

CAUSE NO. CR- [REDACTED] G

STATE OF TEXAS

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IN THE DISTRICT COURT

v.

370th JUDICIAL DISTRICT

[REDACTED]

HIDALGO COUNTY, TEXAS

MOTION FOR TRE 601 HEARING PRIOR TO TRIAL AND OUT OF PRESENCE OF JURY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, [REDACTED], DEFENDANT herein, and files this motion for the Court to entertain a TRE 601 hearing before trial and out of the presence of a jury.

Defendant contends that [REDACTED] at the time of events about which she is expected to be examined, was of unsound mind and incapable to observe intelligently, which affects her ability to recollect events. Defendant has the burden of proving by a preponderance of the evidence that [REDACTED] lacked the capacity to observe intelligently at the time of events, lacks the capacity to recollect, or lacks the capacity to narrate. As grounds therefore would show the court the following:

Trial process

1. First trial setting is [REDACTED] 2017.
2. On [REDACTED] 2017, Defendant filed medical records with the Court pertaining to alleged victim/witness [REDACTED] from Doctors Hospital at Renaissance--Behavioral Center ("DHR-BC", hereinafter).
3. On [REDACTED] 2017, Defendant filed pediatric records with the Court pertaining to alleged victim/witness [REDACTED] from pediatrician Dr. [REDACTED]

Timeline

2012 *Auditory hallucinations begin*

2014 *Visual hallucinations begin*

<i>Aug/Sept 2015</i>	<i>Bathroom incident alleged to have occurred</i>
■ <i>Oct 2015</i>	■ <i>witnesses non-existent school stabbing</i>
■ <i>Oct 2015</i>	<i>Dr. ■ discovers hallucinations, recommends psychiatric help</i>
■ <i>Oct 2015</i>	<i>Inpatient at DHR-BC</i>
■ <i>Oct 2015</i>	<i>1st outcry to school counselor re: ■</i>
■ <i>Nov 2015</i>	<i>2d outcry to school counselor (initially describing Defendant sexually abusing her younger sister)</i>
■ <i>Dec 2015</i>	<i>3d outcry to school counselor re: ■</i>
■ <i>Dec 2015</i>	<i>School counselor calls CPS to report</i>
■ <i>Dec 2015</i>	<i>Alleged 4th outcry to school counselor upon which HCSO initiates investigation</i>
■ <i>Dec 2015</i>	<i>CAC forensic interview</i>
■ <i>Dec 2015</i>	<i>SANE</i>
■ <i>January 2016</i>	<i>DHR-BC psychiatric records filed with Court by Defendant</i>
■ <i>March 2016</i>	<i>Pediatric records filed with the Court by Defendant</i>

Outcries and Allegations

4. On ■ 2015, ■ was interviewed at CAC Estrella's House pertaining to a ■ 2015 'outcry' to a school counselor of her mother's ex-boyfriend, ■ having 'raped' her. (Attached Exhibit 1, pgs. 1-2 & 1-3, ■ school counseling records.)

5. The school counselor reported the 'outcry' on ■ 2015 to CPS.

6. HCSO report indicates that it began an investigation into a ■ December 2015 'outcry' by ■ to the school counselor regarding Defendant having sexually abused her. (Though subpoenaed, no school counselor records were produced regarding any 8 December school counseling.)

7. In the CAC interview, ■ stated that incident with Defendant had occurred after 2015 summer vacation. ■ described Defendant as having entered the bathroom, while everyone in the house was asleep, forcing her down on the floor, covering her mouth, opening his pants, and penetrating her vagina with his penis...for 30-40 minutes.

Midway through the narrative, ██████ lost her train of thought and began discussing some other sexual abuse accusation from the Dallas area.

Near the end of the CAC interview ██████ discloses that an ex-boyfriend of her mother named ██████ (of Dallas) had ripped her clothes off with a knife, touched her everywhere and did 'the same thing' as she alleged against Defendant.

██████ also alleged that an unknown Black male had done 'the same thing' to her, too.

8. The mother ██████ stated that she recalled Defendant and ██████ leaving the bathroom of their home in the middle of the night sometime in August or September 2015. The mother also reported that ██████ had informed her of the ██████ allegations during an argument 3-4 months prior to the alleged bathroom incident. After Irasema disclosed that she was going to report the alleged abuse by ██████, ██████ changed her story and blamed an unknown Black male from school.

