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Competency and Credibility: Double Trouble for Child Victims of Sexual Offenses

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COMPETENCY AND CREDIBILITY: DOUBLE TROUBLE FOR CHILD VICTIMS OF SEXUAL OFFENSES

I. INTRODUCTION

Sexual assaults, especially those upon children, remain a major concern to both law enforcement officials and the public.[1] A startling report issued by the National Center for Juvenile Justice reveals that one in seven victims of all sexual assaults are under the age of six, and one in three are under the age of eleven.[2] Prosecutors who handle these crimes against young children face lingering issues surrounding both the competency of children as witnesses and public skepticism associated with victims of sex crimes.[3]

In many cases of child sexual abuse and assault, the child's account of the crime constitutes the prosecution's entire case against the defendant.[4] Thus, the testimony of the child becomes especially important to the prosecution of the case.[5] Defense attorneys rely on the absence of corroborating evidence and the victim's age to demand that fundamental fairness to the accused requires a psychiatric examination of the child victim for purposes of assessing competency or credibility.[6] Requiring a child victim of sexual abuse to submit to a psychiatric exam, however, conflicts with the overarching policies of encouraging victims to come forward and protecting the privacy interests of particularly vulnerable victims.[7] The nationwide disparity in the treatment of compelled psychiatric examinations for child victims of sexual crimes reflects the courts' difficulties in balancing these competing interests.[8]

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[1] *See* HOWARD N. SNYDER, PHD., NATIONAL CTR. FOR JUVENILE JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (2000).

[2] *Id.* at 2.

[3] *See* Ballard v. Superior Court of San Diego, 410 P.2d 838, 846 (1966) (citing 3 J. Wigmore, Evidence § 924a. (1940)).

[4] Robin W. Morey, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 245-46 (1985).

[5] *Id.* at 246. Children are often limited by immaturity, suggestibility and inexperience. *Id.* at 251.

[6] *See generally Ballard*, 410 P.2d at 846 (emphasizing frequency of uncorroborated allegations in sexual assault cases).

[7] *See id.* at 847-49 (acknowledging import of privacy rights of victims).

[8] *See* State v. Gregg, 602 P.2d 85, 89-90 (Kan. 1979) (categorizing different jurisdictional approaches to compelled psychiatric examinations). The Supreme Court of Kansas

This Note explores the various ways courts across the country balance the rights of child victims of sex crimes against a defendant's constitutional guarantee to a fair trial. Part II provides a historic analysis of the origins of the skepticism related to the competency of children as witnesses as well as credibility issues surrounding victims of sexual crimes. Part III explores legislative and judicial methods used by various states to address compelled psychiatric examinations of children. Part IV analyzes the implications of these approaches in the context of the right of the accused to a fair trial, the policy goals of protecting young victims of sexual crimes, and the state's desire to encourage victims to come forward. Part V recommends isolating the competency issues from the credibility issues as the most appropriate way to strike a balance for the defendant, the child victim and the whole of society.

II. SKEPTICISM OF COMPETENCY THE COMPETENCY OF CHILDREN AND CREDIBILITY OF VICTIMS OF SEXUAL CRIMES

A. *Competency of Children*

Until 1974, many states adopted common law principles suggesting children younger than a certain age were presumptively incompetent to testify.[9] For example, prior to the adoption of statutes regarding the presumptive competency of all witnesses, South Carolina followed the common law which presumed that a child is incompetent until age fourteen.[10] Some commentators suggest that a child's tendency to mix fact with fantasy limits their viability as witnesses.[11] Concerned that a child's imprecise statements would "be irretrievably engraved on the record by a guileless witness with no conception that they are incorrect," scholars seriously

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categorized the approaches as follows: (1) The court has no inherent power to compel psychiatric examination; (2) the defendant has an absolute right to an order compelling a psychiatric examination; and (3) the trial judge has the discretion to order a psychiatric examination of the complaining witness where a compelling reason is shown. *Id.* at 89. The court's analysis indicated that the vast majority of jurisdictions fell into the third category and relied on *Ballard* for support. *Id.*

[9] Morey, *supra* note 4, at 251. Many states adopted versions the Federal Rules of Evidence or the 1974 Uniform Rules of Evidence approximately stating that "[e]very person is competent to be a witness except as otherwise provided in these rules." FED. R. EVID. 601.

[10] *See* South Carolina Department of Social Services v. Doe, 355 S.E.2d 543, 547 (S.C. Ct. App. 1987). The South Carolina legislature later adopted S.C. CODE 1976 ANN § 19-11-25 which embraces the principle that all witnesses are presumed competent to testify. S.C. CODE 1976 ANN § 19-11-25 was repealed in 1995 by 1995 S.C. Acts 104 § 7.

