IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff / Petitioner, vs. ROBERT PERAZA, Defendant / Respondent.	Sup. Ct. Case No: 20180487-SC Ct. App. Case No: 20160302-CA

RESPONDENT'S BRIEF

On Writ of Certiorari to the Utah Court of Appeals. The State of Utah petitioned review after Peraza's convictions were reversed and remanded for a new trial.

DOUGLAS J. THOMPSON (12690) Appeals Division Utah County Public Defender Assoc. 51 South University Ave., Suite 206 Provo, UT 84601 Telephone: (801) 852-1070 Counsel for Respondent	**WILLIAM HAINS** **SEAN REYES** Utah Attorney General Appeals Division 160 East 300 South, Sixth Floor P.O. Box 140854 Salt Lake City, UT 84114 Counsel for Appellee

ORAL ARGUMENT REQUESTED

Appellant is currently incarcerated on this case

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[1] Including paper copies of each of the parties' briefs and petitions would not only make the brief prohibitively long for binding purposes, it would also not be particularly helpful. Instead, Peraza makes them available as addendum in the digital copy of the brief in case the Court wants easy access.

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INTRODUCTION

This case is a mess. The trial court admitted expert testimony without requiring the State to meet the threshold for expert witness evidence over Peraza's objection. When Peraza moved for a continuance, because it now had to respond to that expert testimony, the details of which had not been disclosed, the court denied that motion too. The Court of Appeals saw the obvious problem with these rulings, and in light of the nature of the allegations, the role the expert testimony played in bolstering the complaining witness, and the importance a defense expert would have played, the court reversed and remanded. The parties are now before the Court to litigate whether the Court of Appeals made its conclusions about the expert witness by incorrectly considering the deficiency of the State's expert notice, and to litigate whether the Court of Appeals' presumption of prejudice from the trial court's erroneous denial of the motion to continue was the wrong standard.

In theory, these issues are important, and should be resolved, but no

matter how the Court rules on these questions it won't change the merits, the meat and potatoes, of the errors below. Regardless of whether the Court of Appeals incorrectly incorporated a notice requirement into the 702 analysis, the fact still remains, the State did not meet its burden to demonstrate its expert could testify. The trial court was wrong, and the conviction must be overturned. And regardless of whether the burden fell on the defense or on the State, the facts were clear that denying the continuance had a significant impact on the defense and there is no question that it prejudiced Peraza.

STATEMENT OF THE ISSUES

This Court granted review on the following issues:

1. Whether the Court of Appeals erred in vacating Respondent's convictions based on its construction and application of Rule 702 of the Rules of Evidence and Section 77-17-13 of the Utah Code. This issue is copied verbatim from the Court's order granting the Petition for Writ of Certiorari.

2. Whether the Court of Appeals erred in assigning Petitioner the burden of demonstrating that Respondent was not prejudiced by the district court's denial of his motion for a continuance. This issue is copied verbatim from the Court's order granting the Petition for Writ of Certiorari.

In addition, Respondent now raises two claims of ineffective assistance of counsel which were raised but not reached by the Utah Court of Appeals below.

3. Whether trial counsel provided ineffective assistance of counsel for failing to investigate and present expert testimony related to the State's evidence about

the complaining witness's multiple statements, her therapy records, and the State's expert witness testimony. "The standard of review for [a defendant's] ineffective assistance of counsel claims raised for the first time on appeal is correctness." *State v. Griffin*, 2016 UT 33, ¶16, 384 P.3d 186 (citing *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344).[2] This issue is not preserved but is subject to an exception to the preservation requirement for ineffective assistance of counsel.

4. Whether trial counsel provided ineffective assistance of counsel for failing to investigate and consult with a medical expert related to the complaining witness's physical examination following disclosure of alleged sexual abuse. "The standard of review for [a defendant's] ineffective assistance of counsel claims raised for the first time on appeal is correctness." *Griffin*, 2016 UT 33, ¶16 (citing *Ott*, 2010 UT 1, ¶16). This issue is not preserved but is subject to an exception to the preservation requirement for ineffective assistance of counsel.

STATEMENT OF THE CASE

A. Facts of the Case

Testimony of George Scott –

K.C. (the complaining witness) is George Scott's granddaughter. R.782. Scott's daughter, Nina Peraza, is K.C.s mother. R.783. Robert and Nina Peraza

[2] Because the facts supporting his ineffective assistance of counsel (IAC) claims are not currently within the record on appeal, Peraza has simultaneously filed a Motion for Remand Pursuant to Rule 23B of the Utah Rules of Appellate Procedure, to supplement the record with facts in support these claims. If, and when, the remand takes place Peraza will seek to file a supplemental brief with the additional evidence and argument.

"lived a number of years in [his] home." R.785. One day in August of 2013 Scott was in his yard when Nina and K.C. drove into the driveway. R.786. Scott spoke with Nina after K.C. ran into the house. R.786. After speaking with Nina, Scott went in the house to speak with K.C. who appeared upset. R.789. The police were then called, who provided Scott and Nina with some forms to write statements. R.791-92.

After Peraza was arrested, Scott "started perceiving quite a noticeable change in" Nina. R.1034. Nina told Scott she had invested eight years in her marriage, and she was going to lose those years. R.1035. Scott believed Nina "was very concerned about the impact of it on her family, on her becoming a single mother." R.1041.

Scott's opinion of K.C.'s reputation for truthfulness is that she "lied at times to protect herself" but, as a "general rule", "she was an honest child." R.793.

Testimony of Carly Echols -

Carly Echols works for the Division of Child and Family Services at the Children's Justice Center (CJC). R.812. Echols conducted an interview with K.C. on August 9, 2013 at the CJC, which was audio and video recorded. R.813-17, State's Exhibit 1.

Echols interviewed K.C. a second time at K.C.'s school September 18, 2013. R.826, 832. The second interview was conducted "to investigate whether [K.C.] had been tampered with". R833. K.C. told Echols that "the attorney had told her

that her mom couldn't talk to her about it, and that hadn't talked about it." R.833.

Testimony of K.C. -

At the time of trial K.C. was 12 years old and in 6th grade. R.835-36. K.C. lived with Peraza for "a couple of years" but "stayed with [her] grandpa most of [her] whole life." R.840. Peraza and her mother, Nina, have been together most of her life but she is not sure whether they were married. R.840-41.

On more than one occasion something happened between K.C. and Peraza that "made [K.C.] feel uncomfortable." R.842. "He -- he made me do things that I didn't like, and he'd get -- he got mad at me a lot, and he used to hurt me." R.842.

The first instance K.C. recalled was when Peraza woke her up late at night, began comforting her, began taking his clothes off, and then "started taking off [her] clothes". R.846. Peraza showed K.C. "his body parts and touch[ed]" her. R.846.

This "happened a couple of nights" and "it started going where he made me touch him." R.846. He made K.C. touch him "[o]n his penis." R.846. "He made me do an up and down gesture on his penis." R.847. Peraza's penis "got hard" and "then white stuff started coming out." R.848. K.C. "felt violated and grossed out." R.848.

K.C. remembered that her mother "could've been at work or asleep" while this was happening because she worked for "old people" during the day and night. R.848. Peraza would watch K.C. while Nina was away. R.849. Her younger

brother, R.P., who would have been three or four at the time "would've been playing his Xbox or playing outside with the dog." R.849.

This happened "every week" until K.C. was seven, then "it started to change." R.849-50. Then Peraza made K.C. "do it longer, and put my mouth on his penis". R.850. "He would grab my hair and make me go up and down, like, it felt like he was ripping my hair up". R.850. The "white stuff" would go "[i]n my mouth or on my face" and Peraza would say, "do you want some milk?" R.850. Once, when K.C. was seven, it occurred in the car while Nina and K.C.'s brothers were in a Denny's restaurant. R.851. One time while K.C.'s mouth was on Peraza's penis her "little brother came in, and then [Peraza] said that we were playing hide and seek…" R.937-38.

Then, a month later, "things started to happen with [K.C.'s] bum". R.854. The first incident "involving your butt" happened when K.C. was five years old, at her "very first house" in Provo. R.955-57.[3] Peraza would "put a sock in my mouth so I wouldn't scream." R.852, 928. "He put some stuff on my butt and stick his penis in me." R.852. During these incidents, Peraza was behind K.C. and she was "[a]t a 90-degree angle on the bed." R.932. Trial was the first time K.C. told anyone about Peraza putting a sock in her mouth. R.968. Trial was the first time K.C. told anyone about using "weird stuff" to make penetration easier. R.968.

[3] But see R.957-59 (K.C. recalls telling "Courtney that the first time anything involving your butt took place was on your -- when you were eight years old", on her birthday, with family members gathered at the house).

Then, "[a] year after he started sticking his penis in my butt", he "stuck his penis in my vagina." R.853. This happened two or three times, standing up, face to face. R.933. This happened either "[a] long time", or a "couple months", before her interview at the CJC. R.934.

Peraza would talk to K.C. "about not telling anyone while this abuse was going on" "[a]lmost every time." R.926. "Sometimes he would push me to do more, and it hurt, and I said, 'I don't want to do this', like five times, and then he said, 'I don't care'." R.927-28. One time, K.C. told Peraza she didn't "want to, he -- and then he had choked me and lifted me off the floor and threw me." R.928. The abuse stopped when K.C. was nine and Peraza moved in with his mother, before K.C. reported it to Nina. R.853.

Once, when she was eight, K.C. saw Peraza and Nina engaging in sex when she has slept in their room, she "woke up to them doing that, and then I had tried to ignore it, I didn't want to leave the room because they would've known that I was awake the whole time." R.929, 962. On two other occasions K.C. "walked in the door when I thought my brothers were in there..., so I walked in there and then I saw him naked." R.930.

K.C. observed a pornographic video which was playing on the TV. She watched about 30 seconds and then went upstairs. R.938. It was a movie involving a man and a woman doing sexual things. R.960. K.C. went upstairs to find Peraza was asleep. R.961. She woke Peraza up, and questioned him about the video, but he said "nothing, nothing, nothing." R.961. Another time, Peraza was

on the computer watching videos involving sex, "[t]wo guys, four girls", and he wanted K.C. "to do what they were doing on the computer." R.939.

K.C. says she reported being abused to her mother, Nina, "[o]nly twice." R.855. "I told my mom when I was five or six. She believed me for a couple minutes, and then she turned away from it." R.855. K.C. said she told her mother "Daddy's really hurting me in a way that I don't like it." R.855. Then again, when K.C. was seven, she told Nina, and K.C. thinks Nina told Scott because they fought about K.C. R.855. K.C. says she told her mother "that 'he's sticking his pee-pee in me, and I -- it hurts, and I don't like it.'" R.855.

K.C. was interviewed by Echols at the CJC on August 9, 2013. R.813, see State's Exhibit 1. K.C. told Echols she promised her grandmother she wouldn't do these things with Peraza on Sundays. R.922. K.C. felt like it "was her fault because I let him do it…" R.922. K.C. also told Echols that nothing like this has happened with anybody else, other than Peraza. R.923. Echols asked K.C. to describe Peraza's penis and K.C. told her it was just "like my mom said." R.962.[4] K.C. had asked her mother about Peraza's penis because she was curious about it. R.962-63. K.C didn't tell Echols about "more abuse with [her] dad that involved things like [her] butt and [her] vagina" because she "was afraid." R.926, 964 (Echols asked "numerous times if it had happened in any other way" and K.C.

[4] See State's Exhibit 1 at 36:15 (Q: Tell me what his pee-pee looks like. A: It was like my mom said.").

told her "nothing else").[5]

After the CJC K.C. told Nina that she missed Peraza, and that she wanted to live with him again. R.945. Nina was confused about why, and asked K.C. whether the things she had said about Peraza actually happened. R.946. K.C. told Nina that they did not happen. R.946. K.C. acknowledged that these things did not happen "all on [her] own". R.946.

A couple months after she was first interviewed at the CJC K.C.'s mother took her to an appointment to talk with a private investigator. R.917, 920-21. The investigator asked K.C. about Peraza having her touch him and she said he had not done that. R.942. She told the investigator Peraza didn't touch her and she didn't touch Peraza. R.942. The investigator asked K.C. about what she said in her CJC interview and she said she said those things because she "had to". R.943, see State's Exhibit 2 at 6-7.[6] K.C. told the investigator that an evil voice in her head told her what to say. R.943. Nobody, but the little voice, told her what to say. R.944. K.C. told the investigator she had never told Nina about the abuse before. R.944. The investigator asked K.C. many times about the alleged abuse

[5] See State's Exhibit 1 at 35:57 (Q: Has your dad ever touched *you* anywhere on your body? A: No.).

[6] "Q. Did you tell her that Robert had you do things with him that you didn't want to do and that weren't right? A. Yes. Q. And why did you tell her that? A. Because I had to. Q. Why did you have to? A. Because that's why I was there for. Q. And why did you have to -- was it because it was true or was it for some other reason? A. I don't know. Q. Well, did those things happen, or didn't they? A. Didn't. Q. They didn't happen? A. Huh-uh. Q. Then why did you tell the lady they did? A. Because that little voice went in my head. Q. A little voice went in your head? A. Uh-huh."

and every time she said they did not happen. R.944.

At trial K.C. said her recantation to the investigator "wasn't true, because I didn't want our family to get split up." R.915. "And I had lied and said that there was a little voice in my head that told me to lie." R.915.

K.C. has talked a lot about the abuse with her counselor in California, Dr. Matoon. R.844. K.C. didn't tell Dr. Matoon everything about the abuse when they first met because she didn't know Dr. Matoon, "[s]he felt like a stranger". R.975. During her sessions with Dr. Matoon, K.C. made dolls of Peraza and Giovanni (Peraza's brother), which she then killed and ran over with a car. R.959. K.C. made a doll of Cassie, Giovanni's girlfriend, and killed her too. R.960. K.C. learned the words penis and vagina from her grandma her therapist who "had been preparing" her. R.925.

After she moved to California, K.C. would call her mother on the phone. R.970. K.C. "kept telling [Nina] in those conversations that [Peraza] didn't do anything to" K.C. R.970-71. K.C. told her mother that nothing happened with Peraza but that Giovanni had done things to her. R.972.

K.C. was interviewed again, in California, by "Courtney" and asked about Giovanni. R.954. K.C. said that Giovanni's girlfriend, Cassie, had heard K.C. and Giovanni "doing things". R.954. Cassie had also heard when Peraza "was doing things to you on your butt". R.954-55. K.C. told Courtney that Giovanni had kissed her, but had done "nothing else". R.955. K.C. told Courtney that Cassie had

been mad at K.C. and had accused K.C. of begging Giovanni to abuse her. R.959.[7]

Testimony of Nina Peraza –

On the day of the football game, Nina and Peraza had been involved in a physical fight. R.985. Nina assaulted Peraza. R.1018. Then Nina took K.C. to the football game and she explained she and Peraza would not be staying together. R.985. That was the first time Nina had "heard [K.C.] claim that Robert had abused her". R.985, 1002.[8] Nina came home and immediately told her dad as much as she could "get out without… dry heaving". R.1004. Nina then spoke to the police and cooperated by having K.C. interviewed at the CJC. R.1004. At that time, Nina believed what K.C. had said. R.1004-05. She thought there was no way K.C could make something like that up. R.1005. Nina also took K.C. to for a physical examination. R.1005. The doctor told Nina that K.C.'s hymen was still intact, and that she had no injuries. R.1005.

While Peraza was in jail, K.C. "would cry for Daddy, she'd ask for Daddy as we would go visit Daddy at the jail. She'd want to go, but she couldn't because they said she couldn't go… It was just always Daddy, and she was crying for him." R.1007. Nina sensed that something was wrong with K.C. R.996-97. Nina was conflicted, she no longer knew whether to believe K.C.'s allegations. R.987.

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[7] But see Defense Exhibit 1 at 34 (K.C. tells Courtney Lee that Giovanni's girlfriend said K.C. was begging *Peraza* to "do that" on her birthday).

[8] K.C. did not tell Nina about these kinds of things in kindergarten. Nina is confident that if her daughter had said something like that before she would remember, she would be traumatized and sickened. R.1002-03.

Nina recalls several times when K.C. walked in on Nina and Peraza having sex. R.1016. In one instance, she observed Nina performing oral sex and later K.C. asked about it, and about why Nina was making "those sounds." R.1016. K.C. also asked Nina about pornography. R.1017. Nina recalls that K.C. might have had access to the pornography on Nina and Peraza's iPad's and phones. R.1017.

Nina recalled the apartment where K.C. alleged the abuse occurred. R.1019. She wasn't working while they lived there because she was pregnant. R.1019. Robert was working and for a time he was gone to New York for work. R.1020. It was a small apartment, all on one floor, with thin walls. R.1019. If "something was being done in another room against someone's will" Nina believes she would have heard it. R.1020. She would check on her kids all the time at night. R.1020.

Eventually, Nina asked K.C. whether these things really happened and K.C. said they didn't happen. R.1007. Nina remembered that K.C. "wrote on a piece of paper what had happened, and she said that it was -- that she wasn't telling the truth, that it was Satan that told her." R.996. Nina was confused and hurt. R.1007.

Nina considered K.C.'s history of getting in trouble as school for talking with other children about sex. R.1010-11. She considered times when K.C. would initially accuse the boys in the neighborhood of kissing her and then later admit they had not done it. R.1011. K.C. had a character for fabricating allegations against people. R.1012-13. Eventually, as time went on and Nina considered what

she knew about K.C., the history and recantations, and her husband, she concluded K.C.'s allegations were not true. R.988-89.

Nina arranged with Peraza's attorney for K.C. to meet with a private investigator for an interview. R.990. Nina took K.C. "to the private investigator only after she recanted to me." R.995. Nina did not call the police to report that K.C. had recanted her allegations. R.990-91. Nina called Peraza's attorney, not the police or DCFS, because the attorney "I knew that he was the one that need to know." R.996. Nina assumed the attorney "would then pass it on to the prosecution." R.1018.

K.C. continued to live with Nina for "about a year after everything came out" but then, based on a court's order, K.C. moved to California to live with her biological father. R.992-93. After K.C. moved to California Nina learned from K.C.'s biological father that K.C. had claimed Peraza had anally sodomized her. R.1013. Nina wondered why K.C. would say these things when Nina knew there had not been any injuries. R.1013-14.

Testimony of Matt Pedersen –

Matt Pedersen was the lead detective on this case. R.1042. Pedersen interviewed Peraza. R.1045. Pedersen informed Peraza about K.C.'s allegations and Peraza initially offered a denial, then blamed others. R.1046. Peraza said these allegations were made up or coached by his wife (Nina) or by the grandfather (Scott). R.1046. Peraza also said K.C. may have walked in on him while he was viewing pornography or she may have viewed it herself. R.1047.

Peraza told Pedersen that K.C. "walked in on his wife giving him oral sex" numerous times, and that she observed them having sex, including in the shower. R.1047.

Pedersen asked Peraza about his alcohol use and posed a hypothetical about the possibility that something happened with K.C. while he was drunk or passed out. R.1048. Peraza stated that "if he was really drunk" he "imagine" mistaking K.C. for his wife. R.1048. Peraza described a situation where he "drank and passed out on the couch" and someone was shaking him. R.1049. Peraza "assumed it was his wife, so he grabbed the head of that person, guided it to his genital area, there was oral sex… he thanked them, and fell back asleep." R.1049-50. The next day Peraza thanked his wife for the act and she didn't know what he was talking about. R.1050. Peraza admitted because it wasn't Nina, "it could've been [K.C.]." R.1050. The State stipulated that Peraza's statements to Pedersen were made in the form of instances where "it could've happened", not that any of it did happen. R.1075.

Testimony of Ken Bourne –

Ken Bourne is an independent private investigator who was retained by original defense counsel to investigate the case. R.1105, 1108. Bourne interviewed K.C. R.1109. Numerous times during that interview K.C. recanted the allegations she had made against Peraza. R.1110-11. See State's Exhibit 2, Addendum A.

"Rebuttal"[9] **Testimony of Chelsea Smith –**

Chelsea Smith works at the Utah County CJC as a forensic interviewer. R.1131. Smith has a bachelor's degree in "marriage, family, human development" and a master's degree in social work. R.1132. She received training in "the Tom Lyons 10 step" protocol. R.1132. She has gone to "advanced forensic interview training, and extended forensic interview training" and other conferences and trainings reviewing forensic interviewing. R.1132. Smith did not interview or make an assessment on K.C., she did not read the transcript of Bourne's interview of K.C, and she did not review any medical records or counselling records. R.1148, 1154.

Smith has performed "[a]round 1,900" forensic interviews. R.1141. In her experience, the fact that a "child recants does not mean that it did not occur." R.1142. The research about the frequency of recantations "varies between four percent to 20 percent of cases, so it's not something that's typical, but it's not unheard of that it does happen." R.1141-42. "Sometimes when a child recants, it may be feeling pressure from family members." R.1142. "It may be feeling pressure from family members." R.1142. A child may "also recant because they're feeling guilty or something" about making a false allegation to begin with. R.1148.

When people in the "sexual abuse community" disclose it is often delayed

[9] Although the State characterized Smith's testimony as rebuttal, the evidence her testimony was admitted to rebut, the multiple inconsistent statements, the delayed and partial disclosure, and the recantation, was all initially admitted through witnesses called by the State.

"until they're an adult", so "when they do disclose as a child, even then, the disclosure can be delayed." R.1143. Sometimes disclosure comes gradually where "kids will just give a little bit of information to test the waters, to see how it is received." R.1143-44. "Sometimes the children are supported and then they feel more comfortable talking about things. Sometimes it's not that well by the person who receives it, and then the child will kind of shut down and not talk about things a lot." R.1144. "Other times, children will say the information that they can think about that time, but just often times, we don't remember all of the information about an experience when someone's asked us about that experience, and so when someone's asked us about that experience, and so sometimes later we'll think, oh, I forgot to tell them that part, or the more we talk about things, the more we remember different experiences." R.1144.

B. **Procedural History of the Case**

On August 15, 2013, Robert Peraza was charged by information with four (4) counts of sodomy upon a child, each a first degree felony, and one (1) count of aggravated sexual abuse of a child, a first degree felony. R.001-02.

The case was assigned to Judge McDade who held a preliminary hearing on September 4, 2014. At the preliminary hearing the State submitted a video recorded interview of the complaining witness (K.C.) at the Children's Justice Center (CJC). R.091. During the CJC interview K.C. describes multiple incidents of Peraza's misconduct, some involving his causing K.C. to touch his penis with her hands, and others where Peraza caused K.C. to perform oral sex upon him.

See State's Exhibit 1.[10] The trial court found sufficient evidence to bind over for trial. R.152.

On November 24, 2014 the trial court held a hearing at which the parties disclosed that no resolution had been reached and the defense asked for a jury trial. R.450. The Court scheduled trial for March 17-19, 2015. R.451. On March 2, 2015 the parties appeared at a pre-trial conference at which they discussed Peraza's written motion to continue the trial on the basis that facts had arisen "requiring the exploration by the defense into a memory expert", Peraza needed access to therapy records, and to consult with an expert in relation to the State's proposed expert. R.164-167. At the hearing, counsel for the State acknowledged that additional evidence was still being gathered (K.C. had disclosed additional abuse by "another suspect" and had been interviewed again in California) so the State did "not want to go forward on the case…" and would not object to the continuance "on those grounds." R.456. The trial court noted that the "case needs to get moving" and scheduled a pretrial hearing to look for another trial date. R.458-59.

At that pretrial hearing, April 27, 2015, the defense asserted that a new trial could not be set because the State had still not provided the additional discovery (new California interview) and because the matter of disclosing K.C.'s therapy

[10] It should also be noted that the Information, which was not amended, charges four counts of Sodomy upon a Child pursuant to Utah Code §76-5-403.1. The probable cause statement within the Information and describes four instances of oral sodomy. Nothing in the case up to the time of trial suggested Peraza would need to confront allegations of anal sodomy or vaginal intercourse.

records had not been resolved. R.466-467. The State responded that it was in the process of reviewing the new interview evidence and would provide it soon. R.467-468. The court wondered why, in a case that had already been set for trial, the evidence had not already been provided, to which the State responded that the new evidence and the therapy records had only recently come to light. R.468-469.

On June 1, 2015 the parties stipulated to Peraza's Rule 14(b) request for a subpoena and in-camera review of K.C's therapy records. R.478-479. The trial court issued its subpoena duces tecum for the therapy records on June 19, 2015. R.207-08. At a status conference the parties discussed the progress of the 14(b) subpoena, but at that point the court had not yet received the records. R.487. At the follow-up hearing the court had still not received any records from K.C.'s therapist. R.494. The parties expected the records to be provided shortly so they set a new trial for October 27-29, 2015. R.495-497.

At the August 24, 205 status conference the trial court informed the parties it had received the therapy records and was waiting for defense counsel to file something about what information in the therapy records would be relevant. R.504-06. On September 23, 2015 defense counsel filed that notice (R.217-18) and at the following review hearing the court informed the parties it intended to provide the redacted records "by the end of the week". R512.

On October 19, 2015 defense counsel "ask[ed] to reset the trial" because it had learned of a recorded recantation by K.C. in the possession of a private

investigator, and because, based on the recently released therapy records, defense counsel believed it was necessary to secure Dr. Matoon as a fact witness "for impeachment purposes." R.1330-31.[11] The State was unaware of the recantation but did admit that the records of the "therapist is kind of a big deal". R.1331. The State also wanted to "look at re-filing… expert notice" because their notice for Dr. Matoon had been filed late. R.1332. The State admitted it would "be better to continue the trial." R.1331. The court was concerned about further delay but noted that it didn't "know that [it] ha[d] any choice", struck the trial, and set a new trial for February 9-11, 2016. R.1336, 1338.

On January 8, 2016 (32 days before trial) the State filed notice of expert testimony for Chelsea Smith. R.282-83. The State's notice did not include a report, or a detailed description of what Smith's testimony would be. See UTAH CODE §77-17-13. The notice only said that the Smith would present evidence of the "methodology and science related to forensic interviewing of suspected child sex abuse victims; science and research regarding child disclosures of sex abuse including identified factors related to delayed, partial and gradual disclosures and recantation." R.283. Attached to the notice was a copy of Smith's Curriculum Vitae (R.284-87), a document titled "Areas of Inquiry for Expert Testimony and Supporting Research Citations Chelsea Smit, LCSW" (R.288-92), and a document titled "References for Court Testimony Chelsea Smith (R.293-301). The "Areas of

[11] The private investigator had been hired by Peraza's public defender prior to the time Mr. Bautista entered the case as private counsel.

Inquiry" document was numbered list of 38 general topics, like "1. Incidence of Stanger v. Intimate Abuse" and "18. Sexual Behavior in Abused and Non-Abused Children", each of which is accompanied by references to what the document refers to as "Research Literature Support". R.288-92. Other than the titles and citations, the "Areas of Inquiry" document has no information. The "References for Court Testimony" document is an alphabetized list of 99 articles. This document does not give any description of the articles, beyond their titles, nor does the document provide any information about how the articles relate to Smith's testimony.

On January 28, 2016 the court held oral argument on Peraza's objection to the State's notice of Chelsea Smith as an expert witness. Peraza objected claiming that the expert notice did not include an adequate report so the defense did not "really know exactly what this expert would be testifying to", that the list of articles cited within the notice were not explained how they would correspond to Smith's proposed opinion, and that the proposed testimony was not supported by any "actual statistical basis". R.533-36. The State responded by claiming that its notice of expert witness for Dr. Matoon was "a little bit different" from its notice for Chelsea Smith because Smith would be called "to rebut the evidence that [the prosecutor was] sure will come in at trial… that this child has changed her testimony over time, at one point that there was a recantation". R.536-37. The State intended Smith to "explain as an expert that the science behind child -- disclosures of children suspected of child abuse, recognizes that there are times

where children do not make a full disclosure initially, and that it's a process." R.538. In support of that position the State cited to a 2015 Utah Supreme Court case where the Court apparently recognized that "[c]ommon experience with rape and child sexual abuse cases indicates that it is not unusual for a victim to recant… or change their stories over time." R.538.[12]

Defense counsel argued that the State's notice was inadequate because it did not provide "a thorough enough written explanation of the expert's proposed testimony" such that the defense did not "know which [studies] she's specifically relying on" and would "have no ability to cross examine her without having more information". R.548-49.

The trial court stated, "according to the rules of evidence, this person would meet the criteria for being an expert…" R.548. After further discussion, the court denied Peraza's objection to the State's proposed expert witness noting she "qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550.

Later that same day, on a phone conference with the parties, defense counsel informed the court that, based on the court's earlier 702 ruling and a conversation with the "director of the mental health and social work and

[12] Peraza assumes the prosecutor was referring to *State v. Schmidt*, 2015 UT 1204, ¶37, 356 P.3d 1204. Peraza notes that the analysis and holding in *Schmidt* has nothing whatsoever to do with the admissibility of expert testimony on the behavior of complaining witnesses being consistent with abuse. Defense counsel accurately pointed out that *Schmidt* "was a case analyzing whether it was proper for a case to have been dismissed at the preliminary hearing" so the Court was "talking about a different standard". R.539.

mitigation department at the Salt Lake legal defenders", the defense needed an expert to review K.C.'s therapy records, that the therapy "could lead to recantation of the recantation, and also… this therapy practice might have led to the allegations becoming much more violent and much more pronounced as the years have gone on." R.590. The defense requested a continuance of the trial to secure an expert. R.591. The State was "unhappy" with the prospect of a continuance but understood "the basis of what they're asking for." R.591-92. The court decided it had "to draw the line somewhere" and, because "this information could've been determined much, much longer -- much -- I mean, this is -- can't be something that could come up on the eve of trial", it denied the motion. R.592. The court "recognize[d] that this might be something that could be used later, but [felt] like this is too late in the game, especially this being the third time that we've set a trial. We have an obligation as well to this victim -- alleged victim, that I have to consider. And so, weighing all things and hearing what I'm hearing today, I see no reason why this trial should not go here in 10 days, whatever it might be." R.592.

The case preceded to trial on February 9, 2016. R.599. The State called Nina Peraza. During her testimony, Nina testified that K.C. admitted she wasn't telling the truth and that Satan had told her to say these things. R.996. K.C. wrote a note to that effect. R.997. Nina testified that she took K.C. to an interview with a private investigator where K.C. again recanted her allegations. R.989. After the State closed its case the defense called Ken Bourne, the private investigator who

testified that he had interviewed K.C., that she had recanted several times. R.1109-11. On rebuttal the State called Chelsea Smith and the defense objected claiming, if she was there to explain or rebut the evidence of recantation, that she was not a rebuttal witness because that testimony came during the State's case in chief from the State's witness, Nina Peraza. R.1133. The court overruled the objection and allowed Smith to testify in rebuttal. R.1133-34.

Peraza was convicted on four counts of Sodomy on a Child. R.1292, 367-68.[13] At sentencing the court ordered Peraza to serve 25 years-to-life on each of the four counts, each to run concurrently. R.1318. Peraza filed a timely notice of appeal. R.392.

The case was assigned to the Utah Court of Appeals. There, Peraza made 4 claims: (1) that the trial court abused its discretion by allowing the State to present expert testimony in violation of Rule 702, (2) the trial court abused its discretion when it denied Peraza's motion to continue the trial, (3) that Peraza was denied effective assistance of counsel in two ways, and (4) that the trial court erred in providing the DVD of the complaining witness's CJC interview to the jury during deliberations. Along with Peraza's ineffectiveness claims he filed a Rule 23B motion to remand to supplement the record with evidence of ineffective assistance.

[13] Prior to giving the jury the closing instructions, the State moved to dismiss Count 5 which was granted. R.1200.

C. Disposition of the Court Below

The Court of Appeals did not address Peraza's motion for a Rule 23B remand. *Peraza*, 2018 UT App 68, fn.1. Instead the court reversed Peraza's convictions on two independent preserved grounds. First, the Court of Appeals agreed with Peraza when he "contend[ed] the district court exceeded its discretion by admitting Expert's testimony without fulfilling its gatekeeping role under rule 702 of the Utah Rules of Evidence." *Peraza*, ¶¶31-32, ¶25. Because the State's notice, the only information upon which the court could base its 702 decision, "did not provide an expert report or detailed information with respect to Expert's testimony or the scientific basis on which she would rely… the requirements under rule 702 were not met". *Id.*, ¶37. The court found the error in the application of rule 702 was prejudicial because "Expert's testimony was 'clearly calculated to bolster [Child's] believability by assuring the jury no credibility problem was presented by the delay' in reporting to conduct or her subsequent recantations." *Id.*, ¶36 (*State v. Rammel*, 721 P.2d 498 (Utah 1986)).

Second, the Court of Appeals agreed with Peraza that the trial court abused its discretion in denying his motion for a continuance for time to respond to the State's expert testimony. The court analyzed the claim under the factors found in *State v. Begishe*, 937 P.2d 527, 530 (Utah App. 1997) and found defense counsel was diligent in preparing for trial and responding to the 702 ruling, that counsel likely could have obtained rebuttal expert evidence had the continuance been granted, that Peraza's right to a fair trial outweighed the threat of inconvenience

or efficiency, and that the State had failed to show there was no reasonable likelihood of a more favorable outcome for Peraza. *Peraza*, ¶¶40-45.

The court addressed Peraza's claim that the CJC DVD should not have been sent to the jury in a footnote and concluded the error was not preserved. *Id.*, fn.6. Finally, the court addressed Peraza's claim that if neither of the individual errors was prejudicial, the court should consider the cumulative effect of the two errors. Because the court found "both errors were independently prejudicial and each warranted a reversal and new trial" it did not apply the cumulative error doctrine. *Id.*, fn.10. However, the court did note that "viewing the two harmful errors together" made the court "even more confident in [its] determination that Peraza was denied a fair trial." *Id.*

SUMMARY OF THE ARGUMENT

The Court of Appeals did not conflate the expert-notice requirements with the 702 requirements, but if it did, this Court can easily affirm because, regardless of the notice, the State failed to meet the 702 requirements before the trial court ordered expert could testify. The Court of Appeals did not incorrectly place the burden on the State to disprove prejudice from the denied continuance, but if it did, this Court can easily affirm because, regardless of who bore the burden, the record clearly shows Peraza was prejudiced.

ARGUMENT

I. The trial court abused its discretion when it admitted the State's expert testimony

A. The Court of Appeals did not err in its reference to the expert-notice statute when considering Rule 702

In its first argument the State claims that the Court of Appeals must be reversed because it "held that providing adequate notice under the expert-notice statute is an element of admissibility under rule 702." Petitioner's Brief at 21. The State goes on to cite the language of both the expert-notice statute and Rule 702 and points out that neither refers to the other, and specifically that 702, because it is about admissibility, relevance and reliability, notice is not generally required. Petitioner's Brief at 22-23. None of this is controversial, and none of it has anything to do with the decision below.

What happens next in the State's brief is the problem, it misinterprets, and incorrectly cites, what the Court of Appeals did when it referenced the expert-notice statute in its discussion of what happens in a criminal case when "[a] party intends to call an expert to testify at trial". *Peraza*, ¶28. But the State puts words in the Court of Appeals' mouth to create an issue where none exists. The State's brief contains the following sentence, which does not accurately quote the opinion:[14]

[14] Peraza will underline the areas of the State's sentence which are not quotations to highlight how the State replaces the Court of Appeals' actual language with its own.

> "By ruling that 'the first step' under rule 702 ' involves giving notice' under the statute, and then by ruling that 'the State failed to satisfy the notice requirements under Utah Code section 77-17-13 ... and therefore the district court exceeded its discretion when it admitted [Smith's] testimony at trial without sufficient information to satisfy rule 702,' [], the Court of Appeals imported requirements into the rule 702 determination that the rule's plain text does not support."

Petitioner's Brief at 27. These underlined sections where the State is using its own words, or simply omitting the court's words, tell the story the State does not want this Court to hear. When the court refers to the "first step" it is not referring to 702 admissibility, it is referencing in a broader sense what must occur when a "party intends to call an expert to testify at trial". *Peraza*, ¶28. And there is nothing unusual or inappropriate about that, nor does it conflate the two sets of requirements, it merely sets the state, the context.

What the State excluded by its "..." is telling too. The Court of Appeals found that the State's notice was insufficient because "it failed to provide an expert report or other written explanation articulating the scope of Expert's testimony..." *Peraza*, ¶49. And that failure, failing to provide any information about what the expert's testimony would be, is also why the State also failed to satisfy the basic requirements of Rule 702, because Rule 702 requires a "threshold showing" that the expert's testimony "will help the trier of fact to understand the evidence", that the "principles and methods that are underlying

the testimony (1) are reliable, (2) based upon sufficient facts or data, and (3) have been reliably applied to the fact." UTAH R. EVID. 702.

The State argues that the "Court of Appeals imported requirements into the rule 702 determination", but that is not what happened. Petitioner's Brief at 27. Instead, the Court of Appeals looked at the record and found that no pretrial hearings were held at which the State could have presented that "threshold showing", it looked to the pleadings and found no proffer of expert's testimony, it looked to the transcripts and found none. So, then the Court looked to the only other place where such a showing could have occurred, in the State's §77-17-13 notice. Because the expert-notice statute requires the proponent of expert testimony to provide a report or written explanation of the proposed testimony, the court was trying to give the State, and the trial court, the benefit of the doubt. After all, it was the State's notice, and only that notice, upon which the trial court could have based its conclusion that Smith, "according to the rules of evidence, this person would meet the criteria for being an expert…" *Peraza*, ¶31, R.548. It was the State's notice, and only that notice, upon which the trial court could have based its conclusion that "looking at skill, expertise, education, and those kinds of things… it appears to me that she does meet those qualifications, so I'll go ahead and deny a motion to exclude this particular witness at this point in time." R. 550.

It was not only the State's "notice [that] 'deprived the district court of the information necessary to rule on the admissibility of Smith's testimony under

rule 702' at the pretrial hearing", it was the complete lack of any information, either through testimony, report, or any other method, that could have satisfied even the low threshold showing required by Rule 702.

The only thing the Court of Appeals did when it introduced the idea of the deficiency of the notice was to identify the absolute dearth of "information to rule on the 702 objection". By pointing out that not even the State's notice, which failed to meet the statutory requirements, contained no information, the court exhausted all avenues that could show the State had met its 702 burden.

Of course, it may have been simpler, more clear, for the court to use the State's words, "[c]ertainly the court needs information to rule on a rule 702 objection, and it is the proponent's burden to supply that information." Petitioner's Brief at 25. On this record, that would have been easy enough, and in reality, that is what the court did. If found that considering the record, which included the State's notice, the State did not provide "an expert report or detailed information with respect to Expert's testimony or the scientific basis on which she would rely" and "[w]ithout this information the requirments under rule 702 were not met". *Peraza*, ¶37.

While the State tries to make hay of the court's refence to §77-17-13, it does not do so persuasively in light of the record and the actual language of the court's opinion. In the end, the Court of Appeals concluded the trial court abused its discretion because when it was called upon to decide whether the State had met its burden to satisfy the threshold showing required by Rule 702, it denied

Peraza's objection without "any idea what Expert's testimony would be or what scientific basis it was based upon." *Peraza*, ¶31. That was the correct conclusion and the only reasonable one given the record in the case. This Court should affirm.

B. This Court should affirm because the Court of Appeal's ultimate conclusion was correct, the trial court abused its discretion in admitting expert testimony under Rule 702

If the Court disagrees and concludes that the Court of Appeals did improperly apply the requirements of the expert-notice statute into the Rule 702 analysis, the Court can and should affirm on the alternative grounds that were initially argued to the Court of Appeals, namely that regardless of the adequacy of the notice, the trial court abused its discretion in allowing Smith to testify because the State utterly failed to meet the requirements under Rule 702.

1. Rule 702

Rule 702 of the Utah Rules of Evidence outlines 3 basic steps a trial court, acting as a gatekeeper, needs to take before admitting expert testimony.[15] Step one, the court must determine "whether expert testimony is necessary to assist the trier of fact". *Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.,* 2010 UT 59, ¶9, 242 P.3d 762 (citing UTAH R. EVID. 702(a)). In other words, is there

[15] In a more recent case, this Court has characterized the 702 analysis as a "two-part analysis" essentially eliminating (or at least omitting) the question of whether the proposed expert has the necessary knowledge or experience. *See State v. Perea*, 2013 UT 68, ¶72, 322 P.3d 624 (*citing State v. Clopten*, 2009 UT 84, ¶31, 233 P.3d 1103). Whether this omitted factor has actually been removed from the 702 analysis is beside the point for this case, because the two remaining steps articulated in *Perea* are the factors that Peraza claims were not satisfied here.

something about the facts of the case that may need to be explained by an expert? Next, the court should consider "whether the proposed expert has the necessary 'knowledge, skill, experience, training, or education' to provide such assistance to the trier of fact." *Eskelson*, ¶9 (citing UTAH R. EVID. 702(a)). In other words, is the witness qualified to help the jury understand specialized information?

Finally, the "court then turns to the reliability of the 'scientific, technical, or other specialized knowledge' that serves as the basis for the expert's testimony." *Eskelson*, ¶9 (citing UTAH R. EVID. 702(b)). In this step the court must ask whether 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." UTAH R. EVID. 702.

2. The State did not meet the threshold for admitting expert testimony

At the hearing on Peraza's objection to Smith's proposed expert testimony the defense asked to have it's earlier "objection applied to this expert as well". R.533.[16] Peraza objected that the State's notice, which did not include a report, didn't show what Smith would actually be testifying to. R.534, 536. The defense complained that "identified factors related to delay, partial and gradual disclosure and recantation" were merely "topics", and were insufficient to identify what the expert opinion would be, and insufficient to allow the defense to cross-

[16] Defense counsel was referring to its April 26, 2015 Motion in Limine to Exclude Testimony of State's Expert Lyssabeth Mattoon. R.190. In that motion the defense claimed the State's notice was too vague to provide fair notice, and that statistical evidence of matters not susceptible to quantitative analysis were inappropriate to be provided to the jury. R.190-94.

examine the witness or prepare for the proposed testimony. R.534-35. The defense also argued that any testimony about the statistical prevalence of recantation in child sex allegation cases could not be supported by scientific studies. R.534-35.

The State responded by claiming that its purpose in calling Smith as an expert was to "rebut the evidence… brought forth by the defense that this child has changed her testimony over time, at one point that there was a recantation, and then, you know, making arguments to the jury that this is a reason that they should… disbelieve the child." R.537. The State wanted Smith to "explain as an expert that the science behind child -- disclosures of children suspected of child abuse, recognizes that there are times where children do not make a full disclosure initially, and that it's a process." R.537-38. The State did not present Smith as a witness to demonstrate reliability of her testimony, nor provide any details about what her testimony would be.

Defense counsel argued that the studies he presumed Smith was relying upon, were directed mainly at therapeutic standards, rather than forensic circumstances. R.540. Defense counsel claimed that allowing the State to present expert testimony about "why a child might recant, when that therapist hasn't actually interviewed and assessed this alleged victim" "gives weight and credibility to [the alleged] victim without a scientific basis for that." R.542.

The trial court denied Peraza's motion in limine, concluding that Smith would be allowed to testify. R.550. According to the court, in response to Peraza's

motion to exclude the State's witness under 702, all it could do "is look at her criteria, figure out for myself whether or not she's qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550. After the court looked at 'those kinds of things', presumably in the State's notice and found Smith did 'qualify' as an expert, the court denied the defense motion in limine. R.550.

The court admitted that it did not know whether Smith's testimony would "help the trier of fact to understand the evidence or to determine a fact in issue." UTAH R. EVID. 702(a). After claiming that Smith "would meet the criteria for being an expert" the court noted, "but again, I -- none of us can really tell until we get the testimony… whether or not she going to be needed." R.548.

The court did not consider any evidence, nor did the State present any, upon which the court could determine whether "the principles or methods that are underlying in the testimony (1) are reliable, (2) are based on sufficient facts or data, and (3) have been reliably applied to the facts." UTAH R. EVID. 702(b). The threshold showing required by paragraph (b) was not satisfied because there was nothing presented to the court to show the "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." UTAH R. EVID. 702(b). As admitted by the State, "it is the proponent's burden to supply" the information needed for the court "to rule on a rule 702 objection.

3. The trial court definitively ruled

In a new argument, the State now claims that the trial court was not required to rule on the pretrial motion in limine prior to trial. In its argument the State cites Rule 103(b) of the Utah Rules of Evidence emphasizing the "either before or at trial" language. Petitioner's Brief at 25. It strikes Respondent's counsel that the State is implying that the cited language means judges are allowed to rule on evidentiary objection either before or at trial, and thus it was appropriate for the trial court here to implicitly deny Peraza's objection after it heard Smith's introductory testimony at trial. Petitioner's Brief at 25, also 28.

But the problem is that the State's emphasis misses the point to the rule itself. The rule is not authorizing trial court's to wait until trial to rule on evidentiary objections, though in many instances courts are allowed to do so. The point of the rule is, and it is incredibly important to this case, that when the court "definitively" rules on an objection, whether it be in a pretrial hearing or during trial, there is no further need of preservation attempts by the objecting party. When the court definitively rules, *it has ruled* and the objecting party "need not renew an objection… to preserve a claim for appeal." UTAH R. EVID. 103(b).

As the State's brief here makes clear, "[o]nce the court rule[d] definitively on the record – either before or at trial – a party need not renew an objection or offer proof to preserve a claim of error for appeal." Petitioner's Brief at 25 (citing UTAH R. EVID. 103(b)). While it is true that the trial court *could* have deferred ruling on Peraza's motion to exclude Smith's expert testimony until trial, that is

not what it did. Peraza made a clear pretrial objection based on 702. The trial court did not require the State to provide information related to the elements of rule 702 at that hearing. The court did not postpone ruling on the objection until such information could be presented. Instead, the court recognized Peraza's objection, took argument from the parties and ruled definitively citing what it believed to be the 702 standards. Once that occurred, Peraza's objection was preserved, Smith's testimony, whatever it was going to be was admissible, and Peraza was able to appeal the legitimacy of the pretrial ruling without being required to raise the objection again at trial when the testimony was presented.

