IN THE UTAH COURT OF APPEALS

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

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

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I. CUMULATIVE ERROR

In discussing cumulative error, the State sometimes claims there was no error. Eg., SB:1,16.[1] The court recognized errors during trial -- Jann's exclamation of VM's credibility, and the prosecutor's closing argument that another alleged perpetrator, JR, was not prosecuted because there was no Jann Boyer to make the case (R2506,2811,2815). Boyer has established additional errors, some of which, such as the Napue v. Illinois, 360 U.S. 264, 269 (1959) errors, the State never addresses. Compare BB:30-34,44,45-51, with SB:*passim*.

In arguing prejudice, rather than defending the dubious nature of its case, the State argues the weakness of Boyer's purported testimony and defense that Jann influenced VM to make her claims to influence ongoing custody proceedings, when in fact there were no such proceedings until after Boyer was charged. SB12-13, 81-82. The State's record citations do not support its position. Jann may have feared custody problems after she was photographed passed out on the floor with a knife in hand when she was supposed to be caring for their sons (R2711), and asked the Detective if VM's allegations could be used to block Boyer from seeing their sons (R2513-14). Boyer never testified and trial counsel never argued as the State claims – that Jann made the accusations to influence ongoing custody proceedings.

Given the dubious nature of the State's case, BB:5-9, Boyer was prejudiced. See, e.g., State v. Burnett, 2018 UT App 80, ¶39 (holding and citing other cases recognizing verdicts

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1 The State's brief is referred to as SB. VM's brief is referred to as VMB. Boyer's opening brief is referred to as BB.

are not strongly supported when they hinge on victim's credibility, and involve no confession, no eyewitnesses, and no physical evidence of abuse).

VM claims the facts are to be viewed in the light most favorable to the verdict. VMB:8, citing State v. Thornton, 2017 UT 9, ¶5n.1, 391 P.3d 1016. Courts assess the entire evidentiary picture in resolving ineffective assistance of counsel and cumulative error. E.g. Strickland v. Washington, 466 U.S. 558, 687-88, 690, 94-95 (1984); State v. Thompson, 2014 UT App 14, ¶ 73., 318 P.3d 1221.

Boyer agrees the Court should view trial counsel's overall performance in assessing claims of deficient performance, SB 19. Counsel's failure to investigate with essential experts, failure to investigate, obtain proof of and assert the accurate facts and research and assert the law in appropriate pretrial motions and at trial, failure to confront and cross-examine the State's witnesses, and misinforming the jury of inaccurate prejudicial facts is an overall performance in which no reasonable attorney would engage. BB: 12-59. Rather, this constitutes deficient performance, if not constructive denial of counsel. See Fisher v. Gibson, 282 F.3d 1283, 1306-08 (10th Cir. 2002) (counsel sometimes acted as effective advocate, but failed to adequately investigate, assisted the State's case, failed to "act as a reasonably diligent professional advocate," and prejudiced client by introducing some of the paucity of evidence supporting conviction, harmed client's credibility, bolstered credibility of prosecution's star witness and failed to challenge credibility of other state witnesses, and reiterated states' case); Menzies v. Galetka, 2006 UT 81, ¶¶ 97-100, 150 P.3d 480 (constructive denial occurred when counsel failed to subject State's case to meaningful testing, acted with reckless disregard for the client's rights, and forfeited capital post-

conviction).

VM claims counsel's strategic decisions are "virtually unchallengeable." VMB:8, citing Strickland, 466 U.S. at 690-91. Strickland actually holds that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland at 690. Failure to investigate precludes formulation of strategy. Strickland at 690.

The State repeatedly complains of the low number of sentences used in some of Boyer's ineffective assistance of counsel claims, and VM also complains of inadequate briefing. SB:21 n.7, 32, 39-40, 41, 42, 44, 45, 47 , 57, 61 n.23, 67, 78; VMB:2.

When appellate briefs set forth sufficiently clear legal challenges under the correct standards of review and do not dump the burden of research and advocacy on the Court, the claims will normally be addressed on the merits. State v. Nielsen, 2014 UT 10, ¶41, 326 P.3d 645. Boyer's briefs adequately inform the Court of how the pertinent law applies to the facts within the appropriate standards of review. Claims of ineffective assistance are governed by the basic law of Strickland, BB:12, unless the ineffective assistance claims revolve around advocacy of underlying legal issues. Strickland claims are by nature fact intensive. See Strickland, 466 U.S. at 687-88, 690, 94-95.

A. FAILURE TO INVESTIGATE PHYSICAL EVIDENCE WITH ESSENTIAL EXPERTS

Like the trial court, the State misstates Boyer's claims as if they were that counsel were ineffective in failing to call experts, SB:17, 20, 21, 26. While refuting the State's responses, Boyer stands by his actual unrefuted claims: trial counsel were ineffective in

failing to investigate the physical evidence with CJC and medical experts. BB:12-19.

The State cites State v. Tyler, 840 P.2d 1250, 1256-57 (Utah 1993), for holding "counsel reasonably relied on State's expert and other witnesses to support defense." SB:24, 31. Tyler made no mention of counsel's reliance on the State's expert. It rejected the claim trial counsel should have called an expert to refute the State's. Id. at 1254-56. Tyler recognized it would have been ineffective had counsel failed to investigate the case, found counsel's investigation adequate, and held counsel's strategy to proceed without calling an expert was reasonable. Id.

1. CJC Expert

The State argues counsel strategically opted to rely on Detective Holdaway instead of calling an independent CJC expert, as counsel were able to avoid the expenditure of time and money required to locate and hire an independent expert, avoid the expert notice requirement and surprise the State, avoid the State's challenging its own expert or calling a rebuttal expert, and avoid the appearance of using a "hired gun." SB:17.

Our law requires defense attorneys to investigate with experts physical evidence strongly corroborating the defense, and does not condone failing to do so to save their own time or the client's money,[2] or to avoid "hired gun" appearances. E.g. State v. J.A.L., 2011 UT 27, ¶¶ 27-45262 P.3d 1. The State could have objected to the defense's calling Detective Holdaway as the CJC expert, for lack of expert notice under 77-17-13. The State

2 After the mistrial, counsel moved for release of the bond, and moved to withdraw for lack of funding (R468,481,489-90), conservatively estimating $15,000 to fund the second trial, including expenses (R2287). The court released $100,000 directly to counsel (R2289).

had no reason to challenge Holdaway or call a rebuttal expert, as the defense led Holdaway to testify as if he expertly conducted a proper and scientific CJC investigation (R2660-72), very pro-prosecution evidence, albeit untrue (R3075, 3533-43).

Like the trial court, State posits a CJC expert's testimony risked the CJC recording being played, showing VM at a younger, more sympathetic age. Id. at 24. Counsel took this risk in using Holdaway to address CJC protocol and his compliance with it in this case (R2660-72). VM's youthfulness at the time of the interview was consistent with her vulnerability to being influenced by Jann. VM's demeanor in grabbing her phone to text when Holdaway left the room was valuable defense evidence,[3] as was the entirety of the interview if it were presented by a qualified expert who could have taught the jury with such examples as to the shortcomings of Holdaway's performance in the CJC protocol.

Contrary to the State's arguments, Holdaway's failures in the CJC investigation process were important to the defense that VM'S claims were false and resulted from her relationship with Jann. An expert's testimony would not have been cumulative to VM's, Jann's and Dr. Corwin's testimony about the impact of the relationship between VM and Jann. SB 23-24. Had counsel learned from an appropriate expert about the memory function problems with VM's claims, counsel could have impugned the genesis and entirety of the State's case, and escaped the Catch-22 of Dr. Corwin's testimony that inconsistency is to be expected in cases involving "real" sexual abuse, and that consistency is a "red flag" for

3 The State suggests VM may not have been texting. SB:24n8. In arguing the new trial motion, the prosecutor asserted she was texting (R3031). There was substantial litigation about discovery and 14(b) subpoenas for cellphone records from the CJC interview (R1332b,1082a-b,4019-64,1792-93), suggesting she was texting.

indoctrination (R2580). Trial counsel pointed to consistent statements as red flags for false claims under Corwin's testimony (R2789), but also introduced inconsistent statements (R2348-49,2513,3530-3532), which are traditionally viewed as impeaching the witness's credibility,[4] but aligned with Corwin's testimony that inconsistent claims are normal in cases of real abuse (R2580).

