IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee/Plaintiff, v. MARK BOYER, Appellant/Defendant.	REDACTED PUBLIC OPENING BRIEF OF APPELLANT* Case No. 20170423-CA District Court Case No. 131902296 (Incarcerated)

This is the opening brief of the appellant, Mark Boyer, on direct appeal from four convictions of aggravated sexual abuse of a child, five convictions of rape of a child, and three convictions of sodomy on a child, entered in the Third District Court in and for Salt Lake County, State of Utah the Honorable Denise Lindberg, the Honorable Mark Kouris, and the Honorable Ryan Harris, Judges, presiding.

MARIAN DECKER
ASSISTANT SOLICITOR GENERAL
160 EAST 300 SOUTH, 6th FLOOR
P.O. BOX 140854
Salt Lake City, Utah 84114-0854

Counsel for Appellee, State of Utah

ELIZABETH HUNT (#5292)
ELIZABETH HUNT LLC
569 BROWNING AVE.
Salt Lake City, Utah 84105
Telephone: (801) 706-1114
E-Facsimile: 1- 801-443-1980
Email: elizabeth.hunt@comcast.net

Counsel for Appellant, Mark Boyer

*Redactions do not reflect Boyer's positions on privilege, waiver of privilege, or substantive or procedural legal issues.

LIST OF CURRENT AND FORMER PARTIES

The parties on appeal are the same as in the trial court, Mark Boyer and the State of Utah. Elizabeth Hunt represents Boyer and Marian Decker represents the State.

VM, the alleged victim, while not a party, was represented in the trial court through counsel Michael Zimmerman and Linda Jones. She is currently represented by Freyja Johnson, Michael Zimmerman, and Troy Booher.

TABLE OF CONTENTS

Addendum Contents

This Court's Order Denying Motion to Supplement Record

Other

VM's Story (handwritten and typed, including last page of handwritten allegation pertaining to cousin, which page was not given to the jury)

VM's letter regarding JR

JR Declaration

Declaration of Donald Bell, CJC Expert

Declaration of Karen Malm, PhD

Declaration of Matthew Davies, PhD

Declaration of Matthew Davies, PhD

Proposed 14(b) subpoenas

Legislative History of House Bill 411 (March 10, 2014)

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTRODUCTION

Boyer stands convicted of heinous child sexual crimes alleged by a former neighbor, VM. To bolster VM's credibility, the State called Dr. Corwin to opine on behavioral norms or "risks" of child sexual abuse victims – normalcy during and after molestation, delayed and inconsistent allegations, and onset of depression and suicidality. The facts the jurors learned about VM fit Dr. Corwin's behavioral profile of sexually abused children. Jurors never learned they were misinformed and uninformed about facts essential to reaching a reliable verdict, let alone to applying Dr. Corwins' inadmissible theory.

Boyer's defense was that VM's false allegations were the product of her bond with and influence of his ex-wife, Jann. [redacted]

After the Boyers divorced, Boyer had one of their sons take and text him a photograph of Jann passed out on the kitchen floor with a knife in her hand. Approximately two months later, Jann took VM to the CJC with a detailed written story of Boyer's sexual abuse. This story, which VM wrote at age fourteen with Jann present the night before the CJC interview, alleged seven sordid vignettes of sexual abuse that allegedly occurred when VM was between the ages of six and eight, in particular order, separated by specific numbers of weeks and months.

The defense led Detective Holdaway to testify he expertly followed CJC protocol.

The jurors never learned he materially deviated from CJC protocol, in failing to explore the very abnormal memory function reflected in VM's written story and first CJC interview, and the obvious potential for contamination by Jann.

The jurors never learned that rather than carefully preserving and processing VM's uncontaminated claims through the CJC process and protocol, when VM returned to the prosecution team for the third time with additional allegations of sexual abuse by a fourth alleged perpetrator, the detective and prosecutor elected to send VM to her therapist to work out her claims, and never investigated those allegations at the CJC or at all.

The jurors never heard three starkly inconsistent initial disclosure stories. Jann testified that VM's initial disclosure of abuse came in very general terms when they were alone in Jann's kitchen after weeks of VM's reticent attempts to tell her something. The jurors never heard Jann originally told Detective Holdaway -- [redacted], who was moving back home, and said Boyer had done something to her also. The jurors never heard the contrasting initial disclosure story from VM -- that VM told Jann and Jann's grandmother about Boyer's sexual abuse in specific detail at a restaurant.

The defense led the detective to testify Boyer had a mole near his penis matching VM's recall from her childhood molestations. The jurors never learned that Boyer had no such mole.

The verdict is the unreliable result of the failure of our adversary system.

ISSUES, STANDARDS OF REVIEW, PRESERVATION

1. Does the cumulative impact of instances of ineffective assistance of counsel, prosecutorial misconduct and evidentiary error require reversal?

The Court considers all errors, both identified and assumed by the Court to have occurred, and requires reversal if the Court's confidence in the fairness of the trial is undermined by the cumulative effect of the errors. State v. Dunn, 850 P.2d 1201, 1229 (Utah 1993).

In reviewing rulings on ineffective assistance raised in a motion for a new trial, the Court reviews legal rulings for correctness and factual findings for clear error. State v. Marchet, 2014 UT App 147, ¶17, 330 P.3d 138.

In reviewing prosecutorial misconduct claims, this Court reviews factual findings for clear error and other rulings for abuse of discretion. State v. Bakalov, 1999 UT 45, ¶28, 979 P.2d 799; Thomas.

The Court generally reviews evidentiary rulings, mistrial rulings, and new trial rulings for abuse of discretion. E.g., State v. Lopez, 2018 UT 5, ¶ 18 (admission of expert testimony); State v. Madsen, 2002 UT App 345, ¶5, 57 P.3d 1134 (mistrial motion); State v. Mitchell, 2007 UT App 216, ¶ 6, 163 P.3d 737 (new trial).

Legal errors establish abuse of discretion. See, e.g., State v. Barrett, 2005 UT 88,¶¶ 15-17, 127 P.3d 692.

Issues unaddressed by the trial court are reviewed as matters of law. State v. Thomas, 830 P.2d 243, 245 (Utah 1992).

The claims were preserved (e.g. R. 1789-93, 1849, 2506, 2524-25, 2603-04, 2612,

2811, 2815).

2. Does judicial bias or apparent bias require reversal?

This Court reviews this question of law for correctness. State v. Alonzo, 973 P.2d 975, 979 (Utah 1998).

This issue was preserved (R767-773).

3. Does the unavailability of [redacted] reviewed and shredded after *in camera* review require reversal?

This issue is reviewed *de novo* on appeal, to determine whether the deficiencies in the record preclude appellate review of Boyer's claims. See State v. Taylor, 664 P.2d 439, 445-47 (Utah 1983).

This issue was preserved (R1791-93,1849).

Assuming deficiencies in preservation, as detailed herein, Boyer's claims all involve errors that were plain under law in effect at the time, and prejudicial, and qualify for relief under the plain error doctrine. The doctrine allows for correction of errors that are plain from law governing at the time of trial, and prejudicial, although the plainness prong may be relaxed when errors are particularly prejudicial in hindsight. See, e.g. State v. Eldredge, 773 P.2d 29, 35 n.8 (Utah), cert. denied, 493 U.S. 814 (1989). Prejudice is proved a reasonable likelihood of a more favorable result absent the errors. See, e.g., State v. Verde, 770 P.2d 116, 124 n.15 (Utah 1989).

STATEMENT OF THE CASE

FACTS

Prosecution Case

Jann believed Boyer was philandering and divorced him (R2686,2706-08). Boyer later had their son take and text him a photograph of Jann unconscious on the floor with a knife in her hand (R2689,2710-11,2717-18). Jann testified she was impaired by Ambien and perhaps alcohol and intending to make a sandwich (R2711). She had joint custody of their sons, made her living training and traveling with other people's children, and was part of an LDS family and culture (R2477-78). Jann testified it was in same month she learned that Boyer obtained the photograph that VM started saying concerning things about Boyer (R2491).

Jann contacted DCFS approximately two months after the photograph incident, claiming Boyer had raped, sodomized and molested VM (R2352). When she took VM to the CJC, Jann asked Detective Holdaway whether, as a result of VM's allegations, she could prevent Boyer from seeing their sons (R2513-14).

*

VM's mother was institutionalized when VM was approximately two, leaving VM with her maternal grandparents, as VM's father was unknown (R2295,2337-39). When she made the initial allegations at fourteen, VM was losing her home and family (R2336-37). VM's mother was ill enough that she died in the year after the allegations (R2337). VM's custodial grandfather had died, and her custodial grandmother was moving into a care facility, leaving VM with no one to live with until her aunt took her in after VM attempted

suicide (R2337-39).

VM considered Jann a substitute mother and called her Mom, as Jann had included VM in family activities for years (R2303, 2476-2481). Boyer commuted and worked long hours, including weekends and holidays (R2488-89;2684-85). VM attended Boyer family vacations, most of which Boyer did not attend (R2302,2480,2691).

Jann worked as a children's performance coach, running a traveling children's performance company for eighteen years (R2477). VM wrote her "story" of allegations against Boyer, which eventually reads like a letter to Jann, the night before the CJC interview (R2358).

Writing that story age fourteen, VM detailed specific sexual assaults that had allegedly occurred when she was between six and eight, in particular order, separated by specific numbers of months and weeks (Trial Exhibit 12, Exhibit 1 to motion for new trial, and supplemented to the record by order of this Court on March 8, 2018). Even with the written story she repeatedly reviewed before testifying (R2383), VM made significant inconsistent statements (R2349-59), belying that she had the abnormally precise memory function reflected in the written story and CJC interview.

*

VM, seventeen, testified that without any prior instances of inappropriate touching, when she was at a sleepover at Boyers' when she was six, Boyer climbed into the bottom bunk with her, tickled her back, sucked on her ear, fondled her genitals, penetrated her vagina with his fingers, started humping her, and put his mouth on her vagina (R2103,2307-2308).

When this allegedly occurred, Boyers' older son was sleeping on the top bunk of this bed and their infant was in a crib in this room (R2367,2371-72). Boyer's then-wife, Jann, was across the hall with the doors open so she could hear and come care for their infant, and there was a clear line of sight from room to room in the 760 square foot duplex (R2370-71,2681). VM's family lived next door to the duplex (R2297). VM claimed Boyer also brutally raped her in a family room with no doors, in Jann and Boyer's bed, and in the shower (R2309-10,2314,2368).

She testified inconsistently about whether Boyer forced her to fellate him, at times to the point of ejaculation. Compare R2348-49,2513,3530-3532, Trial Exhibit 12 and typed version in Exhibit 1 to motion for new trial, in addendum with R2349-51,2625-2626,3593. During the nurse practitioner's exam, when asked if he raped her more than once, she answered, "Ah, I think it was more. Yeah." (R2623).

*

When VM was examined at fourteen, there was no physical evidence of repeated rapes over ages six to eight, sometimes involving strong rips, pain and bleeding (R2373-74, 2624).

Neither VM's physician nor any of the many caring adults in VM's life attested to VM showing pain, discomfort or fear of Boyer during the years these brutal rapes allegedly occurred (R2339-42,2372-75,2377,2478-79,2482,2640). VM and Boyer reputedly got along "very well" (R2480,2488). She stayed at the Boyers' homes repeatedly because she wanted to (R2374-75).

*

VM claimed she erupted with herpes some two years after Boyer stopped raping her (R2347), then explained she mistook ingrown pubic hairs for herpes (R2328), then acknowledged she had no pubic hair when she claimed to have had herpes, and finally agreed with the prosecutor that Jann "planted" the idea VM had herpes (R2379). Jann essentially admitted this (R2503-04,2514).

*

Jann said one morning Boyer claimed to have had a nosebleed and showed her blood that had "gooshed all over" the middle of their bed, where a nose would not have bled (R2507-2508).

In VM's testimony about the alleged rape on that bed, she made no claim of bleeding or getting out of bed, and testified Boyer cuddled her back to sleep, but that she was not really sleeping, as she was in so much pain (R3526-3527,3530). VM claimed to have bled once, when Boyer supposedly raped her on the couch, after which she said she bled on the bathroom floor, and told Jann she had a nosebleed (R2320-21,2374). Jann testified Boyer once told Jann to go comfort VM in the bathroom, as VM was homesick, and she found VM was squatting in the bathroom crying and Jann told her to go lie on the couch, as she could not stay if she was homesick (R2508). Jann made no mention of blood or VM mentioning a bloody nose.

*

VM claimed the first assault occurred on blue striped sheets (R2308-09). Jann testified she could not recall those sheets and thought she had caught VM lying until Jann found a blue striped sheet (R2506). The prosecutor asked if this surprised her and she

testified, "I was floored. I was – it was just those things that just happen that made me more aware that she was telling the truth." (R2505-06). The court struck the last sentence of her testimony (R2506,2522,2526).

*

Decorated expert Dr. Corwin (R2550-2561) testified about risks of child sexual abuse -- a behavioral pattern of apparent normalcy during and after molestations, long-delayed and inconsistent allegations, and then depression and suicidality (R.2576-2580). What the jurors learned of VM's life fit this pattern (R2329-30,2349-51,2625-2626,2815-16,3593).

*

The prosecution introduced close-up enlarged color photographs of Boyer's penis as physical evidence that VM was truthful because she recalled the birthmark on the front of his thigh (R2763-64). Trial counsel cross-examined Detective Holdaway about VM's inconsistent statements and incorrectly elicited his testimony and argued as if Boyer had a mole near his penis consistent with VM's memories (R2520;2784-85).

Defense Case

The defense led Detective Holdaway to testify he expertly followed NICHD best practice standards in the CJC interview (R2660-2672).

[redacted]

Boyer denied VM's allegations, theorizing they were likely the product of Jann's

desire for vengeance after their marriage ended badly and Boyer had their son take and text him the compromising photograph (R2684, 2695).

The prosecutor's points in cross-examination and rebuttal were not compelling. Boyer testified he took the boys to school the day after the photo was texted to him, and the prosecutor suggested the photo was taken and texted on a Friday (R2690,2696). Boyer denied fixing Jann's drinks, while Jann testified he made sure she had plenty to drink (R2699,2709).

Boyer said there was an elevated bed, not bunk beds in the duplex (R2693-94). Jann could not recall having the elevated bed, was confused about whether the elevated bed was a bunk bed, and maintained there were bunk beds in the duplex (R2712,2715-16). Jann's friend attested to bunk beds in the duplex (R2721). In closing, the prosecutor argued it was unimportant whether there were bunk beds (R2769).[1]

Boyer and Jann differed as to whether they had blue striped sheets (R2506,2695). Jann brought no sheet to trial (R2507).

Boyer testified it was easy to hear from one bedroom to the other in the duplex (R2700). Jann testified there was a swamp cooler in the hall that occluded sound from room to room (R2713). Their infant slept in the bedroom across the hall from the parents, suggesting they could hear from room to room (R2367,2371-72).

---

1 The Court should credit his assessment of the insignificance of the evidence. Cf. State v. Farnsworth, 2018 UT App 23, ¶36 ("Where a prosecutor has touted the importance of erroneously admitted evidence, we should be hesitant to find its admission harmless, let alone harmless beyond a reasonable doubt.").

PROCEDURAL HISTORY AND DISPOSITION

Following a mistrial, the second jury convicted Boyer as charged (R534-544). The court sentenced Boyer to prison for two consecutive terms of fifteen-to-life, three concurrent terms of fifteen-to-life, three concurrent terms ten-to-life, and two concurrent terms of five-to-life (R653-656).

With new counsel, Boyer unsuccessfully moved to recuse Judge Kouris (R3331-46,661-662,669,767-68). Reviewing Judge Harris affirmed (R769-773).

The court denied the motion for a new trial (R1789-93). Boyer appealed (R1850).

SUMMARY OF ARGUMENTS

The cumulative impact of multiple instances of ineffective assistance of counsel, prosecutorial misconduct, and evidentiary error requires a new trial.

The court's sentencing comments establish bias and structural error. Assuming there were only apparent bias, Boyer was prejudiced.

The unavailability of VM's [redacted] the court reviewed *in camera* precludes full adjudication of Boyer's appellate claims, further justifying reversal.

ARGUMENTS

I. CUMULATIVE ERROR

The court made general incorrect rulings there was no ineffective assistance or prosecutorial misconduct (R1789-1793), and other specific incorrect rulings, discussed

below.

To establish ineffective assistance of counsel, Boyer must identify acts or omissions that were not conceivably reasonably strategic, fell below an objective standard of reasonableness, and prejudiced Boyer. Strickland v. Washington, 466 U.S. 668-690 (1984). Counsel's failure to investigate and reckless disregard for Boyer's rights were not strategic and may qualify as constructive denial of counsel, justifying presumptive prejudice.[2] Many instances of deficient performance prejudiced Boyer.[3]

A. INEFFECTIVE ASSISTANCE: FAILURE TO INVESTIGATE PHYSICAL EVIDENCE WITH ESSENTIAL EXPERTS

Failure to investigate and present physical evidence and expert testimony strongly corroborating the defense establishes ineffective assistance of counsel, particularly if guilt is questionable. See Houskeeper v. State, 2008 UT 78, ¶¶ 35-51, 197 P.3d 636 (finding ineffective assistance in failure to call medical expert on whether attempted rape was violent and premeditated); Lenkart, 2011 UT 27, ¶¶ 27-45 (finding ineffective assistance in failure to have Code R test processed and call expert to testify physical evidence may have reflected consent).

Counsel moved for a continuance to hire an expert to contend with Dr. Corwin

---

2 See Menzies v. Galetka, 2006 UT 81, ¶¶ 97-100, 150 P.3d 480 (counsel's failure to subject prosecution's case to meaningful testing, reckless disregard for client's interests and forfeiture of proceedings may constitute constructive denial of counsel, resulting in presumptive prejudice).

3Compare Fisher v. Gibson, 282 F.3d 1283, 1297-1307 (10th Cir. 2002)(counsel's bolstering government's case, and failure to present a defense theory and hold prosecution to its burden of proof honestly did not reflect coherent trial strategy, but reflected a lack of preparation and diligence that undermined the functioning of the adversary system).

(R2014). Post-trial, counsel maintained they consulted with one expert – Dr. Garber, on herpes (R3717,3719). Dr. Garber denied being consulted about any issue in Boyer's case (R3724).

1. CJC Expert

The defense called Detective Holdaway as the first defense witness, leading him to testify about his wonderful qualifications and expertise in following the best evidence based CJC protocols to obtain accurate information from sexual abuse victims (R2660-72). This reinforced the jurors' tendency to trust the prosecution,[4] and forfeited Boyer's rights to confrontation and defense.[5]

The jurors never learned Detective Holdaway substantially deviated from NICHD protocols in the CJC interview, undermining the reliability of the interview and investigation. See Donald Bell report (R3534-3543), Declarations of Matt Davies, Ph.D., and Steven Gabaeff, M.D., (R3862, 3743) concurring in Bell's report.

Detective Holdaway never tested VM's memory function according to NICHD standards (R3537-38). He did not question VM's recall of detail so many years after the fact,

---

4 Jurors tend to trust the prosecution, given the prestige of the prosecutor's office and assumption it has ample resources to investigate properly. E.g., State v. Todd, 2007 UT App 349, ¶17, 173 P.3d 170.

5 Our Confrontation Clause was designed to provide the accused "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." Mattox v. United States, 156 U.S. 237, 242-43 (1895). It is one of multiple interrelated constitutional rights to defend. Crane v. Kentucky, 476 U.S. 683, 645 (1985).

or how she knew exactly how old she was and how many months and weeks transpired between the assaults, or how she could recall the exact chronological order of the assaults, in the written story and interview (R3538-39). Her claimed recall of such details from her childhood so many years later deviates substantially from normal memory function (R3537,3539,3743).

Throughout the CJC interview process (R3545-3586), he failed to explore the relationship between VM and Jann, and the potential for contamination of VM's claims that was obvious from the DCFS report he had before the interview (R3535-3598,3606).

Detective Holdaway omitted the portion of the NICHD process wherein he should have asked VM how other people found out about the abuse, whom she talked to, and what she said, to identify investigative leads to corroborate or dispel her allegations (R3538-41).

He apparently did not monitor VM when he left the CJC room for the break recommended by the NICHD protocol; for in violation of his explicit instructions at the outset of the CJC interview, VM grabbed her phone and texted for approximately eight minutes until Detective Holdaway returned, and he did not investigate this (R3540). See Motion for New Trial Conventionally filed Exhibit 16 (1st CJC interview) beginning at 11:06:56.

The defense closing emphasized Detective Holdaway's professionalism in contrast to conversations VM may have had with Jann, Jann's mother and the school counselor that were never detailed at trial (R2787-88). This does not justify characterizing counsel's failure to investigate and challenge Detective Holdaway's CJC interview and investigation as reasonable strategy. Counsel's failure to investigate with an expert precluded formulation of

strategy. Strickland.

Actual tactical decisions are reviewed for reasonableness, State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989); only "sound" trial strategy suffices under Strickland. Id. at 690-91. The defense argument about the unprofessional conversations that may have been conducted by Jann and the other people did not require portraying Detective Holdaway and his CJC interview as if they expertly comported with NICHD protocol. The defense that VM could not be trusted as a result of Jann's improper influence would have been far stronger with expert testimony explaining how Detective Holdaway failed to recognize VM's highly abnormal memory function in the letter she wrote with Jann the night before the interview and during the interview, and failed to follow through with NICHD-required investigation of VM's memory function and potential contamination.

There is a reasonable likelihood of a better result had the defense investigated with an expert. Rather than reinforcing juror tendencies to trust the State's team and lead detective, Todd, with an appropriate expert, the defense could have proved VM's memory process recorded in her story and the CJC interview was highly abnormal, that the CJC interview substantially deviated from the protocol and failed to explore VM's memory function and Jann's influence on VM and her claims, and that the investigative foundation of the prosecution's case was unprofessional, unreliable, and biased in favor of VM's unexplored claims (R3536,3541,3545-3588).

Prejudice was compounded because counsel allowed VM's written account into deliberations, and the prosecutor touted it as the account closest in proximity to the actual events (R2764-65). "[E]xhibits which are testimonial in nature should not be given to the

jury during its deliberations" because this gives them undue weight. State v. Carter, 888 P.2d 629, 643 (Utah 1995). The prosecutor's strong reliance on VM's written story (R2764-65), particularly in the absence of expert testimony illuminating the abnormal memory function reflected therein, confirms prejudice. See Farnsworth, *supra.*

*

The court ruled Boyer's claim that the CJC interviews should have been conducted differently failed to account for VM's age during the CJC interview, that counsel strategically opted not to introduce the CJC recordings to avoid showing a younger more sympathetic VM making the claims, and that counsel had the opportunity to cross-examine VM at trial. The court ruled Boyer failed to show prejudice, particularly because the jury had the opportunity to personally assess VM's credibility (R1790-91).

Boyer's claim was not that counsel were deficient for failing to introduce the recordings, it was failure to investigate with an expert.[6]

It is not possible to marshal evidence in support of the negatively-phrased finding Boyer's claim failed to account for VM's age. CJC Expert Bell's report did consider VM's age at the time of the interview, with regard to her memory function, and the sexual knowledge purportedly embedded in the supposed memories of a child between the ages of six and nine, when VM claimed to have been raped by Boyer (R3537,3539,3743). Bell found many aspects of Detective Holdaway's CJC interview and investigative process

6 While the recording did have valuable demeanor evidence (1st CJC recording beginning at 11:06:56 – VM's texting demeanor), assuming counsel strategically wished to avoid her youthful appearance on the recordings, the expert's testimony would have been equally effective with transcript of the interview.

professionally lacking because this case involved an older alleged victim making long-delayed allegations, and should have been investigated for contamination (R3536,3539,3541,3545-3588).

