###### 1

2

3

## 4

#### 5

##### THE SUPERIOR COURT OF THE STATE OF WASHINGTON

6 IN **AND FOR THE COUNTY OF CLARK**

7

##### 8 STATE OF WASHINGTON,

9

1. **v.**

##### XXXXXX

'

12

###### 13

**Plaintiff,**

**Defendant.**

**NO. **

**DEFENDANT'S CONSOLIDATED MOTION AND MEMORANDUM TO COMPEL A MENTAL EVALUATION OF WITNESS TMR TO ASSESS TESTIMONIAL COMPETENCY**

14

* 1. **MOTION**

15

**COMES NOW** the Defendant, XXXXXX, by and through his attorney, AMY I. MUTH

16

of RHODES & MERYHEW, and moves this Court for an order COMPELLING a psychiatric

17

evaluation of complainant TMR to assess her testimonial competency.

18

1. This motion is brought pursuant to CrR 4.7 and the Sixth and Fourteenth Amendments of
2. the United States Constitution as well as the parallel provision of the Washington State
3. Constitution including Art. I, § 22, and is based on the facts and record herein, as well as the

A\_,

1. subjoined Memorandum of Authorities and Declaration ofR\_ M.D.

23

24 II. **MEMORANDUM**

25

**MOTION TO COMPEL MENTAL EVALUATION OF WITNESS TMR** - 1

RHODES & MERYHEW, LLP

600 First Avenue, Suite 410

Sealtle, Washington 98104

### FACTS

1

1. Defendant :X:XXXXX is alleged to have sexually molested complainant TMR, DOB
2. -• between 11/27/08 and 12/9/08, when TMR was 13 years old. Approximately three to
3. four weeks prior to the allegation, TMR had been complaining of auditory and visual
4. hallucinations. She reported seeing images of an old man who would speak to her and of a
5. young child. She also reported having thoughts of self-harm. She was placed on Abilify and
6. began seeing a therapist. TMR had also been seeing a school counselor for a period of time. In
7. addition, TMR had seen the movie "Titanic" and became fixated on the love scene between the
8. lead characters. TMR wrote short stories and told the child interviewer that after she saw the 10

movie, every story she wrote had to have "the sexual thing" in it.

11

XX:XXXX is a co-worker ofTMR's father R- R-. and C­

12

(TMR's mother) are divorced. TMR and her younger sister EMR visit Mr. R­

13

on the weekends. :XXX:XXX had separated from his wife and Mr. R- had let XXXXXX

14

1. stay at his house. :X:XXXXX had his own bedroom and ER and TMR had their own bedroom.
2. TMR alleges that :X:XXXXX came into her bedroom one night ar0trnd 5 AM, touched her
3. pajamas, her breast, and attempted to place his fingers into her underwear. TMR did not
4. disclose the incident right away. She eventually told her friend BB approximately 2-3 weeks

F-

1. later, and BB urged TMR to report the incident to TMR's school coirnselor C- F\_,

V-0.,

1. which TMR did. Ms. 21

0- 0-

# 22

then reported the incident to the authorities.

a pediatric nurse practitioner, participated in an examination ofTMR and

observed TMR's forensic interview. Ms.

23

was interviewed by the defense on August 28,

2009, at the Children's Justice Center. During the interview, Ms.

24

reported that she was

aware ofTMR's reports of visual and auditory hallucinations prior to the incident alleged with

:XXXXXX, and knew that TMR was placed on Abilify. She also indicated awareness ofTMR's

###### 1

* 1. medical diagnosis of schizophrenia. When asked about the impact that schizophrenia and

0-

* 1. auditory and visual hallucinations would have on one's ability to accurately perceive and recall
	2. events, Ms.

conceded that it could impact that recall and perception.

* 1. The defense has retained ., M.D., to review the discovery and counseling
	2. records, and render an opinion on whether TMR possesses testimonial competency and the
	3. impact the diagnosis of a major psychiatric disorder would have on her ability to accurately
	4. perceive and recall events. Dr. A. has prepared a declaration, attached as Appendix A (and
	5. his CV is attached to that declaration), setting forth the reasons why an evaluation is necessary 10

for him to render an opinion on her testimonial competency.