A CJC expert was uniquely essential to show the State's investigation was biased and unreliable, in failing to follow the science-based CJC protocol, failing to hone in on the highly abnormal memory function reflected in VM's journal/letter to Jann VM wrote with Jann the night before the CJC interview, and in the first CJC interview (R3537-39,3543), and on the contaminating effects of the relationship between Jann and VM (R3535-3598,3606). This would have been powerful evidence to support the defense that VM's claims in the letter/story, initial CJC interview, and trial were not true memories, but instead resulted from her relationship with Jann.

The State misstates Boyer's claim regarding the witnesses Holdaway's inadequate CJC interview process failed to identify and investigate, BB:14 (R3535-3598,3606), as if Boyer were complaining his counsel failed to identify and explore these witnesses. SB:25,n.10. The State cites R2686-87, trial counsel's closing argument about hearing for the first time with the jurors that Jann took VM to talk to Jann's mother and a school counselor, and argues that despite having been apparently surprised by this testimony, counsel reasonably could have chosen not to investigate what VM said to Jann's mother and the school counselor because counsel had many other accounts containing inconsistent statements. SB:25. Trial

4 E.g. State v. Robbins, 2009 UT 23, ¶ 17, 210 P.3d 288 (finding inconsistent statements unreliable).

counsel could not have made a valid tactical decision not to investigate what VM told Jann's mother and the school counselor, when counsel were unaware Jann had taken VM to talk to these people. See State v. Ott, 2010 UT 1, ¶¶ 34-39, 247 P.3d 344 (courts reject claims of strategy that are unsupported by the record).

Because the State does not reveal the "similar reasons" it feels Boyer has not shown prejudice, SB:26, and because its apparently similar deficient performance arguments are refuted above, the Court should accept Boyer's arguments as to prejudice, BB:15-16.

The Court should adopt Boyer's position as to the erroneous nature of the trial court's ruling, BB:16-17, which the State does not address or refute.

2. Medical Expert

The State argues counsel needed no independent medical expert, because Nurse Lewis conceded sexual injuries may be visible years later, prepubertal girls are more likely to show injury, and the absence of injury might indicate the absence of abuse. SB:27-28. Lewis did testify she can sometimes see unspecified injuries many years later and that a normal exam with no findings such as VM's would not exclude or include sexual abuse (R2616-17,2650).

The bulk of Lewis's testimony supported the State's position that the absence of injury was consistent with VM's claims. She testified four times that 95 percent of exams are normal and remarked that this was "absolutely" true in cases involving penetration, grounding her testimony in the thousands of cases she had done, and a study about pregnant teenagers, maintaining on cross-examination the study with teenagers showed prepubertal girls can be fully penetrated with no injury (R2615,2616,2617,2650). Lewis reiterated that

prepubertal girls can stretch without tearing, and she had seen this, although pubertal girls were "even less likely" to show injury (R2636). Lewis testified that depending on the location of the transection, even fully transected hymens may heal completely (R2646,2648-49).

Had counsel investigated with an independent medical expert, the jurors could have learned that when female children between the ages of six and eight years are raped by adult men, this causes significant tearing, bleeding and pain, and leaves lasting scarring that is still visible when the girls reach the age of fourteen, the age of VM during the examination by Nurse Lewis (R3735, 3737-3739). An expert could have explained the study relied on by Nurse Lewis to the effect that no findings of sexual activity are expected to be found in teenage girls (R2618) is lacking in scientific integrity, and was not scientifically relevant here, as it did not involve six to eight years olds with smaller, more fragile genitalia (R3740). Such expert testimony would not have been cumulative to Nurse Lewis's, and counsel's deficient performance in failing to investigate the physical evidence was prejudicial. Compare J.A.L., 2011 UT 27, ¶¶ 30 and 43 (despite Code R nurse's testimony that vaginal tearing and tenderness, and tampon's presence in vagina were consistent with rape but may have been consistent with consent, counsel was ineffective in failing to call expert to testify that tearing and tampon are frequently present in consensual sex, and in failing to process Code R showing absence of salivary amylase and countering victim's claim of oral sex).

The State's argument that the defense conferred with other experts and then strategically chose to rely on Dr. Corwin to present the defense, SB:30-31, is contradicted by the record and the State's concession counsel did not hire an expert, SB:9. While counsel

represented in court they would consult with experts to combat Dr. Corwin's testimony (R2014), post trial, the only expert trial counsel claimed to have consulted was Dr. Howard Garber (R3717,3719,3002), who denied having been consulted on any issue in Boyer's case (R3724).

The record shows counsel did not make a strategic choice to rely on Dr. Corwin instead of an independent expert. Trial counsel stated during trial that she had been preparing only the night before to address Dr. Corwin's testimony, when she realized he had no knowledge of the facts of this case (R2605-2607,2609). Counsel argued she was not prepared to cross-examine Corwin because the prosecution had not provided sufficient information for counsel to understand the foundation for Corwin's testimony (R2562-65). This Court should reject the State's unfounded arguments. Ott.

The evidence trial counsel elicited from Dr. Corwin -- that children frequently show no symptoms of abuse until after they make delayed allegations (R2583-84), supported the prosecution's theory. Had counsel properly investigated with an independent expert, they could have presented evidence such as Dr. Gabaeff offered – children in the relevant age range of six to eight years are not adept at masking pain, discomfort and fear 3736). "Pain from tearing of the genital tissues will last at least 7 days. Crying, emotional upset, pain with urination, blood on panties or bedding, fear, and aversion to new acts are predictable consequences from random sexual assaults." (R3736,3740,3739-3740,3742).

Assuming some of Dr. Gabaeff's opinions were inadmissible, SB:31-32, the bulk of his testimony was admissible, compelling defense evidence. See addendum. Courts address the admissibility of each point of expert testimony. See White v. Jeppson, 2014 UT App 90,

¶22, 325 P.3d 888. The inadmissibility of any expert opinion did not absolve counsel of their duty to investigate the physical evidence with appropriate experts. J.A.L., *supra*. As the evidence they failed to investigate was non-cumulative compelling defense evidence, Boyer was prejudiced by their deficient performance.

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

1. Inconsistent Disclosure Stories

The State does not gainsay the importance of disclosure stories in cases of delayed child sexual abuse allegations, e.g., State v. Pecht, 2002 UT 41, ¶ 20, 48 P.3d 941. Rather, it misstates facts in arguing there were no significant discrepancies in the disclosure stories. SB:33-37. Contrary to page 36 of the State's brief, the two women involved with VM and Jann in two of the disclosure stories were not the same person, and the disclosure stories were different. According to VM, she first disclosed her claims of sexual abuse to Jann and Jann's grandmother in a restaurant after hearing those two discuss Boyer's involvement with another person (R2161-62). According to Jann, VM overheard Jann talking to the bishop's wife, Linda Nielsen, about Boyer hitting on a different friend, Julie Fox, and then told Jann repeatedly she had something to tell her before finally disclosing in Jann's home when Jann's boys were across the street (R3662-3666). Jann's original version of VM's disclosing because KB, who had allegedly molested her before, was moving back home (R3610), is radically different from the hemming and hawing version she told the jurors (R2493-95) and VM's restaurant version (R2161-62).

The State argues the court ruled "the K.B. allegation was too far afield, it was not relevant where V.M. did not discuss it, and it would be unfairly prejudicial. R2603-04." SB:35. Boyer refuted the trial court's actual ruling -- that Boyer's abuse prompted her to disclose, and other things that may have been bothering VM would be excluded for irrelevance and prejudice (R2603-04). BB:20-21.

The State argues counsel made a tactical choice not to bring in the inconsistent stories of VM immediately disclosing at the restaurant with Jann and Jann's grandmother after overhearing their conversation about another woman, and VM's delayed disclosure at Jann's home to only Jann after overhearing Jann and Linda Nielsen talking about another woman. SB:36-38. The record shows this was not strategic; counsel had not investigated by reviewing discovery. The State cites R2686-87, trial counsel's argument about hearing for the first time with the jurors that Jann took VM to talk to Jann's mother and a school counselor, and argues that despite having been apparently surprised by this testimony, counsel reasonably could have chosen not to investigate what VM said to Jann's mother and the school counselor because counsel had many other accounts containing inconsistent statements. SB: 25. This demonstrates trial counsel never reviewed the relevant discovery, as Jann told the prosecution team about having taken VM to talk to her mother and the school counselor (R3667-3668), in the same recorded interview as Jann told them one of the inconsistent disclosure stories about VM telling her about Boyer's abuse after overhearing Jann talking with her friend about Boyer "hitting on" a different friend (R3660-3667). Counsel did not have the interview transcribed (R3722) and were unfamiliar with this

recording when the first case mistried, and at the end of the second trial (R2253-2265,2686-87).