[11] Morey, *supra* note 4, at 251 (fearing imprecise statements of a child would confuse jury).

questioned whether children should be allowed to testify at all.[12] Yet even early common law rejected such an absolute refusal.[13] In a 1779 English child sexual abuse case, *The King v. Braiser*,[14] where the child involved did not testify at the trial, the English court declared that children are not automatically disqualified from testifying because of their age.[15] Instead the relevant question involved the witness' understanding of the obligation to tell the truth.[16]

By the end of the nineteenth century, the Supreme Court of the United States relied on *Braiser* to reject the common law notion that a five-year-old was incompetent to testify.[17] Acceptance of children as witnesses at common law was only part of a more inclusive approach to competency generally.[18] Other categories of previously excluded witnesses included parties to the suit, spouses of a party to the suit, and convicted felons.[19] The court disqualified them because "the nature of human passions and

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[12] Morey, *supra* note 4, at 245 (citing Meyers, When Children Take the Stand, 11:1 Student Law. 14, 15 (Sept. 1982). Often in abuse cases "the eyewitness testimony of the youngster involved may be the only direct link between the child and the offender; any other evidence is generally circumstantial physical evidence that indicates only that the abuse was committed." *Id.*

[13] *Id.* at 248-49 (providing historical context of competency statutes). Even in nineteenth century England, children were allowed to testify as long as the child understood the obligation to tell the truth. *Id.*

[14] 168 Eng. Rep. 202 (1779).

[15] Morey, *supra* note 4, at 249 *citing with approval* The King v. Braiser, 168 Eng. Rep. 202 (1779). The English court singled out the obligation to tell the truth as the only critical test of competency. Morey, *supra* note 4, at 249. As long as the child realized the danger of a lie, there should be no fixed rule to exclude competency. *See Braiser*, 168 Eng. Rep. at 201.

[16] Morey, *supra* note 4, at 249. "[It is understood that] no testimony whatever can be legally received except upon oath; and that an infant, though under the age of seven years maybe sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to posses a sufficient knowledge of the nature and consequences of the oath . . . for there is no precise or fixed rules as to the time within which infants are excluded from giving evidence; but their admissibility depends on the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found to be incompetent, their testimony cannot be received." *Braiser,* 168 Eng. Rep. at 202.

[17] *See* Wheeler v. United States, 159 U.S. 523 (1895) (emphasizing child's ability to tell the truth).

[18] *See* Morey, supra note 4, at 249 (outlining other categories of witness deemed incompetent). At early common law, courts deemed many parties incompetent to testify including those who lacked religious belief who could not be bound by an oath, parties to the suit, the spouse of a party to the suit, persons with a financial interest, naturally incapacitated persons, and convicted felons. Morey, *supra* note 4, at 250. Though no longer accepted by courts as grounds for exclusion, each can be used for impeachment purposes. Morey, *supra* note 4, at 250.

[19] Morey, *supra* note 4, at 250 (citing 1 S. GREENLEAF, LAW OF EVIDENCE § 328 (1899)). Courts described these categories of witnesses as particularly distrustful. 1 S. GREENLEAF, LAW OF EVIDENCE § 328 (1899).

actions [suggests] there is more reason to distrust such biased testimony than to believe it."[20] As the nineteenth century progressed, the common law gradually expanded to include these types of witnesses and left the question of credibility to the jurors.[21] Children however, remained vulnerable to competency statutes.[22]

By 1974, the Federal Rules of Evidence 601 and the 1974 Uniform Rules of Evidence articulated these evolving common law principles by providing that "every person" is competent to testify.[23] Based on this broad standard, courts disqualify few witnesses on competency grounds.[24] Even an adjudication of "feeblemindedness" or the fact that a witness has spent time in a mental institution does not render a witness incompetent.[25] As long as a witness possesses sufficient knowledge of the nature and consequences of the oath and an ability to communicate with the jury, the judge exercises discretion in favor of allowing the witness to testify.[26]

When the question of competency arises relative to a child, the judge orders a competency hearing.[27] During a typical competency hearing, the judge inquires about the child's name, where he attends school, his age, whether he knows what a lie is, and whether he knows what happens if he tells a lie.[28] The simplistic nature of the competency hearing reflects the singular intent of the judge to determine the ability of a child witness to

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[20] *See* Morey, supra note 4, at 250 (citing 1 S. GREENLEAF, LAW OF EVIDENCE § 328 (1899)).

[21] *See* Morey, supra note 4, at 250. Scholars recognized the danger of such a broad standard but opined on the benefits: "Conceding the jury's deficiencies, the remedy of excluding such witness[es] [of minimum credibility], who may be the only person available who knows the facts, seems inept and primitive. Though the tribunal is unskilled, and the testimony difficult to weigh, on balance it is still better to let the evidence come in for what it is worth with cautionary instructions." McCormick, Evidence 62 at 267-69 (5th ed. 1999).

[22] *See e.g.*, IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1985) ("Children under ten [10] years of age [are not competent], unless it appears that they understand the nature and obligation of the oath"): Louisiana: LA REV. STAT. ANN. § 15-469 West 1981) ("[N]o child less than twelve years of age shall, over the objection either of the district attorney, be sworn as a witness, until the court is satisfied, after examination, that such child has sufficient understanding to be a witness."); New York: N.Y. Crim Proc. Law § 60.20 (Consol. 1979) ("A child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath").

