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6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

7 THE PEOPLE OF THE STATE OF) Case No.
CALIFORNIA,)
8) MOTION TO COMPEL A
Plaintiff,) PSYCHIATRIC EVALUATION OF
9) THE COMPLAINING WITNESS
10) FOR THE PURPOSE OF
11) DETERMINING HER CAPACITY
12) TO GIVE CONSENT TO SEXUAL
13 Defendant.) INTERCOURSE
14) Date:
Time:
Dept:
_____)

15 I. ISSUE

16 MAY A DEVELOPMENTALLY DISABLED COMPLAINING WITNESS
17 (WHO IS A CONSERVATEE) BE ORDERED TO UNDERGO
18 PSYCHOLOGICAL EVALUATION AT DEFENSE REQUEST TO
19 DETERMINE HER CAPACITY TO CONSENT TO SEXUAL
INTERCOURSE?

20 II. STATEMENT OF FACTS

21 A. HISTORY OF THE COMPLAINING WITNESS

22 (Insert the facts of your case)

23
24 B. RECENT PSYCHOLOGICAL TESTING

25 (Summarize if applicable)

1
2 **C. REFUSAL OF THE COMPLAINANT'S GUARDIAN TO PERMIT A**
3 **PSYCHOLOGICAL RE-EVALUATION**
4 (Summarize your particular facts)

5 **III. ARGUMENT**

6 **A DEFENDANT IS ENTITLED TO DISCOVER WHETHER THE COMPLAINING**
7 **WITNESS IS INCAPABLE OF GIVING CONSENT TO SEX, SINCE A LACK**
8 **OF SUCH CAPACITY IS AN ELEMENT OF THE CHARGED OFFENSE.**

9 Defendant is charged with rape in violation of Penal
10 Code section 261. The relevant portion of that section
11 provides:

12 "(a) Rape is an act of sexual intercourse accomplished
13 with a person not the spouse of the perpetrator, under
14 any

15 of the following circumstances:

16 (1) Where a person is incapable, because of a mental
17 disorder

18 or developmental or physical disability, of giving
19 legal

20 consent. . .the prosecuting attorney shall prove, as an
21 element of the crime, that a mental disorder or
22 physical

23 or developmental disability rendered the alleged
24 victim incapable of giving consent."
25

1 (Quote from statute of any other offense defendant may be
2 charged with that includes incapacity of consent as an
3 element, such as PC 289.)

4
5 **1. SCOPE OF DISCOVERY.**

6 Penal Code section 1054(e) specifies that "...no
7 discovery shall occur in criminal cases except as provided
8 by this chapter, other express statutory provisions, or as
9 mandated by the Constitution of the United States." The
10 purpose of Penal Code section 1054 is to establish
11 reciprocal discovery, which is now constitutionally
12 compelled. (Cal. Constitution article I, section 30(c).)
13 Other purposes include the ascertainment of truth, court
14 time savings, the protection of victims and witnesses from
15 harassment and the prevention of undue delay. (In re
16 Littlefield (1993) 5 Cal.4th 122.)

17
18 **2. CRIMINAL DEFENDANTS HAVE A RIGHT TO GATHER ALL
19 RELEVANT EVIDENCE BASED ON THE RIGHT OF THE ACCUSED TO
20 PRESENT A COMPLETE DEFENSE.**

21
22 A constitutional right to present defense evidence was
23 unanimously recognized in Crane v. Kentucky (1986) 476 US
24 683, 690:
25

1 Whether rooted directly in the Due
2 Process Clause of the Fourteenth
3 Amendment, Chambers v. Mississippi ...,
4 or in the Compulsory Process Clause or
5 Confrontation Clauses of the Sixth
6 Amendment, Washington v. Texas ...; Davis
7 v. Alaska ...; the Constitution guarantee
8 criminal defendants "a meaningful
9 opportunity to present a complete
10 defense."