4. The trial court abused its discretion

As this Court explained in *Eskelson*, even though the trial court has discretion on questions of whether or not to admit expert testimony, trial courts must apply the correct test in exercising that discretion. *See Eskelson*, ¶5. And if the trial court erred in interpreting Rule 702, "it did not act within the limits of reasonability". *Id*. In this case it is clear, the trial court did not apply the correct test, therefore it abused its discretion.

When the trial court concluded that Smith could testify it did so after acknowledging that neither it, nor the parties, "can really tell until we get the testimony… whether or not she going to be needed." R.548. The court explicitly found that it did not know whether the expert testimony would "help the trier of fact to understand the evidence or to determine a fact in issue." UTAH R. EVID. 702(a).

When the trial court concluded that Smith could testify because she had sufficient "skill, experience, education, and those kinds of things" (R.550) it completely failed to examine whether her testimony and opinions were based upon principles and methods that were reliable, that they were based upon sufficient facts or data, and had been reliably applied to the facts. UTAH R. EVID. 702(b). Nor could the court have made any such conclusions because the court had no idea what Smith's testimony was going to be, or what her opinions or conclusions were based upon. The State presented no report containing her opinions and proposed testimony, nor did the State produce Smith at an evidentiary hearing. Instead, and over defense counsel's objection and implicit request for a hearing (R.542, 548-49), the trial court proceeded upon Peraza's motion in limine with only the State's one sentence explanation in its notice and its oral assertions about why it wanted to call Smith to rebut Peraza's evidence. The trial court, just like Peraza, had no idea what Smith's testimony would be, whether her methods or principles were reliable, whether they were based upon sufficient facts or data, and whether those methods and principles had been reliably applied to the facts in this case. The trial court did not consider any of these question, each of which is required under Rule 702.

The only question the court considered was if Smith "qualified as an expert by knowledge, skill, experience, training, or education". UTAH R. EVID. 702(a). This is not sufficient to establish that Smith was admissible as an expert to testify about anything and everything related to the "methodology and science related to

forensic interviewing of suspected child sex abuse victims" and the "science and research regarding child disclosures of sex abuse including identified factors related (sic) delayed, partial and gradual disclosures and recantation." R.283. The scant information provided by the State left all the important questions unanswered. What methodology? What science? What factors? None of these questions were answered by the State or even asked by the court. The trial court's failure to properly apply Rule 702 and require the State to provide information under the other 702 steps constitutes an error in interpreting Rule 702 and exceeds the limits of reasonability and constitutes an abuse of discretion.

C. Expert's subsequent testimony at trial did not remedy the court's abuse of discretion, the court definitively ruled before trial

There is no way the State can defend the trial court's application of Rule 702 when it denied Peraza's objection, so instead the State now argues, that despite what happened at the January 28, 2016 pretrial hearing,[17] the court did not err in applying the 702 standards because Smith's trial testimony laid a sufficient foundation. Petitioner's Brief at 28. The State's position here is modified, in a subtle but significant way, from its arguments to the Court of Appeals. That modification implicates the preservation rule as it applies to petitioners for writ of certiorari.

[17] The trial court denied Peraza's 702 objection to exclude Smith's testimony based on the State's notice because it found Smith "met the criteria… looking at skill, experience, education, and those kinds of things". R.550.

To the Court of Appeals, the State argued that Peraza did not preserve his 702 objection and, because the objection wasn't properly preserved, Peraza must rely on plain error. See Appellee's Brief at 28-29, 33-34. According to the State's arguments to the Court of Appeals, Smith's "unchallenged testimony clearly met rule 702's threshold." Appellee's Brief at 34. Because Peraza did not elicit any testimony at trial suggesting the articles Smith relied upon were "inaccurate" he could not show that the trial court plainly erred by admitting Smith's expert testimony after she laid the foundation. Appellee's Brief at 35.

That plain error argument is different than the Rule 103 argument the State now makes to this Court. Rather than depending upon the idea that Peraza's objection was not preserved and must meet plain error, the State now acknowledges Peraza's objection was sufficient but claims that the trial court need not have ruled on the objection until trial. The State wants this Court to reverse and remand to the Court of Appeals "so that court can consider the rule 702 issues presented by the parties." Petitioner's Brief at 28. But this new argument is not what the State presented to the Court of Appeals.

What has not changed is Peraza's position. As made clear during rebuttal at oral arguments, Peraza's position was that when the trial court said, "I know you want to know whether or not this lady is going to be allowed to testify, for the purpose of today she meets the criteria", "That's a definitive ruling." Oral Arguments in Court of Appeals, 31:45-32:27 (February 21, 2018). Because it was a definitive ruling, because the judge ruled the expert could testify, Peraza's

objection to the evidence was preserved based on the information provided to the judge at the pretrial hearing.

D. Admission of expert testimony was prejudicial

1. Preservation

The State argues that the "Court of Appeals also erred when it concluded that admitting Smith's testimony prejudiced Peraza." Petitioner's Brief at 29. The problem is that this Court did not grant the petition for writ of certiorari on the issue of prejudice resulting from the 702 ruling. The exact relevant language of this Court's order is as follows: "1. Whether the Court of Appeals erred in vacating Respondent's convictions based on its construction and application of Rule 702 of the Rules of Evidence and Section 77-17-13 of the Utah Code." And it should not surprise the State that the Court's order does not include a review of the prejudice question because the State did not put that issue in its petition. Nowhere in any of the State's petition discussing the 702 claim does the State challenge the Court of Appeals' ruling on prejudice, nor does it ask this Court to grant cert to review the issue of prejudice. See State's Petition for Writ of Certiorari, pages 11-14.

The only relevant issue in the State's petition was "Whether the Court of Appeals erred by conflating the standards and remedies under the expert notice statute and rule 702." State's Petition for Writ of Certiorari at 3. The merits of that request are found on pages 11-14. Nowhere in the petition did the State invite the Court to review whether the Court of Appeals erred in concluding the error in

admitting Smith's testimony was prejudicial. Neither is any mention of the 702 error's prejudice discussed in the State's Reply to Brief in Opposition to Petition for Writ of Certiorari.

Just as appellants are obliged to demonstrate that they preserved an issue in the trial court before it can be raised on appeal, petitioners are obligated under the preservation rule to demonstrate that they both preserved the issues at the appellate court below, but also that they raised the issue in the petition for writ of certiorari and that the Court included the issue in the order granting certiorari. "Issues not presented in the petition for certiorari, or if presented, not included in the order granting certiorari or fairly encompassed within such issues, are not properly before this Court on the merits." *Debry v. Noble*, 889 P.2d 428, 443 (Utah 1995) (citing *Butterfield v. Okubo*, 831 P.2d 97, 101 fn.2 (Utah 1992)).

The State briefly cites *State v. Hummel*, 2017 UT 19, ¶42, 393 P.3d 314 in support of the idea that "reversible error requires proof of both error and prejudice" in hopes that this Court will allow it to address an issue which it did not raise in its petition. Petitioner's Brief at 29. But that citation to *Hummel* does not eliminate the preservation rules nor expand the scope of the issues which this Court has agreed to review.

The axiomatic proposition, that reversible error requires both error and prejudice, has no bearing on and no effect on what issues the State raised in its petition and on what issues this Court granted review. The fact of the matter is clear, the Court of Appeals found the trial court's abuse of discretion was

prejudicial, the State did not seek review of that question and this Court did not grant review of the issue, therefore the State's attempt to widen the scope of the cert review is unavailing.

Because the State did not include a challenge to the Court of Appeals' decision related to prejudice in its petition, and because the Court did not grant review on the question of prejudice, the merits of that argument are not before the Court and the State's arguments should be stricken or ignored.

2. There is a reasonable likelihood of a more favorable result if Smith's bolstering was excluded

If for whatever reason the Court is inclined to review an issue that was not part of the petitioner's petition, not part of the Court's order granting cert, and not properly before the Court, the Court should find, just as the Court of Appeals did, that but for the trial court's abuse of discretion there is a reasonable likelihood of a more favorable outcome for Peraza.

Not every abuse of discretion constitutes reversible error, but in this case, the improper admission of Smith's testimony, and its effect of bolstering K.C's trial testimony, prejudiced Peraza's case. "When Utah appellate courts reverse for improper bolstering, they usually do so not only where a case hinges on an alleged victim's credibility and there is no physical evidence, but also where the bolstering was done by an expert witness." *State v. King*, 2010 UT App 396, ¶46,

248 P.3d 984.[18] In this case the trial court erroneously admitted expert testimony directed specifically at rehabilitating and bolstering K.C.'s impeached testimony. The case hinged on K.C.'s credibility and there was no physical evidence. K.C.'s credibility had been impeached by her multiple inconsistent statements, her delayed and partial disclosures, and significantly by her recantations. This kind of error is exactly the kind that Utah courts have repeatedly found to be prejudicial because the error goes to the very heart of what the jury had to decide, whether K.C. was credible in spite of the impeaching evidence.

"The Utah Supreme Court has continued to condemn anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as witness veracity, as one of the categories of evidence leading to undue prejudice." *State v. Iorg*, 801 P.2d 938, 941 (Utah App 1990) (*citing State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989)). In *Iorg*, the defendant was charged with sexual abuse of a child where the victim testified that the defendant "entered a tent where she and her cousins were sleeping and touched her breasts." *Iorg*, 801 P.2d at 939. The defendant acknowledged entering the tent to check on the children but denied the illegal touching. The victim delayed reporting. The deputy who interviewed the victim testified that at least half of the victims "she had interviewed delayed reporting for over a year." *Iorg*, 939. The deputy testified "it was not unusual for [the victim] to wait from age eleven to fourteen to report the

[18] *See e.g. State v. Stefanik*, 900 P.2d 1094 (Utah App 1995); *State v. Jacques*, 924 P.2d 898, fn.4 (Utah App 1996); *State v. Iorg*, 801 P.2d 938, 942 (Utah App 1990); *State v. Rimmasch*, 775 P.2d 388 (Utah 1989).

incident" and that "based on her experience, the fact that [the victim] delayed reporting was not an indication she was not telling the truth." *Iorg*, 939. The Court of Appeals found the deputy's erroneous testimony was prejudicial because the entire case "hinged on credibility". *Id.*, 941.

This is exactly the kind and significance as the evidence Smith presented in this case. Smith presented evidence that between four to 20 percent of victims recant. R.1141. She testified that "because a child recants does not mean that it did not occur. R.1142. Smith testified that, in her experience, victims may recant based on family pressures and other personal concerns, irrespective of the validity of the allegations. R.1142. Smith testified that *the majority of people* who have been sexually abused as a child delay disclosure. R.1143. She testified that gradual disclosure occurs for a number of reasons. R.1143-44. Each of these statements were admitted to bolster K.C.'s testimony and rebut impeachment based on the generally held belief that inconsistent statements, delayed and incomplete reporting, recantations, and changing allegations, could undermine a witness's credibility. Because, like *Iorg* and the other case cited in the footnote above, this case "hinged on the jury's assessment of Child's credibility" (*Peraza*, ¶36), which had been impeached, without the erroneous admission of Smith's bolstering evidence there is a reasonable likelihood of a more favorable result. This is a prejudicial error and this Court should reverse.

In it's brief the State alleges that, under the totality of the evidence, any error in admitting Smith's testimony was harmless. For the State, Smith's

testimony did not have an effect upon the "entire evidentiary picture" because the "record as a whole reveals that excluding Smith's testimony was not reasonably likely to have led to a more favorable outcome". Petitioner's Brief at 30-31.

The State believes that the testimony from Smith, who was presented as an expert in forensic interviewing, had performed 1,900 interviews, had been trained interview techniques, reviewed scientific research on the subjects of delayed disclosure, partial disclosure, and recantation, who testified that delay in disclosing was normal, who testified that partial disclosure was normal, and who testified that false recantation occurs when a child feels pressure from family members was "a wash" and "helped both the defense and the prosecution." Petitioner's Brief at 31-32.

But getting Smith to admit on cross examination that a recantation might, in some cases be true, was hardly the equivalent of having Smith's testimony excluded entirely. Getting the expert witness, who testified that children who allege abuse and then later recant falsely do so for all the reasons the State has presented from its earlier witnesses, to also say that sometimes recantations are truthful was actually of almost no persuasive value. In fact, that point, that a recantation may actually be the truth, requires no expertise at all. And for the State to now claim that Smith's testimony was a wash is an unfair characterization of the evidence and not helpful in analyzing prejudice.

The State also tries to downplay Smith's testimony regarding delayed disclosure with an clever spin. At trial, the State asked Smith to opine about

K.C.'s delay in disclosing the allegations against Peraza. In order to combat the assumption that K.C. should have disclosed earlier the State asked Smith whether the research and her experience showed that victims give delayed disclosures. R.1143. Smith did one better and said that not only do victims often delay, "the majority of people who have been sexually abused as a child delay disclosure. Most often, they don't disclose about it until they're an adult." R.1143. In context, Smith's testimony regarding delayed disclosure was intended to bolster K.C.'s credibility to show that her delay was not unusual. The State now changes that context to say that Smith's testimony was that because most victims delay even longer, K.C.'s shorter delayed disclosure makes her unusual. Petitioner's Brief at 33. But the point of the State's evidence, and the clear emphasis of Smith's answer, was that disclosure is usually delayed, often for many years, and therefore K.C.'s delayed disclosure is not indicative of falsity.

The State's assertion now that Smith's testimony was unlikely to have an impact on the outcome of the trial, when the clear intent and effect of the testimony was to bolster K.C.'s testimony is inconsistent with the way Utah cases have examined erroneous expert bolstering and the record of the evidence in this case. As explained above, the Court should strike the State's argument on the prejudice of the 702 error, it is not properly before the Court on cert review. And if the Court does address it, the purpose and significance of Smith's testimony was directed at and likely successfully addressed many if not most of the credibility issues in K.C.'s testimony. This kind of bolstering from an expert

witness has an outsized impact on juries and in this case there is clearly a reasonable likelihood that the jury may have entertained a reasonable doubt where K.C.'s multiple statements changed, and where she recanted multiple times. If the Court does consider the propriety of the Court of Appeals' prejudice determination, the Court should affirm.

II. Peraza was prejudiced by the denial of his motion to continue

A. The Court of Appeals properly assigned the burden of disproving prejudice to the State

The second issue in the Court's order granting cert review is whether the Court of Appeals erred in assigning Petitioner the burden of demonstrating that Respondent was not prejudiced by the district court's denial of his motion for a continuance. It should be understood upfront, on the issue of the trial court's denial of Peraza's motion to continue the State is not now contesting that the denial was correct, or that there was no error. And frankly, how could it? The State knows, based on its position related to the 702 error and its complaints about the Court of Appeals' use of the expert-notice statute, that because of the inadequacy of the State's notice (it did not contain an expert report, or an adequate explanation of the testimony) Peraza was "entitled to a continuance of the trial… sufficient to allow preparation to meet the testimony." UTAH CODE §77-17-13. Therefore, the State's only contention on the issue of the continuance was whether the Court of Appeals' should have required the State prove the error was not prejudicial because Peraza did not argue insufficient notice on appeal.

In its decision, the Court of Appeals cited *State v. Tolano*, 2001 UT App 37, 19 P.3d 400 when it placed the burden of disproving prejudice on the State. *Peraza*, ¶44. In *Tolano*, the defendant claimed "that the trial court abused its discretion when it denied his motion for a continuance because the State failed to fulfill the mandatory notice requirements regarding expert witnesses set out in Utah Code Ann. §77-17-13". *Tolano*, 2001 UT App 37, ¶1.

The State now objects to that burden shifting because "Peraza did not seek a continuance under the expert-notice statute, and this Court has required the moving party to prove prejudice for non-expert-notice-statute continuances." Petitioner's Brief at 38. That is not entirely correct. Peraza did seek a continuance under the expert-notice statute, though not by name, it just wasn't raised as the justification on appeal. During the phone conference where Peraza requested the continuance, counsel complained that because he didn't have a "full report by" Smith he was doing his best by "consulting with Mr. Swickert", but it was "all new to me as of today". R.594. This request has to be viewed in light of counsel's earlier objection to Smith as an expert where he repeatedly complained that he did not know what her testimony would be without a report.[19] Without specifically citing to §77-17-13, counsel repeatedly notified the Court that his

[19] R.534 ("Without having more of a report, I don't really know exactly what this expert would be testifying to."), 536 ("I'm concerned because I don't have an actual report from the expert, so I don't know exactly what studies she's drawing on…"), 540 ("and again, without having the report, I don't know what her basis is…"), 542 ("without reviewing these studies, and hearing from the expert in a more thorough report, we don't really know exactly what they're basing it on.").

difficulty in responding to the State's expert was directly tied to the lack of any report explaining what Smith's testimony would be.

So, while it's true that Peraza did not mention the statute by name to the trial court, and true that Peraza did not base his appellate claim on the expert-notice statute, it is clear that the issue was preserved in the trial court. Because the State's notice was clearly insufficient, and because the Court of Appeals recognized trial counsel was "hitting the notice drum hard" (Oral Arguments in Court of Appeals, 9:30 (February 21, 2018)) to the trial court, it was not unusual for the Court of Appeals to apply its cases which place the burden on the State to disprove prejudice when the State's notice is insufficient.

B. This Court should affirm on alternative grounds because even if Peraza bore the burden of demonstrating prejudice he met that burden

In its briefs to the Court of Appeals, Peraza did not argue that the State bore the burden of disproving prejudice according to *Tolano*. To be frank, appellate counsel simply missed that case and in hindsight, that was a huge mistake. Instead, Peraza argued to the court that prejudice was demonstrated because Smith's testimony bolstered K.C.'s credibility which had otherwise been significantly impeached, through scientific explanations related to K.C.'s inconsistencies. See Appellant's Brief at 43. Peraza asserted that there was a reasonable likelihood of a more favorable outcome had he been granted time "to procure an expert witness or adequately prepare cross-examination strategy prior to trial". Appellant's Brief at 45. Those arguments remain persuasive now and for

all the same reasons the 702 error is prejudicial, the denial of the continuance to address Smith's testimony is equally prejudicial.

The State now claims that the entire burden-shifting scheme in *Tolano* and its predecessors should be overturned. Peraza, as an individual defendant has no bone in this fight, he did not argue to the Court of Appeals that the State bore the burden, nor encourage the court to apply *Tolano*. To the extent that this issue has been raised for the first time in the State's brief on cert, Peraza objects to being forced into an argument that he never invited, that he believes has little bearing on the merits of his claims, and to be fair, that the Court of Appeals was never asked to justify. To the extent that the State wants to take the opportunity to challenge a pet peeve in the Court of Appeals' case law, Peraza asks the Court to reserve that argument to a case where more time and space can be devoted by two parties that have squarely addressed the issue below. Here, Peraza must dedicate all available space to arguments which will ensure that his reversed convictions stay reversed.

Peraza notes that the State makes no attempt to actually address the merits of whether he met the burden of demonstrating prejudice in the Court of Appeals. Due to a lack of space, Peraza will not repeat the arguments about prejudice in Section I D 2 above, but asks the Court to apply them equally to the prejudice question here.

C. This Court should affirm on alternative grounds because the cumulative effect of the 702 error and the continuance error was prejudicial

As was argued to the Court of Appeals, application of the cumulative error doctrine in this case is natural because of the close relationship between the trial court's ruling that the State's expert testimony was admissible and it's denial of Peraza's motion for a continuance to prepare rebuttal evidence to that expert witness. To be clear, Peraza agrees with the Court of Appeals that each of these "errors were independently prejudicial and each warranted a reversal and new trial." *Peraza*, fn.10. However, because the State has petitioned this Court to reconsider the prejudice associated with the continuance error and challenged both the error and prejudice of the expert witness claim, Peraza now reasserts his claim that, in the event that this Court reaches the 702 prejudice question and finds these errors were not independently prejudicial, the combined effect of erroneously allowing Smith to testify and erroneously denying Peraza a continuance to answer to Smith's testimony was undoubtedly prejudicial.

III. Peraza was denied effective assistance of counsel

Peraza asserts he was denied his Sixth Amendment right to counsel because trial counsel rendered ineffective assistance (IAC) in two ways. First, counsel failed to investigate and present expert witness evidence related to the reliability of K.C.'s multiple and conflicting statements. Second, counsel failed to investigate and present expert witness evidence related to the medical evidence collected when K.C. was subject to a physical examination after her disclosure. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's "representation fell below an objective standard of reasonableness"

and that the defendant was prejudiced by the errors. *Strickland*, 466 U.S. 668, 687-88.

Cases reviewing IAC claims based on failing to investigate and secure expert testimony have established that questions of deficient performance are reviewed in light of "prevailing professional norms", which include "an important duty to adequately investigate the underlying facts of the case… 'because investigation sets the foundation for counsel's strategic decisions about how to build the best defense.'" *State v. Lenkart*, 2011 UT 27, ¶27 (*citing State v. Hales*, 2007 UT 14, ¶96, 152 P.3d 321). Reviewing courts "attempt to 'eliminate the distorting effects of hindsight' by adopting [trial counsel's] perspective at the time of the decision to limit their investigation". *Hales*, ¶70.

Because these IAC claims depend heavily upon evidence not currently in the record, and appellate courts will only consider extra record evidence to determine the propriety of remanding on 23B Peraza cannot fully brief his IAC claims at this time. However, in anticipation of the Court's granting of the 23B motion and the supplementation of the record, Peraza now signals to the Court and the State the two IAC claims he will make. First, trial counsel did not investigate and present evidence related to K.C.'s multiple statements, recantations, and controversial therapy. Second, trial counsel did not investigate and present expert witness evidence related to the medical records and evidence provided in discovery. When the record is supplemented, Peraza will show that trial counsel's failures in

these areas were unreasonable under the circumstances and that if counsel had done the work, there is a reasonable likelihood of a more favorable result.

CONCLUSION AND SPECIFIC RELIEF SOUGHT

The Utah Court of Appeals did not err in concluding that the trial court abused its discretion, both with respect to admitting the expert witness evidence and the denied motion to continue. This Court should affirm the Court of Appeals and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 28th day of January, 2019.

/s/ Douglas Thompson
Appointed Appellate Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

I certify that this brief complies with the following requirements of Rule 24(a)(11) of the Utah Rules of Appellate Procedure:

A. The total word count of this brief is 13,885. It was prepared in Microsoft Word.

B. Neither this brief, nor its addendum, contains any non-public information as described in Rule 21(g).

/s/ Douglas Thompson

CERTIFICATE OF MAILING

I certify that I emailed a copy of the foregoing brief and mailed two paper copies, postage prepaid, to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 28th day of January, 2019.

/s/ Douglas Thompson

ADDENDA

A – *State v. Peraza*, 2018 UT App 68, --- P.3d ----
B – State's Exhibit 2
C – Utah Rules of Evidence, Rule 702
D – Utah Code §77-17-13
(digital only)[20]
E – Appellant's Brief
F – Appellee's Brief
G – Appellant's Reply Brief
H – Petition for Writ of Certiorari
I – Opposition to Petition for Writ of Certiorari
J – Petitioner's Reply to Opposition to Petition for Writ of Certiorari

[20] Including paper copies of each of the parties' briefs and petitions would not only make the brief prohibitively long for binding purposes, it would also not be particularly helpful. Instead, Peraza makes them available as addendum in the digital copy of the brief in case the Court wants easy access.

Addendum A – *State v. Peraza*, 2018 UT App 68, --- P.3d ----

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ROBERT ALONZO PERAZA,
Appellant.

Opinion
No. 20160302-CA
Filed April 19, 2018

Fourth District Court, Provo Department
The Honorable Darold J. McDade
No. 131402387

Douglas J. Thompson and Margaret P. Lindsay,
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for Appellee

JUDGE KATE A. TOOMEY authored this Opinion, in which JUDGES JILL M. POHLMAN and RYAN M. HARRIS concurred.

TOOMEY, Judge:

¶1 Robert Alonzo Peraza appeals his conviction of four counts of sodomy on a child (Child). Peraza's trial was continued twice because the State did not provide all relevant discovery in time for defense counsel to prepare a defense and to procure an expert witness for impeachment purposes. Then, thirty-two days before trial, the State filed a notice of expert witness to rebut Peraza's anticipated defense. The notice disclosed the name and address of the expert (Expert), her curriculum vitae, a one-sentence description of the nature of her testimony, and a list of citations to more than 130 articles upon which Expert would rely; the notice did not include an expert report.

¶2 We are asked to determine whether the State sufficiently complied with the notice requirements under Utah Code section 77-17-13 and, if not, whether the district court erred in admitting Expert's testimony under rule 702 of the Utah Rules of Evidence. We are also asked to determine whether, based on the lack of expert report, Peraza's third motion for a continuance should have been granted. We conclude the district court exceeded its discretion when it denied the motion to continue after erroneously deciding to allow Expert to testify. The State's notice did not comply with section 77-17-13, depriving the court of the information necessary to rule on the admissibility of Expert's testimony under rule 702. The State also failed to meet its burden of demonstrating that Peraza would not be prejudiced by the denial of his motion. Peraza was entitled to a continuance so that he could prepare to respond to Expert's testimony. We therefore vacate Peraza's convictions and remand for a new trial.[1]

BACKGROUND

The Allegations

¶3 Peraza was charged with four counts of first-degree sodomy on a child[2] after Child accused him of sexually abusing her.[3]

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1. Peraza also filed a motion for a rule 23B remand "for findings necessary to determine ineffective assistance of counsel." *See* Utah R. App. P. 23B. Because we vacate Peraza's convictions and remand for a new trial on other grounds, we need not address Peraza's motion or consider his claims that his counsel was ineffective. *See State v. Richardson*, 2006 UT App 238, ¶ 1 n.2, 139 P.3d 278.

2. Peraza was also charged with one count of first-degree aggravated sexual abuse of a child, but the State dismissed the charge after closing arguments and it is not an issue on appeal.

3. "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. (continued…)

¶4 Child informed her mother (Mother) and her grandfather that Peraza did "bad things" to her that she "did not like." During an interview at the Children's Justice Center (CJC), Child told a social worker that Peraza did something to her that happens "when parents really love each other." Child explained that Peraza showed her his "pee pee," and made her use a hand gesture while she touched it, and he forced her to touch it with her mouth. She said he forced her to do this more than once.

¶5 After the first CJC interview, Child moved to California to live with her father, and after relocating to California she began therapy. Part of her treatment was to, "make effigy dolls, and . . . kill the effigy doll named [Peraza]." Eventually, Child disclosed that a second perpetrator may have also sexually abused her, and she made and "killed" effigy dolls of that person too.

¶6 Child's descriptions of the abuse varied over time. On some occasions, she was explicit in describing the acts Peraza had her perform, including descriptions of anal penetration; at other times she recanted what she had described. While she was living with Mother in Utah, Child wrote Mother a note asserting that the abuse did not happen. After she moved to California, Child called Mother, more than once, to say that Peraza did not do anything to her. She also told a private investigator that Peraza did not touch her and that she never touched him.

¶7 But at trial, Child withdrew her recantations and testified that Peraza sexually abused her. She also provided more detail when describing the abuse than she had done in previous interviews and therapy sessions. For example, at trial, she testified that "Peraza had put his penis in her vagina"; that testimony was the first time the prosecutor and defense counsel had heard that allegation.

(…continued)
We present conflicting evidence only as necessary to understand issues raised on appeal." *Mackin v. State*, 2016 UT 47, ¶ 2 n.1, 387 P.3d 986 (quotation simplified).

Pretrial Proceedings

¶8 Peraza's trial was first scheduled for March 2015. But the district court granted Peraza's motion for a continuance based on newly disclosed "evidence warranting additional investigation"—including a sexual assault nurse examination report; Child's second interview with someone at a CJC in California; and the State's indication of its "intent to have [Child's therapist] testify at trial." The court set a pretrial hearing in April to schedule a new trial date. During that hearing, defense counsel argued, based on arguments made in Peraza's motions supporting his motion for a continuance, that trial could not be scheduled because the State still had not produced the requested evidence, the therapist had not provided Child's therapy records, and these records had not been subjected to an in camera review.[4] The court determined it would postpone scheduling a trial until further evidence had been disclosed.

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4. "In camera" means "[i]n the judge's private chambers" or "[i]n the courtroom with all spectators excluded." *In Camera*, Black's Law Dictionary (9th ed. 2009). Rule 506 of the Utah Rules of Evidence "cloaks in privilege confidential communications between a patient and her therapist in matters regarding treatment." *State v. Blake*, 2002 UT 113, ¶ 18, 63 P.3d 56. An exception to this rule applies if an otherwise privileged communication is "'relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense.'" *Id*. (quoting Utah R. Evid. 506(d)(1)). If a party resists disclosure of the physician-patient communications, "the defendant must petition for an in camera review in which the [district] court will review the records to determine if they actually contain material that is relevant and ought to be disclosed." *State v. Otterson*, 2010 UT App 388, ¶ 5, 246 P.3d 168. This review may be conducted "only if the defendant shows with reasonable certainty that exculpatory evidence exists which would be favorable to [the] defense." *Id*. (quotation simplified).

¶9 In June 2015, the district court issued a subpoena duces tecum for Child's therapy records, and the State stipulated to an in camera review of those records. By August, the court still had not received Child's therapy records, but the therapist indicated she was reviewing them to redact information not relevant to the case. Relying on this, the court scheduled trial for October 2015. Then in late September, after receiving the records and defense counsel's request for information from the records, the court informed the parties it would provide the redacted records "by the end of [the] week."

¶10 Although trial was set for the end of October 2015, defense counsel requested another continuance because he had learned that a private investigator recorded one of Child's recantations. Counsel also explained that he needed more time to secure Child's therapist as a fact witness "for impeachment purposes" because of Child's recantations. The State agreed that given the circumstances, "it'd be better to continue the trial" and stated that it was also "look[ing] at re-filing" a notice of expert witness based on Child's therapy records. The court commented that it did not "know that [it] ha[d] any choice" and continued the trial to February 2016 with a final pretrial conference scheduled for late January.

¶11 During the January pretrial conference, the State stipulated to the introduction of Child's therapy records for impeachment purposes because defense counsel was unable to procure Child's therapist as a witness at trial. Peraza also challenged whether Expert should be allowed to testify. The court agreed to hear oral argument on Peraza's objection the following week, on January 28, 2016—twelve days before trial.

¶12 During the hearing, defense counsel argued that the State's notice of expert witness was inadequate because it did not include an expert report or any written explanation that would inform the court "exactly what this expert would be testifying to." The notice provided Expert's name and address, her curriculum vitae, and a list of more than 130 articles that she would be relying upon. The notice also included a one-sentence statement that the State intended to use Expert to present

evidence of the "methodology and science related to forensic interviewing of suspected child sex abuse victims" and related to "child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and recantations." But counsel asserted that he could not get access to the articles cited, because the medical journals in which they were published required readers to pay for a subscription. And without an expert report, defense counsel argued that all he had been provided were "topics" that could be related to Expert's testimony. Further, he argued,

> What's troubling to me is, I don't know if those are case notes that talk about possible theories, which if they're just theories, that would be argument, and the state is clearly allowed to argue. But to present evidence of this nature, I think implies a statistical analysis. And the case law that was cited in my objection . . . ha[s] already said that [our courts] disfavor this type of testimony, because . . . it implies there's a scientific . . . [and] statistical basis for it, but yet there isn't an actual statistical basis for [the theories].

He asked the court "to incorporate the objection that [was] filed" in response to the State's initial notice of expert when the State sought to admit Child's therapist's testimony. This written objection, based on Utah Code section 77-17-13 and rules 702 and 403 of the Utah Rules of Evidence, discussed the prejudicial effects of expert witnesses testifying to "statistical evidence of matters not susceptible to quantitative analysis" and pointed out that the Utah Supreme Court had determined in *State v. Rammel*, 721 P.2d 498 (Utah 1986), that "statistically valid probabilities evidence that focuses the jury's attention on 'a seemingly scientific, numerical conclusion'" should be excluded. *Id.* at 501.

¶13 The State handed the court a copy of defense counsel's previous written objection, then explained that the purpose of Expert's testimony was to rebut the defense's assumed strategy

of showing "that [Child] changed her testimony over time, [and] at one point that there was a recantation." Moreover, it did not intend "to have [Expert] say that [Child] is telling the truth or lying, but to simply explain to the jury that there are circumstances" where children "with confirmed histories of sexual abuse" have expressed "denial or hesitation" in their disclosures of the abuse.

¶14 Defense counsel countered that "with no doubt, we will be presenting evidence that [Child] has recanted both to her mother and also [to] a private investigator." But he argued that without a report from Expert, the State's notice did not provide sufficient information with respect to Expert's proposed testimony to allow the defense to adequately prepare to rebut her testimony. Further, he argued that it appeared Expert's testimony would relate only to "possibilities" for why Child recanted and that to have "an expert testify about them without a scientific basis, is concerning because it gives more weight to the state's arguments than maybe it should." Defense counsel added that, if Expert were to mention the "possibility that there are repressed memories," such references are prohibited by Utah Supreme Court precedent, and while they may be "valuable in the therapeutic setting . . . they're too prejudicial and not allowed in a forensic setting."[5]

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5. This argument was further supported by Utah case law cited in Peraza's motion to exclude Child's therapist as an expert witness, which he incorporated into his motion with respect to Expert. For example, Peraza cited *State v. Rammel*, 721 P.2d 498 (Utah 1986), in which a detective drew on his experiences and provided anecdotal data to support his conclusions that "there was a high statistical probability" that a witness lied to the police in his first interview. *Id*. at 501. The Utah Supreme Court determined that the detective failed to show that the anecdotal data from which he drew his conclusions had any statistical validity or that the data established the detective as an expert. *Id*. It also determined that the detective's testimony stating that

(continued…)

¶15 At the conclusion of the hearing, the district court determined that Expert would be allowed to testify at trial if the State determined her testimony was necessary for rebuttal. It told the parties, based on its assumption of what Expert would testify to, Expert was qualified because "according to the rules of evidence, this person would meet the criteria for being an expert even [though] . . . none of us can really tell until we get to the testimony . . . whether or not [Expert is] going to be needed [for rebuttal]."

¶16 Later that day, after the State "provide[d] some" of the articles on which Expert would rely, the court held a telephone conference to address defense counsel's motion to continue the trial in light of the court's decision to allow Expert to testify. The State's disclosure led defense counsel to consult a social worker from the Salt Lake Legal Defender Association to help prepare a defense strategy with respect to Expert's testimony. Counsel requested, once again, a continuance to allow him to procure an

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(…continued)
"there was a high statistical probability" that another witness lied should have been excluded because "its potential for prejudice substantially outweighed its probative value." *Id*. The supreme court explained that "[e]ven where statistically valid probability evidence has been presented . . . courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." *Id*. And "[p]robabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts not susceptible to quantitative analysis, such as whether a particular individual is telling the truth at any given time." *Id*. (quotation simplified). Peraza used *Rammel* and other cases to support his argument that "proposed testimony linking [Child's] symptoms and behavior to behavioral norms testimony is presumptively unreliable and prejudicial . . . and inadmissible as expert witness evidence under Rule 403."

expert to rebut that testimony. He explained that he felt further obligated to make this request because of the therapy treatments Child received—specifically, killing the effigy dolls of her alleged abusers—"could give grounds for the recantation of the recantation . . . [and] might have led to the allegations becoming much more violent and much more pronounced as the years have gone on." The State responded that although it was "unhappy with the fact that we're continuing again" but understood the basis for it. Nevertheless, the court stated that it was "not inclined" to continue the trial and that it had to "draw the line somewhere." After denying the motion to continue, the court "recognize[d] this might be something that could be used later" on appeal, but determined "this [was] too late in the game."

The Trial

¶17 The following week, the case proceeded to trial. During the State's case-in-chief, Child testified to the nature of the abuse she allegedly suffered from Peraza, beginning when she was six years old. She also testified that she lied to Mother and the private investigator when she said the abuse did not occur.

¶18 The State also called Mother, who testified that Child recanted her allegations to her and to the private investigator. Mother testified that Child recanted her allegations more than once. Defense counsel called the private investigator, who testified about his interview with Child in which Child recanted her allegations.

¶19 In an effort to rebut Mother's and the private investigator's testimonies that Child had recanted her allegations on different occasions, the State called Expert to testify about disclosures and recantations by victims of sexual abuse. Defense counsel objected to Expert's testimony on the ground that she was not a "rebuttal witness" because "the evidence about [Child] recanting her statements came out in the [S]tate's case." Defense counsel added that it was the State that introduced Child's interview in which Child recanted her allegations against Peraza, and as such, Expert's testimony could not be characterized as a

rebuttal. The court overruled the objection and allowed Expert to testify.

¶20 Expert explained she was "trained as a forensic interviewer" and that she had provided "supporting research citations" for the "areas of inquiry for expert testimony." She said that the articles identified in the notice were "articles that [she had] read, and so, the topics that would be contained in some of those different articles" were information "that [she] felt" allowed her "to testify as an expert." But Expert did not interview or assess Child. She had not reviewed any evidence of the case before testifying and answered questions "based off of the testimony [she] heard, since [she had not] seen transcripts or anything." Expert acknowledged her testimony was only "academic."

¶21 Expert testified she had conducted around 1,900 forensic interviews with children and that recanting is "not something that happens in all cases, as far as some of the research says," and that recantations can "var[y] between four percent to 20 percent of cases, so it's not something that's typical, but it's not unheard of." She reiterated that "generally, because a child recants does not mean that it did not occur" and commented,

> Sometimes, when a child recants, it may be feeling pressure from family members. . . . [O]ften times if it's someone that they love, having gone to jail, or if the person's no longer in the home, and now the family is struggling for money, sometimes those are circumstances where the child might think, "things were not like this before I talked about it, I'll just—it's just better to go back to how things were, I can deal with that."

¶22 The jury convicted Peraza on all four counts of sodomy upon a child. Peraza appeals his convictions.

ISSUES AND STANDARDS OF REVIEW

¶23 Peraza contends the district court erred when it admitted Expert's testimony at trial because the State had not provided sufficient information to demonstrate the scientific validity or basis of the testimony that would have allowed the court to determine whether she met the requirements for expert testimony under rule 702 of the Utah Rules of Evidence.[6] Specifically, Peraza argues that the State did not provide "any

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6. Peraza also contends the district court erred when it permitted the jury to review the video of the CJC interview during deliberations. This argument is unpreserved. Generally, "an appellant must properly preserve an issue in the district court before it will be reviewed on appeal." *State v. Houston*, 2015 UT 40, ¶ 19, 353 P.3d 55 (quotation simplified). To preserve an issue, it must have been presented "in such a way that the court ha[d] an opportunity to rule on [it]." *Id.* (quotation simplified). There are limited exceptions to the preservation rule, including instances of plain error or exceptional circumstances—neither of which are argued by Peraza on appeal. *See id*.

Although this argument is unpreserved, we briefly address this issue to avoid its recurrence on remand. Rule 17 of the Utah Rules of Criminal Procedure allows the jurors to "take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury." In *State v. Carter*, 888 P.2d 629 (Utah 1995), s*uperseded by statute as stated in Archuleta v. Galetka*, 2011 UT 73, 267 P.3d 232, the Utah Supreme Court determined that rule 17 "indicates that exhibits which are testimonial in nature should not be given to the jury during its deliberations." *Id*. at 643. After Peraza's trial, this court determined in another case that video recordings of CJC interviews are recorded testimony and should not be given to the jury during deliberations. *State v. Cruz*, 2016 UT App 234, ¶¶ 37–41, 387 P.3d 618. Accordingly, on remand the district court should not provide any testimonial evidence to the jury during its deliberations.

details about what [Expert's] testimony would be so that the defense could investigate whether such testimony could be supported by" the more than 130 article citations Expert provided. The district court "has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (quotation simplified). "[W]e will not reverse a decision to admit or exclude expert testimony unless the decision exceeds the limits of reasonability." *Id.* (quotation simplified). Even if we determine the testimony was erroneously admitted, the defendant must show that the error was prejudicial. *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

¶24 Peraza also contends that the district court's denial of his third motion to continue the trial to allow him to procure an expert witness to rebut Expert's testimony constituted an abuse of discretion and prejudiced his trial. We review the grant or denial of a motion to continue under an abuse of discretion standard. *State v. Tolano*, 2001 UT App 37, ¶ 5, 19 P.3d 400.

ANALYSIS

I. Expert Witness Testimony

¶25 Peraza contends the district court exceeded its discretion by admitting Expert's testimony without fulfilling its gatekeeping role under rule 702 of the Utah Rules of Evidence. He argues the court "failed to examine whether [Expert's] testimony and opinions were based upon principles and methods that were reliable, that they were based upon sufficient facts or data, and had been reliably applied to the facts" of this case.

¶26 Rule 702 provides that a witness may testify as an expert if that person "is qualified as an expert by knowledge, skill, experience, training, or education" and "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."

Utah R. Evid. 702(a). An expert's "scientific, technical, or other specialized knowledge" must meet "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." *Id.* R. 702(b). This threshold showing "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." *Id.* R. 702(c).

¶27 District courts are assigned the duty of "gatekeeper" and are responsible for preventing the admission of unreliable expert testimony. *State v. Jones*, 2015 UT 19, ¶ 21, 345 P.3d 1195. Even if the testimony satisfies rule 702, the court must also "determine whether the proffered scientific evidence will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence." *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996).

¶28 A party that intends to call an expert to testify at trial must demonstrate that the expert meets the requirements of rule 702. Utah Code Ann. § 77-17-13(1)(a) (LexisNexis 2017);[7] *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). In criminal cases, the first step involves giving notice to the opposing party "not less than 30 days before trial or 10 days before the hearing." Utah Code Ann. § 77-17-13(1)(a). The notice "shall include the name and address of the expert, the expert's curriculum vitae," and either "a copy of the expert's report," "a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony," or "a notice that the expert is available to cooperatively consult with the opposing party on reasonable

7. Recent amendments to the relevant statutes cited within this opinion are not substantive and do not affect the outcome of this appeal. We therefore refer to the most recent edition of the Utah Code for convenience. *See State v. Rackham*, 2016 UT App 167, ¶ 9 n.3, 381 P.3d 1161.

notice." *Id.* § 77-17-13(1)(b). If the party seeking to admit expert testimony "fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony." *Id.* § 77-17-13(4)(a).

¶29 Here, thirty-two days before trial, the State filed a notice of expert testimony with a copy of Expert's curriculum vitae and a list of medical journal articles that she would rely upon for her testimony. The articles were not readily accessible to the court or to defense counsel because they were published in journals for which subscriptions were required.

¶30 Peraza argues the district court had no basis for determining that rule 702 was satisfied because "the court had no idea what [Expert's] testimony was going to be . . . what her opinions or conclusions were based upon . . . [or whether her] methods and principles had been reliably applied to the facts in this case."[8] We agree.

¶31 In determining that Expert was qualified under rule 702, the district court relied solely on her curriculum vitae, the list of article citations, and the State's "oral assertions about why it wanted to call [Expert]." There was no information from which to determine the principles or methods that would form the basis of Expert's testimony, or whether her opinions were based upon sufficient facts or data. *See* Utah R. Evid. 702(b). The State did not provide an expert report, gave only a single-sentence description of the broad subject upon which Expert would testify, and failed to provide meaningful access to the articles upon which Expert relied. We agree with Peraza that neither the court nor defense counsel had "any idea what [Expert's] testimony would be or what scientific basis it [was] based upon."

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8. At trial, Expert testified she had not read the transcripts of interviews, had not reviewed any material involving the case, and had not interviewed Child or any other witness.

¶32 We therefore conclude the district court exceeded its discretion when it admitted Expert's testimony at trial without complying with the requirements of rule 702.

¶33 Having made that determination, "we must separately determine whether the error was prejudicial." *State v. Stefaniak*, 900 P.2d 1094, 1096 (Utah Ct. App. 1995). "If there is a reasonable likelihood that, absent the error, there would have been a more favorable result for the defendant, then his conviction must be reversed." *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

¶34 Peraza argues that the improper admission of Expert's testimony constitutes reversible error because of "its [prejudicial] effect of bolstering [Child's] trial testimony." We agree.

¶35 In *State v. Rammel*, 721 P.2d 498 (Utah 1986), the district court admitted a detective's testimony stating that, "[b]ased on his experience interviewing several hundred criminal suspects," it was not "unusual for [a suspect] to lie" when first interrogated. *Id.* at 500. The district court determined that the detective "was an expert apparently qualified to testify on [a suspect's] capacity for telling the truth" as a witness in a criminal case. *Id.* Although our supreme court concluded that the testimony was inadmissible because it "did not relate to [the suspect-witness's] character for veracity, but instead invited the jury to draw inferences about [the suspect-witness's] character based upon [the detective's] past experience with other suspects," it held that, "in view of the other evidence supporting defendant's conviction," the admission of the detective's testimony was harmless. *Id.* at 500–01.

¶36 Here, unlike *Rammel*, there was no "other evidence supporting [the] conviction." *See id.* Instead, this case hinged on the jury's assessment of Child's credibility versus that of Peraza. *See Iorg*, 801 P.2d at 941–42. We agree that Expert's testimony was prejudicial because it was "clearly calculated to bolster [Child's] believability by assuring the jury no credibility problem was presented by the delay" in reporting the conduct or her subsequent recantations. *See id.*; *cf. State v. King*, 2010 UT App

396, ¶ 46, 248 P.3d 984 ("When Utah appellate courts reverse for improper bolstering, they usually do so not only where a case hinges on an alleged victim's credibility and there is no physical evidence, but also where the bolstering was done by an expert witness."(internal citation omitted)). Because there was "no[] other evidence [to support his] conviction beyond that which is tainted by" Expert's testimony, "we cannot say that absent the error there is not a reasonable likelihood of a more favorable result" to Peraza.[9] *See Iorg*, 801 P.2d at 942 (citation and internal quotation marks omitted).

