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October 26, 2018

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Re: "Court-Ordered Rape" – *Revised Letter_v2*

Dear Lynn, Jennifer, and Joanne,

[Note: This letter is nearly identical in substance to my September 23, 2018 letter, with the addition of helpful citations at footnotes 1 and 6.]

Last year, Jennifer referred an inquiry to my attention regarding the practice of "court-ordered rape." A survivor, Lisa, had contacted AEquitas for assistance in raising awareness and combating this practice. I believe Lisa also reached out to Legal Momentum and EVAWI, and so I'm writing

to all three of you, in hopes that it may prove of assistance in addressing this issue.

After talking with Lisa, I offered to do some preliminary legal research into “court-ordered rape.” My Research Assistant, Libby Hemler, and I have now looked into the issue, and I’m writing to report on our findings. Please note that the statements and opinions below represent my own views and do not represent the views of any client or Villanova University Charles Widger School of Law.

What is “Court-Ordered Rape”?

The phrase, “court-ordered rape,” used hereinafter interchangeably with the phrase, court-ordered gynecological examination, refers to a penetrative vaginal and/or anal examination of a victim conducted pursuant to a discovery order issued by a trial court in the course of a criminal prosecution or civil litigation.¹ While “court-ordered rape” is the phrase that Lisa uses to characterize these cases, it’s worth noting some confusion that may arise in using this terminology, since some may confuse it with cases in which women and girls are raped pursuant to village council orders.²

I have no strong views regarding whether the phrase “court-ordered rape” is confusing or misleading. Certainly, the phrase has rhetorical power that may prove helpful in raising awareness and rallying support to abolish this practice. Indeed, a 2015 statement published in the *Journal of Forensic and Legal Medicine* condemning virginity testing opined that such examinations “should be considered a form of sexual assault and rape,” and that “[i]nvolvement of health professionals in these examinations violates the basic standards and ethics of the professions.”³ As such, I will use the phrase “court-ordered rape” below, as a synonym for court-ordered gynecological examination.

Where is “Court-Ordered Rape” Occurring?

Given the lack of available data regarding trial court orders that do not result in published appellate opinions, it is difficult to determine the extent of “court-ordered rape” in the United States. That said, we have identified twenty-two appellate cases in which a trial court’s authority to order such examinations was at issue. (See attached spreadsheet.)

It should be noted that each of the cases we identified involved criminal prosecutions, not civil litigation. The lack of appellate caselaw regarding court-ordered vaginal examinations in civil cases suggests that such orders are either less common in civil settings, or have proven less controversial in the course of civil litigation.

¹ It has recently come to my attention that the phrase, “court-ordered rape,” was coined by Wendy Murphy. See, Wendy Murphy, *AND JUSTICE FOR SOME* 22 (2007).

² Sarah Brightman, *Rights, Women, and the State of Pakistan*, 18(3) *CONTEMPORARY JUSTICE REVIEW* 334 (2015).

³ Independent Forensic Expert Group, *Statement on Virginity Testing*, 33 *JOURNAL OF FORENSIC AND LEGAL MEDICINE*, 121 (2015).

The relative lack of controversy in civil cases (if that indeed explains the paucity of appellate caselaw) may be attributable to the fact that the person ordered to undergo the examination in civil litigation is a party to the case (plaintiff) and is claiming personal injury damages as a result of the rape/sexual assault. As such, civil trial courts might very well analogize court-ordered gynecological exams to common-place “independent medical examinations” (IME’s), wherein plaintiffs in personal injury cases are required to undergo physical and/or psychological examinations by independent medical professionals at the defendant’s request, for the purpose of corroborating the plaintiff’s claims regarding the nature and extent of damages. The authority of trial courts to order IME’s is well-recognized:

[T]he prevailing rule [states] that the trial court has the power to require the plaintiff in a personal injury action to undergo a physical examination at the behest of the defendant, although the latter’s right is not considered absolute, and the matter is wholly within the discretion of the trial court, so long, of course, as the exercise of such discretion is free from palpable abuse.⁴

Thus, if a plaintiff in a civil case claims monetary damages relating to personal injuries as a result of rape/sexual assault, the general rule is that the trial court has discretion to order a gynecological IME to assess the extent of the alleged damages.⁵

Why Should “Court-Ordered Rape” Be Prohibited?

