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

19 THE PEOPLE OF THE STATE OF
20 CALIFORNIA,

21 Plaintiff,

22 v.

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24
25 PEDRO MARTINEZ,

26 Defendant.
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28

Case: FVI19000218

**DEFENDANT PEDRO MARTINEZ'S
MOTION NO. 2 TO RECONSIDER THIS
COURT'S SEPTEMBER 29, 2023
RULING**

Dept.: M2
Hon. Christopher Pallone

1 **I. Precluding The Defense From Introducing Evidence that Ismael was Engaging**
2 **in Sexual Acts Prior to Meeting Mr. Martinez Would Warrant A New Trial**

3 On September 29, 2023, the Court considered the admissibility of evidence that Ismael
4 engaged in sexual conduct before he ever encountered Mr. Martinez. This testimony is directly
5 relevant to Magdalena Serna's credibility as to the timing of her communications with Essence
6 Smith (who reported the sexual conduct) and Ms. Serna's and the People's theory that Ismael
7 sexually assaulted his little brother as a result of Ismael's contact with Mr. Martinez. The
8 testimony will establish, *inter alia*, the following:

- 9 1. Magdalena Serna testified that she learned from Essence Smith that Ismael had been
10 engaging in sexual conduct;
- 11 2. Ms. Serna believes she received this information after the alleged abuse by Mr.
12 Martinez began;
- 13 3. Ms. Serna, based on this information, began investigating whether Ismael was
14 sexually abusing his little brother, Maximo, which ultimately led her to determine that
15 Ismael was being sexually molested;
- 16 4. Essence Smith will establish that Ismael engaged in sexual conduct before Ismael
17 encountered Mr. Martinez. Specifically, she witnessed Ismael poke her son, Micah,
18 with his fingers in the area of Micah's buttocks. Ms. Smith then had a conversation
19 with Micah who said, "Ismael likes butts so he likes to poke me in the butt."
20 Additionally, Ms. Smith observed Ismael poke a pencil in the "bottom region" of his
21 younger brother, Maximo. She also observed that Maximo experienced pain and
22 discomfort in or around his anus when defecating and when being cleaned during
23 diaper changes. Based on her concerns, she immediately contacted Alba Rosa, Ismael
24 and Maximo's mother, and Ms. Serna to inform them that (a) she suspected that
25 Ismael was sexually assaulting his brother and (b) Ismael had potentially been
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1 sexually assaulted while in foster care. She will testify that both incidents occurred in
2 2018 prior to the summer¹ and prior to Ismael encountering Mr. Martinez.

3 The Court ruled that the evidence was irrelevant, prejudicial, and would result in the undue
4 consumption of time and would confuse the jury. In doing so, the Court made the following
5 determinations:

6 First, the Court determined that the behavior observed by Essene Smith, including
7 Ismael approaching his little brother's derriere with a pencil, coupled with the brother's act of
8 screaming while defecating and experiencing pain and irritation to his anus, was not
9 sufficiently similar to the behavior discovered by Ms. Serna, specifically Ismael inserting
10 items, including a pencil, into his little brother's anus (and Ismael's alleged confession that he
11 did so). The Court found the act observed by Ms. Smith was not sufficiently similar because
12 Ms. Smith did not witness Ismael inserting the pencil directly into his brother's anus.

13 Second, the Court stated Ms. Smith's observation of irritation to Maximo's anus
14 (discovered at the same time she observed Ismael approaching Maximo's butt with a pencil)
15 was not sufficiently similar to Ms. Serna's observation that Maximo's anus was irritated and
16 that he would recoil and pull away during diaper changes, which ultimately generated Ms.
17 Serna's concern that Ismael was sexually abusing his brother.

18 Third, the Court determined that Ismael's poking of Micah on the butt was not
19 sufficiently similar to Ismael's inserting objects into Maximo's anus and could be innocuous
20 play.

21 The Court's determinations that Ismael approaching his brother's butt with a pencil is
22 dissimilar to the behavior discovered by Ms. Serna (i.e. Ismael inserting objects, including a
23 pencil, into his brother's anus), that the irritation to Maximo's anus (observed by Ms. Smith in
24 conjunction with the pencil incident) was dissimilar to the same irritation observed by Ms.
25 Serna, and the interaction between Ismael and Micah (observed on the same weekend as the
26 pencil incident) might have been innocuous play invades the fact-finding province of the jury.

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28 ¹ The People maintain that the sexual abuse of the children started at the beginning of the
school year in late August or early September of 2018.