###### 11

1. **LAW AND ARGUMENT**

12

**1. A mental examination is necessary to evalnate TMR's testimonial competency and**

1. **ability to accurately perceive and recall events.**
2. The standard for testimonial competency in a criminal case is set forth in both statute and
3. court rule. RCW 5.60.060, as well as CrR 6.12, provide that "those who are of unsound 16

mind... are incompetent to testify." The test for testimonial competency is whether the witness

17

understands the nature of the oath administered by the court and is capable of giving a correct

18

account of what he or she has seen and heard. State v. Mines, 35 Wn. App. 932, 671 P.2d 273

19

(1983). Simply having a history of mental disorders does not render a witness incompetent.

20

21 State v. Thach, 5 Wn. App. 194,486 P.2d 1146 (1971).

1. The court has the inherent authority in a criminal case to order a psychiatric
2. examination of the complaining witness where a compelling reason is shown. Trial courts
3. retain the discretion to compel a witness to submit to psychiatric testing. State v. Israel, 91

Wn. App. 846, 849, 963 P.2d 897 (1998); State v. Demos, 94 Wn.2d 733, 738, 619 P.2d 968

###### 1

2 (1980); State v. Braxton, 20 Wn.App. 489, 580 P.2d 1116 (1978); State v. Weisberg, 65

3 Wn.App. 721,829 P.2d 252 (1992).

* 1. As stated in Weisberg:
	2. The granting or denying of a motion for psychiatric examination of a complaining witness is within the sound discretion of the trial court.
	3. State v Braxton, 20 Wn.App. 489,580 P.2d 1116 (1978), *review denied,* 91 Wn.2d 1018 (1979). A psychiatric exam maybe ordered
	4. upon a showing of a "compelling reason" for doing so. State v. Demos,

94 Wn.2d 733,619 P.2d 968 (1980). Absent this showing, other,

* 1. more traditional means of assessing witness credibility and percephml
	2. ability are sufficient. State v. Demos, supra.
	3. 65 Wu.App at 727.
	4. Few cases address what constitutes a "compelling reason." In State v. Stamm, the Court
	5. of Appeals upheld the trial court's order directing a witness to submit to a psychiatric evaluation
	6. and the court's decision to appoint an independent expert for that purpose, but did not specify the
	7. nature of the mental disorder. 16 Wn. App. 603, 604-05, 559 P.2d 1 (1976). Notably, in the
	8. cases where compelling the examination was found to be error, the defendant was alleging that 16

the witness suffered from a personality disorder or some non-specified, vague "mental health

17

disorder," not a major psychiatric disorder with psychotic episodes. See, . Israel,

18

(antisocial personality disorder); State v. Demos, 94 Wn.2d 733,619 P.2d 968 (1980) (victim

19

had received unspecified "mental health treatment" in the past).

20

1. The vividness and entrenched nature ofTMR's psychosis is quite frankly, rare for a
2. complainant in a criminal case, much less a minor child. Dr. A.'s thirteen-page declaration
3. lists example upon example upon example of the classic symptoms of schizophrenia, including
4. paranoid behaviors, delusional thinking, self-injury, disorganized thinking, tangential responses

to questioning, appearing to respond to internal stimuli, and auditory and visual hallucinations.

##### 1

1. Furthermore, the manifestation of these symptoms coincided with when TMR reported that
2. XXXXXX touched her. In addition, TMR has been placed on a serious mood stabilizer, starting
3. at a dosage of 5 mgs and is now up to 30 mgs daily-a significant amount. We also know that as
4. recently as the end of January (less than one month ago), TMR had yet another episode of
5. disorganized thinking and paranoid behavior, when she once again wandered away after an
6. incident with boys at her school. There is, quite frankly, a legitimate concern that counsel has
7. that TMR will experience a psychotic episode while testifying in front of a jury-she previously
8. attempted to stab herself with a pen in front of her French class after she gave a wrong answer in 10

class and could feel the other students' eyes "burning" on her. If TMR is going in and out of

11

psychosis, she can hardly be expected to give a correct account of what she has seen and heard.

12

##### 13 2. A mental evaluation is necessary to ensure that XXXXXX's constitutional rights to present a complete defense and to confront adverse witnesses are guaranteed.

14

1. The Sixth Amendment to the United States Constitution and Wash. Const. Art. **1,** § 22
2. grant criminal defendants two separate rights: (1) the right to present testimony in one's defense,
3. and (2) the right to confront and cross-examine all adverse witnesses. Davis v. Alaska, 415 U.S.

18 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct.

19 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d

20 1019 (1967); State v. Harris, 97 Wn. App. 865,872,989 P.2d 553 (1999).