There are several strong reasons why “court-ordered rape” should be prohibited. First, where such orders are issued by a criminal court, the court arguably exceeds its lawful authority by claiming jurisdiction over the body of a non-party.⁶ Since victims are not parties to criminal prosecutions, but are merely witnesses, court-ordered vaginal examinations arguably violate victims’ constitutional rights to privacy.⁷ As the Court recognized in *State v. Hewett*, 93

⁴ POWER TO REQUIRE PLAINTIFF TO SUBMIT TO PHYSICAL EXAMINATION, 108 A.L.R. 142 (Originally published in 1937). See also, FEDERAL RULE OF CIVIL PROCEDURE 35, “Physical or Mental Examinations...The court where the action is pending may order a party whose mental or physical condition...is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner...”

⁵ Note, however, that if a plaintiff’s damages claim relates only to previous physical injuries, and the plaintiff abandons any claim as to present or future physical injuries, then the court may refuse to order an IME. *Coca-Cola Bottling Co. of Puerto Rico v. Negron Torres*, 255 F.2d 149 (1958).

⁶ See, Wendy Murphy, *Privacy Rights in Mental Health Counseling: Constitutional Confusion and the Voicelessness of Third Parties in Criminal Cases*, 39 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND LAW 387, 388 (2011), arguing that “the due process rights of the accused, as applied to third parties, exist only during trial, not during the pretrial period.” See also, *J.W. v. Knight*, 2009 WL 2491812 (U.S.), in which Murphy argued that a trial court lacked constitutional authority to issue an order for a vaginal exam. *State ex rel. J.W. v. Knight*, 223 W. Va. 785, 679 S.E.2d 617 (2009), cert. denied, *J.W. v. Knight*, 558 U.S. 970, 130 S. Ct. 461, 175 L. Ed. 2d 308 (2009).

⁷ See, Troy Andrew Eid, *A Fourth Amendment Approach to Compulsory Physical Examinations of Sex Offense Victims*, 57 UNIVERSITY OF CHICAGO LAW REVIEW 873, 899 (1990), arguing that court ordered gynecological examinations “violate the Fourth Amendment for two reasons. First, the technique involved ‘the most intimate of

N.C.App. 1 (1989), a court order for a physical examination of a person is significantly distinct from a court order for examination of other kinds of non-human physical evidence:

Defendant argues that had he been arrested for possessing white powder, which the State subsequently tested and concluded to be cocaine, he would plainly have a right to have his own expert conduct a second test upon the substance. He argues that the examinations he requested in this case are no different. We reject defendant's analogy. *Powder does not have dignity, and courts are rightly solicitous when a human being's privacy faces invasion.*⁸

Second, there is a significant risk that defendants will use the threat of such exams to harass and further traumatize victims. In rape/sexual assault cases, the victims have previously experienced the psychological and physical ramifications of non-consensual penetration. Undergoing a medical examination that involves a similar penetration, albeit for a different reason, is likely to cause victims to be retraumatized. In ordering such examinations, courts become complicit in the further abuse and retraumatization of victims.

Third, even in cases where a particular defendant is unsuccessful in his attempt to obtain a court-ordered vaginal examination, the mere possibility that such an examination may be ordered will likely deter victims from reporting sexual offenses, lessen their cooperation with prosecutors, and/or dissuade them from pursuing civil damages following a rape/sexual assault.

