Case No. 20180487-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ROBERT ALONZO PERAZA,
Defendant/Respondent.

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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STATE OF UTAH,
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Reply Brief of Petitioner

This Court granted review on two questions: whether the Court of Appeals erroneously reversed based on its construction and application of rule 702, Utah Rules of Evidence, and section 77-17-13 of the Utah Code; and whether the Court of Appeals erroneously placed the burden on the State to disprove prejudice from the denial of a continuance.

Peraza urges the Court not to address those issues. He does not contest much of what the State argues. Instead, he asks the Court to affirm on alternate grounds, even presenting two additional questions for review wholly unrelated to the questions this Court agreed to review.

This Court should deny Peraza's invitation and resolve the case based on the questions presented for review. The Court should reverse the Court of

Appeals because it improperly wrote notice requirements into rule 702, and because it improperly placed the burden on the State to disprove prejudice from the denial of a continuance. And the Court should remand to the Court of Appeals to address the remaining issues in the case.

ARGUMENT

I.

The Court of Appeals imported the requirements of the expert-notice statute into rule 702.

The Court of Appeals held that the State failed to comply with the expert-notice statute and, therefore, the testimony of the State's expert (Smith) was inadmissible under rule 702. *State v. Peraza*, 2018 UT App 68, ¶¶2, 37, 49, 427 P.3d 276. The State argued in its opening brief before this Court that the Court of Appeals improperly imported the requirements of the expert-notice statute into rule 702, and that doing so was inconsistent with the distinct purposes, timing requirements, and remedies available under each rule.

Peraza does not contest the State's interpretation of rule 702 and the expert-notice statute. Br.Resp.26. He essentially concedes that it would have been error for the Court of Appeals to conflate rule 702 and the expert-notice statute as the State argues it did. Br.Resp.26. But he argues that the Court of Appeals did not conflate the two. Br.Resp.26–30. He contends that the Court

of Appeals' extensive discussion of the expert-notice statute and of the notice that the State provided was merely an attempt to give the State "the benefit of the doubt"—to look for any possible point at which the State could have satisfied its burden under rule 702. Br.Resp.28.

But as shown in the State's opening brief, the plain language of the opinion erroneously conflates rule 702 and the expert-notice statute. The State will not repeat its argument here. But the State addresses two points of the opinion because Peraza suggests that the State has intentionally misrepresented the opinion in an attempt to hide "the story the State does not want this Court to hear." Br.Resp.26–27.

First, the State paraphrased the Court of Appeals by saying that the court ruled that "'the first step' under rule 702 'involves giving notice' under the statute." Br.Pet.27. The full quotation that the State paraphrased is as follows:

> A party that intends to call an expert to testify at trial must demonstrate that the expert meets the requirements of rule 702. Utah Code Ann. § 77-17-13(1)(a) (LexisNexis 2017); *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). In criminal cases, the first step involves giving notice to the opposing party "not less than 30 days before trial or 10 days before the hearing." Utah Code Ann. § 77-17-13(1)(a).

Peraza, 2018 UT App 68, ¶28 (footnote omitted). Peraza claims that the court was just describing the general process for presenting expert testimony and "is not referring to 702 admissibility." Br.Resp.27.

But that plainly is not what the Court of Appeals did. Rather, the quoted language explicitly ties "the first step"—"giving notice"—to "meet[ing] the requirements of rule 702." *Peraza*, 2018 UT App 68, ¶28. And while a single reference linking rule 702 to the expert-notice statute could possibly be written off as mere imprecision, the broader context of the Court of Appeals' opinion forecloses that possibility, as it repeatedly links the State's supposed noncompliance with the expert-notice statute to a failure to satisfy rule 702. *Id.* ¶¶2, 28, 37, 49.

Second, the State omitted a phrase from a lengthy quotation and indicated the omission with an ellipsis. Br.Pet.27. Peraza argues that the omitted language is "telling," apparently because it illuminates the link between the expert-notice statute and rule 702. Br.Resp.27–28.

But that is exactly the point. The Court of Appeals ruled that Smith's testimony was inadmissible under rule 702 because the State did not satisfy the requirements of the expert-notice statute. The full quotation is just as clear on this point as the portion quoted by the State (indicated by the added emphases):

> We conclude *the State failed to satisfy the notice requirements under Utah Code section 77-17-13* when it failed to provide an expert report or other written explanation articulating the scope of Expert's testimony *and therefore the district court exceeded its discretion when it admitted Expert's testimony at trial without sufficient information to satisfy rule 702* of the Utah Rules of Evidence.