[23] FED R. EVID. 601, 1974 UNIF.R. EVID. 601. The federal rule adds a second sentence providing that state competency laws prevail where state laws of evidence eliminate all competency requirements. *See* Morey, *supra*, note 4 at 251 (*citing with approval* Goodman, Children's Testimony in Historical Perspective, 40:2 J. Soc. Issues 12, 14 (1984)).

[24] Henry Weihofen, *Testimonial Competency and Credibility*, 34 GEO. WASH. L. REV. 53 (1965).

[25] HANDBOOK OF FEDERAL EVIDENCE, §601.2 (Michael H. Graham 2003).

[26] *Id.*

[27] 18 U.S.C. §3509 §(c)(9). "A psychiatric examination of a child shall be made "only upon written motion and offer of proof of incompetence by a party." *Id.*

[28] *See* Morey *supra* note 4, at 263.

"recall, recount and relate" factual matters.[29] The competency hearing purposefully avoids issues directly related to the trial because those matters remain the province of the jury.[30] The jury, not the judge, determines how much weight, if any, should be given to a child victim's testimony.[31]

The judge, however, can only allow testimony deemed relevant to the proceedings.[32] If the witness by reason of age, retardation, injury, medication, or illness is so severely deficient that a reasonable juror could not put any credence in the testimony of the witness, the court must find the witness incompetent to testify.[33] Thus, to a certain extent, competency must be viewed through the lens of credibility as well.[34]

B. Credibility of Victims of Sexual Assaults

Assuming a child victim witness of a sex crime satisfies the minimal credibility standard required for competency, defense attorneys could raise the possibility of unfair prejudice created by a lack of credibility as yet another way to exclude the witness.[35] In the case of sexual assaults on young victims, defense attorneys frequently revisit the settled competency issues by coupling the child's age with historic assumptions about victims of sex crimes to suggest that child victims of sexual crimes are inherently not credible.[36]

In the late 1950's, courts required complaining witnesses of a sex violation to undergo a psychiatric examination if their testimony was uncorroborated.[37] Prominent psychiatrists explained that many women or

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[29] *See* People v. Espinoza, 95 Cal. App. 4th 1287, 1310-12 (2002) (distinguishing role of judge in determining competency from jury's role of weighing evidence).

[30] *Id.* at 1311.

[31] *See* Commonwealth v. Widrick, 467 N.E.2d 1353, 1357 (Mass. 1984) (emphasizing differences between questions of competency and credibility).

[32] HANDBOOK OF FEDERAL EVIDENCE, §601.2 (Michael H. Graham 2003).

[33] *See* Morey, *supra* note 4, at 258-62 (analyzing subtle overlap in competency and credibility issues).

[34] *See* Morey, *supra* note 4, at 258-62 (discussing evidentiary requirements of relevancy for admissibility).

[35] *See* FED. R. EVID. 403. Rule 403 provides for the exclusion of relevant evidence on grounds of prejudice, confusion or waste of time. *Id.* "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

[36] *See infra* notes 37-39 (discussing credibility concerns of legal scholars).

[37] *See Ballard,* 410 P.2d at 846 (citing ROSCOE N. GRAY; LOUISE J. GORDY; ATTORNEYS' TEXTBOOK OF MEDICINE (3d ed. (1950)). "Pseudologia phantastica is described as a mental condition involving a mixture of lies and imagination. Not infrequently this is the basis of the alleged sexual assault. Girls assert that they have been raped, sometimes recounting as true a story they have heard falsely naming individuals or describing them." ROSCOE N. GRAY; LOUISE J. GORDY; ATTORNEYS' TEXTBOOK OF MEDICINE at 940 (3d ed. (1950)). Professor Wigmore's remark that "[N]o judge should ever let a sex-

girls could falsely accuse a man of a crime as a result of a mental condition.[38] The psychiatrists reasoned that such a charge might flow from an "aggressive tendency directed to the person or from a childish desire for notoriety."[39] The early 1960's signaled a significant retreat from this harsh rule.[40] Rather than support the mandatory requirement for a psychiatric examination, courts exercised discretion when the defendant presented compelling reasons for such an examination.[41] For example, the Supreme Court of California suggested that such compelling reasons would generally arise if there were little or no corroboration and the defense raised the issue of the effect of the complaining witness' mental or emotional condition upon veracity.[42] While the shift toward judicial discretion represented a welcome change for victims of sexual abuse, the court still implied a corroboration requirement for victims of sexual crimes.[43] Unlike victims of other types of crimes who are not subject to the possibility of a compelled psychiatric examination, victims of sexual crimes remain vulnerable.[44]

Legislatures began to address the special concerns regarding victims of sex crimes in the mid to late 1970's in the form of Rape Shield Statutes.[45] Rape Shield Statutes prevent the introduction at trial of evidence relating to the reputation of a victim's sexual conduct.[46] The Massachu-

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offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician," reflected this mindset. 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 924 (a), at 737 (Chadbourn rev. 1970).

[38] *See Ballard*, 410 P.2d at 846.

[39] Gray, *supra* note 42, at 940.