Legally, failure to investigate precluded valid strategy formulation. E.g. Lenkart.

The court's reliance on counsel's opportunity to cross-examine VM and the jury's opportunity to assess VM's credibility is legally incorrect. Failure to investigate and present evidence bearing on the State's witnesses' incredibility or corroborating the defense constitutes ineffective assistance if the overall context of the case indicates the omitted evidence reasonably may have influenced the verdict. E.g., State v. Templin, 805 P.2d 182, 187 (Utah 1990) (reversing rape conviction for ineffective assistance in failing to investigate and present witnesses whose testimony bore on consent, the disputed issue, and the credibility of the complainant). An appropriate CJC expert would have informed the jury that VM's claims, written with Jann present the night before and delivered at the CJC, deviated from real memory function, powerfully illuminating VM's incredibility and corroborating Boyer's testimony and defense that VM's claims were the untrue product of VM's relationship with Jann. Given the weakness of the State's case, Boyer was prejudiced.

2. Medical Expert

Counsel consulted and called no experts to challenge the Nurse Practitioner's opinion that VM's normal examination was consistent with her claims (R2616,2624,2636,2648). Counsel elicited Dr. Corwin's testimony that children frequently show no signs of being raped until after they make long-delayed allegations (R2583-84). Counsel repeatedly

reinforced the apparent scientific reliability of the prosecution's experts and case, forfeiting Boyer's constitutional rights to confrontation and defense. See, e.g. Mattox and Crane.

The Declaration of Steven C. Gabaeff, MD, FAAEM, FACEP, AMAAFC, explains, when female children between the ages of six and eight years are raped by men, experiencing "strong rips," bleeding and lasting pain (R2373-74), as VM claimed, this leaves scarring visible at age fourteen, VM's age during the examination (R3735,3737-3739). Children in the age range of six to eight years are not adept at masking pain and fear (R3736). "Pain from tearing of the genital tissues will last at least 7 days. Crying, emotional upset, pain with urination, blood on panties or bedding, fear, and aversion to new acts are predictable consequences from random sexual assaults." (R3736,3740,3739-3740,3742).

There is a reasonable probability of a better result absent counsel's deficient performance. Rather than receiving reinforcement of the State's ostensibly well-founded experts' testimony that VM's physical examination, showing no injury, and behavior as a child, showing no pain, fear or aversion of Boyer, were entirely consistent with her claims of brutal rapes (R2616,2624,2583-84), the jurors would have learned from appropriate expert testimony that the absence of physical signs of rape is inconsistent with VM's claims, and the State's case was scientifically implausible and untrustworthy (R3735-3739).

The court did not address this claim, but ruled generally that experts need not be called by the defense, that Boyer's counsel addressed Boyer's defense through experts, addressed the foundation for the State's experts, and pointed out weaknesses and flaws in the State's experts' testimony (R1790).

Defense attorneys must investigate with necessary experts, and failure to investigate

the physical and other evidence with a necessary expert precludes valid strategic decisions. Strickland, Lenkart, and Houskeeper, *supra.* Counsel's examination of the State's medical experts did not present Boyer's defense, it reinforced the State's case.

B. INEFFECTIVE ASSISTANCE: FAILURE TO INVESTIGATE DISCOVERY, PREPARE AND CONFRONT WITNESSES

1. Inconsistent Disclosure Stories

The reliability of child sexual abuse claims often focuses on the consistency of the initial disclosures. See, e.g., State v. Pecht, 2002 UT 41, ¶ 20, 48 P.3d 941. In the second trial, Jann testified that after VM repeatedly over a period of time said she had something to tell Jann without saying what it was, she finally disclosed Boyer's abuse when they were at Jann's home together and added details over time (R2493-95).

Jann's initial disclosure story to Detective Holdaway differed – that VM [redacted], and added that Boyer had done something to her (R3610).

VM provided a different initial disclosure story the jurors never heard –s he disclosed the allegations to Jann in specific detail at a restaurant after overhearing Jann talking to Jann's grandmother about Boyer and another woman, and realizing that VM was "not the only one" (R2161-62).[7]

---

7 In a recorded interview, Jann claimed VM was sitting in the back seat of Jann's car, and overheard Jann telling her friend that another adult friend, Julie Fox, was the one Boyer had "hit on" (R3661-3664), then VM began telling Jann for weeks she wanted to tell Jann something before finally telling Jann that Boyer had raped, sodomized and molested her (R3660-3667).

Trial counsel did not have this interview transcribed (R3722) and was apparently unfamiliar with it, arguing he had no notice of this 404(b) evidence of another molestation in discovery, and that a mistrial was required by VM's testimony whether the other person

In the midst of the second trial, trial counsel argued for impeachment of Jann's trial disclosure story with the one she told Detective Holdaway, arguing the evidence had nothing to do with Rule 412 (R2599-2600,2604).

The court ruled VM testified Boyer's abuse was what prompted her to disclose, and other things that may have been bothering VM would be excluded for irrelevance and prejudice (R2603-04).

The ruling was clearly erroneous and legally incorrect. Neither VM nor Jann testified Boyer's abuse prompted VM to make her allegations. Evidence is relevant if it has "any tendency" to make a fact "of consequence" more or less probable. State v. Alzaga, 2015 UT App 133, ¶50, 352 P.3d 107. The inconsistent disclosure stories were relevant; they increased the probability that VM's claims against Boyer were untrue, and were the product of Jann's influence on VM. Cf. id. (conversation bearing on identity of killer, central issue, was relevant).

The probative value of the inconsistent stories in confronting and cross-examining Jann and VM was high, as the significant conflicts in the initial disclosures tend to show the unreliable nature of the allegations. E.g. Pecht and Mattox, *supra*.

There was no risk of prejudice sufficient to outweigh the probative value of this important evidence. Cf. Alzaga (finding statement about identity of killer, while coarse, was not sufficiently prejudicial so as to outweigh the probative value of the evidence). The inconsistent disclosures could have been presented in clear and simple ways that neither

---

referred to by VM was a child or an adult (R2253-2265). The prosecutor maintained he did have notice of these facts, in the interview summarized above (R2253-2265).

confused the jury nor portrayed VM as sexually promiscuous – the type of prejudice normally disallowed by Rule 412. There was no need for a trial within a trial, as the whole point was impeachment, not to establish the truth of any version.

The court's ruling excluding Jann's first disclosure story and ruling denying the motion for a new trial (R2603-04, 1789-93) preserved that part of the claim under State v. Hansen, 2002 UT 114, ¶ 16, 61 P.3d 1062 (issue is preserved if court rules).

Assuming not, counsel's failure to proffer the relevant facts underlying the impeachment and confrontation argument in pre-trial 412 proceedings, as required by subsection (c)(1) of the rule, was deficient. E.g.. State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005 (recognizing duty to preserve claims). Counsel's failure to conduct the most rudimentary investigation by reviewing discovery (R2253-2265) precludes a finding of reasonable strategy, e.g. Lenkart, and their raising the issue mid-trial shows the strategy was to admit the evidence.

The Court should reject any claim of strategy based on counsel's mistrial motion and effort to keep the jury from hearing about Boyer's philandering, for such strategy was not investigated (R2253-2265), Strickland, or reasonable, Bullock. After Boyer's counsel opened the door with the defense opening statement that VM's allegations resulted from Boyer's purportedly long, difficult divorce (R2469), jurors heard Jann's testimony the marriage ended over Boyer's philandering (R2706-08). Evidence of Boyer's "hitting on" Jann's friend is cumulative. Assuming counsel wished to exclude the details about Boyer's philandering, this could have been accomplished by a motion in limine or agreement with the prosecutor,

particularly after the mistrial; Jann conveyed her version of events in the second trial without reference to Boyer "hitting on" her friend (R2493-95).

There is a reasonable probability of a better result absent this deficient performance. One need only imagine themselves in the radically different contexts of the various initial disclosure stories to appreciate their disparity, the likelihood that the State's key witnesses were not telling the truth, and the likelihood of acquittal had the jurors been properly informed.

2. Jann's Bolstering VM's Credibility

After Jann testified about being "floored" by finding the sheet and realizing VM was telling the truth, counsel moved for a mistrial for Jann's nonresponsive answer (R2522). Counsel argued Jann's comment came after the court had sustained multiple hearsay objections as to what VM had told Jann, and that the inference from her stated opinion of VM's credibility was that VM was telling her the truth about whatever she said (R2524). The court found the error harmless, struck the last sentence of Jann's testimony (R2506), and offered a curative instruction, reasoning that if the jurors found VM to be incredible,

> they're not going to believe anything she said, whether she said she's telling the truth or not telling the truth. If they find her to be credible then she's going to – then they might believe all of that.

(R2524-25).

This reasoning overlooked and would effectively swallow Utah R. Evid. 608 (b), which provides, "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." Striking only the last sentence of Jann's testimony

(R2506) was not an adequate remedy, as the entire vignette was designed to bolster VM's credibility and was inadmissible under 608(b). Compare State v. Stefaniak, 900 P.2d 1094, 1095-96 (Utah App. 1995) (reversing conviction for social worker's bolstering testimony about alleged victim's CJC demeanor under 608(b), because victim's credibility was key issue, there was no corroborative evidence of guilt, allegation was made months after alleged incident in "post-divorce turmoil" between victim's mother and defendant).

Particularly because the jurors were taught the absence of physical evidence was consistent with VM's claims of rape (R2616,2624), VM's credibility was the crux of the trial. Jann's orchestrated story of realizing VM's truthfulness was prejudicial, requiring a mistrial. Cf. Stefaniak, *supra*. The prosecutor relied heavily on this in his closing argument, citing the blue striped sheet as the first example of Jann bringing pieces of the puzzle that fit with VM's claims (R2759-60). This confirms prejudice. See Farnsworth, *supra*.

Trial counsel's objection and moving for a mistrial resulted in a ruling denying the motion and preserved the claim, as did final ruling denying the motion for a new trial (R1789-93). See Hansen.

Assuming not, given counsel's pretrial notice of Jann's persona as the skeptic of VM's claims, who came to believe through finding the sheet (R3642-3675), counsel were objectively deficient in failing to seek exclusion of this testimony pre-trial under 608(c), and in failing to argue the relevant law at trial. See Maese *supra*. The court recognized the error (R2506), and thus, likely would have excluded the evidence. As detailed above, Boyer was prejudiced.

3. Jann Always Home

Given the brutality of the rapes VM claimed, and their locations in the bedroom across from Jann's, in the family room with no doors, in Jann's and Boyer's bed, and in the shower, Jann's presence in the home was important defense evidence. At preliminary hearing, VM claimed that Jann was always home when VM showered at their home (R1923-24).

In VM's written story, VM said that after the last shower incident, she waited for "you" to come home (Trial Exhibit 12). At trial, Jann testified as if she knew that VM had showered while Jann was at one or more rehearsals (R2509). Trial counsel argued VM had testified Jann was always home during the showers (R2801), but deficiently had not elicited the evidence (R1923-24). Counsel's arguing the evidence he should have presented confirms his omission was not strategic. The prosecutor argued VM's letter mentioned Jann was gone, and argued Jann's testimony about being gone during the showers showed VM was truthful (R2766). This confirms prejudice. Farnsworth, *supra.* There is a reasonable probability of a better result absent the error, given the relative weakness of the State's case, *supra.*

4. Jann's Unsupported Claims of VM's Memories

Jann told the prosecution three things VM told Jann that convinced Jann VM was telling the truth: Boyer had a birthmark, moved his tongue in circular fashion during sex, and took a "long time to cum." (R3678-3679). Jann told the prosecution that she and VM would laugh and giggle through tense conversations about sexual details (R3678-79).

In the first trial, VM could not recall how Boyer moved his mouth during sexual activities (R2147) and answered that "it depended" how long it took Boyer to reach orgasm (R2152), but counsel omitted this from the second trial. Counsel omitted evidence that Jann and VM discussed the birthmark using that term (R3679).

There was no strategy advanced by omitting this important evidence of Jann's coaching VM with details to prosecute Boyer, VM's inability to retain them, and their inappropriate bond. The strategy was to show that VM and Jann could not be trusted. Addressing such topics as Boyer's herpes, VM's herpes claims, when VM grew pubic hair, the details of the claimed sexual assaults, her painful family problems, her mental health difficulties, her suicide attempt, her hospitalization, and her inconsistent statements she made about Boyer's supposedly forcing her to perform fellatio, counsel's cross-examination was not tailored to avoid offending the jurors. Thus, it would not be accurate to characterize as reasonable strategy counsel's failure to confront Jann's unfounded examples of VM's credibility. Cf. State v. Ott, 2010 UT 1, ¶¶ 34-39, 247 P.3d 344 (rejecting State's claim that failure to object to evidence was part of valid trial strategy).

Absent counsel's failure to present Jann's coaching and giggling conversations with VM about sex with Boyer, and VM's inability to actually retain or recall what Jann claimed VM had told her, there is a reasonable probability of acquittal.

5. Nosebleed Stories

As detailed *supra* at 8, VM and Jann told a variety of inconsistent nosebleed stories. Counsel deficiently did not cross-examine or argue the inconsistencies, including how Jann came to be sleeping in the bed wherein Boyer supposedly showed Jann the blood from his

nosebleed, where VM went, how VM could have been "gooshing" such a large quantity of blood without incurring any lasting injury or noticeable discomfort, or how VM did not recall and was not noticed to be bleeding so copiously.

There is no strategic justification for trial counsel's failure to introduce this key evidence supporting the defense that Jann and VM were working together to prosecute Boyer but could not keep their stories straight.

Absent these errors, there is a reasonable probability of acquittal.

6. VM's Inconsistent Statements

VM made many significantly inconsistent allegations the jurors never heard. See Motion for New Trial Exhibit 32 (spreadsheet of VM's inconsistent statements).

Post-verdict, the trial investigator interviewed VM's grandmother, who said VM told her Boyer "played with her" or "fore played her." (R3628,3633-3634). Counsel claimed the defense was told the grandmother was in Idaho prior to trial, and the trial defense investigator claimed he was trying to find her in Murray prior to trial (R3622-23,3716). Assuming the investigator was diligently seeking VM's grandmother and could not find her before trial (R3622-23), this evidence should be considered newly discovered evidence. Evidence qualifies as newly discovered and requires a new trial if it could not have been produced at trial with reasonable diligence, is not cumulative, and would probably produce a different result on retrial). Cf., e.g., State v. Edmunds, 73 P. 886 (1903) (where newly discovered evidence established that most incriminating witness gave untrue or mistaken testimony on an important point, new trial was required). In the event trial counsel did not conduct a timely investigation (R3622-23, 3716), this was another prejudicial instance of

deficient performance.

There is no strategic justification for counsel's failing to introduce all key evidence undermining the credibility of VM, Jann, and the State's case. Failure to investigate and prepare constitutes deficient performance. Strickland. The topics of cross-examination detailed above disprove any notion that counsel's strategy was to avoid an invasive offensive cross-examination. See Ott.

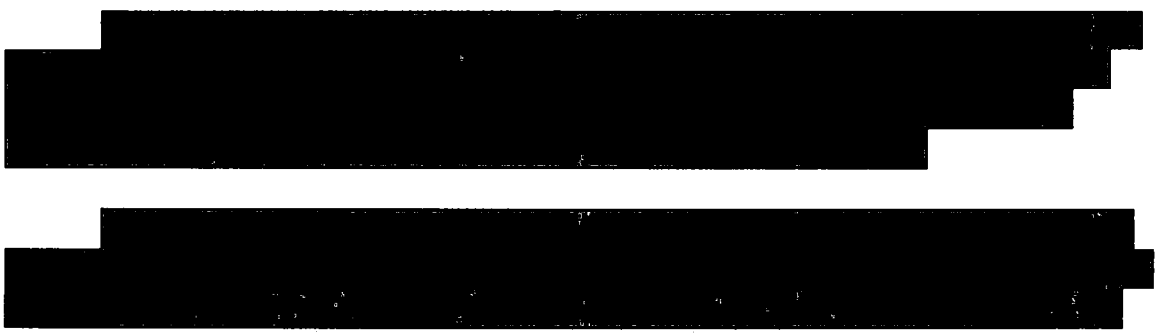
Given the weaknesses in the State's case, there is a reasonable probability of acquittal absent these instances of deficient performance.

C. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE: RULE 412 EVIDENCE

1. Prosecutorial Failure To Provide VM's Exculpatory Letter

Due process requires the prosecution to produce exculpatory and impeachment evidence in discovery. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963), United States v. Bagley, 473 U.S. 667 (1985); Utah R. Crim. P. 16(a) (4).

Boyer's counsel submitted discovery requests for police reports, witness statements and exculpatory evidence (R12-13,67,74,682,3384-85). The prosecution withheld from trial counsel a material and exculpatory letter written by VM that is inconsistent with the stipulation given to the jurors and her statements in two CJC interviews. VM's letter stated:



[redacted]

[Sic](R3902).

VM's letter is exculpatory:

[redacted]

8 [redacted]

Trial counsel maintain the prosecutors represented the only letter VM ever wrote was the story VM wrote accusing Boyer (R3716). The prosecution never disputed this, asserting it was too late to reconstruct miscommunications (R3894 n.18).

2. Counsel's Failure To Investigate The Facts

The defense filed no discovery motion for VM's letter described in Detective Holdaway's report they received on December 7, 2015 (R364). Counsel could not reasonably have rested on the prosecutors' representation that the letter did not exist (R3716); the report indicated it did (R3704). Counsel maintain they believed the report should have referred to JR as the office perpetrator (R3716). This does nothing to justify failure to investigate properly.

As discussed *infra* at 31-32, the record demonstrates counsel did not read discovery, never mentioned the office molestation claims, and did not accurately assert the facts underlying the 412 evidence, in the 412 litigation or at trial (R379a-b,2051-2089,3110-3117, 3144-3154,3207-3215,3216-3286,3825-3826).

The post-verdict interview of JR by trial counsel's investigator is the sum total of their investigation of the office allegations (R3623-3624). Despite the prosecution providing trial counsel with a complete police report regarding VM's allegations against JR and PR pre-

trial (R364), the investigator used a heavily redacted report and did not mention or investigate [redacted] (R3793-3780,3790).

The defense asked for the all DCFS reports in discovery (R75), but did not press for discovery or investigate the [redacted] listed in the DCFS form they received (R3597). Counsel maintain they always believed that [redacted] (R3716). This assumption provided no reasonable basis not to investigate. The dates of birth attributed to the [redacted] on the DCFS forms differed by roughly twenty-five years (R3597-99).

Their failure to investigate and properly litigate Boyer's claims was deficient performance under Strickland, not strategic. Identifying [redacted] and garnering all details was essential, so the stipulated facts about VM's false claims [redacted] were accurate, and so jurors could accurately determine Dr. Corwin's risks of child sexual abuse did not prove Boyer's guilt (R2576-78,2580-81,2583,2585-86).

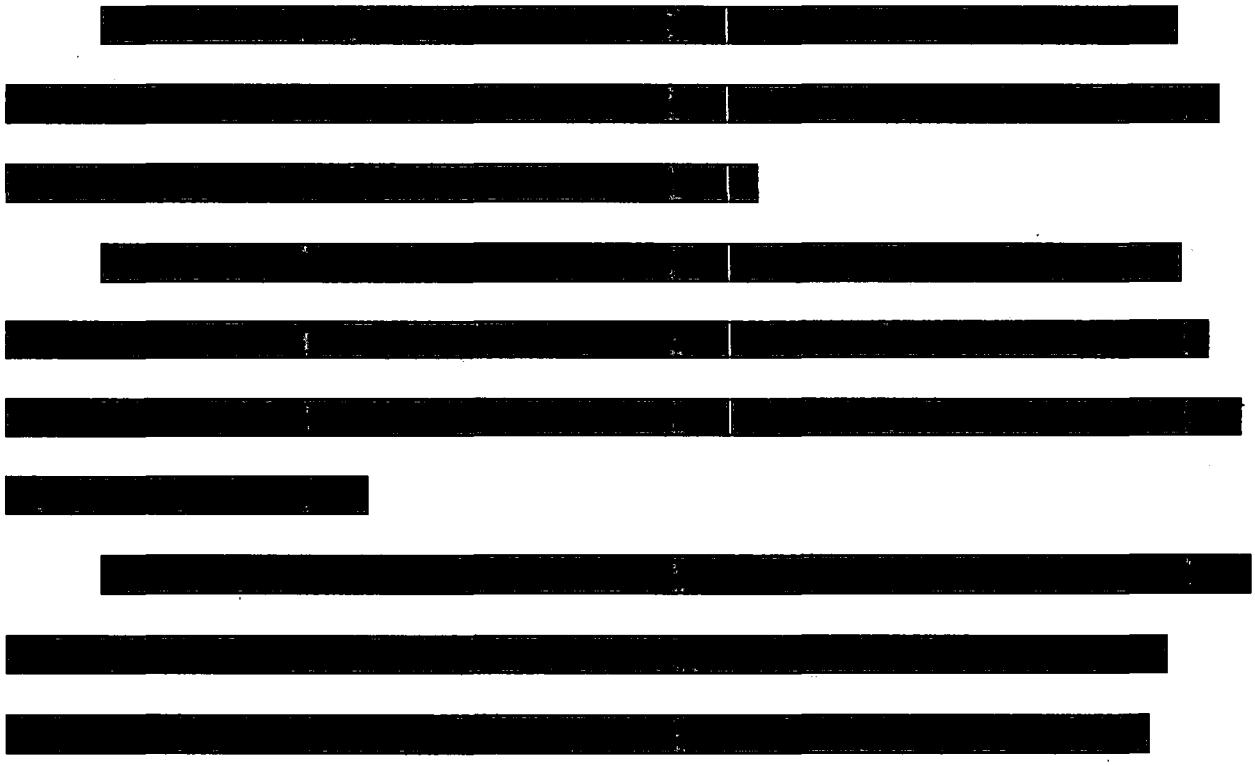
3. Prosecutorial Provision Of False And Misleading Information To The Court And Jury Without Intercession By Ineffective Counsel

A criminal trial should be a search for the truth, and prosecutors should be ministers of justice. E.g. State v. Saunders, 1999 UT 59, 992 P.2d 951. The prosecution's knowing use of misleading or false evidence or failure to correct false evidence violates a defendant's federal and state constitutional due process rights. E.g., Walker v. State, 624 P.2d 687, 690 (Utah 1981); Napue v. Illinois, 360 U.S. 264, 269 (1959). A conviction obtained by knowing use of false or misleading evidence is fundamentally unfair and must be reversed if there is

any reasonable likelihood that the evidence could have affected the jury's judgment. E.g. Walker, 624 P.2d at 690. Even if a prosecutor does not intentionally solicit false evidence, a defendant's due process rights are violated when the State leaves faulty evidence uncorrected. E.g. Napue, 360 U.S. at 269.

It is the State's burden to prove preserved claims of prosecutorial misconduct harmless beyond a reasonable doubt, with all reasonable doubts resolved against the prosecution. State v. Tarafa, 720 P.2d 1368, 1373 and n.21 (Utah 1986); State v. Ross, 2007 UT 89, ¶ 54, 174 P.3d 628.