Contrary to the State's argument that counsel strategically avoided the discrepant disclosure stories to avoid opening the door to Boyer's infidelity, SB:37, trial counsel opened that door in the poorly investigated opening statement that VM's allegations resulted from the purportedly long, difficult divorce (R2469). Jurors heard Jann's testimony the marriage ended over Boyer's philandering (R2706-08). While the court sustained the objection (R2706-07), no one moved to strike the testimony or requested a curative instruction.

Contrary to page 37 of the State's brief, the discrepancies between Jann's two versions and VM's one version did nothing to risk making VM look like she was making inconsistent claims such as Dr. Corwin associated with real sexual abuse.

2. Jann's Bolstering VM's Credibility

The State argues Boyer's challenge to the court's ruling denying the mistrial motion confuses improper bolstering with permissible corroboration. SB:39-40. The trial court sustained trial counsel's objection and struck Jann's declaration of VM's credibility, recognizing the inadmissibility of this testimony (R2506), a ruling the State does not challenge.

The State cites State v. Calliham, 2002 UT 87, ¶38, 57 P.3d 220, arguing counsel may reasonably have decided that Jann's bedsheet testimony corroborated VM's account and was thus relevant, and may have decided the bedsheet corroboration was not bolstering, as it went to credibility on a specific point, rather than character for truthfulness. SB:40. Counsel objected and moved for a mistrial, and made no such strategic decisions (R2524), see Ott.

There would have been no legal basis for such strategy. Calliham's assessment of the relevance of gruesome photos in that murder case is inapposite to Jann's testimony about VM's credibility on a specific occasion, in violation of Utah R. Evid. 608(b). Much like State v. Stefaniak, 900 P.2d 1094 (Utah App. 1995), wherein this Court reversed a lewdness with a child conviction because the prosecutor elicited testimony from a social worker that the alleged victim seemed "quite candid," open, and volunteered information during the CJC interview, Boyer's case involved testimony regarding a victim's truthfulness in a specific instance, which was inadmissible under 608(b).

The State does not contest Boyer's prejudice argument, but asserts trial counsel conceded to the jury that "it didn't really matter," as if counsel conceded the prosecutor's claim the blue striped sheet vignette proved VM's telling the truth and having a good memory did not matter. SB:39. Trial counsel's statement, "it doesn't really matter" referred to whether the blue striped sheet was used for a birdcage in the duplex or the Holladay house (R2800).

The State's no prejudice argument – that Jann could have attested to the sheets being in the house in rebuttal after Boyer denied this, SBL40, overlooks that Jann could not have told her story about reluctantly and forcefully coming to believe VM's credibility.

3. Trial Counsel Introduced Evidence Jann Was Always Home.

The State is correct trial counsel elicited VM's testimony that Jann and the boys were always home "every time any of this stuff" was going on (R371). Counsel apologizes for overlooking this important testimony and withdraws the claim.

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

The State cites to and roughly summarizes what the prosecutor elicited during VM's second trial testimony about recalling a "mole" by Boyer's penis, that she could not recall Boyer doing "anything with his mouth" other than sucking on her ears and putting it on her vagina, and how long his sexual activities, particularly involving his penis inside of her, lasted -- it was over in between quickly and a long time, and depended (R2322-23). SB:42. The State does not refute that trial counsel deficiently failed to elicit what Jann told the prosecution team: that in her giggling conversations with VM, VM told Jann it took Boyer "a long time to cum," that he would use his tongue in circles, and that he had a mark or birthmark (R3679). There is a reasonable probability of a more favorable result had the jurors learned Jann had been having detailed conversations with VM about things VM had supposedly volunteered to Jann, which VM could not recall. Particularly as to the sexual details, the evidence would have underscored the strange and inappropriate relationship of Jann and VM.

5. Nosebleed Stories

The State argues trial counsel may have made a reasonable strategic decision not to address the nosebleed stories, because there was no material inconsistency. SB:44. The State does not mention that the only time VM claimed to have bled was after Boyer allegedly raped her on the couch in the family room with no doors, after which Jann found her bleeding in the bathroom and VM told her she was having a bloody nose (R2320-21,2374). The State makes no mention of Jann's testimony of finding VM crying in the bathroom on one occasion, without any mention of VM bleeding (R2508). The State does not

acknowledge VM's story of being raped in Jann's bed does not match with Jann's story of finding blood in bed where Boyer purportedly said his nose had gooshed all over, as VM did not claim to have bled in Jann's bed after Boyer allegedly raped her before cuddling her to sleep when she was feigning sleep (R3526-27,3530), and there was never an explanation of how VM got out of that bed and Jann got in.

The record shows trial counsel's strategy was to address the nosebleed stories. Trial counsel argued the outlandishness of Jann's story that after supposedly brutally raping VM, Boyer told her to go comfort VM in the bathroom because VM was homesick, VM elected to stay after Jann told her she should go home if she were homesick, and VM showed her no blood (R2797-98). Counsel's argument would have been far more effective had he argued the discrepancies between the bed and couch nosebleed stories.

The State claims there was no evidence Jann claimed there was a large quantity of blood in the bed. SB:43-44. While Jann's testimony was interrupted, it is fair to read it as if there was a large quantity and more than one spot of blood (R2507-2508), in the addendum.

6. VM's Inconsistent Statements

The State does not address or contest Boyer's claim that trial counsel were deficient in failing to introduce the many inconsistent statements documented in the spreadsheet (R3827-3851).

With regard to the interview of VM's grandmother, the State posits trial counsel could reasonably have determined not to call VM's grandmother to testify, as the grandmother suffers from mental issues and believed VM. SB:44-46. Trial counsel's

investigator did not interview the grandmother until after the verdict (R3621-3640). Particularly because courts do not assess counsel's performance with the benefits of hindsight, Strickland, the contents of the interview do not constitute a strategic basis for counsel's decision not to call the grandmother as a witness at trial, Ott.

The grandmother's belief in VM's honesty likely was inadmissible under Utah R.Evid. 608, and even if it had been admitted, given that VM told her that Boyer had "played with" or "foreplayed" her, there is a reasonable probability the jurors would not have shared the grandmother's views of VM's credibility (R3628,3633-3634), given the brutal rapes and instances of sodomy VM alleged at trial.

C. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE: RULE 412 EVIDENCE

1. Prosecutorial Provision of False And Misleading Information to the Court and Jury Without Intercession By Ineffective Counsel

The State does not address or refute the Napue errors, wherein the prosecutors provided and failed to correct false information regarding the 412 evidence in pretrial proceedings and at trial. See BB:30-37.

2. Prosecutorial Failure to Provide VM's Exculpatory Letter

a. The letter was exculpatory.

The State does not dispute that trial counsel's general discovery requests covered VM's letter (R12-13,67,74,682,3384-85), or that the prosecutors withheld it and misinformed trial counsel VM's letter to Jann that she took to the CJC was the only one VM wrote

(R3716). The State sees no problem with this, claiming the letter was not exculpatory because trial counsel had the police report summarizing the letter, which was nearly identical to the letter. SB: 55-56.

[redacted]

5 In opposing the motion for a new trial, after opposing a motion to compel production of the letter (R952-53), prosecutor Fisher maintained Detective Holdaway apparently understood VM's letter as referring to PR and referred the matter to VM's therapist because evidence of sex offenses against minors is inadmissible (R3885).

[redacted]

[redacted]

[redacted]

[redacted]

b. Boyer challenged the 403 ruling and Established Materiality.

The State claims Boyer failed to show a due process violation because he failed to show materiality of the letter – a reasonable probability of a different result had the evidence been disclosed, because he has not challenged the trial court's ruling that the contents of the letter would have been inadmissible under rule 403. SB:53-54,58.