[40] *See generally Ballard*, 410 P.2d at 849 (dismissing Wigmore's assessment in favor of balanced approach). "Rather than formulate a fixed rule in this matter we believe that discretion should repose in the trial judge to order a psychiatric examination of the complaining witness in a case involving a sex violation if the defendant presents a compelling reason for such an examination." *Id.*

[41] *Id.*

[42] *See id.* (adopting the middle ground between absolute prohibition and absolute requirement).

[43] *See Widrick*, 467 N.E.2d at 1357 (emphasizing creation of corroboration requirement in the instance of a sex crime).

[44] *Id.*

[45] *Id.* at 1358. The Massachusetts legislature adopted its' Rape Shield Statute, MASS GEN. LAWS ch. 233 § 21B in 1977. The Supreme Judicial Court of Massachusetts relied on the legislative history of the Rape Shield statute indicating that the legislature intended to provide an atmosphere where victims would come forward. *Id.*

[46] MASS GEN. LAWS ch. 233 § 21B (1977). Section 21 B provides "[e]vidence of the reputation of a victim's sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth . . . Evidence of specific instances of a victim's sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however that such evidence shall be admissible only

setts Supreme Judicial Court relied on the state's Rape Shield Statute when refusing a petitioner's request for a psychiatric evaluation of a complaining witness in a sex crime.[47] The court stated that the statute "was aimed at eliminating a common defense strategy of trying the complaining witness rather than the defendant."[48] This defense strategy often resulted in harassment and further humiliation of the victim as well as discouraging victims of rape from reporting the crimes to law enforcement authorities.[49] In 1978, the North Carolina Supreme Court echoed a similar sentiment stating, "zealous concern for the accused is not justification for a grueling and harassing trial of the victim."[50]

By 1980, the California Legislature eliminated a trial judge's discretion to compel a victim of a sex crime to undergo a psychiatric examination by adopting California Penal Code section 1112.[51] Specifically, the law forbids courts from ordering psychiatric examinations of victims or complaining witnesses in sex crime cases in order to assess their credibility.[52] The California Supreme Court reiterated support for this view by declaring "previous expectational disparities that singled out the credibility of rape complainants as suspect, have no place in a modern system of jurisprudence."[53]

Despite the enormous progress for victims of sexual crimes in states like California, Massachusetts, and North Carolina, skepticism lingers in other jurisdictions across the nation.[54] Most jurisdictions allow the trial judge discretion to compel an examination when the defendant shows a compelling need for such an evaluation.[55] Regardless of the form of the test, most jurisdictions continue to treat victims of sex crimes inherently different than victims of other crimes.[56]

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after an in camera hearing on a written motion for admission of the same and an offer of proof. If after the hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh the prejudicial effect to the victim, the evidence shall be admitted; otherwise not." *Id.*

[47] *See Widrick*, 467 N.E.2d at 1357.

[48] *Id.*

[49] *Id.*

[50] *See* State v. Horn, 446 S.E.2d. 52, 53 (N.C. 1994) *citing with approval* State v. Looney, 240 S.E.2d 612 (N.C.1978).

[51] CAL. PENAL CODE § 1112 (1980).

[52] *See* People v. Espinoza, 95 Cal. App. 4th 1287, 1312 (2002) (citing People v. Anderson, 22 P.3d 347, 369 (2001)).

[53] *See Espinoza*, 95 Cal. App. 4th at 1311 (citing People v. Barnes, 721 P.2d 110, 121 (1986)).

[54] *See* In the Interest of Michael H., No. 25529, 2002 WL 31051575, at*3 (S.C. Sept. 16, 2002) (listing Alaska, Nevada, New Jersey, Tennessee, and West Virginia as representative examples of inherent authority jurisdictions).

[55] *See id. See also* State v. Gregg, P.2d 85, 90 (Kan. 1979) (asserting vast majority of jurisdictions use compelling needs test).

[56] *See In the Interest of Michael H.*, 2002 WL 31051575, at *3 (implying victims of

III. VARIOUS JURISDICTIONAL APPROACHES

The scope of authority courts have to compel child victims to submit to a psychiatric examination fall into four categories: (i) lack of authority because of a statute; (ii) lack of inherent authority; (iii) implied lack of authority; and (iv) inherent authority subject to a balancing test.[57] While the first three categories eliminate the possibility that a child victim witness may be forced to undergo a psychiatric examination, the application of common law principles in the final category leaves victims vulnerable to an invasive psychiatric exam.[58]

A. *Banned by Statute*

California is the only state in the nation that has legislatively banned a trial court from ordering a psychiatric examination of a complaining witness in a sex offense.[59] Prior to the adoption of Penal Code § 1112 in 1980 which forbids such examinations, California operated under common law principles that allowed a trial judge to compel psychiatric examinations of victims of sexual crimes, including children.[60] In *Ballard v. Superior Court of San Diego County*,[61] the Supreme Court of California ruled that upon the showing of compelling need by the defendant, the victim could be compelled to submit to a psychiatric examination.[62] The court suggested that a lack of corroboration and an assertion by the defendant that there was a connection between the "mental or emotional condition" of the complaining witness and her veracity qualified as such compelling circumstances.[63] Other cases demonstrated the difficulty in applying the compel-

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sexual crimes deserve unique analysis).

