

1 **CLANCY LITIGATION GROUP**

Patrick E. Clancy, SBN 60805
2 Dr. Demosthenes Lorandos, SBN 177644
1600 S. Main St., Suite 185
3 Walnut Creek, CA 94596
Tel: (925) 256-4600
4 eFax: (888) 802-5089

5 Attorneys for Defendant
6
7
8

9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF
10
11

12 THE PEOPLE OF THE STATE OF) Case No.
13 CALIFORNIA,)

14) MOTION IN LIMINE

15 Plaintiff,) TO EXCLUDE EXPERT WITNESS OPINION

16) ABOUT THE ALLEGED VICTIM'S

17 vs.) CAPACITY TO CONSENT AS A DENIAL

18) OF DUE PROCESS

19)

20) Date:

21 Defendant.) Time:

22) Dept:
23

24 I. ISSUE
25

1 IN VIEW OF EVIDENCE CODE SECTION 1112, WHICH BARS A
2 COURT FROM ORDERING AN ALLEGED VICTIM TO SUBMIT TO A
3 PSYCHOLOGICAL EVALUATION, THE PROSECUTION SHOULD NOT
4 BE ALLOWED TO OFFER EXPERT OPINION ON EVALUATIONS TO
5 WHICH IT SUBJECTED THE ALLEGED VICTIM.

6
7
8 This motion is to be read along with defendant's motion
9 entitled "Motion for Psychiatric Evaluation of the Complaining
10 Witness." Both motions are offered in the alternative; one
11 shall become moot if the other is granted.

12 II. PROCEDURAL FACTS:

13 RECENT PSYCHOLOGICAL TESTING BY THE PROSECUTION

14
15 The complaining witness has been subjected to the following
16 psychological/psychiatric examinations at the behest of the
17 government: **List and describe the exams**

18 III. ARGUMENT:

19 ALLOWING PSYCHOLOGISTS TO TESTIFY ON THE PROSECUTION'S
20 BEHALF IN A SEXUAL ASSAULT CASE DENIES THE DEFENDANT
21 HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE
22 PROCESS AND EQUAL PROTECTION BY THE APPLICATION OF
23 PENAL CODE SECTION 1112.

24
25 Penal Code Section 1112, enacted in 1980, provides:

1
2 "The trial court shall not order any
3 prosecuting witness, complaining witness, or
4 any other witness, or victim of any sexual
5 assault prosecution to submit to a
6 psychiatric or psychological examination for
7 the purpose of assessing his or her
8 credibility."

9 Before this legislation the trial court had discretion to
10 compel such an examination in sex offense cases. **Ballard vs.**
11 **Superior Court** (1966) 64 C2d 159, 49 Cal.Rptr. 302, 410 P.2d
12 838. **Ballard** established an exception for sex offense cases to
13 the general rule disfavoring psychiatric evidence of
14 credibility. The courts have generally excluded such evidence
15 out of concern that "expert" testimony on credibility will not
16 assist jurors in performing their function of independently
17 assessing witness credibility. **Ballard vs. Superior Court;**
18 **People vs. Manson** (1976) 61 CA3d 102, 132 Cal.Rptr. 265,
19 Cert.Denied 1977 430 U.S. 986, 97 Sup.Ct. 1686, 52 L.Ed.2d 382.

20
21 While it is true that there is no inherent unconstitutional
22 disparity in treatment of sex charges as contrasted with other
23 crimes under Section 1112 (see **People vs. Fleming** (1983) 140
24 CA3d 540, 189 Cal.Rptr. 619) defendant's right to due process
25 will be violated by allowing prosecution witnesses to testify as

1 to the psychological condition and credibility of the victim.

2 As **Fleming** states:

3 "Under almost every rule of evidence, some
4 arguably relevant material is excluded. The
5 confrontation in due process clauses do not
6 prohibit a legislature from determining that
7 a certain class of evidence is generally
8 unreliable or excessively prejudicial and
9 barring its use altogether. Defense counsel
10 was permitted to employ all the traditional
11 techniques of impeachment during the cross-
12 examination of the victim. No restriction
13 of appellant's right to confrontation of his
14 accuser or to compulsory process occurred."
15 (**Id.**, at p. 544, emphasis added.)

16
17 Defendant therefore contends that allowing **prosecution**
18 testimony on the credibility or psychological condition of the
19 victim, while applying Penal Code Section 1112 to the
20 availability of this evidence to his defense, constitutes a
21 denial of his state and federal constitutional rights to due
22 process and equal protection, thus making Penal Code Section
23 1112 unconstitutional as applied. In order to fairly administer
24 the well intentioned Penal Code Section 1112 such evidence must
25

1 be completely excluded as generally unreliable or excessively
2 prejudicial and its use altogether barred.

3 Dated:

4 Respectfully submitted,
5
6

7 _____
8

9 Attorney for Defendant
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25