PUBLIC

Case No. 20160794-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JAIME ERNESTO NUNEZ-VASQUEZ,
Defendant/Appellant.

Brief of Appellee

Transferred appeal from a conviction for forcible sodomy, a first degree felony, in the Third Judicial District, Salt Lake County, the Honorable Mark S. Kouris presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

JURISDICTION 4

STATEMENT OF THE ISSUES 5

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES 6

STATEMENT OF THE CASE 6

A. Summary of facts. 6

B. Summary of proceedings. 10

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. [redacted] 16

A. [redacted] 16

B. [redacted] 25

1. [redacted] 25

2. [redacted] 30

3. [redacted] 37

II. The trial court did not abuse its discretion by rejecting mistake-of-fact instructions because the elements instruction required the jury to resolve any mistake-of-fact issue. 38

A. The trial court ruled that the elements instructions adequately conveyed the State's burden to prove forcible sodomy and permitted a mistake-of-fact defense. 39

B. A defendant is entitled to instructions accounting for his defense, but may not dictate the form that the instructions take. The elements instruction sufficed here.....41

III. Trial counsel was not ineffective for abandoning a line of questioning on Nunez-Vasquez's Miranda waiver that counsel concluded was a legal question. 49

A. Defense counsel invited error by assenting that the confession circumstances were a legal matter for the court, not a fact matter for the jury. 50

B. Nunez-Vasquez cannot show ineffective assistance because further detail on the interview is largely speculative and would have made no difference. 52

IV. A motion to exclude Nunez-Vasquez's statements would have been futile, so counsel cannot have been ineffective by not seeking to exclude them. 56

V. Counsel was not ineffective for not objecting when a nurse testified that trauma can cause memory loss because her full testimony shows that she concluded that alcohol and/or drugs caused the victim's memory loss here. 58

VI. Nunez-Vasquez has shown no error, let alone cumulative error.....60

CONCLUSION 61

CERTIFICATE OF COMPLIANCE.....61

ADDENDA

Addendum A: Constitutional Provisions, Statutes, and Rules

Addendum B: [redacted]

Addendum C: Jury instructions, proposed instructions, and argument on mistake-of-fact defense, R246-49, 259-60, 1042-47

Addendum D: Interview circumstances testimony, R978-79, 1004-08

Addendum E: "Trauma" testimony, R819-20

TABLE OF AUTHORITIES

FEDERAL CASES

Bullock v. Carver, 297 F.3d 1036 (10th Cir. 2002) 23

Burt v. Titlow, 134 S.Ct. 10 (2013) 37

Chapman v. California, 386 U.S. 18 (1967) 24

Crane v. Kentucky, 476 U.S. 683 (1986) 52

Delaware v. Fensterer, 474 U.S. 15 (1985) 28

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 28, 35

Harrington v. Richter, 562 U.S. 86 (2011) 23, 24

Holmes v. South Carolina, 547 U.S. 319 (2006) 30, 33

Jackson v. Denno, 378 U.S. 368 (1964) 52

Kimmelman v. Morrison, 477 U.S. 365 (1986) 25

Michigan v. Lucas, 500 U.S. 145 (1991) 27, 29

Miranda v. Arizona, 384 U.S. 436 (1966) 52

Premo v. Moore, 562 U.S. 115 (2011) 24

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 23

Strickland v. Washington, 466 U.S. 668 (1984) ..... *passim*

United States v. Scheffer, 523 U.S. 303 (1998) 29, 33

STATE CASES

Bott v. DeLand, 922 P.2d 732 (Utah 1985) 42

Burns v. Boyden, 2006 UT 14, 133 P.3d 370 31

Diversified Holdings, L.C. v. Turner, 2002 UT 129, 63 P.3d 686 56

Erickson v. Sorensen, 877 P.2d 144 (Utah App. 1994) 42

In re Adoption of Baby E.Z., 2011 UT 38, 266 P.3d 702 21

Miller v. Utah Dep't of Transp., 2012 UT 54, 285 P.3d 1208 5

People v. Hackett, 365 N.W.2d 120 (Mich. 1984) 32

State v. Ashby, 2015 UT App 169, 357 P.3d 554 27

State v. Bair, 2012 UT App 10, 275 P.3d 1050 59

State v. Barela, 2015 UT 22, 349 P.3d 676 ..... 44, 45, 49

State v. Billingsley, 2013 UT 17, 311 P.3d 995 ..... 27, 29, 35

State v. Bond, 2015 UT 88, 361 P.3d 104 24

State v. Bravo, 2015 UT App 17, 343 P.3d 306 26

State v. Chacon, 962 P.2d 48 (Utah 1998) 24, 55

State v. Clark, 2004 UT 25, 89 P.3d 162 5

State v. Clark, 2009 UT App 252, 219 P.3d 631 27

State v. Eldredge, 773 P.2d 29 (Utah 1989) 31

State v. Glodgett, 813 A.2d 444 (N.H. 2002) 32

State v. Gonzales, 2005 UT 72, 125 P.3d 878 61

State v. Hall, 946 P.2d 712 (Utah App. 1997) 31

State v. Higgins, 821 A.2d 964 (N.H. 2003) 35

State v. Hutchings, 2012 UT 50, 285 P.3d 1183 ..... *passim*

State v. Iorg, 801 P.2d 938 (Utah App. 1990) 59

State v. Johns, 615 P.2d 1260 (Utah 1980) 28

State v. Kelley, 2000 UT 41, 1 P.3d 546 ..... 24, 36

State v. Litherland, 2000 UT 76, 12 P.3d 92 37

State v. Lucero, 2014 UT 15, 328 P.3d 841, *overruled on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016 ..... 25, 26, 57

State v. Marchet, 2012 UT App 197, 284 P.3d 668 ..... 42, 44, 45, 47

State v. Marks, 2011 UT App 262, 262 P.3d 13 27

State v. McNeil, 2013 UT App 134, 302 P.3d 844 ..... 21, 22, 50, 51

State v. Nelson, 2015 UT 62, 355 P.3d 1031 ..... 42, 47

State v. Piansiaksone, 954 P.2d 861 (Utah 1998) 53

State v. Rammel, 721 P.2d 498 (Utah 1986) 59

State v. Richardson, 2013 UT 50, 308 P.3d 526 26

State v. Sessions, 645 P.2d 643 (Utah 1982) 41, 42

State v. Tarrats, 2005 UT 50, 122 P.3d 581 27

State v. Taylor, 947 P.2d 681 (Utah 1997) 23

State v. Taylor, 2005 UT 40, 116 P.3d 360 41

State v. Thornton, 2017 UT 9, 391 P.3d 1016 ..... *passim*

State v. Tyler, 850 P.2d 1250 (Utah 1993) 22, 23

State v. Williams, 773 P.2d 1368 (Utah 1989) 28

STATE STATUTES

Utah Code Ann. § 76-2-101 39

Utah Code Ann. § 76-5-403 .....6, 39

Utah Code Ann. § 78A-4-103 (West Supp. 2012) 4

STATE RULES

Utah R. App. P. 23B 22

Utah R. App. P. 24 61

Utah R. App. P. 27 61

Utah R. Crim. P. 30 48

Utah R. Evid. 103 55

Utah R. Evid. 403 .....6, 15, 56, 57

Utah R. Evid. 412 .....*passim*

Utah R. Evid. 608 .....10, 31, 33, 36

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STATE OF UTAH,
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JAIME ERNESTO NUNEZ-VASQUEZ,
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Brief of Appellee

INTRODUCTION

Defendant Jaime Nunez-Vasquez has "a thing for straight guys," finds them "attractive," and takes it as a personal "challenge" to get them to have sex with him. Nunez-Vasquez told police that the victim here fit this bill. The victim wound up in an apartment with Nunez-Vasquez and another man after the three spent the night drinking. As the third man went to his bedroom, the victim sat down on a couch in the living room and passed out or blacked out.

The victim awoke the next morning on the floor, pants and underwear around his ankles, in the embrace of Nunez-Vasquez, who was fondling the victim's genitals. When the victim got up, he felt rectal pain and a substance he guessed was personal lubricant. The victim immediately

called police to say he was raped. Nunez-Vasquez admitted that the two had sex, but claimed that it was consensual and that the victim had initiated and sustained it.

Nunez-Vasquez raises six issues in this appeal.

[redacted]

Mistake-of-fact jury instructions. Nunez-Vasquez argues that the trial court abused its discretion by refusing to give his proposed mistake-of-fact instructions. The trial court refused the instructions because the elements instruction, which required intent with respect to consent, required the jury to consider and reject Nunez-Vasquez's mistake-of-fact

theory before it convicted him of rape. That ruling was well within the trial court's broad discretion.

Excluded testimony on police interrogation. Nunez-Vasquez asserts that the trial court erroneously excluded evidence about the circumstances of his police interrogation. This claim is unpreserved because counsel invited error below. He cannot show prejudice on his alternative ineffective assistance claim because the jury saw the interview for themselves, many of the additional details he sought were admitted at trial, and additional excluded details were speculative. He also cannot show deficient performance because counsel could have reasonably decided to abandon this line of questioning where it was unlikely to persuade the jury.

Admitted testimony of Nunez-Vasquez's attraction to straight men. Nunez-Vasquez argues that his counsel was ineffective for not moving under rule 403 to exclude his statements that he found straight men "attractive" and considered it a "challenge" to get them to have sex with him. This claim is frivolous. These statements were highly probative of Nunez-Vasquez's mental state, and not at all outweighed—let alone substantially outweighed—by any danger for unfair prejudice. Because any motion to exclude them would have been futile, Nunez-Vasquez cannot show ineffective assistance.

Lack of memory testimony. The sexual examination nurse testified that alcohol, drugs, and trauma can cause memory loss. Nunez-Vasquez argues that his counsel was ineffective for not objecting to the trauma portion of the nurse's testimony because, he says, this constituted anecdotal statistical evidence. This disregards the nurse's full testimony, which made clear that she believed that the victim's memory loss here was caused by alcohol and/or drugs. Given this context, counsel could have reasonably decided not to object to the trauma portion. At any rate, the trauma remark was not prejudicial because it was made in passing and not mentioned again.

Cumulative error. Nunez-Vasquez finally argues that this Court should reverse for cumulative error, if nothing else. He has shown no error, let alone cumulative error.

JURISDICTION

Defendant appeals from a conviction for forcible sodomy, a first degree felony.[1] This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West Supp. 2012).

[1] He was also charged and convicted of possession of a controlled substance (marijuana). R1-4, 334. He has not appealed that conviction.

STATEMENT OF THE ISSUES

1. [redacted]

Standard of Review. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162.

2. Did the trial court abuse its discretion by rejecting the defense-proposed mistake-of-fact instructions because the elements instruction required the jury to resolve the mistake-of-fact issue?

Standard of Review. A trial court's refusal to give proposed jury instructions is reviewed for abuse of discretion. *Miller v. Utah Dep't of Transp.*, 2012 UT 54, ¶13, 285 P.3d 1208.

3. Was trial counsel ineffective for not arguing that additional detail on the circumstances of the police interview was admissible?

Standard of Review. See issue 1.

4. Was trial counsel ineffective for not moving to exclude Nunez-Vasquez's admission that he found straight men "attractive" and considered it a "challenge" to get them to have sex with him?

Standard of Review. See issue 1.

5. Was trial counsel ineffective for not objecting to a nurse's passing remark that trauma can cause memory loss, where the nurse was clear that alcohol and/or drugs accounted for the victim's memory loss?

Standard of Review. See issue 1.

6. Should this Court reverse for cumulative error where Nunez-Vasquez has shown no error?

Standard of Review. None applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 76-5-403 (forcible sodomy);
Utah R. Evid. 403, 412, 608.[2]

STATEMENT OF THE CASE

A. Summary of facts.[3]

Victim: "I've been raped."

C.C. woke up on the living room floor of a "random apartment" in South Salt Lake. SE1-3. His pants and underwear had been pulled down to

[2] Unless otherwise noted, the State cites to current versions of statutes for the court's convenience, as any changes do not affect the issues on appeal.

[3] Consistent with well-established appellate standards, the State recites the facts in the light most favorable to the jury's verdict. *See State v. Hutchings*, 2012 UT 50, ¶26, 285 P.3d 1183.

his ankles, and he was in the embrace of Defendant Jaime Nunez-Vasquez, who was "stroking" C.C.'s penis. SE3; DE3 at 1:15-2:00; R760, 794-95, 819, 956. C.C. "broke free" and began to dress when he noticed that his rectum "felt weird" and "hurt." SE3, 763-64, 957. He put his hand down and felt an oily substance, which was consistent with a container of personal lubricant he saw sitting on a nearby coffee table. SE1, 3, 5; R760, 795. C.C. immediately went outside and called 911 to report that he had been raped. SE3; DE3 at 0:20; R760. When officers arrived, they found C.C. "pacing around," "visibly upset," "speaking fast" and "loud," and wanting to go to the hospital to be examined. R794-95, 952.

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Defendant: "I have a thing for straight guys"; "It's just a thing, it's attractive to me. It's like a challenge, getting a straight guy" to have sex.

C.C. had a number of gay friends. R772, 991, 1009. One evening, he went to a house party with his friend Travis, who is gay. R755, 772, 992-93. There, C.C. drank and met Erik Robinson and Nunez-Vasquez, who are also gay. R756; DE1. C.C., Erik, and Nunez-Vasquez left the house party together

to continue drinking at a gay bar called Try-Angles.[4] R757, 773, 874-75. After a quick stop at Erik's house to pick up some sound equipment, they then went to Club Manhattan, where the drinking continued. R757-58, 878.

Nunez-Vasquez heard C.C. say at one point that he was not gay. SE9:4-5; R1009. Nunez-Vasquez later told police that he has "a thing for straight guys." SE9:21. "It's just a thing" he finds "attractive . . . . It's like a challenge, getting a straight guy" to have sex with him. *Id.*; *see also id.* at 21-22 (Nunez-Vasquez: "Just because a guy tells [him] the[y're] straight" "doesn't mean they don't want to" have sex; Officer: "Do you try to turn them gay, or do you just desire the sexual act with a straight guy?" Nunez-Vasquez: "A little bit of both.").

As the bar-hopping wound down, C.C. wanted to go home, but found himself back at Erik's apartment. R758-59. Frustrated but lacking a ride, he took off his shirt and sat down on the living room couch, where he "passed out, blacked out." R759-60, 956. He woke up the next morning to the scene described above. He deduced that he had been raped from what he saw and felt, and insisted that he had not flirted with Nunez-Vasquez or conversed

[4] The name of this bar appears as "Triangles" in the transcript, *see, e.g.*, R757, 875, but the company's website spells it as it appears above. Likewise, Robinson's name appears as "Eric" in the transcript, but is spelled with a "k" on his witness statement. *Compare* R872 *with* DE1. The State follows Robinson's spelling.

at all about sex with him. R763-74, 766-67 (Prosecutor: "Do you remember flirting with Jaime that night?" Victim: "I definitely would have never done that." . . . "I did not do such behavior." Prosecutor: "Do you remember if you ever had a conversation with Jaime that night about having sex?" Victim: "I did not have such conversation."). He also insisted that he "would know if [he] would have given consent." R772.

Defendant's story

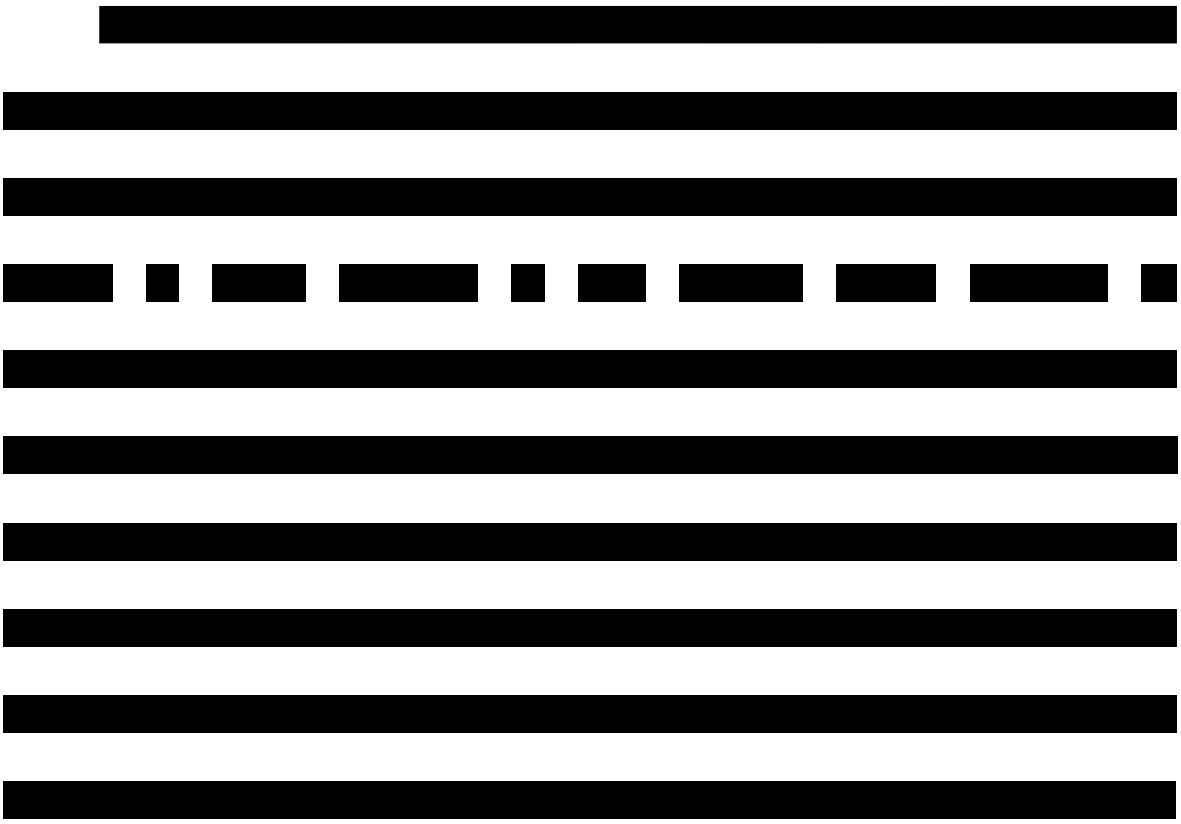
Officer Frank Fisher responded to the 911 call. R792-94. After speaking with the victim, Fisher asked Nunez-Vasquez if he had spooned and fondled C.C. while nude; Nunez-Vazquez said he had. R801. Fisher then asked if they had had sex; Nunez-Vasquez said, "I don't know." R801-02. Fisher then asked what made Nunez-Vasquez think that the victim "was open to sex with another man"; Nunez-Vasquez said "he thought it was mutual because they were close." R801-03.

