

Case No. 20180131-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

GILBERTO MARTINEZ,
Defendant/Appellant.

Brief of Appellant

An Appeal from a Judgment and Criminal Convictions for Two Counts of Sodomy on a Child (First Degree Felonies), Entered by the Fourth District Court, Utah County, Before the Honorable Darold McDade

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Oral Argument Requested

CURRENT AND FORMER PARTIES

- A. Parties and counsel before the Utah Supreme Court.
 - 1. Defendant/Appellant: Gilberto Martinez; counsel Aaron P. Dodd of Fillmore Spencer, LLC
 - 2. Plaintiff/Appellant: Utah Attorney General
- B. Parties below not parties in the appeal.
 - 1. There are no parties below not a party in the appellate proceeding.

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INTRODUCTION

Trial counsel did not allow the jury to know that during the five-day time period that AAO was allegedly sodomized and raped by Martinez, AAO's grandmother was in the small two-bedroom home the entire time. Counsel did not let the jury know that even though AAO said she yelled at Martinez to try to get Martinez to stop the abuse, a sound test of bedroom revealed that a person standing in the kitchen could easily hear an elevated conversation in the bedroom with the door closed. Counsel did not let the jury know that AAO's own maternal grandmother was ready and willing to testify that AAO was not alone with Martinez during this entire time period and that she never saw Martinez do anything inappropriate or act inappropriately with AAO.

The guilty verdicts were based on (1) the unchallenged testimony of AAO that Martinez sodomized her in the bedroom during a five-day period in September 2016; (2) the unchallenged testimony of Mariela Torres, AAO's mother, that AAO

had the symptoms of a sexually abused child; and (3) the testimony of a police officer who testified that Martinez changed his story when confronted with the abuse allegations.

While counsel cross-examined the State's witnesses, counsel failed to refute any of the State's evidence and he failed to impeach the witnesses' credibility.

Counsel refused to call a single witness and he put on no defense for Martinez, even though he promised the jury that Vilma Rasmussen, AAO's grandmother, would testify. Vilma was willing and able to testify that Mariela's testimony regarding AAO's alleged symptoms was not accurate or had other reasonable explanations, and that AAO's allegations of abuse were implausible. Counsel also failed to move to suppress the testimony from the police officer that Martinez changed his story when confronted with the allegations of abuse.

Counsel's refusal to call any witnesses and his failure to exclude Martinez's statements cannot be construed to be a component of any rational defense strategy.

Martinez was prejudiced by counsel's deficient performance and the outcome would have been different but for trial counsel's errors. With no physical evidence or eyewitness testimony supporting the abuse allegations, and with no confession, the State's case relied upon the credibility of AAO, Mariela, and the officer that interrogated Martinez. Vilma's testimony would have undermined Mariela's credibility regarding AAO's alleged symptoms of abuse and Vilma's testimony would have undermined AAO's testimony that Martinez sodomized and raped AAO while Vilma was in the kitchen. Had counsel moved to suppress the

police interrogation, the jury also would not have heard testimony that Martinez changed his story when faced with the abuse allegations.

In addition, and for the same reasons set forth above, the trial court erred in denying Martinez's Motion for New Trial. The outcome would have been different had counsel simply allowed Vilma to testify and had counsel moved to suppress the police interrogation.

Alternatively, counsel was ineffective for not allowing Martinez to testify and for failing to obtain Martinez's waiver of his right to testify. At an evidentiary hearing after trial, counsel admitted that Martinez maintained his innocence, that Martinez wanted to testify, and there were no ethical issues with Martinez testifying in his own behalf. Counsel also admitted that on the last day of trial while sitting at counsel's table just after the State rested and while telling Martinez that he would not call Vilma as a witness, counsel advised Martinez not to testify. According to counsel, Martinez "did not indicate one way or the other" whether he would or would not testify. According to Martinez, Martinez told counsel that he wanted to testify and that he wanted Vilma to testify, but counsel would not listen.

Counsel's errors in not challenging the credibility of AAO and Mariela affected the entire evidentiary picture and the outcome would have been different but for counsel's errors.

STATEMENT OF THE ISSUES

1. Whether trial counsel was ineffective for failing to put on a defense and failing to move to suppress the police interrogation, and whether the outcome would have been different but for counsel's deficient performance?
2. Whether the trial court erred in denying Martinez's Motion for New Trial?
3. Alternatively, whether trial counsel was ineffective for failing to allow Martinez to testify and failing to obtain Martinez's waiver of his right to testify?

Standard of Review. All three issues on appeal are reviewed under the same standard: "[W]hen a trial court has heard a motion based on ineffectiveness of counsel, we afford the trial court's **conclusions** no deference but review them for correctness. The trial court's factual findings, however, will be set aside only if they are clearly erroneous." *State v. Hay*, 859 P.2d 1, 4-5 (Utah 1993).

Preservation. All three issues on appeal were preserved in Martinez's Motion to Arrest Judgment, or Alternatively, Motion for New Trial, and his Reply. R.517-60, 689-709.

STATEMENT OF THE CASE

A. SUMMARY OF FACTS.

Jury Trial

Opening Statements

During opening statements, the prosecutor informed the jury that a police officer would testify to statements Martinez made during his police interview concerning the allegations made by AAO. R.233-34.

Martinez's trial counsel told the jury that Vilma Rasmussen will testify, and that Vilma, **AAO's grandmother**, will testify **that AAO's mother** "thought AAO was being abused at the daycare," before the alleged abuse by Martinez occurred, and **that AAO's mother quit her job and** took AAO out of the daycare to stay home with her. R.238. Trial counsel further told the jury that Vilma will testify that in August **2016, AAO's mother placed** AAO in therapy to see a psychologist, and it was one **month later in September when AAO's mother left AAO in Vilma's care to go to** California. *Id.*

Trial counsel further informed the jury Vilma will explain the layout and dimensions of the home where the alleged abuse occurred, and that the home was about 700 square feet. R.241.

Testimony of Mariela Torres

Mariela Torres ("Mariela") **is AAO's** mother. R.248. Mariela began living with her mother, Vilma Rasmussen, in Spanish Fork, Utah, in about 2012. R. 247-48, 282. **Mariela's two children, AM and AAO also lived with them in Vilma's** home. R.248. Mariela testified that her son AM was 14 years old and AAO was 6 years old. R.249. AAO was born in 2010. R.288.

Mariela testified that AAO was in first grade. R.249.

AM and AAO do not have the same father. R.255. Mariela does not live with either of the **children's** fathers, but she is still **married to AAO's father**. R.255. **AAO's** father lives in Costa Rica. R.255. Mariela testified that her relationship with **AAO's** father has been rocky. R. 255.

Mariela met Martinez in December 2012. R.256. Martinez attempted to date Mariela, but she let him know that she was not interested. R.257-58.

Martinez was fine with Mariela not being interested in her, and he continued to treat them the same way. R.258. Martinez would come to the home and hang out with Vilma, Mariela and the children, and go to movies and dinners as a whole family. R.258. Mariela had a normal, friendship relationship with Martinez and she would confide in him and tell him things. R.258-59.

Eventually, Martinez and Vilma began dating, and around June 2014 Martinez **moved into Vilma's home with Mariela and her children.** R.259-61, 282. Mariela believes that Martinez and Vilma were married in 2016. R.262. From the time that Martinez moved into the home, he slept in the same bedroom with Vilma. R.261.

Vilma's home in Spanish Fork is an older, two-bedroom, one bathroom, home, with a living room and kitchen.¹ R.249. Mariela and her daughter slept in one bedroom, Vilma and Martinez slept in the other bedroom, and Mariela's son slept in the living room on the couch. R.250, 253-54.

Martinez was always nice and very friendly to AAO. R.262. Mariela did not have any concerns about Martinez at first. *Id.* Martinez was like a father figure to AAO and AAO was pretty close to him. *Id.*

¹ Mariela was unsure if the home was about 700 square feet, R.301, but in opening statement, trial counsel stated the home was about 700 square feet. R.486-87.

When AAO turned five, AAO “started backing off” from Martinez. R.262-63. “She used to go in his room a lot and play with him, and she gradually started backing off.” *Id.* At this same time, AAO’s behavior started to change. R.263-64. Mariela testified that AAO “started to be very clingy to me, very afraid.” R.263. If AAO was alone, “she would panic”. R. 263. A couple of times AAO got stuck in the trampoline because the zipper would close and she could not open it “and she would just scream ‘cause she couldn’t get out.” R.263. “AAO also started bed wetting. She started having nightmares. She would get headaches, stomach aches, high fevers. I would take her to the doctor, they never found anything except like a sore throat, like red throat, but no sign of infection or anything.” *Id.* Mariela took AAO to the doctor “plenty of times and her file is huge”. R.266.

Mariela testified that AAO had stopped wetting the bed when she was potty trained at three years old and she rarely had accidents. R.288.

Mariela further testified that AAO’s “appetite decreased completely” during this time. R.264. “She wouldn’t eat. She said she, that she couldn’t swallow, that she was afraid to swallow.” R.264.

During this same time period, AAO would still go to **Martinez’s** bedroom until about the end of 2016. R.264. At the end of 2016, Mariela noticed that when Martinez came home from work, AAO would run into her bedroom and hide. *Id.*

Mariela testified that she started working at Jive Communications full time on September 22, 2014, Monday through Friday, and that she worked there for a little over a year and a half. R.265-66, 283. AAO was in daycare and preschool

about nine hours per day Monday through Friday, while Mariela worked at Jive Communications. R.265-66, 284. AAO would go to preschool in the mornings and daycare after that. R.266. About six months after Mariela started working at Jive Communications, **Mariela started seeing “these bad symptoms of [AAO] getting worse and worse.”** R.265.

While AAO was in preschool and daycare, Mariela became concerned that something sexual happened to AAO at preschool or daycare. R.266-67, 284. AAO **mentioned “that one of the kids had put something in her mouth”.** R.267, 284. AAO never told Mariela what was put in her mouth. R.267. Mariela testified that a boy put something **in AAO’s mouth and she thought this** might be sexual. R.284, 289. At this time, AAO started wetting the bed again and her appetite decreased. R.284. This incident, along with **AAO’s symptoms, caused Mariela to be** concerned. R.284. Mariela and a daycare worker confronted AAO about the daycare allegation, and AAO said that nothing happened. R.292-93.

At the beginning of 2015, a few months after AAO turned 5, Mariela took AAO to see a psychologist, Lori Findeis, because **AAO’s** symptoms were getting worse. R.276, 290-91. **Mariela was concerned that AAO’s problems were from AAO** being separated from her for so long because of daycare. R.291. AAO had about 5 visits with Ms. Findeis. R.276-77. Mariela **mentioned AAO’s behaviors to Ms.** Findeis and Ms. Findeis asked about the possibility of sexual abuse, and Mariela **“told her I didn’t know, no.”** R.277. Mariela did not tell Ms. Findeis about the daycare incident because AAO had recanted. R. 292-93.

