2018

# State of Utah, Plaintiff and Appellee, v. Mark Boyer, Defendant/ Appellant. : Amicus Brief

Utah Court of Appeals

PUBLIC

No. 20170423-CA

IN THE
UTAH COURT OF APPEALS

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STATE OF UTAH,
*Plaintiff and Appellee*,
v.
MARK BOYER,
*Defendant and Appellant*.

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# BRIEF OF AMICUS CURIAE VICTIM V.M. IN SUPPORT OF APPELLEE STATE OF UTAH

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On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Mark Kouris, District Court No. 131902296

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Mark Boyer is incarcerated.

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## Current and Former Parties

**Appellant**

Mark Boyer
Represented by: Elizabeth Hunt

**Appellee**

State of Utah
Represented by: John J. Nielsen of the Utah Attorney General's Office

**Amicus Curiae**

Victim V.M.
Represented by: Troy Booher and Freyja Johnson of Zimmerman Booher

**Parties Below Not Parties to the Appeal**

Other Party - Brenda Hulme

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## Identification of Amicus Curiae and Statement of Interest in Issue Presented

Defendant sexually abused V.M. In 2016, a jury convicted Defendant of aggravated sexual abuse of a child, rape of a child, and sodomy on a child. Defendant now appeals those convictions.

Utah's Constitution recognizes a crime victim's interest in cases involving the prosecution of the perpetrator. *See* Utah Const. art. I, § 28. Here, V.M. has a significant interest in this appeal not only because she is the victim, but also because Defendant asks this court to reverse his conviction in part on grounds related to subpoenaing V.M.'s mental health records.

## Statement of the Issues

V.M. adopts the statement of issues presented and standards of review as well as the statement of the case and facts submitted by the State of Utah.

## Determinative Provisions

There are no determinative provisions or cases.

## Summary of the Argument

Defendant suggests, without proper briefing, that V.M. waived her privilege protecting her mental health records. But V.M. did not testify about what doctors told her or about her specific treatment. Instead, her testimony at trial referring to the counseling she received was general in nature and could not, as a matter of law, operate to waive her patient-physician privilege.

Defendant argues that his trial counsel provided ineffective assistance by failing to "investigate and advocate 14(b) issues" related to subpoenaing V.M.'s mental health records for in camera review. Defendant cannot meet the high burden to establish constitutionally deficient performance for many reasons, but the most basic one is this: the parties stipulated to Rule 14(b) subpoenas and the trial court reviewed thousands of pages of mental health records. After that review, the trial court determined that the records contained no exculpatory information. Therefore, not only was defense counsel's performance reasonable, but there could be no prejudice because the court reviewed the records and found nothing exculpatory.

Defendant similarly contends that he was entitled to post-conviction subpoenas to access all of V.M.'s mental health records. While the Utah Supreme Court has held that a trial court *may* grant such a subpoena, the Defendant had no right to the records. The trial court properly rejected Defendant's post-trial efforts.

Moreover, the issue of subpoenas for V.M.'s mental health records must be considered in light of her established constitutional and statutory right to be afforded greater protection and privacy and to have the judicial process be conducted in the least traumatic and intrusive manner possible.

This court should reject Defendant's arguments and uphold his conviction.

## Argument

V.M. will address two arguments in the opening brief. The first is that his counsel's performance was deficient for "failing to investigate by seeking 14(b) subpoenas" related to V.M.'s mental health records and that there "is a reasonable probability of a better result" had counsel obtained the subpoenas. (Op. Br. at 52, 56.) The second argument is that Defendant was entitled to post-conviction 14(b) subpoenas related to V.M.'s mental health records. (*Id*. at 59-62.)

Before addressing these arguments, V.M. will address Defendant's initial assertion that V.M. waived the privilege with regard to these records and that Defendant therefore did not need a subpoena to access them.

