Public

Case No. 20170423-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

MARK BOYER,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for four counts of aggravated child sexual abuse, five counts of rape of a child, and three counts of sodomy on a child, all first-degree felonies, in the Third Judicial District, Salt Lake County, the Honorable Mark S. Kouris presiding

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Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

STATE RULES

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INTRODUCTION

Defendant Mark Boyer sexually abused a neighbor girl, V.M., for several years and was charged with various sex crimes. He hired Edward Brass and Kim Cordova to represent him. Despite their vigorous representation, a jury convicted him. Boyer filed a new trial motion, arguing that his counsel were ineffective for more than a dozen reasons, that the trial court erred on several rulings, and that the cumulative prejudice from all these alleged errors denied him a fair trial. The trial court rejected these claims. He raises them again on appeal, but he has shown neither error nor prejudice.

Boyer next argues that the trial court (Judge Kouris) was biased against him. At sentencing, Judge Kouris praised and encouraged the victim, saying that he believed her testimony. He also chided Boyer for not taking responsibility for his crimes. After sentencing, Boyer hired his present counsel, who moved (1) for a new trial and (2) to recuse Judge Kouris. Counsel argued that Judge Kouris' sentencing remarks showed that he could not fairly decide the new trial motion. Then-Presiding Judge Harris denied the recusal motion. That decision was correct. Judge Kouris's remarks show neither actual nor apparent bias, and he repeatedly demonstrated his fairness toward the defense, notwithstanding his personal thoughts about the evidence—indeed, he had previously granted the defense a new trial.

Boyer finally argues that the trial court erred by not re-subpoenaing victim records. The parties stipulated before trial that the court could receive and review V.M.'s mental health records in camera for any relevant evidence. After that review, the court ruled that the records had nothing exculpatory in them and then shredded them. Defense counsel did not object to the shredding. The trial court later denied present defense counsel's motion to re-subpoena those records. Because trial counsel did not object to destroying the records, Boyer can get relief only if he proves ineffective assistance. He

cannot, because there is no prejudice—the record shows that any evidence in the records would be cumulative or of marginal impeachment value.

STATEMENT OF THE ISSUES

1. Did the trial court abuse its discretion when it rejected Boyer's new trial motion alleging cumulative prejudice?

Standard of Review. This Court reviews the denial of a new trial motion for abuse of discretion. *State v. Pinder*, 2005 UT 15, ¶67, 114 P.3d 551. Ineffective assistance claims raised in the trial court are reviewed for legal correctness, with any fact findings reviewed for clear error. *State v. Griffin*, 2016 UT 33, ¶16, 384 P.3d 186.

2. Did Judge Harris abuse his discretion by ruling that Judge Kouris was capable of fairly deciding the defense's new trial motion? In particular, did Boyer prove that a judge who had already granted him one new trial was too biased against him to fairly decide whether to grant him another?

Standard of Review. A defendant claiming error from a failed recusal motion must show either abuse of discretion or actual bias. *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998).

3. Was counsel ineffective for not objecting when the trial court said that it would destroy the victim's mental health records following an in

camera review where the trial court found that the destroyed records contained no exculpatory evidence?

Standard of Review. This is a question of law considered for the first time on appeal. *State v. Griffin*, 2016 UT 33, ¶16, 384 P.3d 186.

STATEMENT OF THE CASE

A. Summary of relevant facts.

V.M. had a secret that she wanted to tell Jann—her best friend's mother, and a sort of surrogate mother to her—but something held her back. R2493-94. V.M. would say that "she had something she wanted to tell" Jann, and Jann would answer, "Well, tell me," but V.M. "wouldn't say anything." *Id*. This pattern "was becoming very irritating" to Jann until she figured out that V.M. likely wasn't talking because Jann's other children were around. R2494. After Jann sent them to a neighbor's house and got V.M. alone, V.M. told her that Defendant Mark Boyer—Jann's ex-husband—had repeatedly abused her years before. R2327; 2495-96.

***

V.M. lived next door to Jann and Boyer. V.M. had a rough childhood: her mother was put into a care center when V.M. was two; she had never known her father; and she was raised largely by her grandparents. R2336-37. When V.M. was five or six, she became best friends with M., Jann and Boyer's

son. R2296-98. V.M. and M. became inseparable to the point that V.M. would spend nights, weekends, holidays, and even vacations with the Boyers. R2298, 2479-81. Jann would buy her clothes and include her in family photos. R2480. Eventually, V.M. felt so welcome and so much "[l]ike family" that she began to call Jann "mom." R2303.

But the situation was not all idyllic. One night during a sleepover when V.M. was six, Boyer came into M.'s room where V.M. was sleeping on a bunk bed. R2306. He lay next to her and started to tickle her back and suck on her ear. R2306-07. He then put his hands down her pants and his fingers in her vagina. R2307. After taking off her pants, he put his mouth on her vagina and "[s]tarted to hump" her. R2307-08.

This was only the beginning. Another time, V.M. fell asleep on the couch after watching movies. R2310. Again, Boyer came in and lay by her, tickled her back, sucked her ear, put his fingers in her vagina, his mouth on her vagina, and "humped" her. R2310-11.

A third time, in addition to the tickling, sucking, fingering, and mouthing, Boyer had sex with her. R2313-14. This time Boyer got "more rough" and caused her vagina to bleed. R2320-21. Afterwards, V.M. went to the bathroom, "sat on the floor and just cried." R2320-21. When Jann found her and saw blood, V.M. lied and said she had a nose bleed. R2321. She didn't

tell the truth because she "didn't think that anyone would believe her." R2325.

The fourth time, Boyer found V.M. showering and got in with her, put her hand on his penis and forced her to masturbate him. R2314-15. He told her not to say "anything to [Jann]" or he would "do it to [V.M.] more." R2315-16.

The fifth time, Boyer found her showering again and "started to wash [her] back and stuff" before digitally penetrating her and trying to force his penis inside her while standing up. R2316-17. When that didn't work, he "put [V.M.] on the shower floor" and raped her. R2317-18. The last time happened when V.M. was sleeping in Jann's bed—Boyer came in, lay beside her, tickled her back and sucked on her ear, raped her, and put his penis in her mouth. R2318-19.

After V.M. disclosed, Jann had her write down what happened. *See* SE12; *see also* R2501-02, 3525-29. V.M. would have to recount the abuse many times—in addition to Jann, she told mental health providers, doctors, nurses, police officers, workers at the Division of Child and Family Services (DCFS), a magistrate at preliminary hearing, and two different juries. *See generally* R2515, 2255 (defense counsel discussing V.M.'s prior statements).

B. Summary of proceedings and disposition of the court.

The State charged Boyer with four counts of aggravated child sex abuse, four counts of child rape, and three counts of child sodomy. R1-9.[1] Boyer hired Edward Brass and Kim Cordova to represent him. R63-64.

The parties raised several evidentiary issues below relevant to appeal.

Mental health records stipulation. After disclosing the abuse, V.M. began to self-harm and even attempted suicide. R2015, 2330. She received mental health treatment at [redacted] R278-84; R2330. The parties stipulated (1) that these mental health providers would send the trial court any records they had of V.M.'s statements about Boyer's abuse and any diagnoses she had; and (2) that the trial court would review the records in camera and disclose to both parties any exculpatory information. R278-84. After reviewing the records, the trial court ruled that they contained nothing relevantly inculpatory or exculpatory, and ordered them destroyed. R303. Defense counsel did not object to the destruction.

[1] The original information included an additional count, but that was dismissed after preliminary hearing. R1926-27, 2055-56.

[redacted]

The court held a hearing, heard arguments, and took the matter under advisement. R2084. Before adjourning, the prosecutor asked for a few minutes to see if the parties could resolve the issue. R2085. After a short recess, defense counsel told the court that the parties would "come up with a written stipulation" regarding [redacted], saying that he denied any wrongdoing, and was never charged. *Id.* This would leave the prosecution "free to argue that there can be many reasons why charges aren't filed," and the defense

[redacted]

[2] [redacted]

[3] [redacted]

"free to argue that there's only one reason, and that's that [the allegation] was false." R2085-86. [redacted].[4]

Dr. Corwin's expert testimony. Before trial, the State filed an expert testimony notice for Dr. David Corwin, a pediatric psychiatrist and University of Utah professor. R312. The State proffered that he would testify about the impact of sexual abuse on victims and explain why they might delay disclosure. R353. Defense counsel asked for a continuance to consider filing a motion for a reliability hearing and to "conduct further investigation into these subjects and consult with an expert." R353-54. Defense counsel ultimately did not ask for a hearing before trial or hire their own expert, but instead, detailed below, sought to prevent or limit Dr. Corwin's testimony at trial, and elicited several concessions from Dr. Corwin on cross-examination that they later used to argue for acquittal.

Mole evidence and genital pictures. Shortly before the preliminary hearing, V.M. told a victim advocate from the prosecutor's office that Boyer had a "mark" near his genitals. R55. She later told an investigator that he had two brown circular moles in his genital area. R3689-92.

[4] [redacted]

The court granted the prosecutor's motion—over defense objection—for pictures of Boyer's genital area, "[g]iven that there are issues of credibility" for the jury to consider. R1943-44, 1947. Those photos were introduced at trial. SE14-17. The pictures show a prominent birthmark on Boyer's left leg, and various smaller marks and moles on his legs and torso. *Id.*

Herpes assertion. Boyer has genital herpes. R3610. After V.M. disclosed to Jann, Jann told her about Boyer's diagnosis and asked V.M. if she had any symptoms like that; V.M. said yes, and Jann said that V.M. must have herpes. R2162; R2343-47; R2503-04, 2514; R3610. It turned out that V.M. did not have herpes, but merely ingrown hairs, and the State stipulated that V.M. never had herpes. R2163; R2343-47.

First trial. Boyer's first trial ended in a mistrial. While V.M. was discussing what made her feel comfortable opening up about Boyer's abuse, she said that it stemmed from a conversation she heard between Jann and Jann's grandmother while the three of them were at a restaurant. R2160-61. They were talking about a "lady" and Boyer, which made V.M. feel like she "wasn't the only one." R2161. Defense counsel moved for a mistrial, and the trial court granted it, explaining that "the only inference I think a person could make" from the victim's statement would be that someone else "had

gone through what she went through at his hands or that she claims to." R2265. The trial court apologized to counsel and the victim, acknowledging that "there's nothing about this that's fun or even pleasant, quite frankly," but did not "see how we could possibly move forward at this point." R2266.

Second trial. A few weeks later, V.M. testified at the second trial. She detailed Boyer's abuse, explained why she had taken so long to disclose it, and talked about some of its psychological effects on her. R2306-31. The most serious of those effects—self-harm and suicide attempts—did not manifest until years after the abuse. R2330, 2339-40. To explain the delayed reporting and delayed effects, the prosecution called Dr. Corwin, who explained that delayed disclosure was common for sexual abuse due to various factors, such as fear and confusion. R2576-78. He also explained that the psychological damage often begins to manifest at the time of disclosure. R2585.

Despite at least one injury from Boyer's abuse, V.M. had no apparent physical damage or scarring. To explain this, the prosecution called nurse Linda Lewis, who explained that it was not unusual for a child's genital tissue to heal completely, even if there is penetration. R2616-18, 2646.

The prosecution also called Jann (to give background and corroborate V.M.'s testimony) and Detective Brian Holdaway (to lay foundation for pictures). R2478-2515, 2517-21.

Defense case. The defense theory was that Jann had fabricated the abuse and manipulated V.M. to try to influence custody proceedings involving their sons, and that V.M.'s inconsistencies showed that she had been manipulated. R2771-2803 (defense closing).[5] To support this defense, they thoroughly cross-examined the prosecution witnesses. With V.M., they questioned the timing of her symptoms, inconsistencies in her accounts, the false herpes assertion, the mole accounts as compared to the pictures, and her and Jann's close relationship. R2340-77. With Jann, they showed her closeness to V.M., that she had taken V.M. around for all her interviews about the abuse, had encouraged V.M. to write down an account of the abuse, had asked Detective Holdaway if she could "prevent [her] boys from seeing" Boyer, and had told V.M. that she had herpes. R2510-16. They got Dr. Corwin to concede that adults can coach children—even unintentionally—to give false accounts of sexual abuse; that the presence or absence of any given psychological symptom (such as depression, anxiety and post-traumatic stress disorder) does not prove that the symptom stems from abuse; that it is important to consider the totality of circumstances in a given victim's life when linking those symptoms to abuse; and that he was not given any information about

[5] Jann denied coaching V.M. and plotting against Boyer. R2713-14.

the specifics of V.M.'s case. R2581-86. Finally, the defense elicited from Nurse Lewis that the victim had not mentioned during her examination that Boyer had forced her to give him oral sex; that V.M. had repeated Jann's herpes assertion; that V.M.'s examination was normal, with no signs of injury; and that injury is more likely to occur in prepubescent children because the genital tissue is less flexible than in teens and adult women. R2625-41; R2649-52.

After the State had rested, the defense called the State's case officer, Detective Holdaway, to explain that interviewing a child requires special techniques to avoid inappropriate influence. They would later use this testimony to argue that Jann did not use the right techniques and thereby improperly influenced V.M.

Boyer also testified and denied abusing V.M., claiming that Jann made everything up to try to influence custody proceedings after their sons had found her passed out from drinking. R2684-99; DEC.[6] But Boyer admitted that the divorce was stipulated and that visitation went smoothly before V.M.'s allegations came to light. R2697-98, 2702. Indeed, the only discussion in the record of a proposed change to visitation was that after Boyer's abuse

[6] Jann explained in rebuttal that she had taken a sleeping pill that night. R2710-11.

came to light, Jann asked a police officer if she could change visitation. R2513-14; R3610. V.M.'s allegations came out at least one year—perhaps longer—after the divorce was final. *See* R2490, R2697, R2492, R2688.

Conviction and sentencing. The jury convicted Boyer as charged. R534-44. The trial court imposed prison terms as follows: (1) five terms of fifteen years to life; (2) four terms of ten years to life; and (3) two years of five years to life. The court ordered two of the fifteen-to-life counts to run consecutively, and the rest to run concurrently. R654-55.

During sentencing, the trial court asked Boyer if he persisted in his claim that Jann had fabricated the abuse; Boyer said that he did. R2864. The trial court said that it believed "every word" that V.M. said, "as did the jury." R2865. The trial court then addressed V.M., calling her a "hero" for being willing to testify about "intimate details" in front of strangers and under cross-examination from "maybe one of the best defense lawyers in the state." *Id.* The court then encouraged V.M. to get on with her life secure in the knowledge that she would not have to worry about Boyer getting out of prison. R2866-67. The court also chided Boyer for lacking the "character or the guts" to admit the abuse. R2867.

New trial and recusal motions. After sentencing, Boyer retained his current counsel, R669, who filed a voluminous new trial motion raising a host

of ineffective-assistance claims. *See* R3416-3864. New counsel also sought to recuse the trial court (Judge Kouris) based on his statements at sentencing, which she argued showed he could not impartially decide the new trial motion. R767-70; R3331-42.

In compliance with the governing rule, Judge Kouris sent the recusal motion to Judge Harris, the then-presiding judge. He denied the motion, ruling that Boyer had "not persuaded" him that Judge Kouris's sentencing statements reflected "the sort of 'deep-seated favoritism or antagonism' against" Boyer "that would make fair judgment on a new trial motion impossible." R769-74. Judge Kouris then denied the new trial motion, ruling that counsel had performed effectively. R1789-93. Boyer timely appealed to the Utah Supreme Court, which transferred the case to this Court. R1850-51, 1856-59.

SUMMARY OF ARGUMENT

I. Cumulative prejudice. Boyer claims cumulative prejudice from nearly two dozen alleged errors below. Most of the alleged errors are presented as ineffective assistance of counsel claims; the remainder allege trial court error. But for each claim, he has shown either no error or no prejudice. There is thus no prejudice to accumulate.

II. Trial court disqualification. Boyer argues that Judge Kouris's sentencing statements showed that Judge Kouris was both actually and apparently prejudiced against him. The record refutes this claim, particularly given that the trial court had previously granted a defense request for a new trial.

III. Replacing victim mental health records. Boyer finally argues that the trial court erred by shredding and refusing to replace V.M.'s mental health records. Because he did not object to this procedure below, he can get relief on this claim only by showing that his counsel were ineffective. He cannot do so, because he cannot prove prejudice. [redacted] And it would not have strengthened Jann's alleged motive to manipulate V.M.

ARGUMENT

I.

Boyer cannot prove cumulative prejudice from his myriad alleged errors because he has proved neither error nor prejudice on any of the underlying claims.

Boyer devotes the bulk of his brief to arguing cumulative prejudice from eight types of alleged errors, each with multiple sub-errors. Aplt.Br. 11-

62. To get reversal for cumulative prejudice, he must prove (1) error; (2) that "standing alone, has a conceivable potential for harm"; and (3) that the "cumulative effect of all the potentially harmful errors undermines" the court's "confidence in the outcome." *State v. Martinez-Castellanos*, 2018 UT 46, ¶42, __ P.3d __. Boyer cannot show cumulative prejudice because there is no prejudice to accumulate—the alleged errors were either not errors or not prejudicial.

A. Counsel could reasonably decide not to call experts on child interviewing techniques and victim behavior; doing so would have either conflicted with the defense strategy or produced cumulative evidence.

Boyer first argues that his counsel were ineffective for not investigating and calling two expert witnesses: (1) a child interview expert; and (2) a medical expert. Aplt.Br. 12-17. To prove ineffective assistance, Boyer must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). If he fails to prove either element, his claim fails. *Id.* at 687, 697.

For the deficient performance element, *Strickland*'s guiding principle is reasonableness. *Id.* at 687 ("[T]he proper standard for attorney performance is that of reasonably effective assistance."); *see also id.* at 688-89; *Premo v. Moore*, 562 U.S. 115, 126 (2011) (similar). So long as counsel acts reasonably,

the defendant has received the sort of assistance that the Sixth Amendment guarantees.

Mere reasonableness gives counsel a "wide range" to operate in. *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997). The range is wide because "[e]ven the best criminal defense attorneys would not" necessarily "defend a particular client in the same way," meaning that there are "countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. In addition, reviewing courts are to "eliminate the distorting effects of hindsight" and "evaluate the conduct from counsel's perspective at the time." *Id.* The point of the *Strickland* analysis is to ensure a fair trial, not to "grade counsel's performance," *Strickland*, 466 U.S. at 687, 697, or to weigh the relative merits of alternative strategies, *State v. Lucero*, 2014 UT 15, ¶¶41-43, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, ¶¶54-55, 391 P.3d 1016.

Reviewing courts must indulge the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This deference also recognizes that, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

In addition, courts must consider the alleged errors in light of counsel's overall performance—"whether, *in light of all the circumstances*, the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690 (emphasis added). It is "difficult" to prove ineffectiveness "when counsel's *overall performance* indicates active and capable advocacy." *Richter*, 562 U.S. at 111 (emphasis added); *see also Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (holding that it "will generally be appropriate for a reviewing court to assess counsel's *overall performance throughout the case* in order" to decide deficient performance element, and chiding the lower courts for "inadvisabl[y]" failing to do so) (emphasis added).

In short, a defendant cannot prove deficient performance unless he proves that "no competent attorney" would have proceeded as his counsel did. *Moore*, 562 U.S. at 124.

On the prejudice element, Boyer must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Proving both deficient performance and prejudice requires actual proof—neither can be "a speculative matter but must be a demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (cleaned up). "It

should go without saying that the absence of evidence cannot overcome the strong presumption that counsel" rendered "reasonable professional assistance." *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (cleaned up). Thus, any record gaps are construed in favor of finding both that counsel performed adequately and that the defendant suffered no prejudice. *State v. Litherland*, 2000 UT 76, ¶17, 12 P.3d 92; *see also Codianna v. Morris*, 660 P.2d 1101, 1113 (Utah 1983).

In his new trial motion, Boyer argued that his counsel were ineffective for not calling (1) a child interview expert to show that Holdaway's interview of V.M. at the Children's Justice Center (CJC) departed from best practices in several respects; and (2) a medical expert to counter Dr. Corwin's and a nurse's testimonies. R3441-47. The trial court rejected these claims, ruling that counsel reasonably presented an indoctrination theory through the witnesses at trial, that an additional expert was not required, and that had counsel sought to attack parts of the CJC interview, "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." R1789-90. It also ruled that Boyer had not proven prejudice. R1790-91.

Boyer re-asserts these ineffectiveness claims on appeal.

1. Calling a different child interview expert would have given the State notice of—and may have undermined—defense tactics.

Boyer argues that his counsel performed deficiently for not calling a child interview expert—former police officer Donald Bell—who would have allegedly said that Holdaway "substantially deviated" from established interview protocols during the first CJC interview. Aplt.Br. 13-14; R3534-41 (Bell report); R3544-86 (interview transcript); R3728 (reference to hard copy of interview video, available in file).[7]

Boyer essentially argues that counsel should have called a different expert in pursuit of a different strategy. Perhaps a different attorney could have reasonably decided to go that route. But the reasonableness of alternatives is not the question—it is whether what counsel actually did was reasonable. *Lucero*, 2014 UT 15, ¶¶41-43.

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[7] Boyer briefly asserts that his attorneys "forfeited [his] rights to confrontation and defense" and that he was constructively denied counsel. Aplt.Br. 12 & n.2, 13 & n.5, 18, 34, 58-59. These claims are inadequately briefed, consisting of mere assertion and bare citation without any reasoned support or analysis. *See* Utah R. App. P. 24(a)(8) (requiring appellants to "explain, with reasoned analysis supported by citations to legal authority and the record," why a particular claim should prevail); *see, e.g. State v. Jaeger*, 1999 UT 1, ¶31, 973 P.2d 404 (holding that adequate briefing "requires not just bald citation to authority but development of that authority and reasoned analysis"). Because these claims are inadequately briefed, the State does not address them further.

It was. Again, the defense theory was that Jann had manipulated V.M. into falsely accusing Boyer. Counsel focused their efforts on eliciting evidence to support that theory. Jann admitted that she had V.M. write down the allegations and that because she did not believe V.M. at first, Jann pressed her pretty hard, trying "to catch her in lies" and "find a reason" to disbelieve her. R2495-96; R2501-02. Instead of going directly to police after this, Jann had V.M. talk to Jann's mother and a school counselor. R2497-99. Only then did Jann take V.M. to the CJC for a police interview. R2500.

Detective Holdaway interviewed V.M. at the CJC. R2667. He briefly testified for the State to lay foundation for the pictures of Boyer's genitals. R2517-19. The defense later called him to discuss proper interview protocols in cases with child victims, such as the proper setting and question forms. R2659-72. Counsel used this testimony in closing argument to show that Jann lacked this training, did not follow those protocols, and thereby manipulated V.M. R2787-90.

By calling one of the State's own witnesses to testify about proper interview techniques, the defense was able to present expert testimony without giving the State advanced notice and an opportunity call another expert. *See* Utah Code Ann. § 77-17-13(1)(a) (requiring reasonably practicable notice of expert testimony, no less than 30 days before trial). In fact, a

competent attorney could reason that the State would not want to be seen challenging its own witness, so it was more likely that the defense expert evidence would go unchallenged. Relying on an expert who works for the opposing side and is not paid by the defense shows that he is not just a hired gun. Calling a State's witnesses also saves time and money. *Richter*, 562 U.S. at 89 (holding that counsel is entitled "to balance limited resources in accord with effective trial tactics and strategies."). Further, given the defense theory, it was reasonable to think that there was little to gain from calling any attention to Holdaway's alleged protocol deviations in the CJC interview. The defense theory was that the damage had already been done by then—Jann had already gotten V.M. to write down what happened. *Contra* Aplt.Br. 14-15. Finally, and more to the point, the CJC interview was never introduced at trial. As the trial court explained, had counsel attacked Holdaway's interviewing and introduced part of it into evidence, the State could have sought to admit the interview in its entirety, *see* Utah R. Evid. 106, replaying

V.M.'s allegations made at a time when she was younger and more sympathetic. R1790-91.[8]

Boyer also asserts that Bell would have shown that Jann and V.M.'s relationship put Jann in a position to manipulate V.M.'s testimony. Aplt.Br. 14. But counsel also reasonably relied on V.M.'s, Jann's, and Dr. Corwin's testimonies to argue just that. *See* R2776-94 (defense closing). They didn't need to call an additional expert to offer cumulative evidence. *See State v. Tyler*, 850 P.2d 1250, 1256-57 (Utah 1993) (holding that counsel reasonably relied on State's expert and other witnesses to support defense).[9]

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[8] Boyer briefly asserts that counsel could have limited the statements to a transcript rather than playing the interview video, Aplt.Br. 16 n.6. That is mere speculation, which cannot prove ineffective assistance. The video is best evidence of the interview. *See* Utah R. Evid. 1002 ("An original writing, recording, or photograph is required in order to prove its content[.]"). But even the transcript would have reiterated V.M.'s testimony, which counsel could reasonably decide to avoid.

Further, counsel raised the memory issue that Boyer says they should have by arguing in closing that V.M.'s consistency over time was a red flag for unreliability. *See* R2789 (defense counsel relying on Dr. Corwin's testimony to "[b]eware of consistency," to argue that V.M.'s accounts showed indoctrination). And what V.M. might have briefly done on her cell phone during an interview break is entirely speculative.

[9] Boyer argues that "[p]rejudice was compounded" here because V.M.'s written letter (SE12) came into evidence, Aplt.Br. 15-16, but he does not challenge the admissibility of SE12 on appeal. At any rate, defense counsel used the letter in closing to argue that V.M. had been manipulated. R2786-89.

Finally, Boyer insists that if counsel had investigated more, they would have discovered more people (apparently, a school counselor and and Jann's mother) to whom V.M. disclosed the abuse and "identif[ied] investigative leads to corroborate or dispel" V.M.'s testimony. Aplt.Br. 14. This is entirely speculative, as there is no record showing that V.M.'s statements to these people were inconsistent with her other accounts.[10] But counsel reasonably reacted to this testimony by arguing that it further supported the defense indoctrination theory. R2786-87. Though this testimony apparently was a surprise, *see id.*, counsel could reasonably decide not to go that investigative route earlier where they already had access to V.M.'s many other accounts—to medical personnel, police, Jann, the magistrate, and at the first trial—and a basis to argue alleged inconsistencies in those accounts. *See, e.g.,* R2794.

[10] Jann attempted to testify about what V.M. told the school counselor, but defense counsel objected on hearsay and speculation grounds, and the trial court sustained the objections. R2499-2500. The only unobjected-to explanation was that V.M. "didn't say much of anything" to the counselor. R2499. As to Jann's mother, Jan said she and V.M. "went over to my mom's house and I said to my mom [V.M.] has something she wants to say and kind of left it at that[.]" R2497. If V.M. refused to talk much to these people, then it does not show that she was inconsistent in the accounts that she gave to others.