At the 412 hearing, the prosecutor argued the allegations against Boyer involved such things as "penile response" and masturbation and a course of conduct showing VM's sexual knowledge that was nowhere explained by the 412 allegations, which were comparatively minimal (R2070-71).



[redacted] had not asserted the correct evidence in the 412 pleadings and hearing, and had promised JR's forceful testimony at trial without first investigating what JR would say. Counsel were in no position to strategize or negotiate for Boyer. Their performance was objectively deficient, not strategically justifiable. Compare Fisher.

After counsel entered into the 412 stipulation, the State expanded the scope of Dr. Corwin's expected testimony to include topics such as delayed disclosure and risks of child sexual abuse (R472-73). Trial counsel did not renew the motion to admit the 412 evidence in response to this shift in the State's position, and did not renew the motion to present

more 412 evidence when Dr. Corwin began testifying about the risks or behavioral characteristics of sexually abused children (R2577-79). This was objectively deficient, as the jurors had to know of all alleged perpetrators to accurately apply Corwin's risk testimony. Cf. State v. Marks, 2011 UT App 262, ¶¶ 71-74, 262 P.3d 13 (defense attorney must renew motion to admit evidence under rule 412 if events at trial might influence court to change pretrial ruling).

At trial, the prosecutor evoked Dr. Corwin's testimony that a risk of sexually abused children is misperception of conduct as sexual (R2579) and argued [redacted], showing her comportment with Dr. Corwin's risks of child sexual abuse, rather than proof of her making false claims of sexual abuse (R2815-16). Had the jurors learned of her office allegations that [redacted] the prosecutor could not have mischaracterized VM's claims against [redacted] as misperception and comportment with Dr. Corwin's profiling. Her [redacted] are more than likely false, *infra* at 35, and if they had been presented accurately, the jury would have learned of VM's pertinent character trait as one willing to destroy another person with devastating false claims.[9]

The prosecutor's closing argument, that the failure to charge [redacted] was not proof of a false claim, but was explained by the absence of Jann Boyer to make the case (R2811), implied the prosecution tried to make the case against [redacted]. Actually, the prosecution elected

9 Cf. State v. Martin, 2002 UT 34, 44 P.3d 805 (reversing felony sex convictions because court should have admitted evidence under rules 404(a)(2) and 405(a) and (b) that complaining witness had previously accepted a ride from a total stranger, in case wherein defendant claimed that the complaining witness had a prolonged consensual sexual encounter with him after meeting him for the first time outside a grocery store, and state presented evidence that she would not do such a thing).

not to investigate the [redacted] once the office allegations were made (R2021), or to record VM's changing and increasing [redacted], and instead called her therapist to work out her claims against Boyer and JR (R3075), where her claims would be privileged and inaccessible to the defense.

4. Admissibility of All 412 Evidence

The office allegation evidence was admissible under rule 412(b)(3) because the prosecution team's sending VM to her therapist to work out her claims against Boyer [redacted] (R3705), and never investigating the office allegations (R2021).disproves Detective Holdaway's testimony that he followed CJC protocol to immediately capture VM's uncontaminated claims (R2660-2670), and reflects the prosecution team's lack of confidence in VM and choice to cloak her growing list of inconsistent claims of [redacted] in therapeutic privilege (R3743). Evidence of prosecution team bias and compromising of evidence are admissible by virtue of Boyer's constitutional rights to confront and defend against the State's case and admissible under Rule 412(b)(3). See, e.g., Crane, *supra*, and Kyles v. Whitley, 514 U.S. 419, 446 (1995) (recognizing the "'common trial tactic of defense lawyers . . . to discredit the caliber of the investigation or the decision to charge the defendant.'" (Citation omitted). "To tell the jury that it may assess the product of an investigation, but that it may not analyze the quality of the investigation that produced the product, illogically removes from the jury potentially relevant information." United States v. Sager, 227 F.3d 1138, 1145 (9th Cir. 2000). See also Utah R. Evid. 608(c).

[redacted] was admissible under 412 (b)(3),

given the State's theory and Dr. Corwin's testimony suggesting VM's depression and suicidality after her delayed disclosure comported with the risks of sexually abused children (R2576,2577-78,2583,2585). Just as Dr. Corwin would need all relevant information to assess the probability that risks of sexually abused children in VM's history were truly the product of sexual abuse (R2584-86), the jurors needed all information to correctly apply Dr. Corwin's principles. Compare, e.g., State v. Ramos, 882 P.2d 149, 154 (Utah App. 1994) (recognizing that party may open the door to otherwise inadmissible evidence).

Under rule 412(b)(3), false claims of sex offenses are admissible if falsity is proved by a preponderance. E.g. State v. Tarrats, 2005 UT 50, ¶¶ 24-26, 122 P.3d 581. Post-verdict, [redacted], originally filed under seal on April 18, 2017, supplemented to the record March 18, 2018). VM's [redacted] (R3790-91).

VM's allegation involving her cousin KB was admissible under 412(b)(3) to confront Jann and VM about their starkly inconsistent initial disclosure stories, *supra.*

All 412 evidence was relevant under Utah R. Evid. 401, as it was probative of consequential facts, such as whether VM and Jann were telling the truth, whether VM's

personal problems were attributable to the conduct charged against Boyer or [redacted], and whether the prosecution team could be trusted to investigate VM and her allegations or to shield VM and her allegations from inquiry and documentation of their unreliability. The 412 evidence was all more probative than prejudicial, as it was essential to prove key issues including whether VM and Jann were telling the truth, whether Dr. Corwin's theory applied to VM's history and proved sexual abuse by Boyer, and the lack of trustworthiness and professionalism of the prosecution team and its investigation. The evidence all could have been presented in clear and simple ways that neither confused the jury nor intimated VM was promiscuous – the primary type of prejudice normally disallowed by Rule 412.

5. Prejudice

There is a reasonable probability of a better result absent counsel's deficient performance. Pre-trial, the court indicated its inclination to admit all 412 evidence (R2065-66), consistent with the law discussed above.

Largely as a result of the questions propounded by the defense, the State's representatives, investigation and case looked fully integrious, objective, scientific, thorough and reliable. Had the jurors known of the [redacted], inconsistent disclosure stories told by VM and Jann, VM's false and inconsistent allegations of [redacted], and the prosecution team's efforts to cloak VM's flow of new and unreliable allegations with therapeutic privilege, rather than properly documenting and investigating them through the

CJC process as Holdaway claimed he did, the jurors' trusting instincts and inferences would have turned to distrust of the prosecution team and reasonable doubt.

There is a reasonable likelihood of a better result had the jurors learned all the accurate facts, as the evidence they did not learn of showed Boyer should be held responsible under Dr. Corwin's risk analysis (R2584-86).

Prejudice is compounded by counsel's agreeing to withhold the 412 stipulation from deliberations to avoid "enhancing the testimony," (R2676), even after the court had promised the jurors they would be given the stipulation in deliberations (R2674), and despite its reflecting agreed upon facts key to the defense and was not a testimonial account by a witness. Cf. Carter, *supra.*

As detailed above, there could be at least "any reasonable likelihood" that the misinformation the prosecution left uncorrected or gave to the court during the 412 proceedings and then the jurors at trial ultimately affected the jury's judgment. Under Napue and Walker, a new trial is required.

6. The Court's Rulings

The court ruled incorrectly there was no prosecutorial misconduct (R1792) and that trial counsel's investigation of the 412 evidence and entering into the stipulation were effective, particularly given [redacted] unwillingness to cooperate pretrial or at trial, and inadmissibility of the evidence under rules 412 and 403 (R1790-91).

As detailed above, there was significant prosecutorial misconduct and counsel were in no position to make a strategic choice to enter into the incorrect stipulation. There is no

evidence to marshal in support of the finding that [redacted] was unwilling to cooperate with the defense prior to trial. The only contact with the trial defense team occurred after both trials (R3623-3624). Had counsel properly investigated, there was proof VM's allegations against JR were more than likely false (R3790-91). All 412 evidence was essential to a just outcome, and admissible under our constitutions and law discussed above.

D. DR. CORWIN'S UNRELIABLE TESTIMONY BOLSTERING VM'S CREDIBILITY

Dr. Corwin testified that with real sexual abuse he expects inconsistency in the allegations (R2580), and that sexually abused children often risk a pattern of a normalcy during and after molestation, long-delayed and inconsistent disclosures of molestation, followed by the onset of depression and suicidality (R. 2576-2578,2580).

The evidence of VM's history fell within Dr. Corwin's risks norms (R2329-31,2349-51,2625-2626,3593), all toward the desired inference the court drew (R2865) -- Boyer must have sexually abused VM because VM's history fit the profile of "risks" of a sexually abused child.

Counsel argued the potential need for a Daubert hearing (R353), but sought none. Mid-trial, counsel objected to Dr. Corwin's testimony, arguing she realized while preparing the night before he had no knowledge of the facts, and thus was not helpful to the jury as required by rule 702 and VM could explain her delayed disclosure (R2605-2607,2609). The court opined Corwin's testimony would help the jury, as it was indicative of child sexual abuse (R2607,2609). Counsel argued Corwin's testimony would violate State v. Rimmasch, 775 P.2d 388 (Utah 1989), because if he identified the behavioral characteristics of sexually

abused children and the prosecutor introduced such characteristics in VM's history, this would bolster VM's credibility, the primary issue (R2608-09).

The court ruled its role as to an expert's reliability was a "very, very low threshold" that was met, and that while Corwin could not testify about VM's credibility, it would be helpful to the jury for Corwin to testify in "generic terms about these sort of cases." (R2612).

This was legally incorrect. The court's role is to serve as the "gatekeeper to screen out unreliable evidence" by "confronting" proposed expert testimony with "rational skepticism." Advisory committee note to Rule 702. This gatekeeping function remains important, particularly in complex cases, wherein courts should assess the reliability and admissibility of each topic of expert testimony. See White v. Jeppson, 2014 UT App 90, ¶22, 325 P.3d 888.

Helpfulness to the jury does not establish admissibility of expert testimony absent proper foundation. E.g. State v. Lopez, 2018 UT 5, ¶¶ 11-35. Lopez reversed a murder conviction obtained with expert testimony on risks of suicide victims, to persuade the jury the deceased did not fit the behavioral profile in suicides. While that theory might be properly used to screen live people for risk of suicide, there was no foundation laid for using the theory to diagnose whether suicide occurred: proof of acceptance in the relevant scientific community, or proof of reliability of the principles, based on adequate data, and reliable application of the theory to the facts. Id.

Conversely to Lopez, the function of Dr. Corwin's testimony about risks of sexually abused children was to lead the jurors to conclude that because VM experienced risks of sexually abused children, she was molested (R2247,2466). Boyer, the person on trial for

molesting her, was the person who was prejudiced, for the prosecution's evidence was not compelling. Given the prosecutor's minimization of the [redacted] under Dr. Corwin's corresponding testimony (R2579-2580,2678), Boyer was the only one to blame for VM's comportment with risks of sexually abused children.

The State did not lay adequate foundation. Dr. Corwin testified his work was premised on the work of his co-worker and mentor, Roland Summit, "The Child Sexual Abuse Accommodation Syndrome," Child Abuse and Neglect, 7, 177-193 (1983), which Corwin described as listing common characteristics of sexually abused children (R2568-2569,2576-2580,2678). Summit's Child Sexual Abuse Accommodation Syndrome was never intended, and cannot be reliably used for diagnosing child sexual abuse. E.g. Myers, Expert Testimony In Child Sexual Abuse Litigation, 68 Neb.L.R. 1, 66-67 (1989). Utah law is consistent with this,[10] and recognizes delayed and inconsistent statements as indicative of unreliability, not "real" sexual abuse, e.g., Stefaniak, *supra* (finding delayed claim less reliable); State v. Robbins, 2009 UT 23, ¶ 17, 210 P.3d 288 (finding inconsistent statements unreliable). Many courts agree characteristics attributed to sexually abused children are too

10 E.g. Rimmasch, 775 P.2d 41-404 and n.13 (expert testimony on criteria used to profile sexually abused children is not inherently reliable under rule 702, as criteria are vague and over-inclusive); State v. Martin, 2017 UT 63, ¶31-32 (citing cases recognizing expert testimony about typical behaviors of sexually abused children tends to improperly influence juror assessment of witness credibility and is not scientifically reliable).

vague to be probative or used to prove or diagnose child sexual abuse, and are not accepted as reliable science in the relevant scientific community for diagnostic purposes.[11]

Consistent with trial counsel's argument that VM could explain her own delay in accusing Boyer and that Corwin's testimony would not be helpful to the jury (R2605-2607,2609), courts correctly reject expert testimony on why children delay making allegations and do not have perfect recall; lay people readily understand such issues. See Dunkle, *supra*, 602 A.2d at 836-38.

Dr. Corwin's testimony bolstered VM's credibility – his behavioral theory invited jurors to infer that her behavioral history circumstantially proved her claims true. This is clear from comparing Corwin's specific testimony that "real" sexual abuse involves inconsistent allegations (R2580), and a victim's inconsistent and delayed claims of sexual abuse and misperception of innocuous conduct as sexual abuse are risks of sexual abuse (R2579-2580,2678), with the evidence and argument that VM fit this profile (e.g. R. 2815-16). Compare Dunkle, *supra*.

Corwin's testimony was inadmissible under Utah R. Evid. 608(a). Our courts recognize expert testimony on the profile or symptomology of child sexual abuse victims bolsters alleged victims when it usurps the jury's role and goes beyond generalities about the

---

11 E.g., State v. Ballard, 855 S.W.2d 557, 562 (Tenn. 1993) (relying on Rimmasch to exclude such testimony as scientifically inadequate for admission in court, noting the "aura of reliability" and confusion of jurors caused by such testimony); Commonwealth v. Dunkle, 602 A.2d 830, 832-36 (Pa. 1992) (relying on Rimmasch to exclude such testimony, recognizing that introducing such testimony and then presenting lay witness testimony to show alleged victim's comportment with syndrome is scientifically unreliable;), superseded by statute, Commonwealth v. Carter, 111 A.3d 1221, 1224 (Pa. 2015).

witness's reputation for truthfulness. See State v. Hoyt, 806 P.2d 204, 211 (Utah App. 1991) (citing case law acknowledging that such expert testimony is recognized as bolstering); Martin, *supra.*

Given the dubious nature of the State's case, there is a reasonable probability of a better result had the application of Dr. Corwin's seemingly scientific principles not been delegated to the jury, who had no way of knowing they were given incomplete and inaccurate information about VM's history. Courts recognize the danger that jurors who are left with the vagaries of such expert testimony will infer that if an alleged victim has behavioral symptoms consistent with the expert testimony, the alleged victim has been abused, when this is not scientifically correct. People v. Bowker, 203 Cal.App.3d 385, 393, 249 Cal.Rptr. 886 (1988). Dr. Corwin's expert testimony prejudiced Boyer, even with the court – the court's belief in VM's allegations against Boyer, was confirmed by how VM's life had "worked out." (R2865), confirming the likelihood the jury was similarly misled. Cf. Sweeney v. Happy Valley, 417 P.2d 126, 130 (Utah 1966)(jurors are more likely than judges to be swayed by the improper evidence).

Counsel's objection and the court's rulings that the threshold to apply in screening expert testimony for reliability was "very, very low" and that Dr. Corwin's testimony met the threshold because it would help the jury (R2612) and final ruling denying the motion for a new trial (R1789-93) preserved the claim under Hansen, *supra.*

Assuming not, counsel were deficient in preparing the night before Dr. Corwin's testimony (R2605-2607, 2609), failing to file a motion in limine challenging Corwin's testimony with the relevant law, and failing to specifically object to foundational deficiencies

the unreliability of the proposed testimony under rules 608 and 702 and related law. E.g., Maese, Smedley, *supra.* Raising the important issue mid-trial was not strategic, but was the product of inadequate preparation. As detailed above, there is a reasonable probability of acquittal absent the deficient performance.

E. PROSECUTORIAL MISCONDUCT: VOUCHING WITH MATTERS OUTSIDE EVIDENCE IN REBUTTAL CLOSING

If a prosecutor's comments taint the fundamental fairness of the proceedings, this violates a defendant's right to due process of law. See, e.g., Darden v. Wainwright, 477 U.S. 168, 181 (1986). The test for prosecutorial misconduct in arguments requires consideration of whether a prosecutor drew the jurors' attention to improper matters, and whether jurors were probably influenced. State v. Troy, 688 P.2d 483, 486-87 (Utah 1984). If prosecutorial comments reasonably lead the jury to think the prosecutor is indicating a personal belief in witness credibility, this constitutes improper vouching. State v. Thompson, 2014 UT App 14, ¶ 52, 318 P.3d 1221. Vouching violates the defendant's rights to be tried on the evidence presented in court, and is highly prejudicial, given the danger the jury will abdicate its responsibility to determine the truth in reliance on the prestige of the prosecutor's imprimatur on evidence known only to him. Id.

After trial counsel argued VM had made a false claim with regard to [redacted] who was never prosecuted (R2802-03), the prosecutor argued that the absence of charges did not make the claim false, for there was no Jann Boyer in the [redacted] R2811). Trial counsel objected and argued the prosecutor violated the stipulation and argued facts outside of

evidence (R2811-2815). The court sustained defense counsel's objection, as there was no evidence as to what proof was unavailable in the [redacted] or why the DA's office did not charge JR (R2811,2815).

The prosecutor's sharing inside information with the jurors, that the absence of Jann Boyer was the reason the State did not charge the [redacted], referred to evidence the jurors did not have but that he, the venerable prosecutor, ostensibly did. This placed his imprimatur on Jann Boyer, and thereby on VM, as Jann's function in the trial was to bolster VM's credibility. His comment undermined the defense that VM's claims resulted from Jann's improper influence. This violated Troy and Thompson.

Boyer was prejudiced. VM's and Jann's intertwined credibility was the crux of the State's dubious case and Boyer's defense. The likelihood of prejudice from the improper argument is magnified by its timing, in rebuttal closing argument. See, e.g., State v. Kozlov, 2012 UT App 114, ¶ 276 P.3d 1207. Further, it appears that the real reason the [redacted] was not prosecuted was because the prosecution team lost confidence in VM, for when she reported additional allegations [redacted], rather than properly investigating VM's claims relating to [redacted] starting at the CJC, the prosecution team elected to send VM to her therapist, rather than the CJC (R3697-3714, 3743), facts suggesting that the prosecution's goal was to cloak, not make the [redacted]. Walker and Napue require reversal of convictions obtained through the prosecutor's misleading arguments.

The court's sustaining the objection and final ruling denying the motion for a new trial (R2811, 2815, 1789-93) preserved the issue under Hansen. Particularly given the prestige attendant to the office of prosecutor, Todd, and the likelihood the jurors were

looking to their trusted official for guidance in this case, Troy at 486-87, the State cannot prove this misconduct harmless beyond a reasonable doubt when all inferences are properly drawn in Boyer's favor, Ross and Tarafa.

Assuming the ruling did not preserve the claim, counsel was deficient in failing to argue vouching and inaccuracy of the improper argument in seeking a mistrial, e.g., State v. Maese, 2010 UT App 106, ¶ 13, 236 P.3d 155. As detailed above, there is a reasonable probability of acquittal absent the errors.

F. INEFFECTIVE ASSISTANCE AND PROSECUTORIAL MISCONDUCT: THE PENIS PHOTOGRAPHS

The prosecutor introduced four enlarged close-up color photographs of Boyer's genitalia (Trial Exhibits 14-17), arguing they depicted Boyer's birthmark VM recalled, and were physical evidence of Boyer's guilt, alleviating the jurors' need to decide who was telling the truth (R2763-64). He did not inform the jury the photos showed that Boyer had no moles where VM originally claimed he did (R2516-2519).

The defense argued but failed to introduce supporting evidence (R3679) that VM had discussed Boyer's birthmark with Jann but could not retain the details of this coaching, as VM never mentioned the birthmark (R2784-85).

The birthmark that was the centerpiece of the prosecution and defense arguments is on the front Boyer's thigh, and could readily have been displayed without genitalia photographs (Trial Exhibits 14-17).

The jurors never learned Boyer has no moles where VM originally claimed,[12] and no moles where trial counsel incorrectly suggested he did in cross-examining the detective (R2520) and in closing argument (R2785-86).

The prosecutor did not correct the evidence when trial counsel led Detective Holdaway to testify and argued as if Holdaway had found a mole or moles in looking at the photos after he took them (R2520, 2785-86), a position the prosecution abandoned after obtaining the photos and changing its factual theory from small moles on and near Boyer's penis to the "large mole," or birthmark on Boyer's thigh (R3115). The birthmark measures a bit over 1 inch by ½ inch (R3774) and does not match VM's description of circular moles smaller than a shirt button (R3748-49).

What Detective Holdaway's report and trial counsel's examination of him suggested to be a mole, near Boyer's ring fingertip on his left side in Trial Exhibit 15 (R3756), may be lint, a coalescence of pubic hair, a shadow of something else. That there is no mole at that location is clear from the exhibit that was given to the jurors covered with a post-it note by the prosecutor, purportedly "for propriety" (R2764), when the post-it note is removed (R3741,3762 and conventionally filed Exhibits 21 and 22 to the motion for a new trial). The absence of moles is also clear when the area is shaved (R3742,3778,3781,3787-3788).

---

12 In VM's interview with Sergeant Jack of the DA's office on July 15, 2013, she told him she thought Boyer had two brown moles that were smaller than a shirt button and slightly larger than a pinhead, one partly on the top of the base of his penis where it connects to his body, and one about an inch above and to the right of his penis and to her left as she was facing Boyer. She said she could see the moles through his pubic hair and could not remember any other moles or marks (R3748-3752).

The State provided the recording of this interview to the defense in discovery on July 23, 2015 (R50).

Despite having a photograph showing that there were no moles where VM originally claimed and where defense counsel suggested and argued, the prosecutor did not bring this to the jury's attention, but instead covered that photo with a post-it note "for propriety" during his closing argument, wherein he argued VM remembered two moles or some kind of mark on his body that matched Boyer's birthmark on his thigh, given her age when she first saw it (R. 2763-64). He argued the jurors could use this physical evidence instead of throwing up their hands in indecision because it was just VM's word against Boyer's (R2763-64).

The genitalia photographs should never have been taken in the first place. Citing Utah R. Crim. P. 16 and State v. Easthope, 668 P.2d 528 (Utah 1983), the State moved for a court order requiring Boyer to submit to photography of his genitals, asserting VM said before preliminary hearing that Boyer had a "mark near his genitals" and said after preliminary hearing that Boyer had two moles that were larger than a pinhead but smaller than a shirt button -- one next to his penis on the left side and one near the base of his penis (R54-56).[13]

As Easthope recognizes, Rule 16 gives counsel the opportunity to bring constitutional challenges to court orders in advance of their issuance. Id. 688 P.2d at 532. There is a heightened privacy interest in the body, which requires heightened proof of probable cause – clear indication that evidence will be found. E.g., State v. Rodriguez, 2007 UT 17, ¶¶24-25 156 P.3d 771.

Boyer's counsel failed to investigate the law or physical evidence, assert his

13 VM actually asserted one mole was on Boyer's right side, and one on the top of his penis where it connected to his torso (R3748-3752).

heightened privacy interest, argue the State had not met the heightened standard of probable cause, or inform the court there was in fact no evidence of moles matching VM's specific recorded claims. Counsel's performance was objectively deficient under Strickland and Lenkart, requiring investigation of the facts and the law, and Smedley and State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989, requiring advocacy of the law.

