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

1. IN **AND FOR THE COUNTY OF KITSAP**
2. **STATE OF WASHINGTON,**
3. **Plaintiff,**

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**v.**

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**Defendant.**

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) **No. **

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**T-**

) **MEMORANDUM OF AUTHORITIES**

) **RE: IN CAMERA INTERVIEW OF**

**KIIII**

.) **VICTIM ADVOCATE**

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)

1. **SO AS TO PROTECT XXXXXX'S SIXTH AMENDMENT RIGHTS,**
2. **DEFENSE COUNSEL MUST INTERVIEW MS. T-**
3. **A. Interviewing Ms. T- in camera is unnecessary when the court has already determined that the defendant's Confrontation rights trump a statutory privilege.**

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This court has determined that, under the unusual and narrow set of facts presented here,

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the sexual assault advocate privilege must yield to XXXXXX's right to confront adverse

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witnesses. Furthermore, the court has ruled that any statements made by Ms. **TIIIII** are not

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1. covered by the statute.
2. Under these special circumstances, an in camera interview is unnecessary. The court has
3. determined that the privilege does not apply with regard to any communications between S.R.
4. and **Ms.1'11111** during the break in the February 7, 2005, defense interview. The statements
5. are discoverable. The court has no need to separately evaluate the evidence, and has no judicial
6. function to perform in evaluating the evidence.

## B. This court should order Ms. T- to submit to a defense deposition because she

1. **has indicated she intends to defy a court order to disclose her communications with**

**S.R. under any circumstances. Otherwise, the trial judge is placed in the position of**

1. **becoming a defense witness.**
2. Here, the issue of an in camera interview is compounded by the fact that the advocate has
3. indicated her intent to stand on privilege regardless of whether the court orders disclosure.
4. Consequently, under the rules of evidence as summarized below, the trial judge conducting the
5. interview may find himself or herself in the undesirable position of becoming a defense witness.
6. Every person is competent to be a witness except as otherwise provided by statute or 12

court rule. ER 601. The credibility of a witness may be attacked by any party. ER 607. A

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statement which was at the time of its making so far contrary to the declarant's interest, or so far

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tended to subject the declarant to civil liability, that a reasonable person in the declarant's

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position would not have made the statement unless the person believed it to be true, is admissible

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1. if the declarant is unavailable as a witness. ER 804(b)(3). A declarant is unavailable as a
2. witness if the declarant "persists in refusing to testify concerning the subject matter of the
3. declarant's statement despite an order of the court to do so." ER 804(a)(2).
4. RCW 5.60.060(7)(b) immunizes **Ms.1'11111** from liability for disclosure absent the
5. alleged victim's consent only when "failure to disclose is likely to result in a clear, imminent risk
6. of serious physical injury or death of the victim or another person." RCW 5.60.060(7)(b).
7. Otherwise, Ms. T- can be sued for unlawfully disclosing privileged communications. 24

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### Here, Ms. may well have unlawfully disclosed S.R.'s communications to the

* 1. prosecution team. This court has already noted that somehow, Ms. managed to alert the
  2. prosecution of discussions S.R. had with her both during the break and over the lunch hour.
  3. This court has found that S.R. lacks capacity to waive privilege. Nonetheless, S.R.'s
  4. commimications which started with the victim advocate were disclosed to the prosecution team,

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either by Ms. T- herself or through Ms. encouraging S.R. to disclose the

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communications. The obvious questions are, if S.R. lacks capacity to waive, did Ms.

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### ever explain to S.R. the privilege, the fact that S.R. did not need to disclose her communications

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1. with Ms. to the prosecution, and did Ms. discuss this information with S.R.'s
2. guardian and talk to her about waiver? If Ms. did not, then she unlawfully disclosed the
3. communications to the prosecution.
4. Therefore, if Ms. persists in disobeying the court's order of disclosure, she is
5. unavailable under ER 804(a)(2) and any statements she makes against interest (including those
6. which could lead to civil liability) come in imder ER 804(b)(3). The defense would need to
7. interview the trial judge to determine which statements are subject to disclosure and subpoena
8. the trial judge to testify to those comnumications. 18

Finally, from a practical standpoint, it hardly makes sense for Ms. to submit to

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the in cmnera interview if she nonetheless intends to stand on privilege despite whatever the

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court rules. At that point, if the court determines that certain information is subject to disclosure,

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defense counsel intends to request the court to enter findings which set forth the disclosures not

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1. covered by the privilege. The consequence is that the defense will receive these disclosures
2. regardless of Ms. , further intention to stand on privilege during a defense deposition. If
3. the defense receives the disclosure, then Ms. , argmnent as to privilege is waived.
   1. XXXXXX would further submit that it is precisely because of all of these ramifications
   2. and hearsay concerns that courts are loath to grant trial judges the authority to conduct in camera
   3. interviews. Should this court conduct the interview under these circumstances, where the
   4. advocate is nonetheless going to assert privilege despite whatever the court determines, this
   5. procedure will generate a whole new set of issues completely unrelated to the privilege issue at

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hand.

