverly Hills, CA 90211
Telephone: (310) 893-3372
Facsimile: (310) 893-3191

GRAY & ASSOCIATES, P.C.
NANCY E. GRAY (SBN 150214)
ngray@grayfirm.com
11500 W. Olympic Blvd., Suite 400
Los Angeles, CA 90064
Telephone: (310) 452-1211
Facsimile: (888) 729-2402

Attorneys for Defendant
PEDRO MARTINEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA,

v.

Plaintiff,

PEDRO MARTINEZ,

Defendant.

Case: FVI19000218

DEFENDANT PEDRO MARTINEZ'S MOTION TO STAY MATTER FOR 14 DAYS, OR, IN THE ALTERNATIVE, TO STRIKE THE OPINION TESTIMONY OF PROSECUTION WITNESS STEVE CVENGROS

I. STATEMENT OF FACTS

To authenticate a Cellebrite report, the People called Steve Cvengros, a former SBSD employee with forensic IT expertise. While the defense had no objection to this *pro forma* testimony explaining how information is extracted from an electronic device, or to his explanation of how long certain images were viewed, the defense objected vigorously when the People attempted to elicit an expert opinion from him characterizing the nature of the material extracted from Mr. Martinez's cell phone internet search history and describing whether certain images were of women or girls.

The grounds for the objections were (a) the People never designated Mr. Cvengros as an expert and failed to comply with their statutory duties under Cal. Pen. Cod. §§ 1054.1 and 1054.7; and (b) Mr. Cvengros lacks the credentials to offer an opinion about anything other than the Cellebrite report itself, its extraction process, and information gained from the Cellebrite report regarding how long certain images were viewed.

This witness's *Curriculum Vitae* was only provided to the defense at the start of his cross-examination and in Word format.

Specifically, Mr. Cvengros testified that he worked alongside investigators and others in child pornography cases to review electronic devices. He did not testify as to what he did with those investigators. His CV does not include the nature of his forensic work.

Without compliance with the statutory (*i.e.*, non-discretionary), provisions of Cal. Pen. Code §§ 1054.1 and 1054.7, the People then inquired as to whether:

- certain images located from an internet search history were of women or girls;
- whether the images constituted "sexually deviant" matter; and
- whether the owner of the electronic device (the defendant) had a systematic practice of viewing sexually deviant material.

This Court, over objection, allowed the following testimony from Cvengros:

- Certain images were of girls as opposed to women;
- Cartoon pornographic images constitute "deviant sexual material";

- Pornographic images of bestiality constitute "deviant sexual material";
- Viewers of such material are sexual deviants with a proclivity for sexually deviant behavior;
- The defendant exhibited a pattern and practice of viewing such materials consistent with those of a sexual deviant;
- Cartoon pornography was the most viewed form of pornography, even more than adult pornography;
- The Cellebrite report might not have captured all the searched for cartoon pornography or bestiality, and
- The Cellebrite report might have missed actual searches for *child pornography* (in other words, it is "**possible**" other evidence exists that was not found).[1]

II. ARGUMENT

A. Expert Testimony was Introduced Impermissibly Warranting Extreme Sanctions

1. Relevant non-discretionary applicable statutes

By eliciting opinion testimony of a non-designated expert, the People violated the requirements of Cal. Pen. Cod. § 1054.1, which provides as follows:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
> (b) Statements of all defendants.
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
> (e) Any exculpatory evidence.
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including

[1] Mr. Martinez is not charged with possessing or viewing Child Pornography.

> the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

The surprise expert opinion violates Cal. Pen. Code § 1054.7, which provides, in pertinent part:

> The disclosures required under this chapter shall be made at least **30 days prior to the trial**, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

(Cal. Pen. Code § 1054.7 (emphasis added).)

When the People elicited expert opinion testimony from Mr. Cvengros, the People violated statutory obligations. These obligations are *statutory*. The Court was without discretion to excuse compliance.

2. Subjects on Which Mr. Cvengros Was and Was Not Qualified to Testify

Mr. Cvengros is not competent to offer opinion testimony as to several issues. Mr. Cvengros has:

- no psychiatric training or degrees;
- no psychological training or degrees;
- no medical training or degrees;
- no anatomical training;
- no clinical experience;
- no publications; and
- no proffered testimony, other than that he works with teams investigating computer crimes, that he qualifies to test to any of the expert opinions he testified to (aside from the time spent viewing images).

The People properly established that Mr. Cvengros knows what he extracts from electronic devices and how it is extracted.

The fact that many of his forensic examinations of electronic devices are part of investigations into child sex abuse or pornography does not make him an expert on these matters or of the issues to which he testified. In other words, just because he may extract child or adult pornography from electronic devices, he is not competent to testify about what constitutes child pornography, whether an image is that of a woman or girl, what motivates an offender, what constitutes sexually deviant material, or whether a viewer of such material is a sexual deviant.

