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SUPERIOR COURT
COUNTY OF SAN BERNARDINO
JOSHUA TREE DISTRICT
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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,

Case: FV11900218

21 v.

**DEFENDANT PEDRO MARTINEZ'S
MOTION TO PRECLUDE EXPERT
TESTIMONY ON REBUTTAL
PURSUANT TO CAL. PEN. CODE §§
1054.1, 1054.7, 1093(d), 1102 AND CAL.
EVID. CODE § 2034**

22 Plaintiff,

24 PEDRO MARTINEZ,

25 Defendant.

1 The defense brings this motion in anticipation of the People offering unnoticed and
2 undisclosed expert testimony on rebuttal without complying with Cal. Pen. Code §§ 1054. 1
3 and 1054. 7. In the event that the People do not offer additional expert testimony on rebuttal,
4 this motion need not be considered. In the event the People so intend, then the motion should
5 be heard now in the interest of judicial economy and to save the time and expense of the
6 People securing the attendance of such a witness.

7 I. INTRODUCTION

8 The People previously introduced “expert” testimony from, an undisclosed and un-
9 noticed expert, Stephen Cvengross, whether the defendant’s viewing of cartoon pornography
10 and images of bestiality constituted “deviant behavior.” This Court allowed the testimony,
11 only to strike it in its entirety the next day following this Court’s review of both *People v.*
12 *Hughes* (2020) 50 Cal. App. 5th 257 and the Judge’s Benchbook. (See § 10 14 Examples of
13 Misconduct, Cal. Judges Benchbook Civ. Proc. Trial.).

14 The defense suspects that the People may once again try to elicit expert testimony
15 without complying with statutorily-mandated requirements during rebuttal and seeks a ruling
16 preventing any such attempt.

17
18 II. APPLICABLE LAW REGARDING STATUTORY NOTICE FOR EXPERT
19 WITNESS TESTIMONY

20 California Penal Code § 1054. 1 provides as follows:

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

- 25 (a) The names and addresses of persons the prosecutor intends to call as witnesses
26 at trial;
27 (b) Statements of all defendants;
28 (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.

1 (f) Relevant written or recorded statements of witnesses or reports of the
2 statements of witnesses whom the prosecutor intends to call at the trial, including any
3 reports or statements of experts made in conjunction with the case, including the results
4 of physical or mental examinations, scientific tests, experiments, or comparisons which
5 the prosecutor intends to offer in evidence at the trial.

6 California Penal Code § 1054.7 governs a motion for denial or regulation of disclosures
7 and provides:

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

16 Upon the request of any party, the court may permit a showing of good cause for
17 the denial or regulation of disclosures, or any portion of that showing, to be made *in*
18 *camera*. A verbatim record shall be made of any such proceeding. If the court enters an
19 order granting relief following a showing *in camera*, the entire record of the showing
20 shall be sealed and preserved in the records of the court, and shall be made available to
21 an appellate court in the event of an appeal or writ. In its discretion, the trial court may
22 after trial and conviction, unseal any previously sealed matter. California Penal Code §
23 1093(d) (comment added):

24 California Penal Code § 1093(d) provides that “Following the conclusion each party’s
25 case-in-chief, only rebutting testimony may be offered, unless the court, for good reason, in
26 furtherance of justice, permits them to offer evidence upon their original case.”

27 California Penal Code § 1102 provides that “[t]he rules of evidence in civil actions are
28 applicable also to criminal actions, except as otherwise provided in this code.”

California Code Civ. Proc § 2034.720 provides as follows:

The court shall grant leave to submit tardy expert witness information only if all
of the following conditions are satisfied:

(a) The court has taken into account the extent to which the opposing party has
relied on the absence of a list of expert witnesses.

(b) The court has determined that any party opposing the motion will not be
prejudiced in maintaining that party’s action or defense on the merits.