## C. Because victim advocate KIii T- is a potential exculpatory witness, defense

1. **counsel must personally interview .**
2. The Sixth Amendment right to effective assistance of counsel imposes upon defense
3. counsel the duty to make reasonable investigations or make a reasonable decision that makes
4. particular investigations unnecessary. Strickland v. Washington, 466 U.S. 668,691, 80 L.Ed.2d 12

674, 104 S.Ct. 2052 (1984). "A lawyer who fails adequately to investigate, and to introduce

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evidence... that raises sufficient doubt as to that question to undermine confidence in the verdict,

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renders deficient performance." Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999).

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Defense counsel's obligation to adequately investigate evidence includes the duty to

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1. personally interview witnesses who can provide exculpatory evidence. Lord v. Wood, 184 F.3d
2. 1083 (1999). In Lord, attorneys for defendant Brian Lord failed to personally interview three
3. potential alibi witnesses, choosing instead to rely on reports from police and investigators
4. regarding the witnesses' testimony. 184 F.3d at 1089. Based on this inforn1ation, trial counsel
5. chose not to call these witnesses, believing that they would not appear credible. Id.
6. The Ninth Circuit ruled that defense counsel rendered ineffective assistance. Id., at 1093.
7. The court found that counsel's investigation into the possible testimony of the three alibi
8. witnesses was cursory, and their failure to call those witnesses during trial, constituted deficient 25
   1. performance that prejudiced Mr. Lord. Id. The court further imposed upon defense counsel a
   2. duty to *personally* investigate witnesses who could provide exculpatory evidence:
   3. We would nevertheless be inclined to defer to counsel's judgment if they had made the decision not to present the three witnesses after interviewing them in
   4. person. Few decisions a lawyer makes draw so heavily on professional judgment
   5. as whether or not to proffer a witness at trial. A witness's testimony consists not only of the words he spealcs or the story he tells, but of his demeanor and
   6. reputation. A witness who appears shifty or biased and testifies to X may persuade the jury not-Xis true, and along the way cast doubt on every other piece
   7. of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and
   8. hearing him tell his story.
   9. Id. at 1095 (emphasis added).
   10. Here, as this court has already noted, S.R.'s reliability as a reporter of abuse is the
   11. dispositive issue in this case for three reasons: 1) the state has no physical evidence to offer to

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corroborate her description of abuse, 2) S.R. has made inconsistent statements describing the

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abuse alleged here, and 3) S.R.'s reliability as a reporter has been previously questioned two

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years prior to meeting XXXXXX, as evidenced by the hospital records admitted during the child

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hearsay hearing. Moreover, given the concerns with S.R.'s reliability, the defense cannot be

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satisfied that she accurately reported her conversation with Ms. **T111111** during the defense

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1. interview.
2. Because this case turns on whether S.R. is a credible witness, whatever communications
3. Ms. T- and S.R. may have exchanged during the break have the potential to exculpate
4. XXXXXX. If S.R. continued to deny the abuse to Ms. T\_, or if Ms. **TIIIIII** said anything,
5. no matter how slight, that may have caused S.R. to change her statement during the defense
6. interview, this evidence will form the center of the defense's theory of case, that S.R. is easily 24

manipulated and is not a credible reporter of abuse.

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* 1. As such, it is necessary for defense counsel to personally interview Ms. so that
  2. counsel can make the critical strategy decision of whether to call Ms. as an
  3. impeachment witness during XXXXXX's trial. As this court is aware, under the extremely
  4. unusual fact pattern presented here, any impeachment evidence gained through Ms. , 5

communication with S.R. rises to the level of exculpatory evidence. Moreover, the potential

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exists that S.R. could have continued to deny the abuse to Ms. - It is precisely because

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of the concerns of S.R.'s reliability that while questioning S.R. about her conversations with Ms.

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**T1111111** is necessary, S.R. cannot be counted on to give a complete picture of whatever

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transpired during the break.

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1. This court must order Ms. T- to submit to the defense deposition to preserve
2. XXXXXX' s Sixth Amendment right to effective representation.

## D. Defense counsel must personally interview Ms. T- to ensure that Ms. T-' statements are subjected to the adversarial process.