After obtaining the photos of Boyer's genital area, which did not match VM's claims, in opposing the motion to suppress the genitalia photographs premised on the concern VM would make a suggestive photo identification at trial, the State detailed VM's claims and then misinformed Judge Lindberg Boyer had a "large mole" consistent with VM's description (R3115). The large mole contention contrasted with the original motion for photography (R54-56), Sergeant Jack's recorded interview (R3687-3694), and Detective Holdaway's report (R3707-3708), none of which mention of a large mole or the birthmark on Boyer's thigh, and all of which asserted VM's claims of two moles smaller than a shirt button on the upper base of base and next to Boyer's penis. Judge Lindberg relied on the prosecution argument in ruling the photography evidence was "highly probative and corroborative of the victim's statements regarding identifying characteristics" in denying the defense motion (R1965-66).

Counsel were deficient in failing to maintain and augment original counsel's argument for exclusion under rule of evidence 403 (R58-59). Cf. State v. Met, 2016 UT 51, ¶¶ 89-90, 388 P.3d 447 (admissibility of even gruesome photographs now assessed under plain language of rule 403). Prior to trial, the prosecution began taking the position that Boyer had a "large mole" consistent with VM's claims (R3115). The only "large mole" was the birthmark on Boyer's thigh. The photographs of Boyer's genitalia made no fact of

consequence more or less probable, and thus were irrelevant under 401.

Assuming relevance, the prejudicial impact of the photos far outweighed any probative value. The photographs depict Boyer's flaccid penis stretched out very small and thin, next to a ruler, and/or taken from angles that do not depict the areas where VM originally claimed to have seen moles, and do not depict the birthmark (R3783- 3784). The photos suggest Boyer's penis is evidence of a crime that was properly photographed next to a police measuring device, in contrast to his presumption of innocence. The photos were apparently staged to bolster the Nurse Practitioner's testimony that a full grown man can repeatedly and violently rape a six to eight year old girl, causing her to rip and bleed, without leaving any physical damage. Exhibit 14, showing Boyer has no moles where VM claimed, showing Boyer's penis's natural girth (albeit when flaccid), is the only one the prosecutor covered with a post-note "for propriety" (R2764). Compare R3741, 3762 and conventionally filed Exhibits 21 and 22 to the motion for a new trial with 3783- 3784. Counsel's failure to press for exclusion under rules 401 through 403 was deficient under Smedley and Moritzsky, *supra.*

Assuming the photographs were properly taken and admitted, counsel should not have misinformed the jurors Boyer had a mole where VM recalled, but have informed the jurors of VM's original recorded claim as to the location of the moles, shown the jurors that Boyer had no moles where she claimed to recall them, and argued the photograph the prosecutor covered with a post-it note actually proved that Boyer had no moles where VM claimed and contrasted with the other photos wherein Boyer's penis is stretched out thinner. Counsel should have argued to the jurors the genitalia photos were staged. And counsel

should have introduced evidence Jann and VM discussed Boyer's birthmark (R3679), rather than arguing without supporting evidence that Jann must have told VM about the birthmark that VM never mentioned (R2784-85). These failures violated Strickland, which requires counsel to investigate, prepare and present the defense.

Failure to investigate the facts and law precludes a finding of trial strategy. E.g. Strickland. Contrary to counsel's post-trial position (R3715-20, 3726), they began representing Boyer in time to oppose the taking of the genitalia photographs (R63), and did not make a strategic choice to allow the admission of the photographs because the birthmark was so exculpatory. Counsel opposed the admission of the photographs (R85-86, 116-121) in a motion Judge Lindberg found factually and legally baseless (R1965-66).

Actual tactical decisions reflected in the record are reviewed for reasonableness, e.g. Bullock, *supra.* As detailed above, there was no strategic reason to give the jurors the inflammatory penis photos and misinform them Boyer had a mole VM recalled, particularly after the prosecution began taking the position that Boyer's birthmark was what VM recalled (R3115), as the birthmark was easy to display without exposing Boyer's genitalia.

There is a reasonable probability of a better result absent counsel's deficiencies. As the prosecutor argued, the mole evidence, albeit very misrepresented and misunderstood by the jurors and defense counsel, appeared to be physical evidence that alleviated the need to decide who was telling the truth (R2763-64). The prosecutor's heavy reliance on this evidence confirms its prejudicial nature. See Farnsworth, *supra.* The photographs, both with and without the ruler, likely supported the notion that Boyer could have raped VM repeatedly without leaving lasting damage, and made Boyer's penis look like evidence of a

crime. Had the jurors not been tainted by the photographs, and/or had counsel informed them of the prosecution's staging of the photographs and VM's inconsistent statements, their trusting inferences reasonably would have shifted to distrust.

Trial Exhibit 15, combined with counsel's cross-examination of Detective Holdaway and counsel's closing argument, misled the jurors to believe that Boyer had at least one mole located where VM claimed to recall from her childhood molestations, when in fact the purported mole was not a mole and was on the wrong side of Boyer's body compared to VM's original claims.

As in Fisher, counsel's haphazard incrimination of Boyer is not honestly viewed as strategic, and requires a new trial. The prosecution's failure to provision of and failure correct misinformation could have influenced the jury's judgment, requiring a new trial under Napue.

G. FAILURE TO INVESTIGATE AND ADVOCATE 14(B) ISSUES WITH EXPERT ASSISTANCE

1. Failure To Investigate With Experts And Seek 14(B) Subpoenas

[redacted]

[redacted]

[redacted]

14 Compare State v. Cardall, 1999 UT 51, 1999 UT 51, ¶¶ 27-34, 982 P.2d 79 (tacitly finding qualifying condition in holding defendant was entitled to *in camera* review of school psychological records of alleged victim in support of his defense that alleged victim had a propensity to lie and had made a false claim of attempted rape by a janitor), with State v. Worthen, 2009 UT 79, ¶¶ 14-15 and 39 n.8., 222 P.3d 1144 (finding qualifying condition in requiring *in* camera review of records for defendant's daughter's hatred of and frustration toward her parents and consequential motive to fabricate claims of sexual abuse).

[redacted]

[redacted]

[redacted]

[redacted]

15 Cf. State v. Martin, 1999 UT 72, ¶ 19 and n.3, 984 P.2d 975 (trial court's sealing of privileged documents and labeling them "Personal and Confidential" after *in camera* review was inappropriate, state should have been required to create a log and index of privileged documents so defense could identify and seek permission to access them during the trial as they became material).

[redacted]

[redacted]

[redacted]

16 [redacted]

[redacted]

II. DISQUALIFICATION OF TRIAL COURT

At sentencing, after telling VM he believed every word she said, lauding her heroism for enduring the invasive medical examination and arduous prosecutions, and expressing his "absolute respect" and "absolute admiration," the judge told VM she would never have to look back again and that while he wished he could do more for her, he would end the need for her to think about Boyer (R2865-66). He reiterated this when he told Boyer he was not a problem VM would "ever have to think of again" (R2867).

Boyer moved for recusal, as the pledge to end the need for VM to think of Boyer again was impossible to keep without denying the forthcoming motion for a new trial. The judge's belief in VM's every word suggested Boyer could not establish prejudice, as the convictions hinge on her testimony (R3331-3348).

The court declined to recuse (R767) and the reviewing judge affirmed, ruling there was no extrajudicial source for the trial judge's opinions (R769-771), his comments did not reflect "'a deep-seated favoritism or antagonism that would make fair judgment impossible'" (R771, quoting Liteky v. United States, 510 U.S. 540, 543-56 (1994), and the judge's belief in

VM's every word would not necessarily impair his ability to assess whether errors justified a new trial (R772). The reviewing judge reasoned that motions for a new trial by design are to be heard by trial judges, and that Boyer had a right to the appeal he would "no doubt" file – presaging the denial of the motion for a new trial (R772).

A. THE TRIAL COURT WAS ACTUALLY AND APPARENTLY BIASED.

"Nothing is more damaging to the public confidence in the legal system than the appearance of bias or prejudice on the part of the judge." State v. Gardner, 789 P.2d 273, 278 (Utah 1989). Accord Code of Judicial Conduct Rule 2.11 (requiring judges to disqualify themselves if their impartiality might reasonably be questioned under a nonexclusive list of factors). The service of a "competent person ... authorized by law to determine the questions" is required by our constitutions in criminal cases. Christiansen, *supra*

Under Utah law, impartiality is assessed from the objective perspective of the average person. State v. Van Huizen, 2017 UT App 30, ¶ 20, 392 P.3d 933. Under federal law, if there is an impermissible risk of prejudgment or actual bias or temptation leading away from balanced judging, for an average judge in light of the case context and human weakness and normal psychological tendencies, due process requires disqualification. See Caperton v. A.T. Massey, Inc., 556 U.S. 868 (2009); Williams v. Pennsylvania, 15-5040 (June 9, 2016).

Recusal may require proof of an extrajudicial source of bias – something the judge did not learn in adjudicating the case. E.g. Liteky v. United States, 510 U.S. 540, 543-56 (1994). Whether the source of bias is extrajudicial is only one factor to consider. Id. at 554-55. Judicial comments require disqualification when they reflect that fair judgment cannot

be had due to deep-seated favoritism or antagonism. Id. at 55. Accord In re Young, 984 P.2d 997, 1007 (Utah 1999) (A "feeling of ill will" or favoritism toward a party constitutes actual bias).

Under Code of Judicial Conduct Rule 2.10(B), for judges are forbidden to,

> [i]n connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

The court's pledge to make things so VM will never have to look back or think of Boyer again and proclamation of belief in every word she said, despite her inconsistent statements, in her claims of vile and horrific sexual abuse by Boyer, violated Rule 2.10(b), establish favoritism toward VM and thus the State antagonism toward Boyer, and prove impermissible actual bias. Compare Liteky at 1158 (court's rulings, admonishing counsel and witnesses, and conducting the trial did not suffice to establish deep-seated antagonism or favoritism) and Fullmer v. Fullmer, 2015 UT App 60, ¶ 14 and 16, 347 P.3d 14 (judge called expert credible, but qualified this by saying he did not always side with her and had no preconceived ideas about her report) with State v. Anderson, 2004 UT 7, 82 P.3d 1134 (juvenile judge's federal lawsuit impugning director of Guardian ad Litem Office and blaming of attorneys from the GAL and AG's offices, displayed actual bias).

Due Process required the court's disqualification, as an average jurist who had expressed in open court belief in every word VM said about the horrific sexual assaults she alleged against Boyer, opined her suffering was heroic, and committed to her in open court that while he wished he could do more to help her recover, he would make it so she would never need to look back or think of Boyer again, would be tempted to adjudicate the motion

for a new trial and related pleadings to keep that commitment and avoid the need for her to testify in a third trial. Compare Caperton[17] and Williams,[18] *supra*. An objective member of the public would not expect a judge who made such statements to preside over the motion for a new trial and related proceedings impartially, requiring disqualification. See Anderson, 2004 UT 7, *supra*.

B. BOYER WAS PREJUDICED.

The service of the biased judge constitutes structural error, requiring presumption of prejudice, as a biased judge affects the fundamental fairness and structural integrity of the proceedings in ways that may defy harmless error analysis. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991).

Assuming a need to prove prejudice, this is proved through abuse of discretion, Neeley, 748 P.2d 1091, 1094, Alonzo, 973 P.2d 975, 979, proof Boyer's substantial rights were affected, or a reasonable likelihood of a more favorable result absent the error, e.g.,

---

17 In Caperton, the Court found that an appellate court justice should have recused himself rather than presiding over an appeal wherein the justice voted with the majority to reverse a $50,000,000 verdict against a corporation, when the chairman of the board and officer of the corporation had contributed significant sums to the justice's political campaign.

18 In Williams, a district attorney approved a prosecutor's decision to seek the death penalty, and some twenty-six years later, this same person, acting as the chief justice of the state supreme court, refused to recuse himself or to refer the recusal motion to the full court, when the defendant's successor post-conviction case was before the court on appeal from the lower court's ruling granting a new penalty phase. The court found that the justice may have felt a subconscious desire to preserve the prosecution's success that was set in motion by his approval of the death penalty decision. Id. at 5-8. The Court held there was an impermissible risk of bias in the appellate performance of the justice that stemmed from his having made the critical decision in the original capital trial. Id. at 12-14.

Alonzo and State v. Gardner, 789 P.2d 273, 278 (Utah 1989). Abuse of discretion occurs when a judge exceeds the relevant range of discretion, State v. Cruz, 2005 UT 45, ¶27, 122 P.3d 543, and encompasses legal errors, Barrett, 2005 UT 88,¶¶ 15-17.

The judge abused and exceeded his discretion in pledging to VM he would make it so she never had to think of Boyer again, in the course of proclaiming to believing her every word and calling her a hero who had earned his absolute admiration and respect. This did not square with the court's duty to adjudicate the case impartially. Rule 2.10(B), *supra.* This proves prejudice under Neeley and Alonzo.

Because the biased and apparently biased trial court was the only decision maker in the motion for a new trial and related proceedings, this increases the likelihood of prejudice in post-trial rulings. Compare Van Huizen, ¶¶ 57-59 (prejudice from apparent bias is more likely to exist when there is only one apparently biased decision maker and no insulating jury) with Alonzo, 973 P.2d 95, 979-80 (prejudice less likely because untainted jury made ultimate decision).

As detailed throughout this brief, Boyer's substantial rights were affected by the ongoing service of the court, and there is a reasonable probability of several more favorable results absent the biased and apparently biased court's continuing to preside. This confirms prejudice under Neeley, Alonzo, and Gardner.

The court's restitution rulings exemplify the court's keeping its pledge to VM that she would not have to look back or think of Boyer, actual bias and prejudice, assuming prejudice were necessary to prove.[19]

---

19 This Court reviews entitlement to a restitution hearing is a question of law, for

The court ordered a restitution hearing would be set (R1231) and then denied Boyer a restitution hearing, purportedly granting VM's motion to strike Boyer's restitution objection, and ruling Boyer's objection was untimely under State v. Weeks, 2002 UT 98, 61 P.3d 1000 (R1500). Boyer had statutory, common law, rule based and constitutional due process rights to a restitution hearing,[20] and timely asserted them three times before any specific amount of restitution was finally ordered by the court (R813-14,2923-2924,2931). VM never moved to strike any of Boyer's objections, and conceded Boyer was legally entitled to a restitution hearing to challenge prospective restitution (R916). Weeks held that the defendant, who requested a restitution hearing after sentence was imposed, received the full hearing to which he was entitled when the court held a hearing wherein Weeks could have presented evidence and argument to contest the restitution award imposed at sentencing. 2002 UT 98, ¶¶ 26-27. Weeks does nothing to justify denying Boyer a restitution hearing.

The court ordered $9,632, the total of estimates VM's counsel provided in a preliminary email to the presentence report author, including expenses unrecoverable in restitution, such as thirty hours of meetings with private attorneys and prosecutors, court attire, and lunches (R1499-1500,3320-3321,3329). See Utah Code Ann. § 76-3-201(11) and Utah Code Ann. § 77-38a-102(6), allowing restitution for expenses "reasonably incurred as a result of participation in criminal proceedings." There were no receipts, let alone an evidentiary hearing to provide the requisite reliable evidentiary basis for the award, e.g.

---

correctness, and reviews restitution orders for abuse of discretion. See, e.g., State v. Breeze, 2001 UT App 200, ¶ 5, 29 P.3d 19. Boyer preserved his restitution claims (R1499-1501,1503-04,1791-93,1849).

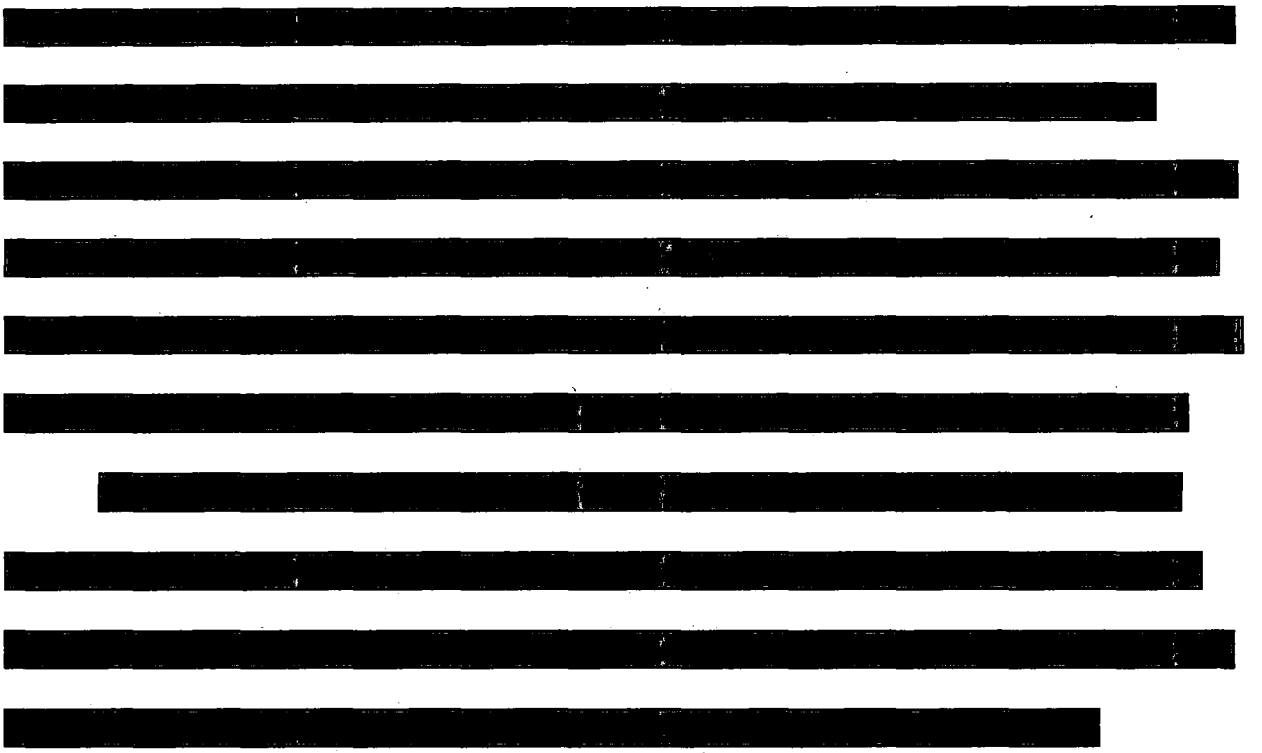
20 See Utah Code Ann. §§ 77-38a-201(2)(c), 77-38a-302(4), Utah R. Crim. P. 21A(c); Breeze, *supra* (reversing trial court's refusal to hold full and fair restitution hearing).

Weeks, ¶26.

The court ruled AP&P itemized these expenses in the presentence report, the court had ordered this restitution at sentencing with the proviso that VM could provide supporting invoices, and Boyer did not object at sentencing, but objected to that order post-sentence (R1499-1500). AP&P and the presentence report itemized nothing, the court ordered no restitution at sentencing but left it open, and Boyer's post-sentencing objections were to restitution to be ordered, until the court said it would order prospective restitution and Boyer objected (R654,2864,2867,813-14,2923-2924,2931,3312).

[redacted]

21 [redacted] In contravention of Boyer's basic due process rights in this case where liberty was at stake, Christiansen, the court denied Boyer's requests for discovery and a hearing regarding waiver of privilege in the issuance of the stipulated subpoenas (R1075-1077,1252-53,1602,1792, 1849,2989), along with all requests for evidentiary hearings (e.g. R. 813-14,1068-79,1133-37,1564-65,1601-04,2964-65,2989,3416,3421).



the prospective restitution award required an evidentiary hearing and the entry of detailed findings regarding proximate cause and treatment needs. Prospective restitution awards must account for the extent to which the defendant or someone else proximately caused the need for treatment, cannot be premised on speculation, but must be "firmly established in the record", *viz.* with expert testimony on future treatment needs premised on history of past treatment. E.g. State v. Ogden, 2018 UT 8, ¶¶ 54-65 (reversing prospective restitution award for inadequate proof defendant was proximate cause of mental health issues, inadequate proof of prospective treatment needs).

The court ruled money posted for bond by Boyer's mother's trust (R24-31,186-87,190), would be deemed Boyer's for payment of restitution under Royal Consulate of the Kingdom of Saudi Arabia v. Pullan, 2016 UT 5, 373 P.3d 1283 (*per curiam*) (R1500). Royal Consulate addresses forfeiture of bond money for non-appearance under Utah Code Ann. §

77-20-5, and does not justify retaining bond money to pay the defendant's restitution obligations. Utah Code Ann. § 77-20-4(5) recognizes expressly that it is only when bail is "posted by the defendant" that it may be applied by the court to the defendant's restitution and fines. Cf. Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another). Our courts apply the plain language enacted by the legislature. State v. Davis, 184 P. 161, 165 (Utah 1919). Assuming the statutory language were ambiguous, the legislative history indicates that the legislature intended that only the cash bail posted by the defendant would be held for accounts receivable and restitution.[22]

On March 15, 2017, the court signed an order that had been proposed and e-filed on February 14, 2017, which released $100,368 of the cash bail to the Boyer Survivor's Trust, and that over the objection of the Trust and Boyer, $49,632 would be retained by the clerk of the court pending a restitution hearing (R1492-93). The retention of the portion of the proposed order referring to a restitution hearing appears to be erroneous, as it conflicts with the detailed minute entry ruling vacating language referring to a "pending restitution hearing" the court believed it had already signed (R1499-1502). The court docket shows the court released $49,632 to VM's counsel on March 22, 2017. Following the entry of these orders, at oral argument on the motion for a new trial counsel for Boyer reiterated his many requests for a restitution hearing and argued that VM's mental health records would

22 Transcripts of the floor debates, in the addendum, were provided to the trial court (R2918) and supplemented to the appellate record by order of this Court dated March 8, 2018.

be required to inform the inquiry (R3075). The court denied the motion for a new trial and denied 14(b) subpoenas for any such records (R1789-93). The court later made docket entries responding to Boyer's efforts to obtain a specific ruling on reconstruction of the record that the order denying the motion for a new trial resolved all issues (R1849).

The court's restitution rulings demonstrate ongoing advocacy for VM at the expense of Boyer's fundamental rights provided by our constitutions, code, rules and case law. There is a reasonable probability of a more favorable result on the restitution issues had the judge recused or been disqualified, as a fair judge who was not advocating for VM would not have committed the many factual and legal errors the trial court did. Boyer must have a new trial with an impartial judge and if convicted, a full and fair restitution hearing.

III. REFUSAL TO REPLACE SHREDDED RECORDS

The court initially issued subpoenas to reconstruct the shredded [redacted] (R3250-58), but after further litigation (R971-977,1034-36,1049-60,1078-84,1763-1808,1841-42) ruled:

(R1814). Boyer unsuccessfully moved this Court to supplement the record with the shredded records.

There is no way to marshal evidence supporting the court's ruling as to the contents of the records, because the court shredded and refused to replace the evidence Boyer cannot obtain. This Court should not rely on this ruling, given the volume of records the court reviewed (R309), the absence of briefing to guide its *in camera* review, the court's inability to recall the details of the *in camera review* and related orders (R2333), and the court's pledge that VM would never have to think of Boyer again (R2865-67).

As detailed *supra*, Boyer was entitled to the records through 14(b) subpoenas regardless of privilege, which was waived.

The court's shredding of records and refusal to replace them violated constitutional law mandating an adequate record of all proceedings in our courts of record. See, e.g., Christiansen, *supra*, and Birch, *supra*.