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9. Peraza has suggested that Expert's testimony is the type of "anecdotal 'statistical' evidence" condemned by the Utah Supreme Court, *see State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990), and implies that, even if the testimony had been properly and timely disclosed, it should be excluded on its own merits. We recognize that our supreme court "has continued to condemn anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as witness veracity, as one of the categories of evidence leading to undue prejudice." *Id*. 801 P.2d at 941 (referencing *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989)); see *also State v. Jones*, 2015 UT 19, ¶ 50, 345 P.3d 1195 (explaining that the Utah Supreme Court has "condemned anecdotal statistical evidence when it concerns matters not susceptible to quantitative analysis," but determining that testimony "regarding the percentage of crimes linked to drug use" was a quantifiable metric (citation and internal quotation marks omitted)); *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986) ("Even where statistically valid probability evidence has been presented . . . courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies."). But because Peraza includes this argument only as part of the harmless error analysis, we are not asked to directly address whether the evidence is admissible even if it had been timely disclosed, and we therefore decline to do so.

¶37 We conclude the district court exceeded its discretion in admitting Expert's testimony at trial because the State failed to comply with Utah Code section 77-17-13 in that it did not provide an expert report or detailed information with respect to Expert's testimony or the scientific basis on which she would rely. Without this information the requirements under rule 702 were not met, and this error prejudiced Peraza's trial. We were not asked to determine whether—assuming that the testimony had been properly and timely disclosed—the Rule 702 requirements could be met with respect to Expert's testimony that "between four and 20 percent" of sex abuse victims recant their allegations or that the "majority" of these victims delay disclosures. On remand, if the State seeks to admit testimony with respect to delayed disclosure and recantations of sex abuse victims, from either Expert or any other expert witness, it must provide sufficient information, consistent with this opinion, to allow the court the opportunity to properly rule on its admissibility under rule 702.

II. Denial of the Motion to Continue

¶38 Peraza contends the district court abused its discretion when it denied his motion to continue the trial to allow him to adequately prepare to cross-examine the Expert and to procure an expert witness to rebut her testimony. He argues that this prejudiced his trial because had he been able to procure a rebuttal expert, there would have been a "reasonable likelihood that the outcome of the case would have been different." We agree.

¶39 As we have discussed, the party seeking to use an expert witness at trial must disclose certain information. Utah Code Ann. § 77-17-13 (LexisNexis 2017); *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). If the party "fails to substantially comply with [these] requirements . . . the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial . . . sufficient to allow

preparation to meet the testimony." Utah Code Ann. § 77-17-13(4)(a).

¶40 When we review the denial of an appellant's request for continuance, we consider four factors:

> (1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the *need* for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the appellant might have suffered harm as a result of the court's denial.

State v. Begishe, 937 P.2d 527, 530 (Utah Ct. App. 1997), *superseded on other grounds by statute as recognized in State v. Roberts*, 2018 UT App 9. We will address each factor in turn.

¶41 First, defense counsel diligently prepared the defense prior to trial. He timely moved to exclude Expert's testimony, highlighting the State's failure to comply with the notice requirements and emphasizing the risk of unfair prejudice to the defense when "'statistical evidence of matters not susceptible to quantitative analysis'" is presented at trial because it is "'uniquely subject to being used to distort the deliberative process and skew the trial's outcome.'" (Quoting *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989).) After the court determined it would admit Expert's testimony if necessary, counsel immediately contacted a social worker for assistance to prepare to cross-examine Expert. The social worker informed counsel that Peraza needed his own expert witness for rebuttal, and counsel requested an "emergency [telephone] conference" to request a continuance to allow sufficient time to procure an expert witness and to prepare for cross-examination. Considering all of these efforts, we conclude that defense counsel acted diligently.

¶42 Second, Peraza likely could have been adequately prepared to meet the expert testimony if the district court granted his motion to continue the trial. He would have had the opportunity to procure an expert witness to rebut Expert's generalized statement of the probability that a victim's recantation of an allegation does not mean that the abuse did not occur. This expert might also have been able to testify about whether the "effigy doll" treatment "could have led to the allegations becoming more violent and much more pronounced over the years."

¶43 Third, Peraza's "right to a fair trial outweighed any inconvenience to the court [and] the opposing party . . . that may have been caused by a continuance." *State v. Tolano*, 2001 UT App 37, ¶ 13, 19 P.3d 400. "Although inconvenience to the court and jury is one of the four factors considered, this court has specifically held that such an administrative concern is outweighed by the [defendant's] right to a fair trial." *Id.* (quotation simplified). The district court's concerns that Child needed to be considered and that it had to "draw a line somewhere" were outweighed by Peraza's right to a fair trial.

¶44 Finally, "the extent to which [Peraza] might have suffered harm as a result of the court's denial . . . is the most important among the factors." *Id.* ¶ 14 (quotation simplified). As this court explained in *Tolano*, because of the "difficult burden placed on defendants to establish prejudice in cases such as these," the burden is on the State to persuade the court there is no reasonable likelihood that, absent the error, the outcome would have been more favorable to the defendant. *Id.*

¶45 The State has not met that burden here. First, it argues that Peraza did not seek to continue the trial to procure an expert witness to rebut Expert's testimony but instead to discuss Child's therapy treatment. This mischaracterizes the type of expert witness Peraza sought to procure. Defense counsel argued that, based on Child's therapy treatments, he needed an expert witness to rebut Expert's testimony and to inform the jury that the type of treatment she received could have influenced her withdrawal of her recantations and that this treatment "might

have led to the allegations becoming much more violent and much more pronounced as the years have gone on." Essentially, he argued that this type of treatment has been shown to affect the description of the alleged abuse.

¶46 The State also argues that the motion's denial did not prevent Peraza from "'put[ting] forward the only defense he had'" or from putting on "'the only testimony potentially effective to his defense.'" (Quoting *United States v. Flynt*, 756 F.2d 1352, 1361–62 (9th Cir. 1985).) It argues that Peraza "was able to call [Child's] credibility into question by highlighting inconsistencies in her disclosures, including her recantation and then withdrawal of the recantation." But this argument is not persuasive and we find no support for it in Utah case law. *Compare Flynt*, 756 F.2d at 1361, *with State v. Torres-Garcia*, 2006 UT App 45, ¶¶ 18–22, 131 P.3d 292 (explaining that appellate courts "must determine if the circumstances [in the present case] are such that a continuance was necessary"). Instead, we consider the circumstances related to defense counsel's ability to sufficiently prepare his defense strategy and to effectively cross-examine the State's witnesses. *See Torres-Garcia*, 2006 UT App 45, ¶¶ 18–22.

¶47 Although Peraza's counsel was able to call a fact witness, the private investigator that recorded one of Child's recantations, he was nevertheless "sufficiently prejudiced by the denial of his . . . request for a continuance." *Id.* ¶ 22. Defense counsel was able to highlight inconsistencies in Child's testimony and was able to present recantations through the private investigator. But this evidence was undercut by Expert's testimony, which should not have been permitted because it "rehabilitated [Child's] credibility, without challenge." And the harm to Peraza's trial was compounded when he was unable to present an expert witness whose testimony, arguably, would have been given similar weight to Expert's testimony. *See id.* Although counsel was able to elicit some concessions from Expert, the jury would have benefited from the opportunity to weigh Expert's testimony with a second expert from the defense. Ultimately, Peraza's ability to put forward his best defense was materially hampered by the denial of the motion to continue to

procure his own rebuttal expert. Under these circumstances, the State has failed to meet its burden of persuading this court that Peraza was not prejudiced by the denial of his motion to continue.

¶48 We conclude the district court exceeded its discretion when it denied Peraza's motion to continue the trial to adequately prepare to cross-examine the Expert and to procure an expert witness to rebut her testimony.[10]

CONCLUSION

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

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10. Peraza also contends that the error in admitting Expert's testimony at trial, along with the erroneous denial of his motion to continue, constitutes grounds for reversal under the cumulative error doctrine because "[t]he close relationship between these two rulings and the effect they had upon the evidence presented" were prejudicial. Generally, a party will invoke the cumulative error doctrine where "errors committed during the course of [the] trial were harmless individually, [but] were cumulatively harmful." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993). Under this doctrine, we will reverse only if "the cumulative effect of the several errors undermines our confidence that a fair trial was had." *Id.* (quotation simplified). In this case, both errors were independently prejudicial and each warranted a reversal and new trial. Therefore, the cumulative error doctrine does not apply. But viewing the two harmful errors together, we are even more confident in our determination that Peraza was denied a fair trial.

the State's failure to comply with section 77-17-13. Neither of these errors was harmless. We therefore vacate Peraza's convictions and remand to the district court for a new trial consistent with this opinion.

Addendum B – State's Exhibit 2

* * *

INTERVIEW OF: KALANI CABELLERO

CONDUCTED BY: KEN BORNE

DATED: 10/28/13

* * *

OCTOBER 28, 2013

* * *

Q. (BY DETECTIVE BORNE:) Okay. Today is October 28th. It is approximately 6:55. My name is Ken Borne and I'm speaking with --

A. Kalani.

Q. What is your last name, Kalani?

A. Caballero.

Q. Spell that for me.

A. C-A-B-A-L-L-E-R-O.

Q. Okay. And how old are you?

A. Ten.

Q. Okay. What's your birthday?

A. October 18th.

Q. So you just turned 10. Okay. What year?

A. 2003.

Q. Okay. I need to ask you some questions about a complaint you made against your father, and in this context we're talking about -- I know you have your natural father but then you also have your father that's married to your mother.

His name is?

A. Robert.

Q. Okay. So we're going to talk about your father, Robert. All right -- [inaudible] talk to you about, you know, so do you understand that?

A. Uh-huh.

DETECTIVE BORNE: You have to hold that up. I'm talking to her. Okay.

Q. (BY DETECTIVE BORNE:) And don't just -- I need you to say "yes" or "no" okay. Okay? All right.

Okay. So what do you remember about this complaint?

A. I don't know.

Q. Okay. Do you remember a day when you were with your mom and you were picking your brother up at his practice? This would have been during the summer.

A. I didn't get that question.

Q. Do you remember a day last summer when you were with your mom at one of your brother's sports practices?

What sports does he play?

A. Football, yes.

Q. Okay. Do you remember your mother telling you that she and Robert had been arguing and that they might separate for a while?

A. Yes.

Q. What did you say to your mother when she told you that?

Do you remember?

A. A little bit.

Q. Well, tell me what you remember.

A. Yeah. I can barely [inaudible] remember [inaudible]

think of it.

Q. Okay. Well, what -- do you remember what you told her?

A. Kind of.

Q. Okay. Let me -- let me kind of narrow it so we know we're talking about the same thing. When she first told you that she was going to separate with your father, Robert, what was your reaction? Were you excited? Were you sad? Were you happy? Were you agree? How did you feel about that news?

A. Bad.

Q. You felt bad. Why?

A. Because they're my parents. I don't know who I'm going to stay with so... Yeah.

Q. Pardon? I didn't hear what you said.

A. So I kind of feel, like, mad because 'cause -- 'cause I don't know who I'm going to stay with and who am I going to trust mostly.

Q. Okay. After -- okay. So then you told your mother about some other things regarding experiences you had with Robert, do you remember telling her any of that?

A. Yes.

Q. Okay. What was -- without going into -- you don't have to go into a lot of detail. What was the general information you gave your mother about these experiences with Robert? What did you tell her?

A. I don't know.

Q. Do you remember?

A. Huh-uh.

Q. Let me -- I don't want to put words in your mouth and I don't know to lead the conversation, okay, but let me try and refresh your recollection. Did you have a conversation -- so first let me get it straight: When your mother told you that she and Robert might be separating, you said you were sad because then you didn't know where you would say with or who you would stay with.

Did you tell her that, "That's good, I'm glad because I don't want to stay with him"?

A. No.

Q. You don't remember telling her that?

A. No.

Q. Okay. Did you then tell her about some experiences you had that Robert -- with Robert that weren't appropriate?

A. Kind of.

Q. Okay. So you do remember telling her that. What is the general nature of those experiences?

Let me ask you this: Did he do, say, or touch you in ways that he shouldn't have?

A. No.

Q. No?

A. Huh-uh.

Q. You never told your mother that he did anything to you that wasn't appropriate? Do you know what the word "appropriate" means?

Did he ever -- did you ever tell your mother that Robert ever touched you or did anything to you that wasn't right, that you didn't want him to?

A. He didn't touch me but he just made me do it.

Q. Made you do what? Did he make you touch or do things to him that you didn't want to do?

A. No.

Q. No?

A. Huh-uh.

Q. Okay. Did you -- do you remember your mom telling -- going after this practice, after you had this conversation with your mom, do you remember going back to your grandpa's house?

A. Huh-uh. I don't remember.

Q. Okay. Do you remember going to a building -- a city building in Orem and do you remember talking to a woman there?

A. Yeah.

Q. Okay. What did you tell the woman at the city building?

A. I can't remember exactly the whole thing.

Q. Did you tell her that Robert had you do things with him that you didn't want to do and that weren't right?

A. Yes.
Q. And why did you tell her that?
A. Because I had to.
Q. Why did you have to?
A. Because that's why I was there for.
Q. And why did you have to -- was it because it was true or was it for some other reason?
A. I don't know.
Q. Well, did those things happen, or didn't they?
A. Didn't.
Q. They didn't happen?
A. Huh-uh.
Q. Then why did you tell the lady they did?
A. Because that little voice went in my head.
Q. A little voice went in your head?
A. Uh-huh.
Q. Did you tell the lady that the little voice had told you to tell her this?
A. No. I should asked her. She came our house and then I gave her the -- I gave the note to my mom and after she left and...
Q. What note?
A. The note that has -- that said the little voice on it.
Q. Who wrote the note?

A. Me.

Q. Okay. Let me ask you a specific question: Did anybody besides the little voice tell you to say these things about Robert?

A. No. No.

Q. So not your mom?

A. Huh-uh.

Q. How about about your grandpa?

A. Huh-uh.

SPEAKER: "Yes" and "no."

A. No.

Q. (BY DETECTIVE BORNE:) Okay. So it's just this little voice. And how often did the little voice tell you to say this?

A. The whole time.

Q. Okay. And how long did the little voice tell you to say this before you told your mom?

A. The day before.

Q. Did you ever tell your mom that Robert had you do things with him that weren't right when you were in kindergarten?

A. Huh?

Q. You were, like, 5 or 6. Okay.

SPEAKER: I don't think she understood that question.

THE COURT: Pardon?

SPEAKER: I don't think she understood that question.

Q. (BY DETECTIVE BORNE:) When you told your mom these things that the little voice told you the day of your brother's practice, was that the first time that you ever told her these things or had you told her those things before?

A. At his football practice.

Q. Just at the football practice. Had you ever said it to her before?

A. Huh-uh. No.

Q. Okay. The reason I'm asking is because in -- in the report that you talked to the lady, okay, you told her that this had been going on for, like, three years, since you were 6 years old.

A. Not 6.

Q. No. How long? How long had this had been going on?

A. I don't know.

Q. But had it been going on?

A. Huh-uh. No.

Q. Okay. You also told the lady that this had happened about six times a week that he would do this.

A. No. I said about three and but it wasn't --

Q. About three?

A. [inaudible].

Q. Okay. Okay. Well, let me -- let me kind of -- do you understand that the questions I'm asking you?

A. Kind of.

Q. Okay. Well, you need to tell me when you don't understand a question. Okay. Because here is the thing: Okay, I'm going to kind of review what we've said up to this point and you need to tell me if I've got it right. Okay? You understand that?

A. Yeah.

Q. Okay. So basically, you were with your mother when you went to your brother's football practice?

A. Yes.

Q. Your mother told you that she and Robert were having difficulties and that they might separate. You said that you were upset about that but yet in the conversation with the police you said that you were glad, okay, because then you didn't have to be with Robert and that your mother supposedly asked you why. And then you told her that Robert had been doing things for a couple of three years to you that he shouldn't be doing.

Did you -- do you remember that?

A. I don't remember what you just said.

Q. Okay.

A. No.

Q. The things that you told your mother, were these things that really happened or were these things that this little voice told you to say?

A. Little voice told me to say.
Q. So did they or did they not happen?
A. Yes.
Q. Did Robert --
A. Did not. Did not.
Q. -- touch you or did you touch Robert --
A. No.
Q. -- inappropriately or where you shouldn't have?
A. No. No.
Q. No. Okay. So when you told the lady at the city office, were the things you told her the truth or were they things that weren't true but what the little voice had told you to say?
A. Little voice told me to say.
Q. So were they true or not?
A. The little voice thing or the things he did that didn't happen?
Q. The things he did that didn't happen. So did he or did he not touch you?
A. Did he not. He didn't not.
Q. So he didn't.
A. Huh-uh, he didn't.
Q. Okay. So the things you told your mother then that day, those weren't true, those were just things the little voice told you to say?

A. Yes.

Q. Okay. All right. Well, it is about ten after 7:00. We are going to go ahead and conclude this part of the interview.

But I need to talk to you again for a minute, okay?

Thank you.

(Break in interview.)

Q. (BY DETECTIVE BORNE:) Okay. Today is October 28th. It is 7:15. My name is Ken Borne.

I'm speaking with?

A. Kalani Caballero.

Q. Okay. And we'd talked before. You had talked to me and said that a little voice had told you to say these things that you told both your mother and to -- did you talk to your grandfather about this, too?

After you talked to your mother, did your grandfather take you in and talk to you?

A. I forgot.

Q. Did he?

A. I don't know.

Q. Can't remember?

A. Huh-uh. Barely.

Q. Okay. You do remember talking though to a lady at the city?

A. Yes.

Q. Okay. And what you told me then was you said that what you told the lady at the city wasn't true, that it really didn't happen but it's something that a voice told you?

A. Yes.

Q. Okay. Tell me about the voice.

A. Evil.

Q. Okay. So was it, like, a voice you could hear actual words or what -- was it impressions or --

A. Like, it was from my head, like, where no one can hear it or, like, see it.

Q. Okay. Who was the voice? Did it have a name? Did it tell you who it was?

A. It's name was --

KALANI: Can I say his real name?

SPEAKER: Uh-huh.

A. Lucifer.

Q. (BY DETECTIVE BORNE:) Okay. And how do you know it was Lucifer? Did he say that's who his name was or did somebody tell you that's who it was?

A. I know his voice because he done it before to me.

Q. How often?

A. Like, he did it on -- to me for a test. He said "fail," and then I didn't fail.

Q. How long before this happened did this [inaudible] happen?

A. I think it was about, like, a month ago.

Q. So just recently?

A. Yeah. I told my mom --

Q. You didn't hear this voice?

A. Huh-uh. And then I told my mom.

Q. Just a month ago when you took the test?

A. Uh-huh. And then I told my mom.

Q. And then you told your mom. Then what did your mom tell you to do?

A. I don't know.

Q. Okay. Is there anything else you need to tell me?

A. No.

Q. No. Okay. Well, it's about 7:20 and we'll conclude this part of the interview.

(End of interview.)

Addendum C – Utah Rules of Evidence, Rule 702

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.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE.

Apart from its introductory clause, part (a) of the amended Rule recites verbatim Federal Rule 702 as it appeared before it was amended in 2000 to respond to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The 2007 amendment to the Rule added that introductory clause, along with parts (b) and (c). Unlike its predecessor, the amended rule does not incorporate the text of the Federal Rule. Although Utah law foreshadowed in many respects the developments in federal law that commenced with Daubert, the 2007 amendment preserves and clarifies differences between the Utah and federal approaches to expert testimony.

The amended rule embodies several general considerations. First, the rule is intended to be applied to all expert testimony. In this respect, the rule follows federal law as announced in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). Next, like its federal counterpart, Utah's rule assigns to trial judges a "gatekeeper" responsibility to screen out unreliable expert testimony. In performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. This degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability. The rational skeptic is receptive to any

plausible evidence that may bear on reliability. She is mindful that several principles, methods or techniques may be suitably reliable to merit admission into evidence for consideration by the trier of fact. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical", but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Finally, the gatekeeping trial judge must take care to direct her skepticism to the particular proposition that the expert testimony is offered to support. The Daubert court characterized this task as focusing on the “work at hand”. The practitioner should equally take care that the proffered expert testimony reliably addresses the “work at hand”, and that the foundation of reliability presented for it reflects that consideration.

Section (c) retains limited features of the traditional Frye test for expert testimony. Generally accepted principles and methods may be admitted based on judicial notice. The nature of the “work at hand” is especially important here. It might be important in some cases for an expert to educate the factfinder about general principles, without attempting to apply these principles to the specific facts of the case. The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The concept of general acceptance as used in section (c) is intended to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah’s Rule 702 jurisprudence. The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means.

Section (b) adopts the three general categories of inquiry for expert testimony contained in the federal rule. Unlike the federal rule, however, the Utah rule notes that the proponent of the testimony is required to make only a “threshold” showing. That “threshold” requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile - or choose between - the different opinions. As such, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert, and it is not contemplated that evidentiary hearings will be routinely required in order for the trial judge to fulfill his role as a rationally skeptical gatekeeper. In the typical case, admissibility under the rule may be determined based on affidavits, expert reports prepared pursuant to Utah R.Civ.P. 26, deposition testimony and memoranda of counsel.

Addendum D – Utah Code §77-17-13

77-17-13 Expert testimony generally -- Notice requirements.

(1)
(a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.
(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:
(i) a copy of the expert's report, if one exists; or
(ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
(iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.
(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.

(2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.

(3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).

(4)
(a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.
(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.

(5)
(a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.
(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

(6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Amended by Chapter 290, 2003 General Session

Addendum E – Appellant's Brief

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. ROBERT PERAZA, Defendant / Appellant.	Case No: 20160302-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM CONVICTIONS OF FOUR COUNTS OF SODOMY ON A CHILD EACH FIRST DEGREE FELONIES,
BEFORE THE HONORABLE DAROLD McDADE

SEAN REYES Utah Attorney General **Appeals Division** 160 East 300 South, Sixth Floor P.O. Box 140854 Salt Lake City, UT 84114 Counsel for Appellee	**DOUGLAS J. THOMPSON (12690)** Utah County Public Defender Assoc. Appeals Division 51 South University Ave., Suite 206 Provo, UT 84601 Telephone: (801) 852-1070 Counsel for Appellant

Oral Argument Requested
Appellant is currently incarcerated at the Utah State Prison

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JURISDICTION OF THE UTAH COURT OF APPEALS

The Court of Appeals has appellate jurisdiction in this matter pursuant to the provisions of Utah Code §78A-4-103(2)(j), as a case transferred to the Court of Appeals from the Utah Supreme Court.

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred by allowing the State to present opinion testimony of Chelsea Smith. The court concluded "according to the rules of evidence, this person would meet the criteria for being an expert, even -- but again, I -- none of us can really tell until we get to the testimony -- … whether or not she's going to be needed." R.548. "A decision to admit or exclude expert testimony is left to the discretion of the trial court, and that decision will not be reversed unless it constitutes an abuse of discretion." *State v. Holm,* 2006 UT 31,

¶ 89, 137 P.3d 726 (citation omitted). "Our review of the district court's exercise of its discretion includes review to ensure that no mistakes of law affected a lower court's use of its discretion." *Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.,* 2010 UT 59, ¶ 5, 242 P.3d 762 (citation and internal quotation marks omitted). Mistakes of law include errors in interpreting rules of evidence because such errors are not "within the limits of reasonability". *Id.* at ¶5 (*citing State v. Barrett*, 2005 UT 88, ¶17, 127 P.3d 682).

This issue was preserved by Peraza's renewed objection to the expert witness evidence. Peraza initially objected in writing to the State's first notice of expert testimony, which the State later withdrew. R.190, 201. After the State later gave notice of intent to call Chelsea Smith, the defense asked to have it's earlier "objection applied to this expert as well". R.533.

2. Whether the trial court erred when it denied Peraza's request to continue the trial. "A trial court's decision to grant a continuance is a matter of discretion, and [this Court] review[s] the decision for abuse of that discretion." *State v. Taylor*, 2005 UT 40, ¶8, 116 P.3d 360. "An abuse of discretion occurs when a trial court denies a continuance and the resulting prejudice affects the substantial rights of the defendant, such that a 'review of the record persuades the court that without the error there was 'a reasonable likelihood of a more favorable result for the defendant.'" *Taylor*, 2005 UT 40, ¶8 (*quoting State v. Knight*, 734 P.2d 913, 919 (Utah 1987)).

This issue was preserved by Peraza's motion to continue trial in order to

investigate and prepare for the State's expert witness. R.589-91.

3. Whether trial counsel provided ineffective assistance of counsel for failing to investigate and present expert testimony related to the State's evidence about the complaining witness's multiple statements, her therapy records, and the State expert testimony. Further, whether trial counsel provided ineffective assistance of counsel for failing to investigate and consult with a medical expert related to the complaining witness's physical examination following disclosure of alleged sexual abuse. Claims of ineffective assistance of counsel raised for the first time on appeal are reviewed for correctness. *State v. Vos*, 2007 UT App 215, ¶9, 164 P.3d 1258.[1]

4. Whether the trial court erred providing the DVD of the CJC interview to the jurors during deliberations. This claim depends upon an interpretation of Utah Rule of Criminal Procedure 17, which is reviewed on appeal for correctness. *State v. Cruz*, 2016 UT App 234, ¶34 (*citing State v. Bosh*, 2011 UT 60, ¶5, 266 P.3d 788). Peraza preserved this claim when he objected to the jury having access to the CJC video during deliberations. R.814.

CONTROLLING STATUTORY PROVISIONS

All controlling statutory provisions are set forth in full in the Addenda.

[1] Because some facts supporting his ineffective assistance of counsel (IAC) claims are not currently within the record on appeal, Peraza has simultaneously filed a Motion for Remand Pursuant to Rule 23B of the Utah Rules of Appellate Procedure, to supplement the record with facts in support these claims. If, and when, the remand takes place Peraza will seek to file a supplemental brief with the additional evidence and argument.

STATEMENT OF THE CASE

A. Nature of the Case

Defendant, Robert Peraza, appeals from the judgment, sentence, and commitment on four count of Sodomy Upon a Child, each a first degree felony.[2]

B. Trial Court Proceedings and Disposition

On August 15, 2013, Robert Peraza was charged by information with four (4) counts of SODOMY UPON A CHILD, first degree felonies, and one (1) count of AGGRAVATED SEXUAL ABUSE OF A CHILD, a first degree felony. R.001-02.

The case was assigned to Judge McDade who held a preliminary hearing on September 4, 2014. At the preliminary hearing the State submitted a video recorded interview of the complaining witness (K.C.) at the Children's Justice Center (CJC). R.091. During the CJC interview K.C. describes multiple incidents of Peraza's misconduct, some involving his causing K.C. to touch his penis with her hands, and others where Peraza caused K.C. to perform oral sex upon him. See State's Exhibit 1.[3] The trial court found sufficient evidence to bind over for trial. R.152.

On November 24, 2014 the trial court held a hearing at which the parties

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[2] Peraza was also charged and bound-over on Count 5 for Aggravated Sexual Abuse of a Child, but the State moved to dismiss that charge at trial after the close of evidence. R.1199.

[3] It should also be noted that the Information, which was not amended, charges four counts of Sodomy upon a Child pursuant to Utah Code §76-5-403.1. The probable cause statement within the Information and describes four instances of oral sodomy. Nothing the case at that point suggested Peraza would need to confront allegations of anal sodomy or vaginal intercourse.

disclosed that no resolution had been reached and the defense asked for a jury trial. R.450. The Court scheduled trial for March 17-19, 2015. R.451. On March 2, 2015 the parties appeared at a pre-trial conference at which they discussed Peraza's written motion to continue the trial on the basis that facts had arisen "requiring the exploration by the defense into a memory expert", Peraza needed access to therapy records, and to consult with an expert in relation to the State's proposed expert. R.164-167. At the hearing, counsel for the State acknowledged that additional evidence was still being gathered (K.C. had disclosed additional abuse by "another suspect" and had been interviewed again in California) so the State did "not want to go forward on the case…" and would not object to the continuance "on those grounds." R.456. The trial court noted that the "case needs to get moving" and scheduled a pretrial hearing to look for another trial date. R.458-59.

At that pretrial hearing, April 27, 2015, the defense asserted that a new trial could not be set because the State had still not provided the additional discovery (new California interview) and because the matter of disclosing K.C.'s therapy records had not been resolved. R.466-467. The State responded that it was in the process of reviewing the new interview evidence and would provide it soon. R.467-468. The court wondered why, in a case that had already been set for trial, the evidence had not already been provided, to which the State responded that the new evidence and the therapy records had only recently come to light. R.468-469.

On June 1, 2015 the parties stipulated to Peraza's Rule 14(b) request for a subpoena and in-camera review of K.C's therapy records. R.478-479. The trial court issued its subpoena duces tecum for the therapy records on June 19, 2015. R.207-08. At the July 13, 2015 status conference the parties discussed the progress of the 14(b) subpoena, but at that point the court had not yet received the records. R.487. At the follow-up, August 10, 2015, hearing the court had still not seen any records from K.C.'s therapist. R.494. The parties expected the records to be provided shortly so they set a new trial for October 27-29, 2015. R.495-497.

At the August 24, 205 status conference the trial court informed the parties it had received the therapy records and was waiting for defense counsel to file something about what information in the therapy records would be relevant. R.504-06. On September 23, 2015 defense counsel filed that notice (R.217-18) and at the September 28, 2015 reviewing hearing the court informed the parties it intended to provide the redacted records "by the end of the week". R512. Peraza cannot find evidence in the record of when the redacted therapy records were delivered by the court.

On October 19, 2015 defense counsel "ask[ed] to reset the trial" because it had learned of a recorded recantation by K.C. in the possession of a private investigator, and because, based on the therapy records, defense counsel believed it was necessary to secure Dr. Matoon as a fact witness "for impeachment purposes." R.1330-31. The State was unaware of the recantation but did admit

that based on the records the "therapist is kind of a big deal". R.1331. The State wanted to "look at re-filing… expert notice". R.1332. The State thought it would "be better to continue the trial." R.1331. The court was concerned about further delay but noted that it didn't "know that [it] ha[d] any choice", struck the trial, and set a new trial for February 9-11, 2016. R.1336, 1338.

On January 8, 2016 (32 days before trial) the State filed notice of expert testimony for Chelsea Smith. R.282-83. The State intended to present evidence of the "methodology and science related to forensic interviewing of suspected child sex abuse victims; science and research regarding child disclosures of sex abuse including identified factors related to delayed, partial and gradual disclosures and recantation." R.283.

By the January 25, 2016 pretrial conference the parties had agreed, because they were having trouble subpoenaing Dr. Matoon out-of-state, that Peraza could admit K.C.'s therapy records if her testimony was inconsistent with her statements to Dr. Matoon. R.519. According to counsel, "With that [stipulation] in mind, the defense is ready to go to trial." R.520.

On January 28, 2016 the court held oral argument on Peraza's objection to the State notice of Chelsea Smith as an expert witness. Trial counsel objected claiming that the expert notice did not include an adequate report so the defense did not "really know exactly what this expert would be testifying to", that the list of articles cited within the notice were not explained how they would correspond to Smith's proposed opinion, and that the proposed testimony was not supported

by any "actual statistical basis". R.533-36. The State responded by claiming that its notice of expert witness for Dr. Matoon was "a little bit different" from its notice for Chelsea Smith because Smith would be called "to rebut the evidence that [the prosecutor was] sure will come in at trial… that this child has changed her testimony over time, at one point that there was a recantation". R.536-37. The State intended Smith to "explain as an expert that the science behind child -- disclosures of children suspected of child abuse, recognizes that there are times where children do not make a full disclosure initially, and that it's a process." R.538. In support of that position the State cited to a 2015 Utah Supreme Court case where the Court apparently recognized that "[c]ommon experience with rape and child sexual abuse cases indicates that it is not unusual for a victim to recant… or change their stories over time." R.538.[4]

Defense counsel argued that the State's notice was inadequate because it did not provide "a thorough enough written explanation of the expert's proposed testimony" such that the defense did not "know which [studies] she's specifically

[4] Peraza assumes the prosecutor was referring to *State v. Schmidt*, 2015 UT 1204, ¶37, 356 P.3d 1204 (an appeal of a magistrate's decision to dismiss after a preliminary hearing where the Court found the magistrate exceeded its discretion in disregarding the contradictory testimony of the complaining witness because "there is at least a reasonable inference from the evidence that the victim was telling the truth"). Peraza would note that the analysis and holding in *Schmidt* has nothing whatsoever to do with the admissibility of expert testimony on the behavior of complaining witnesses being consistent with abuse. The Court's mention of "common experience" cannot be interpreted as an indication that such testimony is admissible under the rules of evidence. Defense counsel accurately pointed out that *Schmidt* "was a case analyzing whether it was proper for a case to have been dismissed at the preliminary hearing" so the Court was "talking about a different standard". R.539.

relying on" and would "have no ability to cross examine her without having more information". R.548-49.

The trial court stated, "according to the rules of evidence, this person would meet the criteria for being an expert…" R.548. After further discussion, the court denied Peraza's objection to the State's proposed expert witness noting she "qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550.

Later that same day, January 28, 2015, the court held a phone conference with the parties. R.589. Defense counsel informed the court that, based on a conversation with the "director of the mental health and social work and mitigation department at the Salt Lake legal defenders", the defense needed an expert to review K.C.'s therapy records. R.590. The defense, after acknowledging the age of the case and denying any intent to delay, requested a continuance of the trial to secure an expert. R.591. The State was "unhappy" with the prospect of a continuance "but at the same time, I understand the basis of what they're asking for." R.591-92. The court decided it had "to draw the line somewhere" and, because "this information could've been determined much, much longer -- much -- I mean, this is -- can't be something that could come up on the eve of trial", it denied the motion. R.592. The court "recognize[d] that this might be something that could be used later, but [felt] like this is too late in the game, especially this being the third time that we've set a trial. We have an obligation as well to this victim -- alleged victim, that I have to consider. And so, weighing all things and

hearing what I'm hearing today, I see no reason why this trial should not go here in 10 days, whatever it might be." R.592.

The case preceded to trial on February 9, 2016. R.599. The State called Nina Peraza (Peraza's wife and K.C.'s mother) as a witness. During her testimony Nina testified that K.C. told her she wasn't telling the truth and that Satan had told her to say these things. R.996. K.C. wrote a note to that effect. R.997. Nina testified that she contacted Peraza's attorney and eventually took K.C. to an interview with a private investigator where K.C. again recanted her allegations. R.989. After the State closed its case the defense called Ken Bourne, the private investigator who testified that he had interviewed K.C., that she had recanted several times, and that he recorded the interview from which a transcript was made. R.1109-11. On rebuttal the State called Chelsea Smith and the defense objected claiming, if she was there to explain or rebut the evidence of recantation, that she was not a rebuttal witness because that testimony came during the State's case in chief from the State's witness, Nina Peraza. R.1133. The court overruled the objection and allowed Smith to testify in rebuttal. R.1133-34.

Prior to giving the jury the closing instructions, the State moved to dismiss Count 5 because the prosecutor wanted to "focus more on the evidence that I think is most important, to dismiss that charge and simplify the instructions to the jury…" R.1199. The court granted the motion and Count 5 was dismissed. R.1200.

During deliberations, the jury submitted a question asking the court to provide a transcript or video of Peraza's police interrogation. R.1289. The parties discussed it and the court ruled that it would instruct the jury that "[a]ll the evidence has been submitted that you need to use in making your decision." R.1292.[5]

Peraza was convicted on four counts of Sodomy on a Child. R.1292, 367-68. At sentencing the court ordered Peraza to serve 25 years-to-life on each of the four counts, each to run concurrent. R.1318. Peraza filed a timely notice of appeal. R.392.

STATEMENT OF RELEVANT FACTS

Testimony of George Scott –

K.C. (the complaining witness) is George Scott's granddaughter. R.782. Scott's daughter, Nina Peraza, is K.C.s mother. R.783. Robert and Nina Peraza "lived a number of years in [his] home." R.785. "There were times that Nina and her family -- they lived with [Scott] largely since [he] moved there [2005], but there were times that they moved out and times -- and then moved back again." R.795. Scott believed K.C. lived with her family in two other apartments/homes in Provo, and one place in California, over the years. R.800-01. Most recently, K.C. and her two brothers had moved back in with Scott, and Nina moved in a few days later. R.795. Peraza did not move in with them. R.795.

[5] The record does not contain any evidence of exactly what or how the court provided this additional instruction to the jury.

One day in August of 2013 Scott was in his yard when Nina and K.C. drove into the driveway. R.786. Scott spoke with Nina after K.C. ran into the house. R.786. Scott thought "something appeared to be off." R.806. After speaking with Nina, Scott went in the house to speak with K.C. who appeared upset. R.789. The police were then called, who provided Scott and Nina with some forms to write statements. R.791-92.

After Nina was informed that Peraza would be arrested, Scott "started perceiving quite a noticeable change in" Nina. R.1034. Nina told Scott she had invested eight years in her marriage and she was going to lose those years. R.1035. Scott believed Nina "was very concerned about the impact of it on her family, on her becoming a single mother." R.1041.

Scott's opinion of K.C.'s reputation for truthfulness is that she "lied at times to protect herself" but, as a "general rule", "she was an honest child." R.793.

Testimony of Carly Echols -

Carly Echols works for the Division of Child and Family Services at the Children's Justice Center (CJC). R.812. Echols conducted an interview with K.C. on August 9, 2013 at the CJC, which was audio and video recorded. R.813-17, State's Exhibit 1.

Echols was trained to utilize the "Tom Lyon's Forensic Interview Protocol" to solicit the child's "narrative or their story of what happened". R.818. The "protocol is based upon using open ended questions… allowing the child to essentially access that memory and free recall all of the information about what

happened." R.819. Interviewers ask "age appropriate" questions and set ground rules to "assess the child's ability to understand, [and] to see how the child communicates". R.819-20.

Echols interviewed K.C. a second time at K.C.'s school September 18, 2013. R.826, 832. The second interview was conducted "to investigate whether [K.C.] had been tampered with". R833. K.C. told Echols that "the attorney had told her that her mom couldn't talk to her about it, and that hadn't talked about it." R.833.

Testimony of K.C. -

At the time of trial K.C. was 12 years old and in 6th grade. R.835-36. K.C. lived with Peraza for "a couple of years" but "stayed with [her] grandpa most of [her] whole life." R.840. Peraza and her mother, Nina, have been together most of her life but she is not sure whether they were married. R.840-41. Peraza and Nina had two children together, K.C.'s younger brothers, R.P. and A.P. R.841.

On more than one occasion something happened between K.C. and Peraza that "made [K.C.] feel uncomfortable." R.842. "He -- he made me do things that I didn't like, and he'd get -- he got mad at me a lot, and he used to hurt me." R.842.

The first instance K.C. recalled was when they were living in an apartment, Peraza woke her up late at night and showed K.C. "his body parts" and made her touch his penis. R.843-44. It was winter, they had the heater on, and K.C. was "sleeping in a long sleeve". R.846. Peraza woke K.C. up, began comforting her,

began taking his clothes off, and then "started taking off [her] clothes". R.846. Peraza showed K.C. "his body parts and touch[ed]" her. R.846.

This "happened a couple of nights" and "it started going where he made me touch him." R.846. He made K.C. touch him "[o]n his penis." R.846. "He made me do an up and down gesture on his penis." R.847. Peraza's penis "got hard" and "then white stuff started coming out." R.848. K.C. "felt violated and grossed out." R.848.

K.C. remembered that her mother "could've been at work or asleep" while this was happening because she worked for "old people" during the day and night. R.848. Peraza would watch K.C. while Nina was away. R.849. Her younger brother, R.P., who would have been three or four at the time "would've been playing his Xbox or playing outside with the dog." R.849.

This happened "every week" until K.C. was seven, then "it started to change." R.849-50. Then Peraza made K.C. "do it longer, and put my mouth on his penis". R.850. "He would grab my hair and make me go up and down, like, it felt like he was ripping my hair up". R.850. The "white stuff" would go "[i]n my mouth or on my face" and Peraza would say, "do you want some milk?" R.850. This happened in other places, though not at Scott's house. R.851. Once, when K.C. was seven, it occurred in the car while Nina and K.C.'s brothers were in a Denny's restaurant. R.851.

The nature of the abuse changed several times. Initially it began with having K.C. touch Peraza's penis with her hands. R.853. One of these instances

happened on the bed at Peraza's mother's house. R.936.

Then, after "[a] couple months" it changed to having K.C. use her mouth on Peraza's penis. R.853. One time while K.C.'s mouth was on Peraza's penis her "little brother came in, and then [Peraza] said that we were playing hide and seek…" R.937-38.

Then, a month later, "things started to happen with [K.C.'s] bum". R.854. The first incident "involving your butt" happened when K.C. was five years old, at her "very first house" in Provo. R.955-57.[6] Peraza would "put a sock in my mouth so I wouldn't scream." R.852, 928. "He put some stuff on my butt and stick his penis in me." R.852. During these incidents, Peraza was behind K.C. and she was "[a]t a 90-degree angle on the bed." R.932. Trial was the first time K.C. told anyone about Peraza putting a sock in her mouth. R.968. Trial was the first time K.C. told anyone about using "weird stuff" to make penetration easier. R.968.

Then, "[a] year after he started sticking his penis in my butt", he "stuck his penis in my vagina." R.853. This happened two or three times, standing up, face to face. R.933. This happened "[a] long time", or a "couple months", before her interview at the CJC. R.934.

Peraza would talk to K.C. "about not telling anyone while this abuse was going on" "[a]lmost every time." R.926. "Sometimes he would push me to do more, and it hurt, and I said, 'I don't want to do this', like five times, and then he

[6] But see R.957-59 (K.C. recalls telling "Courtney that the first time anything involving your butt took place was on your -- when you were eight years old", on her birthday, with family members gathered at the house).

said, 'I don't care'." R.927-28. One time K.C. told Peraza she didn't "want to, he -- and then he had choked me and lifted me off the floor and threw me." R.928. The abuse stopped when K.C. was nine and Peraza moved in with his mother, before K.C. reported it to Nina. R.853.

Once, when she was eight, K.C. saw Peraza and Nina engaging in sex when she has slept in their room, she "woke up to them doing that, and then I had tried to ignore it, I didn't want to leave the room because they would've known that I was awake the whole time." R.929, 962. On two other occasions K.C. "walked in the door when I thought my brothers were in there..., so I walked in there and then I saw him naked." R.930.

K.C. observed a pornographic video which was playing on the TV. She watched about 30 seconds and then went upstairs. R.938. It was a movie involving a man and a woman doing sexual things. R.960. K.C. went upstairs to find Peraza was upstairs asleep. R.961. She woke Peraza up, and questioned him about the video, but he said "nothing, nothing, nothing." R.961. Peraza was embarrassed that he had forgotten to turn the video off. R.961. Another time, Peraza was on the computer watching videos involving sex, "[t]wo guys, four girls", and he wanted K.C. "to do what they were doing on the computer." R.939.

K.C. reported being abused by Peraza to her mother, Nina, "[o]nly twice." R.855. "I told my mom when I was five or six. She believed me for a couple minutes, and then she turned away from it." R.855. K.C. said "Daddy's really hurting me in a way that I don't like it." R.855. Then again, when K.C. was seven,

she told Nina, and K.C. thinks Nina told Scott because they fought about Nina K.C. R.855. K.C. told her mother "that 'he's sticking his pee-pee in me, and I -- it hurts, and I don't like it.'" R.855.

K.C. was interviewed by Echols at the CJC on August 9, 2013. R.813, see State's Exhibit 1. During the interview K.C. told Echols she promised her grandmother she wouldn't do these things with Peraza on Sundays. R.922. K.C. felt like it "was her fault because I let him do it…" R.922. K.C. also told Echols that nothing like this has happened with anybody else, other than Peraza. R.923. Echols asked K.C. to describe Peraza's penis and K.C. told her it was just like my mom said." R.962.[7] K.C. had asked her mother about Peraza's penis because she was curious about it. R.962-63. K.C didn't tell Echols about "more abuse with [her] dad that involved things like [her] butt and [her] vagina" because she "was afraid." R.926, 964 (Echols asked "numerous times if it had happened in any other way" and K.C. told her "nothing else").[8]

After the CJC K.C. spoke with Nina and told her that she missed Peraza, and that she wanted to live with him again. R.945. Nina was confused about why and asked K.C. whether the things she had said about Peraza actually happened. R.946. K.C. told Nina that they did not happen. R.946. K.C. acknowledged that these things did not happen "all on [her] own". R.946.

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[7] See State's Exhibit 1 at 36:15 (Q: Tell me what his pee-pee looks like. A: It was like my mom said.").
[8] See State's Exhibit 1 at 35:57 (Q: Has your dad ever touched *you* anywhere on your body? A: No.).

A couple months after she was first interviewed at the CJC K.C.'s mother took her to an appointment to talk with a private investigator. R.917, 920-21. K.C. told the investigator she felt bad that Nina and Peraza might be getting divorced. R.941. She wasn't sure who she would stay with, Peraza or Nina. R.942. The investigator asked K.C. about Peraza having her touch him and she said he had not done that. R.942. She told the investigator Peraza didn't touch her and she didn't touch Peraza. R.942. The investigator asked K.C. about what she said in her CJC interview she said she said those things because she "had to". R.943, see State's Exhibit 2 at 6-7.[9] K.C. told the investigator that an evil voice in her head told her what to say. R.943. Nobody, but the little voice, told her what to say. R.944. K.C. told the investigator she had never told Nina about the abuse before. R.944. The investigator asked K.C. many times about the alleged abuse and every time she said they did not happen. R.944.

At trial K.C. said her statement to the investigator "wasn't true, because I didn't want our family to get split up." R.915. "And I had lied and said that there was a little voice in my head that told me to lie." R.915.

K.C. has talked a lot about these incidents with her counselor, Dr. Matoon.

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[9] "Q. Did you tell her that Robert had you do things with him that you didn't want to do and that weren't right? A. Yes. Q. And why did you tell her that? A. Because I had to. Q. Why did you have to? A. Because that's why I was there for. Q. And why did you have to -- was it because it was true or was it for some other reason? A. I don't know. Q. Well, did those things happen, or didn't they? A. Didn't. Q. They didn't happen? A. Huh-uh. Q. Then why did you tell the lady they did? A. Because that little voice went in my head. Q. A little voice went in your head? A. Uh-huh."