Peraza, 2018 UT App 68, ¶49; *see also* Br.Pet.27.

Furthermore, if, as Peraza argues, the Court of Appeals were simply scouring the record for any possible indication that the State satisfied its burden under rule 702, the court would have looked to the evidentiary foundation laid at trial—as the State asked the Court of Appeals to do. The State argued that it laid adequate foundation during trial to satisfy rule 702. *See* Br.Aple.33–36.[1] Yet the Court of Appeals never addressed that argument. Instead, it reversed based on an argument that Peraza waived—the adequacy of notice under the expert-notice statute. *See* Br.Resp.47 (acknowledging that Peraza did not ask Court of Appeals to address expert-notice statute on appeal). And doing so without the benefit of briefing from either party led to the court mistakenly importing the requirements of the expert-notice statute into rule 702.

[1] The State's Brief of Appellee, filed in the Court of Appeals, is reproduced in Addendum F of the electronic copy of Peraza's Brief of Respondent.

II.

The alternate basis Peraza raises for his rule 702 argument is not apparent on the record.

Peraza argues that this Court should affirm on the alternate ground that the district court "abused its discretion in allowing Smith to testify because the State utterly failed to meet the requirements under Rule 702." Br.Resp.30. Peraza concedes that the district court was not required to rule on his motion before trial. Br.Resp.34. But he argues that it did definitively rule—before trial—that Smith would testify, and at that point the State had not met its burden. Br.Resp.30–38.

This issue is not apparent on the record, and this Court should remand for the Court of Appeals to resolve the dispute in the first instance.

The Court has authority to resolve a case on alternate legal grounds not addressed by the Court of Appeals. *State v. Van Huizen*, 2019 UT 1, ¶15 & n.3, 39–40. But at a minimum, the "'legal ground or theory'" must be "'*apparent on the record*.'" *Francis v. Utah Div. of Wildlife Res.*, 2010 UT 62, ¶19, 248 P.3d 44. To be apparent on the record, "'[t]he record must contain sufficient and *uncontroverted* evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.'" *Id.* (emphasis added). And even then, the decision whether to address an alternate basis for affirmance is discretionary. *Id.* ¶¶39–40. For

example, when "the court of appeals is in a better position to address these arguments in the first instance," addressing an alternate ground for affirmance is inappropriate. *Van Huizen*, 2019 UT 1, ¶40.

Affirming on the basis Peraza suggests is inappropriate because his legal theory—that the district court abused its discretion by definitively ruling pre-trial that the State had satisfied rule 702—is not supported by a clear and uncontroverted record. If anything, the record demonstrates that the district court did not definitively rule on Peraza's rule 702 objection pre-trial.

The district court's pre-trial ruling that Smith could testify was expressly tentative. Rule 702 sets forth three basic requirements for expert testimony: qualification, helpfulness, and reliability. Utah R. Evid. 702. The court ruled that Smith was qualified as an expert. R548, 550. But it said it did not have information to decide anything else: "none of us can really tell until we get to the testimony … whether or not she's going to be needed"; "all I can do is look at her criteria, figure out for myself whether or not she's qualified as an expert." R548, 550.

Thus, when the district court ruled pre-trial that it was denying Peraza's motion, that ruling was patently non-final and invited reconsideration: "For purposes of today, … I'm going to deny your motion at

this point in time, but, you know, we'll look at objections, maybe [Smith] doesn't come in." R550. The court acknowledged that the parties would want to know definitively whether Smith would testify. R550. But the court reiterated that all it could do at that point was decide whether Smith was qualified and concluded, "For purposes of today, she meets the criteria. … And it appears to me that she does meet those *qualifications*, so I'll go ahead and deny a motion to exclude this particular witness at this point in time." R550 (emphasis added).

