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6 SUPERIOR COURT OF CALIFORNIA, COUNTY OF \_\_\_\_\_

7 THE PEOPLE OF THE STATE OF ) Case No.  
8 CALIFORNIA, )  
9 Plaintiff, ) MOTION TO COMPEL A  
10 ) PSYCHIATRIC EVALUATION OF  
11 ) THE COMPLAINING WITNESS  
12 ) FOR THE PURPOSE OF  
13 ) DETERMINING HER CAPACITY  
14 ) TO GIVE CONSENT TO SEXUAL  
15 ) INTERCOURSE  
16 ) Date:  
17 Defendant. ) Time:  
18 ) Dept:  
19 )

20 I. ISSUE

21 MAY A DEVELOPMENTALLY DISABLED COMPLAINING  
22 WITNESS (WHO IS A CONSERVATEE) BE ORDERED TO  
23 UNDERGO PSYCHOLOGICAL EVALUATION AT DEFENSE  
24 REQUEST TO DETERMINE HER CAPACITY TO CONSENT TO  
25 SEXUAL INTERCOURSE?

26 II. STATEMENT OF FACTS

27 A. HISTORY OF THE COMPLAINING WITNESS

28 (Insert the facts of your case)

29 B. RECENT PSYCHOLOGICAL TESTING

(Summarize if applicable)

30 C. REFUSAL OF THE COMPLAINANT'S GUARDIAN TO PERMIT A  
31 PSYCHOLOGICAL RE-EVALUATION

(Summarize your particular facts)

32 III. ARGUMENT

1 **A DEFENDANT IS ENTITLED TO DISCOVER WHETHER THE**  
2 **COMPLAINING WITNESS IS INCAPABLE OF GIVING CONSENT TO**  
3 **SEX, SINCE A LACK OF SUCH CAPACITY IS AN ELEMENT OF THE**  
4 **CHARGED OFFENSE.**

5 Defendant is charged with rape in violation of  
6 Penal Code section 261. The relevant portion of that  
7 section provides:

8 "(a) Rape is an act of sexual intercourse  
9 accomplished  
10 with a person not the spouse of the perpetrator,  
11 under any  
12 of the following circumstances:  
13 (1) Where a person is incapable, because of a  
14 mental disorder  
15 or developmental or physical disability, of giving  
16 legal  
17 consent. . .the prosecuting attorney shall prove,  
18 as an  
19 element of the crime, that a mental disorder or  
20 physical  
21 or developmental disability rendered the alleged  
22 victim incapable of giving consent."

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

26 **1. SCOPE OF DISCOVERY.**

27 Penal Code section 1054(e) specifies that "...no  
28 discovery shall occur in criminal cases except as  
provided by this chapter, other express statutory  
provisions, or as mandated by the Constitution of the  
United States." The purpose of Penal Code section 1054  
is to establish reciprocal discovery, which is now  
constitutionally compelled. (Cal. Constitution article  
I, section 30(c).) Other purposes include the  
ascertainment of truth, court time savings, the  
protection of victims and witnesses from harassment and  
the prevention of undue delay. (In re Littlefield

1 (1993) 5 Cal.4th 122.)

2 **2. CRIMINAL DEFENDANTS HAVE A RIGHT TO GATHER ALL**  
3 **RELEVANT EVIDENCE BASED ON THE RIGHT OF THE**  
4 **ACCUSED TO PRESENT A COMPLETE DEFENSE.**

5 A constitutional right to present defense evidence  
6 was unanimously recognized in Crane v. Kentucky (1986)  
7 476 US 683, 690:

8 Whether rooted directly in the Due  
9 Process Clause of the Fourteenth  
10 Amendment, Chambers v. Mississippi  
11 ..., or in the Compulsory Process  
12 Clause or Confrontation Clauses of the  
13 Sixth Amendment, Washington v. Texas  
14 ...; Davis v. Alaska ...; the  
15 Constitution guarantee criminal  
16 defendants "a meaningful opportunity  
17 to present a complete defense."