Boyer's rights to appeal, Constitution of Utah, Article I § 12, and to effective assistance of counsel on appeal, e.g., Evitts v. Lucey, 469 U.S. 387, 391-97 (1985), require a complete record , for if counsel provides an incomplete record, the courts may disregard even meritorious claims. See, e.g., Horton v. Gem State Mut., 794 P.2d 847, 849 (Utah App. 1990).

Reversal is required by deficiencies in the record precluding proper appellate review of claims. See State v. Taylor, 664 P.2d 439, 445-47 (Utah 1983) (reversing conviction because voir dire transcript contained many inaudible portions, precluding proper adjudication of Taylor's claim of inadequate voir dire). The unavailability of records precludes complete adjudication of Boyer's claims of ineffective assistance of counsel in failing to investigate the [redacted] with subpoenas and experts, and of his

entitlement to post-verdict subpoenas. The records ostensibly contain VM's [redacted], aiding in full resolution the judicial disqualification and restitution claims. Because Boyer's appellate issues cannot be properly adjudicated absent the records, reversal is required. Taylor.

CONCLUSION

Cumulative prejudice from the foregoing errors undermines confidence in the verdict. The Court should reverse and remand for a new trial with a new judge and observance of all of Boyer's fundamental rights to due process of law.

Respectfully submitted this 11th day of April, 2018.

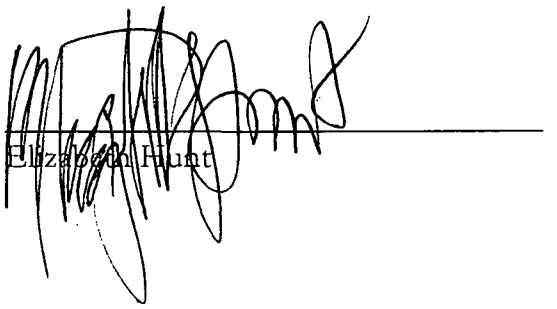
Elizabeth Hunt
Counsel for Mr. Boyer

CERTIFICATE OF COMPLIANCE

All portions of the brief to be counted under Utah R. App. P. 24(g)(2) contain a total of 20,000 words, complying with the Court's order of April 9, 2018.

Consistent with Rule 21, a public brief deleting all non-public information is filed herewith.

Respectfully submitted this 11th day of April, 2018.



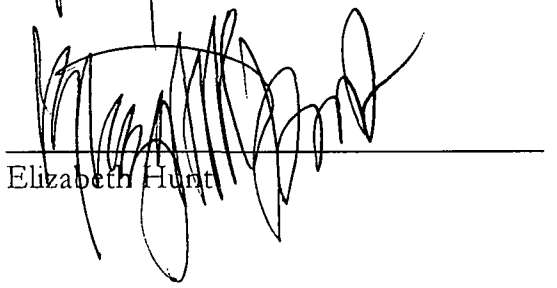
Elizabeth Hunt

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of May, 2018, I caused Orange Legal to mail, first class postage prepaid, two true and correct copies of the foregoing and the addenda, one copy of the public brief and addenda, and a PDF disk containing true and correct copies of the nonpublic brief and addenda, to the Criminal Appeals Division of the Utah Attorney General's Office, 160 East 300 South 6th Floor, P.O. 140854, Salt Lake City, Utah 84114.

Without conceding VM's standing to litigate on appeal, counsel caused Orange Legal to mail one copy of the brief and addenda and one PDF disk of the brief and addenda, and one copy of the public brief to Freyja Johnson, Michael Zimmerman and Troy Booher at Zimmerman Booher, 341 South Main, Felt Building, Fourth Floor, Salt Lake City, Utah 84111.

Respectfully submitted this 14 day of May, 2018.



Elizabeth Hunt

Addendum Contents

This Court's Order Denying Motion to Supplement Record

Other

VM's Story (handwritten and typed, including last page of handwritten allegation pertaining to [redacted] which page was not given to the jury)

VM's letter regarding [redacted]

[redacted]Declaration

Declaration of Donald Bell, CJC Expert

Declaration of Karen Malm, PhD

Declaration of Matthew Davies, PhD

Declaration of Matthew Davies, PhD

Proposed 14(b) subpoenas

Legislative History of House Bill 411 (March 10, 2014)

Constitutional Provisions, Statutes and Rules

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

CONSTITUTION OF UTAH

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UNITED STATES CONSTITUTION

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UTAH CODE

76-3-201. Definitions -- Sentences or combination of sentences allowed -- Civil penalties.

(1) As used in this section:

(a) "Conviction" includes a:

(i) judgment of guilt;

(ii) plea of guilty; or

(iii) plea of no contest.

(b) "Criminal activities" means any misdemeanor or felony offense for which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of

property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e) (i) "Victim" means any person or entity, including the Utah Office for Victims of Crime, who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include a codefendant or accomplice.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal or disqualification from public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment;

(e) on or after April 27, 1992, to life in prison without parole; or

(f) to death.

(3) (a) This chapter does not deprive a court of authority conferred by law to:

(i) forfeit property;

(ii) dissolve a corporation;

(iii) suspend or cancel a license;

(iv) permit removal of a person from office;

(v) cite for contempt; or

(vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4) (a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall

follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(c) In addition to any other sentence the court may impose, the court, pursuant to the provisions of Sections 63M-7-503 and 77-38a-401, shall enter:

(i) a civil judgment for complete restitution for the full amount of expenses paid on behalf of the victim by the Utah Office for Victims of Crime; and

(ii) an order of restitution for restitution payable to the Utah Office for Victims of Crime in the same amount unless otherwise ordered by the court pursuant to Subsection (4)(d).

(d) In determining whether to order that the restitution required under Subsection (4)(c) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (vi) and provide findings of its decision on the record.

(5) (a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court, the defendant shall pay restitution of governmental transportation expenses if the defendant was:

(i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;

(ii) charged with a felony or a class A, B, or C misdemeanor; and

(iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) $100 for up to 100 miles a defendant is transported;

(B) $200 for 100 up to 200 miles a defendant is transported; and

(C) $350 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to

each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(6) (a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court pursuant to Subsection (6)(c), the defendant shall pay restitution to the county for the cost of incarceration and costs of medical care provided to the defendant while in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii) (A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13e-104 if the defendant is a state probationary inmate, as defined in Section 64-13e-102, or a state parole inmate, as defined in Section 64-13e-102.

(b) (i) The costs of incarceration under Subsection (6)(a) are the amount determined by the county correctional facility, but may not exceed the daily inmate incarceration costs and medical and transportation costs for the county correctional facility.

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining whether to order that the restitution required under this Subsection (6) be reduced or that the defendant be exempted from the restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (vi) and shall enter the

reason for its order on the record.

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

(7) In addition to any other sentence the court may impose, the court shall determine whether costs are appropriate pursuant to Section 77-32a-107.

77-20-4. Bail to be posted in cash, by credit or debit card, or by written undertaking.

(1) Bail may be posted:

(a) in cash;

(b) by written undertaking with or without sureties at the discretion of the magistrate; or

(c) by credit or debit card, at the discretion of the judge or bail commissioner.

(2) Bail may not be accepted without receiving in writing at the time the bail is posted the current mailing address, telephone number, and email address of the surety.

(3) Bail posted by debit or credit card, less the fee charged by the financial institution, shall be tendered to the courts.

(4) Bail refunded by the court may be refunded by credit to the debit or credit card, or cash. The amount refunded shall be the full amount received by the court under Subsection (3), which may be less than the full amount of the bail set by the court.

(5) Before refunding bail that is posted by the defendant in cash, by credit card, or by debit card, the court may apply the amount posted toward accounts receivable, as defined in Section 77-32a-101, that are owed by the defendant in the priority set forth in Section 77-38a-404.

77-38a-102. Definitions.

As used in this chapter:

(1) "Conviction" includes a:

(a) judgment of guilt;

(b) a plea of guilty; or

(c) a plea of no contest.

(2) "Criminal activities" means:

(a) any misdemeanor or felony offense of which the defendant is convicted; or

(b) any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, including those which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses, including lost earnings, including those and other travel expenses reasonably incurred as a result of participation in criminal proceedings, and medical and other expenses, but excludes punitive or exemplary damages and pain and suffering.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(9) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(10) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific

terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12) (a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14) (a) "Victim" means any person or entity, including the Utah Office for Victims of Crime, who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

77-38a-201. Restitution determination -- Law enforcement duties and responsibilities.

Any law enforcement agency conducting an investigation for criminal conduct which would constitute a felony or class A misdemeanor shall provide in the investigative reports whether a claim for restitution exists, the basis for the claim, and the estimated or actual amount of the claim.

77-38a-302. Restitution criteria.

(1) When a defendant enters into a plea disposition or is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence or term of a plea in abeyance it may impose, the

court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, "victim" means the same as that term is defined in Subsection 77-38a-102(14). In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and

rehabilitation;

(iv) the income lost by the victim as a result of the offense;

(v) the individual victim's reasonable determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider:

(i) the factors listed in Subsections (5)(a) and (b);

(ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204;

(iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(vi) other circumstances that the court determines may make restitution inappropriate.

(d) (i) The prosecuting agency shall submit all requests for complete restitution and court-ordered restitution to the court at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) If a defendant is placed on probation pursuant to Section 77-18-1:

(A) the court shall determine complete restitution and court-ordered restitution; and

(B) the time period for determination of complete restitution and court-ordered restitution may be extended by the court upon a finding of good cause, but may not exceed the period of the probation term served by the defendant.

(iii) If the defendant is committed to prison:

(A) any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole; and

(B) the Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

Utah Code of Judicial Conduct

RULE 2.10

Judicial Statements on Pending and Impending* Cases*

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall take reasonable measures to require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

RULE 2.11

Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous three years made aggregate* contributions* to the judge's retention in an amount that is greater than $50 .

(5) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court and is now acting as a judge who would hear the appeal or trial de novo.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A trial court judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(D) An appellate court judge or justice subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may send notice to the parties disclosing the basis for the judge or justice's disqualification and asking them to consider whether to waive disqualification. With respect to paragraphs (A)(2) or (A)(3), the judge or justice may participate in the decision of the case if all parties, other than the party presumably benefitted by the apparent bias constituting the disqualifying circumstance, waive the disqualification. With respect to paragraphs (A)(4) through (A)(6), the judge or justice may participate in the decision of the case if all parties waive the disqualification. The responses to a notice of a disqualifying circumstance shall be included in the appellate file pertaining to the proceeding.

Utah Rules of Criminal Procedure

Rule 16. Discovery.

(a) **Disclosures by prosecutor.** Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which the prosecutor has knowledge:

(a)(1) relevant written or recorded statements of the defendant or codefendants;

(a)(2) the criminal record of the defendant;

(a)(3) physical evidence seized from the defendant or codefendant;

(a)(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced
punishment; and

(a)(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare a defense.

(b) **Timing of prosecutor's disclosures.** The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required
to plead. The prosecutor has a continuing duty to make disclosure.

(c) **Disclosures by defense.** Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare the case.

(d) **Timing of defense disclosures.** Unless otherwise provided, the defense attorney shall make all disclosures at least 14 days before trial or as soon as practicable. The defense has a continuing duty to make disclosure.

(e) **Methods of disclosure.** When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places. The prosecutor or defense may impose reasonable limitations on the further dissemination of sensitive information otherwise subject to discovery to prevent improper use of the information or to protect victims and witnesses from harassment, abuse, or undue invasion of privacy, including limitations on the further dissemination of videotaped interviews, photographs, or psychological or medical reports.

(f) **Restrictions on disclosure.** Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, that limitations on the further dissemination of discovery be modified or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) **Failing to disclose.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) **Additional requirements that may be imposed on the accused.** Subject to constitutional limitations, the accused may be required to:

(h)(1) appear in a lineup;

(h)(2) speak for identification;

(h)(3) submit to fingerprinting or the making of other bodily impressions;

(h)(4) pose for photographs not involving reenactment of the crime;

(h)(5) try on articles of clothing or other items of disguise;

(h)(6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;

(h)(7) provide specimens of handwriting;

(h)(8) submit to reasonable physical or medical inspection of the accused's body; and

(h)(9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense. Whenever the personal appearance of the accused is required for the
foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and the accused's counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.

UTAH RULES OF EVIDENCE

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Utah Constitution;
- a statute; or
- rules applicable in courts of this state.

Irrelevant evidence is not admissible.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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.

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) **Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(2) **Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) **Exceptions for a Witness.** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(2) **Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity,

absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 412. Admissibility of Victim's Sexual Behavior or Predisposition

(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 righ t to attend and be heard. Unless the court orders otherwise, the motion, r elated materials, and the record of the hearing
are classified as protected.

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

Rule 506. Physician and Mental Health Therapist-Patient.

(a) Definitions.

(1) "Patient" means a person who consults or is examined or interviewed by a physician or mental health therapist.

(2) "Physician" means a person licensed, or reasonably believed by the patient to be licensed, to practice medicine in any state.

(3) "Mental health therapist" means a person who

(A) is or is reasonably believed by the patient to be licensed or certified in any state as a physician, psychologist, clinical or certified social worker, marriage and family therapist, advanced practice registered nurse designated as a registered psychiatric mental health nurse specialist, or professional counselor; and

(B) is engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction.

(b) Statement of the Privilege. A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient. The privilege applies to:

(1) diagnoses made, treatment provided, or advice given by a physician or mental health therapist;

(2) information obtained by examination of the patient; and

(3) information transmitted among a patient, a physician or mental health therapist, and other persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist. Such other persons include guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, or the guardian or conservator of the patient. The person who was the physician or mental health therapist at the time of the communication is presumed to have authority during the life of the patient to claim the privilege on behalf of the patient.

(d) Exceptions. No privilege exists under paragraph (b) in the following circumstances:

(1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:

(A) in any proceeding in which that condition is an element of any claim or defense, or

(B) after the patient's death, in any proceedings in which any party relies upon the condition as an element of the claim or defense;

(2) Hospitalization for Mental Illness. For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of

diagnosis or treatment has determined that the patient is in need of hospitalization; and

(3) Court Ordered Examination. For communications made in the course of, and pertinent to the purpose of, a court-ordered examination of the physical, mental, or emotional condition of a patient, whether a party or witness, unless the court in ordering the examination specifies otherwise.

Rule 510. Miscellaneous Matters.

(a) Waiver of Privilege. A person who holds a privilege under these rules waives the privilege if the person or a previous holder of the privilege:

(1) voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or

(2) fails to take reasonable precautions against inadvertent disclosure.

This privilege is not waived if the disclosure is itself a privileged communication.

(b) Inadmissibility of Disclosed Information. Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or made without opportunity to claim the privilege.

(c) Comment or Inference Not Permitted. The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from any claim of privilege.

(d) Claiming Privilege Without the Jury's Knowledge. To the extent practicable, jury cases shall be conducted to allow claims of privilege to be made without the jury's knowledge.

(e) Jury Instruction. Upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to a jury instruction that no inference may be drawn from that claim of privilege.

(f) Privilege Against Self-Incrimination in Civil Cases. In a civil case, the provisions of paragraph (c)-(e) do not apply when the privilege against self-incrimination has been invoked.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(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.

Rule 702. Testimony by Experts

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(1) are reliable,

(2) are based upon sufficient facts or data, and

(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Trial Court Orders

Oral Ruling Allowing Photography

PROCEEDINGS

(Electronically recorded on August 19, 2013)

MR. BRASS: Number 8, Mr. Boyer.

THE COURT: I'm sorry, tell me again.

MR. BRASS: Boyer.

THE COURT: Boyer, thank you. Okay.

MR. BRASS: We're here for two purposes today, as I understand it. One is to receive your ruling on a motion that was handled by former Counsel. The other is to set a trial.

MS. SANCHEZ: That was, your Honor, the Rule 16 motion.

THE COURT: Yes. I reviewed the motion. I reviewed the response. The response does not really answer the State's request directly, but simply says it -- whatever happens should be excluded under 403, and that Mr. Boyer believes that this allegation came from coaching.

Given that there are issues of credibility that are going to be -- need to be considered by a fact finder, I am granting the State's motion. I am ordering Mr. Boyer -- I'm continuing the prior order that there be no steps taken by Mr. Boyer to alter his appearance in any way, and that the -- he submit to these photographs promptly. What's the time line?

MS. SANCHEZ: Your Honor, if he can -- I spoke with the case manager on Friday. She's available at the Unified Police Department (inaudible) on 33rd until 5 o'clock, so he can go there before 5 today, and I can give Counsel Detective Holdaway's

information so he can get in contact with him today.

THE COURT: Can Mr. Boyer report today?

MR. BRASS: I'll need to talk to him about that.

THE COURT: Okay.

MR. BRASS: We'll get it done

THE COURT: At the latest, if not today, by the latest tomorrow.

MR. BRASS: Understood.

THE COURT: Okay.

MS. SANCHEZ: Your Honor, may we also get a certified copy of the order from your clerk so that I can give it to the case manager?

THE COURT: As soon as the clerk is able to finalize the minutes, I'll -- she'll print it out and I'll sign it, and then you can -- they can get it -- you can get it certified, okay?

MS. SANCHEZ: Okay. Thank you, Judge. The other thing that we need, your Honor --

THE COURT: We need to set a trial date.

MR. BRASS: Yes.

MS. SANCHEZ: -- is we need a trial date, yes.

THE COURT: How many days are we looking at?

MR. BRASS: At least two, judging by the number of allegations that there are.

THE COURT: Okay.

MR. BRASS: I'm being advised that it's more likely to

Oral Ruling Denying Motion to Suppress Photographs

dramatically to what the conduct that's alleged against the defendant.

He's also not explained why that information would be relevant to whether he committed the acts, nor does it explain anything relevant to the victim's sexual knowledge. I -- he's also failed to provide any basis upon which I could reasonably question the truthfulness of the victim's statement.

Secondly, I am also denying the motion to produce medical records for the reasons stated in the prosecution's memoranda. The motion does not comply with Rule 14. It is not reasonably limited, does not describe the record sought with particularity, and the defendant has failed to show that the privilege does not apply. Most importantly, he's failed to show with reasonable certainty that the records in fact exist that contain exculpatory evidence.

The motion to exclude the photos and disqualify is also denied. He's not given any valid reason to exclude the photos. They are highly probative and corroborative of the victim's statements regarding identifying characteristics. The photographs were not shown to the victim or anyone else as represented by the State.

There are also no grounds to exclude the DA's office. The assistant DA who identified -- heard about the characteristics provided that information to the investigators of -- provided a copy of the investigator's interview, and the

defendant has been able and had the right to interview and call as witnesses the advocate who interview the victim.

As to the motion to amend the protective order, I think that the State raises legitimate concerns regarding the possibility that because of the relationship between the son, who is a potential witness, and alleged victim in this matter, that defendant could exert undue influence over the victim. However, I believe that allowing supervised visitation would balance the potential interest in maintaining and in having parent time against the possibility of undue influence.

So -- but the supervised parent time would have to be supervised by someone -- by either an approved supervising entity like WillWin, or another -- that would be my preference. Alternatively, by someone that would be approved by the prosecution. So those are my rulings on those motions.

MR. BRASS: Understood.

THE COURT: What?

MR. BRASS: Understood.

THE COURT: Okay. Where do we stand?

MR. BRASS: We're set for next Tuesday. I can't answer that question right today because I was in trial every day last week, so I'm not caught up yet, but I'll be able to let your clerks know later today.

THE COURT: Okay.

MS. SANCHEZ: Your Honor, to be up front with Counsel

Order Regarding *In Camera* Review for Inculpatory and Exculpatory Records

The Order of Court is stated below:
Dated: July 23, 2015 09:20:27 AM
/s/ Mark Kouris
District Court Judge

SIM GILL
District Attorney for Salt Lake County
CORAL SANCHEZ-ROSE, Bar No. 10380
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: (385) 468-7677

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- MARK BOYER Defendant.	ORDER Case No. 131902296 JUDGE MARK S. KOURIS

By stipulation, both parties agree that the State will disclose to this Court for *in camera* review the items requested in the subpoenas duces tecum the State filed on July 20, 2015.

IT IS HEREBY ORDERED that the State disclose to the Court for *in camera* review the items requested in the subpoenas duces tecum the State filed on July 20, 2015. Upon receipt of the subpoenaed materials, this Court will conduct an *in camera* review of the alleged victim's mental health records. The court will review the documents and provide both parties with any materials that contain relevant inculpatory or exculpatory information.

Order Indicating Mental Health Records Contained No Exculpatory or Inculpatory Evidence and Would Be Shredded

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

State of Utah, Plaintiff,	:	**MINUTE ENTRY**
Mark Boyer, Defendant.	:	Case No. 131902296 Judge Mark S. Kouris

By stipulation of the parties, this Court received sealed envelopes containing the alleged victim's medical records from multiple medical entities. The submission included more than 25 records ranging in size from 1 to more than 250 pages.

This Court conducted an *in camera* of all information received and found no information of exculpative or inculpative value with regard to the charged crimes. Based on this finding, all materials received by this Court will be shredded.

DATED this 24th day of August 2015.

By the court:

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

Mark S. Kouris
District Court Judge

Oral Ruling Excluding Inconsistent Disclosure Story

SALT LAKE CITY, UTAH - JULY 13, 2016

JUDGE MARK KOURIS PRESIDING

(Transcriber's note: speaker identification may not be accurate with audio recordings.)

PARTIAL TRANSCRIPT OF PROCEEDINGS

THE COURT: We're on the record in the matter of the State versus Boyer. I understand there was a couple things before we begin today.

Mr. Brass?

MR. BRASS: I don't think this will take too long, Your Honor.

THE COURT: okay.

MR. BRASS: It's - a prior trial, the Court ruled consistent with what had been ruled previously, that we did not go into anything about abuse with a [redacted]r relative named [redacted] you'll remember that discussion.

THE COURT: Right.

MR. BRASS: We think that maybe that that door has been opened to some degree yesterday by the testimony of Jan Boyer. And here's how we think that that happened. She testified, you'll recall, that [redacted]pestered, or pester, or pestered, you know, annoyed her about wanting to tell her something, and wanting to tell her something, and finally told her something, and then she didn't believe it at first, and there were further discussions than that.

Well, back in - on February 18th of 2013, Detective Holdaway interviewed Ms. Boyer and asked her specifically, I asked Jan, "How did she find out about [redacted] and Mark?" And I'm quoting from a police report we've been provided in discovery at this point. And the answer was, "Jan told me [redacted] guardian is her grandmother, [redacted] when [redacted] was younger, he had been charged with sexual abuse. [redacted] started hanging out at the residence and may be moving back." And at that point, [redacted] came up to Jan and told her [redacted] and Mark had done something to her. So, it's - what's been presented to the jury at this point is effectively misleading, because the discussion that initiated all this was a discussion about [redacted] moving back into the neighborhood. And we think the door's open to that by her testifying about, you know, some different version. This is a prior inconsistent statement that she's made at this point, and that's the extent to which we would go into it.

THE COURT: Okay.

Mr. Fisher?

MR. FISHER: Your Honor, that's - we're way off there. She's - she testified - we tried to go into what the next step was, what the next thing that [redacted] said that was - that inspired these next actions. And we were shot down on that, as far as it being hearsay, as far as going

into that in any more detail. But, Ms. Boyer's testimony about that she was saying, I want to tell you something, I want to tell you something, certainly doesn't open up the door to anything that might've been said by [redacted] along the way. I mean this is something that - one is, it's completely irrelevant to the situation at hand. I mean, what other little things may have occurred along the way for [redacted] to get there? I mean, these are issues that we should - that would've been addressed, and were addressed when we were talking about 412. Doesn't make it any more relevant that she's saying that she was saying something about, I have something I want to tell you, and then we went on to discuss what that was, essentially, to the extent that we could. And I certainly don't see how that opens the door to 412 information, especially about something like this that is so irrelevant and would be so prejudicial and misleading to the jury, when you're dealing with a youth who is deceased, who was very young, and in a completely different context of touching and any kind of contact there.

