

2016

**State of Utah Plaintiff/Appellee v. Terianne Smith Defendant/
Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

TERI ANNE SMITH,

Defendant/Appellant.

Case No. 20160084-CA

(District Ct. No. 141701716)

BRIEF OF THE APPELLANT AND REQUEST FOR ORAL ARGUMENT

Appeal from the Second District Court- Farmington, Davis County, from a conviction of one third degree felony before the Honorable Judge Robert J. Dale.

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2. JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated §78a-4-103(2)(e).

3. ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue I: Whether the Doctrine of Vicarious Consent is a recognized in Utah as a defense against a charge of wiretapping under U.C.A. §77-23A-4.

Standard of Review: "The standard of review for a conclusion of law is one of correctness, giving no particular deference to the trial court's decision." *State v. James*, 819 P.2d 781 (Utah 1991) (Cert. denied).

Preservation: Appellant filed a Motion in *Limine* to include evidence of suspected sexual abuse of her child as a defense to the wiretapping charge. The motion was denied. Appellant subsequently pled guilty to a third degree felony wiretapping charge as part of a conditional Sery plea in order to preserve this issue on appeal.

Issue II: Whether, if the defense exists, the trial improperly analyzed Ms. Smith's proffered evidence of good faith and reasonable belief in suspected abuse by applying the wrong legal standard.

Standard of Review: "The standard of review for a conclusion of law is one of correctness, giving no particular deference to the trial court's decision." *State v. James*, 819 P.2d 781 (Utah 1991) (Cert. denied).

Preservation: The trial court denied Appellant's motion to allow the defense of vicarious consent. Appellant subsequently pled guilty to a third degree felony wiretapping charge as part of a conditional Sery plea in order to preserve this issue on appeal.

4. STATEMENT OF THE CASE

Teri Anne Smith was charged with three counts of Wiretapping or Unlawful Interception of Communication. The "wiretapping" of her estranged husband, Greg Smith, allegedly occurred on three dates: February 14, 2012; February 20, 2012; and March 7, 2012. (R. at 1-2). During pretrial proceedings, Defense Counsel submitted a Motion in Limine to admit evidence of Ms. Smith's belief that Mr. Smith, the alleged victim, was sexually abusing their toddler-aged daughter. (R. at 72-87). Defense Counsel sought to admit this evidence as part of a defense under the Doctrine of Vicarious Consent. *Id.* The Doctrine of Vicarious Consent allows parents to consent to the recording of conversations or interactions others have with their minor child on behalf of that minor child. Whether or not the Doctrine is a recognized defense to wiretapping is an issue of first impression in Utah, but it has been adopted in several other jurisdictions including many federal jurisdictions.

At a pre-trial hearing on Defense Counsel's Motion in Limine, the Court refused to admit the evidence of suspected child abuse and noted two concerns. (R. at 407). First, the Court did not believe the defense was available in this jurisdiction. *Id.* Second, the Court was concerned that, even if the defense did exist, it would not be applicable under these circumstances because the device used to record the interactions was a continuous

listening device that recorded interactions other than those between Mr. Smith and the minor children. *Id.* Following the Court's refusal to admit the evidence, Ms. Smith entered a conditional Sery plea to preserve these evidentiary concerns for appeal. (R. at 150).

5. RELEVANT FACTS

Teri Anne Smith was charged with three counts of Wiretapping or Unlawful Interception of Communication. (R. at 1-2). The wiretapping of Greg Smith, allegedly occurred on three dates: February 14, 2012; February 20, 2012; and March 7, 2012. On February 14, 2012, Mr. Smith allegedly found a recording device in his child's diaper or clothing bag. *Id.* On February 20, 2012, Mr. Smith allegedly found a recording device that had been placed in his child's coat pocket. *Id.* And lastly, on March 7, 2012, Mr. Smith allegedly found another recording device in his daughter's bag. *Id.*

In an effort to establish a defense under the Doctrine of Vicarious Consent, Ms. Smith filed a Motion in Limine, seeking to introduce evidence of suspected sexual abuse of her daughter, not to prove the truth of the matters asserted, but as evidence of her good faith belief that she was acting in the best interest of her children to protect them from being sexually abused by Mr. Smith. (R. at 72-87) (See Addendum 1).

This evidence included Ms. Smith's contact with Layton City Police Department Detective Chad Jones, Division of Child and Family Services, the Children's Justice Center of Davis County (CJC-Davis), and Children's Justice Center of Weber/Morgan County, beginning January 24, 2012 and ending June 05, 2012. (R. at 226-237, 304-340) (See Addendum 1). Ms. Smith also had her daughter examined by several medical

professionals once she began to suspect her daughter was being sexually abused. (R. at 331-338) (See Addendum 1).

Ms. Smith's interactions with Det. Jones included her initial report of suspected sexual abuse; follow-up emails regarding her daughter's unusual comments, behavior, and medical concerns; concerns about images of pornography she discovered on her home computer; and steps she was taking to ensure her daughter was receiving proper medical care. (R. at 226-237, 304-340) (See Addendum 1). In addition, Ms. Smith had her daughter interviewed by CJC-Davis staff and examined by their medical staff following the initial reporting. (R. at 331-338) (See Addendum 1).

Ms. Smith also had her daughter examined by her pediatrician, a dermatologist, physicians at Primary Children's Medical Center, and ER staff at Ogden Regional Medical Center. (R. at 331-338) (See Addendum 1). These examinations each occurred subsequent to Ms. Smith observing rashes, bruises, and apparent vaginal swelling or irritation on her daughter following scheduled visitations with Mr. Smith. (R. at 210-213) (See Addendum 1). Furthermore, the child made several disconcerting comments that were relayed to Det. Jones which included statements about sleeping in the same bed with her father, showering naked with her father, putting things into her vagina, receiving 'French' kisses from her father, and reports of bleeding in her underwear. *Id.* The medical examinations were unable to rule out sexual abuse as the root cause of the child's medical problems. *Id.* As such, Ms. Smith sought counseling for her daughter and filed for a restraining order against Mr. Smith on February 10, 2012. (R. at 318) (See Addendum 1).

On two separate occasions, May 2012 and June 2012, Det. Jones noted that the Davis County Attorney's Office declined to prosecute the allegations reported by Ms. Smith. (R. at 329-330) (See Addendum 1).

On January 28, 2016, the District Court judge denied Ms. Smith's motion, finding the Doctrine of Vicarious Consent was not a recognized defense in Utah. (R. at 407). In addition, the trial court noted that even if the Doctrine of Vicarious Consent were an available defense it would not apply to Ms. Smith's case as she used a continuous recording device that recorded conversations and interactions beyond those between the minor children and Mr. Smith. (R. at 407).

On January 28, 2016 Ms. Smith plead guilty to Count One as a conditional Sery plea to preserve her right to appeal the evidentiary ruling. (R. at 150).

6. SUMMARY OF THE ARGUMENT

During the pre-trial phase, Ms. Smith's counsel filed a motion in limine to admit evidence of suspected child abuse in order to support a defense of vicarious consent due to a reasonable and good faith belief in the need to protect her child. (R. at 72-87) (See Addendum 1). Defense Counsel argued the Court's only responsibility was in determining the availability of the defense and from then on it merely needed to act as gatekeeper on the admissibility of the proffered evidence. (R. at 361-407). The judge denied the motion citing the current non-availability of the defense in Utah and the lack of applicability under the specific factual scenario of the instant matter. (R. at 407). These conclusions were incorrect for several reasons: (1) the court did not necessarily preclude the availability of the defense and the weight of persuasive authority favors adoption of

the doctrine; (2) once the doctrine was adopted as a recognized defense, the Court only needed to examine the evidence to meet a preponderance of the evidence standard; and (3) the Court unnecessarily evaluated the weight and credibility of the evidence proffered to support Ms. Smith's vicarious consent defense.

The Court's refusal to allow the defense was improper as the weight of persuasive authority and policy arguments favor the adoption of the Doctrine of Vicarious Consent in Utah. The Doctrine is allowed under the federal statute, which bears remarkable similarities to the Utah statute, and outlined in federal case law similar to the instant matter. The policy underpinnings of the doctrine, namely, allowing parents to protect their minor children, is readily applicable in Utah case law and the case at bar.

Once the Doctrine of Vicarious Consent is a recognized defense under the Utah wiretapping statute, the Court then needed to determine the admissibility of Ms. Smith's proffered evidence. The proffered evidence was specifically intended to demonstrate Ms. Smith's good faith and reasonable belief in a need to protect her children from further abuse. Such preliminary issues are only subject to Utah Rule of Evidence 104, requiring the Court to only examine whether a reasonable jury could find by a preponderance of the evidence that the preliminary condition existed. However, The Court and State's Counsel erroneously applied the clear and convincing evidence standard to the proffered evidence during the hearing on Ms. Smith's motion. (R. at 382).

Because the Court erroneously concluded that the availability of the defense would hinge on the specific facts of the case at bar, it proceeded to evaluate the weight and credibility of Ms. Smith's claims. (R. at 361-407). After weighing the credibility of Ms.

Smith's claim under the improper clear and convincing standard, the Court necessarily concluded the defense would not, even if recognized by Utah law, apply to the facts and evidence provided by Ms. Smith. (R. at 407).

7. DETAIL OF THE ARGUMENT

I. **THE TRIAL COURT INCORRECTLY DENIED MS. SMITH'S MOTION TO ADMIT EVIDENCE OF SUSPECTED SEXUAL ABUSE.**

The trial court's failure to admit Ms. Smith's evidence of suspected child abuse was an incorrect legal ruling for several reasons. First, the Doctrine of Vicarious Consent should be recognized in Utah as a viable defense to a charge of wiretapping. Second, once the defense is recognized, the elements of good faith belief and reasonableness under the circumstances are issues for the trier of fact. *State v. Lucero*, 2014 UT 15, ¶19. Lastly, Rule 104 of the Utah Rules of Evidence allows such preliminary issues of fact to be admitted under a preponderance of the evidence standard, which Ms. Smith met. *State v. Poole*, 2010 UT 25, ¶22.

The Court of Appeals reviews a trial court's legal conclusions as to the admissibility of evidence under a correctness standard. *State v. Ramirez*, 817 P.2d 774 (Utah 1991). When reviewing a trial court's legal conclusions for correctness, the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). This is because appellate courts have traditionally been seen as having the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. *Id.* This is of particular importance in issues of first impression, such as in the instant matter.

A. The Doctrine of Vicarious Consent should be recognized in Utah as a viable defense to a charge of wiretapping.

The vicarious consent doctrine has not been addressed by any state court in Utah. However, various federal and state court holdings support the adoption of vicarious consent as an exception to Utah Code § 77-23a-4. There are two main cases courts discuss when deciding whether to adopt this doctrine, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), and *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993). Both cases adopted the vicarious consent doctrine as an exception to the federal wiretap statute. See 18 U.S.C. § 2511.

Thompson involved a case on remand by the Tenth Circuit Court concerning a defendant who had made recordings of her ex-husband and their children. *Thompson*, 838 F. Supp. at 1537. The defendant tried to admit recordings that she had made between her ex-husband and their children during a custody hearing in a Utah State court. *Id.* The defendant was then sued by the ex-husband in a civil case for allegedly violating the federal wiretap statute. *Id.* at 1537–38. The District Court had previously dismissed the claim, and the husband appealed the matter to the Tenth Circuit Court. *Id.* at 1538. The Tenth Circuit noted the defendant’s argument that “she consented to the tapping” between her ex-husband and her children “as a parent acting in the best interests of her minor children,” and remanded the wiretap claims to the District Court to address that argument. *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992). On remand, the District Court adopted the vicarious consent doctrine and stated the exception was

“permissible under both [federal law] and applicable Utah law.” *Thompson*, 838 F. Supp. at 1544.

In *Thompson* the defendant made many arguments for why she should be able to vicariously consent on behalf of her minor children. She argued that “the rights associated with being a parent are fundamental and basic rights and therefore, she should be afforded wide latitude in making decisions for her children,” and that “Utah statutory law gives parents the right to consent to legal action on behalf of a minor child in other situations, such as marriage, medical treatment and contraception.” *Id.* She further argued that “as the legal guardian of the children, Utah law allows her to make decisions on behalf of her children” so that the “parental right to consent on behalf of minor children who lack legal capacity to consent and who cannot give actual consent, is a necessary parental right.” *Id.*

The District Court agreed and stated, “Utah law clearly vests the legal custodian of a minor child with certain rights to act on behalf of that minor child.” *Id.* The court further stated that in that instance, where the father was allegedly interfering with the relationship between the defendant and her children, “or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, *vicarious consent is necessary to enable the guardian to protect the children* from further harassment in the future.” *Id.* (emphasis added). As such, the court held that the defendant could vicariously consent on behalf of her children, stating, “[a]s long as the guardian has a good faith basis that it is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of phone

conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.” *Thompson*, 838 F. Supp. at 1544. Therefore, the recording would then be lawful as at least one party, the minor child through his parent, had consented to the recording. *See* 18 U.S.C. § 2511(2)(d); *see also* Utah Code § 77-23a-4(7)(b).

In the second case, *Pollock v. Pollock*, the court considered a lower court ruling adopting the vicarious consent doctrine. The matter stemmed from a “bitter and protracted child custody dispute” in which the defendant “taped certain telephone conversations” between her children and her ex-husband and his wife. *Pollock*, 154 F.3d at 603. The defendant argued she “‘vicariously consented’ to the recording on behalf of [her daughter], a minor child in her custody, because she was concerned that [the ex-husband] was emotionally abusing” the daughter. *Id.* The defendant claimed that the reason she recorded the telephone calls was because she believed her fourteen-year-old daughter was being emotionally and psychologically “pressure[d]” by the ex-husband. *Id.* The district court dismissed the 18 U.S.C. § 2511 claims and adopted the vicarious consent doctrine as an exception under 18 U.S.C. § 2511(2)(d). *Id.* at 605.

The Sixth Circuit reviewed *Thompson*, and other cases, and adopted the standard in *Thompson* holding that “as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.” *Pollock*, 154 F.3d at 610. The court stated that “there are situations, such as verbal, emotional, or

sexual abuse by the other parent, that make such a doctrine necessary to protect the child from harm.” *Id* at 610. While the court refused to place an age limit for which a parent may vicariously consent for their child “as not all children develop emotionally and intellectually on the same timetable,” they did note the need for such consent and protection “is especially true in the case of children who are very young.” *Id*.

Both *Thompson* and *Pollock* explain the need for the vicarious consent exception to wiretap statutes. The main concern of these cases is to protect the child from an abusive situation with the other parent. The exact concern is at issue in the present case.

Even though these two cases adopted the vicarious consent doctrine for the federal wiretap statute, 18 U.S.C. § 2511, the Utah wiretap statute’s consent provision, Utah Code § 77-23a-4, is almost identical to that of the federal statute in substance. In addition, the logical reasoning and policy concerns which led *Thompson* and *Pollock* to adopt the doctrine are implicated in the instant matter.

The Utah statute provides:

A person not acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication *or one of the parties to the communication has given prior consent* to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.

Utah Code § 77-23a-4(7)(b) (emphasis added).

The federal statute provides:

It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication *or where one of the parties to the communication has given prior consent* to

such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Both statutes allow for one-party consent to any recording of a communication, which would make a concerned parent exempt from liability under the wiretap statutes if they are able to vicariously consent for their minor child.

Both federal courts and state courts have addressed whether to adopt the doctrine. Few federal courts, and only one circuit court, have specifically addressed the vicarious consent doctrine, and whether it applied to the wiretap statute. Almost all federal courts who have addressed the doctrine went on to adopt it.¹ See *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998); *Dahl v. Dahl*, 2013 U.S. Dist. LEXIS 22365, at 18–20. (D. Utah Feb. 19, 2013), *decided on other grounds*, 744 F.3d 623 (10th Cir. 2014); *Isaacson v. Isaacson*, 2011 U.S. Dist. LEXIS 37762, at 11 (W.D. Okla. Apr. 6, 2011); *Babb v. Eagleton*, 616 F. Supp. 2d 1195, 1206 (N.D. Okla. 2007); *Wagner v. Wagner*, 64 F. Supp. 2d 895, 900 (D. Minn. 1999); *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

Furthermore, sixteen state courts have addressed whether or not the vicarious consent doctrine applied to their state statutes. Of those, twelve states found that there was some kind of vicarious consent exception to their state's wiretap statute. *Silas v.*

¹ From the Federal cases searched, vicarious consent for the wiretap statute was either adopted, referenced, or declined to be addressed due to the matter being decided on other grounds. Defendant could not find any federal cases explicitly declining to adopt the vicarious consent doctrine.

Silas, 680 So.2d 368, 371–72 (Ala. Civ. App. 1996); *State v. Morrison*, 203 Ariz. 489, 490-91 (Ariz. Ct. App. 2002); *G J.G v. L K.A*, 2006 Del.Fam.Ct. LEXIS 92, at 31 (Del. Fam. Ct. 2006); *State v. Spencer*, 737 N.W.2d 124 (Iowa 2007); *Smith v. Smith*, 2004-2168, at 10 (La. App. 1st Cir. 9/28/08), 923 So. 2d 732; *Griffin v. Griffin*, 2014 ME 70, ¶ 27, 92 A.3d 1144; *State v. Diaz*, 308 NJ Super 504, 516 (N.J. Sup. Ct. App. Div. 1998); *People v. Badalamenti*, 124 A.D.3d 672, 674 (N.Y. App. Div.) *appeal granted*, 2015 N.Y. LEXIS 798 (N.Y. Mar. 31, 2015); *Kroh v. Kroh*, 152 N.C. App. 347, 352–53 (N.C. Ct. App. 2002); *State v. Whitner*, 399 S.C. 547,554 (2012); *Lawrence v. Lawrence*, 360 SW3d 416, 421 (Tenn. Ct. App. 2010); *Alameda v. State*, 235 S.W.3d 218, 223 (Tex. Crim. App. 2007).

Only four of the states that have addressed vicarious consent for their state wiretap statute have declined to adopt the doctrine. *See Bishop v. State*, 241 Ga. App. 517, 521 (Ga. Ct. App. 1999); *Williams v. Williams*, 603 N.W.2d 114, 115 (Mich. Ct. App. 1999); *State v. Christensen*, 153 Wn.2d 186, 193-94 (Wash. 2004); *West Virginia Dep't of Health & Human Resources v. David L.*, 192 W. Va. 663, 671 (1994) (Finding the vicarious consent exception did not apply where a third party placed a recording device in his ex-wife's home. However, the Court did examine the proffered evidence as to the father's reasonable belief and refused the defense under other grounds.). Importantly, two of the states declining to allow vicarious consent have state statutes requiring two-party consent for a conversation to even be recorded. *See Williams v. Williams*, 603 N.W.2d 114, 115 (Mich. Ct. App. 1999) (declining to create a vicarious consent exception to the

Michigan State statute); *cf. Sullivan v. Gray*, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982) (stating that the Michigan wiretap statute requires all parties to consent); *State v. Christensen*, 153 Wn.2d 186, 193-94 (Wash. 2004) (finding no vicarious consent exception as Washington State's wiretap statute requires consent from all parties involved). Moreover, one of these cases took place in Georgia, which has a state statute that specifically outlines the procedures necessary for vicarious consent of minor child to record phone calls. *See Georgia Code Annotated* § 16-11-66(d).

As outlined above, a significant majority of courts that have addressed the doctrine of vicarious consent, both federal and state, have gone on to adopt it including the Tenth Circuit. The weight of persuasive authority in favor of adopting the Doctrine of Vicarious Consent clearly leans in favor of adopting the defense under Utah's wiretapping statute. In addition, the similarity of Utah's wiretapping statute to the federal statute, gives rise to an inference that similar exceptions and defenses should be available under both statutes. Meaning, the federal case law adopting the Doctrine of Vicarious Consent as a defense to wiretapping is persuasive authority that a similar defense ought to be made available under the Utah statute.

The policy and reasoning behind the Vicarious Consent exception, to wiretapping charges, relies heavily on the belief that parents have a significant interest in protecting the health safety and welfare of the minor children under their care. The same policies and concerns are broadly applicable, including in the instant matter. Under the Doctrine of Vicarious Consent, the dividing line between an acceptable recording and an

unacceptable wiretapping should be drawn along a similar boundary. Meaning, recording of conversations involving one's minor child should be evaluated based on the reasonableness of the good faith belief in suspected abuse or the potential for serious harm to the minor child. To support this policy of protecting *very young* minor children from potential harm, the availability of the vicarious consent defense should be based on whether the parent has a good faith and reasonable belief that such a recording is necessary to protect the safety, health, and welfare of the minor child.

As such, the defense of vicarious consent under the wiretapping statute should be recognized in Utah and in the instant matter. The policy and logical reasoning other federal and state courts have cited in adopting the vicarious consent doctrine are applicable to Utah and present in this matter. At the trial court, Ms. Smith argued that she vicariously consented on behalf of her minor children to record conversations between the children and Mr. Smith, as an exception under Utah Code § 77-23a-4(7)(b). (R. at 72-87, 361-407). Both *Thompson* and *Pollock* explained that the need for the vicarious consent exception was to protect children from an abusive situation with the other parent.

Similar to *Thompson* and *Pollock*, Ms. Smith was concerned that her toddler-aged child was in danger of severe and ongoing sexual abuse at the hands of her father. (R. at 209-340). Ms. Smith could not be present during the father's parent time and sought to protect the vulnerable minor, make certain she was safe from any potential abuse at the hands of her father, and if needed collect the necessary proof to provide to investigators. Indeed, Ms. Smith testified as to these concerns being the motivating force behind any

alleged wiretapping. The evidence sought to be admitted shows her belief was genuine and based on conversations with her child and the child's doctors and therapist. Under the vicarious consent doctrine, Ms. Smith would be lawfully allowed to consent to the recordings she attempted to make between her children and Mr. Smith.

