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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**

**IN AND FOR THE COUNTY OF KITSAP**

8

**STATE OF WASHINGTON,** )

9 )

1. **Plaintiff,** )

)

1. **v.**
2. **xxxxxx,**

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**Defendant.**

) **No.XXXXXXX**

)

) **MEMORANDUM IN SUPPORT**

) **OF MOTION TO COMPEL**

) **DEPOSITION OF SEXUAL**

) **ASSAULT ADVOCATE**

)

#### I.

**FACTS**

T-

#### XXXXXX has been charged with one count of assault, second degree against R­

1. **NIII** R- and one count of child molestation, first degree, against S.R. K-

is an

1. employee of the Kitsap Sexual Assault Center and is the assigned victim advocate to both Ms.
2. **RIii** and S.R.
3. **Facts relevant to S.R.**

#### On February 7, 2005, a child interview of S.R was conducted. During the interview, S.R. 24

initially stated that no abuse between X:XX:XXX and S.R. occurred. The parties then took a

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* 1. break so that defense counsel could confer with her expert. After counsel returned, the deputy
  2. prosecuting attorney asked that the interview resume. S.R. then stated that XXXXXX had
  3. touched her once on her vagina. When asked if anyone told S.R. what to say, S.R. responded,
  4. "She did" and pointed at Ms. **TIIIIII,** See Excerpt of Defense Interview of S.R., February 7,
  5. 2005, Appendix. When asked what Ms. T- told her to say, S.R. responded, "If you don't

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know, just say I don't know and I don't remember. If you just said I just need a break, I just

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need a break to tell (unintelligible). See id.

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S.R. was again asked about the contents of that conversation during the child hearsay

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hearing later that day:

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# Q.

1. A.
2. Q.
3. A.
4. Q.
5. A.

# Q.

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Ms. **TIIIIII,** that lady right there; did she tell you anything? Yes.

What did she tell you? She said don't be scared.

That was nice of her. Did she tell you anything else?

She said if you need a break, I just need a break to visit my grandma. Okay. What about anything else?

* 1. That's it.

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Q. What did you tell her?

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A. I told her, tUn, it's myfault.

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Verbatim Record of Proceedings ("RP"), February 7, 2005, at 31.

R-

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**Facts relevant to RIIIIIIRIii,**

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1. **RIii**was also interviewed by the defense on February 7, 2005. During that
2. interview, Ms. **RIii**indicated that Ms. **TIIIIII** had told her that if she failed to cooperate with

#### the prosecution against XXXXXX, Ms. **TIii!** would prevent Ms. **RIii** from regaining

1. custody of S.R. S.R. is presently in the custody of Ms. **RIii'** mother.
2. Although Ms. R- is not a victim of a sexual assault, and it is the position of
3. XXXXXX that RCW 5.60.060(7) does not therefore apply, Ms. R- has signed a waiver of
4. privilege under that statute. Moreover, counsel has been appointed for Ms. **RIii**to review any

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#### rights Ms. R- may have lmder the statute.

7 Because Ms. **RIii**has executed a waiver of privilege, XXXXXX will address only the

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#### issue of the role RCW 5.60.060(7) plays in interviewing Ms. **TIii!**as to statements made by

R-

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#### S.R. XXXXXX asserts that Ms. T- cannot claim privilege with regard to any examination

1. of statements Ms. 12

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has made to Ms. **TIii!.**

**II.**

**~~T-~~**

**LAW AND ARGUMENT**

1. **A. A deposition of I- is necessary to guarantee XXXXXXX's rights to**

**confront adverse witnesses under the Confrontation Clauses of the Sixth**

1. **Amendment to the U.S. Constitution and Article I, Section 22 of the Washington**
2. **Constitution.**
3. Both the state and federal constitutions guarantee the defendant's right to confront
4. adverse witnesses. U.S. Const. amend 6; Const. art. I, sec. 22; Washington v. Texas, 388 U.S. 19 14, 23, 87 S.Ct. 1920. 18 L.Ed.2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 20 1105, 39 L.Ed.2d 347 (1974); State v. Hudlow, 99 Wn.2d I, 15, 659 P.2d 514 (1983). The
5. primary and most important component of the right to confront is the right to conduct a
6. meaningful cross-examination. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998).
7. The purpose of cross-examination is to test the perception, memory, and credibility of witnesses. 24 State v. PmTis, 98 Wn.2d 140, 144, 654 P.2d 77 91982); State v. Roberts, 25 Wn.App. 830, 834, 25
   1. 611 P.2d 1297 (1980). The right to cross-examine includes the opportunity to show that a
   2. witness is biased, or that the testimony is otherwise unbelievable. U.S. v. Abel, 469 U.S. 45, 50
   3. (1984); Davis v. Alaska, 415 U.S. 308,316 (1974). Confrontation therefore helps guarantee the
   4. accuracy of the fact-finding process. Chambers v. Mississippi, 410 U.S. 284,295, 93 S.Ct. 1038,
   5. 35 L.Ed.2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of the

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fact-finding process is called into question. Id. As such, courts must zealously guard this right.

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State v. Kilgore, 107 Wn.App. 160, 184-85, 26 P.3d 308 (2001).

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Moreover, defense expert

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C. **YIIIIII,** Ph.D., previously testified during the child

1. hearsay hearing of February 28, 2005, that the main difficulty in interviewing children and

Y-

1. determining the reliability of their disclosures is that children are especially suggestible. As to
2. S.R., Dr.

testified that she appeared very different when she resumed the interview after

1. the breaI<. Interviewing Ms. T- is necessary to give the defense, the prosecution, and the
2. court a clear picture of the circumstances surrounding S.R.'s disclosures in the second part of the
3. defense interview, and to determine whether the state can show that the Ryan reliability factors

J.