Finally, the scientific basis underlying most court-ordered vaginal examination requests relies on widely debunked myths regarding female genital structure, injury, healing, and what constitutes “normal” or “abnormal” medical findings. Put simply, hymen-related medical testimony is “junk science.”⁹ While most of the appellate cases are not entirely clear regarding the nature of evidence being sought in a court-ordered gynecological exam, it seems that such exams are typically searching for evidence of injury to, or stretching of, the victim’s hymen. The medical literature suggests that such evidence is unreliable. Even if a vaginal examination shortly after an assault provides evidence of injury, it is unlikely that these findings will be present at the time when defendants are requesting courts to order vaginal examinations. Indeed, after any significant passage of time, a negative finding with respect to vaginal injury is to be expected – and thus does not provide exculpatory evidence.

Are Appellate Courts Approving of “Court-Ordered Rape”?

bodily functions, traditionally and universally regarded as private’ Second, the evidence desired, ‘though possibly “relevant| in the broadest sense of the term,’ was of limited probative value.” (internal citations omitted).

⁸ *Hewett*, 93 N.C.App. at 8 (emphasis added).

⁹ Howard Dubowitz, *Healing of Hymenal Injuries: Implications for Child Health Care Professionals* 119(5) *PEDIATRICS* 997 (2007); Graeme Walker, *The (In)significance of Genital Injury in Rape and Sexual Assault*, 34 *JOURNAL OF FORENSIC AND LEGAL MEDICINE* 173 (2015); See also, *Statement on Virginity Testing*, supra note 2.

Court-ordered gynecological examinations were approved in only two of the twenty-two cases we identified: *State ex rel. J.W. v. Knight*, 679 S.E.2d 617 (W. Va. 2009) and *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky. 1989). However, several other Courts suggested in dicta that it would be permissible for trial courts to order victims to undergo gynecological examinations under slightly different factual scenarios. For example, while the Appellate Court in *People v. Nokes*, 183 Cal.App.3d 471 (1986) found that the trial court did not abuse its discretion in denying defendant's request for a court ordered exam, the Court indicated a willingness to approve such court orders if the alleged abuse and the court-ordered examination were closer in time.¹⁰ Similarly, the Appellate Court in *State v. Hewett*, 93 N.C.App.1 (1989) ruled that a trial judge would have had the discretion to order the requested vaginal exam if the defendant had made a sufficient showing that the appearance of the victim's hymen would have been consistent with non-abuse.

There is no universally accepted standard for determining whether trial judges are entitled to issue court-ordered gynecological examinations. As the Court in *State v. Barone*, 852 S.W.2d 216, 221-22 (Tenn. 1993) observed, “[s]tate courts have adopted a number of approaches to determining whether an accused sex-offender is entitled to a compulsory physical examination of a complainant.”

First is the material assistance inquiry, which requires a physical examination when it could lead to evidence of material assistance to the defendant. See *Turner v. Commonwealth*, 767 S.W.2d 557 (Ky.1988). Second is the compelling need inquiry, which balances the defendant's interest in the evidence against the burden the examination imposes upon the complainant.¹¹ Some states include a factor-based balancing approach. See [...] *State v. Ramos*, 553 A.2d 1059 (R.I. 1989); *State v. Garrett*, 384 N.W.2d 617 (Minn.App.1986). Third is the exculpatory approach, which allows a defendant a physical examination only when the evidence likely to be obtained could absolutely bar his conviction. See *People v. Nokes*, 183 Cal.App.3d 468, 228 Cal.Rptr. 119 (1986); *State v. Hewett*, 93 N.C.App. 1, 376 S.E.2d 467 (1989). Fourth is the medically deficient standard, which permits an examination only if the prosecutor's examination failed to conform to proper medical procedures. See *State v. Drab*, 546 So.2d 54 (Fla.Dist.Ct.App.1989), *rev. denied*, 553 So.2d 1164 (Fla.1989).

Given the wide variety of approaches adopted by state courts in addressing “court-ordered rape,” and the fact that courts in several jurisdictions have approved of such examinations in principal

¹⁰ Note that charges were later dismissed against the defendants in the Nokes case and each were awarded \$10,000-\$20,000 in settlement of a complaint against the Kern County for improper prosecution. See, Lois Henry, *Kern County Settles Last of Molestation Conviction Suits* (March 23, 2013), at https://www.bakersfield.com/news/kern-county-settles-last-of-molestation-conviction-suits/article_49117483-79fe-5839-80c2-890937b88828.html. While the allegations in the Nokes were withdrawn, it remains the case that the examinations requested by the defendants would “at best, produce equivocal results and would, at least, subject the [victim] to emotional harm.” *Nokes*, 183 Cal.App.3d at 483.

