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Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF CALIFORNIA,)	Case No.
)	
Plaintiff,)	MOTION IN LIMINE
)	EXCLUDING EXPERT WITNESS
vs.)	OPINION THAT CHILD IS A
)	VICTIM OF SEXUAL MOLEST,
)	BASED ON "PREDICTORS" OR
)	FOR DISPELLING MYTHS
Defendant.)	
)	Date:
)	Time:
)	Dept:

The defense moves for a protective order that:

1. The prosecution not be allowed to introduce expert testimony that the minor is a victim of sexual molestation based on "predictors."
2. (A) The prosecution be required to specifically identify any alleged "myths" it intends to dispel by introducing expert testimony.
(B) The prosecution be limited to introducing evidence of victims as a class to dispel myths.

I. SYNDROME AND OTHER PSYCHOLOGICAL THEORIES OR MODELS DESIGNED FOR THE TREATMENT OF CHILD MOLEST VICTIMS ARE NOT ADMISSIBLE AS PREDICTORS, SINCE THEY PRESUME THE EXISTENCE OF WHAT THEY CLAIM TO HAVE DISCOVERED.

A - RAPE TRAUMA SYNDROME

In **People vs. Bledsoe** (1984) 36 Cal.3d 236, the California Supreme Court held that evidence that a victim was suffering from Rape Crisis Trauma Syndrome was not admissible for the purpose of proving that a rape had occurred. The prosecution called a rape counselor who had treated the victim after the incident and who the prosecution indicated would testify that the victim was suffering from "rape trauma syndrome". The trial court found the evidence relevant on the issue of whether a rape occurred and determined that a showing of the victim's continuing condition and strife was further evidence of the fact that a rape occurred as opposed to evidence that a rape did not occur. (**Id.**, 36 Cal.3d 241.) The counselor testified at length that 99.9% of the rape victims fall into the "rape trauma syndrome", and to its various aspects. Ultimately she expressed an opinion based on her experience and past training in interviews and her contact with the victim, that the victim was suffering from rape trauma syndrome. (**Id.**, 36 Cal.3d 243-244.)

The Supreme Court stated:

"...rape trauma syndrome was not devised to determine the truth or accuracy of a particular past event--that is, whether in fact, a rape in the legal sense occurred-but rather was developed by professional rape counselors as a

therapeutic tool to help identify, predict and treat emotional problems experienced by the counselors clients." (**Id.**, 36 Cal.3d 248 to 250, emphasis added.)

The court went on to note that rape trauma counselors, by their training, are particularly required not to judge the credibility of their clients and not to pass judgment. Thus, "as a rule, rape counselors do not probe inconsistencies in their client's descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients renditions." (**Id.**, 36 Cal.3d 250.)

The court squarely held that expert testimony that a complaining witness suffers from rape trauma syndrome is not admissible to prove the witness was raped "[b]ecause the literature does not even purport to claim that the syndrome is a scientifically reliable means of proving that a rape occurred." (**Id.**, 36 Cal.3d 251.)

B - CHILD MOLEST SYNDROME

In **In re Sara M.** (1987) 194 Cal.App.3d 585, the Court of Appeal held that evidence that a victim was suffering from Child Molest Syndrome was not admissible for the purpose of proving that a child molest had occurred.

The trial court allowed two expert witnesses to testify to the "Child Molest Syndrome" but did not allow the experts to testify to his opinion that a molest had in fact occurred.

According to one psychologist who had treated Sara M., the common characteristics of child molest victims included:

1. Consistency in recounting the molestation to different people;

2. Denial the molestation occurred;
3. Sexual knowledge beyond that usually associated with the victim's age;
4. The ability to recall the molestation over an extended period of time;
5. A feeling of loss of control over their life. (*Id.*, at p. 589.) Another psychologist who treated Sara elaborated on the symptoms of child molest syndrome:
6. They often are angry or depressed;
7. They often exhibit a variety of behavioral problems;
8. They suffer from sleep disturbances or eating disorders;
9. They show a false sense of maturity;
10. They may trust too much or too little;
11. They are fearful of the purported molester;
12. They consistently name one person as the molester, and;
13. Details of the incident may be revealed only over time. (*Id.*, at p. 589.)