The ruling the State claims was unaddressed was as follows:

> Also, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice and would have been confusing to the jury. The evidence was unnecessary; it would have caused undue delay; and it would have necessitated a trial within a trial. The evidence is inadmissible under Utah Rules of Evidence 412 and 403.

(R1791-92).

In his opening brief, Boyer noted the court found the 412 evidence inadmissible under 412 and 403 (R1791-92), BB:37, and copied the ruling and evidentiary rules in his

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7 [redacted]

addendum. Boyer argued why the admission of all 412 evidence was required under constitutional law and Ut.R.Evid. 412(b)(3), BB:34-35. He argued relevance of the evidence under 401, and that the evidence was more probative than prejudicial, and that it could have been presented in clear and simple ways that neither confused the jury nor intimated VM was promiscuous. BB:35-36. He then summarized the court's ruling, specifically mentioning rule 403, and then refuted the ruling, first challenging the factual errors leading up to the court's conclusion of inadmissibility, and then arguing legal error based on the constitutional and other law he had discussed earlier in the brief. BB:36. He provided the appropriate standards of review for rulings on admissibility of evidence. BB:3. In a later argument he cited State v. Met, 2016 UT 51, ¶¶ 89-90, 388 P.3d 447, a gruesome photographs case, recognizing the plain language of rule 403 applies. BB:48. Boyer did refute the court's 403 ruling.

While counsel omitted mention of materiality, she established prejudice under the Napue standard for prosecutorial use of and failure to correct false evidence regarding the 412 issues, and that there was a reasonable probability of a more favorable result under the Strickland standard as to the parallel IAC claims, BB:36-37. The Strickland prejudice and materiality standard are the same, thus the opening brief proves materiality under Kyles v. Whitley, 514 U.S. at 433-34.

c. Rule 16 Requires Reversal.

The State recognizes that under rule 16 and State v. Knight, 734 P.2d 913, 921 (Utah 1987), there is no materiality requirement and that if the failure to produce the letter impaired the defense, the State must show no reasonable likelihood of a different result

absent the error. SB:55n.21. The prosecutors' representations that the letter did not exist impaired the defense, for without the letter, defense counsel went along with the prosecutor's representation of the police report that [redacted]

d. There was no Legitimate Strategy Behind the 412 Stipulation.

The State contends the defense strategically chose to use only the sleepover allegations with JR, as they were the most similar to the allegations against Boyer, and counsel did not know if the court would admit any 412 evidence. SB:58-59.

Counsel were in no position to strategize when they entered into the stipulation. When counsel entered into the 412 stipulation, they had not read the discovery (R2081), [redacted]

[redacted] Counsel were in no position to strategize or negotiate for Boyer. Their failure to investigate was objectively deficient, not strategically justifiable. Compare Fisher.

[redacted]

When the State filed Dr. Corwin's expert witness notice including both topics of expert testimony – delayed allegations and risks of sexually abused children (R312), in the 412 pleadings filed in January of 2016, the defense claimed that Dr. Corwin's anticipated testimony on the risks of child sexual abuse required admission [redacted] (R3825-3826,379a-b). The State then took the position that at that time it intended only to present expert testimony on delayed allegation (R3221). In the first trial ending in a mistrial, on May 24, 2016, the prosecutor indicated in his opening statement that Dr. Corwin would testify both about delayed allegations and risks of child sexual abuse (R2247). After the defense moved for discovery of Dr. Corwin's intended testimony (R464-465), on June 2, 2016, the State filed a response indicating its intention for Dr. Corwin to address a host of issues pertaining both to delayed disclosure and risks of child sexual abuse (R472-73). Trial

counsel did not renew the motion to admit the 412 evidence in response to this shift in the State's position. At trial, the defense did not renew the motion to present the 412 evidence when Dr. Corwin began testifying about the risks or behavioral characteristics of sexually abused children (R2577-79), although counsel tried to impeach Jann with her disclosure story about VM disclosing Boyer's alleged abuse in conjunction with [redacted], arguing this had nothing to do with 412 (R2599-2600,2604). This was objectively deficient performance, not strategy. See, e.g., State v. Marks, 2011 UT App 262, ¶¶ 71-74, 262 P.3d 13 (defense attorney must renew motion to admit evidence under rule 412 if events at trial might influence court to change pretrial ruling denying admission of evidence under 412).

At the time counsel entered into the stipulation, the court's statements indicated it was inclined to admit 412 evidence (R2065-2067, in addendum).

[redacted]

Counsel's strategy regarding the 412 evidence was not investigated, J.A.L., or reasonable. State v. Bullock, 791 P.2d 155, 158-59 (Utah 1989) (actual strategy established in the record is subject to review for reasonableness).

The Court should adopt Boyer's unrefuted prejudice argument, BB:36-37, and challenge to the trial court's ruling on prosecutorial misconduct, BB:37-38.

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

Claiming there is no analysis or citation to authority, the State does not address Boyer's claim that the court erred in admitting Dr. Corwin's testimony, as it was not helpful to the jury, as jurors need no expert assistance in understanding why children might delay disclosing sexual abuse, or not have perfect recall. SB:61n.23. As is not refuted by the State, trial counsel raised this objection, and the trial court erred in ruling the expert testimony was admissible, given the purportedly low threshold of rule 702. BB:38-39, 41. Boyer's argument is clear and supported by citation to Commonwealth v. Dunkle, 602 A.2d 830, 836-38 (PA. 1992).

The State argues Boyer's challenge to the absence of foundation for Dr. Corwin's profiling testimony is raised for the first time on appeal and unpreserved. SB:61. An issue is preserved if court has opportunity to rule on it, in light of three factors: timeliness of claim, specificity of claim, and whether claim is supported by relevant legal authority or evidence. State v. Maese, 2010 UT App 106, ¶ 13, 236 P.3d 155.

Boyer's memoranda and oral argument repeatedly raised this claim in timely and specific manner, with appropriate legal support (R. 3486,3489-90,4144-45,4164,3021-22,

3067, Reply to VM's Response to Motion for New Trial and 14(b) Motions, pages 41-2). The court ruled on the issue, finding that Mr. Brass handled the prosecution's experts "perfectly," and "cut into the foundation with regard to what they were relying upon," (R3082). While the ruling was clearly erroneous because Ms. Cordova examined all the State's experts (e.g. R2650,2520,2583-84), and no one cut into Dr. Corwin's foundation, the ruling preserved the foundational challenge. Maese. The court's final order also preserved the issue of whether counsel addressed the State's expert's foundation (R1790). Id.

The State argues as if Boyer is arguing that Dr. Corwin's reliance on one supposedly discredited study deprived him of foundation, when Corwin actually relied on many studies. SB:62. Boyer appropriately asserts State v. Lopez, 2018 UT 5, an opinion filed after this appeal began, in arguing that Corwin's basic theory -- the Child Abuse Accommodation Syndrome, developed by Corwin's mentor and co-worker, Roland Summit (R2568-69,2576-80,2678), is a theory developed for therapeutic purposes, is not reliably applied in court, and was never intended to be applied as the jurors were invited to – to diagnose whether VM had been sexually molested. BB:39-41 and nn.10,11.

The State discusses cases approving of similar expert testimony that the behavior of alleged victims is consistent with abuse, including the recent case, State v. Burnett, 2018 UT App 80,¶¶28-31, wherein this Court approved of such testimony by Dr. Corwin. SB:63-64. None of these cases alleviates the requirement to lay foundation under rule 702. Burnett qualifies the admissibility of such testimony on the laying of foundation, id. at 42, something never required here.

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

The State does not take up or carry its burden to prove the prosecutorial misconduct in closing argument harmless beyond a reasonable doubt. SB:43-45. The State argues without citing authority that because trial counsel was successful in objecting below, Boyer must prove counsel ineffective in failing to move for a mistrial. SB:66. The prosecutor's misconduct was legally more serious and prejudicial than trial counsel argued below, and counsel were ineffective under Maese in failing to preserve Boyer's claims by arguing vouching and inaccuracy of the argument and moving for a mistrial, *supra*. BB:43-45. The State responds with a general argument about judicial discretion over mistrial motions in cases involving innocuous, isolated, unintentional remarks. SB:67-68. The prosecutor's closing argument vouched for the credibility of Jann Boyer with the weight of the prosecutor's office, and falsely suggested to the jurors the prosecution was unable to prosecute JR as they should have, when in fact the prosecution team intentionally diverted the investigation to [redacted]. The prosecutor's vouching and misleading the jurors with facts outside evidence in rebuttal closing required a mistrial. BB:44-45.

