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CLERK OF DISTRICT COURT  
18TH JUDICIAL DISTRICT  
SEDGWICK COUNTY, KANSAS

IN THE EIGHTEENTH JUDICIAL DISTRICT  
DISTRICT COURT, SEDGWICK COUNTY, KANSAS  
CRIMINAL DEPARTMENT

THE STATE OF KANSAS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TERRYBLUM, )  
 )  
 Defendant. )

Case No. 10CR3795

**MOTION FOR ORDER COMPELLING ALLEGED VICTIM TO SUBMIT TO A  
PSYCHOLOGICAL EXAMINATION**

**COMES NOW**, the defendant, by and through his attorney, John B. Sullivan and requests this Court for an order requiring the alleged victim in the above-entitled matter to undergo a psychological examination. In support of his request, Defendant shows the court the following:

**INTRODUCTION**

The complaining witness in this case has accused Mr. Blum of improper touchings and penetrations. Mr. Blum denies that the touchings and penetrations described by the complaining witness occurred, and has steadfastly maintained his innocence. The complaining witness, on the other hand, has given materially inconsistent versions of the events underlying this case. There is

a lack of corroborating evidence in this case: there is no physical evidence to corroborate the complaining witness' statements, and there were apparently no witnesses to the alleged events. In light of the lack of corroborating evidence, the state seeks to solely rely primarily on the complaining witness' own testimony. Examination of the complaining witness is necessary so that the Court might determine the complaining witness' competency to testify before the jury at trial.

Additionally, examination of the complaining witness is necessary so that, if the Court finds the complainant competent to testify, Mr. Blum may effectively cross-examine the complainant and/or any state experts at trial, and present expert testimony in his own defense, pursuant to Mr. Blum' constitutional rights to confrontation, to present evidence and to due process guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kansas Bill of Rights.

Counsel for the defendant anticipates that the state may present, in addition to the complainant herself, mental health and medical professionals. The defense anticipates these witnesses will testify regarding their conversations with and/or subjective observations and/or conclusions regarding the complainant. It is further anticipated that these experts will testify regarding alleged psychological, emotional or behavioral difficulties encountered by the complaining witness or that the complainant exhibits symptoms of child sex abuse. The defendant is entitled to file a motion for psychological examination of the complaining witness, which, in a case such as this, the trial court "would certainly have granted in view of the expert testimony to be offered by the State." *State v. Munyon*, 240 Kan. 53, 61 (1986).

Although an examination is warranted even if the state does not intend to present such evidence, if such expert evidence is presented, an examination is particularly necessary to guarantee that Mr. Blum may confront it effectively via an expert who likewise has had some meaningful first-hand interaction with the complainant.

Finally, there appears to be no compelling reason to protect the complainant from undergoing psychological examination. Under these circumstances, Mr. Blum is entitled to an order that the complainants submit to psychological examination by an expert chosen and funded by Mr. Blum.

### **ARGUMENT**

The Kansas Supreme Court has held that “a trial judge has the discretion to order a psychiatric examination of the complaining witness in a sex crime case if the defendant presents a compelling reason for such examination.” *State v. Gregg*, 226 Kan. 481, 489 (1979). In determining whether such compelling reasons exist, courts rely on the following list of non-exclusive factors:

- (1) whether there was corroborating evidence of the complaining witness' version of the facts;
- (2) whether the complaining witness demonstrates mental instability;
- (3) whether the complaining witness demonstrates a lack of veracity,
- (4) whether similar charges by the complaining witness against others are proven to be false,
- (5) whether the defendant's motion for a psychological evaluation of the complaining witness appears to be a fishing expedition, and
- (6) whether the complaining witness provides an unusual response when questioned about his or her understanding of what it means to tell the truth.

*State v. Price*, 275 Kan. at 84, 61 P.3d 676; *Gregg*, 226 Kan. at 490, 602 P.2d 85; *c.f.*, *State v. McIntosh*, 274 Kan. 939, 955, 58 P.3d 716 (2002).

In *Gregg*, the Court found the trial judge's denial of the defendant's motion for examination was not an abuse of discretion when it was made only one day before the trial and the defendant showed no compelling reason the complaining witness should submit to the requested exam. *Id.* at 490. Although the *Gregg* Court did not purport to offer an exhaustive listing of what reasons might qualify as compelling, the Court did note that the defendant in that case failed to claim or introduce evidence "as to the child's mental instability, lack of veracity, similar charges against other men proven to be false, or any other reason why this particular child should be required to submit to such an examination." *Id.* Thus, the Court suggested that, had the defendant shown any one of the three specified factors, or alternatively, some other compelling reason, he may have been entitled to have the complainant examined.

The facts and circumstances in support of an order for examination of the complainants are much more compelling in the present case than they were in *Gregg*. In *Gregg*, *inter alia*, the defendant was charged with aggravated sodomy for forcing a young girl to commit fellatio on him. *Id.* at 482. The defendant did not deny that the sexual act had occurred; rather, he made the improbable claim that the girl had voluntarily performed the act of her own initiative while the defendant was high on drugs and alcohol and was unaware of what was occurring. *Id.* The defendant did not argue either that the girl had fabricated the sexual event, or that she had given different versions of her accusations of force such as to raise any question about her inability to tell the truth about the encounter. *Id.* In contrast to *Gregg*, Mr. Blum has credibly and steadfastly denied that any sexual act or sexual touching (consensual or not) occurred between him and the complaining witness. Moreover, the complainant's lack of veracity and mental instability are evident in the material inconsistencies in their various versions of events. Finally,

there is no reason to protect this complainant from undergoing a psychological evaluation. Such an evaluation would only aid in the search for the truth in this important case, and would ensure that the defendant's constitutional rights to confrontation, to present evidence and to due process are guaranteed.