[57] *See Gregg*, 602 P.2d at 89 (categorizing jurisdictions in a similar manner). The court created three categories: (1) the court has no inherent power to compel psychiatric examination; (2) the defendant has an absolute right to an order compelling a psychiatric examination; (3) the trial judge has the discretion to order a psychiatric examination of the complaining witness where a compelling reason is shown. *Id.* In the first category, the court listed the District of Columbia, Oregon, Illinois as jurisdictions that have ruled the court has no inherent power to compel a psychiatric examination. *Id.* The *Gregg* court opined that this has "always been a minority view and it appears to be declining even further." *Id.* In the second category, the court included only Indiana. *Id.* The court included California and South Dakota in the category where the trial court has the discretion to order an examination. *Id.*

[58] *See infra text* accompanying notes 90-122.

[59] *See* People v. Espinoza, 95 Cal. App. 4th 1287, 1310 (2002) (describing modernization of treatment of victims of sex crimes).

[60] *See* Ballard v. Superior Court, 410 P.2d 838, 847-49 (1966) (discussing relevant common law principles); *Espinoza*, 95 Cal. App. 4th at 1310 (explaining Penal Code § 1112 ban of psychiatric examinations of complaining witnesses in sex-crime cases).

[61] 410 P.2d 838 (1966).

[62] *Id.* at 849.

[63] *Id.*

ling need standard.[64] For example, in *People v. Francis*,[65] involving lasciviousness toward a preteen boy, the trial court ruled that the precarious state of the boy's mental condition suggested that exposing the child to an intrusive psychiatric examination might be harmful to the child.[66] For precisely the same reason, the appeals court in *Francis* overturned the trial court decision and demanded the examination.[67]

The legislature effectively overruled the compelling needs standard by enacting Penal Code § 1112.[68] In applying the statute in *People v. Espinoza*[69] in 2002, the appeals court referred to the distrust of complaining witnesses that formed the foundation of *Ballard* as "antiquated beliefs that have since been disproved and discarded."[70] The statute, operating in conjunction with the court's strong support for the legislation, reflects the high level of protection California affords victims of sexual crimes.[71]

B. No Inherent Authority

While California acted legislatively, several jurisdictions including North Carolina, Texas, New York, Oregon, and the District of Columbia have ruled that their courts lack the authority to compel psychiatric examinations of victims of sexual crimes.[72] Citing the constant danger of perjury under any circumstances, these jurisdictions rely on the jury to be "the lie detector in the court room" and will not allow a psychiatrist to bolster the credibility of a witness.[73] In concurring that a lower court lacked authority to compel a psychiatric examination, the Supreme Court of North Carolina emphasized that requiring a witness to subject himself to a psychiatric examination violated the public policy of encouraging witnesses to come forward.[74]

Recognizing the duty of the trial judge to protect a defendant's rights by allowing him to provide an adequate defense, the North Carolina

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[64] *See infra* text accompanying notes 66-67 (describing different outcomes of same test to same facts).

[65] 5 Cal. App.3d 414 (1970), *abrogated by* CAL. PENAL CODE § 1112.

[66] *Id.* at 419.

[67] *Id.* at 419-20.

[68] *See Espinoza*, 95 Cal. App. 4th at 1310 (describing statute's effect on common law).

[69] 95 Cal. App. 4th 1287 (2002).

[70] *Id.* at 1310.

[71] *See* CAL. PENAL CODE § 1112; *Espinoza*, 95 Cal. App. 4th at 1310 (emphasizing sound public policies of Cal. Penal Code § 1112).

[72] *See* State v. Gregg, P.2d 85, 90 (Kan 1979) (categorizing different jurisdictions treatment of court's inherent authority).

[73] *See* State v. Looney, 240 S.E.2d 612, 627 (N.C. 1978) (citing U.S. v. Barnard, 490 F.2d 907,912 (9th Cir., 1973)).

[74] *See* State v. Horn, 446 S.E.2d 52, 54 (N.C. 1978)(emphasizing impact of authority on public policy).

court offered several potential remedies.[75] First, the trial judge could allow the defendant to employ the services of his own mental health expert and dispute the findings of the psychological evaluations already performed on the victim.[76] In the alternative, the judge could deny the admission of the state's evidence of the alleged victim's mental status.[77] Finally, the case against the defendant could be dismissed if the defendant's right to adequately present a defense is in danger.[78] Thus, despite holding that the court lacks inherent authority to compel a psychiatric examination of any victim witness, these courts maintain other tools to protect the rights of a defendant.[79]

C. *Massachusetts - An Interesting Twist*

Like North Carolina, Texas, New York, Oregon, and the District of Columbia, Massachusetts agrees that the court lacks inherent authority to compel a victim of a sexual crime to undergo a psychiatric examination.[80] In the absence of such authority, however, the Massachusetts legislature granted the trial judge discretion to compel a psychiatric exam relative to competency.[81] In *Commonwealth v. Widrick*,[82] a defendant suggested that the legislature intended the authority to extend to issues of credibility.[83] The Supreme Judicial Court of Massachusetts firmly responded that the absence of such language implied the exact opposite.[84] The court explained that it would have been logical for the legislature to consider psychiatric examinations relative to credibility simultaneously with competency and the failure to do so necessarily suggests a lack of intent to extend that authority.[85]

In addition to analyzing the construction of MASS. GEN. LAW 123 § 19, the court emphasized the Massachusetts Rape Shield Statute.[86] The

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *See Horn*, 446 S.E.2d at 54.

