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FILED
OCT 09 2023

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16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **FOR THE COUNTY OF SAN BERNARDINO**

19 THE PEOPLE OF THE STATE OF
20 CALIFORNIA,

21 v.

22 Plaintiff,

23 PEDRO MARTINEZ,

24 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**

1 **I. STATEMENT OF FACTS**

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

9 The grounds for the objections were (a) the People never designated Mr. Cvengros as
10 an expert and failed to comply with their statutory duties under Cal. Pen. Cod. §§ 1054.1 and
11 1054.7; and (b) Mr. Cvengros lacks the credentials to offer an opinion about anything other
12 than the Cellebrite report itself, its extraction process, and information gained from the
13 Cellebrite report regarding how long certain images were viewed.

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

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

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

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

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

- 26 • Certain images were of girls as opposed to women;
27 • Cartoon pornographic images constitute “deviant sexual material”;

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

12 **II. ARGUMENT**

13 **A. Expert Testimony was Introduced Impermissibly Warranting Extreme**

14 **Sanctions**

15 1. Relevant non-discretionary applicable statutes

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

18 The prosecuting attorney shall disclose to the defendant or his or her attorney all
19 of the following materials and information, if it is in the possession of the
20 prosecuting attorney or if the prosecuting attorney knows it to be in the possession
21 of the investigating agencies:

22 (a) The names and addresses of persons the prosecutor intends to call as witnesses
23 at trial.

24 (b) Statements of all defendants.

25 (c) All relevant real evidence seized or obtained as a part of the investigation of
26 the offenses charged.

27 (d) The existence of a felony conviction of any material witness whose credibility
28 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.

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

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

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

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

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

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

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

- 20 • no psychiatric training or degrees;
- 21 • no psychological training or degrees;
- 22 • no medical training or degrees;
- 23 • no anatomical training;
- 24 • no clinical experience;
- 25 • no publications; and
- 26 • no proffered testimony, other than that he works with teams investigating
27 computer crimes, that he qualifies to test to any of the expert opinions he
28 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.

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

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

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

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

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

24 Trial judges have a critical gatekeeping function when it comes to expert
25 testimony beyond merely determining whether the expert may testify at all. Expert
26 evidence that does not require a Kelly analysis must still be admissible under
27 Evidence Code section 801, which mandates it be "of a type that reasonably may
28 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

1 gatekeeper to ensure the opinions offered by an expert are not “based on reasons
2 unsupported by the material on which the expert relies.” (Sargon Enterprises, Inc.
3 v. University of Southern California (2012) 55 Cal.4th 747, 771 [149 Cal. Rptr.
4 3d 614,]) “This means that a court may inquire into, not only the type of material
5 on which an expert relies, but also whether that material actually supports the
6 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.)

7 A trial court's duty to keep unfounded opinions from the jury is particularly
8 important in a situation like the one presented here, where significant criticism of
9 the expert's methodology was presented (even if it was not shown to have been
10 rejected by a clear majority of the scientific community). The existence of such
11 criticism should prompt a trial court to carefully determine what conclusions can
12 reliably be drawn from the methodology in question. But here the trial court
13 abandoned its gatekeeping role, allowing unfettered expert testimony that went far
14 beyond what the underlying material supported. Over defendant's in limine
15 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.”

16 Such a purportedly infallible conclusion is a leap too far from what the underlying
17 method allowed. There was support for the opinion that the projectiles likely came
18 from the same gun, perhaps more likely than not, but there was no basis to present
19 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.

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

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

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

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

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

14 3. Controlling Authority Requires a Mistrial or a Stay.

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

19 In *Hughes*, without notice or compliance with § 1054.1, the prosecution provided an
20 expert witness to testify in a vehicular homicide case. A witness testified that a report
21 prepared by a Multidisciplinary Accident Investigation Team (“MAIT Report”) understated
22 the defendant’s speed. The witness “emphasized the MAIT report was designed to determine
23 only a vehicle's minimum speed. But he also provided new reasons for thinking the report had
24 underreported that speed. First, he pointed out the older event data recorder in [defendant’s]
25 car recorded data for only 78 milliseconds, whereas newer recorders capture data for a longer
26 period. The witness further testified that the older recorder underreported the decrease in [the
27 defendant’s] speed caused by the collision “probably between 3 and 4 miles per hour.” He said
28

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

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

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

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

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

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

25 (*Id.* at 261.)