1 It is not the Court's role to interpret Ismael's intent or state of mind at any time, including
2 these prior acts. That is question solely to be determined by the jury. In *Estate of*
3 *Horman* (1968) 265 Cal.App.2d 796, 808-809, the Court stated:

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5 A party is entitled to have received in evidence and considered by the court, before
6 findings are made, all competent, relevant and material evidence on any material
7 issue. (*R. J. Cardinal Co. v. Ritchie*, 218 Cal.App.2d 124, 146-147,
8 *Foster v. Keating*, 120 Cal.App.2d 435, 451; *Bole v. Bole*, 76 Cal.App.2d 344,
9 345-346.) While it is within the sound discretion of the trial court to define the
10 issues and direct the order of proof, the court may not act so as to preclude a party
11 from adducing competent, material and relevant evidence which tends to prove or
12 disprove any material issues. (*Foster v. Keating, supra*; *Everts v. Matteson*, 21
13 Cal.2d 437, 450; *Lawless v. Calaway*, 24 Cal.2d 81, 91; *Pastene v. Pardini*, 135
14 Cal. 431, 432-433.)

15 The Court did not properly evaluate the relevance of Essence Smith's testimony. It is
16 relevant for the reasons set forth herein. As for prejudice, the Court did not specify what the
17 evidence would prejudice. The only asserted fact which this evidence could prejudice is the
18 People's proffered theory that Ismael engages in such conduct as a result of his interactions
19 with Mr. Martinez. As to the assertion of undue consumption of time, the evidence can be
20 presented with one witness – Essence Smith.

21 The defense maintains that:

- 22 1. Ismael had knowledge of and engaged in sexual conduct before he ever met Mr.
23 Martinez. This is confirmed by Essence Smith.
- 24 2. Ismael's conduct prior to encountering Ms. Martinez is similar to the allegations
25 against Mr. Martinez and was not innocuous. This is a jury determination;
- 26 3. Multiple witnesses confirm that Ismael was sexually assaulting his little brother. Ms.
27 Serna claims he confessed to such conduct – including inserting a pencil in his
28 brother's anus;
4. Essence Smith's testimony is directly relevant to Ms. Serna's credibility. Ms. Serna
testified that the call from Ms. Smith was her, Ms. Serna', first inkling that there had
been sexual abuse against Maximo and Ismael. Once Ismael confirmed he was

1 abusing his brother, she began questioning Ismael about whether he'd been sexually
2 molested.

3 The People plan to argue that Ismael assaulted his little brother by, among other things,
4 inserting a pencil in his brother's anus, as a result of the alleged abuse by Mr. Martinez. There
5 is competent, admissible evidence to the contrary. Exclusion of the evidence proffered and
6 described herein warrants a new trial and deprives Mr. Martinez of his constitutional right to
7 cross-examine the witnesses against him. (*See Chapman v. California*, 386 U.S. 18, 24
8 (1967).) Further, by excluding this evidence and allowing the People to so argue, the People
9 are presenting a fiction to the jury which this Court is duty bound to avoid.

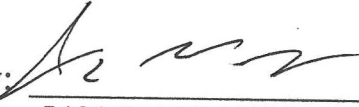
10 The net effect is to "hobble" defendant's ability to challenge a crucial prosecution
11 theory and to present "independent, objective and admissible evidence" of the fact that Ismael
12 engaged in sexual conduct and/or assaults prior to encountering Mr. Martinez. (*See People v.*
13 *Filson* (1994) 22 Cal.App.4th 1841, 1852, *disapproved on another ground in People v.*
14 *Martinez* (1995) 11 Cal.4th 434, 448, 452.)

15 Exclusion of evidence concerning Ismael's prior sexual conduct and the timing of such
16 warrants a new trial. (*People v. Stewart* (2020) 55 Cal.App.5th 755.) While a trial court has
17 discretion to balance between the probative value of evidence and the danger of prejudice,
18 confusion and undue consumption of time, "[t]his balance is particularly delicate and critical
19 where what is at stake is a criminal defendant's liberty." [Citation.] Evidence Code section 352
20 must bow to the due process right of a defendant to a fair trial and his right to present all
21 relevant evidence of significant probative value to his defense." (*People v. Burrell-Hart* (1987)
22 192 Cal.App.3d 593, 599.)

23 The jury is entitled to this evidence when determining whether Ismael engaged in
24 sexual conduct, which the People and Ms. Serna attribute to Mr. Martinez, prior to Ismael ever
25 encountering Mr. Martinez and the credibility of Ms. Serna's testimony as to when she became
26 aware of such conduct.

1 DATED: October 2, 2023

THE LAW OFFICE OF IAN WALLACH, PC

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3 By: 

4 IAN WALLACH
5 Attorney for Defendant
6 PEDRO MARTINEZ

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

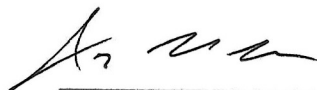
I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 5777 W. Century Blvd., Ste. 750, Los Angeles, CA 90045.

On October 2, 2023, I served the following document(s) described as: **DEFENDANT PEDRO MARTINEZ'S MOTION NO. 2 TO RECONSIDER THIS COURT'S SEPTEMBER 29, 2023 RULING** in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Deena Pribble, Esq.
Email: dpribble@sbcda.org

- 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 2, 2023 at Joshua Tree, California.



IAN WALLACH