This is precisely the testimony that this non-designated expert offered. And this occurred without statutory compliance or establishing his qualifications to testify as to these matters.

What makes this conduct more egregious is that the defense fully complied with all statutory obligations throughout this matter. And the People brought several motions in the pre-trial court asserting non-compliance with its statutory obligations, and the pre-trial court ultimately found that the defense had so complied with its statutory discovery obligations. The People then used the defense's compliance to have two 402 hearings to challenge the defense experts, allowing the People a preview of anticipated testimony.

The People, however, avoided statutory compliance and provided an unqualified expert, without notice, to make highly prejudicial statements to the Jury that were outside of the witnesses' expertise. When the defense raised this issue to the Court, the Court responded that the jury decides who is an expert. Not so.

The Court, not the jury, is the gatekeeper of what constitutes an expert opinion. In *People v. Azcona* (2020) 58 Cal.App.5th 504, 513-514, there was statutory compliance. But even with such compliance, the *Azcona* Court stated:

> Trial judges have a critical gatekeeping function when it comes to expert testimony beyond merely determining whether the expert may testify at all. Expert evidence that does not require a Kelly analysis must still be admissible under Evidence Code section 801, which mandates it be "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject." (Evid. Code, § 801, subd.(b); see In re O.D. (2013) 221 Cal.App.4th 1001, 1009.) Further, under Evidence Code sections 801, subdivision (b), and 802, the court must act as a

> gatekeeper to ensure the opinions offered by an expert are not "based on reasons unsupported by the material on which the expert relies." (Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747, 771 [149 Cal. Rptr. 3d 614,.) "This means that a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning. 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" (Ibid.) A trial court's decision regarding the permissible scope of an expert's opinion is reviewed for abuse of discretion. (Ibid.)
>
> A trial court's duty to keep unfounded opinions from the jury is particularly important in a situation like the one presented here, where significant criticism of the expert's methodology was presented (even if it was not shown to have been rejected by a clear majority of the scientific community). The existence of such criticism should prompt a trial court to carefully determine what conclusions can reliably be drawn from the methodology in question. But here the trial court abandoned its gatekeeping role, allowing unfettered expert testimony that went far beyond what the underlying material supported. Over defendant's in limine objection, the court allowed the expert to testify that the matching marks on the relevant projectiles are "much more than can ever happen by random chance," and therefore the projectiles came from the same gun, "to the practical exclusion of all other guns." The expert did not support that conclusion with anything more definitive than a broad reference to having "done numerous studies on the subject trying to see what can happen by random chance."
>
> Such a purportedly infallible conclusion is a leap too far from what the underlying method allowed. There was support for the opinion that the projectiles likely came from the same gun, perhaps more likely than not, but there was no basis to present it as a scientific certainty. The trial court abused its discretion by failing to limit the expert's opinion to what was actually supported by the material the expert relied on.

(*Azcona*, 272 Cal.Rptr.3d 471.)

The conduct here is even more egregious than that in *Azcona*. First and foremost, in this matter the Prosecutor and the Court avoided obligations for statutory compliance. At the issue's core, the People did not, and could not have, established that Mr. Cvengros was qualified to opine to the jury that Mr. Martinez's internet search history contains child pornography or sexually deviant material, much less, whether Mr. Martinez is a sexual deviant. Over objection, this Court allowed that to happen.

Moreover, the People argued erroneously that the defense somehow "opened the door" to such opinion evidence in their cross-examination of Mr. Cvengros. That argument is without merit. There are no rules allowing for unexpected introduction of expert witness testimony without statutory compliance with §§ 1054.1 and 1054.7. Simply put – it is not a thing.

When there is "surprise" expert testimony -- as there was here -- the ramifications are even more consequential. The Fourth Appellate Division has squarely addressed this issue, holding that even a curative instruction is insufficient, and the sole remedies are either a mistrial or the harsh remedy of a stay sufficient to allow the opposing party time to secure and prepare a rebuttal expert.

In this case, the Defense is not seeking a mistrial and any such order would be *sua sponte*. Should the People request a mistrial based on their own misconduct, the Court should enter a judgment of acquittal under the doctrine of invited error.

3. Controlling Authority Requires a Mistrial or a Stay.

The *precise* situation facing this Court was addressed by the Fourth District Court of Appeal – three years ago – in this appellate district -- in *People v. Hughes* (2020) 50 Cal.App.5th 257. Where the trial court allowed an expert to testify about previously undisclosed opinions, the conviction was reversed.