R.844. K.C. didn't tell Dr. Matoon everything about the abuse when they first met because she didn't know Dr. Matoon, "[s]he felt like a stranger". R.975. During her sessions with Dr. Matoon, K.C. made dolls of Peraza and Giovanni, which she killed and ran over with a car. R.959. K.C. made a doll of Cassie and killed it too. R.960. K.C. learned the words penis and vagina from her grandma her therapist who "had been preparing" her. R.925.

After she moved to California, K.C. would call her mother on the phone. R.970. K.C. "kept telling [Nina] in those conversations that [Peraza] didn't do anything to" K.C. R.970-71. K.C. told her mother that nothing happened with Peraza but that Giovanni had done things to her. R.972.

K.C. was interviewed again, in California, by "Courtney" and asked about Giovanni. R.954. K.C. said that Giovanni's girlfriend, Cassie, had heard K.C. and Giovanni "doing things". R.954. Cassie had also heard when Peraza "was doing things to you on your butt". R.954-55. K.C. told Courtney that Giovanni had kissed her but "nothing else". R.955. K.C. told Courtney that Cassie had been mad at K.C. and had accused K.C. of begging Giovanni to abuse her. R.959.[10]

Testimony of Nina Peraza –

Nina Peraza is K.C.'s mother and Peraza's wife. R.983. On the day of the football game, Nina and Peraza had been involved in a physical fight. R.985. Nina assaulted Peraza. R.1018. Then Nina took K.C. to the football game and she

[10] But see Defense Exhibit 1 at 34 (K.C. tells Courtney Lee that Giovanni's girlfriend said K.C. was begging *Peraza* to "do that" on her birthday).

explained she and Peraza would not be staying together. R.985. That was the first time Nina had "heard [K.C.] claim that Robert had abused her". R.985, 1002.[11] Nina came home and immediately told her dad as much as she could "get out without… dry heaving". R.1004. Nina then spoke to the police, and cooperated with having K.C. interviewed at the CJC. R.1004. At that time, Nina believed what K.C. had said. R.1004-05. She thought there was no way K.C could make something like that up. R.1005.

Nina took K.C. to the CJC, and took her for a physical examination. R.1005. The doctor told Nina that K.C.'s hymen was still intact, and that she had no injuries. R.1005.

Nina was conflicted, she did not know whether to believe K.C. R.987. While Peraza was in jail K.C. "would cry for Daddy, she'd ask for Daddy as we would go visit Daddy at the jail. She'd want to go, but she couldn't because they said she couldn't go… It was just always Daddy, and she was crying for him." R.1007. Nina sensed that something was wrong with K.C. R.996-97.

Eventually, Nina asked K.C. whether these things really happened and K.C. said they didn't happen. R.1007. Nina remembered that K.C. "wrote on a piece of paper what had happened, and she said that it was -- that she wasn't telling the truth, that it was Satan that told her." R.996. Nina was confused and hurt. R.1007. Nina considered K.C.'s history of getting in trouble as school for talking

[11] K.C. did not tell Nina about these kinds of things in kindergarten. Nina is confident that if her daughter had said something like that before she would remember, she would be traumatized and sickened. R.1002-03.

with other children about sex. R.1010-11. She considered times when K.C. would initially blame the boys in the neighborhood for kissing and then later say they didn't do it. R.1011. Nina was concerned that her daughter had a character for fabricating charges against people. R.1012-13. Eventually, as time went on and Nina considered what she knew about K.C., and the history, and her husband she concluded K.C.'s allegations were not true. R.988-89.

Nina arranged with Peraza's attorney for K.C. to meet with a private investigator for an interview. R.990. Nina took K.C. "to the private investigator only after she recanted to me." R.995. Nina did not call the police to report that K.C. had recanted her allegations. R.990-91. Nina called Peraza's attorney, not the police or DCFS, because the attorney "was on our side, so… I knew that he was the one that need to know." R.996. Nina assumed the attorney "would then pass it on to the prosecution." R.1018.

K.C. continued to live with Nina for "about a year after everything came out" but then, based on a court's order, K.C. moved to California. R.992-93. After K.C. moved to California Nina learned from K.C.'s biological father that K.C. had claimed Peraza had sodomized her anally. R.1013. Nina wondered why K.C. would say these things when Nina knew there had not been any injuries. R.1013-14.

Nina recalls several times when K.C. walked in on Nina and Peraza having sex. R.1016. In one instance, she observed Nina performing oral sex and later K.C. asked about it, about why Nina was making "those sounds." R.1016. K.C. also

asked Nina about pornography. R.1017. Nina recalls that K.C. might have had access to the pornography on Nina and Peraza's iPad's and phones. R.1017.

Nina recalled the apartment where K.C. alleged the allegations occurred. R.1019. She wasn't working while they lived there because she was pregnant. R.1019. Robert was working and for a time he was gone to New York to work. R.1020. It was a small apartment, all on one floor, with thin walls. R.1019. If "something was being done in another room against someone's will" Nina would have heard it. R.1020. She would check on her kids all the time at night. R.1020.

Testimony of Matt Pedersen –

Matt Pedersen was the lead detective on this case. R.1042. Pedersen interviewed Peraza. R.1045. Pedersen informed Peraza about K.C.'s allegations of "oral sodomy and things like ejaculation of semen" and Peraza initially offered a denial, then blamed others, and "then later on in the discussions, he talked about, if he was possibly drunk, it could have happened or may have happened." R.1046. Peraza said these allegations were made up or coached by his wife (Nina) or by the grandfather (Scott). R.1046. Peraza also said K.C. may have walked in on him while he was viewing pornography or she may have viewed it herself. R.1047. Peraza told Pedersen that K.C. "walked in on his wife giving him oral sex" numerous times, and that she observed them having sex, including in the shower. R.1047.

Pedersen asked Peraza about his alcohol use and posed a hypothetical about the possibility that something happened with K.C. while he was drunk or

passed out. R.1048. Peraza stated that "if he was really drunk he could do that [mistake K.C. for his wife], he could imagine that." R.1048. Peraza described a situation where he "drank and passed out on the couch" and someone was shaking him. R.1049. Peraza "assumed it was his wife, so he grabbed the head of that person, guided it to his genital area, there was oral sex… he thanked them, and fell back asleep." R.1049-50. The next day Peraza thanked his wife for the act and she didn't know what he was talking about. R.1050. Peraza admitted he thought "it could've been [K.C.]." R.1050.

When Pedersen asked Peraza about how K.C. might know about sexual matters Peraza suggested she may have walked in on him while he was watching pornography, while he was having sex, while he was in the shower, and when he was passed out and naked. R.1057, 1059-60. The stipulated that Peraza's statements were made in the form of instances where "it could've happened." R.1075.

Testimony of Ken Bourne –

Ken Bourne is an independent private investigator who was retained by original defense counsel to help investigate this case. R.1105, 1108. Bourne interviewed K.C. R.1109. Numerous times during that interview K.C. recanted the allegations she had made against Peraza. R.1110-11. See State's Exhibit 2.

Rebuttal Testimony of Chelsea Smith –

Chelsea Smith works at the Utah County CJC as a forensic interviewer. R.1131. Smith has a bachelor's degree in "marriage, family, human development"

and a master's degree in social work. R.1132. She received training in "the Tom Lyons 10 step" protocol, which is used in Utah County. R.1132. She has gone to "advanced forensic interview training, and extended forensic interview training" and other conferences and trainings reviewing forensic interviewing. R.1132. Smith did not interview or make an assessment on K.C., she did not read the transcript of Bourne's interview of K.C, and she did not review any medical records or counselling records. R.1148, 1154.

There is more scientific research relating to interviewing children than there used to be. R.1134. The research suggests the "kind of question types that we use in forensic interviews." R.1134. Smith opined that Bourne's questioning of K.C., based on what she heard in court (because she had not seen the transcript of the interview), was that "we don't use yes, no questions." R.1135. Smith described a system of questioning that encourages the child to use their own words. R.1135. Interviewers should use very simple language, and one question at a time. R.1136.

Smith has performed "[a]round 1,900" forensic interviews. R.1141. In her experience, the fact that a "child recants does not mean that it did not occur." R.1142. The research about the frequency of recantations "varies between four percent to 20 percent of cases, so it's not something that's typical, but it's not unheard of that it does happen." R.1141-42. "Sometimes when a child recants, it may be feeling pressure from family members." R.1142. "It may be feeling pressure from family members." R.1142. A child may "also recant because they're feeling guilty or something" about making a false allegation to begin with. R.1148.

When people in the "sexual abuse community" disclose it is often delayed "until they're an adult", so "when they do disclose as a child, even then, the disclosure can be delayed." R.1143. Sometimes disclosure comes gradually where "kids will just give a little bit of information to test the waters, to see how it is received." R.1143-44. "Sometimes the children are supported and then they feel more comfortable talking about things. Sometimes it's not that well by the person who receives it, and then the child will kind of shut down and not talk about things a lot." R.1144. "Other times, children will say the information that they can think about that time, but just often times, we don't remember all of the information about an experience when someone's asked us about that experience, and so when someone's asked us about that experience, and so sometimes later we'll think, oh, I forgot to tell them that part, or the more we talk about things, the more we remember different experiences." R.1144.

SUMMARY OF ARGUMENTS

The trial court abused its discretion in admitting the testimony of Chelsea Smith because the State did not present any evidence upon which the court could have concluded that Smith and her testimony satisfied the requirements of Rule 702. The court did not analyze or even examine the reliability of the scientific, technical, or other specialized knowledge that served as the basis for the expert's testimony.

The trial court abused its discretion when it denied Peraza's motion to continue the trial. The court did not consider the factors relevant to whether a

continuance was warranted. The court only noted that other continuances had already been granted the court decided to 'draw the line somewhere'. That reasoning, focusing on irrelevant facts, was an abuse of discretion.

Trial counsel committed ineffective assistance of counsel by failing to adequately investigate and consult with expert witnesses in the areas of child sex abuse disclosures and medicine. These failures constitute deficient performance because they fell below the basic standards of reasonable counsel. Counsel knew there was reason to question the K.C.'s inconsistent statements and to reason to doubt her claims based on the results of her physical examination. Even so, counsel did not consult with any experts and proceeded to trial unprepared to confront the State's evidence or present counter evidence. Because expert witness testimony in both these areas would have served to undermine K.C.'s credibility, and because the case depended entirely upon her testimony, there is a reasonable likelihood of a more favorable result.

The trial court erred when it submitted the DVD of K.C.'s CJC interview to the jury for them to consider during deliberations. Testimonial-like evidence, submitted at trial, is not the kind of exhibit that the jury should be taking back into deliberations to review.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY

"A decision to admit or exclude expert testimony is left to the discretion of the trial court, and that decision will not be reversed unless it constitutes an

abuse of discretion." *Holm,* 2006 UT 31, ¶ 89. "Our review of the district court's exercise of its discretion includes review to ensure that no mistakes of law affected a lower court's use of its discretion." *Eskelson,* 2010 UT 59, ¶ 5. Mistakes of law include errors in interpreting rules of evidence because such errors are not "within the limits of reasonability". *Id.* (*citing State v. Barrett*, 2005 UT 88, ¶17). The trial court here abused its discretion because it incorrectly applied Rule 702.

A. Rule 702

Rule 702, of the Utah Rules of Evidence, outlines 3 basic steps a trial court, acting as a gatekeeper, needs to take before admitting expert testimony.[12] Step one, the court must determine "whether expert testimony is necessary to assist the trier of fact". *Eskelson*, ¶9 (*citing* Utah R. Evid. 702(a)). In other words, is there something about the facts of the case that may need to be explained by an expert? Next, the court should consider "whether the proposed expert has the necessary 'knowledge, skill, experience, training, or education' to provide such assistance to the trier of fact." *Eskelson*, ¶9 (*citing* Utah R. Evid. 702(a)). In other words, is the witness qualified to help the jury understand specialized information?

[12] In a more recent case the Utah Supreme Court has characterized the 702 analysis as a "two-part analysis" essentially eliminating (or at least omitting) the question of whether the proposed expert has the necessary knowledge or experience. *See State v. Perea*, 2013 UT 68, ¶72, 322 P.3d 624 (*citing State v. Clopten*, 2009 UT 84, ¶31, 233 P.3d 1103). Whether this omitted factor has actually been removed from the 702 analysis is beside the point for this case, because the two remaining steps articulated in *Perea* are the factors that Peraza claims were not satisfied in this case.

Finally, the "court then turns to the reliability of the 'scientific, technical, or other specialized knowledge' that serves as the basis for the expert's testimony." *Eskelson*, ¶9 (*citing* Utah R. Evid. 702(b)). In this step the court must ask whether 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." UTAH R. EVID. 702.

B. The State did not meet the threshold for admitting expert evidence

At the hearing on Peraza's objection to Smith's proposed expert testimony the defense asked to have it's earlier "objection applied to this expert as well". R.533.[13] Peraza objected that the State's notice, which did not include a report, didn't show what Smith would actually be testifying to. R.534, 536. The defense complained that "identified factors related to delay, partial and gradual disclosure and recantation" were merely "topics", and were insufficient to identify what the expert opinion would be, and insufficient to allow the defense to cross-examine the witness or prepare for the proposed testimony. R.534-35. The defense also argued that any testimony about the statistical prevalence of recantation in child sex allegation cases could not be supported by scientific studies. R.534-35.

[13] Defense counsel was referring to its April 26, 2015 Motion in Limine to Exclude Testimony of State's Expert Lyssabeth Mattoon. R.190. In that motion the defense claimed the State's notice was too vague to provide fair notice, and that statistical evidence of matters not susceptible to quantitative analysis were inappropriate to be provided to the jury. R.190-94.

The State responded by claiming that its purpose in calling Smith as an expert was to "rebut the evidence… brought forth by the defense that this child has changed her testimony over time, at one point that there was a recantation, and then, you know, making arguments to the jury that this is a reason that they should… disbelieve the child." R.537. The State wanted Smith to "explain as an expert that the science behind child -- disclosures of children suspected of child abuse, recognizes that there are times where children do not make a full disclosure initially, and that it's a process." R.537-38. The State's response did not present Smith as a witness to demonstrate the scientific validity of the basis of her testimony, or provide any details about what her testimony would be so that the defense could investigate whether such testimony could be supported by the scientific literature.

Defense counsel argued that the studies he presumed[14] Smith was relying upon, were directed mainly at therapeutic standards, rather than forensic circumstances. R.540. Defense counsel claimed that allowing the State to present expert testimony about "why a child might recant, when that therapist hasn't actually interviewed and assessed this alleged victim" "gives weight and credibility to [the alleged] victim without a scientific basis for that." R.542.

[14] *Presumed* because the defense was not provided access to the studies, nor did Smith prepare a report about how the conclusions of these studies could be applied to the facts of this case. The State's notice merely contained a list of "Areas of Inquiry" with accompanying list of "Research Literature Support" and then a list of "References for Court Testimony". R.288-301. Nothing within the notice, or the State's discussions at the hearing disclosed how the cited support and references related to Smith's proposed testimony.

The trial court ruled, at least for the "purposes of today" that the defense motion in limine would be denied, but allowed the defense to make further objections at trial. R.550. According to the court, all it could do "is look at her criteria, figure out for myself whether or not she's qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550. After the court looked at 'those kinds of things' and found Smith did qualify as an expert, the court denied the defense motion in limine. R.550.

The absolute dearth of support provided by the State, the complete lack of any actual content about what Smith's testimony would be and how it was reliable, was not a sufficient showing to satisfy the threshold for Rule 702.

C. The trial court abused its discretion

As the Utah Supreme Court explained in *Eskelson*, even though the trial court has discretion on questions of whether or not to admit expert testimony, trial courts must apply the correct test in exercising that discretion. *See Eskelson*, ¶5. And if the trial court erred in interpreting Rule 702, "it did not act within the limits of reasonability". *Id*. In this case it is clear, the trial court did not apply the correct test, therefore it abused its discretion.

When the trial court concluded that Smith could testify because she had sufficient "skill, experience, education, and those kinds of things" (R.550) it completely failed to examine whether her testimony and opinions were based upon principles and methods that were reliable, that they were based upon sufficient facts or data, and had been reliably applied to the facts. UTAH R. EVID.

702(b). Nor could the court have made any such conclusions because the court had no idea what Smith's testimony was going to be, or what her opinions or conclusions were based upon. The State presented no report containing her opinions and proposed testimony, nor did the State produce Smith at an evidentiary hearing. Instead, and over defense counsel's objection and implicit request for a hearing (R.542, 548-49), the trial court proceeded upon Peraza's motion in limine with only the State's one paragraph explanation in its notice and its oral assertions about why it wanted to call Smith to rebut Peraza's evidence. The trial court, just like Peraza, had no idea what Smith's testimony would be, whether her methods or principles were reliable, whether they were based upon sufficient facts or data, and whether those methods and principles had been reliably applied to the facts in this case. The trial court did not consider any of these question, each of which is required under Rule 702.[15]

The only question the court considered was if Smith "qualified as an expert by knowledge, skill, experience, training, or education". UTAH R. EVID. 702(a). This is not sufficient to establish that Smith was admissible as an expert to testify about anything and everything related to the "methodology and science related to forensic interviewing of suspected child sex abuse victims" and the "science and research regarding child disclosures of sex abuse including identified factors related (sic) delayed, partial and gradual disclosures and recantation." R.283. The

[15] The court also completely neglected to consider whether the testimony would assist the jury.

information provided by the State left all the important questions unanswered. What methodology? What science? What factors? None of these questions were even address by the State or asked by the court. The trial court's failure to properly apply Rule 702 and require the State to present evidence under the other steps constitutes an error in interpreting Rule 702 and exceeds the limits of reasonability.

It's possible the State will assert now that the list of articles and studies attached to the expert notice was sufficient to satisfy the requirements of Rule 702. This Court should not accept this potential argument. None of the content or conclusions of any of these sources is in the record, nor was any of it made known to the trial court. As trial counsel put it, without a report and without an explanation of the proposed testimony we "don't know what those studies say." R.534. The trial court had no idea what was contained within the documents listed in the notice. With respect to the adequacy of the State's proposed expert testimony, this Court stands in the same position as the trial court, without any idea what Smith's testimony would be or what scientific basis it is based upon. This Court should reject any attempt to use the content of those listed documents to supplement the record, and should conclude that the trial court abused its discretion by not requiring the State to comply with Rule 702.

D. The admission of Smith's testimony was prejudicial

Not every abuse of discretion constitutes reversible error, but in this case, the improper admission of Smith's testimony, and its effect of bolstering K.C's

trial testimony, prejudiced Peraza's case. "When Utah appellate courts reverse for improper bolstering, the usually do so not only where a case hinges on an alleged victim's credibility and there is no physical evidence, but also where the bolstering was done by an expert witness." *State v. King*, 2010 UT App 396, ¶46, 248 P.3d 984.[16] In this case the trial court erroneously admitted expert testimony directed specifically at rehabilitating and bolstering K.C.'s uncorroborated testimony which had been impeached by her multiple inconsistent statements, her delayed and partial disclosures, and her recantations. This kind of error is exactly the kind that Utah courts have found to be prejudicial because they go the very heart of what the jury had to decide, was K.C. credible in spite of the impeaching evidence.

"The Utah Supreme Court has continued to condemn anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as

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[16] *See e.g. State v. Stefanik*, 900 P.2d 1094 (Utah App 1995) (a caseworker testified that when the child was interviewed she was open and candid in her responses, which was found to be improper bolstering and because the State's case hinged on the victim's credibility, the error was prejudicial); *State v. Jacques*, 924 P.2d 898, fn.4 (Utah App 1996) (a prosecutor erroneously testified to lay the foundation for a handwriting expert in a prescription fraud case, and although the erroneous testimony was not itself expert evidence, because it paved the way for the expert's evidence, which was "the single most incriminating part of the State's case, the error was prejudicial); *State v. Iorg*, 801 P.2d 938, 942 (Utah App 1990) (where no physical evidence corroborated the victim's allegations and the case hinged on credibility, the deputy's testimony was designed to bolster the victim's credibility by "assuring the jury no credibility problem was presented by the delay[ed]" report and therefore the erroneous was prejudicial); *State v. Rimmasch*, 775 P.2d 388 (Utah 1989) (case hinged on victim credibility and her version was bolstered by four experts who testified the victim's reports were truthful based on their expertise, therefore the errors were prejudicial).

witness veracity, as one of the categories of evidence leading to undue prejudice." *State v. Iorg*, 801 P.2d 938, 941 (Utah App 1990) (*citing State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989)). In *Iorg* the defendant was charged with sexual abuse of a child where the victim testified that the defendant "entered a tent where she and her cousins were sleeping and touched her breasts." *Iorg*, 801 P.2d at 939. The defendant acknowledged entering the tent to check on the children but denied the illegal touching. The victim reported the incident two and a half years later and the State presented evidence from the deputy who interview the victim. The deputy testified that at least half of the victims "she had interviewed delayed reporting for over a year." *Iorg*, 939. The deputy testified "it was not unusual for [the victim] to wait from age eleven to fourteen to report the incident" and that "based on her experience, the fact that [the victim] delayed reporting was not an indication she was not telling the truth." *Iorg*, 939. This Court found the deputy's statements to be erroneously admitted and prejudicial because the entire case "hinged on credibility"

This is exactly the kind and significance as the evidence Smith presented. Smith presented evidence that between four to 20 percent of victims recant. R.1141. She testified that "because a child recants does not mean that it did not occur. R.1142. Smith testified that, in her experience, victims may recant based on family pressures and other personal concerns, irrespective of the validity of the allegations. R.1142. Smith testified that *the majority of people* who have been sexually abused as a child delay disclosure. R.1143. She testified that gradual

disclosure occurs for a number of reasons. R.1143-44. Each of these statements were admitted to bolster K.C.'s testimony and rebut impeachment based on the generally held belief that inconsistent statements, recantations, changing allegations, could undermine a witness's credibility. Because, like *Iorg* and the other case cited in the footnote above, this case depended entirely upon K.C.'s credibility, which had been impeached, but for the erroneous admission of Smith's bolstering evidence there is a reasonable likelihood of a more favorable result. This is a prejudicial error and this Court should reverse.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PERAZA'S MOTION TO CONTINUE THE TRIAL

The trial court abused its discretion when it denied defendant's motion to continue because: 1) defendant was prejudiced as he was not given sufficient time to procure an expert witness and 2) there was a reasonable likelihood that the outcome of the case would have been different if the continuance would have been granted. The grant or denial of a continuance is within the trial court's discretion. *State v. Cabututan*, 861 P.2d 408, 413 (Utah 1993). An appellate court will not interfere with the judge's decision absent an abuse of that discretion. *Id.* However, as general principle, a district court abuses its discretion when it denies a continuance and the resulting prejudice affects the substantial rights of the defendant, such that 'a review of the record persuades the court that without the error there was a "reasonable likelihood of a more favorable result for the defendant." *State v. Taylor*, 2005 UT 40, ¶8, 116 P.3d 360.

There is no formulaic test that appellate courts apply in deciding whether

the denial of a continuance is so arbitrary or unreasonable as to constitute an abuse of discretion. *See State v. Cornejo*, 2006 UT App 215, ¶5, 118 P.3d 97, 100. The appellate court must review each case on its own facts and circumstances. *Id.* Moreover, the abuse of discretion inquiry should emphasize the reasons presented to the trial court when the motion to continue was sought. *Id.*, ¶5. Here, Peraza asserts that the facts and circumstances, and the trial court's stated reason for denying the motion, should persuade this Court that the trial court abused its discretion.

Utah courts utilize a four factor test to determine whether the reasons presented warranted a continuance: (1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the need for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which moving party might have suffered harm as a result of the court's denial. *State v. Torres-Garcia*, 2006 UT App 45, ¶20, 131 P.3d 292.

Under the first factor, a defendant shows sufficient due diligence where he demonstrates a reasonable or competent trial strategy that includes timely objections prior to trial so that he could not have reasonably anticipated a last minute development in light of his preparation. *Id.* For example, in *Arellano*, this Court held that "it is not defendant's duty to anticipate and prepare for all potential, yet undisclosed, expert witnesses" *State v. Arellano*, 964 P.2d 1167,

1171 (Utah App 1998). In short, the inquiry focuses on totality of a circumstances approach where defendant ought to demonstrate that he could not have anticipated the "last minute" development. *State v. Begishe*, 937 P.2d 527, 531 (Utah App 1997).

A defendant satisfies the second factor where he shows that the continuance would have provided him with sufficient time to procure his own expert testimony or additional evidence to incorporate new information into the defense strategy. *Arellano*, 964 P.2d at 1171. In simpler terms, defendant can to prove that the motion to continue would have enabled him to adequately prepare for trial by procuring new witnesses or presenting new evidence to counteract the last minute development. *Id*.

The third factor focuses primarily on whether the inconvenience to the court and the involved is justified in light of the state's actions. *Begishe*, 937 P.2d at 530–31. Several courts have ruled that where a defendant is surprised by a crucial last minute ruling or development that was primarily caused by the state, Defendant's right to a fair trial outweighs the administrative concern of delaying or postponing a trial. *Id*; *Torres-Garcia*, 2006 UT App 45, ¶21.

As to the fourth factor, courts place emphasis on the degree of harm caused to the defendant as a result of the denial of the motion to continue. Courts analyze the strength of the evidence that was admitted and how prejudicial it was for defendant's case. *Id*. In cases where the unanticipated evidence was pivotal to the state's case, a motion to continue is warranted. *Begishe*, 937 P.2d at 530–31;

Torres-Garcia, ¶21.

Typically, an accused who is surprised by some unexpected occurrence or by the introduction of unexpected evidence which, by reasonable diligence, he could not have anticipated, may have a legitimate basis to move for a continuance. *State v. Jensen*, 30 P.2d 203, 204 (1934). Accordingly, Utah courts have held that where a defendant shows that is so taken by surprise due to the introduction of new evidence or unforeseen circumstances so that he does not have adequate time to prepare, a continuance or postponement should be granted. 22A C.J.S. Criminal Procedure and Rights of Accused § 575. *Begishe*, 529; *Jensen*, 30 P.2d 203, 204.

For instance, in *Begishe*, this Court held that a denial of a continuance constitutes an abuse of discretion where the defendant is not provided with sufficient time to procure an expert witness to examine newly introduced evidence. *Id*., 528. There, after having reiterated to defense counsel that all the testing was completed prior to trial, the state unexpectedly sought to introduce the report of human blood tests results performed on a sexual abuse victim's underwear on the second day of trial. *Id*. Defendant moved for a continuance, but the trial court denied his motion. *Id*. This Court applied the four-factor test articulated above and concluded that the denial of the continuance was a clear abuse of discretion because: "[defendant] needed the continuance to fully analyze the new data submitted by the State". *Id*., 530. The court also noted that in light of the state's tardiness in submitting the new evidence, the defendant should have

been allowed additional time to procure an expert witness to conduct additional testing and rebut the newly introduced evidence. *Id.*

This court has been consistent with this line of reasoning and has ruled several times that a motion to continue should be granted where defendant is unprepared due to unanticipated evidentiary rulings. *Torres-Garcia*, 2006 UT App 45, ¶24. There, the trial court excluded the testimony of the state's expert witness, as the state had not complied with the 30-day notice requirements. *Id.*, ¶11. Both parties stipulated that if the state's expert witness were to testify at trial, defendant should be granted a continuance. *Id.* Thus, the state decided to move forward with the trial and opted to forgo the testimony from the expert witness. *Id.* However, the state moved again to have the expert witness testify during the second day of trial under the state employee exception to Rule 26. *Id.*, ¶11. The court reconsidered its prior ruling, denied defendant's motion to continue, and allowed for the state to introduce its expert witness. *Id.*, ¶6.

Applying the four-factor test, the appellate court held that the trial court abused its discretion by the denying the defendant a reasonably opportunity to prepare in light of the unanticipated admission of the state's expert testimony. *Id.*, ¶23. The court noted that "the effective administration of justice requires that discoverable evidence be provided much sooner than "moments" before trial,' much less during the course of trial". *Torres-Garcia*, ¶23. Finally, the court also alluded that the unanticipated admission of the expert testimony prejudiced the defendant, as the credibility of defendant's case in chief was significantly

impaired. *Id.*, ¶ 22.

This case is very similar. Mr. Peraza was prejudiced by the unanticipated ruling of the court allowing the state's expert witness to testify at trial as she bolstered the credibility of the state's main witness. (R.589). Also, like *Torres-Garcia*, Peraza relied on the prosecutor's assertions that he was not going to seek to introduce the testimony of Dr. Matoon, the alleged victim's therapist, as an expert witness. R.201. Even though Peraza was properly notified of the state's expert witness pursuant to Rule 26(b), the admission of the state's expert witness still constitutes an unanticipated development that defendant did not have adequate time to prepare for. The trial court did not rule on Peraza's objection to Smith serving as an expert until ten calendar days before trial. R.592. Prior to that hearing Peraza had no reason to suspect that the court would allow Smith to testify, since the State had not produced anything which could allow the court to find her testimony was admissible under Rule 702. *See expert witness argument supra*. Consequently, the motion to continue was warranted in order to allow Peraza to re-organize his trial strategy and consult with an expert in light of the newly introduced evidence.

Additionally, all four discretionary factors weigh in favor of a finding that the trial court abused its discretion. First, defendant demonstrated sufficient due diligence as he properly requested several continuances and made timely objections to the admission of the state's expert witness. R.201-202, 592. Defendant even requested an emergency telephone conference the same day the

court ruled in favor of admitting the state's expert witness in order to request a continuance. R.589. Second, if the motion had been granted, defendant would have been able to consult with or retain an expert witness to confront the Smith's testimony regarding the alleged victim's recantation, and her delayed and partial disclosure. In the alternative, defendant could have prepared an additional defense strategy in light of the newly admitted testimony.

As to the third factor, despite the fact that the trial had already been continued two times, Peraza's right to a fair trial far outweighed the administrative inconvenience of granting a continuance, especially in light of the nature of the charges and minimum mandatory sentence of 25 years in prison. R.375. The trial court was aware of this; it even suggested that denying the motion to continue alone could constitute valid grounds for an appeal. The court stated "I recognize that [denying the motion] is something that could be used later". R. 592.

The State, although it made it known it would not be 'happy' if a continuance were granted, did recognize how important the continuance would be and admitted that it believed defense counsel was doing "his best to deal with the case." R.591-92. The State did not object based on a concern about the availability of the witnesses or the threat of disappearing evidence, or any other legitimate concern. In reality, the State was not objecting to the motion. Furthermore, the court did not take into consideration the potential prejudice of his ruling against the defendant as it is required by this Court's jurisprudence.

The court didn't even consider what would happen if the State were allowed to produce expert testimony to bolster K.C.'s testimony and the defense could not present any counter evidence. The trial court based his decision entirely upon the fact that the trial had already been continued twice. R.592.[17] That was not a sufficient reason to deny a legitimate and timely motion to continue.

Finally, defendant was prejudiced by Chelsea Smith's testimony as it bolstered the credibility of the state's main witness, the alleged victim. During trial, the alleged victim was confronted with incomplete and inconsistent statements; however, the state's expert witness rehabilitated her testimony by providing *scientific* explanations relating to K.C.'s inconsistencies. For example, K.C. was confronted with her inconsistencies between her CJC interview and her statements to Bourne. R.942-45. K.C. was confronted about her statements to her mother, Nina, where she admitted to Nina that these things didn't happen at all. R.946. K.C. was confronted about the fact that she had had many opportunities to disclose allegations of vaginal penetration, including over a year of therapy with Dr. Matoon, but yet only at trial had it been disclosed. R.951-52. K.C. was confronted about her claims that she had falsely accused Peraza because she had been told to lie by Satan's voice in her head. R.943-44. K.C. was confronted about

[17] "Well, I'm not inclined to continue this trial. If it had not been the third time that we've set this, I have to draw the line somewhere. And I think that this information could've been determined much, much longer -- much -- I mean, this is -- can't be something that could come up on the eve of a trial. I just don't see it, and I'm not going to allow a motion to continue. I'm going to proceed as is." R.592.

her conflicting statements about Giovanni, telling Dr. Matoon about sexual abuse involving his penis and then telling the Califonia CJC it was only kissing. R.955.

At every stage of the case K.C.'s claims have changed, including several recantations, and defense counsel was able to present these statements to the jury in an attempt to challenge her credibility. But, because of the court's denial of Peraza's motion to continue, the State's expert witness rehabilitated K.C.'s credibility, without challenge, by explaining that often children make partial or gradual disclosures, make inaccurate disclosures, and even recant, none of which means the allegations weren't true.

None of this would have come as a surprise to the trial court, because all of these issues were raised the first time the State tried to call an expert witness at an earlier scheduled trial. On November 24, 2014 the court scheduled a trial for March 17-19, 2015. R.153, 451. On February 18, 2015 (27 days before the scheduled trial) the State filed notice of expert witness for Dr. Matoon. R.157. Apparently, the State was in the habit of waiting until the last minute to give expert notice. On February 27, 2015 the defense filed a motion for a continuance citing the serious nature of the crimes and possible punishments, the lack of physical evidence and significance of K.C.'s credibility, the conflict between K.C.'s subsequent allegations of anal penetration and the Sexual Assault Examination report, K.C.'s additional allegations against Giovanni and the need for a memory expert, the need for access to the therapy records, and need to consider challenging the State's expert's qualifications. R.165-66. The court was also

informed that in deciding the motion to continue the court must consider the factors found in *Layton City v. Longcrier*, 943 P.2d 655 (Utah App 1997). *Compare to the factors in Begishe.*

In sum, the state's expert witness was able to rehabilitate the testimony of the state's main witness and therefore prejudiced the defendant only because the court denied the motion to continue. If the court had allowed the defendant time to procure an expert witness or adequately prepare cross-examination strategy prior to trial, there is a reasonable likelihood of a more favorable outcome. Thus, the trial court abused its discretion when it denied defendant's motion to continue.

Cumulative Error

If the Court is not convinced that either the 702 error or the continuance error are prejudicial in their own respects, Peraza asserts that the cumulative prejudice in incorrectly admitting the State's expert witness evidence and denying Peraza time to respond to that evidence should qualify. The close relationship between these two rulings and the effect they had upon the evidence presented at trial are evident. Peraza asserts that the combination constitutes prejudice and should satisfy the prejudice requirement.

III. PERAZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Ineffective assistance of counsel

Peraza asserts he was denied his Sixth Amendment right to counsel because trial counsel rendered ineffective assistance (IAC) in several ways. First, counsel

failed to investigate and present expert witness evidence related to the reliability of K.C.'s multiple and conflicting statements. Second, counsel failed to investigate and present expert witness evidence related to the medical evidence collected when K.C. was subject to a physical examination after her disclosure. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel's "representation fell below an objective standard of reasonableness" and that the defendant was prejudiced by the errors. *Strickland*, 466 U.S. 668, 687-88.

Cases reviewing IAC claims based on failing to investigate and secure expert testimony have established that questions of deficient performance are reviewed in light of "prevailing professional norms", which include "an important duty to adequately investigate the underlying facts of the case… 'because investigation sets the foundation for counsel's strategic decisions about how to build the best defense.'" *State v. Lenkart*, 2011 UT 27, ¶27 (*citing State v. Hales*, 2007 UT 14, ¶96, 152 P.3d 321). Reviewing courts "attempt to 'eliminate the distorting effects of hindsight' by adopting [trial counsel's] perspective at the time of the decision to limit their investigation". *Hales*, ¶70.

23B and the record in its current state

Because these IAC claims depend heavily upon evidence not currently in the record, and appellate courts will only consider extra record evidence to determine the propriety of remanding on 23B (*State v. Jaramillo*, 2016 UT App 70, ¶27, 327 P.3d 34) Peraza cannot fully brief his IAC claims at this time. However, in order

to prepare for supplemental briefing that will occur after the 23B remand, and to give important context to Peraza's non-IAC claims, Peraza now outlines the IAC claims he intends to fully brief when additional evidence is added to the record.

A. Trial counsel did not investigate and present expert witness evidence related to the reliability of K.C.'s interviews and disclosures

1. Deficient performance

When the record has been supplemented with additional evidence, Peraza will show that his trial counsel provided IAC because it failed to consult with an expert in the science of children's disclosures of sexual abuse and forensic interview techniques. Peraza will be able to point to evidence that shows trial counsel did not consult or even contact any expert witnesses in this field (or any other field) and failed to investigate whether there were scientific reasons to question the reliability of K.C.'s multiple and contradictory disclosures. When the record is supplemented, Peraza will also be able to demonstrate that, from the perspective of trial counsel at the time he was preparing for trial, there was good reason to do such investigation and consultation, such that professional norms would have required him to fully investigate the issue before making a strategic choice about whether or not to present such expert testimony. *See Hales*, 2007 UT 14, ¶69 ("strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation) (*citing Strickland*, 46 U.S. at 690-91).

2. Prejudice

When the record has been supplemented Peraza will be able to show how an expert witness's testimony could have had an impact on how the jury viewed K.C.'s testimony, how much relevance they would have placed on her prior inconsistent statements, the weight they would have placed on her recantations, and her credibility overall. The prejudice analysis for this evidence will depend heavily upon the specific details of the expert evidence that is added to the record. However, it is clear that if the supplemental expert evidence is relevant to K.C.'s credibility (which it will be) then the is a substantial likelihood of a more favorable outcome.

B. Trial counsel did not investigate and present expert witness evidence related to available medical evidence

1. Deficient performance

When the record is supplemented, Peraza will show that trial counsel did not consult with or contact any medical expert with respect to the medical report written by Katherine Koller and provided in discovery to investigate whether the medical evidence there was consistent with the allegations, especially the later allegations, made by K.C. about Peraza's actions.

The record already contains evidence that shows trial counsel was aware at the time that the medical records were not consistent with at least some of the allegations made by K.C. In an earlier filed motion to continue, trial counsel acknowledged that, based on the new "allegations of anal penetration, and under

information and belief the physical examination report contradicts such allegations, this case may become extremely complex because of the necessary medical expert testimony on both sides of the matter." R.167. And later, during argument regarding the State's request to present expert medical evidence through Katherine Koller, trial counsel disclosed that it was the defense's intention to show that K.C.'s allegations of anal sodomy (and surprise allegation of vaginal penetration) were "unbelievable" based on the results of the physical examination report and the finding of evidence of anal or vaginal injury. R.1094-95. Defense counsel made it known that he "could bring in an expert to rebut" the proposed expert testimony "that it's still possible for the anal and vaginal sex to occur". R1095. These comments demonstrate both that trial counsel was aware of the potential for favorable defense evidence from a medical expert, and the need for the evidence. This awareness, without having actually conducted any investigation or consultation, cannot meet the standard of what a reasonable professional would be obliged to do. Adequate representation, under the circumstances, required trial counsel to consult with a medical expert, to thoroughly investigate the facts and the evidence, in order to determine what the best strategy would be when confronted with this medical evidence.

2. Prejudice

When the record is supplemented, Peraza will be able to show that if trial counsel had consulted with a medical expert about the medical records and been prepared to call an expert, there is a reasonable likelihood of a more favorable

result. Peraza will be able to point to evidence that demonstrates if an expert witness had been at trial to testify evidence would have been presented to cast serious doubt on the possibility that K.C.'s allegations of anal sodomy and vaginal intercourse could have occurred. Not only would this have directly challenged the validity of part of the State's theory of the case, but it would have been a serious blow to K.C.'s credibility. There should be little doubt that the jury would have concerns about the truthfulness of a witness who claims certain sexual acts occurred repeatedly in the face of an impartial medical professional testify that, given her physical condition, those acts did not occur.

IV. THE TRIAL COURT ERRED IN PROVIDING THE DVD OF K.C.'s CJC INTERVIEW TO THE JURY DURING DELIBERATIONS

Rule 17(l) of the Utah Rules of Criminal Procedure provides that:

> Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband.

The Utah Supreme Court has interpreted this rule to prevent the jury from taking some kinds of exhibits into deliberations. *See State v. Carter*, 888 P.2d 629, 643 (Utah 1995). This issue recently reviewed by this Court in *State v. Cruz*, 2016 UT App 234. There this Court recognized that CJC recordings which were admitted at trial are "testimonial in nature and thus should not be allowed in the jury room." *Cruz*, 2016 UT App 234, ¶37. The CJC interviews are admissible in the first place because they are considered "recorded testimony" and the

unfettered jury's access to it during deliberations poses a "danger of undue emphasis". *Cruz*, ¶¶38-39. If the jury were to replay the video it would be as if the State were allowed to have K.C. "testify a second time" without affording the defendant the opportunity to cross-examine a second time. *Id.*

Trial counsel, after losing his motion to exclude the CJC interview completely, moved to prevent the jury from having access to the video during deliberations. R.814. The court declined to rule on that question, in front of the jury, and asked to "defer that issue for a minute." R.815. The time for that argument apparently never came and it was not addressed again. Then, prior to swearing the bailiff and sending the jury to deliberate the court mentioned that it had "two exhibits for the state, and two exhibits for defense in this case. So, we have four total." [18] "They're all right here. They'll all go back. As far as the DVD, would it be alright if Pona sets that up? I think we'll use the same TV that we have been using and just put that in there, and they can figure out how to do it after that." R.1287.

The record clearly demonstrates that (1) defense counsel objected to having the CJC DVD provided to the jury during deliberations, (2) the court ruled that all the exhibits, including the CJC DVD would "go back", and (3) the judge ordered the bailiff to provide the jury with the same TV that was used during trial to show the video.

[18] See State's Exhibits 1 and 2, Defense Exhibits 1 and 2. The video recording of the of K.C.'s Provo CJC interview was State's Exhibit 1.

Ultimately, this Court concluded the error in *Cruz* was harmless because the defendant had not contradicted or cross-examined the victim about her statements, and the defendant was largely spared conviction for the counts described in the video. *Id.*, ¶¶44-45. Such a result is not likely in this case. K.C.'s credibility and the accuracy of her statements at the CJC (and other statements) were the focus of the defense. Peraza was able to demonstrate through cross-examination and other evidence that K.C.'s statements at the CJC were later added to, changed, recanted, reaffirmed, and changed again, including as late as trial. Furthermore, although there is a possibility that the jury convicted Peraza based on K.C.'s later allegations of anal sodomy, as opposed to the oral sodomy initially disclosed in the CJC video, it is far from clear what facts the jury's verdicts were based upon. If, as the *Cruz* opinion makes clear, the threat is that the jury will overemphasize the testimonial evidence in the video at the expense of other contradictory evidence presented, then there is a significant chance that Peraza's convictions were based entirely upon the jury's repeated review of the statements made at the CJC. This significant threat satisfies the need to show a "reasonable likelihood that the trial court's error affected the outcome of the proceedings." *Cruz*, ¶49.

CONCLUSION AND PRECISE RELIEF SOUGHT

The trial court abused its discretion in admitting Chelsea Smith's testimony under Rule 702 without applying adequate gatekeeping analysis. The trial court then abused its discretion by denying Peraza's reasonable and necessary motion

to continue the trial in order to prepare for Smith's testimony. For these abuses the Court should reverse and remand for a new trial.

Trial counsel provided ineffective assistance of counsel for failing to properly investigate and produce expert witness evidence. For this the Court shou;ld reverse and remand.

The trial court erroneously send the CJC DVD into the jury room during deliberations causing the jury to place undue emphasis on that evidence. For this the Court should reverse and remand.

RESPECTFULLY SUBMITTED this 14th day of December, 2016.

_____

CERTIFICATE OF MAILING

I herby certify that I mailed a true and correct copy of the foregoing Brief postage prepaid to the Utah State Attorney General, Appeals Division, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 14th day of December, 2016.

_____

Addendum F – Appellee's Brief

Case No. 20160302-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ROBERT ALONZO PERAZA,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for four counts of sodomy on a child, first-degree felonies, in the Fourth Judicial District, Utah County, the Honorable Darold J. McDade presiding

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STATEMENT OF JURISDICTION

Defendant appeals from convictions for four counts of sodomy on a child, first-degree felonies. This Court has jurisdiction under Utah Code section 78A-4-103(2)(j).

INTRODUCTION

Robert Alonzo Peraza sexually abused his stepdaughter, K.C., over a period of four years beginning when she was about five. The abuse began with Peraza making K.C. masturbate him and give him oral sex, but it progressed to him anally sodomizing her and even vaginally raping her. K.C. tried disclosing the abuse a couple times but was not taken seriously until she was nine years old. She detailed the oral sodomy in an interview with the Children's Justice Center (CJC). But when she saw the effects of her

disclosure on her family, K.C. recanted, both to her mother and to a private investigator. After K.C. began living with her biological father in California, she withdrew her recantation, and in her therapy sessions she began disclosing more details, including anal sodomy. K.C. detailed this abuse in a second interview at California's equivalent to the CJC.

Before trial, the State notified the defense that it may call a rebuttal witness to discuss reasons a witness may make partial disclosures or even falsely recant allegations. Peraza objected fifteen days before trial based on inadequate notice, arguing that he could not tell whether there was a scientific basis for the expert's testimony because the State did not provide sufficient information. The trial court ordered the State to provide more information and tentatively ruled that the expert could testify, though Peraza was free to object at trial. The trial court's tentative ruling prompted Peraza to reexamine his trial strategy, and he decided to try to call an expert to explore problems with K.C.'s therapy that could have impacted her allegations. But when he sought a continuance to do so—his third requested continuance of the trial date and fifteenth request in the case—the trial court denied it.

At trial, K.C. reiterated her allegations and for the first time accused Peraza of vaginally raping her. When the private investigator testified for

Peraza that it was rare to see recantations in these types of cases, the State called its rebuttal witness, who agreed that it was rare, stated that a recantation itself may be true or false, and provided some explanations for why a child may either truthfully or untruthfully recant.