One day Mariela heard AAO “giggling too much” in the Martinez’s room and when she walked in, AAO stopped and Mariela asked “what are you doing?” and AAO said, “Oh we’re just playing.” R.267. From there, Mariela “started kind of getting a weird feeling about maybe the relationship that [Martinez] had with [AAO].” R.267.

From September 22, 2016 to September 26, 2016, Mariela went to California to renew her passport. R.268. Mariela trusted her mother so she left AAO with Vilma to babysit. *Id.*

In October 2016, Mariela quit her job. R.285, 287. In July 2016, Mariela was on family medical leave from her work and she took AAO out of daycare. R.286-87. Up to this point, AAO had been showing these symptoms and signs, but AAO’s fevers decreased and her appetite got better when Mariela was at home away from work. R.287. AAO continued to wet the bed, continued to have nightmares, and still occasionally had headaches. *Id.*

In December 2016, Mariela took her children to Costa Rica for two months. R.267-68. Mariela testified that in Costa Rica, AAO stopped wetting the bed and her nightmares went away. R.268. About a week after they returned from Costa Rica, AAO started wetting the bed again and she started having nightmares again. R.268.

Mariela researched the internet for symptoms of child abuse and she believed her daughter had most of the symptoms. R.269. Mariela “approached AAO, and I asked her if anybody had ever done anything bad to her that, you know,

she could tell me, that she doesn't need to be afraid to say stuff like that." R.269-70. AAO responded saying, "yeah, I know." R.270. Mariela testified, "I left it at that." *Id.*

The next day, AAO approached Mariela and said:

'Mommy, do you know that sometimes grownups do bad things?' And I said, 'yeah, what do you mean, what kind of things?' And she said 'well, you know, sometimes when I go into [Vilma's] and [Martinez's] room, he'll play his games with me.' And I said 'okay, what kind of games?' And then she kind of just shrugged her shoulders and she didn't want to talk about it anymore.

R.270. A couple of days later, Mariela again approached AAO and asked her again, **"AAO, do you want to talk about, you know, those games that Mr. Martinez would play with you?"** *Id.* AAO said **"yeah."** Mariela then asked AAO **"if he had every [sic] shown her his private parts, and she said 'yes', and then she would get shy, she didn't want to talk about it."** *Id.* Mariela subsequently testified that the conversation occurred by her asking AAO if the Martinez had ever shown you **things he wasn't supposed to, and Mariela asked "like what?" and Mariela said, "has he ever shown you his private parts?"** R.298. Mariela then asked AAO if Martinez ever told her not to tell anyone about it, and AAO said **"he told me to keep it a secret."** R.299.

The third time Mariela approached AAO and again asked if she wanted to **talk about this again, AAO "went into more detail."** R.271. Mariela asked AAO what Martinez would do with his private parts and AAO **"said that he would put his thing**

in her mouth.” *Id.* AAO said this happened on the bed and **“it happened maybe twice.”** *Id.*

A couple of days later, Mariela took AAO to the psychologist that AAO was already seeing. R.271. The psychologist told Mariela this needed to be reported and an appointment was made the next day to meet with the authorities. R.271-72. Mariela believes that she and AAO met with and were interviewed by the authorities on March 29, 2017. R.272-76.

Mariela testified that after March 29, **2017, “I had to quit my job ... because if I didn’t, my daughter was going to end up in the hospital.”** R.279. On cross-examination, Mariela acknowledged that Martinez was not in the home after March 29, 2017. R.281-82.

Mariela testified that she did AAO’s laundry, even when she was working full-time. R.290. Mariela never saw any **blood or anything else in AAO’s underwear** that would have indicated that AAO was possibly being raped. R.290.

Testimony of AAO

AAO was six years old at the time of trial. R.310. AAO did not know her birthdate. *Id.* AAO did not know the name of the school she attends. *Id.* But she did know **her teacher’s name.** R.310-11. AAO also knew her father lives in Costa Rica. R.316.

AAO likes to play Minecraft, a video game. R.313. She plays video games on the TV and iPad. *Id.* She also likes to play Plants versus Zombies. R.313-14.

When AAO first met Martinez, **she liked him “cause he was nice when I’d come in his room sometimes.”** R.317. **This changed when “most of the time like when I wanted to say hi, like, he would like, put me on the bed, on my grandma’s bed and his and like – he would like put his private part into, into mine.”** R.317.

Upon this testimony, the prosecutor asked:

Prosecutor: Into your what?

AAO: Into my private part.

Prosecutor: Did he put it anywhere else?

AAO: In my mouth.

Prosecutor: And where were you when he did those things?

AAO: On the bed.

Prosecutor: Who else was in the room when that happened?

AAO: Just [the Defendant].

Prosecutor: Do you know where your mom was when that happened?

AAO: In California.

Prosecutor: Do you know what she was doing in California?

AAO: Yeah, she wanted to visit her friends.

Prosecutor: Do you know, where was your brother, AM?

AAO: My brother AM was in our room.

Prosecutor: And –

AAO: Actually **in the living room ‘cause he was playing.**

Prosecutor: He was playing what?

AAO: **It’s like a shooting game, but not like Zombies, like it’s a team – I can’t remember though.**

Prosecutor: Do you know if your grandma was home?

AAO: Yeah, but she was cooking a lot.

R.317-18.

The prosecutor then asked AAO what is **Martinez’s** “private,” and AAO said **“it’s kind of like a snake, most boys have it.”** R.318. AAO said it looks **“kind of like weird ‘cause it’s like, kind of like a snake, but really it’s not. It’s like mostly to like pee.”** R.318-19. **AAO said that the private part is found “usually like on the bottom, like on this side between the legs.”** R.319.

AAO said that Martinez did this five times to her while her mom was in California. R.319.

AAO said that Martinez's private part **"felt kind of soft at first, weird, too. Kind of like the skin, like it felt like skin, it's not like normal skin, but it was like squishy stuff."** R.320.

AAO further said that while her mom was gone, **"every time like he would do it, he would do it like I think five times, I think he would do it like five times and like I would hide in my room probably for like two hours."** R.328.

AAO said that she was laying on the bed, **"Like he put his private part into my first one ... My first one is like between my legs."** R.329. This would happen for **"like each of five minutes, or ten minutes."** R.329. **After that, "Then like he would put it in my mouth, and like, like he did put it in my mouth but then like I would try to escape, but he tries to hold me, but every time, every five times I go into his room, like I'm able to escape."** R.329.

AAO said he would yell at the Martinez to stop but it did not work. R.331. AAO said that grandma was in the kitchen when this would happen. R.330. AAO would also pull at the blanket and hit him and then she was able to escape. R.330-31.

AAO said that the Martinez **said "if I told somebody then he would kill my mom, so like I was hiding the secret until we almost went to our apartment or a house."** R.330.

AAO said she would lay on the bed when this happened and that she was not sitting on the bed when this happened. R.331.

AAO thought this happened five or six times, “probably seven, but I’m not sure.” R.332. AAO agreed that this happened five times in one day. R.332.

AAO further said sometimes white stuff would come out, and that her mom told her that. R.332-33. AAO said that sometimes the Martinez would drink milk. R.333. AAO said that **the white stuff would come out “in the beginning when he was starting to do it.”** R.333. **“First he would do it in my private part and then he would put his into my mouth.”** R.333. When asked when she saw white stuff, she said, **“When – like he didn’t put it in, but like I begin to feel it.”** R.333-34. She said **“The white stuff and it was gross”** and **“like sometimes I would throw up and not like all the time”** and **“I would just like wash my mouth in the bathroom then hide in my room.”** R.334.

AAO said that after Martinez **would do this, “sometimes he’s really, really tired, so he’ll go to sleep after that.”** R.334.

AAO said these things happened when she was four years old. R.334.

Testimony of Miguel Lee

Miguel Lee is a police officer with the Springville Police Department. R.338. **Officer’s Lee’s first language** is Spanish. R.341.

Officer Lee interrogated Martinez on March 29, 2017, in the interview room of the Spanish Fork Police Department, and the interrogation was in Spanish.

R.344, 366. Detective Adams was present during the interrogation. R.344. The interrogation was recorded. R. 365.

Officer Lee testified that he read Martinez his *Miranda* rights and Martinez **“agreed to talk to me.”** R.345. Martinez explained his living arrangements and who he is married to, and then Officer Lee explained to him why he wanted to talk to him and Officer Lee told Martinez that AAO disclosed an incident that happened **with him.”** R.345-47.

Officer Lee then gave the following testimony:

Q: And what was his response?

A: His first response was, trying to disengage from the household and the people that live at the house. He said ‘well, she’s never been to my room, before.’ That was the first thing he said to me when I explained to him why I wanted to talk to him.

Q: At that point did you mention anything about a room?

A: No.

Q: At that point was it just you wanted to talk to him about an incident?

A: Yes.

Q: And his first response was ‘she never came into my room’?

A: Correct.

R.347-48.

Officer Lee then asked Martinez to tell him more about it, whether she came into his room to play or watch TV, and Martinez **said “the girl hasn’t been to his room and that every time that the kid is around him either his wife, Vilma, or Mariela are present.”** R.348.

Officer Lee asked Martinez what happened when Mariela was gone to California for a few days, and Martinez said that AAO was at the home during that

time, and that his wife **“pretty much took over her and watch her.”** R.350. Officer Lee testified that Martinez **“made it sound like he wasn’t there at first.”** R.350.

Officer Lee then asked Martinez if AAO had been to his room and Martinez **said “no.”** R.350. Officer Lee then testified that Martinez changed his testimony **after Officer Lee asked him, “So you’re telling me that in the time that you guys have lived together, three, four years, living in a small house, she’s never been to your room at all?”** R.351. Martinez then **admitted that “she has been in once or twice.”** R.351. The prosecutor had Officer Lee repeat this story three times to the jury. R.351, 357, 370. Officer Lee testified that Martinez stated that the one or two times he was alone with AAO in his bedroom was maybe when Vilma was gone to the bathroom or maybe to the kitchen. R.357.

Officer Lee further testified that Martinez brought up that he did not spend time alone with AAO **“because he didn’t want to get in trouble, he didn’t want to be accused of something that he has done”.** R.351.

On cross-examination, Officer Lee reiterated that at the beginning of the interview with Martinez, Martinez said that AAO never went in the room and that it was Martinez maintained that position for a time throughout the interview. R.359. Trial counsel then presented Officer Lee with trial **counsel’s own translation** and transcription of **Officer Lee’s interview with** Martinez. R.360-62, 366. The transcription was not certified and was not introduced as a trial exhibit. R.362. After reviewing the uncertified transcription of Martinez’s interrogation, counsel asked Officer Lee if that refreshed his recollection of the interview, and Officer Lee

testified “Probably.” R.361. Officer Lee then acknowledged that during Martinez’s interview, Martinez may have disclosed that AAO did come in the room just after Martinez first said that she had not come in the room. R.361.

But on re-direct, Officer Lee again testified that Martinez eventually changed his story with respect to whether or not AAO was in the room ever alone with him, when Officer Lee asked him **“so you’re going to tell me that in the time you guys have lived together, three, four, five years, she never been here alone?”** R.370. Officer Lee testified that Martinez responded, **saying, “perhaps.”** R.370.