At trial, Nunez-Vasquez admitted—and DNA evidence confirmed—that he had sex with C.C. DE2; R416-17, 1001-02. But Nunez-Vasquez claimed it was consensual. According to him, C.C. did not pass out on the couch, but rather "cuddled" and "[c]anoodl[ed]" with him. SE9:11-12. Because they "kept falling off the couch," they moved to the floor. *Id.* at 13-14. Once there, they "spoon[ed]" with Nunez-Vasquez behind. *Id.* at 15.

"[A]t some point," the two had sex. *Id.* Nunez-Vasquez insisted that while C.C. had not flirted with him or talked about having sex, C.C.'s behavior—such as C.C. having an erection, his "grinding" and "pressing" into Nunez-Vasquez's body, and "doing all the work" during sex—"clearly" showed that C.C. was conscious and consented. *Id.* at 18, 24-25; R999-1002. Nunez-Vasquez admitted that he—not C.C.—had taken C.C.'s pants and underwear off. R1016.

B. Summary of proceedings.

The State charged Nunez-Vasequez with—relevant here—forcible sodomy. R1-4.



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Mistake-of-fact defense. Defense counsel proposed three instructions to support a mistake-of-fact defense at trial. The first stated that to convict, the jury had to believe both that the victim did not actually consent and that Nunez-Vasquez did not reasonably believe that he consented. R247. The second stated that the State bore the burden of disproving mistake-of-fact beyond a reasonable doubt. R249. The third was an elements instruction incorporating the other two instructions. R259-60. The trial court refused these instructions, ruling that its chosen elements instruction adequately accounted for this defense by requiring the State to prove both that the victim did not consent and that Nunez-Vasquez acted knowingly, intentionally, or recklessly regarding the victim's nonconsent. R1042-47.

Miranda questions. Twice during trial, defense counsel attempted to explore the details of Nunez-Vasquez's *Miranda* waiver. R978-79, 1004-08. But after the prosecutor objected and argued that those details went to a legal issue rather than a fact issue, counsel conceded that the prosecutor "might have a point" and thereby abandoned the objection. *Id.* Defense counsel did explore some aspects of the interview, including Nunez-

Vasquez's alcohol consumption, his not getting drinking food or drink right away, and his being in handcuffs and talking to a uniformed officer. R1004-08.

Forensic nurse testimony. During direct examination of the forensic nurse who examined the victim, the prosecutor asked her if the nurse was "concerned" by the victim's lack of memory. R819. The nurse testified that she was not, because it is "very common that either due to alcohol, drugs[,] or just the traumatic experience," that "a lot of people will not have any real recollection or they just don't know a lot of detail about what happened. It's just part of trauma." *Id.* The prosecutor then asked if there was anything in the victim's history up to the point of their meeting "that would explain why he wasn't able to remember"; the nurse said that it was likely alcohol and/or drugs. R819-20. Defense counsel did not object to any of this testimony.

Conviction, sentence, and appeal. The jury convicted Nunez-Vasquez as charged, and the trial court sentenced him to five years to life in prison. R333-34, 344-45. He timely appealed to the Utah Supreme Court, which transferred the case to this Court. R354-55, 358-63.

SUMMARY OF ARGUMENT

[redacted]

Issue II: Mistake-of-fact jury instruction. Nunez-Vasquez argues that the trial court abused its discretion by rejecting his mistake-of-fact jury instructions in favor of an elements instruction stating that the jury had to find both that the victim did not consent and that Nunez-Vasquez was at least reckless as to the victim's nonconsent. This Court may affirm on the alternative ground that Nunez-Vasquez was not entitled to a mistake-of-fact instruction on the facts here. At any rate, the trial court did not abuse its discretion because the elements instruction permitted Nunez-Vasquez to argue mistaken consent.

Issue III: Ineffective assistance and interrogation circumstances. Nunez-Vasquez argues that the trial court erroneously excluded some evidence of the police interrogation circumstances. This claim is unpreserved because defense counsel acceded below that the interrogation circumstances went to a legal issue for the court, not a factual issue for the jury. Nunez-Vasquez alternatively argues that counsel was ineffective for not arguing that the evidence was admissible. The only proffered statement that was excluded—that Nunez-Vasquez was "confused" during the interrogation—would not have changed the result given that the jury was able to watch the entire interview for themselves. But even assuming that additional evidence on the interrogation circumstances—beyond what was

in the video—was admissible, there is no record of what those circumstances were, making this claim speculative.

Issue IV: Ineffective assistance and Nunez-Vasquez's statements. Nunez-Vasquez argues that his counsel was ineffective for not moving to suppress, under evidence rule 403, his statements to police that he found straight men "attractive" and took it as a "challenge" to get them to sleep with him. This claim is frivolous. The probative value of these statements was high because they bore on the central issues at trial: Nunez-Vasquez's actions and his recklessness as to the victim's nonconsent. Counsel could have reasonably decided that a motion to suppress them was likely to fail, and choosing not to file a futile motion cannot prove ineffective assistance.

Issue V: Ineffective assistance and "trauma" testimony. Nunez-Vasquez asserts that his counsel was also ineffective for not objecting when a nurse testified that trauma can cause memory loss. But the full context of her testimony shows that she told the jury that she believed that alcohol and/or drugs—not trauma—accounted for the victim's memory loss in this case. Thus, counsel could have reasonably decided not to object to the trauma portion.

Issue VI: Cumulative error. Because Nunez-Vasquez has shown no error, he necessarily has not shown cumulative error.

ARGUMENT

I.

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A. [redacted]

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II.

The trial court did not abuse its discretion by rejecting mistake-of-fact instructions because the elements instruction required the jury to resolve any mistake-of-fact issue.[8]

Nunez-Vasquez next argues that the trial court erroneously rejected his proposed mistake-of-fact jury instructions because they had a "strong evidentiary basis," were "clear and accurate," and would have "reconciled all the evidence." Aplt.Br. 28-39. But the trial was only obligated to correctly instruct the jury on the law. It did that. The elements instruction required the jury to find that Nunez-Vasquez was at least reckless with respect to whether the victim consented before convicting him. That finding necessarily required the jury to resolve whether Nunez-Vasquez was mistaken about whether the victim consented. The trial court therefore correctly instructed the jury on the law. And even if the instruction fell short, it could not have harmed Nunez-Vasquez because there was no basis in the evidence to find a mistake of fact on the issue of consent.

[8] The proposed instructions, relevant given instructions, and trial court's ruling are attached as Addendum C.

A. The trial court ruled that the elements instructions adequately conveyed the State's burden to prove forcible sodomy and permitted a mistake-of-fact defense.

Forcible sodomy requires proof that a person "engage[d] in any sexual act" "involving the genitals of one person and the . . . anus of another person" and acted "without the other's consent." Utah Code Ann. § 76-5-403(1), (2). Because the statute contains no mental state, a defendant must act at least recklessly with respect to both the act and the lack of consent. *See* Utah Code Ann. §§ 76-2-101(1) (default mental state statute); 76-2-103(3) (defining recklessness).

Defense counsel requested three separate instructions on a mistake-of-fact consent defense at trial. R246-49. The first stated, "Under Utah law, ignorance or mistake of fact which disproves the culpable mental state is an affirmative defense to any prosecution for that crime. Said differently, a defendant may not be found guilty of a crime if there would be no crime if the facts were as he believed." R246. The second said that a defendant could claim mistake-of-fact based on "the existence of consent." R247. It then stated that in order to convict, the jury had to believe both (1) that C.C. "did not actually consent" and (2) that Nunez-Vasquez did not have "a reasonable belief that consent existed." *Id.* This second component, the instruction continued, required both that Nunez-Vasquez have a subjective

good-faith belief in the existence of consent, and that the belief be objectively reasonable. *Id.* The third and final instruction stated that mistake of fact was an affirmative defense, and that once "some evidence has been presented" on it, then the State bore the burden of disproving it beyond a reasonable doubt. R249.

The trial court denied the instructions, explaining that the elements instruction gave counsel "everything [he was] asking for," but "in a little easier way to understand." R1046-47. The elements instruction stated, in relevant part, that the jury needed to find beyond a reasonable doubt both that the act was "without [C.C.'s] consent" and that Nunez-Vasquez "acted with intent, knowledge or recklessness that [C.C.] did not consent." R320.

The State argued that the victim did not consent—and could not have because he was unconscious—and that Nunez-Vasquez was at least reckless as to whether the victim did not consent. R1062-68, 1083-87. The thrust of defense counsel's argument was that the victim consented and later regretted it. He argued that the victim was a "liar" with a "selective memory," that he clearly consented by his conduct, and that if he had truly been "asleep or passed out or blacked out," he would have woken up "screaming" when the assault began, "but that never happened." R1069-79. Defense counsel also argued that there was "no proof beyond a reasonable

doubt that Mr. Nunez knew that [C.C.] was unconscious" and unable to consent. R1080-81.

B. A defendant is entitled to instructions accounting for his defense, but may not dictate the form that the instructions take. The elements instruction sufficed here.

Trial courts instruct juries on the law so that the juries can decide whether the facts that they believe fit the applicable legal standards to support a conviction. Because the instructions are directed to jurors, appellate courts view the instructions "with commonsense understanding" and "in light of all that has taken place at the trial" rather than "'parsing [them] for subtle shades of meaning in the same way that lawyers might.'" *State v. Hutchings* 2012 UT 50, ¶25, 285 P.3d 1183 (quoting *Boyde v. California*, 494 U.S. 370, 380-81 (1990)). This includes looking at the instructions "as a whole rather than in isolated segments." *State v. Taylor*, 2005 UT 40, ¶ 24, 116 P.3d 360.

There is no required order, number, or kind of instructions in any given case. *See generally State v. Sessions*, 645 P.2d 643, 646 (Utah 1982) (separate instructions not required where instructions as whole correctly explain law). Though "Utah law recognizes each party's right to have the jury fairly instructed on his or her theory of the case, '[i]t is not error to refuse a proposed instruction if the point is properly covered in the other

instructions.'" *Erickson v. Sorensen*, 877 P.2d 144, 151 (Utah App. 1994) (quoting *Sessions*, 645 P.2d at 647). Merely because "certain of the instructions could have been slightly more accurate or more complete does not mean they were inaccurate, incomplete, or erroneous—nor does it mean they were prejudicial." *State v. Nelson*, 2015 UT 62, ¶47, 355 P.3d 1031; *see also Bott v. DeLand*, 922 P.2d 732, 741 (Utah 1985) ("As we have repeatedly held, if the jury instructions as a whole fairly instruct the jury on the applicable law, reversible error does not arise merely because one jury instruction, standing alone, is not as accurate as it might have been.").

The trial court acted well within its discretion to reject Nunez-Vasquez's proposed mistake-of-fact instructions on consent because he got all that he was entitled to: a correct instruction on the State's burden to prove lack of consent, which necessarily required rejecting any mistake-of-fact issue. This Court's decision in *State v. Marchet*, 2012 UT App 197, 284 P.3d 668, resolves this issue. In *Marchet*, this Court affirmed a conviction where although the trial court denied a mistake-of-fact instruction, the elements instruction required the prosecution to disprove the claimed mistake of fact beyond reasonable doubt. The instruction in *Marchet* told the jury that before they could convict Marchet of rape, they must find beyond a reasonable doubt that Marchet (1) had sexual intercourse with the

victim, (2) without the victim's consent, and (3) that Marchet acted intentionally, knowingly, or recklessly. 2012 UT App 197, ¶¶18-19.

This Court held that this instruction, together with other instructions stating that the State had the burden of proving the defendant guilty beyond a reasonable doubt, "communicated to the jury that Marchet was guilty of rape not simply if he knowingly, intentionally, or recklessly had sexual intercourse with [the victim], but only if he knowingly, intentionally, or recklessly did so without [the victim]'s consent." *Id*. ¶19. "Accordingly, the instructions properly informed the jury as to the elements and mental state of the crime and allowed the jury to consider Marchet's theory of the case "that there may have been a mistake about whether the victim consented." *Id*.

So too here. The elements instruction adequately conveyed to the jury that, in order to convict, they had to believe beyond a reasonable doubt both that the victim did not consent, and that Nunez-Vasquez was at least reckless in determining whether the victim consented. R320. This necessarily required the jury to resolve Nunez-Vasquez's defense theories that the victim either consented, or that Nunez-Vasquez reasonably, but mistakenly, believed the victim consented. Had the jury believed either of

those things, it could not have found that he was at least reckless on whether the victim consented and it could not have convicted him.

Three years after *Marchet*, in *State v. Barela*, 2015 UT 22, 349 P.3d 676, the Utah Supreme Court held that a similar, but distinguishable instruction was erroneous. *Id*. ¶26. The *Barela* elements instruction indicated that to find Barela guilty of rape the jury would have to find the following:

> 1. The defendant, Robert K. Barela,
>
> 2. Intentionally or knowingly;
>
> 3. Had sexual intercourse with [the victim];
>
> 4. That said act of intercourse was without the consent of [the victim].

Id. ¶13. The Supreme Court explained that "[i]n asking the jury to consider whether Barela 'intentionally or knowingly' 'had sexual intercourse with [the victim]," the instruction implied that the mens rea requirement … applied *only* to the act of sexual intercourse," and not to the victim's nonconsent. *Id*. ¶26 (emphasis in *Barela*). "It conveyed that idea by coupling the mens rea requirement directly with the element of sexual intercourse, and by articulating the element of [the victim]'s nonconsent without any apparent counterpart requirement of mens rea." *Id*. "That implication was error." *Id*.

But the Court distinguished this erroneous instruction from the correct instruction in *Marchet*, where "the mens rea element was listed last, after both the 'sexual intercourse' and 'nonconsent' elements, "suggest[ing] that "the mens rea element appl[ied] to all of the above-listed elements." *Id*. ¶26 n.3. In other words, under the *Marchet* instruction, the jury had to find beyond a reasonable doubt that Marchet acted intentionally, knowingly, or recklessly with respect to the victim's nonconsent.[9]

Nunez-Vasquez attempts to distinguish *Marchet* and *Barela* on the basis that the defenses in those cases focused on consent, not reasonable mistake as to consent. Aplt.Br. 32; *Barela*, 2015 UT 22, ¶¶23-24; *Marchet,* 2012 UT App 197, ¶13. Nunez-Vasquez argues that the evidence here, unlike in those cases, showed that the victim might have consented, but not been able to remember due to an alcoholic blackout. Aplt.Br. 17-18, 31-32.

But he presented no evidence below on the effects of alcoholic blackout, and made no argument that the victim could have consented, but not remembered it due to alcohol consumption. On appeal, Nunez-Vasquez does not argue that counsel was ineffective for not pursuing an alcoholic blackout defense—that is, that counsel should have presented evidence and

[9] The Court therefore "proceed[ed] on the ground that *Marchet*" was "distinguishable, and without reaching the question whether the instruction in that case was an accurate statement of law." *Barela*, 2015 UT 22, ¶26 n.3.

argument that the victim could have been conscious and consenting, but unable to recall his consent due to memory loss from his intoxication.[10]

Like Marchet and Barela, Nunez-Vasqeuz focused the bulk of his defense on actual consent. In opening, he asserted that the victim "play[ed] with fire" and "g[o]t burned." R744. In closing, he argued that the victim was a "liar" with a "selective memory" who actively consented. R1070-79. The closest counsel got to arguing mistaken consent was asserting that there was "no proof beyond a reasonable doubt that Mr. Nunez knew that [C.C.] was unconscious" and unable to consent, and that if the jury did not find "beyond a reasonable doubt about [C.C's] unconsciousness that [Nunez-Vasquez] perceived," then the jury could not find him guilty. R1080-81. But moments earlier, counsel had argued that if the victim had truly been "asleep or passed out or blacked out," he would have woken up "screaming" when the assault began, "but that never happened." R1077.

Nunez-Vasquez asserts that without the mistake-of-fact instruction, counsel's statements "sounded inflammatory." Aplt.Br. 38. But his sought-for instructions would not have taken the edge off of counsel's remarks. From the beginning, counsel sought to blame the victim. In opening

[10] Further, the victim was clear that he was not just "blacked out," but "passed out." *See* R759-60, 956.

statement, he insisted that the victim had "decided to play with fire and he got burned." R744. In closing, counsel continued this theme by insisting that the victim was "reckless" because he wore an expensive purple suit, went out with a "gay friend" to a party and "a gay bar," "h[u]ng out with gay guys all night," and "stay[ed] with two gay men in an apartment where the resident is gay." R1079. An "ordinary person," by contrast "would have called a cab and got home." *Id.* This kind of what-did-he-think-would-happen argument is not about mistaken consent or regretting behavior, but rather is geared to convince the jury that the victim deserved what he got. A separate mistake-of-fact instruction would not have changed that.[11]

Nunez-Vasquez also argues that, unlike the proposed instruction in *Marchet*, his was "clear and accurate" because it incorporated both subjective and objective elements. Aplt.Br. 32-33. But just because another instruction might have been "slightly more accurate or more complete does not mean"' that the instructions given "were inaccurate, incomplete, or erroneous." *Nelson*, 2015 UT 62, ¶47. As shown, the elements instruction

[11] This was not counsel's only attempt to influence the jury with emotion rather than engage them with reason. Counsel closed his argument by telling the jury that the defense left the case "in God's hands. That's why [Nunez-Vasquez was] wearing the rosary around his neck," and "suggest[ing]" that the jurors "go say a prayer to your maker" "before you go and render a vote." R1082.

correctly explained the law to the jury and required it to resolve the disputed issue—whether Nunez-Vasquez mistakenly believed that the victim consented.

Nunez-Vasquez further argues that without his proposed instructions, "the jury likely believed the focus should be on CC's mental state," rather than his own. Aplt.Br. 38. This is unconvincing for two reasons. First, the jury would have properly focused on victim's mental state to determine whether he actually consented. Second, the elements instruction clearly required the jury to find, beyond a reasonable doubt, that Nunez-Vasquez acted knowingly, intentionally, or recklessly regarding nonconsent, and thus focused the jury's attention on his own mental state. R320. The instructions as given properly focused the jury's attention on the relevant mental states, and the trial court did not abuse its discretion.

Even if the instructions given somehow failed to require the jury to resolve whether Nunez-Vasquez was mistake about whether the victim consented, that error would have been harmless given the evidence and argument at trial. *See id; see also* Utah R. Crim. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded."). As shown, the encounter Nunez-Vasquez described would have left no room for a mistake as to consent. In his

version, the victim was at least a co-equal participant, and at times, the sexual aggressor. And the victim did not give a differing account that the jury could have believed, but still found a mistake of fact. *Cf. Barela*, 2015 UT 22, ¶¶30-32 (reversing where jury could have believed victim and still acquitted based on Barela's reasonable misunderstanding). The victim simply could not remember what happened. Because any error in the instruction did not go to any issue raised in the evidence, that error could not have harmed Nunez-Vasquez's case.