The jury was allowed to take a DVD of the CJC interview into its deliberations. It also took a transcript of the California interview—submitted by Peraza—and a transcript of the private investigator's interview where K.C. recanted. The jury convicted Peraza of four counts of sodomy on a child.

STATEMENT OF THE ISSUES

I. Did the trial court plainly abuse its discretion by admitting expert testimony under rule 702, Utah Rules of Evidence?

Standard of Review. Review is for abuse of discretion. *Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶5, 242 P.3d 762.

II. Did the trial court abuse its discretion by denying Peraza's motion for a continuance made on the eve of trial?

Standard of Review. Review is for abuse of discretion. *State v. Taylor*, 2005 UT 40, ¶8, 116 P.3d 360.

III. Did the cumulative effect of the trial court's rulings on Points I & II prejudice Peraza?

Standard of Review. None applies.

IV. Did Peraza invite error by approving of the jury taking the recording of the CJC interview into deliberations? Alternatively, did the trial court plainly abuse its discretion under rule 17(*l*), Utah Rules of Criminal Procedure, when it allowed the jury to take a recording of the CJC interview into deliberations along with transcripts of two other interviews?

Standard of Review. While interpretation of a rule of procedure is reviewed for correctness, *State v. Cruz*, 2016 UT App 234, ¶34, 387 P.3d 618, appellate courts review the application of that rule deferentially when the rule explicitly gives the trial court discretion, as rule 17(*l*) does, *see State v. Thurman*, 846 P.2d 1256, 1270 n.11 (Utah 1993).

V. Absent a remand under rule 23B, Utah Rules of Appellate Procedure, can Peraza establish his ineffective-assistance claim based on failure to consult or call expert witnesses?

Standard of Review. None applies.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following rules are dispositive of this appeal:

Utah Rule of Criminal Procedure 17(*l*):

> Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the

> opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

Utah Rule of Evidence 702:

> (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.

STATEMENT OF THE CASE

This appeal involves several challenges to the trial court's discretionary rulings leading up to and during Peraza's jury trial for sodomy on a child.

A. Summary of facts.[1]

1. The abuse.

When K.C. was about five years old, her stepfather, Peraza, came into her bedroom one night, woke her up, removed his and K.C.'s clothes, and began showing K.C. his penis and having her touch it. R843, 846; SE1 at 34:00–45.[2] Peraza repeated this almost nightly; then one night he started having K.C. wrap her hand around his penis and move it up and down until he ejaculated. R846–48; SE1 at 24:24–30. Later, Peraza showed K.C. pornography on the computer and told her to mimic it. R939; SE1 at 34:00–45. K.C. protested, but Peraza forced her to perform oral sex on him. SE1 at 24:00–40;

Peraza forced K.C. to masturbate him and perform oral sex several times a week. R850; SE1 at 46:47–49:05; SE2 at 9. When she said she did not want to do it, Peraza would say, "I don't care." R927–28. Sometimes when she protested, Peraza would slap her face. R927–28; SE1 at 38:50–39:50. Or he would grab her hair and force her mouth onto his penis and move her

[1] Consistent with appellate standards, the facts are recited in the light most favorable to the jury verdict. *State v. Maestas*, 2012 UT 46, ¶3, 299 P.3d 892.

[2] In citing to the video of the CJC interview (SE1), the State indicates how far into the video the reference occurs; the time does not refer to the video recorder's digital clock as displayed on the screen.

head up and down. R850. Once, he grabbed her by the throat, lifted her, and threw her back. R928; SE1 at 37:20–30; DE1 at 21–22.

Because protesting did not work, sometimes K.C. would try to hurry through the process to get it over with, but Peraza would make her slow down, telling her it would take longer if she went fast. SE1 at 38:30–45. Other times, he would say, "Hurry, hurry, it's gonna be right there. If [you] stop, it's gonna go all the way down and [you] have to start over." SE1 at 49:05–25. Sometimes Peraza would stop K.C. while she was performing oral sex, masturbate himself, say, "Do you want some milk?" and then wipe the semen on K.C.'s face. R850; SE1 at 34:40–50, 49:20–40. Other times he would ejaculate into her mouth and tell her she had to swallow it; she pretended to but would then go to the bathroom to spit it out. R850–51; SE1 at 49:40–50:20.

K.C. was able to explain male anatomy and physiology in detail. She described Peraza's penis as starting out soft and getting "really hard," and she said she could see veins on his penis when it was erect. SE1 at 36:10–37:05. K.C. could also describe the color and consistency of semen, describing it as "mostly whitish" with the look of amoxicillin. SE1 at 34:50–35:20.

K.C. was not sure of the timing, but about the time she was seven years old, the abuse changed: Peraza began anally sodomizing her. R850, 853–54; DE1 at 19. Peraza would force a sock into K.C.'s mouth so others would not hear her scream. R852, 928–29. If she did say "ow," he would tell her to shut up. DE1 at 39. Peraza would put lubricant on himself or K.C., and he would cover his penis with what K.C. described as "a bag"; the bag would be wet when Peraza was done and he would throw it in the garbage. R852, 929; DE1 at 43. On K.C.'s eighth birthday, Peraza came into her room; said, "This is a birthday present"; then anally sodomized her. DE1 at 32. K.C. identified five different locations where Peraza anally sodomized her: her bedroom, Peraza's bedroom, the bathroom, the living room, and a hotel. DE1 at 43–44. He did this about once a week until sometime after K.C.'s ninth birthday. DE1 at 27.

Several months after K.C.'s ninth birthday, the abuse changed again: Peraza put his penis in K.C.'s vagina. R854, 933–35. He did this on two or three occasions. R933–35. The abuse stopped only when K.C.'s family moved out of their house in June 2013; Peraza moved in with his mother, and the rest of the family moved in with K.C.'s maternal grandfather. R794–96, 853, 933–35; DE1 at 27.

Almost every time Peraza abused K.C., he threatened her not to tell. R926; SE1 at 40:50–41:15. He threatened to kill K.C. and her mother, brothers, and grandfather. SE1 at 41:15–42:10; DE1 at 54. Peraza offered to buy K.C. gifts to convince her to do what he wanted, but she refused them. SE1 at 35:20–35; DE1 at 24. Although K.C. acknowledged that she could not stop Peraza, she blamed herself for letting Peraza abuse her. R922. She repeatedly promised her deceased grandmother that she would not let him do it anymore, especially on Sundays—but she repeatedly felt like she let her grandmother down for not stopping Peraza. R922; SE1 at 54:00–56:15.

Peraza was not K.C.'s only abuser. Peraza's brother, Giovanni, also abused K.C. every time he stayed overnight—almost on a weekly basis. DE1 at 51. Giovanni would come into her room at night, pull his pants down, lie down with K.C. on top of him, kiss her in sexualized ways, and rub his penis on her vagina. R953; DE1 at 49–52. Giovanni stopped abusing K.C. when he got a girlfriend named Cassie. DE1 at 51. But Cassie did nothing more to protect K.C.: She once heard K.C. saying "ow" behind a closed door when Peraza was anally sodomizing K.C., but later Cassie simply said to K.C. that K.C. "was begging him to do that to [her]." DE1 at 34.

2. The disclosure process.

K.C. tried to tell her mother, Nina, about the abuse when she was five and again when she was seven. R855; SE1 at 41:15–42:10; DE1 at 19, 23. K.C. thought she had been fairly explicit in what she told Nina, but Nina did not recall ever learning about the abuse until August 2013, when K.C. was nine. R786, 855. Nina and K.C. were watching a football practice, and Nina mentioned that she and Peraza were talking about separating. R856, 985. K.C. said she was glad. R856. After some prodding, K.C. explained that Peraza made her suck on his penis. R1164.

When they returned home, K.C. uncharacteristically ran into the house without acknowledging her grandfather, who was outside working in the yard. R786–87, 856. He could tell that she was emotional and that something was wrong. R786–87, 790. Although Nina had favored her sons over K.C., she was distraught at the news and could hardly tell K.C.'s grandfather what K.C. had said. R787, 805–06, 984, 986. After speaking with K.C, the grandfather called the police. R791. Nina was not cooperative and would not answer questions, but she gave a written statement recounting what K.C. told her. R792, 1051. At some point that day, Nina told K.C., "It's gonna get ugly, [K.C.] It's gonna get really ugly." SE1 at 40:20–30. But K.C. was glad that Peraza would be in jail. SE1 at 40:20–50.

The next day, K.C. was interviewed at the CJC, where she disclosed the details of Peraza repeatedly forcing her to masturbate him and perform oral sex. R814; *see generally* SE1. A medical examination revealed no injuries to K.C.'s vagina or anus. R1005.

Peraza was arrested after the CJC interview, and an officer interviewed him after obtaining a *Miranda* waiver. R1034, 1053. In two interviews over two days, the officer told Peraza seven or eight times to stop talking with him and get an attorney "if you didn't do this at all," but to keep talking so they could "get to the bottom of this" if he did do it. R1054, 1060. Peraza kept talking, asking at one point how he could get the charges reduced. R1054, 1056, 1060.

During the interviews, Peraza first suggested that Nina or the grandfather were behind the allegations. R1046–47. He then suggested several ways K.C. could have obtained her sexual knowledge: Peraza passed out naked on his couch on occasion and K.C. could have seen him; she could have walked in on him viewing pornography or accessed it herself; he remembered K.C. walking in on Nina giving him oral sex a number of times—"in the double digits"; and, "because they never locked their doors," K.C. had walked in on Nina and Peraza having sex in the shower once and in their room a number of times. R1047, 1059.

Peraza also began the first interview saying that he and K.C. had a great relationship, but as the interviews progressed and the officer told Peraza more details about K.C.'s allegations, Peraza gradually changed his characterization of the relationship until, by the end of the second interview, he was saying, "I don't spend much time with her at all." R1051–52.

Peraza said he would never intentionally do any of the things K.C. alleged, but he said it "could have" happened when he was drunk. R1065, 1075. He said he remembered passing out on his couch once after drinking, and when someone who he assumed was Nina came to shake him awake, he grabbed the person's head and "guided it" to his penis, letting go only after the person "finished" performing oral sex on him. R1049–50. He fell back asleep, but when he thanked Nina the next day, she did not know what he was talking about. R1050. Peraza said this happened "a few times," and he wondered if it "could have" been K.C. or one of his sons. R1050, 1068–69, 1075.

K.C.'s grandfather saw "a noticeable change" in Nina when Peraza was arrested. R1034. She became "very concerned about the impact of it on her family, on her becoming a single mother." R1041. Over the next several weeks, she began to disbelieve K.C.'s allegations. R987–89. She thought it "didn't feel right" that K.C. missed Peraza and even cried "for Daddy."

R945, 996–97, 1006–07. Nina also believed K.C. had a "reputation" for "fabricating charges against someone," though the only example she gave was a vague reference to how K.C. would "blame boys for doing things and then later tell you that they actually didn't do it." R1011–13, 1024.

In September 2013, the woman who interviewed K.C. at the CJC conducted a follow-up interview at K.C.'s school to determine whether anyone was pressuring K.C. to recant. R833. K.C. said an attorney told her not to talk about the case with Nina, so she had not done so. R833.

But soon after that, Nina confronted K.C. and asked if the allegations against Peraza were really true. R1007. In response, K.C. wrote a note saying that Satan had told her "in a little voice" that K.C. would die if she did not tell Nina at the football practice. R996–97; DE2. Nina interpreted that as a recantation, and she told Peraza's defense counsel. R989–90, 996. Defense counsel arranged for a private investigator to speak with K.C. in October 2013. R997; SE1. During the interview, K.C. began by reaffirming what she said in the CJC interview: Peraza "didn't touch me but he just made me do it." SE2 at 6. She then changed her statements and said Peraza did not make her do anything she did not want to do. SE2 at 6. When asked why she told the woman in the CJC interview that Peraza had made her do things she did

not want to do, K.C. said it was because an "evil," "little voice" in her head, named Lucifer, told her to say those things. SE2 at 7, 11, 13.

K.C. later explained that she was lying when she recanted. R915, 945. She lied to the private investigator because she "didn't want [her] family to get split up." R915.

In about May 2014, K.C. moved to California to live with her biological father. R810, 991–92. She attended therapy there, and as therapy progressed, additional details about the abuse emerged—specifically, that Peraza would anally sodomize her, and that Peraza's brother, Giovanni, would abuse her as well. R844–45, 971–72. One technique the therapist used was to have K.C. make effigy dolls of Peraza and Giovanni and have her kill the dolls by running over them with a (presumably toy) car. R959–60. Although K.C. was disclosing more details about the abuse to her therapist and family in California, throughout the time K.C. was living in California she continued to tell Nina when they spoke over the phone that Peraza did not abuse her. R952, 970–72, 1014–15.

In February 2015, K.C. was interviewed at California's equivalent to the CJC. DE1 at 2. In the California interview, K.C. reaffirmed that Peraza started abusing her by having her masturbate him and perform oral sex on him. DE1 at 25–26. She then detailed how Peraza later began to anally

sodomize her on a weekly basis, and how Giovanni would also abuse her. DE1 at 27–44. In December 2015, she told her aunt that Peraza had also put his penis in her vagina. R951–52, 973. She had not disclosed anything about anal or vaginal penetration earlier because she was afraid. R926, 972–75.

B. Summary of proceedings.

The State charged Peraza with four counts of first-degree-felony sodomy on a child, and one count of first-degree-felony aggravated sexual abuse of a child. R1–3; *see* Utah Code Ann. §76-5-403.1 (West 2015); *id.* §76-5-404.1 (West 2015).

1. Pre-trial Proceedings.

Leading up to the preliminary hearing, defense counsel requested eleven continuances. R16–19, 23–32, 37–38, 44–47, 76–77, 422, 439–41, 1324–25. A few resulted from Peraza switching from a public defender to a private attorney back to a public defender. R20–21, 37–38, 1324–25. After the case was bound over, defense counsel sought another continuance of a pretrial conference. R141–42. Trial was then set for March 2015. R152–53, 450–51.

The State filed a notice stating that it intended to call K.C.'s therapist as an expert witness to testify about "the psychological symptoms, reactions, and behaviors common in children that report having been

abused sexually" and whether she observed any symptoms or behavior in K.C. that were consistent with that. R157. The notice added that the therapist "may also provide corroborative evidence to rebut any defense claims of fabrication, coaching, etc." R157.

Eighteen days before trial, Peraza filed a motion to continue the trial. R153, 164–68. The motion was based in part on the State's expert notice. R165–66. Peraza argued that because the State was going to call the therapist to testify about "her observations of K.C., her motivations for recanting, then recanting the recantation, etc.," he needed access to the therapist's records, and he needed time to file objections to the admissibility of her testimony. R165–66. But the request was also based on the discovery of new evidence: K.C.'s recent allegations of anal sodomy, and abuse by Giovanni. R164–66. Defense counsel believed that the allegations of anal sodomy were inconsistent with the results of K.C.'s medical examination, which he had not yet received. R165. And he believed that the involvement of another perpetrator required "the exploration by the defense into a memory expert." R166.

The State did not object, and the trial court granted the motion, though it stated, "This case needs to get moving." R456, 458. The parties later agreed to have the trial court review the therapist's records *in camera*.

R478. Peraza filed an objection to having the therapist testify as an expert, R190–95, but the State withdrew its notice because there was no trial date set and the court's *in camera* review could change whether it intended to call the therapist, R201, 479. Peraza waived any speedy-trial claim, acknowledging that "[t]he delay is ours," and trial was set for October 2015. R212–13, 497–98.

Although it took longer than expected to get the therapist's records, R494–95, the trial court had them by August 24, 2015, R502. Peraza then filed a notice asking the court to review the records for all descriptions of the alleged abuse, any recantations, and any statements bearing on K.C.'s ability to tell the truth. R217–18. At a status conference held September 28, 2015, the trial court indicated that it had reviewed the records and by the end of the week would present the parties with copies of the records they could use. R512.

Peraza had the records at the latest by October 19, 2015, when Peraza moved for a continuance eight days before trial. R213, 1330–32. Defense counsel explained that he wanted to call the therapist as an impeachment witness, but she had not been responding to his attempts to contact her. R1331. Defense counsel also explained that he had just learned about the recorded interview with the private investigator, which had taken place

before he was on the case. R1330. That interview was being transcribed so he could give it to the prosecutor, who was aware that K.C. had allegedly recanted but was not aware that there was a recording of it. R1330–31. The State said it was willing to go forward with trial but did not object to a continuance. R1331–32. It stated, however, that because it had not yet seen the therapist's records, it would need Peraza to waive any notice objection to the State possibly calling the therapist as an expert, which Peraza did. R1332–33.

The trial court did not want to continue the case because it was two years old, and the court recognized the dangers inherent in waiting to put witnesses on in "this type of a case." R1331. It suggested skepticism that a recantation justified continuing trial, because it would be better just to get K.C. on the stand and let Peraza cross-examine her. R1332. But the court felt it had no choice. R1332. Trial was reset for February 2016. R278.

A month before trial, the State filed a notice stating that it intended to call a Ms. Smith as an expert witness. R282. The notice stated that Smith would testify about forensic interviewing methodologies and about the "science and research regarding child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and

recantation." R283. No report was attached. A list of articles Smith would rely on was attached, though the articles themselves were not. R288–92.

Fifteen days before trial, Peraza certified that he was ready for trial. R519–20. Peraza and the State had reached a stipulation that neither side would call the therapist, but her notes could be admitted for impeachment purposes. R519. Peraza stated that he still had an outstanding objection to the State's notice regarding Smith. R520. Although he had not actually filed an objection, the trial court set a hearing for January 28, 2016, twelve days before trial, to allow Peraza to argue his objection. R520–21.

At the objection hearing, the State clarified that it would call Smith, if at all, as a rebuttal witness to respond to evidence about K.C.'s recantation. R537, 545. Peraza objected that he did not have enough notice of what she would be testifying about to adequately challenge the scientific basis of her testimony. R534, 548. He also argued that if Smith was going to testify about statistics of children recanting, such statistics have been rejected as unscientific; furthermore, there is no scientific basis for any studies suggesting why children recant. R534–35.

The trial court agreed that without more information, it could not say what Smith would testify about or whether her testimony would be helpful for the jury. R547–48. But it ruled that she was qualified as an expert. R548,

550. The court stated that "at this point in time," it was going to let Smith testify. R550. But it clarified that Peraza could raise future objections to Smith's testimony, and "maybe [Smith] doesn't come in." R550. At the end of the objection hearing, Peraza asked if he could get a copy of the studies Smith would be relying on to effectively prepare his cross-examination. R570. The court ordered the State to provide the studies, and it reiterated that if Peraza objected at trial, Smith's testimony "may not come in." R572. The State complied with the court's order to give copies of relevant studies to Peraza. R746.

Following the trial court's tentative ruling that Smith's testimony would be admitted, Peraza moved to continue trial. R591. The trial court held a telephone conference that same day, January 28, 2016. R589. Peraza stated that after speaking with a mitigation expert on staff at the Salt Lake Legal Defender Association, he decided to get an expert to discuss the therapist's practices and how those practices could have influenced K.C. to falsely withdraw her recantation or to describe the abuse in more violent terms than were true. R589–90.

The trial court denied the continuance. It pointed out that this was the third time it had set the case for trial, and the court "had to draw the line somewhere." R592. The court explained that issues arising out of

information in the therapist's records could have been dealt with much earlier. R592. The court also noted that it had an obligation to the alleged victim as well. R592. It was thus "too late in the game" to continue trial. R592. After the trial court's ruling, the State offered to stipulate to evidence that some of the therapist's techniques could have negatively influenced the accuracy of K.C.'s allegations, if Peraza was able to "marshal something" to that effect. R594–95. No such evidence was presented at trial.

2. Trial.

At trial, K.C.—now twelve years old—testified about the abuse. R835. Her testimony was inconsistent on dates, contradicting her multiple pre-trial statements. *Compare, e.g.*, R849–50, *with* SE1 at 34:00–45, *and* R852, *with* DE1 at 31. She also added several details in describing the abuse, such as Peraza's use of a sock to muffle her screams during the abuse and Peraza's use of lubricant. R968–69. Other details contradicted her earlier denials, such as her earlier statements that the abuse was limited to masturbation, oral sex, and anal sodomy, or that no one other than Peraza abused her. SE1 at 35:55–36:05, 55:50–55; DE1 at 44. And although K.C. had told her aunt that Peraza had put his penis in her vagina, neither the prosecutor nor defense counsel was aware of that allegation until K.C. testified about it at trial. R854, 951–52, 973.

However, K.C. was consistent in describing a progression of abuse. R846–47, 849–50, 852–54. And she explained why she had not told others all the details of the abuse earlier. R926. She also explained her recantation, which she said was false. R915.

Nina testified for the State. On cross-examination, defense counsel used Nina to adduce evidence about the results of K.C.'s medical examination. R1005. Nina also stated that she was confused by K.C.'s later allegations of anal and vaginal penetration because of the lack of injuries. R1013–14.

Peraza had the private investigator testify. In addition to discussing K.C.'s recantation, the investigator stated that he "[n]ot very frequently" comes across cases where the alleged victim recants. R1130.

The State called Smith as a rebuttal expert. Smith first testified about interview techniques and potential flaws in the recantation interview, though she conceded that she had not reviewed a transcript of the recantation interview. R1134–38. The State also used Smith to respond to the investigator's testimony about recantation. Smith testified that recantations were "not something that's typical," though it was "not unheard of." R1141–42. She testified that between 4–20% of cases of child abuse involve recantations. R1141. Smith stated that recantation does not necessarily mean

the initial accusation was false. R1142. She identified two reasons a child might falsely recant: pressure from family members; and seeing negative results from disclosing the abuse, such as incarceration of someone they still love and the financial stress that often accompanies that. R1142.

Peraza did not object to Smith's testimony at trial under rule 702, Utah Rules of Evidence. But on cross-examination, he got Smith to acknowledge that the figure she presented of the frequency of recantations included both sexual as well as physical abuse. R1147. Peraza also got Smith to concede that a child may honestly recant, and that an allegation is not true just by virtue of its having been made. R1147–48. Smith identified one reason a child might truthfully recant: she feels guilty for lying about the allegations in the first place. R1148.

Earlier in the trial, the State had offered a DVD of the first CJC interview as evidence and played it for the jury. R815, 861. The State also offered a transcript of the recantation interview with the private investigator. R920. Peraza offered a transcript of the California interview, along with the note K.C. wrote to her mother saying Satan told her to make the allegations at the football practice. R969, 1105. All four exhibits were admitted into evidence and sent with the jury into deliberations. R1287. The trial court also said the bailiff would provide a TV for the jury to watch the

CJC interview. R1287. Peraza had objected earlier in the trial to sending the CJC recording in with the jury. R814–15. The trial court deferred ruling on the issue, telling Peraza he could argue it later outside the presence of the jury "since we're not going to be sending it back . . . right now." R815. Peraza did not renew his objection when the trial court made arrangements to send the DVD in with the jury along with the other transcripts. R1287–88.

The State moved to dismiss the aggravated sexual abuse charge. R363, 1199–1200. The jury then found Peraza guilty of all four counts of sodomy on a child. R367–68. The court later sentenced Peraza to four concurrent terms of twenty-five years to life. R380–81.

Peraza timely appealed, filing a simultaneous motion for remand under rule 23B, Utah Rules of Appellate Procedure. R392.

SUMMARY OF ARGUMENT

I. Peraza contends that the trial court abused its discretion by admitting Smith's expert testimony. He argues that no foundation was provided to establish the reliability of the principles and methods on which Smith relied.

Peraza never objected based on rule 702. Rather, he objected only based on inadequate notice. Or at most, he abandoned his objection. Peraza focuses on the trial court's tentative denial of his pre-trial notice objection,

but he ignores what happened at trial. The prosecutor gave Peraza the studies on which Smith's testimony would be based, and Peraza never raised a rule 702 objection at trial.

Peraza cannot show plain error because Smith testified that she based her opinion on several studies that were generally accepted in her field. That established the minimal threshold showing the State was required to make. In any event, admission of Smith's testimony was harmless because Peraza was able to effectively undermine it through cross-examination.

II. Peraza contends that the trial court abused its discretion when it denied his motion for a continuance twelve days before trial. Peraza argues that a continuance was required because he had diligently prepared for trial but could not have foreseen the trial court's denial of his objection to Smith's testimony.

In reality, Peraza had requested fifteen continuances in this case, three of which involved continuing trial after it had already been scheduled. Although Peraza casts his continuance argument in terms of responding to Smith's testimony, the continuance was really about getting an expert to testify about K.C.'s therapist's techniques. The trial court rejected the request because that issue could have been raised earlier. Peraza does not address that fact on appeal. Peraza had access to the therapist's records

three months before he moved for a continuance. The trial court also correctly considered the fact that continuing trial would be detrimental to the State's ability to put on evidence given that this case deals with a child–victim who would already be testifying about abuse that occurred between three to seven years in the past. Furthermore, Peraza was not prejudiced by the ruling because he was able to effectively cross-examine Smith.

III. Peraza contends that the cumulative effect of the trial court's admission of Smith's testimony and denial of a continuance rendered the two errors prejudicial. In support, he relies on the intertwined nature of the two rulings.

In fact, the two rulings were not as intertwined as Peraza suggests. Although the denial of his objection prompted him to recalibrate his strategy and ultimately ask for a continuance, Peraza sought the continuance to get an expert to talk about K.C.'s therapy, not to challenge Smith. Peraza thus has not shown how the two harmless errors work together to create prejudicial error.

IV. Peraza next contends that the trial court erred by allowing the jury to take the CJC recording into deliberations. He claims that the error prejudiced him because it overemphasized K.C.'s allegations.

Peraza invited any error because he affirmatively stated that he had no issues to raise before the jury was sworn in, even though the trial court explicitly stated that the CJC recording would be going back with the jury. Alternatively, the claim is unpreserved because Peraza abandoned his earlier objection. Peraza raised the issue with the trial court in the midst of trial, but the court told Peraza to wait to argue it outside the presence of the jury. The record does not indicate that Peraza ever did so, even when the trial court stated at the close of the case that it would be sending the CJC recording back with the jury. Peraza thus obtained no ruling on the record for this Court to review.

This Court should not review for Peraza's claim for plain error because Peraza invited any error, or because Peraza's objection is unpreserved and he did not brief plain error on appeal. But Peraza could not establish plain error in any event. At the time of trial, no controlling precedent required the trial court to exclude the CJC recording from jury deliberations. Furthermore, the trial court was not required to intervene because strategic considerations supported Peraza's decision not to object: The CJC recording was sent to the jury along with transcripts of the recantation interview and the California interview—neither of which Peraza

challenges on appeal. Together, those three exhibits supported Peraza's theory that K.C.'s various allegations were inconsistent and thus incredible.

In any event, any error was harmless because the CJC recording was not overemphasized. Because the jury had all three interviews in deliberations, it could compare the three accounts, along with their memory of K.C.'s more damning trial testimony, to determine what they believed. Allowing the jury to have the CJC recording thus furthered Peraza's strategy of focusing on the inconsistencies across her various statements.

V. Peraza argues that defense counsel was ineffective for failing to investigate and call expert witnesses. But he concedes that he cannot establish his ineffective-assistance claim relying solely on evidence in the record. This Court therefore should deny his ineffective-assistance claim absent a 23B remand.

ARGUMENT

I.

Peraza did not preserve his rule 702 objection and does not argue plain error. In any event, the trial court did not plainly abuse its discretion in allowing the expert to testify.

Peraza contends that the trial court abused its discretion in admitting Smith's testimony. He argues that the trial court "did not apply the correct test" under rule 702 because it "completely failed to examine" the threshold

issue of reliability. Aplt.Br.30–32. But even if the court had addressed it, he argues, the State presented no basis for a finding of reliability. Aplt.Br.28–30. Lastly, Peraza argues that admitting Smith's testimony prejudiced him because "this case depended entirely upon K.C.'s credibility," and Smith bolstered K.C.'s problematic testimony. Aplt.Br.32–35. [3]

Peraza never made a rule 702 objection. Rather, he objected pre-trial on the basis of inadequate notice: He argued that he did not have enough information to assess whether Smith's testimony met rule 702's reliability threshold. But once he got the necessary information, he never raised a rule 702 objection. Instead, he cross-examined Smith on the limits of her conclusions. And even if Peraza's objection could be construed as a rule 702 objection, he abandoned that objection when he chose not to reassert it after the State provided Peraza with the information necessary to assess the basis for Smith's testimony.

Furthermore, Peraza has not shown that the supporting evidence—which the trial court was not privy to—was so plainly unreliable that the

[3] Although Peraza emphasizes the prosecutor's allegedly inadequate notice in his argument, he disclaims any formal notice challenge. *See* Aplt.Br.40 ("Peraza was properly notified of the state's expert witness . . . ."). Furthermore, he does not analyze or discuss any rule delineating the notice requirements. Rather, his notice argument is presented only as support for his rule 702 challenge.

trial court should have excluded Smith's testimony on its own initiative. Finally, Peraza has not shown prejudice—trial counsel effectively highlighted the limits of the testimony and elicited favorable testimony from the expert.

A. Peraza raised only a notice challenge below, not a rule 702 challenge; alternatively, Peraza abandoned his challenge when the evidentiary picture changed at trial.

Peraza's rule 702 objection is unpreserved. "A claim is preserved before the district court when it has been presented to the district court in such a way that the court has an opportunity to rule on [it]." *State v. Prater*, 2017 UT 13, ¶27 (alteration in original) (internal quotation marks omitted). When Peraza objected to Smith's testimony before trial, he did so on the basis of inadequate notice. R534, 536, 548. He argued, "I don't know exactly what studies she's drawing on, and what she'd be actually testifying to." R534. Peraza speculated about what her testimony might be, but he added that "without having the report, I don't know what her basis is." R540. Peraza presented several arguments about how Smith's testimony *might* lack "a scientific basis" and not meet the threshold. R535, 540–42. But by his own admission, those arguments were all based on speculation as to what Smith's testimony would be. And the trial court essentially agreed and stated that all it could do "at this point" is to decide whether Smith was

qualified. R547–47, 550. The court directed the State to provide Peraza the necessary information so that Peraza could object at trial if necessary. R572. The State did. R746. But Peraza never objected at trial. Peraza thus never gave the trial court an opportunity to rule on whether Smith's testimony met the reliability requirements of rule 702.

But even if Peraza's pre-trial objection could be construed as a rule 702 objection, he abandoned that objection when the evidentiary picture changed at trial. "A claim is not preserved for appeal if a party initially objects but later, while 'the wheel's still in spin,' abandons the objection and stipulates to the court's intended action." *In re Estate of Anderson*, 2016 UT App 179, ¶9, 381 P.3d 1179 (quoting Bob Dylan, The Times They Are A–Changin' (Columbia Records, 1964) (additional internal quotation marks omitted)). Although the rules of evidence generally do not require a party to renew an objection to preserve it, that rule applies only when "the court rules definitively" on the issue. Utah R. Evid. 103(b). Furthermore, a party is required to renew an objection even after a definitive pre-trial ruling when the evidentiary picture changes. *State v. Lintzen*, 2015 UT App 68, ¶28, 347 P.3d 433 ("[P]retrial rulings are subject to revision at trial as the evidentiary picture unfolds, but a party must request such a reconsideration when circumstances change."). "Thus, 'subsequent developments' at trial can

'affect the continuing wisdom' of an *in limine* order to the extent that a defendant is 'required to renew his request.'" *Id.* (quoting *State v. Marks*, 2011 UT App 262, ¶¶73–74, 262 P.3d 13).

In arguing that the State never presented a basis for the trial court to determine the reliability of Smith's testimony and that the court never ruled on the issue, Peraza ignores what happened at trial, instead focusing exclusively on his pre-trial objection. *See* Aplt.Br.28–32. But the trial court's pre-trial ruling that Smith could testify was expressly a tentative ruling—not a definitive one. R550. And the court repeatedly said it may well exclude Smith if an objection was raised at trial based on what she testified to. R550, 572. Peraza did not take the court up on its suggestion. Thus, he abandoned his objection by failing to raise it based on Smith's testimony at trial. *See* Utah R. Ediv. 103(b); *Lintzen*, 2015 UT App 68, ¶28.

But even if the trial court's ruling were treated as a definitive rejection of Peraza's objection, Peraza still needed to reassert his rule 702 objection at trial because the evidentiary picture changed. Again, Peraza based his pre-trial objection on the fact that he did not know what Smith would testify about and thus could not challenge the reliability of her testimony. R534, 536, 540, 548–49, 570. But by the time Smith testified, Peraza had the studies. R746. Peraza was apparently satisfied with the threshold reliability of

Smith's testimony based on those studies because he did not reassert his objection at trial. R1140–46. Furthermore, Smith testified without objection that the studies on which she relied were "generally accepted" within her field "as being sources that were reliable." R1140. And there is nothing in the record to contradict that assertion.

Having received copies of those studies, it was incumbent upon Peraza to alert the trial court if he thought they were insufficient to establish rule 702's threshold reliability requirements. Because he did not do so, his rule 702 claim is unpreserved. *See Matter of Estate of Anderson*, 2016 UT App 179, ¶9; *Lintzen*, 2015 UT App 68, ¶28. And because he has not argued any exception to the preservation rule, this Court should not address the claim further. *See State v. Pinder*, 2005 UT 15, ¶45, 114 P.3d 551; *Lintzen*, 2015 UT App 68, ¶29.

B. Because the expert testified without objection that the studies on which she relied were generally accepted in her field, the trial did not plainly abuse its discretion in allowing her to testify.

Under the doctrine of plain error, an appellant must prove that the trial court committed obvious, prejudicial error. *State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). Peraza cannot do that here. Peraza has not argued that the foundation for Smith's testimony was so unreliable that it plainly did not meet rule 702's threshold reliability requirements. He

therefore has not shown that the trial court should have excluded the testimony under rule 702 even without a contemporaneous rule 702 reliability objection from him.

And Peraza could not meet that burden on this record because the unchallenged testimony clearly met rule 702's threshold. Expert testimony must meet three threshold showings to be admissible: (1) the witness must be "qualified as an expert by knowledge, skill, experience, training, or education"; (2) the testimony must "help the trier of fact to understand the evidence or to determine a fact in issue"; and (3) the principles and methods underlying the testimony must meet a "threshold showing" that they are "reliable," "based upon sufficient facts or data," and "have been reliably applied to the facts." Utah R. Evid. 702. Peraza challenges only the third requirement.[4]

[4] Peraza expressly concedes that Smith was qualified to testify under rule 702. Aplt.Br.27 n.12. He purports to raise a challenge based on whether Smith's testimony would help the jury, but he devotes to the issue only one-and-a-half sentences in two separate footnotes. Aplt.Br.27 n.12; 31 n.15. Peraza has not even begun to carry his burden on appeal as to this issue, and this Court should decline to address it. *See* Utah R. App. P. 24(a)(9); *State v. Hawkins*, 2016 UT App 9, ¶64, 366 P.3d 884. Furthermore, as with Peraza's reliability argument, this argument is also unpreserved. Because Peraza does not analyze the issue under an exception to the preservation doctrine, this Court should not address Peraza's cursory challenge. *See Pinder*, 2005 UT 15, ¶45; *State v. Holgate*, 2000 UT 74, ¶11, 10 P.3d 346.

The threshold showing "will vary depending on the complexity of the particular case." *Eskelson ex rel. Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶15, 242 P.3d 762. It can be satisfied "if the underlying principles or methods . . . are generally accepted by the relevant expert community." Utah R. Evid. 702(c). Here, the evidence established reliability under that standard.

As noted, Smith testified that the studies on which she relied were "generally accepted" within her field "as being sources that were reliable." R1140. That testimony went unchallenged at trial. Smith also testified that the studies were published in peer-reviewed publications, and she explained that that meant other researchers had reviewed it "to make sure that it's accurate" and that "it represents the field." R1140–41. On cross-examination, Smith clarified that the peer-review process does not require other researchers to agree with the articles and it often leads to debate within intellectual community. R1146. But Peraza never elicited any testimony suggesting the articles—to which he had access—were inaccurate. R1146. And he has not acknowledged that evidence on appeal. Nor has he attempted to explain how the trial court, which did not have access to the studies Peraza had access to, could have recognized that Smith's testimony was obviously insufficient under rule 702.

Smith's uncontroverted testimony that the articles on which she relied were generally accepted in the field is enough to satisfy the threshold showing under rule 702. *See State v. Jones*, 2015 UT 19, ¶26, 345 P.3d 1195 (describing threshold showing as a "minimal" showing). Any further assessment of the reliability of Smith's testimony belonged to the jury. *See id.* (stating that "'the line between assessing reliability and weighing evidence can be elusive,'" and "'the factfinder bears the ultimate responsibility for evaluating the accuracy, reliability, and weight of the testimony'" (quoting *Gunn Hill Dairy Properties, LLC v. Los Angeles Dep't of Water & Power*, 2012 UT App 20, ¶47, 269 P.3d 980)); *Majors v. Owens*, 2015 UT App 306, ¶¶21–22, 24, 365 P.3d 165 (stating that proponents are "required to make only a threshold showing," and issues going to weight are irrelevant to that showing because opponents "have the opportunity to expose and probe such weaknesses once the opinions are admitted at trial"), *cert. granted*, 384 P.3d 1139 (Utah 2016).

C. Any error in admitting the expert's testimony was harmless.

Peraza argues that admitting Smith's testimony prejudiced him because it bolstered K.C.'s testimony. Aplt.Br.32–35. He focuses his prejudice analysis on two elements of Smith's testimony: her discussion of recantation and her discussion of delayed and partial disclosure. Aplt.Br.34–

35. He argues that because the case "depended entirely on K.C.'s credibility," there is a reasonable likelihood of a more favorable result had Smith's testimony not been admitted. Aplt.Br.35.

Smith's testimony did not bolster K.C.'s credibility. Unlike the cases Peraza relies on to argue prejudice, Smith did not ever testify that K.C. was telling the truth or otherwise presented as candid when she alleged that Peraza abused her. *See State v. Rimmasch*, 775 P.2d 388, 407–08 (Utah 1989), *superseded by* Utah R. Evid. 702; *State v. Stefaniak*, 900 P.2d 1094, 1095 (Utah Ct. App. 1995); *State v. Iorg*, 801 P.2d 938, 940–41 (Utah Ct. App. 1990).[5] In fact, Smith acknowledged that she never reviewed the specifics of this case, and thus she offered no opinion as to K.C. R1148. And she offered no "seemingly scientific, numerical conclusion" about whether someone who recants was truthful when first she made the allegations. *See State v. Rammel*, 721 P.2d 498, 501 (Utah 1986) (concluding that evidence about the statistical probability of truthfulness is inadmissible).

Peraza's argument takes into account only Smith's direct examination. But Peraza ignores the inroads the defense made during cross-

[5] In *State v. Jacques*, 924 P.2d 898 (Utah Ct. App. 1996), the inadmissible and harmful testimony was not about a witness's truthfulness, but, like credibility, it was about the ultimate issue in that case—whether the defendant forged certain documents. *Id.* at 900, 902–03 & n.4. Smith presented no testimony as to the ultimate issue here.

examination. Peraza also undermined the specific percentage Smith gave by drawing out the concession that the study referred to both sexual and physical abuse. R1147. Furthermore, Peraza's own witness—the private investigator—provided essentially the same testimony as Smith that recantation is fairly uncommon. R1130.

After direct and cross-examination, the take-away from Smith's testimony was this: (1) recantations are uncommon, but they do happen, R1141–42; (2) a child's recantation may or may not be true, R1142, 1147–48; (3) reasons a child may falsely recant include pressure from family members and seeing negative results from disclosing the abuse, R1142; and (4) reasons a child may truthfully recant include a feeling of guilt for lying about the initial allegation, R1148. Again, Smith never offered any opinion about whether K.C. was telling the truth when she accused Peraza of sexually abusing her. Given the concessions Smith made, her testimony did little, if anything, to bolster K.C.'s credibility.

Peraza's prejudice argument also fails to take into account the total evidentiary picture, including the circumstantial corroboration of K.C.'s allegations. Although K.C. was inconsistent about the ages at which various forms of abuse occurred, she fairly consistently described the locations where the abuse occurred. R837, 843–44, 851, 853–54, 909–10, 935–36; DE1 at

28–29, 43–44. Her grandfather and Nina corroborated her account not only of where she lived at various ages, but also the fact that Peraza stayed at a hotel for a short period—one of the places K.C. claimed the abuse had occurred. R796–801, 998.

And K.C. had an uncharacteristically detailed knowledge of sexuality, sexual processes, and male anatomy for a child five to nine years old. K.C. acknowledged that she had seen her parents have sex once, when she was sleeping in their room and woke up during the night. R929–30, 962. But that single incident could not have accounted for the breadth and detail of her knowledge. And Peraza's and Nina's testimony was too conflicting to establish that K.C. had seen more than she testified to. Nina claimed that K.C. had only walked in on them "a couple times," and that she walked in when Nina was performing oral sex on Peraza "maybe like once." R1015–16. Peraza on the other hand claimed that the number of times K.C. had walked in on Nina giving him oral sex was "in the double digits," and that K.C. had walked in on them having sex "a number of times, and once in the shower." R1047. Nina acknowledged that K.C. could have accessed pornography on their electronic devices, but she implied that the likelihood was not great. R999–1000, 1017. Furthermore, she testified that K.C. never asked her about pornography she had seen, but K.C. was "inquisitive"

enough to ask Nina questions about when she saw Nina and Peraza having sex. R1016–17.

Finally, Peraza did not completely deny that he and K.C. had any sexual contact. Rather, he owned that it was possible, blaming drunken stupor as the reason for the contact. Peraza admitted that he "could have" forced K.C. to perform oral sex on him, allegedly not knowing it was her, and that after realizing his mistake, he "could have" done it again "a few times" after that. R1049–50, 1068–69, 1075. While K.C.'s various allegations were not perfectly consistent, she was consistent in describing a progression of abuse. R846–47, 849–50, 852–54. Thus, even if Smith's testimony had been as effective as Peraza argues it was, admitting the testimony was harmless when viewed in the context of the evidence at trial.

II.

The trial court properly exercised its discretion not to delay the trial further when, a year-and-a-half after Peraza was bound over, Peraza requested his third continuance to address a matter he had known about for three months.

A trial court's decision to deny a continuance will not be reversed "[a]bsent a clear abuse" of discretion. *State v. Williams*, 712 P.2d 220, 222 (Utah 1985). No definitive list of factors binds that discretion. *Compare State v. Begishe*, 937 P.2d 527, 530 (Utah Ct. App. 1997), *with State v. Wallace*, 2002 UT App 295, ¶37, 55 P.3d 1147. But relevant considerations include such

things as "(1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the need for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the appellant might have suffered harm as a result of the court's denial." *Begishe*, 937 P.2d at 530.

Peraza argues that the trial court abused its discretion because each factor cuts in favor of granting a continuance. But Peraza is mistaken.

First, Peraza argues that defense counsel diligently prepared for trial, requesting several continuances, making timely objections to the State's proposed experts, and requesting an emergency hearing to request a continuance the evening that the court denied his objection to Smith. Aplt.Br.40. But Peraza had requested fifteen continuances throughout the life of this case, three of which were requested after trial dates had already been set. R16–19, 23–32, 37–38, 44–47, 76–77, 153, 164–68, 213, 422, 439–41, 591, 1324–25, 1330–32. The trial court was rightfully concerned about the age of the case and the effect that would have on the evidence. R592, 458, 1331–32. By this point, the case was two-and-a-half years old and Peraza had been bound over just shy of a year and a half earlier. R1–4, 80–81. While

each prior continuance request may have been individually justified, the combined effect of so many requests supports the trial court's decision to deny the final one. *Cf. Layton City v. Longcrier*, 943 P.2d 655, 659 (Utah Ct. App. 1997) (indicating that prior continuance requests weigh against granting a later continuance to find new counsel); *Fishbaugh v. Utah Power & Light*, 969 P.2d 403, 408–09 (Utah 1998) (upholding denial of motion to amend complaint where motion was filed following two different continuances of trial date, and only forty-four days before third scheduled trial date).

Furthermore, Peraza had the information necessary to obtain an expert at least three months before he moved for a continuance. Peraza sought a continuance not to get an expert to respond to Smith, but to get an expert to address issues that arose in the therapist's notes. R590. He wanted an expert to testify that making effigy dolls during therapy sessions and killing them could have influenced K.C. to falsely withdraw her recantation or to exaggerate the violence of Peraza's abuse. R590. But Peraza had those therapy notes by October 19, 2015, at the latest. R1330–31. Thus, Peraza was not "unprepared due to unanticipated evidentiary rulings" that came three months later. Aplt.Br.39. The trial court recognized as much, stating that the information Peraza sought was available much earlier. R592. Peraza does

not address this basis for the trial court's ruling. *See State v. Vargas*, 2001 UT 5, ¶34, 20 P.3d 271 (holding appellant's contention on appeal "irrelevant" where "argument does not address the basis stated by the trial court for its decision").

Furthermore, even if Peraza had sought the continuance to respond to Smith—which he did not—Peraza could have reasonably anticipated that his "objection" to Smith would be denied. For one thing, he never actually filed an objection. R520–21, 532–33. Rather, after receiving notice of the state's proposed expert a month before trial, he orally moved to exclude her testimony fifteen days before trial. R520–21. This is not a case where a "last minute development" was sprung upon defense counsel in the midst of trial. *See Begishe*, 937 P.2d at 529, 531 (concluding that defense counsel count not have reasonably anticipated prosecutor presenting new test results and expert witness on afternoon of first day of trial). This factor thus weighs strongly against a continuance.

Second, Peraza argues that a continuance would have given him time to consult an expert to assist him in confronting Smith, or at least develop a new trial strategy in response to the court's ruling. Aplt.Br.41. But again, he never asked the court for more time to respond to Smith's testimony. R590. And he has made not any argument as to how this factor weighs in his favor

when applied to the reason for which he did seek a continuance: to find an expert to address the therapist's techniques.