Defense counsel understood what was plain from the court's language: counsel asked for copies of the studies on which Smith would rely, "[i]n light of the reservation—reserving the expert testifying or not." R570. The court directed the State to narrow the studies down to a "reasonable amount" and provide them to Peraza. R570–72. The court cautioned the State that if Smith testified about something not covered by the studies given to Peraza and Peraza objected, "it may not come in." R572.[2]

In short, the court's ruling was tentative. The court decided only that Smith was qualified, and it reserved the questions of whether her testimony

[2] Peraza is correct that the number of studies originally listed was 99, not, as the State mistakenly stated, over 130. R293–301. The State provided a smaller, reasonable number of actual studies to Peraza before trial, but the exact number of studies provided is not in the record. R746.

would be helpful and reliable until trial. And again, Peraza concedes that the court had discretion to do that. Br.Resp.34–35.

Because the ruling was tentative, Peraza had an obligation to object at trial if he thought there were grounds to do so. *See* Utah R. Evid. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). But after reviewing the studies that the State provided, after hearing the testimony at trial, and after hearing Smith's foundational testimony that the studies on which she relied were "generally accepted" within the field "as being sources that were reliable," Peraza chose not to object to the reliability or helpfulness of Smith's testimony. R1140. Because he did not obtain a definitive ruling before trial, his failure to object at trial required Peraza to show that the district court plainly erred in admitting Smith's testimony in the face of that foundation. *See* Utah R. Evid. 103(b); *State v. Johnson*, 2017 UT 76, ¶¶18–19, 416 P.3d 443. He has not done so. In fact, at no point during Peraza's appeal or this proceeding has Peraza addressed the foundation the State laid at trial, let alone attempted to establish plain error.

"[I]t falls to the party seeking the benefit of the rule to explain why it is eligible to have the alternative arguments considered." *Francis*, 2010 UT 62, ¶21. Because Peraza has not shown that his legal theory is apparent on the

record, this Court should remand for the Court of Appeals to resolve Peraza's rule 702 claim. *See Van Huizen*, 2019 UT 1, ¶40. But if the Court does address it in the first instance, the Court should reject the claim.[3]

[3] Peraza also argues that the State presents a new argument when it says the district court was not required to rule on a 702 objection before trial. Br.Resp.34,37–38. It is unclear why Peraza objects to the State's argument because he concedes that the district court was not required to rule before trial. Br.Resp.34–35. He argues only that the district court definitively ruled before trial that the State satisfied rule 702, and that it abused its discretion in so ruling. Br.Resp.34–35. Regardless, the State made this argument to the Court of Appeals. The State argued in its brief to that court that the district court did not definitively rule that the State satisfied rule 702, and that Peraza was thus obligated to object at trial or establish plain error in admitting Smith's testimony at trial. Br.Aple.32–33. And what was implicit in the State's briefing the State made explicit at oral argument: the district court was not required to rule on a 702 motion before trial. Oral Argument in Court of Appeals, 19:00–21:10 (Feb. 21, 2018) ("[Peraza] argues that it was an abuse of discretion for the trial court not to rule on this at the hearing or sometime before trial, but he cites no authority requiring the court to definitively rule on a motion *in limine* before trial.").

Peraza is correct that that timing argument is somewhat different from the timing argument the State presented in its opening brief before this Court. In both forums, the State has relied on the same undisputed principle that the district court need not rule on a motion *in limine* before trial, but it did so in its opening brief to this Court to argue that the timing requirements of the expert-notice statute are incompatible with the timing requirements of rule 702. The change in the State's argument is in response to an issue that arose for the first time in the Court of Appeals' opinion. *See DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995) (stating that issue not raised in Court of Appeals may be raised on certiorari if "the issue arose for the first time out of the court of appeals' decision").

III.

The question of prejudice is included in the question presented, and Peraza's prejudice analysis, just like the Court of Appeals', overlooks the compelling evidence of guilt.

The State argued in its opening brief that the Court of Appeals erroneously concluded that Smith's testimony was prejudicial. Peraza argues that the State did not ask the Court to review this issue, and the Court did not include it in the questions presented for review. Br.Resp.39–40. Peraza also argues that the admission of Smith's testimony was prejudicial. Br.Resp.41–46.

A. The question of prejudice is included in the question of whether the Court of Appeals erroneously vacated.

The question of prejudice is included in this Court's order granting review, and it was fairly included in the question presented in the State's petition. This Court's review is limited to "questions set forth in the petition or fairly included therein." Utah R. App. P. 49(4)(a). But this Court has stated that "'this rule should be construed broadly to avoid the rigid exclusion of reviewable issues, however peripheral.'" *State v. Leber*, 2009 UT 59, ¶10, 216 P.3d 964. Thus, "[t]he statement of a question presented will be deemed to comprise every subsidiary question fairly included therein." Utah R. App. P. 49(4)(a).