Officer Lee further testified on re-direct that he prepared his typed report based off of the recording he made of Martinez’s interrogation, and that he had never seen the transcript of the interrogation prepared by trial counsel. R.366.

Officer Lee also stated that during the interrogation, Martinez said that AAO never went into the room while Mariela was in California and that during the **four or five years that he lived in the home, “maybe” AAO had been in his bedroom.** R.371.

Testimony of Casey Stillman

Casey Stillman is a case worker for the Division of Child and Family Services, and is a forensic interviewer of children. R.393-94. Stillman interviewed AAO at **the Children’s Justice Center in Provo, Utah on March 29, 2017.** R.396. The interview was recorded. R.397.

The video of the interview was played for the jury. R.397-98. In the CJC interview, AAO stated “sometimes bad people, really bad people put like their

private parts like sometimes here or somewhere else of your body and my uncle did this like two times and then I never wanted to go in there.” R.951. AAO stated this happened when her mother went to California. R.951. AAO stated this happened in his room and her grandma “was cooking for like ten hours.” R.954. AAO further stated that Martinez put his privates in her mouth. R.954. AAO said this happened twice on separate days. R.955. AAO said she escaped by pushing with her feet and she was strong enough to push away. R.956.

During the CJC interview, AAO further stated that when Martinez put it in, nothing came out. R.959. Stillman asked AAO what she meant, and she said, “My mom says sometimes like white stuff comes out. But nothing comed (sic) out that time.” R.959. Stillman then asked AAO about the white stuff, and AAO and Stillman stated as follows:

A: Yeah, but like (inaudible) my brother was being like honest but like my brother don’t know.

Q: What do you mean?

A: ‘Cause you know when your brain can tell stuff to you –

Q: Uh-huh (affirmative).

A: - like your brain makes you remember stuff and I remember that I wasn’t like that because [Martinez] doesn’t drink milk or nothing.

Q: Oh, okay, so it wasn’t like that?

A: No, he just – [Martinez] just drinks soda and water and that’s it.

Q: Okay. That time did he say anything to you?

A: No.

Q: No? Did he ever say anything to you after?

A: Probably no.

Q: No? Okay.

A: ‘Cause this is kind of hard to remember for me.

Q: Yeah. Did you ever tell anybody about what happened?

A: Only mom ‘cause I couldn’t do it to, I couldn’t tell anybody else ‘cause this is just between me and my mom.

Q: Okay. What did you tell your mom?

A: The same story.

Q: Okay. What made you decide to tell your mom about what happened?

A: So, I told her how do kids keep safe? And then she asked me, you know, the time that you were in like, in [Martinez's] room and then I started telling her the story and then she bring me to my psychologist and then here.

Q: Okay. You told me that your mom told you about some type of white stuff?

A: Actually, I think I did, I think the second time did.

Q: Okay. What else has your mom said about it?

A: My mom said that did he say something and I said no 'cause I don't talk to [Martinez] that much.

Q: So is there anything else that happened or is there anything else you want to talk about?

A: That was just it.

Q: That was just it?

A: Uh-huh (affirmative).

Q: You told me that the two different times that your uncle put his private part in your mouth, was it ever different than that?

A: Okay, so the first when my mom left, like the first time that my mom left, that happened, the same story, and then the second day my mom didn't come back, she was going to stay there for like a week, I can't remember but the second day, white stuff comed [sic] out.

Q: ... You told me about the things that happened with him and I asked you before if he said anything when these things happened –

A: I think he said something once.

Q: Oh.

A: He said I'm going back to sleep.

Q: ... Have you ever talked to [Martinez] about what happened?

A: No.

Q: Has he ever talked to you about what happened?

A: 'Cuase my mom said not to tell anybody, just her.

Q: Just her?

A: Yeah, 'cause it's personal to us and like she said, don't tell this to [Martinez] or he'll be aware.

Q: She said what?

A: She don't say this to [Martinez] or else he might get mad.

Q: Oh. What do you think he would think if you told?

A: Like he didn't do that but he did 'cause it was a long time ago so he doesn't remember.

Q: Oh, okay.

A: That's what I feel.

R. 961-67.

After the CJC interview was played to the jury, Stillman testified that children do not typically disclose every detail related to an allegation of sexual abuse in a single interview. R.400. Stillman testified it is common for children to make delayed disclosures. R.402.

Stillman testified that during the CJC interview with AAO, she tried to follow **up with inconsistencies in AAO's disclosure.** R.408. These inconsistencies included AAO saying it happened two different times and later saying maybe it was only one time. R.408, 411. Stillman also testified that during the interview, she asked AAO four separate times whether Martinez ever said anything to her during or after, and **AAO's consistent response was "no."** R.409. Although one time, AAO said that Martinez said he was going back to sleep. R.409-10.

Stillman testified that AAO was inconsistent by saying that white stuff came out and then saying maybe it had not. R.410-11. The reason AAO changed her mind is because Martinez did not drink milk. R.411.

Stillman acknowledged that Mariela had asked AAO many leading questions and had been quite descriptive with AAO in her questioning. R.413. Stillman acknowledged that Mariela's leading questions were concerning because from a forensic standpoint, they try to steer clear of leading or suggestive questions

because such questions “can introduce things to the child that they may not already have experienced or know about” and the child may develop a story around the suggestions or details. R.413-14. Stillman testified that it was inappropriate for Mariela to tell AAO that white stuff comes out. R.414-15. Stillman further testified that she did not know whether AAO was lying or whether she developed a story around Mariela’s leading questions. R.421.

Testimony of Lori Findeis

Lori Findeis is a licensed clinical social worker. R.422. Findeis testified that in children that have been sexually abused or allegedly sexually abused, parents report the following behaviors in their children: extreme isolating behaviors or extreme clinginess, nightmares or difficulty sleeping, bed wetting, difficulty focusing, getting very aggressive, become more passive, and loss of appetite. R.427-28. Findeis testified that she has observed some of these behaviors during sessions with children. R.427. Findeis acknowledged it is common for children that have not been abused to wet the bed. R.432-33.

Testimony of Zachary Adams

Zachary Adams is a detective with the Spanish Fork Police Department. R.437. Adams transported Martinez to the police station to be questioned. R.440-441. Adams testified that before Officer Lee questioned Martinez, another officer informed Martinez that AAO had made an accusation against him and they wanted to discuss the accusation with him. R.441.

Closing Arguments

In closing arguments, the prosecutor asked the jury to consider what Martinez said in his interview with the police. R.468. The prosecutor stated that Martinez “acknowledges that the mother, Mariela, went to California and it took him some time, although at first he said, no, while they’re in California, that girl, she never came into my bedroom. And then it evolved into well, maybe she came into the bedroom, but my wife was always there. And then eventually it evolved into well, maybe there were a couple of times that she was in with me alone, and we played a game, okay?” R.468.

The prosecutor also asked the jury to consider Findeis’ testimony that AAO’s behaviors were consistent with the behaviors of other kids that were treated by Findeis for sexual abuse. R.469.

Trial counsel never explained to the jury why Vilma did not testify. R.476-89. Instead, the summation of trial counsel’s closing argument was calling Mariela and AAO liars. R.481-82, 484-86.

The jury returned guilty verdicts on both counts. R.502.

B. PROCEDURAL HISTORY.

Gilberto Martinez was charged by an Information filed in the Fourth Judicial District Court on April 4, 2017, with two counts of sodomy on a child, first degree felonies, in violation of Utah Code § 76-5-403.1. R.2-3.

On August 25, 2017, Martinez filed Defendant’s Witness and Exhibit List, giving the State notice he may call Vilma Rasmussen to testify at trial. R.104-05.

The jury trial was held on August 29 and 30, 2017. R.119-21, 138-40. Trial counsel called no witnesses. R.447.

During deliberations, the jury requested a copy of the entire police report. R.124, 500. Because the police report was not admitted as a trial exhibit, the trial court did not allow the jury to receive the police report. R.124, 501.

Motion to Arrest Judgment or for New Trial

Martinez retained new counsel and filed a Motion to Arrest Judgment, or Alternatively, Motion for New Trial (“Motion for New Trial”), asserting that (1) trial counsel was ineffective by failing to move to suppress Martinez’s statements during the interrogation on the grounds of inadequate Miranda warnings; (2) trial counsel was ineffective for failing to call Vilma Rasmussen as a witness; and alternatively (3) trial counsel was ineffective for failing to call Martinez to testify on his own behalf and for not obtaining a valid waiver from Martinez. R.517-41, 701.

Declaration of Vilma Rasmussen

Vilma Rasmussen signed a declaration averring she expected to be called to testify at trial by trial counsel and that she was willing and able to testify. R.544.² Vilma declared that she and Martinez were married August 29, 2015. R.547.

Vilma declared that Mariela stopped working around February 2016 and after that, Mariela stayed home and took care of AAO. R.547. About the same time, Mariela stopped having AAO go to daycare. R.547.

² The Declaration of Vilma Rasmussen is attached as Addendum B.

In September 2016, when Mariela went to California, she left on a Thursday afternoon and Vilma took work off and watched AAO. R.548. Martinez did not work on Saturday or Sunday, and Mariela returned on Monday. R.548. Vilma stayed home the entire time Mariela was gone, and at no point did Vilma see Martinez and AAO alone, even in his bedroom. R.548. Vilma believes she would have noticed if AAO and Martinez were alone together because she was home. R.548. Vilma watched AAO during this time and she behaved normally and nothing seemed different. R.548.

Vilma declared that Mariela and her two children began living with her in December 2012, when AAO was about two years old. R.544. At this time, AAO always wore nighttime diapers to bed because she wet the bed. R.544. AAO was potty trained when she was 4 years old, but even after AAO was potty trained, she usually continued to wear the nighttime diapers because she continued to wet the bed. R.545. When AAO would not wear the diapers to bed, she would wet the bed two to three times per week. R.545.

From the time that Mariela took the children to Costa Rica near the end of 2016 to one year before this time, Vilma did not see a difference in the number of times or frequency of AAO wetting the bed. R.545. When AAO came back from Costa Rica, she was wetting the bed two to three times per week. R.545. In fact, when Mariela and the children were coming back from Costa Rica, Mariela called Vilma from her hotel room and told Vilma that AAO wet the bed. R.545. Mariela would always tell Vilma when AAO wet the bed. R.545.

Vilma declared that AAO did have nightmares, but she also played zombie video games and stayed up late at night. R.546. Vilma did not notice an increase in the frequency of the nightmares during 2016. R.546.

Vilma declared that AAO was a picky eater like many children, but the only times AAO would not eat is when she was sick. R.546. Vilma did not see AAO's appetite change after September 2016. R.546.

Vilma declared that throughout the time Mariela and AAO lived with her, AAO was always clingy with her mother. R.547.

Vilma declared that AAO and Martinez had a friendly relationship, and that did not change until about two weeks after Mariela and AAO came back from Costa Rica. R.547, 548. When Martinez and Vilma picked up Mariela and the children from the airport, AAO ran and hugged Martinez first and then she hugged Vilma. R.547. About two weeks after returning from Costa Rica, AAO stopped talking to Martinez and she would not talk very much with Vilma. R.548. Even during this time however, AAO never appeared scared of Martinez. R.548.