THE COURT: Okay. Response, Mr. Brass?

MR. BRASS: Judge, I don't intend to go into the details of what happened whatsoever, as the Court pointed out yesterday, credibility's a paramount issue in this case. Ms. Boyer volunteered that opinion about how J- excuse me, [redacted] was telling the truth, which the Court promptly

struck from the record. Her version that she's been allowed to present to the jury, as I've said, is misleading. I mean, she's been allowed to say that she pestered me, pestered me, pestered me, it was about - it was about Mark, these were the conclusions that I drew, that isn't what it was about. It was about [redacted] and oh, by the way, Mark did something to me too. So, I think the jury should be permitted to see the full picture of what it was that caused this so-called disclosure. It wasn't anything to do with Mr. Boyer. And these are statements that Jan made to the police, that are not consistent with what her testimony was. It was statements about Kyle that she made to the police.

THE COURT: Okay. Well, I certainly see Mr. Brass's argument here. That said, I think that if we weigh these things out, number one, how - talk to me about 412. How do you think this applies to 412?

MR. BRASS: It doesn't. I mean, we're not concerned about 412 at this point. This isn't a matter of going into someone's prior sexual history.

THE COURT: Right.

MR. BRASS: It's a matter of impeachment of a witness. And as the Court has said, you know, do they believe her, don't they believe her? And that goes to whether or not she should be believed, because she's not

related correctly how this disclosure took place, at least she related a different version than she did when she talked to the police in February of 2013.

THE COURT: All right. Despite the fact there may be other issues that caused her or helped her to disclose, I think that she testified yesterday, the primary purpose of her disclosure to Ms. Boyer was to talk about, in fact, the defendant, and nothing else. She didn't talk about that there were other things on her mind, or anything, this was the one of paramount importance, at least according to her testimony yesterday. There may have been other issues that may have also assisted [redacted] in terms of coming forward, but again, I think the relevance of that, as well as the prejudice of that, is going to prevent it from coming in, so I'm going to deny the motion.

MR. BRASS: Before you do that, though, I want to be clear, because I think that you may not have understood what I was saying. It's not impeachment of [redacted] I'm not asking to impeach [redacted]

THE COURT: Oh, I agree.

MR. BRASS: This is impeachment of Jan.

THE COURT: Right.

MR. BRASS: So, she said something that is different than what she said - very different than what she said to the police in 2013, and I'll just - again, so the record's clear,

I mean no offense to you, that what she said was, Jan told me [redacted] guardian is her grandmother, [redacted] When [redacted] was younger, he'd been charged with [redacted] started hanging out at the residence and may be moving back." In fact, in that statement, she's not even saying that that's the person that's - if we stop there, tha[redacted] Just that [redacted] and he was moving back. That's not consistent with what she talked about when she talked about how [redacted] you know, quote, disclosed, unquote, to her, that -

THE COURT: Well, that makes the assumption that she disclosed for only one reason and that's not the case. The reason she disclosed at this time, at least according to Ms. Boyer, was apparently it had been bubbling up inside of her and she finally came forward. I agree that, in fact, she probably was worried about a number of things, and maybe that was the reason for the disclosure. But that said, I think the - whatever the number of things were, I think at this point are not relevant. And the reason for her disclosure is, at least according to Ms. Boyer, which I believe was - would not be controverted by that, was this abuse. So, I'm going to deny the motion.

Did you want to talk?

MR. FISHER: Just for the record, Your Honor.

THE COURT: Go ahead.

MR. FISHER: Also, just as far as Mr. Brass's indication that Ms. Boyer's testimony was misleading, I had specifically instructed her, there are certain things that the Court has ruled are not - we're not to go into, one of those is the issues with [redacted] and so forth. So, we didn't go down that path, and I don't think that was ever opened.

THE COURT: So, the fact that she left that out was more contingent upon an earlier ruling -

MR. FISHER: The Court's ruling.

THE COURT: - than her trying to mislead the jury, is what you're saying.

MR. FISHER: That's - that's my (inaudible).

THE COURT: All right. Very good. All right. Anything else before we get the jury back? Yes?

MS. CORDOVA: I have an issue -

THE COURT: Sure. Go ahead.

MS. CORDOVA: - (inaudible). Your Honor, we got a notice of expert testimony by Mr. Fisher, and who they're intending to call, he spoke about this in his opening statement, and named Dr. David Corwin -

THE COURT: Right.

MS. CORDOVA: - as one of the witnesses that's going to come in today. You know, and as I was going over this last night, and prepping for this, and looking at some of the case law associated with this, the State is asking that Dr.

Oral Ruling Admitting Dr. Corwin's Testimony

MR. FISHER: Also, just as far as Mr. Brass's indication that Ms. Boyer's testimony was misleading, I had specifically instructed her, there are certain things that the Court has ruled are not - we're not to go into, one of those is the issues wit[redacted]nd so forth. So, we didn't go down that path, and I don't think that was ever opened.

THE COURT: So, the fact that she left that out was more contingent upon an earlier ruling -

MR. FISHER: The Court's ruling.

THE COURT: - than her trying to mislead the jury, is what you're saying.

MR. FISHER: That's - that's my (inaudible).

THE COURT: All right. Very good. All right. Anything else before we get the jury back? Yes?

MS. CORDOVA: I have an issue -

THE COURT: Sure. Go ahead.

MS. CORDOVA: - (inaudible). Your Honor, we got a notice of expert testimony by Mr. Fisher, and who they're intending to call, he spoke about this in his opening statement, and named Dr. David Corwin -

THE COURT: Right.

MS. CORDOVA: - as one of the witnesses that's going to come in today. You know, and as I was going over this last night, and prepping for this, and looking at some of the case law associated with this, the State is asking that Dr.

Corwin testify about delayed disclosure in child sex abuse, and risks associated with being a victim of child sex abuse, and that Dr. Corwin doesn't have any particular knowledge, or wasn't provided any material specific to this case at all, so he has no relationship or any information about Victoria specifically, about [redacted] specifically. And so, looking at Rule 702, and so, we are then objecting to Dr. Corwin testifying. Under Rule 702, if the testimony of experts - testimony of an expert is allowed to help the fact finder with specialized - to help understand - let me start again. Under 702, expert testimony is allowed to help the fact finder with other specialized knowledge to help the trier of fact to understand the evidence or to determine a fact in issue. Okay, to help understand the evidence, how I see it is, the evidence would be Victoria's delayed disclosure and associated risk of child sex abuse, which I'm assuming is going to be her later on depression and suicide attempt in 2015.

And so - so, based on that, it doesn't - Dr. Corwin's testimony shouldn't be allowed because Ms. Moss was able to articulate and effectively communicate with the Court, with Mr. Fisher and Mr. Brass, as to the reasons why she delayed her - she was delayed in her disclosure. She specifically testified that she didn't tell anybody that she knew at ages six, seven, and eight, between the years of 2005

and 2009, she didn't forget, she remembered what happened to her, but she didn't think that anyone would believe her which was why she did not tell anybody. Time passed, she ends up talking to Ms. Boyer in 2013. And so, we have the reason. We understand. We know why she did not disclose -

THE COURT: But if this is -

MS. CORDOVA: - immediately.

THE COURT: - if this is indicative of child sex cases, why wouldn't that be something that would help the jury?

MS. CORDOVA: Oh, and I'm going to get to that.

THE COURT: Oh, please. I'm sorry about that.

MS. CORDOVA: Okay. And so - and so, the next part of it - and so, under that prong, it doesn't come in, because we have [redacted] statement. You know, this isn't a nonverbal child or who is acting out or having some type of behaviors, that we're needing a psychological person to come and help us maybe interpret some of the behaviors and the actions of that nonverbal child. We have a 17-year-old young woman who's able to effectively communicate with the Court.

And so, the next issue is determine a fact in issue. We don't have any DNA. We don't have any statements by Mr. Boyer. We don't have any witnesses. We don't have any forensic evidence. We don't have anything other than [redacted] [redacted] testimony as the evidence. And so, the material - so

determine a fact in issue, the fact in issue is her credibility. Right? Is if the jury is going to believe her. And so, if Dr. Corwin is going to come in and say, well, this is the reason why she delayed in her disclosure, or this is common in these types of cases, and some of these symptoms, depression or suicide attempts are associated, or can be seen in the research that's been presented or reviewed in child sex abuse cases, then Mr. Fisher is going to later on then say, see, on arguing that we can believe [redacted] because Dr. Corwin said, A, B, and C, and we see it in [redacted] testimony. And so, thereby is a disguised bolstering of her credibility, which she is unable to do under Remausch. And he can't comment - he can't support her credibility or say that she is telling the truth or not, under Remausch.

THE COURT: No, but she can say cases like this would indicate - how do you - how do you compare that to when defense lawyers bring in experts that talk about the interview that took place in the CJC and how that interview was so poor, and for that reason, the information got from that interview should not be - is not reliable information. They can go all the way up to the point to say, well, we know that these five things cause an unreliable testimony, we think she had these five things, and that's where it has to stop, they can't say you should believe or not believe the witness. Why is this any different?

MS. CORDOVA: Why I think it's different is because we've had - we don't have - what we have - we've had a live witness who's been able to communicate and talk about the situation that she was in, and the decisions that she made, and why she made them. She did not - there was a delayed disclosure because of a specific reason, because she didn't think that anyone would believe her.

THE COURT: Well, that's the only specific reason that she might understand.

MS. CORDOVA: Understood.

THE COURT: So, for an expert to come in and talk to a jury about a group that have never seen a case like this, and to say, okay, folks, you guys have never seen a child sex case before in your life, let me tell you how these generally unfold. Why would that not be helpful?

MS. CORDOVA: Because - because it comments on an issue of fact. And the fact that's in issue is [redacted] credibility. And so, it runs afoul of Remausch because it's a disguised way to bolster her credibility -

THE COURT: So -

MS. CORDOVA: - and that is improper and not admissible.

THE COURT: - so, how do you differentiate that, then, from the example that I gave you before?

MS. CORDOVA: About the -

THE COURT: Where they have the CJC - the person that interviewed - made the interview in the CJC interview, and the expert gets on the stand and says, that was a bad interview, and for that reason, you shouldn't believe this girl based on that.

MS. CORDOVA: Well, no, what we do in - when we are talking about or challenging the admissibility of a Children's Justice Center video under 15.5 -

THE COURT: No, no. I'm not talking about that, I'm talking -

MS. CORDOVA: (Inaudible) -

THE COURT: - okay.

MS. CORDOVA: Right. But also, when an investigator or detective or DCFS worker comes in to talk about, this is why it's reliable, right? An interview has to be reliable and trustworthy, that interview. And what the focus of those challenges are, are the interviewing techniques of the interview. It's usually a small child, it's usually a younger child, right? And so -

THE COURT: But what is it going to?

MS. CORDOVA: Right, it's going to attack if whether the investigator was improperly suggestible, or improperly feeding information to the child, and so the statement doesn't become - we don't say untruthful, it becomes unreliable.

THE COURT: So, can you believe this little girl, is what it ultimately comes down to, right?

MS. CORDOVA: Right, but based on the investigators, there's an intervening cause in that, it's the investigator. Who we're going after in that context is the investigator or the forensic interview, the guideline, the way that they conducted themselves, and so it's the method that's being attacked, not the child.

THE COURT: Okay.

Response, Mr. Fisher?

MR. FISHER: Your Honor, unfortunately these cases, there are a plethora of myths and misunderstandings that pervade society generally, and that's why I think that it's important, as the Court indicated, to have somebody with vast experience in this field to describe the underlying psychology, psychiatry, and research with regard to these things in general.

Also, Your Honor, I think that this matter has - this issue has been dealt with in the law, and I've recently been reminded of State versus Clopton, which indicates that this kind of generic scientific testimony, based on research, can help a trier of fact. They're the ones who then take that, compare it to the facts of this case, and say, does it apply, or does it not? And both sides can argue if it does or if it doesn't.

THE COURT: Okay.

Response?

MS. CORDOVA: Well, and I guess my response to that is that Clopton dealt with eyewitness identification, which is a completely different context and realm that we're talking about. And these myths and these things that Mr. Fisher's talking about, that, in fact, have been introduced and none of that is going to be allowed in for the jury's consideration. And so, you know, my argument still stands and the objection on (inaudible) testifying.

THE COURT: All right. I appreciate that. Well, first of all, my role as a - to test the reliability of an expert is a very, very low threshold. And I find in this instance that that threshold has been made. Now, will this testimony help the jury? And I believe it will help the jury. That said, obviously the one thing the expert won't talk about is whether to believe or not believe the witness, but instead talk in terms of generic terms about these sort of cases, and I think that would be helpful to the jury.

Anything else before we call the jury in? No? Okay. Let's get the jury.

(Whereupon the jury entered the courtroom)

THE COURT: Good morning, ladies and gentlemen. Welcome back. Thank you for your promptness this morning, I very much appreciate it.

Oral Ruling Denying Mistrial Re: Jann's Bolstering

at 8:25. Hopefully we'll kick off right at 8:30, get going again and stay on schedule here to make sure that this case doesn't go any further than it needs to go in terms of time. So thank you very, very much. I'll see you all tomorrow morning.

(Whereupon the jury left the courtroom)

THE COURT: Please be seated. For the record the jury has exited the courtroom.

Mr. Brass, do you want the record?

MR. BRASS: Yes. When Ms. Boyer testified she testified at some point and it was clear that - in fact, I don't think Mr. Fisher had finished asking a question at the point that she decided that she would volunteer without being asked a question and not in response to any question, that she felt that [redacted] was telling the truth and that's the pivotal issue in this case. She volunteered that. It's inappropriate, as we all know for one witness to comment on the truthfulness or lack thereof of another witness. It's something that I can't cross examine her about. I mean, I think we're in the same position we were six weeks ago and that I'm - in order to represent my client properly I have to ask for a mistrial. I don't have any choice because again, this is the pivotal issue for the jury to decide in this case. No witness is permitted to say, Well, I think that witness was truthful, ever, and she opted to volunteer that

and that's - I mean that's the price that has to be paid, in my opinion.

THE COURT: Mr. Fisher, response?

MR. FISHER: Well, Your Honor, I think that it was not the State's question that elicited that response. It was offered spontaneously and I think that this is not the kind of situation that we had the last time around where the jury is going to be trying to think things through and make up their own minds. This is just somebody who threw out an opinion and here I think we can have corrective instruction. The Court can make sure that the jury is aware that they're not to consider those statements and, ummm, that it is their prerogative to - and their area to make the determination of whose telling the truth. It's a different situation, it's, ummm, one where the jury can say we understand that. They're going to be able to determine when a witness testifies as to who they believe and who they don't believe. It's not something that is a big shock to them, they just need to be advised to ignore that situation. And the case law that deals with those kinds of situations are after the fact where nothing has been said to them about those kinds of things and they usually involve experts who are coming to the conclusion.

THE COURT: Response?

MR. BRASS: Yes. To elaborate, the problem is that

at a minimum, ten times the Court sustained objections which she repeatedly wanted to say what it was that [redacted] said to her. So in effect, her conclusion can only be drawn from the things that the Court quite properly excluded from evidence in this case. It didn't come from nowhere. It is clear that the jury's going to draw the inference, whatever it was she had to say to her, must be consistent, must have been truthful because she told us it was truthful. Again, it is a lot like last time because I didn't contend the last time that the State elicited that opinion at all but when the witness volunteered about some other event. I didn't think that was the State's fault. It's not the State's fault this time but it's been said that it was very clear that it was volunteered and it was done so in such a way to enhance the credibility of [redacted] and that's the crucial issue in this case. That's not proper, it shouldn't be before the jury and it is, so I don't know how you fix that.

THE COURT: Well, first of all I think that this case, I definitely agree that assigning fault has no place here with regard to the evidentiary value; however, I think this piece of evidence is quite a bit different than the last piece of evidence. The last piece of evidence actually referred to a situation that was completely outside, that the jury themselves had no way to judge that, as if something like that had happened before.

In this case, however, if they find this witness to be incredible, they're not going to believe anything she said, whether she said she's telling the truth or not telling the truth. If they find her to be credible then she's going to - then they might believe all of that. That said, I think that's something that very well can be fixed. I think the jury is going to make their own decision as to terms of whether they're going to believe her or not. And then if she says, Well, I want you to believe as well what [redacted] said, that's just stacking it on top of each other. Again, that's all based on her credibility which again is going to be the call of the jury.

So what I'm going to do is I will do whatever you want me to do in terms of instructions. If you want me to read an instruction effectively laying out the rule to say that you're not allowed to opine on whether or not another person in the courtroom is telling the truth or not and credibility is purely a question for the jury, I will do that. If you want me to do something less than that and do something orally, ummm, but it's my opinion, at least that was, quite frankly, it was incorrect, yes, but was it harmless? I think the fact that the jury - that's something the jury can weigh on their own and I think they'll find it to be harmless as well.

So I'm going to deny the mistrial but I want you to

think about it tonight and figure out if you'd like me to do any sort of curative instruction, I will certainly do that.

As well if you wouldn't mind tonight, taking the jury instructions home that we had last time. I don't know if you had a chance to look through them. Next week we will - or tomorrow prior to lunch we can end a little bit early and go through them real quickly. Is that okay?

You're smiling, what's wrong? You don't have them, do you?

MR. BRASS: No.

THE COURT: Oh, you don't.

MR. BRASS: I'm sure Ms. Cordova has them.

MS. CORDOVA: (Inaudible).

THE COURT: Oh, you have them. Okay. Very good.

All right, anything else before we adjourn?

MR. FISHER: Not from the State, Judge.

MR. BRASS: No, Your Honor.

THE COURT: Thank you all very much. If you'd like to leave your stuff then you're welcome to and we'll lock up the courtroom.

MR. FISHER: Thank you, Judge.

(Whereupon the trial was continued)

(Transcript completed on October 6, 2016).

Oral Ruling Sustaining Objection to Improper Closing Argument

the per - first - I'm getting tired, I guess.

This is perfect example of why logic and the application of logic is some important in this case as you go through your deliberations, because if the incident occurred - if it really did happen the way [redacted] said to Detective Holdaway, even though it was determined, oh, well, there's not enough evidence to charge. There's no Jan Boyer to give us those -

MR. BRASS: You know, I'm going to object to that. He insisted that the facts not be elaborated on them. We don't know that, and he's just elaborated on the facts. He's broken his own stipulation.

THE COURT: He said that's -

MR. BRASS: How do we know that there isn't?

THE COURT: Fair enough. That's sustained. I think we've gone as deep as we're going to into that stipulation. I won't talk about that any further, but...

MR. BRASS: It looks like you've got...

MS. CORDOVA: Could we take a five minute break?

MR. BRASS: Oh.

THE COURT: Okay. All right, very good. Let's do that. Let's just take - how much longer do you have?

MR. FISHER: I may have a little bit, Judge.

THE COURT: Okay. Well, if that's the case, let's do that then. Let's take a five minute break. We'll come in

- actually, a 10-minute break. We'll come back in, and they can finish up. Okay?

Remember my admonitions. Please don't talk about the case. Don't talk to anyone involved in the case. Don't get any information from anywhere else outside this courtroom. You're excused. We'll see you back here in 10 minutes.

(Whereupon the jury left the courtroom.)

THE COURT: All right. For the record, the jury has left now. Please sit down. Let's take 10 minutes, and then come back, and we'll have - finish up. Okay?

(Whereupon a recess was taken)

THE COURT: Do we need to talk about something before we start?

MR. FISHER: Yes, Judge.

THE COURT: Go ahead.

MR. FISHER: Yes. Your Honor, I would like to clarify the Court's ruling about Mr. Brass's objection, if I could address that issue?

THE COURT: Go ahead.

MR. FISHER: Your Honor, the stipulation that we indicated to the Court yesterday said that we would not expand on the facts, but we could argue about what happened.

Mr. Brass certainly did that. Just as the defense argued that these two allegations were so similar that it

indicated that there was no proof of abuse - paraphrasing, of course. I should be able to argue why the reverse is true, and why they are not factually similar so that they have any relevance, and I should be able to argue why or how, if at all, the second allegation is not relevant to this case. Why the jury should not pay attention to that.

Essentially, Mr. Brass ended his statement saying it was the nail in the coffin. I should be able to say no, it wasn't. It's not relevant, and here's why without talking about the specific facts or expanding.

MR. BRASS: The problem is he did expand the facts. He said we don't have a Jan Boyer in this case. I don't know that that's the truth. I don't know that that's accurate at all. I stuck to the facts that were in the stipulation. I didn't insert any others. I didn't say, you know, you can infer this fact on that. You know, I argued those facts add up to a false allegation.

THE COURT: Right.

MR. BRASS: He can argue those facts are different in this case, but he can't talk about facts that weren't part of the stipulation. I mean, he proposed that, not me. I mean, that was his stipulation he read to you yesterday, and that's what he did. He argued a fact that wasn't in evidence.

THE COURT: That was the issue. I think what Mr.

Brass did was take things specifically out of that and compare them to facts in this case, and said these two things are -

MR. FISHER: I don't plan to go down that path anymore. I'm just going to talk about -

THE COURT: Well, I mean, I guess the question you're asking me is -

MR. FISHER: They're referring to -

THE COURT: - is can I now go through the facts of that and say it's not similar to this case? And I would say absolutely you can, but you can't -

MR. BRASS: Then I won't object.

MR. FISHER: No. I - right.

THE COURT: - bring - right, but you just can't bring other things in.

MR. FISHER: Okay. I just wanted to make sure the Court's ruling wasn't that I not talk about that.

THE COURT: No, no, no. As long as you confine yourself to what is in that stipulation. I think that's what Mr. Brass did by pulling -

MR. BRASS: Right, and I don't think it should be, well, you know, the DA's Office declined the file or anything like that.

THE COURT: No.

MR. BRASS: I mean, there shouldn't be anything

about this Jan Boyer business, because that isn't part of the stipulation.

THE COURT: That's correct. Okay.

MR. BRASS: Great.

THE COURT: Are we on the right track here?

MR. BRASS: Yes.

THE COURT: Very good. Let's go ahead and bring them back in then.

(Whereupon the jury enters the courtroom)

THE COURT: Thank you.

Ladies and gentlemen, I certainly apologize. I promised frequent bathroom breaks, and I don't know if anybody would define frequent as once every six hours, which apparently that was what I was going on. So please forgive me for that. I appreciate that. We'll begin now and finish up.

Go ahead, Mr. Fisher.

MR. FISHER: Thank you, Your Honor.

Ladies and gentlemen, last - one last comment about that subsequent allegation that was read to you in the stipulation.

Dr. Corwin told us that misperception of other's behavior is a common risk for those who have suffered sexual abuse. In this instance what we heard in that stipulation that was read to you is not evidence of what the defendant -

Judge Kouris Order Declining to Recuse

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff,	:	**MINUTE ENTRY**
	:	
	:	
MARK BOYER,	:	Case No. 131902296
	:	Judge Mark S. Kouris
Defendant.	:	

Defendant's attorney filed a Motion to Recuse the assigned judge. This Court questions the legal sufficiency of defendant's attorney's claim. Pursuant to Rule 63(b)(2), this Court certifies the Motion and supporting documents to the associate presiding judge for determination as to whether a legally sufficient issue has been raised.