B. Under the Doctrine of Vicarious Consent, Ms. Smith's proffered evidence was admissible.

The evidence proffered by Ms. Smith is not properly excluded under the Utah Rules of Evidence. The admissibility of evidence is a question of law. *State v. Mickelson*, 848 P.2d 677, 684 (Utah Ct. App. 1992). Reviewing courts grant no deference to a trial court's decision on that issue, but review it for correctness. *Id.* Under Utah Rule of Evidence Rule 104, “[w]hen the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.” Utah R. Evid. 104(b). Under Rule 104, evidence is admissible before a jury if there is evidence sufficient to support a finding of a preliminary issue of fact. *State v. Lucero*, 2014 UT 15, ¶ 19. It is not the province of the court to weigh credibility of the evidence submitted to prove a preliminary issue of fact, the trial court is merely a gatekeeper to determining whether a jury could find the preliminary issue of fact to be established by a *preponderance of the evidence*. *Id.* (emphasis added). As such, the trial court's examination of Ms. Smith's proffered evidence was improper.

- i. *The trial court's examination of Ms. Smith's good faith and reasonable belief under the circumstances was both unnecessary and incorrectly conducted.*

The factual analysis done by the trial court in examining the circumstances of Ms.

Smith's good faith and reasonable belief was erroneously conducted. Under the Doctrine of Vicarious Consent, whether Ms. Smith had a good faith and reasonable belief in a need to protect her children from further abuse is a preliminary issue of fact. The rules of evidence generally do not apply to preliminary questions of fact which are to be determined under Utah R. Evid. 104(a), such as the admissibility of evidence. Utah R. Evid. 104(b)(1); *State v. McArthur*, 2000 UT App 23 (Utah Ct. App. 2000). As such, once the Doctrine of Vicarious Consent is recognized, the good faith and reasonableness of Ms. Smith's belief need only be proven by a preponderance of the evidence.

In the instant matter, the trial court erred by examining the weight and credibility of Ms. Smith's proffered evidence and further erred by applying the wrong legal standard to those examinations.

1. The court erred by examining the weight and credibility of Ms. Smith's claims as that is an issue for the trier of fact.

The trial court unnecessarily examined the weight and credibility of the evidence proffered by Ms. Smith in support of her contentions of good faith and reasonable belief. It is not the province of the trial court to examine the weight and credibility of evidence offered as part of a rule 104 preliminary issues. *Lucero*, 2014 UT 15, ¶ 19. Instead the trial court simply acts as a gatekeeper by deciding whether or not a reasonable jury could, from the proffered evidence, decide that a preliminary issue of fact had been established. *Id.*

In this instance, the trial court went beyond that face-level examination and used

those conclusions to erroneously deny Ms. Smith's motion. The trial court specifically noted, "I think [the doctrine of vicarious consent] has some potential viability if it were applied in a *proper* case. . . I just don't believe this is the *proper* case . . ." (R. at 407) (Emphasis added). The court then noted it was denying Ms. Smith's motion for that reason. *Id.* By noting that this case was not the proper application of the doctrine, the court acknowledged that it examined the factual circumstances surrounding Ms. Smith's claims of suspected abuse and then decided the defense should not be allowed. In that sense, the trial court incorrectly acted as the trier of fact on a preliminary issue.

The trial court's evaluation of the factual circumstances of Ms. Smith's claims hinged upon the trial court's mistaken belief that the use of a continuous listening device somehow made the defense of vicarious consent unavailable to Ms. Smith. At the pre-trial hearing, the trial court focused much of their questioning of Ms. Smith's defense on a belief that the use of a continuous listening device, a device that could potentially pick up conversations other than those between Mr. Smith and his minor child, meant Ms. Smith had exceeded the scope of a defense of vicarious consent. (R. at 361-407). The trial court believed that the defense of vicarious consent had only been applied to cases involving telephonic recordings. (R. at 406). However, cases applying this particular defense do not specifically limit the availability of the defense along those lines and, if they did, that limitation would be an issue for the trier of fact. Whether or not Ms. Smith's use of a continuous listening device under the circumstances of this case was reasonable and in good faith is an issue for the jury to decide.

Several cases have applied the defense of vicarious consent in circumstances beyond telephonic recordings and even in circumstances involving continuous listening devices. *State v. Duchow*, involved parents who put a voice activated recording device in their child's backpack before he got on the school bus. *State v. Duchow*, 2008 WI 57 (Wis. 2008). In *Duchow* the parents were concerned that their disabled son was being bullied by the bus driver and implemented the use of the recording device in order to assist them in protecting the interests of their disabled child who was unable to protect himself. *Id.* In a criminal proceeding against the same bus driver for abusing this minor child, the judge ruled the recordings were admissible against the bus driver and not unlawfully obtained citing the vicarious consent exception. *Id.* In *State v. Diaz*, concerned parents video-recorded their nanny whom they believed to be abusing their minor child who was under her care. *State v. Diaz*, 308 N.J. Super. 504 (N.J. Super. Ct. App. Div. 1998). In a criminal proceeding charging the nanny with abuse of the minor child, the nanny sought to suppress the recordings. *Id.* The court ruled that recordings were admissible under the vicarious consent exception to the state wiretapping statute. *Id.* The trial court specifically noted that vicarious consent exception under the federal statute was properly applied to the state statute given the similarity in language between the state and federal statute. *Id.* at 510.

In *Kroh v. Kroh*, a concerned mother placed recording devices throughout her home to record a father's conversations with their minor children. *Kroh v. Kroh*, 152 N.C. App. 347 (N.C. Ct. App. 2002). In an appeal from a civil judgment against her regarding the recordings, the appeals court noted, "[the defendant] presented some

evidence showing that she undertook the taping of her husband to protect her children. While this evidence is disputed, it nonetheless presents an issue of fact concerning her motivations in recording . . . We therefore conclude that the trial court erred in granting partial summary judgment to [the plaintiff].” *Id* at 353. In *People v. Clark*, a mother placed a recording device in her disabled child’s backpack before he got on the school bus. *People v. Clark (Connie)*, 19 Misc. 3d 6 (N.Y. App. Div. 2008). In a criminal proceeding against the suspected abuser, the defendant abuser sought to suppress the recordings. *Id*. The court admitted the recordings applying the vicarious consent exception and noted that keeping a particularly vulnerable child safe was of paramount concern. *Id* at 10.

In these cases, the court examined the good faith and objectively reasonable concerns of the individual placing the recording, but either in the context of summary judgment in civil proceedings or to determine the admissibility of the recordings in a criminal prosecution of the abuser. In the instant criminal matter, there is no procedural rule that allows for a summary judgment-like motion against a criminal defendant as criminal defendants have an absolute right to put their case to a jury of their peers. *State v. Moosman*, 794 P.2d 474, 477 (Utah 1990). As such, the trial court’s examination of Ms. Smith’s use of a continuous listening device was both inaccurate and unnecessary as it unnecessarily narrowed the application of the doctrine by examining the weight and credibility of Ms. Smith’s evidence, which is an issue that falls within the purview of the jury and not the court to examine.

Additionally, similar to *Diaz*, *Duchow*, and *Clark* the Utah Wiretapping Statute provides an exclusionary rule for communications intercepted in violation of the statute and evidence derivative of any illegally intercepted communications. Utah Code Annotated § 77-23a-9. Thus limitations on the vicarious consent doctrine, such as those suggested by the trial court, would severely hinder the ability to prosecute those recorded committing abuses such as those outlined by *Diaz*, *Duchow*, and *Clark*.

2. The court erred by applying the wrong legal standard to the preliminary issue of fact regarding admissibility of evidence.

The court improperly analyzed Ms. Smith's reasonableness and good faith under the circumstances. Under the proper legal standard, Ms. Smith's proffered evidence would have been admissible to establish the preliminary issue of fact. In analyzing the admissibility of evidence with regard to a preliminary issue of fact, the proponent need only meet a preponderance of the evidence standard. *State v. Poole*, 2010 UT 25, ¶22. Ms. Smith, proffered significant evidence in support of her good faith and reasonable belief in potential sexual abuse.

During the pre-trial phase, Ms. Smith submitted significant evidence and information, which tended to establish her good faith and reasonable belief in a need to protect her children from potential abuse. (R. at 209-340) (See Addendum 1). After her toddler-aged daughter made several disconcerting statements regarding parent time with her father and Ms. Smith noticed bruising, rashes, and irregularities on the child, Ms. Smith became concerned that her very young minor child was being sexually abused by her estranged husband. (R. at 226-337, 304-340) (See Addendum 1). Ms. Smith had her

daughter examined by several medical professionals once she began to suspect her daughter was being sexually abused. Ms. Smith's reported her concerns to Det. Jones of Layton City, Police Department. (R. at 331-338) (See Addendum 1). Her interactions included her initial report of suspected sexual abuse; follow-up emails regarding her daughter's unusual comments, behavior, and medical concerns; concerns about images of pornography she discovered on her home computer; and steps she was taking to ensure her daughter was receiving proper medical care. (R. at 209-237, 304-340) (See Addendum 1). In addition, Ms. Smith also had her daughter interviewed by CJC-Davis staff and examined by their medical staff following the initial reporting. (R. at 331-338) (See Addendum 1).

Ms. Smith had her daughter examined by her pediatrician, a dermatologist, physicians at Primary Children's Medical Center, and ER staff at Ogden Regional Medical Center. (R. at 304-340) (See Addendum 1). These examinations each occurred subsequent to Ms. Smith observing rashes, bruises, and apparent vaginal swelling or irritation on her daughter following scheduled visitations with Mr. Smith. Furthermore, the child made several disconcerting comments that were relayed to Det. Jones which included statements about sleeping in the same bed with her father, showering naked with her father, putting things into her vagina, receiving 'French' kisses from her father, and reports of bleeding in her underwear. *Id.* The medical examinations were unable to rule out sexual abuse as the root cause of the child's medical problems. As such, Ms. Smith sought counseling for her daughter and filed for a restraining order against Mr. Smith on

February 10, 2012. On two separate occasions, May 2012 and June 2012, Det. Jones noted that the Davis County Attorney's Office declined to prosecute the allegations reported by Ms. Smith. (See Addendum 1).

During the hearing on Ms. Smith's motion in limine, both the Court and State's Counsel opined that the correct legal standard was "clear and convincing." (R. at 382). This was the standard relied on when deciding whether or not Ms. Smith had met her burden of production on the preliminary issues of her good faith and reasonable belief. *Id.* Clear and convincing is a more exacting standard than preponderance of the evidence. By applying a more exacting standard to the evidence outlined above, the court improperly denied admission of Ms. Smith's evidence. The court improperly concluded, after examining the proffered evidence under this more exacting standard, that this was not the proper case to apply the Doctrine of Vicarious Consent. (R. at 407).

CONCLUSION

This Court should adopt the Doctrine of Vicarious Consent as a viable defense for wiretapping allegations under Utah Code § 77-23a-4. The court, in both examining the credibility and weight of the evidence and using the wrong evidentiary standard, improperly denied Ms. Smith's motion. The Court should remand for a new trial in accordance with this holding.

CERTIFICATE OF SERVICE

I hereby certify that on the August 15, 2016, I filed a true and correct copy of the foregoing **BRIEF OF APPELLANT AND REQUEST FOR ORAL ARGUMENT**, with the Utah Court of Appeals electronic filing system and served an electronic copy of the foregoing with the following:

Utah Attorney General
Appeals Division
160 East 300 South
P O Box 140854
Salt Lake City, UT 84114-0854

Forthwith, I shall provide the Utah Court of Appeals with one signed, original, and unbound copy and six bound copies, as well as provide opposing counsel, at the above listed address, with two bound copies.



Skordas, Caston & Hyde, LLC

ADDENDUM 1:

(Defense's Motion in Limine to Admit Evidence of Suspected Child Abuse and Attachments)

FILED

JAN 26 2016

Layton District Court

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**IN THE SECOND DISTRICT – FARMINGTON
IN AND FOR DAVIS COUNTY, STATE OF UTAH**

THE STATE OF UTAH,

Plaintiff,

v.

TERI ANNE SMITH,

Defendant.

FILED UNDER SEAL

**MOTION IN LIMINE TO
INTRODUCE EVIDENCE OF
SUSPECTED CHILD ABUSE**

Case No. 141701716

Judge Robert Dale

Teri Anne Smith, through her counsel, Rebecca Hyde Skordas, hereby submits this Motion in Limine to Introduce Evidence of Suspected Child Abuse. Ms. Smith seeks to admit evidence of her good faith belief that Mr. Smith has sexually abused their children under the vicarious consent theory to Utah Code § 77-23a-4.

STATEMENT OF FACTS

Teri Anne Smith is currently charged with three counts of Wiretapping or Unlawful Interception of Communication, all third degree felonies, under Utah Code § 77-23a-4. Specifically, the wiretapping allegedly occurred on three dates: February 14, 2012; February 20, 2012; and March 7, 2012. On February 14, 2012, Mr. Smith allegedly found a recording device in his child's diaper or clothing bag. *See* Detail Incident Report at 6, Incident Report #12-03620, J, Lynch (May 16, 2014) (attached as "Exh. A"). On February 20, 2012, Mr. Smith allegedly

found a recording device that had been placed in his child's coat pocket. *See id.* And lastly, on March 7, 2012, Mr. Smith allegedly found another recording device in his daughter's bag. *See id.* at 8.

On March 15, 2012, Ms. Smith made certain statements at a hearing that she recorded Mr. Smith's conversations with their children. *See* Transcript of Hearing ("Transcript"), *Smith v. Smith*, No. 114701250 (Mar. 15, 2012) (attached as "Exh. B"). Ms. Smith admitted she had placed a "digital recorder into the diaper bag or other areas with the kids and passing that off to Mr. Smith unbeknownst to him . . ." *Id.* at 52:1–14. Ms. Smith stated that she "took it under [her] own advisement" to try and record Mr. Smith and she knew it was illegal to do so. *Id.* at 54:15–22.

Ms. Smith also testified as to her concern that Mr. Smith had been sexually abusing her daughter. *Id.* at 8:9–10:16; 11:12–12:20; 15:21–23:4; 26:22–31:18. Ms. Smith stated "I want to protect my daughter and my son. I want to know that they're not – I want to know that he's not doing something inappropriate to her." *Id.* at 8:9–12. Ms. Smith also testified that "I want to protect the kids and I want to know that their best interests are taken care of." *Id.* 9:1–4. Ms. Smith further stated her concern and testified

I know that something is happening to her. I know by the physical evidence, I know by the way that she is acting and her behavior. She is afraid of Greg. She is saying that daddy's naked. She's saying these things that indicate it to Greg. There's no doubt in my mind, which is why we're here today . . . I want the Court to help me protect my children.

Id. at 30:23–31:5.

i. Evidence Sought to be Introduced

Ms. Smith seeks to introduce the following evidence, not to prove the truth of the matters stated, but as evidence of her good faith belief that she was acting in the best interest of her

children to protect them from being sexually abused by Mr. Smith. On January 24, 2012, Detective Chad Jones, of the Layton Police Department, filed an Incident Report, #12-01466, stating he had received a "Child Abuse Neglect Report" ("CANR") "from the Division of Child and Family Services" ("DCFS"). (Layton Police Department Incident Report, Incident #12-01466 ("Incident Report #12-01466") (attached as "Exh. C"), at page 2). Detective Jones noted Ms. Smith had reported that her daughter told her when she goes on visits with her father, Mr. Smith, that she "sleeps in the same bed as he does" and Mr. Smith "had been showering with her naked and that she had been putting objects inside her vagina," and that "Greg French kisses" the daughter. *Id.* The case number 1851640 was assigned by DCFS. *Id.*

On January 26, 2012, Detective Jones filed a Supplemental Report for Incident #12-01466, noting that Ms. Smith's daughter had been interviewed and recorded the events of that interview. *Id.* at 3–7. On January 27, 2012, Detective Jones filed Supplemental Report #2 for the same incident noting he had received a concerned email from Ms. Smith. *Id.* at 8. On January 30, 2012, Detective Jones filed Supplemental Report #3 recording the contents of three more emails, two from Ms. Smith, and one from her mother, Jan Houskeeper, with concerns that Ms. Smith's daughter told Ms. Houskeeper that Mr. Smith had been naked in bed with her. *Id.* at 9. On January 31, 2012, Detective Jones filed Supplemental Report # 4 noting another email Ms. Smith sent concerning more disturbing statements made by her daughter concerning possible abuse by Mr. Smith. *Id.* at 10.

On February 1, 2012, Detective Jones filed Supplemental Report #5 reporting the events of his meeting with the Davis County Attorney's Office as well as a police report where Ms. Smith called the police to investigate a large number of pornographic images she had found on her computer. Exh. C at 11. Supplemental Report #6, filed on February 3, 2012, notes an email

from Ms. Smith about a video she tried to record talking to her daughter about the incidents. *Id.* at 13. Supplemental Report #7, filed February 8, 2012, notes that Mr. Smith would be interviewed by Detective Jones concerning the abuse allegations. *Id.* at 14. Supplemental Report #8, filed February 13, 2012, notes that Mr. Smith called Detective Jones and told him his attorney advised him not to attend the interview. *Id.* at 15. The Report notes that Ms. Smith filed a restraining order on February 10, 2012, against Mr. Smith. *Id.*

Supplemental Report #9, February 23, 2012, notes that Ms. Smith had contacted DCFS concerning possible abuse. *Id.* at 17. Supplemental Report #10, February 27, 2012, notes that Ms. Smith had contacted the reporting officer's colleague concerning the possible abuse. Exh. C at 18. Supplemental Report #11, March 20, 2012, notes that Ms. Smith had been taking her daughter to a therapist concerning the abuse and another incident had been reported. *Id.* at 19. Supplemental Report #12, April 2, 2012, notes that Ms. Smith had attempted to have her daughter examined at Primary Children's Medical Center and a report was generated by DCFS. *Id.* at 20.

Supplemental Report #13, April 18, 2012, notes that another Incident Report had been filed under the incident #12-06754. *Id.* at 21. Supplemental Report #14, April 18, 2012, notes that Ms. Smith had decided to use an at-home semen test on her daughter's fecal matter which returned a positive result. *Id.* at 23. The Report further notes that Ms. Smith filed another allegation against Mr. Smith. *Id.* Supplemental Report #15, April 19, 2012, notes that Ms. Smith reported her daughter had been sexually abused and needed to be interviewed at the Weber/Morgan County Children's Justice Center. *Id.* at 24.

Supplemental Report #16, April 30, 2012, notes Detective Jones was notified by the DCFS that Ms. Smith had taken her child to the Emergency Room at Ogden Regional Medical

Center with the concern that her daughter had been sexually abused, and that the Doctor had found no evidence of penetration, "but perhaps fondling." Exh. C at 25. The Report further notes that Detective Jones requested copies of the CJC reports and medical reports from the emergency room. *Id.* Supplemental Report #17, May 2, 2012, notes that Detective Jones discussed the incident with the Davis County Attorney's Office and advised them that he would be sending a complaint questionnaire to review this incident and to request a summons to be issued for Mr. Smith for one count of Felony-1, Aggravated Sexual Abuse of a Child. *Id.* at 26. Supplemental Report #18, May 5, 2012, notes that the Davis County Attorney's Office declined to prosecute the incident "because of evidentiary concerns." *Id.* at 27.

On April 15, 2012, Officer D. Himle, of the Layton Police Department, filed an Incident Report regarding Ms. Smith's allegations of Mr. Smith sexually abusing their daughter. (Layton Police Department Incident Report, Incident #12-06754 ("Incident Report #12-06754") (attached as "Exh. D"), at page 1-4). The Report noted allegations that Ms. Smith saw bruises and marks on her daughter, that the daughter reported her mouth hurting, and that her vagina was swollen. *Id.* The Report notes further remarks by the daughter that led Ms. Smith to believe there to have been possible sexual abuse. *Id.* On April 17, 2012, Officer Himle filed a Supplemental Narrative reporting on his follow-up conversation with Ms. Smith. *Id.* at 5. This Report also notes the conversation concerning the at-home semen test used by Ms. Smith. *Id.*

On June 5, 2012, Detective Jones filed a Supplemental Report for incident #12-06754, stating that incident 12-06754, and incident #12-01466, had been declined for prosecution by the Davis County Attorney's Office. *Id.* at 9.

ARGUMENT

I. MS. SMITH SHOULD BE ALLOWED TO ADMIT EVIDENCE OF HER GOOD FAITH BELIEF THAT MR. SMITH SEXUALLY ABUSED THEIR CHILDREN

Ms. Smith will argue she vicariously consented on behalf of her minor children to record conversations between the children and Mr. Smith, as an exception under Utah Code § 77-23a-4(7)(b). The vicarious consent doctrine has not been addressed by any state court in Utah. However, various federal and state court holdings support the adoption of vicarious consent as an exception to Utah Code § 77-23a-4. There are two main cases courts discuss when deciding whether to adopt this doctrine, *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998), and *Thompson v. Dulaney*, 838 F.Supp. 1535 (D. Utah 1993). Both cases adopted the vicarious consent doctrine as an exception to the federal wiretap statute. *See* 18 U.S.C. § 2511.

Thompson involved a case on remand by the Tenth Circuit Court concerning a defendant who had made recordings of her ex-husband and their children. 838 F. Supp. at 1537. The defendant tried to admit recordings that she had made between her ex-husband and their children during a custody hearing in a Utah State court. *Id.* The defendant was then sued by the ex-husband in a civil case for allegedly violating the federal wiretap statute. *Id.* at 1537–38. The District Court had previously dismissed the claim, and the husband appealed the matter to the Tenth Circuit Court. *Id.* at 1538. The Tenth Circuit noted the defendant’s argument that “she consented to the tapping” between her ex-husband and her children “as a parent acting in the best interests of her minor children,” and remanded the wiretap claims to the District Court to address that argument. *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992). On remand, the District Court adopted the vicarious consent doctrine and stated the exception was “permissible under both [federal law] and applicable Utah law.” *Thompson*, 838 F. Supp. at 1544.