Several other jurisdictions have suggested that examinations of complainants may be constitutionally required in similar cases involving charges of sex offenses against children, either for competency determinations or to guarantee the defendant's confrontation rights at trial, or both.

In *State v. Stacy*, 371 S.E.2d 614 (W. Va. 1988), the Court reversed the defendant's conviction of first-degree sexual abuse, holding that the trial court erred in denying the defendant's motion to have the complainant evaluated by an independent psychiatrist regarding the child's competency to testify. The Court explained that the child's inconsistent and vague testimony placed her ability to recall events and testify truthfully into serious question, and thus "there was significant impairment of defendant's right to confront his accuser through effective cross-examination." *Id.* at 618.

Similarly, in *Anderson v. State*, 749 P.2d 369 (Alaska Ct. App. 1988), the Court found reversible error in the trial court's failure to grant the request of the defendant, charged with multiple counts of sexual abuse of a minor, for an examination of the complainants in order to determine the children's competency and to aid the defense in evaluating their credibility. The Court found that the state, by presenting expert testimony about behavioral characteristics associated with victims of child sexual abuse, had placed the children's psychological characteristics in controversy. *Id.* at 371. Consequently, "[u]nder the circumstances, a

psychological examination of the children would have substantially benefitted the defendant in preparing to understand and, if possible, to critically evaluate [the state's expert's] testimony," in addition to "aid[ing] the defense in preparing to litigate the question of [the children's] competency." *Id.* at 371-72.

In *Griego v. State*, 893 P.2d 995 (Nev. 1995), the Court reversed the defendant's convictions of sexual assault of a minor and lewdness with a minor, holding that the trial court should have granted the defendant's request for an independent psychological examination of two of the complainants. The Court in *Griego* based its holding on a number of factors: (1) the state presented at least two experts of its own at trial; (2) there was no evidence that the complainants needed protection from further examination by an independent mental health expert; (3) the evidence against the defendant, while sufficient, was "hardly overwhelming," and any corroboration evidence was "de minimis"; and (4) the veracity of the complainants was "questionable at best," due in part to the state's suggestive interview procedure. *Id.* at 999-1000.

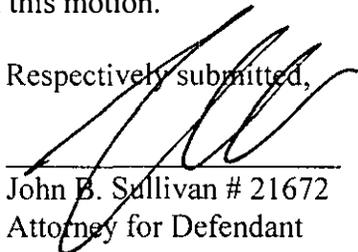
Finally, in *Gray v. State*, 640 So.2d 186 (Fla. Dist. Ct. App. 1994), in a ruling "bottomed upon fundamental fairness notions inherent in due process," *id.* at 193, the Court found reversible error in the trial court's denial of the defendant's request for a psychological examination of the complainant in a multiple count sexual battery case. There, the state relied at trial on its own expert's personal interview with the child, and thus, the Court concluded, that the "failure to allow a defense interview in such circumstances deprive[d] defendant of 'fundamental fairness' by prevent[ing] him from presenting a fair defense to the [state's] case." *Id.* at 192.

Consistent with *State v. Gregg*, as well as with the reasoning of these subsequent opinions from other jurisdictions, Mr. Blum respectfully submits that an order for the

complainant in this case to submit to psychological examination is necessary both for a competency determination and to protect Mr. Blum' rights to confrontation, to present evidence and to due process, under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 18 of the Kansas Bill of Rights.

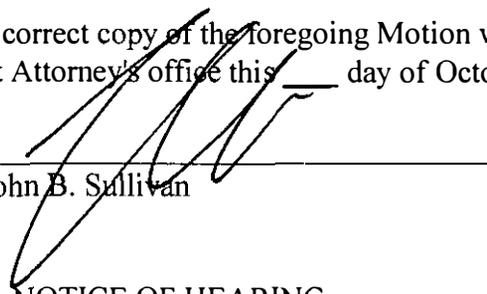
WHEREFORE, for the above and foregoing reasons, as well as any further reasons which may be presented in any further memorandum of law or oral argument on this motion, defendant TerryBlum hereby respectfully requests that the Court grant his motion and order the complaining witness to submit to a psychological examination by an expert of the defendant's choosing, at his expense, or order such other and further relief as the Court deems just. Counsel respectfully requests a hearing and oral argument on this motion.

Respectively submitted,

  
\_\_\_\_\_  
John B. Sullivan # 21672  
Attorney for Defendant

#### CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion was delivered in person to the Sedgwick County District Attorney's office this \_\_\_\_\_ day of October, 2011.

  
\_\_\_\_\_  
John B. Sullivan

#### NOTICE OF HEARING

Please take notice and be advised that the foregoing Motion will be heard at 9:00 a.m. on the <sup>4<sup>th</sup></sup> 11<sup>th</sup> day of November, 2011, before the Honorable Judge Wilbert.