In *Hughes*, without notice or compliance with § 1054.1, the prosecution provided an expert witness to testify in a vehicular homicide case. A witness testified that a report prepared by a Multidisciplinary Accident Investigation Team ("MAIT Report") understated the defendant's speed. The witness "emphasized the MAIT report was designed to determine only a vehicle's minimum speed. But he also provided new reasons for thinking the report had underreported that speed. First, he pointed out the older event data recorder in [defendant's] car recorded data for only 78 milliseconds, whereas newer recorders capture data for a longer period. The witness further testified that the older recorder underreported the decrease in [the defendant's] speed caused by the collision "probably between 3 and 4 miles per hour." He said

he came to that figure by using the trajectory of the speed loss graph provided by the event data recorder and by consulting with someone who teaches analysis and downloads for event data recorders. Based on that analysis, he concluded that the defendant was moving about 67 miles per hour just before he applied the brakes, and the impact speed was about 59 miles per hour. (*Id*. at 270.)

Unlike this case, at least the surprise expert witness in *Hughes* had some knowledge of the subject matter to which he testified. Here, Mr. Cvengros lacks any qualifications to evaluate what is and is not sexually deviant material and who is or is not a sexual deviant.

The Court in *Hughes* highlighted why pre-trial disclosure of expert testimony is essential:

> The fact that this case involves an accident reconstruction expert's technical notes only heightens the importance of early disclosure. "' [T]he need for pretrial discovery is greater with respect to expert witnesses than it is in the case of ordinary fact witnesses. If a party is going to present the testimony of experts during trial, the other parties must prepare to cope with the testimony to be given by people with specialized knowledge in a scientific or technical field.'" (*Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1117)

(*People v. Hughes,* 50 Cal.App.5th at 279.)

> The only remedy for this error is either a mistrial or a stay to allow the defense to locate, prepare, and seek the assistance of an expert to rebut the surprise expert causation testimony when the defense first objected. By failing to do so and allowing the prosecution to proceed in its questioning of the expert, the trial court contributed to a situation with no adequate remedy and a mistrial should have been ordered.

(*Id.* at 261.)

There exist only two remedies for this improper introduction of undisclosed expert testimony: (1) declaring a mistrial[2], or (2) issuing an order staying the matter to allow the defense to locate and produce a rebuttal expert. The trial court has "discretion to consider lesser remedies . . ." (*Id.* at 284.)

[2] The Defense is not seeking a mistrial, and any such order would be *sua sponte*. And if the People choose to demand a mistrial based on their own error, the defense seeks a judgment of acquittal based on the theory of invited error.

The Court of Appeal *might* hold an acceptable solution in this case is striking Mr. Cvengros' opinion testimony in its entirety (aside from his testimony authenticating the Cellebrite report). It is not sufficient for the jury to be instructed that the testimony was not disclosed in a timely fashion. Further, it is not sufficient to recall the witness for further questioning. (*Ibid.*)

Hughes stated:

> Though the trial court had discretion to consider lesser remedies, the remedies it chose were simply inadequate. First, directing the jury that the prosecution didn't disclose Berns's testimony in a timely fashion did nothing to enable Hughes's defense team to test the merits of his new testimony. Nor did allowing them to recall Berns for further questioning. What they needed to address the merits was additional information about Berns's new opinions and their basis, time to seek out and engage new experts, and the time to work with new experts to produce a fact-based response to what turned out to be damning testimony. The trial court could have saved the trial by ordering that admittedly drastic remedy when defense counsel objected to Berns's new opinions at trial. However, when the court instead allowed the prosecutor to present the new evidence, the situation changed, and the only effective remedy at that point was to declare a mistrial and allow Hughes to face trial again, prepared to respond to Sergeant Berns's testimony on the merits. That is the remedy we order now.

(*Id*. at 284-85 (*emphasis added*).)

The Court should have been familiar with the *Hughes* case. Not only is it the binding decision on the issue for this Court, but it is expressly identified as a case establishing such Prosecutorial and Judicial error in the Judge's Benchbook. (*See* §10.14 Examples of Misconduct, Cal. Judges Benchbook Civ. Proc. Trial.)

Cal. Judges Benchbook Civ. Proc. Trial § 10.14, states, in relevant part:

> An attorney's innocent mistake or incompetence does not constitute misconduct for purposes of declaring a mistrial. The term "misconduct" implies a dishonest act or attempt to persuade the judge or the jurors by using deceptive or reprehensible methods (*People v Parson* (2008) 44 C4th 332, 359 (citing *Darden v Wainwright* (1986) 477 US 168, 181)), or engaging in egregious or outrageous behavior with the intent of improperly affecting the judge or jurors (*see People v Hamilton* (2009) 45 C4th 863, 920 (also citing *Darden*)).
>
> For example, an attorney commits misconduct by doing any of the following with this intent:…

