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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF [REDACTED]**

9 THE PEOPLE OF THE STATE OF) Case No.:
10 CALIFORNIA))
11) Plaintiff,) Motion to Exclude Post Molestation
12) Symptoms of Alleged Victim (Victim Impact
13) Evidence)
14 vs.)
15 Defendant name(s),) Date:
16) Time:
17) Dept:
18 Defendant)

19 The defendant moves for a protective order that the alleged complainant's post-molest symptoms
20 not be admissible in evidence. These symptoms include but are not limited to: (insert symptoms
21 revealed by the facts of the case if known)

22 **I**

23 **THE PROSECUTION MAY NOT INTRODUCE THE VICTIM'S**
24 **POST-MOLESTATION BEHAVIOR AND STATEMENTS TO PROVE**
25 **AN ALLEGED MOLESTATION ACTUALLY OCCURRED.**

26 Opinion testimony on rape trauma syndrome and Child Abuse Accommodation
27 Syndrome is inadmissible to prove that an alleged victim was sexually attacked but may, in
28 keeping with certain narrow parameters, be admitted to support the credibility of a witness.
(*People vs. Bledsoe* (1984) 36 Cal.3d 236, 203 Cal. Rptr. 450; *In re Sara M.* (1987) 194
Cal.App.3d 585. Thus, it is improper to prove that a crime had occurred based on symptoms that
the alleged victim exhibited post-crime. These symptoms include, but are not limited to:

1. *People vs. Bledsoe*, supra, 36 Cal.3d at p. 242-243:
 - a. Disorientation
 - b. Stress

- 1 c. Agitation
- 2 d. Fear
- 3 e. Anxiousness
- 4 f. Subdued
- 5 g. Controlled
- 6 h. Flashbacks
- 7 i. Denial
- 8 j. Relives incident
- 9 k. Insecurity
- 10 l. Nightmares
- 11 m. Trauma
- 12 n. Mistrust

13 2. In re Sara M., 194 Cal.App.3d at p. 589:

- 14 a. Consistency of story
- 15 b. Denial
- 16 c. Unusual sexual knowledge
- 17 d. Feeling of loss of control
- 18 e. Anger
- 19 f. Depression
- 20 g. Behavioral problems
- 21 h. Sleep disturbances
- 22 i. Nightmares
- 23 j. Eating disorders
- 24 k. False sense of maturity
- 25 l. Trust too much
- 26 m. Trust too little
- 27 n. Fear
- 28 o. Details given over time

1 *People vs. Jeff* (1988) 204 Cal.App.3d 309, 251 Cal. Rptr. 135 is controlling. In that case
2 the prosecution presented one expert witness who described the alleged complainant's post-
3 molest symptoms, including nightmares, crying, depression, low self-esteem, and helplessness.
4 The prosecution then presented a second witness to explain these symptoms as evidence of child
5 molest. Neither witness was called for the purpose of rehabilitating the complaining witness.
6 (Id., at p. 338.) The defense objected to the first witness on the ground that it was evidence of
7 post-molest emotions used to prove that the molestation had occurred and objected to the second
8 witness testimony as improper opinion testimony under *People vs. Bledsoe*, supra and *In re Sara*
9 *M.*, supra. The trial court held each witnesses' testimony was admissible with respect to the
10 symptoms exhibited by the complaining victim, but that neither witness would be allowed to
11 state her opinion regarding whether a molestation had in fact occurred. The Court of Appeal
12 found the admission of such testimony and the trial court's attempt to limit its import ran afoul of
13 the proscriptions set forth in *Bledsoe*, supra, and its progeny and reversed the defendant's
14 conviction:

15 "It is not significant the prosecutor told the jury

16 Susan Holland would merely describe symptom she
17 observed and '[a]ny conclusion that is to be drawn
18 will be yours.' In effect and result, the prosecutor,
19 by what he apparently believed was a brilliant
20 subterfuge, engaged in the exact conduct, here
21 condoned by the trial court, that was proscribed in
22 *Bledsoe*, Gray and *In re Sara M.* The challenged
23 testimony was not offered to rehabilitate a wavering
24 or equivocal Gypsy. Rather, it told the jury that
25 they should accept gypsy's version of these events as
26 true, that she was a victim, molested over a three-
27 year period by defendant, because here is now typical child
28 molest victims act and Gypsy fits the mold perfectly."

(*People vs. Jeff*, supra, 204 Cal.App.3d at p. 340.)