III.

Trial counsel was not ineffective for abandoning a line of questioning on Nunez-Vasquez's *Miranda* waiver that counsel concluded was a legal question.

Nunez-Vasquez argues that "contextual details" of his interrogation—such as the "influence of exhaustion, dehydration, alcohol, nerves, and minimization techniques"—were admissible, and that the trial court erroneously excluded them. Aplt.Br. 39-49. Any error on this claim was invited below and can be addressed only for ineffective assistance, which Nunez-Vasquez cannot prove.

A. Defense counsel invited error by assenting that the confession circumstances were a legal matter for the court, not a fact matter for the jury.[12]

Nunez-Vasquez claims on appeal that the trial court improperly prohibited questions about the circumstances of Nunez-Vasquez's confession. But defense counsel ultimately agreed that the questions were improper and stopped asking them. If the trial court erred, defense counsel invited the error, and this Court may only consider his alternative ineffective-assistance claim.

As explained, defense counsel invites error when "a party initially objects but later, 'while the wheel's still in spin,' abandons the objection and stipulates to the court's intended action." *McNeil*, 2013 UT App 134, ¶23. That is what happened here. Defense counsel sought to explore the conditions of the interrogation, first with the interviewing officer, and then with Nunez-Vasquez himself. *See* R978-79; R1005-08. When counsel asked the interrogating office whether Nunez-Vasquez waived his *Miranda* rights, the prosecutor objected, and the trial court told counsel that it was "not an issue for the jury. That's a legal issue. That's not a jury issue." R979. Defense counsel chose to not challenge that ruling. Instead, he responded, "Okay," and resumed questioning on other issues about the interrogation. R979-83.

[12] The portions of the record discussed in this subsection are attached as Addendum D.

When defense counsel did the same thing while questioning Nunez-Vasquez, counsel ultimately agreed that the questions were improper. When counsel asked Nunez-Vasquez if police read him his rights, the prosecutor objected, and defense counsel agreed to "ask the question in a different way." R1006. Counsel then asked Nunez-Vasquez if he spoke to police "voluntarily"; Nunez-Vasquez replied, "I think I was a little bit confused." *Id.* The prosecutor objected, and the trial court struck the answer. *Id.* During a bench conference, the prosecutor told the court that "It seems like every question seems [sic] to be going to whether his statement was involuntary or whether he was forced into it (inaudible). That's all been litigated and it's the judgment of this Court, not the jury." R1008. The court turned to defense counsel, who replied, "He might have a point there," and stopped asking questions about the interview. *Id.*

Though counsel used the modal verb "might"—which indicates "possibility," *see* Cambridge Dictionary, *Might,* at http://dictionary.cambridge.org/us/dictionary/english/might, last accessed August 10, 2017—his acquiescence in the prosecutor's argument is clear because he did not offer any argument or authority for the proposition that the interrogation circumstances *were* admissible, and acceded the prosecutor's point. He thus invited any error. *McNeil*, 2013 UT App 134, ¶23. The only

claim left is whether trial counsel was ineffective for agreeing not to ask further question about whether Nunez-Vasquez voluntarily talked to police.

B. Nunez-Vasquez cannot show ineffective assistance because further detail on the interview is largely speculative and would have made no difference.

Nunez-Vasquez argues that counsel performed deficiently because he clearly wanted to introduce evidence about the interview circumstances, and such evidence is admissible. Aplt.Br. 43. Both of these appear to be true—as far as they go. Counsel initially wanted to explore the interview circumstances. *See* R978-79, 1004-08. And evidence of the interview circumstances are admissible when offered by the defendant, so long as they are admitted for a proper purpose.

Whether a *Miranda* waiver is valid is a legal issue for the court. *See generally Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (explaining that statements are inadmissible at trial if police fail to comply). Thus, counsel cannot elicit evidence of a *Miranda* waiver to argue to the jury that the waiver was legally invalid. But counsel may elicit detail of the interrogation to challenge the reliability of his statements, *Crane v. Kentucky*, 476 U.S. 683, 688-89 (1986), which includes arguing that his statements were coerced, *Jackson v. Denno*, 378 U.S. 368 (1964). Because courts analyzing coercion claims consider whether *Miranda* warnings were given as part of a totality

analysis, *State v. Piansiaksone*, 954 P.2d 861, 866 (Utah 1998), it logically follows that defense counsel can explore the *Miranda* circumstances to aid a coercion claim at trial.

But the questions under *Strickland* are not whether counsel wanted the evidence in or whether it was admissible—though the answers to these questions may bear on the outcome. The questions under *Strickland* are whether all reasonable counsel would have sought to introduce this evidence, and if so, whether it would have made any difference at trial.

That latter question is dispositive here. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."). Regardless of the reasonableness of counsel's choice to abandon a line of questioning about the interview circumstances, there was ample evidence from which counsel could—and did—argue that the jury should believe his trial statements rather than his statements to police. It was clear that Nunez-Vasquez had been up late drinking and woke up late in the day. R879, 892, 964, 992-94. It was also clear that Nunez-Vasquez had received the *Miranda* warning. R801. Regarding his statements to police at the scene, Nunez-Vasquez explained that he was in handcuffs, the officer was in uniform, and he "didn't want to talk" to the officer because he "didn't know what was going on." R1007.

Regarding his statements at the police station, counsel elicited that Nunez-Vasquez had been handcuffed before his taped interview, that some suspects are hesitant to talk to police, and that police did not give him food or water "for a while." R968-69, 1007-08.[13] There was thus evidence on which counsel could draw to argue the "influence of exhaustion, dehydration, alcohol, [and] nerves" on Nunez-Vasquez's statements. Aplt.Br. 46. Further, Nunez-Vasquez was able to explain his most damaging statement—that he finds straight men "attractive" and a "challenge"—by saying that he was merely trying to explain to the officer how a straight man could consent to gay sex. R1030.

In closing, defense counsel cited to the evidence that police were in uniforms and Nunez-Vasquez was in handcuffs, and liberally quoted from the interview transcript to try and show that Nunez-Vasquez had been consistent. R1074-76. Counsel also asked the jury to consider whether Nunez-Vasquez was "justifiably afraid of talking to police," and asserted that Nunez-Vasquez was hesitant to talk at first because he knew that "something[was] wrong" and he did not want to "air his laundry." R1073.

[13] Though the prosecutor objected to these latter statements, he never moved to strike them, and the court did not strike them on its own. R1008.

Only one statement about the interrogation was stricken at trial. Defense counsel asked Nunez-Vasquez if he spoke with the detective "voluntarily"; Nunez-Vasquez answered, "I think I was a little bit confused." R1006. The prosecutor objected, and the court struck the answer. *Id.* But Nunez-Vasquez has not proved, based on all the evidence, that striking that answer undermines confidence in the guilty verdict. As shown, the interview circumstances were amply explored at trial. Indeed, the interview itself—which defense counsel asserted was "probably [they jury's] best guide to what actually happened," R1074—was played for the jury, and defense counsel quoted extensively from it during closing argument. *See* SE8 (interview DVD); SE9 (interview transcript); R1074-76 (defense closing). Adding Nunez-Vasquez's self-serving opinion that he was "a little bit confused" during the interview would not have swayed the jury. To the extent that counsel asserts—for the first time on appeal—that counsel would have further explored police "minimization techniques," Aplt.Br. 46, this evidence is not in the record and cannot consider it. *Chacon*, 962 P.2d at 50 (ineffective assistance may not rest on speculation); *see also* Utah R. Evid. 103(a)(2) ("[I]f [a] ruling excludes evidence, a party [must] inform[] the court of its substance by an offer of proof, unless the substance was apparent from the context."). Besides, Nunez-Vasquez told a consistent

story both in his interview and at trial—that the victim consented. Whatever his professed confusion, it did not go so far as to affect his substantive claims.

IV.

A motion to exclude Nunez-Vasquez's statements would have been futile, so counsel cannot have been ineffective by not seeking to exclude them.

Nunez-Vasquez asserts that his counsel was ineffective for not moving to exclude, under evidence rule 403, his statement that he "has a thing for straight guys" and considers it a "challenge" to have sex with them. Aplt.Br. 50-51. This claim is frivolous.

Rule 403 states in relevant part that trial courts "may exclude relevant evidence if its probative value is *substantially outweighed* by a danger of" "*unfair* prejudice, confusing the issues," or "misleading the jury." Utah R. Evid. 403 (emphasis added). Trial courts have "wide latitude" in deciding rule 403 claims. *Diversified Holdings, L.C. v. Turner*, 2002 UT 129, ¶38, 63 P.3d 686.

Nunez-Vasquez's statements that he is attracted to straight men and considers it a challenge to get them to sleep with him were highly probative of his intent to have sex with the victim—who Nunez-Vasquez reported identified as straight—and whether he was at least reckless regarding the victim's nonconsent. And the danger for *unfair* prejudice was low because

the statement went to the critical issues at trial and gave context to the events at issue. Reasonable counsel could have seen the statement that way and decided that a motion to exclude the statement would have been futile, and that the defense should instead try to explain it away.

Which is precisely what counsel did. Nunez-Vasquez asserts that counsel "had no reason to not object under rule 403" because the statements were "misleading" and Nunez-Vasquez was "unable to explain their context." Aplt.Br. 50-51. But as stated above, there were reasons not to challenge the statement under rule 403—reasonable counsel could conclude that such a motion was not likely to succeed, and Nunez-Vasquez did explain their context, saying at trial that he was merely trying to explain to the officer how a straight man could consent to gay sex. R1030.

On appeal, Nunez-Vasquez has done nothing more than identify a different approach. But that is not enough to prove deficient performance. He must prove that no objectively reasonable counsel would have done what his counsel did. *See Lucero*, 2014 UT 15, ¶43. He has not even argued that that is true, let alone attempted to prove it.

Because counsel could have reasonably decided that a motion to exclude would have failed, Nunez-Vasquez cannot show deficient performance and his ineffective assistance of counsel claim fails. And given

the probative value of the statements, the court surely would have denied that motion had it been made. Nunez-Vasquez thus cannot show prejudice.

V.

Counsel was not ineffective for not objecting when a nurse testified that trauma can cause memory loss because her full testimony shows that she concluded that alcohol and/or drugs caused the victim's memory loss here.[14]

Nunez-Vasquez argues that counsel was ineffective for not objecting to nurse Stephanie Johnson's testimony that trauma can cause memory loss because it was a form of "anecdotal statistical analysis" that purported to show that the victim's memory loss "made him statistically more likely to be a victim of the charged crime." Aplt.Br. 51-53. But in context, she testified only that trauma may cause memory loss, not that it did in this case. She testified that she believed alcohol and/or drugs to be the cause of the victim's memory loss.

During direct examination, the prosecutor asked Johnson if the victim told her "that he had remembered being sexually assaulted" and if that "concerned" her; she answered that he had not, but it was not concerning to her because it was "very common that either due to alcohol, drugs, or just the traumatic experience, a lot of people will not have any real recollection or they just don't know a lot of detail about what happened. It's just part of

[14] Testimony relevant to this claim is attached as Addendum E.

trauma." R819. The prosecutor then followed up on the circumstances of this case, asking if there was anything she learned "that would explain why he wasn't able to remember"; she answered, "just the fact that he said he had several drinks and he wasn't sure what was in them. That can be a red flag for maybe possibly that someone put drugs in his drink, which can happen." R819-20. When the prosecutor asked if "just alcohol" could have caused the victim's memory loss, Johnson replied, "Oh yeah, of course." R820.

Nunez-Vasquez argues that this constituted anecdotal statistical evidence. Aplt.Br. 52-53. The proscription on anecdotal statistical evidence covers a very narrow class of testimony: empirically non-verifiable numbers that directly undermine or bolster a witness's credibility. *See State v. Rammel*, 721 P.2d 498 (Utah 1986) (holding improper and lacking foundation officer's testimony that it was not unusual for a suspect to lie); *State v. Iorg*, 801 P.2d 938 (Utah App. 1990) (holding improper detective's testimony that delayed reporting from child victim was not indicative of fabrication). It does not apply where a witness does not "directly comment" or "otherwise directly opine" on witness veracity. *State v. Bair*, 2012 UT App 106, ¶47 & n.10, 275 P.3d 1050.

Nunez-Vasquez argues that counsel should have objected to the trauma aspect of Johnson's testimony, because "it provided a speculative explanation" that the victim "did wake up but he did not remember the event due to trauma." Aplt.Br. 53. But counsel could have reasonably decided that Johnson was saying not that the trauma explanation applied in this case, but that the victim's memory loss was entirely attributable to alcohol and/or drugs. R819-20. Nunez-Vasquez thus cannot show deficient performance.

He also cannot show prejudice. He asserts that absent the trauma testimony, the victim's "inability to remember the incident was questionable, and even if true, did not contradict Nunez-Vasquez's testimony." Aplt.Br. 54. But in context, the trauma testimony was a passing, general remark without any applicability to the facts of this case. In its absence, the upshot of Johnson's testimony on the victim's memory would have been the same: he could not remember likely due to alcohol consumption.

VI.

Nunez-Vasquez has shown no error, let alone cumulative error.

Nunez-Vasquez finally asserts that this Court should reverse based on cumulative error, if nothing else. Aplt.Br. 54. But because he has not

shown any error, he necessarily cannot show cumulative error. *State v. Gonzales*, 2005 UT 72, ¶74, 125 P.3d 878.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on October 25, 2017.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 12,878 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

/s/ *John J. Nielsen*

JOHN J. NIELSEN
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 25, 2017, electronic copies of public and private versions of the Brief of Appellee were emailed to Counsel for Appellant at *appeals@sllda.com.* Hard copies of same will be mailed within 5 days to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief on CD in searchable portable document format (pdf):

☐ was filed with the Court and served on appellant.

☑ will be filed and served within 14 days.

/s/ *Lee Nakamura*

Addenda

Addendum A

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-403

§ 76-5-403. Sodomy--Forcible sodomy

Currentness

(1) A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.

(2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.

(3) Sodomy is a class B misdemeanor.

(4) Forcible sodomy is a first degree felony, punishable by a term of imprisonment of:

(a) except as provided in Subsection (4)(b) or (c), not less than five years and which may be for life;

(b) except as provided in Subsection (4)(c) or (5), 15 years and which may be for life, if the trier of fact finds that:

(i) during the course of the commission of the forcible sodomy the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the forcible sodomy the defendant was previously convicted of a grievous sexual offense.

(5) If, when imposing a sentence under Subsection (4)(b), a court finds that a lesser term than the term described in Subsection (4)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

(6) The provisions of Subsection (5) do not apply when a person is sentenced under Subsection (4)(a) or (c).

(7) Imprisonment under Subsection (4)(b), (4)(c), or (5) is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-403; Laws 1977, c. 86, § 2; Laws 1979, c. 73, § 3; Laws 1983, c. 88, § 21; Laws 2007, c. 339, § 16, eff. April 30, 2007; Laws 2013, c. 81, § 8, eff. May 14, 2013.

U.C.A. 1953 § 76-5-403, UT ST § 76-5-403
Current through the 2017 General Session.

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 403

RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

Currentness

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Credits
[Amended effective December 1, 2011.]

Rules of Evid., Rule 403, UT R REV Rule 403
Current with amendments received through September 1, 2017

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 412

RULE 412. ADMISSIBILITY OF VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

Currentness

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or

(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(C) serve the motion on all parties.

(2) *Notice to the Victim.* The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) *Hearing.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) Definition of "Victim."In this rule, "victim" includes an alleged victim.

Credits

[Adopted effective July 1, 1994. Amended effective December 1, 2011; May 1, 2017.]

Rules of Evid., Rule 412, UT R REV Rule 412
Current with amendments received through September 1, 2017

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VI. Witnesses

Utah Rules of Evidence, Rule 608

RULE 608. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

Currentness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

Credits
[Amended effective October 1, 1992; November 1, 2004; December 1, 2011.]

Rules of Evid., Rule 608, UT R REV Rule 608
Current with amendments received through September 1, 2017

End of Document

Addendum B

THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	: Case No. 141900845FS
Plaintiff,	: Appellate Court Case No. 20160794
vs.	:
JAMIE ERNESTO NUNEZ-VASQUEZ,	:
Defendant.	: With Keyword Index

FINAL PRETRIAL JULY 2, 2015

BEFORE

JUDGE MARK KOURIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

APPEARANCES

For the Plaintiff: SANDI JOHNSON
Assistant District Attorney

For the Defendant: JOSEPH F. ORIFICI
Attorney at Law

* * *

INDEX

	Page
ORAL ARGUMENT	
Mr. Orifici	3
Ms. Johnson	2, 7
RULING	16

SALT LAKE CITY, UTAH; JULY 2, 2015

HONORABLE MARK KOURIS

(Transcriber's note: Identification of speakers may not be accurate with audio recordings)

P R O C E E D I N G S

THE COURT: Please be seated. Good morning.

MR. ORIFICI: Good morning, Your Honor.

THE COURT: Good morning, Mr. Orifici.

Good morning, Ms. Johnson.

This is set today for a final pretrial conference. Tell me what is anticipated.

First of all, is your client in custody?

MR. ORIFICI: No, Your Honor. My client, I spoke with ten minutes ago and he said that he was - he lives close and he was on his way.

THE COURT: All right.

MR. ORIFICI: And then also there's a sign on your door that confused me. I went down to West 39 because it looked like your hearings were being heard by Judge Harris. So, he might be having the same confusion.

THE COURT: It's on my door?

MS. JOHNSON: It says Judge Kennedy cases are being heard by Judge Harris in Judge Kennedy's courtroom (inaudible).

MR. ORIFICI: Maybe I saw the K and I assumed it

was you.

THE COURT: Yeah. No, we need to take that down. I didn't even know it was there.

All right. Thoughts?

MS. JOHNSON: Well, Your Honor, we're here today also because there is still two outstanding motions that we needed to address.

THE COURT: Very good.

MS. JOHNSON: And then we were going to set the jury trial.

THE COURT: Okay. If that's the case, then go ahead and proceed.

MS. JOHNSON: Your Honor, so there's two - there's the two motions. One is the State's motion in limine to limit questioning. Originally, the motion was to limit questioning of the victim regarding his past mental health or medical treatment. It's my understanding defense counsel already stipulated that he will not be asking those questions.

THE COURT: Okay.

MS. JOHNSON: And then there was also some allegations of blackmail. Mr. Orifici informed me this morning, I believe he's stipulating to the State's motion that he will not be asking questions of that as well. But I'll let him address that.