26 There exist only two remedies for this improper introduction of undisclosed expert
27 testimony: (1) declaring a mistrial², or (2) issuing an order staying the matter to allow the
28 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.

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

6 *Hughes* stated:

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

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

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

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

27 An attorney's innocent mistake or incompetence does not constitute misconduct
28 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:...

1 ... In a case based on a motor vehicle collision, failing to disclose to the
2 defendant's attorney the substance of an accident reconstruction expert's
3 testimony, including the expert's notes, until the expert was on the witness stand
4 in front of the jury. *People v Hughes* (2020) 50 CA5th 257, 260, 263 CR3d 794.
5 In this case, although the defendant's attorney objected to this testimony in a timely
6 manner, the judge allowed the questioning to proceed, denied the attorney's
7 motion for a mistrial, and attempted to remedy the discovery violation by
8 instructing the jurors that this new evidence had not been disclosed in a timely
9 fashion and allowing the attorney to recall the expert. The appellate court held that
10 it was an abuse of discretion for the judge to fail to grant a mistrial. 50 CA5th at
11 260, 284. It found that the judge had an opportunity to salvage the trial by
12 continuing it and allowing the defendant to locate, prepare, and seek the assistance
13 of an expert to rebut the surprise expert causation testimony when the defendant
14 first objected. 50 CA5th at 260–261. By failing to do so and allowing the
15 prosecution to proceed in its questioning of the expert, the judge contributed to a
16 situation in which the only remedy was a mistrial. 50 CA5th at 261, 281–285

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

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

21 4. The Defense Is Not Requesting A Mistrial. Ordering A Mistrial Would Be
22 *Sua Sponte*.³ The People Are Barred From Requesting A Mistrial As The
23 Error Was That Of The People, And Should The Court Grant Such A
24 Request The Court Should Also Enter A Judgment Of Acquittal Under The
25 Doctrine Of Invited Error.

26 In the present case, the Defense is not requesting a mistrial. However, the defense is
27 entitled to, and the Court must order, a sufficient stay to allow the defense to locate an expert
28 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).

1 deviant. But the defense does not have, at present, an expert with any experience relating to
2 how such an opinion can be derived from computer forensics or whether the term “on the
3 phone” is indicative of law enforcement language regarding data stored off of a phone (another
4 piece of surprise expert testimony elicited by the People during the direct examination of Mr.
5 Cvengros⁴). Therefore, the defense, at this time, is not capable of producing an expert who
6 can testify as to these key issues.

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

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

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23 _____
24 ⁴ Dr. Romanoff is free, of course, to opine that Mr. Cvengros’s medical, psychological, or psychiatric
25 opinions are without logic, sense, qualifications or authority.

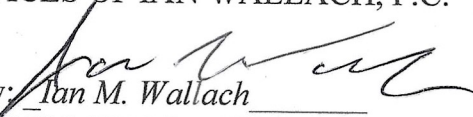
26 ⁵ The Cal. Judges Benchbook Civ. Proc. Trial § 10.14 *expressly* relies on this identical conduct in
27 *People v. Hughes* to describe “attorney misconduct” -- not mere error. And while the Court has
28 cautioned the defense from making such allegations, by reiterating the example contained in the
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.

1 **III. CONCLUSION**

2 For the reasons set forth above, this matter should be stayed for a minimum of 14 days
3 or, alternatively, the testimony of Mr. Cvengros – aside from his authentication of the
4 Celebrite data and establishment of the durations Mr. Martinez viewed the images in question
5 – should be stricken in its entirety.
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7 DATED: October 8, 2023

LAW OFFICES OF IAN WALLACH, P.C.

8
9 By:  _____
10 IAN M. WALLACH

11 Attorney for Defendant
12 PEDRO MARTINEZ
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

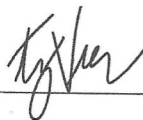
I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 5777 West Century Blvd., Suite 750, Los Angeles, CA 90045

On 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