Two days before Martinez was arrested, Vilma asked Mariela why AAO was behaving different. R.549. Mariela told Vilma that she suspected AAO was abused. R.549. Vilma asked Mariela why she thought AAO was being abused, and Mariela said all the things that AAO is doing, wetting the bed, and the way she is acting. R.549. Vilma told Mariela to ask AAO, and Mariela said that AAO said that no one had been touching her. R.549. Vilma then asked Mariela who she thought did it, and Mariela said she did not know. R.549.

Vilma declared that she never saw Martinez do anything inappropriate or act inappropriately with AAO. R.549. Vilma further declared that she would never subject AAO to abuse or allow anyone to abuse her. R.549.

Vilma further declared that on the second day of trial, trial counsel told her that he did not need her testimony. R.544. Vilma was not allowed to witness the trial so she did not understand why the attorney stated he did not need her testimony. R.544.

Testimony of Trial Counsel

An evidentiary hearing on the Motion for New Trial was held on November 6, 2017. R.563. At the hearing, the State called Martinez's trial counsel to testify. R.598.

Trial counsel testified that he began practicing law two years ago. R.598-99. Counsel does not speak Spanish and Martinez speaks Spanish and his English is minimal. R.601. Counsel visited with Martinez a number of times in jail and at court. R.602, 605. Counsel reviewed Martinez's interrogation by the police after his office translated the interrogation to English. R.604. Counsel did not notice any *Miranda* issues. R.604.

Trial counsel testified he discussed with Martinez that these cases are very difficult "so the defenses would be to find inconsistencies within her statements." R.609. Another defense was that the police did not properly investigate the case because there were no interviews done with anyone else in the home. R.610.

Trial counsel testified that he discussed with Martinez numerous times and “at great **length**” about having his wife, Vilma, testify. R.610. Martinez thought that Vilma should be a witness and trial counsel and Martinez would go over questions and answers regarding Vilma’s expected testimony. R.610-11. Counsel starting speaking with Vilma at least a month before trial about her expected testimony. R.611. Counsel went to Vilma’s home, had Vilma meet with him in his office, and he spoke to Vilma on the phone regarding a possible defense. R.611-12. Regarding Vilma testifying at trial, counsel testified:

Early on in the case I thought it might be helpful to have her. We started to develop these questions. Ultimately, I decided it would not be beneficial to the case to put her on the stand.

R.612. Counsel testified he decided not to put Vilma on the stand because “oftentimes the extreme positions she was taking with her answers, I believed it led to what I believed would lead to a jury finding her not credible.” R.613. Counsel stated, “the first time I really thought I won’t be putting [Vilma] on the stand” was the night before the last day of trial.³ R.614.

Trial counsel admitted he did not tell Martinez that he would not let Vilma testify until after the State rested. R.613, 617. Martinez was not happy with this decision because Vilma “knows things that will help win the case” and Martinez wanted her to testify. R.613, 616. Martinez told counsel that he wanted Vilma to testify but counsel said no. R.617.

³ Mariela, AAO and Officer Lee testified on the first day of trial. R.223.

Trial counsel testified that the night before the last day of trial, he informed Martinez that he was leaning towards advising him not to testify. R.619. On the last day of trial after the State rested, while sitting at counsel table in the courtroom, counsel advised Martinez not to testify, and counsel testified that Martinez did not have much of a reaction and “there didn’t appear to be an objection.” R.619-20, 621, 626. Counsel further stated, “I don’t recall him putting up any objection or any – basically a non-response.” R.626. When asked, “So [Martinez] did not indicate one way or the other,” trial counsel testified, “Not – not to my recollection.” R.626.

On cross examination, trial counsel admitted that Martinez said “early on that he wanted to testify.” R.621. Counsel further admitted that when he advised Martinez on the last day of trial to not testify, counsel believed the jury would acquit Martinez without his testimony. R.622, 652.

Trial counsel conceded that Martinez maintained his innocence and that he wanted to testify, and that he advised Martinez not to testify because counsel believed the outcome was going to be an acquittal. R.623. Counsel testified he was surprised that Martinez was found guilty. R.623. Counsel admitted that “a big part of” advising Martinez not to testify was because AAO gave a different story on the stand and counsel was convinced he had won the case and he did not need Martinez to testify. R.631, 652.

Trial counsel testified that the types of questions he had asked Vilma related to her being in the home when the alleged abuse occurred, her relationship with

Martinez, her interactions with AAO in the home, how long AAO had lived in the home, and her observations of AAO wetting the bed and AAO's nightmares. R.614.

Regarding trial counsel's decision not to call Vilma as a witness, counsel admitted he knew that Vilma would contradict some key points of Mariela's testimony. R.633. Counsel knew that Vilma would contradict Mariela's testimony related to AAO's bed wetting history because AAO was still wetting the bed and had always been wetting the bed, but he could not recall the other issues. R.633, 636. Counsel could not recall if he had asked Vilma about AAO being a picky eater, whether AAO lost her appetite, or whether AAO was clingy with her mother. R.637-38. Counsel thought he asked Vilma about AAO's headaches, but he could not recall Vilma's response. R.637-69. Counsel also could not recall Vilma's response to his questions whether AAO had been examined by a physician while living with Vilma, AAO's medical history, whether AAO's relationship with Martinez changed over time, whether AAO's relationship with Vilma changed, or whether the door to the bedroom remained open or closed when Mariela was in California. R.638-642. Counsel also could not remember what Vilma talked to Mariela about regarding Mariela thinking that AAO might have been abused. R.643.

Trial counsel did remember that Vilma stated that AAO and Martinez had a good relationship. R.638. Counsel also remembered Vilma would have testified that she never saw AAO and Martinez alone in the bedroom. R.639. Counsel remembered that Vilma said when Mariela was in California that AAO's behavior

was normal. R.641. Counsel also remembered that Vilma said AAO's behavior was normal the weeks after Mariela came back from California. R.642.

Trial counsel also went to the home and conducted a sound test of the bedroom, and he stated that if the bedroom door was shut, and a person in the bedroom spoke in a normal voice, "it was difficult to hear that person in the kitchen. You could vaguely make out someone was talking. If the voice was elevated at all it became quite clear that somebody was in there, and even to the point you could hear what they were saying." R.641. Counsel admitted the jury never heard this testimony regarding the ability to hear conversation in the bedroom from the kitchen. R.641.

When asked if he could remember any contradictions between what Vilma's testimony would be in regards to Mariela's testimony, trial counsel testified "I don't recall specifics, but I do remember there were many contradictions." R.644.

On cross-examination, trial counsel testified he determined the night before the last day of trial that Vilma's testimony "likely could be found not credible." R.645. Counsel testified Vilma was very emotional, but that was not the reason he decided to not put her on the stand. R.633-34. Asked if Vilma ever lied to him, counsel stated, "Vilma's story, her time lines, was [sic] inconsistent." R.645. Despite a number of questions as to how Vilma's statements were inconsistent, counsel was unable to provide a single example. R.646-47.

At the end of trial counsel's testimony, the prosecutor asked the trial court whether trial counsel could go back to his office and review his notes and come

back and testify with more specificity. R.667. The trial court gave the State leave to allow trial counsel a chance to review his notes. R.668. Despite this opportunity, the State presented no further testimony nor written statements from trial counsel.

Declaration of Gilberto Martinez

In response to trial counsel's testimony, Martinez submitted a declaration stating he told trial counsel he wanted to testify at trial to let everyone know of his innocence. R.708. Martinez understood that trial counsel was going to call his wife to testify at trial. R.709. On the second day of trial, trial counsel told Martinez that he should not testify and that his wife would not be testifying. R.709. Martinez told trial counsel that he wanted to testify and that he wanted his wife to testify, but trial counsel would not listen. R.709.

Ruling on Motion for New Trial

On January 29, 2018, the trial court held arguments on Martinez's Motion for New Trial and entered its ruling from the bench. R.717, 868-93.⁴

Regarding trial counsel's decision to not call Vilma to testify, the trial court found that trial counsel "acted within the reasonable standard of care for a defense attorney." R.887. The trial court found that trial counsel's decision was a strategic decision because trial counsel "did not believe that the testimony from Ms. Rasmussen ... nor the defendant was necessary in order to avoid a conviction." R.888. The trial court added, "any testimony by either would have been subject to

⁴ The relevant portion of the transcript is attached as Addendum A.

cross examination, which could have potentially harmed the defendant's case." R.888.

The trial court further found that even if trial counsel's decision to not call Vilma to testify was unreasonable, the trial court found "that defendant has not affirmatively proved that testimony of Ms. Rasmussen and the defendant would have changed the outcome of the trial..." R.888.

Regarding trial counsel's failure to move to suppress Martinez's statements made in the police interrogation, the trial court found such failure constituted ineffective assistance of counsel. R.889, 890-91. The trial court further found, however, that such error was harmless and would not have changed the outcome of the trial. R.889. The trial court elaborated:

The Court finds that even if prior counsel timely filed a motion to suppress, and the police interview was excluded, it would likely not have changed the outcome of the case. The Court finds that at trial the victim was a credible witness, and described in detail the events of the case, knowing that as a child she would be unlikely to have acquired these specific details from other people around here. Also note that at the preliminary hearing, state [sic] declined to call the police officers who interviewed the defendant, indicating that their testimony was not essential to prove the elements of the case.

R.886-91.

The trial court did not address Martinez's contention that trial counsel failed to obtain Martinez's waiver of his right to testify at trial, in violation of his constitutional rights, other than finding that trial counsel's strategic decision to not have Martinez testify would not have changed the outcome. R.877, 888, 886-91.

C. **DISTRICT COURT'S** JUDGMENT UNDER REVIEW

Martinez appeals from the trial court's denial of his Motion for New Trial, set forth in the oral ruling entered on January 29, 2018, R.868-93.

Martinez also appeals from the judgment, sentence and commitment of the Fourth District Court entered on February 5, 2018, wherein Martinez was sentenced on both counts to an indeterminate term of not less than twenty-five years and which may be life in the Utah State Prison, with the two counts to be served concurrently with each other. R.723-24.

Martinez timely filed a Notice of Appeal on February 16, 2018. R.726.

SUMMARY OF ARGUMENT

The State put on unrefuted evidence that in September 2016, when AAO was five years old, Martinez sodomized AAO in his bedroom twice while Vilma was in the kitchen. The State also put on unrefuted evidence that AAO had the symptoms of a sexually abused child.

Vilma Rasmussen's testimony would have controverted the testimony that AAO had the symptoms of an abused child and her testimony would have made AAO's allegations of abuse implausible.

Yet trial counsel refused to call Vilma as a witness and counsel failed to controvert any of the State's **evidence** or impeach the credibility of the State's witnesses.

Trial counsel also failed to move to suppress Martinez's statements in a police interrogation, which the State used to impeach Martinez's credibility.

Trial counsel's failure to put on a defense and his failure to move to suppress the police interrogation constitute ineffective assistance of counsel. These errors affected the entire evidentiary landscape of the trial. But for counsel's errors, the outcome would have been different.

