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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. LEONEL CONTRERAS, et al Defendant and Appellant.	)	No. _____

Following the Unpublished Decision of the Court of Appeal of the State of California, Fourth Appellate District, Division One Numbered D063428, Affirming a Judgment of Conviction

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PETITION FOR REVIEW TO EXHAUST STATE REMEDIES
(Rule 8.508)

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By Appointment of the Court of Appeal
pursuant to the Appellate Defenders, Inc.,
Independent Case Program

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TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA: Appellant Leonel Contreras respectfully seeks review in the above-captioned matter pursuant to rule 8.500 of the California Rules of Court from the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One, filed on January 14, 2014 which remanded for resentencing but otherwise

affirmed the judgment. A copy of the opinion is attached to this petition. This petition is under rule 8.508 of the California Rules of Court.

NECESSITY FOR REVIEW

This petition is presented under rule 8.508 of the California Rules of Court. It presents no grounds for review under rule 8.500(b) and is filed solely to exhaust state remedies for purposes of federal habeas corpus.

STATEMENT OF THE CASE

On October 1, 2012, appellant Leonel Contreras and a codefendant, William Rodriguez, were charged in case number SCD236438 with the following felony offenses:

> Count 1 – Conspiracy to commit kidnapping (Pen. Code, § 207, subd. (a)) and/or forcible rape (Pen. Code, §261, subd. (a)(2)), in violation of Penal Code[1] section 182, subdivision (a)(1);
>
> Counts 2 and 14 – Kidnapping, in violation of section 207, subdivision (a);

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[1] Unless otherwise noted, subsequent citations to statutes will be to the California Penal Code.

Counts 3, 5, 7, 8, 15, 17, and 20– Forcible rape, in violation of section 261, subdivision (a)(2);

Count 4 – Rape by foreign object, in violation of section 289, subdivision (a)(1)(A);

Count 5 – Forcible rape, in violation of section 261, subdivision (a)(2);

Counts 6, 9, 11-13, 18, 19, 21 – Forcible oral copulation, in violation of section 288a, subdivision (c)(2)(A); and

Counts 10 and 16 – Sodomy by use of force, in violation of section 286, subdivision (c)(2)(A).

(2 C.T. 431-464.)

Counts 2 through 13 named Jane Doe 1 as the victim, while counts 14 through 21 named Jane Doe 2 as the victim. Numerous allegations were attached to the sexual assault charges, including allegations related to the "one strike law," section 667.61, subdivisions (b)(c)(e), that the crimes were committed during a kidnapping, multiple victims, and use of deadly weapon, as well as allegations that appellant personally used a knife during the assaults. (2 C.T. 431-464.)

On November 2, 2012, a jury returned guilty verdicts on all counts, with true findings on all allegations except for multiple victim allegations as to counts 4 and 5. (4 C.T. 1271-1279, 1280-1317.)

On December 12, 2012, Mr. Contreras was sentenced to consecutive terms of 25 years to life on counts 3 and 15, plus 4 years each for the use of a weapon pursuant to section 12022.3,

subdivision (a). Sentence on the remaining counts were imposed concurrent to counts 3 and 15. Appellant's aggregate term of imprisonment is 50 years to life plus 8 years. (4 C.T. 969-972, 1326-1331.)

In case number SCD236438, the Court of Appeal remanded for resentencing, but otherwise affirmed the judgments as to both defendants. (Slip Op. attached.)

STATEMENT OF FACTS

Appellant adopts the Statement of the Facts found in *People v. Contreras*, Slip Opinion 1/14/2015, pp. 4-12 (Attached). Additional and clarifying facts are set forth below with citations to the record.

ARGUMENT

I

APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND THE RIGHT TO PRESENT A DEFENSE WITHIN THE MEANING OF THE SIXTH AND FOURTEENTH AMENDMENTS BY THE TRIAL COURT'S IMPROPER EXCLUSION OF EVIDENCE

A. The Defendant Has A Fundamental Right To Present Evidence Upon Which A Reasonable Doubt May Arise

The United States Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [106 S.Ct. 2142, 90 L.Ed.2d 636].) This constitutional right stems from the right of Due Process in Fourteenth Amendment, and from the Compulsory Process clause of the Sixth Amendment. (*Ibid;* see also, *Chambers v. Mississippi* (1973) 410 U.S. 284, 294 [93 S.Ct. 1038, 35 L.Ed.2d 297]; *Washington v. Texas* (1967) 388 U.S. 14, 23 [87 S.Ct. 1920, 18 L.Ed.2d 1019].) "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Taylor v. Illinois* (1988) 484 U.S. 400, 408 [108 S.Ct. 646, 98 L.Ed.2d 798].) An accused's right to present his own witnesses to establish a defense is a fundamental element of due process of the law. (*Washington v. Texas, supra,* 388 U.S. at p. 19.)