For all these reasons, Boyer has not shown deficient performance on his interview expert claim. For similar reasons, he also has not shown prejudice.

2. Calling appellate counsel's proposed medical expert would have adduced evidence that was either cumulative or inadmissible.

Boyer asserts that his counsel were ineffective for not calling a medical expert—Dr. Steven Gabaeff—who would have countered the State's evidence about the physical and psychological effects of abuse. Aplt.Br. 17-18.

V.M. said that one of the rapes was more aggressive and violent than the others, causing her to bleed. *See* SE12 at 2a-3[11] (written account); R2150-51 (first trial); R2320-21 (second trial); *see also* R2624 (nurse testimony).

When V.M. was examined years later, she showed no signs of physical injury. R2620, 2624, 2633-34. To explain this, the State called Linda Lewis, a nurse practitioner who examines children in sexual abuse cases. R2614. She testified that a lack of injury evidence did not preclude abuse because children heal quickly, and most exams done two weeks or more after a sexual assault show no injury—including those involving significant tearing. R2616-18; R2644-49. But she acknowledged that "[s]ometimes the injury stays there

[11] SE12 has page numbers for each sheet of paper, or one every other written page. For in-between pages, the State adds an "a". These excerpts come from pages 2a and 3 under the title "Couch."

and I can still see it many years later." R2616-17. And she conceded that injuries are more likely in female victims who, like V.M., had not gone through puberty at the time they were assaulted, and that not having injuries was also consistent with no abuse having occurred. R2635-36, 2650-51.

V.M. also testified that her psychological issues did not manifest until years after the abuse, when she was a teenager. R2330. To explain this, the State gave notice that it would call Dr. Corwin, who would testify that psychological symptoms stemming from abuse—such as anxiety and depression—can take years or even decades to manifest in some victims. R2577-78, 2582-84. Dr. Corwin never interviewed V.M. or reviewed any case-specific information. R2580.

Defense counsel made two objections at trial to Dr. Corwin's testimony. First, counsel objected that Dr. Corwin's testimony would be unhelpful—and thus inadmissible—under rule 702, Utah Rules of Evidence, because (1) he had no "particular knowledge" about V.M.; (2) V.M. was "able to articulate and effectively communicate" the reasons for her delayed disclosure; and (3) his testimony would unfairly bolster her credibility,

contrary to *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). R2606-08.[12] The prosecutor responded that "there are a plethora of myths and misunderstandings that pervade society generally" about sexual abuse, and that Dr. Corwin's testimony would help combat those false conceptions. R2611. The trial court ruled that "the one thing [Dr. Corwin] won't talk about is whether to believe or not believe the witness, but instead talk in . . . generic terms about these sort[s] of cases," which would "be helpful to the jury." R2612.

Counsel continued their vigilance. When the prosecutor asked Dr. Corwin whether delayed disclosure was more common than immediate disclosure in sexual abuse cases, defense counsel objected on lack of foundation, and the trial court let defense counsel voir dire him. R2562. Dr. Corwin testified that he relied on "30 plus years of experience" treating perpetrators and victims, as well as "articles describing experience with sexually abused children and their families and research studies looking at series of cases." R2563. Defense counsel then argued that the defense lacked notice of the foundation for Dr. Corwin's testimony because the prosecutor

[12] The transcript says "Remausch," R2608, but it is clear that defense counsel is referring to *Rimmasch*, the reliability test of which was "subsumed" into rule 702 in 2007. *State v. Clopten*, 2009 UT 84, ¶38, 223 P.3d 1103.

did not turn over any specific articles or literature. R2564-65. Dr. Corwin explained that while he had relied on studies, he "[p]rimarily" based his opinion on 30 years of experience. R2569, 2572-73. The court ruled that Dr. Corwin could testify based on that experience, but could not "specifically cite a study or anything else like that." R2573-75.

Dr. Corwin testified about child sexual abuse and delayed disclosure generally—that most abuse occurs between victims and people known to them; that delayed disclosure is more common than immediate disclosure; that delayed disclosure often results from fear of harm, fear of being disbelieved, or fear of consequences; and that abuse can cause victims to suffer psychological problems which may not manifest immediately. R2561, 2576-78, 2585.

Defense counsel elicited that it is possible for adults to unintentionally coach young children to fabricate abuse. R2581-82. Counsel also elicited that just because a child had certain psychological symptoms, it does not mean that those symptoms stem from abuse. R2582. Finally, Dr. Corwin admitted that it was important to consider "other things that are happening" in the child's life in connection with when the symptoms manifest. R2584-86.

Defense counsel argued in closing that the lack of injury was consistent with the defense's fabrication theory, and highlighted nurse Lewis's

testimony that injury was more likely where (as here) the victim had not gone through puberty at the time of the abuse. R2795. The absence of any injury findings, despite years of doctor's visits—counsel argued—showed that there had never been any injury. *Id.*

As to Dr. Corwin, defense counsel reminded that he never interviewed V.M. or reviewed the evidence in this case, and spoke merely in terms of "general principles." R2780. Counsel argued that his testimony supported the defense "indoctrination" theory because the V.M. had parroted Jann's herpes diagnosis and V.M. had been overly consistent in detailing the abuse. R2780-84, 2789-90, 2793. Finally, counsel used Dr. Corwin's testimony to argue an alternative explanation for V.M.'s supposedly delayed psychological symptoms: they were a reaction to then-current events in her life—the deaths of her mother and grandfather, and her grandmother's being put into a care center. R2798-2800.

Boyer argues that counsel should have used an expert to investigate the State's evidence and rebut the State's experts. Aplt.Br. 18-19. But counsel *did* consult experts to potentially rebut Dr. Corwin's testimony. R353-54 (Defense counsel: "Additional time is needed to consult with and retain an expert or experts"; counsel had "begun the process of consulting with experts but have not retained one"). They merely decided instead to rely on cross-

examination of the State's witnesses, which is a reasonable strategy. *See Richter*, 562 U.S. at 111 (holding that *Strickland* does not require "an equal and opposite expert from the defense" for every prosecution expert, and that in "many instances, cross-examination" of prosecution expert "will be sufficient"); *Tyler*, 850 P.2d at 1256-57 (Utah 1993) (holding that counsel reasonably relied on State's expert and other witnesses to support defense). Boyer cannot show deficient performance on this claim.

He also cannot show prejudice because Dr. Gabaeff's proposed testimony would not have added much to the evidence, and would have been partially inadmissible. Dr. Gabaeff is an emergency and forensic medicine specialist. R3734-36. He opines that V.M.'s allegations were fabricated because (1) she did not manifest any symptoms during the time of the abuse; (2) she did not have any vaginal scarring; (3) she did not mention a prominent birthmark on Boyer's thigh; and (4) she falsely accused other men of abuse. R3734-44. But evidence on all of these points came in and was argued at trial. *See* R2771-2083 (defense closing). It was thus cumulative, and Boyer cannot prove prejudice. *See, e.g., State v. Bradley*, 2000 UT App 336U, ¶3 (holding no prejudice on ineffective assistance claim where omitted testimony was "largely cumulative" of that presented at trial). To the extent that Dr. Gabaeff purports to opine on V.M.'s credibility, *see, e.g.,* R3734, 3740, that would have

been inadmissible. *See Rimmasch*, 775 P.2d at 406 ("As a general matter, scientific expert testimony that purports to determine whether a witness is truthful on a particular occasion is not admissible."). There can be no prejudice from not attempting to admit inadmissible evidence.

B. Counsel reasonably investigated and challenged the State's evidence, and the alleged evidentiary errors or omissions made no difference.

Boyer next argues that the trial court erroneously ruled on—or that his counsel was ineffective in their treatment of—six kinds of evidence at trial: (1) alleged inconsistencies in what prompted V.M. to disclose the abuse initially; (2) Jann's testimony about finding a bedsheet that corroborated V.M.'s account of the first instance of abuse; (3) V.M.'s prior statement that Jann was always home when V.M. showered; (4) several alleged inconsistencies in V.M.'s accounts that were not explored at trial; (5) V.M.'s and Jann's allegedly differing accounts of the time that V.M. bled after being raped; and (6) V.M.'s grandmother's belief that the abuse was not serious or extensive. Aplt.Br. 19-27. Many of these claims are inadequately briefed and fail because Boyer has not met his burden of persuasion on appeal. But they also fail on the merits.

1. The initial disclosure accounts did not materially differ, and exploring the differences would not have made any difference.

Boyer argues that the trial court and/or counsel erred in dealing with the different initial disclosure accounts from V.M. and Jann. Aplt.Br. 19-22. They did not.

There are three places in the record where V.M. discusses her initial disclosure. First, at preliminary hearing, V.M. said that she did not disclose initially because she was afraid no one would believe her, but eventually opened up to Jann because she trusted her. R1908. Second, at the first trial, V.M. again said that she did not disclose at first for fear of not being believed, and that she told Jann because she trusted her. R2159-60. But she added that she decided to disclose after listening to a conversation between Jann and her grandmother at a restaurant talking about another "lady," which made her feel like she "wasn't the only one."[13] R2160-61. She then talked to Jann at the restaurant and told her what happened. R2161-62. Third, at the second trial, V.M. said that she disclosed the abuse details to Jann, but did not discuss the circumstances under which the disclosure took place—only the timing, which was after the divorce. R2327-28. So V.M.'s disclosure accounts are all

[13] As explained above, this testimony resulted in a mistrial. R2255-56, 3013.

materially consistent —she did not say anything for a long time because she was afraid no one would believe her, but she eventually opened up to Jann at a restaurant after hearing of Boyer's actions toward another woman.

There are three places in the record where Jann discusses the circumstances of V.M.'s initial disclosure. [redacted]

Second, in an interview with an investigator, Jann said that V.M. told her for some time that she had something to tell Jann. R3660-61. According to Jann, what finally convinced V.M. that she could safely disclose Boyer's abuse was overhearing a conversation between Jann and her friend Linda while Jann, Linda, and V.M were riding in a car together.[15] R3661-62. "[I]t was after that that [V.M.] started to say, 'I have something I want to tell you.'" R3665. Third, at the second trial, Jann testified that V.M. "over a period of time kept saying

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[14] [redacted]

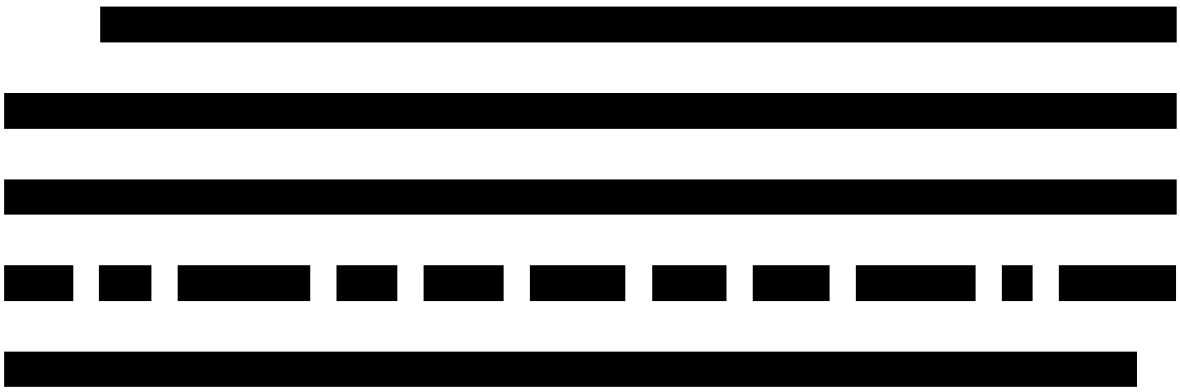
[15] During that car ride, Jann looked at her phone, saw a woman named Julie was calling, and said, "Oh, . . . [i]t's Julie. I'll just call her back." R3662. Jann then turned to Linda and said, "That's the one that Mark hit on in my house." R3663. Linda then said, "Oh, that Julie." R3663. Jann told the investigator that V.M. told Jann that if she had not overheard that conversation, she "never would have opened up about this." R3664.

she wanted to tell" Jann something, but her boys were always around. R2493-94. Eventually, Jann figured out that V.M. would only talk if they were alone, and when they boys went to a friend's house, V.M. and she talked at Jann's home. R2495. The conversation was not very detailed, but included "the gist" of what Boyer had done. R2494-95.

Defense counsel filed a rule 412 motion to introduce the K.B. allegation at trial to argue that it was false—this included saying that K.B.'s imminent return motivated V.M.'s initial disclosure. *See* R3207-15. The parties' stipulation to admit only the J.R. allegation meant that the K.B. allegation did not come in. But after Jann testified, defense counsel argued that he should be able to impeach Jann [redacted]

In his new trial motion, Boyer argued that defense counsel was ineffective for not trying to impeach Jann and V.M. with the alleged

differences in initial disclosure accounts. R3479-83. The trial court denied the new trial motion, but did not specifically address this argument. Rather, the court broadly stated that Boyer's arguments did not undermine the court's confidence in the verdict or show that counsel was ineffective, and that even had counsel done as Boyer claimed they should have, there was no reasonable likelihood of a different result. R1792.



Boyer argues that counsel were ineffective for not exploring the details of the other initial disclosure stories with V.M. and Jann at trial. Aplt.Br. 20. But counsel could reasonably decide that the accounts were sufficiently inconsistent to make it productive to explore . As shown, V.M.'s accounts were consistent with each other. They were also generally consistent with Jann's recollection: V.M. had something she wanted to tell Jann, but opened up only after hearing about Boyer's treatment of another woman—indeed, it may well have been the same woman in both the restaurant and the car stories. Competent counsel could conclude that the jury may have viewed the

locational difference to be too minor to suggest fabrication. And competent counsel could have concluded that probing the small differences in their accounts might would have been counterproductive and irritating to the jury. It might have opened the door to discussing Boyer's marital infidelity. R2706-07.[16] [redacted]. For these same reasons, Boyer cannot show prejudice.

Boyer, however, insists that exploring the disparate initial disclosure stories would have made a big difference because the case was based entirely on V.M.'s allegations. Aplt.Br. 22. But counsel was walking a fine line—exploring an additional inconsistency could have started to undermine the defense fabrication/manipulation theory, because counsel relied on V.M.'s *consistency* to argue that she was lying. R2789. And counsel explored several inconsistencies at any rate—such as the moles, the herpes, and differences between accounts. *see, e.g.*, R2343-57. Choosing which inconsistencies are

[16] Boyer argues that the jury heard about Boyer's infidelity anyway, Aplt.Br. 21, but the court sustained defense counsel's objection to that testimony. R2706-07.

most likely to undermine an accuser's testimony is the very kind of strategy a review court must defer to.

2. Counsel could reasonably decide not to try and exclude evidence of a bedsheet that corroborated the victim's account and impeached Boyer.

Boyer argues that his counsel was ineffective for not moving pre-trial to exclude an "entire vignette" about Jann finding a striped bedsheet because "it was designed to bolster VM's credibility and was inadmissible under [evidence rule] 608(b)." Aplt.Br. 23.

Three witnesses testified about striped bedsheets: V.M., Jann, and Boyer. V.M. said that the bunk bed she slept on during Boyer's first instance of abuse had blue and white striped sheets on it. R2309.

Jann testified that when V.M. told her that about the sheets, Jan "didn't think we had blue and white striped sheets," and went around the house looking for them in an attempt to prove that V.M. "was lying." R2506. She found the sheets a few days later, covering a birdcage in a cupboard. *Id.* The prosecutor asked if this "surprised" Jann; Jan said, "I was floored. I was—it was just those things that just happen that made me more aware that [V.M.] was telling the truth." *Id.* Defense counsel objected, and the trial court sustained the objection. *Id.* Defense counsel also moved for a mistrial, arguing that though the improper "telling the truth" part was "not the State's fault,"

it was offered "to enhance the credibility of" V.M. R2524. The trial court denied the mistrial, explaining that the jury could decide whether to believe Jann or not, and that the remark was harmless. R2525. The court offered to give a curative instruction, but defense counsel declined, not wanting to draw any more attention to it. R2525-26, 2734.

Boyer testified that he was "certain" that there were never any striped sheets on the bunk bed "or any other bed in [his] house." R2695.

The prosecutor argued that the striped sheets detail showed that V.M. had a good memory and was telling the truth. R2759-62. Defense counsel in closing said it did not "really matter[]." R2800.

Though Boyer faults his counsel's handling of the bedsheet evidence, this Court should not address its merits because this argument is inadequately briefed. Rule 24(a)(8), Utah Rules of Appellate Procedure, requires an appellant to provide "reasoned analysis," supported by relevant authority, to support his claims.

Boyer's argument on this point is mere two-odd-page string of assertions. Aplt.Br. 22-23. Though he cites to a rule and a few cases, he does not explain why they apply or how this case compares to them. *Id.* Because Boyer has not adequately briefed this claim, the Court hold that he has not met his heavy burden of persuasion on appeal. *State v. Nielsen*, 2014 UT 10,

¶42, 326 P.3d 645 (holding that party who fails to inadequately brief issue "will almost certainly fail to carry its burden of persuasion on appeal.").

At any rate, Boyer confuses corroboration and bolstering. Boyer has not shown deficient performance because counsel could reasonably decide that Jann's bedsheet testimony corroborated V.M.'s account, and was thus relevant. *See, e.g., State v. Calliham*, 2002 UT 87, ¶38, 57 P.3d 220 (holding that photographs were relevant because they corroborated the "testimony of witnesses whose credibility was in question"). Counsel could further reasonably decide that corroborating evidence does not improperly bolster a witness's testimony, and does not violate rule 608(b) because it does not go to the witness's *character* for truthfulness, it goes to whether she is telling the truth on a particular point.

Boyer also cannot show prejudice. Even if Jann had not testified the first time about finding the sheets, she could have done so in the State's rebuttal case to impeach Boyer's claim that they never had striped sheets in the house. There was thus no prejudice.

3. Counsel reasonably elicited at trial that Boyer's ex-wife was always being home when the victim was being abused.

Boyer argues that counsel was ineffective because he did not elicit V.M.'s preliminary hearing testimony that Jann was always at home when she (V.M.) took a shower. Aplt.Br. 24.

V.M. wrote that after the last shower incident, she waited for Jann to come home. SE12 at 3. At preliminary hearing, defense counsel asked V.M. if the "adults [were] always home when you took a shower," and V.M. agreed. R1924. At trial, defense counsel elicited from V.M. that Jann was home "every time any of [the abuse was] going on." R2371. Jann testified that though she (Jann) had previously said that V.M. "had never taken a shower at my house when I wasn't home," she later "realized that that was not the case," and that she had sometimes been gone at rehearsals with her performing group. R2509. Counsel argued in closing that V.M. and Jann contradicted each other, and that V.M. has said that Jann "was always there." R2801.

Boyer's argument on this claim consists of five conclusory sentences, and is inadequately briefed under the standards discussed above. But counsel in essence elicited the evidence that Boyer says they should have—and then some—by getting V.M. to agree that Jann was home "every time" the abuse occurred, whether in the shower or not. R2371.

4. Counsel could reasonably decide not to elicit details about Boyer's body and sexual practices that the prosecutor had already asked about, or that would have undermined the defense strategy.

Boyer argues that his counsel was ineffective for not asking V.M. about Boyer's time to climax or her allegedly using the term "birthmark," because this would have supported the defense contention that Jann had coached V.M. Aplt.Br. 25. This claim is inadequately briefed under the standards above, and this Court should not address it. But it fails at any rate.

A prosecutor and an investigator interviewed Jann and asked her if V.M. ever said anything about Boyer having markings on his body. R3677. Jann said that from time to time, V.M. had said some things about Boyer's body and sexual practices—that he had a "mark" or "birthmark," that it took him a long time to reach sexual climax, and that when he used his tongue, he would "do it in circles." R3678-79.

At the first trial, V.M. testified that Boyer had a mole on the "left side of his penis," that the time for him to reach climax varied, and that she did not remember anything "about how he moved his mouth." R2147, 2152-53. At the second trial, V.M. testified that Boyer had a "mole by his penis," that his time to climax varied, and that she did not remember him "doing anything else with his mouth" other than sucking on her ears and putting it

on her vagina. R2322-23. V.M.'s written account said that Boyer "would twirl his tongue" on V.M.'s vagina. SE12:1-1a.

On the time to climax, counsel could reasonably decide not to re-ask V.M. the prosecutor's question or to ask Jann about a detail that V.M. did not remember. Doing so may well have sparked V.M.'s memory and strengthened the prosecution's case by showing greater detail in her accounts. On the "birthmark," counsel could reasonably decide not to try and elicit—either from V.M. or Jann—that V.M. had used the term "birthmark" previously, because counsel's strategy was to argue that V.M. used the term "mole," a term that did not fit Boyer's prominent birthmark. R2784-85; *see* SE14. For these same reasons, Boyer cannot show prejudice.

5. Counsel could reasonably decide not to reinforce the victim's testimony that Boyer raped her so hard that it caused her to bleed.

Boyer asserts that his counsel was ineffective for not cross-examining V.M. and Jann on their supposedly "inconsistent nosebleed stories" which would supposedly have supported the indoctrination theory. Aplt.Br. 25-26.

Jann testified that one morning during the time that Boyer was abusing V.M., she saw blood on the sheets of her and Boyer's bed. R2507. Boyer explained he had "had a really bad bloody nose" the night before that "gooshed all over" when he sat up. *Id.* Later on, Jann realized that there was

no blood on the pillow, and nowhere on the sheet but "that one spot." R2507-08. As explained above, V.M. said that after one incident of abuse she bled from her vagina, but when Jann caught her crying in the bathroom, she said it was a nose bleed. R2321.

Boyer's claim is inadequately briefed, consisting merely of a few conclusory sentences. Aplt.Br. 25-26. In any event, counsel could have reasonably decided that there was no material inconsistency to address—both V.M. and Boyer tried to cover up evidence of Boyer's abuse by blaming a nosebleed. And contrary to Boyer's assertion, Aplt.Br. 26, there is there is no evidence that there was a large amount of blood on the sheet. Although Boyer told Jann that he "gooshed" blood when he sat up, Jann said the sheet had only "one spot" with blood. R2507-08.

6. Counsel could reasonably decide not to call the victim's grandmother to testify where she said she believed the victim and clearly suffers from mental issues.

Boyer argues that his counsel should have been able to get a new trial based on alleged "newly discovered evidence" from V.M.'s grandmother of an alleged prior inconsistent statement from V.M., or alternatively that his counsel were ineffective for not tracking down the grandmother and discovering the statement before trial. Aplt.Br. 26-27.

After trial, a defense investigator went to an Idaho rest home to interview V.M.'s grandmother. R2121, 2296, 3625-38. During that interview, the grandmother claimed that V.M. told her that Boyer "played with" her or "fore played with" her. R3628, 3633-34.

Counsel explained that he tried to find the grandmother, but did not know anything beyond that she "was in a rest home in 'Idaho.'" R3716. Counsel "were looking for her because [they]had been led to believe that she would not support [V.M.'s] story." *Id.* But when their investigator did find her, she said "that she did in fact believe" V.M. *Id.* Thus, even if the investigator had found her before trial, "it would have been a waste of time." *Id.*

Boyer's claims are inadequately briefed under the standards above. But Boyer cannot prove ineffective assistance. Trial counsel did the investigation Boyer says they should have. Litigation decisions made after a complete investigation are "virtually unchallengeable." *Strickland* 466 U.S. at 690. And even short of that, decisions about what witnesses to call are entitled to great deference. *See State v. Wood*, 648 P.2d 71, 91 (Utah 1982) ("Decisions as to what witnesses to call . . . are generally left to the professional judgment of counsel."). Competent counsel could decide not to call the grandmother. In addition to counsel's assessment that the grandmother would say she

believed V.M., counsel reading the full interview and consulting with the investigator would have seen that the grandmother had clear mental problems—she did not track the conversation very well, went off on tangents, and kept begging the investigator to take her home to Utah, *see* R3625-38—and would thus not be a very good witness. [redacted]

The grandmother's sparse information on the abuse likely resulted from V.M. not telling her much.

Further, if counsel could have admitted part of the interview or had the grandmother testify, he could reasonably conclude that all of the interview would have come in under evidence rule 106, including the portion where she says that V.M. is a "very honest little girl" who "wouldn't dare lie." R3634-35. Because of all these potential pitfalls, Boyer has shown neither deficient performance nor prejudice.

C. [redacted]

1. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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17 [redacted]

[redacted]

[redacted]

Defense counsel's actions. As explained above, the defense counsel entered into a stipulation with the prosecutor about the movie night incident, and used that stipulation to argue at trial that V.M. fabricated the allegations. Defense counsel read the stipulation at trial, which said: (1) that V.M. told

[redacted]

[18] [redacted]

[19] [redacted]

police that when she was 10 years old, she slept over at a friend's house one time, where the friend's father, J.R., "came into the room where the children were sleeping," "laid [sic] down beside" her, "tickled her stomach," and "touched her 'boobs' on the outside of [her] bra"; (2) J.R. "has denied that this ever happened"; and (3) no charges were ever filed. R2674. Based on this stipulation, the defense argued that V.M. had fabricated the J.R. allegation. R2802-03.

[redacted]

[20] R3716-17 appears to be an explanation from Edward Brass sent to current defense counsel in response for her request for him to sign an affidavit (R3718-20). Mr. Brass did not sign it, but related his memory of certain events. The unsigned statements and declaration are not admissible evidence, but because the prosecutor did not object to it below, the State takes the explanatory statements as true for purposes of appeal.

New trial ruling. [redacted]

Boyer argues that by not sending defense counsel a copy of V.M.'s letter, the State violated his Due Process rights. To make out a Due Process claim for nondisclosure of evidence, a defendant must prove both (1) that the evidence was not disclosed; and (2) that it was material. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995) (outlining history of *Brady* doctrine). This principle applies to both substantive and impeachment evidence. *United States v. Bagley*, 473 U.S. 667 (1985).

Materiality is the same standard as the *Strickland* prejudice element: a reasonable probability of a different result had the evidence been disclosed. *Kyles*, 514 U.S. at 433-34.