Dated this 11th day of October, 2016.

BY THE COURT:

MARK S. KOURIS
DISTRICT COURT JUDGE

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

Reviewing Judge Harris Order Affirming Judge Kouris' Remaining on Case

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH, **Plaintiff,** **vs.** **MARK BOYER,** **Defendant.**	**MINUTE ENTRY** **Case No. 131902296** **October 12, 2016** **Judge Ryan M. Harris**

Before the Court is a Motion to Disqualify Judge Kouris ("the Motion"), filed by Defendant Mark Boyer ("Defendant"). By the Motion, Defendant seeks an order assigning this case away from Judge Mark Kouris ("Judge Kouris"), the judge currently assigned to this case, to another judge within the district. Judge Kouris questions the legal sufficiency of the Motion, see Minute Entry dated October 11, 2016, and has referred it to me for review in my capacity as Associate Presiding Judge.

Upon review of the Motion and the case file, it is apparent that Defendant seeks disqualification of Judge Kouris because of certain remarks Judge Kouris made at the sentencing hearing that took place on September 19, 2016. This case was tried to a jury in July 2016, with Judge Kouris presiding. The jury found Defendant guilty of eleven felony counts of rape, sodomy, and aggravated sexual abuse of a child. At the sentencing hearing on September 19, Judge Kouris imposed two consecutive terms of fifteen years to life; three concurrent terms of fifteen years to life; four concurrent terms of ten years to life; and two concurrent terms of five years to life.

During the course of the sentencing hearing, Judge Kouris stated that he had watched the victim ("VM") testify on two separate occasions, and that after watching her testimony he "believe[d] everything she told" the Court. He told VM that he considered her a "hero" for

standing up in court and telling her story, on multiple occasions, and for not giving up, and for and subjecting herself to both physical examination by doctors as well as cross-examination by lawyers. He also stated that she had his "absolute respect" and "absolute admiration" for her actions. He told VM that he was going to impose a sentence upon Defendant that would result in him "probably never, ever get[ting] out of prison," and stated that he hoped that the sentence would provide VM with "some comfort."

Defendant now asserts that these statements have revealed Judge Kouris to be a biased judge who will not be able to fairly adjudicate certain upcoming motions he intends to file, including motions for a new trial. Defendant argues as follows:

> The average person or jurist in Judge Kouris's position, who believes every word VM said about the horrific sexual assaults she alleged against [Defendant], and who felt her suffering through trial was heroic, and who did all he could to help her recover by committing to her in open court that she would never need to look back or think of [Defendant] again, would be tempted to adjudicate the motion for new trial and related pleadings in such a manner as to keep that commitment. . . Judge Kouris expressed his bias or apparent bias in such a manner that a reasonable person would not expect him to preside impartially over the motion for a new trial and related proceedings.

See Defendant's Br., at 11.

This Court disagrees. Motions seeking to disqualify a judge based on events that occurred in court—as opposed to motions based on extrajudicial events, like a judge's out-of-court relationships—are only rarely to be granted. The Utah Supreme Court has emphasized that, as a general rule, parties claiming that a judge is biased or partial "must demonstrate that the alleged bias stems from an extrajudicial source." See Dahl v. Dahl, 2015 UT 23, ¶49, 345 P.3d 566; see also State v. Munguia, 2011 UT 5, ¶17, 253 P.3d 1082 ("the bias or prejudice must usually stem from an extrajudicial source, not from occurrences in the proceedings before the judge"). Here, the only argument made for removing Judge Kouris from this case is that

Judge Kouris made statements at the sentencing hearing that reveal a bias. This, of course, is not an "extrajudicial" basis for removing Judge Kouris from this case.

The only exception to the general rule occurs in cases where judicial actions on the bench reach a point where they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." See Liteky v. United States, 510 U.S. 540, 555 (1994) (also stating that "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible," and that "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge"); see also Campbell, Maack & Sessions v. DeBry, 2001 UT App 397, ¶25, 38 P.3d 984 (citing Liteky); cf. Madsen v. Prudential Fed. Sav. & Loan Ass'n, 767 P.2d 538, 546 (Utah 1988) (stating that "[t]he traditional view is that if a judge can be disqualified for bias following a comment . . . during the court proceedings, there would be no limit to disqualification motions and there would be a return to 'judge shopping'" (citation omitted)).

In the Court's view, the comments made by Judge Kouris at sentencing do not rise to the level of displaying a "deep-seated favoritism or antagonism that would make fair judgment impossible." Certainly, Judge Kouris has developed some strong opinions about the case during the course of his years presiding over it. But so does every judge who presides over a case to conclusion. Every time a party files a motion for a new trial, that party is asking the trial judge to effectively reverse himself, and/or to find some infirmity in his own previous rulings. With regard to motions for a new trial, a party is simply not entitled to have those motions heard by a judge who is operating on a blank slate. Indeed, part of the whole idea of having the same trial judge who presided over the underlying trial adjudicate motions for new trial is so that those

motions can be decided by a judge who has more than a mere cold record to work from. Indeed, there is a process in the law by which a party can have a panel of fresh judges take a look at whether the trial judge erred: it is called an appeal. Defendant certainly has a right to one, and will no doubt file one. But Defendant does not have a right to have his motion for new trial decided by a judge who has not ever developed opinions about the case.[1]

In this Court's view, after reviewing the papers submitted by Defendant and reviewing the case file, the comments made by Judge Kouris fall short of disqualifying him from presiding over any remaining proceedings in this case. The fact that he found VM to be a credible witness, or even that he considered her actions "heroic," will not necessarily impair his ability to decide whether there was "any error or impropriety which had a substantial adverse effect upon the rights of a party." See Utah R. Crim. P. 24(a) (setting forth the standard for motions for a new trial in criminal cases). Stated another way, Defendant has not persuaded this Court that Judge Kouris has developed the sort of "deep-seated favoritism or antagonism" against Defendant that would make fair judgment on a new trial motion impossible.

[1] There are many other areas of law in which judges are asked to revisit their own rulings or statements about a case, and there is nothing definitionally improper about that. For instance, motions for reconsideration are so commonplace that the Utah Supreme Court has referred to them as "the cheatgrass of the litigation landscape." See Shipman v. Evans, 2004 UT 44, ¶18 n.5, 100 P.3d 1151. In each and every one of those motions, judges are asked to evaluate and potentially criticize their own rulings. No one would plausibly suggest, however, that each motion for reconsideration must be decided by one of the original judge's colleagues; that would improperly turn trial judges into appellate judges and would create administrative problems. To use another example in the criminal context, judges are often asked to quash bindover rulings rendered by the magistrate at a preliminary hearing, and in many cases (especially in rural counties or smaller districts) the judge who is asked to quash the bindover is the same judge who, in the capacity of a magistrate, rendered the very bindover order at issue. While some larger judicial districts have attempted, through administrative means, to minimize the number of occasions on which a judge is asked to evaluate his or her own bindover order, there is no rule of law that prevents a judge from doing just that. See State v. Black, 2015 UT 54, ¶19, 355 P.3d 981 (stating that "a judge may switch between a magistrate role and a judicial role in the same case"). Finally, in cases where a petitioner seeks post-conviction relief, the applicable rule expressly *requires* that, if possible, the same judge who sentenced the petitioner adjudicate the petition for post-conviction relief. See Utah R. Civ. P. 65C(g) (stating that "[o]n the filing of the petition, the clerk shall promptly assign and deliver it to the judge who sentenced the petitioner," if that judge is available).

For all of these reasons, Defendant's Motion is respectfully DENIED. There is no basis for disqualification. This matter is therefore returned to Judge Kouris for further proceedings. This Minute Entry is the order of the Court with regard to the Motion, and no further writing is necessary to effectuate this decision.

DATED this 12th day of October, 2016.

RYAN M. HARRIS
Associate Presiding Judge
Third District Court

Order Restitution Hearing Would Be Set

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING (NEF)

A filing has been submitted to the court RE: 131902296

Judge:

MARK KOURIS

Official File Stamp:	12-14-2016:12:21:47
Court:	3RD DISTRICT COURT - SALT LAKE District Salt Lake
Case Title:	STATE OF UTAH vs. BOYER, MARK
Document(s) Submitted:	Other - Not Signed Order (Proposed) Amended Order on Motions to Release Bond and Objections
Filed by or in behalf of:	MARK KOURIS
Note from the Court:	Objection filed to motion. Restitution hearing to be set.

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

MICHAEL D ZIMMERMAN for VICTIM

JEFFREY ROBROY PLATT for BRENDA HULME

T LANGDON FISHER for STATE OF UTAH

SIMARJIT S GILL for STATE OF UTAH

LINDA M JONES for VICTIM

ELIZABETH HUNT for MARK BOYER

ANNA L ROSSI for STATE OF UTAH

The following people have not been served electronically by the Court. Therefore, if service is required, they must be served by traditional means:

Order Denying Restitution Hearing and Granting Restitution

THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

State of Utah, Plaintiff,	:	**MINUTE ENTRY** (Resolution of Defendant's Bond)
Mark Boyer, Defendant.	:	Case No. 131902296 Judge Mark S. Kouris

On 1 March 2017, Ms. Elizabeth Hunt, Esq. (representing the defendant), and Mr. J. RobRoy Platt, Esq. (representing the Boyer Survivor's Trust), jointly filed a Motion to Submit on the proposed order to release $100,368.00 of the cash bond deposited with the court for the benefit of defendant.

By way of background, on 14 July 2016 a jury found defendant guilty of 11 criminal counts comprised of Aggravated Sexual Abuse of a Child, Rape of a Child and Sodomy of a Child. These counts are first-degree felonies.

More specifically, the jury found that the defendant raped and sodomized the victim when the victim was six or seven year's old. At the time of trial, the victim was approximately 17 years old. [redacted] because of the defendant's actions, [redacted]

Adult Parole and Probation prepared a pre-sentence report for this case. In that report, AP&P itemized restitution due to the victim. AP&P included an itemed schedule of expenses the victim incurred directly regarding this case and trial. That amount equals $9,632.00. At the time of sentencing, this Court ordered this restitution and the defense did not object.

The report also includes 5 billing statements itemizing some of the victim's [redacted] dant's actions. The bills document a total $24,813.00 of [redacted] The court granted the restitution amount, but allowed time for the plaintiff to

augment the amount with any outstanding medical invoices. The defense did not object to this portion of the restitution ordered.

The day following the sentencing, 20 September 2016, Ms. Hunt entered her appearance and became defendant's counsel. Two days later, on 22 September 2016, Mr. Platt moved to release the $150,000.00 cash bond posted for the benefit of defendant. On 27 September 2016, Ms. Jones (representing the victim) filed her objection to the bond's release. Then on 2 November 2016, Ms. Hunt filed her objection to the ordered restitution.

The court conducted a hearing on 2 December 2016. At that hearing, Ms. Jones petitioned the court to strike Ms. Hunt's objection to restitution and the court denied the motion. The court's denial was based upon confusion that may have arisen when the defendant's case was transferred from defendant's trial attorney to defendant's appellate attorney.

Upon further reflection, it is not uncommon for the trial attorney to hand off the case to an appellate attorney if the jury result was unfavorable. This case is no exception and Ms. Hunt entered her appearance the day after the defendant's sentencing. This Court reverses itself and strikes Ms. Hunt's objection to restitution as untimely and for the reasons stated in Ms. Jones filings. *See* STATE V. WEEKS, 61 P.3d 1000 (2002). Further, the reference to a pending restitution hearing contained in an order signed by this Court is hereby vacated.

After argument, the court also determined that, the cash bail posted is deemed the property of the defendant. The district court has no obligation to investigate the relationship between the defendant and any other person who may have posted the cash bail. *See* ROYAL CONSULATE OF THE KINGDOM OF SAUDI ARABIA V. PULLAN, 2016 UT 5, 373 P.3d 1283 (2016). Therefore, the cash bail posted on behalf of the defendant, can go to satisfy the restitution in the defendant's case.

At the same hearing, Ms. Jones abandoned her restitution claim for [redacted] treatment. Ms. Jones reasoned that by abandoning this claim, she is removing any claim Ms. Hunt may have to access th[redacted]

Finally, relying on case law from other jurisdictions, Ms. Jones argued that a portion of the defendant's bail should be set aside for the victim's [redacted] Waiving no claims of privilege or confidentiality, Ms. Jones proffered that $40,000.00 correlates with the past expenses and is an accurate estimate of the victim's [redacted] and the proposed time period for the victim to receive the treatment is 30 years from this order.

This Court agrees with setting restitution aside for the [redacted] The court also agrees with the general construct Ms. Jones suggested regarding the victim accessing these funds. Agreeing in principle, this Court makes this ORDER, overruling its previous proclamations.

The sum of $40,000.00 will be deducted from the defendant's cash bail and delivered to Ms. Jones' firm. Ms. Jones will coordinate with the victim and the funds will be deposited in a federally insured, interest bearing account. Anytime the victim needs access to these funds for [redacted] the victim or victim's guardian will provide proof of the [redacted] this Court. This Court will then approve of the disbursement.

Any funds remaining the account at the end of the 30-year treatment period, will be returned to the defendant or his estate. If the victim predeceases the 30-year term of treatment, all remaining funds will be returned to the defendant or his estate.

It is therefore **ORDERED**, the remaining $150,000.00 of the defendant's bail will be released as follows:

$9,632.00	is released to Ms. Jones for the victim;
$40,000.00	is released to Ms. Jones to set up the above described account for the victim:
$100,368.00	is release to defendant or his representative.

No further filings are necessary.

DATED this 14th day of March 2017.

By the court:

Mark S. Kouris
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE CITY

Order Releasing Bail

The Order of the Court is stated below:
Dated: March 15, 2017 10:56:58 AM /s/ MARK KOURIS, District Court Judge

ELIZABETH HUNT (#5292)
Attorney for Defendant
ELIZABETH HUNT LLC
569 BROWNING AVE.
Salt Lake City, Utah 84105
Telephone: (801) 706-1114
E-Facsimile: 1- 801-443-1980
Email: elizabeth.hunt@comcast.net

J. ROBROY PLATT (11750)
PLATT LAW, P.C.
256 N. Main Street,
Suite C Alpine,
Utah 84004
Office: (801) 769-1313
Fax: (801) 877-2325
robroy@plattlawpc.com

IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY,
SALT LAKE DEPARTMENT, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. MARK BOYER, Defendant.	ORDER TO RELEASE $100,368 OF CASH BAIL Case No. 131902296 JUDGE MARK KOURIS

The Court hereby orders the Clerk of the Court to release $100,368 of the cash bail in this case to the Boyer Survivor's Trust. Over the objection of the defendant and the Trust, the remaining $49,632, the amount for restitution claimed by VM, will be retained by the Clerk of the Court

pending the outcome of the restitution hearing.

* * *

END OF ORDER. DIGITAL SIGNATURE IN UPPER RIGHT CORNER OF PAGE 1.

CERTIFICATE OF SERVICE

I hereby certify that I e-filed this on February 14, 2017.

/s/ Elizabeth Hunt
ELIZABETH HUNT
Counsel for Defendant

Oral Ruling Denying Motion for New Trial

Court is inclined to deny the new trial, I'd ask the Court to consider giving me a full evidentiary hearing so Mr. Brass can be brought in here to answer the questions I want to ask him so I can put on the other proof that I'd like to put on. I'd ask the Court to consider granting me access to the discovery and the subpoenas so I can fully represent my client. Thank you.

THE COURT: Give me 15 minutes. I'll be right back.

(Short recess taken)

THE COURT: We're back on the record in the matter of State vs. Boyer. We've just listened to all of the attorneys' arguments with regard to granting Mr. Boyer a new trial based upon the trial that was held months ago, and I have had a chance to listen to everything. I read everything last night, read everything that was given to me. I listened to everything today, and I think I'm ready to rule at this point.

With regard to overviews, first of all, I think it would be fair to say that if we brought in 10 defense lawyers, I think there would be 10 different defense strategies. Does that mean that some are better than others? Well, incrementally they are, but the reality is that on numerous occasions in this courtroom, I see very poor defense lawyers who get acquittals and very good lawyers who get guilty pleas, which to me is a -- makes me feel good about the system we have here, because it seems like the jury is able to see through what's going on, although in this case I don't find that -- I find it's a very good lawyer that got

an acquittal.

There's two different directions the defense seems to be pulling on here. The first one would be that the defendant's wife has concocted all of this stuff and has loaded the victim with all of this information to come out in somehow -- in some way of revenge to come after him.

As part of that, obviously the defendant took the stand during the trial. His misrepresented how tumultuous this divorce was. There was really only two events that even pointed to the fact that it was a tough divorce, that being at some point apparently there was -- stuff was loaded in a car and moved somewhere when he left, and then there's the picture of the wife passing out on the floor. Nonetheless, that was the first story that he came to say that this had happened and this was the -- there was no evidence to base that on, quite frankly, and the law -- and the jury had a chance to hear the whole theory, and they decided that there was nothing to it.

The second theory is that this victims make -- makes these allegations for whatever reason, whether it be mental health or whatever reason it can be, makes these allegations about everyone. So she's constantly talking about all these people that have done these terrible things to her, and he -- and Boyer is just one that just got caught up in that sausage grinder that she's putting these people through.

Well, first of all, obviously that's inconsistent with

the wife's testimony, because in fact the wife wanted to use -- the wife (inaudible) have to know about this little girl's history, which there is certainly nothing to show that. Second of all, as far as making a proof of that sort of thing, I think that Mr. Brass did everything he could to try to get to the bottom of that to see what was there, including having me read through a whole stack of records to indicate -- to look for was there ever a chance that she actually said, [redacted] and found that not to be the case on any level.

As a matter of fact, on which I think is -- I characterize it a little bit differently than most people do, but I think that the stipulation that Mr. Brass was able to enter into is -- my opinion is tactically I think was as good as a defense lawyer could possibly get. He was able to get that. Otherwise, I doubt if anything would have come in.

Specifically, we get down the claims that are made by Mr. Boyer's attorney at this time, the first one being that he failed to challenge the credibility, given the fact that this is a credibility case. I don't find the record supports that at all. In fact, Mr. Brass did everything he could to challenge her credibility.

The cross examination he did on her, he did it on two different occasions. He pushed on every little dif -- different direction to find a crack in the armor. He did find some

inconsistencies, which obviously can be expected in a case like this. He also pointed out problems with the State's experts and the assumptions that they built their things on. He forwarded this theory of indoctrination and told that to the jury that this may -- might be an issue. So I think that he absolutely did as much as anybody could have done with regard to challenging the credibility of the witnesses.

Second of all, the allegation is that in fact he didn't complete -- he didn't do a good investigation. The first example that is pointed out is by looking at the police officer's investigation and figuring out that it's not perfect, and somehow he should have presented that to the jury. First of all, you don't have a right to have the police officers' investigation be perfect. The idea is that police officers do their investigation and then they bring it to the Court, and the jury's the one that determines what has -- what happens. I don't even know what the definition of a perfect investigation can be.

This case is very, very, very difficult. All of these cases like this are -- there are almost no forensic evidence. We don't have video cameras, we don't have fingerprints, we don't have anything like that. Given the fact that it takes years after the thing -- the event happens, it's very, very difficult -- it's very, very difficult to handle that.

As well, he looked at -- Mr. Brass did look into all the -- as far as he could as far as the allegation that in fact

[redacted] us he asked for those records, which he got.

Finally, there's an argument that in fact he didn't go to the mat on these CJC interviews that Don Bell talks about. The reality is in a case like this, I think Mr. Fisher accurately describes, this is not the case for a CJC interview. If there were -- if there were mistakes made by the victim during that interview, that's certainly something that could have been brought up, but then of course you weigh that with the jury hearing this little girl saying the same thing again.

Even younger, maybe it would even cause the jury to like her more, so as a lawyer you sit back and say well, how do I want to do this? Do I want to say that she messed up her time periods, or instead do I want to have this jury look at this little tiny girl talking about these terrible things, and I'm sure that's precisely what he made the choice not to do that.

The fact that the interview wasn't conducted properly had nothing to do in this case because the jury, No. 1, didn't see the interview. So if it wasn't conducted properly, that's quite frankly, so what? The victim actually stayed here and was cross examined and spent a significant amount of time in this courtroom being stared at by the jury and having them check her

credibility and doing whatever else they could, and they did just that.

The next claim is one of prosecutorial misconduct. Effectively the idea here is that the overall approach was a biased approach. Well, the reality is on some extent, a prosecutor's approach does have to be biased, because they are looking for the guilty person, so they have to construe facts in their favor. I think they did that in this case. That said, I don't think that there was any shenanigans that were going on that would cause this trial to go the direction that it did, No. 1, and No. 2, given the fact that again this is a pure credibility case, this jury got to listen to the victim get up and say what this man did to her. Then they got to the listen to the man who did this get up and say what his explanation were, and they made a decision. There's nothing that a prosecutor could have done to do whatever. They heard both people and they made their call. I don't see any sign at all here of prosecutorial misconduct.

With regard to the experts, I think Ed Brass handled the defense -- the prosecution experts perfectly. He did string them out on a number of their strengths. He cut into the foundation with regard to what they were relying upon. He actually had one of them talk about his own theory. The fact that he didn't call any witnesses, I don't think that there's been any proof that that made any difference at all. The witness statements --

although admittedly I didn't read the one here by Karen -- well, I read to it real quickly over Karen Malm. She's not saying anything except that, "I'd like to examine the victim," and that -- that doesn't get us anywhere.

They -- really there was no expert pointed to that said -- had any conclusions at all that indicates to me that if in fact this expert were to talk to that jury, we would have had a different result.

With regard to the [redacted] I think Mr. Brass got some of them. He tried to get everything he could. He got a big stack delivered to me. I went through them, and I think that anything beyond what he asked for would have been strictly barred by Rule 506. The ones he got may have been as well, but nonetheless those came through, and the defense has shown no exceptions that would have allowed her to get around the Rule 406 -- I'm sorry, 506.

[redacted]

calculated decisions with all of those. If one person decides that he doesn't want to testify at all and doesn't want to be part of it, there's nothing he can do that about. The other person, [redacted] I think -- I hope I didn't mix those up. I may have. So he didn't even have what of a false allegation because that person didn't deny it.

So I think that Mr. Brass actually did do a very

extensive investigation. He was able to ferret all of those claims, and he concluded that the stipulation he got that was given to the jury was the best he could get, and I agree with that. I believe that is true.

There -- the defense has still shown no exception to 412 to getting this information in they wanted to. That said, even before I get to 412, I think 403 would not allow this evidence in. I think I've got to weigh at that time the probative value being substantially outweighed by confusion -- absolutely be confusion. The jury would be thinking about one case, and having them try to figure out okay, did -- did this person try to affect this victim and is this victim lying about him or is he lying -- and then it would be wrapped into the next case, and that's the problem with that. I think that would lead to unfair prejudice as well. Certainly it would cause a lot of undue delay, as this would cause a trial to be put inside of a trial, which is always a catastrophe.

Rule 412, the constitutional challenge to 412 is -- I think it's been well developed in this state, and I believe it is constitutional, and I rely upon the parties' papers for that without going into it.

Ultimately I find that even if Mr. Brass did all of the things that Mr. Boy now -- Boyer asks him to do, there would be no -- no evi -- the result, I don't believe, would be different on any level, and I don't believe the evidence has indicated that

the result would be any different. I know that he was found guilty of all of his charges, so I could say well, it might actually be worse. Well, it probably was as bad as it got, but that said, nonetheless it would not have been better.