¹¹ The *Barone* court adopted the “compelling need” test. See discussion below for examination of the factors to be considered in applying this test.

and/or in practice, it is worth considering a statutory remedy to prohibit court-ordered gynecological examinations in criminal and civil cases.

What Next Steps Would Best Prevent “Court-Ordered Rape”?

In light of the strong reasons against court-ordered gynecological exams and the extent to which appellate courts have sanctioned such orders, as noted above, it is advisable for states to enact statutes to prohibit court-ordered gynecological examinations in criminal and civil cases.

Illinois has come closest to adopting such an approach. In 1984, the Illinois General Assembly enacted a rule of criminal procedure (725 ILCS 5/115-7.1) prohibiting court-ordered psychiatric or psychological examinations of victims of alleged sex offenses.¹² While the statute did not speak to the permissibility of *physical* examinations, the Illinois Supreme Court extended the statute’s reach to physical examinations in the case of *People v. Lopez*, 800 N.E.2d 1211 (2003), overruling *People v. Glover*, 49 Ill.2d 78 (1971). In effect, the *Lopez* decision held that trial courts in Illinois have no jurisdiction to issue psychiatric, psychological, or *physical* examinations of sex abuse victims in criminal cases.¹³

One problem with Illinois’ approach concerns the question of whether a victim’s refusal to voluntarily undergo an examination at the defendant’s request should impact the admissibility of other evidence. In *People v. Wheeler*, 151 Ill.2d 298 (1992), the Illinois Supreme Court considered this issue in the context of a defendant’s request for a psychological examination of the victim. The Court “concluded that if a victim refuses to undergo [the psychological] examination, the State is precluded from introducing evidence of rape trauma syndrome from an examining expert. The State could, however, still introduce rape trauma evidence through the testimony of nonexamining experts.” *Lopez*, 207 Ill. 2d at 466, citing *Wheeler*, 151 Ill.2d at 312.

As the concurring justice in *Lopez* noted, Illinois’ current state of jurisprudence regarding court-ordered examinations creates a dilemma for victims:

Fully cognizant that the use of State expert testimony will be compromised if the victim does not agree with the defendant's request, the prosecuting attorney may be tempted to apply pressure on the victim to comply with the request. Even if external pressures are not applied on the victim, the victim

¹² “Except where explicitly authorized by this Code or by the Rules of the Supreme Court of Illinois, no court may require or order a witness who is the victim of an alleged sex offense to submit to or undergo either a psychiatric or psychological examination.” 725 ILCS 5/115-7.1. While the Illinois statute does not, on its face, limit its scope to criminal prosecutions, the fact that the statute amended the Code of Criminal Procedure ensures that the application of its terms is limited to criminal cases.

¹³ However, in so ruling, the *Lopez* court cautioned lower courts to “ensure a defendant's constitutional rights to a fair trial is not compromised by the inability to obtain an independent physical examination,” and emphasized that “trial courts should exercise vigilance when rendering decisions on what evidence the State is allowed to produce” from previous medical examinations. *People v. Lopez*, 207 Ill. 2d at 467 (2003).

may yet feel the need to comply with the request in order to safeguard the prosecution's case. Freeman, J. (concurring) *Lopez*, 207 Ill.2d at 477.

Rather than supporting the extension of 725 ILCS 5/115-7.1 to cases involving requests for physical examinations, and thus establishing a jurisdictional prohibition on court-ordered gynecological examinations, Freeman, J. would have had Illinois follow several other jurisdictions in adopting the more flexible “compelling need” test. According to this test, trial courts retain jurisdiction to order examinations of victims at the defendant’s request, but they must conclude that defendants have shown a “compelling need” for the examination.