In **In re Sara M.**, supra, the court held that the Child Molest Syndrome's primary purpose at trial in that case was as evidence that the molest did in fact take place and its admission was therefore reversible error. (*Id.*, at p. 592, 595.)

Similarly, in **People vs. Bowker** (1988) 203 Cal.App.3d 385, the court determined that general testimony regarding Child Sexual Abuse Accommodation Syndrome ("CSAAS") was not permitted to be used "in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude the child was sexually abused." (*Id.*, at p. 393.) Leaving such an application to the jurors was dangerous because of their lack of training in the perils of

drawing "predictive conclusions." (**Id.**, at p. 393.) Thus, general, educational testimony on CSAAS is inadmissible even if there is no reference to the victim because it "has the potential of being used by an untrained jury as a construct within which to pigeon-hole the facts of the case and draw the conclusion that the child must have been molested." (**People vs. Bothuel** (1988) 205 Cal.App.3d 581, 587.)

C - WHY SYNDROMES AND PREDICTORS ARE INADMISSIBLE.

The fatal defect in the Child Molest Syndrome was the same defect in the Rape Trauma Syndrome: child molestation was presumed!

"Psychologists testified the syndrome is neither included in the DSM nor recognized by the American Psychological Association or any other professional organization. They described the syndrome as being in the beginning stages of development and acceptance. No treatises on the syndrome were introduced into evidence. The psychologists further testified they did not know how the symptoms of the syndrome were developed; they knew of no studies comparing the reactions of children known to be molested with those who claimed to be molested or with those who were not molested. A basic defect of the syndrome is thus apparent: the syndrome was developed on the assumption the children studied were in fact molested. Moreover, while no one at the hearing testified directly concerning the reason for the syndrome's development, it appears to be a tool for therapy and treatment, much like the rape trauma syndrome. Consequently, the same problem discussed in Bledsoe may be present in the case of the child molest syndrome: if it was not developed as a truth-seeking procedure but rather as a therapeutic aid, it cannot be used for a different purpose, i.e., to prove a molestation occurred." **In re Sara M.** (1987) 194 Cal.App.3d 585, 594, 239 Cal.Rptr. 605-611.

II.

**AN EXPERT WITNESS MAY DISPEL MYTHS AS TO MOLEST VICTIMS
AS A CLASS, BUT MAY NOT RENDER A PERSONAL OPINION ON
A SPECIFIC COMPLAINING WITNESS OR DEFENDANT**

In **People vs. Roscoe** (1985) 168 Cal.App.3d 1093, 215 Cal.Rptr. 45, the court established the rule on the use of experts to rehabilitate alleged victims. The court stated:

"The Bledsoe court would permit the expert to tell the jury about 'recent findings of professional research on the subject of a victim's reaction to sexual assault' to rehabilitate the complaining witness. (**People vs. Bledsoe**, supra, 36 Cal.3d at p. 247, 203 Cal.Rptr. 450, 681 P.2d 291.) The language suggests-although it does not explicitly require-that the opinion testimony must be based upon the literature in the field and the general professional experience of the witness rather than upon an analysis and diagnosis based upon a review and evaluation of the facts in the case at hand. Thus, for example, a victim whose credibility is attacked for initially denying that he had been molested could be rehabilitated by expert testimony that such denials are more likely than not in molestation cases. The testimony would not be that this particular child was a victim of molestation, causing him to react in a certain way, but rather that as a class victims of molestation typically make poor witnesses, and are reluctant to disclose or discuss the sordid episodes.

Since the language used by the court does not clearly proscribe testimony in support of credibility based upon a diagnosis of the victim, we must consider Bledsoe further.