### 1. V.M. Did Not Waive Her Privilege

Rule 506(b) of the Utah Rules of Evidence provides as follows: "A patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing information that is communicated in confidence to a physician or mental health therapist for the purpose of diagnosing or treating the patient." Utah R. of Evid. 506(b). There is no dispute that V.M.'s

communications with her doctors were privileged. The issue is whether she waived that privilege.

Under Utah law, waiver of a privilege occurs when the person who holds a privilege "(1) voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or (2) fails to take reasonable precautions against inadvertent disclosure." Utah R. Evid. 510(a). Here, V.M. did not disclose any significant part of her communications with her doctor, so trial counsel was not constitutionally ineffective in failing to argue otherwise.

The Utah Supreme Court has long held that the privilege is not waived because a patient has described the nature and extent of injuries. *See Clawson v. Walgreen Drug Co.*, 162 P.2d 759, 763-64 (Utah 1945) (although the patient described the nature and extent of his injuries, he did not testify about communications or details of treatment, and therefore, did not waive the privilege). In the trial court, Defendant asserted that under *Clawson*, if a patient testifies that he received treatment, he "cannot claim [the] statutory medical privilege." (R. 887n.) But *Clawson* does not support that broad proposition.

In *Clawson*, the plaintiff sued Walgreen Drug after he sustained injuries on the sidewalk. At trial, he testified "concerning the nature and extent of his injuries." 162 P.2d at 763. Based on that testimony, defendant argued that plaintiff waived his medical privilege. *Id.* The Supreme Court disagreed. *Id.* at 63-64. It relied on *Dahlquist v. Denver & R. G. R. Co.*, 174 P. 833 (Utah 1918), and

reiterated that a patient can "testify generally concerning his physical condition, [and] describe the nature and extent of his injuries as he saw and felt them so long as he d[oes] not refer to what the doctor may have told him or did for him concerning his injuries." *Id.* at 763-74. Because Clawson "did not testify concerning anything which either Dr. Dumke or Dr. West told him nor did he give details concerning the mode of treatment," he "did not by his own testimony waive the privilege." *Id.* at 764. Nor did the testimony of others inadvertently waive the privilege for him. *Id.; see also, e.g., State v. Boyd*, 2001 UT 30, ¶ 46, 25 P.3d 985 (referring to safeguards of rule 412 and stating they are not "waived" by the testimony of another but "are for the benefit of the victim herself, in this case, S.B., and only she could have waived them").

Nothing about V.M.'s testimony waived her privilege. At trial, she disclosed that she had "emotional troubles," she "wanted to commit suicide," she had felt that way in the past couple of years and that after she disclosed the abuse to Defendant's wife, she "didn't want to live anymore," she tried to hurt herself, she tried to "end it all," and she was hospitalized. (R. 2329-31.) Those statements are general. In fact, when asked about treatment, V.M. made only passing references without disclosing details or privileged communications. She stated the following:

> Q [Mr. Fisher]. Did you ever end up being hospitalized for these things?
>
> A [V.M.]. Yep.

Q. Where at?

A. UNI.

Q. The psychiatric hospital at the University of Utah?

A. Yep.

Q. Do you remember how long you were up there?

A. About a week.

Q. In your mind, in your thoughts, were the things you were feeling at that time, like you didn't want to live any more, was that in any way connected to the things you've been telling us here, about here today?

A. Yes.

MR. FISHER: No more questions at this time, Your Honor.

(*Id*.)

In cross-examination, counsel stated the following:

Q. Let's talk about the time that you were hospitalized at UNI and as I understand it, your birthday is in February?

A. Yep.

Q. So you turned 17 in February?

A. Yep.

Q. Eighteen in 2017, right?

A. Yep.

Q. And so you're 17 now, how old were you when you were at UNI?

A. Sixteen, I think.

Q. So this was like last year, right?

A. Yeah, I go twice.

Q. So this is 2016 and that would have been 2015, sometime you were there, right?

A. Yep.

Q. And you talked about the things that were going on and this case as being part of the reason that you were there. I want to talk to you about the other things that were going on in your life, right? So let's back up in time. You never know your dad?