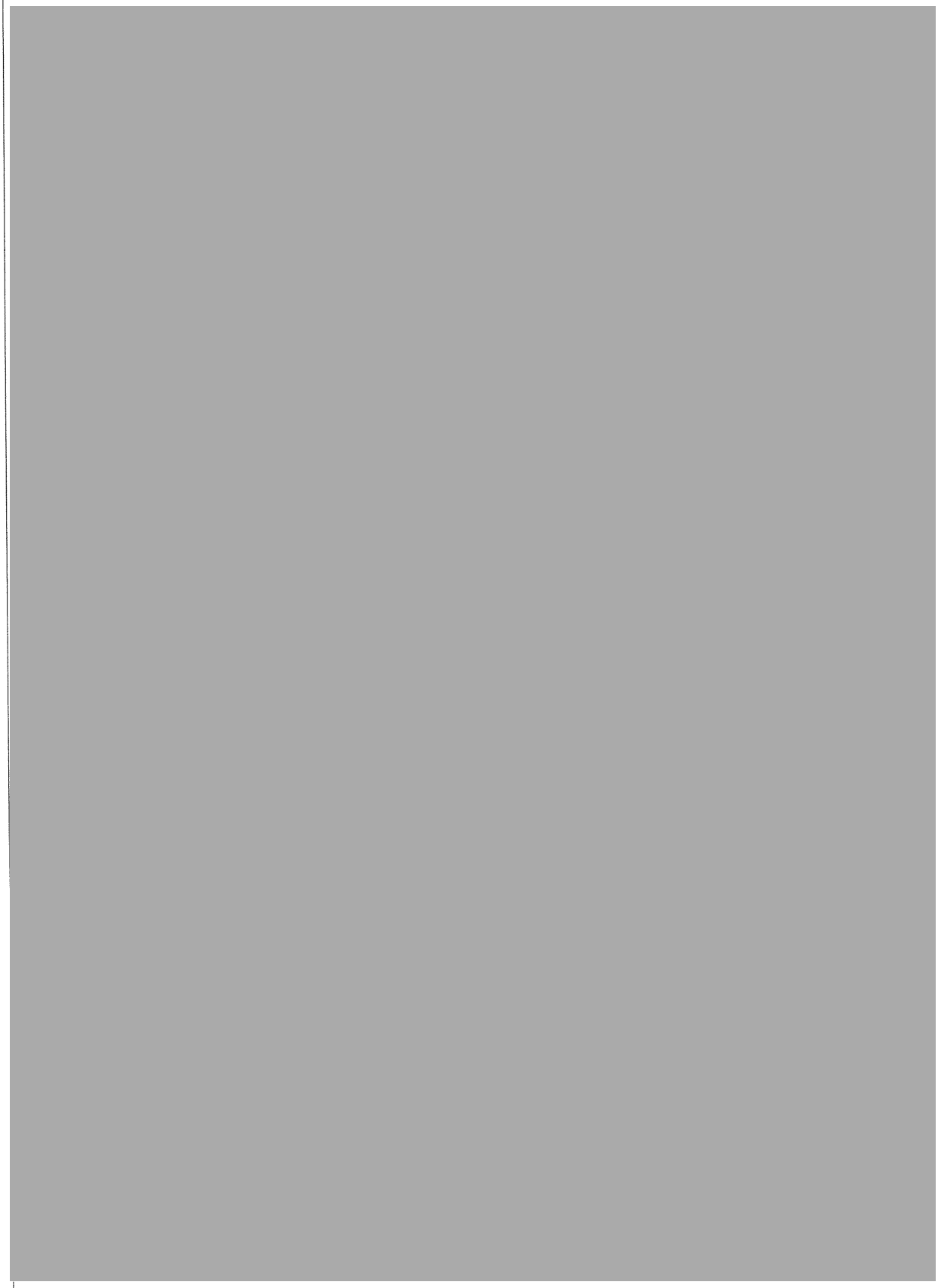
THE COURT: All right. Mr. Orifici?

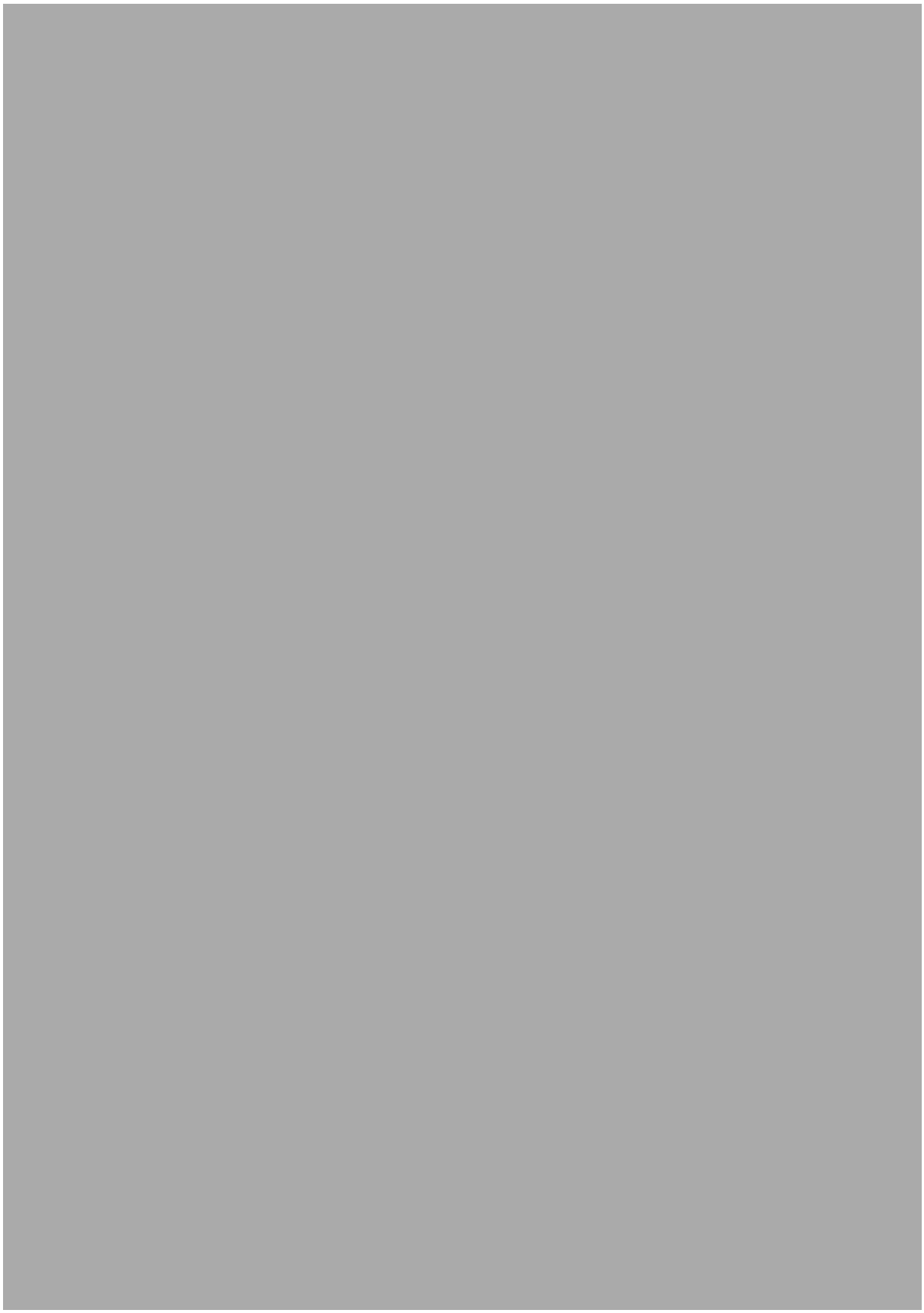
MR. ORIFICI: That's true. I stipulate to that. I mean, at this point all I have as to whether the alleged victim attempted to blackmail somebody else is hearsay. So I've got no real evidence to put the chain together. If I do come across some evidence, then I guess I do a different motion.

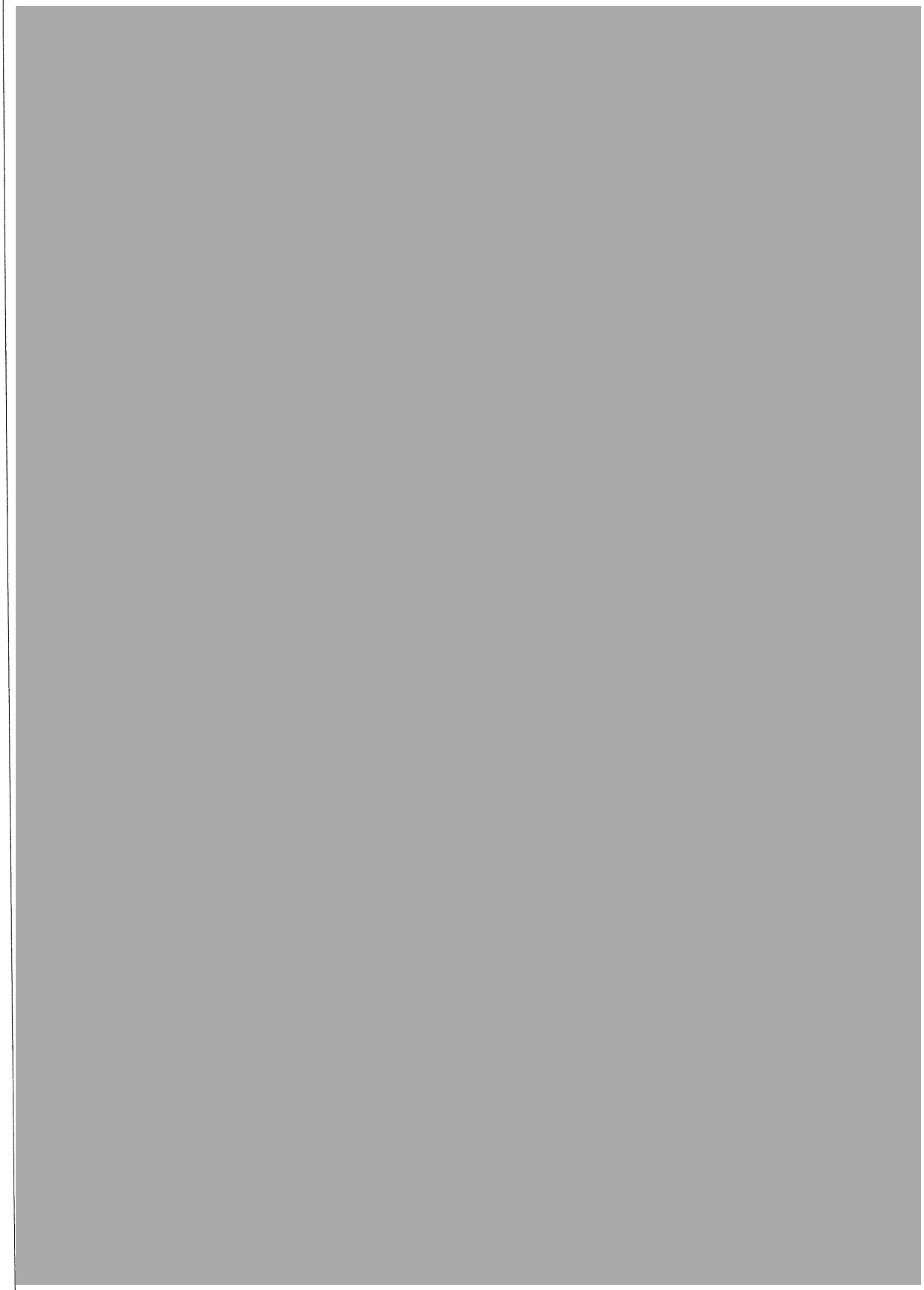
THE COURT: Okay.

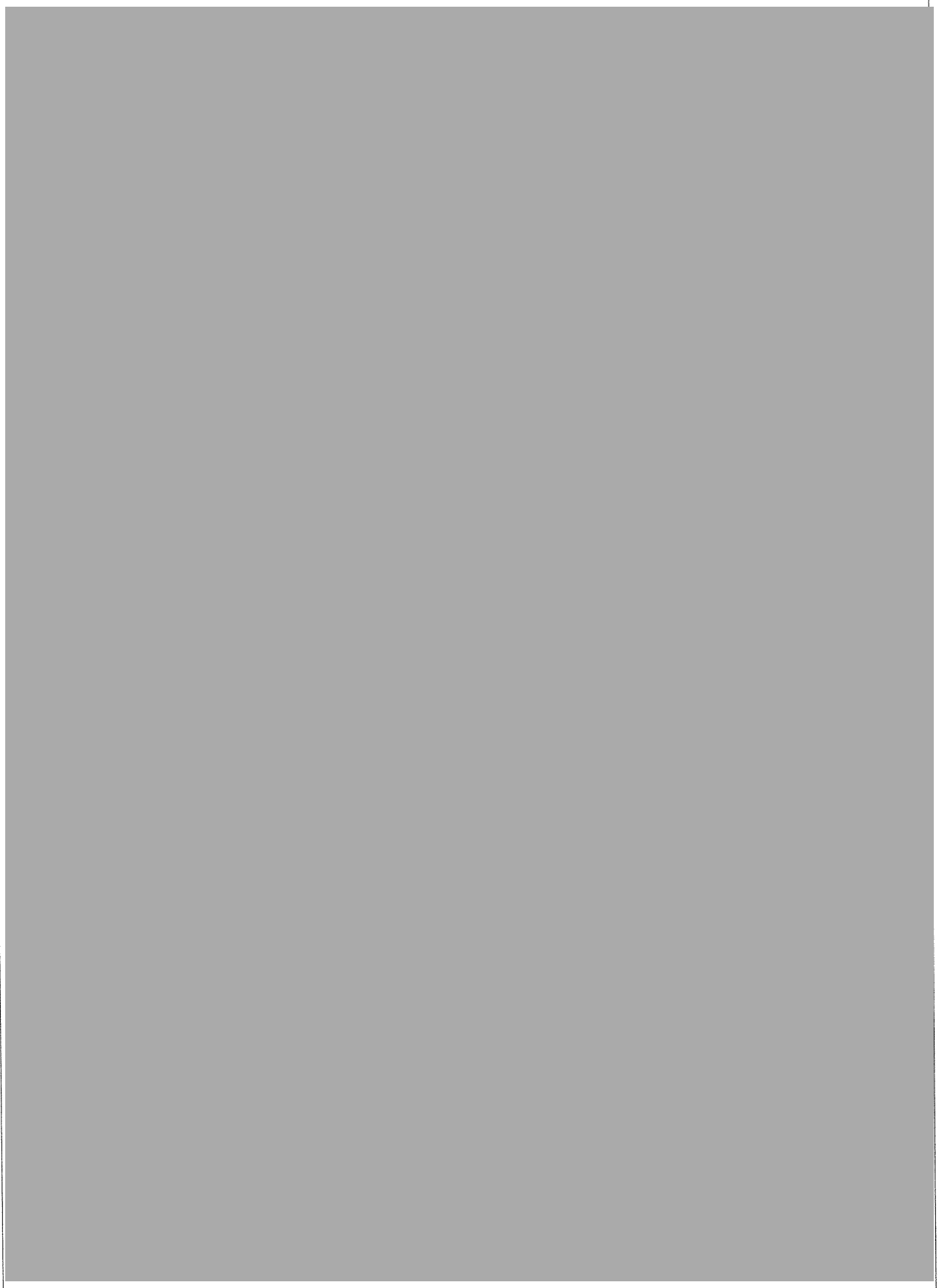
MR. ORIFICI: But at this point, she's correct.

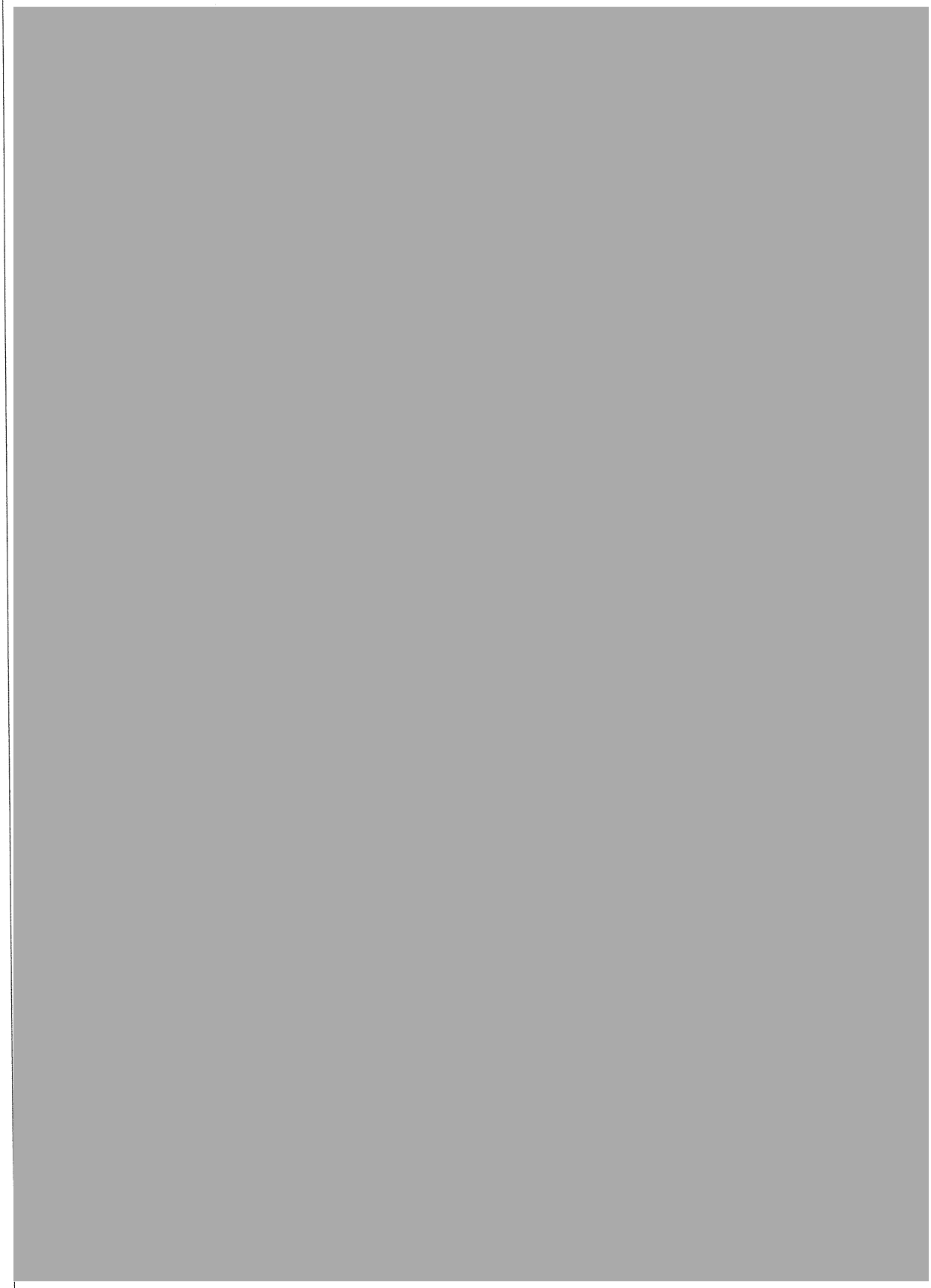
THE COURT: Okay.