11
12 The right of a defendant to present a defense is one of his
13 most fundamental rights. (People v. Mizchele (1983) 142
14 Cal.App.3d 686, 691.) In this regard, People v. Filson
15 (1994) 22 Cal.App.4th 1841 reversed a conviction in a child
16 molest case based on a due process violation arising from
17 the trial court's refusal to order disclosure of a taped
18 statement of the defendant which might have corroborated
19 his intoxication defense. The defendant was not foreclosed
20 from presenting the thrust of his defense, but "was
21 deprived of a vital tool" which would have supported his
22 theory.
23
24

25 Prejudicial error was found in People v. Reeder (1978)
82 CA3d 543, 147 CR 275, when a trial court excluded

1 relevant evidence proffered by a defendant on a theory of
2 motive. There, the defendant sought to establish that his
3 co-defendant had reneged on a \$200 debt, caused his step-
4 daughter to contract TB, tried to introduce her to heroin,
5 and had then introduced his nephew to heroin which caused a
6 near-fatal overdose. His theory was that the defendant,
7 having knowledge of these actions, so disliked his co-
8 defendant that he would never have conspired with him to
9 sell narcotics. The trial court excluded this evidence
10 based on inadmissible hearsay, doubtful relevancy, and by
11 operation of Evidence Code section 352, which exclusion was
12 overturned on appeal. "[I]n criminal cases, any evidence
13 that tends to support or rebut the presumptions of
14 innocence is relevant," since "it is fundamental in our
15 system of jurisprudence that all of defendant's pertinent
16 evidence should be considered by the trier of fact."
17 (Reeder, supra, 82 CA3d at 552, emphasis added.) The court
18 found that the defendant had the right to show he believed
19 what others had told him about the co-defendant and that
20 the proffered evidence supported his defense of such
21 intense dislike as to preclude him from engaging in a
22 criminal conspiracy with him:
23
24
25

1 "Evidence Code section 352 must bow to
2 the due process right of a defendant to a
3 fair trial and to his right to present
4 all evidence of significant probative
5 value to his defense. In Chambers v.
6 Mississippi 410 US 284, 93 SC 1038, 35
7 LED2d 297 (1973) it was held that the
8 exclusion of evidence, vital to a
9 defendant's defense, constituted denial
10 of a fair trial in violation of
11 constitutional due-process requirements."
12 (Reeder, supra, 82 Cal.App.3d at p. 553,
13 emphasis added.)

14
15 In the instant case, Defendant cannot practically
16 counter the People's assertion that the complaining witness
17 lacked capacity to consent to sex without a psychological
18 re-evaluation of her and refusal to order such evaluation
19 will effectively prevent him from presenting a full
20 defense.

21
22 **3. THE DEFENDANT'S REQUEST FOR PSYCHOLOGICAL RE-**
23 **EVALUATION OF THE COMPLAINING WITNESS IS ANALOGOUS**
24 **TO THE RE- TESTING OF PHYSICAL EVIDENCE, WHICH**
25 **IS A DUE PROCESS RIGHT.**

1
2 The complaining witness, is essentially a container of
3 evidence. The central issue in this case is whether she is
4 capable of legally consenting to sex. The defense is not
5 simply trying to discover psychiatric information which the
6 prosecution already possesses. Rather, Defendant seeks to
7 "re-test" the source of that information, which is the
8 complaining witness herself. To do this, Defendant's
9 expert must delve independently into the mind of the
10 complainant without the possible biases under which state-
11 paid witnesses might have been laboring.
12

13
14 Defendant's request to re-test the complaining witness
15 on the limited issue of her capacity to consent to sexual
16 activity is analogous to situations where other
17 demonstrative evidence (such as latent fingerprints, blood
18 or other chemical samples) exists and a defendant wants to
19 retest and verify the results gathered by the prosecution.
20 Courts routinely grant these requests and the instant case
21 should be no exception. (People v. De La Plane (1979) 88
22 Cal.App.3d 223.)
23

24 Although Penal Code section 1112 prevents a victim in a
25 sexual assault case from being forced to submit to a

1 psychiatric or psychological evaluation for purposes of
2 assessing her credibility, Defendant does not seek such
3 examination for that proscribed purpose. As such, whether
4 or not the complaining witness must undergo such
5 examination as requested by the defense is within this
6 Court's discretion. (People v. Taylor (1986) 180
7 Cal.App.3d 622, 634-635.) The factual record here
8 justifies this Court's exercise of its discretion to order
9 the requested psychiatric or psychological examination.