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Criminal trials depend upon the adversarial process to seek and evaluate evidence and

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testimony. As explained in the Confrontation briefing previously filed in Defendant's

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1. Supplemental Memorandum of Authorities, April 14, 2005, cross-examination forms the
2. cornerstone of the adversarial process. This method aJlows a criminal defendant to fully
3. examine an accuser's testimony and test the truthfulness and credibility of an accuser's
4. statements.
5. As recently as 2004, in Crawford v. Washington, the United States Supreme Court
6. stressed the need for cross-examination:
7. the (Confrontation) Clause's ultimate goal is to ensure reliability of evidence, but
8. it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that the reliability be assessed in a particular manner: by
9. testing in the crucible of cross-examination.

## MEMORANDUM RE: IN CAMERA INTERVIEW ... 6

### Ronald **D.** Ness & Associates

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### 541 U.S. 36, 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

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Although Confrontation refers to cross-examination at trial, the priniciple here is the

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same: only an adverse party can be expected to fully investigate evidence in possession of the

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### opposing party. The adversarial set-up of the truth-seeking process, furthennore, is part and

1. parcel of the civil discovery process. The civil rules on discovery supply parties with wide
2. latitude when they depose their adversaries. See CR 26, 30. A judge, on the other hand, is not
3. an adverse party and cannot reasonably be expected to fill the role of defense counsel here.
4. Defense coimsel is the proper party to conduct Ms. ' interview.
5. **E. Case law which authorizes iu camera interviews focuses on the need to protect the**
6. **identity of the witness, not communications.**
7. Typically, a trial court's authority to conduct an in camera review of discovery
8. information is limited to records. See, , Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989,
9. 94 L.Ed.2d 40 (1987) (authorizing courts to review child abuse records in camera in response to
10. blanket defense discovery requests for such records); RCW 70.125.065 (authorizing in camera
11. inspection of records of rape victims pursuant to defense requests). Notably, records provide
12. finite an10unts of information, and most significant (and obvious), a record cannot be cross­ 18

examined.

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Courts have authorized in camera interviews of witnesses in two situations, and both

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involve confidential infonnants. The first arises when a defendant seeks disclosure of the

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identity of a confidential informant. The U.S. Supreme Court authorized disclosure of a

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1. confidential informant's identity under limited circumstances in Roviaro v. United States, 353
2. U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623 (1957). There, while the Court acknowledged the
3. confidential informant's privilege as necessary to encourage citizens to disclose information to

**MEMORANDUM RE: IN CAMERA INTERVIEW ... 7**

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### protect the public interest through law enforcement, it ruled that the privilege was not absolute.

1. Rovario, 353 U.S. at 60. If disclosure of an informant's identity "is relevant and helpful to the
2. defense... or is essential to a fair determination of the cause, the privilege must give way." Id. at
3. 60-61. The Washington supreme court, applying this holding, further ruled that the "preferred
4. method for making this determination.. .is for the court to hold an in camera session at which the

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### judge hears the informer's testimony and applies the Rovario standard." State v. Harris, 91

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### Wn.2d 145, 150, 588 P.2d 720 (1978).

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The other circumstance in which courts are authorized to conduct in camera interviews

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### occurs when a defendant wishes to attack the veracity of a confidential informant's statements

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1. provided to a search warrant affiant. There, disclosure is allowed "where deemed necessary to
2. assess the affiant's credibility or accuracy." State v. Casal, 103 Wn.2d 812,817,699 P.2d 1234 13 (1985).
3. Conducting an in camera interview in the confidential infonnant context is not analogous
4. to conducting an in camera interview here. First, the policy underlying each is different. Courts
5. authorize in camera interviews of an informant to protect the identity of the confidential
6. informant, not the communications of the infonnant. Here, identity is obviously not an issue 18

the defense is concerned with communications. And even with informants, if disclosure is

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necessary to protect the defendant's constitutional rights, the courts must order disclosure of the

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infonnant's identity so that the defense can presumably interview the informant.

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Furthermore, situations involving infonnants are far more likely to arise at the probable

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1. cause/pre-trial motions stage, not at trial. Detennining whether a judge properly relied on
2. statements attributed to an informant in a search warrant affidavit is completely different from
3. interviewing an identified witness about whether an accuser provided exculpatory evidence or
4. whether the witness unduly influenced the accuser. In one situation, the court is assessing
5. credibility, and in the other, the court is conducting pre-trial discovery and investigation, a role
6. that only defense counsel can properly perform.
7. No authority permits a trial judge to conduct an in camera interview under these
8. circumstances. This court must allow defense counsel to personally interview Ms. -

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## II.

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**CONCLUSION**

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### For the foregoing reasons, XXXXXX respectfully requests this court ORDER Ms.

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### 10 to submit to a defense deposition regarding her communications with S.R. on February

11 7,2005.

12 **DATED** this day of 13

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- ,2005,

### RONALD D. NESS & ASSOCIATES

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### Attorney for Defendant