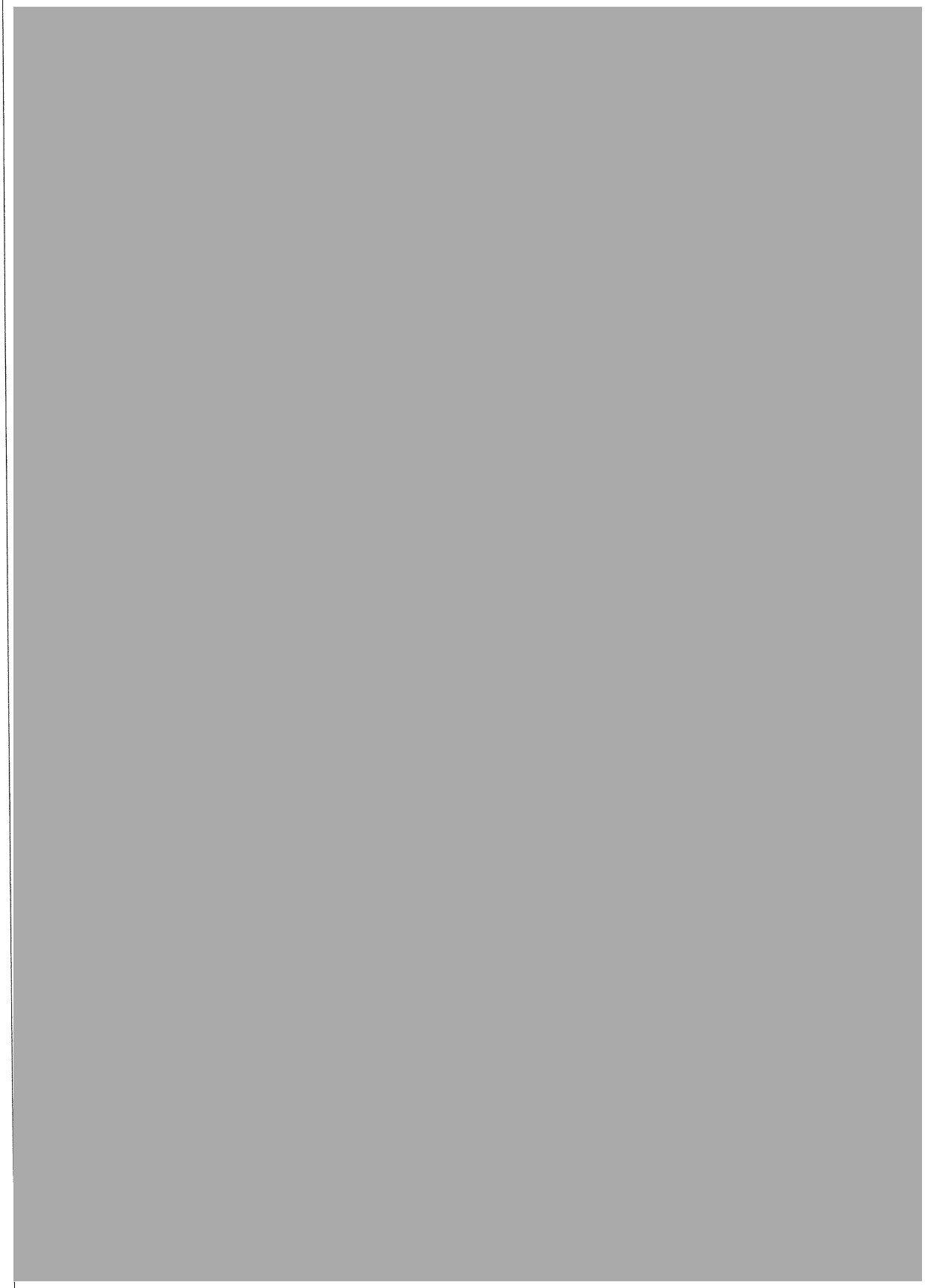


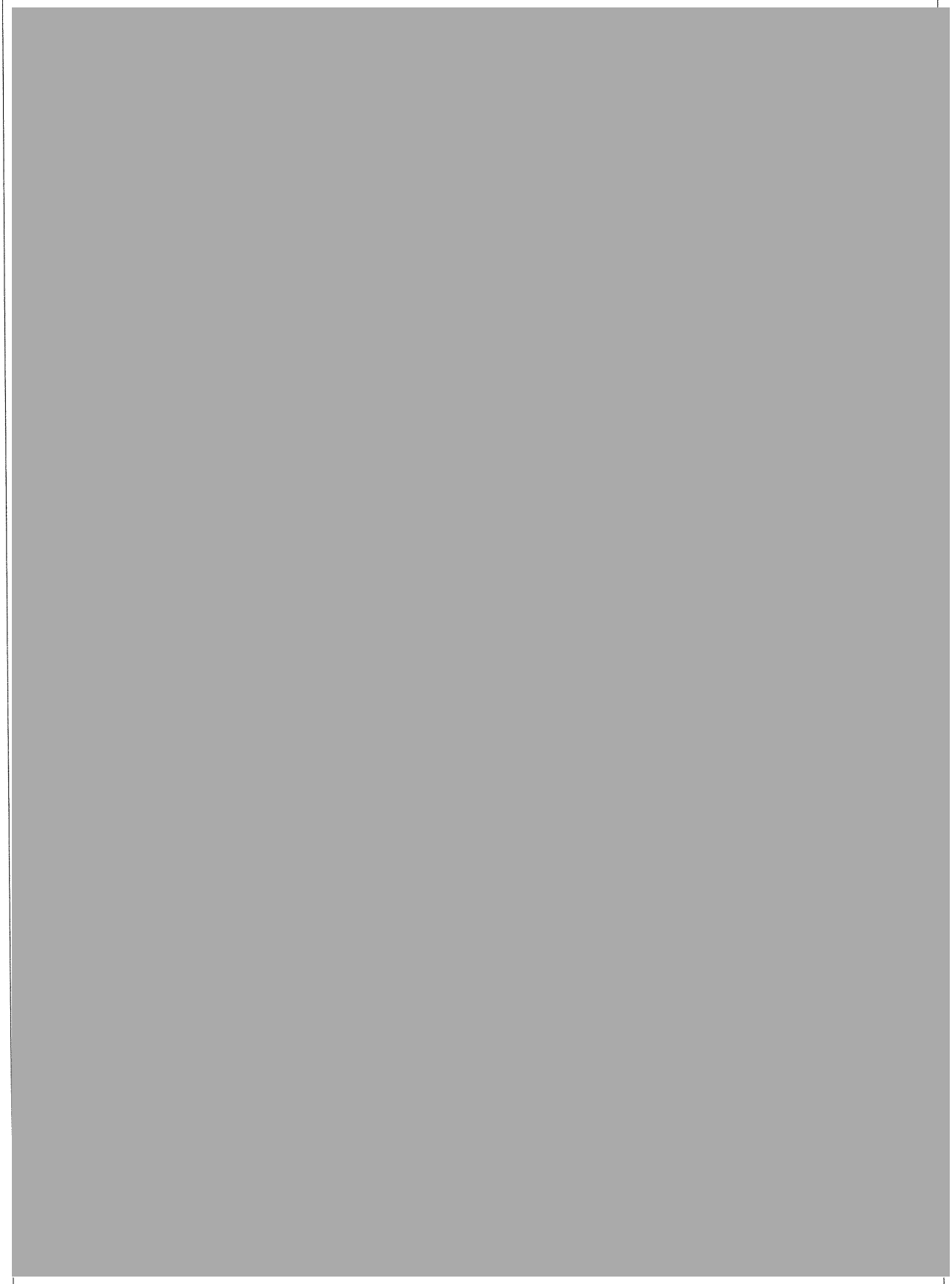


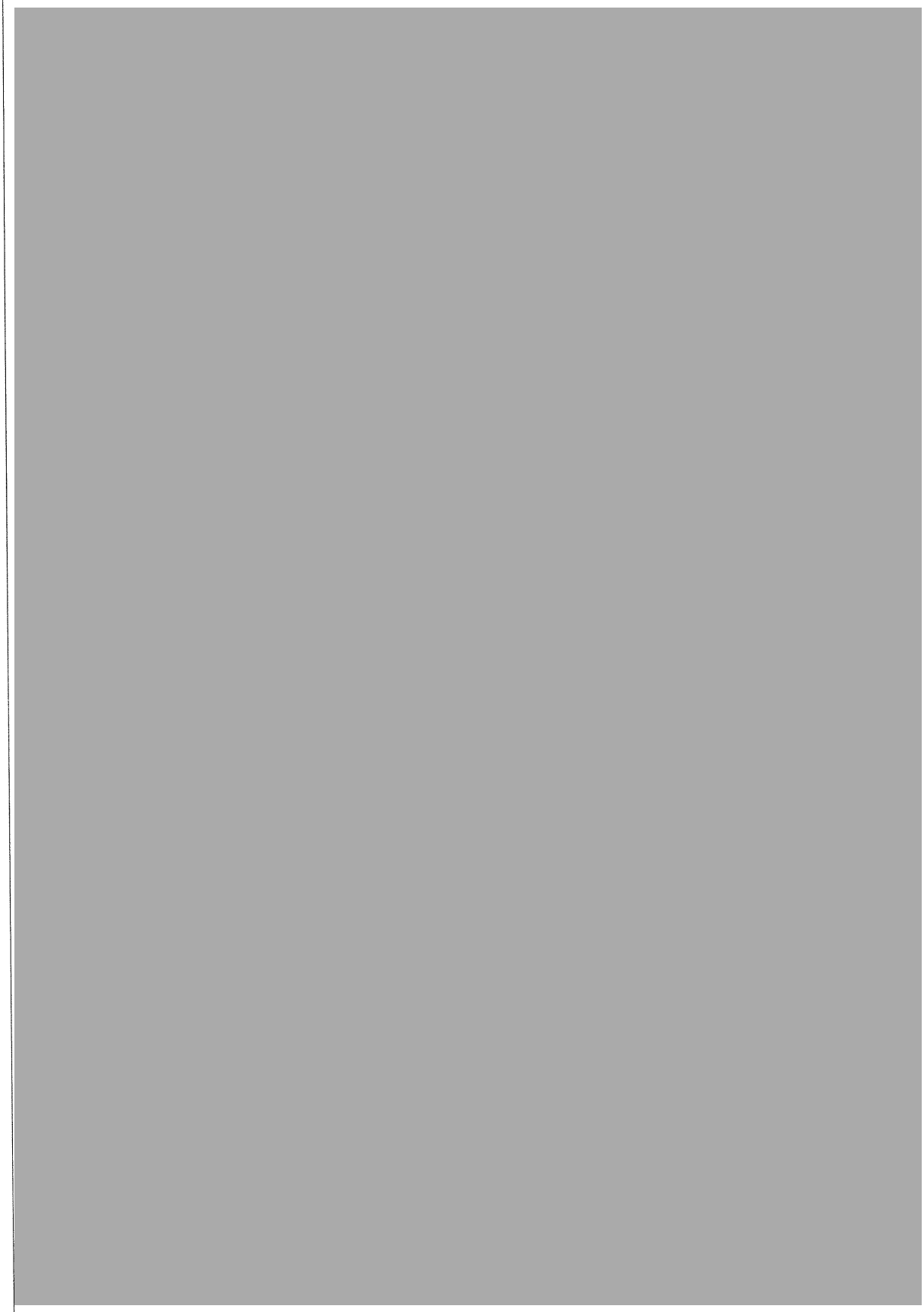


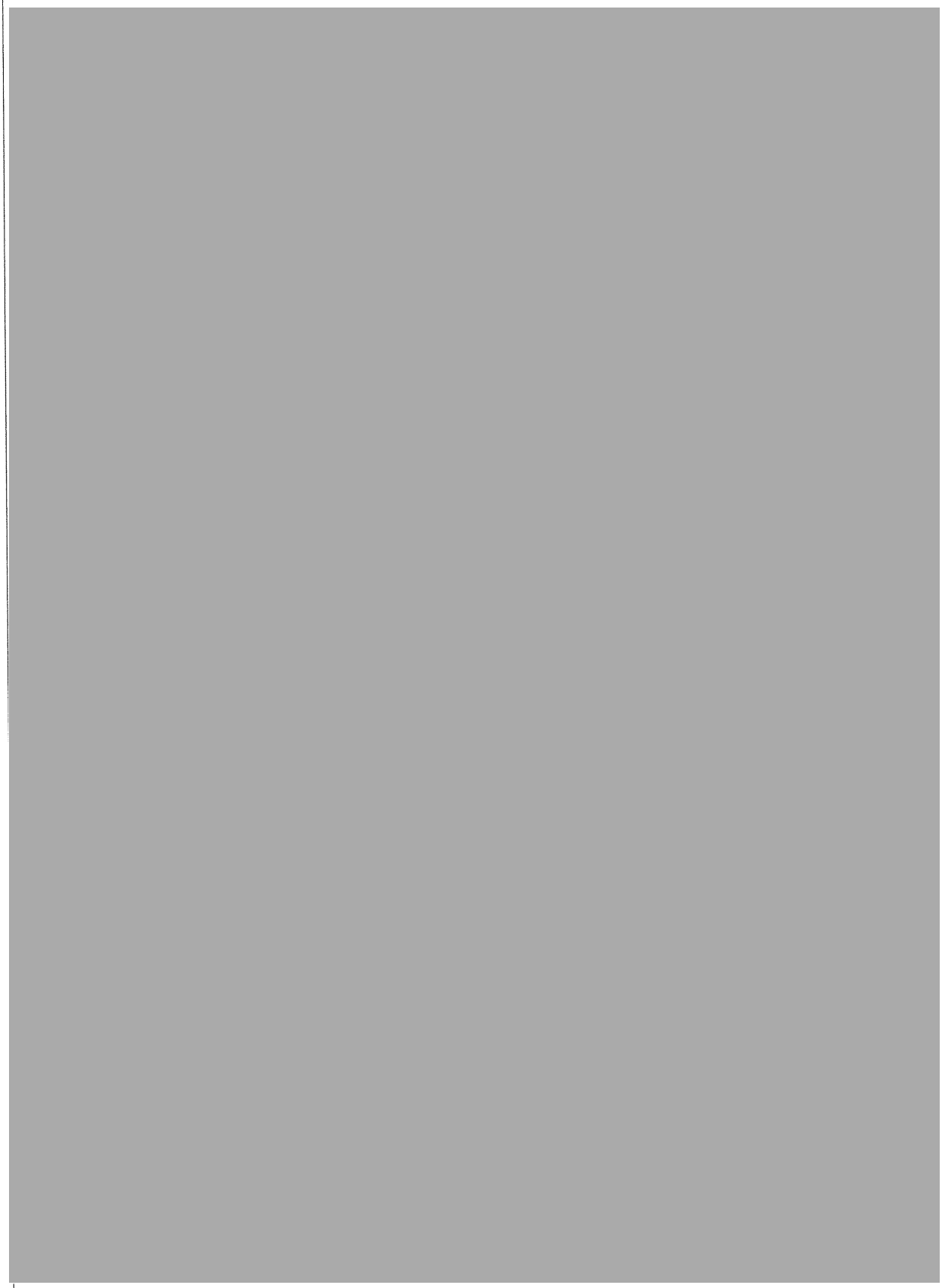


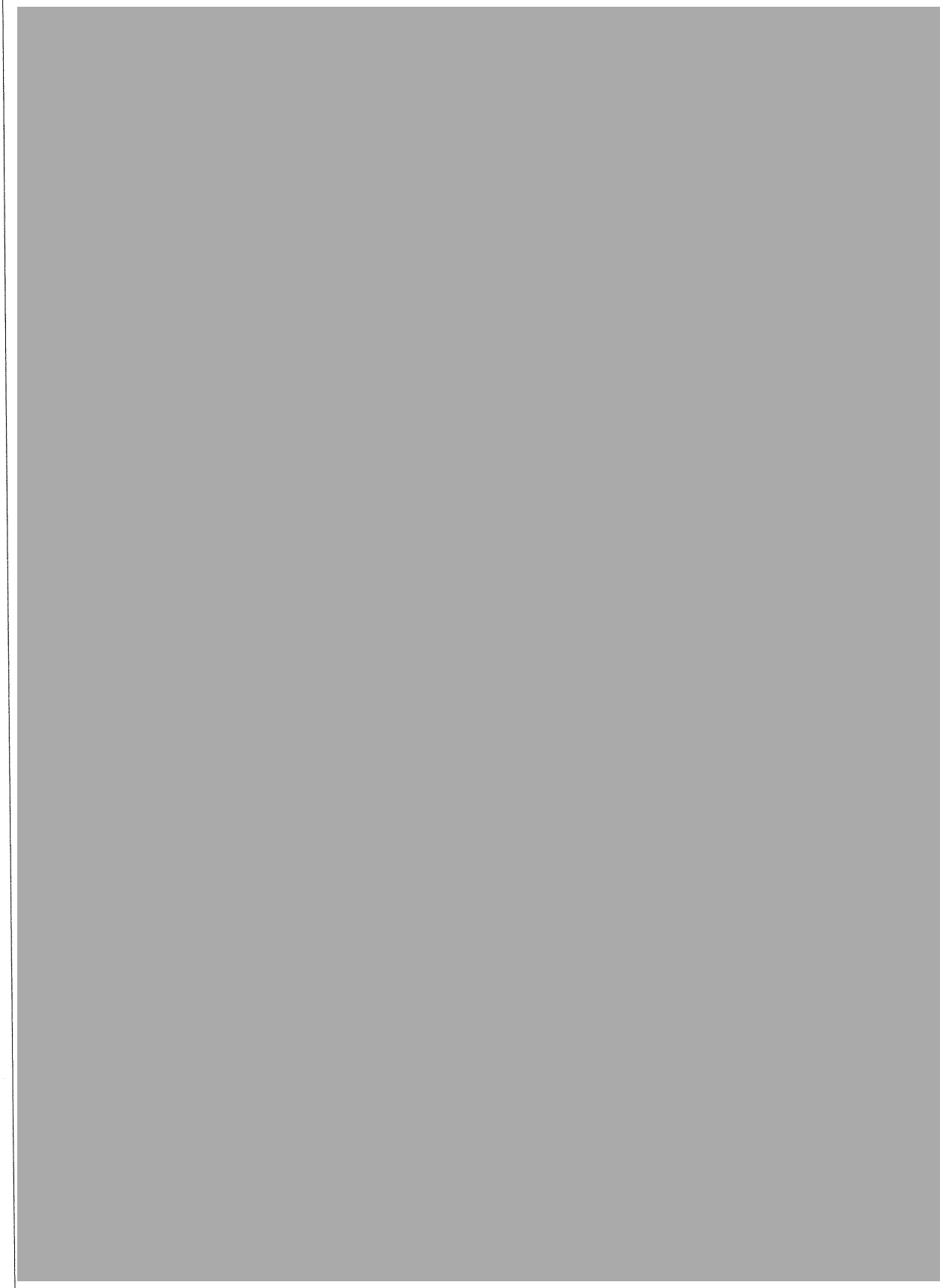


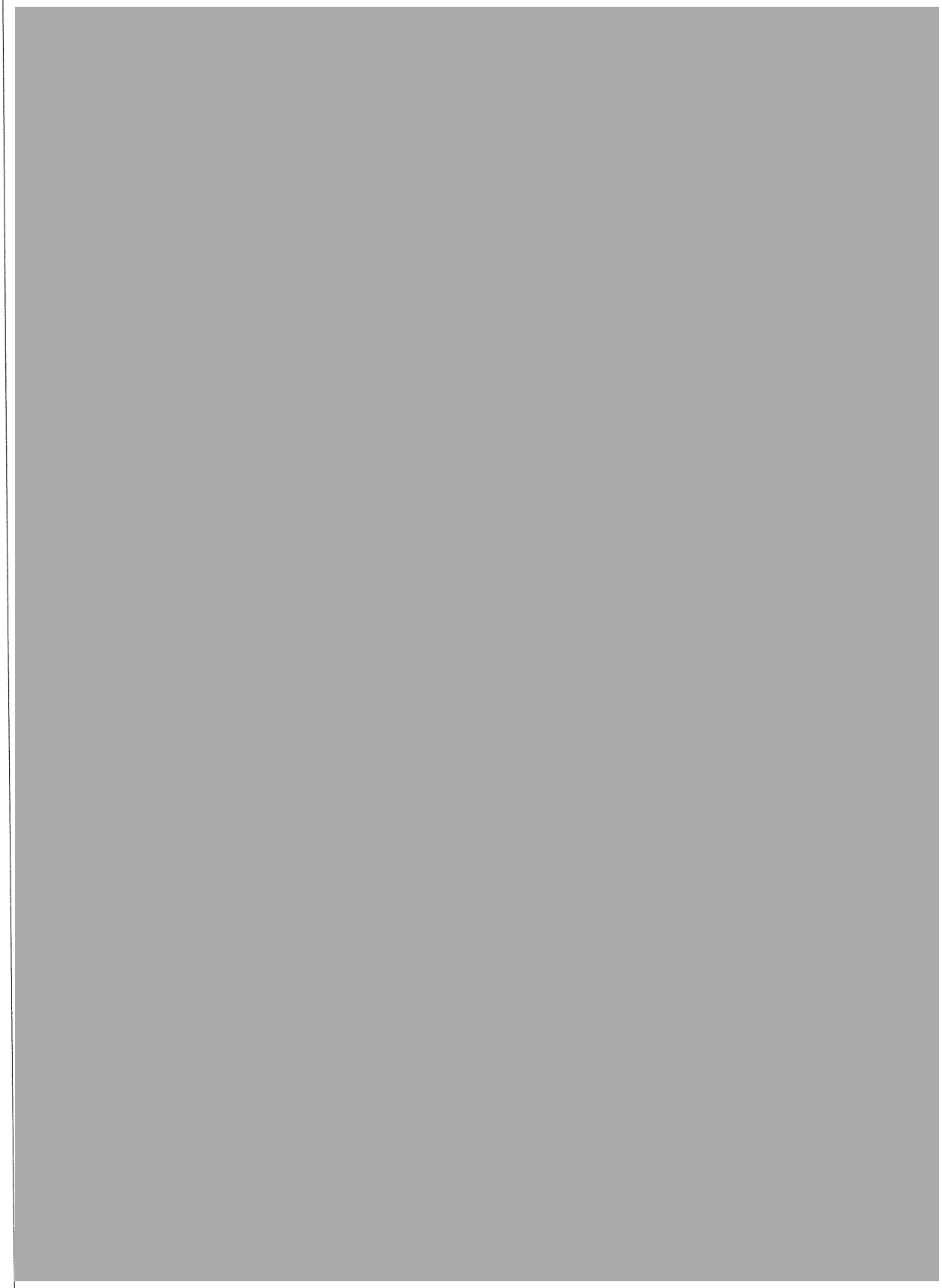


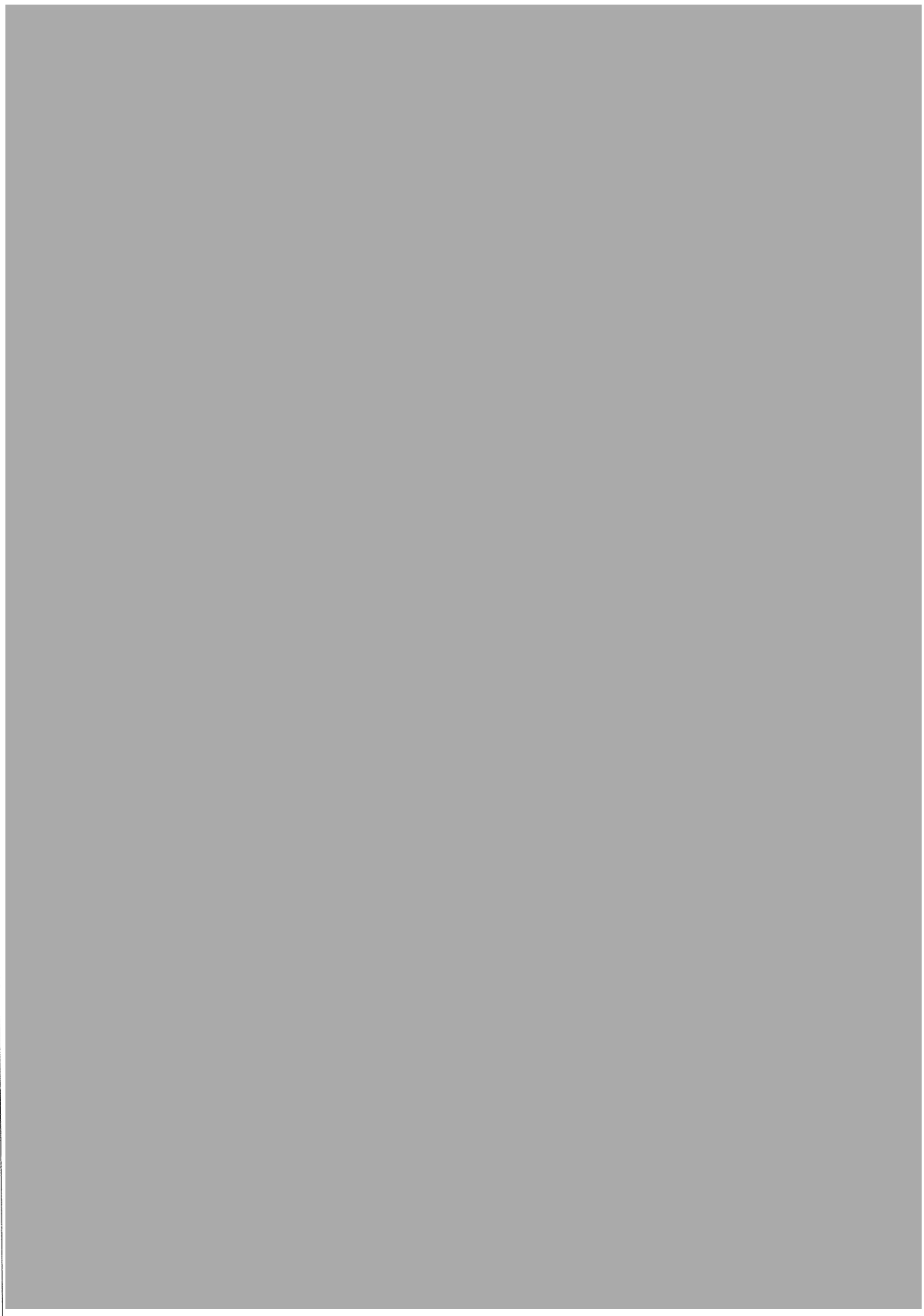


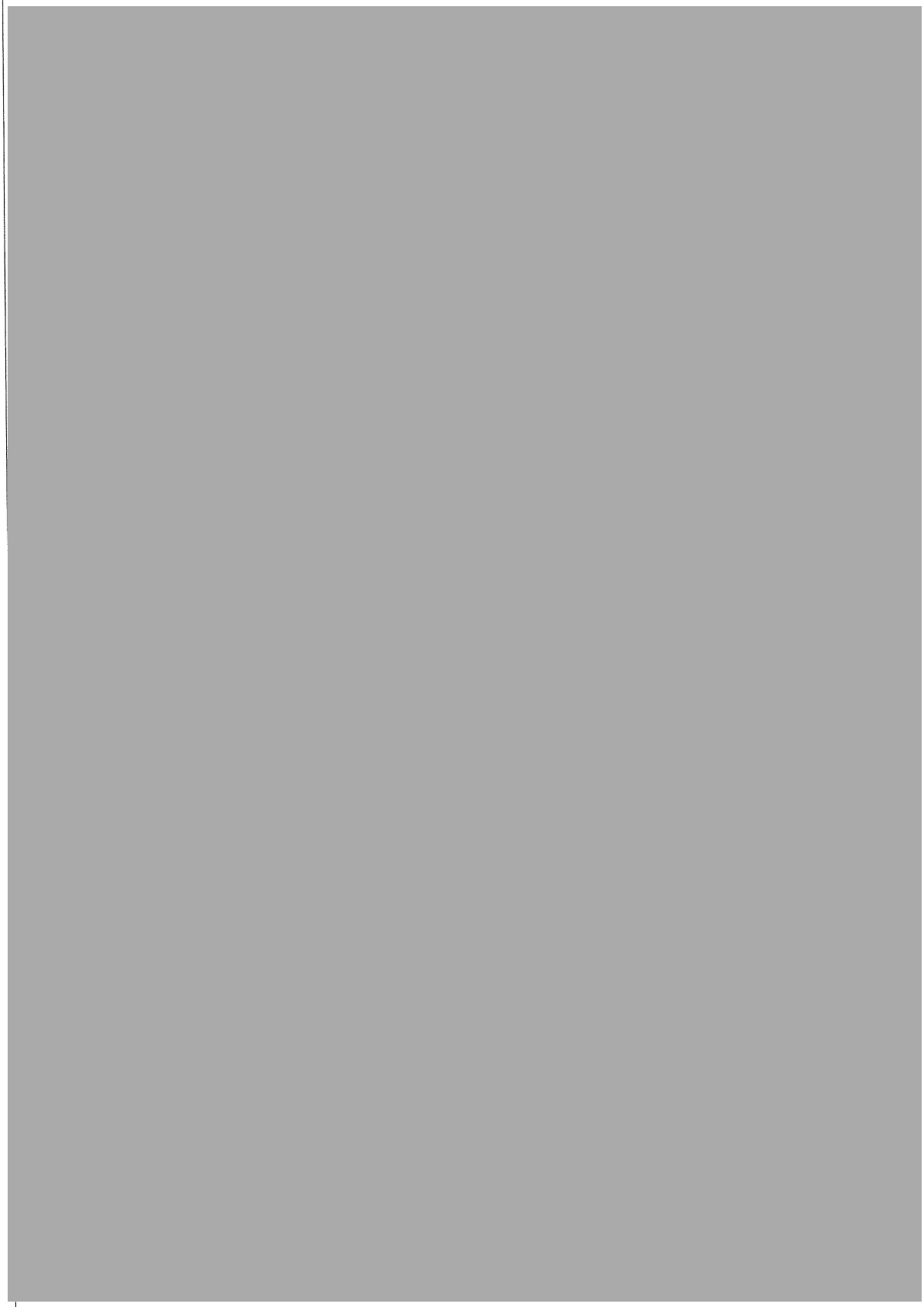












[redacted]

time do you think this trial might take?

MS. JOHNSON: I only anticipate two days, Your Honor.

THE COURT: Okay.

MR. ORIFICI: Did you say two days, Sandi?

MS. JOHNSON: Yes.

MR. ORIFICI: Yeah, I would agree with that.

THE COURT: All right. Well, if that's the case, then let's find some time. How does July 28th look? Is that too fast?

MR. ORIFICI: Yeah, that's way too fast. I really do have a bad calendar.

THE COURT: All right. How does -

MS. JOHNSON: Your Honor, I think we could go probably into September.

THE COURT: September? Okay.

MR. ORIFICI: September, you said?

MS. JOHNSON: Yes, September.

THE COURT: How does September 8th through the 10th look?

MR. ORIFICI: I've got a conflict on the 8th.

THE COURT: How about if we start on the 9th and go

through the 11th?

MR. ORIFICI: I think on the 9th I'm okay, Your Honor.

THE COURT: Ms. Johnson, how about you?

MS. JOHNSON: Is it possible to go into next week?

THE COURT: Let me look. We're doing the every other so we have to bounce it over one week. But I've got--

MS. JOHNSON: Or the week of the 22nd. I just--I have a conflict on the 9th. If necessary, I could move it.