The question of prejudice is interwoven with the question of whether the Court of Appeals erroneously vacated. Reversible error requires proof of both error and prejudice. *State v. Hummel*, 2017 UT 19, ¶42, 393 P.3d 314. When this Court picks up one end of the stick, it necessarily picks up the other.

While the State did not discuss prejudice in its petition, it asked this Court to review the Court of Appeals' opinion vacating Peraza's conviction. It presented two separate questions related to the expert-notice issue: "Whether the Court of Appeals erred by conflating the standards and remedies under the expert-notice statute and rule 702," and "Whether the Court of Appeals violated this Court's opinion in *State v. Johnson*, 2017 UT 76, 416 P.3d 443, when it reversed based in part on an issue the appellant waived on appeal and the appellee did not have the opportunity to brief or argue."

This Court granted review on the following question: "Whether the Court of Appeals erred *in vacating Respondent's convictions* based on its construction and application of Rule 702 of the Rules of Evidence and Section 77-17-13 of the Utah Code." Order of October 8, 2018 (emphasis added). The Court of Appeals could not have vacated the convictions without finding both error and prejudice. If the court correctly interpreted rule 702 and the expert-notice statute but incorrectly found prejudice, it necessarily "erred in

vacating Respondent's convictions based on its construction and application of Rule 702 of the Rules of Evidence and Section 77-17-13 of the Utah Code." *Id.* Therefore, the question of prejudice was fairly, if not directly, included in the question on which this Court granted review.

If prejudice were not fairly included in the question of whether the Court of Appeals erroneously vacated a conviction, then arguments to affirm on alternate grounds would not be fairly included either. Whether the Court of Appeals' prejudice ruling was correct is more closely related to the question of whether its error analysis was correct than is the question of whether alternate grounds not addressed by the Court of Appeals justify affirmance. And this Court has indicated that such questions are fairly included. *See Van Huizen*, 2019 UT 1, ¶15 & n.3.

The State is not trying to change the issues that this Court agreed to review. The State asks this Court to correct the legal error in the Court of Appeals' opinion and reverse on that basis. But the State has briefed the question of prejudice in the event this Court finds it necessary to resolve the case on that basis.

B. The totality of the evidence demonstrates no reasonable likelihood of a different result had the expert's testimony been excluded.

Peraza argues that if this issue is properly before the Court, a more favorable result was reasonably likely had Smith's testimony been excluded. Br.Resp.41–46. Although Peraza addresses Smith's testimony, he does not grapple with the totality of the evidence. He ignores the compelling evidence of guilt discussed in the State's opening brief. The only reference he makes to the evidence the State identified is in the fact section of his brief, where he recasts Peraza's admission that he could have orally sodomized Child when he was drunk as a "hypothetical," and claims that the State stipulated to that characterization. Br.Resp.14.

The State made no such stipulation. And Peraza did not present the scenario as a hypothetical. Peraza described to the officer a concrete, specific situation: when he was in a drunken stupor lying on the couch, someone whom he thought at the time was his wife tried shaking him awake, and he grabbed that person's head and forced that person to perform oral sex on him; when he thanked his wife the next day, she did not know what he was talking about. R1049–50, 1068–69. If the details Peraza provided did not make it clear, Peraza told the officer that it "actually did happen." R1068. And he mentioned two specific times to the officer. R1068. The only uncertainty in

what he told the officer was whom he forced to perform oral sex—Child or one of his sons—and whether it happened more than those two times. R1048–50, 1074–75. It was in reference to those "other times" that the State stipulated that Peraza used the words "could have happened." R1074–75. And there is no evidence in the record that Peraza's sons have ever accused him of forcing them to perform oral sex on him. In light of Peraza's damning admission to the officer and the other evidence of guilt discussed in the State's opening brief, but unmentioned by the Court of Appeals or Peraza, there is no reasonable likelihood of a different result had Smith's testimony been excluded.