Alternatively, trial counsel was ineffective for advising Martinez to not testify and for failing to obtain Martinez's waiver of his right to testify. But for this error, the outcome would also have been different.

ARGUMENT

I. TRIAL COUNSEL'S REFUSAL TO PUT ON A DEFENSE AND HIS FAILURE TO MOVE TO SUPPRESS THE POLICE INTERROGATION CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL, AND BUT FOR TRIAL COUNSEL'S ERRORS, THE OUTCOME WOULD HAVE BEEN DIFFERENT

Trial counsel did not call a single witness on Martinez's behalf, and trial counsel refused to allow AAO's own grandmother to testify in Martinez's behalf. Had Vilma testified, she would have contradicted most of Mariela's testimony that AAO had the symptoms of a sexually abused child. Vilma's testimony further would have shown that AAO's allegations of abuse were implausible.

Trial counsel also failed to move to suppress Martinez's statements made during the police interrogation, which the State used to show the jury that Martinez lacked credibility because a police officer testified that Martinez changed his story when confronted with AAO's allegations.

Refusing to allow Vilma to testify and failing to move to suppress the police interrogation were not sound trial strategy, and counsel's errors deprived Martinez

of a fair trial. Had counsel called Vilma to testify and moved to suppress Martinez's statements, the outcome would have been different.

Martinez appeals both the trial court's ruling denying his Motion for New Trial and the trial court's sentence, judgment and commitment below.⁵

In *State v. Hay*, 859 P.2d 1 (Utah 1993), the Utah Supreme Court held, "when a trial court has heard a motion based on ineffectiveness of counsel, we afford the trial court's conclusions no deference but review them for correctness. The trial court's factual findings, however, will be set aside only if they are clearly erroneous." *Id.* at 4-5.

The Sixth Amendment to the United States Constitution guarantees the accused the "Assistance of Counsel for his defence." *State v. Garcia*, 2017 UT 53, ¶35, 424 P.3d 171. **The United States Supreme Court recognizes that** "the right to counsel [for his defence] is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). To determine whether an accused receives effective—or ineffective—assistance of counsel, a reviewing court engages in a two-part test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

⁵ Martinez does not challenge the trial court's finding that trial counsel's performance was deficient for failing to move to suppress the police interrogation.

Id. at 687. The “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A “reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* “In making this determination, an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record.” *State v. Templin*, 805 P.2d 182, 187 (Utah 1990) (citing *Strickland*, 466 U.S. at 694).

- A. Trial counsel was ineffective for refusing to allow Vilma Rasmussen to testify in Martinez’s **defense**.

Vilma’s testimony would have contradicted Mariela’s testimony on key points, thereby leaving doubt whether AAO had symptoms of an abused child and leaving doubt as to whether Martinez could have possibly abused AAO.

The State’s main witness was AAO. AAO testified in explicit detail on direct examination how Martinez put her on her grandma’s bed and “put his private into, into mine.” R.317. AAO further testified that Martinez also put his private “In my mouth.” R.317. AAO was able to testify that this abuse occurred when her mother was in California. R.317. AAO also testified the abuse happened five times while her mom was in California. R.319.

AAO described Martinez’s “private” as “kind of like a snake, most boys have it” and it is used “mostly for peeing.” R.318-19. AAO further testified that

Martinez's "private" was positioned "like on the bottom, like on this side between the legs." R.318.

On cross-examination, trial counsel elicited from AAO that when Martinez did this to her, white stuff would come out. R.333. Counsel also elicited from AAO further testimony that the white stuff "was gross" and that "I would just like wash my mouth in the bathroom and hide in my room." R.334. Apparently, counsel elicited this testimony from AAO to try to show that her mother was coaching her, because Mariela told AAO that white stuff would come out when this happened. R.332-33.

Through cross examination and through the playing of the CJC video, counsel was able to show that AAO delayed disclosing the rape until the time of trial. R.317-19, 951-56.

Mariela, AAO's mother, testified that AAO was potty trained at three and she rarely had accidents. R.288. Mariela testified when AAO turned five, AAO "started backing off" from Martinez. R.262-63. At the same time, AAO "started to be very clingy to me, very afraid" and if she was alone, "she would panic." R.263. At the same time "AAO also started bed wetting. She started having nightmares. She would get headaches, stomach aces, high fevers." R.263. The doctors were unable to diagnose the cause of her problems. R.263. AAO's "appetite decreased completely" during this time and she was "afraid to swallow." R.264. AAO also wet the bed every night. R.303.

Mariela further testified that at the end of 2016, when Martinez came home from work, AAO stopped going into his bedroom and she would instead run into her bedroom and hide. R.264.

Mariela testified that she was not working from July 2016 for medical leave to help AAO, and she took AAO out of daycare. R.286-87. AAO's symptoms started getting better when Mariela stopped working, but she continued to wet the bed and to have nightmares and headaches. R.287.

Mariela testified that when she took AAO to Costa Rica in December 2016 for two months, AAO stopped wetting the bed. R.267-68. About one week after returning from Costa Rica, AAO started wetting the bed again and started having nightmares again. R.268.

Mariela testified she started searching the internet for symptoms of child abuse and believed her daughter had most of the symptoms. R.269. Mariela asked her daughter if anyone had done anything bad to her, and eventually, AAO disclosed that Martinez had put his private parts in her mouth twice. R.269-70, 271, 298.

The State's witness, Lori Findeis, a licensed clinical social worker, confirmed that extreme isolating behaviors or extreme clinginess, nightmares or difficulty sleeping, bed wetting, and loss of appetite are symptoms usually reported by parents of sexually abused or allegedly sexually abused children. R.247-28.

Officer Lee gave damning testimony that during Martinez's interrogation, after telling Martinez about AAO's disclosure, Martinez said that AAO had never

been in his room before and every time AAO is around him that Vilma or Mariela are present. R.347-48. Officer Lee further testified that when he asked Martinez what happened when Mariela was gone to California, Martinez “made it sound like he wasn’t there at first.” R.350. Officer Lee then testified that Martinez changed his story later in the interview and admitted that AAO had been in her room once or twice when he Officer Lee said, “So you’re telling me that in the time that you guys have lived together, three, four years, living in a small house, she’s never been to your room at all?” R.351. The prosecutor had Officer Lee repeat this story three times to the jury. R.351, 357, 370.

On cross-examination, trial counsel used his own uncertified translation and transcription of the interview to try to show that Martinez did not change his story later during the interview, but that Martinez may have disclosed that AAO did come in the room just after Martinez first said that she had never come into the room. R.361. But on re-direct, Officer Lee again testified that Martinez changed his story with respect to whether or not AAO was in the room alone with Martinez. R.370. And Officer Lee testified that his report was prepared from the recording he made of Martinez’s interrogation, and that he had never seen the transcript prepared by trial counsel. R.366.

Notably, there was no physical evidence that AAO was abused by anyone, let alone by Martinez. Nor were there any eye-witnesses to the alleged abuse. Even Mariela admitted she never saw blood in AAO’s underwear that would have supported AAO’s story that Martinez raped her. R.290. The State’s case ultimately

hinged on the testimony and credibility of AAO, whose testimony was bolstered by Mariela's testimony, because Mariela explained that AAO had the symptoms of a sexually abused child, and those symptoms decreased when AAO was not around Martinez and the symptoms increased when AAO was around Martinez. And even though Martinez did not testify, the State was able to damage Martinez's credibility by having Officer Lee testify over and over again that Martinez changed his story about AAO never being in his bedroom.

Given the evidence the jury heard, trial counsel should have known it was necessary to call Vilma to testify and put on a defense. If counsel was prepared, which Martinez asserts he was not, counsel would not have promised the jury that Vilma would testify and then refuse to put Vilma on the stand to refute AAO's and Mariela's testimony and thereby undermine their credibility. If counsel was prepared, he would have called Vilma who was able to undermine AAO's and Mariela's credibility. If counsel was prepared, he would have called a witness to testify that a person standing in the kitchen could vaguely make out someone talking in a normal voice in the bedroom with the bedroom door shut. R.641. If the voice was elevated, one could hear what was being said in the bedroom. R.641. If counsel was prepared, he would have put on a defense, instead of resorting to calling AAO and Mariela liars in closing argument without any foundation. R.481-82, 484-86. If counsel was prepared, he would have shown the jury through admissible evidence that AAO's story was not credible and that Mariela's testimony regarding AAO's symptoms also was not credible.

For example, Vilma would have testified that AAO continuously wet the bed from the time they moved in with her in December 2012, to the time Mariela moved out. R.545. Vilma would have further testified that when Mariela and AAO were returning from Costa Rica in 2017, Mariela called Vilma from her hotel room and let Vilma know that AAO had wet the bed. R.545. This testimony would contradict Mariela's testimony regarding AAO's symptom of wetting the bed that coincided with being around Martinez.

Vilma would have testified that Mariela allowed AAO to stay up late to play zombie games and watch YouTube, which could have been the reason for AAO having headaches and nightmares. R.546. This could also have been a reason for AAO being exposed to adult themes. Vilma further would have testified that she did not see a change in the frequency of AAO's nightmares in 2016, again contradicting Mariela's testimony. R.546.

Vilma would have testified that AAO's appetite did not change after September 2016, again contradicting Mariela's testimony that AAO would not eat. R.546. Vilma would have testified that the only times AAO would not eat was when she was sick. R.546.

Vilma would have testified that AAO was always clingy to her mother and that never changed, again contradicting Mariela's testimony. R.547.

Vilma would have testified that Martinez's and AAO's relationship did not change until about two weeks after AAO came back from Costa Rica. R.547-58.

Vilma would also testify that AAO did not appear to be scared of Martinez even when she stopped talking to him. R.548.

Vilma would have testified that Mariela stopped working around February 2016 and that Mariela took AAO out of daycare about the same time. R.547.

Vilma would have testified that in September 2016, when Mariela went to California and when the abuse allegedly occurred, that Vilma took off work on Thursday, Friday and Monday, and stayed home the entire time Mariela was gone, and that Vilma did not see Martinez and AAO alone together. R.548. Vilma would have further testified that she believes she would have noticed if they had been alone together and that AAO behaved normally during this time. R.548.

Vilma would have testified that two days before Martinez was arrested, she asked Mariela why AAO was behaving differently, and Mariela stated she suspected AAO had been abused. R.549. Vilma told Mariela to go and ask AAO, and Mariela told Vilma that AAO would not tell her. R.549. This would have contradicted Mariela's testimony regarding the timing of AAO's disclosures.

Vilma's testimony was critical to Martinez's defense, and there was no justifiable reason that counsel refused to allow Vilma to testify. Had Vilma testified, Mariela's testimony which was previously unopposed, would have been contradicted by her own mother and AAO's grandmother, and the jury would have reason to doubt that AAO had the symptoms of an abused child, thereby negating Mariela's and Findeis' testimony. Had Vilma testified, the jury would have reason to believe that Mariela coached AAO and gave AAO understanding of adult details.