THE COURT: Did you say two days on the trial?

MS. JOHNSON: Yes, Your Honor.

THE COURT: We could do it the 10th and 11th if you think we could polish off in that. Would that work?

MS. JOHNSON: That would work for the State.

THE COURT: Is that okay with you?

MR. ORIFICI: Yes, Your Honor.

THE COURT: All right. So, let's set it then for State v. Nunez, put that down as a jury trial. Let's plan to start that - we'll plan to start that at 8:30 that morning on the 7th - oh, it looks like that's Labor Day, isn't it? So we'll have to have the pretrial conference two weeks before that, which will be on the 24th of August at 8:30 in the morning. And at that time I would ask for all proposed jury instructions, voir dire, and any motions in limine as well to be filed at that time. And then we will plan to begin

promptly and take care of this case on the 10th and the 11th of September. Is that okay?

MS. JOHNSON: Yes, Your Honor.

THE COURT: All right. Very good.

Mr. Orifici?

MR. ORIFICI: The only thing on the 24th date, Your Honor.

THE COURT: Yeah?

MR. ORIFICI: You're setting it at 8:30.

THE COURT: Yes.

MR. ORIFICI: But I've got a hearing in front of Judge McKelvie at 11:00. So, would it be okay if I came at like 10:00?

THE COURT: Of course.

MR. ORIFICI: Okay.

THE COURT: That would be fine.

MR. ORIFICI: I just wanted to give you a heads up.

THE COURT: Okay. Yeah, that works fine. All right. Anything else?

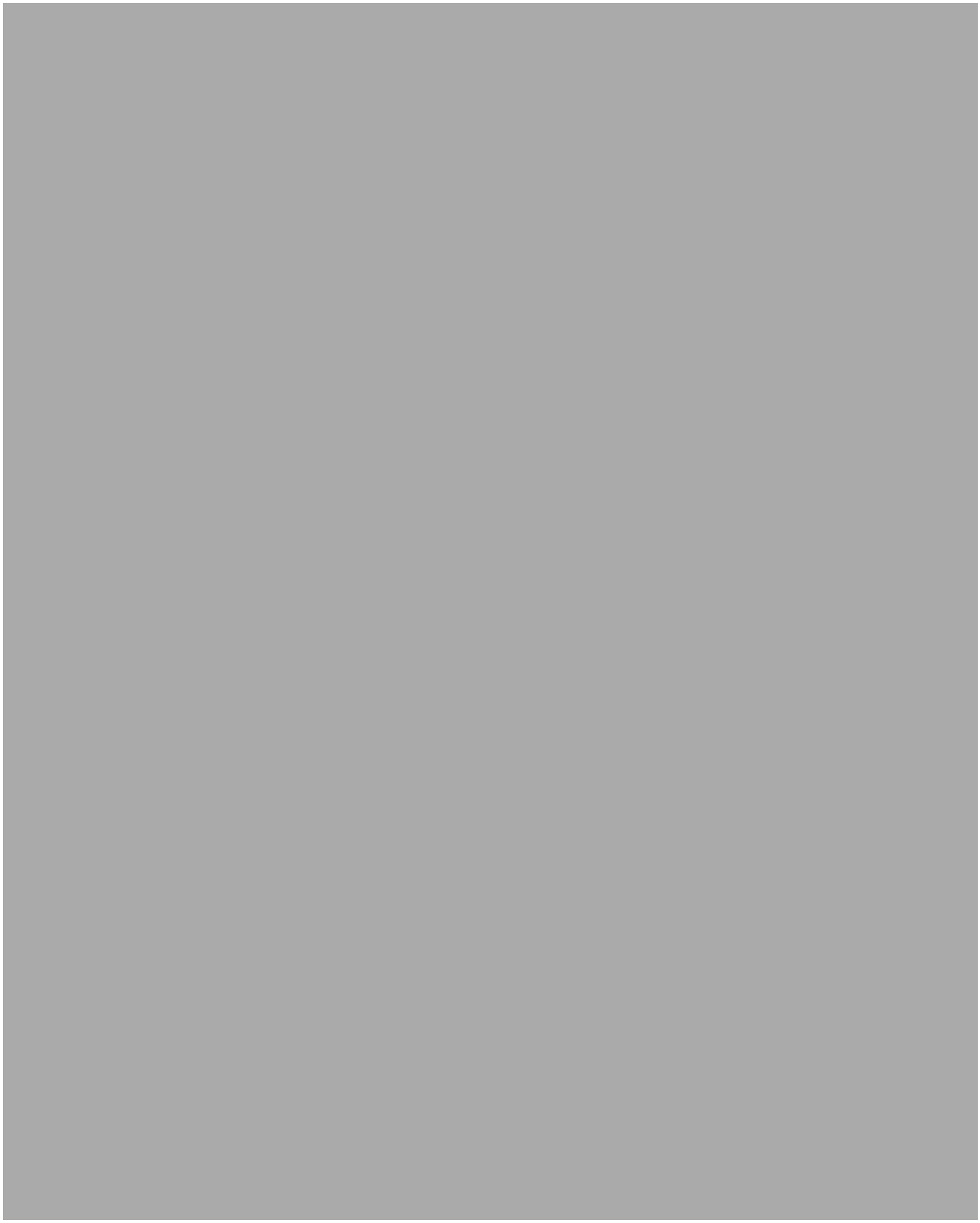
MR. ORIFICI: No, Your Honor.