The factors to be considered in determining whether a defendant has shown a compelling need [include] the age of the alleged victim; the remoteness in time of the alleged criminal incident to the proposed examination; the degree of intrusiveness and humiliation associated with the procedure; the potentially debilitating physical effects of such an examination; the probative value of the examination to the issue before the court; and the evidence already available for the defendant's use. Freeman, J. (concurring) *Lopez*, 207 Ill.2d at 641-42.

Given the risk that courts will misjudge the reliability of hymen-related medical testimony,¹⁴ and underestimate the degree of intrusiveness and humiliation (not to mention retraumatization) caused by these examinations, the “compelling need” test is problematic. It entrusts to trial judges the discretion to determine whether a compelling need has been presented. Given that the trial court’s discretion is subject to being overruled only in cases where the trial judge has abused his/her discretion, the “compelling need” test provides little protection for victims who may be targets of “court-ordered rape.”¹⁵

In light of these considerations, the better way forward is to prohibit “court-ordered rapes” statutorily, so that trial courts are simply not permitted to issue such orders. A jurisdiction can adopt this approach by enacting a variation of the Illinois statute, with three amendments.

First, additional language of “or physical” would need to be added to the statute, in order to reflect the effect of the *Lopez* ruling. Second, the statute would need to make it clear that the prohibition extends to both criminal and civil cases.¹⁶ Third, the statute would need to clarify that a victim’s refusal to voluntarily undergo an examination shall not impact the admissibility of

¹⁴ See above at note 7.

¹⁵ Indeed, Freeman, J. seemed to underestimate the risk that trial judges would exercise their discretion inappropriately, concluding that justice would best be served by adopting the “compelling need” test and “rest[ing] confident in the trial courts' proper exercise of discretion.” Freeman, J. (concurring), *Lopez*, 207 Ill. 2d at 478.

¹⁶ One way to ensure that the prohibition on court-ordered rape extends to both criminal and civil cases would be to amend both the Code of Criminal Procedure and the Code of Civil Procedure. Another way is to enact a single statute that includes an explicit statement regarding the scope of the prohibition.

evidence from other relevant examinations, unless the admission of such evidence would violate a criminal defendant's constitutional rights.¹⁷

Suggested model language is as follows:

No court may require or order a victim of an alleged sex offense to submit to or undergo a psychiatric, psychological, *or physical* examination [in connection with any criminal or civil proceeding]. The refusal of a victim of an alleged sex offense to undergo such examination at the request of the defendant shall not impact the admissibility of evidence from other relevant examinations of the victim, except where constitutionally required.

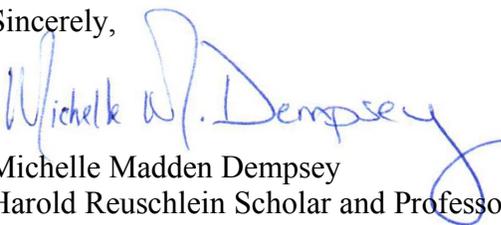
In jurisdictions where this statutory language is adopted, this practice will be effectively prohibited. Moreover, the state (in a criminal prosecution) and plaintiff (in a civil case) will still be permitted to introduce evidence from previous examinations unless the admission of such evidence would violate a criminal defendant's constitutional rights.

Conclusion

In sum, our legal analysis demonstrates that "court-ordered rape" is occurring in the United States, and that several jurisdictions have sanctioned court-ordered rape, either in practice or in principle. While reasonable minds may differ as to the best way forward to address this issue, it seems evident that a statutory solution which prohibits such orders in both criminal and civil cases would be preferable.

I hope this legal analysis proves helpful. Please let me know if you would like to discuss this issue further.

Sincerely,



Michelle Madden Dempsey
Harold Reuschlein Scholar and Professor of Law

¹⁷ That is, the statute should depart from the *Wheeler* court's conclusion that a victim's refusal to undergo an examination requested by the defendant necessarily precludes the State from introducing evidence from another examining expert. Rather, such evidence should be excluded only when necessary to protect a criminal defendant's constitutional right to a fair trial.