[80] *See supra* note 54 and accompanying text (listing no inherent authority jurisdictions); Commonwealth v. Widrick, 467 N.E.2d 1353,1358 (Mass. 1984) (discussing lack of inherent authority for Massachusetts's judges to compel psychiatric exams relative to credibility).

[81] *See Widrick*, 467 N.E.2d at 1356 (analyzing Mass. Gen. Laws ch. 123 § 19 (1970) extending judge discretion to order psychiatric examination relative to competency). The court emphasized that competency was entirely within the province of the judge. *Id.*

[82] 467 N.E.2d 1353 (Mass. 1984).

[83] *Id.* at 1355.

[84] *Id.*

[85] *Id.*

[86] *See Widrick* at 467 N.E.2d at 1358 (alluding to legislative intent in enacting the Rape Shield Statute). *See also* Mass. Gen. Law c. 233 §21B (1977) (protecting privacy of

court reasoned that in adopting this statute, the legislature demanded that the complaining witness should not be put on trial.[87] Finally, the Massachusetts Supreme Judicial Court held that compelling a psychiatric examination for credibility imposed a corroboration requirement where none exists.[88] In such a case, the psychiatrist would be required to "vouch for the witness credibility" which invades the province of the jury.[89] While recognizing the legislature's grant of power to the courts to compel an examination for competency, a province reserved for the trial judge, the Massachusetts courts leave the question of credibility in the hands of the jury.[90]

D. The Balancing Tests

Most jurisdictions, however, have determined that a court maintains inherent authority to compel a psychiatric evaluation upon the showing of substantial need or compelling need.[91] These courts find the inherent authority to grant such an examination in the duty to guarantee the defendant a fair trial.[92] Typically, the courts apply some sort of balancing test weighing the public policy interests of encouraging victims of sexual abuse to come forward and protecting victim's privacy rights against a defendant's right to a fair trial.[93]

Interestingly, many of the courts employing the balancing tests rely on the now legislatively overturned *Ballard* test in California.[94] For example, federal judges may order a child victim witness to undergo a psychiatric examination if the defense satisfies a two-prong test demonstrating substantial need.[95] First, the defense must show a witness deviates from acceptable norms, such as an identifiable or clinical psychiatric disorder.[96] Second, the defense must present evidence indicating something peculiar that would influence the competence of the witness or the court's ability to assess that competence.[97] For example, in *Gov't of the Virgin Islands v. A., Leonard*,[98] the third circuit upheld a trial judge's denial of such a com-

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rape victims).

[87] *Widrick*, 467 N.E.2d at 1358.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *See* State v. Gregg, 602 P.2d 85, 89-90 (categorizing jurisdictions).

[92] *Id.* at 90.

[93] *Id.*

[94] *See id.* at 89 (declaring that *Ballard* is most cited case supporting compelling reason standard). *But see In the Interest of Michael H.*, 2002 WL 31051575, at *6 (explicitly stating *Ballard* not basis of opinion).

[95] *See* Joseph v. Gov't of the Virgin Islands, 226 F.Supp. 2d 726, 732 (D.C.V.I. 2002).

[96] *Id.*

[97] *Id.*

[98] 922 F.2d 1141 (3d Cir. 1991).

pelled examination of the child witness because the defendant's daughters, aged thirteen and ten, (1) "were not of such tender years that their ability to perceive the events and recount them were doubtful" and, (2) did not suffer from mental illness; and therefore, the defendant failed to demonstrate a substantial need.[99] Similarly, in *Joseph v. Gov't of the Virgin Islands*, the court denied a defendant's request because the victim was thirteen and capable of adequately perceiving and recounting events.[100]

South Dakota likewise employs a substantial needs test but defines it differently than the federal government.[101] Unlike the federal government which uses the test to assess reliability of the testimony, South Dakota applies it to identify distortions of perceptions that might affect the credibility of the complaining witness.[102] In applying the test to a defense request that a five-year-old child victim undergo a psychiatric exam when an interview with an independent forensic examiner had already been videotaped, the Supreme Court of South Dakota upheld the trial court's denial of the request.[103] The critical factors influencing the court included the trauma to the child, the fact that the child actually testified, and the fact that the defense had the opportunity to have its own expert review the videotape of the independent forensic interview.[104]

West Virginia courts weigh a similar set of factors but require a showing of compelling need.[105] In *State v. Delaney,*[106] the defendant asserted that the court violated his constitutional due process rights by denying his request to access the victims for psychological examinations.[107] In support of the lower court's ruling, the Supreme Court of West Virginia emphasized the victims' young ages and the availability of a psychologist

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[99] *A., Leonard*, 922 F.2d at 1142.

[100] *Joseph*, 226 F.Supp. 2d at 733.