F. INEFFECTIVE ASSISTANCE AND PROSECUTORIAL MISCONDUCT: THE PENIS PHOTOGRAPHS

The State does not dispute the Napue claims with regard to the penis photographs. BB:45-51. It does nothing to justify the photograph with Boyer's penis stretched out thin next to a ruler, or the prosecutor's placing a post-it note on the only photograph exhibit

showing Boyer had no moles where trial counsel suggested and showing Boyer's penis's natural girth, and the photos that do not depict the areas originally described by VM as having moles. BB:46,49. The State makes no mention of Boyer's unrefuted claim that trial counsel's twice misinformed the jury as if he had a mole where she claimed (R2520,2785-86).

Boyer is not arguing counsel should have raised a constitutional challenge to Rule 16, SB:68. He is arguing trial counsel were ineffective in failing to read the case interpreting rule 16 and cited in the State's motion to take photographs of Boyer's genitals, State v. Easthope, 668 P.2d 528 (Utah 1983) (R54-56), granting the right to bring constitutional pre-compliance challenges to court orders.

The State argues heightened probable cause may not be required for the taking of genital photographs, as this is not as intrusive as the taking of blood draws or buccal swabs, and that trial counsel may have opted against trying to suppress the photos, given the low probable cause standard. SB:72. This omits mention of counsel's true strategy to suppress the mole photographs, evinced in their motion to suppress (R85-86). Had trial counsel investigated and communicated with Boyer regarding the locations of the moles on his body, they would have learned he had none where VM claimed he did (R3764-81), and could and should have made a dispositive pre-compliance challenge to the photographs for lack of probable cause.

The State relies on Mr. Brass's letter claiming to believe the photos were "helpful to the defense" (R3717,3719), arguing trial counsel strategically opted to introduce the photos including Boyer's penis to show the jurors VM's mole claims were inconsistent with his skin after extensively discussing this with Boyer. SB:70-71. This overlooks trial counsel's effort

to suppress the penis photos for having been taken in a leading and suggestive manner (R85-86), and incorrect introduction of evidence and argument that Boyer had a mole where VM claimed she did (R2520,2785-86). Mr. Brass's letter also indicates he and Ms. Cordova began representing Boyer after it was too late to oppose the photography (R3717,3719), despite their representing Boyer at the hearing wherein Judge Lindberg ordered the photos to be taken (R1964-68). At the later hearing wherein trial counsel were trying to have the photographs suppressed, due to their failure to investigate Boyer's actual skin and failure to track the prosecution's changing assertions about Boyer's moles,[8] Judge Lindberg ruled incorrectly the photography evidence was "highly probative and corroborative of the victim's statements regarding identifying characteristics" (R1965-66). The strategy claimed by the State and trial counsel should be rejected as it does not square with the record. Ott. Counsel's failure to investigate and advocate was objectively deficient and prejudicial. Strickland.

The State incorrectly asserts Brass claimed he let Boyer review the evidence. SB:71, citing R3717. Brass's letter never claims he showed Boyer the photographs, and only asserts he "believed" Boyer was provided copies of the police report (R3717). Brass blamed Boyer for not telling them that he had no moles where VM and Holdaway claimed, and believed it was incumbent on Boyer to say something, given what he heard at the first trial, and given their conversations with him on this topic (R3717). Boyer was not aware of what VM said

8 After obtaining the photographs that did not match VM's original claims, the prosecution asserted that Boyer had a "large mole" consistent with VM's description (R. 3115). This contrasted with the original motion for photography (R. 54-56), Sergeant Jack's recorded interview (R. 3687-3694), and Detective Holdaway's report (R. 3707-3708), none of which mention of a large mole or the birthmark on Boyer's thigh, and all of which document VM's claims of two small moles on the base of and next to Boyer's penis.

about his moles and their locations when she talked to Rob Jack, and counsel did not show him the State's photos or Detective Holdaway's report about them (R3765-81). The first trial clarified nothing. Boyer still has not seen the photographs introduced in evidence, aside from when they were being passed around in the courtroom at a distance, and still has not seen Detective Holdaway's report wherein he purportedly reported the presence of a mole (R3765-81).

Counsel failed in their basic duty to investigate under Strickland. Assuming this Court believes that it was incumbent on Boyer to investigate what VM claimed and inform counsel about not having moles where VM claimed, counsel are clearly responsible for multiple related prejudicial errors. BB:45-41.

The State argues the photos were properly introduced with Boyer's genitalia included, as this facilitated trial counsel's ability to show the jurors VM's claims were not consistent with Boyer's body. SB:71. Trial counsel did not inform the jurors of the mole locations VM claimed, and twice misinformed the jury as if Boyer had a mole in his pubic hair matching VM's original claims (R2520, 2785-86). This was highly prejudicial failure to investigate and deficient performance. Trial counsel and the prosecution were both focused on the birthmark on Boyer's thigh, with the defense claiming VM's inability to recall it showed her claims were indoctrination rather than the truth (R2784), and the prosecution claiming the birthmark and moles on Boyer's belly were close enough to VM's recall to constitute physical evidence that VM was the person telling the truth (R2763-64). There was no need to take photographs of Boyer's genitals, with or without a ruler, and give them to the jury. This could only have undercut his presumption of innocence and supported the State's case.

The strategy was not investigated, J.A.L., or reasonable, Bullock. See addendum.

The State argues trial counsel strategically opted not to introduce evidence that Jann and VM had discussed Boyer's "moles," as this would have bolstered VM's credibility. SB:71. Boyer's claim is that counsel should have introduced evidence to support his argument (R2784-85) that Jann claimed VM told her about Boyer having a birthmark (R3679), a term VM never used in any subsequent discussion of Boyer's purported moles. BB:49-50. This Court should reject the State's baseless strategy arguments. Ott.

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

1. Failure to Investigate with Experts

[redacted]

The State contends there is no proof trial counsel failed to consult with [redacted] experts. SB:77. While counsel represented in court they would consult with experts to combat Dr. Corwin's testimony (R2014), post trial, the only expert trial counsel claimed to have consulted was Dr. Howard Garber (R3717, 3719, 3002), who denied having been consulted in Boyer's case (R3724).

2. Absence of Valid Strategy in Stipulating to Limited Subpoenas

[redacted]

[redacted]

[redacted]

3. Failure to Inform the *In Camera* Review

[redacted]

[redacted]

4. Failure to Preserve or Replace Records of *In Camera* Review

The State does not refute the law requiring complete records in criminal cases, e.g., Birch v. Birch, 771 P.2d 1114, 1116 (Utah App. 1989), and requiring courts to have privilege logs made of records reviewed *in camera* so attorneys can identify records for renewed motions to access them as cases proceed, State v. Martin, 1999 UT 72, ¶19, and n.3, 984 P.2d 975. BB:57 and n.15.

It suggests counsel were effective in allowing the court to shred the records after the *in camera* review, arguing that Rule 14(b)(5) and State v. Gerrard, 584 P.2d 885, 886 (Utah

1978), allow courts to enter such orders, unless no reasonable judge would have done so. Actually, counsel demanded access to the records from the *in camera* review after VM testified (R2331-32), demonstrating counsel had not read the court order that the records would be shredded (R309), and were not acting pursuant to strategy. See Ott.

Rule 14(b)(5), in the addendum, does not authorize courts to have records shredded. Gerrard says nothing of shredding records.

The State contends the trial court found nothing inculpatory during the *in camera* review because the records were redundant to VM's inculpatory testimony, SB:74n.25. This overlooks the *in camera* review occurred before VM's trial testimony. A different judge presided at preliminary hearing (R1884).

H. POST-VERDICT ENTITLEMENT TO 14(B) SUBPOENAS

1. Law Authorizing Post-Verdict Subpoenas

The State argues under Utah R. Crim. P. 14(b)(3), Boyer could not have post-verdict 14(b) subpoenas, and had to request subpoenas "'as soon as practicable, but *no later than 28 days before trial.*'" State's brief at 79-80 (emphasis added by the State). The State omits part of the sentence it quotes from 14(b)(3), allowing courts discretion to issue subpoenas "by such other time as permitted by the court." Consistent with the plain language of this rule, State v. Barela, 2015 UT 22, 349 P.3d 676, recognizes trial court discretion to issue 14(b) post-verdict. Id. at ¶ 49.