(R. 2335-36.)

Contrary to Defendant's suggestions, V.M. has never disclosed a significant part of her privileged communications. V.M. therefore did not waive her privilege.

**2. Defendant Received Effective Assistance of Counsel**

Defendant also asserts that his trial counsel was deficient in failing to investigate and forcefully seek 14(b) subpoenas prior to trial. (Op. Br. at 51-59.) Defendant's argument fails on both the facts and the law.

To succeed with a claim that trial counsel provided constitutionally ineffective assistance, Defendant must prove that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him—i.e., there exists a reasonable likelihood that, absent counsel's deficient performance, the result at trial would have been different. *Strickland v.*

*Washington*, 466 U.S. 668, 687, 697 (1984). Generalizations are insufficient to meet this standard: Defendant must demonstrate "*actual unreasonable representation and actual prejudice*." *State v. Tyler*, 850 P.2d 1250, 1258-59 (Utah 1993) (emphasis in original). The *Strickland* standard is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). Here, Defendant cannot satisfy either prong.

In addressing Defendant's ineffective assistance of counsel claim, several presumptions in favor of counsel's conduct and in favor of the jury verdict apply. Utah courts view the facts in the light most favorable to the verdict. *State v. Thornton*, 2017 UT 9, ¶ 5 n.1, 391 P.3d 1016. In addition, courts begin the ineffective assistance analysis with "a strong presumption that counsel was competent and effective." *State v. Arriaga*, 2012 UT App 295, ¶¶ 12,20-21, 288 P.3d 588 (concluding counsel's failure to address the victim's allegedly inconsistent statements constituted strategy). Trial counsel has "wide latitude in making tactical decisions" and Utah courts "will not question such decisions unless there is no reasonable basis supporting them." *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996). And finally, if counsel has made a strategic choice about an issue, that choice is "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91.

Defendant articulates his ineffective assistance claim as follows:

> Counsel were objectively deficient in failing to investigate the mental health issues with appropriate experts and seek 14(b) subpoenas. Failure to investigate is legally not reasonably strategic. There is a reasonable probability of a better result had they done so, as the

> records, detailed above, were exculpatory to Boyer." (Op. Br. at 56) (internal citation omitted).

Defendant's assertions do not satisfy the exacting standard *Strickland* requires for several reasons, but foremost among them is that the parties stipulated to, and the court *in fact issued*, subpoenas for V.M.'s mental health records for in camera review. The trial court reviewed "25 records ranging in size from 1 to more than 250 pages" and found "no information of exculpative. . .value." (R.303.) Counsel cannot be ineffective in failing to ask the trial court to do so something that the trial court, in fact, did.

These facts undermine Defendant's arguments under both prongs of the *Strickland* analysis. His counsel did not fail to investigate, but instead reached a stipulated agreement with the State to allow for in camera review of thousands of pages of documents, which is precisely the approach the Utah Supreme Court has approved. *State v. Worthen*, 2009 UT 79, ¶ 19, 222 P.3d 1144. Counsel's performance was, therefore, objectively reasonable. More to the point, Defendant cannot show prejudice where the trial court reviewed thousands of pages and found nothing exculpatory. (R.303.) Had his counsel sought further review of non-exculpatory records, the motion would likely have been denied, but even if granted, another review of the records cannot be said to have likely led to a different outcome.