##### a. Presenting a defense

1. The Supreme Court has held that a criminal defendant has a constitutional right to "a 23

meaningful opportimity to present a complete defense." California v. Trombetta, 467 U.S. 479,

24

485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). In criminal cases, any evidence tending to qualify

25

**MOTION TO COMPEL MENTAL EVALUATION OF WITNESS TMR - 5**

RHODES & MERYHEW, LLP

**600 First Avenue, Suite 410**

**Seattle, Washinglon 98104**

or disprove the State's theory, is normally relevant and admissible evidence which the defense

1

2 has a constitutional right to present. State v. Harris, 97 Wn. App. at 872; see also State v. 3 Camara, 113 Wn.2d 631, 643-44, 781 P.2d 483 (1989).

1. For purposes of the right to present a defense, if evidence that is admissible is wrongfully
2. excluded, the constitutional question is whether the proffered testimony was material and
3. relevant to the outcome of the case. State v. Atsbeha, 96 Wn.App. 654, 660, 981 P.2d 883
4. (1999). A criminal defendant has "the right to put before a jury evidence that might influence
5. the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d
6. 40 (1987); Chambers v. Mississippi, 410 U.S. at 294 ("the right of an accused in a criminal trial 10

to due process is, in essence, the right to a fair opportunity to defend against the State's

#### 11

accusations").

12

Moreover, a criminal defendant has a right to present relevant evidence, beyond cross­

13

examination of the complainant, in conducting his defense. State v. Hudlow, 99 Wn.2d 1, 16,

14

1. 659 P.2d 514 (1983). Sex crimes by their very nature require a trial court to give defense
2. counsel an opportunity to fully cross-examine witnesses and espouse a theory of defense. In
3. State v. Peterson, the Court of Appeals ruled,
4. It is fundamental that a defendant charged with commission of a crime should be given great latitude in the cross-examination of prosecution witnesses to show
5. motive or credibility. This is especially so in the prosecutions of sex crimes

where, owing to natural instincts and laudable sentiments on the part of the jury,

1. the usual circumstances of isolation of the parties involved at the commission of
2. the offense and the understandable lack of objective corroborative evidence, the defendant is often disproportionately at the mercy of the complaining witness'
3. testimony.
4. (Internal citations omitted.) 2 Wn. App. 464, 466-67, 469 P.2d 980 (1970). In Peterson, the
5. defendant attempted to elicit testimony to prove he did not commit the crime and to discredit a

25

**MOTION TO COMPEL MENTAL EVALUATION OF WITNESS TMR - 6**

RHODES & MERYHEW, LLP

**600 First Avenue, Suite 410**

witness's testimony by showing that it was fabricated. 2 Wn. App. at 465. Finding that the

1

1. defense was denied its constitutional right to present a defense, the Court reversed the conviction
2. and awarded the defendant a new trial. Id. at 468.
3. **b. Confronting adverse witnesses**
4. The defendant's guarantees of cross-examination of prosecution witnesses and of
5. presenting relevant evidence supporting his version of events are also critical aspects of his
6. constitutional right to defend. State v. Harris, 97 Wn. App. at 872. These guarantees are
7. designed to ensure the integrity of the truth-finding process. State v. Lavaris, 41 Wn. App. 856,
8. 859, 707 P.2d 134 (1985) (to perform its truth finding function, "the jury must be apprised of all 10

the material and relevant evidence, whether presented by the prosecution, the defense, or both"),

11

affirmed, 106 Wn.2d 340, 721 P.2d 515 (1986).

12

Both the state and federal constitutions guarantee the defendant's right to confront

13

adverse witnesses. U.S. Const. amend 6; Const. art. I, sec. 22; Washington v. Texas, 388 U.S.

14

15 14, 23, 87 S.Ct. 1920. 18 L.Ed.2d 1019 (1967); Davis v. Alaska, 415 U.S. 308,315, 94 S.Ct.

16 1105, 39 L.Ed.2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15,659 P.2d 514 (1983). The

1. primary and most important component of the right to confront is the right to conduct a
2. meaningful cross-examination. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998).
3. The purpose of cross-examination is to test the perception, memory, and credibility of witnesses. 20 State v. Parris, 98 Wn.2d 140, 144,654 P.2d 77 91982); State v. Roberts, 25 Wu.App. 830,834,

21 611 P.2d 1297 (1980). The right to cross-examine includes the opportunity to show that a

# 22

witness is biased, or that the testimony is otherwise unbelievable. U.S. v. Abel, 469 U.S. 45, 50

23

(1984); Davis v. Alaska, 415 U.S. 308,316 (1974). Confrontation therefore helps guarantee the

24

accuracy of the fact-finding process. Chambers v. Mississippi, 410 U.S. 284,295, 93 S.Ct. 1038,

25

**MOTION TO COMPEL MENTAL EVALUATION OF WITNESS TMR** - **7**

RHODES & MERYHEW, LLP

600 First Avenue, Suitt: **410**

35 L.Ed.2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of the

1

2 fact-finding process is called into question. Id. As such, courts must zealously guard this right. 3 State v. Kilgore, 107 Wn.App. 160, 184-85, 26 P.3d 308 (2001).

