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Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF	)	Case No.
CALIFORNIA,	)	
	)	
Plaintiff,	)	DEFENDANT'S CHARACTER FOR
	)	NON-DEVIANT SEXUAL BEHAVIOR
vs.	)	IS ADMISSIBLE
	)	
	)	
	)	Date:
Defendant.	)	Time:
_____	)	Dept:

**ISSUE**

May the accused introduce expert and lay opinion evidence of his character for nondeviant sexual behavior?

**EVIDENCE OF THE ACCUSED'S  
CHARACTER FOR NON DEVIANT SEXUAL  
BEHAVIOR IS ADMISSIBLE**

In People v. Stoll(1989) 49 C3d 1136, 265 Cal Rptr 111 the Supreme Court ruled that a defendant could present expert opinion of good character to show non-commission of a crime. The court found that the legislature implicitly endorsed lack of deviance as a relevant character trait in a lewd and lascivious conduct case.

The absence of a "disposition" tends to prove that defendant has not committed the crime.

Criminal defendants are authorized to use character evidence, including expert opinion, to prove conduct in conformity with character as allowed by Evidence Code section 1102. People v. Stoll, supra at 1159. This is an exception to the general rule

stated by Evidence Code section 1101 which prohibits use of evidence of a person's character (by opinion, reputation or specific instances) to prove conduct on a specified occasion.

Defendants can offer lack of deviance as circumstantial evidence that a defendant is unlikely to have committed charged acts of molestation. Ibid. Stoll understood that the testimony is offered by the defendant to suggest that he did not commit the requisite act.

That opinion may be based on matter perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of the type of matter the reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. Evidence Code section 801.

Stoll also recognizes that no precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgements about his behavior. The court's have permitted an expert to rely on standardized psychological tests to reach an opinion on a mental state at the time acts were committed.

Expert testimony of the defendant's personality has been admitted to prove that defendant was not likely to commit certain acts in the future.

Kelly/Frye standards have never been applied by California courts to expert medical testimony and the subject matter is as esoteric as the reconstitution of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association. People v. Stoll, supra at

1157.

Expert opinion that the defendant shows no obvious psychological or sexual problem is circumstantial evidence which bears on whether he committed sexual acts upon children and is admissible character evidence on his behalf. Id., at 1162.

**THE ACCUSED CAN INTRODUCE  
LAY OPINION CHARACTER EVIDENCE  
OF HIS NON DEVIANT SEXUAL BEHAVIOR**

Lay opinion evidence based on personal observation of defendant's conduct with children is a proper subject of lay opinion testimony and is relevant to a charge of child molest where the opinion is based on long term observation of defendant's consistently normal behavior around children. People v. Mc Alpin (1991) 53 C. 3d 1289, 283 Cal. Rptr. 382. Where the opinion goes beyond facts he personally observed it is inadmissible.

Testimony of lay witnesses, not based solely on specific instances in which the defendant could have molested children, but based on long term personal observation of the defendant's consistently normal behavior with children is admissible. Ibid.

Testimony that the defendant does not have a reputation for being sexually attracted to young girls is relevant and admissible character evidence in a charge of child molest. Ibid. The rationale behind this is that evidence that the defendant does not have a bad reputation for relevant character trait (sexual deviancy) is admissible as tending to show he has a good reputation for that trait. Evidence Code section 1102. Peo. v. Mc Alpin, supra. Reputation evidence is the estimation in which an individual is held. It is the character imputed to an individual rather than what is actually known of him by the witness or others.

Such testimony does not need to be based on personal observation of the witness. Ibid.

Testimony of character witnesses that the defendant has a reputation as a person of high moral sexual character is relevant and admissible reputation opinion evidence. Ibid.

The evidence code provides for the admissibility of lay opinion.

Evidence Code Section 800:

"If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:

- (a) Rationally based on the perception of the witness;
- and
- (b) Helpful to a clear understanding of his testimony."

In the case of **Holland vs. Zollner** (1894) 102 C 633, 638, 36 P 930, the court first established the use of lay opinion to describe various mental and moral aspects of humanity. These included temper, fear, anger and excitement.

"Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving to him the ultimate fact, and which for want of a more accurate expression, we call opinion." **Holland vs. Zollner**, supra, 638.

### **CONCLUSION**

Expert opinion that the defendant does not show signs of a character trait for sexual deviancy is admissible. Lay witnesses who are familiar with the parties can testify as to their personal opinion as to the defendant's character for sexual non-deviancy. Lay witnesses can testify as to the defendant's reputation for non-deviant sexual character.

Dated:

Respectfully submitted,

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Attorney for Defendant