The defendant made many arguments for why she should be able to vicariously consent

on behalf of her minor children. She argued that “the rights associated with being a parent are fundamental and basic rights and therefore, she should be afforded wide latitude in making decisions for her children,” and that “Utah statutory law gives parents the right to consent to legal action on behalf of a minor child in other situations, such as for marriage, medical treatment and contraception.” *Id.* She further argued that “as the legal guardian of the children, Utah law allows her to make decisions on behalf of her children” so that the “parental right to consent on behalf of minor children who lack legal capacity to consent and who cannot give actual consent, is a necessary parental right.” *Id.*

The District Court agreed and stated that “Utah law clearly vests the legal custodian of a minor child with certain rights to act on behalf of that minor child.” *Id.* The court further stated that in that instance, where the father was allegedly interfering with the relationship between the defendant and her children, “or perhaps a more extreme example of a parent who was making abusive or obscene phone calls threatening or intimidating minor children, *vicarious consent is necessary to enable the guardian to protect the children from further harassment in the future.*” *Id.* (emphasis added). As such, the court held that the defendant could vicariously consent on behalf of her children, stating that “[a]s long as the guardian has a good faith basis that it is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children.” *Thompson*, 838 F. Supp. at 1544. Therefore, the recording would then be lawful as at least one party, the minor child through his parent, had consented to the recording. *See* 18 U.S.C. § 2511(2)(d); *see also* Utah Code § 77-23a-4(7)(b).

In the second case, *Pollock v. Pollock*, the court considered a lower court ruling adopting

the vicarious consent doctrine. The matter stemmed from a “bitter and protracted child custody dispute” in which the defendant “taped certain telephone conversations” between her children and her ex-husband and his wife. 154 F.3d at 603. The defendant argued that she “vicariously consented to the recording on behalf of [her daughter], a minor child in her custody, because she was concerned that [the ex-husband] was emotionally abusing” the daughter. *Id.* The defendant claimed that the reason she recorded the telephone calls was because she believed her fourteen-year-old daughter was being emotionally and psychologically “pressure[d]” by the ex-husband. *Id.* The district court dismissed the 18 U.S.C. § 2511 claims and adopted the vicarious consent doctrine as an exception under 18 U.S.C. § 2511(2)(d). *Id.* at 605.

The Sixth Circuit reviewed *Thompson*, and other cases, and adopted the standard in *Thompson* holding that “as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording.” *Pollock*, 154 F.3d at 610.

The court stated that “there are situations, such as verbal, emotional, or sexual abuse by the other parent, that make such a doctrine necessary to protect the child from harm.” *Id.* at 610. While the court refused to place an age limit for which a parent may vicariously consent for their child “as not all children develop emotionally and intellectually on the same timetable,” they did note that the need for such consent and protection “is especially true in the case of children who are very young.” *Id.*

Both *Thompson* and *Pollock* explain the need for the vicarious consent exception to wiretap statutes. The main concern of these cases is to protect the child from an abusive situation with the other parent. Here, Ms. Smith was legitimately concerned that her child was being

sexually abused by Mr. Smith. The evidence sought to be admitted shows this belief was genuine and based on conversations with her child and the child's doctors and therapist. Admitting this evidence will show Ms. Smith was acting in the best interest of her children by attempting to record conversations between her very young, minor children, and Mr. Smith. Under the vicarious consent doctrine, Ms. Smith would be lawfully allowed to consent to the recordings she attempted to make between her children and Mr. Smith.

Even though these two cases adopted the vicarious consent doctrine for the federal wiretap statute, 18 U.S.C. § 2511, the Utah wiretap statute's consent provision, Utah Code § 77-23a-4, is almost identical to the federal in substance and the same logical reasoning and policy concerns which led *Thompson* and *Pollock* to adopt the doctrine are applicable.

The Utah statute provides that

A person not acting under color of law may intercept a wire, electronic, or oral communication if that person is a party to the communication *or one of the parties to the communication has given prior consent* to the interception, unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of state or federal laws.

Utah Code § 77-23a-4(7)(b) (emphasis added).

The federal wiretap statute provides that

It shall not be unlawful under this chapter [18 USCS §§ 2510 et seq.] for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication *or where one of the parties to the communication has given prior consent* to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (emphasis added). Both statutes allow for one-party consent to any recording of a communication, which would make a concerned parent exempt from liability under the wiretap statutes if they are able to vicariously consent for their minor child.

Both federal courts and state courts have addressed whether to adopt the doctrine. Few federal courts, and only one circuit court, have specifically addressed the vicarious consent doctrine, and whether it applied to the wiretap statute. Almost all federal courts who have addressed the doctrine went on to adopt it.¹ See *Pollock v. Pollock*, 154 F.3d 601, 610 (6th Cir. 1998); *Dahl v. Dahl*, 2013 U.S. Dist. LEXIS 22365, at 18–20. (D. Utah Feb. 19, 2013), *decided on other grounds*, 744 F.3d 623 (10th Cir. 2014); *Isaacson v. Isaacson*, 2011 U.S. Dist. LEXIS 37762, at 11 (W.D. Okla. Apr. 6, 2011); *Babb v. Eagleton*, 616 F. Supp. 2d 1195, 1206 (N.D. Okla. 2007); *Wagner v. Wagner*, 64 F. Supp. 2d 895, 900 (D. Minn. 1999); *Thompson v. Dulaney*, 838 F. Supp. 1535, 1544 (D. Utah 1993).

Furthermore, sixteen state courts have addressed whether or not the vicarious consent doctrine applied to their state statutes. Of those, twelve states found that there was some kind of vicarious consent exception to their state's wiretap statute. *Silas v. Silas*, 680 So.2d 368, 371–72 (Ala. Civ. App. 1996); *State v. Morrison*, 203 Ariz. 489, 490-91 (Ariz. Ct. App. 2002); *G J.G v. L K.A.*, 2006 Del.Fam.Ct. LEXIS 92, at 31 (Del. Fam. Ct. 2006); *State v. Spencer*, 737 N.W.2d 124 (Iowa 2007); *Smith v. Smith*, 2004-2168, at 10 (La. App. 1st Cir. 9/28/08), 923 So. 2d 732; *Griffin v. Griffin*, 2014 ME 70, ¶ 27, 92 A.3d 1144; *State v. Diaz*, 308 NJ Super 504, 516 (N.J. Sup. Ct. App. Div. 1998); *People v. Badalamenti*, 124 A.D.3d 672, 674 (N.Y. App. Div.) *appeal granted*, 2015 N.Y. LEXIS 798 (N.Y. Mar. 31, 2015); *Kroh v. Kroh*, 152 N.C. App. 347, 352–53 (N.C. Ct. App. 2002); *State v. Whitner*, 399 S.C. 547,554 (2012); *Lawrence v. Lawrence*, 360 SW3d 416, 421 (Tenn. Ct. App. 2010); *Alameda v. State*, 235 S.W.3d 218, 223 (Tex. Crim. App. 2007).

¹ From the Federal cases searched, vicarious consent for the wiretap statute was either adopted, referenced, or declined to be addressed due to the matter being decided on other grounds. Defendant could not find any federal cases explicitly declining to adopt the vicarious consent doctrine.

Only four of the states that have addressed vicarious consent for their state wiretap statute have declined to adopt the doctrine. *See Bishop v. State*, 241 Ga. App. 517, 521 (Ga. Ct. App. 1999); *Williams v. Williams*, 603 N.W.2d 114, 115 (Mich. Ct. App. 1999); *State v. Christensen*, 153 Wn.2d 186, 193-94 (Wash. 2004); *West Virginia Dep't of Health & Human Resources v. David L.*, 192 W. Va. 663, 671 (1994). However, two of the states declining to allow vicarious consent have state statutes that require more than one party's consent for a conversation to be recorded. *See Williams v. Williams*, 603 N.W.2d 114, 115 (Mich. Ct. App. 1999) (declining to create a vicarious consent exception to the Michigan State statute); *cf. Sullivan v. Gray*, 324 N.W.2d 58, 60 (Mich. Ct. App. 1982) (stating that the Michigan wiretap statute requires all parties to consent); *State v. Christensen*, 153 Wn.2d 186, 193-94 (Wash. 2004) (finding no vicarious consent exception as Washington State's wiretap statute requires consent from all parties involved). Moreover, Georgia has a state statute specifically addressing parental consent for their minor child. *See GA. CODE ANN. § 16-11-66(d)*. This shows that a large majority of courts that have addressed the doctrine, both federal and state, have gone on to adopt it.

Most of these cases involve recordings of oral communications over the telephone. However, there should be no difference between a recording of a telephone conversation and a recording using a listening device for the vicarious consent doctrine. The statute itself does not include any different standard for a recording over a telephone or over a listening device. In fact, the federal wiretap statute states that “[i]t shall not be unlawful under this chapter . . . for a person not acting under color of law to intercept a *wire, oral, or electronic communication* where such person is a party to the communication *or where one of the parties to the communication has given prior consent* to such interception” 18 U.S.C. § 2511(2)(d) (emphasis added). Likewise, the Utah wiretap statute states that “[a] person not acting under color of law may

intercept a *wire, electronic, or oral communication* if that person is a party to the communication or one of the parties to the communication has given prior consent to the interception. . . .” Utah Code § 77-23a-4(7)(b) (emphasis added).

Neither statute explicitly references telephone recordings at all. Both, however, state that prior consent will allow a person to record a wire recording, electronic recording, or an oral recording. Therefore, it follows that if a parent is able to vicariously consent for their minor child to make a telephone recording under either 18 U.S.C. § 2511(2)(d) or Utah Code § 77-23a-4(7)(b), then they are able to vicariously consent to make any other recording as long as the communication is an oral communication.

Furthermore, parents should be able to vicariously consent on behalf of their minor children by using a listening device even if the court finds that there is a difference between cases that allow for a telephone recording and any other type of recording of an oral communication. Defendant was able to find sixteen states that addressed the vicarious consent doctrine. Of those states, only five cases were found that addressed a recording that wasn’t a telephone communication. However, of the cases adopting vicarious consent, there were no cases found to explicitly decline allowing vicarious consent because the recording was not a telephone recording.

Four of the five cases allowed a non-telephone recording under the vicarious consent doctrine. For example, in *State v. Duchow*, the court allowed the doctrine when a child’s parents “put a voice-activated recording device in [their child’s] backpack before he got on the school bus.” 2007 Wisc. App. LEXIS 329 at 3, 46 (Wisc. Ct. App. Apr. 3, 2007), *rev’d on other grounds*, 2008 WI 57, ¶ 2 n.4 (2008). In *State v. Diaz*, the court allowed the audio portion of a

recording through the doctrine when concerned parents secretly videotaped their child's nanny to see if the child was being abused. 308 N.J. Super. 504, 506–07, 515–16 (N.J. Super. Ct. App. Div. 1998). In *Kroh v. Kroh*, the court allowed the doctrine when a wife placed tape recorders in the family home to record her husband's conversations with her children. 152 N.C. App. 347, 349, 352–53 (N.C. Ct. App. 2002). And in *People v. Clark (Connie)*, the court allowed vicarious consent for a disabled child when a mother placed an audio recording device in her child's backpack before he got on the school bus. 19 Misc. 3d 6, 7, 9–10 (N.Y. App. Div. 2008).

The only case found that did not allow a non-telephone recording for the vicarious consent doctrine was for reasons other than the type of recording device. In *Lewton v. Divingnzzo*, the mother placed a teddy bear, "Little Bear," with a recording device in the other party's house while the child was not present. 772 F. Supp. 2d 1046, 1053, 57 (D. Neb. 2011). The Plaintiff testified the child "owned several Little Bears," and that she "would find more than one in the house at a time, and [the child] would leave a Little Bear . . . when she left." *Id.* at 1053. A second Plaintiff testified the child had brought Little Bear for a family dinner, and "[a]fterwards, the toy was left in [Plaintiff's] van for at least 4–5 days, during which time he had many conversations." *Id.* A third Plaintiff "was responsible for transportation and drove [the child] from his house to [the defendant's] house, and those conversations would have been recorded. [Plaintiff] recalled that [the child] may have left Little Bear in her car over a weekend, during which time [the child] was not present." *Id.* at 1054. A fourth Plaintiff, a therapist, testified "[s]he discovered that some of her own conversations had been recorded when [another Plaintiff] came into the office for a session with [the child]. This revelation was very upsetting because other clients came into the office, she had been talking to other patients, and those conversations were recorded." *Id.* at 1055.

The court found that “[e]ven assuming (without deciding) that [defendant] could legally give ‘vicarious consent’ on [her child’s] behalf, the uncontroverted evidence shows that the bugging of [the toy] accomplished much more than simply recording oral communications to which [the child] was a party.” *Id.* at 1057. “Rather, the device was intentionally designed to record absolutely everything that transpired in the presence of the toy, at any location where it might be placed by anybody. The evidence demonstrates conclusively that the device recorded many oral communications made by each of the plaintiffs, to which [the child] was not a party.” *Id.* The listening device had been recording in the houses of the ex-husband, the therapist, and various third parties, from January 1–June 3 of that year, approximately 155 total days. *Id.* at 1060.

Lewton is different than the matter at hand because more than the alleged abuser was recorded, the manner in which the recording were taken, the reason for the recordings, and the length of time the recordings took place. Ms. Smith stated she recorded parent time only with Mr. Smith and the children, rather than a continuous recording outside of the children’s presence. She placed the recording devices where the children would be, in their diaper bag, overnight bag, and on their person. The placing of the device in each of these places attempted to assure that the child would be in the presence of the device, and would also ensure that the device was returned when the parent time was over. The recording devices were meant to record only conversations between Mr. Smith and the children, rather than any other conversations without the children present.

Both sets of cases, those that involve a telephone recording and those that involve a non-telephone recording, clearly display the main purpose of the vicarious consent doctrine: to allow parents to protect their children. There is nothing to explain why a non-telephone recording

would not be allowed if a telephone recording would be admitted. Ms. Smith was in line with the policy considerations of the vicarious consent doctrine, to protect her children against sexual abuse by Mr. Smith. Ms. Smith had a good faith belief that her children were being sexually abused during Mr. Smith's parent time, not during phone calls while the children were present with Ms. Smith. Thus, Ms. Smith attempted to record their conversations during parent time.

The policy and logical reasoning other federal and state courts have cited in adopting the vicarious consent doctrine are present in this matter. This Court should admit the evidence showing Ms. Smith's good faith belief that she was acting in the best interest of her children through the vicarious consent doctrine for Utah Code § 77-23a-4(7)(b).

CONCLUSION

This Court should adopt the vicarious consent doctrine for Utah Code § 77-23a-4 and allow the admittance of the evidence showing Ms. Smith's good faith belief that Mr. Smith was sexually abusing their children.

DATED this 14th day of January, 2016.

SKORDAS, CASTON & HYDE, LLC

/s/ Rebecca H. Skordas
Rebecca H. Skordas
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2016, I electronically filed a true and correct copy of the foregoing MOTION IN LIMINE TO INCLUDE EVIDENCE OF SUSPECTED CHILD ABUSE, to the following:

Davis County Attorney's Office
800 West State Street
Farmington, UT 84025

/s/ Christine Wilson, Paralegal

Skordas, Caston & Hyde, LLC

Exhibit A

05/16/14
14:08

Detail Incident Report

Page: 701
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Incident #: 12-03620

LAW INCIDENT:

Nature: ASSIST CITIZEN Address: 2741 N 1825 E
Location: City: LAYTON ST: UT Zip: 84041

Offense Codes: COMM
Received By: NELSON, D How Received: NON-EMERGENCY Agency: LPD
Rspndg Officers: X LYNCH, JOHN
Rspnsbl Officer: X LYNCH, JOHN Disposition: CHARGES PENDING on 04/17/14
When Reported: 16:11:12 02/27/12
Occurred; Between 18:00:00 02/14/12 and 18:00:00 02/20/12

Assigned_To	Detail	Date_Assigned	Status	Status_Date	Due_Date
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		//**		**/**/**	**/**/**

Case History:

Call Number: 594797
Reported:

[The page contains approximately 25 horizontal lines, which are mostly blank or contain very faint, illegible text.]

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14:08

Detail Incident Report

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Incident #: 12-03620

VICTIMS:

NAME: SMITH, GREGORY T. Name Number: 83499
Race: W Sex: M DOB: 11/22/75
Address: 2741 N 1825 E, LAYTON, UT 84041
Home Phone: (801)773-1050 Work Phone: (801)395-8215

WITNESSES:

NAME: SMITH, LARRY T. Name Number: 131253
Race: W Sex: M DOB: 01/25/49
Address: 2741 N 1825 E, LAYTON, UT 84041
Home Phone: (801)771-4097 Work Phone: () -

SUSPECTS:

NAME: SMITH, TERI A. Name Number: 118471
Race: W Sex: F DOB: 04/19/77 Height: 5'06" Weight: 125 Hair: BLK Eyes: GRN
Address: 3205 S TETON DR, SALT LAKE CITY, UT 84109
Home Telephone: (801)791-7463 Work Telephone: () -

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Incident #: 12-03620

EVIDENCE INFORMATION:

Item Type: Recorder	Evidence Number:	30670
Item/Brand: COBY	Model: CXR 180-2G	
Serial Number:	Color: /	
Quantity: 1	Meas:	
Owner ID Number:		

Item Type: Recorder	Evidence Number:	30807
Item/Brand: digital	Model:	
Serial Number:	Color: BLK /	
Quantity: 1	Meas:	
Owner ID Number:		

Item Type: Recorder	Evidence Number:	33631
Item/Brand: unk	Model: USB recorder	
Serial Number:	Color: SIL /	
Quantity: 1	Meas:	
Owner ID Number:		

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Incident #: 12-03620

PROPERTY INFORMATION:

Item Type: Recorder
Item/Brand: COBY DIGITAL
Serial Number: 05210007444
Characteristics:
Quantity: 1
Owner ID Number: 118471

Property Number: 68729
Model: CXR180-2G
Color: /
Meas: Total Value: 100.00

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Incident #: 12-03620

NARRATIVE:

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Incident #: 12-03620

19:02:59 02/27/2012 - LYNCH, J

Summary

Greg t Smith 11-22-75 found a recorder on and working in a diaper bag his estranged wife, Teri Smith 04-19-77 had sent along with his two children. The recorder had two files, one was a recording of his wife talking few minutes prior to Greg picking up the children on 02-14-12. Greg had spotted the red light through the side of the bag where the recorder was hidden in slit in the lining. Teri told him some days later to return the recorder as it wasn't her's. Greg found another recorder in coat pocket a few days later. This one was not working. Greg called LPD as he is afraid she will try and bug something else. Greg did not want LPD to talk to Teri yet but gave me the recorder which was booked into evidence.

OFFICER: J LYNCH
INCIDENT: 12-03620
DATE: 02/27/12

NARRATIVE REPORT

At 1600 hours on 02/27/12, Larry Smith called in to report he needed some police advice. He said his son, Greg T. Smith, stayed with him and has had some problems with his estranged wife.

When I arrived at the home, I talked to Greg Smith. Greg informed me that he and his wife were separated. She is currently living in their house in Syracuse. He keeps the two children, Riley and Ryan, ages 3 and 22 months, on Tuesday nights and then on weekends. He picks them up fairly early on Tuesday. He has to have them back early on Wednesday mornings.

On Valentine's Day, 02/14/12, Greg was getting the kids' stuff ready to return them; he says it's better to get the bags and everything ready by the door so he can return the kids quickly on Wednesday morning. He picked up the diaper bag/clothing bag of his son Ryan and could see a faint red light through the side of the bag. He couldn't figure out what it was. He looked inside the bag and on the right-hand side there was a slit. He reached inside the slit where he could see the red light and pulled out a digital tape recorder. The digital tape recorder was a black Coby. Ryan took it out and looked at it, played it back. It had a couple of the files there. He downloaded on them on his computer to keep them. The files had his wife talking on them prior to him picking up the kids. She was talking to the kids and doing various things in the house. Greg didn't know what to do about this. He was unsure of whether his wife had put it there or what was going on. They're going through a bit of an ugly divorce.

After a while she wanted the recorder back. She said it was not hers; she needed to return it. Greg said he was thinking about keeping it. He didn't know what to do.

At approximately 02/20/12, he found another recorder in the coat pocket of his child. This recorder was not on. Apparently it looked like the batteries had gone dead. It was Greg's older recorder that he had actually brought for work, but he hadn't seen it for quite a while and believes he left it at the house when his wife asked him to leave. She made statements to him a few days later that he had found the decoy. He was getting upset about it. He talked to several people and decided he better call Layton Police Department.

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I explained to him that it is illegal for people to record conversations without people's knowledge, especially where his wife was planning that the recorder would pick up whatever sounds were in his dad's house.

Greg was unsure of what he wanted to do at this time. He didn't know whether his estranged wife, Teri Smith, who has quite a temper, would start screaming and yelling at him about things. He said but this explained some other problems they've had with her attorney knowing things that Greg had only discussed with his dad. He feels that possibly she had been recording for several weeks.

I told him that I would take the recorder and book it into evidence. He is making a hard copy of the downloaded files to provide to Layton Police Department. He doesn't know if he wants to proceed and have us talk to Teri at some time due to her anger. He said he wanted to talk to his attorney first before we proceeded. I said I would wait for his call whether I would interview her about the recording device being in the bag.

There is nothing further at this time.

EOR/JL
CN/03/08/12

05/16/14
14:08

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Incident #: 12-03620

SUPPLEMENTAL NARRATIVE:

Supplemental Report - S. Lewis

On 03-07-12 I was dispatched to this address to speak to those involved regarding another DVR that had been found at approx. 0700 hrs on 03-07-12. I spoke to Greg, who reported that he had found a hidden recording device which fell out of his daughter's bag as she was leaving. Greg reported that he was going through a custody battle and that his wife, as this initial report indicates, had been surreptitiously using recording devices without his consent and in violation of law.

He indicated that he used a plastic bag to retrieve the recorder which was black in color and had a capacity of 4 gig, but which had no visible brand, model, or serial number. He did not touch the recorder with his bare hand to preserve any future evidentiary needs. He also reported not listening to the contents of the device. He wanted the recorder booked into evidence as requested by Ofc. Lynch.

I took possession of the device, not listening to it's contents. I booked it into the LPD evidence facility under this case number. After speaking to Greg and his parents, explaining the court process, and giving some insight into Ofc Lynch's investigation, I left the residence taking no further action on this case.

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Incident #: 12-03620

SUPPLEMENTAL NARRATIVE:

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Incident #: 12-03620

Detective C. Jones
Date: 08/21/12
Incident# 12-01466

SUPPLEMENTAL REPORT

On 06/05/12 during my investigation of incident 12-01466, I came across this incident that was originally taken by Officer Lynch. After reading through the initial report and Officer Lewis' supplemental report I felt that there may be a criminal violation with Teri Smith placing recording devices in her daughters clothing and bags to record conversations that she was not aware of at the time they were recorded.