This necessarily includes the right to present evidence that calls into doubt the reliability of the evidence on which the state is relying (*Davis v. Alaska,* (1974) 415 U.S. 308 [94 S.Ct. 1105, 39 L.Ed.2d 347].) These rights are violated by the exclusion of evidence that, if admitted, would have created "a reasonable doubt that did not exist without the evidence." (*Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 872, citing, *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 868 [102 S.Ct. 3440, 73 L.Ed.2d 1193].)

Where the state has interfered with the defendant's right to defend against the charges, a subsequent conviction cannot stand. (*Davis v. Alaska, supra; Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297]; *Washington v. Texas, supra,* 388 U.S. 14 .)

A criminal defendant also has a right to introduce relevant evidence under Article I, section 28(d) of the California Constitution. This court has expressly held a criminal defendant has the right to present relevant evidence that a third party committed the crime of which the defendant is accused. (*People v. Hall* (1986) 41 Cal.3d 826, 833; *People v. Cudjo* (1993) 6 Cal.4th 585, 604-610.) Such evidence may not be excluded under Evidence Code section 352 if it is capable of raising even a reasonable doubt of the defendant's guilt. (*Ibid.*)

In this case, Mr. Contreras sought to present the testimony of two experts who conducted extensive interviews and psychological tests and found that he did not fit the profile of an individual

inclined to sexual deviancy. Appellant also was going to present the testimony of five lay witnesses who would testify to his character and reputation for being respectful toward females and not aggressive sexually. The court excluded all evidence of psychological and character-type testimony that could have raised a reasonable doubt as to appellant's guilt.

Finally, appellant was prepared to present expert testimony to impeach the testimony of three prosecution witnesses who had conducted initial SART and follow up examinations, and question their conclusions about the use of force. The court excluded the doctor's testimony as irrelevant, cumulative, and time consuming.

The Court of Appeal rejected each of appellant's claims of error. With this petition, appellant urges this court to consider whether the trial court's exclusion of much of the defense evidence in this case deprived appellant of his ability to present a meaningful defense to the charges in violation of his state and federal constitutional rights.

B. The Trial Court Erroneously Excluded Strong Psychological And Character Evidence Showing That Appellant Did Not Fit The Profile Of A Person Who Would Commit The Charged Offenses

1. Procedural and Factual Background

Appellant sought, pursuant to Evidence Code section 1102, to present the testimony of two psychiatric experts who were prepared

to demonstrate that appellant did not demonstrate the psychological profile or character traits of a young man who would commit crimes of sexual violence. (3 R.T. 225-227.) The trial court granted the prosecution's motion to exclude the experts' testimony, concluding the evidence was not relevant, and would be more time consuming then probative. (3 R.T. 230-233, 241-244, 261.) The court also excluded the testimony of five lay witnesses who would have testified that appellant was not the type of person who would commit the charged offenses. (2 C.T. 465-532; 3 R.T. 357-361.)

On appeal, the Court of Appeal rejected appellant's arguments, and found no error in the court's exclusion of the proffered character evidence. (Slip Op. at pp. 24-28.)

2. Appellant was entitled to present psychological evidence showing his lack of deviancy

In *People v. Stoll* (1989) 49 Cal.3d 1136, this court held that a defendant has the right to present evidence of a lack of deviancy as circumstantial evidence that the defendant is unlikely to have committed the charged acts of molestation. (*Id.* at pp. 1152-1155.) And in *People v. Jones* (1954) 42 Cal.2d 219, 224-225 this court found prejudicial error in the exclusion of expert testimony that a defendant was not a "sexual deviate," reasoning the interrogator's expert analysis was character evidence allowing an inference the defendant did not sexually abuse a child. (*Id.* at pp. 224-226; see

also, *People v. McAlpin* (1991) 53 Cal.3d 1289, 1306, 1309 [holding that layperson opinion of a defendant's lack of propensity for deviant behavior is admissible].)