Boyer's claim fails at the outset because he has not challenged the court's rule 403 ruling. "Since an appeal is a resort to a superior court to review the decision of a lower court, Utah appellate rules require the appellant to address [the] reasons why the district court's [decision] should be overturned." *Allen v. Friel*, 2008 UT 56, ¶14, 194 P.3d 903. Where an appellant has failed to address either "the basis of the trial court's ruling," *State v. Needham*, 2016 UT App 235, ¶2, 391 P.3d 295 (quotation simplified), or each alternative ground for a trial court's decision, *Salt Lake County v. Butler, Crockett & Walsh Development Corp.*, 2013 UT App 30, ¶28, 297 P.3d 38, this Court rejects his claim without addressing the bases that the appellant does challenge. *See also Duschene Land, L.C. v. Division of Consumer Prot.*, 2011 UT App 153, ¶8, 257 P.3d 441 (rejecting claim where appellant had "not addressed the actual basis for the district court's ruling"). When there is an unchallenged basis, issuing a decision on the challenged one becomes an advisory opinion, because it will not change the underlying outcome. Utah courts are loath to produce such a result. *See generally Velasquez v. Harman-*

Mont & Theda, Inc., 2014 UT App 6, ¶18, 318 P.3d 1188 (citing cases cautioning against issuing advisory opinions).

Even if Boyer were correct about the 412 ruling as discussed below—and the State does not concede that he is—this Court should still affirm on this issue because there is still an independent rule 403 bases that he has not challenged on appeal, rendering any holding on this advisory. Though he acknowledges the rule 403 basis in the trial court's ruling, Aplt.Br. 37, and baldly asserts at one point that the 412 evidence was "more probative than prejudicial," Aplt.Br. 36, this does not adequately address the court's ruling. It does not even have the correct language. Evidence is excluded under rule 403 if its probative value is "*substantially outweighed* by a danger of . . . *unfair* prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403 (emphases added). Even if he had addressed the trial court's unfair prejudice ruling, he has not even attempted to address the court's other bases—undue delay, lack of necessity, and creating a "trial within a trial." Because he has not challenged any of the trial court's rule 403 bases, this Court should affirm.

At any rate, Boyer has shown neither element of a Due Process claim. He has not shown that the prosecution failed to disclose the letter because defense counsel had a copy of a police report discussing the letter's contents.

See Gill v. State, 300 S.W.3d 225, 231 (Mo. 2009) (holding no *Brady* violation based on nondisclosure of computer contents where prosecution sent report listing computer's "file folders" and "directories").

Neither has he shown that it was material.

[21]

[21] For the same reasons that the information was not material, its lack did not impair the defense and was also not prejudicial under rule 16. *See State v. Knight*, 734 P.2d 913, 921 (Utah 1987) (holding that if defendant shows undisclosed evidence impaired the defense, State must show that "there is no reasonable likelihood" of a different result absent the error).

[redacted]

2. [redacted]

[redacted]

3. [redacted]

[redacted]

[redacted]

[redacted]

To mitigate that risk and ensure that they had some evidentiary support for the fabrication argument, counsel reasonably entered into a stipulation on the J.R. evidence. [redacted]

[redacted]

[redacted][22]

[redacted]

[22] [redacted]

[redacted]

D. Neither defense counsel nor the trial court erred regarding the State's mental health expert testimony.

Boyer asserts that Dr. Corwin's testimony was inadmissible because it lacked foundation and merely "bolstered" V.M.'s testimony. Aplt.Br. 38-43.[23] The foundation issue is unpreserved and must be addressed only for ineffective assistance. The bolstering issue is preserved, but fails because Dr. Corwin did not improperly bolster V.M.'s testimony.

Dr. Corwin testified that delayed disclosure was common for sexual abuse due to various factors, such as fear and confusion. R2576-78. He also explained that the psychological damage often begins to manifest at the time of disclosure. R2585.

Defense counsel made two objections to Dr. Corwin's testimony at trial: (1) a helpfulness objection and (2) a notice objection. R2606-08; 2562-75. Boyer originally framed his notice objection as lack of foundation, R2562, but that was merely a basis for counsel to voir dire Dr. Corwin. R2562. After voir dire, counsel claimed surprise for not having been given copies of the many articles that Dr. Corwin said he had considered over 30 years' experience.

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[23] Boyer also briefly asserts, without analysis or citation, that Dr. Corwin's testimony was not helpful because jurors "readily understand" why children might delay disclosing abuse and that no one has perfect recall. Aplt.Br. 41. The State does not agree, but does not address these arguments because they are inadequately briefed.

R2562-75. The trial court ruled that Dr. Boyer could not cite any particular article, but must say he was relying on his experience. R2573-75. Boyer now argues—for the first time on appeal—that Dr. Corwin's testimony lacked foundation because it relied on a supposedly discredited study. Aplt.Br. 40-41. Because the trial court never had an opportunity to rule on that issue, the argument is unpreserved. *State v. Sanchez*, 2018 UT 31, ¶30, 422 P.3d 866 (explaining that preservation requires timely and specific objection that gives trial court an "opportunity to rule on that issue"). Thus, Boyer must prove his alternative ineffective assistance claim. Aplt.Br. 42-43. Boyer has not done so because he inadequately briefs it—he offers a mere four conclusory sentences. *Id.* This Court should affirm because Boyer has failed to meet his heavy burden of persuasion on appeal. *Nielsen*, 2014 UT 10, ¶42.

The claim also fails on this record. Dr. Corwin's years of experience involved reading a great many articles and studies, not just the article that Boyer cites. R2571-72. Thus, counsel could have reasonably decided that attacking a single article would not have removed the experiential foundation from Dr. Corwin's testimony.

Boyer argued below that Dr. Corwin's testimony was unhelpful because, among other things, it would bolster V.M.'s credibility. R2606-12. The trial court rejected this argument. *Id.* The trial court was correct. Dr.

Corwin never opined on V.M.'s veracity because he did not examine her and had no information about this case. And even if his testimony served to support V.M.'s testimony, it did not cross the line into improper bolstering.

An expert witness may not testify that a witness is telling the truth on a particular occasion. *See Rimmasch*, 775 P.2d at 390-93; *State v. Rammel*, 721 P.2d 498 (Utah 1986); *State v. Iorg*, 801 P.2d 938 (Utah App. 1990). But this line of cases does not apply where a witness does not "directly comment" or "otherwise directly opine" on witness veracity. *State v. Bair*, 2012 UT App 106, ¶47 & n.10, 275 P.3d 1050. Dr. Corwin did not have any information about this particular case, so he could not comment on V.M.'s credibility directly.

An expert may testify that a victim's behavior is *consistent with* abuse. *See State v. Martin*, 2017 UT 63, ¶30, 847 Utah Adv. Rep. 29 (holding no abuse of discretion in trial court admitting expert testimony on disclosures in child abuse cases); *see also State v. Kallin*, 877 P.2d 138, 141 (Utah 1994); *State v. Christensen*, 2016 UT App 225, ¶28, 387 P.3d 588. But Dr. Corwin did not even go that far—he did not opine at all on V.M.'s behavior because he had no information on it. R2580-81.

Dr. Corwin merely discussed child abuse victims and their reactions generally. This sort of testimony is admissible. *See State v. Burnett*, 2018 UT

App 80, ¶¶28-31, 864 Utah Adv. Rep. 7 (holding Dr. Corwin's testimony admissible to the extent he said that certain symptoms are "more common among sexually abused and traumatized children" and "stopped well short of offering an opinion that Victim had been abused").

Boyer argues that Dr. Corwin nevertheless bolstered V.M.'s testimony because he opined that "'real' sexual abuse involves inconsistent allegations." Aplt.Br. 41. Boyer is mistaken.

The "real experiences" comment, in context, was permissible because it addressed memory generally. The prosecutor asked Dr. Corwin if children "who have been verifiably abused in a sexual way" were "more likely to be consistent" than someone who is fabricating abuse allegations. R2579. Dr. Corwin answered that no one has a perfect memory, and that "real experiences tend to have some level of inconsistency" over time because recall is affected by various factors—such as a person's "state of development" and the circumstances under which the person is telling what happened. R2579-80. By contrast, fabricated allegations—whether as a result of intentional or unintentional indoctrination—tended to involve stories that are "always exactly the same and relatively simple," lacking "rich, associated detail." R2580.

Contrary to Boyer's characterization, Dr. Corwin did not tell the jurors that inconsistency in reports indicates actual sexual abuse. Rather, he told them, in essence, that they should not be surprised if a sex-abuse victim did not recall traumatic experiences perfectly every time. *Cf. State v. Kirby*, 2016 UT App 193, ¶23, 382 P.3d 644 ("Often the events being recalled by trauma survivors are distant and difficult to express in words. We should expect such testimony to contain some inaccuracies without compromising the value of the testimony as a whole.") (cleaned up).

Boyer finally asserts on this point that that Dr. Corwin bolstered V.M.'s testimony because he said that sexual abuse can cause victims to misperceive "innocuous conduct as sexual abuse." Aplt.Br. 41; *see* R2815-16. Again, this did not bolster V.M.'s testimony, because he did not talk about her or any case details. Here merely testified that "if a child has been sexually abused they are more likely, they are more vulnerable to misperceiving what someone's intentions are later," and that "an innocent show of affection might be misinterpreted." R2579.[24]

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[24] The prosecutor used this testimony in closing—without objection—to argue that the J.R. allegation was a misperception stemming from Boyer's abuse. R2815-16. That was proper, *contra* Aplt.Br. 41, because the parties agreed that each could argue the import of J.R.'s not being prosecuted. *See* R2085-86.

E. Counsel successfully objected to the prosecutor's closing argument, and could reasonably decide not to seek a mistrial based on an isolated improper remark.

Boyer argues that the prosecutor improperly vouched for V.M. in closing argument. Aplt.Br. 43-45. Because counsel successfully objected to the challenged remark, Boyer must show that all competent counsel would have asked for more relief than his counsel did. He has not done so.

When the parties resolved the 412 evidence dispute by stipulation, defense counsel told the trial court that the stipulation on J.R. not being charged for his alleged abuse would permit the defense to argue that V.M. fabricated both that instance of abuse and Boyer's abuse, and allow the prosecutor to provide alternative interpretations. *See* R2085-86 (defense counsel explaining that stipulation left prosecution "free to argue that there can be many reason why charges aren't filed," and left the defense "free to argue that there's only one reason, and that's that it was false.").

In its first closing argument, the prosecutor did not discuss the stipulation. Defense counsel then cited it to argue fabrication. R2802-03. In rebuttal, the prosecutor argued the State did not bring charges against J.R. because there was "no Jan[n] Boyer" there. R2810-11. Defense counsel objected that the prosecutor had just "elaborated on the facts" and "broken" the stipulation. R2811.

The court called a brief recess, during which the prosecutor explained that he was simply doing what defense counsel did—arguing about the import of J.R. not being charged. *Id.* Defense counsel said that the issue was not arguing an alternative explanation for the lack of charges, but bringing in facts not in evidence. R2813. Defense counsel said he would not object if the prosecutor instead relied on facts in evidence. R2814. Sustaining the defense objection, the court admonished the prosecutor to "confine [him]self to what is in that stipulation." *Id.* The prosecutor then argued that V.M. likely misperceived J.R.'s conduct as sexual abuse. R2815-16. Defense counsel did not object. *Id.*

Boyer has not adequately briefed his ineffective assistance claim on this issue—he offers only two conclusory sentences. Aplt.Br. 45. That is not enough to meet his burden under *Strickland* or as appellant, and this Court should affirm.

At any rate, counsel could reasonably decide not to seek a mistrial, given trial courts' discretion on such rulings and the isolated nature of the prosecutor's remark. *See State v. Allen*, 2005 UT 11, ¶40, 108 P.3d 730 (holding that where prosecution elicits improper testimony, a "review of [Utah] case law amply reveals that a mistrial is not required where an improper

statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented.").

F. Counsel were not ineffective in litigating the mole/birthmark evidence.

Boyer argues that his counsel were ineffective litigating the mole/birthmark evidence because they did not: (1) challenge rule 16's constitutionality or argue that the pictures were inadmissible under rule 403; (2) support the fabrication defense with evidence that Jann and V.M. had discussed Boyer having a "mark" or a "birthmark"; or (3) present evidence that Boyer did not have the sort of moles that V.M. claimed he did. Aplt.Br. 45-51. He has not shown ineffective assistance, because counsel used the pictures to argue against V.M.'s credibility, and thoroughly explored her inconsistent statements about Boyer's moles.

Shortly before the preliminary hearing, V.M. told a victim advocate from the prosecutor's office that Boyer had a "mark" near his genitals. R55. She later told an investigator that he had two brown circular moles in his genital area; one was located about an inch above his penis on the left side, the other was near where his penis came out of the body. R3689-92. V.M. thought that the moles were smaller than a shirt button, but larger than a pinhead. R3689-90. These descriptions were given about five years after the last instance of abuse. R2295 (V.M. born in 1999); R2339 (abuse happened

between 2005-08); R3688 (V.M. interviewed 07/15/13). About five months after the investigator interviewed V.M., Jann told the same investigator that V.M. had told her about Boyer having a "mark" or "birthmark." R3679; *see* R3642 (Jann interviewed 12/05/13).

After the first prosecutor learned of the moles, she filed a discovery motion under rule 16, Utah Rules of Criminal Procedure, to compel Boyer to have pictures taken of his genital area and to prevent him from removing any moles. R54-56, 1943. Previous defense counsel (Gregory Skordas) opposed the motion, arguing that it violated evidence rule 403 and that the victim's alleged knowledge of his moles was actually evidence that Jann had fabricated the abuse and "coached" V.M. into making false allegations. R58-59. The court granted the prosecutor's motion "[g]iven that there are issues of credibility" for the jury to consider. R1943-44, 1947. Those photos were introduced at trial. SE14-17. The pictures show a prominent birthmark on Boyer's left leg, and various smaller marks and moles on his legs and torso. *Id.*

On direct examination at the first trial, V.M. said that Boyer had a mole "on the left side of his penis." R2152. There was no cross-examination due to the mistrial. At the second trial, she was less specific, saying on direct that he had "a mole by his penis." R2322. On cross-examination, defense counsel

spent five pages of transcript exploring her prior statements and omissions about Boyer's mole, including that: she never talked about it in any of her interviews or medical exams; she disclosed it for the first time at preliminary hearing; she first said it was one mole, then two; and that she was unsure about their color and size. R2353-57.

In closing, the prosecutor acknowledged that the pictures of Boyer's genitals were "graphic," but corroborated V.M.'s testimony "that there were multiple moles—two moles—some kind of mark on" Boyer's body. R2763-64. Defense counsel argued that V.M.'s purported knowledge about Boyer having moles was "indoctrination" from Jann; that a "mole" was different than a birth mark; that V.M. never mentioned a prominent birth mark on Boyer's leg; that V.M. never mentioned the mole in any of the interviews in which she disclosed the abuse; and that she got the number, color, and size wrong. R2784-86. In rebuttal closing, the prosecutor briefly pointed out that V.M. testified that there "may have been a couple of moles," and the pictures showed "a span of moles across Mr. Boyer's abdomen." R2806.

After trial, defense counsel said that he "felt that the photographs were helpful to the defense, as they depicted a large birthmark on Boyer's leg that [V.M.] never mentioned." R3719 (unsigned declaration); R3717 (counsel email stating that this statement was "accurate"). Counsel extensively

discussed the mole evidence with Boyer, and let him review the evidence. R3717.

Boyer has not proven that his counsel were ineffective for not challenging the court's rule 16 order, given that defense counsel saw the pictures as "helpful to the defense." This was reasonable, particularly because counsel also thoroughly explored V.M.'s prior inconsistent statements about Boyer's moles.

Counsel could also have reasonably decided that presenting evidence that Jann recalled V.M. telling her about the moles would have bolstered V.M.'s credibility rather than undermined it. Given the victim's statements about Boyer having a mole near his penis, it was reasonable not to try to excise his genitalia from the photos, because they would give defense counsel a way to argue that here descriptions were not wholly consistent with the actual marks on Boyer's body.

Boyer argues that counsel should have tried to suppress the photos under the Fourth Amendment because of a "heightened privacy interest" in one's body. Aplt.Br. 47-48. The State does not agree that pictures of the *outside* of one's body are akin to the cases that Boyer cites, which involve physical intrusions *inside* the body. *Id.* But at any rate, counsel could have reasonably concluded that any Fourth Amendment challenge to rule 16 would fail

because rule 16 provides *greater* protection than the Fourth Amendment. *See State v. Easthorpe*, 668 P.2d 528, 532 (Utah 1983); *State v. White*, 2016 UT App 241, ¶¶19-20, 391 P.3d 311. If rule 16 permits physical intrusions like the blood draw in *Easthorpe* and the buccal swab in *White*, it certainly permits the non-physical intrusion of taking pictures.

Finally, given the very low threshold to get a warrant, counsel could also reasonably decide that the victim's statements provide at least probable cause to believe that the photos would corroborate her testimony. *See State v. Jones*, 2016 UT 4, ¶¶11-13, 365 P.3d 1212 (describing probable cause as a "light" prosecutorial burden).

G. Counsel reasonably stipulated to the trial court's reviewing the victim's mental health records in camera, because this avoided the possibility of the trial court denying the defense motion.

Boyer claims that his counsel should have consulted two mental health expert—Dr. Karen Malm and Dr. Matthew Davies—[redacted] R1684-86 (Malm declaration); R887AA-887BB) (Davies declaration). Had counsel done so before stipulating to in camera review of V.M.'s records, he says, they would have been able to guide the court's review better and get exculpatory information. Aplt.Br. 51-59. He also faults

counsel for not challenging the court's order to destroy the records. Aplt.Br. 57. Boyer has not shown that counsel were ineffective.

[redacted]

Before cross-examining V.M. at trial, defense counsel moved to discover the mental health records, arguing that her direct examination testimony opened the door to her mental health records because she tied her

hospitalization to Boyer's abuse. R2330-32. [redacted][25]

The trial court complied with the law. Evidence rule 506 states that 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 . . . mental health therapist for the purpose of diagnosing or treating the patient." Utah R. Evid. 506(b). This privilege applies to

[25] [redacted]

"diagnoses," "treatment," "advice," and "information" received from the patient or shared between treatment specialists. *Id.*

"The purpose of the privilege is to promote full disclosure within a physician-patient relationship and thereby facilitate more effective treatment" by "alleviat[ing] patients' fear that their medical records could be disclosed to the public and cause them embarrassment." *Burns v. Boyden*, 2006 UT 14, ¶10, 133 P.3d 370 (cleaned up). Courts should "not treat the policy underling this privilege lightly." *Id.*

Relevant here, rule 506 has an exception for "communications relevant to an issue of the physical, mental, or emotional condition of the patient . . . in any proceeding in which that condition is an element of any claim or defense." Utah R. Evid. 506(d)(1). A "condition" is something that "is not transitory or ephemeral," but "persists over time and significantly affects a person's perceptions, behavior, or decision making in a way that is relevant to the reliability of the person's testimony," and can include formal diagnoses. *State v. Worthen*, 2009 UT 79, ¶¶20-21, 222 P.3d 1144.

A defendant seeking disclosure under this exception must show three things: (1) that "the patient suffers from a physical, mental or emotional condition"; (2) that the condition itself "is an element of any claim or defense"; and (3) a "reasonable certainty," evidenced by "extrinsic"

information, "that the mental health records will contain exculpatory evidence favorable to the defense." *State v. J.A.L.*, 2011 UT 27, ¶48, 262 P.3d 1 (cleaned up).[26]

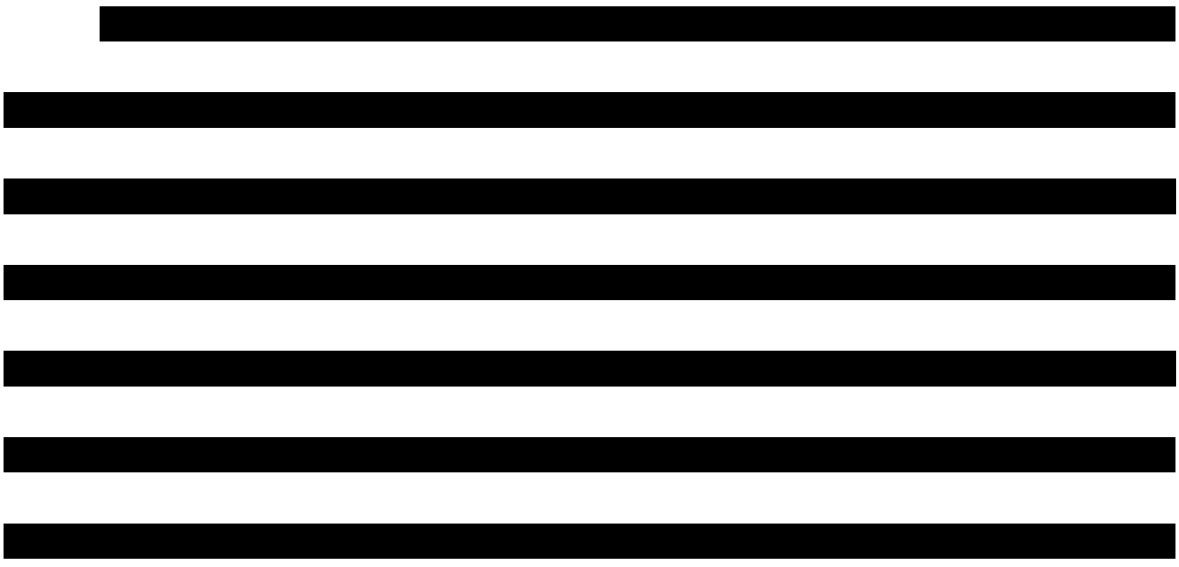
If he meets these requirements, the trial court reviews the records in camera and discloses relevant exculpatory material. Utah R. Crim. P. 14(b); *see also Worthen*, 2009 UT 79, ¶¶48, 50. An in camera, ex parte review serves defendants' interests "without destroying the [State's] need to protect the confidentiality of those involved in child-abuse investigations." *Pennsylvania v. Ritchie*, 480 U.S. 39, 61 (1987). After the review, the court has discretion to issue "any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records." Utah R. Crim. P. 14(b)(5).

By convincing the State to stipulate to in camera review, defense counsel leapfrogged all the preliminary requirements under *J.A.L.* and got what they wanted: impartial review for exculpatory evidence. This was likely more than Boyer was entitled to. Amicus at 12-20. That the review did not turn up what they hoped it might did not render their advocacy unreasonable. And counsel could reasonably decide not to challenge the

[26] Defense counsel refers to *J.A.L.* by its prior name. *See, e.g.,* Aplt.Br. 48, 52, 53. After J.A.L. expunged his records, this Court removed his name from the case.

court's order to have the records shredded because rule 14(b)(5) gives courts discretion to enter such orders. To prove an abuse of discretion, a defendant must show that no reasonable judge would have done what the trial court did. *See State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978). Faced with such a high bar to clear, counsel could reasonably decide not to jump.

Though Boyer alleges that counsel "consulted with no experts," Aplt.Br. 51, he provides no evidence of this. And without supporting evidence, the presumption of constitutionally acceptable representation stands. And what is in the record shows that counsel were aware of the potential need for investigating expert testimony—counsel planned to consult with mental health experts in preparing for Dr. Corwin's testimony. *See* R353-54 (motion to continue, arguing that additional time was "needed to consult with and retain an expert or experts").



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Boyer argues that counsel performed deficiently by not filing a memorandum "explaining defense or prosecution theories," because "the court had no way of knowing" what the theories would be "or how the diagnoses bore on their claims and defenses." Aplt.Br. 56-57. But counsel reasonably choose to cast a wider net, with the court on the lookout for *anything* exculpatory, without limiting the search to certain theories. *See* R278. And again, if the victim's diagnoses had affected her credibility, that would have been apparent in the records themselves.

[redacted]

H. [redacted]

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At the beginning and end of his cumulative error argument, Boyer compares his counsels' performance with that of counsel in *Fisher v. Gibson*, 282 F.3d 1283 (10th Cir. 2002). Aplt.Br. 12 n.3, 53. That comparison is inapt.

Counsel in *Fisher* showed a "singular lack of preparation"; he "had no idea what answers he would receive to his questions and was not pursuing any particular strategy of defense." *Fisher*, 282 F.3d at 1294. He was "grossly inept" and "disloyal" to the point that he waived closing argument based on his hatred of his client. *Id.* at 1298, 1305.

Boyer's counsel, by contrast, exhibited diligence, strategic thinking, zeal, and loyalty throughout the case. They researched expert testimony, elicited helpful testimony through both direct- and cross-examination, filed motions, and strenuously argued Boyer's cause. Though these efforts were

ultimately unsuccessful, that does not make them ineffective. *Tyler*, 850 P.2d at 1258 (explaining that a defendant is not guaranteed "successful assistance of counsel" and that counsel's competency "is not measured by the result") (cleaned up). Their overall performance showed skillful and effective performance, and the trial court did not err. Because there can be no prejudice where there is no error, and no cumulative prejudice from non-prejudicial errors, this Court should affirm. *See Martinez-Castellanos*, 2018 UT 46, ¶55 (holding no cumulative error on errors that "standing alone, had no potential to cause harm").

Most of the alleged errors relate to strengthening the fabrication defense in some way. But that defense was not strong to begin with, and would not have been shored up much by counsel doing what Boyer now claims they should have done. The essence of the defense was that Jann fabricated the abuse—and manipulated V.M. into either lying or thinking that it actually happened—in an attempt to get a more favorable custody arrangement with her and Boyer's children. R2771-2803 (defense closing). But the divorce was not contested, and visitation went smoothly. R2697-98, 2702. The first mention in the record that Jann wanted to potentially change visitation was after V.M.'s allegations came out. R2513-14. The most likely inference that the jury was to draw from the timing was that the revelation of

Boyer's abuse was the cause—not the effect—of Jann's (potentially) seeking to limit their children's time with Boyer. Boyer's alleged errors would not have materially altered the evidentiary picture in a way that would meet his heavy cumulative prejudice burden.

II.

The trial court was not actually biased against Boyer, and he cannot show that the presiding judge abused his discretion by denying recusal.

Boyer argues that then-Presiding Judge Harris erred by ruling that Judge Kouris was not actually or apparently biased against Boyer because his sentencing remarks showed he could not fairly rule on the new trial motion, and that his rulings on restitution show that he was actually biased. Aplt.Br. 62-71. Boyer has not shown that Judge Kouris was either actually or apparently biased. The record shows that he respected defense counsel and could fairly decide Boyer's new trial motion; indeed, he had previously granted Boyer a new trial in this case.

A party seeking recusal must file a timely motion alleging "facts sufficient to show," relevant here, "bias or prejudice." Utah R. Crim. P. 29(b)(1)(A). "Bias or prejudice" means disfavor based on personal attributes such as race, sex, religion, and national origin. *See* Utah R. Jud. Con. Canon 2.3(B). If a judge has an actual "personal bias or prejudice" against a party, he is required to recuse himself. Utah R. Jud. Con. Canon 2.11(A). He is also

required to recuse himself if his "impartiality might reasonably be questioned" on some other basis. *Id.* If the judge does not grant the recusal motion, he certifies it to the "reviewing judge"—usually the presiding judge in the district—who then decides it. Utah R. Crim. P. 29(b)(2)(A).