[101] State v. Osgood, 667 N.W.2d 687, 691-92 (S.D. 2003).

[102] *Id.* at 693-94. Among the factors to be considered are: (1) the victim's age; (2) the nature of the examination and whether it would further traumatize the victim; (3) whether the prosecution employed a similar expert; (4) whether the evidence already available to the defendant suffices for the purposes sought; (5) whether there is a reasonable basis for believing that the child's mental or emotional state may have affected the child's veracity; (6) whether evidence of the crime has little or no corroboration beyond the testimony of the victim; (7) whether there is other evidence available for the defendant's use; and (8) whether the child will be able to testify. *Id.*

[103] *Id.* at 694.

[104] *Id.*

[105] *See* State v. Delaney, 417 S.E.2d 903 (W. Va. 1992). The test lists: (1) the nature of the examination requested and the intrusiveness of such an examination; (2) the victim's age; (3) the resulting effects of the examination on the victim; (4) the probative value to the issue before the court; (5) the remoteness in time of the examination to the alleged criminal act; and (6) the evidence already available for the defendant's use. *Id.* at 907.

[106] 417 S.E.2d 903 (W. Va. 1992).

[107] *Id.* at 906.

to assist with evaluation and cross-examination of the state's expert testimony.[108]

South Carolina employs the same compelling needs test outlined in *Delaney* but limits its application to children.[109] The Supreme Court of South Carolina held that "cases involving child victims could raise unique concerns that may necessitate a psychiatric examination of the child victim in order to protect the defendant's right to a fair trial."[110] In the case, *In the Interest of Michael H.*,[111] the child victim admitted to hearing voices in his head that told him to say and do mean things to his friends.[112] In light of the *Delaney* factors, the court held that the victim's young age (four at the time of the assault, six at the time of trial), the fact that the victim was undergoing counseling, his ability to speak freely about the incident, and the fact that the victim had heard these voices during the year of the alleged assault were reasons compelling the psychiatric examination.[113]

Kansas uses the compelling needs standard but does not define it as clearly as the courts in West Virginia and South Carolina.[114] In *State v. Gregg*,[115] the Supreme Court of Kansas suggested that compelling reasons included evidence of a child's mental instability, lack of veracity, similar charges against other men proven to be false, or any reason why a particular child should be required to submit to such an examination.[116] In *State v. Bourassa*,[117] the trial court ruled that a child victim who had previously accused her father (not the defendant) of sexually assaulting her, had mutilated two kittens, had a tendency of soiling her pants, had been treated with Prozac, and received mental health counseling for behavioral disorders should not be subject to a psychiatric examination.[118] In denying the defendant's request, the lower court explained that this was not a "he said/she said" case, and though the previous accusation against her father was not ultimately supported by charges being filed, the allegation was supported by other corroborating evidence.[119] On an abuse of discretion standard, the

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[108] *Id.* at 907-08.

[109] In the Interest of Michael H., No. 25529, 2002 WL 31051575, at*3 (S.C. Sept. 16, 2002).

[110] *Id.* at *4.

[111] No. 25529, 2002 WL 31051575, at*3 (S.C. SC. Sept. 16, 2002).

[112] *Id.* at *1.

[113] *Id.* at *5.

[114] State v. Gregg, 602 P.2d 85, 91 (Kan. 1979).

[115] 602 P.2d 85 (Kan. 1979).

[116] *Id.*

[117] 15 P.3d 835 (Kan. 1999).

[118] *Id.* at 839-40.

[119] *Id.* at 840. The court makes no reference to the Kansas Rape Shield Law which excludes "evidence of the complaining witness' previous sexual conduct with any other person including the defendant. KAN STAT. ANN. § 21-3525 (1976). Contrast with Massachusetts who relies on its Rape Shield Statute as evidence the courts lacks the authority to compel a psychiatric examination. *See supra* text accompanying notes 83-90.

appeal's court overturned the motion judge, holding that "no reasonable person" would adopt the motion court's ruling.[120]

Nevada employed a similar compelling needs test, but up until 2000 it was the victim who had to show a compelling need to be protected by the state.[121] In *Lickey v. State,*[122] the court held that unless the prosecution presents competent evidence of a compelling reason to protect the victim, a defendant is entitled to have the victim undergo an independent psychiatric examination.[123] Acknowledging that *Lickey* effectively shifted the burden away from the defendant, the Supreme Court of Nevada now requires a defense showing of compelling need based on the state's intent to obtain benefit from a psychiatric expert, the availability of corroborating evidence and the reasonableness of the belief that the victim witness' mental or emotional state may affect his/her veracity.[124]

IV. IMPLICATIONS OF THE VARIOUS APPROACHES

Children remain particularly vulnerable in jurisdictions that still employ balancing tests, however sparingly.[125] Despite the claim that children are presumptively competent witnesses, these jurisdictions consistently use the type of crime and the age of the child to revisit well-settled competency issues.[126] Although the balancing tests reflect care and concern for the child victim, application of the various tests yields inconsistent results depending on the individual judge and the jurisdiction of the crime.[127]

Until the California legislature abrogated *Ballard*, the balancing test in use yielded different results depending on the judge.[128] For example, the lower court in *People v. Francis*[129] viewed the boy's precarious mental condition as a factor weighing in favor of denying an intrusive psychiatric examination, but the appeals court offered his fragile mental state as a compelling reason to order the examination.[130] In denying the examina-

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[120] State v. Bourassa, 15 P.3d 835, 839 (Kan. Ct. App. 1999). The standard of review after denial of defense motion to compel a psychiatric examination in a sex crime case is abuse of discretion. *Id.* "Judicial discretion is abused when no reasonable person would take the view adopted by the court." *Id.*

[121] *See* Koerschner v. State, 13 P.3d 451, 454 (Nev. 2000)(shifting burden back to defendant).