Or the jury would have reason to believe that AAO learned these adult details by staying up late and watching videos and YouTube. The jury would also have reason to doubt AAO's allegations of abuse, because Vilma would have testified that AAO was not alone with Martinez while Mariela was in California and that AAO was never scared of Martinez, making AAO's allegations that Martinez raped and sodomized AAO in the bedroom while Vilma was a few feet away, implausible.

Moreover, had Vilma or another knowledgeable person testified about being able to hear elevated voices in the bedroom from the kitchen, AAO's testimony that she yelled at Martinez to get off of her would be impeached, because AAO testified that Vilma was in the kitchen when the abuse allegedly occurred. R.331, 641.

In *Gregg v. State*, 2012 UT 32, 279 P.3d 396, the Utah Supreme Court observed, "**As we noted in *Templin***, it can never be a tactical decision to fail to investigate and introduce evidence that would undermine the credibility of the only witness who presented direct evidence of the defendant's **guilt.**" *Id.* at ¶34.

In this case, even if trial counsel was prepared, which Martinez does not concede, it cannot be sound strategy to fail to introduce evidence that would undermine AAO's credibility and allegations, thereby making it implausible that Martinez could have abused AAO without Vilma knowing. It cannot be sound strategy to fail to introduce evidence that would undermine Mariela's credibility and testimony, thereby making the jury doubt whether AAO had the symptoms of an abused child.

Trial counsel's refusal to allow the jury to hear Vilma's testimony caused Martinez to be denied a fair trial and the outcome would have been different had Vilma testified.

B. The trial court's ruling denying the Motion for New Trial was erroneous.

In its ruling denying the Motion for New Trial, the trial court made the following findings regarding counsel's refusal to allow Vilma to testify:

In the evidentiary hearing on the matter, prior counsel indicated that after the state rested at trial, he did not believe that the testimony from Ms. Rasmussen or the defendant – nor the defendant was necessary in order to avoid a conviction. In addition, any testimony by either would have been subject to cross examination, which could have potentially harmed the defendant's case.

R.888. While counsel's reason for not allowing Vilma to testify was because he believed he would earn an acquittal, the trial court's findings that this was proper trial strategy and that Vilma's testimony would have harmed Martinez's case are without support and are clearly erroneous.

To further show that counsel was not prepared and that his decision to not call any witnesses was not sound strategy, in his opening statement, counsel could not remember whether AAO was in daycare or preschool. R.238. Counsel also admitted that he did not decide until the night of the last day of trial that he would not allow Vilma to testify. R.614.

While counsel conceded that Vilma would contradict much of Mariela's trial testimony, counsel was unable to recall most of Vilma's testimony that would have impeached Mariela's testimony. R.633, 636-43, 644.

Trial counsel testified that he determined the night before the last day of trial that Vilma's testimony "likely could be found not credible." R.645. Counsel testified that Vilma took "extreme positions," but the only so-called extreme position he could remember her taking was on re-direct when the prosecutor asked counsel the following leading question: "Was one of your concerns the fact that Vilma was telling you that the victim was never in the room alone or she was never in the room with Mr. Martinez?" Counsel answered, "Yeah." R.613, 657.

Martinez disagrees that this was an "extreme position" that would damage his case, especially considering the fact that Vilma never made such a statement to trial counsel. R.695, 705, 870-71.

And when further pressed why counsel thought Vilma might not be credible and when asked whether Vilma ever lied to him, counsel stated, "Vilma's story, her time lines, was inconsistent." R.645. After ample opportunities to provide a single instance when Vilma gave him an inconsistent statement, counsel was unable to provide a single example. R.646-47.

Concerned that trial counsel's testimony was insufficient, the prosecutor requested that trial counsel be allowed to go back to his office and review his notes so he could come back and testify with more specificity. R.667. The trial court granted leave to allow trial counsel to review his notes and supplement his testimony, but the State presented no further testimony from trial counsel. R.668.

The trial court's finding that refusing to call Vilma to testify was sound strategy because counsel believed he would win an acquittal and because Vilma

may have harmed the case is clearly erroneous. As set forth above, Vilma could have undermined the testimony and credibility of both AAO and Mariela. Neither the State nor trial counsel were able to provide any evidence showing that Vilma's testimony would be harmed by cross-examination.

Vilma was the critical witness for Martinez, and she was ready to testify in his behalf. Counsel's failure to call her to testify was not a sound strategic decision and but for this error, the outcome would have been different.

C. The trial court's **findings** that Martinez did not prove prejudice are clearly erroneous.

The trial court also found that even if counsel's performance was deficient by failing to call Vilma as a witness, Martinez did not show prejudice as required by *Strickland*. R.888. This finding is clearly erroneous.

The trial court made no separate findings to support this ruling, other than citing "State versus Garcia." R.888. Assuming the trial court meant *State v. Garcia*, 2017 UT 53, 424 P.3d 171, *Garcia* is not relevant to the facts of this case and does not support the trial court's finding that Martinez failed to show prejudice.

In *Garcia*, the defendant was convicted of attempted murder after the jury instruction on his imperfect self-defense claim misstated the law. 2017 UT 53, ¶2. On certiorari review, the State asserted the Court of Appeals erred by presuming prejudice from the erroneous jury instruction. *Id.* at ¶4. The defendant asserted that the Court of Appeals erred when it found trial counsel failed to preserve a constitutional argument challenging the application of a statute. *Id.* at ¶4. The

Utah Supreme Court determined that the Court of Appeals erred in holding that errors in elements instructions are never harmless. *Id.* at ¶¶34-48. The Court found that the prejudice analysis was required and that the defendant was not prejudiced by the erroneous elements instruction because the overwhelming evidence negated the imperfect self-defense claim. *Id.* at ¶45. The Court further determined that the constitutional challenge was preserved, so trial counsel was not ineffective for failing to preserve the challenge, but the Court found that the trial court properly denied the motion for directed verdict. *Id.* at ¶¶49-65.

The facts in *Garcia* are not relevant here. Martinez does not allege ineffective assistance of counsel for a faulty jury instruction, nor does Martinez allege that prejudice should be presumed.

Rather, Martinez asserted below that counsel's failure to call Vilma as a witness was prejudicial, requiring a new trial.

Given the facts and arguments set forth above, counsel's refusal to allow Vilma to testify was prejudicial, and the verdict would have been different if Vilma would have been allowed to testify. The trial court's finding otherwise is clearly erroneous.

The trial court's **further finding** that Martinez was not prejudiced by counsel's **failure** to move to suppress the police interrogation is also clearly erroneous. After finding that counsel's **performance was deficient for not moving** to suppress the police interrogation, the trial court found that such error was harmless. R.891. The trial court supported this finding by stating:

The Court finds that at trial the victim was a credible witness, and described in detail the events of the case, knowing that as a child she would be unlikely to have acquired these specific details from other people around here.

R.891. Martinez asserts this finding is clearly erroneous.

As set forth above, counsel's **refusal** to call Vilma to testify was prejudicial to Martinez because had the jury heard Vilma's testimony, neither AAO nor Mariela would be found credible, and the result would have been different.

Moreover, the trial court's findings are self-contradictory. The trial court cannot reasonably conclude it was sound trial strategy for counsel to not call any witnesses because of his belief the evidence was insufficient for a guilty verdict, and then also conclude it did not matter whether or not Vilma or Martinez testified because AAO's testimony was credible. R.888, 891. If it was sound trial strategy to not call any witnesses on Martinez's behalf because there was a reasonably likelihood of an acquittal, then AAO's testimony could not have been credible. Or, if AAO's testimony was credible without any further adversarial testing by counsel by calling other witnesses, then counsel's refusal to call witnesses could not be sound trial strategy.

The trial court's findings are clearly erroneous and unsound. Martinez was prejudiced by counsel's refusal to put on a defense and his convictions should be reversed and he should be granted a new trial.

D. Martinez was prejudiced by trial counsel's **failure to exclude** the police interrogation.

The trial court correctly found that **counsel's** performance was deficient for failing to move to suppress Martinez's statements taken in violation of his *Miranda* rights. R.889-91. But the trial court's finding that Martinez was not prejudiced by this failure is clearly erroneous. R.891.

The trial court did not analyze the effect Martinez's statements had on the jury, other than finding that AAO was a credible witness at trial and further stating, "at the preliminary hearing, state [sic] declined to call the police officers who interviewed the defendant, indicating that their testimony was not essential to prove the elements of the case." R.891.

The trial court misunderstands the purpose of a preliminary hearing. The purpose of a preliminary hearing is not to prove all elements charged. Rather, the limited purpose of a preliminary hearing is to determine "**whether probable cause** exists." *See State v. Goins*, 2017 UT 61, ¶31 (citing Utah Constitution, article I, section 12).

At the preliminary hearing, the State needed to show only sufficient evidence to support a reasonable belief that probable cause existed that Martinez committed the crimes charged. The State was not obligated to present evidence "capable of supporting a finding of guilt beyond a reasonable doubt." *See State v. Virgin*, 2006 UT 29, ¶20, 137 P.3d 787 (citation omitted).

The trial court erroneously held the State was required “to prove the elements of the case” at the preliminary hearing. R.891. The trial court further erroneously found the State’s **choice of not calling the officers to testify at the preliminary hearing shows that the officer’s testimony was not important at trial.** R.891. With this erroneous legal conclusion and clear erroneous finding, the trial court then erroneously determined that counsel’s ineffectiveness would not have changed the outcome at trial. R.891.

The only direct evidence of the alleged abuse was AAO’s testimony. There was no physical evidence that AAO was raped. Importantly, Mariela testified that she never saw blood in AAO’s underwear. R.290. There were also no eyewitnesses to the alleged abuse. Even though counsel put on no defense, the jury still had concerns about the State’s case because the jury requested to have the full police report during jury deliberations. R.124, 500.

Despite the lack of physical evidence, because counsel put on no defense, Martinez was convicted based on AAO’s testimony that Martinez abused her, plus Mariela’s testimony that AAO showed the symptoms of an abused child, plus Officer’s Lee’s repeated testimony that Martinez changed his story when confronted with the abuse allegations.

The State relied on the interrogation to obtain the conviction and without it, the outcome would have been different. The prosecutor informed the jury in opening statements that a police officer would testify to statements Martinez made during the interrogation concerning allegations made by AAO. R.233-34. Officer

Lee told the jury three separate times that Martinez changed his story about AAO never being in his room. R.351, 357, 370. Although trial counsel attempted to set the facts straight and show that Martinez quickly corrected his statement that AAO had never been in his room, Officer Lee testified on re-direct that his report was based off of his review of the recorded interrogation and that he had never seen trial counsel's uncertified transcript. R.366. Officer Lee then again told the jury that Martinez changed his story, thereby cementing in the jurors' minds that Martinez lacked credibility. R.371. In closing argument, the prosecutor asked the jury to consider what Martinez said in the interrogation and the prosecutor emphasized Martinez's allegedly changing story. R.468.

Destroying Martinez's credibility was necessary to obtain the verdict because there was no physical evidence of abuse and no eyewitness testimony supporting AAO's allegations. The outcome would have been different had trial counsel moved to suppress the police interrogation.