Not all "unfavorable disposition towards an individual" is "properly described" as bias or prejudice. *Liteky v. United States*, 510 U.S. 540, 550 (1994).[27] The disposition must not be merely unfavorable, but "*wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge the subject ought not to possess . . . or because it is excessive in degree." *Id.*

The sort of knowledge that ought not to influence a judge's decisions is that which is external to the case or the defendant at hand—often called the "extrajudicial source" rule.[28] *Id.* at 544-45. "The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person.

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[27] *Liteky* interpreted 28 U.S.C. § 455(a), which requires judges to disqualify themselves "in any proceeding in which his impartiality might reasonably be questioned." As shown, that is also the Utah standard.

[28] *Liteky* clarified that "extrajudicial source" it is less a rule, and more a "significant' and "often determinative" "factor" in determining bias. 510 U.S. at 554-55.

But the judge is not thereby recusable for bias or prejudice," because that knowledge and opinion came from the case. *Id.* at 550-51.

In a rare case, it is possible for the judge to have such an excessive disfavor (or favor)—an actual bias—that is "so extreme as to display clear inability to render fair judgment," regardless of whether it springs from within the proceedings. *Id.* That was the case in *Berger v. United States*, 255 U.S. 22 (1921). There, several German-Americans[29] were charged with espionage. The district court judge showed consistent, specific bias against Germans, saying things like, "If anybody has said anything worse about the Germans than I have I would like to know it so I can use it," and "One must have a very judicial mind, indeed, not to be prejudiced against the German-Americans" because their "hearts are reeking with disloyalty." *Id.* at 28. Because of this bias, the judge was removed from the case. *Id.* at 36.

But bias or prejudice is not shown by more common occurrences, such as adverse rulings or mere "expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women, even after having been confirmed as [] judges, sometimes display." *Liteky*, 510 U.S. at 555-56.

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[29] Technically, one was Austrian. *Berger*, 255 U.S. at 28. But "Teutonic-American" does not sound right.

Where actual bias looks to a judge's subjective attitude, the appearance of bias is an objective question viewed from the standpoint of a reasonable person. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988) (explaining that apparent bias depends on public's reasonable belief, not actual knowledge of judge); *American Rural Cellular, Inc. v. Systems Communication Corp.*, 939 P.2d 185, 195 (Utah App. 1997) (explaining that appellate courts "must ask the following question: Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned?") (cleaned up). In deciding this question, this Court considers the total record, including the context of any allegedly improper remarks. *See Liljeberg,* 486 U.S. at 860; *see also Fullmer v. Fullmer*, 2015 UT App 60, ¶¶14-18, 347 P.3d 14.

Liljeberg is one example of apparent bias. There, the judge was on a university board of trustees that was negotiating with Liljeberg on a land deal. 486 U.S. at 850. The university's success in those negotiations "turned, in large part, on Liljeberg prevailing" in a case before the judge. *Id.* Regardless of whether the judge actually knew about the land deal or the negotiations, because the information was public, a reasonable person would question whether the judge could fairly preside over the lawsuit. *Id.* at 860-61.

If a party shows that a judge is actually biased and impartial, then the error is structural and cannot be harmless. *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). But if a party shows mere apparent bias, then reversal is not necessarily required, because a violation of judicial canons—while it may subject the judge to discipline—does not necessarily prove a violation of a defendant's right to a fair trial without a showing of prejudice. *See Munguia*, 2011 UT 5, ¶¶16-17 (explaining that judicial canons have a "higher standard" than the constitution); *State v. Gardner*, 789 P.2d 273, 278 (Utah 1989) (explaining that code of judicial conduct "does not establish the parameters of a defendant's constitutional right to a fair trial" and that defendants must show prejudice under rule 30, Utah Rules of Criminal Procedure); *see also Liljeberg*, 486 U.S. at 862 ("As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance.").[30] Where, as here, another judge decides the

[30] One caveat: due process may require reversal without prejudice in an appearance of bias case where an objective view shows a high probability of actual bias. *See, e.g., Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (discussing cases in which "the probability of actual bias . . . is too high to be constitutionally tolerable") (cleaned up); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (reversing conviction where trier of fact—a county mayor—had a "direct pecuniary interest" in case outcome and an "official motive to convict"). The record here shows no probability—let alone a high one—that Judge Kouris was biased.

motion, the party must show either "actual bias or an abuse of discretion." *State v. Alonzo*, 973 P.2d 975, 979 (Utah 1998). Boyer can show neither.

Boyer has not shown that Judge Kouris was actually biased. He did not denigrate any of Boyer's personal characteristics or express extreme anger or outrage toward him. And Judge Kouris's remarks to V.M. did not show the kind of extreme favoritism toward her that rendered him impartial. At most, Judge Kouris said he believed V.M., encouraged her, and questioned Boyer's fortitude. R2867. V.M.'s credibility was not really at issue in the new trial motion. And Judge Kouris's remarks are a far cry from actual bias, and merely "expressions of impatience, dissatisfaction, annoyance, and even anger" that "are within the bounds of what imperfect men and women, even after having been confirmed as [] judges, sometimes display." *Liteky*, 510 U.S. at 555-56. And those expressions came only at the end of the case and after all the evidence was in.

Nor has Boyer shown that Judge Harris abused his discretion in deciding that Judge Kouris was not apparently biased. Considering his remarks toward V.M. and Boyer at sentencing in context, Judge Kouris simply intended—in fairly tame terms—to encourage a victim and chide her abuser. If being "exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person" does not make a judge

"recusable for bias or prejudice," *id.* at 550-51, then Judge Kouris's comparatively mild remarks did not require his recusal. Indeed, the Utah Supreme Court has held that much more scathing remarks from Judge Kouris did not require his recusal. In *Munguia*, Judge Kouris excoriated the defendant at sentencing, saying that he had misplaced responsibility for his crimes on the victim and "ruined" and "destroyed" an innocent child. 2011 UT 5, ¶¶18-20. The supreme court held that recusal was not required, explaining that "[p]erhaps there is a judge who could remain emotionally neutral when faced" with an unrepentant child molester; but that "no law requires it." *Id.* at ¶20.

Further, while a court's adverse rulings and statements, by themselves, cannot show bias, *Liteky*, 510 U.S. at 555-56, the court's rulings and statements in the defense's favor here show the opposite. Most saliently, Judge Kouris had granted the defense mistrial motion during the first trial, providing the very relief Boyer sought in the disputed motion: a new trial. R2265-66. He limited some of the State's evidence on an issue raised by the defense. R2573-75 Further, Judge Kouris sustained several defense objections during the second trial, including one during the prosecutor's closing argument. *See, e.g.,* R2491; R2493-94; R2499-2500; R2503-04; R2506; R2706-07; R2723; R2811-15. He granted defense extension requests. *See, e.g.,* R2018-27 (continuing trial);

cf. R1220-21 (granting current counsel a fourth extension to file new trial motion). He demonstrated trust in defense counsel. *See, e.g.,* R2025 (explaining to prosecutor that defense counsel would never share protected discovery with Boyer). And he even praised defense counsel while speaking to the victim, lauding her for enduring cross-examination from "maybe one of the best defense lawyers in the state." R2865.

Finally, Judge Kouris's restitution rulings adverse to the defense, Aplt.Br. 66-71, are insufficient to show bias.[31] *See Liteky*, 510 U.S. at 555-56.

III.

Boyer cannot show prejudice from the trial court's refusal to re-subpoena the victim's mental health records.

Boyer's final claim is that the trial court erred in shredding V.M.'s mental heath records after in camera review, and in not replacing them after conviction. Aplt.Br. 71-72. The trial court's order notified the parties that it would shred the records. R303. Boyer did not object to this. Thus, he can only get relief on this claim by proving that his counsel were ineffective for not objecting. He cannot do so.

[31] Though Boyer discusses restitution statutes and cases in some detail, he does not challenge the restitution orders themselves. *See* Aplt.Br. 66-71.

Regardless of whether counsel performed deficiently in not objecting, this Court may resolve this claim on prejudice alone. *See Strickland*, 466 U.S. at 697 (stating that if it is easier to dispose of ineffective assistance claim for lack of prejudice, "that course should be followed"). [redacted]

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on September 14, 2018.

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Utah Attorney General

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, and this Court's order of April 9, 2018, this brief contains 19,920 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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

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

/s/ John J. Nielsen
JOHN J. NIELSEN
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on September 14, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Elizabeth Hunt
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Salt Lake City, UT 84105
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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

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

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

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

/s/ Melanie Kendrick

Addenda Index

Addendum A: Relevant Rules

- Utah R. Crim. P. 14, 16
- Utah R. Evid. 403, 412, 506, 510, 608, 702
- Utah R. Jud. Con. 2

Addendum B: Oral and written rulings denying new trial motion, R1789-93; R3077-85.

Addendum C: Defense objections, court rulings on State expert (Dr. Corwin): R2653-75; R2605-12

Addendum D: Rule 412 stipulation, ruling; R2085-87 (agreement to stipulate); R2674 (stipulation at trial); R2598-2605 (rule 412 motion and ruling)

Addendum E: Closing arguments, R2758-2822

Addendum F: Orders re: mole/genital pictures, R1941-44; R1946-48

Addendum G: Mental health records stipulation, rulings, R278-85; R303; R3221-34

Addendum H: Miscellaneous rulings re: pictures, 412 evidence, medical records, R1963-66

Addendum I: Sentencing transcript, R2844-68

Addendum J: Disqualification ruling, R769-73

Addenda

Addendum A

West's Utah Code Annotated
State Court Rules
Utah Rules of Criminal Procedure

Utah Rules of Criminal Procedure Rule 14

RULE 14. SUBPOENAS

Currentness

(a) Subpoenas requiring the attendance of a witness or interpreter and production or inspection of records, papers, or other objects.

(a)(1) A subpoena to require the attendance of a witness or interpreter before a court, magistrate or grand jury in connection with a criminal investigation or prosecution may be issued by the magistrate with whom an information is filed, the prosecuting attorney on his or her own initiative or upon the direction of the grand jury, or the court in which an information or indictment is to be tried. The clerk of the court in which a case is pending shall issue in blank to the defendant, without charge, as many signed subpoenas as the defendant may require. An attorney admitted to practice in the court in which the action is pending may also issue and sign a subpoena as an officer of the court.

(a)(2) A subpoena may command the person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other objects, other than those records pertaining to a victim covered by Subsection (b). The court may quash or modify the subpoena if compliance would be unreasonable.

(a)(3) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying the witness or interpreter of the contents. A peace officer shall serve any subpoena delivered for service in the peace officer's county.

(a)(4) Written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made.

(a)(5) A subpoena may compel the attendance of a witness from anywhere in the state.

(a)(6) When a person required as a witness is in custody within the state, the court may order the officer having custody of the witness to bring the witness before the court.

(a)(7) Failure to obey a subpoena without reasonable excuse may be deemed a contempt of the court responsible for its issuance.

(a)(8) Whenever a material witness is about to leave the state, or is so ill or infirm as to afford reasonable grounds for believing that the witness will be unable to attend a trial or hearing, either party may, upon notice to the other, apply to the court for an order that the witness be examined conditionally by deposition. Attendance of the witness at the

deposition may be compelled by subpoena. The defendant shall be present at the deposition and the court shall make whatever order is necessary to effect such attendance.

(b) Subpoenas for the production of records of victim.

(b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other non-public records pertaining to a victim shall be issued by or at the request of the defendant unless the court finds after a hearing, upon notice as provided below, that the defendant is entitled to production of the records sought under applicable state and federal law.

(b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.

(b)(3) The request for the snbpoena or court order shall be filed with the court as soon as practicable, but no later than 28 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the prosecutor. Service on an unrepresented victim shall be made on the prosecutor.

(b)(4) If the court makes the required findings under subsection (b)(1), it shall issue a subpoena or order requiring the production of the records to the court. The court shall then conduct an in camera review of the records and disclose to the defense and prosecution only those portions that the defendant has demonstrated a right to inspect.

(b)(5) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.

(b)(6) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code Ann. § 77-38-2(2).

(c) Applicability of Rule 45, Utah Rules of Civil Procedure.

The provisions of Rule 45, Utah Rules of Civil Procedure, shall govern the content, issuance, and service of subpoenas to the extent that those provisions are consistent with the Utah Rules of Criminal Procedure.

Credits
[Amended effective November 1, 1996; April 1, 2001; November 1, 2007; November 1, 2015.]

Rules Crim. Proc., Rule 14, UT R RCRP Rule 14
Current with amendments received through August 15, 2018

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Criminal Procedure

Utah Rules of Criminal Procedure Rule 16

RULE 16. DISCOVERY

Currentness

(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.

Credits

[Amended effective November 1, 2001; November 1, 2015.]

Rules Crim. Proc., Rule 16, UT R RCRP Rule 16
Current with amendments received through August 15, 2018

End of Document

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

Utah Rules of Evidence, Rule 403

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

Currentness

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

Credits

[Amended effective December 1, 2011.]

Rules of Evid., Rule 403, UT R REV Rule 403
Current with amendments received through August 15, 2018

End of Document

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

Utah Rules of Evidence, Rule 412

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

Currentness

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

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

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

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

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

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

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

(c) Procedure to Determine Admissibility.

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

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

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

(C) serve the motion on all parties.

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

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

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

Credits

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

Rules of Evid., Rule 412, UT R REV Rule 412
Current with amendments received through August 15, 2018

End of Document

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

Utah Rules of Evidence, Rule 506

RULE 506. PHYSICIAN AND MENTAL HEALTH THERAPIST-PATIENT

Currentness

(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.

Credits

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

Rules of Evid., Rule 506, UT R REV Rule 506
Current with amendments received through August 15, 2018

End of Document

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

Utah Rules of Evidence, Rule 510

RULE 510. MISCELLANEOUS MATTERS

Currentness

(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.

Credits

[Formerly Rule 507. Renumbered as Rule 510 and amended effective December 1, 2011.]

Rules of Evid., Rule 510, UT R REV Rule 510
Current with amendments received through August 15, 2018

End of Document

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

Utah Rules of Evidence, Rule 608

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

Currentness

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

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

(1) the witness; or

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

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

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

Credits

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

Rules of Evid., Rule 608, UT R REV Rule 608

Current with amendments received through August 15, 2018

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VII. Opinions and Expert Testimony

Utah Rules of Evidence, Rule 702

RULE 702. TESTIMONY BY EXPERTS

Currentness

(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.

Credits

[Amended effective November 1, 2007; December 1, 2011.]

Rules of Evid., Rule 702, UT R REV Rule 702
Current with amendments received through August 15, 2018

End of Document

West's Utah Code Annotated
State Court Rules
Utah Code of Judicial Administration
Part II. Supreme Court Rules of Professional Practice
Chapter 12. Code of Judicial Conduct

Judicial Administration Code, Canon 2

CANON 2. A judge shall perform the duties of judicial office impartially, competently, and diligently

Currentness

RULE 2.1. Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

RULE 2.2. Impartiality* and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.

COMMENT

[1] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[2] When applying and interpreting the law, a judge may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[3] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity

to have their matters fairly heard.

RULE 2.3. Bias, Prejudice, and Harassment*

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall take reasonable measures to require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Examples of sexual harassment include but are not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

RULE 2.4. External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

RULE 2.5. Competence, Diligence, and Cooperation

(A) A judge shall competently and diligently perform judicial and administrative duties.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all judicial and administrative responsibilities.

[3] Competent and diligent disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In competently and diligently performing judicial and administrative duties, a judge must demnnstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

RULE 2.6. Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] If a judge participates in the settlement of disputes, the judge should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge may consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

RULE 2.7. Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required or permitted.

COMMENT

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. A judge should not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

RULE 2.8. Decorum, Demeanor, and Communication with Jurors

(A) A judge shall take reasonable measures to require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall take reasonable measures to require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

COMMENT

[1] The duty to hear all proceedings with patience and courtesy is consistent with the duty imposed in Rule 2.5 to dispose competently and diligently of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

RULE 2.9. Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law* applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record and does not abrogate the responsibility to personally decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substanec of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts to ensure that the judge does not receive inappropriate ex parte communications through or from court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums,

including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

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.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations 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 circumstauce, waive the disqualificatiou. 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.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the

judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] A judge is disqualified in proceedings involving a law firm that employs the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household as an equity holder in the law firm. A judge is not disqualified in other situations unless the judge's impartiality might reasonably be questioned under paragraph (A), or a relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c).

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

RULE 2.12. Supervisory Duties

(A) A judge shall take reasonable measures to require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's fulfillment of his or her obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the timely disposition of matters before them.

COMMENT

[1] A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision timely administer their workloads.

RULE 2.13. Administrative Appointments

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially* and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not appoint a lawyer to a position if the judge either knows* that the lawyer, or the lawyer's spouse or domestic partner,* has contributed more than $50 within the prior 3 years to the judge's retention campaign, or learns of such a contribution* by means of a timely motion by a party or other person properly interested in the matter, unless:

(1) the position is substantially uncompensated;

(2) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made contributions; or

(3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent, and able to accept the position.

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

[3] The rule against making administrative appointments of lawyers who have contributed in excess of a specified dollar amount to a judge's retention campaign includes an exception for positions that are substantially uncompensated, such as those for which the lawyer's compensation is limited to reimbursement for out-of-pocket expenses.

RULE 2.14. Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in questiou address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not

limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

RULE 2.15. Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.*

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information iodicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action.

COMMENT

[1] A judge has an obligation to address a known violation by a judge or a lawyer of the Code or the Utah Rules of Professional Conduct. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have violated the Code or the Utah Rules of Professional Conduct, but receives information indicating a substantial likelihood of snch misconduct, should take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation or reporting the suspected violation to the appropriate authority or other agency or

body.

RULE 2.16. Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

Credits

[Adopted effective April 1, 2010. Amended effective July 16, 2013.]

Judicial Administration Code, Canon 2, UT R J ADMIN CODE, Canon 2
Current with amendments received through August 15, 2018

End of Document

Addendum B

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
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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.

4. [redacted]

[redacted]

5. [redacted]

[redacted]

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

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

STATE OF UTAH, Plaintiff, vs. MARK BOYER, Defendant.	Case No. 131902296 FS

Hearing
Electronically Recorded on
April 19, 2017

BEFORE: THE HONORABLE MARK KOURIS
Third District Court Judge

APPEARANCES

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Transcribed by: Natalie Lake, CCT

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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.

[redacted]

[redacted]

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. [redacted]

[redacted]

[redacted]

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.

[redacted]

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.

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.

[redacted]

[redacted]

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)

Addendum C

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131902296 FS
	:	
Plaintiff,	:	
	:	
v	:	
	:	
MARK BOYER,	:	
	:	
Defendant.	:	With Keyword Index

PARTIAL TRANSCRIPT OF JURY TRIAL JULY 13, 2016

BEFORE

THE HONORABLE MARK KOURIS

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

A I'm relying on my 30 plus years of experience in dealing with child sexual abuse cases, both those that I learned about from perpetrators and from the victims, from those cases in treatments when I was at UCLA and those cases I have worked with since that time and also the literature, the articles describing experience with sexually abused children and their families and research studies looking at series of cases, so...

Q That's what you're basing your (inaudible) on?

A Yes.

MS. CORDOVA: And so now Judge, I do find the objection to be made but I think - it's going to have some argument that might be take a little bit of time so I don't know if you want to do that in front of the jury or not.

THE COURT: Why don't you come forward if you wouldn't mind?

(Whereupon a sidebar was held as follows:

THE COURT: What are we talking about?

MR. BRASS: We have issue about notice. It'll take some time to argue but probably should be heard out of the presence of the jury.

THE COURT: All right. If that's the case...

(End of sidebar)

THE COURT: Ladies and gentlemen, we're going to take about a 10-minute break here. There's a small matter

that we need to talk about. So I would ask you again please not to talk about the case. Don't talk to anybody involved in the case and do not do any research or (inaudible) any information from anywhere else but this courtroom. With that, I'll excuse you now and we'll have you back here in about 10 minutes of so, okay?

(Whereupon the jury left the courtroom)

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

Ms. Cordova, the floor is yours.

MS. CORDOVA: Thank you, Your Honor. The reason for my objection is Mr. Fisher provided us notice of expert witness that he was calling Dr. Corwin as an expert witness some time ago prior to the first trial. On May, the end of May, I believe it was May 25th of this year we asked for a supplemental discovery request in compliance with Utah Code Annotated 77-17-13 and we specifically asked for, in Section 1, any specialized data upon which Dr. David Corwin, MD's expert opinion or opinions would be based. This specialized data should include (inaudible) and then we go onto ask for any (inaudible) history and articles, any literature that he has relied on.

In subsection 2 of 77-17-13, "If an expert's anticipated testimony will be sole or in part on results of any tests or other specialized data, the party intending to

call the witness shall provide to the opposing party the information upon request.

So we requested the information that Dr. Corwin is going to base his expert opinion testimony on and in response to that, Mr. Fisher supplied something more in detail and I quoted that, to that this morning about delayed disclosures and the risk associated with being a victim of child sex abuse but just now on, when I spoke with Mr. Corwin he is relying on other specialized data that has not been provided to us and it has to be under the statute.

THE COURT: It seems to me some of the data he's going to rely upon will be his 30 years of experience. How would that -

MS. CORDOVA: I understand.

THE COURT: Is that what you're talking about?

MS. CORDOVA: No. He specifically said the literature, the articles, and the research studies that have been conducted recently, that he's relying on. I understand that I can't, we can't ask for his entire education in his 36 years of his profession -

THE COURT: Right.

MS. CORDOVA: - but we can ask for the research studies that he's been apart of, that he's written, that he's relying on when he's talking about delayed disclosures and the risks of child sex abuse.

THE COURT: Why don't you flush that out right now and ask him about all of the things he's relying upon to come up with that and then let Mr. Fisher respond to that, okay?

MS. CORDOVA: Okay.

///

///

VOIR DIRE EXAMINATION (resumed)

BY MS. CORDOVA:

Q So okay, in direction by the Court, and so the (inaudible) what you're relying on when you - it's my understanding that you were asked to come here to talk about delayed disclosures, right, in child abuse cases?

A Correct.

Q And also the risks associated with being a victim of child sex abuse (inaudible) later on?

A I don't recall that being, you know, part of the questions I was asked but I could address those things, you know, I've written on those, I've seen, you know, many people over the years affected by child sexual abuse.

Q Okay. And so what specifically were you asked to talk about today?

A Primarily it was in the area of addressing delayed disclosure in child sexual abuse victims.

Q Okay. And I'm sorry for interrupting you. And what are you, besides your - like your education and your

practical experience of being a psychiatrist, what articles or studies that you mentioned that you've written on that you've reviewed, are you relying on to talk about the delayed disclosure in child sexual abuse cases?

MR. FISHER: Judge, if I can interrupt, a curriculum vitae of over 30 pages was provided to counsel as a part of our notice of expert early on and counsel raised the issue of notice and the possibility that they may need to look into this and file motions, seven months ago. So I'm not sure why we're going into this now. Dr. Corwin's vitae lists all of these articles that he has been involved with. I can't believe that we're going to go through his 30 some years of research, article by article now to discuss this.

THE COURT: I don't think we are either, so go ahead and you can ask the question again and we'll see where it leads us.

MS. CORDOVA: Okay.

Q (BY MS. CORDOVA) So can you talk to us a little bit about - well, not a little bit, can you tell us what articles - and, you know, it can be recent, we can limit it to the past, you know, couple of years, any articles or research, studies that you are relying on in your expert opinion testimony today with regard to the delayed disclosure in child sex abuse cases?

A Well, in addition to my experience and direct

knowledge, probably the most important article was written by my mentor, Dr. Roland Summit, and published in 1983 in the Journal of Child Abuse and Neglect and it was entitled the child sexual abuse accommodation syndrome and that was based on his experience with over 2000 cases talking about their common characteristics, what's similar. And some of the things that were common among these cases of child sexual abuse that because they were not widely known to the public, they were used in courts to try to impeach the credibility of victims when they were only behaving in a manner that was well known to be typical of victims of child sexual abuse. So he wrote that article, the Child Sexual Abuse Accommodation Syndrome to disabuse the public, judges, and jurors of common features that are used to impeach the credibility of victims in courts. So that is the, probably the most important summary of observations of a large number of cases.

And then over the years, there have been a variety of other studies published, some based upon interviews with perpetrators about how they choose their victims, how they groom their victims, some based on looking at children who have been sexually abused and so I've tried to keep up with that information as it's developed because it's relevant to this particular type of question and legal proceeding.

And most recently in I think it was around 2012 or

2013 there was a very good article published, it was based on a dissertation by Stacia Stonzenberg and so that was within the recent literature and when a scientist or academician goes to look at a question, what you do is you look at the most recent review article you can find and then look and see what the citations and the research that are described in that. So in preparing to testify here today, I reviewed her subsequent peer review article, which was published in, I think 2013 or 2014, and then in reviewing that yesterday I saw that she relied particularly heavily on a study that was done in Canada in, published in 1995 and it was a study that I wasn't familiar with because it wasn't ever published in the peer review literature. It was published in a report. So I emailed her and asked her for a copy of it and she sent it to me. So I reviewed that yesterday.

Q Okay. So basically three research studies or articles that you've relied on - that you're going to rely on?

A No. Primarily my history of work with victims and knowledge of child sexual abuse and the developing literature in the area and specifically I noted the Child Sexual Abuse Accommodation Syndrome from 1983 and then more recently I looked at the literature yesterday just to make sure I was familiar with the latest findings.

Q And let me followup with a question. Who has

access to that literature or those peer review articles?

A Anybody.

Q Anybody?

A Anybody who goes to the library and searches disclosure of child sexual abuse and starts doing the research. You could do it, your legal assistants could do it.

Q Okay. I tried. Okay. And there's a lot of barriers actually to seeing those articles.

MS. CORDOVA: And so Judge, based on -

THE COURT: So what was disclosed to you when you sent out to the supplement? Was the 1982 article sent to you?

MR. BRASS: No, nothing. That's the answer, that's what - I'm the one that did that so I'm going to supplement just a little bit but May 25th which was the day after the other trial and we asked for this pursuant to 77-17-13(2) any specialized data upon which Dr. David Corwin MD's expert opinion or opinions will be based. And under subsection 2 of the statute says if it's based on whole or in part upon the results and tests - we're not talking about tests - or other specialized data -

THE COURT: What specialized data has he identified?