To get around *Strickland*'s requirement that Defendant demonstrate prejudice, he faults defense counsel for failing to file a "memorandum explaining

defense or prosecution theories, to aid the court's recognition of exculpatory or inculpatory evidence. This was objectively deficient, as the court had no way of knowing what Boyer's defenses or the prosecution's theories were, or how the diagnoses bore on their claims and defenses." (Op. Br. at 56-57.) Defendant undercuts this argument, however, because he notes that "[t]his case hinged on the credibility of VM." (*Id*. at 53.) That is true of most sexual assault cases, and it required no special memorandum for the trial court to understand that any records undermining V.M.'s credibility would be exculpatory. Moreover, Defendant filed a motion during the second trial for production of the mental health records, and the court denied the motion, stating, "[T]here was nothing exculpatory in those records at all." (R.2333.) At that time, the court had presided over one trial and so was privy to the State's and defense's theories, but still determined that the records did not contain exculpatory information. Defendant, therefore, cannot show that a likely different result had counsel provided a memorandum to the court when it reviewed the subpoenaed documents.

Defendant has failed to satisfy either prong of *Strickland* in contending that his counsel provided ineffective assistance. His effort to set aside his conviction on these grounds should be rejected.

### 3. Defendant Was Not Entitled to Discovery and In Camera Review of V.M.'s Privileged Records

Defendant argued below that he was entitled to discover V.M.'s privileged records—including her privileged mental health records, DCFS records, private

school records, and cell phone [redacted] (R.3498.) According to Defendant, he was entitled to discover privileged records for the following reasons:

- his attorney was required to have a [redacted] (R.3948);
- jurors could not properly analyze the case without a [redacted] (*id*. 3490);
- [redacted] (R.3514-15);
- it is important [redacted] (R.3515);
- it is important [redacted] (*id.*);
- it is important [redacted] (*id.*);
- [redacted] (R.3517.)

Defendant's arguments go too far. He requested discovery of V.M.'s privileged records for a full-scale fishing expedition. The trial court correctly rejected his efforts.

### 3.1 Defendant Was Not Entitled to In-Camera Review of V.M.'s Privileged Records Under Rule 506

Under the law, a defendant has no constitutional right to conduct his own search of a victim's mental health records. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). Rule 506 is in accord. It provides that a victim's mental health records are privileged and not discoverable unless the defendant is able to establish an exception to the rule. The exception to the rule states the following:

> No privilege exists under paragraph (b) in the following circumstances:
>
> (1) Condition as Element of Claim or Defense. For communications relevant to an issue of the physical, mental, or emotional condition of the patient:
>
> (A) in any proceeding in which that condition is an element of any claim or defense. . .

Utah R. Evid. 506(d).

The Utah Supreme Court has held that before a victim's mental health records may be in issue for purposes of in camera review of privileged records, the defense must satisfy a three-step test. The defendant must show in pretrial proceedings that (1) "the patient suffers from a physical, mental, or emotional condition" that "significantly affects" her perceptions in a way that makes her testimony unreliable; (2) the victim's condition is an element of the claim or defense; and (3) to a reasonable certainty, the records sought contain exculpatory evidence. *State v. J.A.L.*, 2011 UT 27, ¶ 48, 262 P.3d 1 (emphasis omitted); *Worthen*, 2009 UT 79, ¶ 21.

Moreover, because Defendant made the request in post-trial proceedings, he was required to satisfy a "high bar," something he was, and remains, unable to do. *State v. Barela*, 2015 UT 22, ¶ 49, 349 P.3d 676; *see also State v. King*, 2012 UT App 203, ¶ 24, 283 P.3d 980 (concluding counsel was not ineffective in failing to discover privileged records where information purportedly contained in the records would have been cumulative of other impeachment evidence).

#### 3.1.1 Defendant's Argument Fails Under the First Step

First, under rule 506, the defendant must show that the victim suffers from "a physical, mental, or emotional condition as opposed to mental or emotional problems that do not rise to the level of a condition." *J.A.L.*, 2011 UT 27, ¶ 48 (emphasis omitted). The condition at issue must be a particular condition and it must be a persistent condition, "not transitory or ephemeral." *Worthen*, 2009 UT 79, ¶ 21. It is a condition or "a state that persists over time and significantly affects a person's perceptions, behavior, or decision making in a way that is relevant to the reliability of the person's testimony." *Id.* Inconsistencies in statements do not constitute a "condition." *McCloud v. State*, 2013 UT App 219, ¶ 12, 310 P.3d 767.

