PROTECTING THE RIGHTS OF YOUNG VICTIMS IN COURT

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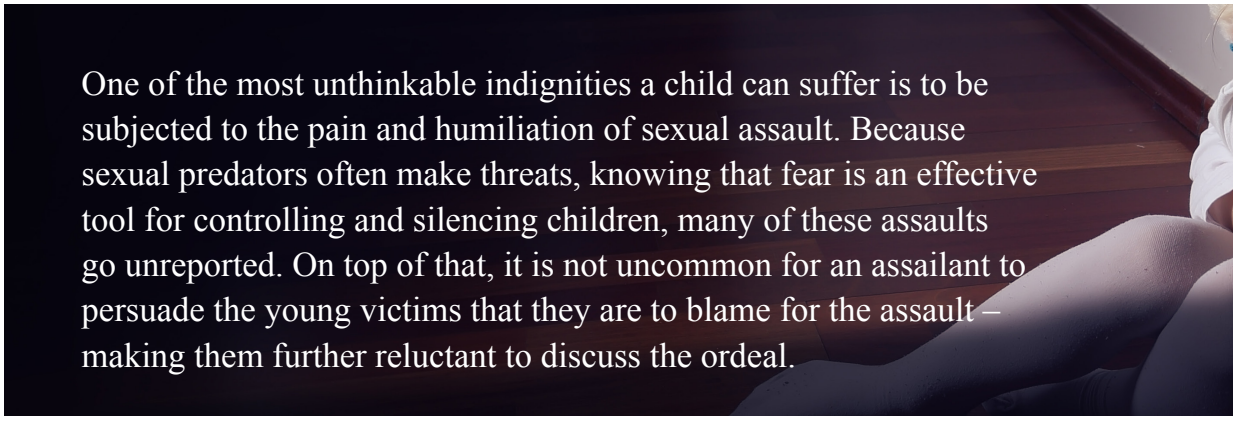

One of the most unthinkable indignities a child can suffer is to be subjected to the pain and humiliation of sexual assault. Because sexual predators often make threats, knowing that fear is an effective tool for controlling and silencing children, many of these assaults go unreported. On top of that, it is not uncommon for an assailant to persuade the young victims that they are to blame for the assault – making them further reluctant to discuss the ordeal.

What of those youngsters brave enough to report the heinous crime? Sadly, their ordeal isn't over yet. In addition to intrusive physical examinations, they must again recount, in detail, the most horrible and embarrassing event of their young lives to a series of complete strangers. This happens first at the Children's Advocacy Center, where members of law enforcement receive reports of child sexual crimes. If there is a prosecution, the young victims will likely have to repeat their traumatizing stories again, this time in a prosecutor's office. Then they will be expected to talk about it yet again, this time in a courtroom full of strangers, where they will also be subjected to cross-examination.

Once these cases reach the courtroom, a common scenario unfolds. Criminal defense attorneys, representing child sexual assault defendants, frequently file motions requesting psychological examination of child victims under the guise of assessing the competency or credibility of the victim as a witness. While such motions may be necessary in order to assess whether or not an alleged victim might be untruthful or have a motive to be so, their dual effect is to harass and dissuade child victims from participating in the criminal justice process. Moreover, psychological examinations are, by their very nature, intrusive and invasive. It is probably worth mentioning that children do not choose to become victims of sexual assault. Yet district courts regularly order child sexual assault victims to submit to psychological examinations in order to assess their credibility and veracity as witnesses in criminal proceedings.

Authority supporting such rulings by Nevada courts dates back as far as 1980. In *Washington v. State*, 96 Nev. 305, 307 (1980), the Nevada Supreme Court held that trial courts have the discretion to require child victims of sexual assault to submit to psychiatric examinations. In reaching this decision, the *Washington* court relied upon authority from Arizona (*State v. Jerousek*, 590 P.2d 1366 (Ariz. 1979)), and California (*Ballard v. Superior Court*, 410 P.2d 838 (Cal. 1966)). Citing to *Ballard*, the Nevada Supreme Court reasoned that if a defendant could present a compelling reason, (for example: there was "little or no corroboration of the victim's allegations and the defense has questioned the effect of the victim's emotional

or mental condition upon her veracity,") the court would reason that psychological examination of the victim was acceptable.

Closer examination of *Ballard*, the legal foundation upon which *Washington* was based, reveals the dim eye through which that California court seems to have viewed sexual assault victims. For example, *Ballard* cited a passage from *Gray's Attorneys' Textbook of Medicine* which defines pseudologia phantastica (pathological lying) and then explained: "Not infrequently, this is the basis of 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." *Id.* at 172 n.6 (citing 1 Gray's Attorneys' Textbook of Medicine (3d ed. 1950) 940). At another point, *Ballard* endorsed abandoning proscribed statutory impeachment in sex violation cases in favor of, "more liberal rules of impeachment than those otherwise applicable." *Id.* at 173. And, in what is perhaps the most unfortunate passage in the case, the *Ballard* court argued that psychiatric examinations of sexual assault victims were appropriate because, "a woman or a girl may falsely accuse a person of a sex crime as a result of a mental condition that transforms into fantasy a wishful biological urge … or a childish desire for notoriety." *Id.* at 172. Although the California Legislature recognized the failings of the *Ballard* decision by legislatively overruling the case in 1980 — the same year *Washington* was decided — its effects continued to be felt in Nevada for years to come.