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

Prejudicial error was found in People v. Reeder  
(1978) 82 CA3d 543, 147 CR 275, when a trial court  
excluded relevant evidence proffered by a defendant on a  
theory of motive. There, the defendant sought to  
establish that his co-defendant had reneged on a \$200

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

21 "Evidence Code section 352 must bow to  
22 the due process right of a defendant  
23 to a fair trial and to his right to  
24 present all evidence of significant  
25 probative value to his defense. In  
26 Chambers v. Mississippi 410 US 284, 93  
27 SC 1038, 35 LED2d 297 (1973) it was  
28 held that the exclusion of evidence,  
vital to a defendant's defense,  
constituted denial of a fair trial in  
violation of constitutional due-  
process requirements." (Reeder,  
supra, 82 Cal.App.3d at p. 553,  
emphasis added.)

1 In the instant case, Defendant cannot practically  
2 counter the People's assertion that the complaining  
3 witness lacked capacity to consent to sex without a  
4 psychological re-evaluation of her and refusal to order  
5 such evaluation will effectively prevent him from  
6 presenting a full defense.

7 **3. THE DEFENDANT'S REQUEST FOR PSYCHOLOGICAL RE-**  
8 **EVALUATION OF THE COMPLAINING WITNESS IS**  
9 **ANALOGOUS TO THE RE- TESTING OF PHYSICAL**  
10 **EVIDENCE, WHICH IS A DUE PROCESS RIGHT.**

11 The complaining witness, is essentially a container  
12 of evidence. The central issue in this case is whether  
13 she is capable of legally consenting to sex. The  
14 defense is not simply trying to discover psychiatric  
15 information which the prosecution already possesses.  
16 Rather, Defendant seeks to "re-test" the source of that  
17 information, which is the complaining witness herself.  
18 To do this, Defendant's expert must delve independently  
19 into the mind of the complainant without the possible  
20 biases under which state-paid witnesses might have been  
21 laboring.

22 Defendant's request to re-test the complaining  
23 witness on the limited issue of her capacity to consent  
24 to sexual activity is analogous to situations where  
25 other demonstrative evidence (such as latent  
26 fingerprints, blood or other chemical samples) exists  
27 and a defendant wants to retest and verify the results  
28 gathered by the prosecution. Courts routinely grant  
these requests and the instant case should be no

1 exception. (People v. De La Plane (1979) 88 Cal.App.3d  
2 223.)

3 Although Penal Code section 1112 prevents a victim  
4 in a sexual assault case from being forced to submit to  
5 a psychiatric or psychological evaluation for purposes  
6 of assessing her credibility, Defendant does not seek  
7 such examination for that proscribed purpose. As such,  
8 whether or not the complaining witness must undergo such  
9 examination as requested by the defense is within this  
10 Court's discretion. (People v. Taylor (1986) 180  
11 Cal.App.3d 622, 634-635.) The factual record here  
12 justifies this Court's exercise of its discretion to  
13 order the requested psychiatric or psychological  
14 examination. (Set forth factual argument showing trial  
15 court should order exam in your case. For example,  
16 previous testing has not been comprehensive and/or  
17 recent and has not included tests you want your expert  
18 to administer.)

19 A defendant's right to prepare an effective defense  
20 and receive a fair trial entitles him to obtain in  
21 pretrial discovery all relevant and reasonably  
22 accessible information. (Craig v. Municipal Court  
23 (1975) 100 CA3d 69; Pitchess v. Superior Court (1974) 11  
24 Cal3d 531.) Unless there is some legitimate need for  
25 confidentiality, the government has no interest in  
26 denying a defendant access to all evidence that can  
27 throw light on the issues in the case. People v. Riser  
28 (1956) 47 Cal.2d 566, 586; cert. den. 353 US 930 (1957).

1 Therefore, the court should order the complainant's  
2 conservator to permit a psychological evaluation by the  
3 defense expert.