The substance of Smith's testimony further diminishes the likelihood of a different result. Without repeating the arguments made in the State's opening brief—which refute the bulk of Peraza's arguments on this issue—the State addresses just one point that Peraza makes about Smith's testimony. Peraza argues that Smith's testimony is "exactly the kind" of "'statistical evidence'" this Court has condemned. Br.Resp.42–43. He relies on the principle set forth in *State v. Rammel*, 721 P.2d 498 (Utah 1986), where this Court held that statistical evidence may not be "used to establish facts 'not susceptible to quantitative analysis,' such as whether a particular individual is telling the truth at any given time." *Id.* at 501.

Peraza never challenged the admissibility of Smith's testimony on this basis at trial.[4] Nor did he argue plain error or ineffective assistance before the Court of Appeals. Instead, Peraza raised the specter of inadmissibility in his prejudice argument before the Court of Appeals, arguing that admitting the testimony was prejudicial because it was inadmissible under *Rammel*. The Court of Appeals refused to address this issue because the admissibility challenge was raised indirectly. *Peraza*, 2018 UT App 68, ¶36 n.9. This Court should do the same. The issue is waived because it was not raised at trial, and Peraza has not analyzed the issue under any recognized exception to the preservation rule. *Johnson*, 2017 UT 76, ¶¶18–19.

In any event, Smith offered no statistical evidence about "whether a particular individual is telling the truth at any given time." *Rammel*, 721 P.2d at 501. She simply mentioned the frequency of recantations—regardless of the veracity of the allegation or recantation. R1141. And she said that most victims delay disclosure until adulthood. R1143. Peraza points to a Court of Appeals opinion, *State v. Iorg*, 801 P.2d 938 (Utah Ct. App. 1990), to suggest that any testimony about the frequency of delayed reporting is inadmissible.

[4] He did speculate pre-trial that the Smith's testimony might run afoul of this rule. R534–35. But the prosecutor assured the court that Smith would not present that kind of testimony. R537–39. Peraza did not raise the issue at trial, once he knew the details of the expert's testimony. R1131–54.

Br.Resp.42–43. But the Court of Appeals has since clarified that the testimony in *Iorg* was inadmissible because it "directly opine[d] on [a] person's veracity." *State v. Bair*, 2012 UT App 106, ¶47 n.10, 275 P.3d 1050 (stating that testimony in *Bair* was admissible because it reflected "a fact already recognized by Utah courts—that '[d]elayed discovery and reporting are common in [child sexual abuse] cases'"). This Court has similarly held that "direct testimony" about a witness's veracity is improper, but "giving testimony from which a jury could infer the veracity of the witness" is not. *State v. Adams*, 2000 UT 42, ¶¶13–14, 5 P.3d 642. The expert in this case offered no statistical or other testimony that served as direct evidence that Child was telling the truth.

IV.

Whether the Court of Appeals' analysis would change if it applied the proper standard is a question for the Court of Appeals to decide on remand; in any event, Peraza did not satisfy his burden to prove prejudice from the denial of a continuance.

In addition to reversing based on its conflation of rule 702 and the expert-notice statute, the Court of Appeals held that the district court abused its discretion when it denied a continuance. *Peraza*, 2018 UT App 68, ¶¶38–48. And to support the reversal, the Court of Appeals placed the burden of disproving prejudice on the State and concluded that the State had not met that burden. *Id.* ¶¶44–47. The State argued in its opening brief before this

Court that placing the burden on the State violated this Court's precedent and, to the extent it is even relevant, the expert-notice statute.

Peraza refuses to defend the Court of Appeals' burden shifting. Br.Resp.46–49. Instead, he argues that the Court of Appeals would have concluded that the denial of a continuance was prejudicial even if Peraza bore the burden of proving prejudice. Br.Resp.50.

Whether the Court of Appeals would have reached a different result if it applied the proper standard is a question for that court to decide on remand. This Court should correct the error perpetuated in the Court of Appeals' precedent because Peraza does not dispute it, and the Court should remand for the Court of Appeals to apply the proper standard. In any event, misplacing the burden made a difference in this case.