10
11 (Set forth factual argument showing trial court should
12 order exam in your case. For example, previous testing has
13 not been comprehensive and/or recent and has not included
14 tests you want your expert to administer.)

15
16 A defendant's right to prepare an effective defense and
17 receive a fair trial entitles him to obtain in pretrial
18 discovery all relevant and reasonably accessible
19 information. (Craig v. Municipal Court (1975) 100 CA3d 69;
20 Pitchess v. Superior Court (1974) 11 Cal3d 531.) Unless
21 there is some legitimate need for confidentiality, the
22 government has no interest in denying a defendant access to
23 all evidence that can throw light on the issues in the
24 case. People v. Riser (1956) 47 Cal.2d 566, 586; cert.
25

1 den. 353 US 930 (1957). Therefore, the court should order
2 the complainant's conservator to permit a psychological
3 evaluation by the defense expert.

4 Izagaga v. Superior Court (1991) 34 Cal3d 356, 374 is
5 instructive. In that case, the court discussed the
6 reciprocal nature of discovery and held that a defendant's
7 Constitutional rights (due process, self-incrimination,
8 effective assistance of counsel, disclosure of exculpatory
9 information in the hands of the prosecution) are not
10 violated by Penal Code section 1054. The court compared
11 the discovery duties of the prosecution with those of the
12 defendant, and concluded that, "**If there is to be any**
13 **imbalance in the discovery rights, it should work in the**
14 **defendant's favor.**"

15
16
17 The Court must realize that the State, represented by
18 the District Attorney and the Public Guardian's Office, has
19 the complaining witness totally within its control. The
20 State makes her major decisions, supplies her with
21 necessities, and brings this legal action--not the
22 complaining witness. Given these facts, any possibly
23 exculpatory evidence within the State's possession (and
24 that includes the complaining witness herself) must be
25

1 shared with the defense, as recognized in a landmark
2 federal case, Brady v. Maryland (1963) 373 US 83, 83 SC
3 1194, 10 LED2d 215. The court should therefore grant this
4 motion for a psychological re-evaluation.
5

6
7 **4. THE COURT HAS THE POWER TO REQUIRE A COMPLAINING**
8 **WITNESS TO UNDERGO EITHER PHYSICAL OR**
9 **PSYCHIATRIC EXAMINATIONS.**

10
11 According to People v. Nokes (1986) 183 CA3d 468, the
12 court has the authority to authorize a physical examination
13 of an alleged victim of sexual abuse. A two step analysis
14 must be used in determining whether to order a physical
15 exam. First, probable cause must exist that relevant
16 evidence will be obtained. Second, the court must balance
17 the defendant's need for the evidence with the degree of
18 intrusion caused to the witness.
19

20 In Nokes the appellate court ruled that the trial court
21 could properly refuse to order minor female victims to
22 undergo vaginal and/or rectal examinations in a sexual
23 assault case if, in its discretion, it believed the danger
24 of psychological harm to be very great. (Id., at pp. 4778-
25 479.) The proposition here is that witnesses "should have

1 ... the same Fourth Amendment protection against
2 governmental intrusion into their bodies that defendants in
3 criminal cases have." (People v. Browning (1980) 108 CA3d
4 117, 124)

5
6 By analogy, the court also has the power to authorize
7 psychological evaluations of a witness. Such an
8 examination is conducted through verbal questioning and
9 does not involve a bodily intrusion or a Fourth Amendment
10 search and seizure, unlike the Nokes or Browning cases.

11
12 Therefore, the right of the defendant in this case to
13 ask the court to order psychological testing of the alleged
14 victim should be weighed against her Fourth Amendment right
15 of unreasonable searches and seizures. Since no bodily
16 intrusion or search is required, the defendant's requested
17 order should be granted.