> … In a case based on a motor vehicle collision, failing to disclose to the defendant's attorney the substance of an accident reconstruction expert's testimony, including the expert's notes, until the expert was on the witness stand in front of the jury. People v Hughes (2020) 50 CA5th 257, 260, 263 CR3d 794. In this case, although the defendant's attorney objected to this testimony in a timely manner, the judge allowed the questioning to proceed, denied the attorney's motion for a mistrial, and attempted to remedy the discovery violation by instructing the jurors that this new evidence had not been disclosed in a timely fashion and allowing the attorney to recall the expert. The appellate court held that it was an abuse of discretion for the judge to fail to grant a mistrial. 50 CA5th at 260, 284. It found that the judge had an opportunity to salvage the trial by continuing it and allowing the defendant to locate, prepare, and seek the assistance of an expert to rebut the surprise expert causation testimony when the defendant first objected. 50 CA5th at 260–261. By failing to do so and allowing the prosecution to proceed in its questioning of the expert, the judge contributed to a situation in which the only remedy was a mistrial. 50 CA5th at 261, 281–285

(California Judges Benchbook: Civil Proceedings-Trial | June 2022 Update, 5. Misconduct by Attorney.)

In *Hughes*, however, the defense exercised its right to request a mistrial – a remedy not being sought by the Defense here.

4. <u>The Defense Is Not Requesting A Mistrial. Ordering A Mistrial Would Be *Sua Sponte*.[3] The People Are Barred From Requesting A Mistrial As The Error Was That Of The People, And Should The Court Grant Such A Request The Court Should Also Enter A Judgment Of Acquittal Under The Doctrine Of Invited Error.</u>

In the present case, the Defense is not requesting a mistrial. However, the defense is entitled to, and the Court must order, a sufficient stay to allow the defense to locate an expert with computer forensic training who works with investigators of child pornography to establish that Mr. Cvengros was not qualified to give the testimony that he did.

The defense does have a *bona fide* expert psychologist – Dr. Romanoff – who can testify as to how a child sex offender views certain material and the characteristics of a sexual

[3] And if the People choose to demand a mistrial based on their own error, the defense seeks a judgment of acquittal based on the theory of invited error. *See People v. Hampton* (2022) 74 Cal.App.5th 1092, 1103) (suggesting that dismissal is warranted if prosecutor erred for tactical reasons and not out of ignorance or mistake).

deviant. But the defense does not have, at present, an expert with any experience relating to how such an opinion can be derived from computer forensics or whether the term "on the phone" is indicative of law enforcement language regarding data stored off of a phone (another piece of surprise expert testimony elicited by the People during the direct examination of Mr. Cvengros[4]). Therefore, the defense, at this time, is not capable of producing an expert who can testify as to these key issues.

This Court may be inclined to order a mistrial because of the drastic "error."[5] The defense opposes such an order at this time and any such order would be *sua sponte*. To the extent that the People request a mistrial based on this error, the defense requests that the Court enter a judgment of acquittal based on Invited Error.

If the Court is disinclined to order a stay, then – without waiving any objections and preserving any and all available rights, the defense proposes that the Court admonish the People for introducing such evidence without statutory compliance (as would be the case with the applicable late notice jury instruction, CALCRIM 306, to which the defense is now entitled) and instruct the jury to disregard Mr. Cvengros' testimony in its entirety but for the authentication of the Cellebrite report and the determination of how long each image was viewed (information that is within Mr. Cvengros' area of expertise).

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[4] Dr. Romanoff is free, of course, to opine that Mr. Cvengros's medical, psychological, or psychiatric opinions are without logic, sense, qualifications or authority.

[5] The Cal. Judges Benchbook Civ. Proc. Trial § 10.14 *expressly* relies on this identical conduct in *People v. Hughes* to describe "attorney misconduct" -- not mere error. And while the Court has cautioned the defense from making such allegations, by reiterating the example contained in the Benchbook as one, the defense is well within its right to do so (if not obligated to) and the Court should identify the "attorney misconduct" at issue and address it with the parties.

III. CONCLUSION

For the reasons set forth above, this matter should be stayed for a minimum of 14 days or, alternatively, the testimony of Mr. Cvengros – aside from his authentication of the Cellebrite data and establishment of the durations Mr. Martinez viewed the images in question – should be stricken in its entirety.

DATED: October 8, 2023 LAW OFFICES OF IAN WALLACH, P.C.

By: _*Ian M. Wallach*_____
IAN M. WALLACH
Attorney for Defendant
PEDRO MARTINEZ

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 October 8, 2023, I served the following document(s) described as: **DEFENDANT PEDRO MARTINEZ'S MOTION TO STAY MATTER FOR 14 DAYS, OR, IN THE ALTERNATIVE, TO STRIKE THE OPINION TESTIMONY OF PROSECUTION WITNESS STEVE CVENGROS** 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 October 8, 2023 at Los Angeles, California.

TRACY VENA