But even if this Court ignored the reason for which Peraza sought a continuance, this factor does not so favor granting a continuance that denial was an abuse of discretion. Even without a continuance, Peraza may well have been able to refine his trial strategy or find an expert—either to rebut Smith or to address K.C.'s therapy. Peraza had twelve days between the trial court's ruling and the start of trial. He had already explored the possibility of "the need for a memory expert." Aplt.Br.43 (citing R165–66). And even if finding an expert who was available to testify would have been difficult, the State offered to stipulate to evidence about the possible effects of the therapist's techniques. R594–95. Peraza never took the State up on that offer. Furthermore, he effectively cross-examined Smith and has not shown that a continuance would have allowed him to adduce any more evidence than what he was able to get Smith to concede. This factor thus weighs against a continuance.

Third, Peraza argues that a continuance was warranted because the State did not object, it recognized "how important the continuance would be," and Peraza's rights are more important than "administrative inconvenience" to the court. Aplt.Br.41. Peraza's characterization of the

State's position is not fully accurate. The State said it was "unhappy with" with prospect of another continuance, though it acknowledged that it could "understand the basis" of Peraza's request. R592. The State and the trial court faced administrative inconveniences in continuing trial yet again. *Cf.* R1331 (indicating at October hearing on Peraza's earlier motion to continue trial that State had already bought airline ticket for victim to attend trial); *see also United States v. Burton*, 584 F.2d 485, 491 n.19 (D.C. Cir. 1978) ("[O]ther considerations in any particular case, such as the interest in orderly procedures or the interest in avoiding manipulation or subversion of the process, may countervail a showing of prejudice and thereby justify the denial of a request for continuance.").

And further prolonging the trial posed more risk than a mere administrative convenience. The State had a significant interest in moving forward with trial to avoid the problem of witnesses' memories fading as time went on. That concern was particularly compelling here, where the case was already two-and-a-half years old, and a child–victim would be testifying as a twelve-year-old about abuse that started when she was five. R592 (trial court identifying obligation to alleged victim as one reason for denying continuance); *cf. State v. Cabututan*, 861 P.2d 408, 413 (Utah 1993) (approving of consideration that elusive witnesses may not be available for

trial if continuance was granted). Again, Peraza does not address this basis of the trial court's decision. This factor thus weighs strongly against a continuance.

Fourth, Peraza argues that he was prejudiced because Smith "rehabilitated K.C.'s credibility, without challenge." Aplt.Br.43. Again, this argument is irrelevant to whether the trial court abused its discretion because Peraza never asked the court for a continuance to find an expert to counter Smith. But even if it were relevant, it is simply not true that Smith rehabilitated K.C.'s credibility without challenge. As explained in Point I.C. above, Smith's testimony did not go unchallenged, and the result was that Smith did not appreciably bolster or rehabilitate K.C.'s credibility. And even if Smith influenced the jury's willingness to believe K.C., that is not enough to conclude that the trial court abused its discretion in denying Peraza's continuance.

In theory, any denial of a continuance harms a defendant in the sense that the defendant may have received some marginal boon from the delay and the ability to put on more evidence. But in reviewing the trial court's discretionary decision to deny a continuance, the question is whether "the result of the court's refusal to grant a continuance was to deprive the accused of *the only* testimony potentially effective to his defense." *United*

States v. Flynt, 756 F.2d 1352, 1361, *amended*, 764 F.2d 675 (9th Cir. 1985) (emphasis added) (internal quotation marks omitted).[6] Here, the continuance did not do that because Smith's concessions were effective for the defense. And he has not shown that an unidentified expert could have given him more. This is not a case where the defendant was "not allowed to put forward the only defense he had," nor is it a case where denial of the continuance prevented him from putting on "the only testimony potentially effective to his defense." *Flynt*, 756 F.2d at 1362. Rather, he was able to call K.C.'s credibility into question by highlighting the inconsistencies in her disclosures, including her recantation then withdrawal of the recantation. While there were any number of ways he could have pursued that strategy, Peraza was not precluded from putting on this defense.

In sum, each factor weighs against granting a continuance. And even if this Court would weigh the factors differently, it cannot say that the trial court's decision was an abuse of discretion.

[6] This Court relied on *United States v. Flynt* when it identified several factors relevant to determining whether a continuance should have been granted. *See Begishe*, 937 P.2d at 530.

III.

Peraza has not shown cumulative error because he did not request a continuance to respond to the expert testimony he challenges on appeal.

Peraza argues that he was prejudiced by the cumulative effect of the trial court's rulings admitting Smith's testimony and denying the continuance. Aplt.Br.44. *See Dunn*, 850 P.2d at 1229 ("Under the cumulative error doctrine, we will reverse only if 'the cumulative effect of the several errors undermines our confidence . . . that a fair trial was had.'").

Peraza suggests two reasons these ruling worked together to prejudice him: the "close relationship between the two rulings," and "the effect they had upon the evidence presented at trial." Aplt.Br.44. Each reason fails to establish cumulative error.

First, the two rulings were not as closely related as Peraza suggests. Although the trial court's preliminary denial of Peraza's motion to exclude Smith's testimony prompted Peraza to speak with a mitigation expert, the result of that conversation was a decision to call an expert to address the therapist's practices—not to challenge Smith's testimony directly. R589–90, 593–94. Thus, there is no "close relationship between the two rulings" that compounds the effect of each.

Second, while the trial court's rulings obviously affected "the evidence presented at trial," Peraza does not discuss the aggregate of that

effect. He points to nothing to explain how two alleged errors, each harmless on their own, combined to affect the evidence produced at trial in a way that prejudiced him. Peraza was able to present evidence of the therapist's practices and argue that they undermined the truthfulness of K.C.'s allegations. R959–60, 780. Peraza does not address how excluding expert testimony to bolster that argument combined with the inclusion of Smith's equivocal testimony on recantations to produce prejudicial error. Thus, Peraza's terse reference to the evidentiary effect of the trial court's two rulings fails to demonstrate that "the cumulative effect" of the alleged errors undermines confidence in the verdict. *Dunn*, 850 P.2d at 1229 (internal quotation marks omitted).

IV.

Peraza invited any error, or at least he abandoned his challenge to allowing the jury to take the recording of the CJC interview into deliberations; in any event, Peraza has not shown obvious, prejudicial error.

Peraza contends that the trial court erroneously sent the recording of the CJC interview in with the jury. Aplt.Br.50. He argues that the error was prejudicial because "K.C.'s credibility and the accuracy of her statements . . . were the focus of the defense"; K.C.'s initial allegations were "added to, changed, recanted, reaffirmed, and changed again"; and there was no way

to tell whether the jury based its verdict on the allegations in the CJC interview or at trial. Aplt.Br.51.

Peraza invited any error, or at least did not preserve his objection. But even if this Court reviews for plain error, there was no obvious error here because at the time of trial the law suggested the trial court had discretion to decide whether the send the CJC recording with the jury. Furthermore, any error here was harmless because the jury took not only the CJC recording into deliberations, it also took a transcript of the recantation interview and a transcript of the California interview. The jury thus had several of K.C.'s accounts—some favoring the State's theory and some favoring Peraza's. And the combination of all three inconsistent accounts favored Peraza's theory that K.C. was incredible. There was thus no risk that the CJC recording would be overemphasized at Peraza's expense.

A. Peraza invited any error when he agreed to sending the CJC recording in with the jury; alternatively, he abandoned his earlier, premature objection by not reasserting it when the issue was ripe.

Peraza invited any error when he said he had no issues to raise before the jury was sworn. Alternatively, he abandoned his earlier objection to allowing the CJC recording into the jury room when he did not renew his objection or at least demand a ruling on the record.

A party invites error if it "led the trial court into committing the error." *Dunn*, 850 P.2d at 1220. Invited error requires some affirmative act or statement, and not "mere silence." *State v. McNeil*, 2016 UT 3, ¶¶18–19, 21 & n.2, 365 P.3d 699.

At the close of trial, the trial court identified the exhibits, which included the DVD of the CJC interview, the transcript of the recantation interview, and the transcript of the California interview. R1287. The trial court then said, "They'll go back. As far as the DVD, would it be all right if [the bailiff] sets that up? I think we'll use the same TV that we have been using and just put that in there, and they can figure out how to do it after that." R1287. Peraza said nothing. While Peraza's silence would not be enough to invite error, the critical point came next: The bailiff was sworn in, but before the jury was sworn, the trial court asked, "Counsel, anything before we go ahead and allow the jury to take care of their work?" R1288. Peraza said, "No, Your Honor." R1288. In light of Peraza's mid-trial objection to allowing the DVD in with the jury and the trial court's instruction to Peraza to address the issue later, R814–15, Peraza's affirmative statement that he had no issues to raise qualifies as invited error. The trial court was led to believe that Peraza wanted the jury to take the DVD into deliberations along with the other transcripts.

But if that were not enough to establish invited error, Peraza at least abandoned his objection. Again, the rule that "a party need not renew an objection . . . to preserve a claim of error for appeal" applies only "[o]nce the court rules definitively on the record." Utah R. Evid. 103(b). Here, the trial court never ruled on Peraza's mid-trial objection. Rather, when Peraza objected during the CJC interviewer's testimony, the trial court told Peraza that it wanted to "defer that issue for a minute," because the recording was not going back with the jury yet, and it was not even going to be played at that point. R814–15. The court thus asked defense counsel to wait to argue the point until the jury was not around. R815.

Despite the trial court's instruction to argue the issue later, the record does not indicate that Peraza ever did. And if he did, he did not obtain a ruling "on the record." Utah R. Evid. 103(b).

That is not enough to preserve an objection for appeal. *See id.* Because the trial court said Peraza's objection was premature when he first raised it, Peraza abandoned his objection by not reasserting it when the issue was ripe. The trial court deferred ruing on Peraza's objection, and Peraza had an opportunity to renew the objection when the issue squarely presented itself. Instead, he expressly stated that he had no issues to raise before the jury began its deliberations. He thus abandoned his initial objection, never

obtaining a ruling for this Court to review. *See id.*; *see also In re Estate of Anderson*, 2016 UT App 179, ¶9; *Lintzen*, 2015 UT App 68, ¶28; *cf. State v. Davis*, 689 P.2d 5, 15 (Utah 1984) (concluding that objection to sending deposition transcript in with jury was "deemed waived" because no "proper and seasonable objection" was made).

Because Peraza either invited error or abandoned his objection below, he cannot succeed on appeal. If Peraza invited error, he is not entitled even to plain-error review. *State v. Winfield*, 2006 UT 4, ¶14, 128 P.3d 1171. Although plain-error review may normally be available when a party abandons a claim of error below, Peraza does not argue plain error on appeal. Thus, this Court should not address the issue further. *See Pinder*, 2005 UT 15, ¶45; *Lintzen*, 2015 UT App 68, ¶29.

B. Peraza cannot establish obvious error because *Cruz* had not been decided yet, and because testimonial statements favoring each party were sent back with the jury.

To establish plain error, Peraza must show that the error should have been obvious to the trial court, such that the trial court should have recognized *sua sponte* that allowing the jury to take the CJC recording into deliberations would be an abuse of discretion. *See Dunn*, 850 P.2d at 1208–09. To establish that the error should have been obvious to the trial court, Peraza must show that "the law governing the error was clear at the time

the alleged error was made." *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276. "Thus, an error is not obvious if there is no settled appellate law to guide the trial court." *State v. Davis*, 2013 UT App 228, ¶32, 311 P.3d 538 (internal quotation marks omitted). Peraza cannot do so here.

After trial in this case, this Court issued *State v. Cruz*, 2016 UT App 234, 387 P.3d 618, in which it held that juries should not take CJC recordings into deliberations because they are testimonial in nature and would overemphasize one party's evidence to the detriment of the other. *Id.* ¶¶33–41. But the law was not so clear at the time of trial. In *State v. Ashby*, 2015 UT App 169, 357 P.3d 554, this Court declined to decide "whether sending the DVD of the CJC interview into jury deliberations was erroneous" because it held that the any error was harmless. *Id.* ¶¶46–47. The Court cited only rule 17(*l*), Utah Rules of Criminal Procedure, which this Court interpreted as allowing the jury "to take jury instructions and 'all exhibits which have been received as evidence' into deliberations with them," and as giving the trial court discretion "to withhold certain exhibits from deliberations unless the jury requests it." *Ashby*, 2015 UT App 169, ¶46 (quoting Utah R. Crim. P. 17(*l*)).

Prior precedent did not obviously dictate the result of *Cruz*. Several prior cases have ruled that the jury may not take deposition transcripts or

prior trial transcripts into deliberations, but those cases are all based on the text of specific statutes or rules that prohibited the jury from doing so. *State v. Carter*, 888 P.2d 629, 642–43 (Utah 1995), *superseded by statute on other grounds as recognized by Archuleta v. Galetka*, 2011 UT 73, ¶70, 267 P.3d 232; *Davis*, 689 P.2d at 14–15; *State v. Solomon*, 87 P.2d 807, 810–11 (Utah 1939). But as noted, rule 17(*l*) explicitly grants the trial court discretion to decide which exhibits will be allowed to go with the jury. Utah R. Crim. P. 17(*l*). *Cruz*'s expansion of rule 17(*l*) was not an obvious application of controlling appellate precedent that should have been obvious to the trial court.

Furthermore, "[p]lain error does not exist when a conceivable strategic purpose exists to support the use of the evidence." *State v. Bedell*, 2014 UT 1, ¶26, 322 P.3d 697. Thus, the trial court is "not required to constantly survey or second-guess [a] nonobjecting party's best interests or trial strategy and is not expected to intervene in the proceedings unless the evidence would serve no conceivable strategic purpose." *Id.* "Further, the court should take measures to avoid interfering with potential legal strategy . . . ." *Id.*; *accord In re J.C.*, 2016 UT App 10, ¶20, 366 P.3d 867.

Thus, even if allowing the CJC recording into jury deliberations was obviously erroneous at the time of trial, the trial court was not required to intervene here because a conceivable strategy existed to support Peraza's

decision not to object. The harm to be guarded against in sending a testimonial exhibit in with the jury is giving "undue advantage" to one party over the other. *Solomon*, 87 P.2d at 811; *accord Carter*, 888 P.2d at 643; *Cruz*, 2016 UT App 234, ¶¶36, 39. But here, the trial court did not send one party's testimonial exhibit back with the jury. Rather, it sent *both* party's testimonial exhibits. And the trial court could have reasonably concluded that Peraza did not object to it doing so for strategic reasons. Peraza's defense certainly would have been aided by allowing the jury to take the transcript of the recantation interview into deliberations. But Peraza likely would not have been successful at objecting to the other exhibits while asking for the recantation transcript to go back. On the other hand, sending all three interviews back with the jury—the CJC interview, the recantation interview, and the California interview—would also have furthered Peraza's defense strategy of highlighting the inconsistencies among K.C.'s allegations. In fact, Peraza needed the jury to review all three interviews to complete the picture of his theory.

Thus, the trial court did not plainly abuse its discretion.

C. Any error was harmless because the jury also had a transcript of the victim's recantation during deliberations.

As noted, *Cruz* was concerned about the risk of overemphasis that can come from sending one party's testimonial exhibit with the jury. *Cruz*, 2016 UT App 234, ¶¶36, 39. But that risk was not present here. And when the "danger of undue emphasis" is not present, any error in sending a CJC recording in with the jury is harmless. *Cruz*, 2016 UT App 234, ¶¶39, 44.

For example, in *Cruz* this Court held that it was harmless for a CJC recording to go in with the jury because, in part, the CJC recording did not clearly favor one side or the other—the defendant had argued that the child was coached, giving him an interest in having the jury review the CJC recording. *Id.* ¶44. Likewise, in *State v. Carter*, the supreme court held that it was harmless for the jury to review the transcript of a previous trial because the transcript contained evidence that supported both parties. 888 P.2d at 643–44.

The likelihood of overemphasis is even weaker here than in *Cruz* and *Carter*. The jury took into deliberations not only the CJC recording; they also took the transcript of the recantation interview and the California interview. R1287; SE2; DE1. Peraza does not challenge the trial court's allowance of either of those transcripts to go back to the jury. In fact, Peraza had

submitted the California interview as an exhibit. R969; DE1. And that transcript was sufficient by itself to establish guilt on each count. DE1 at 27–44. Of course, Peraza submitted it to highlight the discrepancies between K.C.'s account in the CJC interview and the California interview. But Peraza's defense would not have been furthered had the jury only taken back the California interview. By allowing the jury to review the CJC recording, the transcript of the California interview, and the transcript of the recantation interview, Peraza was able to place his defense squarely before the jury. "Thus, both sides had an interest in the jury's scrutinizing [the] interviews." *Cruz*, 2016 UT App 234, ¶44. Furthermore, the CJC recording was more tame than the transcript of the California interview, where K.C. described not only masturbation and oral sex but also repeated anal sodomy, and it was more tame than K.C.'s trial testimony, where K.C. described not only masturbation, oral sex, and anal sodomy, but also gagging K.C. and vaginal intercourse. Thus, not only is the danger of overemphasis not present here, but having the jury view all three interviews furthered Peraza's theory that K.C.'s allegations were inconsistent and thus incredible. Therefore, any error here was harmless.

V.

Absent a 23B remand, this Court must reject Peraza's ineffective-assistance claim.

To support his ineffective-assistance claim, Peraza must point to facts in the record. *State v. Jaramillo*, 2016 UT App 70, ¶27, 372 P.3d 34. He cannot rely on facts proffered with his rule 23B motion. *Id.*; *State v. Bredehoft*, 966 P.2d 285, 290 (Utah Ct. App. 1998) ("We consider affidavits supporting Rule 23B motions solely to determine the propriety of remanding ineffective assistance of counsel claims for evidentiary hearings."). Peraza concedes as much, briefing ineffective assistance only "to prepare for supplemental briefing" in the event this Court grants his rule 23B motion. Aplt.Br.45–49. Because he expressly premises his ineffective-assistance claim on extra-record evidence, Peraza cannot succeed on his ineffective assistance claim unless and until this Court grants his 23B motion, receives findings from the trial court, and receives supplemental briefing from the parties. *See* Utah R. App. P. 23B; *Bredehoft*, 966 P.2d at 290.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on April 14, 2017.

SEAN D. REYES
Utah Attorney General

_/s/William M. Hains_____
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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 13,469 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.

_/s/William M. Hains_____
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 17, 2017, two copies of the Brief of Appellee were ☑ mailed ☐ hand-delivered to:

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

☐ was filed with the Court and served on appellant.

☑ will be filed and served within 14 days.

_/s/William M. Hains_____

Addendum G – Appellant's Reply Brief

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. ROBERT PERAZA, Defendant / Appellant.	Case No: 20160302-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM CONVICTIONS OF FOUR COUNTS OF SODOMY ON A CHILD EACH FIRST DEGREE FELONIES,
BEFORE THE HONORABLE DAROLD McDADE

SEAN REYES Utah Attorney General **WILLIAM HAINS** Assistant Solicitor General Appeals Division 160 East 300 South, Sixth Floor P.O. Box 140854 Salt Lake City, UT 84114 Counsel for Appellee	**DOUGLAS J. THOMPSON (12690)** Utah County Public Defender Assoc. Appeals Division 51 South University Ave., Suite 206 Provo, UT 84601 Telephone: (801) 852-1070 Counsel for Appellant

Oral Argument Requested
Appellant is currently incarcerated at the Utah State Prison

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REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY

A. Peraza preserved this argument below

The State alleges that Peraza cannot claim the trial court erred below by admitting the expert testimony because "Peraza never objected based on rule 702" or "he abandoned his objection." State's Brief at 24. Neither of these excuses are correct.

According to the State, Peraza's only objection to Smith testifying as an expert was to the lack of adequate notice, not Rule 702, therefore the trial court was excused from performing the gatekeeper function and this Court should not consider the 702 challenge. See State's Brief at 30-31. For whatever reason the State has neglected to consider the preservation explanation described in Peraza's

opening brief. See Appellant's Brief at 2 ("After the State later gave notice of intent to call Chelsea Smith, the defense asked to have it's earlier 'objection applied to this expert as well.' R.533."). Peraza now replies to the State's arguments by pointing to the record to show that the defense's objection the State's expert witness on 702 grounds was squarely raised to the trial court, the court had the opportunity to consider it, and the objection was overruled. Furthermore, nothing about Peraza's conduct at trial, or the way the testimony came out at trial, required Peraza to renew his 702 objection. Peraza did not abandon his pretrial motion in limine to exclude Smith just because K.C.'s allegations changed again at trial.

Preservation

According to Rule 103 of the Utah Rules of Evidence, "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and… a party, on the record… (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context…" UT. R. EVID. 103(a)(1). When a party makes a pretrial objection to proposed evidence and the trial court denies that objection, the party is "not required to object during trial to evidence offered in accordance with the court's pretrial ruling." *State v. Domiguez*, 2003 UT App 158, ¶18, 72 P.3d 127.

This was true in *Domiguez*, where the defendant objected prior to trial that the court should not admit his status on parole and a prior incident at the prison. At the pretrial hearing the defendant opposed admission of these pieces of

evidence because it violated rules 404(b) and 403. *Dominguez*, 2003 UT App 158, ¶8. The trial court denied the objection and admitted the evidence at trial. On appeal the State claimed the defendant did "not properly preserve this issue for appeal because he failed to object on the same rule 404(b) grounds urged at the pretrial proceeding." *Dominguez*, at ¶17. This Court disagreed. "Although Defendant's objections could have been clearer, they were raised during the pretrial hearing and provided the trial court with an opportunity to address the objections." *Id.*, at ¶19. The objection was preserved for appeal because "the pretrial hearing was held on the record, Defendant timely objected, the judge made a definitive ruling on the motion, and the same judge presided at trial." *Id.*, at ¶19.

This is almost the exact scenario that occurred in this case. Defense counsel filed a motion in limine to exclude testimony of the State's proposed expert "based on Utah Code of Criminal Procedure §77-17-13 and Utah Rules of Evidence 702 and 403." R.190-91. This pretrial motion was specifically directed at the State's intended use of Dr. Lyssabeth Mattoon, however, the objection stated explicitly that the defense wanted the Court to "perform an important gatekeeping function, intended to ensure that only reliable expert testimony will be presented to the jury." R.191 (*citing Gunn Hill Dairy Properties, LLC v. Los Angeles Dept. of Water & Power*, 2012 UT App 20, 269 P.3d 980). In that written motion, Peraza objected to the State presenting expert testimony related to K.C.'s status and behavior as a sexual abuse victim because it was "based on uncertain

and invalid behavioral norms designed to improperly bolster K.C.'s claims of sexual abuse." R.195. Put plainly, the defense objected to the State calling an expert witness to present scientific or other specialized evidence related to what a normal sexual abuse victim looks like without establishing that it satisfied the requirements of Rule 702.

Eventually, the State decided not to call Dr. Mattoon. But, as trial approached, the State filed notice of intent to call Chelsea Smith as an expert. R.282. At the January 28, 2016 hearing, where the State's expert notice was discussed, defense counsel reminded the trial court about the earlier motion in limine:

> "back in April of 2015, I actually filed a motion to exclude testimony of state's expert, who at the time was actually the actual therapist of the alleged victim. My understanding was, she was going to testify again for the same reasons and logic that the state wants to have Ms. Smith testify. I'm assuming one of the reasons why Ms. Smith was chosen was because Ms. Matoon, as I indicated before, has been very difficult to get to communicate with, and it was indicated she didn't want to come. Again, I'm not sure exactly. But the same logic and -- so -- is applied. So, I would ask to have my objection applied to this expert as well, because it's the same context that we -- the state is asking to have an expert testify about behaviors."

R.532-33. Defense counsel complained that Smith's testimony would not meet the expert witness requirements "for the same reasons and logic" that were objected to before. Defense counsel asked to have the earlier "objection applied to

this expert as well, because it's the same context…" R.533. Counsel was again concerned about "the science and research regarding child disclosures of sex abuse, including identified factors related to delay, partial and gradual disclosures and recantation." R.534. Counsel asked the court to "incorporate the objection that [he] filed before." R.536. Counsel for the State even provided the trial court with "a hard copy of Mr. Bautista's motion that he's referring to as the objection…" R.536.

With a record this clear, there is no doubt that defense counsel was objecting to Smith as an expert "under Utah Rules of Evidence 702 and 403." R.190-91. And the trial court understood the objection in terms of 702 when it ruled that the State's notice was timely "under 702, and all I can do is look at her criteria, figure out for myself whether or not she's qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550. According the trial court's incorrect or incomplete reading of 702, it found Smith did "meet those qualifications," so the court went "ahead and den[ied] a motion to exclude this particular witness at this point in time." R.551.

Peraza's preservation is clear. He objected based on Rule 702 when the State provided notice of Dr. Mattoon. He renewed that objection and incorporated it into his objection when the State provided notice of Chelsea Smith. When the trial court ruled that Smith could testify it found, without a hearing where Smith's qualifications could be revealed or challenged, without an explanation of what her testimony would be, without requiring the basis for

Smith's opinions, that she "would meet the criteria for being an expert…" R.548. Peraza's objection to Smith under 702 was made clear to the trial court and the court rejected it "according to the rules of evidence". R.548. The issue is preserved.

Abandonment

The State's brief argues that even though trial counsel adequately raised Peraza's pretrial objection to Smith as an expert witness the defense abandoned that objection when the "evidentiary picture changed" at trial. State's Brief at 32. According to the State, trial counsel was obligated to "reassert his objection at trial", after he had obtained the studies upon which the expert's opinion was based. State's Brief at 32-33. The State suggests that Peraza abandoned his objection to Smith's testimony because "it was incumbent upon Peraza to alert the trial court if he thought [the studies] were insufficient to establish rule 702's threshold reliability requirements." State's Brief at 33. This argument turns the burden of admission on its head.

According to Rule 702 and the cases interpreting it, it is the party who intends to present the expert testimony who bears the "threshold burden to show the reliability of the principles that form the basis for the expert's testimony and the reliability of applying those principles to the facts of the case." *Eskelson v. Davis Hosp. & Med. Ctr.*, 2010 UT 59, ¶11, 242 P.3d 762. It is the State who bore the burden of demonstrating the admissibility of Smith's expert testimony. It is the State who completely failed to provide any support for its proposed expert.

Nothing about the change in the *evidentiary picture* changed the rules of evidence or the principles of preservation. Nothing about the fact that Peraza *may* have later gained access to the studies attached to the State's notice changed that burden that was ignored by the trial court when it allowed Smith to testify.

The State cites two cases in support of its abandonment theory. Peraza asserts these cases are inapplicable, and that this Court should reject the State's argument and find the 702 claim was preserved and not abandoned. The first case cited by the State is *Matter of Estate of Anderson*, 2016 UT App 179, 381 P.3d 1179. The State would urge the Court to consider in isolation paragraph 9 where this Court found the appellant had "effectively withdr[rawn] her response to [appellee's] objection, and the trial court had no need to rule on that response." *Anderson*, 2016 UT App 179, ¶9. But the facts and circumstances of *Anderson* are so different than this case. There the appellant initially intended to present her own expert witness in opposition to the proposed expert retained by the appellee. After "[e]ach party disputed some aspect of the other's expert designation… the trial court and the parties agreed that the court would appoint a single expert witness to serve in the case, for whom the parties would share the cost." *Anderson*, ¶3. Later the appellant wanted her own expert's opinion to be admitted at trial, after she had stipulated that neither her nor the other party's expert would be used. It was the earlier stipulation, that she would not be presenting her own expert testimony, which acted as an abandonment of her request to use her own expert.

But this case is nothing like *Anderson* and Peraza did nothing like abandon his objection to the State's expert. Here, the State gave notice of its intent to use Smith as an expert. Then Peraza objected and incorporated his earlier objection to the State's first proposed expert. Then the trial court overruled the objection and allowed Smith to testify. Then Smith testified at trial. What the State has characterized as abandonment looks nothing like the examples of abandonment in *Anderson*.

The second case the State cites to suggest Peraza abandoned his 702 objection is *State v. Lintzen*, 2015 UT App 68, 347 P.3d 433. There the defendant was charged with sexually abusing his stepdaughter. During pretrial motion practice the prosecutors gave notice of intent and request to admit evidence of the defendant's prior incidents of sexual abuse under rule 404(c) of the Utah Rules of Evidence. *Lintzen*, 2015 UT 68, ¶6. A significant portion of the victim's allegations, prior to trial, were that the earlier incidents and the charged incidents both involved penetration of her vagina and anus. However, at trial the victim's testimony "seemed to imply, at least in the defense's view, that no penetration, either vaginal or anal, had ever occurred." *Lintzen*, at ¶7. On appeal the defendant challenged the trial court's initial granting of the State's 404(b) request, arguing that the pretrial ruling was incorrect. *Id.*, ¶¶12-25. On appeal the defendant also claimed the trial court erred when it denied his motion for a new trial which was based in part upon the fact that the victim's changed testimony undermined the validity of the pretrial 404(b) in limine order. *Id.*, at ¶27. In

other words, the defendant was claiming that the *Shickles* factors used to find the earlier incidents were probative and not unfairly prejudicial under the 403 analysis of 404(b) were wrong now that the victim's changed testimony made the balancing of factors different.

The relevant portion of the decision, for this case, is where this Court analyzed the preservation rule. The Court recognized the importance of Rule 103, where a party need not renew an objection to evidence after a court has ruled it will or won't be admitted,[1] but because the defendant's challenge to the 404(b) evidence was now "based on circumstances arising after" the admissibility had been decided the principle in Rule 103 did not apply. *Id.*, at ¶28. "In other words, pretrial rulings are subject to revision at trial as the evidentiary picture unfolds, but a party must request such a reconsideration when circumstances change." *Id.* But that is only because the basis of the appellate challenge depends upon those changed circumstances, circumstances that the trial court was never asked to consider.

But the facts at issue in *Lintzen* are not present in this case. Peraza's appellate challenge to Smith's admission as an expert is not based on circumstances arising after the pretrial conference where the trial court found her to have met the qualifications of Rule 702. Nothing about Peraza's appellate challenge to the trial court's 702 ruling depends upon the changing evidentiary

[1] See Utah Rules of Evidence, Rule 103(b) ("Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

picture at trial. As Peraza's initial brief makes clear, his appeal is based upon the trial court's complete lack of support, at that pretrial hearing, to conclude the State had met its burden to present Smith as an expert. See Appellant's Brief at 28-32. The trial court abused its discretion on January 28, 2016, that is what this appeal is about. The fact that K.C.'s testimony changed again at trial on February 9 and 10, and the fact that Smith's testimony had to account for those new changes makes no difference in the preserved issue before this Court. The State's argument that Peraza's initial objection to Smith's testimony was no longer valid when K.C. changed her testimony at trial is unpersuasive. This Court should ignore it and find Peraza's 702 objection was adequately preserved.

B. The trial court abused its discretion

The State's brief does not address the question of the trial court's abuse of discretion.[2] The State does not even attempt to suggest that the trial court properly conducted the 702 test prior to concluding Smith could testify as an expert.[3] This Court should interpret the lack of argument as an implied admission

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[2] But see State's Brief at 33-36 where the State argues that the trial court "did not plainly abuse its discretion". There is an important distinction here that undermines the State's position. Peraza has not raised a plain error claim. Peraza does not need to meet the higher standard of an unpreserved error. As his initial brief demonstrates, the question for this Court to consider is whether the trial court acted within the limits of reasonability in not applying the 702 test and concluding the State's notice of expert satisfied the threshold burden for Rule 702. See Appellant's Brief at 30.

[3] It is critical to note that the State's citation to Smith's testimony about the reliability of her sources came at trial, not at the 702 hearing. See State's Brief at 35-36. Whether this is merely an oversight or not, these citations are misleading to the relevant question of the trial court's exercise of discretion in applying 702 in ruling on Peraza's pretrial objection.

that the trial court did not have the discretion to incorrectly and incompletely apply the Rule 702 test before the court ruled Smith could testify as an expert.

Instead, the State argues Peraza's claim fails because he has not shown "obvious, prejudicial error." State's Brief at 33. Because Peraza has not made a plain error claim, this argument is unnecessary and unhelpful, and does nothing to establish the trial court acted within its discretion by ignoring the plain language of Rule 702.

C. Smith's testimony was prejudicial

Finally, the State argues that even if the trial court abused its discretion in finding the State met its 702 burden, any error "was harmless because Peraza was able to "effectively undermine [Smith's testimony] through cross-examination." State's Brief at 25. The State also argues that the "total evidentiary picture" corroborates K.C.'s allegations and, therefore, undermines the likelihood of prejudice from Smith's testimony. State's Brief at 38-40.

As a preliminary matter, Peraza would like to point out that the State makes no genuine attempt to distinguish this case from the prejudice cases cited in Peraza's initial brief. The State does cite to the cases following the claim that Smith testimony was not used to bolster K.C.'s testimony. State's Brief at 37. Presumably, the State is claiming that the expert testimony in the cited cases was prejudicial because in those cases the experts were testifying that the alleged victims were "telling the truth or otherwise presented as candid", distinct from Smith's unspecific rehabilitation testimony in this case. State's Brief at 37. This

argument does not hold up under any degree of scrutiny, perhaps that is why the State did not actually analyze the cited cases in its brief. Peraza maintains that because this case absolutely hinges on K.C.'s credibility, which was challenged by evidence of her inconsistencies and recantations, the State's erroneous use of Smith's expert testimony directed at rehabilitating K.C.'s credibility is problematic and prejudicial.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PERAZA'S MOTION TO CONTINUE THE TRIAL

The State's brief analyzes the factors laid out in Peraza's opening brief from *State v. Torres-Garcia*, 2006 UT App 45, ¶20, 131 P.3d 292. See State's Brief at 41-47, and Appellant's Brief at 36-44. Rather than rehash each of these factors that are adequately address in Peraza's initial brief, Peraza now only makes a few comments in reply. The majority of the State's response to this claim is that Peraza was not seeking a continuance because of Smith's unexpected testimony, but instead only to deal with the mental health records. This is a misreading of record and the context of the request for a continuance.

Perhaps the State believes it if repeats a half-truth enough times, it will become a full truth. The State repeatedly claims that defense counsel's expressed desire to retain an expert was not "to respond to Smith, but to get an expert to address issues that arose in the therapist's notes." State's Brief at 42 (citing R.590); see also State's Brief at 48. And although trial counsel's concern about the therapist's treatment was real and justified, it was not his only concern. If the Court reads trial counsel's statements to the judge in their entirety it is clear that,

"after this morning's rulings… that the state's LCSW expert, Ms. Smith, would be allowed to testify", counsel "spent the afternoon… getting advice on how to prepare a cross examination of Ms. Smith, *and* talked about the mental health records…" R.589 (emphasis added). Counsel was not only concerned about the mental health records, his discussions with Ms. Swickert were not only about controversial effigy therapy. Counsel made it clear he was concerned about Smith too.

Furthermore, if and when the record is supplemented with evidence of ineffective assistance of counsel through 23B remand, the impact of a defense expert witness, both with respect to Smith's testimony and the mental health records, will be evident.

Cumulative Error

The State argues that Peraza cannot demonstrate cumulative error between the combination of the trial court's erroneous granting of the State's request to present Smith as an expert witness and the trial court's denial of Peraza's request for a continuance. See State's Brief at 48-49. What falls short in the State's argument is that it ignores the record and misapprehends the function of a cumulative error claim.

The State briefly argues that there is no relationship between these two rulings because the result of the 702 ruling "was a decision to call an expert to address the therapist's practices—not to challenge Smith's testimony directly." State's Brief at 48. According to the State, because there is no relationship

between the trial court's ruling that the State's proposed expert could testify and trial counsel's motion to continue the trial in order to retain a defense expert, there can be no accumulation of the prejudice that results from the two rulings. The State argues that trial counsel's request for time to retain an expert was not aimed directly at Smith, as the timing and language of the request explicitly describes, but instead was only to address the therapist's practice of using effigy dolls. State's Brief at 48. First, there *is* a strong relationship between the two rulings, and second, this is not how cumulative error works.

In the motion to continue trial counsel explained that he had spoken to Ms. Swickert "after this morning's rulings… that the State's LCSW expert, Ms. Smith, would be allowed to testify on rebuttal, and discussed "*how to prepare a cross examination of Ms. Smith…*" R.589-90. Counsel also explained his discussions with Ms. Swickert included the topic of K.C's controversial treatment methods and the fear that it "could give grounds for the recantation of the recantation…" R.590. Clearly, trial counsel's intent, expressed directly to the trial court in his motion to continue, was prompted by and directed at a concern about Smith's testimony which was expected to be aimed at explaining away K.C.'s recantation.[4] The State's suggestion, that the motion to continue was not to seek a defense

[4] See R.545 (The prosecutor explains that his purpose in presenting Smith's expert testimony was to "be able to rebut what clearly they're going to say, which is, she's changed her story, she's changed her story."). See also R.549-50 (The prosecutor explains that his intent in using Smith as an expert will be to rebut the defense evidence that K.C. had repeatedly recanted her allegations against Peraza. Defense counsel made it clear, the defense would be "presenting evidence that [K.C.] has recanted both to her mother and a private investigator.).

expert "to challenge Smith's testimony directly", is misdirection and not supported by the record. State's Brief at 48. The record makes it perfectly clear, the court ruling allowing Smith's expert testimony and the motion to continue to time to consult with and retain a defense expert directly related. The one prompted and justified the other.

Cumulative error is a matter of prejudice. The cumulative error doctrine is used "when a single error may not constituted grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of a trial." *State v. Perea*, 2013 UT 68, ¶97, 322 P.3d 624.[5] If the Court disagrees with Peraza and finds the error in allowing Smith testify as an expert is not sufficiently prejudicial on its own, the results of that error can be combined with the results of the error in denying Peraza's motion to continue trial in order to retain an expert in response to Smith's opinion. These two errors are intertwined leading to a natural inclination to combine the prejudice.

It is one thing for the trial court to have allowed Smith to testify as an expert without performing any of the gatekeeping functions under Rule 702. That on its own was significantly damaging to Peraza's defense. And when, as a result of that decision, defense counsel's requested a continuance to the trial in order to consult with an expert to respond to Smith's testimony was denied, that was still another. But taken together these two errors led to a situation where the State was allowed to admit inadmissible expert evidence without any chance of

[5] See also *State v. Martinez-Castellanos*, 2017 UT App 13, ¶¶77-81.

admitting expert testimony to test and try it. The combination of these errors, taken collectively, undermines the confidence this Court should have in the fairness of Peraza's trial.

III. PERAZA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

The State's brief correctly points out that, unless and until the Court grants Peraza's pending Rule 23B motion for remand on the question of ineffective assistance of counsel (IAC), this Court cannot grant his IAC claims which depend upon non-record evidence. Peraza has asked the Court, consistent with its discretion authorized by the Revised Order Pertaining to Rule 23B, to adjudicate the motion prior to its treatment of the merits of other issues presented on appeal. The Court has declined to do so. Therefore, Peraza, to the extent possible, wants to encourage the Court to keep in mind that the IAC claims raised in his 23B motion are intricately related to the preserved issues raised in this brief. The resolution of the claims raised in this brief, prior to any decision about the 23B motion, in Peraza's mind would be premature. Peraza maintains that his trial counsel's failure to consult with and present expert witnesses constituted deficient performance which prejudiced his case, especially given the fact that the State was allowed to present Smith as an expert witness and Peraza was denied a motion to continue to be prepared with his own experts.

IV. THE TRIAL COURT ERRED IN PROVIDING THE DVD OF K.C.'s CJC INTERVIEW TO THE JURY DURING DELIBERATIONS

A. Peraza objected timely and did not invite any error

The State claims the "trial court was led to believe that Peraza wanted the

jury to take the DVD into deliberations" because, after the trial court told the parties that the jury would be given the exhibit to view, he did not re-raise the objection. State's Brief at 51. There would be no reason the trial court would have believed Peraza wanted the exact opposite of his earlier objection. In fact, although the trial court said it intended to "argue that later", the only mention of whether the exhibit should be given to the jury on the record was defense counsel's objection. R.814-15. Initially, trial counsel argued to keep the CJC video out of the trial completely, under Rule 15.5 of the Utah Rules of Criminal Procedure and Rule 403 of the Utah Rules of Evidence. R.270-75; R. There trial counsel makes it very clear, the exhibit should "not go back into the jury room during deliberations." R.814.

The State's argument depends upon an inaccurate understanding of the rules of preservation. According the State, after trial counsel had already objected, when the trial court ruled that the DVD would "go back" and arranged to have the bailiff set-up the television so the jury could view it, Peraza was obliged to re-raise his objection. That is not correct.

As discussed in section I above, Rule 103 provides that "[a] party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and… a party, on the record… (A) timely objects or moves to strike; and (B) states the specific ground, unless it was apparent from the context…" UT. R. EVID. 103(a)(1). Despite the fact that trial counsel squarely raised the issue, and made his objection known to the court, the court did not

explicitly rule on the issue. Instead, when the time for deciding what to do with the exhibit came, the court simply ruled that it would go back with a TV for deliberations. Peraza was not obligated to repeatedly object, especially after the trial court had ruled that all four exhibits would "go back." R.1287. Analogous to the rule that once a party makes a pretrial objection to evidence, it need not object again at trial (see *Domiguez*, 2003 UT App 158, ¶18), once Peraza objected to the jury having access to the CJC video during deliberations he didn't need to re-object when the judge was ordering the bailiff to provide that access.

The objection was timely, made at the time the evidence was offered, and the objection gave sufficient grounds, that admission of such evidence was distinct from whether it should "go back into the jury room during deliberations." R.814. Peraza's objection was properly preserved and counsel's failure to continue to object over and over did not invite any error.

B. The timing of the *Cruz* decision is irrelevant

The State claims that because *State v. Cruz*, 2016 UT App 234, 387 P.3d 618 was not issued until after the trial in this case, the trial court's decision to send the CJC video to the jury for deliberations was not obvious. See State's Brief at 53-54. Because Peraza's challenge to the CJC exhibit being provided to the jury is based on a preserved, uninvited, and not abandoned error, he need not prove the error was obvious. Peraza does not attempt to do so here.

C. The error is prejudicial

The State's position is that this error is harmless because the judge also

ordered the jury to take other prejudicial and erroneous exhibits into deliberations. This is a strange argument indeed. The State argues that even though the jury should not have been allowed to review the video of K.C. making allegations against Peraza in her CJC interview (State's Exhibit 1) during deliberations, because the jury was also allowed to review another transcript of K.C. making even more prejudicial allegations against Peraza (Defense Exhibit 1), there was no harm done. State's Brief at 58.

This makes no sense. Sure, the two sets of allegations are not consistent, and K.C. makes contradictory statements between the two statements, but they are both horrible for Peraza's case. Each of these two statements, incorrectly characterized and treated by the court as exhibits, show K.C. accusing Peraza of sexually abusing her. Neither of these two statements contains any cross-examination or challenge to K.C.'s allegations. And each of these statements was used by the State in its closing argument demonstrating what it characterized as evidence that K.C. was as consistent as a girl her age would normally be. The prosecutor, after reading pages and pages from a transcript of the CJC video and then giving the "Reader's Digest version" of the second CJC transcript, and tells the jury to refer to specific things within the video and specific pages in the transcript.[6]

[6] The prosecutor spent 33 pages of his closing argument almost exclusively quoting from the CJC video or CJC transcript. The State repeatedly refers to times on the video or pages in the transcript and encourages the jury to refer to them in their deliberations.

At least three of the four exhibits which the judge sent back with the jury were should not have been provided for deliberations.[7] And if trial counsel had preserved an objection to any of these other exhibits, they would be raised in this appeal. But, because there was no objection, those errors are unpreserved and not raised on appeal. That lack of preservation should not have a negative impact on the prejudice analysis of the preserved error. And it especially should not be used, as the State attempts to do, to show incorrectly providing K.C.'s recorded CJC interview to the jury in deliberations helped Peraza's case.

As Peraza asserted in his opening brief, this case begins and ends with K.C.'s credibility. See Appellant's Brief at 33-34, 40, 42, 43, 47, 49, 51. In this case there is a real and dangerous threat that the jury's verdicts were based on overemphasis of the testimonial evidence in the video at the expense of other contradictory evidence. This real threat is sufficient to show a reasonable likelihood that the trial court's error affected the outcome of the trial. See *Cruz*, at ¶49. There is a real threat that the jury's credibility determination was significantly impacted by the fact that the jury could watch and re-watch K.C. make allegations at the CJC. This makes the trial court's error prejudicial.

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[7] As the State points out, juries are not permitted to take video recordings of statements or transcripts of statements that are testimonial in nature into deliberations. See State's Brief at 54-55; see also *State v. Davis*, 689 P.2d 5, 15 (Utah 1984), *Shoreline Development Inc. v. Utah County*, 835 P.2d 207 201 (Utah App. 1992), *State v. Carter*, 888 P.2d 629, 643 (Utah 1995). Arguably, K.C.'s handwritten note, Defense Exhibit 2, about "santin" [sic] telling her she would "die if you don't tell at his football" was not akin to testimonial evidence and thus not prohibited under Rule 17 and the cases interpreting it.

CONCLUSION AND PRECISE RELIEF SOUGHT

Because the trial court abused its discretion in admitting Chelsea Smith's testimony under Rule 702 without applying adequate gatekeeping analysis, this Court should reverse and remand for a new trial.

Because the trial court abused its discretion by denying Peraza's reasonable and necessary motion to continue, the Court should reverse and remand for a new trial.

Because trial counsel provided ineffective assistance of counsel for failing to properly investigate and produce expert witness evidence, this Court should reverse and remand for a new trial.

Because the trial court erroneously sent the CJC DVD into the jury room during deliberations, this Court should reverse and remand for a new trial.

Because the cumulative prejudice of these errors combine to undermine the fairness of Peraza's trial, this Court should reverse and remand for a new trial.

RESPECTFULLY SUBMITTED this 6th day of June, 2017.

/s/ Douglas Thompson
Appointed Appellate Counsel

CERTIFICATE OF MAILING

I certify that I emailed a copy of the foregoing Reply Brief and mailed 2 paper copies to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 6th day of June, 2017.