1. **c. XXXXXX is entitled to present a case theory that the accuser's mental deficiencies affect her ability to recall or perceive events, or testify**
2. **accurately, and to cross-examine the complainant regarding those deficiencies.**

6

It is well-established under Washington law that the cross-examiner may bring out a

7

witness' mental or sensory deficiencies for purposes of impeachment if they affect the witness'

8

1. memory, observation, or ability to testify accurately. State v. Pryor, 74 Wn. 121, 132 P. 874
2. (1913) ("delusions, hallucinations... and illusions"). Courts have granted wide latitude to
3. counsel in cross-examining witnesses regarding mental conditions:
4. Cross-examination as to a mental state or condition, to impeach a witness, is permissible. Cross-examination is one of several recognized means of attempting
5. to demonstrate that a witness has erred because of his mental state or condition.

In addition, in a proper case counsel may produce experimental evidence to

1. indicate a mental infirmity, or he may call an expert witness to testify as to the
2. witness' mental infirmity. In each of these methods the purpose is the same, i.e., to impeach the witness and put his credibility in issue by showing his mental
3. condition and how it affects his testimony.
4. State v. Froehlich, 96 Wn.2d 301, 305-06, 635 P.2d 127 (1981) (internal citations omitted).
5. Courts have also been receptive the introduction of expert testimony to explain the
6. mental disorder. Psychiatric testimony can often be helpful in aiding the jury in its evaluation of
7. the testimony of a mentally defective witness. State v. Froehlich, 96 Wn.2d 301, 307, 635 P.2d
8. 127 (1981). The court must determine "whether expert testimony will help cast light on the
9. effect the particular mental disorder will have on credibility." State v. Stamm, 16 Wash. App. 23

603,559 P.2d 1 (1976).

24

25

**MOTION TO COMPEL MENTAL EVALUATION OF WITNESS TMR** - **8**

RHODES & MERYHEW, LLP

600 First Avenue, Suite 410

* 1. Here, to effectively cross-examine TMR and to present a defense, counsel must have
	2. information from an expert that specifically addresses the role that TMR's schizophrenia plays in
	3. her ability to accurately perceive and recall events. While there are voluminous records that

4

document the schizophrenia, no one has evaluated what role these delusions and hallucinations

5

play in TMR's ability to recount events, respond appropriately to questioning, and accurately

6

perceive and recall events. This is all the more necessary here, as TMR was experiencing some

7

of the most disturbing acts of psychosis immediately prior and after she claims that :XXXXXX

#### 8

1. entered her bedroom. Immediately prior to this event she alleges, she was waking up at 3 AM
2. every night, hearing voices that tell her horrible things, hearing voices in six languages, and at
3. the last session before the incident, she was asked by her doctor if anyone had sexually abused
4. her-potentially planting this idea in her head. In addition, TMR was preoccupied with things of
5. a sexual nature immediately before this incident, having admitted to writing stories that always
6. contain "the sexual thing" in them after seeing the movie "Titantic" and becoming entranced
7. with a love scene from the movie. Determining whether TMR could distinguish fiction from fact 16

during this period is the crux of the defense case and requires an evaluation by an expert, given

17

the gravity and highly unusual nature of the psychiatric problems this child is experiencing.

18

19

20

21

# 22

23

1

##### C. CONCLUSION

* 1. FOR THE FOREGOING REASONS, this court should GRANT :XXXXXX's motion to
	2. compel a mental examination of TMR.
	3. Dated this

6

7

8

9

10

11

12

13

14

###### 15

16

17

18

19

20

21

# 22

23

## 24

day of February, 2010.

Respectfully submitted, RHODES & MERYHEW

AMY I. MUTH, WSBA #31862

Attorney for :XXXXXX

25

**MOTION TO COMPEL MENTAL EVALUATION OF WITNESS TMR** - 10

**RHODES** & **MERYHEW, LLP**

600 First Avenue, Suite 410

Seattle, Washington 98104

TEL: 206-264-1590

fax: 206-264-1593