MR. BRASS: All these articles.

THE COURT: That's not specialized date. Specialized data would be specific results of tests.

MR. BRASS: That's not what the statute says.

THE COURT: Well, it depends what specified data means, right?

MR. BRASS: Right.

THE COURT: If they said article, that would mean everything he read. Why would they say specified data?

MR. BRASS: Specialized data would include reports that are done by other experts that he's relying upon. He's talking about -

THE COURT: So in a 30-year history of his work, if he's read 1000 articles to come to where he is now, you want all 1000 articles?

MR. BRASS: I wouldn't go that far, I don't think that's necessary but he's referred to three different things and including something that he looked up yesterday.

THE COURT: I agree with that but I think that all of those things are a result of his 30-year practice in this field and the fact that he's trying to keep, he did mention as well, that the information is coming out so quick now that he's doing everything he can to keep up. So the fact that he just mentioned these three articles, my guess would be that if we had enough time and asked him to sit down and write down the number of articles he has actually read on this

area, it would number fair to say in the hundreds, doctor?

THE WITNESS: Probably couldn't remember all of them.

THE COURT: Fair enough. But if he could it would probably be in the hundreds and I don't think they have a responsibility to give you all 100 articles to say what his opinion today is based upon.

MR. BRASS: May I ask him one question?

THE COURT: Please.

Q (BY MR. BRASS) Is your opinion that you're going to render here today, based in part, at all upon the three different articles that you've referenced just now?

A Yes.

Q Okay. And also based on the contact that you had with this author in Canada yesterday?

A I didn't have contact with the author in Canada. I contacted the author who had cited the article in her article.

Q Got it.

A So that's how I obtained access to that report.

Q Okay, so you knew how to get ahold of her and contacted her directly. And then is your opinion based in part upon that contact as well?

A Primarily my opinion is based on my knowledge over the 30 some years that I've worked in this area and the early

literature on this topic which essentially was just scientifically validated and verified by the more specific and detailed research done with in the last 20 years.

THE COURT: All right. Mr. Fisher, response?

MR. FISHER: I'll submit, Judge. I think he's told the Court that he's relying on this entire 30 years.

THE COURT: All right. What I'm going to do, doctor, is have you testify without specifically noting any studies or articles that you've read to derive and get your final base of knowledge and instead base that when you're talking to the jury only on the 30 years of experience that you have. So don't specifically cite a study or anything else like that.

MR. BRASS: May I ask him one more question in that case?

THE COURT: Please.

Q (BY MR. BRASS) So, is that fair to ask you to do that? I mean, can you testify exclusively based on your experience without referencing any of these articles you've referenced?

A Well, yes, because my experience includes my awareness, attendance at presentations, my review of the literature. He's asked me not to cite specific articles but my knowledge is the cumulative, accumulation of both my experience directly in dealing with child sexual abuse cases

of which I've dealt with hundreds, if not thousands, and all of my learning from lectures and presentations, discussions with colleagues, case reviews, including any reports or research articles I've read, right?

Q Okay. And so -

MR. FISHER: Your Honor, isn't the Court ruling that he's just not suppose to cite to those?

THE COURT: Let's let - go ahead, Mr. Brass, finish your questions.

Q (BY MR. BRASS) So it's impossible for you to render an opinion without including the things that you've referred to, your literature and so forth? You don't have to talk about them out loud, but those do form part of the basis of your opinion you're going to render, right?

A To the degree that everything I have seen and learned over the past 30 to 40 years is part of what I know today, that's all there. And my current testimony regarding that knowledge, experience, is based upon all of that and I can't say, well, parse this out because it came from that source.

Q Got it. That's what I was asking you. You can't cut a slice out of the pie and throw it away (inaudible) opinion?

A Exactly.

Q It's the whole pie or nothing, right?

A Well, my knowledge is my knowledge.

MR. BRASS: Okay, thanks.

THE COURT: I agree with the point that Mr. Brass just made and that is it's impossible to separate all of the sort of things that go now into your general body of knowledge and if we wanted to find everything that had any basis to where you are now intellectually, I don't think that would be possible quite frankly. So, I'm going to allow you to testify to that body of knowledge without specifically citing any specific study or anything along that line that you can point to say the Johnson study says 'x' but instead say my 30 years of whatever, all right?

THE WITNESS: Okay.

THE COURT: Go ahead and bring the jury back in.

MR. BRASS: Before he does that, to be clear, what's the Court's ruling with respect to the production of this specialized data? Are you ruling that that's not specialized data?

THE COURT: I am.

MR. BRASS: Okay. Thank you.

THE COURT: All right.

(Whereupon the jury entered the courtroom)*10:35:04)

THE COURT: Mr. Fisher, you may continue.

MR. FISHER: Thank you.

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131902296 FS
	:	
Plaintiff,	:	
	:	
v	:	
	:	
MARK BOYER,	:	
	:	
Defendant.	:	With Keyword Index

PARTIAL TRANSCRIPT OF JURY TRIAL JULY 13, 2016 - VOLUME II

BEFORE

THE HONORABLE MARK KOURIS

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

MR. FISHER: Also, just as far as Mr. Brass's indication that Ms. Boyer's testimony was misleading, [redacted]

THE COURT: [redacted]

THE COURT: - [redacted]

MR. FISHER: [redacted]

THE COURT: [redacted] 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 [redacted] 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 [redacted] 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 Ms. [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.

Addendum D

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

STATE OF UTAH, Plaintiff, vs. MARK BOYER, Defendant.	Case No. 131902296 FS

Hearing
Electronically Recorded on
May 17, 2016

BEFORE: THE HONORABLE MARK KOURIS
Third District Court Judge

APPEARANCES

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THE COURT: [redacted]

MR. FISHER: [redacted]

[redacted]

THE COURT: [redacted]

MR. FISHER: [redacted]

THE COURT: [redacted]

[redacted]

MR. FISHER: [redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

MR. FISHER: [redacted]

[redacted]

MR. BRASS: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

MR. FISHER: [redacted]

[redacted]

THE COURT: [redacted]

Mr. Fisher?

MR. FISHER: [redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

MR. FISHER: [redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131902296 FS
Plaintiff,	:	
v	:	
MARK BOYER,	:	
Defendant.	:	With Keyword Index

PARTIAL TRANSCRIPT OF JURY TRIAL JULY 13, 2016 - VOLUME II

BEFORE

THE HONORABLE MARK KOURIS

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

and T. Langdon Fisher, deputy district attorney, and counsel for the Defendant Mark Boyer, Edward Brass, hereby submit the following stipulations to read to the jury at trial.

Number one, on March 27th, 2013, [redacted] told Detective Bryan Holdaway of the Unified Police Department about a separate incident that did not involve the defendant or his children. [redacted] told Detective Holdaway that when she was about 10 years old, she was at a sleep over at the home of another friend in her neighborhood. She and several other children had been watching movies, and the children had fallen asleep. JR - and that's the way we're going to refer to him - JR, the father of the friend who lived at the house, came into the room where the children were sleeping. JR laid down beside [redacted] and tickled her stomach. He then touched her, quote, boobs, unquote, on the outside of [redacted] bra. [redacted] told Detective Holdaway that this only happened on one occasion.

Number two, JR, the father, has denied that this ever happened.

Number three, no charges have been filed against JR. That's our stipulation.

THE COURT: Very good.

We'll actually give that document with you when you go back into the jury room, so you'll be able to refresh yourself with that.

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131902296 FS
Plaintiff,	:	
v	:	
MARK BOYER,	:	
Defendant.	:	With Keyword Index

PARTIAL TRANSCRIPT OF JURY TRIAL JULY 13, 2016 - VOLUME II

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(Transcriber's note: Testimony of Dr. Corwin was previously transcribed and is not included in this transcript.)

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: [redacted]

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 Victoria and Mark?" And I'm quoting from a police report we've been provided in discovery at this point. And the answer was, [redacted]

[redacted]

THE COURT: [redacted]

Mr. [redacted]

MR. FISHER: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

[redacted]

THE COURT: Okay. [redacted]

[redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

[redacted]

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]

THE COURT: [redacted]

[redacted]

[redacted]

MR. FISHER: [redacted]

THE COURT: [redacted]

MR. FISHER: [redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. FISHER: [redacted]

THE COURT: - [redacted]

[redacted]

MR. FISHER: [redacted]

THE COURT: [redacted]

[redacted]

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.

Addendum E

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131902296 FS
Plaintiff,	:	
v	:	
MARK BOYER,	:	
Defendant.	:	With Keyword Index

PARTIAL TRANSCRIPT OF JURY TRIAL JULY 14, 2016 - VOLUME III

BEFORE

THE HONORABLE MARK KOURIS

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

THE COURT: Mr. Fisher, you may begin.

MR. FISHER: Thank you, Your Honor.

You heard her. [redacted] voice may have been as small as she was when the defendant was raping her. She found the courage. She found the courage to tell you what was done to her, even in this intimidating setting.

These are the kinds of facts that pop out at us and ring true because of their extreme realness, their rawness. Think, for example, of [redacted] description of the time when she was in the shower and the defendant put her up against the wall and tried to insert his penis into her vagina. He was unsuccessful so he lays her down in the bottom of the tub to complete his violation of her.

Think too about that strange, little detail about the defendant putting something gross tasting in her mouth, and then putting something sweet in it afterwards. I wouldn't even want to try and guess what that was that he put in there at first, but that is the kind of a memory that we know just from life experience is the kind of memory a child would have, a vague memory that something was put in her mouth. She's not sure what. And then another thing, it was sweet, and that's the kind of analysis that we need you to conduct in this kind of case.

What things ring true to you? Whose testimony rings true to you? What does not, on the other hand? And in

completing that kind of analysis, it is extremely important in a case like this to rely on your common sense, and I'll talk some about the importance of logic in this case as well.

Don't forget about your common sense. It's just all the more powerful when there's a group of you, because you can bounce ideas, thoughts, and things you heard that somebody might not have caught. You can talk about those things in your deliberations, and that's extremely important. It's an important part of the way the system works.

Remember that you are the judges of the witness's credibility - all of you. All the people who have testified. You decide if somebody was believable or not believable, and I would propose to you, suggest to you that [redacted] and Jan Boyer were utterly credible when they were on the witness stand. I'll talk more about that as well, and you had a chance to watch them, engage their demeanor, as well as listen to what they had to say.

And you heard from Jan Boyer talking about these specific things - the details that are so important in this case, as Ms. Cordova mentioned in her opening remarks to you that the facts are in the details, and that's what's so important in this case.

Jan Boyer brought out some small things that seemed - that might seem inconsequential when you first hear them, but they fit with what [redacted] had to say like pieces of a

puzzle. For example, [redacted] described a blue-striped sheet - blue-striped sheets on that first bed - that bunk bed in the first incident when these things happened, and that was the time when something gross was put in her mouth, and then followed by something sweet.

Jan told us how - of course, this is six or seven years after the fact. But when [redacted] told her that, she said, "Well, I - I don't have any blue-striped sheets." That's one of the things that Jan thought was proof that [redacted] wasn't telling her the truth. Later on, she remembered the blue-striped sheet, the top sheet used as a bird cage cover.

Mr. Brass said, "Well, wait a second. That was at another house. That was later on." Well, yeah. She's using an old sheet as a bird cage cover. You don't put a new sheet on a bird cage.

Jan Boyer remembered - she told us how she had seen some kind of a stain on there. She'd gone in there at some point. She wasn't able to tell all the - tell us the timing of these occasions that these were the exact times, but again it all fits just like a puzzle.

Jan Boyer went in and the defendant was already in that room - [redacted] room with the bunk beds, and she went in and sure enough, she remembers that there was some kind of a stain on there. She thought it was maybe bluish, but some

kind of a stain. And surprise, surprise the bottom sheet went missing. We don't know what happened to it. The bottom sheet with the stain went missing, and there were, in fact, blue-striped sheets.

Another piece of the puzzle that fit in. Another one of these details that Jan brought out. It was on that occasion - and I should say this detail that Jan brought out fits with the occasion that [redacted] told us about when the defendant was so rough with her that she was so upset she went into the bathroom, closed herself in there, and cried to herself, and she found blood - blood coming from her vagina.

And then Jan tells us, "Well, there was this incident." She remembers a time when the defendant - she was up in bed in their bedroom. This is at the house in Holladay, and the defendant came up late. She met him at the top of the stairs, and he said something to her, and she went on down to check what was going on, and sure enough, there was [redacted] in the bathroom crying to herself upset. According to [redacted] she said something about a bloody nose.

These are the kinds of details that make the difference between a situation where we say this is a he said/she said. This is just something where, you know what, one person is saying that this happened, and the other person is saying that it didn't. We have to throw up our hands and

just say, "Well, we don't know. There's not enough evidence here." These are the details that make the difference between that kind of a case and a case like this one. It brings it out of the shadows, where the defendant did his dirty work, and into the light of day beyond a reasonable doubt, because we can listen to these witnesses and say, "Yeah, that fits. That makes this case."

Did [redacted] get a little confused during her testimony? Yeah, under the skillful cross examination of Mr. Brass, she got a little confused. But I would argue to you that, with all due respect, Mr. Brass was a little confused too, because [redacted] was not 30 years old when these things happened. She was not 40 years old when she was testifying to us. She was seven. She's now 17. And while I know that 17 year olds think that they're all grown up, most of us who are a little bit older than that see it differently, and we can see that the [redacted] who was testifying was practically a child herself trying to tell us about what was done to her when she was practically still a baby.

We heard questioning of that 17-year-old girl that essentially followed this pattern. [redacted] isn't it true that you said X, Y, and Z to Nurse Lewis? But when you talked to the umpteenth person that you had to talk to in the course of this case, you said Z, Y, and not X." The implication, of course, being that if she didn't say the same

thing by rote to all people all the time she had to talk about this, there must be something false about it. We know that's not true. We really didn't need any expert to tell us that. That kind of knowledge just comes from life and from living.

But speaking of which, what did - speaking of which - excuse me - what did [redacted] say to Nurse Lewis? Think about that. She was about to get a physical exam shortly after all of this - after years of being her little secret, her private secret, I should say, not a little secret. All of this had just exploded into public knowledge - public and familial knowledge, I should say.

And she was worried now that this man might not have only violated her childhood, but he might have given her a disease that would stick with her for the rest of her life. That's the kind of concern that she had when she went into see Nurse Lewis.

But still, what was she able to relate? "I was raped when I was eight by Mark, my friend's dad." Quote, "He touched me on the vagina with his penis," close quote. He also touched her with his, quote, "fingers and his mouth to my vagina," close quote. All things considered, it sounds like she hit those key points pretty well.

Now, speaking of her youth. There was some discussion about her mentioning these moles on Mr. Boyer's

body. You're going to look at the pictures, and they're graphic. I apologize about that, but this is an important case, obviously. So it's necessary. But you're going to see pictures - I included - put a sticky on here for now for propriety. But you're going to see pictures that show his midsection, okay, of his genitals.

[redacted] remembers that there were multiple moles - two moles - some kind of a mark on his body. That's back from when she was somewhere between six and nine years old. This memory comes back. So that's what's important to remember when you're looking at these pictures. You'll see there are a whole series of moles across Mr. Boyer's lower abdomen and a big birthmark right here, which would be just on his left thigh close to his genitals.

That fits. It fits because we're talking about a child. And at the time, a girl of a teenager looking back many years to her childhood thinking that there was some kind of a mark down there. Whatever look or flash she got there. It's another one of those little details that can pop out to us and say this is not something where we just have to throw up our hands and say there's not enough evidence. It's one person's word against another.

I'd also ask you - State's Exhibit number 12. It's the writing that [redacted] put together. It will be important for you to compare [redacted] testimony to this piece of

evidence. This is the first and only written statement that [redacted] made of these events, and it's a statement that was written - the testimony said - told us that it was written the night before her interview with Detective Holdaway. So within a couple months of her disclosure, she wrote this down. So it's the closest thing we have to an account of what happened to her. Closest to the time that these events actually happened, I should say.

Now, I'll ask you to read it in your deliberations. You might want to have somebody read it aloud and all listen to it. Now, it's a young girl's writing, but it certainly, again, acts as one of those pieces of the puzzle.

As Jan testified - Jan Boyer testified, [redacted] was able to write it out - what happened, even better than she was able to articulate. And you'll see that this is a letter to Jan. A personal letter where she is pouring out these events as she remembered them at that time.

For the first time, these things are spilling out of her, and she's able to let someone else know about these violations of her body.

Well, I think it's important to read it all, but there is one thing it's the very last section of this letter, and it's a little - on this photo copy, it's a little faded, a little difficult to read, but look at it closely, and you'll be able to pick it out.

And what she said was, quote, "I got out, and got dressed, and watched TV 'til you got home. Then when you got home, I don't think you remember, but I ran to tell you, and I gave you a hug, and he gave us this look like, 'Don't you dare say anything' so I never did." She's relating what happened just after one of those shower incidents.

So those - that fits as a puzzle piece in a lot of ways, because not only does it express that she was going to Jan with, at least, the intention or desire of telling her, but that Jan was away.

Remember Jan talking about, "I had to leave. There were some mornings where I had to leave and then come back with her singing group?" Another puzzle piece. It fits perfectly.

So yes, all these years later [redacted] didn't give us all the details, but the State has produced evidence of everything we said we would in our opening statement.

On the other hand, there are the defense opening remarks. Ms. Cordova suggested in her opening statement that the key to the defense would be what was happening between 2011 and 2013.

So what was happening during that period? Well, even from the testimony of the defendant himself, it was, for the most part, fairly a smooth period of shared custody after the separation - at least up until December of 2012.

And just after that from 2013, this case has been pending. So we're still waiting to hear what the big revelation is in that time frame, unless -

Excuse me, Your Honor. I just need to grab one of these.

- unless Ms. Cordova is talking about this picture of Jan Boyer laying on the kitchen floor. And the trick about that is that Jan Boyer acknowledged all that, even down to the part where she told us about - that the defendant came and picked up the kids.

That's one thing about Jan Boyer. She laid it all out there. Good, bad, or ugly, she said it as it was, and that I would suggest to you shows her credibility - one of the things, including her general demeanor you observed.

So if Jan Boyer can be trusted, then we know that the boys were on her custodial schedule when [redacted] first disclosed to Jan, because the boys, as Jan told us, went over to sleep over at a friend's house opening up the opportunity for [redacted] to finally disclose to somebody about these terrible events.

In her opening statement, Ms. Cordova also said that Jan and Mark Boyer had - and I quote, "An ugly, contentious divorce." There's no evidence of that. No evidence whatsoever.

As I said to the contrary, even according to the

defendant himself, the divorce wasn't the problem. It was Jan changing the locks at the beginning of their separation that chapped his hide. That was what angered him - that section. But after that, they were separated. They had shared custody. The divorce - the defendant thought it went on for a long time, but it was not something that was contentious by anything he said. Weren't any problems there, and then they signed a stipulation. They didn't go to trial, came to a stipulated agreement, and went on from there.

You were also told in the defense's opening statement that all of the statements made by [redacted] about what Mark did to her can be attributed to Jan Boyer. What is the evidence of that? What is the evidence of that?

We certainly didn't hear anything from Mark Boyer, except a general, vague opinion that, "Oh, this is all Jan's fault. Jan's behind this somehow." He was angry at Jan about the separation, like I said, but there's no evidence of anything else suggesting that this would be attributed to Jan, that she's behind this somehow.

There was some straw grasping. I'm talking about these bunk beds. Was there - were there bunk beds or were there not? That wasn't accurate, as we heard from Mindy Pack, who testified. She said, "Yeah, I remember the white bunk beds. I wanted to buy them. They were not in this room, but they were moved."

Could you get that her the other way?

Moved from one room to the other. But one way or the other, what difference does this make about the beds? If instead of getting into a bunk bed the time she stayed over they pulled out a bed from underneath an elevated bed or threw a sleeping bag on the floor, what difference does that make? It's really not an important factor in this case.

And there is no evidence of anything to suggest that Jan Boyer, the woman who you watched testify, became so embittered, so emotionally violent that she would concoct a complex plot of all these events spread out over years, and then somehow convince or convey to a then 13-year-old girl, cause she would have been 13 when - if there was any kind of conspiracy going on - somehow convey that to [redacted] and get her to act on it.

No evidence that Jan had a motive for coming up with this strange, long, drawn-out plot to get back at her husband for something that we really haven't - no evidence of what that would be. We haven't seen any - anything through text messages, no bitter emails about custody, nothing about running back and forth to court and fighting over custody. They did mention custody, because that was the only thing that was even mentioned. Well, there's no evidence that that was an issue. Nothing. Nothing to bear out things that the defense were so important in their opening statement.

They're simply asking you to make assumptions for no better reasons than because they say you should.

So what has been borne out by the evidence? First. The State's witnesses were credible. You watched them and you had a chance to assess their credibility, their demeanor, and what they had to say.

Second. That [redacted] was sexually abused repeatedly by the defendant.

With regard to the four counts of aggravated sexual abuse of a child, I know it's kind of going over something yet again, but it is important. The aggravated sexual abuse of a child counts are focused on the times that the defendant penetrated [redacted] vagina with his fingers. As she said, "He put his fingers in me," or the time that he put her hand on his penis.

With regard to the counts of rape of a child, of course, those counts are concerned with the times that he touched his penis to her vagina, and I say touched, not necessarily penetrating. Because as the instructions have told you, with children, rape is a different kind of animal, and any touching of the penis to the vagina, like [redacted] testified happened at the incident on the couch at the duplex. That's sufficient to meet the definitions of rape of a child.

And with regard to the counts of sodomy on a child,

those counts are focused on the time that the defendant put his mouth on [redacted] genitals or made her put her mouth on his penis. Again, the definitions are different when we're talking about children. Sodomy upon a child not only includes any touching, but it can be through clothing.

But you'll need to rely on your notes and your memory - your collective memory to confirm that you find beyond any reasonable doubt which of these offense occurred. Talk to each other about it, walk through it, and I suggest to you that when you do that, you will find that there is evidence to convict the defendant of all counts, and, therefore, it is appropriate to find the defendant guilty as charged.

Ladies and gentlemen, I will now yield the floor to the defense and talk to you again in a few minutes.

THE COURT: Thank you.

Mr. Brass?

MR. BRASS: Thank you, Your Honor.

If it would please the Court, Detective Holdaway, Mr. Fisher, my partner, Ms. Cordova, and Mark Boyer, who Mark Boyer has a name. He's a human being. We're going to judge him as a human being and not - you know, we lawyers have this sort of trick that we use. It becomes subconscious. This isn't intentional, but where we sort of dehumanize people by referring to them as something other than their name. You

know, the witness, or the defendant.

We keep hearing about the defendant. That's a man over there. That's Mark Boyer, and Mark Boyer is charged with extraordinarily serious crimes in this case, and so judge him as a fellow human being and not some title - some label that the State puts on in trying to dehumanize him in some way.

This is my only opportunity to speak to you, as the prosecutor has pointed out a couple times now in this case, and the reason for that is because they do bear this burden that the Judge has told you about a number of different times. The burden to prove their case to you beyond a reasonable doubt in all respects.

It's the highest burden that there is in the law of the United States. There is no higher burden, and he - as he sits there right now, he is still presumed to be innocent. It's only unless and until you get in the jury room and decide that there has been this proof beyond a reasonable doubt that we can even begin to talk about whether or not he's guilty of anything.

You have the instruction in front of you. I'm not going to repeat it to you. The Judge read it to you. You are intelligent people. You can review it when you get in the jury room.

What I'm going to talk to you, just a little bit,

is why we have this. There are a number of different reasons we have proof beyond a reasonable doubt.

One of those is because the State - the government who brings these charges has vastly more resources than a defendant has. They have the police departments, they have investigators, they have witness counselors, they have trained and paid for prosecutors versus the defendant of when the American Criminal Justice System, if he has any resources whatsoever, is on his own to go out and find his lawyer, and find a way to afford a lawyer, and find a way to investigate a case on his own, and present evidence.

That's why there is no burden for a defendant to present evidence of anything in a criminal case. That's why there's no burden [inaudible]. Mr. Fisher just spent some time on this for the defendant to show any sort of reason behind this, and I'm going to come back to that in just a minute.

But I like to think that there's another reason for proof beyond a reasonable doubt, and that is so that you people who we sort of bring in here at random and through the selection process, which is really more of an elimination process. All of you wind up on this jury.

So that when you go home tonight, and you get in bed, and you start to think about what happened with this case over the last three days, and you start to think about

what your verdict was so that you feel comfortable that what you did was the right thing to do. That you were persuaded that what you did was the right thing to do so that there's no doubts about whether or not an innocent person was convicted of crimes that are this serious. So that you don't have to wake up in the middle of the night and wonder about whether you did the right thing.

This is a simple case. You know, all of us have gone through, on this side of that wall right there, all sorts of emotional contortions, and you can see that it's a hotly, contested case as well.

But when it comes right down to it, it's a very simple case. I'm not going to spend any time talking to you about what the elements, the parts of the offense are, because that's not important. What is important is that you have - Mr. Boyer is human. This fellow human being over there who took the witness stand and told you he did none of these things - none.

Now, the prosecutor made an argument to you where he talked about, you know, she's a sweet girl, she's - she has a small voice, she's obviously petite, she's young, she's quiet, she's in an intimidating situation. Right? And we take the witnesses as we find them. Mr. Boyer there, he was gruff, he was blunt, he was direct, maybe he was a little bit angry.

You know, the prosecutor talked to you about using your common sense. If we decided cases on personalities, I could stop talking to you right now. It wouldn't matter, you know. Who between the two is the more affecting in terms of being charming? You know, who's the one that you feel some sympathy for? Is it the person who's angry, who's blunt, or direct, or is it the quiet one, young one, the petite one?

Well, we don't decide cases based on those sorts of things. That's what we call in the law an appeal to passion and prejudice. That's what we call something that's to cause you to overlook what the real facts of this case are. You know, look - just feel some kind of sympathy, because he's big, and he's a man, and he's blunt, and he's gruff.

What do you think in employing your common sense and in looking what the evidence is in this case? What do you think the effect would be on a human being with any sense of sensitivity whatsoever at all of being falsely accused of these sorts of horrible crimes? Crimes that are the moral equivalent, if not worse, than murder, and he's had that hanging over his head now for three years. Three years.

Remember, what he talked about? All of a sudden he comes home one day, and there - no police officer ever came and talked to him. All of a sudden he comes home and there's some flyer from some fly-by-night lawyer that says, "Hey, man, you've been charged." That's how he finds out about

this. And from that moment to this, his life has been turned upside down. He's had to live with that.