Relevant expert testimony pertaining to psychological information, outside the common knowledge of jurors, is admissible to aid the jury in understanding and evaluating the facts and circumstances presented. (See, *People v. Bowker* (1988) 203 Cal.App.3d 385, 390-394 [expert testimony on the common reactions of child molestation victims is admissible to educate the jury about the emotional antecedents of abused children, and what may be considered inconsistent with his or her testimony claiming molestation]; *People v. Bledsoe* (1984) 36 Cal.3d 236, 248-251 [expert testimony pertaining to rape trauma syndrome is admissible to disabuse the jury of misconceptions of rape and rape victim, as to allow the jury to evaluate the evidence free of the constraints of popular myths]; *People v. McAlpin, supra,* 53 Cal.3d 1289, 1300-1302, [expert testimony of a police officer regarding the behavior of parents of abused children was admissible to dispel jurors intuition that a parent would promptly report known child molestation]; *People v. Brown* (2004) 33 Cal.4th 892 [it was not error to admit expert testimony under Evidence Code section 801 concerning the behaviors of victims of domestic violence to assist the jury in understanding the tendency of domestic violence victims to recant

or minimize the description of violence]; *People v. Humphrey* (1996) 13 Cal.4th 1073 [as pertaining to self-defense, expert testimony concerning "battered women's syndrome" is relevant to educate the jury on both the reasonableness and existence of an accused's belief the killing was necessary]; *People v. MacDonald* (1984) 37 Cal.3d 351 [expert testimony regarding psychological factors affecting the accuracy of witness identification is admissible to assist the trier of fact].

Such psychological expert testimony does not bear on the ultimate fact to be decided by the jury, but rather provides a social and psychological context in which the jury can understand and evaluate the facts that lead to its ultimate decision. The admissibility of the expert testimony is not dependent on proof of a recognized syndrome. (*People v. Brown, supra,* 33 Cal.4th 892, 906, citing, *People v. McAlpin, supra,* 53 Cal.3d 1289.)

Indeed, the *Stoll*-type evidence offered in this case was a keystone element because it provided objective support for appellant's assertions of innocence. Such evidence is particularly necessary when other circumstances point to the client's innocence, such as in this case where there was no previous history of sexual offense, no independent evidence pointing to sexual deviancy, no physical evidence connecting appellant to the scene, and weak eyewitness identification, and a questionable confession.

3. Appellant was entitled to present evidence of his good character that was inconsistent with the charged offenses

In addition to expert testimony about appellant's character, the law expressly allowed appellant to present the testimony of lay witnesses who could attest that he was not the type of person who would commit the charged offenses. Evidence Code section 1102 provides, in part: "In a criminal action, evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character." The 1965 comment to section 1102 states: "evidence of the character of the defendant or the victim--though weak--may be enough to raise a reasonable doubt in the mind of the trier of fact concerning the defendant's guilt. And, since his life or liberty is at stake, the defendant should not be deprived of the right to introduce evidence even of such slight probative value."

Section 1102 creates a unique privilege of a criminal defendant to introduce evidence of good character "in the form of an opinion or evidence of his reputation" as a means of raising a doubt as to guilt. The defendant may present the evidence of a character trait if it is offered to "prove his or her conduct in conformity with that trait, and that trait is relevant to the issue of the defendant's guilt or

innocence of the crime for which the defendant is being prosecuted." (2 Jefferson, Cal. Evidence Benchbook (Cont.Ed.Bar 4th Ed. 2012) Criminal Defendant's Character Trait To Prove Conduct § 35.12, p. 824.)

The prosecution argued that appellant's reputation for nonviolence and respectfulness toward women was irrelevant in a rape case. (3 R.T. 229-230.) This could not be further from the truth. Rape is both a crime of violence and a crime of sexual deviancy. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1157 [no requirement that mental disorder be specifically defined in the DSM-IV]; *People v. Williams* (2003) 31 Cal.4th 757, 761 [SVP commitment based on paraphila NOS]; *People v. Burris* (2002) 102 Cal.App.4th 1096, 1110 [SVP commitment based on paraphilia involving rape and antisocial personality disorder]; *People v. Carter* (2005) 36 Cal.4th 1215, 1271; *People v. Malone* (1988) 47 Cal.3d 1, 47; *People v. Leonard* (2000) 78 Cal.App.4th 776, 782.)

The testimony offered by appellant in this case was directly relevant to the question to be resolved by the jury: Was appellant someone who was likely to commit the charged offenses? The psychological and character evidence would have raised a reasonable doubt.

C. The Trial Court Erroneously Excluded Testimony Of A Defense Expert That Would Have Raised A Reasonable Doubt As To The Use Of Force

1. Procedural and Factual Background

Three different prosecution witnesses testified about the existence and extent of injuries suffered by the two Jane Does, describing significant traumatic injuries that the witnesses claimed were most consistent with nonconsensual forceful acts, and definitely consistent with the victims' accounting. (5 R.T. 742-744, 784-785, 787-788, 794, 797-798, 799-800, 800, 800, 807-808.)