On 06/16/12 I met with Gregory Smith at his home and he advised me that Teri had placed several recorders in bags and other items during his visitation with his daughter. Greg provided me with another USB type device that could be used to record conversations. After talking with Gregory, I asked him and his parents Larry and Susan Smith to complete witness statements about the most recent recording device. Those statements will be attached to this report.

Also during my conversations with Gregory that day he advised me that Teri had admitted during one of their court hearings that she had planted the recording devices while her daughter was on visitation. I asked Gregory if he was able to get a copy of the court transcripts from his attorney to provide me for evidence purposes. He stated that he would talk with his attorney and would get a copy for me to use.

After talking with Gregory for a period of time I left his home and had no further contact with him that day.

On 07/25/12 I received a package from Daniel Drage, Gregory Smith's attorney, The papers was a court transcript from 03/15/12 in the Second District Court-Layton, before Commissioner David R. Hamilton. On the front page was a note from Daniel stating, "pgs. 52-56"

After receiving this information, I reviewed those pages pointed out by Daniel. As I read those pages it documents Teri's admission to placing recording devices in clothing and bags while her daughter was visiting her father. Teri admitted to placing recording device on at least nine different times. Also during that hearing Teri admits that she knew that recording the conversations between Gregory, his parents and children was illegal, but she didn't care and continued to do so. A copy of that court transcript will be attached to this report.

Because of the information that had been obtained from Gregory and the court transcript, I will complete a complaint questionnaire with the Davis County Attorney's Office requesting that Teri Smith be charged with three counts of Felony-3 Interception of Communications as described in UCA 77-23a-4.

This incident will be active pending charges. At the time of this report I had no further information and took no further action.

EOR/CAJ

05/16/14
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Detail Incident Report

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Incident #: 12-03620

SUPPLEMENTAL NARRATIVE:

Officer: C. Jones
Date: 04/13/14
Incident#: 12-03620

SUPPLEMENTAL REPORT

On 04/13/14, I was advised that the Davis County Attorney's Office (DCAO) had not received a Complaint Questionnaire in regard to this incident.

A Complaint Questionnaire has been completed and re-sent to DCAO requesting a summons be issued for Teri Smith on three counts of Interception of Communications (Felony-3) per UCA 77-23a-4.

This incident will remain active pending charges. At the time of this report, I had no further information and took no further action.

EOR/CAJ

Exhibit B

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IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR LAYTON CITY, DAVIS COUNTY, STATE OF UTAH

-ooOoo-

TERI SMITH, : CIVIL NO. 114701250

Petitioner, : HEARING TRANSCRIPT

v. :
TAKEN: MARCH 15, 2012

GREG SMITH, :
Respondent. :

-ooOoo-

BEFORE THE HONORABLE
DAVID R. HAMILTON
Layton, Utah

A P P E A R A N C E S

For the Petitioner: F. Kim Walpole
F. KIM WALPOLE, P.C.
2661 Washington Blvd.
Suite 203
Ogden, Utah 84401
(801) 621-2464

For the Respondent: Daniel S. Drage
DANIEL S. DRAGE, P.C.
2506 Madison Avenue
Ogden, Utah 84401
(801) 675-5797

Guardian ad Litem: Brian Hart
HART LAW OFFICE, P.C.
515 North Main
P.O. Box 1573
Bountiful, Utah 84011
(801) 550-6505

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I N D E X

WITNESS

PAGE

TERI SMITH

Direct Examination (Cont'd)

By Mr. Walpole. 5

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1 Detective Swander?

2 A. Swanner, yeah.

3 Q. And let me just clarify what you
4 understood about the (Inaudible) issue.

5 A. Well, what he said was when he went to
6 disconnect -- or when he finished with his scan, he
7 went to shut down the computer, and what -- he noticed
8 a remote connector to it. So he said that someone was
9 remotely connecting to the computer. And in the
10 process, they would have been able to see any
11 information that I was doing and be able to transfer
12 and download files. In the process of shutting down
13 the computer, it automatically disconnects the remote
14 user.

15 So the next day, I went down there to get
16 on the computer and the computer wouldn't turn on so I
17 called him and asked him if that was --

18 Q. Called?

19 A. Called Detective Swanner and asked him if
20 that was just the part of the process that they go
21 through. And he said, "No, that's not standard. It
22 should be able to start back up." And so --

23 MR. DRAGE: Your Honor, I'm going to
24 object to stating what's (Inaudible) regarding to what
25 Detective Swanner said. (Inaudible).

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THE COURT: Sustained.

THE WITNESS: So I took the hard drives out of the computer and took them into an external hard drive reader to try and download family photos. And in the process of that, I noticed that everything from the -- there was a file folder that the majority of the pornography, the videos were saved in, and it was labeled "downloads X." Everything out of that folder was deleted, but nothing else on the hard drive was removed.

So there was still miscellaneous pornographic videos in a different folder with the children's videos, but everything that was the thousands and thousands of videos had been deleted in the process of -- for some reason, when he shut the computer down, it shut the computer down so it wouldn't reboot at all and everything was deleted in the process.

BY MR. WALPOLE:

Q. This was the day after Detective Swanner?

A. Uh-huh. Uh-huh. The next morning, I went to turn the computer on.

Q. So was anything else lost, do you know?

A. No.

Q. Just those --

1 A. Uh-huh, just the pornographic videos.

2 Q. Let me have you talk just a little bit
3 more -- let me ask you a question directly.

4 Why are you bringing this action? Why are
5 you asking that the Court issue a temporary
6 restraining order? Are you trying to get one up on
7 the child custody -- the custody evaluation that's
8 pending?

9 A. No. I want to protect my daughter and my
10 son. I want to know that they're not -- I want to
11 know that he's not doing something inappropriate to
12 her.

13 It's not something I came to easy. I
14 spent a lot of time trying to come up with any other
15 possible solution to why she had a rash that was
16 causing blood in her panties, why she was talking
17 about banana candy that she had to have in order to
18 get gummy bears. I tried everything I could possibly
19 think of to prove his innocence.

20 When she said that she was seeing him
21 naked in bed, I assumed that it was he just didn't
22 have his shirt on, but she clarified things. And it
23 took me a long time to be willing to come to this
24 conclusion.

25 And it's a hard pill to swallow, but when

1 it comes down to it, it has nothing to do with me and
2 it has nothing to do with Greg, it has to do with the
3 kids. And I want to protect the kids and I want to
4 know that their best interests are taken care of.

5 I don't want it to reach the point where
6 she's unable to have children or that she's unable to
7 have a normal, healthy relationship with someone some
8 day. I want to know that it can stop before it
9 progresses to the point of no return.

10 Q. You talked a little bit about
11 this (Inaudible). Explain to the Court, if you would,
12 a little bit more, have you had any concerns prior to
13 the separation or prior to the filing for the divorce?

14 A. You know, hindsight's always 20/20. In
15 looking back in it, there were signs, but at the time,
16 I knew that Riley was showing that she was afraid of
17 Greg. You know, the garage door would open and I'd
18 say "daddy was home" and she'd run to the corner and
19 hide.

20 Q. This is prior to the separation?

21 A. About four to six months before the
22 separation. She started talking about the dragon, but
23 I didn't -- it was the separation that kind of started
24 showing the pattern of the rash. It was the
25 separation and the absence of the rash for three

1 months in the summer and the absence of the dragon and
2 the absence of the --

3 Q. Why wasn't there a rash for three months
4 in the summer?

5 A. He didn't have overnights during the
6 summer. So she had irritation --

7 Q. This was prior to the temporary order
8 served on him?

9 A. Yes. So she started having a strange
10 rash, irritation on her genitals showing up last
11 January, and in the summer, it stopped. And I just
12 assumed, oh, well, maybe it's worked through her
13 system.

14 When the overnights started again, the
15 rash started again. And it started to establish the
16 pattern that it was only happening up at his house.

17 Q. And you testified a little bit about this.
18 I want you to clarify a little bit more about the late
19 nights -- you would go to bed and he would stay up?

20 A. I went to bed about 10:30 almost every
21 night and Greg stayed up until about 1:00 or 2:00
22 almost every evening after me. He'd have the baby
23 monitor and would be on call from 10:30 until 1:00 or
24 2:00, when he came to bed. And then I was on call for
25 the rest of the evening after that, or the morning.

1 Q. Would you ask him to come to bed with you?

2 A. Yeah. It was one of the biggest fights we
3 had through our marriage, was the constant begging of
4 him to come to bed with me.

5 Q. What was he doing?

6 A. He was on the computer.

7 Q. What was he doing on the computer?

8 A. My guess now is looking at porn. I never
9 went in there. I think I went in once or twice and
10 saw that he was looking at porn, but I never went in,
11 I went to bed. I don't know what else he was doing.

12 Q. You mentioned the dragon. Clarify the
13 dragon again. When did she start talking about that
14 and what does the dragon do?

15 A. She started talking about the dragon
16 last -- last year, and it was only at bedtime, and she
17 was scared of the dragon. She'd cry and say, "The
18 dragon comes into my room at night. Mommy can't save
19 me from the dragon. The dragon's scary."

20 I just thought she was a little girl that
21 had an imagination. So we started getting Dragon
22 Tales and talking about how dragons are nice, but she
23 never would accept it. She just kept saying, "No,
24 dragons are scary."

25 When summer came, the dragon went away.

1 So when Greg moved out in June, the dragon went away
2 that night and it -- and then it came back when the
3 overnights started again. So it dawned on me that she
4 was kind of putting two and two together, that it was
5 Greg.

6 I still didn't think that it was sexual
7 abuse at the time. I thought that it was he -- he has
8 a way of you either do what he says or you do what he
9 says, and so that can be kind of hard for a little
10 girl. And I thought she was just struggling with
11 that.

12 And then other things started happening.
13 "The dragon's scary. I see the dragon when daddy's
14 naked in bed. The dragon touches my privates," and
15 she'd start talking about stuff like that.

16 We started a -- as therapy kind of grew, I
17 think she -- I don't know, she stopped talking about
18 the dragon and she started talking more about her dad.
19 So I don't know -- I don't know. I'd be speculating
20 if I said anymore about that.

21 Q. You separated in June but the therapy
22 didn't begin until?

23 A. Therapy began mid-October.

24 Q. Okay. And, again, why did you start in
25 October?

1 A. Well, I took her in September and they
2 said nightmares and high regression and stuff are
3 normal through a divorce, but it should be resolved
4 within five weeks. If it's not resolved within five
5 weeks, then to bring her back or to seek additional
6 counseling.

7 Q. (Inaudible)?

8 A. Right.

9 Q. Have there ever been problems with the
10 visits since the two of you separated?

11 A. Probably --

12 Q. (Inaudible) Ryan that you recall?

13 A. In what way? Like what do you mean, like
14 fear of going or --

15 Q. To pick up the children.

16 A. Well, when he comes to pick up the kids, a
17 lot of times Riley runs to the corner and hides or
18 she'll hide behind me and cry and say she doesn't want
19 to go. It's not every time. Sometimes she's happy to
20 see him, but she'll hide and cry.

21 I've had to carry both children out before
22 many times because both of them are reluctant to go.
23 Ryan, if he's down on the ground, he'll shut the door
24 in Greg's face. Greg's never said "hi" or "goodbye"
25 to Ryan during visits.

1 Q. It's sort of normal though and sometimes
2 they don't to (Inaudible) at home?

3 A. I guess. I mean, I don't know if it's
4 normal or not. We try really hard to -- I try really
5 hard to get them pumped up, get them excited, tell
6 them how much fun they're going to have. We've made
7 cupcakes, we've picked flowers, we do her hair pretty.
8 I let her pick out what outfit she's going to wear
9 home the next day, just trying to encourage her to go
10 up there, but sometimes you just can't encourage it.
11 She's called Greg a couple of times saying that she's
12 not ready to go up there and she doesn't want to go up
13 for the night, but he just told her --

14 Q. What's his reaction?

15 A. He said, "You're the child, I'm the
16 parent, you need to know that you do whatever I tell
17 you."

18 Q. There was some talk about secrets at
19 daddy's house.

20 A. Riley spends a lot of time -- she zones
21 out a lot of time if you ask her anything as simple
22 as, "What did you have dinner? Did you have fun
23 playing up there? What color were your pajamas?"
24 Just normal little things that you'd ask a
25 three-year-old about her visit. And she usually zones

1 out. If you ask her something, she'll say, "I'm not
2 supposed to talk about what happens at daddy's house."

3 And so in therapy, I -- one day, you know,
4 Rebecca always did it where once Greg started coming,
5 at the beginning of the session she'd say, "Is there
6 anything you want to talk about in private? Is there
7 anything you want to talk about together?"

8 So I just said -- with Greg in the room, I
9 said, "Yeah, Riley said that she feels -- she doesn't
10 feel comfortable talking about things that happened up
11 at daddy's house. She thinks she's going to get in
12 trouble."

13 So I thought maybe Greg could
14 either explain why he doesn't want her talking about
15 what happens up there or let her know that it is okay
16 to talk about what happens up there. So we spent the
17 session talking about, you know, it's okay to talk
18 about what happens at mommy's house, it's okay to talk
19 about what happens at daddy's house, but he made it
20 hard on her.

21 Q. Has that changed since the temporary
22 restraining order (Inaudible)?

23 A. Yeah, there was a -- right after the
24 temporary restraining order was ordered, she started
25 zoning out more. Like she'd kind of worked through

1 that in the last couple months, where she'd just kind
2 of distract, but she kind of would start zoning out
3 and go -- I always called it catatonic, because she'd
4 just kind of go off to a different place. She had
5 more of that.

6 She was more jumpy. If she heard a loud
7 noise, she'd run and hide. She'd cry over anything
8 and was definitely even more afraid of talking about
9 anything. You can't ask her any questions. She
10 doesn't answer any questions. It's more like her
11 randomly bringing something up or her randomly asking
12 you a question, is the way to get anything that she
13 tells you.

14 Q. All right. Just two more subjects.

15 Tell the Court what you can about what you
16 understand about the gummy bears and (Inaudible).

17 A. Well, the first time I heard about the
18 gummy bears was she was telling me that she sees daddy
19 naked in bed, and that he has gummy bears, and that
20 was kind of it. I kind of stopped it there.

21 And then a couple of days later, just out
22 of the blue she tells me, "Well, I have banana candy
23 up at daddy's house."

24 And I'd say, "Well, banana candy," I'm
25 thinking -- what I was thinking was, okay, if you like

1 banana candy, lets go to the store and get you banana
2 candy here. And I'm like, "Well, what is it like? Is
3 it those little, itty-bitty hard ones?"

4 And she says, "No, it's big. It's like
5 about the size of your hand and it's soft like your
6 hand."

7 I'm like trying to think, and I'm like,
8 "Is it like a marshmallow? Is it a popsicle?"

9 And she's like, "No, it's not like that."

10 I'm like, "Well, do you chew it? Do you
11 suck on it? Do you bite it?"

12 And she's like, "It's soft, but you never,
13 never bite it and you don't chew on it. You have to
14 suck it like a sucker."

15 And she just kind of was telling me
16 different things and I'm like, "Do you like the banana
17 candy in your mouth?"

18 "No, but I have to do that to get the
19 gummy bears."

20 "Well, the gummy bears, where are the
21 gummy bears?"

22 "They're under daddy's pillow, but I get
23 five gummy bears."

24 I said, "You get five gummy bears?"

25 "Yeah, but Bella only gets four gummy

1 bears because I'm more special."

2 And I'm like, "So, Bella gets the banana
3 candy, too?" And I asked her, I said, "Well, you
4 know, Ryan really likes bananas. Does he get banana
5 candy, too?"

6 And she says, "No, it doesn't taste like
7 bananas. It's called banana candy because it looks
8 like a banana."

9 I said, "Well, can we get it at the
10 store?"

11 And she says, "Nope, it's only in daddy's
12 bed, not papa's, not yours, no one's bed but daddy's."

13 And I'm like, "It's in his bed?"

14 And she said, "Yeah." And we went to the
15 store and we went down the candy aisle and she said,
16 "No, it's none of this stuff."

17 And so then we went to another store and,
18 you know, those little candy machines, you put a
19 quarter in? One of them actually had the Runts and I
20 said, "Oh, is it one of those?"

21 And she says, "No, but those do look like
22 little bananas, but that's not daddy's banana candy."

23 And so based upon everything that she had
24 said to me that day, I just came to the conclusion
25 that he was talking about his penis and that she had

1 to perform oral sex on him to get five gummy bears in
2 return.

3 She'll ask me questions like, "Mommy, do
4 you like banana candy? Because you're a good mommy
5 and good mommy's like banana candy."

6 She'll say, "I like banana candy because
7 it makes me feel special, but I don't like to eat it."

8 She'll say stuff like that but she --
9 she'll ask questions out of the blue, "Have you ever
10 had banana candy? Do you like banana candy? What do
11 you think it tastes like?" Things like that, but
12 she --

13 Q. Have you ever asked her directly about it
14 now that -- at least there's been testimony
15 identifying the anatomical -- you know, whether or not
16 she's doing anything with her dad or --

17 A. I don't want to be the one to do that
18 because I don't want it to come back as saying that
19 I'm the one that put words in her mouth, so I've been
20 relying on Becky or Brian or something else to be able
21 to get that out of her.

22 Q. You're not making that suggestion?

23 A. No. No. I steer clear of -- I don't want
24 to -- I don't even want to touch that.

25 Q. Because it all seems kind of vague, you're

1 talking about candy and these things, but it's kind of
2 related to something sexual and sometimes there
3 is what seemed to be the connection.

4 A. Right. I understand what you're saying.
5 It's just -- just peculiar. It's unusual. I can't
6 think of what the banana candy would be. And based
7 upon her saying, "It feels like your hand. You have
8 to swallow something. It's in his bed. It's the size
9 of your hand. It's soft but you can't bite it."

10 In describing it, I come -- I come short
11 of trying to find a candy or any other food object
12 that that would fall into place with.

13 The other day, I was asleep on the couch
14 and she stuck my finger in her mouth and started -- I
15 don't know what to call it, but I said, "What are you
16 doing, that's not a hamburger? We only put food in
17 our mouth."

18 She said, "It's okay, mommy, I'll be good
19 and I'll swallow." Just things like that. I don't
20 think that's normal stuff that a little girl would
21 know about or talk about or be aware of that kind of
22 information.

23 Q. Have you and Mr. Smith
24 communicated (Inaudible)?

25 A. Yes.

1 Q. And then back -- and Brian (Inaudible) has
2 been appointed as the Special Master some time ago?

3 A. November.

4 Q. November? So worked with the two of you
5 and that was to help you communicate; is that correct?

6 A. Uh-huh.

7 Q. So you send emails back and forth. You
8 communicated at least by email and maybe even
9 personally with Mr. Smith about all these concerns,
10 about the gummy bears and the banana candy and --

11 A. I've talked in great detail with him
12 multiple times about the rash and the irritation
13 between her legs. There's probably five or six emails
14 in regards to trying to figure out what that rash
15 could be caused from.

16 Q. Let me show you what's been marked
17 as Exhibit No. 1. These were attached, were they not,
18 to the affidavit for (Inaudible)?

19 A. Correct.

20 Q. So they're the same emails?

21 A. Right.

22 THE COURT: Do you have one for Mr. Hart?
23 He's been left out again. He's going to get a
24 complex.

25 MR. WALPOLE: (Inaudible).

1 THE COURT: What number is this?
2 MR. WALPOLE: No. 1.
3 BY MR. WALPOLE:
4 Q. So is this a sample or an example if --
5 THE COURT: Hold on.
6 UNIDENTIFIED SPEAKER: Do you want me to
7 make a copy of this?
8 MR. WALPOLE: No, not yet. I've got one
9 in the affidavit.
10 BY MR. WALPOLE:
11 Q. Is this an example of the emails back and
12 forth --
13 A. Uh-huh.
14 Q. -- between you and Mr. Smith to deal with
15 the rashes with your daughter?
16 A. Uh-huh.
17 Q. And to deal with the rashes with your son,
18 with Ryan --
19 A. Yeah, I think -- yeah, where he had welts
20 all over his legs one time and he had a burn mark on
21 his --
22 Q. (Inaudible) topic, the deal with the
23 banana candy and gummy bears?
24 A. No, all of that, the banana and candy
25 bears took place after the TRO was ordered. So it was

1 the first of February. I think February 13th is when
2 she told me about the banana candy, so it was the day
3 before Valentine's Day. So none of this was in -- the
4 banana candy's not in there.

5 MR. WALPOLE: Move for admission of
6 Exhibit No. 1.

7 MR. DRAGE: Your Honor, I object. There's
8 a lot of information here, a lot that may or may not
9 be involved. And I've read this, a lot of this is
10 self-served as far as questions posed, responses
11 on having a (Inaudible) expect in sessions (Inaudible)
12 information. So I want to object to it.

13 THE COURT: Are we talking about from a
14 foundational aspect or the totality of it or --

15 MR. DRAGE: Both, Your Honor,
16 foundation and -- I'm pretty sure this involve emails
17 between the parties as well. I've been CC'd
18 on (Inaudible) on a file about this thick. So
19 with (Inaudible) self-serve for foundational purposes
20 and (Inaudible). I'm not exactly sure about
21 (Inaudible), what was involved here.

22 THE COURT: Mr. Walpole, response?

23 MR. WALPOLE: Yes, Your Honor.

24 She's identified that these are emails
25 between yourself and her husband. She's testified

1 this is what they contain. Again, this isn't the
2 first time we've introduced them. They were attached
3 to the affidavit so (Inaudible) familiar with what
4 they are. I think it's important to show that she has
5 communicated, she has talked with him. And I'm going
6 to lead up with another question and ask her what's
7 been his reaction since (Inaudible).

8 THE COURT: Mr. Hart?

9 MR. HART: Your Honor, I don't have an
10 objection or a position on this. I'm going to let the
11 Court decide.

12 THE COURT: Do I understand that the
13 emails deal with more topics than just what Ms. Smith
14 has most recently testified to?

15 MR. DRAGE: Your Honor, we've discovered
16 the first page (Inaudible) talks about returning phone
17 calls, talking about preschool. My client's asking
18 about information from the preschool that
19 she unilaterally put the child in.

