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IN THE SUPERIOR COURT OF WASHINGTON  
FOR CLARK COUNTY  
JUVENILE DEPARTMENT

STATE OF WASHINGTON, ) NO.  
Plaintiff, )  
) MOTION FOR USE AND  
) DERIVATIVE USE *DECKER*  
) IMMUNITY  
vs. )  
)  
Respondent. , )  
\_\_\_\_\_ )

COMES NOW \_\_\_\_\_, Respondent, by and through his attorney of record, Darcy J. Scholts, who moves for a protective order.

**RELIEF REQUESTED**

The respondent respectfully requests the court to grant use and derivative use immunity for statements he might make in the course of a sexual deviancy evaluation.

**STATEMENT OF THE FACTS**

Respondent is a fourteen year old with no prior criminal history who is charged with one count of Extortion in the Second Degree with Sexual Motivation, a class C felony, and one count of Cyberstalking.

THE SCHOLTS LAW OFFICE  
712 W. EVERGREEN BLVD.  
VANCOUVER, WA 98660  
(360) 735-5950  
FAX: (360) 735-7938  
darlaw@spiritone.com

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**ISSUE PRESENTED**

Should this court exercise its discretion to grant use and derivative use immunity for all statements Respondent might make in the sexual deviancy evaluation?

**LEGAL ANALYSIS**

**1. The court clearly has discretion to issue a protective order for statements a child may make when undergoing a pre-disposition evaluation.**

Criminal defendants may not be compelled to testify against themselves. U.S. Const. amends. 5, 6, 14; *Estelle v. Smith*, 451 U.S. 454, 462, (1981). Criminal defendants also have the right to assistance of counsel at all critical stages of the proceedings. *Id.*

The Court in State v. Decker held that a court has the inherent authority to issue a protective order granting use and derivative use immunity for statements a child may make during an evaluation. 68 Wn. App. 246, 252-53, 842 P.2d 500 (1992). In Decker, the trial court refused to allow respondent’s counsel to be present during the evaluation but imposed a protective order granting use immunity. *Id.*, at 248. The Court of Appeals decided that the trial court appropriately exercised its authority when it issued the protective order. *Id.*, at 252. The Decker Court explained that the protective order would not prevent the prosecutor from prosecuting other matters which were discovered independently of the evaluation. *Id.* In State v. Diaz Cardona, the Court of Appeals reaffirmed that Decker created a narrow exception to what is normally the exclusive province of the prosecutor; therefore, the trial court can issue a protective order granting use immunity. 123 Wn. App. 477, 488-89, 98 P.3d 136 (2004).

1     **B. The court should issue a protective order that grants both use immunity and**  
2 **derivative use immunity to the respondent when undergoing a pre-disposition**  
3 **evaluation.**

4           Only a grant of both use and derivative use immunity can ensure that REDACTED can  
5 openly and honestly complete a sexual deviancy evaluation that is essential for the Court,  
6 the State and the probation department to obtain an accurate assessment of his amenability  
7 to treatment and risk to the community. It is essential that the process is a thorough,  
8 complete, and accurate so that an appropriate individualized treatment program can be  
9 created.

10           “Use immunity” prohibits the use of statements made during an evaluation to be used at  
11 a subsequent criminal trial. In re Dependency of J.R.U.-S., 126 Wash. App. 786  
12 (2005)(citing State v. Bryant, 146 Wn.2d 90, 98, 42 P.3d 1278 (2002). “Derivative use  
13 immunity” prohibits the use of any evidence which arises from statements made during an  
14 evaluation. Id. According to the Court of Appeals in In re Dependency of J.R.U.-S.,  
15 “when granted together, ‘derivative use’ and ‘use’ immunity provide protection that is  
16 ‘coextensive’ with the Fifth Amendment privilege.” Id. The Court noted that the  
17 “immunity granted in Decker actually included both use and derivative use immunity”. Id.  
18 at 799.