Following the testimony of the prosecution's medical witnesses, defense counsel announced he would be calling a physician expert witness, "to dispute some of the findings and conclusions." (5 R.T. 866-867.) The trial court initially ruled the testimony would be allowed. (5 R.T. 867-872.) With the prosecutor's objection, however, and following a hearing, the court reversed its earlier ruling, saying, " So I'm not going to turn it into a consent case because there is some medical evidence that can be spun to say that maybe there was consent involved. So I'm not going to do that." (13 R.T. 2349.) The court thus excluded testimony of an expert who would have testified the injuries were not as serious as described by prosecution doctors, and that were consistent with consensual or at least non-forcible contact.

The Court of Appeal found the trial court acted within its discretion when it excluded the doctor's testimony. (Slip Op. at pp. 19-21.)

2. The Court Improperly Deprived Appellant Of His Right To Present Evidence Casting Doubt On The Use of Force

The focus by the trial court and Court of Appeal on defense counsel's strategy was entirely improper. The jury may certainly consider alternate theories of reasonable doubt, just as the prosecutor may present alternate theories of guilt. (*People v. Flannel* (1979) 25 Cal.3d 668, 674, superseded by statute on another ground as noted in *In re Christian S.* (1994) 7 Cal.4th 768, 777 [unreasonable self defense acceptable as alternative defense theory]; *People v. Breverman* (1998) 19 Cal.4th 142, 154-155 [sua sponte duty to instruct on lesser included offenses even when directly in conflict with defense trial tactics]; *People v. Valdez* (2013) 55 Cal.4th 82, 153-154 [no unanimity requirement on theory of guilt as long as each juror is convinced defendant guilty beyond a reasonable doubt].)

Moreover, the proffered evidence here was not even fully inconsistent with appellant's defense – if the jury had a reasonable doubt as to the use of force as to any of the charged offenses, appellant could not be convicted of that offense regardless of whether the jury believed he was present or not.

It is well recognized that a properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510, citing Evid. Code, § 801, subd. (a).) An expert opinion may be "based on matter (including his special knowledge, skill, experience, training, and education) 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 a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evidence Code section 801, subd. (b).)

Evidence Code section 801, subdivision (a), requires expert testimony to be "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." According to this court, expert testimony should "be excluded only when it would add *nothing at all to the jury's common fund of information* . . . ." (*People v. MacDonald, supra,* 37 Cal.3d 351, 368, emphasis added; see also, *People v. Stoll, supra,* 49 Cal. 3d 1136, 1153-1154, Emphasis added.)

The excluded expert testimony here clearly falls within the boundaries of Evidence Code section 801. It also was impeachment evidence that appellant had the fundamental right to present. (*People*

v. Trombetta (1985) 173 Cal.App.3d 1093, 1102 ["the fundamental interest at stake is the defendant's right to impeach the evidence against him or, stated more broadly, his right to a fair trial"]; *People v. Marquez* (1992) 1 Cal. 4th 553, 574 [impeachment testimony of defendant's own attorney can't be excluded despite rules against counsel testimony]; *People v. Earp* (1999) 20 Cal. 4th 826, 879 [same].)

The prosecution presented no fewer than three professionals from the hospital to testify about the extent of the girls' injuries and draw conclusions about how those injuries occurred, while appellant was prevented from putting on a single witness to counter that testimony. If the evidence of those injuries was relevant to the prosecution's case, then impeaching evidence was at least as relevant for the defense. The trial court stepped far into the province of the jury in reaching the conclusion that the evidence was not relevant. The court's conclusion that it was too time consuming was particularly unfair, given that the prosecution put on 29 witnesses over 12 days, while appellant's case in total consumed less than a full day of testimony.

D. The Errors In Excluding Defense Witnesses Deprived Appellant Of His Sixth And Fourteenth Amendment Rights And Reversal Is Required

A criminal defendant is constitutionally assured of a meaningful opportunity to present a complete defense. (*California v. Trombetta* (1979) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413].)

In *Chambers v. Mississippi, supra,* 410 U.S. 284, 294, Justice Powell recognized the importance of the criminal defendant's right to present evidence on his own behalf:

> The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948), identified these rights as among the minimum essentials of a fair trial: 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'

Thus, "The right to produce legally admissible relevant evidence in defense of a criminal charge is one of the *'basic ingredients of due process of law.'*" (*People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1030-1031, italics in original, quoting *Washington v. Texas, supra,* 388 U.S. 14, 18.) An evidentiary error that violates a defendant's federal constitutional rights requires reversal unless the prosecution can demonstrate beyond a reasonable doubt that the jury would have rendered the same result in the absence of the