1. have been met. The Confrontation concerns are compo,mded in a case involving a child, given
2. their particular suggestibility (and indeed, testimony by the defense's expert **Y111** that

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S.R. is a very suggestible child). So as to fully cross-examine S.R. at trial, XXXX:XX absolutely

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must know if any party influenced her recall of events and her change in testimony.

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**B. The privilege cited in RCW 5.60.060(7) applies only to statements made by the**

1. **alleged victim, not the victim advocate.**
2. Defendant :XXXXXX previously filed a motion to compel the deposition of victim
3. advocate **I<IIIIII** T- to interview her with reference to the child interview. Ms. **T111111** has 24

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* 1. cited RCW 5.60.060(7) as the basis to refuse to answer any questions regarding the conduct of
  2. the interview.
  3. Privileges are designed to protect certain communications from disclosure because the
  4. legislature has determined that the need for frank discussion between certain parties trumps the
  5. need of the courts to hear evidence. In Washington, privileges are largely statutory in nature,

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and are mostly set forth in RCW 5.60.060. See ER 501, Judicial Council Comment. ER 501

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recites an illustrative, and not comprehensive, list of privileges available under Washington law.

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A testimonial privilege is, by definition, in conflict with the power of the courts to

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10 compel evidence. Consequently, privileges are strictly construed. See State v. Sanders, 66 Wn.

11 App. 878, 833 P.2d 452 (1992); State v. Burden, 120 Wn.2d 371,841 P.2d 758 (1992).

1. Statutory privileges can cover either communications between two parties or
2. communications made by the designated party to another party. For example, communications
3. made by both parties to marital, attorney-client, and physician-patient relationships are protected 15 under RCW 5.60.060. See RCW 5.60.060(1), (2), (4).
4. In the case of a sexual assault advocate, the legislature has chosen to protect statements
5. made only by the *victim* to the advocate. RCW 5.60.050(7) provides in part: "A sexual assault 18

advocate may not, without the consent of the victim, be examined as to any communication

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made by the victim to the sexual assault advocate." Nothing in the statute prohibits the

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examination of statements made by Ms. **TIIIIIIII** to S.R.

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The legislature could have extended the privilege to cover communications between the

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1. parties, as it did in the privileges recited above, but apparently chose not to. As it stands, Ms.
2. **TIIIIIIII** cannot assert privilege as to any statements she has made to S.R., or indeed, any sexual
3. assault victim. Only the communications made by the victim are protected. This court should, at

**MOTION AND DECLARATION TO COMPEL RECORDS ... 5**

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1. a minimum, direct Ms. T- to answer any and all questions regarding statements she has
2. made to S.R. To do otherwise would be to fail to strictly construe the privilege, as mandated by
3. the privilege common law cited above.
4. **C. By disclosing the contents of defense interview, any claim to privilege under the**
5. **statute has been waived.**
6. Generally, whenever the holder of the privilege discloses or testifies to the contents of the
7. communication, the privilege is waived. See State v. Vanderburg, 19 Wn. App. 182, 575 P.2d
8. 254 (1978) (holding that attorney-client privilege is waived if a client chooses to testify as to
9. statements that are otherwise privileged); Swearingen v. Vik, 51 Wn. App. 843, 322 P.2d 876
10. (1958) (holding that marital privilege is waived if the conummicating spouse chooses to testify
11. as to statements that are otherwise privileged); Randa v. Bear, 50 Wn.2d 415, 312 P.2d 640 12

(1957); Phipps v. Sasser, 74 Wn.2d 439, 445 P.2d 624 (1968) (holding that physician-patient

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privilege is waived if the patient chooses to testify as to statements that are otherwise privileged).

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Here, not only did S.R. discuss the contents of her conversation with Ms. T- during

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the defense interview, see App., she also testified to the contents of that conversation during the

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1. child hearsay hearing. As such, the privilege is waived, and Ms. T-' assertion of the
2. privilege is without merit.

### D. Interviewing Ms. T- is necessary to ensure that XXXXX:X's due process rights to effective representation are protected.

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The Sixth Amendment right to counsel includes the right to effective assistance of

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counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n.14, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970).

## 22

1. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision
2. that malces particular investigations unnecessary. *Strickland v. Washington,* 466 U.S. 668, 691,
3. 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). "A lawyer who fails adequately to investigate, and to

**MOTION AND DECLARATION TO COMPEL RECORDS ... 6**

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1. introduce evidence, [information] that demonstrates his client's factual innocence, or that raises
2. sufficient doubt as to that question to undermine confidence in the verdict, renders deficient
3. performance." *Hartv. Gomez,* 174 F.3d 1067, 1070 (9th Cir. 1999).
4. Here, interviewing Ms. **1JIIIII** is necessary to determine if any misconduct transpired
5. during the defense interview, and if any misconduct, such as witness tampering, has taken place
6. between Ms. **1JIIIII** and Ms. - This investigation must be completed for the defense to

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detennine whether to file any motions to suppress evidence or dismiss the cause based on

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govennnental misconduct.

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1. **III.**
2. **CONCLUSION**
3. This court should find that the advocate privilege cited by Ms. T- has been waived,
4. and order Ms. T- to submit to the defense deposition. To fail to do so will deny XXXXXX
5. his constitutional right to investigate the charges against him, and will never answer the question
6. of whether the government has engaged in misconduct in prosecuting him.
7. For the foregoing reasons, XXXXXX respectfully requests this court GRANT his motion
8. to compel the deposition **ofl<ll 'IJIIIII.**

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19 **DATED** this 20

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day of ,2005.

RONALD D. NESS & ASSOCIATES

AMY I. MUTH, WSBA #31862

Attorney for Defendant

**MOTION AND DECLARATION TO COMPELRECORDS ... 7**

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