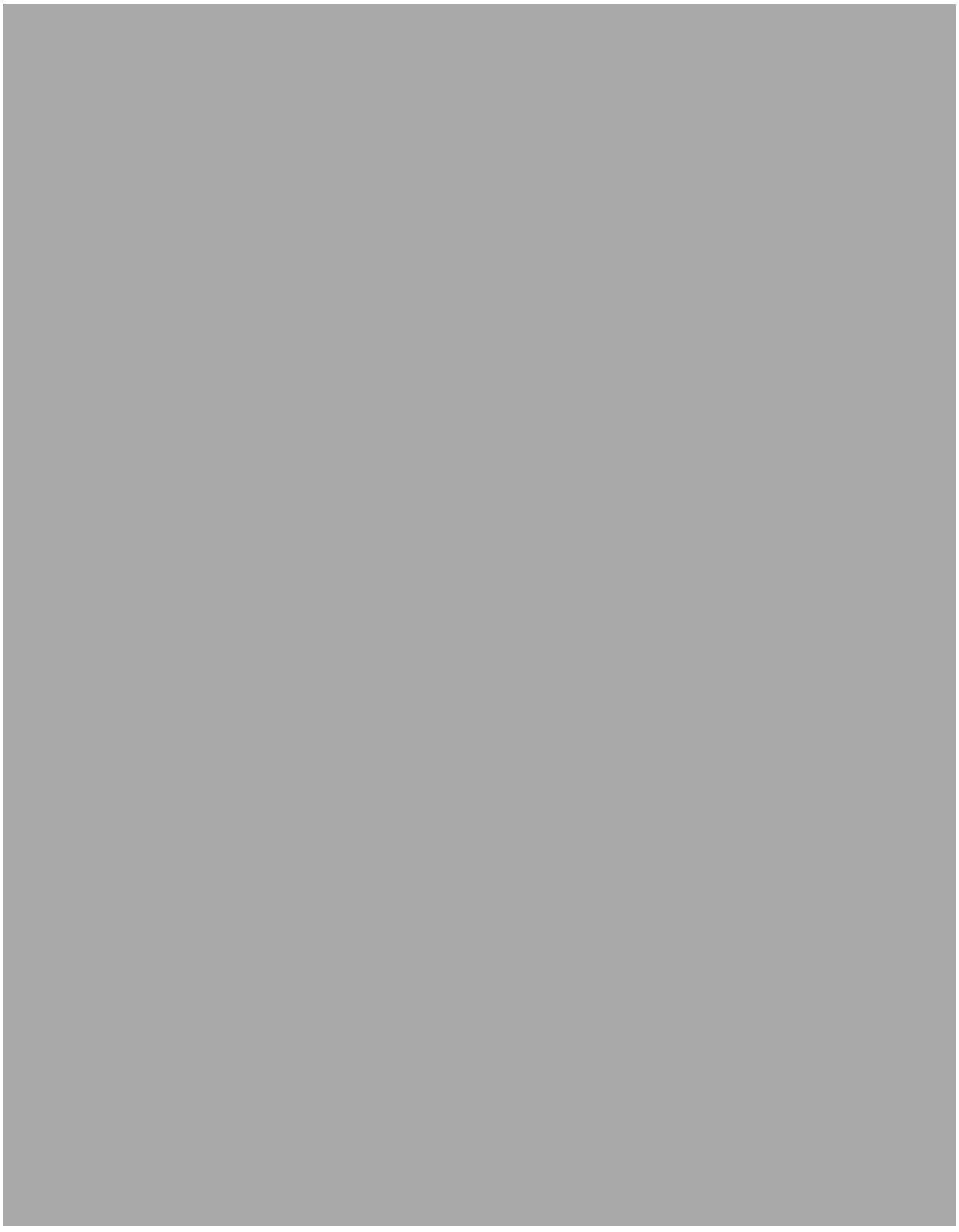
MS. JOHNSON: No, Your Honor.

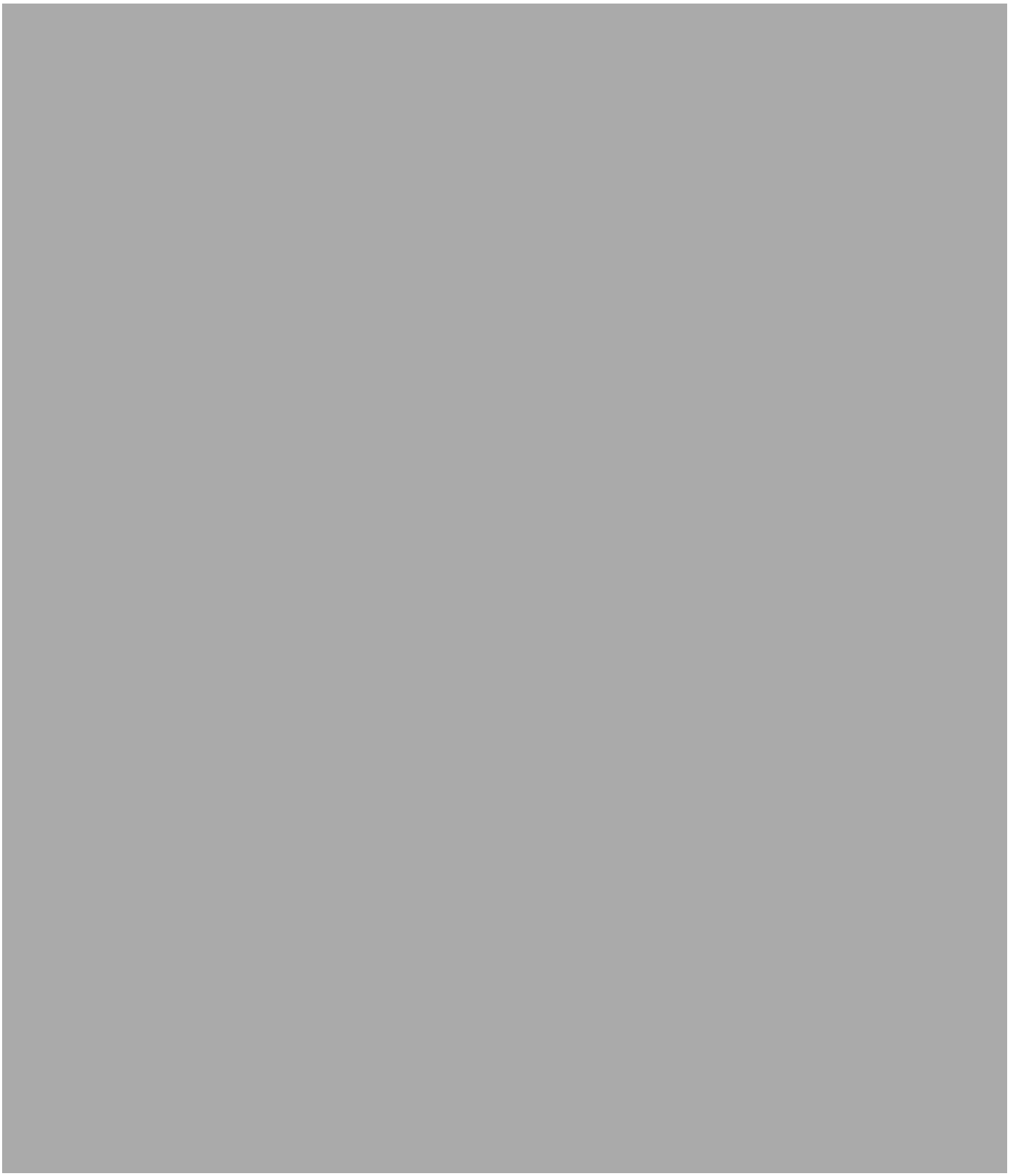
THE COURT: Thank you all.

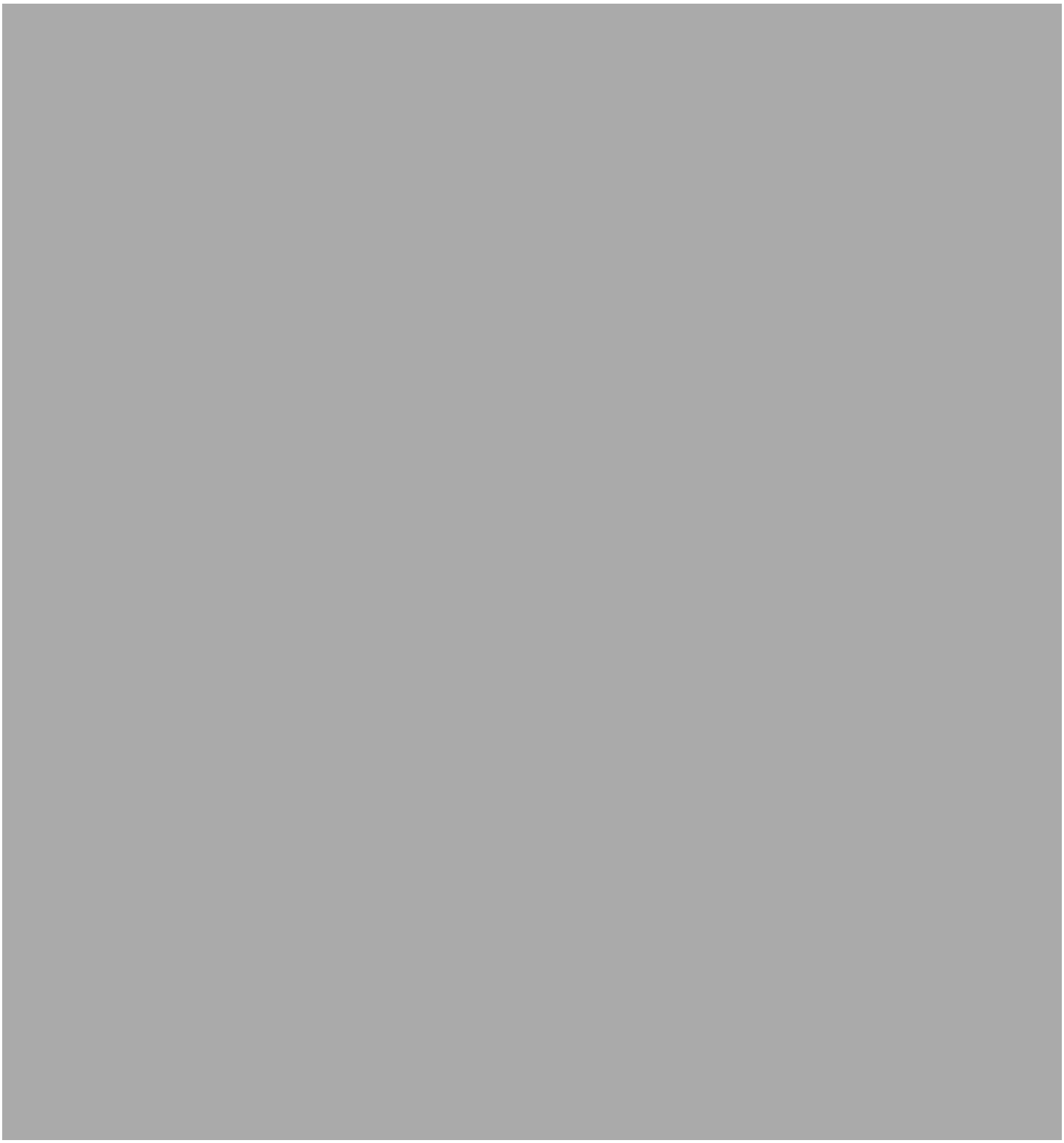
(Whereupon the hearing was concluded)

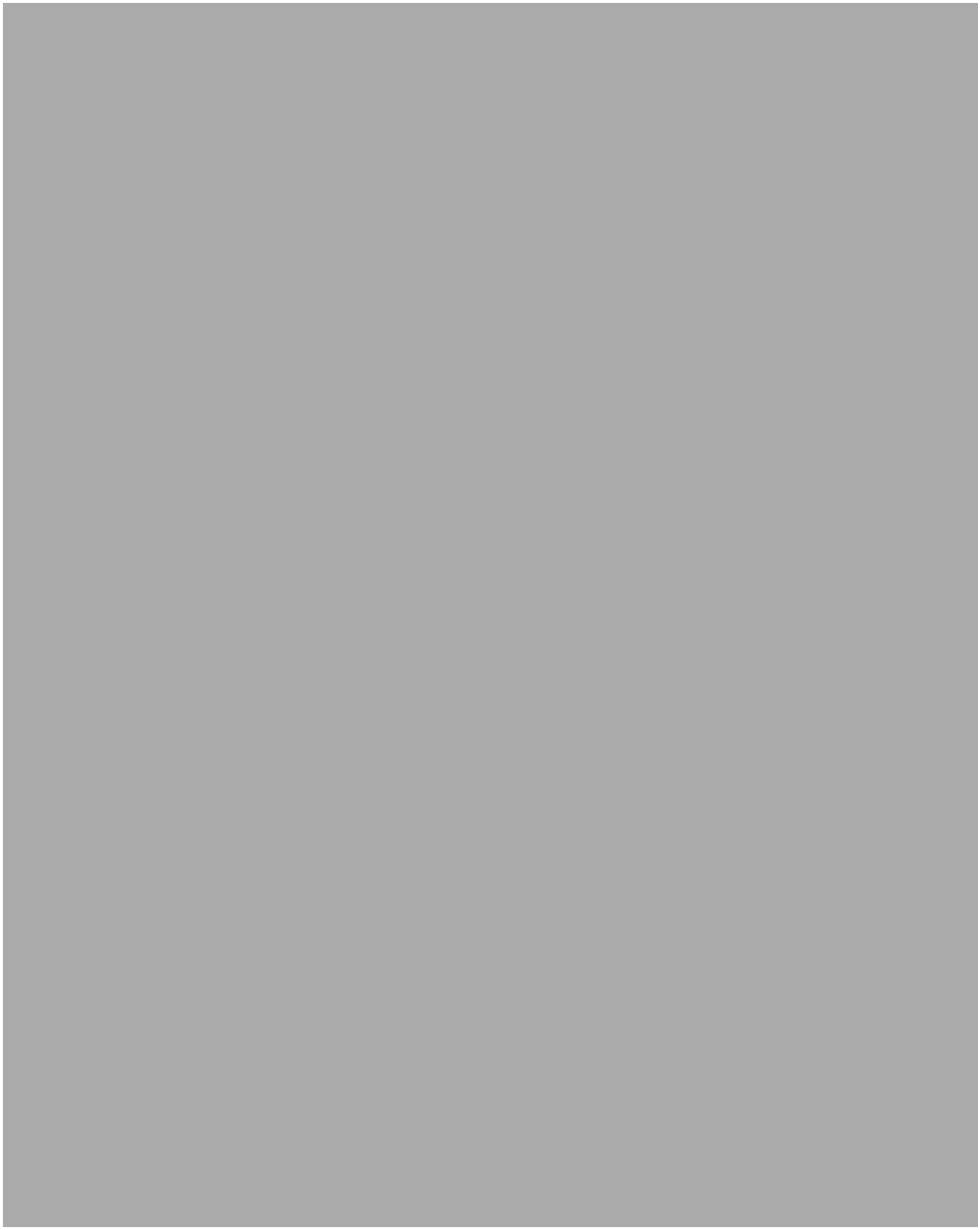
(Transcript completed on January 1, 2017)











Addendum C

INSTRUCTION NO. _____

(Mistake of Fact Affirmative Defense)

Under Utah law, ignorance or mistake of fact which disproves the culpable mental state is an affirmative defense to any prosecution for that crime. Said differently, a defendant may not be found guilty of a crime if there would be no crime if the facts were as he believed.

Utah Code Ann. § 76-2-304; §76-2-308

INSTRUCTION NO. ____

Mistake of Fact As to Consent)

You have been instructed previously that for any crime, the required criminal intent must exist at the time of the commission of the act. You have also been instructed that under Utah Law, it is an affirmative defense to a crime when a person acts under ignorance or a mistake of fact-here, a mistake of fact as to the existence of consent.

Evidence has been presented that Mr. Jaime Nuñez-Vazquez believed [redacted] consented to the sexual activity for which he is charged with a crime. Therefore, if you ultimately find that [redacted] did not actually consent, in order to convict Jaime Nuñez-Vazquez of this crime, you must also find beyond a reasonable doubt that Jaime Nuñez-Vazquez did not hold a "mistake of fact" as to consent-here, a reasonable belief that consent existed.

A mistake of fact defense as to a person's lack of consent to the sexual activity charged has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the other person consented to the sexual intercourse or activity. The objective component asks whether the defendant's mistake regarding consent was reasonable under the circumstances.

Here, evidence has been presented that Jaime Nuñez-Vazquez believed [redacted] consented to the sexual activity for which he is charged. Accordingly, the State has the burden to prove beyond a reasonable doubt, that the defendant did not hold a reasonable and good faith belief that [redacted] consented to the sexual activity. If the State has not met its burden of proof, you must find Jaime Nuñez-Vazquez not guilty.

State v. Low, 2008 UT 58, 192 P.3d 867, 876 (When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented---either by the prosecution or by the defendant—that provides any reasonable basis upon which a jury could concluded that the affirmative defense applies to the defendant); *State v. Sellers*, 2011 UT App 38 ¶ 15, 248 P.3d 70, 76 (a defendant is entitled to an affirmative defense instruction so long as there is a reasonable basis in the evidence for such a defense and "[t]rial courts should separately instruct each jury clearly that the State must disprove...[an] affirmative defense [ ] beyond a reasonable doubt"); State b. Burke, 2011 UT App 168 256 P.3d 1102, 1129 (When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented...that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant); *State v. Hall*, 2013, 2013 UT App 4, 294 P. 3d 632, 637 *cert. denied,* 308 P. 3d 536 (Utah 2013) *cert. denied,* 134 S. Ct. 1299, 188 L. Ed. 2d 323 (U.S. 2014) (When a criminal defendant requests a jury instructions regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented...that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies); *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (stating that a defendant is "*entitled to* have the jury instructed on the law applicable to [her] theory of the case if there is *any reasonable basis* in the evidence to justify it" (emphasis added).

Utah Code Ann. § 76-2-304;

Cf. *State v. Dalton*, 2014 UT App 68, ¶ 39, 331 P.3d 1110, 1122 ("if the jury was convinced that Defendant honestly believed that Victim purported to consent to sex with Harman, the jury could find that the State did not meet its burden..."); *State v. Marchet*, 2012 UT App 197, n.6., 284 P.3d 668, 674, cert. denied (Oct. 23, 2012), cert. denied, 288 P.3d 1045 (Utah 2012 (citing People v. Williams, 841 P.2d 961, 965 (1992) for jury instruction as to mistake of fact as to consent); State v. Houston, 2000 UT App 242, ¶ 6,9 P.3d 188 (nothing that defendant was acquitted of rape (and other charges) and his primary defense at trial was that "he had a reasonable and good faith belief that [the complainant] voluntarily consented to engage in sexual intercourse," but not analyzing issue);

INSTRUCTION NO. ____

(Disprove Affirmative Defense Beyond Reasonable Doubt)

As a general rule, if some evidence has been presented by either the defense or the prosecution that supports an "affirmative defense," then the State has the burden to prove beyond a reasonable doubt that the defense does not apply.