In this case, nothing suggests that V.M. suffered a condition that persisted and would affect her perceptions or behavior at trial. Instead, the facts support that V.M. was admitted for treatment and she received treatment. (R.2329-31.)

Because she received treatment, she suffered no condition for purposes of discovery under rule 506.

Defendant made little effort to identify *a condition* for purposes of the exception under rule 506. Instead, he offered to the trial court a variety of possible conditions that his own expert admitted may be fleeting. That is insufficient. Specifically, Defendant complained that [redacted] (R.3496-97, 3517-18.) But even if Defendant could establish that V.M. suffered any of those conditions, that showing would not be sufficient to support an exception under rule 506. In fact, Defendant's own expert, Dr. Davies, admitted that those "disorders" may be "acute" and may respond to treatment, therapy, or medication. (R.887AA.) [redacted] (R.3862.) Those assertions turn rule 506 on its head. The rule does not allow a defendant to obtain in camera review of a victim's records to discover her history or some potential condition. It requires just the opposite: a defendant must show that the victim "was

suffering from a[] type of disorder or mental illness during trial." *State v. Wengreen*, 2007 UT App 264, ¶ 17, 167 P.3d 516.

In short, Defendant failed to establish that V.M. was suffering at trial from a physical, mental, or emotional condition that affected her testimony. Defendant is not entitled to in camera review of V.M.'s privileged records in the hopes of finding something that will suit his purposes.

#### 3.1.2 Defendant's Argument Fails under the Second Step

Under the second step in the analysis for rule 506, a defendant must show that the victim's condition is an element of the claim or defense. *J.A.L*, 2011 UT 27, ¶ 48.

Defendant identified no documented cognitive condition supporting a propensity to misinterpret or misrepresent the facts. Rather, he offered the trial court a scattershot approach hoping that something would stick. Instead of identifying an element of a claim or a defense, Defendant argued that he is entitled to in camera review of V.M.'s privileged records because [redacted]

(R.3490-91; R.3498; R.3514-15; R.3517.) Notably, the strict standard for application

of the exception cannot rely on such general and overarching assertions without more. If a request for privileged records is general and is a search for impeachment materials—as the request here was—"a court *ought not to grant in camera review*." *State v. Blake*, 2002 UT 113, ¶ 22, 63 P.3d 56 (emphasis added). Defendant has failed to satisfy the second step.

#### 3.1.3 Defendant's Argument Fails Under the Third Step

Under the third step for rule 506, Defendant must "show to a reasonable certainty that the records sought contain exculpatory evidence." *Worthen*, 2009 UT 79, ¶ 15; *J.A.L.*, 2011 UT 27, ¶ 48. The phrase, "reasonable certainty" requires the defendant to show "that the sought-after records actually contain 'exculpatory evidence. . .which would be favorable to his defense.'" *Blake*, 2002 UT 113, ¶ 19 (quoting *State v. Cardall*, 1999 UT 51, ¶ 30, 982 P.2d 79). "This is a stringent test, necessarily requiring some type of *extrinsic indication that the evidence within the records exists and will, in fact, be exculpatory*. The difficulty in meeting this test is deliberate and prudent in light of the sensitivity of these types of records and the worsening of under-reporting problems in the absence of a strong privilege." *Id.* (emphasis added) (footnoted omitted). The standard "lies on the more stringent side of 'more likely than not.'" *Id.* ¶ 20. "[S]pecific facts must be alleged." *Id.* ¶ 22.