In its opening brief before this Court, the State did not address the Court of Appeals' prejudice ruling on the continuance issue because the proper course—if this Court agrees with the State that the Court of Appeals erred—would be to remand for the Court of Appeals to apply the proper test. *See Patterson v. Patterson*, 2011 UT 68, ¶20 n.8, 266 P.3d 828 ("'The appropriate law must be applied in each case and upon a failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the appropriate law, even if the question was not raised in the court below.'");

cf. State v. James, 2000 UT 80, ¶17, 13 P.3d 576 ("Because the court of appeals did not address this argument, we remand to the court of appeals for appropriate treatment." (citation omitted)). But because Peraza argues that it would not have made a difference, the State responds here to those new arguments.

The Court of Appeals identified two reasons Peraza sought a continuance: (1) to adequately prepare to cross-examine Smith; and (2) to get a rebuttal expert. *Peraza*, 2018 UT App 68, ¶38; *see also id.* ¶¶41–42, 45, 47.

The first reason is inaccurate. Peraza never asked for more time to prepare his cross-examination of Smith. R589–95. In fact, trial counsel mentioned that he had already met with an LDA social worker to "get[] advice on how to prepare a cross examination of" Smith. R589–90. He apparently got the advice he needed because he never asked the district court for more time to prepare his cross-examination. R589–95. He said only that he needed additional time to find a competing expert. R591, 593–94.[5]

[5] In his Court of Appeals brief, Peraza mentioned without elaboration that he needed more time to "adequately prepare cross-examination strategy." Br.Aplt.44. But that is not what he told the district court when he asked for a continuance, nor did he identify on appeal how denying a continuance impaired his ability to cross-examine Smith.

Nor is it likely that more time would have made a difference in cross-examining Smith. By the time of trial, counsel had received the studies on which Smith would rely. R746. The district court told counsel that if Smith testified about something that was not covered by the studies provided by the State, counsel could object and "it may not come in." R572. Counsel raised no such objection. But he did use the studies to cross-examine Smith about recantations. *See Peraza*, 2018 UT App 68, ¶47 (acknowledging "counsel was able to elicit some concessions from [Smith]"). He drew out a concession that the studies on which she relied did not differentiate between victims of sexual and physical abuse. R1147. And while Smith stated on direct-examination that a recantation "does not mean that it did not occur," counsel got Smith to concede that children "might also recant because they're telling the truth that it didn't happen." R1142, 1148. Smith provided a reason a child might recant truthfully—guilt for lying in the first place. R1148. Thus, with the inroads counsel made on cross-examination, Smith's testimony amounted to nothing more than an acknowledgement that recantations happen, and an identification of some reasons children may recant truthfully or falsely. R1141–42, 1147–48.

There is no evidence in the record or even a proffer about what the additional cross-examination would have been, or what additional evidence

it may have elicited. Without at least a proffer, there was no way for the Court of Appeals to conclude that additional cross-examination, when viewed with all the other evidence, would have been reasonably likely to have tipped the scales in Peraza's favor. But placing the burden on the State to disprove prejudice started the analysis from a presumption of prejudice. *See State v. King*, 2008 UT 54, ¶¶20–25, 30–37, 190 P.3d 1283. Had the Court of Appeals required Peraza to prove prejudice by pointing to a proffer in the record of what he could have elicited, or evidence otherwise indicating that he lacked the ability to adequately cross-examine Smith, it would have concluded that Peraza did not meet that burden.

The second reason the Court of Appeals identified—and the only one Peraza presented to the district court—was time to call a competing expert. But that would not have created a reasonable likelihood of a more favorable result.

The Court of Appeals identified three things it says Peraza could have accomplished if he had had more time to call his own expert. First, the court said a defense expert could rebut Smith's testimony about the probability of false recantations. *Peraza*, 2018 UT App 68, ¶42. ("He would have had the opportunity to procure an expert witness to rebut [Smith's] generalized

statement of the probability that a victim's recantation of an allegation does not mean that the abuse did not occur.").

Peraza never proffered anything to suggest that he intended to present or could have presented evidence to rebut Smith's testimony about probabilities. *See* R590. The Court of Appeals' assumption that Peraza could have presented a rebuttal expert on this point was based on pure speculation. *Cf. State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (stating in context of ineffective assistance that proof of prejudice "must be 'a demonstrable reality and not a speculative matter'").