19           The State may argue that the Court should not grant use and derivative use  
20 immunity because it might be difficult to obtain independent proof of sexual offenses  
21 committed against juvenile victims. The Court in In re Dependency of J.R.U.-S rightly  
22 recognized that “[i]n essence, use and derivative use immunity leave the witness, and the  
23 government, in the same situation they would have been in had the witness not given a  
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25  
26 THE SCHOLTS LAW OFFICE  
27 712 W. EVERGREEN BLVD.  
28 VANCOUVER, WA 98660  
(360) 735-5950  
FAX: (360) 735-7938  
darlaw@spiritone.com

1 statement or testified.” Id. at 798 *quoting State v. Bryant*, 97 Wash. App. at 485. The  
2 J.R.U.-S Court explained that the protection order issued in the Decker case did not  
3 prohibit prosecution of matters which were not discovered as a result of the evaluation. Id.  
4 The Court went on to note that any information obtained in a deviancy evaluation could  
5 still be “used to protect children through protective orders, orders for specific services, and  
6 protective dispositional decisions, such as guardianships or terminations. Id. at 779.

7 That State may also argue that Decker has outlived its usefulness in light of State v.  
8 Diaz-Cardona, however it is important to note that In re Dependency of J.R.U.-S. was  
9 decided after Diaz-Cardona and, in its decision, the Court cited Decker favorably and even  
10 indicated that the “immunity granted in Decker actually included both use and derivative  
11 use immunity.” 126 Wash. App. 786, 799. The reasoning employed by the Courts in  
12 Decker and In re Dependency of J.R.U.-S is still valid following Diaz-Cardona since the  
13 State and the Court continue to have an interest in promoting candid disclosures in sexual  
14 deviancy evaluations which allow the Court to have as much information as possible when  
15 crafting orders that serves both the needs of the respondent and the community. The Court  
16 distinguished the situation in Diaz-Cardona from that the situation in Decker, where the  
17 court granted immunity for information about unadjudicated crimes, on the basis that in  
18 Diaz-Cardona the respondent was concerned about the impact of statements obtained  
19 during a sexual deviancy evaluation on disposition, rather than unadjudicated crimes. The  
20 court appropriately noted that use and derivative use immunity cannot protect a youth from  
21 the possibility of a manifest injustice sentence and that a juvenile thusly had the right to  
22 assert his Fifth Amendment privilege against self incrimination through the conclusion of  
23 the disposition hearing. Here, the Respondent understands that the Court could consider  
24 results of a sexual deviancy evaluation in any disposition hearing and is simply asking the

1 court to grant a protective order that will allow him to be as candid as possible and ensure  
2 that his statements cannot be used for the purposes of adjudication. The situation here is  
3 very different than the one that the respondent and the Court confronted in Diaz-Cardona.

4  
5 **C. There is a need for use and derivative use immunity to be granted in this**  
6 **case.**

7 Contrary to the likely assertions of the state, the Court would not be granting the  
8 Respondent freedom from prosecution by entering a protective order that grants both use  
9 and derivative use immunity. Even with a protective order in place, the prosecutor could  
10 still prosecute matters that are discovered independently of the evaluation and any  
11 information obtained in a deviancy evaluation could still be “used to protect children  
12 through protective orders, orders for specific services, and protective dispositional  
13 decisions, such as guardianships or terminations”. In re Dependency of J.R.U.-S at779.

14 Defense believes that psychological and physiological assessments of sex  
15 offenders, which uncover different results for juveniles than for adults, weigh strongly in  
16 favor of Respondent being able to undergo a sexual deviancy evaluation with the  
17 appropriate protections in place. Defense would point to the studies which have found no  
18 measurable differences in sexual preferences between juveniles adjudicated of sex-  
19 offending and other juveniles. Instead, juveniles’ criminal sexual activity appears to result  
20 more from a lack of appropriate channels for sexual expression than from the kind of  
21 psychological disorder attributed to most adult offenders. Studies than examine the social  
22 backgrounds of juvenile offenders are often no more conclusive than the psychological  
23 studies; neither successfully differentiates sexual offenders from nonsexual offenders. *See*  
24 *Garfinkle, E., Coming of Age in America: The Misapplication of Sex Offender Registration*

1 *and Community Notification Laws to Juveniles*. California Law Review, 190, 163- 208.  
2 (2003).

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**CONCLUSION**

For the foregoing reasons, the respondent respectfully asks the court to grant use and derivative use immunity for all statements Respondent might make in the sexual deviancy evaluation.

DATED this \_\_\_\_\_ day of January, 2013.

Respectfully submitted,

\_\_\_\_\_  
Darcy J. Scholts, WSB #12911  
Attorney for Respondent