Are you going to be happy? Are you going to be like Oprah urges you to be, and, you know, be positive and pleasant? Of course not. That's not human nature. That's not the way you are.

We decide cases not on personalities and not on, you know, differences in age and differences in gender. We decide cases - you decide cases based on evidence, and the evidence here, no matter what the State says to you, is absent. It's talk. There's nothing to support it. There is literally nothing to corroborate what [redacted] has said to you.

Now, I want you to think, you know, when you go back there an deliberate about the prosecutor's opening remarks. It took about 30 - 35 minutes. Who did he talk about? What was the majority of the time that he spent addressing you about? Jan Boyer. Jan Boyer. Jan Boyer. Jan Boyer. He spent all of that time just now defending Jan Boyer.

Was Jan Boyer angry? No, she wasn't angry, it says. Was Jan Boyer contentious? No, she wasn't contentious. Stop and think about that.

What did she say to you? She said, "I threw him out." "I took the time to take all his belongings, put them

in the car, drive them down to Lehi to his mother's house, park the car there with his belongings and the key in it, get a ride back home, and change the locks." That's not contentious. That's not angry. She told you she was angry herself.

And now, what about this picture, Defendant's Exhibit C that the prosecutor showed to you just a minute ago? Take a good look at that. I want you to think about this. What this means in terms of contention between the two of these, and I want you to think about what the testimony was about when this happened. "I had a drink or two. I took an Ambien. One of my boys needed help. I got up. The next thing you know, she's passed out on the kitchen floor." These two boys, who she has custody of, who she's suppose to take care of are helpless.

And so what do they do? They reach out to him, the defendant, this less than human person, their father. And they say, "Please come and get us. We need you." And at 11:45 at night, that's what he does. And in order to preserve that for future use, - it's not in dispute - he has one of the boys take this picture on his cell phone so that later on this can be used.

Is this the root of why we're here today? We don't know that for certainty, but we're not the ones that are required to prove a case beyond a reasonable doubt. Use your

common sense and think about what happened right after this. This is December of 2014 that this picture's taken. That's not in dispute.

The only thing that's in dispute is which particular day in December it was, and no one disputes - no one that it's immediately thereafter - right after that that - not in 2005, not in 2006, not in 2007, not in 2008, not in 2009, not in 2010, not in 2011, but in December of 2012 - right after that picture,"Oh, Mark molested."

And the details, you know, they sort of dribbled out over time, and we don't know how they dribbled out or what got said. Because unlike police reports - it isn't like interviews conducted by professionals like him. None of that was preserved.

We weren't party to this. None of us were. We don't know what the discussions were between Jan and [redacted] at the time following that. What we do know is this goes away. This becomes irrelevant. This becomes nothing, a blip unlike - when you drop the hammer on someone who's saying, "My gosh, this man sexually molested in so many different ways this young girl during that very same month."

So let's talk about what the evidence is and why it's lacking in this particular case. And as we do, I want you to think about this. This is Defendant's Exhibit D. I wrote it down on the back of it. It's pretty scribbled.

So...

See that? That's a D.

Remember what this picture represents when it was taken? This picture was taken at Lagoon in 2009, which would have been at the end of all these horrible things that you heard about in this trial, and there she is - [redacted] and one of the boys. I can't remember which one, and they're at Lagoon. Yes, it looks like they're having a good time.

But who took this picture? A monster. A man who did all these horrible things to her, and here she is smiling at him into the camera. The man who supposedly did all these things. This is at the end of that time period that we're talking about.

Let's talk a little bit about Dr. Corwin, the fellow from the university and what Dr. Corwin - let's start with what Dr. Corwin wasn't, and I'm sorry. I may have to talk to you a little bit longer than he did at first, but again that's because he has the last word, and I want to make sure I cover everything.

And I'll just tell you. Human frailties being what they are, I know I'm not going to touch on every single thing, and it would insult your intelligence to talk about every bit about it. So if there's something that you think is important in the jury room and I neglect to talk about, by all means discuss it to your heart's content, and I urge you

to do that.

And beginning with what Dr. Corwin wasn't, Dr. Corwin didn't come in and say somebody was molested, or somebody wasn't molested. He never interviewed [redacted]. He never, at any time, interviewed her, reviewed any police reports, conducted any sort of investigation. You know, he just threw out some general principles about what sorts of things happen in these cases, and he talked about cases that were verified abuse.

You know, he didn't talk about cases that were in dispute like this is, because it is our contention this never happened. There's no question about that, but the cases he talks about and the things he drew on were cases that were proven, you know, in some fashion or another. Who knows? Guilty plea, or confession, you know - who knows? But he said they were verified.

Dr. Corwin didn't interview her. So he just talked about these general principles, but one of the things that he talked about that ought to be critical that we have on this side and in your deliberations is that a hallmark of a false report is something that he referred to as indoctrination. Indoctrination - and please refer to your notes - is where someone suggests -

(Whereupon someone enters the courtroom)

THE COURT: Don't let anybody else come back into

the courtroom unless it's an emergency. I would ask that nobody leave until the closing is completed. Okay? Thank you.

MR. BRASS: It'll be just a second. So we can stay focused on each other for a little while longer.

And by the way, thank you for your attention and thank you for serving your community. You know, this is the only chance I do get to talk to you, and so I want to include that in there.

You know, we get it that this is not easy. You know, you didn't volunteer or sign up to come in here and hear about a case that has these kinds of issues in it and so from both parties, I would thank you.

You know, you hear a lot about the criminal justice system, you know, and how it's all messed up. I'm going to hear that - I've been in this for a long time. I've heard it for years. We're not the criminal justice system. You are. You people make the decision. We don't. You're to decide what the facts are. We know that's not easy, and so I think it's appropriate that we all thank you for your service.

So back to Dr. Corwin. Dr. Corwin said that a hallmark of a false report is where someone - and he called it indoctrination - suggests to a child things that didn't happen intentionally or otherwise. Okay? It could be unintentional or intentional. That's a hallmark of a false

report.

The prosecutor argued to it in his opening remarks. Where is the proof that Jan ever did any of that stuff? Where's the proof? I mean, you might have had to sleep through the trial to have missed the proof, because again all of his initial remarks were about her.

Do we have indoctrination here? You bet we do, and you know it, because you paid attention. Let's talk about exactly about how this genital herpes business went down.

This is a pattern that emerges in this case. That the night before - the very night before she goes, our witness, [redacted], for her physical examination by Linda Lewis - the very night before - Jan tells [redacted] that Mark has genital herpes. She isn't just telling that. She goes - and this came from [redacted] It didn't come from some place else. It didn't come, you know, floating in here somehow. It didn't come from Mr. Boyer. It didn't come from any place else. It came from her, [redacted] that Jan told her that the first outbreak is the worst, and she told her what the symptoms were. You would develop painful lesions. Jan's explanation was, "Well, she had an upset stomach," which [redacted] never testified about. "So I was concerned that maybe she had it." She never testified to that effect.

Did the indoctrination? This indoctrination. This is classic. This is what you look for when you have a false

report. Their expert that they called told you that.

Did it work? Well, it sure did, because the next day when she went in to see the nurse - this is in 2013, the very next day in February. She tells Linda Lewis that she had sores on her genitals. That she had had three to four outbreaks. That the first one was the worst. That's exactly - exactly what Jan had told her the night before. It sure sounds like a case of herpes. It sure sounds like that to Linda Lewis, except that when you come to court and there's people there to ask questions.

And by the way, I make no apologies for representing someone to the utmost of my ability in asking questions. You took no offense to that, but that's how we get to the truth in a case like this.

What did she say when she came to court and it all fell apart? First, she said she had these outbreaks. When I asked her one to two years later, what did Linda Lewis say? The max is three weeks.

Number two. No one - no person - any person ever saw these outbreaks. Not one. Not Jan, mom, not grandparents, not her aunt, not any nurse, not any doctor.

Number three. She never sought or asked for medical attention. Linda Lewis told you that that would be very painful, and particularly in a young person. You would think that it would think that it would be very frightening

as well not knowing what was happening to you.

And now, she says here - it's 2016, years and years later - "Oh, I guess, I didn't really have it." Remember what happened the night before Jan tells her all about this, what it looks like, how it feels, how often it happens. She repeats that the next day.

And then today - or yesterday, or two days ago when she testified, she said that, "I had ingrown hairs." Which created the awkward situation of having to ask about whether you had hair at the time you had these outbreaks, and her answer was not confused. Her answer was, "No, I did not." So there was no hair to be ingrown. A false story to cover up the other false story.

More indoctrination. The mole? You think that if Jan discussed herpes with her that there wasn't also a discussion of physical characteristics?

Like the prosecutor said, "Use your common sense." She testified - and you were here. She testified there was a mole. Not a birth mark on the leg. That never got mentioned. No. He just showed you a picture of a birthmark on a leg.

Did she mention a birthmark on a leg? No, she didn't. You look at that. You do what he said to do when you go in there. You see how prominent that birthmark on his leg is, and you ask yourself, how did she miss that? How did

she miss that and see something that she refers to as a mole.

Detective Holdaway there told you he couldn't see at first, because it was obscured by hair. No birthmark.

What else did she say? Remember, as you go through this, she spoke to Family Services on February 7th of 2013. She didn't mention a mole. On February 11th of 2013, she spoke to the police and had a Children's Justice Center interview. She didn't say anything about a mole.

In preparation for the preliminary hearing and the preliminary hearing itself on May 10th of 2013, no mention of a mole. She sort of remembered about the mole somehow. We don't know how, because she couldn't explain it.

But she remembers some time before July 15th of 2013, and I had her read to you what it was that she said at the time. "I think two moles," not one. "I think two."

"What color?"

"I think brown."

"How big are they?"

"I don't know how big they are." Remember, no mention of that very prominent birthmark that's very obvious.

"Why did you decide to tell now?"

"I don't know." "I don't know."

You know all that's going on in between these times - all the conversations that are taking place about this case. You know what's going on with that. So she had the

wrong number. She was unable to describe the color or size, and she doesn't know why she wanted to tell.

You know where the information came from. Who would know about a single mole so small that Detective Holdaway had difficulty finding it? Who would know about that? Who told her about herpes? Who told her that he had it? Who told her what the symptoms were? More indoctrination. Okay?

The letter that she wrote down. What proof? Yeah, he spent all his remarks attempting to defend Jan's - you know, there's no hostility between the two of these people. Really? Really?

Did anything ever come of this? No, because he's backpedaling having to defend himself against these heinous - heinous accusations.

She called it the story. The story that she wrote down, Exhibit 12, go ahead and read it. Jan says that [redacted] began to pester her in December 12th, the same month of this exhibit as we've talked about. In December of 2012, Jan talked to her for a month after that. She called it hard questioning. "You know, I pressed her. I pressed her, and she became kind of a pest."

Jan had her talk to her mother - Jan's mom. Jan had her talk to a school counselor. You heard about those things for the first time, as everyone else did, in this

trial. Detective Holdaway told you where Jan conceded that no one had spoken to those people, because they'd never been mentioned before, and this case, ladies and gentlemen, is three and a half years old. Three and a half years old and you're going to see a pattern now of things being said for the very first time when you are here to decide the case that have never been mentioned before.

Why is that? Why is that when you've been interviewed numerous times? You have all these opportunities to talk about these important things, but you leave out talking to the mom, and you leave out the school counselor. Why is that important? Why does that matter? For the same reason that Dr. Corwin tells you that indoctrination is a problem and a hallmark of false reporting. That's why.

And, you know, Detective Holdaway talked about it when Ms. Cordova called him, you know, our case. Professional interviewers, right? Detective Holdaway are trained in a particular way to interview people - children in particular - to be sure that they get accurate information, because the theory is - and it's borne out by research. The people who interview children can suggest things to them inadvertently that they will adopt as their own, you know. You can say, "Remember the time you shoplifted that fruit pie from the 7-11 back when you were six years old?" And some children - cause that's been suggested to them - will adopt

that as a real event, even if it never happened. That's part of this indoctrination business.

Jan's not trained in interviewing. We don't know anything about the school counselor or the mother. We can assume the same thing, because he told you about the - the detective did - about what kind of training you have to go through to properly get an interview with a child.

And what's the point of that? Why do we need that? To make sure that the information we get is as accurate as it possibly can be and not tainted with other information that's been planted in their [inaudible] - excuse me - in their minds.

So Jan and [redacted] - and here's our pattern again - know absolutely that this is an important interview. That it's a critical interview. That's it's law enforcement that's going to be talking to her, and then she's going to get it down. And so the night before, - just like the night before they went to the hospital - just like that night - Jan sits down with her and she says, "Let's write it out. Journaling helps." And they're there together.

You know, we have no recording of this. We have no video, or audio, or anything to know what happened, but we can sort of draw reasonable inferences from what happened.

She sits down, and she writes it out, and Jan's there. Jan's the one that suggested it. And when she's

done, she hands it to Jan to read. You know, they review it together, and that's what she calls her story.

But that story not only taints the interviewer, because it's listed in this process where they're sort of getting together and collaborating on this information, but it becomes a script for her to follow before all court proceedings.

Remember that when you look at this Exhibit 12, and I would encourage you to do the same thing. Go ahead and read it. That's why it's in there.

Why is that important? Because when she comes to court, and takes the oath, and gets on the witness stand, and what we call preliminary hearing, and then two other hearings in this case including this trial, she always reads that first. Always. She always reads that before she comes in and testifies. So she's not testifying from memory about what might or might not have happened years ago. She's testifying from the story that was created in 2013 for the May hearing and before the trial.

And Corwin - Dr. Corwin said to you, "Beware of consistency. Beware of consistency, because consistency could be a sign of this indoctrination." And what is this doing? If you read this every time before you testify, then you get consistency, or what Dr. Corwin would call indoctrination, a hallmark of a false story.

Detective Holdaway told you that this sort of behavior is to be avoided. Do you think that Jan was truthful when she said, and the prosecutor argued to you, that she didn't try and influence or shape [redacted] in any way? You'd have to ignore the herpes story. You'd have to ignore that. You'd have to pretend that doesn't exist to believe that.

She called her mom. Jan referred the case to DCFS. Jan went to the police. Jan didn't tell about the interviews. Jan went with the nurse. Jan - no contention between these two? Jan asked Detective Holdaway if she could stop Mark from seeing his boys because of this. Not alleged to be involved in any way. "Can I stop having them visit with his boys" that he so dearly loves?

Another thing that Dr. Corwin talked about - and you think about this when you get in there. I'm going to talk to you about the blue sheets in just a second - or striped sheets, whatever they are and how that came to pass.

But Dr. Corwin said that there should be rich detail. He called it a rich detail is a concept of - "Can you talk about not just the things that are happening to you? To wit, 'I was raped. I did this. I was forced to do that.' But can you talk about the things that are going on around you at the time?" And I will suggest to you that that's utterly lacking in this case.

The shower curtain. Need a description about that. These are just examples - color, pattern, bathroom floor tile, colored tile, patterned tile, is there a rug, wasn't there a rug, what sheets were in Jan's bedroom, where was the TV, was the TV on or off, was there a blanket for her on the couch when this happened?

None of these questions were asked. All she talked about were the things that happened, and he says it's easy to talk about terrible things happening to you, but what isn't so easy is, that if it's real, to leave out the details that are going on at the time.

She said he ejaculated. Where? That's not there. What happened afterwards? Did he make any sounds, was his chest on her face, or were they chest-to-chest?

What were his physical reactions? Did he breathe hard, did he say anything? Oh, and what about a swamp cooler. Now, remember what I told you. As this case evolved, - and especially as this trial went on - details were added to try and make these puzzle pieces, he talked about, fit together better.

A swamp cooler would be a rich detail. Remember that when the swamp cooler was introduced into this case for the first time ever? Ever. It was on rebuttal yesterday when Jan Boyer was called back. She didn't testify about it the first time around. She's never, ever said anything about

a swamp cooler before, and it's thrown in for you at the very end of the case, because now we have an explanation as to why maybe she wouldn't have heard things.

When remember this little demonstration we did about here's the open door to one bedroom. Here's the open door to the other one in which a roughly six-foot tall, 200 pound man is allegedly raping an eight-year-old, tiny, sweet, little girl. "Oh, I didn't hear it because there was a swamp cooler," but [redacted] never said anything about there being a swamp cooler in that house ever. Ever. And nor before yesterday did Jan Boyer bring that up. It's in an effort to make the State's case a little bit better - a little bit more believable.

The same thing happened with drinking. You know, "Oh, every time she came over, Mark would make me drinks." You know, really? Really, think about that.

Again, when we talk about rich detail in the background, did [redacted] ever say that, "I smelled alcohol" or whatever she might have thought alcohol smelled like at that age - "on Jan's breath?" Really? I mean, are they trying to imply that somehow he got Jan drunk so that she'd pass out, and, you know, not know that he was doing all these things? Interesting. Really interesting.

As long as this case has gone on, the Division of Family Services were involved, the police were involved with

this Children's Justice Center, the doctors and nurses at Primary Children's Hospital were involved, and a medical history was taken. There was a preliminary examination conducted in this case. There was additional investigation done by Detective Holdaway. Five different sources of information. All these interviews and the prosecutor made a point of pointing out. Never, ever was this business about drinking when she was there brought up before yesterday. Never.

So now, I have to come up with an explanation - Jan does - for why I didn't know any of this stuff was going on. Does her in - does what she say make sense?

And again, if we were having rich detail from [redacted] she would talk about people who were drinking drinks, I don't know what they were, did they smell funny? No, not.

"There was a swamp cooler, and so I couldn't hear what was going on in other rooms." None of that. She didn't say that. All she talked about were the acts. Dr. Corwin warned you to look for background detail.

Think about what Jan's really telling you. This is at a time when she has an infant and a young boy of her own, and so she would let her husband get her drunk so that he could take advantages in a very sneaky way of [redacted] And at the same time, render her incapable of caring for her own kids like she is in that picture? No way. It's not what

moms do. No way.

There is nighttime feedings for an infant. There's diaper changes. There is no way that happened. It's garbage. And why don't you start throwing in things like that at the very end of the trial unless you're worried about how this thing's going?

What was [redacted] doing? What happened afterwards? Those are the things that are lacking in this case. She couldn't tell you what [redacted] was doing. She couldn't tell you even where [redacted] was. There's no background.

What else? She testified in a hearing in this matter. Six weeks ago she told you under oath, and she told people under oath at that time that she was forced to perform oral sex in the shower on Mr. Boyer to orgasm.

When she testified in this case, she said, "No, that didn't happen." She said yesterday on the couch when she testified that it wasn't an orgasm. But when she spoke to the nurse in 2013 when it was closer in time to the actual events, she was asked specifically if she touched his penis with anything other than her hands, and she didn't say, "I don't know." She said, "No." No. So she's added things, taken things away.

The nurse was there to help. There wasn't any rush. She was comfortable with the nurse. Which version is true? The answer is none.

Intercourse - Linda Lewis said the absence of physical findings. Not a shock. Okay, you know, the State will argue that she healed. No problem there, except for this. She was eight, and you will remember the discussion that was had about when someone becomes estrogenated? Before that happens, your tissue is much more likely to be damaged because it's not as elastic, and she's seeing a pediatrician at least once a year during this time for checkups.

So maybe in 2013, you're not going to notice any kind of damage, but when she talks about bleeding, and being in pain, and hurt, and all that, and that doesn't come up with the pediatrician, and the pediatrician doesn't notice anything? It's unbelievable. It's because it didn't happen. Maybe, she was healed in 2013, but what about back when she was seeing a doctor on a regular basis during this time frame? She said she bled and didn't show anyone.

We talked about the size of the duplex. Jan says she didn't hear or notice anything that was going on, but she did wake up that one time. And [redacted] never wakes up, who's right there. He's right above it. All these horrible things are taking place in this bunk bed. He never wakes up.

She doesn't tell mom, grandma, grandpa, aunt, or Jan. Who knows why? You know, who knows the reason why, but her answer was that no one believe her, particularly her family who love and trust her.

And it wasn't for any other reason. She gave you the reason. The prosecutor argued a different reason. She said, "It's because no one would believe me, particularly my family."

She's crying on the floor. Remember that - that event? I want you to think about that for a minute. And when you think about how that came to pass as you employ your common sense and use it when you judge the evidence in this case - just like he asked you to do, I'm asking you to do the same thing. Throw your common sense at this.

What the State has argued to is this grown man somehow has managed to just rape a small girl in a tiny bathtub. You've seen the pictures. He has to be at least a foot taller than her and probably a 150 pounds or more - heavier than her, and somehow he gets on top of her and rapes her in a tub. No detail about that. She doesn't tell us how big the tub is, or how that was possible, but that's just happened.

And so he comes up the stairs and he meets - you know, he doesn't go up the stairs, cause there aren't any stairs. He goes down the hall and he meets Jan in the hallway. You got that? And he says, - but please employ your common sense - "Hey, she's homesick, and she's crying. Will you go talk to her?"

Who does that? I mean, minutes maybe seconds

before he's just supposedly raped this girl. He's not going to want her, Jan, to have any contact with her whatsoever if she's crying and balled up in a corner, and it's because he raped her because she's going to tell.

And what happens? Jan goes and she said, "If you're homesick, you've got to go home. You've got to go home." She goes, "Well, I had a bloody nose." She doesn't show her where she's bleeding from, cause she wasn't bleeding from there. She said, "I had a bloody nose, but I'll stay." I'll stay.

Do you want to talk about human nature? You don't need a psychiatrist from the University of Utah to tell you that when - even as a small child, if you put your hand on a hot oven - gas or electric, take your choice - and it burns you - it burns you - you pull your hand away. The same thing.

Here's the key. The key to the escape door. You can go home right now. "You can go."

"No, I think I'll stay." I mean, sure I just got raped and I'm bleeding all over the place, but I think I'll stay. I'll make it through the night.

Did it happen? People don't behave that way. You have your hand on the burner, you take your hand off the burner, and you get away from the pain, and you get away from the monster. And you're being offered an excuse to go home

that doesn't involve - you don't have to tell anything. You don't have to say anything. You bet I'll go home. I'm out of here.

It didn't happen, and it wouldn't have involved her telling anything about what happened. She could have just left. She didn't, because nothing happened. She didn't show any blood, because there wasn't any blood to show.

But she didn't just stay that night. She continued to come over. She continued to ask to come over. She continued to ask to come over to Holladay. She continued to ask people to drive her there and take her back home.

What about the depression? Is that corroboration? And when I talk about corroboration, I'm talking about things that support the story. Is that corroboration? No.

Remember what Dr. Corwin said about depression? Depression is a lesser symptom, and remember that Dr. Corwin knows nothing about [redacted] - nothing. And what did he say? He said, "Generally speaking, the onset of symptoms happened right after the report." The report was in February of 2013 - maybe, December of 2012 to Jan, but again we don't know anything about what that said during those next 60 days or so. Nothing, no depression at that time. None. And he said it generally follows right on.

When was she depressed? When was she suicidal? In mid-2015. Okay? And what was going on in mid-2015? Dr.

Corwin didn't know this, because he didn't talk to her, but you know. Her life was falling apart. She told you that. It was in chaos.

Her grandfather died right around the time of her birthday. He was the only father she ever knew was her grandfather, because her dad's never been in the picture. Do you think having an absent dad isn't depressing? Especially, when you lose the one that you have - your grandpa.

Grandma goes to a care center. Her mother died. There's nowhere for her to go. The people who have taken care of her all her life - the ones she knows - are leaving her life right at that time. She lost three of them. The ones, who at that point in her time - her life, she was closest to. She's 16 years old.

So not in 2013 close in time, but two years later when her life is in chaos does she become depressed. That's not an indication of anything, except that she was depressed.

Do you remember what Dr. Corwin told you? He said sometimes these things can be asymptomatic. I mean, there's no symptoms, but he also told you that the number one thing that he sees with young children - and the State's arguing she was a young child when this happened. The number one symptom is a young child displays unusual sexual knowledge or acts out sexually. Do you remember that? To your notes. We're talking about the time frame from 2005 to 2009 when she

was between six and almost 10 years old. A young child. Zero evidence in this case. This is their expert telling you this. Zero evidence that she had unusual sexual knowledge. Zero evidence that she acted out sexually in any way. Everything about her - all of it - is countered to the things that Dr. Corwin told you you could expect.

Let's take one last look at this business about Jan not being a part - or her not being a part of it. The business about the stained sheets that were being used - striped sheets? That were being used - some - one of them was being used, and the prosecutor tried to imply that somehow Mr. Boyer got rid of the other one. I mean, it's missing. You know, he must - the bad guy must have done that. No evidence to support that theory, but oh, well, we'll just throw that out there.

It's being used as a bird cage in some house. So I think it was after the Holladay after they had split up. I don't know that that really matters.

What does matter is this. Do you think she's not a partisan? When did she remember that? When does she remember that? July 7th. Today's July 14th, 2016. She remember that and told it to the prosecutor on July 7th of 2016. Twenty-sixteen? What's happened in the meantime? She didn't tell it to DCFS in February of 2013. She didn't tell it to the police in February 2013.

MR. FISHER: Objection. That's misstating the evidence. Are you talking about the sheet?

MR. BRASS: I am talking about the sheet.

MR. FISHER: That is not what came out on July 7th.

THE COURT: Okay, it's argument. You can talk about it when you speak.

Go ahead, Mr. Brass.

MR. BRASS: She didn't talk about it to the police in 2013, she didn't talk about it to the nurse in 2013, she didn't talk about it when they had this journal discussion, and she didn't talk about it to anybody at the time of the preliminary hearing.

Three and a half years into the case? And you remember the evidence. You remember what the testimony was the way you want to remember it. Three and a half years into the case she remembers that she was gone on some of the occasions that [redacted] was taking showers, but [redacted] told you that she was never gone when she was taking showers. She was always there.

The drinking business - that came up for the first time on rebuttal yesterday. [redacted] never said anything about smelling anything upon - and I've already talked to you about the fact that she has a newborn baby that's dependent upon her.

And finally this, you know, this came by pretty

fast. This is an intense trial. No question about it, and so I'm going to read this to you again. This is the, as the Judge told you, the equivalent of testimony in this case. This is the stipulation that was read to you at trial.

"On March 27th, 2013, [redacted] told Detective Brian Holdaway at the Unified Police Department about a separate incident that did not involve the defendant or his children. [redacted] told Detective Holdaway that when she was about 10 years old," - and parenthetically, I'll tell you that that's about 2009, cause you know she's born in 1999 - "she was at a sleep over at the home of another friend in her neighborhood.

"She and several other children had been watching movies, and the children had fallen asleep. JR, the father of the friend who lived at the house, came into the room where the children were sleeping.