20 On page 3 of 6 it talks about (Inaudible)
21 in past conversations.

22 Page 4 of 6 talks about another phone call
23 that happened (Inaudible) the departure at (Inaudible)
24 store. I don't know what kind of pornography we have
25 here but that is not what she has testified to.

1 (Inaudible) work through (Inaudible).

2 There's arguments about the dry skin and
3 not dry, (Inaudible). Something here about Santa
4 Claus, some more information about (Inaudible) on page
5 3 of 9, (Inaudible).

6 And that's only the couple of emails, Your
7 Honor. That's just based upon how (Inaudible). I
8 haven't listened to each one. There may be
9 (Inaudible) that conversation, but there's a lot more
10 to it than just there is a rash. And this is
11 what (Inaudible).

12 MR. WALPOLE: Again, that's why we think
13 it's representative of the communications. Their
14 objection is it's cherry picking. Cherry picking
15 means you just take things out of context and give
16 what we feel would support the case. Obviously not,
17 it's (Inaudible) other things (Inaudible)
18 representative of (Inaudible).

19 THE COURT: Well, without -- without going
20 through all of the emails, Ms. Smith has testified
21 that she made multiple contacts with Mr. Smith about
22 the subject matter.

23 And I guess that one of the things I'm
24 concerned about is there are a lot of other material
25 in here that isn't germane to the topic that we're

1 discussing today. And I don't want to go through the
2 exercise of redacting all of these emails.

3 I think what I would prefer to do is
4 simply highlight, if you will, because I don't want to
5 get into a lot of the other materials that in theory
6 could be part of what's in here, subject matter
7 regarding other issues that the Court might ultimately
8 have to hear and I want to hear it in the proper
9 context.

10 So I think for that purpose alone, I will
11 sustain the objection. I don't mind if you want to go
12 through and highlight some items or if you want to
13 specify that on certain dates they were talked about.
14 There's just too much stuff in here that's not germane
15 to what we're doing today.

16 MR. WALPOLE: We can do that. We'll
17 (Inaudible).

18 THE COURT: All right.

19 MR. WALPOLE: We can do that at a later
20 time. We won't do that right now.

21 BY MR. WALPOLE:

22 Q. Based on least emails that you testified
23 to and oral communications you had with Mr. Smith,
24 what's generally been his response when you talk about
25 these things like the rashes or, you know, the gummy

1 bears, the candy or -- all these things that you
2 testified about both today and last time?

3 A. When I talked to him via email, I clearly
4 spelled it out. There was one in particular where I
5 said, "It looks like the doctor says it is aggressive
6 rubbing. Let's rule out everything that it is. It's
7 not diapers, it's not wipes, it's not soap, it's not a
8 food allergy," listed 12 --

9 Q. That's what the email says?

10 A. The email says. And I flat out said that,
11 "The doctor says it is aggressive -- it looks like
12 aggressive rubbing. It's not from poor hygiene based
13 upon previous communications we've had. What is
14 happening at your home?"

15 And his reply back was, I think that one
16 was, "Is it because I have rosacea or is it because we
17 have a water softener or we don't have a water
18 softener," but I don't have a water softener either.
19 So it was these vague, not really helpful and didn't
20 seem concerned. He asked more on, "Is she complaining
21 about it," than trying to resolve the issue.

22 In person I asked him once -- she wanted
23 to have yogurt up at his house and I'd been giving her
24 yogurt at my house with no rash. So I told him, I
25 said, "You know, Riley wants to have yogurt."

1 And he says, "Well, it's got dairy."
2 And I just told him, "Well, you and I both
3 know the rash isn't being caused by dairy."
4 And he got panicked for a second and then
5 he got stoic and said, "Okay, I guess she'll have
6 yogurt."
7 After that, the rash didn't come back
8 again. It's come back two other times since then, but
9 not on the frequency it was. But that's when she
10 started talking about the banana candy. So I think
11 that he realized that I knew he was sticking his penis
12 behind her legs and rubbing her, and so he switched to
13 an alternative method of having her put it in her
14 mouth instead.
15 Q. You told him that specifically?
16 A. Told him what?
17 Q. That you thought he was sticking his penis
18 in her --
19 A. No. It's just the conclusion I drew,
20 based upon his reaction when I brought it up.
21 Q. The session where it was discussed about
22 the gummy bears --
23 A. Yes.
24 Q. -- what was his reaction to that when you
25 (Inaudible) --

1 A. He got an erection.
2 Q. How do you know that?
3 A. I saw it. We came back in -- we'd been
4 sitting in the other room and we came back in and
5 there was two pillows on the floor and there was a
6 blanket. And she picked up the gummy -- she picked up
7 the pillow and there was five gummy bears sitting
8 underneath it. And he got panicky, he was fidgety and
9 wiggling all over the place.
10 And the counselor started saying, "Well,
11 let's talk about whose bed this is. It's not your
12 bed, it's not Mister's, it's not" -- Mister is Ryan --
13 "it's not Ryan's bed, it's not your mom's bed, it's
14 not papa, it's not Scott's, it's not nana's, who's bed
15 is it?"
16 And he's saying, "Well, it's not mine, is
17 it, Riley? It's not mine." And then he sat back in
18 his chair and I noticed that he had an erection.
19 I crawled on the floor to pick up Ryan
20 after that and I tried to point it out to Becky, but
21 after that -- Greg kind of always sat like this
22 through the sessions away from everyone. After that,
23 he was kind of leaned over like this and contorted
24 kind of funny, and so I don't know if she got a chance
25 to see it.

1 When he walked out, he walked out with his
2 coat standing right here, but I saw it before that. I
3 was looking for it because two weeks earlier, during a
4 session, he got an erection when he put Riley on his
5 shoulders.

6 Q. So what are you asking for to
7 do (Inaudible)? You indicated you wanted a
8 restraining order, that that specified
9 specifically (Inaudible).

10 A. I want my children protected. I want to
11 know that they're not going to be subjected to sexual
12 abuse while being visited by their father.

13 I'm not trying to take away his rights.
14 Like I said before, it's not about him. I want to
15 know that they're safe and I want to know that no
16 harm's coming to them.

17 What the Court is capable of doing, I'm
18 not sure. I would like supervised visits to ensure
19 that their safety is protected. If there's such a
20 thing as a psychosexual test that I've heard about, I
21 think that that would be something that would be
22 beneficial to find out for sure if that's the case.

23 I know that something is happening to her.
24 I know by the physical evidence, I know by the way
25 that she is acting and her behavior. She is afraid of

1 Greg. She is saying that daddy's naked. She's saying
2 these things that indicate it to Greg. There's no
3 doubt in my mind, which is why we're here today. And
4 it took me a long time to come to that conclusion, but
5 I want the Court to help me protect my children.

6 Q. The commissioner ordered that the test
7 evaluator (Inaudible), psychologist, psychiatrist,
8 whoever can do the psychologicals, found that there
9 should be a psychosexual evaluation, that is your
10 (Inaudible). So you're asking (Inaudible)?

11 A. Right.

12 Q. And, as a result, show that there's some
13 concerns and that there be therapy?

14 A. I'm not quite sure what the normal course
15 of action is, but, yeah, that makes sense to me.

16 Q. So you just want to see a resolution to
17 the problem?

18 A. Yes.

19 Q. Any other concerns or other things you'd
20 ask the Court to do to try to remedy this?

21 A. In regards to Riley or both children?

22 Q. Both.

23 A. Well, I have a lot of concerns for whether
24 or not Ryan's being taken care of properly up there as
25 well. Do you want me to expand on that?

1 Q. Yes. Yeah, I'm sorry.
2 A. No, that's okay.
3 Like I said on Friday, Ryan has been
4 assessed with showing signs of autism, and he needs a
5 lot of help. I've got four different specialists
6 coming in on a regular basis to try and explain what
7 needs to be done to help him with his development.
8 He --
9 Q. We talked about the assessment --
10 A. Uh-huh.
11 Q. -- (Inaudible) diagnosis?
12 A. Right. They don't do a full diagnosis in
13 a child this young. Plus, they don't want to put it
14 on the medical records because it can change -- with
15 aggressive therapy and help, it can change before you
16 should really get that type of a diagnosis on it.
17 Q. And all this has come up since the
18 separation?
19 A. Yeah. We found out in January.
20 Q. Of this year?
21 A. Uh-huh. And so there's just been things.
22 Ryan's come home with big welts all over his arms and
23 legs and just not being taken care of properly. He's
24 come home with a big burn mark on his leg once. He
25 doesn't talk at all, so there's no way of him to be

1 able to communicate.

2 Greg has never said "hi" or "goodbye" to
3 him in the entire time he's done visits. He just
4 doesn't seem to show much of an attention to Ryan or a
5 care for Ryan. So I think that Ryan needs someone
6 who's going to be there for him and help him and be
7 there to help him through it.

8 He's had Ryan wear poopy clothes that he
9 sat in for over three hours and left him in those
10 soiled clothes, rather than putting him in clean
11 clothes that were available to him.

12 Q. Let me show you what's been marked as
13 Petitioner's Exhibit 14. Did you take this
14 photograph?

15 A. I did.

16 Q. When did you take it?

17 A. February 20th.

18 Q. Of this year?

19 A. Yes.

20 Q. And who's that?

21 A. That's Ryan's legs.

22 Q. And when -- what was the circumstances
23 around this?

24 A. He'd just come back from the President's
25 Day weekend at Greg's. And I gave him a bath, and

1 when I went to take his clothes off to give him a
2 bath, he had marks like this all over his arms and his
3 legs and his stomach and chest.

4 I emailed Greg asking what happened, and
5 he came back saying that it looked worse than this
6 when he got him on Friday, but I had a play date that
7 day and Ryan ran around in a diaper all day so there
8 was people that saw him and saw that he wasn't -- my
9 mom was one of them.

10 Q. On Friday before that visitation, did
11 he --

12 A. None, not even a pink mark. Not even a
13 pink mark.

14 Q. So this is developed Friday and to when he
15 was returned to you on?

16 A. Monday.

17 Q. Monday. And what was this rash
18 usually (Inaudible)?

19 A. I think Ryan has a little bit of dry skin.
20 And instead of Greg talking to me or communicating or
21 putting on lotion or Aqua 4 on him, he did something
22 different. At least that's my hope. I don't know if
23 it's something worse than that, but that's my hope,
24 that that's just what it was.

25 Ryan always comes back with redder marks

1 after there. He came home with a big burn mark one
2 time that Greg said was because he put a corn bag on
3 him, but ten hours later he still had the red mark.
4 So obviously -- and Ryan's old enough to be able to
5 move it off of him if it was burning him, so --

6 Q. So is this something that happens all the
7 time with him?

8 A. Yes.

9 Q. With Ryan?

10 A. Oh, no, no, with Greg, he always -- he
11 comes back with red marks a lot.

12 Q. No, no, prior to separation, had he had
13 these kinds of --

14 A. No.

15 Q. So do you know what it's from?

16 A. Like I said, I'm hoping that it's just dry
17 skin that's not being taken care of, or maybe instead
18 of taking the correct measures -- he mentioned that he
19 gave him a baking soda bath. It might have amplified
20 it, but simple Aqua 4 fixes it. I've told him that
21 multiple times, but he still comes back with big red
22 marks when he comes back from Greg's, because he won't
23 even put the Aqua 4 on him.

24 MR. WALPOLE: I would move for admission
25 of Petitioner's Exhibit 4 (Inaudible).

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MR. DRAGE: No objection, Your Honor.

THE COURT: Mr. Hart?

MR. HART: No objection.

THE COURT: It will be received.

MR. WALPOLE: (Inaudible).

THE COURT: Mr. Drage?

MR. DRAGE: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. DRAGE:

Q. I'm going to start in reverse order real quick and then work our way back to what we talked about last week.

You just testified that Ryan is showing signs of autism; correct?

A. Yes.

Q. And Greg was privy to that initial assessment; correct?

A. Yes.

Q. And then you just indicated you've got four specialists coming on different occasions. Have you provided that list to Greg about the specialists?

A. Greg was given the information at the intake.

Q. At the intake. So who are these four specialists that are coming in?

1 A. It's the -- the person on the intake form,
2 I called and followed up with them and scheduled the
3 people, based upon their recommendation.

4 Q. Okay. So have you sent Greg notice of the
5 schedules?

6 A. He hasn't followed up with me on any of
7 it.

8 Q. Followed up with you? You're the one
9 scheduling the appointments. Do you not feel it's
10 necessary to notify him, "I've got these appointments
11 for our son Ryan at these times, be there"? Not
12 asking do you want to be there, but be there. These
13 are these times. Give him the opportunity. You
14 haven't done that.

15 A. He's not a child. He can take care of
16 himself. If he wants to come, it's his child, he
17 should be responsible for it.

18 Q. (Inaudible). Do you not have joint legal
19 custody of your two children?

20 A. Yes.

21 Q. And is that joint legal custody based upon
22 the parent plan you proposed or your first lawyer?

23 A. I believe so.

24 Q. It is. Doesn't it say you should
25 share information on all things regarding the

1 children?

2 A. Do you have a copy of it for me to look
3 at?

4 MR. DRAGE: Do you have a copy?

5 MR. WALPOLE: I don't have one.

6 BY MR. DRAGE:

7 Q. Your understanding is you don't have to
8 share that information -- I've looked at this, you
9 don't have to share that information with Greg?

10 A. That's not necessarily what I'm saying.

11 Q. Well, tell me what your understanding of
12 the parent is (Inaudible).

13 A. Well, my understanding is he came to the
14 intake, he was aware of the assessment. If he wants
15 to follow through with it, he's been notified of it
16 and he should be following through with the same
17 effort that I followed through.

18 Q. So when you call and set appointments with
19 these four different specialists to come to your
20 house, you don't think it's important to keep Greg in
21 the loop?

22 A. Just as important as it is for him to
23 follow through with it.

24 Q. So it's entirely his responsibility. So
25 you don't have to give him notice, it's his

1 responsibility to call the therapists and find out
2 when you've set the appointments (Inaudible)?
3 MR. WALPOLE: Objection, Your Honor.
4 This has been asked and answered.
5 THE COURT: I don't know that it has been
6 answered.
7 MR. DRAGE: It hasn't been answered, Your
8 Honor. Thank you.
9 THE COURT: Well, answer the question,
10 please.
11 THE WITNESS: Ask it again, please.
12 BY MR. DRAGE:
13 Q. You don't think it's important, when you
14 set times for these four separate specialists to come
15 out and assess Ryan, that you don't send a quick email
16 to Greg to say, "Hey, our son has these specialists
17 coming in"?
18 A. No.
19 Q. Okay. So he should be (Inaudible)?
20 A. Yes.
21 Q. Okay. So if something else comes up with
22 Ryan, let's say his school, that it's Greg's
23 responsibility to track that down; is that correct?
24 A. No.
25 Q. Oh, so you're (Inaudible) with the school

1 issues; is that correct? As a therapist, not a
2 school (Inaudible).

3 A. The same way I notified him about the
4 assessment.

5 Q. Okay. So our son -- the assessment with
6 our son, may have autism and I'm having him assessed;
7 correct?

8 A. Yes.

9 Q. And since then, they've come back and said
10 he had some concerns with your son; is that correct?

11 A. Yes.

12 Q. And you have notified Greg of
13 that information?

14 A. He was there when they said that.

15 Q. At that assessment?

16 A. Correct.

17 Q. Okay. So since the assessment with four
18 of the specialists, coming in and out on different
19 occasions is what you said, you haven't notified Greg
20 of this?

21 A. No.

22 Q. And have you notified him of the therapy
23 tactics or plans or what they're thinking to do with
24 your son?

25 A. He hasn't asked.

1 Q. So joint legal custody means to you you
2 don't have to tell your husband anything about your
3 son?

4 A. Joint legal custody to me means that we're
5 on equal playing fields and if I take an initiative,
6 he should, too.

7 Q. Despite the fact that you (Inaudible)?

8 A. Well --

9 THE COURT: Now we're becoming
10 argumentative. Move along.

11 (Discussion held off the record.)

12 MR. DRAGE: I'm going to have you -- Your
13 Honor, may I approach?

14 THE COURT: You may.

15 MR. DRAGE: Does the Court have the
16 Respondent's (Inaudible), it was submitted by Brian
17 Duncan at the temporary --

18 THE COURT: What's the date on it?

19 MR. DRAGE: That was submitted by
20 Mr. Duncan dated -- the last page is notarized 14th of
21 July 2011.

22 THE COURT: I think I have it.

23 MR. DRAGE: (Inaudible) copy but --

24 THE COURT: If this is the one that was
25 filed with the Court, it was filed on the 21st, it is

1 dated the 14th --

2 MR. WALPOLE: Your Honor, that one was
3 (Inaudible).

4 MR. DRAGE: Well, he adopted -- we
5 stipulated (Inaudible) part of the parent time.

6 THE COURT: Maybe what would be the
7 prudent thing to do is simply to have Ms. Smith
8 acknowledge that that's her signature on it. I think
9 it's page 8.

10 MR. DRAGE: If I may approach.

11 THE COURT: You may.

12 THE WITNESS: Yes, that's my signature.

13 THE COURT: I think it's page 8.

14 MR. DRAGE: It's the last page.

15 THE COURT: It may not have a page number.
16 It's right after 7. No, it does have a page -- it
17 does have a page 8, and it looks like it's at the top
18 of page 8.

19 MR. WALPOLE: (Inaudible).

20 THE COURT: I see on the --

21 MR. DRAGE: Your Honor, let me stop real
22 quick. I just realized the therapist is still
23 (Inaudible). I (Inaudible).

24 THE COURT: She was to be excluded, even
25 though her testimony had been concluded. In fact, we

1 had excused her, so you'll need to step outside at
2 this time.

3 MR. WALPOLE: She can't remain as an
4 expert witness?

5 MR. DRAGE: No, Your Honor. I've got
6 serious issues with the way the therapy was all
7 created in the first place so she --

8 THE COURT: Under the circumstances, I'm
9 going to have her step out.

10 MR. WALPOLE: I thought as an expert she
11 could be in here, so...

12 MR. DRAGE: That's the only one I have on
13 this, Your Honor. I (Inaudible).

14 THE COURT: Do you have a different one,
15 Mr. Walpole? Let me see if there's anything -- that's
16 the one that was filed with the Court. Wait a minute,
17 here's another one. I take it --

18 MR. WALPOLE: I think I have two so I'm
19 not sure which one was -- is this one dated September
20 23rd?

21 THE COURT: I have Mr. Drage --

22 MR. WALPOLE: (Inaudible).

23 THE COURT: I have the one filed by
24 Mr. Drage that was received on the 15th of August.

25 MR. DRAGE: Would that one be (Inaudible)?

1 Mr. Duncan at that time?

2 (Discussion held off the record.)

3 THE COURT: Does the order specify? I'll
4 look at the order right now while you continue to
5 search through there.

6 MR. WALPOLE: The order adopted the one
7 that Mr. Duncan submitted.

8 MR. DRAGE: We object to that -- or Kim
9 actually drafted (Inaudible). I believe that was
10 submitted sometime in October. But Kim (Inaudible) on
11 the intake, drafted an order. That order would be on
12 the (Inaudible), so it should be -- it should be in
13 there. Yeah.

14 MR. WALPOLE: Okay.

15 MR. DRAGE: It's paragraph 10, page 3 of
16 the order. (Inaudible) adopted (Inaudible) parent
17 plan of the parties a copy of which was attached
18 there. My copy doesn't have that attached.

19 MR. WALPOLE: It appeared to be the same
20 except for this page and this page, so I think the
21 content is the same.

22 MR. DRAGE: Yeah, it is the same.

23 MR. WALPOLE: So, yeah, I don't know.

24 THE COURT: Well, there's not a copy
25 attached to the order that's submitted.

1 MR. WALPOLE: No. My understanding was
2 the commissioner already had it on file so she said
3 we're going to adopt the one that Mr. Duncan's
4 file (Inaudible).

5 THE COURT: And that makes sense. If
6 that's the case, and the only one I'm seeing then is
7 that one back from July, that was filed July on
8 the 21st, it's entitled "Proposed Parenting Plan."

9 MR. WALPOLE: Again, I prepared the
10 content and I think the only difference is Mr. Duncan
11 sent me one that he had signed after the fact. So I
12 think the content's the same. So I'm okay with
13 what (Inaudible).

14 THE COURT: All right, then. Go ahead.

15 MR. DRAGE: If I may approach.

16 THE COURT: You may.

17 BY MR. DRAGE:

18 Q. Turn to page 2 of that parenting plan,
19 specifically paragraph F. I'm going to have you
20 review that form.

21 A. "The parties should establish and maintain
22 good communication and cooperative relationship
23 regarding the care of the children."

24 Q. Okay. And then I'll have you turn to
25 page 3, paragraph 10, and read that to the Court.

1 A. Paragraph K or paragraph I? You have "I"
2 circled.

3 Q. Paragraph K.

4 A. "The parties hold use their best effort to
5 communicate and share information frequently regarding
6 the children and to keep the other apprised of what is
7 happening in the children's lives."

8 Q. Okay. Can I have you read paragraph M?

9 A. "The parties should advise and exchange
10 information with each other concerning the social,
11 religious training, education, health, welfare and
12 medical treatment of the children, and where possible,
13 consult and consider each other's input."

14 Q. Paragraph N, will you read that for me.

15 A. "Both parties should advise and reasonably
16 consult with each other about any nonemergency major
17 or significant decisions affecting the welfare,
18 social, religious training, education, health, medical
19 treatment or residence of the minor children, and both
20 parties should reasonably consider each other's
21 input."

22 Q. Okay.

23 MR. DRAGE: Can I approach (Inaudible)
24 that?

25 THE COURT: Yes.

1 MR. DRAGE: I would just have the Court
2 take notice of what's already been submitted.

3 BY MR. DRAGE:

4 Q. So you -- although there would be joint
5 physical (Inaudible) with Mr. Smith, more or less you
6 had these kids a lot more than Mr. Smith?