Credibility questions arise whenever the defendant denies the victim's story, explicitly or implicitly suggesting misrecollection or fabrication. If, in every such case, the jury could be informed that a doctor had diagnosed the complainant, based upon the specific facts in the case, as a child molest victim (or rape victim, or whatever), then the protection against misuse of psychologists' testimony erected by Bledsoe would be largely dismantled.

Where the expert refers to specific events, people and

personalities and bases his opinion as to credibility on his diagnosis of this witness, then the conclusion that the witness is credible rests upon the premise that the diagnosis is accurate, and that in fact molestation had occurred. The jury in effect is being asked to believe the diagnosis, to agree that the doctor's analysis is correct and that the defendant is guilty. Such a result would subvert the sound rule adopted by a unanimous Supreme Court in Bledsoe. It follows, therefore, that the expert testimony authorized by Bledsoe to permit rehabilitation of a complainant's credibility is limited to discussion of victims as a class, supported by references to literature and experience (such as an expert normally relies upon) and does not extend to discussion and diagnosis of the witness in the case at hand." (*Id.*, at pp. 1099-1100, 215.)

The court also held that the doctor/expert should not be allowed to discuss the facts of this particular case under Evidence Code Section 352.

"While we believe that this reading of Bledsoe is proper, we find as an independent ground of decision that all of the above considerations required the trial court to exclude this testimony under Evidence Code Section 352, even though this was not specifically urged in support of defendant's various objections. It would be possible for an expert witness to tell the jury about various studies showing typical responses of victims in molest situations without relying on a detailed analysis of the facts in the case at hand. All of the 'probative value' that the prosecution was entitled to could have been preserved by so limiting the doctor's testimony, without creating any 'substantial danger of undue prejudice'. (Evid. Code Section 352). The doctor's discussions of specific facts of this case in support of his conclusion that the complainant was indeed a victim of molestation by the defendant had all the force of a district attorney's closing argument, and even greater impact since it was delivered in clinical terms by a 'doctor' purporting to make an objective scientific analysis." (*Id.*, at p. 1100.)

Also see **People vs. Bowker**, *supra*, at pp. 393-394; **People vs. Bothuel**, *supra*, at pp. 587-588; **People vs. Bergschneider** (1989) 211 Cal.App.3d 144, 158-159; **People vs. Gilbert** (1992) 5 Cal.App.4th 1372, 1384; **People vs. Humphrey** (1996) 13 Cal.4th 1095-1096.)

The Correct Procedure for Dispelling Myths:

In **People vs. Gray** (1986) 187 Cal.App.3d 213, 213, the court allowed an expert witness to testify regarding the child abuse accommodation syndrome. It was made clear to the jury that this was not a diagnosis or a test for child abuse. The expert did not form any opinions that the child had been molested. The expert confined his remarks to behavioral traits of child abuse victims as a class nor did he rely on a detailed analysis of the facts in the case at hand. The expert's testimony was allowed to explain that late reporting is not unusual and disclosure of details over time is not unusual.

This view was reiterated in **People vs. Harlan** (1990) 222 Cal.App.3d 439 wherein the court held that it was permissible to use expert testimony to dispel myths about victims as a class. The myth must be identified, the testimony must be limited to dispel this myth, and the jury must be admonished that the expert testimony is not intended and should not be used to determine whether the victim's molestation claim is true. (See also **People vs. Stark** (1989) 213 Cal.App.3d 107, 116-117, **People vs. Bowker**, *supra*, at pp. 393-394.)

III. PROFILE EVIDENCE IS INADMISSIBLE IF THE DEFENDANT DOES NOT PUT HIS OR THE VICTIM'S CHARACTER IN ISSUE.

The admissibility of "profile" evidence was considered in **People vs. Stoll**, *supra*:

"The Attorney General argues that, under Bledsoe, supra, 36 Cal.3d 236, 203 Cal.Rptr. 450, 681 P.2d 291, use of 'syndrome' or 'profile' terminology by a mental health professional makes the diagnosis seem 'scientific' to a jury, and thus invokes Kelly/Frye. We adopted no such per se rule in Bledsoe, despite its reference to concerns raised in out-of-state cases. We are not persuaded that juries are incapable of evaluating properly presented references to psychological 'profiles' and 'syndromes'." (*Id.*, at p. 1161, fn. 22.)