/s/ Douglas Thompson

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah Rule of Appellate Procedure, this brief contains 5,772 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah Rule of Appellate Procedure, this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 in Georgia 13 point.

/s/ Douglas Thompson

Addendum H – Petition for Writ of Certiorari

Case No. _____-SC
Case No. 20160302-CA

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ROBERT ALONZO PERAZA,
Defendant/Respondent.

Petition for Writ of Certiorari

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STATE STATUTES

STATE RULES

Case No. _____-SC
Case No. 20160302-CA

IN THE
UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

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ROBERT ALONZO PERAZA,
Defendant/Respondent.

Petition for Writ of Certiorari

INTRODUCTION

A child (Child) accused Robert Alonzo Peraza of sexually abusing her. She later recanted, but by the time of trial she had withdrawn her recantation. Over a month before trial, the State gave notice that it would call an expert witness to talk about recantation, but it did not provide an expert report or a description of what the expert's opinion would be. Peraza objected to the adequacy of the notice, and he argued that he suspected that the testimony would be inadmissible under rule 702, Utah Rules of Evidence. The trial court directed the State to provide Peraza copies of the studies on which the expert would rely. The court also ruled that the expert was qualified under rule 702 and tentatively ruled that the expert could testify, but it emphasized that Peraza could raise his objections again at trial once he had received the studies and once the details of the expert's testimony were more apparent. Peraza

also asked for a continuance, but the court denied it. The State provided the relevant studies before trial, and Peraza never renewed his notice or rule 702 objections. Rather, he used the studies to draw out concessions from the expert.

The statute governing notice of expert witnesses requires a party to give notice thirty days before trial sufficient to allow a party to prepare to meet the testimony, and it specifies a continuance as the remedy for not substantially complying with the statute. Expert testimony is excludable under the statute only for deliberate notice violations. In contrast, rule 702 governs the admissibility of expert testimony by establishing a threshold reliability standard, implicitly requiring only that the threshold be met at some point before the evidence is admitted at trial.

On appeal, Peraza argued that the trial court abused its discretion by admitting the expert's testimony under rule 702 without sufficient evidence of reliability from the State and without explicitly conducting a full rule-702 analysis at the pre-trial hearing. Peraza did not raise any argument based on the expert-notice statute. Yet the Court of Appeals stated that it was asked to decide whether the State violated the expert-notice statute.

Without any briefing or argument from either party addressing that waived issue, the Court of Appeals held that compliance with the expert-notice statute was a prerequisite to admissibility under rule 702. This conflicts with the limits this Court has set on appellate consideration of unbriefed claims. Further, the Court of Appeals held that the expert's testimony was inadmissible under rule 702 *because* the State's timely notice lacked sufficient detail under the statute—writing a notice requirement

into rule 702 that is not in the plain language of the rule, and writing out of the expert-notice statute the explicit requirement that evidence may be excluded only on a showing of bad faith.

The Court of Appeals also addressed Peraza's argument that he was entitled to a continuance to respond to the expert's testimony. Contrary to the language of the expert-notice statute and contrary to this Court's precedent governing non-statutory continuances, the court held that the State bears the burden of disproving prejudice and concluded that the State did not meet that burden.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by conflating the standards and remedies under the expert-notice statute and rule 702.

2. Whether the Court of Appeals violated this Court's opinion in *State v. Johnson*, 2017 UT 76, 416 P.3d 443, when it reversed based in part on an issue the appellant waived on appeal and the appellee did not have the opportunity to brief or argue.

3. Whether the Court of Appeals erred by placing the burden on the appellee to disprove prejudice arising from the denial of a continuance.

OPINION BELOW

The Court of Appeals opinion sought to be reviewed is *State v. Peraza*, 2018 UT App 68.

JURISDICTION

The Supreme Court has jurisdiction to consider this petition under Utah Code Section 78A-3-102(3)(a), (5) (West 2009). The Court of Appeals issued its decision on April 19, 2018. A petition for rehearing was not filed. On May 30, 2018, this Court granted the State's motion for a 30-day extension to file its petition, extending the time to June 20, 2018.

CONTROLLING STATUTES AND RULES

Utah Code Section 77-17-13, and rules 104 and 702, Utah Rules of Evidence, are reproduced in Addendum B.

STATEMENT OF THE CASE

A. Summary of Relevant Facts

A child (Child) disclosed to her mother (Mother) that Robert Alonzo Peraza was sexually abusing her. R855–56,1164. In an interview at the Children's Justice Center, Child disclosed the details of Peraza repeatedly forcing her to manually stimulate him and perform oral sex on him. R814; SE1.

Peraza was arrested, and an officer interviewed him after obtaining a *Miranda* waiver. R1034,1053. In two interviews over two days, the officer told Peraza seven or eight times to stop talking with him and get an attorney "if you didn't do this at all," but to keep talking so they could "get to the bottom of this" if he did do it. R1054,1060. Peraza kept talking, asking at one point how he could get the charges reduced. R1054,1056,1060.

Peraza began the first interview saying that he and Child had a great relationship, but as the interviews progressed and the officer told Peraza more details about Child's allegations, Peraza gradually changed his characterization of the relationship until, by the end of the second interview, he was saying, "I don't spend much time with her at all." R1051–52.

Peraza said he would never intentionally do any of the things Child alleged, but he admitted it "could have" happened when he was drunk. R1065,1075. He said he remembered passing out on his couch once after drinking, and when someone who he assumed was Mother came to shake him awake, he grabbed the person's head and "guided it" to his penis, letting go only after the person "finished" performing oral sex on him. R1049–50. He fell back asleep, but when he thanked Mother the next day, she did not know what he was talking about. R1050. Peraza said this happened "a few times," and he wondered if it "could have" been Child or one of his sons. R1050,1068–69,1075.

Mother, who favored her and Peraza's sons over Child, later confronted Child and asked if the allegations against Peraza were true. R806,946,987–88,1007. Child said they were not. R946,1007. Mother told Peraza's defense counsel, because he "was on our side," and he arranged for a private investigator to speak with Child. R989–91,995–96,1006–07. Child recanted to the private investigator. SE2.

Child moved to California to live with her father. R810,991–92. She started therapy, where she disclosed more details of the abuse, including anal sodomy, and alleged that Peraza's brother also sexually abused her. R844–45,971–72. One

technique the therapist used was to have Child make effigy dolls of Peraza and his brother and have her kill the dolls by running over them with a (presumably toy) car. R959–60. Although Child was disclosing more details about the abuse to her therapist and family in California, throughout the time she was living in California she continued to tell Mother when they spoke over the phone that Peraza did not abuse her. R952,970–72,1014–15.

Child later explained that she lied when she recanted because she did not want her family to get split up. R915.

B. Summary of Proceedings and Disposition of the Court

In August 2013, the State charged Peraza with four counts of sodomy on a child and one count of aggravated sexual abuse of a child. R1–3.

Pretrial Proceedings. Leading up to the preliminary hearing, defense counsel requested eleven continuances. R16–19,23–32,37–38,44–47,76–77,422,439–41,1324–25. After the case was bound over, defense counsel sought another continuance. R141–42. Trial was then set for March 2015. R152–53,450–51. But in February 2015, Peraza moved to continue trial because Child had made new allegations earlier that month and neither party had a copy of the new forensic interview, and because Peraza wanted to subpoena Child's therapy records. R164–68,456. The State agreed to the continuance and the court granted it. R456,458.

Trial was later set for late October 2015. R212–13. Defense counsel received Child's therapy records, after *in camera* review, by early October. R512,1330–32. After reviewing the records, Peraza moved to continue trial so he could call the

therapist as a witness. R201,1330–31. Peraza also needed a continuance because he needed more time to transcribe the recantation interview and get it to the State. R1330. The State said it was ready to proceed but did not object to the continuance, and the court granted it, setting trial to start February 9, 2016. R1331–38.

Thirty-two days before trial, the State filed notice saying it intended to call Chelsea Smith as an expert witness. R282. The notice stated that Smith would testify about, "The methodology and science related to forensic interviewing of suspected child sex abuse victims; science and research regarding child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and recantation." R283. No report was attached, but the notice was accompanied by Smith's curriculum vitae and a list of over 130 articles Smith would rely on, though the articles themselves were not attached. R288–92.

Fifteen days before trial, Peraza certified that he was ready for trial, though he objected to Smith's testimony without identifying why. R519–20. Twelve days before trial, the court held argument on the objection. R520–21,532. Peraza argued under the expert-notice statute that the notice was insufficient to allow him to prepare to meet the testimony. R534,548–49. He also argued that he *expected* that the testimony would be inadmissible under rule 702, Utah Rules of Evidence, though he was basing that argument on an assumption of what Smith's testimony might be. R534–35.

The trial court ruled that Smith was qualified as an expert, but it agreed that without more information it could not say what Smith would testify about or whether her testimony would be helpful for the jury. R547–48,550. The court stated that "at

this point in time," it was going to let Smith testify. R550. But it clarified that Peraza could raise future objections to Smith's testimony, and "maybe [Smith] doesn't come in." R550. The court also directed the State to narrow the studies to "a reasonable amount" and provide copies to Peraza, cautioning that if Smith testified about something based on studies Peraza had not been given, her testimony may not come in. R570–72. The State complied, providing copies before trial. R746.

The same day as the hearing, Peraza asked for a telephone conference and moved to continue trial. R589,591. After speaking with an in-house mitigation expert about Smith and other aspects of the case, defense counsel had decided to get an expert to discuss the therapist's practice of killing effigy dolls and how that practice could have influenced Child to falsely withdraw her recantation or to describe the abuse in more violent terms than were true. R589–90.

The trial court denied the continuance. It pointed out that this was the third time it had set the case for trial, and it "had to draw the line somewhere." R592. The court explained that the issue of the therapist's practices could have been dealt with much earlier. R592. The court also noted that it had an obligation to the alleged victim as well. R592. It was thus "too late in the game" to continue trial. R592.

Trial. Child testified at trial about the masturbation, oral sodomy, and anal sodomy. R842–53. She also testified that Peraza raped her—an allegation that neither the prosecutor nor defense counsel had heard before. R854,951–52,973.

Among other witnesses, the State called Smith. Before Smith testified generally about recantations, she testified without objection that the studies on which

she would base her testimony were "generally accepted" within her field "as being sources that were reliable." R1138–40. Smith testified that recantations were "not something that's typical," though it was "not unheard of." R1141–42. She testified that between 4–20% of cases of child abuse involve recantations. R1141. She stated that recantation does not necessarily mean the initial accusation was false. R1142. She identified two reasons a child might falsely recant: pressure from family members; and seeing negative results from disclosing the abuse, such as incarceration of someone they still love and the financial stress that often accompanies that. R1142.

Peraza did not object to Smith's testimony at trial under rule 702 or renew a notice objection. Instead, he used the studies the State had provided to draw out concessions from Smith. R1146–48. He got Smith to acknowledge that the figure she presented of the frequency of recantations included both sexual as well as physical abuse. R1147. Peraza also got Smith to concede that a child may honestly recant, and that an allegation is not true just by virtue of its having been made. R1147–48. Smith identified one reason a child might truthfully recant: she feels guilty for lying about the allegations in the first place. R1148.

The State withdrew the aggravated sexual abuse charge, and the jury convicted on all four counts of sodomy on a child. R363,367–68,1199–1200.

Appellate Proceedings. On appeal, Peraza did not renew his notice objection. Br.Aplt.1–3,25–52. Instead, he argued that the trial court abused its discretion by admitting Smith's testimony under rule 702 without requiring the State to present evidence of the reliability of Smith's testimony and without conducting a complete

rule-702 analysis. Br.Aplt.1–3,25–35. He also argued that the court abused its discretion when it denied his third motion to continue trial. Br.Aplt.35–44.[1]

Even though Peraza did not raise the notice issue, the Court of Appeals stated that it was "asked to determine whether the State sufficiently complied with the notice requirements under Utah Code section 77-17-13 and, if not, whether the district court erred in admitting Expert's testimony under rule 702 of the Utah Rules of Evidence." *State v. Peraza*, 2018 UT App 68, ¶2. The court held, as a matter of first impression, that "the first step" in meeting "the requirements of rule 702" "involves giving notice" according to the terms of the expert-notice statute. *Id.* ¶28 (citing Utah Code §77-17-13). The court concluded that, in the absence of an expert report, the State's "single-sentence description of the broad subject upon which Expert would testify" and its failure "to provide meaningful access to the articles upon which Expert relied" was inadequate under the statute. *Id.* ¶¶31,37. "Without this information the requirements *under rule 702* were not met … ." *Id.* ¶37 (emphasis added). Therefore, the court held, the trial court "exceeded its discretion in admitting Expert's testimony at trial because the State failed to comply with Utah Code section 77-17-13." *Id.* The court further held that the admission of the testimony was prejudicial because "there was no 'other evidence supporting [the] conviction'" besides Child's testimony, and

[1] Peraza advanced other arguments on appeal, one of which the Court of Appeals declined to consider as invited error and the others it declined to consider because doing so was unnecessary given its ruling. *See State v. Peraza*, 2018 UT App 68, ¶¶2 n.1, 23 n.6.

Smith's testimony "was 'clearly calculated to bolster [Child's] believability.'" *Id.* ¶36 (alteration in original).

The Court of Appeals did not apply or even acknowledge this Court's restrictions in *State v. Johnson*, 2017 UT 76, 416 P.3d 443, on an appellate court's ability to dispose of unbriefed issues.

Next, the Court of Appeals addressed "whether, based on the lack of expert report, Peraza's third motion for a continuance should have been granted." *Id.* ¶2. Considering Peraza's diligence, the potential efficacy of a continuance, inconvenience to the court and opposing party, and the extent of any prejudice from denying a continuance, the court held that the trial court abused its discretion in denying the continuance. *Id.* ¶¶40–43. The Court of Appeals placed the burden on the State to disprove prejudice. *Id.* ¶44. Without discussing the totality of the evidence, the court concluded that the State did not meet this burden because Smith "'rehabilitated [Child's] credibility, without challenge,'" and "Peraza's ability to put forward his best defense was materially hampered" because he could not call a competing expert. *Id.* ¶47. The court thus vacated Peraza's conviction. *Id.* ¶49.

ARGUMENT

I.

The Court of Appeals decided an important issue of first impression in a way that conflates the standards and remedies applicable under rule 702 and the expert-notice statute.

The Court of Appeals held as a matter of first impression that satisfying the requirements of the expert-notice statute is an element of admissibility under rule

702, and that failure to satisfy the statute makes expert testimony inadmissible under rule 702. This Court should issue a writ of certiorari to review this important issue of first impression because the Court of Appeals' decision renders superfluous the statute's provisions governing remedies, it conflicts with the plain language of rule 702 and the statute and with another decision from the Court of Appeals, and it creates confusion as to the controlling standards and remedies in cases involving expert witnesses. *See* Utah R. App. P. 46(a)(2), (4).

The expert-notice statute requires a proponent of expert testimony to give notice at least thirty days before trial, accompanied by either a report or "a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony." Utah Code Ann. §77-17-13(1) (West 2017). The statute allows two possible remedies, each conditioned on a specific showing. If a proffering party does not "substantially comply" with the statute, and if a continuance is "necessary to prevent substantial prejudice" to the opposing party, the opposing party is "entitled" to a continuance. *Id.* §77-17-13(4)(a). The court may also exclude the expert testimony, but only as a sanction for a "deliberate[]" or "bad faith" violation. *Id.* §77-17-13(4)(b). In short, because the expert-notice statute is about preparation for trial, its requirements must be met before trial, and the default remedy is a continuance.

In contrast, rules of evidence are generally about reliability, not notice. A party's inability to satisfy an evidentiary rule's requirements entitles the opposing party to a specific remedy: the evidence is excluded. *See, e.g.*, *State v. Guard*, 2015

UT 96, ¶62, 371 P.3d 1 (concluding that testimony not meeting reliability standard of rule 702 was inadmissible). Some evidentiary rules expressly incorporate pre-trial notice requirements into the rule. *See* Utah R. Evid. 404, 609. But rule 702 does not. Absent explicit notice requirements in the rules of evidence, admissibility under the rules may be determined during trial, and it may generally be done through preliminary questioning to lay foundation even in front of the jury. *See id.* R.104(a), (b), (c).

That is what happened here, where Smith testified at trial and without objection that the studies on which she relied were "generally accepted" within her field "as being sources that were reliable." R1138–40. Despite the State having satisfied the requirements for admissibility under the plain language of rules 104 and 702, the Court of Appeals read additional requirements into rule 702 by injecting the expert-notice statute into it. The Court of Appeals held that "the first step" in meeting the admissibility requirements of rule 702 "involves giving notice" under the statute. *Peraza*, 2018 UT App 68, ¶28. The court did not cite rule 702 or any case interpreting it to support this new rule. *See id.* But the court concluded that because the notice was insufficient under the statute, neither Peraza nor the court had the necessary information "from which to determine the principles or methods that would form the basis of Expert's testimony, or whether her opinions were based upon sufficient facts or data." *Id.* ¶31.

This holding conflicts with the plain language of both the statute and rule 702. The statute is clear: exclusion of expert testimony based on a violation of the statute

is only available upon a showing of bad faith. Utah Code Ann. §77-17-13(4)(b). Indeed, three months before issuing its decision in this case, the Court of Appeals held in *State v. Roberts*, 2018 UT App 9, 414 P.3d 962, that under the expert-notice statute trial courts have "no discretion" to exclude expert testimony "absent a finding that the State deliberately violated its obligation under the statute." *Id.* ¶37; *see also id.* ¶38. The Court of Appeals issued an opinion in direct conflict with *Roberts* and the plain language of the expert-notice statute when it held—absent a showing of bad faith—that the trial court "exceeded its discretion in admitting Expert's testimony at trial because the State failed to comply with Utah Code section 77-17-13." *Peraza*, 2018 UT App 68, ¶37. But that holding cannot be grounded in the text of rule 702 either. Exclusion under rule 702 depends on scientific reliability or whether the evidence will assist the fact finder. *See* Utah R. Evid. 702. Notice is irrelevant under the plain text of the rule.

By importing additional requirements into rule 702 that do not appear in the text of the rule, and then excluding evidence based on a violation of those requirements, the court has either written the bad-faith limitation out of the expert-notice statute or, at the very least, created confusion as to when it applies. Going forward, litigants will not know when bad faith must be shown (or rebutted), let alone when substantial compliance and substantial prejudice are at issue. Indeed, whether a violation triggers the statutory remedies or qualifies as a violation of rule 702 may well turn on the predilections of a particular judge or panel. This Court should grant review to resolve the confusion this opinion creates.

II.

By vacating based on an issue that Peraza never raised on appeal, the Court of Appeals violated this Court's directive in *Johnson* and significantly departed from the accepted and usual course of judicial proceedings.

This Court recently specified the circumstances in which appellate courts may reverse based on issues that were raised before a lower court but waived on appeal. In *State v. Johnson*, the Court held that raising such issues *sua sponte* is only appropriate when, among other things, "the issue is 'astonishingly erroneous'" *and* "neither party is unfairly prejudiced by raising the issue at that point in the litigation" 2017 UT 76, ¶49. The Court also held that appellate courts "should typically allow some form of argument from the parties to 'test a notion of [the court's] own invention before using it to justify a reversal.'" *Id.* ¶45.

In this case, the Court of Appeals reversed, without supplemental briefing or argument, based on an objection that Peraza waived on appeal. And it did so without even acknowledging *Johnson*. Peraza objected to the inadequacy of the notice before trial, R534,548–49, but he abandoned that argument on appeal, Br.Aplt.1–3,25–52. Although he argued that the State failed to present evidence to meet its burden to establish the admissibility of Smith's testimony and, implicitly, that the State had an obligation to meet that burden sometime before trial, Peraza based his appellate arguments exclusively on rule 702. Br.Aplt.1–3,25–35. He never cited the expert-notice statute, let alone claimed that the State violated it.

The Court of Appeals violated *Johnson* by addressing a waived issue *sua sponte* where that issue was not "'astonishingly erroneous.'" 2017 UT 76, ¶49. In

fact, as shown above, the court adopted a new rule that conflicts with the plain language of both the expert-notice statute and rule 702. But even if the court's interpretation of the statute and rule were correct, its application to this case was not obvious. Peraza's counsel asserted during oral argument that the State had not put on any evidence of reliability "other than providing this notice [of expert witness]," which he then quoted. Oral Argument at 7:25–8:00 (Feb. 21, 2018). The Court asked, "But isn't that sort of summary ordinary or usual?" *Id.* at 8:00–8:07. Peraza responded by agreeing and clarifying that his objection went to rule 702, not the inadequacy of notice: "It's ordinary for notice, but it's not ordinary to explain what the science is, whether or not it's reliable, and whether or not this person has the experience." *Id.* at 8:05–8:15. The commonplace nature of the State's notice demonstrates that even if it technically violated the statute, it was not "astonishingly erroneous." Further, the showing of an "astonishingly erroneous" violation is even more difficult when the statute requires only substantial compliance. *See* Utah Code Ann. §77-17-13(4)(a).

The Court of Appeals also violated *Johnson* because the State is "unfairly prejudiced" by the decision to vacate on this basis. 2017 UT 76, ¶49. When Peraza objected before trial to the inadequacy of the notice, the trial court tentatively ruled that Smith could testify but told the State to provide copies of the relevant studies that Smith would be relying on. R550,570–72. The State did so. R746. And after the State provided copies of the studies, Peraza did not renew any notice or rule 702 objection. Rather, he effectively used the studies to cross-examine Smith at trial. *See* R1146–48. The State could thus reasonably rely on its compliance with the trial court's order and

Peraza's lack of further objection at trial or on appeal to conclude that it had cured any notice defect. Had Peraza believed that the studies were inadequate to cure any statutory notice defect, the State may have been able to provide further detail about Smith's potential testimony to allow Peraza "to prepare to meet the testimony." *See* Utah Code Ann. §77-17-13(1)(b)(ii); *see also Johnson*, 2017 UT 76, ¶49 ("[U]nfair prejudice exists when 'a party demonstrates that it would have presented additional evidence or that it otherwise would have proceeded differently if the claim had been raised at trial.'"). But by raising no further objection, Peraza led the State and the trial court to believe that his notice objection had been resolved.

True, the Court of Appeals' violation of *Johnson* is not apparent from the face of the opinion. But review is still appropriate because the opinion "so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of [this] Court's power of supervision." Utah R. App. P. 46(a)(3). Despite Peraza's complete abandonment of the notice issue on appeal, the Court of Appeals said it was "asked to determine whether the State sufficiently complied with the notice requirements under Utah Code section 77-17-13." *Peraza*, 2018 UT App 68, ¶2. And it explicitly said it was "not asked to determine whether … the Rule 702 requirements could be met with respect to [the substance of] Expert's testimony," *id.* ¶37—despite the State's explicit argument that it laid sufficient foundation at trial to satisfy rule 702. *See* Br.Aplt.25–35; Br.Aple.33–36.

Having relied on Peraza's waiver of the issue on appeal, the State was never given the opportunity to address what the Court of Appeals believed the dispositive

issue to be. The State was never given the opportunity to address—and the Court of Appeals never addressed—whether the State's notice "substantially compl[ied]" with the expert-notice statute, let alone whether any deficiency was astonishingly erroneous. *See* Utah Code Ann. §77-17-13(4). Nor was the State able to address—and the Court of Appeals never addressed—whether a continuance was "necessary to prevent substantial prejudice," which is the controlling test for providing a remedy for a violation of the statute. *See id.* And the State never had the opportunity to address the issue the Court of Appeals eventually found dispositive—whether insufficient notice without bad faith can be a basis for excluding expert testimony under rule 702. This Court should therefore exercise its supervisory powers to ensure that the Court of Appeals honors Peraza's strategic choice to waive the statutory issue on appeal, or at the very least gives the State the opportunity to address the issue as the Court of Appeals has reframed it.

III.

By placing the burden on the appellee to disprove prejudice from the denial of a continuance, the Court of Appeals issued an opinion that conflicts with the expert-notice statute and this Court's precedent governing non-statutory continuances.

This Court should also grant review because the Court of Appeals placed the burden of disproving prejudice from the denial of a continuance on the State. That holding conflicts with the expert-notice statute and this Court's precedent governing non-statutory continuances. *See id.* R.46(a)(1), (4).

In *State v. Knight*, 734 P.2d 913 (Utah 1987), this Court held that the State bears the burden of disproving prejudice when it violates discovery rules—if "the

defendant can make a credible argument that the prosecutor's errors have impaired the defense." *Id.* at 921. The Court of Appeals has previously held that *Knight* should be extended to violations of the expert-notice statute. *See State v. Arellano*, 964 P.2d 1167, 1171 (Utah 1998). The Court of Appeals followed that precedent here. *Peraza*, 2018 UT App 68, ¶44.

This Court has never addressed this issue. *See* Utah R. App. P. 46(a)(4). But it should because the Court of Appeals' holding conflicts with the expert-notice statute. The statute implicitly places the burden on the movant to show that he is entitled to a continuance: "the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial … ." Utah Code Ann. §77-17-13(4)(a). The Court of Appeals has held that the statute's use of the word "entitled" places the burden on the party desiring a continuance to request it. *State v. Perez*, 2002 UT App 211, ¶41, 52 P.3d 451. Likewise, the word places the burden on the party desiring a continuance to prove that he is "entitled" to it.

But Peraza's appeal was never about the expert-notice statute. And this Court's precedent governing *non-statutory continuances* forecloses placing the burden of proving prejudice on the non-moving party. *See Mackin v. State*, 2016 UT 47, ¶33, 387 P.3d 986 (placing on movant burden of proving prejudice for denial of continuance to secure attendance of witness); *see also State v. Oliver*, 820 P.2d 474, 476 (Utah Ct. App. 1991) ("[O]n appeal, the moving party must show that it was materially prejudiced by the court's denial of the continuance … .").

The placement of the burden made a difference in this case, as it will in many others. Peraza could not have proven prejudice in light of the equivocal nature of Smith's testimony and the totality of the evidence supporting Peraza's guilt. Smith's testimony amounted to nothing more than an acknowledgement that recantations happen, and an identification of some reasons children may recant truthfully or falsely. R1141–42,1147–48. Further, Child's account was corroborated by significant circumstantial evidence—including the evidence of Mother's motive to side with Peraza, R806,983–84,989–91; SE1 at 40:20–30; inconsistencies between Mother's and Peraza's stories, R1015–16,1047; and Peraza's statements to police, which included his changing story, his weak denial, and his acknowledgement that he could have sodomized Child a few times when he was drunk, R1049–50,1068–69,1075. Yet the Court of Appeals did not address the totality of the evidence because its analysis proceeded on a presumption of prejudice. *See State v. Maestas*, 2012 UT 46, ¶56, 299 P.3d 892 (stating that prejudice analysis requires review of whole record).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted on June 20, 2018.

SEAN D. REYES
Utah Attorney General

/s/ *William M. Hains*
WILLIAM M. HAINS
Assistant Solicitor General
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 49(d), Utah Rules of Appellate Procedure, this petition contains 20 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this petition, including the addenda:

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

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

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

CERTIFICATE OF SERVICE

I certify that on June 20, 2018, the Petition for Writ of Certiorari was served upon the respondent's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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

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

☑ was filed with the Court and served on respondent by email, and the appropriate number of hard copies will be mailed to counsel within 7 days.

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

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

/s/ *Lee Nakamura*

Addenda

Addendum A

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ROBERT ALONZO PERAZA,
Appellant.

Opinion
No. 20160302-CA
Filed April 19, 2018

Fourth District Court, Provo Department
The Honorable Darold J. McDade
No. 131402387

Douglas J. Thompson and Margaret P. Lindsay,
Attorneys for Appellant

Sean D. Reyes and William M. Hains, Attorneys
for Appellee

JUDGE KATE A. TOOMEY authored this Opinion, in which JUDGES JILL M. POHLMAN and RYAN M. HARRIS concurred.

TOOMEY, Judge:

¶1 Robert Alonzo Peraza appeals his conviction of four counts of sodomy on a child (Child). Peraza's trial was continued twice because the State did not provide all relevant discovery in time for defense counsel to prepare a defense and to procure an expert witness for impeachment purposes. Then, thirty-two days before trial, the State filed a notice of expert witness to rebut Peraza's anticipated defense. The notice disclosed the name and address of the expert (Expert), her curriculum vitae, a one-sentence description of the nature of her testimony, and a list of citations to more than 130 articles upon which Expert would rely; the notice did not include an expert report.

¶2 We are asked to determine whether the State sufficiently complied with the notice requirements under Utah Code section 77-17-13 and, if not, whether the district court erred in admitting Expert's testimony under rule 702 of the Utah Rules of Evidence. We are also asked to determine whether, based on the lack of expert report, Peraza's third motion for a continuance should have been granted. We conclude the district court exceeded its discretion when it denied the motion to continue after erroneously deciding to allow Expert to testify. The State's notice did not comply with section 77-17-13, depriving the court of the information necessary to rule on the admissibility of Expert's testimony under rule 702. The State also failed to meet its burden of demonstrating that Peraza would not be prejudiced by the denial of his motion. Peraza was entitled to a continuance so that he could prepare to respond to Expert's testimony. We therefore vacate Peraza's convictions and remand for a new trial.[1]

BACKGROUND

The Allegations

¶3 Peraza was charged with four counts of first-degree sodomy on a child[2] after Child accused him of sexually abusing her.[3]

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1. Peraza also filed a motion for a rule 23B remand "for findings necessary to determine ineffective assistance of counsel." *See* Utah R. App. P. 23B. Because we vacate Peraza's convictions and remand for a new trial on other grounds, we need not address Peraza's motion or consider his claims that his counsel was ineffective. *See State v. Richardson*, 2006 UT App 238, ¶ 1 n.2, 139 P.3d 278.

2. Peraza was also charged with one count of first-degree aggravated sexual abuse of a child, but the State dismissed the charge after closing arguments and it is not an issue on appeal.

3. "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. (continued...)

¶4 Child informed her mother (Mother) and her grandfather that Peraza did "bad things" to her that she "did not like." During an interview at the Children's Justice Center (CJC), Child told a social worker that Peraza did something to her that happens "when parents really love each other." Child explained that Peraza showed her his "pee pee," and made her use a hand gesture while she touched it, and he forced her to touch it with her mouth. She said he forced her to do this more than once.

¶5 After the first CJC interview, Child moved to California to live with her father, and after relocating to California she began therapy. Part of her treatment was to, "make effigy dolls, and . . . kill the effigy doll named [Peraza]." Eventually, Child disclosed that a second perpetrator may have also sexually abused her, and she made and "killed" effigy dolls of that person too.

¶6 Child's descriptions of the abuse varied over time. On some occasions, she was explicit in describing the acts Peraza had her perform, including descriptions of anal penetration; at other times she recanted what she had described. While she was living with Mother in Utah, Child wrote Mother a note asserting that the abuse did not happen. After she moved to California, Child called Mother, more than once, to say that Peraza did not do anything to her. She also told a private investigator that Peraza did not touch her and that she never touched him.

¶7 But at trial, Child withdrew her recantations and testified that Peraza sexually abused her. She also provided more detail when describing the abuse than she had done in previous interviews and therapy sessions. For example, at trial, she testified that "Peraza had put his penis in her vagina"; that testimony was the first time the prosecutor and defense counsel had heard that allegation.

(...continued)
We present conflicting evidence only as necessary to understand issues raised on appeal." *Mackin v. State*, 2016 UT 47, ¶ 2 n.1, 387 P.3d 986 (quotation simplified).

Pretrial Proceedings

¶8 Peraza's trial was first scheduled for March 2015. But the district court granted Peraza's motion for a continuance based on newly disclosed "evidence warranting additional investigation"—including a sexual assault nurse examination report; Child's second interview with someone at a CJC in California; and the State's indication of its "intent to have [Child's therapist] testify at trial." The court set a pretrial hearing in April to schedule a new trial date. During that hearing, defense counsel argued, based on arguments made in Peraza's motions supporting his motion for a continuance, that trial could not be scheduled because the State still had not produced the requested evidence, the therapist had not provided Child's therapy records, and these records had not been subjected to an in camera review.[4] The court determined it would postpone scheduling a trial until further evidence had been disclosed.

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4. "In camera" means "[i]n the judge's private chambers" or "[i]n the courtroom with all spectators excluded." *In Camera*, Black's Law Dictionary (9th ed. 2009). Rule 506 of the Utah Rules of Evidence "cloaks in privilege confidential communications between a patient and her therapist in matters regarding treatment." *State v. Blake*, 2002 UT 113, ¶ 18, 63 P.3d 56. An exception to this rule applies if an otherwise privileged communication is "'relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense.'" *Id.* (quoting Utah R. Evid. 506(d)(1)). If a party resists disclosure of the physician-patient communications, "the defendant must petition for an in camera review in which the [district] court will review the records to determine if they actually contain material that is relevant and ought to be disclosed." *State v. Otterson*, 2010 UT App 388, ¶ 5, 246 P.3d 168. This review may be conducted "only if the defendant shows with reasonable certainty that exculpatory evidence exists which would be favorable to [the] defense." *Id.* (quotation simplified).

¶9 In June 2015, the district court issued a subpoena duces tecum for Child's therapy records, and the State stipulated to an in camera review of those records. By August, the court still had not received Child's therapy records, but the therapist indicated she was reviewing them to redact information not relevant to the case. Relying on this, the court scheduled trial for October 2015. Then in late September, after receiving the records and defense counsel's request for information from the records, the court informed the parties it would provide the redacted records "by the end of [the] week."

¶10 Although trial was set for the end of October 2015, defense counsel requested another continuance because he had learned that a private investigator recorded one of Child's recantations. Counsel also explained that he needed more time to secure Child's therapist as a fact witness "for impeachment purposes" because of Child's recantations. The State agreed that given the circumstances, "it'd be better to continue the trial" and stated that it was also "look[ing] at re-filing" a notice of expert witness based on Child's therapy records. The court commented that it did not "know that [it] ha[d] any choice" and continued the trial to February 2016 with a final pretrial conference scheduled for late January.

¶11 During the January pretrial conference, the State stipulated to the introduction of Child's therapy records for impeachment purposes because defense counsel was unable to procure Child's therapist as a witness at trial. Peraza also challenged whether Expert should be allowed to testify. The court agreed to hear oral argument on Peraza's objection the following week, on January 28, 2016—twelve days before trial.

¶12 During the hearing, defense counsel argued that the State's notice of expert witness was inadequate because it did not include an expert report or any written explanation that would inform the court "exactly what this expert would be testifying to." The notice provided Expert's name and address, her curriculum vitae, and a list of more than 130 articles that she would be relying upon. The notice also included a one-sentence statement that the State intended to use Expert to present

evidence of the "methodology and science related to forensic interviewing of suspected child sex abuse victims" and related to "child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and recantations." But counsel asserted that he could not get access to the articles cited, because the medical journals in which they were published required readers to pay for a subscription. And without an expert report, defense counsel argued that all he had been provided were "topics" that could be related to Expert's testimony. Further, he argued,

> What's troubling to me is, I don't know if those are case notes that talk about possible theories, which if they're just theories, that would be argument, and the state is clearly allowed to argue. But to present evidence of this nature, I think implies a statistical analysis. And the case law that was cited in my objection . . . ha[s] already said that [our courts] disfavor this type of testimony, because . . . it implies there's a scientific . . . [and] statistical basis for it, but yet there isn't an actual statistical basis for [the theories].

He asked the court "to incorporate the objection that [was] filed" in response to the State's initial notice of expert when the State sought to admit Child's therapist's testimony. This written objection, based on Utah Code section 77-17-13 and rules 702 and 403 of the Utah Rules of Evidence, discussed the prejudicial effects of expert witnesses testifying to "statistical evidence of matters not susceptible to quantitative analysis" and pointed out that the Utah Supreme Court had determined in *State v. Rammel*, 721 P.2d 498 (Utah 1986), that "statistically valid probabilities evidence that focuses the jury's attention on 'a seemingly scientific, numerical conclusion'" should be excluded. *Id.* at 501.

¶13 The State handed the court a copy of defense counsel's previous written objection, then explained that the purpose of Expert's testimony was to rebut the defense's assumed strategy

of showing "that [Child] changed her testimony over time, [and] at one point that there was a recantation." Moreover, it did not intend "to have [Expert] say that [Child] is telling the truth or lying, but to simply explain to the jury that there are circumstances" where children "with confirmed histories of sexual abuse" have expressed "denial or hesitation" in their disclosures of the abuse.

¶14 Defense counsel countered that "with no doubt, we will be presenting evidence that [Child] has recanted both to her mother and also [to] a private investigator." But he argued that without a report from Expert, the State's notice did not provide sufficient information with respect to Expert's proposed testimony to allow the defense to adequately prepare to rebut her testimony. Further, he argued that it appeared Expert's testimony would relate only to "possibilities" for why Child recanted and that to have "an expert testify about them without a scientific basis, is concerning because it gives more weight to the state's arguments than maybe it should." Defense counsel added that, if Expert were to mention the "possibility that there are repressed memories," such references are prohibited by Utah Supreme Court precedent, and while they may be "valuable in the therapeutic setting . . . they're too prejudicial and not allowed in a forensic setting."[5]

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5. This argument was further supported by Utah case law cited in Peraza's motion to exclude Child's therapist as an expert witness, which he incorporated into his motion with respect to Expert. For example, Peraza cited *State v. Rammel*, 721 P.2d 498 (Utah 1986), in which a detective drew on his experiences and provided anecdotal data to support his conclusions that "there was a high statistical probability" that a witness lied to the police in his first interview. *Id.* at 501. The Utah Supreme Court determined that the detective failed to show that the anecdotal data from which he drew his conclusions had any statistical validity or that the data established the detective as an expert. *Id.* It also determined that the detective's testimony stating that

(continued...)

¶15 At the conclusion of the hearing, the district court determined that Expert would be allowed to testify at trial if the State determined her testimony was necessary for rebuttal. It told the parties, based on its assumption of what Expert would testify to, Expert was qualified because "according to the rules of evidence, this person would meet the criteria for being an expert even [though] . . . none of us can really tell until we get to the testimony . . . whether or not [Expert is] going to be needed [for rebuttal]."

¶16 Later that day, after the State "provide[d] some" of the articles on which Expert would rely, the court held a telephone conference to address defense counsel's motion to continue the trial in light of the court's decision to allow Expert to testify. The State's disclosure led defense counsel to consult a social worker from the Salt Lake Legal Defender Association to help prepare a defense strategy with respect to Expert's testimony. Counsel requested, once again, a continuance to allow him to procure an

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(...continued)
"there was a high statistical probability" that another witness lied should have been excluded because "its potential for prejudice substantially outweighed its probative value." *Id.* The supreme court explained that "[e]ven where statistically valid probability evidence has been presented . . . courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." *Id.* And "[p]robabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts not susceptible to quantitative analysis, such as whether a particular individual is telling the truth at any given time." *Id.* (quotation simplified). Peraza used *Rammel* and other cases to support his argument that "proposed testimony linking [Child's] symptoms and behavior to behavioral norms testimony is presumptively unreliable and prejudicial . . . and inadmissible as expert witness evidence under Rule 403."

expert to rebut that testimony. He explained that he felt further obligated to make this request because of the therapy treatments Child received—specifically, killing the effigy dolls of her alleged abusers—"could give grounds for the recantation of the recantation . . . [and] might have led to the allegations becoming much more violent and much more pronounced as the years have gone on." The State responded that although it was "unhappy with the fact that we're continuing again" but understood the basis for it. Nevertheless, the court stated that it was "not inclined" to continue the trial and that it had to "draw the line somewhere." After denying the motion to continue, the court "recognize[d] this might be something that could be used later" on appeal, but determined "this [was] too late in the game."

The Trial

¶17 The following week, the case proceeded to trial. During the State's case-in-chief, Child testified to the nature of the abuse she allegedly suffered from Peraza, beginning when she was six years old. She also testified that she lied to Mother and the private investigator when she said the abuse did not occur.

¶18 The State also called Mother, who testified that Child recanted her allegations to her and to the private investigator. Mother testified that Child recanted her allegations more than once. Defense counsel called the private investigator, who testified about his interview with Child in which Child recanted her allegations.

¶19 In an effort to rebut Mother's and the private investigator's testimonies that Child had recanted her allegations on different occasions, the State called Expert to testify about disclosures and recantations by victims of sexual abuse. Defense counsel objected to Expert's testimony on the ground that she was not a "rebuttal witness" because "the evidence about [Child] recanting her statements came out in the [S]tate's case." Defense counsel added that it was the State that introduced Child's interview in which Child recanted her allegations against Peraza, and as such, Expert's testimony could not be characterized as a

rebuttal. The court overruled the objection and allowed Expert to testify.

¶20 Expert explained she was "trained as a forensic interviewer" and that she had provided "supporting research citations" for the "areas of inquiry for expert testimony." She said that the articles identified in the notice were "articles that [she had] read, and so, the topics that would be contained in some of those different articles" were information "that [she] felt" allowed her "to testify as an expert." But Expert did not interview or assess Child. She had not reviewed any evidence of the case before testifying and answered questions "based off of the testimony [she] heard, since [she had not] seen transcripts or anything." Expert acknowledged her testimony was only "academic."

¶21 Expert testified she had conducted around 1,900 forensic interviews with children and that recanting is "not something that happens in all cases, as far as some of the research says," and that recantations can "var[y] between four percent to 20 percent of cases, so it's not something that's typical, but it's not unheard of." She reiterated that "generally, because a child recants does not mean that it did not occur" and commented,

> Sometimes, when a child recants, it may be feeling pressure from family members. . . . [O]ften times if it's someone that they love, having gone to jail, or if the person's no longer in the home, and now the family is struggling for money, sometimes those are circumstances where the child might think, "things were not like this before I talked about it, I'll just—it's just better to go back to how things were, I can deal with that."

¶22 The jury convicted Peraza on all four counts of sodomy upon a child. Peraza appeals his convictions.

ISSUES AND STANDARDS OF REVIEW

¶23 Peraza contends the district court erred when it admitted Expert's testimony at trial because the State had not provided sufficient information to demonstrate the scientific validity or basis of the testimony that would have allowed the court to determine whether she met the requirements for expert testimony under rule 702 of the Utah Rules of Evidence.[6] Specifically, Peraza argues that the State did not provide "any

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6. Peraza also contends the district court erred when it permitted the jury to review the video of the CJC interview during deliberations. This argument is unpreserved. Generally, "an appellant must properly preserve an issue in the district court before it will be reviewed on appeal." *State v. Houston*, 2015 UT 40, ¶ 19, 353 P.3d 55 (quotation simplified). To preserve an issue, it must have been presented "in such a way that the court ha[d] an opportunity to rule on [it]." *Id.* (quotation simplified). There are limited exceptions to the preservation rule, including instances of plain error or exceptional circumstances—neither of which are argued by Peraza on appeal. *See id.*

Although this argument is unpreserved, we briefly address this issue to avoid its recurrence on remand. Rule 17 of the Utah Rules of Criminal Procedure allows the jurors to "take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury." In *State v. Carter*, 888 P.2d 629 (Utah 1995), *superseded by statute as stated in Archuleta v. Galetka*, 2011 UT 73, 267 P.3d 232, the Utah Supreme Court determined that rule 17 "indicates that exhibits which are testimonial in nature should not be given to the jury during its deliberations." *Id.* at 643. After Peraza's trial, this court determined in another case that video recordings of CJC interviews are recorded testimony and should not be given to the jury during deliberations. *State v. Cruz*, 2016 UT App 234, ¶¶ 37–41, 387 P.3d 618. Accordingly, on remand the district court should not provide any testimonial evidence to the jury during its deliberations.

details about what [Expert's] testimony would be so that the defense could investigate whether such testimony could be supported by" the more than 130 article citations Expert provided. The district court "has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (quotation simplified). "[W]e will not reverse a decision to admit or exclude expert testimony unless the decision exceeds the limits of reasonability." *Id.* (quotation simplified). Even if we determine the testimony was erroneously admitted, the defendant must show that the error was prejudicial. *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

¶24 Peraza also contends that the district court's denial of his third motion to continue the trial to allow him to procure an expert witness to rebut Expert's testimony constituted an abuse of discretion and prejudiced his trial. We review the grant or denial of a motion to continue under an abuse of discretion standard. *State v. Tolano*, 2001 UT App 37, ¶ 5, 19 P.3d 400.

ANALYSIS

I. Expert Witness Testimony

¶25 Peraza contends the district court exceeded its discretion by admitting Expert's testimony without fulfilling its gatekeeping role under rule 702 of the Utah Rules of Evidence. He argues the court "failed to examine whether [Expert's] testimony and opinions were based upon principles and methods that were reliable, that they were based upon sufficient facts or data, and had been reliably applied to the facts" of this case.

¶26 Rule 702 provides that a witness may testify as an expert if that person "is qualified as an expert by knowledge, skill, experience, training, or education" and "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."

Utah R. Evid. 702(a). An expert's "scientific, technical, or other specialized knowledge" must meet "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." *Id.* R. 702(b). This threshold showing "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." *Id.* R. 702(c).

¶27 District courts are assigned the duty of "gatekeeper" and are responsible for preventing the admission of unreliable expert testimony. *State v. Jones*, 2015 UT 19, ¶ 21, 345 P.3d 1195. Even if the testimony satisfies rule 702, the court must also "determine whether the proffered scientific evidence will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence." *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996).

¶28 A party that intends to call an expert to testify at trial must demonstrate that the expert meets the requirements of rule 702. Utah Code Ann. § 77-17-13(1)(a) (LexisNexis 2017);[7] *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). In criminal cases, the first step involves giving notice to the opposing party "not less than 30 days before trial or 10 days before the hearing." Utah Code Ann. § 77-17-13(1)(a). The notice "shall include the name and address of the expert, the expert's curriculum vitae," and either "a copy of the expert's report," "a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony," or "a notice that the expert is available to cooperatively consult with the opposing party on reasonable

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7. Recent amendments to the relevant statutes cited within this opinion are not substantive and do not affect the outcome of this appeal. We therefore refer to the most recent edition of the Utah Code for convenience. *See State v. Rackham*, 2016 UT App 167, ¶ 9 n.3, 381 P.3d 1161.

notice." *Id.* § 77-17-13(1)(b). If the party seeking to admit expert testimony "fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony." *Id.* § 77-17-13(4)(a).