In any event, trial counsel's failure to call Vilma as a witness and trial counsel's failure to move to suppress the police interrogation affected the entire evidentiary picture because it left the State's evidence unchallenged. The verdict would have been different but for trial counsel's errors.

II. ALTERNATIVELY, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO HAVE MARTINEZ TESTIFY AND FOR FAILING TO OBTAIN MARTINEZ'S **WAIVER OF HIS** RIGHT TO TESTIFY

Trial counsel acknowledged that Martinez wanted to and could have testified at trial. R.623. Counsel was unable to articulate a reasonable strategy for not

allowing Martinez to testify. Counsel also failed to obtain Martinez's waiver of his right to testify. R.619-20, 621, 626.

“The right of criminal defendants to testify and present their version of events in their own words is fundamental.” *State v. Brooks*, 833 P.2d 362, 364 (Utah App. 1992) (citing *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). “This fundamental right is guaranteed by both the United States Constitution and the Utah Constitution. The defendant retains ultimate authority in deciding whether or not to testify.” *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). “Generally, waiver of a fundamental right must be knowing, intelligent and voluntary.” *Id.* (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Trial counsel was ineffective in advising Martinez not to testify. In any event, Martinez told counsel he wanted to testify, but counsel would not listen. R.709. Counsel also failed to ensure that Martinez waived his right to testify. Counsel admitted that while he was sitting at the table just after the State rested and advising Martinez not to testify, Martinez did not give a response. R.619-20, 621, 626.

Because Martinez retained the ultimate authority in deciding whether or not to testify, counsel should have either listened to Martinez and allowed him to testify, or at least counsel should have obtained a response from Martinez stating one way or the other. At best, counsel failed to determine whether Martinez was willing to waive his right to testify. At worst, counsel ignored Martinez and told the trial court he would not be calling any witnesses.

It was counsel's obligation to ensure a valid waiver of Martinez's rights to testify, and counsel failed in this regard.

Either way, counsel's performance was deficient and the outcome would have been different had Martinez testified, considering there was no physical evidence to support AAO's allegations. Without Martinez's testimony, AAO's allegations were unrefuted. Martinez at least would have testified that he was innocent, thereby refuting AAO's allegations and casting doubt over AAO's credibility. R.708. The State would have been unable to impeach Martinez any further because trial counsel already allowed the State to use the interrogation against Martinez.

Counsel's refusal to allow Vilma and Martinez to testify affected the entire evidentiary picture. Counsel left the State's **evidence unchallenged** and unrefuted. Counsel failed to impeach any of the State's **witnesses through cross-examination**. Counsel's **decision** to put on no defense cannot be construed to be a component of any rational defense strategy under the facts of this case.

CONCLUSION

For the above reasons, Martinez respectfully requests the Court reverse his convictions and grant him a new trial.

Respectfully submitted on January 8, 2019.

FILLMORE SPENCER, LLC

/s/ Aaron P. Dodd

AARON P. DODD

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

This brief is in compliance rule 24(g)(1), Utah R. App. P., as it contains 13,773 words, excluding the table of contents, table of authorities, certificates of counsel, and addendum. I certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia 13 point.

/s/ Aaron P. Dodd

AARON P. DODD

Fillmore Spencer LLC

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on January 8, 2019, two copies of the Brief of Appellant will be

mailed hand-delivered, within the timeframes of the rule, to:

SEAN D. REYES
Utah Attorney General
APPEALS DIVISION
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Counsel for Appellee

I certify that on July 8, 2018, this copy of this brief was email to:

criminalappeals@agutah.gov

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

- was filed with the Court and served on appellant.
- will be filed and served within 14 days.

/s/ Aaron P Dodd

Addenda A

Trial Court Ruling

1 witnesses. Certainly the two we put forward, Velma and
2 the defendant, that could've challenged these things.
3 And given the information that was available to trial
4 counsel, this should -- the jury should've had the chance
5 to consider this evidence. And we believe the outcome
6 would've been different.

7 Any other questions, Your Honor?

8 THE COURT: No, sir. Thank you.

9 MR. DODD: Thank you, Your Honor.

10 THE COURT: Thank you for your briefing,
11 counsel, as well as your argument today, respect shown to
12 one another, as well as the Court.

13 After carefully reviewing your briefs, as well
14 as the transcript and the -- my memory of the evidentiary
15 hearing that we had, here's what I come up with.

16 Defendant argues the Court should arrest judgment, grant
17 a new trial due to ineffective assistance of counsel.

18 Specifically, defendant argues that counsel made three
19 decisions that would warrant a dismissal based on

20 ineffective assistance of counsel. The decision not to
21 address possible violations of defendant's Miranda

22 rights, the decision not to use testimony from Ms.

23 Rasmussen, and the decision not to have the defendant
24 take the stand in his own defense.

25 With regard to that, defendant further argues

1 that prior counsel failed to adequately investigate what
2 Ms. Rasmussen's testimony would've been.

3 All right. With regard to the decisions not to
4 call Velma Rasmussen and the defendant to testify during
5 trial, the Court finds that prior counsel acted within
6 the reasonable standard of care for a defense attorney.
7 In Strickland versus Washington, U.S. Supreme Court held
8 that in order to rule that a jury verdict should be
9 dismissed or vacated due to ineffective assistance of
10 counsel, it must be proven that the defendant's counsel
11 was ineffective, and that defendant was prejudiced by
12 relying on that assistance.

13 Regarding the first factor on the standard for
14 ineffective assistance, the Supreme Court held, the Court
15 must determine whether, in light of all the
16 circumstances, the identified acts or omissions were
17 outside the wide range of professionally competent
18 assistance. In making that determination, the Court
19 should keep in mind that counsel's function, as
20 elaborated in prevailing professional norms, is to make
21 the adversarial testing process work in a particular
22 case.

23 At the same time, the Court should recognize
24 that counsel is strongly presumed to have rendered
25 adequate assistance and made all significant decisions in

1 the exercise of reasonable professional judgment.

2 In the present case, prior counsel, Mr. Hakes,
3 decided that it would be better not to call the defendant
4 and Ms. Rasmussen to testify at trial. These were
5 strategic decisions that could depend on numerous
6 factors. In the evidentiary hearing on the matter, prior
7 counsel indicated that after the state rested at trial,
8 he did not believe that the testimony from Ms. Rasmussen
9 or the defendant -- nor the defendant was necessary in
10 order to avoid a conviction. In addition, any testimony
11 by either would have been subject to cross examination,
12 which could have potentially harmed the defendant's case.
13 The Court finds that in light of the standards set by
14 Strickland versus Washington, these decisions were
15 reasonable under the circumstances.

16 Even if the Court were to find that prior
17 counsel had acted unreasonably in light of the standards
18 set forth in Strickland versus Washington, the Court
19 finds that defendant has not affirmatively proved that
20 testimony of Ms. Rasmussen and the defendant would have
21 changed the outcome of the trial, and that's citing State
22 versus Garcia.

23 With regard to the decision not to move to
24 suppress the police interview. The same standard as used
25 in Strickland versus Washington is used to determine

1 whether the failure of prior counsel to move to suppress
2 the initial interview of the defendant with police
3 sufficiently constitutes ineffective assistance of
4 counsel so as to vacate the judgment or require a new
5 trial.

6 In this case, the Court finds that prior
7 counsel's decision not to move to suppress the statements
8 of the defendant constituted ineffective assistance of
9 counsel, but that there were -- the error was harmless,
10 and would not have changed the outcome of the case. In
11 State versus Millett, a Utah Appellate Court decision,
12 police gave constitutionally deficient Miranda warnings
13 to a defendant accused of forcible sodomy. In that case,
14 the police officer said, you have the right to remain
15 silent. Anything you say can and will be used against
16 you in a court of law. You understand all that. Okay.
17 You understand all of them, right? You're okay talking
18 to me? Millett said, yes. The Court found that this
19 Miranda warning was deficient, and that the failure of
20 the attorneys to -- the attorney to move to suppress the
21 information obtained in that interview constituted
22 ineffective assistance of counsel.

23 The current matter is similar to Millett, but
24 complicated by cultural and linguistic differences
25 between the police and the defendant. The defendant in

1 this case was given his Miranda rights twice by police
2 officers, with varying levels of proficiency in Spanish.
3 The defendant argues that the first Miranda warning was
4 deficient for the following reasons. One, instead of
5 saying, you have the right to remain silent, the officer
6 stated, you have your rights to talk or not to talk to
7 us.

8 Two, the officer also stated, you only have to
9 know that what you say can be used against yourself
10 between the Court.

11 And three, the officer also failed to say that
12 an attorney would be provided to him if he could not
13 afford one.

14 Defendant argues that the second Miranda warning
15 given by an officer, who was more fluent in Spanish, was
16 also deficient, because instead of saying, you have a
17 right to have an attorney present, the officer said, you
18 are going to have the right to have an attorney present,
19 implying that there was no need for an attorney at that
20 moment, or that the right existed only in the future.

21 These statements, while more ambiguous than
22 those addressed in Millett, were nonetheless deficient.
23 The Court finds that the prior attorney should have moved
24 to exclude these statements based on deficiencies in the
25 Miranda statements issued by the police, and failure to

1 do so constituted ineffective assistance of counsel.

2 So after determining there was ineffective
3 assistance of counsel, the Court must now determine
4 whether the defendant was prejudiced, or whether the
5 result would have been different if the police interviews
6 had been excluded. Recently, in State versus Garcia, the
7 Utah Supreme Court addressed the application of the
8 prejudice prong. It stated, Strickland's requirement of
9 a reasonable probability of a different outcome is a
10 relatively high hurdle to overcome.

11 The Court finds that even if prior counsel
12 timely filed a motion to suppress, and the police
13 interview was excluded, it would likely not have changed
14 the outcome of the case. The Court finds that at trial
15 the victim was a credible witness, and described in
16 detail the events of the case, knowing that as a child
17 she would be unlikely to have acquired these specific
18 details from other people around here. Also note that at
19 the preliminary hearing, state declined to call the
20 police officers who interviewed the defendant, indicating
21 that their testimony was not essential to prove the
22 elements of the case.

23 For these reasons, and noted the high bar set in
24 Strickland versus Washington as interpreted by State
25 versus Garcia, the Court finds despite the ineffective

1 assistance of counsel regarding the failure to move to
2 suppress the police statements, there was not sufficient
3 prejudice to the defendant so as to warrant vacating the
4 judgment or granting a new trial. Therefore, I'm denying
5 the motion to arrest judgment or alternatively motion for
6 a new trial at this time.

7 I would ask you, Mr. Sturgill, to prepare
8 findings and an order consistent with that, utilizing
9 your briefing material. Get that to Mr. Dodd for
10 approval and see where he might go with that.