25 That the testimony concerning a complaining witness's post molest symptoms does not
26 come from an expert does not make it admissible. In *In re Christie D.* (1988) 206 Cal.App.3d
27 469, 253 Cal. Rptr. 619 the court held that the non-expert status of witness opinion concerning
28 the sex play with anatomical dolls did not make the play admissible. (Id., at pp. 478-480.) The

1 play with anatomical dolls was not relevant to establish a molestation had occurred since there
2 was no study showing its reliability as a predictor whether the opinions interpreting the play
3 were formed by the expert or the trier of fact. Therefore, since experts cannot form opinion
4 interpreting post-molest symptoms as a predictor of molest, the non-expert status of the witness
5 does not cure the problem.

6 **II**
7 **POST-MOLEST SYMPTOMS ARE INADMISSIBLE AS IMPROPER**
8 **VICTIM IMPACT EVIDENCE UNLESS THE PROSECUTION**
9 **CAN ARTICULATE A THEORY OF RELEVANCE.**
10

11 Victim impact evidence, i.e., post-molest symptoms, is inadmissible at the guilt
12 phase of a trial unless relevant to a specific disputed issue in the case. For example, in *People v.*
13 *Redd* (2010) 48 Cal.4th 691, the victim’s testimony concerning the permanency of his injuries
14 was deemed relevant to a charged great bodily injury enhancement. (Id., at p. 731-732.) In
15 *People v. Taylor* (2001) 26 Cal.4th 1155, 1171, a doctor’s testimony about the victim’s injuries
16 and loss of bodily functions was held relevant to show the extent of said injuries and confirm he
17 could accurately recall the incident.

18 Generally, victim impact evidence (or victim impact argument by the prosecution) at the
19 guilt phase is inadmissible as having little probative value and great prejudicial effect. In *People*
20 *v. Vance* (2010) 188 Cal.App.4th 1182, the defendant’s murder conviction was reversed where
21 the prosecutor made a victim impact argument during his argument to the jury. The court noted
22 that such argument is banned at the guilt phase, stating, “The justification for both of these
23 exclusionary policies is that they deal with subjects that are inherently emotional, possessing an
24 unusually potent power to sway juries, and that their use must therefore be rigidly confined and
25 controlled.” (Id., at 1193.)

26 Other jurisdictions are in accord. See *Colon v. Georgia* (2005) 619 S.Ed.2d 773 [victim
27 impact evidence in child molest case admissible to rebut defendant’s attack on credibility of
28 child victim]; *United States v. Copple* (3rd Cir. 1994) 24 F.3d 535, 546 [error to admit victims’

1 testimony about negative effects of defendant's fraud on their health and savings, such testimony
2 was more prejudicial than probative]; *Sager v. Maass* (D.C. Ore. 1995) 907 F. Supp. 1412, 1419-
3 1420 [ineffective assistance of trial counsel for said counsel to introduce at guilt phase victim's
4 entire written victim impact statement, which was a "prejudicial piece of evidence"]; *Armstrong*
5 *v. State* (Wyo. 1992) 826 P.2d 1106, 1116 ["Consideration of victim-impact testimony or
6 argument remains inappropriate during proceedings determining the guilt of an accused"];
7 *Miller-El v. State* (Tex. Crim. App. 1990) [in an attempted murder case, a victim's paraplegic
8 disability hardship held inadmissible in the guilt phase: "We cannot agree, however, that [Dr.]
9 Harrison's testimony regarding Hall's future hardship as a paraplegic had any tendency to make
10 more or less probably the existence of any fact of consequence at the guilt stage of trial"].

11 Based on these authorities, victim impact evidence in this case must be excluded
12 unless the prosecution can articulate a theory of relevance and this Court conducts the necessary
13 balancing of interests under Evidence Code section 352.

14 II

15 **EVIDENCE CODE SECTION 352 PRECLUDES TESTIMONY**
16 **OF POST-MOLEST SYMPTOMS (VICTIM IMPACT TESTIMONY).**
17 **FURTHER, THE ADMISSION OF SUCH EVIDENCE WOULD VIOLATE**
18 **THE DEFENDANT'S FEDERAL CONSTITUTIONAL**
19 **RIGHT TO DUE PROCESS AND A FAIR TRIAL**
20

21
22 *Evidence Code Section 352* permits the trial court in its discretion to exclude
23 evidence if its probative value is substantially outweighed by its prejudicial impact, if it will
24 consume an undue amount of time, confuse the issues or mislead the jury. "Prejudice" within the
25 meaning of section 352 is defined as follows:

26 ""The prejudice which [section] 352 is

27 designed to avoid is not the prejudice or damage to a defense that naturally flows
28 from relevant, highly probative evidence.' [Citations] `Rather, the statute uses the

1 word in its etymological sense of "prejudging" a person or cause on the basis
2 of extraneous factors." [Citation]" (*People vs. Harris (1998)* 60 Cal.App.4th727.)