VM claims Barela held that a trial court's denial of post-verdict 14(b) subpoena motions will be upheld on appeal. VMB:21. Barela recognized a trial court's discretion to

rule on such motions, and did not indicate that all denials of post-verdict 14(b) subpoenas would be affirmed on appeal. Id. VM cites State v. King, 2012 UT App 203, ¶24, 283 P.3d 980, arguing Boyer has not justified post-verdict 14(b) subpoenas. King holds that trial counsel properly investigated the availability of subpoenas for privileged records before withdrawing his motion, and indicates in dicta that on the facts of that case, the information to be found in the privileged records was presented to the jury, rendering any error harmless. Id. at ¶¶ 33 and 34. This contrasting record shows an ongoing pattern of counsel's failure to engage in representing Mr. Boyer with regard to the 14(B) subpoena issues at trial, and as a result, the jurors were deprived of evidence necessary to a just verdict.

2. Waiver of Privilege

The State adopts VM's argument regarding waiver of privilege, SB:80, which largely copies her arguments in the trial court (R4045-4048), and not is directly responsive to Boyer's opening brief.

VM begins by quoting the general rule of privilege in Utah R. Evid. 506(b), including information communicated in confidence for diagnosis or treatment, VMB:3. VM's brief omits the full scope of information subject to privilege and waiver. See Utah R.Evid. 506(b)(1)-(3), in the addendum.

VM recognizes the applicable Utah R.Evid. 510(a)(1), indicates a person waives privilege if she or a previous privilege holder "voluntarily discloses or consents to the disclosure of any significant part of the matter or communication[,]" but argues because VM did not disclose any significant part of her communications with her treatment providers, there was no waiver. VMB:1, 4-7.

This overlooks the portion of rule 510(a)(1) indicating privilege is waived if any significant part of the "matter" is disclosed. We interpret our court rules according to their plain language. E.g., Stellia Ltd. v. Yknot Ltd., 2016 Ut App 133, ¶17, 379 P.3d 29. Thus, VM's disclosure of any significant part of either the "matter or communication" resulted in waiver.

VM's case, Clawson v. Walgreen Drug Co., 162 P.2d 759, 763-64 (Utah 1945), was decided under a statute no longer in effect, bearing no resemblance to the current evidentiary rule. Id. at 763. VM's citation to State v. Boyd, 2001 UT 30, ¶46, 25 P.3d 985, is also inapposite, as Boyd addresses the safeguards of Utah R. Evid. 412, not evidentiary privilege. In contrast to rule 412, Utah R. Evid. 501(c) allows the patient, her guardian, her conservator or her treatment providers to claim privilege.

When people and their counsel fail to invoke privilege, privilege is irrevocably waived. State v. Anderson, 972 P.2d 86, 89-90 (Utah App. 1998) (holding defendant waived any arguable medical privilege under Utah R. Evid. 506 when he failed to object to physicians' testimony at preliminary hearing, and could not reassert the privilege at trial; discussing multiple cases to the effect that once such privilege is waived, the waiver is permanent and cannot be withdrawn in subsequent proceedings).

Contrary to VM's brief and the court's perfunctory conclusion that VM had not waived privilege (R1791), any arguable privilege was waived. BB:61-62 and n.16.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

fair opportunity to submit evidence, examine and cross-examine witnesses" and procedural requirements of statutes and rules).

4. VM's Status as an Alleged Victim of Child Sexual Abuse Does not Exempt Her Records from *In Camera Review*

VM, now nineteen (R. 3597) asserts she has independent constitutional and statutory protections against disclosure of her confidential counseling information, by virtue of her statuses as a child and a victim. VMB:23-26.

Children's' and victims' interests in privileged records are served through application of the court rules governing privilege, *in camera* review and protective orders. E.g. State v. Cramer, 2002 UT 9, ¶22, 44 P.3d 690 (recognizing that *in camera* review of mental health records protects victims' interest in privacy of records); *supra*, Utah R.Evid. 506, and Utah

R.Crim.P. 14. Ultimately, the function of our courts, particularly in criminal cases, must remain to search for the truth. E.g. Walker v. State, 624 P.2d 687, 691 (Utah 1981).

None of the provisions VM cites amends or exempts cases involving child witnesses or alleged victims from the rules governing evidentiary privileges, see, Constitution of Utah, Article I § 28 and Utah Code Ann. §§ 77-37-1, 77-37-4, 77-3[8]-2., in the addendum.

Our polestar cases involving access to mental health records of alleged child sexual abuse victims apply the rules of evidence just as they do in other cases. E.g. State v. Worthen, 2009 UT 79, 222 P.3d 1144. None of the cases cited by VM exempts the records of victims from the application of the rules of evidence. See Blake, *supra* (applying Utah R. Evid. 506); Whalen v. Roe, 529 U.S. 589, 599-600 (1977) (upholding prescription drug database from constitutional challenge); State v. Gonzales, 2005 UT 72, ¶41, 125 P.3d 878 (quashing subpoena for victim's mental health records for failure to comply with Ut.R.Civ.P. 45's notice requirement); Cramer, 2002 UT 9, ¶22, 44 P.3d 690, *supra*, Jaffe v. Redmond, 518 U.S. 1, 10 (1996) (extending privilege of Fed.R.Evid. 501 to psychotherapists); State v. Wengreen, 2007 UT App 264, ¶18 (applying Utah R. Evid. 506 to records access issue); State v. Billsie, 2006 UT 13, ¶13, 131P.3d 239 (affirming order allowing victim's mother to sit behind her during her testimony); State v. Anderson, 97 2P.2d 86, 89 (Utah App. 1998) (finding privilege waived after several doctors testified at preliminary hearing without objection, with statutory exception to privilege).

II. DISQUALIFICATION OF THE TRIAL COURT

The State cites State v. Alonzo, 973 P.2d 975, 979 (Utah 1998), claiming this Court

should review Judge Harris's ruling allowing Judge Kouris to remain on the case for an abuse of discretion, or that Boyer must prove actual bias. SB:3,82. The standard of review of the court's failure to recuse is for correctness. Alonzo. After Judge's Harris's rejection of the motion to disqualify, Boyer must show actual bias or abuse of discretion, a reasonable likelihood of a more favorable result absent the error, id., or that his substantial rights were affected. State v. Gardner, 789 P.2d 273, 278 (Utah 1989).

The State relies on the trial court's granting a mistrial and other rulings for the defense during the trial as disproof of bias. SB:2,82,88-89. The court's ending the first trial when he felt he had no other choice (R2266), sustaining defense objections and granting defense motions as the case proceeded, SB:88-89, and respect for trial counsel, SB:82,88-89, do nothing to ameliorate the pledge he made at sentencing to make it so VM would not have to think of Boyer again (R2865-67).

The State never grapples with the pledge or Utah Code of Judicial Conduct Rule 2.10(B), which the pledge plainly violated. BB:64, 66. Abuse of discretion is proved by this exceeding the range of discretion, State v. Cruz, 2005 UT 45, ¶27, 122 P.3d 543, and encompasses this legal error, State v. Barrett, 2005 UT 88, ¶¶ 15-17, 127 P.3d 692. Boyer has justified reversal assuming there were no actual bias. See Alonzo, *supra*.

The State does not fully address the judge's comments that he believed every word VM said, and that VM had his "absolute respect," and "absolute admiration" (R2865-66). It argues that "VM's credibility was not really in issue in the new trial motion." SB:87. The order denying the motion for a new trial turned on the court's unshaken confidence in the verdict (R1792), which hinged on VM's credibility, as it was unsupported by physical

evidence, eyewitnesses, or a confession. E.g. Burnett.

The State claims incorrectly in a footnote that Boyer does not challenge the restitution rulings. SB:89 n.31. Boyer challenged the "many factual and legal errors" in the restitution rulings, BB:66-71, cited the relevant standard of review, cited to the record of preservation of his claims, and sought a full and fair restitution hearing. BB:66-67n.19,71.

The State does not defend the series of factual and legal errors in the court's restitution rulings, or refute that they demonstrate the court's keeping of the pledge, ongoing advocacy for VM, violation of Boyer's substantial rights, and prejudice. BB:65-71.