Twenty years after our Supreme Court decided *Washington*, its central holding was reaffirmed in *Koerschner v. State*, 116 Nev. 1111 (2000). A trial court had the authority to order a psychological examination of a child sexual assault victim if a defendant could present a compelling reason to do so. *Koerschner* also reviewed prior Nevada case law on child victim psychological examinations and refined the analysis of what would be required to establish a compelling reason to perform an examination when requested by a defendant. The court determined the following three factors should be considered:

1. Whether or not the state actually calls, or obtains some benefit from, an expert in psychology or psychiatry;
2. Whether or not the evidence of the offense is supported by little or no corroboration beyond the testimony of the victim; and
3. Whether or not there is a reasonable basis for believing that the victim's mental or emotional state may have affected his or her veracity. *Id.* at 1117.

Courts have recognized that the rights of victims cannot be ignored when undertaking the analysis of whether the intrusiveness of a psychological evaluation will be undertaken.

There can be no question that in the prosecution of a criminal case, the rights of the accused reign supreme in the courtroom. That is what our Founding Fathers intended. That is not to say, however, that the rights of the state or the rights of victims are to be wholly or even substantially relegated. Courts must be particularly delicate in balancing the rights of a defendant when considering whether or not to exercise their jurisdictions over an underage citizen who is not a party to the litigation.

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continued on page 14

continued from page 13

PROTECTING THE RIGHTS OF YOUNG VICTIMS IN COURT

intrusiveness of a psychological evaluation will be undertaken. *See, e.g., State v. Looney*, 240 S.E.2d 612, 626 (N.C. 1978) (to require a witness to submit to a psychiatric examination would be a drastic invasion of the witness's right to privacy); *State v. Robinson*, 1992 Mo. App. LEXIS 200, *13-14 (Mo. Ct. App. Feb. 11, 1992) (when considering whether to subject a child sexual assault victim to a compulsory psychological examination, the victim's constitutional right to privacy must be honored and is assumed to exist); *State v. LeBlanc*, 558 So. 2d 507, 509-10 (Fla. Dist. Ct. App. 1990) (a compulsory psychological examination is a significant invasion of a victim's privacy). These rights would undoubtedly be infringed upon if a forced psychological examination revealed something out of the ordinary and private. What if the child were suffering from a societally stigmatized disorder such as bipolar disorder, depression or a low I.Q.? Such a finding would have little or nothing to do with credibility. Yet under the current Nevada jurisprudence of *Washington* and *Koerschner*, a psychological report containing such information would be handed over to a defense attorney and prosecutor with no consideration of the child victim's right to keep these matters private.

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However, change is coming to Nevada. Just as California's legislature departed from the holding in *Ballard*, Nevada's legislature has abandoned the central holding of the Nevada Supreme Court in *Washington*. The 78th Session of the Nevada Legislature enacted Assembly Bill (A.B.) 49, signed into law by Governor Brian Sandoval on June 8. It will became effective on October 1. Although A.B. 49 is far-reaching and addresses many aspects of the prosecution of sexually-related offenses, it also protects children by preventing them from compulsory psychological examination.

The language contained in Section 24 of A.B. 49 is quite simple: "In any criminal or juvenile delinquency action relating to the commission of a sexual offense, a court may not order the victim of or a witness to the sexual offense to take or submit to a psychological or psychiatric examination." While there are provisions in the legislation to address situations where victims may consent to an examination, child victims will no longer be ordered to submit to the examinations against their will.

Nevada trails behind several other western states in making this change. In 1985, Arizona, whose jurisprudence served as a basis for the *Washington* decision, legislatively prohibited compulsory psychological examinations for child sexual assault victims unless both the prosecution and the defense agree it would be appropriate. *See* A.R.S. § 13-4065. Four years later, in 1989, Idaho enacted a statute very similar to the Arizona law. Idaho Code § 19-3025. Finally, there is the California version of a statute prohibiting compelled psychological examinations of victims; this statute is more analogous to A.B. 49. It provides, "the trial court shall not order any prosecuting witness,

complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility." Cal Pen Code § 1112.

Whether the statutes enacted in the western states are representative of a more victim-centered criminal justice system, or if we as a society are becoming more sensitive to the needs of children, one thing is for certain: the rights of child victims matter. When a child suffers the brutality of a sexual attack, our system of justice will now be more conscientious of that child than it was 35 years ago.

Perhaps Justice Isaac Lake, the author of the *Looney* decision said it best. In denouncing the practice of judicially compelled psychological examinations, he observed: "This is not in the public interest. A zealous concern for the accused is not justification for a grueling and harassing trial of the victim as a condition precedent to bringing the accused to trial." *State v. Looney*, 240 S.E.2d at 627. NL

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