(c) The court has determined that the moving party did all of the following: (1)
Failed to submit the information as the result of mistake, inadvertence, surprise, or

1 excusable neglect; (2) Sought leave to submit the information promptly after learning of
2 the mistake, inadvertence, surprise, or excusable neglect; and (3) Promptly thereafter
3 served a copy of the proposed expert witness information described in Section 2034.260
4 on all other parties who have appeared in the action.

5 (d) The order is conditioned on the moving party making the expert available
6 immediately for a deposition under Article 3 (commencing with Section 2034.410), and
7 on any other terms as may be just, including, but not limited to, leave to any party
8 opposing the motion to designate additional expert witnesses or to elicit additional
9 opinions from those previously designated, a continuance of the trial for a reasonable
10 period of time, and the awarding of costs and litigation expenses to any party opposing
11 the motion.

12 III. APPLICABLE COMMON LAW REGARDING STATUTORY NOTICE 13 REQUIREMENTS FOR EXPERT WITNESS TESTIMONY

14 In *People v. Carter* (1957) 48 Cal.2d 737, 753-754 the California Supreme Court
15 stated:

16 . . . proper rebuttal evidence does not include a material part of the case in the
17 prosecution's possession that tends to establish the defendant's commission of the crime.
18 It is restricted to evidence made necessary by the defendant's case in the sense that he has
19 introduced new evidence or made assertions that were not implicit in his denial of guilt.
20 (*See People v. Byrd* (1954) 42 Cal.2d 200, 211-212, *cert. denied*, 348 U.S. 848 [75 S.Ct.
21 73, 99 L.Ed. 668]; *People v. Nye* (1951) 38 Cal.2d 34, 38-39 [237 P.2d 1]; *People v.*
22 *Avery* (1950) 35 Cal.2d 487, 491 [218 P.2d 527]; 6 Wigmore, Evidence 510-511, 516 (3d
23 ed. 1940).) A defendant's reiterated denial of guilt and the principal facts that purportedly
24 establish it does not justify the prosecution's introduction of new evidence to establish
25 that which defendant would clearly have denied from the start.

26 In *People v. Miller* (1963) 211 Cal.App.2d 569, 574-575, the Court stated:

27 Testimony tending to impeach an adverse witness must naturally follow the
28 testimony of that witness; and therefore, it often becomes properly admissible on rebuttal.
This is not true, however, with respect to statements or admissions of a party to the action.
In *People v. Robinson* (1960), 179 Cal.App.2d 624, 630 [4 Cal.Rptr. 50], it was held
improper to admit testimony on rebuttal concerning damaging statements made by
defendant. The court stated, "It was, of course, wholly unnecessary to question defendant
on cross-examination with respect to any statement or admissions he may have made. (2)
The rules with respect to laying a foundation for impeachment by proof of inconsistent
or contrary statements have no pertinency to proof of statements or admissions of a party.
'The act, declaration, or omission of a party, as evidence against such party' may be
proved upon a trial. (Code Civ. Proc., § 1870, subd. 2.) (3) The statements attributed to
defendant by the rebuttal testimony were a part of the People's evidence in chief, and not
proper rebuttal." The court then pointed out that the proper method would have been for
the People to have moved to reopen their case in chief which motion could have been
granted by the court only upon a showing of good cause.

1
2 IV. ARGUMENT

3 A. A New Trial Would Be Mandated On Any Conviction If The Court Allows The
4 People To Introduce Further Expert Witness Testimony

5 Should the People attempt to introduce expert witness testimony during rebuttal, it is
6 without question that the People have not complied with any of the disclosure requirements of
7 Cal. Pen. Code §§ 1054.1, 1054.7, or Cal. Code Civ. Proc. § 2034.720 (applicable through Cal.
8 Pen. Code § 1102).

9 Absent such statutory compliance, any exercise of the Court's discretion allowing for
10 the introduction by the People of any expert testimony on rebuttal would be an abuse, would
11 not survive appellate review, and mandate a new trial (or other more extreme relief) following
12 any conviction in this matter.