"JR laid down beside [redacted] and tickled her stomach. He then touched her, quote, 'boobs,' unquote, on the outside of [redacted] bra. [redacted] told Detective Holdaway this only happened on one occasion. JR, the father, denied that this ever happened and no charges had been filed against JR."

So about the time she was 10 would have been 2009, about the time that we're talking about that some of these events come to an end, and what does she do? She accuses

another male neighbor, an adult male neighbor in the same time frame, another father of a friend, another sleep over, another rub during the movie where everyone else is asleep, another sex accusation, and there are no charges that come of that. What are the odds? What are the odds? A father of a friend, neighbor, rub, sleep over, watching TV, laying down.

I've said enough times that these are horrible accusations, and you can tell they've destroyed Mr. Boyer's life. Her claims are not in any way supported by evidence. She wasn't injured, because there's no evidence of any injury, even contemporaneous when she's seeing doctors or had the opportunity to show people who loved her and trusted her.

She didn't think they'd believe her, even though she had physical symptoms, she told you. She doesn't have any injuries, because she wasn't injured. She doesn't have, and she never had herpes.

Don't you believe her. Have the courage to say that not guilty means not proven beyond a reasonable doubt. Let Mr. Boyer begin to put his life back together. Send him home to his friends and loved ones, and you set him free from this three and a half year nightmare and find him not guilty.

THE COURT: Thank you, Mr. Brass.

Mr. Fisher?

MR. FISHER: Thank you, Judge.

THE COURT: Before Mr. Fisher begins, if there's

anyone who wants to exit, you can do it before he starts. But then once he starts, I'm going to ask everyone to please remain seated. Go ahead.

MR. FISHER: Sorry, Judge. Just one sec.

THE COURT: Okay.

MR. FISHER: Ladies and gentlemen, first I'm going to address some specifics and then talk about some more general terms of Mr. Brass's remarks to you.

It's true that Dr. Corwin never interviewed [redacted] A decision has to be made somewhere between leading an expert witness objective, having him testify in generalities or leaving him vulnerable to claims of prejudice, because he's gotten to know and speak with the patient, and so anyway, you can make your - your own decisions about that witness.

With regard to indoctrination, Dr. Corwin said that is usually with younger children. Little - even younger than [redacted] was. My recollection is it was three or four years old, but you can rely on your own notes. Kids that can pick things up, and pop out of their mouth, and they don't really know what they're saying.

That is not the instance in this case at all, both because [redacted] was somewhat older than that age range, and primarily because when this came out, [redacted] was quite a bit older, relatively speaking. She was almost 14 - 13 going

on 14.

The genital herpes statement from Jan Boyer was made after the disclosure, and was it a smart thing to say? A smart thing to tell a girl who might be concerned about the exam that is coming up, and the results of this sexual abuse? No, no. Probably not a smart thing at all.

Just - but on the other hand, Jan Boyer is a voice coach. She's not a medical professional. She's not a psychologist. She was playing this by ear, and she told you how difficult this was for her. She couldn't bear the burden alone of knowing all this stuff. She had to get it to somebody else.

So it might not have been a smart thing to say. It might have frightened the pants off of [redacted] but the fact that [redacted] was wrong about it means nothing. She was a scared, teenage girl shortly after puberty thinking that - and hearing about this disease that she might have caught from - from this abuse that is going to affect her forever. And Nurse Lewis said, It's an easy mistake to make. There are other things that people mistake for herpes.

[redacted] did acknowledge - as I said before, Mr. Brass is a skilled cross examiner. You know, [redacted] really started allowing him to lead her around by the nose.

For example, the pubic hair issue. Pretty soon, Mr. Brass had her believing that this was - happened back

when she was nine years old or so.

If you were listening carefully, he led her back to a pre-disclosure date talking about just after these things happened and talking about, did you even have hair? I mean, she was 14 years old when these things came up - when she went to the - get the exam, and see Nurse Lewis, and Jan Boyer mentioned about genital herpes, and she thinks it may have been an ingrown hair. She's 14 years old, gone through puberty. She certainly had had the event of pubic hair in her life at that point. It wasn't nine years old, in any event. So it was not an issue that was where she was answering something relevant to the issue of the genital herpes.

Now, being led around - led by the nose in front of an audience of people in a courtroom setting by a skilled defense attorney is a very different thing from memorizing events that span years and cover all different kinds of time frames, places, and acts, and keeping those things in mind throughout multiple interviews and conversations, and we'll talk some more about that in a minute.

With regard to the moles during cross examination again, relying on your own notes, but my notes indicate that at some point she said something about that there may have been a couple of moles. Look at the pictures. As I said, there was a span of moles across Mr. Boyer's lower abdomen.

Again, Mr. Brass was talking about why isn't that certain things were heard before from the beginning and every time? Again, she's a child trying to remember these things. A child trying to remember memories of six - five, six, seven years ago - 10 years ago from when she was a child, and we do not have transcripts or information about every time she talked to someone about it. She did not talk to a DCFS person. That's - there's no evidence of that. The first interview after talking with Jan and the school counselor was with Dr. - excuse me, with Detective Holdaway.

I gave you a promotion.

Detective Holdaway - so - were these ideas - actually, we'll talk about that in just a second.

Mr. Brass made something about that we were lacking detail from [redacted] That detail was the key, he was talking about. Pulling, I think, out of context some of the things that Dr. Corwin was saying, but again you can rely on your own memory of the testimony.

Lacking detail - this was what I was talking about in my initial statements. Lacking detail from somebody who was six or seven, maybe eight years old when these things were being done and is now 17.

The defense attempted to impeach her and to present as evidence impeaching her memory just about the bunk beds - about whether or not there were bunk beds in that room. Can

you imagine what we would be hearing if she was throwing out all kinds of other details? If she doesn't remember it, she doesn't remember it.

What stuck in her mind from the time she was a little girl, what was pounded into her mind over and over again, the fact that this man was sexually abusing her, raping her, putting his mouth between her legs, was sticking his fingers in her. That she remembers.

And how convenient would it be for the defendant to have told her when she was little, "You say anything I'm going to do it to you even more?" And so for years she doesn't say anything. Years go by, the court system grinds through its process, and then we talk. "Oh, well, she doesn't remember anything." She remembers what's important.

The pediatrician - and she said she had a pediatrician. If the pediatrician's caught every time there was a transection in a hymen, you know, a little girl and reported it as abuse when nothing else is before that pediatrician - you'd never have such a thing as delayed disclosure. You might have delays until the next time the child saw her pediatrician, but there wouldn't be such a thing as delayed disclosure.

How did [redacted] not know what was going on or see what was going on? He was even younger than her - at least a full year. He's 15 now. She's 17. So at least a full year

younger than her, and we don't know if he's a hard sleeper, if he did hear something, but didn't understand, or didn't want to tell on his father, didn't want to get in trouble. We don't know.

The incident about the bathroom - [redacted] crying in the bathroom at that time when Jan Boyer went down and found her there. She met him at the top of the stairs. He had to say something. It's not - there's no evidence that he went in, woke her up, and said, "You need to go down and see [redacted] She's down there crying." Jan met her - met him at the top of the steps. So yeah, there must have been some motive. He felt like he had to say something, but it is not an incident where he offered something that he could have just let slip by.

With regard to [redacted] - I don't know what to call this. This probably isn't the right term, but mental breakdown or emotional troubles that she hit a year or two ago - within the last year or two. Yes, it's - I mean, is it common sense that all those other things in her life - the deaths of the relatives, the change in her situation - all those other things certainly contributed to the state of her emotional and psychological state. Certainly. She's only a teenager. It's amazing she made it through at all with all that stuff happening, and this case was still pending.

That was another thing that was going on in her

life when all those things were happening. That doesn't mean that this wasn't underlying or a catalyst for what really broke open those emotions as she tried to deal with all of this turmoil in her young life. She had things to deal with that are tremendously difficult for any of us, let alone where they're - we are teenagers, and she had this going on in the back of her mind.

Mr. Brass was mentioning about the sheets not coming - the blue-striped sheets being - that were used - the sheet that was used as the birdcage cover not coming out until July 7th. Rely on your notes, your memory of the testimony. That was Jan Boyer's testimony about there being blood on the sheets of their bed together. The same bed that one of the incidents occurred on, and she remembered him claim - the defendant, Mark Boyer, claiming that he had had a nosebleed at night. That is what she testified to. And under cross, she acknowledged that, "Yeah, I thought of that recently, and it wasn't until last week that I said anything about it."

Mr. Brass made a point of ending with the - or he did end with comments about the other allegation that [redacted] made in talking to Detective Holdaway. She said, "Yeah, something else has happened to me." She said that she'd been touched by another man - the person we referred to in the stipulation that was read to you as JR - and this is

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 -

that the defendant did not do anything to [redacted] but evidence of what he did to her - what he did to her thoughts of men and sex even before she was out of elementary school. She was still seven or eight years old, and the effects were felt even when she was 10. Another piece of the puzzle.

So let's get back to the case at hand - eleven counts of sexual abuse against Mark Boyer. Mr. Brass talked about reasonable doubt. Reasonable doubt does not mean beyond any doubt. It does not mean beyond a shadow of a doubt.

Defense counsel implied that the reasonable doubt standard is like some kind of insurmountable obstacle as if there were no way to find someone guilty of an offense unless you had DNA or a security video or a sworn testimony of a troop of boy scouts or girl scouts. This is not that kind of a case, as you know, where you are looking back in time, and that kind of evidence is not available. Reasonableness is the key to the standard of beyond a reasonable doubt. It doesn't mean you have to see it for yourself.

If you believe [redacted] if you find that there is no motive to why, if you find that it is not reasonable to believe in any kind of conspiracy or indoctrination theory as proposed, and you believe that - you do not believe that the 13 or 14-year-old [redacted] was capable of carrying out such a conspiracy, then there is evidence for you to find the

defendant guilty beyond a reasonable doubt. You have to look at the evidence and make that determination.

With regard to the sound in the duplex, first of all, we've talked a lot about what could be heard in this small duplex, the building that could fit right within this courtroom. Too small for any of these things to happen is what is claimed.

If the story is made up - if this is conjured up some form of conspiracy, some form of lie, why set anything there then? Why not have all the incidents have occurred at the house in Holladay? There's one reason, because that's what happened. It is what it is. It happened at the duplex, and that's why we're talking about the duplex.

Jan Boyer told us about the loud swamp cooler. That was on rebuttal, because that became an issue. She talked about what the sound issues were in that duplex.

Thirdly, why else might Mark Boyer not have been able - or Mark Boyer might have been able to do these things without Jan hearing? Whether he plied her with alcohol or not, she drank. She acknowledged that she had maybe even a couple of drinks and an Ambien on that occasion.

Somebody who is married to somebody for all those years, I would posit to you would know what their spouse is going to wake up to. How much noise level there can be. Where one has to be in the house to remain quiet enough for

that person not to wake up if that person has drunk enough, or taken an Ambien that night, or whatever. The playing field was wide open for these incidents.

The suggestion has been made that [redacted] made these things up, either through this conspiracy with Jan Boyer by being somehow unconsciously indoctrinated or whatever. But unless you believe that she somehow incorporated things which would have to be many things - all kinds of sex acts, and little, weird details, and everything else. Unless you believe that she somehow unconsciously - that these things were said in the first place, and even the defendant said they didn't discuss - he didn't discuss sex with [redacted] Jan said she never discussed sex acts with [redacted] There's no way for her to have unconsciously put this whole story together. So she would have had to make it up. Again, either with Jan's help or not.

She said these things happened days after her 14th birthday when she sat down with Detective Holdaway. She repeated them to him. To believe that [redacted] made these things up you'd have to believe that a 13-year-old girl with no proven motive whatsoever decided not only to create something and to accuse the father of her closest friends in the world of unspeakable acts, but that she had this evil imagination. An imagination to space things out over the course of several years to make it sound more realistic.

That she was so cunning that she knew not to claim it happened every time, but just once in a while. And that rather than having each event be exactly the same, that she needed to tweak them a little bit. Invent a series of sexual encounters that - and then throw in a few little habitual things like sucking on her ear. She would have to be at that level of malevolent imagination to come up with those things.

Now, defense knows that is so unlikely. So we throw in the evil acts. Why? The modern version perhaps of the evil stepmother. They talked about Jan either - that she planted these things as they were collaborated with [redacted] that she was a partisan to it, or a part of it - all those things. So the primary defense theory is that Jan Boyer and Victoria entered into a conspiracy about these things.

So to believe that Jan Boyer coached a 13 almost 14-year-old [redacted] again, let's talk about what you have to believe in order to follow that theory of the defense. Again, we're applying logic.

Does any of that make sense? You would have to believe that all of the decisions that Jan made about what to make up in order to go after her ex-husband were made with the knowledge that she was not going to be planting these ideas in the mind of a professional actress or some sociopathic ex-con who loved to do malevolent things with [redacted] a 13-year-old girl. A girl whose closest friends

were the sons of Mark Boyer.

And then nevertheless, Jan decided to do those things and to coach this young girl on numerous encounters. Not something like, you know what, let's get him. Let's say that he snuck downstairs and raped you on that weekend just before the Fourth of July when you were nine years old. Boom! If you were going to try something like this something like the defense has suggested to you and plant an idea in a young girl's mind and say let's get him through this, is it not far more likely that somebody would say let's throw out one event that he did this to you? Or two or three over the course of several weekends all the same.

You also have to believe that she wanted to space these things out. That she would add the hazy memory of the - of putting something gross tasting in her mouth and then something sweet. It's not as if they had the lower sheet to show the stuff - to show the markings on it. So these are things that they're - she would just be telling her out of her imagination if you want to follow the defense's theory.

And then, of course, as I was just saying, you would have to believe that [redacted] was willing to lie about these things - to lie about the father of her best friends in the world not once but over, and over, and over again to the police, to a nurse, in court.

And you would have to believe that Jan trusted that

girl of 13 years old, that not only she could - could that girl memorize these events - memorize the history and be sufficiently consistent about it to get it across, and she would never tell anybody about this coaching. Never break, be willing to follow through over the course of years no matter the impact on her close friends, and especially she would never, ever tell on Jan.

If Jan had conspired with [redacted] she would know that [redacted] would hold that over her for the rest of her life, and that it would be possible, if not highly probable, that [redacted] would eventually tell someone what had been done about the conspiracy - a high school friend, a college roommate, the police, somebody. The defense claims that Jan Boyer coached [redacted] in all this is simply not credible. It contradicts that common sense. It contradicts logic. It doesn't make sense.

Things were good for [redacted] Things were good for her. She enjoyed being with them. She clung to that family desperately. Desperately enough to go back there over those years. Her surrogate family. She clung to them and loved them. She loved them like family. She got to do fun and wonderful things with them like go to Lagoon, go to Disney Land with [redacted] and later [redacted] her best friends in the world.

[redacted] simply had no reason, no motive to

lie about any of this, and especially after Mark Boyer was out of the picture anyway. By the time she disclosed, he wasn't around anymore. They didn't have to try and get him away from her. She had no motive to make up the terrible things that she wrote down in that letter to Jan. She had no motive to lie in this trial.

In closing, remember ladies and gentlemen, it is the job - the State's job to prove this case beyond a reasonable doubt. We accept that. That's the law, but it is not the State's job to prove this case beyond an unreasonable doubt, and it is not reasonable to think that Jan Boyer and [redacted] made these things up.

No other explanation makes reasonable, logical sense. The only thing that makes reasonable, logical sense is what [redacted] testified to. The defendant, Mark Boyer, sexual abused her repeatedly over the course of years. That's why I ask you to carefully consider this case and convict the defendant of all charges. Thank you, ladies and gentlemen.

THE COURT: All right, ladies and gentlemen, we are finished with the court part. The only thing left is for your deliberations.

So I'm going to give you a number of things we need to think about when you go back there and some further instructions that won't take long, by the way. As well, as soon as you get back, there should be menus back there. So

Addendum F

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

STATE OF UTAH,	)	
Plaintiff,	)	
vs.	)	Case No. 131902296 FS
MARK BOYER,	)	
Defendant.	)	

Hearing
Electronically Recorded on
July 29, 2013

BEFORE: THE HONORABLE DENISE P. LINDBERG
Third District Court Judge

APPEARANCES

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PROCEEDINGS

(Electronically recorded on July 29, 2013)

MR. SKORDAS: Then we have a case that both the State and I thought was on the calender today.

THE COURT: What's the name?

MR. SKORDAS: Mark Boyer. I think what happened is we were here last time and put it on for today, but it was entered as August 29th on the --

THE COURT: Oh, on the docket?

MR. SKORDAS: -- calendar.

THE COURT: Oh.

MR. SKORDAS: So --

THE COURT: So do we have Mr. Boyer here?

MR. SKORDAS: He's here. He's out in the hallway.

THE COURT: And the State is here?

MS. SANCHEZ: Yes, your Honor.

THE COURT: Okay.

MS. SANCHEZ: May I approach, your Honor, with a motion?

THE COURT: Please. Where is Mr. Boyer?

MR. SKORDAS: He's making his way.

THE COURT: Did you receive a copy of this motion?

MR. SKORDAS: Yes.

THE COURT: All right. Will you be responding to this motion?

MR. SKORDAS: Yeah, if it would please the Court. I

just got it, but --

THE COURT: Okay.

MR. SKORDAS: There may not be a response. We may stipulate to it.

THE COURT: Okay. How much time will you need to make a determination?

MR. SKORDAS: A week or two.

THE COURT: Okay. So I should look for a response from you by the 6th -- by the 12th?

MR. SKORDAS: Yes, that's fine.

THE COURT: Okay.

MS. SANCHEZ: Your Honor, my concern with -- my concern with this motion is that the alleged victim asserts that the defendant has certain moles on his body, and I obviously have a concern. I would ask your Honor to order the defendant not to do anything to his body that would disturb it.

THE COURT: No mole removal.

MS. SANCHEZ: Mole removal is inexpensive, and it takes a few minutes, and that's something that obviously I'm concerned about.

THE COURT: I think that's a fair request.

MR. SKORDAS: I agree.

THE COURT: So Mr. Boyer, until this -- there's a determination by your attorney -- by you and your attorney whether or not there's going to be a response to this matter, and

until this matter is determined by the Court, you are to take absolutely no action to remove any distinguishing marks from your body. Are we clear?

MR. BOYER: Yes.

THE COURT: Okay. I have your promise that that will be the case?

MR. BOYER: Yes.

THE COURT: All right. So --

MR. SKORDAS: Is that 26th date okay?

THE COURT: You want to come back the 26th?

MS. SANCHEZ: Oh, the 26th, okay. I think I'm going to be out of town, your Honor.

THE COURT: Okay.

MS. SANCHEZ: If I could just have a minute to check.

THE COURT: Sure. I can also have you come back the 19th.

MS. SANCHEZ: The 19th I will be here, your Honor. The 26th I'm out of town.

THE COURT: Okay. How about the 19th?

MR. SKORDAS: That's fine.

THE COURT: Okay.

MR. SKORDAS: Thank you, your Honor.

THE COURT: All right. Good to see you both.

MS. SANCHEZ: Thank you, Judge.

(Hearing concluded)

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

STATE OF UTAH, Plaintiff, vs. MARK BOYER, Defendant.	Case No. 131902296 FS

Hearing
Electronically Recorded on
August 19, 2013

BEFORE: THE HONORABLE DENISE P. LINDBERG
Third District Court Judge

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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

Addendum G

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

SIM GILL
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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.

The signing judge's signature appears at the top of the first page.

The Order of Court is stated below:
Dated: July 23, 2015 09:20:55 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.	SUBPOENA DUCES TECUM Case No. 131902296 JUDGE MARK S. KOURIS

TO: [redacted]

YOU ARE COMMANDED:

[X] to produce or copy the following documents or electronically stored information in your possession, custody, or control and mail or deliver to

Third District Court
Attention: Judge Mark S. Kouris
450 South State Street
P.O. Box 1860
Salt Lake City, UT 84114-1860

Any/all mental health or medical records/notes for client/patient [redacted]

00280

[redacted]

This subpoena reflects the Court's ruling in the above matter. ***Per court order, these records must be sent or delivered to Judge Mark S. Kouris, only, at the above address.*** Per the Court's ruling and Rule 14 of the Utah Rules of Criminal Procedure, Judge Kouris will then conduct an in camera review of the records, to determine materiality. The information being sought by this Subpoena is: (1) limited in scope as to what is needed because it is limited to the dates the patient was seen at and treated by medical personnel; (2) the requested information is relevant and material to a legitimate law enforcement inquiry, namely, a first-degree felony sexual abuse investigation and prosecution; and (3) Deidentified information cannot be used.

JUDGE MARK S. KOURIS _____ DATE _____

NOTICE TO PERSONS SERVED WITH A SUBPOENA

The party or attorney responsible for issuing the subpoena shall pay the reasonable cost of producing or copying documents, electronically stored information or tangible things. Rule 45(d) Utah Rules of Civil Procedure.

Subpoena to Produce or Copy Documents or Electronically Stored Information and Mail or Deliver that Information.

1. A person commanded to copy and mail or deliver documents or electronically stored information or to produce documents, electronically stored information or tangible things shall serve on the party or attorney responsible for issuing the subpoena a declaration under penalty of law stating in substance:
    a. that the declarant has knowledge of the facts contained in the declaration;
    b. that the documents, electronically stored information or tangible things copied or produced are a full and complete response to the subpoena;
    c. that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and
    d. the reasonable cost of copying or producing the documents, electronically stored information or tangible things

2. You must produce documents as you keep them in the ordinary course of business or organize and label them to correspond with the categories demanded in the subpoena.

3. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in the form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

4. You have the right to object if the subpoena:
    a. imposes an undue burden or expense upon you;
    b. does not allow you at least 14 days to comply, unless the party serving the subpoena has obtained a court order requiring earlier response;
    c. requires you to produce electronically stored information in a form or forms to which you object;
    d. requires you to disclose a trade secret or other confidential research, development or commercial information;
    e. requires you to disclose privileged or other protected matters and no exception or waiver applies; or
    f. requires you to disclose an uretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from experts study made not at the request of any party.

5. To object to a subpoena for one of the reasons stated in paragraph 4, you must provide notice in writing of your objection to

the party or attorney serving the subpoena before the date specified in the subpoena for you to respond. If your objection is based on either paragraph 4(d), 4(e), or 4(f), your written objection must describe the nature of the documents, communications or things that you object to producing with sufficient specificity to enable the party or attorney serving the subpoena to contest your objection. You must also comply with the subpoena to the extent that it commands production or inspection of materials to which you do not object.

The Order of Court is stated below:
Dated: July 23, 2015 09:21:18 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.	SUBPOENA DUCES TECUM Case No. 131902296 JUDGE MARK S. KOURIS

TO: [redacted]

YOU ARE COMMANDED:

[X] to produce or copy the following documents or electronically stored information in your possession, custody, or control and mail or deliver to

Third District Court
Attention: Judge Mark S. Kouris
450 South State Street
P.O. Box 1860
Salt Lake City, UT 84114-1860

[redacted]

00283

[redacted]

This subpoena reflects the Court's ruling in the above matter. ***Per court order, these records must be sent or delivered to Judge Mark S. Kouris, only, at the above address.*** Per the Court's ruling and Rule 14 of the Utah Rules of Criminal Procedure, Judge Kouris will then conduct an in camera review of the records, to determine materiality. The information being sought by this Subpoena is: (1) limited in scope as to what is needed because it is limited to the dates the patient was seen at and treated by medical personnel; (2) the requested information is relevant and material to a legitimate law enforcement inquiry, namely, a first-degree felony sexual abuse investigation and prosecution; and (3) Deidentified information cannot be used.

JUDGE MARK S. KOURIS _____ DATE

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    c. that the documents, electronically stored information or tangible things are the originals or that a copy is a true copy of the original; and
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    e. requires you to disclose privileged or other protected matters and no exception or waiver applies; or
    f. requires you to disclose an uretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from experts study made not at the request of any party.
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the party or attorney serving the subpoena before the date specified in the subpoena for you to respond. If your objection is based on either paragraph 4(d), 4(e), or 4(f), your written objection must describe the nature of the documents, communications or things that you object to producing with sufficient specificity to enable the party or attorney serving the subpoena to contest your objection. You must also comply with the subpoena to the extent that it commands production or inspection of materials to which you do not object.

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

[redacted]

DATED this 24th day of August 2015.

By the court:

Mark S. Kouris
District Court Judge

IN THE THIRD DISTRICT COURT - SALT LAKE

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 131902296 FS
Plaintiff,	:	
v	:	
MARK BOYER,	:	
Defendant.	:	With Keyword Index

PARTIAL TRANSCRIPT OF JURY TRIAL JULY 12, 2016

BEFORE

THE HONORABLE MARK KOURIS

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

were feeling at that time, like you didn't want to live any more, was that in any way connected to the things you've been telling us here, about here today?

A Yes.

MR. FISHER: No more questions at this time, Your Honor.

THE COURT: Thank you. You doing okay?

THE WITNESS: Yes. Can I have a break?

THE COURT: You need a break?

THE WITNESS: Yeah.

THE COURT: Very good, let's take a 10-minute break or so. As I indicated before please don't talk about the case, don't do any research, don't talk to anybody involved in the case. We'll take 10 minutes and come back and have cross.

(Whereupon the jury left the courtroom)

THE COURT: You may be seated. For the record, the jury has exited the courtroom. Mr. Brass?

MR. BRASS: Yes. Relating to the last question or several questions that were asked, I think something to the effect of in your mind is there a connection between your hospitalization and the things that happened to you. [redacted]

[redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

THE COURT: [redacted]

[redacted]

MR. BRASS: [redacted]

[redacted]

THE COURT: [redacted]

[redacted]

[redacted]

MR. BRASS: [redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

THE COURT: [redacted]

MR. BRASS: [redacted]

THE COURT: [redacted]

(Whereupon a recess was taken)

THE COURT: Please be seated.

Ms. M, you're still under oath.

Mr. Brass, you may begin.

MR. BRASS: Thank you.

CROSS EXAMINATION

BY MR. BRASS:

Q Good afternoon. This is the last time you'll have to talk about this I believe, okay?

A Okay.