[122] 827 P.2d 824 (Nev. 1992).

[123] *Id.* at 826.

[124] *See Koerschner*, 13 P.3d at 455.

[125] *See supra* notes 91-124 and accompanying text.

[126] *See supra* text accompanying notes 91-124.

[127] *See infra* text accompanying notes 128-43.

[128] *See* People v. Francis, 5 Cal. App. 3d 414, 419 (1970) (describing different outcome at trial court level).

[129] 5 Cal. App. 3d 414 (1970).

[130] *Id.* at 419.

tion, the lower court expressed its concern for the victim because he was "about to crack up" from the strain of the trial.[131] Conversely, the appeals court overturned that decision because the lower court should have "considered the emotional and mental condition of the witness" as a reason to grant the motion for psychiatric examination instead of denying it.[132]

Kansas represents a similarly disjunctive situation.[133] In *Bourassa*, the appeals court overturned the trial judge on an abuse of discretion standard even though the lower court listed two specific reasons for denying the motion.[134] In holding the motion judge's reasons "insufficient to deny the defendant's motion," the appeals court suggests a shift of the burden of proving compelling circumstances from the defense to the prosecution to show why the factors are not compelling.[135] This burden shift contravenes the letter and spirit of the Kansas Rape Shield Statute, which is designed to protect victims of sexual offenses.[136]

Application of the substantial or compelling needs tests varies depending not only on which judge hears the case, but also on the jurisdiction in which the crime against the child victim occurs.[137] South Dakota and West Virginia courts indicate that the younger the child, the more trauma involved for the young victim and the less likely the court would be to order such an examination.[138] In Nevada, where the courts only recently rejected the presumption that the prosecution must show a compelling reason why the child victim should be protected, the mere existence of the old standard suggests an increased likelihood that a child could face a compelled psychiatric examination.[139] South Carolina's approach, however, implies the strongest likelihood of a compelled psychiatric examination.[140] In granting defendant's request for a psychiatric examination of the child, the Supreme Court of South Carolina specifically limited the authority of the court only to cases where the child is the complaining witness.[141] By emphasizing the "unique concerns" regarding children and limiting its' holding to child victims of sex crimes, the court reveals an inclination to

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[131] *Id.*

[132] *Id.*

[133] *See supra* notes 116-20 and accompanying text.

[134] *See supra* notes 116-20 and accompanying text.

[135] State v. Bourassa, 15 P.3d 835, 840 (Kan. Ct. App. 1999). *See* Koerschner v. State, 13 P.3d 451,455 (Nev. 2000) (explaining burden shift created by forcing prosecution to show compelling need for victim to be protected). Though burden shift not expressly stated by the Kansas court, the appeals court holding suggests the same analysis as the Nevada court.

[136] *See supra* note 119 and accompanying text.

[137] *See supra* notes 101-13, 116-20 and accompanying text.

[138] *See supra* notes 101-13 and accompanying text.

[139] *See supra* notes 116-20 and accompanying text.

[140] *See supra* notes 109-13 and accompanying text.

[141] *See supra*, notes 108-11 and accompanying text.

compel a psychiatric examination for younger children.[142] Therefore, whether the court compels a child victim witness of a sexual crime to undergo an intrusive psychiatric exam largely depends on the jurisdiction of the crime.[143]

V. COMMITMENT TO EXISTING STATUTES

Child victims of sexual crimes need protection from the state. A parent of such a child would be reluctant to pursue charges if the process involves even more trauma to the child. In order to pursue the public policy interests in encouraging victims to come forward without neglecting the responsibility of providing a fair trial to the defendant, courts need only rely on broad competency statutes and Rape Shield statutes.

While the constitutional requirement of a fair trial to a defendant is clear, the skepticism surrounding young victims of sexual crimes blurs the court's duties owed to them. There is no reason to create a different evidentiary standard for child victim witnesses of sexual crimes. Even in the circumstances of *In the Interest of Michael H.*, where the child witness heard voices in his head, the defendant still can rely on traditional courtroom tools such as cross-examination to challenge the child's credibility. In the absence of full commitment to the competency statutes and Rape Shield statutes, the resolution of this unfair skepticism toward child victims of sexual crimes lies in the hands of the various state legislatures.

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[142] In the Interest of Michael H., No. 25529, 2002 WL 31051575, at *3, *4 (S.C. Sept. 16, 2002).

[143] *See supra* notes 128-42 and accompanying text.