7 A. I have them 20 days, he has them 10.

8 Q. Okay. So on a normal week, what's the
9 parent time like (Inaudible)?

10 A. He has them Tuesday night and every
11 weekend. One weekend's a short weekend, one weekend's
12 a long weekend.

13 Q. Okay. So you know he works full time; is
14 that correct?

15 A. Yes.

16 Q. And you're not working at all at this
17 time; is that correct?

18 A. I work part time, but I'm there during the
19 day.

20 Q. Where do you work part time?

21 A. I'm working Saturday evenings.

22 Q. That's it?

23 A. Yeah.

24 Q. Okay. So you're there the rest of the
25 time with the children. So you're the one that's kind

1 of orchestrating the care and the doctors'
2 appointments for the children; is that correct?
3 A. Always has been.
4 Q. Tell me about autism. What's your
5 understanding of autism?
6 A. It's a long one.
7 Q. It's a pretty big deal, isn't it?
8 A. I -- it's a developmental, neurological
9 issue that happens where a child isn't hitting their
10 developmental milestones in certain categories,
11 emotional, social, vocal.
12 Q. Absolutely. So it's a pretty big deal?
13 A. There's a large spectrum associated with
14 it, but yes.
15 Q. Where would you say Ryan fits in that
16 large spectrum?
17 A. On the assessment, he was rated as severe
18 in a lot of the categories.
19 Q. Okay. So it's a pretty big, severe deal
20 with Ryan?
21 A. Which is why I told him about the
22 assessment.
23 Q. About the assessment, but the rest of
24 the appointments, the rest of the counseling, the
25 therapy tactics or plan?

1 A. He has not followed up or communicated
2 with me about it.

3 Q. But you haven't shown (Inaudible). You
4 just testified you set these appointments. You just
5 read specifically your parent plan that says you're to
6 communicate frequently regarding medical, health,
7 school. That doesn't apply to you, in your opinion?

8 A. I'm not saying that.

9 Q. Well, you're not communicating with Greg
10 on the issue, are you?

11 A. He's not communicating freely with me
12 either. It takes two to communicate.

13 Q. You seem to be (Inaudible) -- quite simply
14 it means, Greg has the opportunity to ask you about
15 these things?

16 A. Well, the parent plan used the word
17 exchange. Exchange means a two-way conversation. He
18 was aware of the assessment. He was given the same
19 information I was. He has not followed up with me,
20 nor has he followed up with the intake people.

21 Q. How do you know he hasn't followed up with
22 the intake people?

23 A. If he followed up with the intake people,
24 you wouldn't be asking me any of the questions you're
25 asking me now.

1 Q. (Inaudible) ask me questions. You just
2 (Inaudible) counselors coming and going for your son.
3 A. Four specialists.
4 Q. The intake people know who the specialists
5 are?
6 A. Yes.
7 Q. Name them for me.
8 A. Well, okay.
9 There's Jolene that deals with speech.
10 There's Karen that deals with
11 developmental.
12 There's Bill who deals with the
13 psychological.
14 And then there's Mike -- I haven't met
15 with him yet, Mike Mark who deals with -- what does he
16 call it -- deals with food and coordination and stuff
17 like that.
18 Q. Okay. So the intake people are people who
19 just answer the phone and tell you what's going on?
20 A. No. Jolene was at the intake. Denise was
21 at the intake.
22 Q. The intake people that Greg is supposed
23 to call and keep in contact with?
24 A. It's on the paperwork that he was given.
25 So there's phone number and a contact information.

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Q. So the one-page piece of paper that he got at the assessments --

MR. DRAGE: If I may approach, Your Honor?

THE COURT: You may.

BY MR. DRAGE:

Q. Is that the intake you're referring to?

A. It's not the only piece of paper he was given, but yes, this is one of them.

Q. What if Mr. Smith testified that's the only piece of paper he was given?

A. Then I think he would be lying.

Q. Okay. Let's assume that's all he was given. Your son's in a pretty severe developmental problem (Inaudible), and you feel like you don't give any of this information because -- these four people and their in particular specialties. Can't you just send an email to him and say, "Here's Bill, here's whomever, this is his specialty"? You don't feel like that's in (Inaudible)?

A. If it's that important, then he should have followed through the same way I did.

Q. Even though the kids are with you all the time and you're setting these appointments?

A. Even though we have joint custody and are on even playing fields, yes.

1 Q. Okay. Let's change gears here real quick.
2 I just read an email recently which you
3 had provided Mr. (Inaudible) where you admit that you
4 have been covertly recording Greg's parent time
5 sessions for quite some time. Did I misread that? Is
6 that correct, you've been recording them?
7 A. Yes.
8 Q. So as far as -- and you've been placing a
9 digital recorder into the diaper bag or other areas
10 with the kids and passing that off to Mr. Smith
11 unbeknownst to him so that you can record his
12 Tuesdays, his weekends and his long weekends; is that
13 correct?
14 A. Yes.
15 Q. And this has been going on since October?
16 A. No.
17 Q. How long has it gone on?
18 A. I would have to look at the file to know
19 how long.
20 Q. What file?
21 A. The file of all the recordings I have.
22 Q. Okay. When was the first time?
23 A. I don't know. I'd have to look at my
24 file to find out.
25 Q. How many recordings do you have?

1 A. I would have to look at my file for that,
2 too.

3 Q. Do you have them here?

4 A. I do.

5 Q. Where is your file?

6 A. On my computer.

7 Q. So you have more recordings -- can
8 I assume you have more recordings, but you can't
9 recall when you first started making these recordings?

10 A. I haven't looked at the date, yeah.

11 Q. Let me put this into perspective.
12 You first called Detective Swanner
13 November 1 because of pornography.

14 A. Yes.

15 Q. And you also told him, according to the
16 police report, that there's some weird things going on
17 with your daughter and you think it's Greg's fault.
18 So did you start recording him in November?

19 A. No.

20 Q. December?

21 A. No.

22 Q. How long will it take you to look through
23 your notes?

24 A. It would only take me a little bit. If
25 you want an approximate time, I would say probably

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January.

Q. Okay. And I want an approximate number, how many times you've recorded Mr. Smith.

A. That I've gotten the tape-recorder back?

Q. Yes. What you've actually received back.

A. There might be six.

Q. Six? And Mr. Smith has caught you three times. There have been at least nine weeks of recordings where you put something in the diaper bag?

A. Nine times.

Q. Nine times. So once a week, twice a week, how often did you do that?

A. Oh, I don't know. (Inaudible) he found recorder, it was really just --

Q. Who advised you to record Mr. Smith without him knowing?

A. I took it under my own advisement.

Q. Your own advisement, and you do realize this is illegal?

A. Yes.

Q. Okay. And you choose to ignore the law?

A. In this case, yes.

Q. In this case. Okay. So you both were -- on these nine separate occasions, you're admitting that right now, at least nine.

1 A. Okay.

2 Q. I'm going to have you look at your
3 notebook. I want to know exactly how many. So is
4 that something you can do right now without a problem?

5 A. Sure.

6 MR. DRAGE: Do you mind if I grab
7 a (Inaudible), Your Honor?

8 THE COURT: With your permission and with
9 Mr. Walpole's consent.

10 MR. DRAGE: (Inaudible).

11 MR. WALPOLE: Yeah, I would object. I
12 don't see why it's necessary. I don't know that
13 they're privy to know what's in her notebook. And I
14 mean --

15 MR. DRAGE: I'm not asking you about
16 referring to it. I'm not asking for the notebook. I
17 want her to recall, and she's specifically testified,
18 she'll know how many times and when she began
19 recording illegally --

20 MR. WALPOLE: She's already testified to
21 that. She said it was about nine times and it started
22 in about January.

23 THE COURT: If Ms. Smith has indicated
24 that it's approximately nine times, Mr. Drage, then
25 what would be the point of looking at the notebook for

1 that purpose?

2 MR. DRAGE: I think it's more towards
3 when it began, because --

4 MR. WALPOLE: The answer to that is
5 probably about January.

6 MR. DRAGE: Well, but she said she will
7 know more exact. And the testimony (Inaudible) she
8 said around the November-December timeframe. It's
9 very vague, two months. If she knows exactly when she
10 recorded and she's recorded ongoing stuff.

11 MR. WALPOLE: Because it's (Inaudible) --

12 THE COURT: Let me ask this:
13 Mr. Walpole, are you familiar with the recordings?

14 MR. WALPOLE: No, I am not.

15 THE COURT: All right. The Court's going
16 to take a brief recess to let Ms. Smith and her
17 counsel talk about this. And also, I'm going to
18 encourage counsel to consult with one another with
19 regard to the recording to see if we can expedite
20 handling this matter without it necessarily taking the
21 Court's time to accomplish it.

22 We'll be in recess for approximately
23 15 minutes to do this.

24 (A recess was taken.)

25 THE COURT: Is counsel ready to proceed?

1 MR. DRAGE: We are, Your Honor.

2 THE COURT: All right. The Court's back
3 in session.

4 Let me first take -- do some housekeeping
5 measures at this point in time.

6 There have been some exhibits that were
7 offered and received and I'm not sure if they
8 inadvertently walked out the door. Exhibits 9, 6, and
9 7, but for ease, if counsel will stipulate, I'll
10 simply utilize the courtesy copies as those exhibits.
11 We have those for 9, 6 and 7. Are counsel okay with
12 that?

13 MR. WALPOLE: (Inaudible), Your Honor.

14 THE COURT: All right.

15 And then 14, I think that's the photograph
16 that's been offered but it's still over here. That
17 has not yet -- I think -- was that offered? I'm not
18 sure if it was.

19 MR. WALPOLE: It was.

20 THE COURT: All right. That's been
21 received.

22 (Petitioner's Exhibit 14 was received into
23 evidence.).

24 THE COURT: So I think we've taken care of
25 all the exhibits that were offered and received.

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With that --

MR. WALPOLE: If I could just ask the Court; the medical records from Tanner Clinic, what number was that? Do you have the -- (Inaudible).

(Discussion held off the record.)

THE COURT: Oh, I think I know what you're talking about. Hold on just a second.

MR. WALPOLE: It's four or five pages.

THE COURT: Is that Respondent's or Petitioner's?

MR. WALPOLE: (Inaudible).

THE COURT: I'm not sure. Let me see those.

MR. WALPOLE: Because I know it wasn't in the originals (Inaudible) try to get the numbers.

THE COURT: So it's not 9, 6, or 7. I don't know that -- pardon?

MR. DRAGE: (Inaudible) now as far as (Inaudible).

MR. WALPOLE: It could be 3 or 4. I know it's not No. 9.

(Discussion held off the record.)

THE COURT: The only ones we had were the ones that were offered and received. And I'm not sure, like I said, where 9, 6 and 7 -- and I've

1 provided my courtesy copies, but I don't -- we don't
2 have 3 and 4. Is it a letter or a specific report?

3 MR. WALPOLE: It's a four-page medical
4 report.

5 THE COURT: You know what, I think that
6 was attached to the affidavit but it's not been
7 offered. I have a recollection -- in fact, I was
8 wondering about that. I don't have a recollection
9 about that being offered.

10 MR. WALPOLE: I think it was copied.

11 MR. DRAGE: Yes, it was copied
12 (Inaudible).

13 MR. WALFOLE: But the Court does have a
14 courtesy copy?

15 THE COURT: No, huh-un. I know that I've
16 read it in the affidavit.

17 MR. WALPOLE: All right. Well --

18 THE COURT: Do you want that to be
19 incorporated by agreement?

20 MR. WALPOLE: I thought that I'd ask her
21 about if it was admitted.

22 MR. DRAGE: I have no objection, quite
23 honestly, if we have to come back and (Inaudible)
24 because we've got the same --

25 THE COURT: You have an extra copy then

1 that we can utilize? All right. Let's just mark
2 this, then. What number was that?

3 MR. WALPOLE: I don't know. That's the
4 problem. I don't have the original.

5 THE COURT: Yeah.

6 THE WITNESS: I can go back and go
7 through (Inaudible).

8 THE COURT: Well, can we just, by
9 agreement, stipulate that it will be a new number and
10 clear it up, instead of having to review the tape?
11 How about No. 15 since you just did 14?

12 MR. WALPOLE: That's fine, Your Honor.

13 THE COURT: We'll stipulate to the entry
14 of Petitioner's Exhibit 15.

15 Are we ready to proceed? Mr. Hart?
16 The floor is yours, or the podium is yours.

17 MR. HART: I'll use the microphone, Your
18 Honor.

19 THE COURT: Thank you.

20 MR. HART: Your Honor, all the parties
21 admit and there are stipulations that you've agreed to
22 preserve the issues and continue this trial without
23 date. And the parties stipulate to Mr. Smith taking
24 a psychosexual that includes EBG with (Inaudible), as
25 they agreed upon the therapist, with upfront costs

1 being paid from the party's tax return.

2 The office of Guardian ad Litem, just to
3 note, would be recommending the evaluation for
4 Mr. Smith to the custody evaluator. So that would
5 ultimately, I think, be the outcome.

6 So for efficiency, we'll move forward to
7 add that agreement to it now.

8 Disclosures of the psychosexual evaluation
9 will only be made available to counsel and the Court
10 and to Ali Thomas, the custody evaluator. And the
11 evaluation will commence immediately with Greg
12 (Inaudible) update us.

13 And, of course, addressing parents' time,
14 that will remain as previously ordered.

15 Does Your Honor have any questions?

16 THE COURT: I don't.

17 Mr. Walpole, is that the agreement, sir?

18 MR. WALPOLE: That's the agreement, Your
19 Honor.

20 THE COURT: Mr. Drage?

21 MR. DRAGE: That is the agreement, Your
22 Honor.

23 THE COURT: All right. Now let me turn to
24 the parties.

25 Ms. Smith, you've heard the presenting

1 made by counsel on the acknowledgements. Is this, in
2 fact, your agreement, are you willing to be bound by
3 it?

4 MS. SMITH: Yes, Your Honor.

5 THE COURT: Thank you.

6 Mr. Smith, you've heard the presentation.
7 Are you willing to be bound by this?

8 MR. SMITH: Yes, Your Honor.

9 THE COURT: And is it, in fact, your
10 agreement?

11 MR. SMITH: It is.

12 THE COURT: All right. With that in mind,
13 Mr. Walpole, if you'll prepare an order on this. The
14 matter will be continued without date and I'll look
15 forward to hearing from counsel. Court's in recess.
16 Thank you.

17 MR. WALPOLE: Is it okay if we discuss
18 the order with the parties?

19 THE COURT: I think that's appropriate.

20 MR. WALPOLE: Okay.

21 THE COURT: The only thing I understood
22 that there was to be limitation on the disclosure was
23 the psychosexual. Is that correct?

24 MR. WALPOLE: That's correct.

25 THE COURT: Okay.

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MR. WALPOLE: Thank you.

THE COURT: Thank you.

MS. SMITH: Your Honor, (Inaudible)?

THE COURT: Oh, sure. In fact, the bailiff will do that because one of those has been received into evidence, I think. And maybe that's where our missing papers are. I think so. Give that to Mr. Walpole just to make sure.

MR. WALPOLE: Oh. We may have found the missing exhibits. She may have some at home.

MS. SMITH: So don't mark (Inaudible).

MR. WALPOLE: Yeah, you have this on (Inaudible). So we'll get those --

THE COURT: That's not unusual. That tends to happen in those kinds of circumstances.

MS. SMITH: (Inaudible).

MR. WALPOLE: Okay.

THE COURT: All right. Thanks, folks. Doesn't the photo --

MR. WALPOLE: The one photo was (Inaudible).

THE COURT: Oh, all right, we've got it.

(The recording concluded.)

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STATE OF UTAH.)
) ss.
COUNTY OF SALT LAKE)

I, LAURA THOMPSON, Transcriptionist for
the State of Utah, certify:

That the foregoing transcript of
proceedings was taken down by me from recorded medium;
that the statements of court and counsel were recorded
by me from recorded medium, all to the best of my
skill and ability;

I FURTHER CERTIFY that I am neither
counsel for nor related to any party to said action,
nor in anywise interested in the outcome thereof.

Certified and dated this 9th day of
July, 2012.


LAURA THOMPSON
Transcriptionist

Exhibit C

12/03/12
12:39

Incident Report

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Incident Number: 12-01466

Addr: 2741 N 1825 E Area: 14 14
City: LAYTON St: UT Zip: 84041 Contact:

Offense(s)
SEXUAL ABUSE OF A CHILD

Responding Officers: JONES, C I13
Rspnsbl Officer: JONES, C Agency: LPD
Last RadLog: **:*:* **/**/**
Clearance: CLOSED

When Reported: 07:03:18 01/24/12 Disposition: EXCEPTION/PROSECUTION DECLI

Occurrd between: 07:03:16 01/24/12
and: 07:03:16 01/24/12

INVOLVEMENTS:

Date	Description	Relationship
04/20/12	[No description]	REPORT RELEASED
01/24/12	SMITH, GREGORY THOMAS	SUSPECT
01/24/12	SMITH, TERI ANNE	MOTHER OF 195841
01/24/12	SMITH, RILEY	JUV VICTIM
11/30/12	SEX OFFENSE 12-06754	RELATED
07/31/12	cjc interview #2 w/riley smith	Evidence Incident
07/31/12	cjc interview #1 w/riley smith	Evidence Incident
01/24/12	07:03:18 01/24/12 SEX OFFENSE	Initiating Call

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12:39

Incident Report

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Detective C. Jones
Date: 01/24/12
Incident#: 12-01466

SEX ABUSE OF A CHILD

REASON FOR RESPONDING:

On 01/24/12 at approximately 0700 hours, I received a Child Abuse Neglect Report (CANR) from the Division of Child and Family Services (DCFS).

In that report it stated that the alleged victim, Riley Smith, had reported to her mother, Teri Smith, that when she goes on visitation with her father, Greg Smith, that she sleeps in the same bed as he does. Riley also reported that her father had been showering with her naked and that he had been putting objects inside her vagina. Teri reported that she has noticed changes in Riley such as her pooping her pants and masturbating to the point that she is bleeding. Teri also stated that Greg french kisses Riley.

A copy of that CANR will be attached to this report. DCFS case number was 1851640. At the time of this report I was not aware of a caseworker from Child Protective Services (CPS) assigned to this incident. This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

EOR/CAJ

12/03/12
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Detective C. Jones
Date: 01/26/12
Incident# 12-01466

SUPPLMENTAL REPORT

REASON FOR RESPONDING:

On 01/26/12 arrangements had been made with Teri Smith to have her daughter, Riley Smith, interviewed at the Davis County, Children's Justice Center (CJC). This interview was being conducted because of allegations that Teri had made against her soon to be ex-husband, Gregory Smith. Teri alleged that Greg was sexually abusing Riley when she would go to his home for visitation.

INTERVIEWS AND CONVERSATIONS:

TERI SMITH:

On 01/26/12 at approximately 0900 hours, Janell Pugh, Division of Child and Family Services (DCFS), Child Protective Services (CPS) and I met with Teri and Riley at the Davis County, CJC. Prior to interviewing Riley, we spoke with Teri in the parent consult room away from Riley.

Once in the room I asked Teri to explain to me what had been occurring. Teri stated that in 01/2011 she began to notice that Riley had a rash on her bottom that would come and go. Teri reported that she attempted to find the cause of the rash such as soap, diapers, wipes and other items that Riley's skin came in contact with on a regular basis, but was unsuccessful in find the problem. Teri advised me that Greg moved out of the home around 06/2011. Teri reported that she told Greg to leave the day after he reportable held her down and raped her at the home in Syracuse. (Janell had previously spoken to Teri about this incident and Teri stated that the reason that incident was not reported was because she got busy with Riley and "lost her window of opportunity" to report the incident.) Teri informed us that in 09/2011 visitation was started with Greg and the children. The visitation schedule was for Greg to have the children on Tuesday night and alternating Friday, Saturday, and Sunday. Teri stated that when these overnight visits started Riley's rash appeared to get worse. Teri stated that the rash would clear up within 24 hours. Teri informed us that she had worked with Greg in trying to determine what could be causing the rash. They coordinated the use of the same diapers, laundry soap, wipes, and other items to make sure that everything was consistent between the two homes.

Teri stated that six months before Greg moved out, Riley was talking about dragons. When Greg moved out in 06/2011, her talk of the dragons stopped. Greg did have contact with the kids but his visits were not overnight. When Greg started to have overnight visits Riley started to talk about the dragon again. Teri said for instance, Riley was playing with her doll and said the dragon peed on the doll's face. Riley then told the doll, "It's o.k. honey. I love you." Teri also informed us that in 11/2011 Riley started to regress with regards to

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toilet training. In the meantime, her rashes were getting worse. When she first started to get the rash, they were in the butt crack and it spread to the vaginal area. Teri said she took Riley to the dermatologist and they suggested she take what she believed was causing the rash and put on the back of Riley's knee covered by a band aid. If it causes a rash on the knee it could be causing the rash on the private area. MO said she got some Gun Oil H2O, a personal lubricant that Teri said Greg would use to masturbate with in the shower and put it on Riley's knee as directed by the Dermatologist. Teri reported that this causes a rash. Also according to Teri, Riley told her the Gun Oil is what her dad had put on her. Teri reported that after she had this information she confronted Greg about this and for the next three weeks, Riley came back from her visit rash free. Teri advised us that the previous weekend Riley came home with a rash again. It was also during that visit that Riley reported that her father had showered with her. I asked Teri if Greg had showered with the children when they lived together. She stated that he did, but she didn't think anything was wrong with it while they lived together.

As we continued to talk with Teri that day, she informed us that Riley was currently seeing Rebecca Burgert for counseling. Riley's Pediatrician was Dr. Brent K. Eberhard at Tanner Clinic in Layton. The Dermatologist that Teri had taken Riley to see was Dr. Scott Checketts also at Tanner Clinic in Layton.

Also during our conversations with Teri she advised us that when Greg lived in the home he would ignore the children or was harsh with them. Teri reported that one time that Riley was in the tub and Greg poured water on her. She started to cry and Greg mocked her, calling her a "poor baby." Teri stated that when Greg would come home from work, and Riley would hear the garage door, she would go in the corner and throw up. Teri also made allegations that Greg's father, Larry Smith, was accused of molesting kids, but she thinks that nothing was ever reported. It should also be mentioned that during Janell's home visit Teri reported that she had caught Riley in the bathtub sticking a toothbrush and her fingers inside of her vagina.

After talking with Teri for quite some time, I advised her of how the interview would be conducted. I told her that I would be the one that would be interviewing Riley and after the interview was completed that we would talk with her about what Riley had disclosed. We then escorted Teri back to the main waiting area of the CJC.