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

15 The Court must realize that the State, represented  
16 by the District Attorney and the Public Guardian's  
17 Office, has the complaining witness totally within its  
18 control. The State makes her major decisions, supplies  
19 her with necessities, and brings this legal action--not  
20 the complaining witness. Given these facts, any  
21 possibly exculpatory evidence within the State's  
22 possession (and that includes the complaining witness  
23 herself) must be shared with the defense, as recognized  
24 in a landmark federal case, Brady v. Maryland (1963) 373  
25 US 83, 83 SC 1194, 10 LED2d 215. The court should  
26 therefore grant this motion for a psychological re-  
27 evaluation.



1 alleged victim should be weighed against her Fourth  
2 Amendment right of unreasonable searches and seizures.  
3 Since no bodily intrusion or search is required, the  
4 defendant's requested order should be granted.

5 **5. FEDERAL CASE LAW PERMITS THE PROBING OF THE**  
6 **ALLEGED VICTIM'S PSYCHIATRIC HISTORY, WHERE**  
7 **SUCH HISTORY MAY AFFECT EITHER HER ABILITY TO**  
8 **TESTIFY OR HER CAPACITY TO GIVE LEGAL CONSENT.**

9 A defendant has a constitutional right, under the  
10 Sixth Amendment, to be able to adequately cross-examine  
11 a witness, including "... the right to expose to the  
12 jury the facts from which jurors, as sole triers of fact  
13 and credibility, could approximately draw inferences  
14 relating to the reliability of the witness." Davis v.  
15 Alaska (1973) 415 US 308, 318; Rinaker v. Superior Court  
16 (1998) 62 Cal.App.4th 155, 165.

17 It is proper for an accused to show that a  
18 witness's testimony was the product of a mental illness  
19 (or by analogy for this case, the product of a  
20 developmental disability). (U.S. v. Lindstrom (4 Cir.  
21 1983) 698 F2d 1154.) Lindstrom involved mail fraud  
22 charges. The reviewing court found reversible error  
23 where the defendant was denied access to psychiatric  
24 information suggesting that a witness suffered from  
25 delusions or bias.

26 A defendant also has the right to show that the  
27 alleged victim possessed the capacity to consent to  
28 sexual acts, or that the defendant possessed a  
reasonable belief that she possessed such capacity.

1 (People v. Dolly (1966) 239 CA2d 143, 146.) Dolly  
2 concerned a rape charge where the complainant allegedly  
3 lacked mental capacity to give consent, since she  
4 comprehended nothing about sex nor where babies came  
5 from. Even under these facts, the court held that a  
6 defendant could properly submit evidence to support his  
7 theory of capacity to consent. (Id., at p. 146.) The  
8 accused's evidence would presumably have included  
9 psychiatric testing of the victim--however the defendant  
10 in Dolly declined to testify or present a defense.

11  
12 **B. "CAPACITY TO CONSENT" IS THE KEY ELEMENT OF THE**  
13 **CRIME CHARGED; THUS THE DEFENDANT MUST BE**  
14 **PERMITTED TO ACQUIRE SUCH EVIDENCE BY**  
**PSYCHOLOGICAL TESTING OF THE COMPLAINANT.**

15 **1. THE BURDEN OF PROOF ON THE "CAPACITY TO**  
16 **CONSENT"**  
17 **ISSUE REMAINS ON THE DISTRICT ATTORNEY EVEN**  
18 **WHEN**  
19 **THE COMPLAINING WITNESS IS A CONSERVATEE.**

20 For the charged crime of rape, the People must  
21 prove beyond a reasonable doubt that because of a mental  
22 disorder or developmental disability, the alleged victim  
23 was incapable of giving legal consent to sexual acts.

24 (Include a similar discussion of any other offenses  
25 Defendant is charged with that have a similar element  
26 and burden of proof requirement.) The fact that the  
27 complaining witness is the subject of a conservatorship  
28 does not shift that burden. (Penal Code section  
261(a)(1).)

In essence, the statute states that no presumption

1 of a lack of capacity to consent to sexual acts can be  
2 drawn from the fact that a person is developmentally  
3 disabled.