People vs. Harlan (1990) 222 Cal.App.3d 439, 448-449 quotes **Stoll** with approval on the subject of allowing profiles although that case did not contain a profile issue. In **People vs. Ruiz** (1990) 222 Cal.App.3d 1241, the court found based upon **Stoll**, that profile evidence of a pedophile may be admissible but found the particular profile evidence proffered in that case to be inadmissible because of the defendant's failure to demonstrate the reliability of the material on which his expert based his opinion. (*Id.*, at pp. 1245-1246.)

However, as stated above, **People vs. Stoll**, supra, 49 Cal.3d at p. 1159, held that the psychological evaluations or personality evaluations was CHARACTER EVIDENCE! Also see **People vs. Ruiz**, supra, wherein the court held that these opinions were character evidence:

"It is now settled that psychological opinions based upon personal examination and analysis of accepted psychological tests, such as the MMPI and MCMI, may be admitted as character evidence...." (*Id.*, at p. 1243.)

The defendant's and the victim's character can only be placed in evidence by the defendant. (Evidence Code sections 1101, 1102, 1103.)

**STUDIES ON RELIABILITY OF PROFILES REQUIRED
BEFORE ADMISSIBLE AS "PREDICTORS."**

In **People vs. Ruiz**, supra, the court held that based upon **People vs. Stoll**, supra, that profile evidence of a pedophile may be admissible. However, since the profile had not been standardized against a population group of pedophile it was not admissible. The court stated:

"Still, it is not enough to determine that certain material--here, profile evidence--might be admissible. Evidence Code section 801, subdivision (b) requires that the matter underlying an expert's opinion be of 'a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.' Thus there must be some showing that the material on which the expert bases his or her opinion--here the profiles of the primary types of pedophile--is reliable.

As discussed, supra, there was no such showing in the present case. There was no evidence that the scientific community had developed any standard profile of a pedophile. Indeed, Dr. Berg explained that the tests he used were not designed to elicit that information and had not been standardized against a population group of pedophile. Dr. Berg said that the disorder usually manifests itself in persons who have become fixated on children or on persons who have experienced some recent stress, but there was no showing that Dr. Berg was stating anything other than his personal opinion, nor was there any showing that his personal opinion in such matters was reliable.

We conclude that in this case, at least, the evidence properly was excluded." (Id., at pp. 1245-1246.)

**AN EXPERT'S PERSONAL OPINION ABOUT A DEFENDANT
IS INADMISSIBLE.**

Other cases hold that it is error for an expert to express a personal expert opinion that the defendant is what he is accused of being. In **People vs. McDonald** (1984) 37 Cal.3d 351, 208 Cal.Rptr. 236, the court ruled that the expert should have been permitted to testify about psychological factors affecting the reliability of eyewitness identification. It did not hold that the expert could give an opinion on the reliability of particular eyewitness

testimony. (Also see **People vs. Page** (1991) 2 Cal.App.4th 161; **People vs. Torres** (1995) 33 Cal.App.4th 37, 46-48 [expert cannot express opinion on the guilt or innocence of the accused or whether or not the conduct in question constituted a crime].) In **People vs. Brown** (1981) 116 Cal.App.3d 820, 172 Cal.Rptr. 221, the court found error where a police officer testified as to the definition of a heroin "runner" and then went further to render an opinion that the defendant in the case was in fact a runner. The court held that the jury was as qualified as the witness to determine whether the defendant worked as a runner. Finally, in **In re Cheryl H.** (1984) 153 Cal.App.3d 1098, 1118-1125, the court held that the opinion of a psychiatrist who had examined a suspected victim of sexual molest as to the identity of the defendant as the abuser was inadmissible.

Dated:

Respectfully submitted,

Attorney for Defendant