The State argues without explanation the restitution rulings do not establish bias. SB:89, citing Liteky v. United States, 510 U.S. 540, 555 (1994). Liteky recognizes that while ordinary legal rulings based on facts learned in judicial proceedings do not establish disqualifying, actual bias, comments reflecting that fair judgment cannot be had due to deep-seated favoritism or antagonism require disqualification for actual bias. Id. The judge's comments indicated absolute respect and admiration for VM and belief of her every word, and the court's commitment to make it so she did not have to think of Boyer again (R2865-67). The average objective person would not expect him to preside fairly over a motion for a new trial after he committed to these positions. The series of restitution rulings exemplify actual bias, abuse of discretion, violation of Boyer's substantial rights, prejudice, and a reasonable probability of more favorable results had the trial court been recused. This justifies reversal under Alonzo and Gardner, and the incorrectness of the reviewing judge's ruling. BB:65-71.

III. REFUSAL TO REPLACE THE SHREDDED RECORDS

Boyer filed a motion to reconstruct the record with the trial court (R3349-3355), and is entitled to appellate review of the court's denial of that motion (R1789-93,1849). E.g. Constitution of Utah Article I § 12 (guaranteeing right to appeal). He has set forth the law refuting the trial court's denial of the motion to reconstruct, BB:72, which the State does not dispute. The Court should grant relief on that basis.

The State argues without citing authority that Boyer is limited to relief from the shredded records only if he can prove ineffective assistance of counsel, because counsel did not object to the court order indicated it would shred the records during the trial. SB:89. Assuming Boyer had to prove ineffective assistance, he has done so. See also BB:56-59 (detailing claim of ineffective assistance regarding the stipulated subpoenas and shredded records).

The State argues this Court should rely on the trial court's ruling that the records included only accounts of Boyer's abuse, and find that Boyer cannot show prejudice from the absence of the records because at most they would have included more inconsistent statements by VM. SB:90. But the State concedes the records most likely contained VM's diagnoses of Attachment Disorder and PTSD. BB:77. Such records were exculpatory. BB:53-56.

The court's comments that during the *in camera* review, it found only inculpatory information and no claims of abuse by other perpetrators (R2333), show the court's ruling there were no exculpatory records is not reliable. The court signed a conflicting order indicating it had reviewed 25 records 1-250 pages in length and found "No information of

inculpative or exculpative value" (R309). That ruling, originating from the court, corresponded with the stipulated order for subpoenas, that the court would review the records *in camera* for both inculpative and exculpative content (R284-85). The subpoenas were limited to VM's diagnoses and claims of abuse by Boyer (R280-84,3372), and would not be expected to include claims against any other alleged perpetrators, confirming the court's inability to recall important details, as the court pointed out there were no details of other perpetrators (R2333).

CONCLUSION

This Court should reverse Boyer's convictions and remand for a new trial before a new judge.

Respectfully submitted this 17th day of October, 2018.

/s/ Elizabeth Hunt
Elizabeth Hunt
Counsel for Mr. Boyer

CERTIFICATE OF COMPLIANCE

All portions of the brief to be counted under Utah R. App. P. 24(g)(2) contain a total of 12,961 words, complying with the Court's order of October 16, 2018.

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

Respectfully submitted this 17th day October, 2018.

/s/ Elizabeth Hunt
Elizabeth Hunt

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2018, I caused Orange Legal to mail, first class postage prepaid, two true and correct copies of the foregoing and the addenda, one copy of the public brief and addenda, and a PDF disk containing true and correct copies of the nonpublic brief and addenda, to the Criminal Appeals Division of the Utah Attorney General's Office, 160 East 300 South 6th Floor, P.O. 140854, Salt Lake City, Utah 84114.

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

Respectfully submitted this 17th day of October, 2018.

/s/ Elizabeth Hunt
Elizabeth Hunt

ADDENDUM TAB 1

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

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

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

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

Constitution of Utah Article I, Section 28. [Declaration of the rights of crime victims.]

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.

Utah Code Ann. § 77-37-1. Legislative intent.

(1) The Legislature recognizes the duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, the essential nature of citizen cooperation to state and local law enforcement efforts, and the general effectiveness and well-being of the criminal justice system of this state. In this chapter, the Legislature declares its intent to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law in a manner no less vigorous than protections afforded criminal defendants.

(2) The Legislature finds it is necessary to provide child victims and child witnesses with additional consideration and different treatment than that usually afforded to adults. The treatment should ensure that children's participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner.

Utah Code Ann. § 77-37-4. Additional rights -- Children.

In addition to all rights afforded to victims and witnesses under this chapter, child victims and witnesses shall be afforded these rights:

(1) Children have the right to protection from physical and emotional abuse during their involvement with the criminal justice process.

(2) Children are not responsible for inappropriate behavior adults commit against them and have the right not to be questioned, in any manner, nor to have allegations made, implying this responsibility. Those who interview children have the responsibility to consider the interests of the child in this regard.

(3) Child victims and witnesses have the right to have interviews relating to a criminal prosecution kept to a minimum. All agencies shall coordinate interviews and ensure that they are conducted by persons sensitive to the needs of children.

(4) Child victims have the right to be informed of available community resources that might assist them and how to gain access to those resources. Law enforcement and prosecutors have the duty to ensure that child victims are informed of community resources, including counseling prior to the court proceeding, and have those services available throughout the criminal justice process.

(5) (a) Child victims have the right, once an investigation has been initiated by law enforcement or the Division of Child and Family Services, to keep confidential their interviews that are conducted at a Children's Justice Center, including video and audio recordings, and transcripts of those recordings. Except as provided in Subsection (6), recordings and transcripts of interviews may not be distributed, released, or displayed to anyone without a court order.

(b) A court order described in Subsection (5)(a):

(i) shall describe with particularity to whom the recording or transcript of the interview may be released and prohibit further distribution or viewing by anyone not named in the order; and

(ii) may impose restrictions on access to the materials considered reasonable to protect the privacy of the child victim.

(c) A parent or guardian of the child victim may petition a juvenile or district court for an order allowing the parent or guardian to view a recording or transcript upon a finding of good cause. The order shall designate the agency that is required to display the recording or transcript to the parent or guardian and shall prohibit viewing by anyone not named in the order.

(d) Following the conclusion of any legal proceedings in which the recordings or transcripts are used, the court shall order the recordings and transcripts in the court's file sealed and preserved.

(6) (a) The following offices and their designated employees may distribute and receive a recording or transcript to and from one another without a court order:

(i) the Division of Child and Family Services;

(ii) administrative law judges employed by the Department of Human Services;

(iii) Department of Human Services investigators investigating the Division of Child and Family Services or investigators authorized to investigate under Section 62A-4a-202.6;

(iv) an office of the city attorney, county attorney, district attorney, or attorney general;

(v) a law enforcement agency;

(vi) a Children's Justice Center established under Section 67-5b-102; or

(vii) the attorney for the child who is the subject of the interview.

(b) In a criminal case or in a juvenile court in which the state is a party:

(i) the parties may display and enter into evidence a recording or transcript in the course of a prosecution;

(ii) the state's attorney may distribute a recording or transcript to the attorney for the defendant, pro se defendant, respondent, or pro se respondent pursuant to a valid request for discovery;

(iii) the attorney for the defendant or respondent may do one or both of the following:

(A) release the recording or transcript to an expert retained by the attorney for the defendant or respondent if the expert agrees in

writing that the expert will not distribute, release, or display the recording or transcript to anyone without prior authorization from the court; or

(B) permit the defendant or respondent to view the recording or transcript, but may not distribute or release the recording or transcript to the defendant or respondent; and

(iv) the court shall advise a pro se defendant or respondent that a recording or transcript received as part of discovery is confidential and may not be distributed, released, or displayed without prior authorization from the court.

(c) A court's failure to advise a pro se defendant or respondent that a recording or transcript received as part of discovery is confidential and may not be used as a defense to prosecution for a violation of the disclosure rule.

(d) In an administrative case, pursuant to a written request, the Division of Child and Family Services may display, but may not distribute or release, a recording or transcript to the respondent or to the respondent's designated representative.

(e) (i) Within two business days of a request from a parent or guardian of a child victim, an investigative agency shall allow the parent or guardian to view a recording after the conclusion of an interview, unless:

(A) the suspect is a parent or guardian of the child victim;

(B) the suspect resides in the home with the child victim; or

(C) the investigative agency determines that allowing the parent or guardian to view the recording would likely compromise or impede the investigation.