In this trial, some evidence has been presented to you regarding the affirmative defense of "Mistake of Fact." Under Utah law, it is an affirmative defense to a crime that a person acts under ignorance or mistake of fact-here, a mistake of fact as to consent.

Accordingly, you are instructed that it is the State's burden to disprove, beyond a reasonable doubt, the defense raised by Jaime Nuñez-Vazquez that he held a reasonable and good faith belief that [redacted] consented to the sexual activity. If the State fails to disprove this defense beyond a reasonable doubt, then Jaime Nuñez-Vazquez is entitled to an acquittal.

Utah MUJI CR501 Preamble to the Affirmative Defense Instruction;

Utah Code § 76-2-308; Utah Code 76-2-304;

State v. Martinez, 200 UT App 320, 14 P.3d 114, 117 aff'd, 2002 UT 80, 52 P.3d 1276 ("[i]I is fundamental that the State carries the burden of proving beyond a reasonable doubt each element of an offense, including the absence of an affirmative defense once the defense is put into issue.); *State v. Campos*, 2013 UT App 213, ¶¶ 38-43, 309 P.3d 1160, 1172 *cert. denied*, 320 P.3d 676 (Utah 2014) *and cert. denied*, 320 P.3d 676 (Utah 2014) ("once a defendant—or even prosecution for that matter—has produced enough evidence to warrant the giving of an instruction of *disproving* the defense beyond a reasonable doubt"); *State v. Knoll*, 712 P.2d 211, 214015 (Utah 1985); *State v. Low*, 2008 UT 58, ¶45, 192 P.3d 867 (murder instruction in error "because it lacked the necessary element that the State show the absence of the affirmative defense[]."); *State v. Swenson*, 838 P.2d 1136, 1138 (Utah 1992) (stating that "a long line of Utah cases imposes on the prosecution the burden to disprove the existence of affirmative defenses beyond a reasonable doubt.").

INSTRUCTION NO. ____

(Elements With Affirmative Defense)

Jaime Nuñez-Vazquez is charged in Count 1 with committing Forcible Sodomy against [redacted] on or about October 19, 2013 in Salt Lake County, State of Utah. You cannot convict Jaime Nuñez-Vazquez of this offense unless and until, based upon the evidence, you find each of the following elements beyond a reasonable doubt:

1. That on or about October 19, 2013;

2. Jaime Nuñez-Vazquez;

3. Engaged in a sexual act with [redacted] involving the genitals of one person and the mount or anus of another person;

4. Without the consent of [redacted] and that

5. Jaime Nuñez-Vazquez did so intentionally, knowingly or recklessly.

Additionally,

6. In the event that you find [redacted] did not consent, you must additionally find beyond a reasonable doubt that the affirmative defense of "Mistake of Fact" as to consent does not apply.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, and you are also convinced that the affirmative defense has been disproven beyond a reasonable doubt, then you must find the defendant guilty. On the other hand, if you are not convinced that each and every element has been proved beyond a reasonable doubt and/or the State has failed to disprove the affirmative defense beyond a reasonable doubt, then you must find the defendant not guilty.

Utah MUJI CR 301 Elements

Utah Code Ann. §76-2-102 (:[W]hen the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility."). State v. Sellers, 2011 UT App 38 ¶ 15, 248 P.3d 70, 76 ("[t]rial courts should separately instruct each jury clearly that the State must disprove...[an] affirmative defense[ ] beyond a reasonable doubt").

THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	: Case No. 141900845FS
Plaintiff,	: Appellate Court Case No. 20160794
vs.	: VOLUME II OF III
JAMIE ERNESTO NUNEZ-VASQUEZ,	:
Defendant.	: With Keyword Index

JURY TRIAL MAY 10, 11 & 12, 2016

BEFORE

JUDGE MARK KOURIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 East Ellen Way
Sandy, Utah 84092
801-523-1186

MR. ORIFICI: I mean, to me, it's a confusing instruction. But, I mean, you know, the whole trial's confusing.

THE COURT: Fair enough. All right. I'll put this one in right before the consent instruction that I'm going to go change. Anything else before we--before I go get these copied?

MR. ORIFICI: Well, I have two instructions that I wanted submitted and they were part of my objection.

THE COURT: All right. Go ahead.

MR. ORIFICI: Well, part of the object--part of the instructions I submitted initially.

THE COURT: All right.

MR. ORIFICI: The first was a mistake of fact as to consent.

THE COURT: Okay.

MR. ORIFICI: That's supported by case law. There's been evidence that's been presented that would provide a reasonable basis upon which a jury could conclude that the affirmative defense of the mistake of fact as to whether consent was given or not should apply. And consequently, mistake of fact is an affirmative defense to consent, and that should be part of the instructions that the jury receives. That was page 27 and 28 on the instructions I submitted. And then the State has to disprove the

affirmative defense of mistake of fact beyond a reasonable doubt. That again is supported by Utah case law.

THE COURT: Okay. So I'm clear, what you want then is you want to--the instruction that begins "as a general rule, some evidence is an affirmative defense?"

MR. ORIFICI: Right.

THE COURT: But you want to talk about--then you want the definition of mistake of fact, which it says under Utah law, "Ignorance or mistake of fact which disproves the culpable state is an affirmative defense." And then--were there just two or were there three?

MR. ORIFICI: There was just--I think I just submitted two, but I didn't look.

THE COURT: Okay. Give me the sentences that they start with.

MR. ORIFICI: Okay. So I'm starting on mistake of fact as to consent. It should have been in parentheses. You've been instructed previously that for any conduct.

THE COURT: Okay. I've got that. That's the one you want in. Okay. That's page 27 on the bottom, right?

MR. ORIFICI: Right, 27.

THE COURT: Okay.

MR. ORIFICI: And then it has a general rule, which was page 29.

THE COURT: Gotcha. All right.

MR. ORIFICI: I don't think I submitted any others on--

THE COURT: Mr. Hansen, response to that?

MR. HANSEN: Yes, Your Honor. I do not think those are necessary. And the reason being is, I'm looking at two cases. Your Honor may be familiar with them. And if not, I can certainly provide you a copy. But one is *State v. Marchette* and one is *State v. Barela* which is a 2015 Supreme Court case.

THE COURT: Okay.

MR. HANSEN: But in *Marchette*, just for Your Honor, in this case, it's a rape case. The defendant is trying to-- wants to add a mistake of fact instruction. And the Court of Appeals is dealing with this case. And what their holding really was is that read as a whole, the jury instructions communicate that Jared Marchette was guilty of rape, not simply he knowingly, intentionally or recklessly had sexual intercourse, but if he did so without his consent. And they asked--everything was taken--the jury instructions had to be taken as a whole.

The reason for that being in the footnote six it talks about a mistake of fact instruction is so difficult to develop because, first, you have to have a subjective component that addresses whether in good faith he mistakenly believed the victim consented. And then an objective

component of whether that mistake was reasonable. And they go on to say, it's unclear whether Utah law recognizes a mistake of fact defense in this particular context of this case.

But how it came out in *Barela*, which was--changed the way we do the element instructions now, is in *Barela* there was a mistake of fact instruction. And this Court--that--this case was sent back to be redone. And the reason being is because it did not say that the intentional, knowing and recklessly to the action and also to the consent. And so that's how our instructions are now written in the elements.

And so I think--so I think what's important is that now the claim of rape or forcible sodomy requires proof that not only did the defendant knowingly, intentionally or recklessly had intercourse, but also the *mens rea* goes to the victim's non-consent. So, by taking as whole the elements instruction, if the jury finds that he did not recklessly--they can find he intentionally did it, but recklessly to the consent, then he's still not guilty. But if they found that the *mens rea* was not appropriate for the consent, which is in a sense all he's asking for, then he's found not guilty anyways. So, I just don't think it's necessary and it's confusing.

THE COURT: all right. Mr. Barardi?

MR. ORIFICI: It is--

THE COURT: Good God. I am so--

MR. ORIFICI: I wasn't put on notice of their arguments, nor have I had an opportunity to look at their cases. But, you know, the *State v. Torres*, defendant is entitled to have the jury instruction on the law applicable to his theory of the case if there is any reasonable basis in the evidence to justify it. I think the case law supports this instruction and I think the case law supports the other instruction and I've cited the cases.

THE COURT: Well, let me ask you this, though. It seems affirmative defenses are bringing in a whole different argument. Like, for instance, let's say a shooting case. The idea of self defense is a whole different concept. But in this case, the issue only comes down to consent.

MR. ORIFICI: Uh-huh (affirmative).

THE COURT: So I think the jury is on notice that they either need to find consent or not consent. And if they find consent, then there's not a crime here. If they don't, on the other hand, and the instruction I think says that your client has to reasonably believe that he had consent to continue. And I think the consent instruction specifically talks about that, which I think is everything you're asking for. It's just put, I think, in a little easier way to understand. "In (inaudible) circumstances. You may also able common ordinary meaning and consent to all the facts."

That's not the one I was looking for.

So, in other words, I guess what I'm saying is, it has to be intentionally or knowing without the consent.

MR. HANSEN: Or recklessly.

THE COURT: Or recklessly. I'm sorry. So if in fact your client acted knowing that the alleged victim did not consent, that's the same as the affirmative defense, is it not? And that's precisely what's included in this instruction.

MR. ORIFICI: Well, I don't agree with your analysis, Your Honor. But I understand that you're the judge. And I've made my argument so that way I've preserved the appeal.

THE COURT: All right.

MR. ORIFICI: But I believe that he's entitled to a separate instruction on each of those issues.

THE COURT: Okay. And I believe that that's included in the instruction. So, let me go make these changes, make the copies, and then we'll meet back here at about five to 2:00 and get started. Okay?

MR. ORIFICI: Okay. Thank you. You told the jury to come back at 2:00?

THE COURT: Yes.

MR. ORIFICI: Okay. I forgot.

(Whereupon a recess was taken)

Addendum D

THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	: Case No. 141900845FS
Plaintiff,	: Appellate Court Case No. 20160794
vs.	: VOLUME II OF III
JAMIE ERNESTO NUNEZ-VASQUEZ,	:
Defendant.	: With Keyword Index

JURY TRIAL MAY 10, 11 & 12, 2016

BEFORE

JUDGE MARK KOURIS

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801-523-1186

you that either?

A. Did Ms. Johnson?

Q. Yes, Ms. Johnson, the nurse, who he claimed--we heard her testify yesterday.

A. I can't remember.

Q. Okay. You can't--

A. I recall--like I was saying before, I think I recall that Tiffany Kelson contacted the state crime lab and asked them if they do tests on urine and they said that they do not, so....

Q. I don't believe that when we heard that--when we watched that video and the transcript, there was any reference by Mr. Nunez to the whole group going to Triangles. Did Mr. Nunez talk to you about that after the interview, if you recall?

A. I don't recall that.

Q. Okay. And you never heard the Miranda warning that was given to Mr. Nunez by Officer Fisher, correct?

A. No, I wasn't there when that was given.

Q. And you don't know if that was a complete Miranda warning?

MR. HANSEN: Objection, Your Honor.

THE COURT: Sustained.

Q. (By Mr. Orifici) Nonetheless, you did not read mister--

MR. HANSEN: Objection.

THE COURT: Sustained. Do you want to approach?

MR. ORIFICI: Yeah, I'll approach, sure.

(Whereupon a sidebar was held as follows:

THE COURT: Why are you asking him (inaudible)?

MR. ORIFICI: Because the videotape says that--the videotape we just watched said Mr. Fisher, Officer Fisher, read you those Miranda rights.

THE COURT: But Miranda's not an issue for the jury. That's a legal issue. That's not a jury issue.

MR. ORIFICI: Okay.

THE COURT: Okay?

MR. ORIFICI: All right.

(End of sidebar)

Q. (By Mr. Orifici) And you smelled alcohol on my client when you were interviewing him?

A. Yes.

Q. Did you smell alcohol on [redacted] when you transported him and interviewed him?

A. I can't recall. I didn't indicate that in my report.

Q. Okay. What did Mr. Anderson--I mean, excuse me, Mr. Robinson, the owner of the apartment, or resident of the apartment, tell you about what he observed prior to and after going to bed between [redacted] and Mr. Nunez?

Q. Okay. And did you have any other discussions with him prior to the police arriving?

A. I just started walking away from him because I got scared of him.

Q. Okay. The police come?

A. Uh-huh (affirmative).

Q. How long after you had this discussion, do you recall?

A. They were--they were right there.

Q. Okay. And who--was a male or female officer the first person to talk to you?

A. I remember it being a female.

Q. Okay. Do you remember what transpired when the female officer arrived, as far as you talking to her?

A. No.

Q. Do you remember anything that happened with her prior to being placed--were you placed into handcuffs?

A. She did put me in handcuffs.

Q. Okay. Did you know why you were being put into handcuffs?

A. No, I did not.

Q. Did you know why the police were there when they first came?

A. It was pretty obvious that [redacted] had called them.

Q. Okay. And how long were you in handcuffs for?

A. They never took me out of handcuffs.

Q. Okay. And then Officer Fisher arrives?

A. Yes.

Q. How--do you recall any conversation that you had with the female officer, Officer Winters?

A. I don't.

Q. Who transported you to the--was it the office or the South Salt Lake PD?

A. It was the office.

Q. Okay.

A. They kept calling it the office.

Q. Was it a police station?

A. It was like a garage with some cells in it.

Q. Okay. So let's go backwards a little bit. Who--and was it the female officer that took you there?

A. No, it was Officer Ware.

Q. Officer Ware took you to the holding cell?

A. Yes.

Q. Okay. And then Officer Fisher arrives?

A. No.

Q. I'm going backwards now. Sorry.

A. Okay.

Q. I'm throwing you off your own time line. I know that. I apologize. You get done with Officer Winters. She's got you in handcuffs. And the next officer on the

scene is Officer Fisher who testified yesterday. Is that your recollection?

A. Correct.

Q. And what, if any, interaction did you have with Officer Fisher?

A. He started asking me questions.

Q. Okay. Did he read your rights to you first?

MR. HANSEN: Objection.

THE COURT: Mr. Orifici?

MR. ORIFICI: Well, I mean, I want him to say that he read his rights and he waived them. He spoke--I can ask the question a different way.

THE COURT: Go ahead.

Q. (By Mr. Orifici) Did you speak with him voluntarily?

A. I think I was a little bit confused.

MR. HANSEN: Objection.

THE COURT: The answer's stricken. Go on to your next question.

MR. ORIFICI: Okay.

Q. (By Mr. Orifici) What did you and Officer Fisher talk about?

A. He was asking me about what happened.

Q. Uh-huh (affirmative). And he testified that you said 'I don't know'.

A. Right.

Q. Twice?

A. Right.

Q. And then he asked you if you had sex with [redacted] and you said 'I don't know'.

A. Correct.

Q. Why did you say those things?

A. I didn't want to talk to him.

Q. Why not?

A. I didn't know what was going on.

Q. Was he in uniform?

A. He was in uniform.

Q. And you were in handcuffs?

A. Yes.

Q. Okay. And then you're taken back to the office. And the next time was--did you have interaction with any other police officers prior to Detective Ware arriving at the office, as you called it?

A. I don't believe so.

Q. Okay. Did anybody offer you water or something to eat?

A. Not for a while.

Q. Okay. Was that prior to Detective Ware showing up?

A. Detective Ware was there the whole time. They didn't offer me water until he was about to interview me.

MR. HANSEN: Objection, Your Honor. Can we approach?

THE COURT: Yes.

(Whereupon a sidebar was held as follows:

MR. HANSEN: It seems like every question seems to be going to whether his statement was involuntary or whether he was forced into it (inaudible). That's all been litigated and it's the judgment of this Court, not the jury.

THE COURT: Mr. Orifici?

MR. ORIFICI: He might have a point there.

THE COURT: Okay.

(End of sidebar)

Q. (By Mr. Orifici) And then after you spoke with Detective Ware what--were you booked into jail?

A. After the interview?

Q. Yes.

A. Yeah, then he took me to the jail.

Q. Okay. And how long were you in jail for before you got out?

A. For three days.

MR. ORIFICI: No further questions.

THE COURT: Thank you. Mr. Hansen?

CROSS-EXAMINATION

BY MR. HANSEN:

Q. This event occurred eight days before your

Addendum E

THIRD JUDICIAL DISTRICT COURT, SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	: Case No. 141900845FS
Plaintiff,	: Appellate Court Case No. 20160794
vs.	: VOLUME I OF III
JAMIE ERNESTO NUNEZ-VASQUEZ,	:
Defendant.	: With Keyword Index

JURY TRIAL MAY **10,** 11 & 12, 2016

BEFORE

JUDGE MARK KOURIS

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quotes, "Too fucked up to take the patient home." Suspect called his friends and the patient went with them to an apartment." In quotations, "I was really tired and decided to lay down on the couch. I woke up on the floor with my pants and underwear pulled down. Jamie," which he's referring to the suspect that he mentioned to me, "Jamie had his arm across my chest. I moved his arm, stood up and pulled up my pants and underwear, then went outside. I called the police and he came outside and was asking me if I was okay. I told him to sit the fuck down. And then the police came. At the Manhattan club, Jamie was giving me a lot of drinks in cups. I'm not sure what was in them. I did not see him make them." That's the end of his statement that I wrote down.

Q. Now, did he tell you that he had remembered being sexually assaulted?

A. No.

Q. Did that concern you?

A. No.

Q. Why's that?

A. It's very common that either due to alcohol, drugs or just the traumatic experience, a lot of people will not have any real recollection or they don't know a lot of detail about what happened. It's just part of trauma.

Q. Now, in this case, did he give you any indication

in the history that would explain why he wasn't able to remember?

A. No, just the fact that he said he had several drinks and he wasn't sure what was in them. That can be a red flag for maybe possibly that someone put drugs in his drink, which can happen. So it just kind of went along with what maybe could have happened from his story with drinking.

Q. What about just alcohol?

A. Sure.

Q. Could just alcohol consumption?

A. Oh yeah, of course.

Q. At that point are you concerned about possible head injury?

A. Not by that point in the exam because he's giving me a pretty good history and talking to me and - alert and oriented is what we call it when they know where they are, what's happening and the date. And he didn't show any obvious signs of a head injury at that time.

Q. As you go through and you're talking with him, you said before that you get the history so as they get undressed that you know what clothing to collect?

A. Yes.

Q. In this case, did you collect clothing from [redacted]

A. I believe that I just collected -