For example, a defendant should reference records of specific relevant counseling sessions or "independent allegations made by others *that a victim has*

*recanted*." *Id.* (emphasis added). This example is "of the type and quality of proof needed to overcome the high *Cardall* hurdle." *Id.* (referencing *Cardall*, 1999 UT 51, ¶ 30); *see also Barela*, 2015 UT 22, ¶ 49 ("[A] defendant must show to a 'reasonable certainty,' that 'the records *actually contain exculpatory evidence favorable to his defense*'") (emphasis added) (ellipses omitted) (quoting *Worthen*, 2009 UT 79, ¶ 38).

In *McCloud*, the defendant failed to make an adequate showing. 2013 UT App 219, ¶ 19. He presented billing records showing the specific times that victim had met with various care providers, diary entries from victim's grandmother stating that victim told grandmother that defendant had inappropriately touched her, and victim's own statements from the preliminary hearing and trial indicating she had revealed the abuse to several care providers. *Id.* ¶ 15. The court concluded that defendant's evidence showed that victim's records existed and would contain statements pertaining to the abuse, but that evidence was not enough to show that the records contained "exculpatory evidence." *Id*. ¶ 16.

Defendant has failed to allege facts to support that the privileged records contain exculpatory information. To the contrary, his own expert—Dr. Davies—stated [redacted] (R.3862.) Far from establishing that

"the records *actually contain exculpatory evidence favorable to his defense*," *Barela*, 2015 UT 22, ¶ 49 (emphasis added) (ellipses omitted), Dr. Davies admits the records may [redacted]

Second, while Defendant asserts V.M. has made inconsistent statements, that assertion is incorrect and irrelevant to a review of her mental health records. Perceived inconsistencies do not meet the high bar and are not a sufficient showing for in camera review of privileged records. Indeed, this court has ruled that a general request for privileged records—as Defendant has made here—in order to search for impeachment materials should not be permitted. *Blake*, 2002 UT 113, ¶ 22. In addition, V.M.'s statements that Defendant abused her have been clear. Defendant can point to no instance where V.M. recanted or was even equivocal that the abuse happened. To the extent minor details about the abuse from several years ago are inconsistent, those inconsistencies are easily explained and do not support with reasonable certainty that exculpatory evidence exists or that Defendant is entitled to review privileged records. To the contrary, with respect to the relevant facts, V.M. has been consistent.

Moreover, trial counsel had other means by which he could and did establish perceived inconsistencies without resorting to discovery of privileged

records. (R.3485 [redacted].)

Third, Defendant asserted below that [redacted] (R.3497.) Defendant's assertion is speculative. It is also spurious and contrary to the law. V.M. has every right to protect her privileged records and Defendant has no basis for drawing a negative inference just because she has taken steps to do so. Indeed, it would be offensive to allow a convicted defendant to inspect the private records of the person he abused just because she took measures to protect herself.

Fourth, Defendant requested in camera review of *all* mental health records, even though the trial court previously reviewed records and determined they contained no useful or exculpatory information. While those records are expressly not discoverable, Defendant made no effort to carve them out of his discovery request, let alone specify which records, if any, purportedly contain discoverable and exculpatory evidence. *See Barela*, 2015 UT 22, ¶ 49 ("[t]he request *must 'identify the records sought with particularity and be reasonably limited as to subject matter'*" (emphasis added) (quoting Utah R. Crim. P. 14(b)(2))). Instead,

Defendant argued that he should be allowed to discover all of V.M.'s mental health records and then to identify how certain records are pertinent to his post-trial proceedings. But rule 506 does not allow a defendant to discover the records first and to establish with reasonable certainty their exculpatory relevance later. The deliberately strict standard requires the opposite.

### 3.2 Defendant Is Not Entitled to Post-Trial Discovery of V.M.'s Records

While Defendant has taken the position that he is entitled in post-trial proceedings to discover V.M.'s privileged records in an effort to reverse engineer the case for any scrap of information he may find, he is mistaken. *Wengreen*, 2007 UT App 264, ¶ 18 ("At best, Defendant is optimistic that the evidence he seeks would be favorable, but he fails to establish that fact in accordance with the reasonable certainty test"). In addition, his reliance on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), and *Barela*, 2015 UT 22, for post-trial discovery are misplaced.