(ii) If the investigative agency determines that allowing the parent or guardian to view the recording would likely compromise or impede the investigation, the parent or guardian may petition a juvenile or district court for an expedited hearing on whether there is good cause for the court to enter an order allowing the parent or guardian to view the recording in accordance with Subsection (5)(c).

(iii) A Children's Justice Center shall coordinate the viewing of the recording described in this Subsection (6)(e).

(f) A multidisciplinary team assembled by a Children's Justice Center or an interdisciplinary team assembled by the Division of Child and Family Services may view a recording or transcript, but may not receive a recording or transcript.

(g) A Children's Justice Center:

(i) may distribute or display a recording or transcript to an authorized trainer or evaluator for purposes of training or evaluation; and

(ii) may display, but may not distribute, a recording or transcript to an authorized trainee.

(h) An authorized trainer or instructor may display a recording or transcript according to the terms of the authorized trainer's or instructor's contract with the Children's Justice Center or according to the authorized trainer's or instructor's scope of employment.

(i) (i) In an investigation under Section 53E-6-506, in which a child victim who is the subject of the recording or transcript has alleged criminal conduct against an educator, a law enforcement agency may distribute or release the recording or transcript to an investigator operating under State Board of Education authorization, upon the investigator's written request.

(ii) If the respondent in a case investigated under Section 53E-6-506 requests a hearing authorized under that section, the investigator operating under State Board of Education authorization may display, release, or distribute the recording or transcript to the prosecutor operating under State Board of Education authorization or to an expert retained by an investigator.

(iii) Upon request for a hearing under Section 53E-6-506, a prosecutor operating under State Board of Education authorization may display the recording or transcript to a pro se respondent, to an attorney retained by the respondent, or to an expert retained by the respondent.

(iv) The parties to a hearing authorized under Section 53E-6-506 may display and enter into evidence a recording or transcript in the course of a prosecution.

(7) Except as otherwise provided in this section, it is a class B misdemeanor for any individual to distribute, release, or display any recording or transcript of an interview of a child victim conducted at a Children's Justice Center.

Utah Code Ann. § 77-38-2. Definitions.

For the purposes of this chapter and the Utah Constitution:

(1) "Abuse" means treating the crime victim in a manner so as to injure, damage, or disparage.

(2) "Dignity" means treating the crime victim with worthiness, honor, and esteem.

(3) "Fairness" means treating the crime victim reasonably, even-handedly, and impartially.

(4) "Harassment" means treating the crime victim in a persistently annoying manner.

(5) "Important criminal justice hearings" or "important juvenile justice hearings" means the following proceedings in felony criminal cases or cases involving a

minor's conduct which would be a felony if committed by an adult:

(a) any preliminary hearing to determine probable cause;

(b) any court arraignment where practical;

(c) any court proceeding involving the disposition of charges against a defendant or minor or the delay of a previously scheduled trial date but not including any unanticipated proceeding to take an admission or a plea of guilty as charged to all charges previously filed or any plea taken at an initial appearance;

(d) any court proceeding to determine whether to release a defendant or minor and, if so, under what conditions release may occur, excluding any such release determination made at an initial appearance;

(e) any criminal or delinquency trial, excluding any actions at the trial that a court might take in camera, in chambers, or at a sidebar conference;

(f) any court proceeding to determine the disposition of a minor or sentence, fine, or restitution of a defendant or to modify any disposition of a minor or sentence, fine, or restitution of a defendant; and

(g) any public hearing concerning whether to grant a defendant or minor parole or other form of discretionary release from confinement.

(6) "Reliable information" means information worthy of confidence, including any information whose use at sentencing is permitted by the United States Constitution.

(7) "Representative of a victim" means a person who is designated by the victim or designated by the court and who represents the victim in the best interests of the victim.

(8) "Respect" means treating the crime victim with regard and value.

(9) (a) "Victim of a crime" means any natural person against whom the charged crime or conduct is alleged to have been perpetrated or attempted by the defendant or minor personally or as a party to the offense or conduct or, in the discretion of the court, against whom a related crime or act is alleged to have been perpetrated or attempted, unless the natural person is the accused or appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct or a crime or act arising from the same conduct, criminal episode, or plan as the crime is defined under the laws of this state.

(b) For purposes of the right to be present, "victim of a crime" does not mean any person who is in custody as a pretrial detainee, as a prisoner following conviction for an offense, or as a juvenile who has committed an act that would be an offense if committed by an adult, or who is in custody for mental or psychological treatment.

(c) For purposes of the right to be present and heard at a public hearing as provided in Subsection 77-38-2(5)(g) and the right to notice as provided in Subsection 77-38-3(7)(a), "victim of a crime" includes any victim originally named in the allegation of criminal conduct who is not a victim of the offense to which the defendant entered a negotiated plea of guilty.

Utah Code of Judicial Conduct RULE 2.10

Judicial Statements on Pending* and Impending* Cases

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

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

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

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

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

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.

Utah Rules of Criminal Procedure Rule 14. Subpoenas

(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 affect 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 subpoena 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.

Utah Rules of Evidence Rule 401. Test for Relevant Evidence

Evidence is relevant if:

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

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

Utah Rules of Evidence Rule 402. General Admissibility of Relevant Evidence

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

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

Irrelevant evidence is not admissible.

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

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

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

(a) Prohibited Uses. The following evidence is not admissible in a criminal proce eding 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, o r other physicalevidence;

(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 orif 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. Unlessthe 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.

Utah Rules of Evidence Rule 506. Physician and Mental Health Therapist-Patient.

(a) Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) **Hospitalization for Mental Illness.** For communications relevant to an issue in proceedings to hospitalize the patient for mental illness, if the mental health therapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization; and

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

Utah Rules of Evidence Rule 510. Miscellaneous Matters.

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

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

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

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

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

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

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

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

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

Utah Rules of Evidence Rule 608. A Witness's Character for Truthfulness or Untruthfulness

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

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

(1) the witness; or

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

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

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

Utah Rules of Evidence Rule 702. Testimony by Experts

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

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

(1) are reliable,

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

(3) have been reliably applied to the facts.

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

ADDENDUM TAB 2

JANN'S BLOODY NOSE TESTIMONY

A It was the top sheet that I put over the birdcage. And the bottom sheet, I didn't have anymore, I don't know where that's at.

Q Okay, so the bottom sheet was gone.

A Uh-huh (affirmative).

Q In your own recollection do you remember seeing any kind of stain or markings on that bottom sheet?

A I walked into the bedroom one of the evenings that she had stayed over and Mark was in the bedroom and I looked at Victoria and I said, Did you get up and eat in the middle of the night because there was stuff all over the bed. And it was blue or I don't remember and then I took the sheets off and washed them.

Q Do you recall an incident concerning blood in your bed at the house in Holladay?

A I do.

Q Tell us about that.

A This was a while later that I recollected one morning I had gotten up in the bed, I'd woken up and Mark had come into the room and he kind of pulled back the sheets and said I had a really bad bloody nose last night. He said I sat up and it just, you know, gooshed all over which I would have never thought any different, you know, bloody nose you get blood but then when I later down the road I thought back to that and the blood was never on the pillow, it was never

anywhere else but in that one spot which -

Q Okay. Did you - was that during the time period that, between the time that Victoria would have been six to eight years old when she was spending the night?

A Yes.

Q Did you - was there ever an incident where Victoria, you found Victoria upset or that you came across her during that same time period?

A Yes. I had come upstairs and gone to bed and I usually always took the dogs with me but Mark didn't like the dogs in the bed so if I heard him or the dogs would be restless, I would get up and put them in the kitchen and for whatever reason, I woke up and went to take the dogs into the kitchen and Mark was at the top of the stairs and he said that Victoria was upset and she was crying 'cause she was homesick.

Q So what did you do?

A I went down to see her and she was in the bathroom and she was kind of in the corner squatting down and -

Q What was her emotional state?

A She was crying which she'd never done before.

Q Okay. Did you say anything to her?

A I told her that she couldn't stay if she was going to be homesick and I her go back and lay on the couch.

MR. FISHER: If I could have just one second,

ADDENDUM TABS 3 – 5 REDACTED