18
19 **5. FEDERAL CASE LAW PERMITS THE PROBING OF THE**
20 **ALLEGED VICTIM'S PSYCHIATRIC HISTORY, WHERE SUCH**
21 **HISTORY MAY AFFECT EITHER HER ABILITY TO TESTIFY**
22 **OR HER CAPACITY TO GIVE LEGAL CONSENT.**

23
24 A defendant has a constitutional right, under the Sixth
25 Amendment, to be able to adequately cross-examine a
witness, including "... the right to expose to the jury the

1 facts from which jurors, as sole triers of fact and
2 credibility, could approximately draw inferences relating
3 to the reliability of the witness." Davis v. Alaska (1973)
4 415 US 308, 318; Rinaker v. Superior Court (1998) 62
5 Cal.App.4th 155, 165.
6

7 It is proper for an accused to show that a witness's
8 testimony was the product of a mental illness (or by
9 analogy for this case, the product of a developmental
10 disability). (U.S. v. Lindstrom (4 Cir. 1983) 698 F2d
11 1154.) Lindstrom involved mail fraud charges. The
12 reviewing court found reversible error where the defendant
13 was denied access to psychiatric information suggesting
14 that a witness suffered from delusions or bias.
15

16 A defendant also has the right to show that the alleged
17 victim possessed the capacity to consent to sexual acts, or
18 that the defendant possessed a reasonable belief that she
19 possessed such capacity. (People v. Dolly (1966) 239 CA2d
20 143, 146.) Dolly concerned a rape charge where the
21 complainant allegedly lacked mental capacity to give
22 consent, since she comprehended nothing about sex nor where
23 babies came from. Even under these facts, the court held
24 that a defendant could properly submit evidence to support
25

1 his theory of capacity to consent. (Id., at p. 146.) The
2 accused's evidence would presumably have included
3 psychiatric testing of the victim--however the defendant in
4 Dolly declined to testify or present a defense.
5

6
7 **"CAPACITY TO CONSENT" IS THE KEY ELEMENT OF THE**
8 **CRIME CHARGED; THUS THE DEFENDANT MUST BE**
9 **PERMITTED TO ACQUIRE SUCH EVIDENCE BY**
10 **PSYCHOLOGICAL TESTING OF THE COMPLAINANT.**
11

- 12
13 1. THE BURDEN OF PROOF ON THE "CAPACITY TO CONSENT"
14 ISSUE REMAINS ON THE DISTRICT ATTORNEY EVEN WHEN
15 THE COMPLAINING WITNESS IS A CONSERVATEE.
16

17 For the charged crime of rape, the People must prove
18 beyond a reasonable doubt that because of a mental disorder
19 or developmental disability, the alleged victim was
20 incapable of giving legal consent to sexual acts. (Include
21 a similar discussion of any other offenses Defendant is
22 charged with that have a similar element and burden of
23 proof requirement.) The fact that the complaining witness
24
25

1 is the subject of a conservatorship does not shift that
2 burden. (Penal Code section 261(a)(1.)

3 In essence, the statute states that no presumption of a
4 lack of capacity to consent to sexual acts can be drawn
5 from the fact that a person is developmentally disabled.
6

7 **3. EXPERT TESTIMONY IS REQUIRED TO ASSIST THE JURY IN**
8 **DETERMINING THE MEANINGS OF SEXUAL "CONSENT"**
9 **AND "INCAPABLE ... OF GIVING LEGAL CONSENT."**

10 In criminal prosecutions where consent is an issue,
11 "consent is defined to mean positive cooperation in act or
12 attitude pursuant to an exercise of free will. The person
13 must act freely and voluntarily and have knowledge of the
14 nature of the act or transaction involved." (Penal Code
15 section 261.6; People v. Gonzalez (1995) 33 Cal.App.4th
16 1440.)
17

18 According to CALJIC 1.23.1, in order to have capacity
19 to give legal consent, a person "must possess sufficient
20 mental capacity to make an intelligent choice whether or
21 not to do something proposed by another person."
22

23 The determination of whether a complaining witness had
24 "sufficient mental capacity" at the time of the alleged
25 incidents is a question for the trier of fact. (People v.