In *Pennsylvania v. Ritchie*, the Court was concerned with the government's pre-trial obligation to disclose evidence favorable to the accused. 480 U.S. at 57-61. A state investigative agency relied on a statutory privilege to fail to disclose information. *Id.* at 43. The Court held that the agency must make the file available for in camera review to determine whether information is material to the defense. *Id.* at 58.

This case is distinguishable from *Pennsylvania v. Ritchie*. The records here do not involve a state agency investigation. They involve V.M.'s personal

treatment and are maintained by her providers. *See, e.g., Goldsmith v. State*, 651 A.2d 866, 872-73 (Md. 1995) (stating *Ritchie* addresses the prosecution's obligation to turn over exculpatory evidence and is distinguishable when the request involves a party's private records: "Neither due process, compulsory process nor the right to confront adverse witnesses establishes a pre-trial right of a defendant to discovery review of a potential witness's privileged psychotherapy records").

Next, in *Barela*, defendant was charged with and convicted of rape after victim reported that defendant had intercourse with her during a massage. 2015 UT 22, ¶¶ 4-10. While victim testified that she was alarmed by the incident, defendant asserted that victim was the instigator. *Id.* After conviction, defendant raised several issues, including a challenge to jury instructions. The court reversed the conviction due to the flawed instruction, making defendant eligible for a new trial. *Id.* ¶ 32; Utah R. App. P. 30(b). Although the holding returned the case to a pre-trial posture—where defendant would have the opportunity to make a timely request under rule 14(b) for discovery of privileged records—this court briefly addressed in dictum the defendant's post-trial request for issuance of a medical records subpoena. 2015 UT 22, ¶¶ 47-50.

The court stated that Utah Rule of Criminal Procedure 14(b) may support a post-trial subpoena request. *Id.* ¶ 49. The court also cautioned that while a district court "*may* permit a request later than thirty days before trial," *it is not required to do so* and its decision *not* to allow such discovery will be upheld on appeal. *Id.*

The court reiterated that a defendant must satisfy the stringent test for discovery of privileged information. *Id.* In addition, "to ensure that no privileged information is released that is unnecessary for discovering exculpatory information, the request *must 'identify the records sought with particularity and be reasonably limited as to subject matter*,'" *id.* (quoting Utah R. Crim. P. 14(b)(2)), something Defendant has wholly failed to do in this case with his broad request for all privileged materials.

Contrary to Defendant's assertions, *Barela* does not support a defendant's absolute right to discover privileged records in post-trial proceedings. It supports the opposite: defendant has no such right and is held to proof of exculpatory evidence before he may be allowed to discover privileged records. *Barela* does not support Defendant's requests for issuance of the subpoenas to [redacted] (R.3490, 3498.) Moreover, Defendant is incorrect when he asserts [redacted] (R.3491.) In this case, defense counsel had several means by which he could address stressors in V.M.'s life. As Defendant points out, jurors learned that [redacted]

[redacted] (R.3491-92; *see also* R.3485 [redacted].) That information allowed the defense to present information without delving into V.M.'s privileged records.

Where Defendant believes that V.M.'s mental health records contain information about those stressors, his argument does not support grounds for issuance of subpoenas because any such information would have been cumulative and unnecessary. *See King*, 2012 UT App 203, ¶ 24 (counsel's failure to retain mental health expert and to obtain mental health records was not ineffective where information would have been primarily cumulative of other impeachment evidence presented at trial). Because Defendant has not demonstrated here that privileged records actually contain exculpatory evidence favorable to his case, *Barela*, 2015 UT 22, ¶ 49, and because the information likely would be cumulative of information presented to the jury, Defendant's arguments fail.