Addendum H

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

STATE OF UTAH, Plaintiff, vs. MARK BOYER, Defendant.	Case No. 131902296 FS

Hearing
Electronically Recorded on
June 1, 2015

BEFORE: THE HONORABLE MARK KOURIS
Third District Court Judge

APPEARANCES

For the Plaintiff:

James Watabe
SALT LAKE COUNTY ATTORNEY
111 E. Broadway #400
SLC, UT 84111
Telephone: (801)366-7874

For the Defendant:

Edward K. Brass
175 East 400 South Ste 400
SLC, UT 84111
Telephone: (801)322-5678

Transcribed by: Natalie Lake, CCT

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

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

STATE OF UTAH, Plaintiff, vs. MARK BOYER, Defendant.	Case No. 131902296 FS

Hearing
Electronically Recorded on
April 28, 2014

BEFORE: THE HONORABLE DENISE P. LINDBERG
Third District Court Judge

APPEARANCES

For the Plaintiff:

Coral Sanchez
SALT LAKE COUNTY ATTORNEY
111 E. Broadway #400
SLC, UT 84111
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For the Defendant:

Edward K. Brass
175 East 400 South Ste 400
SLC, UT 84111
Telephone: (801)322-5678

Transcribed by: Natalie Lake, CCT

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

PROCEEDINGS

(Electronically recorded on April 28, 2014)

MR. BRASS: Good morning.

THE COURT: Good morning.

MR. BRASS: Number 3, Mr. Boyer.

THE COURT: Yes.

MR. BRASS: Mr. Boyer is present.

THE COURT: Thank you. A number of motions have been filed by the defense that -- to which the State responded. I am denying most of -- if not all of the motions. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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

Addendum I

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

STATE OF UTAH, Plaintiff, vs. MARK BOYER, Defendant.	Case No. 131902296 FS

Sentencing
Electronically Recorded on
September 19, 2016

BEFORE: THE HONORABLE MARK KOURIS
Third District Court Judge

APPEARANCES

For the Plaintiff:
Scott A. Fisher
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111 E. Broadway #400
SLC, UT 84111
Telephone: (801)366-7874

For the Defendant:
Edward K. Brass
175 East 400 South Ste 400
SLC, UT 84111
Telephone: (801)322-5678

Transcribed by: Natalie Lake, CCT

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

PROCEEDINGS

(Electronically recorded on September 19, 2016)

THE COURT: Let's call the case of the State of Utah vs. Mr. Mark Boyer. This -- good afternoon, Mr. Boyer. This is the time and place set for sentencing. Mr. Brass, have you had an opportunity to review the pre-sentence report with your client?

MR. BRASS: Yes, sir.

THE COURT: Any factual inadequacies that need to be addressed?

MR. BRASS: No.

THE COURT: All right. If that's the case, go ahead and proceed.

MR. BRASS: Other than the fact that, of course, the official version was disputed at trial, as you well know.

THE COURT: I do.

MR. BRASS: There is one thing I would raise before I get into what I intend to say, and that is that there are people in the exercise of your discretion who are asking to speak on his behalf today. There are people who have given you letters. I know you read the letters.

THE COURT: I have read the letters. I've read the ones that were connected to the pre-sentence report, as well the ones that you've given me.

MR. BRASS: Right. So I've explained to them that that may be the manner in which they're considered.

THE COURT: Okay. I think it will be.

MR. BRASS: All right. So let me say this, Judge. I mean it -- nothing has really changed, as far as we're concerned, from the trial, so I'm going to tell you that I'm very proud to have represented Mr. Boyer, to have represented him through his trial. I'm more proud of him than I was during the trial now because of the way that he's conducted himself since the Court took him into custody, the way he's handled this situation.

Nothing has changed. Mr. Boyer maintains his innocence. We know the Court is going to do what it has to do, the mandatory sentencing involved. The sentences in this case are so long and so serious, particularly for a person his age, that there really isn't any reason nor necessity to make them consecutive. Concurrent would be adequate under the circumstances that are presented here. We'll take it from there. As I said, Mr. Boyer does continue to maintain his innocence. Nothing's changed in that regard.

THE COURT: All right. Mr. Fisher?

MR. FISHER: Your Honor --

THE COURT: First of all, are there any victims that want to be heard from today?

MR. FISHER: There are, your Honor.

THE COURT: Very good. Would you mind taking your client?

MR. BRASS: Sure. Of course.

MR. FISHER: Your Honor, Ms. Jones is present (inaudible) the victim, and I'll defer to her. If she wants to correct me, but it is my understanding, just so the Court is aware, that [redacted] has drafted a letter, but she's reticent to read that aloud in court.

THE COURT: Okay.

MR. FISHER: With the Court's permission, we would ask that her aunt, [redacted] be permitted to read that letter on her behalf. I believe that [redacted] also wants to address the Court.

THE COURT: I don't think that will be a problem. Go ahead.

MS. JONES: Thank you, your Honor. Your Honor, (Inaudible) Jones and this is [redacted]

THE COURT: Thank you, [redacted] This is all being tape recorded, so if you wouldn't mind please starting by introducing yourself, and then once you've done that, you're more than welcome to tell me whatever you'd like.

[redacted] Okay. My name is [redacted]

THE COURT: Thank you.

[redacted] Legal guardian of [redacted]

THE COURT: Okay.

[redacted] [redacted] has composed a letter.

THE COURT: Okay.

[redacted] She's chosen not to read it herself.

THE COURT: All right. Would you bring that microphone and make sure you bring it -- just bend it down. There you go. Okay. Thank you. Go ahead and proceed. This is the letter now that you're reading; is that correct?

[redacted] This is the letter, yes.

THE COURT: Thank you.

[redacted] As you know, I don't have a father or a mother. My mother was a disabled, bedridden, and lived in a care facility from the age of 2 until she passed away in October of 2015. I was raised by my elderly grandparents, [redacted] and [redacted] I was 6-years-old when your son [redacted] and I quickly become inseparable friends. I found myself spending more and more time at your house, becoming what I felt and dreamed of being part of your family.

Jan opened her arms and her heart to me. I loved experiencing being part of a normal family, something I had never experienced before. I came to love all of you and started feeling the love in return. At the time I was 6 or 7-years-old, I didn't know what was in store for me. I didn't know what a true monster you really were. I didn't know you were luring me and to cause me such harm, pain and shame.

I didn't know you were going to take advantage of me being so young, naive and trusting. You falsely led me into feeling safe, loved and cherished. You had an agenda with me. I was too young to understand. You were about to alter my life and

cause such horrific pain. I didn't even know.

What started off as a dream soon turned into the nightmare, one that I didn't understand, one I didn't know how to stop. My dreams quickly turned into the worst kind of nightmare any child should experience. You took those dreams and you crushed them. You shattered them into a billion pieces. You shattered me, my heart, my life, my trust and my self worth. You shamed me and you turned my whole safe world upside down.

You knew I didn't have anyone I could talk to about the horrendous acts you inflicted on me. You knew my grandparents were old and really not paying much attention. You knew that I was an easy conquest for your sick and perverted fantasies. You knew, which was why you chose me, which is why you encouraged my friendship with [redacted] which is why you made me start to feel like a princess. You knew.

You knew you found your victim. You raped and molested me beginning at the age of 6 or 7, and repeatedly raped and molested me for your own sick and perverted sexual satisfaction. This was all premeditated on your part. You knew the odds of telling me -- of me telling on you were very slim due to the fear you instilled in me. You knew what you were doing from the first time you met me. You knew that I was to become your victim. I was easy prey.

I kept telling myself each time you touched me it would be the last time. I wanted it to be the last time, but each time

it wasn't. They continued. The pain being forced on me, the shame of you touching my private areas and doing horrific sexual acts on me. Each time you got rougher, and each time the pain got worse. I just didn't understand. I was a child after all.

I had a fear, a very deep fear, a fear that if Jan and [redacted] found out what you were doing, they would stop loving me. This fear was more than I could adore -- endure. I was afraid if [redacted] found out he would stop being my only friend. I was afraid I'd never get to see [redacted] and hold him again. I was afraid if my grandmother and grandfather found out that they would stop loving me.

I felt shamed, ugly, alone and afraid. I was only 8 or 9, and I was so afraid. I finally had to stop coming to your home. I lost my new family of three plus years, but I also knew that you would never stop hurting me.

I was truly all alone at that point and had no one to turn to, no one to console me, and no one to notice the changes in me. The nightmares became real, nightmares that have continued since the age of 6 and 7.

I've carried this horrible story within myself for far too long. The damage caused to me at your evil hands was like cancer eating away at me. I carried this darkness, this cancer inside of me for almost five years. It destroyed my life. It started a lifetime sentence of hell for me, all because your selfish, sick, perverted need to rape a child. That child was

me.

I was alone in hell for five years. I had almost lost Jan and your boys, but somehow God returned (inaudible) answered prayer and returned them to me after your divorce. I finally decided I could not live with this internal hell I was living in any longer and broke the silence. The only person I could talk to was Jan, your ex-wife. I was so afraid she wouldn't believe me. I was so afraid my grandparents wouldn't believe me and stop loving me. I was so afraid.

You inflicted this fear on me. You ruined my life. You ruined my dreams, my hopes and my childhood. I lived in fear from the moment I told Jan the story. The nightmares become stronger. The depression became deeper. The anxiety became overwhelming and the fears became unbearable. Once I realized Jan started to believe what I had told her, I had no idea what was in store for me.

I didn't know I would be physically examined inside and out, and the shame I would feel. I didn't know I would have to talk to the police officers and Detective Holdaway and the shame I would feel. I didn't know what was in store for such a horrific horrible battle. I didn't know it would take my whole teenage life to see justice done. I didn't know the depression that set in so deep I would soon become suicidal. I didn't know anything about self harm and slicing until the pain became so unbearable I had nothing else to loose.

I tried to control all of these emotions that I didn't understand. I lost the battle almost. My suicidal thoughts became more frequent. The thoughts became so powerful, the pain so unbearable. I felt taking my own life would end the pain for me and everyone else involved. I didn't know how the next four years of my life were going to be stolen from me.

I didn't know that was done to me at such a young age would affect my whole life and bring such tragedy to my heart and soul. I didn't know. I was only 13 at the time, and I didn't know to what extent your repeated attacks had damaged me.

My two stays [redacted] -- not one, as indicated in trial -- saved my life both times. My first time I was 14. I tried to commit suicide unsuccessfully, thankfully. After overdosing on Tylenol, the hospital had be committed to [redacted] for a week. I refused to talk about the pain or the shame, the nightmares or the fears. I just couldn't face telling anyone else the horrid details of the horrendous acts you inflicted on me.

I left after a week and tried to talk to a therapist, but just couldn't. It made my nightmares return. The whole process added more fears, more anxiety and deeper depression. I climbed up within inside myself once again. I was in a downhill spiral of a mental breakdown, and I was living through these nightmares, unrest, not able to eat, not able to focus on school and not caring about anything in life, including myself. I was

living in a private hell that no one understood, all because of your need to harm, rape and molest a baby over and over. I was that baby.

My second trip to [redacted] was voluntary. I came to live with [redacted] and [redacted] in January of 2015 and soon discovered my [redacted] was there to help. I finally started to believe I had some hope in getting help, hope and someone loving me and guiding me out of the dark deep hole that you had buried me in. I knew if I didn't get help this time, I wouldn't survive to see justice done. I knew for everyone involved I had to find a way to continue on so I could make sure justice was served.

I went into [redacted] for another week. I participated in many therapy sessions. I talked, I listened, I found a way to overcome the pain, the shame, the suffering just enough to keep moving forward. I did not enter [redacted] due to the loss of my mother, as indicated during trial. Yes, I had just lost my grandfather, but my mental conditions had declined long before my grandfather became ill.

I went to [redacted] in April of 2015. My mother passed away in October of 2015. What I received from [redacted] this time was enough to move forward in my quest to see you held accountable for all the harm you caused me, for all the pain, the tears, the fears, the shame, the nightmares, the never ending nightmares.

I knew when I left [redacted] we had an uphill battle to forge -- to forge on with, but I was in a better place mentally,

and hopefully was ready to move on. You almost won the battle once again. Thankfully with the loving help from others, you did not.

My fears since 2013 has been many. My fear you would find me and harm me again, my fear you were following me, my fear you would sneak into my bedroom window and kill me or my grandparents. My fears were so deep I started to sleep with my grandparents every night. My fears were many, too many for a child my age to be carrying. My fears were all wrapped around you and what you had done and continued to do to me. You sentenced me to a lifetime sentence of pure living hell beginning at the age of 6 or 7.

The delays in trial and the trial became harder and harder, but I knew I had to stick it out. I knew I had to do my best to see justice done, and I had to remove you from being my worst fear. Again, you almost won the battle, but good overcame evil.

Our day was finally here after three-and-a-half years. I had fought to hard to stay here for this day. I fought so hard to keep my fears and nightmares at bay until we had our day. The first trial in May was to be the end of this part of the nightmare; however, it wasn't. Due to me being thank -- due to me being thankful -- truthful, answering a question we needed, we ended up in a mistrial.

I left the courtroom that day after telling the

strangers and the jury all the horrid details of my life and what you had done. I had to talk about the details of the painful sexual acts you committed on me, the many acts of perversion you inflicted on me. I left with my head hung low, shamed once again at your hands, and once again, fearful. Fearful that you would find me, fearful you would kill me to stop me, and fearful for the need that I was going to have to relive this and be victimized all over again.

I knew you thought you had won the battle, but again, I allowed those surrounding me encourage, guide me and help me to the second trial. I was angry at this point. Angry at the courts for allowing all of the delays, angry that I had to keep reliving this real life nightmare and being victimized.

Everything seemed to be in your favor. I was so afraid to start over, but knew in my heart I had to do this. I had to follow this through to the very end. I had to win. I had to take you off the streets from harming another child. I had to take you off the streets so I might find some peace within my soul, and I had to protect everyone close to you. I was fearful for them. I was fearful for me. I was fearful for little girls I didn't even know.

The trial in July was that much harder on me and those surrounding me. We did not know if we would end up in another mistrial or what your attorneys had in store. Sitting on the stand telling a new group of jurors and strangers my horrid life

story was almost more than I could bear. I was lightheaded, I was sick to my stomach, I was -- had uncontrolled shakes, and I was so frightened. I knew whatever happened this time, I would not be able to continue on and do it a third time. You almost won again, but good overtook evil, and we got the conviction you deserve.

You stole everything from me, my childhood, my adolescent years, my teen years. You stole my dreams, my ability to focus on the smallest things in life, the ability to enjoy school, the ability to be a normal kid.

My life had nothing but pain, fear, shame and the lack of self worth or good dreams. You took that all from me one rape at a time, one molestation at a time. You took my life from me and shattered it into a billion pieces, never to be fixed. I was only a child, remember?

I will overcome some of the fears knowing you should be going away for a lifetime, which is short in comparison to what lifetime sentence I've been dealt with. I will somehow put this behind me and go on with my life and find a way to restore myself worth, my good dreams and put behind the shame.

The fear and the pain will remain for me for life. One does not forget such sordid attacks from someone I once innocently believed loved me and someone I trusted. I will have trust issues for the rest of my life at your hands.

I started my life sentence 10 years ago on the first day

you molested me, a lifetime sentence that I will have the burden to carry. I will find a way to overcome and already know in my heart some I never will, all because of -- because you're a -- your very sick and demented sexual drive.

I was the little girl that was being victimized and having her life ruined at your hands by the continued rape and molestation over and over and over again. I've been victimized over and over for the last three-and-a-half years of the delays and the continued denials.

I hope the Court gives you 25 to life for each of the 11 1st Degree Felonies that you were convicted of. I hope that each count is served on its own, and that you never become eligible for parole. I am just thankful you were found guilty of 11 counts and now will begin your lifetime sentence as you've done for me.

My life now becomes mine. You will no longer be in control of me, my feelings, my fears or my shame. I'm now taking that control from you and joyfully watching as you sit handcuffed, shackled and knowing that prison life won't be so kind to you.

It pleases me to know that you'll no longer get to wear your fancy clothes and walk free. It pleases me to know that you might experience some of the fear unlike -- much like the fear that you inflicted on me at such a young age. The only difference now is you're old enough and you understand enough to

realize your life is now over as you know it. Your fears and shame began. With the love of God, you will never be released from those fears or shame, just as I won't be.

Again, you almost won, almost, but in the end good overcomes evil. I had my day. I won the hardest most fierce battle any child should ever have to fight. I won with the loved ones standing tall next to me, helping me and guiding me, making me understand that it was okay that I talked out. We fought this battle, good versus evil, for three-and-a-half years and we won. You will never be allowed to harm another human being again.

My family and those close, including Jan and your boys, will continue to stand behind me, helping me assist in my healing while you, on the other hand, get to (inaudible) you get to go into the prison system with others just like you, and with the rest of your life in fear. May your nightmares become as vivid as mine. May your fears be as strong and many, and may your shame become as unbearable as mine has been.

You, Mark Boyer, are a demon, a true monster. You have no heart, no soul. I was the child you raped. I was the child you molested repeatedly. I will never forgive you for the lifetime sentence, the suffering, pain and nightmares that you gave to me. May God take no mercy on you, and may the devil burn your soul in eternal hell.

THE COURT: Did you want to say something as well, ma'am?

[redacted] I do.

THE COURT: Go ahead.

[redacted] I appreciate that. Thank you. One of our most sacred and valuable gifts given to us by our higher powers is the life of children. We as adults are responsible for nurturing those children, whether they're our own children or those that become entwined in our lives for whatever reason. We are to teach them love, trust and guide them, to teach them -- to keep them safe and to allow them sweet dreams, to allow them to grow from experience and guidance. These precious jewels have been sent to us for care and nurturing.

[redacted] at the age of 6 or 7 became a part of your family through your son. You became -- she became a normal in your home. She became a little person that needed and wanted nothing but your love. She was just a baby.

You were given this little girl for whatever reason to help guide her. You freely offered her love, her trust, admiration. You falsely (inaudible) that love, that trust and that admiration from her. You gave her a sense of belonging unlike anything she had ever experienced, due to not having her own mother and father.

You played on her emotions of being a lonely child without parents. You allowed her dreams of being your princess. You took this love, this trust, this admiration, these dreams and you destroyed them. You used her trust, admiration and

loneliness for your own selfish, horrific satisfactions over and over again. Not just once, but many times.

It is your duty, the duty of a responsible normal adult, to care for a child, to keep them safe in your care. It was your responsibility to see no harm come to her while she was in your home. It was your responsibility to allow her to remain being a 6, 7 and 8-year-old without the pain you inflicted on her. Instead, you turned her dreams into nightmares, lifelong nightmares. You used her loneliness and her love to satisfy your own demented and sick fantasies. You harmed a baby, a 6-year-old baby that had no mother or father to turn to.

You used this little girl for your own sick sexual fan -- pleasures. You altered her life path each time you raped or molested her. You took another piece of life, trust and dreams. You changed her in such a way that the years following these horrible incidents altered her ability to be a normal 9-year-old or 11 or 17.

Normal was taken from her by your demented actions. She has such vivid nightmares of the rape and sodomy, such huge fears you would attempt to harm her again, such anxiety that you were following her. The depression set in at a very young age. It took some time to discover, and will take her a lifetime to manage. All this so your sick sexual pleasures were satisfied. You're a monster, a living monster.

You harmed a child that had dreams, hopes and offered

you nothing but unconditional love. You shamed her, you took her very core and shamed her for nothing more than your sexual gratification. You not only hurt her physically, but mentally, which has so far proven to be one part of her lifetime sentence starting at the age of 6, a lifetime sentence should -- that she should never have had to experience.

Shame, pain, remorse, anxiety, depression, loneliness, fear and most all the horrific nightmares, you damaged her for life in a way that can never be undone. This is her lifetime sentence given to her by your actions.

As we sit here today, I hope your 11 counts -- and I've already said this, so I won't repeat it. We know what our hopes are. [redacted] will have a lifetime to recover from you and your actions. She will require further treatments and counseling to overcome her fears, her nightmares, her shame and her mistrust issues. We don't know if her help will be for one -- if she'll need help for one year or 50. What we do know, [redacted] is serving a lifetime sentence starting at the age of 6 that will continue forever due to your actions.

Learning how to deal with the destruction you caused to her by your horrific and selfish actions of rape, we may never know to the extent of what damage you caused to this child, the extent of pain, shame, fear that you caused, but we do know it's a lifetime sentence for her and started at a very tender age.

What has been proven without reasonable doubt in the

courtroom is that you are a true monster, one that every parent warns their children about, one that lives in the darkness and feeds off of vulnerable children. You are the worst nightmare of every parent -- of every parent's dream. You are a very sick and demented poor excuse of a human being. Understand that being punished to the full extent of the law will never be enough for this little girl.

We all have to atone for our actions, and we all pray that God takes no mercy on you. Your lifetime sentence is just beginning. Hers has already started 10 years ago, the first time you touched her.

I feel sorry for everyone in the courtroom, everyone that has been affected that is here in the courtroom by your horrific crimes. Your actions have altered the path of many, including your sons. You chose to hurt your family, your sons by your actions, knowing your actions were wrong, or maybe you're delusional enough that you really didn't know that they were wrong, but in any case, your actions have altered and hurt many.

My heart feels for those that go on without their father, their brother, their uncle. You hurt many, but none as much as you've hurt [redacted] the little girl you raped and molested over and over again. A lifetime sentence isn't enough for you. May God take no mercy and may the devil not accept you. Thank you, your Honor.

THE COURT: Thank you. I appreciate it. Come back up

please, Mr. Fisher.

MR. FISHER: Your Honor, I won't add to that with comments of my own. I think the statements that have been made to the Court pretty much cover it. We'd ask the Court to impose the minimum mandatory terms in these matters, and to --

THE COURT: As you see them, what are the -- I've received the pre-sentence report from Mr. Brass, and it looks like they're citing the 2007 statutes, which seem to be accurate here. What --

MR. BRASS: It changed in May of 2008.

THE COURT: In 2008, so that's when they changed, so these are all pre-2008 statutes. Is that what you have as well?

MR. FISHER: Yes, your Honor.

THE COURT: Okay. So you have -- the rape of the childs are all 15 to life; is that what you show?

MR. FISHER: Right.

THE COURT: Okay. Sodomy on a child is 15 to life?

MR. FISHER: Yes.

THE COURT: Is that right? Aggravated sexual abuse, 15 to life?

MR. FISHER: That's correct, your Honor.

THE COURT: Okay. Rape of a child, 10 to life, yes?

MR. FISHER: That's correct.

THE COURT: Sodomy on a child, 10 to life?

MR. FISHER: That's correct.

THE COURT: Aggravated sexual abuse of a child, there's one 10 and two 5 to lifes?

MR. FISHER: Yes.

THE COURT: Okay. I wanted to make sure that was -- anything else you'd like me to know?

MR. FISHER: Your Honor, we'd ask the Court to impose -- to run at least two of the aggravated sex abuse of a child, 15 to life -- or two of the 15 to life terms consecutive to each other, and order restitution pursuant to the materials submitted that are part of -- or attached to (inaudible).

THE COURT: Thank you. Mr. Boyer, is there anything you'd like me to know before I sentence you, sir?

MR. BOYER: No.

THE COURT: So it's your opinion then --

MR. BRASS: There is one thing he wants to say.

THE COURT: Go ahead.

MR. BOYER: I would like to thank my family and my friends for their love and support, for being here today. I love you very much.

THE COURT: So if I understand what you gave me in the pre-sentence report, your rendition of this is this is all something conjured up by your ex-wife; is that accurate?

MR. BOYER: Yes.

THE COURT: And somehow your ex-wife brought this little girl in and indoctrinated her with all those sort of stories and

put her in the [redacted] and all those sort of things, that's all -- they come up from your ex-wife?

MR. BOYER: No.

THE COURT: No? Well, I have to be honest with you, I completely think -- I watched her testify on two separate occasions, given the fact that we had to try this case twice, and I believe every word she said, as did the jury. I think everything she said was right on point. Everything she said had the detail and so forth that that is not a story that could have been fed to her, and certainly her life the way that's worked out shows that. I believe everything she told me.

[redacted] I want to talk to you for a minute, and I want to tell you -- I'll tell you what the problem with today's society is. Today the problem is that we don't have a lot of heroes anymore. Those of things of the past. But I have to tell you that in my opinion, and I think the opinion of the jurors and other people believe that you're a hero.

The reason you're a hero is because you had to do some things that were very, very unpleasant. You had to undergo maybe one of the best defense lawyers in the state. You had to embarrass yourself in front of a large group of strangers by telling them intimate details that you shouldn't have to be forced to share with anyone. You had to be poked and prodded by doctors that you had never seen before, and it just kept going on and on and on.

Any minute you could have said, "You know what, it's not worth it. I'm not putting myself out there anymore," but you chose not to. I have to tell you, I wish we had more people like you, quite frankly. I wish there were more heroes in this world, but you're definitely one of them.

The other thing I'll tell you is that this person may have pushed you back a little bit in life in terms of what's going on, but he didn't conquer you, and he certainly didn't stomp you out, and you're going to came back twice as good now, knowing that this man will probably never, ever get out of prison. You'll never even have to look backwards. I hope you understand that, and I hope that gives you some comfort.

I know there's no way I can undo the harms that this man did to you. There's nothing I can do today. I wish there were. I -- there isn't. The one thing I can do, though, is this little piece of the puzzle here, that is having him out and you having to never think about him again, that's all going to end today, all right? I want you to understand that, and understand that you have my absolute respect and my absolute admiration for what you did.

With regard to sentencing, what I'm going to do is with regard to the case of the charge of rape of a child, which is 15 to life, I'm going to impose 15 years to life. The second count is 15 to life. I'm going to impose 15 years to life. That will run consecutively with the other charge, which is at least 30

years then in life, which I think should put you, what, in your 80s or higher than that. Next to that I'm going to impose 15 to life. The rest will be re -- the first two will run consecutive to each other. The rest will run concurrent to all of the rest of them.

On the sodomy of a child, I'm going to sentence you to 15 years to life. On your aggravated sexual abuse of a child, I'm going to sentence you to 15 years to life. On your rape of a child, I'm going to sentence you to 10 years to life. On your sodomy of a child, I'm going to sentence you to 10 years to life. On your aggravated sexual abuse, I'm going to sentence you to 10 years to life. On your aggravated sexual abuse, I'm going to sentence you to five years to life. On the aggravated sexual abuse of a child, I'm going to sentence you to five years to life.

Part of the problem here is I don't even think that you have the character or the guts to even come forward and admit to what you've done to this poor person, and that's horribly unfortunate, more to you than anything. The reality is that she -- you're not a problem she's ever going to have to think about again. Good luck to you, sir.

MR. FISHER: Thank you, your Honor.

THE COURT: Thank you, Mr. Fisher. Oh, excuse me. I forgot one thing as well. I will order an open restitution issue, so if you go get counseling, which I hope you will, go get

some other help. Keep in contact with Mr. Fisher. I think that Mr. Boyer is going to be making about a dollar an hour down at the prison, but he will help pay for all of that stuff, okay? Good luck to you.

(Hearing concluded)

Addendum J

**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.

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[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