1 Mobley (1999) 72 Cal.App.4th 761, 85 Cal.Rptr.2d 474, 490.)
2 Such issue is not within the common experience of most jury
3 members, so expert testimony would be admissible per
4 Evidence Code section 801. (People v. Lewis (1977) 75
5 Cal.App.3d 513, 518-519, cited with approval in People v.
6 Torres (1995) 33 Cal.App.4th 37, 46.) If only the
7 prosecution is allowed to present its experts and its
8 recent test results, Defendant will be greatly prejudiced
9 and unable to mount an effective defense.

11 **4. THE DEVELOPMENTALLY DISABLED HAVE BEEN HELD TO**
12 **POSSESS LEGAL CAPACITY TO GIVE CONSENT IN OTHER**
13 **AREAS OF CRIMINAL LAW.**

14
15 An analogy is useful. Courts have already wrestled
16 with the issue of whether a mentally retarded person was
17 capable of voluntarily consenting to waive his Miranda
18 right to remain silent. In the case of Colorado v.
19 Connelly (1986) 479 US 157, the United States Supreme Court
20 ruled that the mental condition of a suspect was
21 insufficient, by itself, to render a statement
22 "involuntary." (Also see People v Kelly (1990) 51 Cal.3d
23 931, 951.) Thus a developmentally disabled person has
24 "capacity" to consent to a waiver of his Fifth Amendment
25

1 rights, as long as his or her will is not overborne by the
2 interrogator's conduct. By inference, a mildly retarded
3 person has legal capacity to consent to sex if he or she is
4 acting without threats or force and understands what sexual
5 intercourse is.
6

7 In the case at bar, the complaining witness has stated
8 several times that no physical or emotional coercion was
9 employed during the alleged sexual acts, and that she knew
10 the nature and quality of those sexual acts. By applying
11 the reasoning in Connelly, and the definitions given above,
12 when the complaining witness was asked to have sex, and
13 then agreed to do so, she displayed all the necessary
14 elements of legal capacity and voluntary consent despite
15 her developmental disability.
16

17 The defense must be permitted to establish with
18 evidence that the complainant possessed the required legal
19 capacity to consent. Expert testimony based on independent
20 psychological testing of the alleged victim is therefore
21 necessary. If the defense is allowed to demonstrate this
22 capacity, then the central element of the prosecution's
23 case can be negated. (People v. Dolly, supra. Dolly
24 involved a mentally retarded victim, with the functional
25

1 age of a young child, who submitted to sexual intercourse.
2 Her level of functioning was so low that she did not know
3 how babies were conceived nor what the sex act involved,
4 and yet even in that case, the defendant had a right to
5 submit evidence to support the theory of capacity to
6 consent.
7

8 Defendant seeks evidence as to capacity, not
9 credibility, and thus there is no violation of either the
10 letter or the spirit of Penal Code section 1112. The court
11 in People v. Hagerman (1985) 164 CA3d 967 observed a
12 further distinction in regard to Penal Code section 1112,
13 holding that even when a court-ordered psychiatric
14 examination is not appropriate, psychiatric testimony is
15 still permitted. The defense contends, however, that in
16 this case both an examination and testimony of a
17 psychiatric nature are required pursuant to the foregoing
18 authorities. The mental state of the complaining witness
19 in a sex case is still a proper subject of inquiry. (Id.,
20 at pp. 974-975.)
21
22

23 IV. CONCLUSION

24 A complaining witness in a sexual abuse case may be
25 ordered to undergo an psychological evaluation where the

1 purpose of the testing is to determine whether he or she
2 had the capacity to legally consent to the sexual acts in
3 question. The court must allow the defendant to negate the
4 "capacity" and "consent" elements of the crimes charged,
5 even when the complainant is a conservatee who is
6 developmentally disabled. Penal Code section 1112 does not
7 bar this testing, because the defendant's purpose is not to
8 attack the credibility of the alleged victim.
9

10 The People have already subjected the complaining
11 witness to (describe testing) concerning the issue of her
12 capacity to consent. Considerations of due process demand
13 that Defendant be given the same opportunity to gather
14 evidence to support the consent defense.
15

16 Dated:

17 Respectfully submitted,
18
19
20
21

22 _____
23 Attorney for Defendant
24
25