When I had completed my interview with Riley, I spoke briefly with the CJC Director, who advised me that Teri had told her that she assumed that Janell would be conducting the interview and that she did not feel Riley would talk to a man because she seems to have issues with men. When I told Teri that I would be conducting the interview, she never mentioned any type of problems that Riley would have with me or any issues with men.

Because there was no disclosure during my interview with Riley and having learned of her alleged problem with men I asked Janell to conduct an interview with Riley. After Janell interviewed Riley and there was still no disclosure from Riley we spoke with Teri again in the parent consultation room away from Riley.

Once we were in the room, I explained to Teri that Riley had not disclosed any type of physical or sexual abuse during my interview or Janell's interview. I told her that it would be hard to file any criminal charges against Greg without

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a disclosure from Riley. I told her that I also had knowledge that Riley had a medical examination by Karen Stilling at the CJC prior to this incident being reported. During that examination from what I understood was that everything was normal during that exam. I advised her that at that point we did not have any evidence to support the allegations. I told Teri that I felt there were some strange things occurring and maybe some inappropriate things happening, but that as a parent Greg had the right to determine whether showing with Riley was a good or bad thing to a certain extent. I advised her that I would attempt to interview Greg in regard to this incident. I told her that once I contacted him that the situation between the two of them may get a little harder, because I assumed he would be upset and that may cause her problems with their divorce. Teri told me that she would be fine with dealing with any problems directed towards her. I told her that I would also discuss this incident with the Davis County Attorney's Office to get there advise on the situation.

Prior to leaving the room that day we advised Teri that if Riley came back from a visit and there were any issues to call and report them and if Riley needed medical attention to take her to the emergency room. After talking with Teri about the interview, we escorted back to the main waiting area where Riley was waiting. They then both left the CJC and I had no further contact with her that day.

RILEY SMITH

After talking with Teri about this incident, I contacted Riley in the main waiting area of the CJC. I spoke with her briefly about the toys she was playing with. I then asked her if she would come talk with me in one of the interview rooms. Janell and I then escorted Riley into interview room #1. The following is a summary of my interview that was conducted with Riley that day.

Once Riley and I sat down I began the interview by introducing myself and telling Riley where we were at that day. I then covered the guidelines of the interview with her, which she demonstrated she understood and promised to tell me the truth about things that really happened.

I then began the rapport building process with Riley. During that process I asked her about things she liked to do. Riley indicated that she could not think of anything she liked to do. Because I had watched her play with the toys in the waiting area, I remembered that she was playing with some dolls. I asked her to tell me about the dolls and she stated that she liked dolls and playing with her doll house. She did not go into much detail of why she liked to play with the dolls. Riley then told me that she liked her mommy. She said that she liked her mommy because she cooks. Riley would not tell me any further information on her mother. Because it appeared she was struggling with telling me about things she liked I asked her about things she didn't like. Riley told me that Mister (her brother's nick name) had been sick for a long, long time.

After talking about things she liked and didn't like I asked her to tell me about what she did that morning. Riley stated that she got up and got dressed. She also mentioned that she had played with her mommy that morning. I attempted to get Riley to tell me more about what she had done that morning, but she was not able to provide me with any further details. I then asked Riley to tell me about her dolls that we had been talking about earlier. Riley looked at me and shrugged her shoulders as to tell me she didn't know. I asked her to tell me

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about her favorite dolly. Riley told me that her favorite doll was a baby doll. When I asked her to tell me more about the doll, she again shrugged her shoulders. I began asking direct questions about her doll in regard to hair and eye color and other descriptors of the doll. Riley did respond to the direct questions about her doll, but when I asked an open ended question about the doll, she would not answer the questions. We continued to talk about her doll and her dress for a period of time.

As we continued to talk that day, we talked about the people that lived in her home. Riley advised me that her mommy and Mister lived in her home, but her daddy didn't live with them anymore. I asked Riley to tell me about her daddy, but she again shrugged her shoulders and could not tell me anything about her daddy. At that point I decided to take a break. I advised Riley to stay in the room and I would return shortly. After I had left the room, Riley can be heard saying something about a stranger and it was a hard time. I was not able to understand exactly what she was saying. She continues to talk to herself as she is in the interview room. She is also heard calling for her mommy and her daddy. She also says my name and mentions that I don't have any hair.

When I returned to the room I asked Riley to tell me about who lives with her dad. Riley stated that Papa lived with her dad. I asked her if there was anyone else that lived with her daddy. Riley could not provide me with any further information. I continued to talk with Riley and asked her about going to the doctor. She acknowledged that she went to the doctor, but would not talk to me about going to the doctor.

After talking with Riley for a period of time and she was not responding to any of the open ended questions, I determined that it would not be of much use to keep Riley in the interview room any longer. I spoke with her about safety issues such as what we should do when crossing the street and riding our bikes and scooters. I then ended the interview and escorted Riley back out to the waiting area where her mother was waiting.

After I had concluded my interview with Riley, I was advised by the Director of the CJC that as she had been talking with Teri, she advised her that she was surprised that I was the one that interviewed Riley. Teri stated that Riley is scared of men and she more than likely would not talk to me because of this. Teri continued to tell the Director that if Janell would interview Riley she would be more likely to talk about what had occurred at her father's home. It should be mentioned that at no time during my conversations with Teri prior to my interview with Riley, after I told her that I would be doing the interview did she mention anything about Riley having issues with men.

Because of this information I asked Janell if she would interview Riley to see if she would open up to her and provided her with any type of a disclosure. Janell agreed to interview Riley and she made contact with her in the waiting room. Janell then escorted Riley back to interview room #1. Janell spoke with Riley for a period of time using the same interview format. Riley did not provide any type of disclosure during that interview.

After Janell completed her interview she escorted Riley back out to her mother. Shortly after talking with Teri about the interview, Teri and Riley left the CJC and I had no further contact with them that day.

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ADDITIONAL INFORMATION:

It should be mentioned that Janell conducted a home visit with Riley and Teri on 01/23/12. During that visit Teri discussed with Janell most of the information that was relayed to me on 01/26/12. One thing that Teri did not mention to me was that Riley had been examined by Karen Stilling at the CJC. During Janell's home visit Teri told Janell about the exam and told her that Karen had told her not to bring Riley back to the CJC or she would have her arrested for filing a false police report. Teri stated that Karen informed her that the only way she would see her was if Riley was bleeding from her vagina.

After Janell told me about this conversations, I did not believe that Karen would tell Teri any of those things. I have worked with Karen for several year and have never heard her say anything like that to a victim or their parents. Karen has always had the patients best interest in mind during her examinations and evaluations. I will follow up with Karen to get her version of the exam as well as a copy of her report.

The DVD's that contained the interviews with Riley were booked in to evidence at the Layton Police Department. This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 01/27/12
Incident# 12-01466

SUPPLEMENTAL REPORT #2

On 01/27/12 at approximately 0700 hours, I noticed I had received an e-mail from Teri Smith in regard to this incident. The e-mail appeared to have been sent on 01/26/12 at 1911 hours and was address to Janell Pugh and myself.

In that e-mail Teri expressed her frustration with what had occurred on 01/26/12. She was upset because Riley had not disclosed anything and we had no physical evidence to support the allegations against Greg and we advised her to have Riley continue with Therapy. Teri stated that Janell and I needed to do our job and protect her children.

After reading the e-mail I contacted Janell to see if she had received the same message. Janell advised me that she had gotten the e-mail and that she would contact Teri and talk with her again about what is needed to proceed with criminal charges.

A copy of that e-mail will be attached to this report. This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 01/30/12
Incident# 12-01466

SUPPLEMENTAL REPORT #3

On 01/30/12 at approximately 0800 hours, I noticed that I had received several e-mails from Teri Smith as well as her mother, Jan Houskeeper.

The first e-mail from Teri was sent on 01/27/12 at 1155 hours. In the message Teri apologizes for her mother's e-mail that was sent to me in regard to her observations of the situation between Teri and Greg. Teri requested that I only speak with her about this incident and not discuss it with anyone else. Teri also attached a copy of a document that she had filed when she attempted to get a Protective Order. She also informed me that she had attached a copy of her journal that started 06/2011. That journal detailed the interactions with Greg and the children. Those attachments were printed and attached to this report.

The second e-mail I received from Teri was sent on 01/27/12 at 1908 hours. That e-mail was addressed to Janell and was talking about the conversations they had on the phone the previous day. She also attached the same documents that I had received in her first e-mail on 01/27/12. Teri also included a digital image she had taken of her son, Ryan Smith, leg that showed the rash that was on his leg. The items that were attached to this e-mail were printed and will be attached to this report.

The last e-mail I received on 01/27/12 was from Jan Houskeeper. That e-mail was sent on 01/27/12 at 1643 hours. In that e-mail Jan explains that Riley had found a doll and was playing with it. While she was playing with the doll she started giggling and said that the doll was naked. Riley was asked if she knew anyone else that was naked and she said that her daddy was when they were in bed. Jan also provided an attachment to her e-mail that had her opinions and observations of Teri over the past week. That document was printed and will be attached to this report.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

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Detective C. Jones

Date: 01/31/12

Incident# 12-01466

SUPPLEMENTAL REPORT #4

On 01/31/12 at approximately 0800 hours, I noticed that I had another e-mail from Teri Smith in regard to this incident. That e-mail was sent on 01/30/12 at 1208 hours.

The e-mail was addressed to Janell and stated that it was an update from the previous weekend when the children were on visitation with Greg. It read as follows:

Riley french kissed me 2 times. She said she gets sad beause she calls for me but I dont help. She told me that "Pee is hot if you drink it". While at a family function at my moms there was a doll that was naked on the floor, she asked whos doll and why was it naked. My mom said that it was Emmy's doll, and Riley said "my daddy sleeps naked too. I can see his bum too." Said it in front of mom and grandma. She was up 4times through the night saying "I don't want to, daddy don't make me." I would ask her what she doesnt want to do and she would say that she in not suppose to tell.

That e-mail was printed and will be attached to this report. This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 02/01/12
Incident# 12-01466

SUPPLEMENTAL REPORT #5

On 02/01/12 at approximately 0830 hours, I met with the Davis County Attorney's Office (DCAO) to review this incident with them.

I provided them with the results of my interview as well as Janel's interview with Riley Smith at the Children's Justice Center (CJC). I also reviewed with them the information that was received in the e-mails that Teri and Jan had sent us.

After discussing that information with DCAO, we spoke with Karen Stilling about the examination she conducted on Riley and the things that Teri had said about Karen having her arrested. After providing Karen with that information she appeared offended by the comments that Teri had made about their conversation. Karen stated that she never told Teri she was going to have her arrested if she came back to the CJC for an exam. Karen stated that she told Teri to continue to have Riley attend therapy and if Riley said anything to her to write it down and not to ask questions. She was told that if there is redness observed to call for a follow-up visit. Karen stated that she had her report from when that examination was conducted on 11/30/2011 and would send it to me. Later that day I received a copy of Karen's report from that examination.

When we had finished discussing this incident with DCAO they stated that without a disclosure or any physical evidence it would be difficult to pursue charges. They requested that I attempt to interview Greg about these allegations and then review this incident with them again.

After conducting the review of this incident with DCAO, I spoke with Janel, who advised me that she would contact Teri and inform her of what was going to happen. Janel also provided me with a copy of a police report, Y11-05945, from Syracuse Police Department. In that report it describes Det. Swander's involvement with Teri Smith.

Det. Swander was contacted on 11/03/2011 by Teri because she had found several images of pornography on her computer. Det. Swander responded to Teri's home and conducted a search of her computer for images of child pornography. He was unsuccessful in locating any images of child, but did find several hundred images of adult pornography. In a supplemental report dated 01/03/2012, Det. Swander reported that Teri had contacted him and advised him that in his initial report he indicated there were hundreds of images of adult pornography when there were thousands. Det. Swander stated that he did not feel the number of images mattered since they were adult images. A copy of that report will be attached to this report.

Janel also provided me with copies of several e-mails that had been exchanged between Greg and Teri. There was also a letter from Blue Sands Counseling LLC that was dated 12/13/2011 written by Rebecca Burgert, LCSW.

In that letter indicated that it was written by request of Teri Smith in regard to Riley's counseling. The letter describes Rebecca's observations and opinions

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of her time with Riley. For more details of that letter please refer to the letter, which will be attached to this report.

After collecting the above information and reports I left the CJC that day. A copy of Karen's report will be attached to this report. This incident will remain active pending an interview with Greg about these allegations. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 02/03/12
Incident# 12-01466

SUPPLEMENTAL REPORT #6

On 02/03/12 at 1100 hours, I noticed that I had two new e-mails from Teri Smith and Jan Houskeeper.

The e-mail from Teri was sent on 02/03/12 at 0935 hours. This e-mail was in regard to a voice message that Teri had left me about a video she had taken while talking to Riley about this incident. She stated that the video did not show any video, but you could hear the audio as she talks to Riley about visiting her father. Teri stated that there was no video, because she had hidden the camera.

I spoke with Teri on the phone about this and advised her that I could not use the video as evidence, because interviews with children have to be done a specific way. She was told that any questioning of her daughter about this incident needed to stop, because it could be portrayed as leader Riley to get answers from her that would benefit her agenda. This issue was also address with the Davis County Attorney's Office (DCAO), who informed me of the same observation I had made and told Teri about. I did not get the video from Teri and advised her to not question Riley.

Janell and I have advised her on several occasion to just listen to Riley if she talks and not to ask her direct questions. A copy of the e-mail Teri sent me will be attached to this report.

The e-mail that I received from Jan was sent on 02/02/12 at 0348 hours. In that e-mail it had a news article about the Susan Powell case from West Valley Police Department. The article talked about the pornography that was found on some computers. Jan wanted to know if the Powell case could be used as presidencies to temporarily keep Riley and Ryan from having to go to their father's for visits. Because of Teri's earlier request to only speak with her about this incident, I did not respond or attempt to speak with Jan about this issue. A copy of that e-mail will be attached to this report.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones

Date: 02/08/12

Incident#: 12-01466

SUPPLEMENTAL REPORT #7

On 02/08/12 I attempted contact with Greg Smith in order to arrange a time that I could talk with him about this incident.

INTERVIEWS AND CONVERSATIONS:

GREG SMITH:

On 02/08/12 I contacted Greg by phone to make arrangements for him to come to the Layton Police Department so that I could talk with him about this incident. I told Greg that I wanted to talk with him about the red mark on his son's leg, because we had received a report of possible abuse. Greg denied any type of physical abuse occurring, but stated he would come in and talk with me about this incident. Because of scheduling conflicts we weren't able to meet until 02/13/12 at approximately 0800 hours.

It should be noted that during my conversation with Greg that day I did not mention anything about the sex abuse allegations involving Riley. After speaking with Greg on the phone I had no further contact with him that day.

TERI SMITH:

After talking with Greg and making arrangement to interview him, I contacted Teri by phone and advised her that Greg had agreed to meet with me on Monday, 02/13/12 at 0800 hours. Teri asked if she should allow the children to go on their weekend visit with Greg. I advised her to continue with the normal schedule, because I only told him that I wanted to talk with him about the mark on Ryan's leg and nothing about the sexual abuse allegations, so that he would come in and talk with me. Teri stated that she understood. I told her that I would call her and let her know how the interview went on Monday.

ADDITIONAL INFORMATION:

This incident will remain active pending my interview with Greg, which is scheduled for 02/13/12 at 0800 hours. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 02/13/12
Incident# 12-01466

SUPPLEMENTAL REPORT #8

On 02/13/12 at approximately 0730 hours, I received a voice message from Greg Smith in regard to our interview that was scheduled for later that morning. In Greg's message he indicated that he had spoken with his attorney, who had advised him not to come in and talk with me that day. Greg requested that I call him back to let him know that I got his message.

INTERVIEWS AND CONVERSATIONS:

GREG SMITH:

I contacted Greg by phone and informed him that I had gotten his message. I asked him why he wasn't coming in to talk to me about the mark on Ryan's leg.

He stated that his attorney, Daniel Drage, advised him that with everything that has been going on with the divorce process that it would be best for him not to talk with me at that time. Greg stated that I could call and talk to his attorney about the situation if I would like. I told him that if he and his attorney would like to sit down with me and discuss this incident to call me and we could schedule a time to meet at the Layton Police Department.

After speaking with Greg for a short period of time I thanked Greg for letting me know he was not coming in that day and to contact me if they decided to come talk. I then hung up the phone and had no further contact with Greg that day.

TERI SMITH:

After talking with Greg that day, I contacted Teri by phone to advise her that Greg's attorney had advised him not to come in for the interview.

As I spoke with Teri that day she advised me that it didn't surprise her that he didn't come in to talk with me. I asked her why, since I had only mentioned the red mark on Ryan's leg as a reason for the interview. Teri advised me that they had served Greg with paper work for a restraining order on Friday, 02/10/12, detailing the sex abuse allegations. I asked Teri why I was not informed of that and why it was served prior to my interview with Greg. Teri stated that they thought it would be best to have it served before the children went on their visit with Greg. I told her that any chance we had of an interview with Greg was ruined now because she had that paper work served on him.

I told her that this incident would be reviewed by the Davis County Attorney's Office and most likely declined for prosecution, because we had no disclosure from the alleged victim, no physical evidence, and no confession from the suspect. I told her that Janell or I would contact her after this incident was reviewed. I then hung up the phone and had no further contact with her that day.

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ADDITIONAL INFORMATION:

This incident will remain active pending a review with the Davis County Attorney's Office. At the time of this report I had no further information and took no further action.

EOB/CAJ

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Detective C. Jones
Date: 02/23/12
Incident# 12-01466

SUPPLEMENTAL REPORT #9

On 02/21/12 I spoke with Janell Pugh about this investigation. She advised me that Teri had contacted the Division of Child and Family Services (DCFS), Central Intake and reported that her daughter, Riley, had come back from visitation with Greg and her vagina was red. We discussed this with the Davis County Attorney's Office (DCAO) and determined that because Riley had already been interviewed twice we were not going to continue to interview her because it would appear we were interviewing Riley until we got a disclosure. It was decided that Teri should have the injuries documented by Karen Stilling at the Davis County, Children's Justice Center (CJC).

We also spoke with DCAO about the information we had obtained since we initially screened this case. DCAO advised that they would not be pursuing charges because of a lack of evidence. DCAO requested that all the information from this investigation be sent to their office for review.

Janell stated that she would pass this information along to Teri and recommend that she have the redness documented by a doctor in the future if it continues to occur.

This incident will remain active pending charges. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 02/27/12
Incident# 12-01466

SUPPLEMENTAL REPORT #10

On 02/27/12 I spoke with Janell Pugh about this incident. She advised me that she had spoken with Teri Smith on 02/24/12 about documenting the injuries to Riley by taking her to the Davis County, Children's Justice Center (CJC) and having her seen by Karen Stilling.

Janell reported that during her conversations with Teri the previous week Teri again mentioned that Karen told her that she would have her arrested if she came back. Knowing that these comments were not true, Janell confront Teri about these accusations against Karen. Janell stated that she told Teri that she knew Karen had not said anything along those lines to her about Riley. She stated that Karen told her that if she continually examined Riley it would be like she was abusing her. Teri admitted that what she said about Karen was not true. Teri stated that she didn't want to go to Karen, because she had not done anything to help her. Janell asked Teri what it was that Karen hadn't done to help her and Teri had no reply. Teri also mentioned that she had taken Riley to see her pediatrician, who also stated there was nothing observed out of the normal. Teri again asked Janell to interview Riley, which she declined.

Janell stated that she provided Teri with Karen's phone number to call and schedule an appointment. It was later confirmed that Teri never called to schedule that appointment.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 03/20/12
Incident# 12-01466

SUPPLEMENTAL REPORT #11

On 03/20/12 I was contacted by Janell Pugh, who reported that another allegation had been reported to Central Intake between Riley and Greg.

Janell stated that during a therapy session with Rebecca Burgert, she asked Riley what's okay to put on our mouths. Rebecca told the child that its not okay to put a penis in your mouth. Riley was also told that its not okay to drink pee. Riley allegedly told Rebecca that she has tasted what comes out of a penis.

Janell reported that she confirmed with the therapist that these statements were made, but it was not because Riley had brought them up during their session. Rebecca just asked Riley about putting penis in her mouth and what came out of penis.

After talking with Janell about this case, she advised me that those allegations were not accepted by the Division of Child and Family Service (DCFS), because of the current investigation.

It should also be mentioned that I received another e-mail from Jan Houskeeper. That e-mail was sent on 03/17/12 at 1646 hours. In that message she describes that Greg and Teri had a court appearance on 03/15/12. During that hearing Greg was ordered to have a Psycho-Sexual Evaluation. She also mentioned that the therapist forgot to testify to the information that was obtained from the above mentioned CANR. A copy of that e-mail will be attached to this report.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 04/02/12
Incident# 12-01466

SUPPLEMENTAL REPORT #12

On 04/02/12 I received information that Teri had once again attempted to have Riley examined at Primary Children's Medical Center (PCMC). A Child Abuse Neglect Report (CANR) was generated by the Division of Child and Family Service (DCFS). This information was received by DCFS Central Intake on 03/28/12.

In that CANR it reported that Teri had previously scheduled three appointments at PCMC and she was attempting to schedule a fourth. Teri reported that Riley had vaginal bleeding the previous night, but did not see anything upon inspection nor was there any blood in Riley's underwear. Teri also reported concerns about oral sex as well because Riley had non descriptive small cuts around her mouth, but no disclosure of oral sex.

I do not believe that an exam was conducted at PCMC that night and Teri did not call to report anything to me about these allegations. This incident will remain active pending further investigation.

EOR/CAJ

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Detective C. Jones
Date: 04/18/12
Incident# 12-01466
Related Incident# 12-06754

SUPPLEMENTAL REPORT #13

On 04/15/12 at approximately 2030 hours, I was reviewing the call screen on my laptop computer and observed a sex offense call (12-06754) at 2741 North 1825 East. I recognized this address as being Greg Smith's address.

As I read through the notes I observed that Teri was the complainant reporting that when Riley returned from visitation that night she was showered and had redness to her genital area. Because I had an active investigation I contacted Officer Himle by computer and requested that he contact me prior to calling Teri.