But even if he had, Smith never testified about the probability of false recantations. Smith said only that *recantations happen* between 4 to 20 percent of the time. R1141–42. That is not much different from Peraza's own evidence that recantations happen "[n]ot very frequently." R1130. Smith also said that, "just generally, because a child recants does not mean that it did not occur." R1142. But the word *generally* in that statement means *generically*, not *usually*. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 944 (1993) (listing *usual* and *generic* among the various accepted definitions of *general*). That meaning is clear from the context of Smith's statement. The prosecutor asked whether Smith's experience and research led her to form an opinion as to "whether the fact

that somebody recants, automatically means that the abuse did not occur." R1142. Smith qualified her opinion as a reference to a general proposition, as opposed to a specific opinion about the recantation in this case:

> No. I've—based off of—without know—like, not being involved in the case and being able to see things, but just generally, because a child recants does not mean that it did not occur.

R1142. And if that was not clear, on cross-examination Smith confirmed that "just because a child makes allegations … doesn't mean that the allegations are true"; rather, the recantation could be truthful. R1147–48. Thus, Smith gave no testimony about the probability of false recantations, so there was nothing for Peraza to rebut.

Second, based on Peraza's proffer to the district court, R590, the Court of Appeals said a defense expert "might also have been able to testify about whether the 'effigy doll' treatment 'could have led to the allegations becoming more violent and much more pronounced over the years.'" *Peraza*, 2018 UT App 68, ¶¶42, 45. But such testimony would not increase the chance of a more favorable outcome for Peraza. Expert testimony that Child's therapist's practices could have led Child to falsely describe the abuse with more violence does little to undermine the likelihood that *the pre-therapy allegations* were true. Peraza's four convictions for sodomy on a child are supported by Child's depiction of oral sex, which she described in her first

CJC interview before she began therapy. SE1 at 24:30–25:00, 34:00–35:45, 38:15–38:45, 46:47–50:20. And oral sex is exactly what Peraza admitted happened twice with someone other than his wife, that it "could've" been Child, and that it "could have" happened a few times. R1049–50, 1068–69, 1075. Child's descriptions of anal and vaginal sex and some of the more violent actions by Peraza came after she began therapy. R844–45, 852, 928–29, 951–52, 972; DE1 at 19, 32.

Defense counsel relied on the progressing nature of the allegations to argue that Child was not a credible witness. Counsel highlighted how frequently Child disclosed something new about the abuse, saying her allegations were "all over the place." R1259–60. Counsel suggested a possible motivation: Child was getting attention for the disclosures. R1261, 1263. Counsel urged the jury not to pick and choose aspects of Child's testimony to believe and aspects to disbelieve; rather, counsel argued that if there was no reasonable basis to decide what parts of Child's testimony were true and which were not, then the State had not proven guilt beyond a reasonable doubt. R1263. This approach challenged the credibility of all of Child's allegations. But a defense expert would have given the jury a reasonable basis to disbelieve Child's post-therapy allegations without disbelieving her pre-therapy allegations, which fully supported the four sodomy convictions.

Thus, presenting expert testimony that explained Child's additional allegations would not lead to a reasonable probability of a more favorable result.

Third, based on Peraza's proffer to the district court, R590, the Court of Appeals said a defense expert could have testified that the therapist's techniques "could have influenced [Child's] withdrawal of her recantations." *Peraza*, 2018 UT App 68, ¶45. Admittedly, that testimony would have been favorable to the defense. But it is not reasonably likely to have led to a more favorable outcome for Peraza. The jury was given several reasons a child may recant truthfully or falsely, and evidence supported each reason. This proposed testimony would have added one more factor for the jury to consider as it weighed Child's motives for recanting and withdrawing the recantation. But it would not have sufficiently changed the entire evidentiary picture in Peraza's favor to make a more favorable outcome reasonably likely. As discussed at length in the State's opening brief, the evidence supporting Peraza's convictions was strong, including Peraza's own admission that he could have orally sodomized Child a few times; his and Mother's conflicting, inadequate explanations of how Child could have gained her detailed, mature sexual knowledge; and Mother's motives for believing Peraza over Child. Br.Pet.34–37. In light of the record as a whole there is no reasonable

likelihood of a more favorable result had Peraza been given a continuance to present this additional piece of testimony.