¶29 Here, thirty-two days before trial, the State filed a notice of expert testimony with a copy of Expert's curriculum vitae and a list of medical journal articles that she would rely upon for her testimony. The articles were not readily accessible to the court or to defense counsel because they were published in journals for which subscriptions were required.

¶30 Peraza argues the district court had no basis for determining that rule 702 was satisfied because "the court had no idea what [Expert's] testimony was going to be . . . what her opinions or conclusions were based upon . . . [or whether her] methods and principles had been reliably applied to the facts in this case."[8] We agree.

¶31 In determining that Expert was qualified under rule 702, the district court relied solely on her curriculum vitae, the list of article citations, and the State's "oral assertions about why it wanted to call [Expert]." There was no information from which to determine the principles or methods that would form the basis of Expert's testimony, or whether her opinions were based upon sufficient facts or data. *See* Utah R. Evid. 702(b). The State did not provide an expert report, gave only a single-sentence description of the broad subject upon which Expert would testify, and failed to provide meaningful access to the articles upon which Expert relied. We agree with Peraza that neither the court nor defense counsel had "any idea what [Expert's] testimony would be or what scientific basis it [was] based upon."

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8. At trial, Expert testified she had not read the transcripts of interviews, had not reviewed any material involving the case, and had not interviewed Child or any other witness.

¶32 We therefore conclude the district court exceeded its discretion when it admitted Expert's testimony at trial without complying with the requirements of rule 702.

¶33 Having made that determination, "we must separately determine whether the error was prejudicial." *State v. Stefaniak*, 900 P.2d 1094, 1096 (Utah Ct. App. 1995). "If there is a reasonable likelihood that, absent the error, there would have been a more favorable result for the defendant, then his conviction must be reversed." *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

¶34 Peraza argues that the improper admission of Expert's testimony constitutes reversible error because of "its [prejudicial] effect of bolstering [Child's] trial testimony." We agree.

¶35 In *State v. Rammel*, 721 P.2d 498 (Utah 1986), the district court admitted a detective's testimony stating that, "[b]ased on his experience interviewing several hundred criminal suspects," it was not "unusual for [a suspect] to lie" when first interrogated. *Id.* at 500. The district court determined that the detective "was an expert apparently qualified to testify on [a suspect's] capacity for telling the truth" as a witness in a criminal case. *Id.* Although our supreme court concluded that the testimony was inadmissible because it "did not relate to [the suspect-witness's] character for veracity, but instead invited the jury to draw inferences about [the suspect-witness's] character based upon [the detective's] past experience with other suspects," it held that, "in view of the other evidence supporting defendant's conviction," the admission of the detective's testimony was harmless. *Id.* at 500–01.

¶36 Here, unlike *Rammel*, there was no "other evidence supporting [the] conviction." *See id.* Instead, this case hinged on the jury's assessment of Child's credibility versus that of Peraza. *See Iorg*, 801 P.2d at 941–42. We agree that Expert's testimony was prejudicial because it was "clearly calculated to bolster [Child's] believability by assuring the jury no credibility problem was presented by the delay" in reporting the conduct or her subsequent recantations. *See id.*; *cf. State v. King*, 2010 UT App

396, ¶ 46, 248 P.3d 984 ("When Utah appellate courts reverse for improper bolstering, they usually do so not only where a case hinges on an alleged victim's credibility and there is no physical evidence, but also where the bolstering was done by an expert witness."(internal citation omitted)). Because there was "no[] other evidence [to support his] conviction beyond that which is tainted by" Expert's testimony, "we cannot say that absent the error there is not a reasonable likelihood of a more favorable result" to Peraza.[9] *See Iorg*, 801 P.2d at 942 (citation and internal quotation marks omitted).

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9. Peraza has suggested that Expert's testimony is the type of "anecdotal 'statistical' evidence" condemned by the Utah Supreme Court, *see State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990), and implies that, even if the testimony had been properly and timely disclosed, it should be excluded on its own merits. We recognize that our supreme court "has continued to condemn anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as witness veracity, as one of the categories of evidence leading to undue prejudice." *Id.* 801 P.2d at 941 (referencing *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989)); see *also State v. Jones*, 2015 UT 19, ¶ 50, 345 P.3d 1195 (explaining that the Utah Supreme Court has "condemned anecdotal statistical evidence when it concerns matters not susceptible to quantitative analysis," but determining that testimony "regarding the percentage of crimes linked to drug use" was a quantifiable metric (citation and internal quotation marks omitted)); *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986) ("Even where statistically valid probability evidence has been presented . . . courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies."). But because Peraza includes this argument only as part of the harmless error analysis, we are not asked to directly address whether the evidence is admissible even if it had been timely disclosed, and we therefore decline to do so.

¶37 We conclude the district court exceeded its discretion in admitting Expert's testimony at trial because the State failed to comply with Utah Code section 77-17-13 in that it did not provide an expert report or detailed information with respect to Expert's testimony or the scientific basis on which she would rely. Without this information the requirements under rule 702 were not met, and this error prejudiced Peraza's trial. We were not asked to determine whether—assuming that the testimony had been properly and timely disclosed—the Rule 702 requirements could be met with respect to Expert's testimony that "between four and 20 percent" of sex abuse victims recant their allegations or that the "majority" of these victims delay disclosures. On remand, if the State seeks to admit testimony with respect to delayed disclosure and recantations of sex abuse victims, from either Expert or any other expert witness, it must provide sufficient information, consistent with this opinion, to allow the court the opportunity to properly rule on its admissibility under rule 702.

II. Denial of the Motion to Continue

¶38 Peraza contends the district court abused its discretion when it denied his motion to continue the trial to allow him to adequately prepare to cross-examine the Expert and to procure an expert witness to rebut her testimony. He argues that this prejudiced his trial because had he been able to procure a rebuttal expert, there would have been a "reasonable likelihood that the outcome of the case would have been different." We agree.

¶39 As we have discussed, the party seeking to use an expert witness at trial must disclose certain information. Utah Code Ann. § 77-17-13 (LexisNexis 2017); *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). If the party "fails to substantially comply with [these] requirements . . . the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial . . . sufficient to allow

preparation to meet the testimony." Utah Code Ann. § 77-17-13(4)(a).

¶40 When we review the denial of an appellant's request for continuance, we consider four factors:

> (1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the *need* for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the appellant might have suffered harm as a result of the court's denial.

State v. Begishe, 937 P.2d 527, 530 (Utah Ct. App. 1997), *superseded on other grounds by statute as recognized in State v. Roberts*, 2018 UT App 9. We will address each factor in turn.

¶41 First, defense counsel diligently prepared the defense prior to trial. He timely moved to exclude Expert's testimony, highlighting the State's failure to comply with the notice requirements and emphasizing the risk of unfair prejudice to the defense when "'statistical evidence of matters not susceptible to quantitative analysis'" is presented at trial because it is "'uniquely subject to being used to distort the deliberative process and skew the trial's outcome.'" (Quoting *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989).) After the court determined it would admit Expert's testimony if necessary, counsel immediately contacted a social worker for assistance to prepare to cross-examine Expert. The social worker informed counsel that Peraza needed his own expert witness for rebuttal, and counsel requested an "emergency [telephone] conference" to request a continuance to allow sufficient time to procure an expert witness and to prepare for cross-examination. Considering all of these efforts, we conclude that defense counsel acted diligently.

¶42 Second, Peraza likely could have been adequately prepared to meet the expert testimony if the district court granted his motion to continue the trial. He would have had the opportunity to procure an expert witness to rebut Expert's generalized statement of the probability that a victim's recantation of an allegation does not mean that the abuse did not occur. This expert might also have been able to testify about whether the "effigy doll" treatment "could have led to the allegations becoming more violent and much more pronounced over the years."

¶43 Third, Peraza's "right to a fair trial outweighed any inconvenience to the court [and] the opposing party . . . that may have been caused by a continuance." *State v. Tolano*, 2001 UT App 37, ¶ 13, 19 P.3d 400. "Although inconvenience to the court and jury is one of the four factors considered, this court has specifically held that such an administrative concern is outweighed by the [defendant's] right to a fair trial." *Id.* (quotation simplified). The district court's concerns that Child needed to be considered and that it had to "draw a line somewhere" were outweighed by Peraza's right to a fair trial.

¶44 Finally, "the extent to which [Peraza] might have suffered harm as a result of the court's denial . . . is the most important among the factors." *Id.* ¶ 14 (quotation simplified). As this court explained in *Tolano*, because of the "difficult burden placed on defendants to establish prejudice in cases such as these," the burden is on the State to persuade the court there is no reasonable likelihood that, absent the error, the outcome would have been more favorable to the defendant. *Id.*

¶45 The State has not met that burden here. First, it argues that Peraza did not seek to continue the trial to procure an expert witness to rebut Expert's testimony but instead to discuss Child's therapy treatment. This mischaracterizes the type of expert witness Peraza sought to procure. Defense counsel argued that, based on Child's therapy treatments, he needed an expert witness to rebut Expert's testimony and to inform the jury that the type of treatment she received could have influenced her withdrawal of her recantations and that this treatment "might

have led to the allegations becoming much more violent and much more pronounced as the years have gone on." Essentially, he argued that this type of treatment has been shown to affect the description of the alleged abuse.

¶46 The State also argues that the motion's denial did not prevent Peraza from "'put[ting] forward the only defense he had'" or from putting on "'the only testimony potentially effective to his defense.'" (Quoting *United States v. Flynt*, 756 F.2d 1352, 1361–62 (9th Cir. 1985).) It argues that Peraza "was able to call [Child's] credibility into question by highlighting inconsistencies in her disclosures, including her recantation and then withdrawal of the recantation." But this argument is not persuasive and we find no support for it in Utah case law. *Compare Flynt*, 756 F.2d at 1361, *with State v. Torres-Garcia*, 2006 UT App 45, ¶¶ 18–22, 131 P.3d 292 (explaining that appellate courts "must determine if the circumstances [in the present case] are such that a continuance was necessary"). Instead, we consider the circumstances related to defense counsel's ability to sufficiently prepare his defense strategy and to effectively cross-examine the State's witnesses. *See Torres-Garcia*, 2006 UT App 45, ¶¶ 18–22.

¶47 Although Peraza's counsel was able to call a fact witness, the private investigator that recorded one of Child's recantations, he was nevertheless "sufficiently prejudiced by the denial of his . . . request for a continuance." *Id.* ¶ 22. Defense counsel was able to highlight inconsistencies in Child's testimony and was able to present recantations through the private investigator. But this evidence was undercut by Expert's testimony, which should not have been permitted because it "rehabilitated [Child's] credibility, without challenge." And the harm to Peraza's trial was compounded when he was unable to present an expert witness whose testimony, arguably, would have been given similar weight to Expert's testimony. *See id.* Although counsel was able to elicit some concessions from Expert, the jury would have benefited from the opportunity to weigh Expert's testimony with a second expert from the defense. Ultimately, Peraza's ability to put forward his best defense was materially hampered by the denial of the motion to continue to

procure his own rebuttal expert. Under these circumstances, the State has failed to meet its burden of persuading this court that Peraza was not prejudiced by the denial of his motion to continue.

¶48 We conclude the district court exceeded its discretion when it denied Peraza's motion to continue the trial to adequately prepare to cross-examine the Expert and to procure an expert witness to rebut her testimony.[10]

CONCLUSION

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

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10. Peraza also contends that the error in admitting Expert's testimony at trial, along with the erroneous denial of his motion to continue, constitutes grounds for reversal under the cumulative error doctrine because "[t]he close relationship between these two rulings and the effect they had upon the evidence presented" were prejudicial. Generally, a party will invoke the cumulative error doctrine where "errors committed during the course of [the] trial were harmless individually, [but] were cumulatively harmful." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993). Under this doctrine, we will reverse only if "the cumulative effect of the several errors undermines our confidence that a fair trial was had." *Id.* (quotation simplified). In this case, both errors were independently prejudicial and each warranted a reversal and new trial. Therefore, the cumulative error doctrine does not apply. But viewing the two harmful errors together, we are even more confident in our determination that Peraza was denied a fair trial.

the State's failure to comply with section 77-17-13. Neither of these errors was harmless. We therefore vacate Peraza's convictions and remand to the district court for a new trial consistent with this opinion.

Addendum B

Utah Code Section 77-17-13. Expert testimony generally—Notice requirements (West 2017)

(1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.

(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:

(i) a copy of the expert's report, if one exists; or

(ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and

(iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.

(2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.

(3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).

(4) (a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose

appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.

(5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.

(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

(6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Rule 104, Utah Rules of Evidence (2011)
Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 702, Utah Rules of Evidence (2011)
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 I – Opposition to Petition for Writ of Certiorari

No. 20180487-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ROBERT PERAZA,
Defendant/Respondent.

Response to Petition for a Writ of Certiorari

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IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ROBERT PERAZA,
Defendant/Respondent.

Response to Petition for a Writ of Certiorari

QUESTIONS PRESENTED FOR REVIEW

1. By deciding that the trial court abused its discretion when it admitted expert testimony without applying the 702 gatekeeping analysis, did the Utah Court of Appeals decide an important issue of first impression?

2. By responding to the State of Utah's claims that Peraza's challenge was to notice, and not 702, did the Court of Appeals reverse on a waived issue?

3. Did the Court of Appeals' decision place an improper burden on the State to disprove prejudice in conflict with the expert-notice statute?

OPINION BELOW

The Court of Appeals' opinion sought to be reviewed is *State v. Peraza*, 2018 UT App 68, __ P.3d __.

JURISDICTION

The Court of Appeals issued its decision on April 19, 2018. The Court granted the State's motion for extension to file its petition, extending the time to June 20, 2018. The Court has jurisdiction to consider this petition under Utah Code §78A-3-102(5).

STATEMENT OF THE CASE

A. Summary of the Facts from Trial

At the time of trial K.C. was 12 years old and in 6th grade. R.835-36. Peraza and K.C's mother, Nina, have been together most of her life but she is not sure whether they were married. R.840-41. K.C. alleged that years before Peraza woke her up late at night and showed K.C. "his body parts" and made her touch his penis. R.843-44. This "happened a couple of nights" and "it started going where he made me touch him." R.846. "He made me do an up and down gesture on his penis." R.847. This happened "every week" until K.C. was seven, then "it started to change." R.849-50. Then Peraza made K.C. "do it longer, and put my mouth on his penis". R.850.

Then, a month later, "things started to happen with [K.C.'s] bum". R.854. Peraza would "put a sock in my mouth so I wouldn't scream." R.852, 928. "He put some stuff on my butt and stick his penis in me." R.852. During these incidents, Peraza was behind K.C. and she was "[a]t a 90-degree angle on the bed." R.932. Trial was the first time K.C. told anyone about Peraza putting a sock in her mouth. R.968. Trial was the first time K.C. told anyone about using "weird stuff" to make penetration easier. R.968.

Then, "[a] year after he started sticking his penis in my butt", he "stuck his penis in

my vagina." R.853.[1] This happened two or three times, standing up, face to face. R.933. This happened "[a] long time", or a "couple months", before her interview at the CJC. R.934. The abuse stopped when K.C. was nine and Peraza moved in with his mother, before K.C. reported it to Nina. R.853.

K.C. was interviewed by Echols at the CJC on August 9, 2013. R.813, see State's Exhibit 1. K.C. told Echols that nothing like this has happened with anybody else, other than Peraza. R.923. Echols asked K.C. to describe Peraza's penis and K.C. told her it was just like my mom said." R.962.[2] K.C. had asked her mother about Peraza's penis because she was curious about it. R.962-63. K.C didn't tell Echols about "more abuse with [her] dad that involved things like [her] butt and [her] vagina" because she "was afraid." R.926, 964 (Echols asked "numerous times if it had happened in any other way" and K.C. told her "nothing else").[3]

After the CJC K.C. spoke with Nina and told her that she missed Peraza, and that she wanted to live with him again. R.945. Nina was confused about why and asked K.C. whether the things she had said about Peraza actually happened. R.946. K.C. told Nina that they did not happen. R.946.

A couple months after she was first interviewed at the CJC K.C.'s mother took her to an appointment to talk with a private investigator. R.917, 920-21. The investigator asked

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[1] Peraza was not charged with conduct involving vaginal rape because K.C.'s trial testimony was the first time she had made these allegations, to anyone other than her aunt a few months before trial, despite being interviewed repeatedly and attending years of therapy. R.951-955.

[2] See State's Exhibit 1 at 36:15 (Q: Tell me what his pee-pee looks like. A: It was like my mom said.").

[3] See State's Exhibit 1 at 35:57 (Q: Has your dad ever touched *you* anywhere on your body? A: No.).

K.C. about Peraza having her touch him and she said he had not done that. R.942. She told the investigator Peraza didn't touch her and she didn't touch Peraza. R.942. The investigator asked K.C. about what she said in her CJC interview she said she said those things because she "had to". R.943, see State's Exhibit 2 at 6-7.[4] K.C. told the investigator that an evil voice in her head told her what to say. R.943. The investigator asked K.C. many times about the alleged abuse and every time she said they did not happen. R.944.

After she moved to California, K.C. would call her mother on the phone. R.970. K.C. "kept telling [Nina] in those conversations that [Peraza] didn't do anything to" K.C. R.970-71. K.C. told her mother that nothing happened with Peraza but that Giovanni, Peraza's brother, had done things to her. R.972.

K.C. was interviewed again, in California, by "Courtney" and asked about Giovanni. R.954. K.C. said that Giovanni's girlfriend, Cassie, had heard K.C. and Giovanni "doing things". R.954.

Chelsea Smith works at the Utah County CJC as a forensic interviewer. R.1131. Smith did not interview or make an assessment on K.C., she did not read the transcript of Bourne's interview of K.C, and she did not review any medical records or counseling records. R.1148, 1154.

Smith has performed "[a]round 1,900" forensic interviews. R.1141. In her experience,

[4] "Q. Did you tell her that Robert had you do things with him that you didn't want to do and that weren't right? A. Yes. Q. And why did you tell her that? A. Because I had to. Q. Why did you have to? A. Because that's why I was there for. Q. And why did you have to -- was it because it was true or was it for some other reason? A. I don't know. Q. Well, did those things happen, or didn't they? A. Didn't. Q. They didn't happen? A. Huh-uh. Q. Then why did you tell the lady they did? A. Because that little voice went in my head. Q. A little voice went in your head? A. Uh-huh."

the fact that a "child recants does not mean that it did not occur." R.1142. The research about the frequency of recantations "varies between four percent to 20 percent of cases, so it's not something that's typical, but it's not unheard of that it does happen." R.1141-42. "Sometimes when a child recants, it may be feeling pressure from family members." R.1142.

When people in the "sexual abuse community" "disclose as a child, even then, the disclosure can be delayed." R.1143. Sometimes disclosure comes gradually where "kids will just give a little bit of information to test the waters, to see how it is received." R.1143-44. "Sometimes the children are supported and then they feel more comfortable talking about things. Sometimes it's not that well by the person who receives it, and then the child will kind of shut down and not talk about things a lot." R.1144. "Other times, children will say the information that they can think about that time, but just often times, we don't remember all of the information about an experience when someone's asked us about that experience, and so when someone's asked us about that experience, and so sometimes later we'll think, oh, I forgot to tell them that part, or the more we talk about things, the more we remember different experiences." R.1144.

B. Summary of the Proceedings

Peraza was charged by information with four (4) counts of Sodomy Upon a Child, first degree felonies, and one (1) count of Aggravated Sexual Abuse of a Child, a first degree felony. R.001-02.

After several continuances due to the State's failure to disclose discovery evidence

and new evidence coming to light, a jury trial was set for February 2016.[5] On January 8, 2016 (32 days before trial) the State filed notice of intent to present expert testimony through Chelsea Smith. R.282-83. The State intended to present evidence of the "methodology and science related to forensic interviewing of suspected child sex abuse victims; science and research regarding child disclosures of sex abuse including identified factors related to delayed, partial and gradual disclosures and recantation." R.283. At the January 25, 2016 pretrial conference, Peraza informed the court that the State had "filed a notice of expert, and we filed an objection…" R.520. After clarifying that the filed objection had originally

[5] The State's petition points to a number of continuances that eventually led to trial. State's Petition, 6-7. Undoubted, the State intends to persuade this Court that the case was drawn out unnecessarily by Peraza's repeated requests for continuances. But the State's recitation of this procedural history is misleading at best. For example, the State claims "defense counsel requested eleven continuances" before the preliminary hearing. But review of the record easily refutes the State's claim. For example at the waiver hearing on February 24, 2014 the case minutes reflect that the continuance was by "stipulation of counsel", and that in fact a preliminary hearing was requested and scheduled. R.031-32. To characterize the setting of a preliminary hearing as a "continuance" is inaccurate. Setting of a preliminary hearing is exact opposite of a continuance or a delay, it moves the case from one stage to the next. Another example is at the hearing on May 5, 2014 where the parties addressed a motion to appoint a Guardian Ad Litem to represent the victim. The parties addressed the court and the court denied the motion. The case was then set for the next hearing. To characterize this as a continuance in the guise of showing the defense as repeatedly delaying the case is a false characterization refuted by the record. At the August 4, 2014 hearing there was a stipulated motion to continue the preliminary hearing because "counsel needs to figure out how to play the interview for the Court prior to the hearing." R.077. The prosecutor was having trouble providing the court with an exhibit that could be viewed and needed the continuance "to allow [him] time to try to figure something out on that". R.440. To blame that continuance on the defense is an unfair reading of the record. The State then cites R.422 which corresponds with a transcript of a hearing on May 5, 2014 at which defense counsel, the public defender, does ask for a continuance after being re-appointed to the case. But what the State either ignores or hopes the Court won't notice is that this is a duplicate of the continuance it cited at R.044. The same is true when the State cites R.439 which is the August 4, 2014 hearing at which the prosecutor asks for two weeks to resolve the problem with the video cited by the State at R.077. So while the State's assertion that defense counsel requested eleven continuances is designed to show a pattern of repeated delay, a review of the record refutes that inference entirely.

been directed at another expert witness that the State was no longer going to call, the State said it had no objection to using the prior motion in limine with regard to the State's new expert and to address the expert witness issue "next week." R.520-21.

On January 28, 2016 at the hearing on Peraza's motion to exclude the State's expert, defense counsel claimed the expert's testimony wasn't needed and was redundant and cumulative. R.533-34. Peraza claimed the science and research regarding child disclosures of sex abuse, including identified factors related to delay, partial and gradual disclosures and recantations" had not been supported by a report and that "I don't really know what this expert would be testifying to." R.534. Counsel complained that the expert may intend to present "statistical analysis" which isn't supported by an "actual statistical basis". R.534-35. He challenged the "scientific basis" for an expert to testify to the different reasons for a child to recant and that such testimony would not "meet[] the threshold." "[T]o have an expert testify about them without a scientific basis, is concerning because it give more weight to the State's argument than maybe it should…" R.535. Defense counsel also argued that the State's notice was inadequate because it did not provide "a thorough enough written explanation of the expert's proposed testimony" such that the defense did not "know which [studies] she's specifically relying on" and would "have no ability to cross examine her without having more information". R.548-49.

The State did not put the expert witness on or present any foundational evidence to meet the threshold showing of reliability. After hearing the parties' arguments the trial court stated, "according to the rules of evidence, this person would meet the criteria for being an expert…" R.548. After further discussion, the court denied Peraza's objection to the State's

expert witness noting she "qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550.

Later that same day, January 28, 2015, the court held a phone conference with the parties. R.589. Defense counsel informed the court that, after that morning's rulings when Smith was allowed to testify he consulted with a mental health, social work, and mitigation director for the Salt Lake Legal Defenders, to get "advice on how to prepare a cross examination of Mr. Smith" and the controversial therapy K.C. was engaged in. R.589-90. Defense counsel decided he needed "an expert of [his] own." R.590-91. Counsel, after acknowledging the age of the case and denying any intent to delay, requested a continuance of the trial to secure an expert. R.591. The State was "unhappy" with the prospect of a continuance "but at the same time, I understand the basis of what they're asking for." R.591-92. The court decided it had "to draw the line somewhere" and, because "can't be something that could come up on the eve of trial", it denied the motion. R.592. The court "recognize[d] that this might be something that could be used later, but [felt] like this is too late in the game, especially this being the third time that we've set a trial. We have an obligation as well to this victim -- alleged victim, that I have to consider. And so, weighing all things and hearing what I'm hearing today, I see no reason why this trial should not go here in 10 days, whatever it might be." R.592.

The case proceeded to trial on February 9, 2016 and Peraza was convicted on four counts of Sodomy on a Child. R.1292, 367-68. At sentencing the court ordered Peraza to serve 25 years-to-life on each of the four counts, each to run concurrent. R.1318. Peraza timely appealed, and the Court of Appeals reversed his convictions finding two separate and

independent prejudicial errors. The State of Utah now seeks certiorari review of the Court of Appeals' decision.

C. Decision of the Court of Appeals

On appeal, Peraza claimed that the trial court abused its discretion in two ways. The questions presented where: 1) "Whether the trial court erred by allowing the State to present opinion testimony of Chelsea Smith"; and 2) "Whether the trial court erred when it denied Peraza's request to continue the trial." Appellant's Brief at 2.[6] The Court of Appeals found that the court abused its discretion in both instances.

ARGUMENT

This Court reviews decisions of the Utah Court of Appeals "only for special and important reasons." UTAH R. APP. PRO. 46(a). The State argues *Peraza* warrants review because the Court of Appeals conflates the standards and remedies applicable under rule 702 and the expert-notice statute. But this claim is misdirection and ignores the language or reasoning used by the Court of Appeals. Nothing about Peraza's claims, or a careful reading of the Court of Appeals' agreement with those claims, suggest that this case is about *excluding* evidence based on a lack of notice. Peraza's arguments in the first claim to the Court of Appeals repeatedly and consistently focused on the trial court's abuse of discretion when it

[6] Peraza made a third claim based on ineffective assistance of counsel which depended upon a pending 23B, motion which the Court of Appeals did not address. *Peraza*, fn.1. Conceivably, if this Court grants the State's petition, and ultimately reverses the Court of Appeals on both independent grounds, the case must be remanded to the Court of Appeals to rule on the pending rule 23B motion and to address the ineffectiveness claim.
Peraza made a fourth argument claiming the trial court erred in sending a copy of the recorded interview with the victim into jury deliberations after he objected but the Court of Appeals ruled this claim was not preserved, while acknowledging that such evidence should not be sent to the jury. *Peraza*, fn.6.

denied Peraza's pretrial motion in limine to exclude the State's proposed expert concluding that the expert could testify after "looking at skill, experience, education, and those kinds of things." R.550. Peraza challenged the trial court's conclusion that the State had satisfied the requirements of Rule 702 to admit expert testimony and the Court of Appeals agreed. The State's current attempt to re-frame that challenge, to put words in the Court of Appeals' mouth, cannot manufacture a special and important reason. This Court should not grant the State's petition because there is nothing to review.

I. The Court of Appeals' decision did not decide an issue of first impression, nor does it conflate rule 702 and the notice statute

The issue before the Court of Appeals was simple, the trial court abused its discretion when it did not require the State to meet the threshold for admitting expert testimony. As the Court of Appeals stated, "Peraza argues the district court had no basis for determining that rule 702 was satisfied because 'the court had no idea what Expert's testimony was going to be… what her opinions or conclusions were based upon… or whether her methods and principles had been reliably applied to the facts in this case." *Peraza*, ¶30. When the court concluded "the district court exceeded its discretion when it admitted Expert's testimony at trial without complying with the requirements of rule 702", it was doing so because the trial court had no "idea what Expert's testimony would be or what scientific basis it was based upon." *Peraza*, ¶¶31-32. This is not an issue of first impression. The application of the 702 analysis in this case is neither novel, or particularly interesting.

The State seems to direct its complaint at the expert notice discussion in paragraph 28, without acknowledging the existence of paragraphs 26-27, and without acknowledging that the holding in paragraphs 31-32 do not reference or depend upon the notice language at

all. The Court of Appeals does mention the items contained within the State's notice, including Expert's "curriculum vitae [and] the list of article citations" but not as criticism of the notice itself. Instead, it seems clear the court references these items in the notice to rebut any claim that the evidence needed to satisfy 702 could be found in the notice.

The State's argument is that the Court of Appeals erred on the 702 question because the State actually satisfied the requirements of 702 when its expert testified at trial. The State continues, because 702 does not require "pre-trial notice" there was no need for the trial court to exclude its expert at the January 28, 2016 hearing on Peraza's objection to the State's proposed expert. The State acts as though the admissibility of the State's expert was an open question up until trial and the judge acted within its discretion because the expert eventually testified "that the studies on which she relied were 'generally accepted' within her field 'as being sources that were reliable.'" State's Petition, page 13.

But this argument is based on a fantasy about "what happened here." State's Petition, page 13. Smith only testified at trial because the trial court denied Peraza's motion in limine to exclude her testimony. When a party makes a pretrial objection to proposed evidence and the trial court denies that objection, the party is "not required to object during trial to evidence offered in accordance with the court's pretrial ruling." *State v. Domiguez*, 2003 UT App 158, ¶18, 72 P.3d 127. Peraza filed a pretrial objection to the proposed expert based on 702. This objection obligated the court to perform its gatekeeping function. At the January 28 pre-trial hearing the court specifically addressed Peraza's objection to the expert. The court heard the parties' positions, considered the State's notice which included the expert's CV, and ruled on the objection concluding that "according to the rules of evidence, this

person would meet the criteria for being an expert..." R.548. The court denied Peraza's objection to the State's proposed expert witness finding she "qualified as an expert, looking at skill, experience, education, and those kinds of things." R.550.

The court did all this without receiving evidence from the witness or reviewing a report or documentation about what expert's testimony would be. The court utterly failed to perform any of the gatekeeping function required by 702. The court made no mention of reliability of the testimony, nor of the methods or principles, or of the application to the facts. This is what the Court of Appeals saw as the abuse of discretion.

Nothing in the reasoning of the opinion suggests that the district court should have excluded the expert's testimony because of a problem in the notice.[7] Nothing suggests the Court of Appeals was reversing because the notice did not include sufficient information. It is true that the Court of Appeals does repeatedly refer to the notice requirement in §77-17-13, but those references are relevant only insofar as they reflect an absence of any evidence demonstrating the reliability of the science underlying the proposed expert testimony.

The opinion clearly concludes that because "[t]here was no information from which to determine the principles or methods that would form the basis of Expert's testimony, or whether her opinions were based upon sufficient facts or data. *See* Utah R. Evid. 702(b)."

[7] Nor was the Court asked to do this. Peraza's initial brief to the Court of Appeals did not even reference §77-17-13, and his reply brief did mention it, but only to reference the language used in the objection filed by trial counsel. The entirety of the expert witness argument was that the trial court abused its discretion in admitted expert testimony because it failed to apply the 702 gatekeeper test. Peraza asserted that when the trial court erred in interpreting and applying rule 702 because it "completely failed to examine whether [Expert's] testimony and opinions were based upon principles and methods that were reliable, that they were based upon sufficient facts or data, and had been reliably applied to the facts."

Peraza, ¶31. That the State now complains the ruling was based on a notice problem is refuted by the straightforward language of the analysis in the opinion. While the court did refer to §77-17-13 in describing the trial court's failure, the actual justification for the holding is that without "detailed information with respect to Expert's testimony or the scientific basis on which she would rely… the requirements under rule 702 were not met…" *Peraza*, ¶37.

Peraza based his 702 argument to the Court of Appeals on *Eskelson v. Davis Hosp.*, 2010 UT 59, ¶11, wherein rule 702 "requires a determination to determine whether a party has met its threshold burden to show the reliability of the principles that form the basis for the expert's testimony and the reliability of applying those principles to the facts of the case." See Appellant's Brief at 27-30, Appellant's Reply Brief at 6. The argument made to the Court of Appeals was that the trial court abused its discretion when it ordered Smith's testimony was admissible when the State had failed to meet this threshold, even within the proffer of the expert notice. See Appellant's Brief at 30-32, Appellant's Reply Brief at 10-11.[8]

Following the plain language of Rule 702 the Court of Appeals agreed with Peraza that the trial court had no "idea what Expert's testimony would be or what scientific basis it was based upon." *Peraza*, ¶31. The rule puts an obligation on trial courts to act as gatekeepers and require the proponent of expert evidence to make a threshold showing of reliability. Because the gatekeeper in this case didn't make any inspection whatsoever of what the State wanted to bring into trial, the court abused its discretion. There is nothing

[8] The State did not oppose these arguments directly. Instead, the State only argued preservation, Peraza's failure to argue plain error, and that any error was harmless. See Appellee's Brief. At no point did the State contend that the State met its burden under 702 when Peraza objected to it.

controversial, novel, or even interesting here. There is certainly *no special or important reason* to review the Court of Appeals' decision and the petition should be denied.

II. THE COURT OF APPEALS DID NOT REVERSE ON AN ISSUE "NEVER RAISED ON APPEAL", IF ANYTHING THE STATE'S ARGUMENTS INVITED IT THE NOTICE ISSUE

The State's second argument is that the Court of Appeals reversed Peraza's conviction based on an issue that was preserved in the trial court, but then waived on appeal, in violation of the direction this Court gave in *State v. Johnson*, 2017 UT 76. See State's Petition, pages 15-18. According to its petition, the State believes this Court should grant certiorari review because the "Court of Appeals violated *Johnson* by addressing a waived issue sua sponte where that issue was not 'astonishingly erroneous.'" State's Petition, page 15 (*citing Johnson*, 2017 UT 76, ¶49). This argument incorrectly reads the holding below and ignores the appellate record, including the State's own arguments to the Court of Appeals. The Court of Appeals did not reverse on the basis of inadequate notice, and even if it did, the State invited the Court of Appeals to address the notice issue in it written and oral arguments.

As explained in the first section, the Court of Appeals did not reverse on Peraza's notice objection or on the question of adequate notice. The Court of Appeals reversed on Peraza's preserved-and unwaived on appeal-objection to the rule 702 admissibility of the State's expert witness evidence.

Secondly, to the extent that the Court of Appeals addressed the notice requirement it did so based upon the State's arguments. For example, in its brief to the Court of Appeals, the State claimed that Peraza's pretrial objection was only about notice, not about 702. See

Appellee's Brief at 24 ("Peraza never objected based on rule 702."), 29 ("Peraza never made a rule 702 objection. Rather, he objected pre-trial on the basis of inadequate notice"), 30 ("When Peraza objected to Smith's testimony before trial, he did so on the basis of inadequate notice"). Peraza's first claim to the Court of Appeals focused on rule 702.[9] The State countered, as is their standard response, that the argument was not preserved and that Peraza had only objected to notice, which the State claimed was proper. In considering the preservation question the Court of Appeals necessarily

III. THE TRIAL COURT RULED THE EXPERT TESTIMONY WAS ADMISSIBLE LONG BEFORE ANY FOUNDATION WAS OFFERED AND THE STATE FAILED TO PRESERVE THE TIMING ARGUMENT IT NOW SEEKS TO MAKE ON CERTIORARI

The State now claims that the Court of Appeals erred in its analysis regarding the rule 702 requirements because rule 702 has no timing requirement and that the expert's trial testimony laid sufficient foundation for admission of expert testimony. See State's Petition, pages 12-13. The State contends that while some "evidentiary rules expressly incorporate pre-trial notice requirements, into the rule… 702 does not" and therefore Smith's trial testimony "satisfied the requirements for admissibility". State's Petition, page 13. Not only does this argument ignore the record, it is an unpreserved argument the State never presented to the Court of Appeals.

First, the State's contention that the 702 requirements were met when Smith testified

[9] The second claim, the denial of the continuance was based at least in part on the fact that the notice did not provide sufficient information from which Peraza could prepare his defense. See Appellant's Brief at 40 (Peraza had no reason to suspect the court would allow Smith to testify, since the State had not produced anything which could allow the court to find her testimony was admissible).

at trial "that the studies on which she relied were 'generally accepted' within her field 'as being sources that were reliable'" acts as though the trial court's 702 ruling occurred at trial. But the State knows that isn't true and only hopes this Court will overlook the actual sequence of events. As was made plain to the Court of Appeals, when the trial court denied Peraza's motion to exclude the State expert it said:

> I know you want to know whether or not this lady's going to be allowed to testify. For purposes of today, she meets the criteria. It is late, but it's within the timeframe allowed to provide an expert under 702, and all I can do is look at her criteria, figure out for myself whether or not she's qualified as an expert, looking at skill, experience, education, and those kinds of things. And it appears to me that she does meet those qualifications, so I'll go ahead and deny a motion to exclude this particular witness at this point.

R.550. The trial judge made it clear, he was allowing the State's expert to testify at trial, he was denying Peraza's pretrial motion. Peraza was not obliged to raise his 702 objection again at trial, nor was he obligated to challenge Smith on the 702 factors in front of the jury.

And Smith's trial testimony that the studies she relied upon are generally accepted as reliable does not meet the 702 test. The State was required to prove her opinion was necessary to assist the jury, that Smith had the necessary knowledge, and that the science is reliable, based upon sufficient facts or data, and reliably applied to the facts. *Eskelson*, ¶9, UTAH R. EVID. 702.

Second, even if the State's new timing argument had a leg to stand on, it could not be made now because it is new. The State never argued that rule 702 has no timing requirement or that Smith's testimony at trial satisfied Peraza's pretrial objection. To the Court of Appeals the State argued that Peraza abandoned his objection "when the evidentiary picture changed at trial" because the trial court had not ruled definitively. See Appellee's Brief, 30-

32. The State's argument to the Court of Appeals was that the trial court's pretrial ruling was "a tentative ruling – not a definitive one" and therefore when Peraza was obligated to object again at trial, but did not. Of course the record made that position difficult to support. As explained above, at the hearing where Peraza's 702 objection was addressed, following argument and without taking any evidence, the trial court definitively denied the motion and ordered that Smith could testify as an expert.

But now the State contends that it doesn't matter whether it was tentative and Peraza didn't re-raise the objection, it only matters that *eventually* at trial Smith did meet the 702 requirements. For this new argument, because 702 does not have a timing requirement, it doesn't matter that the State completely failed to satisfy 702 at the time of the objection and hearing. The State never argued that before and cannot now ask this Court to reverse the Court of Appeals on a new theory.

IV. THE BURDEN OF DISPROVING PREJUDICE WAS PROPERLY PLACED ON THE STATE WHERE ITS EXPERT NOTICE WAS INSUFFICIENT

The State's claims that because "Peraza's appeal was never about the expert-notice statute" the precedent which clearly places the burden to disprove prejudice on the State does not apply. State's Petition, pages 18-19. According to the petition, this Court's holding regarding the burden for prejudice from discovery violations in *State v. Knight*, 734 P.2d 913 (Utah 1987), should not apply to expert-notice violations because it "conflicts with the expert-notice statute." State's Petition, 19. For the State, the "statute *implicitly* places the burden on the movant to show that he is entitled to a continuance" because the word "entitled" requires the moving party "to prove that he is 'entitled' to it." State's Petition, 19.

But this assertion is not based on precedent, not based on the explicit language of the statute, and ignores the reasoning this Court laid out in *Knight* to begin with. That reasoning is solid, and the Court of Appeals' application of that holding to expert-notice violations does not give rise to a special and important reason to review it.

Furthermore, this appeal was "about" expert notice, just not in the way State wants this Court to think about it. Peraza's motion in limine cited both §77-17-13 and Rule 702, claiming the notice didn't give adequate notice about what the testimony would be, and that it was unreliable and unfairly prejudicial. R.190-94.[10] On appeal Peraza separated these two interrelated claims. First, he claimed error when the court denied his objection to the State's expert, which at trial had been based both on notice and on reliability. On appeal this first claim focused exclusively on rule 702 and the required gatekeeping function, which the trial court completely failed to perform. Second, he claimed that after the motion in limine had been erroneously denied, his motion for continuance should have been granted because he needed time to secure an expert witness to respond to Smith's opinions.

Peraza's second claim undoubtedly had to do with expert notice and his ability to adequately respond to the State's evidence. While Peraza's second claim was not directed at the timing of the State's expert notice (because the notice was filed 32 days before trial) it was directed at his ability to respond to the State's proposed use of Smith's expert testimony. Given the lack of specificity and the fact that no report had been included, the inadequacy of the State's notice was, in fact, part of Peraza's appeal, even though the timing of the notice

[10] "Defendant… moves this Court to exclude the State's expert… from testifying at trial… This motion is based on Utah Code of Criminal Procedure § 77-17-13 and Utah Rules of Evidence 702 and 403." R.190. Remember, this motion written specifically for another proposed expert was "incorporate[d]" into Peraza's objection to Smith. R.536.

was not necessarily challenged.

The State also claims that the Court of Appeals was wrong to use the burden described in *Knight* because it "conflicts with the expert-notice statute." State's Petition, 18. But as the State recognizes, this Court directed placing the burden on the State when "the defendant can make a credible argument that the prosecutor's errors have impaired the defense." State's Petition, 18-19 (citing *Knight*, 921). The only reason the State gives for this Court to overrule its precedent is that it supposedly conflicts with §77-17-13(4)(a), which the State asserts *implies* places the burden on the party that requested the continuance. But the State's assertion is just that, a bare assertion without any explanation why the term "entitled" would create a burden to prove prejudice on the party who requested it. It seems even more likely that the party that failed "substantially comply with the requirements" would be forced to disprove any prejudice associated with their refusal to comply with the statute.

CONCLUSION

There is not any special or important reason for this Court to review the decision of the Court of Appeals. The Court of Appeals was correct in concluding that the trial court denied Peraza's objection to the State's expert witness without any evidence which could have satisfied the requirement of rule 702. The Court of Appeals did not reverse on a waived issue or violate *Johnson*. The trial court admitted the expert testimony long before any hint of foundation was laid and the State failed to make a timing argument to the Court of Appeals. And finally, the State did bear, and rightly so, the burden of disproving prejudice because the expert notice actually was insufficient.

RESPECTFULLY submitted this 15th day of July, 2018.

/s/ Douglas J. Thompson

CERTIFICATE OF SERVICE

I certify that I emailed a copy of the foregoing Response to Petition for a Writ of Certiorari to the Utah Attorney General, Criminal Appeals Division, criminalappeals@agutah.gov, on this 15st day of July.

/s/ Douglas J. Thompson

Addendum J – Petitioner's Reply to Opposition to Petition for Writ of Certiorari

Case No. 20180487-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ROBERT ALONZO PERAZA,
Defendant/Respondent.

Reply to Brief in Opposition to Petition for Writ of Certiorari

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UTAH SUPREME COURT

STATE OF UTAH,
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v.

ROBERT ALONZO PERAZA,
Defendant/Respondent.

Reply to Brief in Opposition to Petition for Writ of Certiorari

Pursuant to rule 50(e), Utah Rules of Appellate Procedure, the State submits this reply to arguments raised in Robert Alonzo Peraza's Brief in Opposition to the Petition for Writ of Certiorari.

ARGUMENT

Peraza appealed his conviction, arguing that the trial court abused its discretion under rule 702, Utah Rules of Evidence, when it admitted an expert's testimony. Br.Aplt.27–32. As Peraza concedes, Opp.12 n.7, on appeal he did not challenge the adequacy of the State's pre-trial notice under the notice statute. Br.Aplt.27–32. Yet the Court of Appeals reversed on that basis. *State v. Peraza*, 2018 UT App 68, ¶¶2,28,31,37.[1]

[1] Peraza labels this characterization of the Court of Appeals' opinion as "misdirection." Opp.9. The Court of Appeals opinion speaks for itself.

In its Petition for Writ of Certiorari, the State argued that this Court should grant review to determine whether the Court of Appeals violated this Court's opinion in *State v. Johnson*, 2017 UT 76, 416 P.3d 443, when it reversed based in part on an issue that Peraza waived on appeal and that the State did not have the opportunity to brief or argue. Pet.3. Peraza argues that review is inappropriate because the State's arguments before the Court of Appeals "invited" the court to address the notice issue when the State claimed that the notice "was proper." Opp.14–15.

Whether the State presented the issue to the Court of Appeals for decision simply begs the question presented to this Court: Did the Court of Appeals violate *Johnson*? But Peraza is wrong in any event. Aside from mentioning that the notice was timely, the State never argued that the notice was proper, *see* Br.Aple.28–40; Oral Argument at 16:00–31:45 (February 21, 2018), and Peraza does not cite anything to support his contrary assertion, *see* Opp.15. Nor did the State concede that notice was improper. In fact, the State said nothing about the substantive propriety of the notice because Peraza never raised the issue on appeal. Simply pointing out that Peraza made a notice challenge below, but that he "disclaims any formal notice challenge" on appeal, did not invite the Court of Appeals to rule on the merits of the abandoned notice challenge. *See* Br.Aple.29 n.3. *Cf. State v. Kruger*, 2000 UT 60, ¶21, 6 P.3d 1116 (holding that appellee does not open door for appellant to address issue in reply

brief when appellee simply points out that appellant did not raise issue in opening brief).[2]

CONCLUSION

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, this Court should grant certiorari review.

Respectfully submitted on September 14, 2018.

SEAN D. REYES
Utah Attorney General

/s/ William M. Hains
WILLIAM M. HAINS
Assistant Solicitor General
Counsel for Petitioner

[2] On an unrelated note, the State mentioned in its petition that "defense counsel requested eleven continuances" before a trial date was set. Pet.6. Peraza claims that this statement is "inaccurate," "false," "unfair," and "misleading at best." Opp.6. The State provided citations to each continuance, and the record speaks for itself.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 49(d), Utah Rules of Appellate Procedure, this reply brief contains 3 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this petition, including the addenda:

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

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

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

CERTIFICATE OF SERVICE

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

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

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

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

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

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

/s/ Melanie Kendrick