11 Having said that, we're still at the sentencing
12 phase, Mr. Dodd. So how long do you want?

13 MR. DODD: Your Honor, we have the PSI
14 completed.

15 MR. STURGILL: Yeah. Could we just put it on
16 next week's calendar, Judge?

17 THE COURT: We could do it next Monday, the 5th,
18 9:30.

19 MR. DODD: I believe so, Your Honor.

20 THE COURT: Okay. Let's do that. We'll put you
21 on for February 5th at 9:30, Mr. Martinez, for
22 sentencing, and as soon as you get that order prepared,
23 Mr. Sturgill, Mr. Dodd can approve that and we'll see
24 where we need to go.

25 MR. STURGILL: Yes, Your Honor.

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THE COURT: Okay. Thank you.

(Whereupon the matter was concluded.)

(Transcribed March 25, 2018)

Addenda B

Declaration of Vilma Rasmussen

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**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH, Plaintiff, vs. GILBERTO MARTINEZ, Defendant.	DECLARATION OF VILMA RASMUSSEN Case No. 171401154 Judge Darold McDade
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Vilma Rasmussen makes the following declaration:

1. I am married to the Defendant, Gilberto Martinez. Estoy casada con el Acusado, Gilberto Martinez.
2. I am the grandmother of AAO, the minor child. Soy la abuela de AAO, la niña menor.
3. I am the mother of Mariela Otarola, who is AAO's mother. Yo soy la madre de Mariela Otarola, quien es la madre de AAO.
4. I am over 18 years of age and am competent to make this declaration, and all statements set forth herein are based on my personal knowledge, unless set forth otherwise. Tengo más de 18 años de edad y soy competente para hacer esta declaración, y todas las declaraciones aquí establecidas se basan en mi conocimiento personal, a menos que se establezca lo contrario.

5. I spoke with the Defendant's attorney in preparation for trial and I told him I wanted to testify at trial. Hablé con el abogado del Acusado en preparación para el juicio y le dije que yo quería testificar en el juicio.

6. I expected to testify at trial and I was ready to testify at trial to the statements I am making in this declaration. Yo esperaba testificar en el juicio y estaba lista para testificar en el juicio a las declaraciones que estoy haciendo en esta declaración.

7. On the second day of trial, Defendant's attorney told me that he did not need me to testify. El segundo día de juicio, el abogado del Acusado me dijo que no necesitaba que yo testificara.

8. Because I was not allowed to witness the trial during this time, I did not understand why the attorney stated he did not need my testimony. Porque no se me permitió ser testigo del juicio durante este tiempo, no entendí por qué el abogado declaró que no necesitaba mi testimonio.

9. If I testified at trial, I would have testified to the following facts. Si testificó en el juicio, yo habría testificado los siguientes hechos.

10. Mariela, and her two children, including AAO, began living with me in December 2012. AAO was about 2 years old at this time. Mariela y sus dos hijos, incluyendo AAO, comenzaron a vivir conmigo en diciembre de 2012. AAO tenía alrededor de 2 años de edad en ese momento.

11. At this time, AAO always wore nighttime diapers to bed because she wet the bed. En ese tiempo, AAO siempre usaba pañales para dormir porque mojaba la cama.

12. AAO was potty trained when she was 4 years old, and even after AAO was potty trained, she usually continued to wear the nighttime diapers because she continued to wet the bed. AAO fue enseñada para ir al baño cuando tenía 4 años de edad, e incluso después de AAO fue enseñada para ir al baño, por lo general continuó a usar los pañales de la noche porque ella continuó a mojar la cama.

13. When AAO would not wear the nighttime diapers to bed, AAO would wet the bed 2-3 times a week. Cuando AAO no usaba los pañales de noche para ir a la cama, AAO mojaba la cama 2-3 veces a la semana.

14. Mariela took AAO to Costa Rica near the end of 2016. From the time that they went to Costa Rica to the year before this time, I did not see a difference in the number of times or frequency that AAO wet the bed. Mariela llevó AAO a Costa Rica cerca del final de 2016. Desde el momento en que fueron a Costa Rica al año anterior, no vi una diferencia en el número de veces o frecuencia que AAO mojaba la cama.

15. When they were returning from Costa Rica, Mariela called me from her hotel room and told me that AAO had wet the bed. Cuando regresaron de Costa Rica, Mariela me llamó desde su habitación del hotel y me dijo que AAO había mojado la cama.

16. When AAO came back from Costa Rica, AAO was wetting the bed 2-3 times a week. Cuando AAO volvió de Costa Rica, AAO estaba mojando la cama dos o tres veces por semana.

17. My daughter would always tell me when AAO wet the bed. Mi hija siempre me decía cuando AAO mojaba la cama.

18. My daughter allowed AAO to stay up late at night. I normally go to bed between 9:30 p.m. and 10:00 p.m., and AAO would go to bed after me. Mi hija permitía AAO para quedarse hasta tarde por la noche. Normalmente me voy a la cama entre las 9:30 p.m. y 10:00 p.m., y AAO iría a la cama después de mí.

19. My daughter allowed AAO to play video games, including Zombie video games. AAO was also allowed to watch youtube. Mi hija permitió a AAO jugar a juegos de video, incluyendo juego de video Zombie. AAO también se le permitía ver youtube.

20. AAO would sometimes have nightmares, and sometimes I would wake up and hear her scream. My daughter would also tell when AAO had nightmares. I did not see an increase in the frequency of the nightmares during 2016. AAO a veces tenía pesadillas, y veces me despertaba y la oía gritar. Mi hija también diría cuando la AAO tenía pesadillas. No vi un aumento en la frecuencia de las pesadillas durante 2016.

21. AAO was a picky eater like many children, and the only times she would not eat is when she was sick. I did not see AAO's appetite change after September 2016. AAO era quisquilloso para comer como muchos niños, y las únicas veces que no comía era cuando estaba enferma. No vi el cambio de apetito de AAO después de septiembre de 2016.

22. AAO would get so angry sometimes that she would vomit, and this would happen since the time she was 2 years old. AAO se enojaba tanto que vomitaba, y esto sucedía desde que tenía 2 años.

23. AAO would get headaches sometimes when she sick. She also had headaches at other times. AAO tenía dolores de cabeza a veces cuando ella enfermaba. También tenía dolores de cabeza en otras ocasiones.

24. AAO saw a physician around May 2016 who treated her for a rash near her vagina. It was never suggested that she was being abused. AAO vio a un médico alrededor de mayo de 2016 que la trató por una erupción cerca de su vagina. Nunca se sugirió que la estaban abusando.

25. The Defendant and I married August 29, 2015. El Acusado y yo nos casamos el 29 de agosto de 2015.

26. AAO had a friendly relationship with the Defendant, and that only changed about two weeks after Mariela and AAO came back from Costa Rica. AAO tenía una relación amistosa con el Acusado, y eso sólo cambió dos semanas después de que Mariela y AAO regresaran de Costa Rica.

27. The Defendant and I went and picked up Mariela and her children from the airport when they came back from Costa Rica, and AAO ran and hugged the Defendant first and then she hugged me. I did not see any change in AAO's behavior at this time. El Acusado y yo fuimos y recogimos a Mariela y a sus hijos al aeropuerto cuando regresaron de Costa Rica, y AAO corrió y abrazó primero al Acusado y luego a mí me abrazo. No vi ningún cambio en el comportamiento de AAO en ese momento.

28. Throughout the time AAO lived with me, she was always clingy to her mother. A lo largo del tiempo que AAO vivió conmigo, siempre se sentía pegajosa con su madre.

29. Mariela stopped working around February 2016. After that she stayed home and she took care of AAO. Mariela did not get another job while she lived with me and she was not working in March 2017. About the same time in February 2016 she stopped having AAO going to daycare. Mariela dejó de trabajar alrededor de febrero de 2016. Después de eso, ella se quedó

en casa y ella se hizo cargo de AAO. Mariela no consiguió otro trabajo mientras vivía conmigo y no trabajaba en marzo de 2017. Casi al mismo tiempo, en febrero de 2016, dejó de llevar AAO ir a la guardería.

30. In November 2016 Mariela took the kids to California for a week. En 2016 de noviembre, Mariela llevó a los niños a California durante una semana.

31. AAO's behavior first changed towards the Defendant about two weeks after they came home from Costa Rica. At this time, AAO would not talk very much to me and she would not talk to the Defendant. Even during this time, AAO never appeared scared of the Defendant. El comportamiento de la AAO cambió primero hacia el Acusado unas dos semanas después de regresar de Costa Rica. En este momento, AAO no hablaba mucho conmigo y ella no hablaba con el Acusado. Incluso durante ese tiempo, AAO nunca parecía asustada del Acusado.

32. In September 2016, when Mariela left to California, she left on a Thursday afternoon. I stayed home from work while Mariela was gone, and Mariela came back the following Monday. I also took Monday off of work. I watched AAO during that time and she behaved normally, nothing seemed different. The Defendant did not work that Saturday or Sunday. At no point did I see them alone, even in his bedroom. I was at home and I believe I would have noticed if they were alone together. En septiembre de 2016, cuando Mariela se fue a California, se fue un jueves por la tarde. Yo me quedé en casa del trabajo mientras Mariela se había ido, y Mariela regresó el lunes siguiente. También no trabajé el Lunes. Vi a AAO durante ese tiempo y ella se comportó normalmente, nada parecía diferente. El acusado no trabajó ese sábado y domingo. En ningún momento los vi solos, incluso en su habitación. Estaba en casa y creo que me habría dado cuenta si estuvieran solos juntos.

33. Two days before the Defendant was arrested, I asked Mariela why AAO was behaving differently. Mariela told me she suspected that AAO was abused. I asked her why she thought she was being abused, and Mariela said all the things she is doing, wetting the bed, and the way she is acting. I told her to go and ask AAO, and Mariela said that AAO said that no one has been touching her. I asked Mariela who she thought did it. Mariela said she did not know, but she would not disregard anyone, including her own husband. She said she even suspected her own husband in Costa Rica. Dos días antes de que el Acusado fuera arrestado, le pregunté a Mariela por qué la AAO se comportaba de manera diferente. Mariela me dijo que sospechaba que la AAO fue abusada. Le pregunté por qué pensaba que había siendo abusada, y Mariela dijo todas las cosas que estaba haciendo, mojando la cama, y la forma en que estaba actuando. Le dije que fuera y preguntara a AAO, y Mariela dijo que AAO dijo que nadie la había estado tocando. Le pregunté a Mariela quién pensaba que lo había hecho. Mariela dijo que no lo sabía, pero no despreciaría a nadie, incluyendo a tu propio marido. Dijo que hasta sospechaba de su propio marido en Costa Rica.

34. I would not and have not changed my testimony just because the Defendant is my husband. No lo haría y no lo he cambiado mi testimonio sólo porque el Acusado es mi esposo.

35. I never saw the Defendant do anything inappropriate with or act inappropriately with AAO. Nunca vi al acusado hacer algo inapropiado con la AAO ni actuar de manera inapropiada.

36. I would never subject AAO to abuse or allow anyone to abuse her. Nunca sometería a AAO que la abusaran o permitir que alguien la abusara.

I declare under criminal penalty of the State of Utah the foregoing is true and correct.

Declaró bajo pena penal del Estado de Utah lo anterior es verdadera y correcta.

DATED this 16th day of October 2017. Fecha del 16 de octubre de 2017.



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