13
14 B. Any Introduction Of Expert Witness Testimony By The People At This Stage Of The
15 Trial Would Deprive The Defense Of Seeking Out And Providing Expert Testimony To
16 Rebut Such Evidence

17 "On surrebuttal [a] defendant in criminal action is entitled to rebut only new matter
18 educed by the people." *People v. Remington* (1925), 74 Cal. App. 371.

19 The California case directly on point is *Kennemur v. State of California* (1982) 133
20 Cal.App.3d 907. In *Kennemur*, the Plaintiffs brought an action following a car accident. The
21 trial court would not let the plaintiffs' expert rebut defendants' expert concerning the origin of
22 certain tire tracks because the Plaintiffs had not disclosed the proposed expert testimony
23 during pretrial discovery. The trial court relied on Cal. Civ. Proc. Code § 2037.5, and its
24 prohibited use of an expert witness, except for purposes of "impeachment," when a party failed
25 under Cal. Civ. Proc. Code § 2037.3 to accurately to disclose the general substance of the
26 expert's testimony. The Court of Appeal affirmed, holding that to give proper effect to the §
27 2037.5 sanction, "impeachment" had to be construed narrowly. The Court held that appellants'
28 expert's "impeachment" testimony could not be allowed to go into the realm of general
rebuttal. Because appellants did not offer their expert witnesses for the purpose of

1 contradicting the foundational facts upon which respondent's expert based his opinions, the
2 trial court's ruling was upheld.

3 In this case, the People only disclosed a CSAAS expert during pre-trial discovery.
4 Moreover, the People brought three unsuccessful challenges to the Defense's complete and
5 thorough compliance with the pre-trial discovery rules, and had the benefit of a preview of the
6 testimony of the defense's experts by utilizing Cal. Pen. Code § 402.

7 Additionally, on one of the two prior occasions where the People elicited almost a day
8 of expert testimony without complying with pre-trial discovery requirements, the Court had to
9 strike such testimony under *Hughes*. This impropriety should not be repeated, as (a) the
10 defendant does not want a mistrial at this point, and (b) a stay is no longer possible in that the
11 People have exhausted at least 17 of the then-available 25 days of trial (wherein the defense
12 will likely have only exhausted 6 to 8) and there will be no time for the stay mandated by
13 *Hughes*.

14 IV. CONCLUSION

15 Should the People again present un-noticed expert witness testimony, especially during
16 a proposed rebuttal and after closure of its case-in-chief, the testimony would not survive
17 appellate review and mandate a new trial on any counts in which a conviction was entered.

18
19 DATED: November 19, 2023

LAW OFFICES OF IAN WALLACH, P.C.

20
21 By: _____



22 IAN M. WALLACH

23 Attorney for Defendant

24 ~~PEDRO MARTINEZ~~

1

2

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed by the County of Los Angeles, and have been for
eighteen years and not a party to the within action. My business address is 5777 West Century
4 Blvd., Suite 750, Los Angeles, CA 90045

5 On November 19, 2023, I served the following document(s) described as:
DEFENDANT PEDRO MARTINEZ'S MOTION TO PRECLUDE ADDITIONAL
6 **EXPERT WITNESSES** by placing true copies thereof enclosed in sealed envelopes and/or
packages addressed as follows:

7 Deputy District Attorney Deena Pribble
8 DPribble@sbcda.org

- 9 **BY MAIL:** I deposited such envelope in the mail at 8383 Wilshire Blvd. Suite 210,
10 Beverly Hills, CA 90211. The envelope was mailed with postage thereon fully
11 prepaid. I am "readily familiar" with the firm's practice of collection and processing
12 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.
- 13 **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant
14 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.
- 15 **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the
16 above addressee(s).
- 17 **BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles,
18 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
19 transmission was reported as complete, and no error was reported that the electronic
transmission was not completed.
- 20 **STATE:** I declare under penalty of perjury under the laws of the State of California
that the foregoing is true and correct.

21 Executed on November 19, 2023 at Los Angeles, California.

22
23 

24 IAN WALLACH