Had the Court of Appeals "yield[ed] the benefit of the doubt on [the question of prejudice] to the appellee—or in other words to the outcome in the lower court," *Hummel*, 2017 UT 19, ¶42, it would have recognized that Peraza failed to carry his burden of proving a reasonable likelihood of a more favorable result. Misplacing the burden on the State led the Court of Appeals to misapply the prejudice analysis in a way that made a difference to the outcome of this case. Thus, this Court must address whether the Court of Appeals improperly placed the burden on the State. And because the point is uncontested, the Court should hold that the party seeking a continuance bears the burden of proving prejudice.

V.

Peraza's ineffective-assistance claims are not properly before this Court.

Peraza presents two additional questions for which this Court did not grant a writ of certiorari. Br.Resp.2–3. First, he asks this Court to review whether trial counsel was ineffective by not investigating and presenting "expert testimony related to the State's evidence about the complaining witness's multiple statements, her therapy records, and the State's expert witness testimony." Br.Resp.2–3. Second, he asks this Court to review

whether trial counsel was ineffective by not investigating and consulting with a medical expert "related to the complaining witness's physical examination following disclosure of alleged sexual abuse." Br.Resp.3.

The only justification Peraza gives for reaching these issues is that ineffective assistance is an exception to the rule of preservation. Br.Resp.3. But the rules governing certiorari review—even if labeled as preservation rules—are distinct from the rules governing initial appellate review. For initial appellate review, appellate rules require a litigant to include in its brief a "citation to the record showing that the issue was preserved for review; or a statement of grounds for seeking review of an issue not preserved." Utah R. App. P. 24(a)(5)(B). For certiorari review, the rules impose a different requirement: a litigant must include in its brief "a statement and citation showing that the issue was presented in the petition for certiorari or fairly included therein." Utah R. App. P. 51(b)(4).

As Peraza acknowledges elsewhere in his brief, questions not raised in a petition for a writ of certiorari and "not included in the order granting certiorari or fairly encompassed within such issues, are not properly before this Court on the merits." *DeBry*, 889 P.2d at 443. These two ineffective-assistance questions are not fairly included in the questions presented. They

are new claims that are wholly independent of the issues this Court agreed to review.

An exception to the rule that review is limited to the question presented is that the Court may affirm on alternate grounds. *See Van Huizen*, 2019 UT 1, ¶15 & n.3, 39–40. Peraza has not asserted this justification for reaching the issue. But even if he had, it would fail. As noted above, this Court has discretion to affirm on alternate grounds only when the "'legal ground or theory [is] *apparent on the record*.'" *Francis*, 2010 UT 62, ¶19.

By Peraza's own admission, the legal basis for his ineffective-assistance claims is not apparent on the record. He asks this Court to remand under rule 23B, Utah Rules of Appellate Procedure, because "the facts supporting his ineffective assistance of counsel (IAC) claims are not currently within the record on appeal." Br.Resp.3.

The Court of Appeals declined to rule on these very claims because doing so was unnecessary to resolve the case. *Peraza*, 2018 UT App 68, ¶2 n.1. Peraza does not ask this Court to review the actual decision of the Court of Appeals'—the decision not to rule on the rule 23B motion. Rather, he asks this Court to remand to the district court to develop a record so that this Court can then affirm the Court of Appeals without having to address the issues that the Court of Appeals decided. That is not what certiorari review is about.

Cf. Judd v. Bowen, 2018 UT 47, ¶8 n.8, 428 P.3d 1032 ("'[O]n a writ of certiorari, we review the decision of the court of appeals, not that of the district court.'"); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that a court of last resort is "a court of review, not of first view"). And while this Court has some authority to address issues not decided by the Court of Appeals, as discussed above, Peraza takes that principle too far, asking for plenary review of the case rather than defending the decision of the Court of Appeals. This Court should reject that invitation and address the issues decided by the Court of Appeals. Peraza will have the chance to raise his ineffective-assistance claims before the Court of Appeals if this Court reverses.

CONCLUSION

For the foregoing reasons and those set forth in the State's opening brief, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted on March 4, 2019.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this reply brief contains 6,717 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on March 4, 2019, the Reply Brief of Petitioner was served upon respondent's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Douglas J. Thompson
Utah County Public Defender Assoc.
Appeals Division
51 South University Ave., Suite 206
Provo, UT 84601

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on respondent by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on respondent.

☐ will be filed with the Court on a CD or by email and served on respondent within 14 days.

/s/ Melanie Kendrick