I don't believe there's any reasonable probability of a different result. I don't -- it does not undermine my confidence in the verdict on any level. I do not find that Mr. Brass was ineffective. In fact, I found him to be very effective. Excuse me. With that, I deny the motion for a new trial. As well, I deny any further motions with regard to any of these issues, and the next step to go would be to go upstairs, okay? Thank you, all.

MR. FISHER: Thank you.

MS. JONES: Thank you.

THE COURT: Mr. Fisher, if you wouldn't mind drafting something?

MR. FISHER: I will.

THE COURT: Thank you.

(Hearing concluded)

Final Order Denying Motion for New Trial

The Order of the Court is stated below:
Dated: May 05, 2017 10:04:31 AM
/s/ MARK KOURIS
District Court Judge

SIM GILL, Bar No. 6389
District Attorney for Salt Lake County
T. LANGDON FISHER, Bar No. 5694
Deputy District Attorney
111 East Broadway, Suite 400
Salt Lake City, Utah 84111
Telephone: 385-468-7600
Email: tfisher@slco.org

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. MARK BOYER, Defendant.	ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL Case No. 131902296 Judge Mark S. Kouris

This matter came before the Court for a hearing on April 19, 2017, regarding the defendant's *Motion for New Trial* and the defendant's motions to permit rule 14(b) subpoenas. The State was represented by T. Langdon Fisher and defendant was represented by Elizabeth Hunt. In addition, the victim ("VM") was represented by Linda Jones. Based upon the proceedings of record and for the reasons set forth in the State's memorandum in opposition, the Court rules as follows:

1. The Court disagrees with the characterization of the pretrial and trial proceedings as set forth in the defendant's motion for a new trial. During trial, the defense took the position that defendant's ex-wife orchestrated VM's allegations, the defense introduced an indoctrination

theory, and the defense questioned and addressed VM's credibility and the validity and credibility of the State's witnesses. The defense presented its theories at trial through cross-examination of witnesses, with presentation of its own evidence, and through defendant's testimony. Defense counsel investigated and engaged in strategic decisions in pretrial and trial proceedings in the case.

2. The defendant asserts more experts should have been called to testify at trial. But the defense is not required to call an expert in every case, and in this case, the defendant's trial counsel addressed defendant's theories through the expert witnesses, they addressed the foundation for the State's expert evidence, they took the position that expert testimony and other testimony was flawed or had weaknesses, and they pointed them out. The defendant has failed to meet his burden to show that trial counsel was ineffective in not calling experts or in not presenting or objecting to other evidence at trial and he has failed to demonstrate a reasonable probability of a more favorable outcome in the case.

3. The defendant has taken the position that CJC interviews with VM should have been conducted differently. But the defendant's argument disregards VM's age at the time of the interview, and that VM was not a young child. In addition, the defense had the opportunity to cross-examine VM about statements she made and to question her credibility at trial. If trial counsel had sought to admit portions or all of the CJC interview in evidence, they would risk exposing the jury to the interview and having VM recount the facts again in the recording, when she was younger and more sympathetic. The defendant's trial counsel had strategic reasons for

not presenting evidence of the CJC interview. Moreover, the defendant has failed to show how different CJC techniques or a different CJC interview would have supported a reasonable probability of a more favorable outcome, particularly where the jury was able to observe VM in person and to weigh credibility.

stipulation that defendant's trial counsel entered into with the State before trial may have been

more than the defense was entitled to admit at trial. Moreover, the defendant's arguments about the evidence are speculative, and the defense has failed to show that evidence would be admissible under any exception to rule 412. Also, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and would have been confusing to the jury. The evidence was unnecessary; it would have caused undue delay; and it would have necessitated a trial within a trial. The evidence is inadmissible under Utah Rules of Evidence 412 and 403. In addition, Utah Rule of Evidence 412 is constitutional.

6. The defendant has made other arguments about pretrial investigations, evidence, and prosecutorial misconduct. The defendant's arguments and proffered evidence do not undermine the Court's confidence in the verdict. The defendant's trial counsel was not ineffective. To the contrary, they were effective. The defendant was well-represented at trial and throughout the litigation. Even if trial counsel had taken other steps, defendant has failed to demonstrate how those steps would support a reasonable probability of a different outcome in the case. In addition, the record fails to support prosecutorial misconduct or how different prosecutorial activity would have led to a different result.

ORDER

Based upon the foregoing, this Court hereby ORDERS:

1. That the defendant's motion for new trial is DENIED.
2. That the defendant's motions for discovery and to compel discovery are DENIED.
3. That the defendant's original and renewed and supplemental motions to permit 14(b)

subpoenas are DENIED.

This is the Court's final order and no further order is required.

BY THE COURT:

[SIGNED ELECTRONICALLY ABOVE]
MARK S. KOURIS
DISTRICT COURT JUDGE

In accordance with Utah R. Civ. P. 10(e), the judge's electronic signature appears at the top of the first page of this order.

END OF DOCUMENT

Sample of Minute Entries Indicating Order Denying Motion For New Trial Resolved All Issues

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 131902296

Judge:

MARK KOURIS

Official File Stamp:	05-09-2017:15:17:52
Court:	3RD DISTRICT COURT - SALT LAKE District Salt Lake
Case Title:	STATE OF UTAH vs. BOYER, MARK
Document(s) Submitted:	Other - Not Signed Order (Proposed) (Alternative) Order Denying Motion to Reconstruct Record (with amended certificate of service
Note from the Court:	All issues resolved per signed State's Findings.

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

JEFFREY ROBROY PLATT for BRENDA HULME

T LANGDON FISHER for STATE OF UTAH

LINDA M JONES for VICTIM

SIMARJIT S GILL for STATE OF UTAH

MICHAEL D ZIMMERMAN for VICTIM

ELIZABETH HUNT for MARK BOYER

The following people have not been served electronically by the Court. Therefore, if service is required, they must be served by traditional means:

LINDA M JONES ATTY

BOYER SURVIVOR'S TRUST

This Court's Order Denying Motion to Supplement Record

IN THE UTAH COURT OF APPEALS

----ooOoo----

STATE OF UTAH, Appellee, v. MARK BOYER, Appellant.	)	ORDER Case No. 20170423-CA

This matter is before the court on Mark Boyer's Motion to Supplement the Record on Appeal. Boyer asserts that there are numerous pleadings and exhibits that are missing from the record. The State does not oppose this request. Boyer also requests that this court compel production of the [redacted] directly to this court. These records were previously reviewed *in camera* by the district court, then subsequently destroyed. This court does not have the authority to grant the relief he requests.

IT IS HEREBY ORDERED that Boyer's motion to supplement the record on appeal is granted in part. The record on appeal shall be supplemented with the pleading and exhibits identified in Boyer's motion as missing from the record. The matter is temporarily remanded to the district court to locate the materials to be included in the record. Upon locating the materials to be supplemented to the record the Fourth District Court shall immediately prepare and forward to this court the supplemental record and record index.

IT IS ALSO HEREBY ORDERED that Boyer's request that this court issue an order requiring the original recipients of the subpoenas concerning the victim's mental health records to produce the documents directly to this court is denied.

Dated this 5th day of October, 2017.

FOR THE COURT:

Jill M. Pohlman

Jill M. Pohlman, Judge

Other

VM's Story (handwritten and typed, including last page of handwritten allegation

[redacted]hich page was not given to the jury)

Duplex/Bunk bed So this was the very first time that he ever touched me. This time he climbed into the bunk bed and started to tickle my back and tummy then he started to suck on my neck and my ears then he went slowly started to pull down my pants and started to put his finger in me and was tickling my vagina and rubbing it then he got on top of me and started to pull pants down then he got out of the bed and went in the kitchen and got something that tasted like shit and then had me suck on a piece of candy. Then he climbed back on top of me and started to lay on me again then he pulled the sheets over my head and after he did that he twisted the around so that I was on top and he was on the bottom and he pushed my head down to his penis and told suck hard and so I did then when I pulled away he came on my leg. At the end he told me to be quiet and go back to sleep.

Duplex/couch this was the second time it happen and this time he was on the couch and I was on the long part of the couch and he came and snuggled with me till I was awake then he would tickle me and suck my ears and lick them then this time he kissed he way down to my vagina and my pants were already off so he started to suck on it and he would twirl his

tongue out and then his fingers went in and he touched his private and then he put me on top of him and said go up and down on me and he put his hands on my thighs and he was moving me up and down then he twisted back around and so I was on the bottom and he was on top and then he put his arm on his shoulder and he put it back away in then he came and stood and he zipped up his pants and he went to the bathroom and I had on my pants back on. And then I went back on the couch and fell asleep

bed So when he came into the room he
came in the bed and started to take
My Pack and Cracked on My ear and My neck
7-8 then he put his head down My front and
y Mouths started to finger Me then he pulled his fingers
fter out and took My pants off and started to
humbingue and then started to go in Me
and rubbing on Me then he finally went all
the way in Me and then he came in Me and
then when he was done he cuddled with
Me until I went back to sleep but he thought
I was asleep but it hurt so bad I couldnt
7-8 go back to sleep
Shower1 So the first time he came in
the bathroom he pulled back the curten and
5Mouths said do you need any help I said No I am
fter good but he stayed their and he pulled
down his pants and graped My hand and
put it on his penis and put his hand on top
of Mine then he started to jack off and at
then he pulled Me closer and said Suck on
this and I did and he kinda came in My
Mouth and in the shower cause I pulled
back And after it was all over he pulled
back and said dont say any of this happened
to day to her Then after I got dressed everything
went back to normal
7-8 Shower2 the second time he did it he got
all the way in the shower and said I am
going to shower with you and so he started
:-3 to wash his body and then he washed My
Mouths back area and then My front area and then

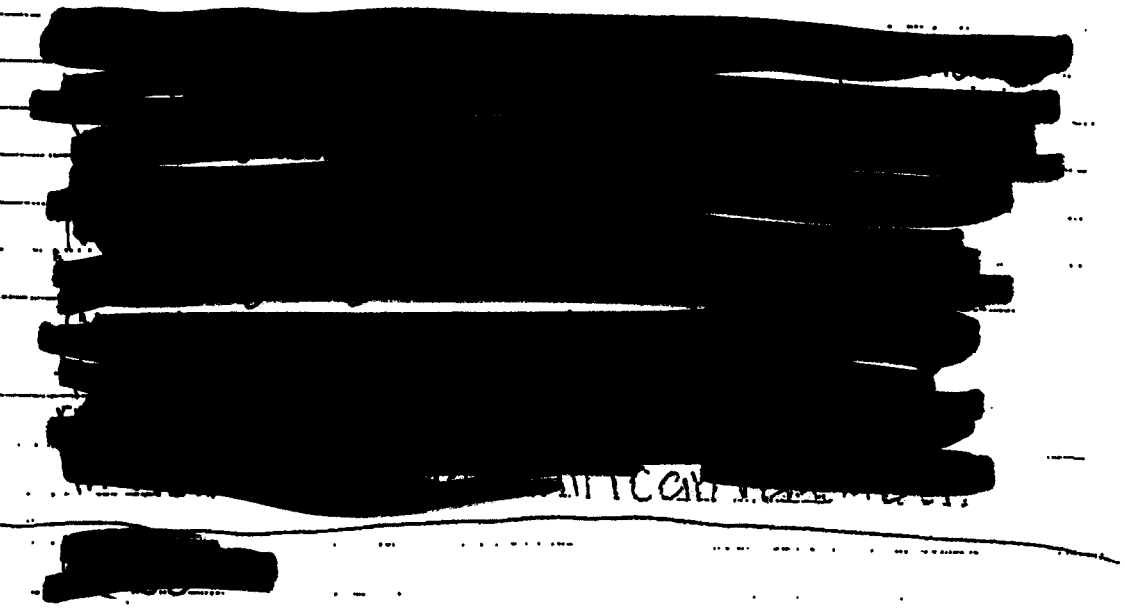
3

and long I started to bleed Mace and in so
Much pain I just sat there all cryed it
felt to sleep this time was the worst time
and the worst pain that keeps coming back.

8 Shower 3

2weeks This time he came in the Shower and he started
after to put his fingers in Me and was like Please not
again and he said yes again and you better
not say anything or I will do More. Then he grabed
Me back me against the wall then turn down
tell he got it in Me then he but Me on top of him
and said go up and down so I did and he started
to Mush and he said Mush in Me so I did.
and he flipped over and got on top of Me and went
fast as he can when he did that he came inside Me
and then he pulled his penis and he went down
to My Vagina and sucked it tell I move and then
he started to Kiss down by that area and then
he was done I got up and got dressed and went
and watched tv tell you got home then was a you got
home I don't think you remember but I run to tell
you and give you a hug and he gave me the
look like don't ya one say anything look so
I never did. this is the last time I remember
him doing anything to Me.

[redacted]



[redacted] Feb 11 2013.

Duplex/Bunkbed So this was the very first time that he ever touched me. This time he climb into the bunk bed and started to tickle my back and tummy than he started to suck on my neck and my ears then he went slowly started to pull down my pants and started to put his fingers in me and was tickling my vagina and rubbing then he got on top of me and started to be up and down then he got out of the bed and went in the Kithchen and got something that tasted like shit and then had me suck on a peace of candy. Then he climbed back on top of me and started to rub on me again then he pulled the sheets over my head and after he did that he twisted me around so that I was on top and he and he was on the bottom and he pushed my h ead down to his penis and said suck hard and so I did then went I pulled a way he comaed on my leg. At the very end he cuddlyed with me tell I went back to sleep.

Duplex/couch this was the second time it happen and this time he was on the couch and I was on the long part of the couch and he came and snuggled with me tell I was awake then he would tickle me and suck my ears and lick them then this time he kissed his way down to my vagina and my pants were already off so he start to sock on it and he would twirl his tongue on it and then his fingers went in and he penetraded his fingers in and out. Then he put me on the top of him and he said go up and down on me and he put his hands on my thighs and he was making me humb him then he twisted back around and so I was on the bottom and he was on the top and then he put one of my legs upon his shoulder and he put it half way in then and he comed and stoped and he fell asleep right next to me and I went in the bathroom and cried and put my pants back on and then I was back on the couch and fell asleep.

7-8
4 mouths after
Bed So when he came into the room he came in the bed and started to tickle my back and sucked on my ear and on my neck then he put his hand down my pants and started to finger me then he pulled his fingers out and took my pants off and started to humbing me and then started to go in me and rubbing on me then he finally went all the way in me and then he came in me and then when he was done he cuddled with me untell I went back to sleep but he thought I was asleep but it hurt so bad I couldn't go back to sleep.

7-8
3 mounths after
Shower 1 So the first time he came in the bathroom he pulled back the curten and said do you need any help I said no I am good but he stayed their and he pulled down his pants and graped my hand and put it on his penis and put his hand on top of mine then he started to jack off and at then he pulled me closer and said suck on this and I did and he kinda comend in my mouth and in the shower cause I pulled back. And after it was all over he pulled back and said don't say any of this happened today to her. Then after I got dressed everything went back to normal.

7-8
2-3 mounths after

Shower 2 The second time he did it he got all the way in the shower and said I am going to shower with you and so he started to wash his body and then he washed my back area and then my front area and then he started to wash my hair and then after that he grabed me and held me and put my back on the shower wall and started to humb me and started to go in me than he had me lay on then shower floor so he could get it all the way in me. Once he got it all the way in me he started to get rough with me and he started to nillon and while I was mooving he finally comed and he was done the he washed off and I did to then we got out of the shower and got dressed and he gave me a hug and said go down with the boyes.

8-9
1 mounth after
Couch
So this time he was lying on the other side of the couch and I feel asleep on the long side of the couch. He pulled me close to him and got on top of me and started to suck on my vagina and started to finger me and was alot more forcefull and harder after he pulled his fingers out he started to humb me and put his penis in me and this time he was penetrated more and a lot more agresively. He also was more wanted more from my part but when he started to go faster I started to moon and make noise he covered my mouth cause I was to loud and he was mooning and he started to slow down then he went faster again and came inside me after he was all done he layed next to me and tickled/massage my back and my leg area then once he left I went in the bathroom and that when I started to bleed cause he done it so hard and long I strated to bleed more and in so much pain I just sat their and cryed my self to sleep. This time was the worst time and the worst part that keeps coming back.

8
2 weeks after
Shower 3
This time he came in the shower and he started to put his fingers in me and I was like please not again and he said yes again and you better not say anything or I will do more. Than he grabed me but me against the wall went up and down tell he got it in me then he but me on top of him and said go up and down so I did and he started to muon and he said muon with me and so I did and he flipped over and not on top of me and went fast and when he did that he came inside me and then he pulled his penis and he went down to my vagina and he sucked it tell I move and then he started to kiss down by that area and when he was done I got out and got dressed and went and watched tve tell you got home then whan you get home I don't think you remember but I ran to tell you and I gave you a hug and he gave me the look like don't you dare say anything look so I never did. This is the last time I remember him doing anything to me.

[redacted]

[redacted]ed 1 2013

BR Holdaway

VM's letter regarding JR

Redacted entirely.

Declaration

Redacted entirely.

Declaration of Donald Bell, CJC Expert

Redacted entirely.

Declaration of Karen Malm, PhD

Redacted entirely.

Declaration of Matthew Davies, PhD

Redacted entirely.

Declaration of Matthew Davies, PhD

Redacted entirely.

Proposed 14(b) subpoenas

Redacted entirely.

Legislative History of House Bill 411 (March 10, 2014)

House Bill 411
Electronically Recorded on
March 10, 2014

Transcribed by: Natalie Lake, CCT

152 E. Katresha St.
Grantsville, UT 84029
Telephone: (435) 590-5575

PROCEEDINGS

(Electronically recorded on March 10, 2014)

MADAME CLERK: House Bill 411, victim restitution amendment, Representative Wilson. This was heard in judiciary with a vote of eight, zero, one.

SPEAKER PRO TEM: Representative Wilson.

MR. WILSON: Thank you, Mr. Speaker pro tem. House Bill 411 does something very simple. It gives judges discretion to apply any bail posted by defendants to court ordered restitution for victims. That concludes my presentation.

SPEAKER PRO TEM: Discussion to the bill? Seeing none, Representative Wilson for summation.

MR. WILSON: Waive.

SPEAKER PRO TEM: Summation is waived. Voting is open on House Bill 411.

(Voting occurs)

SPEAKER PRO TEM: Representative -- seeing all present having voted, voting will be closed. House Bill 411, having received 70 yea votes and zero nay votes passes the House and will be transmitted to the Senate for its consideration.

(Conclusion of HB411)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF TOOELE)

I, Natalie Lake, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 18th day of November 2016.

My commission expires:
January 9, 2020

Natalie Lake
NOTARY PUBLIC
Residing in Tooele County

NATALIE LAKE
NOTARY PUBLIC-STATE OF UTAH
COMMISSION# 686678
COMM. EXP. 01-09-2020

Beverly Lowe, RSR, CCR

House Bill 411
Electronically Recorded on
March 14, 2014

Transcribed by: Natalie Lake, CCT

152 E. Katresha St.
Grantsville, UT 84029
Telephone: (435) 590-5575

PROCEEDINGS

(Electronically recorded on March 14, 2014)

MADAME CLERK: House Bill 411, victim restitution amendment, Senator Hillyard.

SPEAKER PRO TEM: Senator Hillyard?

MR. HILLYARD: Thank you very much. This -- you know, when I was handed this bill by Representative Wilson, I was concerned because I thought we had already done something like this, but it makes it clear what happens now.

If -- a judge has a discretion -- it's not mandatory -- to apply any bail posted by a defendant by cash, credit card or debit card to the court ordered restitution of fines, fees and surcharges. Now this only applies to the defendant. So if it's posted by anyone else, it doesn't apply. Again it's not mandatory. The judge can look at it and make a decision.

Nineteen states in the federal government allow this method of collecting restitution. This method has been tested numerous appellate courts, so it's legal. So like I say, it's -- I thought we had done something like this before. I hadn't had a chance to check it out, but this bill makes it clear, and I think very appropriately that if the defendant himself posts bond, either credit card, cash or a debit card, at that point in time the Court, upon his release, could take that money and apply it directly on restitution and fines. Glad to respond to any questions.

SPEAKER PRO TEM: Questions for Senator Hillyard on House Bill 411, 4-1-1. Okay. Senator Hillyard, back to you.

MR. HILLYARD: As permitted by the constitution, I move to suspend the three reading requirements for House Bill 411.

SPEAKER PRO TEM: Okay. All in favor say I.

(I's voted)

SPEAKER PRO TEM: Any opposed? That motion passes. Senator Hillyard?

MR. HILLYARD: Thank you. I would move under suspension of the rules the final passage of House Bill 411.

SPEAKER PRO TEM: Roll call vote?

MADAME CLERK: Senator Adams?

MR. ADAMS: I.

MADAME CLERK: Bramble?

MR. BRAMBLE: I.

MADAME CLERK: Christensen.

MR. CHRISTENSEN: I.

MADAME CLERK: Dabakis?

MR. DABAKIS: I.

MADAME CLERK: Davis?

MR. DAVIS: I.

MADAME CLERK: Dayton?

MS. DAYTON: I.

MADAME CLERK: Harper?

MR. HARPER: I.

MADAME CLERK: Henderson?

MS. HENDERSON: I.

MADAME CLERK: Hillyard.

MR. HILLYARD: I.

MADAME CLERK: Hinkins?

MR. HINKINS: I.

MADAME CLERK: Jenkins?

MR. JENKINS: I.

MADAME CLERK: Jones?

MR. JONES: I.

MADAME CLERK: Knudson?

MR. KNUDSON: I.

MADAME CLERK: Madsen?

MR. MADSEN: I.

MADAME CLERK: Mayne.

MS. MAYNE: I.

MADAME CLERK: Okerlund?

MR. OKERLUND: I.

MADAME CLERK: Osmond?

MS. OSMOND: I.

MADAME CLERK: Reid?

MR. REID: I.

MADAME CLERK: Robles?

MR. ROBLES: I.

MADAME CLERK: Shiozawa?

MR. SHIOZAWA: I.

MADAME CLERK: Howard Stephenson?

MR. STEPHENSON: I.

MADAME CLERK: Jerry Stevenson?

MS. STEVENSON: I.

MADAME CLERK: Saata?

MR. SAATA: I.

MADAME CLERK: Urquhart?

MR. URQUHART: I.

MADAME CLERK: Valentine?

MR. VALENTINE: I.

MADAME CLERK: Van Tassell.

MR. VAN TASSELL: I.

MADAME CLERK: Vickers?

MR. VICKERS: I.

MADAME CLERK: Weiler?

MR. WEILER: I.

MADAME CLERK: President Niederhauser.

MR. NIEDERHAUSER: I.

SPEAKER PRO TEM: House Bill 411, having received 26 yea votes, zero nay votes, three being absent, passes and shall be signed by the president in open session and sent to the House for the signature of the speaker.

(Conclusion of HB411)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF TOOELE)

I, Natalie Lake, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have been authorized by Beverly Lowe to prepare said transcript, as an independent contractor working under her court reporter's license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 18th day of November 2016.

My commission expires:
January 9, 2020

Natalie Lake
NOTARY PUBLIC
Residing in Tooele County

NATALIE LAKE
NOTARY PUBLIC-STATE OF UTAH
COMMISSION# 685670
COMM. EXP. 01-09-2020

Beverly Lowe, RSR, CCR