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

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

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

20 The determination of whether a complaining witness  
21 had "sufficient mental capacity" at the time of the  
22 alleged incidents is a question for the trier of fact.  
23 (People v. Mobley (1999) 72 Cal.App.4th 761, 85  
24 Cal.Rptr.2d 474, 490.) Such issue is not within the  
25 common experience of most jury members, so expert  
26 testimony would be admissible per Evidence Code section  
27 801. (People v. Lewis (1977) 75 Cal.App.3d 513, 518-  
28 519, cited with approval in People v. Torres (1995) 33  
Cal.App.4th 37, 46.) If only the prosecution is allowed

1 to present its experts and its recent test results,  
2 Defendant will be greatly prejudiced and unable to mount  
3 an effective defense.

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

7 An analogy is useful. Courts have already wrestled  
8 with the issue of whether a mentally retarded person was  
9 capable of voluntarily consenting to waive his Miranda  
10 right to remain silent. In the case of Colorado v.  
11 Connelly (1986) 479 US 157, the United States Supreme  
12 Court ruled that the mental condition of a suspect was  
13 insufficient, by itself, to render a statement  
14 "involuntary." (Also see People v Kelly (1990) 51 Cal.3d  
15 931, 951.) Thus a developmentally disabled person has  
16 "capacity" to consent to a waiver of his Fifth Amendment  
17 rights, as long as his or her will is not overborne by  
18 the interrogator's conduct. By inference, a mildly  
19 retarded person has legal capacity to consent to sex if  
20 he or she is acting without threats or force and  
21 understands what sexual intercourse is.

22 In the case at bar, the complaining witness has  
23 stated several times that no physical or emotional  
24 coercion was employed during the alleged sexual acts,  
25 and that she knew the nature and quality of those sexual  
26 acts. By applying the reasoning in Connelly, and the  
27 definitions given above, when the complaining witness  
28 was asked to have sex, and then agreed to do so, she  
displayed all the necessary elements of legal capacity

1 and voluntary consent despite her developmental  
2 disability.

3 The defense must be permitted to establish with  
4 evidence that the complainant possessed the required  
5 legal capacity to consent. Expert testimony based on  
6 independent psychological testing of the alleged victim  
7 is therefore necessary. If the defense is allowed to  
8 demonstrate this capacity, then the central element of  
9 the prosecution's case can be negated. (People v.  
10 Dolly, supra. Dolly involved a mentally retarded  
11 victim, with the functional age of a young child, who  
12 submitted to sexual intercourse. Her level of  
13 functioning was so low that she did not know how babies  
14 were conceived nor what the sex act involved, and yet  
15 even in that case, the defendant had a right to submit  
16 evidence to support the theory of capacity to consent.

17 Defendant seeks evidence as to capacity, not  
18 credibility, and thus there is no violation of either  
19 the letter or the spirit of Penal Code section 1112.  
20 The court in People v. Hagerman (1985) 164 CA3d 967  
21 observed a further distinction in regard to Penal Code  
22 section 1112, holding that even when a court-ordered  
23 psychiatric examination is not appropriate, psychiatric  
24 testimony is still permitted. The defense contends,  
25 however, that in this case both an examination and  
26 testimony of a psychiatric nature are required pursuant  
27 to the foregoing authorities. The mental state of the  
28 complaining witness in a sex case is still a proper

1 subject of inquiry. (Id., at pp. 974-975.)

2 **IV. CONCLUSION**

3 A complaining witness in a sexual abuse case may be  
4 ordered to undergo an psychological evaluation where the  
5 purpose of the testing is to determine whether he or she  
6 had the capacity to legally consent to the sexual acts  
7 in question. The court must allow the defendant to  
8 negate the "capacity" and "consent" elements of the  
9 crimes charged, even when the complainant is a  
10 conservatee who is developmentally disabled. Penal Code  
11 section 1112 does not bar this testing, because the  
12 defendant's purpose is not to attack the credibility of  
13 the alleged victim.

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

19 Dated:

20 Respectfully submitted,

21 \_\_\_\_\_  
22 Attorney for Defendant  
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