I spoke with Officer Himle and advised him of my current investigation involving Riley and Greg. I informed Officer Himle to have Teri contact the Davis County Children's Justice Center (CJC) the following morning and schedule an appointment to see Karen Stilling. I stated that this procedure is what has been recommended by the Davis County Attorney's Office (DCAO) in regard to Teri reporting more sex abuse involving Riley. I also requested that he collect the basic information from Teri and refer the incident to me for investigation.

On 04/16/12 at approximately 0700 hours, I received Officer Himle's report header form and summary of the allegations against Greg. After receiving that information I contact the CJC and left them a message informing them that Teri should be calling them to schedule an exam to document any injuries.

After leaving a message with the CJC, I contacted Mindy Sneddon, Division of Child and Family Services (DCFS), Child Protective Service (CPS). Mindy had been assigned the case, because Janell was out of town that week. I informed her that it had been recommended that we not interview Riley after the two attempts that we had in 01/2012. I told Mindy that I would confirm with DCAO to ensure they did not want to have Riley interviewed. I told her that I would call her after I had spoken with DCAO.

Later that morning I spoke with DCAO and advised them of the newest allegations Teri had made against Greg. I told DCAO that Teri was advised to schedule an appointment with the CJC for an examination. I also advised them that I still did not think it was a good idea for us to conduct another interview with Riley, because I had concerns that she may have been coach what to say at this point. DCAO stated that they agreed and not to interview Riley.

After speaking with DCAO, I contacted Mindy Sneddon and informed her that we would not be conducting an interview with Riley in regard to incident 12-06754. I told her that my previous incident was still active and everything would be documented under 12-01466.

Later that afternoon I received a phone call from Karen Stilling at the CJC informing me that Teri had scheduled an appointment with her and she had spoken with Teri at the CJC. Karen stated that Teri told her of some concerning things that had occurred since the last time she had seen Riley. She also told me that

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Teri had admitted to her that she was inspecting Riley's vagina when she returned from visitation with Greg. Teri confirmed that she was looking on the outside as well as inside of her vagina for signs of redness. Karen stated that she did not exam Riley that day. Karen advised me that she would get me a copy of her report as soon as it was completed.

On 04/18/12, I again discussed this incident with DCAO. Karen was present during that conversation. As we talked about this incident, I learned that the information Teri had provided to Karen on the previous Monday was all information Janell and I had already known about. Karen informed us of the information about the rash on Riley's genitals and Teri's visit to the Dermatologist and what was recommended by that Doctor. This information was also known from the onset of this investigation. Karen stated that she would contact Dr. Checketts and talk with him about his observations of Riley when he examined her rash.

Later that day Karen contacted me by phone and advised me that she had spoken with Dr. Checketts by phone. Karen reported that Dr. Checketts had never told Teri that the rash was due to rubbing, but may be an irritant rash. He also mentioned that the rash he saw was on the cheeky fleshy part of the buttocks and her vagina and anus were free of any rash or redness.

Karen also informed me that she had spoken with Teri about this information as well and confronted her about the twisting of statements to make them appear in her favor. Karen stated that Teri did not have much of a response. She told Teri that she did not feel that it was in the best interest of Riley to have a examination or swabs taken at that time.

After we had reviewed this incident earlier that day with DCAO it was determined the Child Protective Services (CPS) should evaluate all of the information that has been collected in this incident and see if it would be in the best interest of the children to have them removed from Teri's care. CPS stated they would review the incident and make that determination.

This incident will remain active to see if Teri reports another sex abuse incident when Riley and Ryan return from visitation on 04/29/12. The information that was obtained by Officer Himle will be combined with this incident. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 04/18/12
Incident# 12-01466

SUPPLEMENTAL REPORT #14

On 04/18/12 I noticed I had an e-mail from Officer Himle in regard to incident 12-06754, which is related to this incident. Officer Himle advised that he had contact with Teri Smith on the evening of 04/17/12 and was advised by Teri that her mother had purchased some semen test kits from the internet.

Teri reported that they tested Riley's clothing and it came back negative. They also tested Riley's underwear she had been wearing when she visited Greg. That test came back negative as well.

Teri then advised Officer Himle that they decided to test Riley's fecal matter, because she had defecated in her underwear. Teri reported that the test came back positive. She also reported that they tested her son's fecal matter and it came back as negative. Teri inquired if we wanted to come collect the test to use against Greg. Officer Himle determined that the test would not be collected after consulting with the State Crime Lab.

During Officer Himle's conversation with Teri, he asked if she had taken Riley to the CJC for an examination. Teri stated that she did but Karen told her that they were not going to do an exam because Riley's hymen was still intact. I confirmed later that this statement was not true. Karen stated that she never examined Riley to make that determination and never told Teri anything about Riley's hymen.

For more details on Officer Himle's conversation with Teri please review his supplemental report under incident# 12-06754.

On 04/18/12 I contacted Greg Smith by phone and advised him that Teri had filed another allegation of sex abuse against him. I asked him if he and his attorney would like to sit down and talk about this incident or make a statement.

Greg advised me that he would talk to his attorney and get back with me. Greg then stated he did not know what was going on with Teri. He felt that she was "out of her damn mind." He stated that the allegations were not true. I told him to talk with his attorney and I would call and talk with him as well. Greg then provided me with the contact information for his attorney, Daniel Drage.

After talking with Greg I called Daniel's office and left a message for him to call me about this incident.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 04/19/12
Incident#: 12-01466

SUPPLEMENTAL REPORT #15

On 04/18/12 at approximately 1645 hours, I received information from the Director of the Weber/Morgan, Children's Justice Center (CJC) that Teri Smith had called to reported that her daughter had been sexually abused and needed to be interviewed.

I learned that the Director advised her that because the crime allegedly occurred in Davis County she needed to go to the Davis County CJC. As he spoke with her he learned that Teri's daughter, Riley, had already been interviewed twice and he advised Teri that he was not going to have anyone interview Riley at his facility.

After learning of this information, I contacted the Director at the Davis County CJC and advised her of the situation. I requested that she send an e-mail to the other CJC Directors in the area and advise them of the situation with Teri, apparently shopping around at other CJC's to get what she wanted. That e-mail was sent to the Director's in Cache, Weber/Morgan, Salt Lake, Utah, and Tooele County's.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 04/30/12
Incident# 12-01466

SUPPLEMENTAL REPORT #16

On 04/30/12 at approximately 0800 hours, I received a Child Abuse Neglect Report (CANR) from the Division of Child and Family Services (DCFS). In that CANR it indicated that Teri Smith had taken her child, Riley Smith, to the Emergency Room at Ogden Regional Medical Center, (ORMC).

The CANR stated that Riley had just returned from visitation with her father, Greg, and Teri was concerned that she was sexually abused. The Doctor noticed that the pelvic area was red but there is no indication that there was penetration but perhaps fondling.

After reading that CANR, I attempted contact with Mindy Sneddon, Child Protective Service (CPS), to discuss getting the medical records from ORMC in regard to the visit on 04/29/12. I was unable to speak with Mindy, but I left her a voice message.

When I was unable to speak with Mindy, I contacted Janell Pugh, CPS, and requested her assistance. I asked her if she could send me an e-mail with all of the CANR's that had been generated in regard to Teri, Riley, and Greg Smith. As Janell researched the CANR's she advised me that including her investigation as well as Mindy's current infestation there had been a total of eleven referrals to DCFS from 11/2011 to 04/29/12. Janell stated that some of those CANR's were unaccepted or documented as additional information to current investigations. Janell e-mailed those CANR's to me later that day. Copies of those CANR's will be attached to this report.

After speaking with Janell, I contacted Karen Stilling at the Davis County, CJC. I requested that she forward copies of her reports to me from the examinations she had conducted or had scheduled with Riley Smith. Later that day I received those copies and they will be attached to this report.

This incident will remain active pending further investigation. At the time of this report I had no further information and took no further action.

EOR/CAJ

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Detective C. Jones
Date: 05/02/12
Incident# 12-01466

SUPPLEMENTAL REPORT #17

On 05/02/12 at approximately 0830 hours, I discussed this incident with the Davis County Attorney's Office (DCAO). I provided them with the information that had been collected in the last two weeks. I advised them that I would be sending a complaint questionnaire to them to review this incident. I also informed DCAO that I would be speaking with Greg's attorney, Daniel Drage. DCAO also advised me that they too would contact Daniel Drage and talk with him about this incident.

After my meeting with DCAO, I contacted Mindy Sneddon, Child Protective Services (CPS), to talk with her about obtaining the medical records from Ogden Regional Medical Center (ORMC). As I spoke with Mindy that day she advised me that she had spoken with her attorney's who requested that Riley be evaluated by a counselor at the Utah County Children's Justice Center (CJC). I informed Mindy that if Riley disclosed any type of abuse by her father, I did not feel it would be useful in court. I told her that with all of the lies that we had caught Teri in and the fact that there was a strong possibility Riley has been coached on what to say, I didn't think we could use a disclosure in court at that point. Mindy stated that she understood, but was advised to offer the five week session to Teri. I told Mindy that I would still submit my complaint questionnaire to DCAO and send her a copy of my reports in regard to this incident. I also advised Mindy that I would discuss the counseling sessions with DCAO.

Later that day I contacted Daniel Drage by phone and advised him that Teri Smith had made another allegation against his client, Greg Smith. I informed Daniel that I would be submitting my information to DCAO and they would review it for charges. I told him that I would contact him as soon as I heard anything from DCAO.

A complaint questionnaire was completed requesting a summons be issued for Greg Smith for one count of Felony-1, Aggravated Sexual Abuse of a Child. A copy of that form will be attached to this report. I will deliver this report and all information obtained to DCAO for their review. This incident will remain active pending charges. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 06/05/12
Incident# 12-01466

SUPPLEMENTAL REPORT #18

On 06/05/12 at approximately 0800 hours, I received a declined prosecution statement from the Davis County Attorney's Office (DCAO) in regard to this incident.

In that statement DCAO stated that the reason for the declination was because of evidentiary concerns. The alleged victim in this incident did not disclose any type of abuse during the forensic interview or the medical examination and there was no other evidence collected that would support the allegations.

A copy of that statement will be attached to this report. This incident will be closed with an exceptional clearance of prosecution declined. At the time of this report I had no further information and took no further action.

EOR/CAJ

Exhibit D

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14:14

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Incident Number: 12-06754

Addr: 2741 N 1825 E Area: 14 14
City: LAYTON St: UT Zip: 84041 Contact: smith, terri

Offense(s)

SEXUAL ABUSE OF A CHILD

Responding Officers: HIMLE, D L31
Rspnsbl Officer: HIMLE, D Agency: LPD
Last RadLog: **:***:*** **/**/**
Clearance: CLOSED

When Reported: 20:07:38 04/15/12 Disposition: EXCEPTION/PROSECUTION DECLI

Occurrd between: 20:05:29 04/15/12
and: 20:05:29 04/15/12

INVOLVEMENTS:

Date	Description	Relationship
11/30/12	SEX OFFENSE 12-01466	RELATED
04/20/12	[No description]	PENDING
09/24/12	[No description]	REPORT RELEASED
04/16/12	SMITH, GREGORY THOMAS	SUSPECT
04/16/12	SMITH, TERI ANNE	COMPLAINANT
04/16/12	SMITH, LARRY THOMAS	OTHER
04/16/12	SMITH, RILEY	JUV VICTIM
04/15/12	20:07:38 04/15/12 SEX OFFENSE	Initiating Call

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Incident Summary

Sexual abuse of a child

Teri Smith reported her daughter, Riley Smith, came home after a visit with her father, Gregory Smith (), with a swollen vaginal area. Teri described the area as pink on the outside and red on the inside. Teri stated Riley told her that Riley's mouth hurt because Gregory puts his fingers inside her mouth. Teri stated there was no observe injuries in the mouth at this time. Teri stated Riley would not tell her about either the redness in her vaginal area or the incident with her mouth hurting. I contacted Karen Stillings, with CJC, to inform her of the case. Karen stated based on the information I gave her and the past cases with Riley being unfounded at this time, to have Riley come in on 04/16/12 for an examination. I will forward this case to detectives for action. This case will remain active. I took no further action. EOR//DDH

OFFICER: D HIMLE
INCIDENT: 12-06754
DATE: 04/15/12

NARRATIVE REPORT

On 04/15/12 at approximately 2040 hours, I attempted contact with Teri Smith () by phone in regards to a sexual offense case against her daughter, Riley Smith (), who was assaulted by her father, Gregory Smith () on 11/22/75).

Teri did not answer the phone and I left a message for her to call the police department back. I left the case open due to the nature of the call.

At approximately 2103 hours, I contacted Teri by phone after she called Dispatch stating she was now available.

Prior to calling Teri again, I contacted Detective Jones, who stated he had multiple cases with Teri and Riley, and as of now all have been unfounded because of lack of evidence. Detective Jones stated if it was a medical emergency to have Teri take Riley to the emergency room. Detective Jones stated if it was not an emergency, to have Teri set up an appointment with Karen Stilling at the CJC center.

I asked Teri to explain what had occurred. Teri stated her daughter, Riley, and son, Ryan Smith (), had come home from a visit from their father's house, Gregory, on today's date. Teri stated their visit was from Friday, April 13th, at approximately 1700 hours, to today's date at 1900 hours. Teri stated she noticed Riley's hair was wet and asked Riley if she had taken a shower. Teri stated before Riley could answer, Larry Smith (), their grandfather, stated the kids were outside playing and got dirty so Riley took a shower.

Teri stated she noticed her two-year-old son did not take a shower and he usually plays in the dirt.

Teri stated after Larry had left, Riley stated she was not playing outside.

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and her dad gave her a shower. Teri stated because of other incidents that have been reported prior, Gregory's mother usually gives the kids showers and Gregory does not.

Teri stated Riley told her that her mouth hurt. Teri stated when she asked Riley why her mouth hurt, Riley told her while Gregory and her were in bed, her dad put his fingers in her mouth. Teri stated she did not observe any obvious injuries at this time.

Teri stated she then also looked at Riley's vaginal area to see if she could see anything because of the fact that she had come home after taking a shower and the prior incidents. Teri stated that she observed the outside to be swollen and pink. Teri stated the inside was red.

Teri stated Riley also had a scratch on her right hip. Teri stated Riley told her she does not know how it happened. Teri stated she observed a bruise on Riley's left hip. Teri stated Riley told her she ran into the wall, which caused the bruise on the left hip.

I asked Teri if Riley had ever told her what had happened with the redness in her vaginal area. Teri stated she asked Riley, but Riley just zones out and does not answer.

Teri stated Riley came up to her a couple weeks ago, on approximately 04/04/12, and stated, "Why do I bleed from here?" while having her finger in her vagina. Teri stated when she asked how she knows she bleeds from that area, Teri stated Riley zoned out again and would not answer.

I advised Teri I would call her back after talking to Karen Stillings about an examination.

I contacted Karen Stilling at approximately 2211 hours and informed her of all the information. Karen stated, based on previous encounters with Teri and Riley, she felt comfortable having an appointment on tomorrow's date of 04/16/12 at approximately 1430 hours for Riley to come in. Karen stated Teri should call her victim's advocate down at CJC, who was Tanya, and gave me the number to give to Teri.

I contacted Teri back and told her to contact Tanya after 0900 hours on tomorrow's date and gave her all the information. I informed Teri at this time, unless it was a medical emergency, Karen felt comfortable with doing the examination on tomorrow's date. Teri stated she would contact Tanya in the morning to set up the exact time.

I then contacted DCFS and talked to Stephanie at approximately 2230 hours and gave them all the information. Stephanie stated she will just add it to the old case that appears to still be open, and if not, they will open a new case. At this time, I do not have the case number for either the old case or possible new case for DCFS.

I will forward this case over to detectives for action.

This case will remain active. I took no further action.

EOR/DDH

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I took no further action.

EOR//DDH

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Detective C. Jones
Date: 04/18/12
Incident# 12-06754
Related Incident# 12-01466

SUPPLEMENTAL REPORT #1

On 04/15/12 at approximately 2030 hours, I was reviewing the call screen on my laptop computer and observed a sex offense call (12-06754) at 2741 North 1825 East. I recognized this address as being Greg Smith's address.

As I read through the notes I observed that Teri was the complainant reporting that when Riley returned from visitation that night she was showered and had redness to her genital area. Because I had an active investigation I contacted Officer Himle by computer and requested that he contact me prior to calling Teri.

I spoke with Officer Himle and advised him of my current investigation involving Riley and Greg. I informed Officer Himle to have Teri contact the Davis County Children's Justice Center (CJC) the following morning and schedule an appointment to see Karen Stilling. I stated that this procedure is what has been recommended by the Davis County Attorney's Office (DCAO) in regard to Teri reporting more sex abuse involving Riley. I also requested that he collect the basic information from Teri and refer the incident to me for investigation.

On 04/16/12 at approximately 0700 hours, I received Officer Himle's report header form and summary of the allegations against Greg. After receiving that information I contact the CJC and left them a message informing them that Teri should be calling them to schedule an exam to document any injuries.

After leaving a message with the CJC, I contacted Mindy Sneddon, Division of Child and Family Services (DCFS), Child Protective Service (CPS). Mindy had been assigned the case, because Janell was out of town that week. I informed her that it had been recommended that we not interview Riley after the two attempts that we had in 01/2012. I told Mindy that I would confirm with DCAO to ensure they did not want to have Riley interviewed. I told her that I would call her after I had spoken with DCAO.

Later that morning I spoke with DCAO and advised them of the newest allegations Teri had made against Greg. I told DCAO that Teri was advised to schedule an appointment with the CJC for an examination. I also advised them that I still did not think it was a good idea for us to conduct another interview with Riley, because I had concerns that she may have been coach what to say at this point. DCAO stated that they agreed and not to interview Riley.

After speaking with DCAO, I contacted Mindy Sneddon and informed her that we would not be conducting an interview with Riley in regard to incident 12-06754. I told her that my previous incident was still active and everything would be documented under 12-01466.

Later that afternoon I received a phone call from Karen Stilling at the CJC informing me that Teri had scheduled an appointment with her and she had spoken with Teri at the CJC. Karen stated that Teri told her of some concerning things that had occurred since the last time she had seen Riley. She also told me that

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Teri had admitted to her that she was inspecting Riley's vagina when she returned from visitation with Greg. Teri confirmed that she was looking on the outside as well as inside of her vagina for signs of redness. Karen stated that she did not exam Riley that day. Karen advised me that she would get me a copy of her report as soon as it was completed.

On 04/18/12, I again discussed this incident with DCAO. Karen was present during that conversation. As we talked about this incident, I learned that the information Teri had provided to Karen on the previous Monday was all information Janell and I had already known about. Karen informed us of the information about the rash on Riley's genitals and Teri's visit to the Dermatologist and what was recommended by that Doctor. This information was also known from the onset of this investigation. Karen stated that she would contact Dr. Checketts and talk with him about his observations of Riley when he examined her rash.

Later that day Karen contacted me by phone and advised me that she had spoken with Dr. Checketts by phone. Karen reported that Dr. Checketts had never told Teri that the rash was due to rubbing, but may be an irritant rash. He also mentioned that the rash he saw was on the cheeky fleshy part of the buttocks and her vagina and anus were free of any rash or redness.

Karen also informed me that she had spoken with Teri about this information as well and confronted her about the twisting of statements to make them appear in her favor. Karen stated that Teri did not have much of a response. She told Teri that she did not feel that it was in the best interest of Riley to have a examination or swabs taken at that time.

After we had reviewed this incident earlier that day with DCAO, it was determined the Child Protective Services (CPS) should evaluate all of the information that has been collected in this incident and see if it would be in the best interest of the children to have them removed from Teri's care. CPS stated they would review the incident and make that determination.

This incident will remain active to see if Teri reports another sex abuse incident when Riley and Ryan return from visitation on 04/29/12. The information that was obtained by Officer Himle will be combined with this incident. At the time of this report I had no further information and took no further action.

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Detective C. Jones
Date: 06/05/12
Incident# 12-06754

SUPPLEMENTAL REPORT

The information in this incident was included in a supplemental report under incident# 12-01466. Both this incident and incident# 12-01466 were declined for prosecution by the Davis County Attorney's Office. That information was documented under incident# 12-01466.

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OFFICER: Himle DATE: 04/17/2012
INCIDENT NUMBER: 12-06754

SUPPLEMENTAL NARRATIVE

On 04/17/12, at approximately 1743 hours, I contacted Teri Smith (04/19/77), by phone by her request in regards to a follow up on this case.

Teri stated her mother had bought her some semen test kits from online for her to test her daughter, Riley Smith, clothes. Teri stated she tested Riley's pants that she was wearing when she returned home in that had a white substance on them. Teri stated the test came back negative for semen on the white substance.

Teri stated she also tested Riley's underwear she was wearing when she came home and those also came back as negative for semen.

Teri stated she decided to test Riley's fecal matter today because she had defecated in her underwear. Teri stated when she tested the fecal matter, the test came back as a positive for semen.

Teri stated she decided to test her son's fecal matter to see if there was a false positive and her son's fecal matter test came back as a negative.

I asked Teri what kind of test she was using. Teri stated the test kit was called "Check Mate" and her mother bought it for her online.

Teri asked if officers could use this test as evidence against her ex husband who she thinks is abusing Riley. I informed her I would call her back so I could find out the procedure for this type of matter.

I asked Teri if she took Riley to have an examination by Karen Stilling at the CJC. Teri stated she did take Riley but no examination was done because Karen stated since Riley's hymen was still intact, there was no evidence of a sexual abuse and no need to put Riley through the examination process.

Teri stated she asked Karen about possible anal penetration because Riley's anal area was red and sore. Teri stated Karen told her there is no way to prove anal penetration from an irregular bowel movement and the anal area will heal within twenty four hours of any tearing of that area.

I told Teri I would contact her back after I had an answer to her question.

After consulting with Sgt Petre, the State Crime Lab nor any other lab will collect fecal matter to test it for health reasons.

I attempted to contact Teri back to inform her of what I had learned but she did not answer the phone. At approximately 1850 hours, Teri contacted me back by phone. I informed her that officers could not collect the fecal matter but I would write a supplemental report to this case and forward the information to detectives.

I wrote an e-mail to Detective Walton, Detective Jones, and Sgt Davis informing them of what Teri was reporting. This information will be referred to detectives since this is an active case.