3 Testimony of [REDACTED]'s post-molest symptoms consisting of
4 [REDACTED], which cannot be used to establish the molestation occurred, is
5 extraneous to the case, highly prejudicial and will engender undue sympathy for her and hence
6 antipathy for the defendant. As explained by the *Copple* court in finding such evidence
7 wrongfully admitted:

8 "Testimony such as this had either no, or very little
9 probative value and was unfairly prejudicial. We believe
10 that it was irrelevant either for the purposes of
11 proving that Copple had failed to make up the loss
12 to the funeral directors or for any other reason.
13 Even if there had been some marginal relevance to the
14 testimony about the particular personal or
15 professional impact the losses had on the funeral
16 directors, its principal effect, by far, was to
17 highlight the personal tragedy they had suffered
18 as victims of the scheme. The testimony was
19 designed to generate feelings of sympathy for the
20 victims and outrage toward Copple for reasons not
21 not relevant to the charges Copple faced. It arguably
22 created a significant risk that the jury would be
23 swayed to convict Copple as a way of compensating
24 these victims wholly without regard to the evidence
25 of Copple's guilt." (*United States v. Copple, supra*,
26 24 F.3d at 546.)

27 Further, such evidence may result in an undue consumption of time. For example, if the
28 victim were to testify to having nightmares or to being withdrawn, the defense on cross-
examination will have the right to search for alternate explanations which would include
everything that ever happened to the child that could cause these symptoms making for an
endless trial.

Defendant further submits that the admission of post-molest symptoms/victim impact
evidence in this case would violate his constitutional rights to due process and a fair trial under
the 5th, 6th and 14th Amendments to the U.S. Constitution and article 1, sections 7 and 15 of the
California Constitution. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [reversal of murder

1 conviction because of other crimes evidence of the defendant’s knife collection and fascination
2 with knives violated federal due process where that evidence was irrelevant to the crime
3 charged]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 887 [same]; *Clark v. Duckworth* (7th
4 Cir. 1990) 906 F.2d 1174 [the defendant has a federal constitutional right to a trial free of
5 irrelevant and prejudicial evidence.]

6 Add the following section if it fits your case

7 **III**

8 **IF THIS COURT PERMITS THE PROSECUTION TO ADMIT EVIDENCE**
9 **OF THE VICTIM'S POST-MOLEST SYMPTOMS, THEN IT MUST ALLOW**
10 **THE DEFENSE TO OFFER EVIDENCE OF ALTERNATIVE**
11 **EXPLANATIONS FOR THOSE SYMPTOMS.**

12
13 Should this court allow the prosecution to admit evidence of the complaining witness's
14 alleged post-molest symptoms as a valid predictor of a crime, due process compels it to allow the
15 defense to present evidence of alternative explanations for those symptoms. (*People vs. Reeder*
16 (1978) 82 Cal.App.3d 543, 550; *People vs. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599.) As
17 stated in Reeder:

18 "Evidence Code Section 352 must bow to the due
19 process right of a defendant to a fair trial and
20 to his right to present all relevant evidence of
21 significant probative value to his defense. In
22 *Chambers vs. Mississippi* (1973) 410 U.S. 284, 93
23 S.Ct. 1038, 35 L.Ed.2d 297, it was held that the
24 exclusion of evidence, vital to a defendant's
25 defense, constituted a denial of a fair trial in
26 violation of constitutional due process requirements."
27 (Reeder, supra, at p. 553, emphasis added.)

28 **CONCLUSION**

Based on the foregoing, the prosecution should be excluded from presenting evidence of
the alleged complainant's post-molest symptoms as a predictor that a molestation in fact occurred
and because such evidence constitutes improper victim impact evidence inadmissible at the guilt

1 phase. If the court allows such evidence, it must allow the defense to admit evidence of
2 alternative explanations for the existence of such symptoms.

3
4 Dated this __ day of __, 20__

5 _____
6 INNOCENCE LEGAL
7 TEAM
8 Names of attorney(s)
9 Attorney for Defendant
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