**4. Victims Possess an Independent Constitutional and Statutory Protections Against Compelled Disclosure of Confidential Counseling Information**

In addition to the therapist-patient privilege protected by Rule 506, when the patient is a crime victim, Utah's Victims' Rights Amendment and the Rights of Crime Victims Act affords her greater protections. This is even truer when the

victim was a child or a victim of sexual assault. *See, e.g.*, Utah Code § 77-37-1(2) ("The Legislature finds it necessary to provide child victims and child witnesses with additional consideration and different treatment than that usually afforded adults."); *Blake*, 2002 UT 113, ¶ 15 ("Utah has enacted both statutes and rules of evidence designed specifically to protect the victims of sexual assault.").

V.M. has strong legal interests in the non-disclosure of her confidential mental health records. Further disclosure of any kind, even for in camera review, undermines her right to privacy, "[t]o be treated with fairness, respect, and dignity," Utah Const. art. I, § 28(1)(a), and her right to be treated with "additional consideration" because of her age at the time of the sexual abuse she endured. Utah Code Ann. § 77-37-1(2).

Crime victims have a privacy interest in the non-disclosure of their medical records. *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *State v. Gonzales*, 2005 UT 72, ¶ 41, 125 P.3d 878; *State v. Cramer*, 2002 UT 9, ¶ 22, 44 P.3d 690. Maintaining confidentiality of mental health and counseling records is necessary to ensure victim treatment and recovery. *Jaffe v. Redmond*, 518 U.S. 1, 10 (1996). In the context of sexual abuse, it is essential to protect the privacy interests of the victim because disclosure often causes retraumatization or revictimization. *See, e.g.*, *Wengreen*, 2007 UT App 264, ¶ 18.

In addition to the privacy interest at stake, V.M. has a right to be treated with "fairness, respect, and dignity, and to be free from harassment and abuse

throughout the criminal justice process." Utah Const. art. I, § 28(1)(a); *see also* Utah Code § 77-37-1(1). Courts have a further duty to ensure that child victims' "participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner." Utah Code § 77-37-1(2); *see also State v. Billsie*, 2006 UT 13, ¶ 13, 131 P.3d 239 ("It is the policy of this state that child victims and child witnesses are to be afforded extra consideration in our criminal trial process."). As noted above, disclosure of private counseling records often hinders recovery and leads to revictimization, thereby potentially violating V.M.'s right to be free from further abuse and the least traumatic criminal process. Utah Code §§ 77-37-4(1); § 77-39-2(1). Compelled disclosure also violates V.M.'s right to be treated with dignity, respect, and sensitivity. *See, e.g.*, *Jaffe*, 518 U.S. at 10 ("Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace."); *State v. Anderson*, 972 P.2d 86, 89 (Utah Ct. App. 1998) ("The purpose of the privilege is to encourage the patient to make a full and complete disclosure to a physician in order to receive effective medical treatment, free from the embarrassment and invasion of privacy that might result from the physician's disclosure of that information."). Given the intimate and personal nature of the therapy at issue here, disclosing V.M.'s mental health records for further review is highly intrusive. As a child victim of sexual assault, the Victims' Rights

Amendment and Rights of Crime Victims' Act provide V.M. with an especially strong set of legal interests in the non-disclosure of her confidential mental health records.

## Conclusion

V.M. did not waive the privilege with regards to her mental health records and Defendant has failed to demonstrate constitutionally ineffective assistance of counsel. In addition, the trial court correctly rejected Defendant's post-conviction motions seeking additional subpoenas for V.M.'s mental health records. V.M. respectfully requests that this court uphold Defendant's conviction and allow V.M. the opportunity to move forward with her life.

DATED this 10th day of September, 2018.

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## Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 5,922 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 10th day of September, 2018.

/s/ Troy L. Booher

**Certificate of Service**

This is to certify that on the 10th day of September, 2018, I caused two true and correct copies of the private and public versions of the Brief of Amicus Curiae Victim V.M. in Support of Appellee State of Utah to be served via first-class mail, postage prepaid, with a copy by email, on:

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