9. ██████ mother reported to HCSO Investigator ██████ that she was advised by 'someone' at Doctor's Hospital at Renaissance--Behavioral Center not to report the ██████ accusation in order to avoid stressing ██████

10. Irasema reported that, on the day of an alleged outcry by ██████ to the school counselor, she had gone to speak to the school counselor about her motherly concern that ██████ would 'make something up about 'the teacher.'

11. Irasema reported that ██████ altered her description of the bathroom incident by, at first, stating that the abuse by Defendant occurred when Irasema was not home and then to the occasion when ██████ saw Defendant and ██████ leaving the home bathroom one night.

12. The ██████ 15 SANE exam indicates two well-healed tears to the hymen.

13. On ██████ January 2016, ██████ school counselor ██████ reported to HCSO Investigator ██████ that ██████ had made a ██████ October 2015 accusation of sexual abuse against her by ██████. The school counselor also reported that on ██████ November 2015, ██████ accused Defendant of having 'raped' her younger sister, but then changed the victim to herself when the school counselor started making phone calls to the elementary school regarding ██████ sister.

Medical/Psychiatric Events

14. On █ October 2015, █ was taken to see pediatrician Dr. █ During the exam, █ mother reported to the MD that █ had witnessed a non-existent stabbing of a schoolmate at school. After dismissing the family, Dr. █ was able to obtain from █ that this was not the first event she had observed which had not occurred. █ stated that her hallucinations had begun a year before. (Exhibit 2-1, █'s pediatric notes.)

15. Dr. █ noted the hallucinations, her prior implications of sexual abuse, and referred her to psychiatric help. (Exhibit 2-2)

16. On █ October 2015, █ was admitted to DHR-BC. The records indicate a self-reported history of auditory hallucinations of 3 years (Exhibits 3-2, 3-8, DHR-BC records). The hallucinations included voices telling her to harm herself (Exhibits 3-3, 3-8) with knives (Exhibit 3-4). The mother reported █ had hidden knives in her bedroom under her pillow (Exhibits 3-4, 3-8).

█ also reported other visual hallucinations (Exhibits 3-5, 3-9). She claimed a history of previous sexual abuse by mother's ex-boyfriend in Dallas when she was 12 years old. (Exhibit 3-6). DHR-BC reports that she was suffering from paranoid delusions (Exhibit 3-7).

WHEREFORE PREMISES CONSIDERED, DEFENDANT respectfully prays that the court set a 601 hearing prior to trial and, after which hearing, find that █ is incompetent as a witness due to her inability to intelligently observe and recollect events upon which she is expected to be examined at trial.

Respectfully submitted,

Law Office of Lennard K. Whittaker
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McAllen, TX 78504
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teksus@mac.com

By: _____

Lennard K. Whittaker
SBT 24008274
Attorney for █

Certificate of Service

I, Lennard K. Whittaker, affirm that a true and correct copy of the foregoing instrument has been delivered to:

Hidalgo County District Attorney
100 E. Cano
Edinburg, TX 78539
[REDACTED]@da.co.hidalgo.tx.us

Lennard K. Whittaker

List of Exhibits Attached:

- Exhibit 1, [REDACTED] High counseling records
- Exhibit 2, excerpt of [REDACTED] pediatric records
- Exhibit 3, excerpt of [REDACTED] DHR-BC hospitalization records

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**ORDER ON DEFENDANT'S MOTION FOR TRE 601 HEARING PRIOR TO TRIAL
AND OUT OF PRESENCE OF JURY**

On this ___ day of _____, 2017, came to be heard the foregoing Motion for TRE 601 Hearing Prior to Trial and Out of Presence of Jury upon consideration and hearing:

It is ordered that said [REDACTED] is hereby determined by the Court to be incompetent as a witness regarding the events of the entire year of 2015 due to her inability to intelligently observe events. The Court finds that [REDACTED] suffered symptoms of visual and auditory hallucinations during the time period about which she is expected to testify.

Signed this ___ day of _____, 2017.

Judge Presiding

cc:

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Hidalgo County District Attorney
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* HIDALGO COUNTY, TEXAS

ORDER SETTING HEARING

Hearing on Motion for TRE 601 Hearing Prior to Trial and Out of Presence of Jury is hereby set for the _____ 2017 at _____ am/pm.

Signed this _____, 2017.

Judge Presiding

cc:

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