

IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS JASON BERNAL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed  
Sep 23 2021 03:32 p.m.  
Docket No. 82465  
Elizabeth A. Brown  
Clerk of Supreme Court  
D. Ct. 20-CR-00099

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APPEAL FROM JUDGMENT OF  
THE HONORABLE JOHN P. SCHLEGELMILCH

THIRD JUDICIAL DISTRICT COURT

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APPELLANT'S APPENDIX

VOLUME 1

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Case No. 20-CR 00099

Dept No. I

TCN: NVLYSO2004688C

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TANYA S. SCURINE  
COURT ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Tanya Scurine*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

**INFORMATION**

STEPHEN B. RYE, District Attorney within and for the County of Lyon, State of Nevada, in the name and by the authority of the State of Nevada, informs the above-entitled Court that THOMAS JASON BERNAL, the Defendant above named, has committed the offense of

**COUNT I**

**SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING SUBSTANTIAL BODILY HARM, a CATEGORY A FELONY, in violation of NRS 200.366(3)(b), in the following manner:**

That the said Defendant on or between the 1<sup>st</sup> day of August, 2018 to the 30<sup>th</sup> day of June, 2019, at and within the County of Lyon, State of Nevada, did willfully and unlawfully subject another person who is under the age of sixteen (16) years to sexual intercourse and/or fellatio and/or other sexual penetration against her will or under conditions in which the perpetrator knew or should have known that the victim is mentally or physically incapable of

1 resisting or understanding the nature of the conduct, to-wit: Defendant digitally penetrated  
2 the vagina of a known but unnamed juvenile H.S. (dob: 07/20/2004), all of which occurred at  
3 or near 610 US Highway 95 Alternate, Yerington, Nevada.

4 **COUNT II**

5 **SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING**  
6 **SUBSTANTIAL BODILY HARM, a CATEGORY A FELONY, in violation of NRS**  
7 **200.366(3)(b), in the following manner:**

8 That the said Defendant on or between the 1<sup>st</sup> day of July, 2019 to the 11<sup>th</sup> day of July,  
9 2019, at and within the County of Lyon, State of Nevada, did willfully and unlawfully subject  
10 another person who is under the age of sixteen (16) years to sexual intercourse and/or fellatio  
11 and/or other sexual penetration against her will or under conditions in which the perpetrator  
12 knew or should have known that the victim is mentally or physically incapable of resisting or  
13 understanding the nature of the conduct, to-wit: Defendant digitally penetrated the vagina of  
14 a known but unnamed juvenile H.S. (dob: 07/20/2004), all of which occurred at or near 610  
15 US Highway 95 Alternate, Yerington, Nevada.

16 **COUNT III**

17 **SEXUAL ASSAULT ON A CHILD UNDER THE AGE OF 16 YEARS, NOT CAUSING**  
18 **SUBSTANTIAL BODILY HARM, a CATEGORY A FELONY, in violation of NRS**  
19 **200.366(3)(b), in the following manner:**

20 That the said Defendant on or between the 1<sup>st</sup> day of December, 2018 to the 28<sup>th</sup> day  
21 of February, 2019, at and within the County of Lyon, State of Nevada, did willfully and  
22 unlawfully subject another person who is under the age of sixteen (16) years to sexual  
23 intercourse and/or fellatio and/or other sexual penetration against her will or under conditions  
24 in which the perpetrator knew or should have known that the victim is mentally or physically  
25 incapable of resisting or understanding the nature of the conduct, to-wit: Defendant digitally  
26 penetrated the vagina of a known but unnamed juvenile H.S. (dob: 07/20/2004) while rubbing  
27 her legs, all of which occurred at or near 610 US Highway 95 Alternate, Yerington, Nevada.

1 All of which is contrary to the form, force and effect of the statute in such cases made  
2 and provided and against the peace and dignity of the State of Nevada.

3 Pursuant to NRS 239B.030, the undersigned hereby affirms that this document does  
4 not contain social security numbers.

5 DATED this 27<sup>th</sup> day of January, 2020.

6  
7 STEPHEN B. RYE  
Lyon County District Attorney

8  
9  
10 By:   
11 Matthew K. Merrill  
Deputy District Attorney

12 The witnesses known to the State at the time of the filing of this Information are as  
13 follows:

14 Detective Michael Messman	911 Harvey Way Yerington, NV 89447
15 Deputy Nicholas Greenhut	911 Harvey Yerington, NV 89447
16 Katie Sabado	40 Sunny Grove Drive Yerington, NV 89447
17 Charles Sabado	40 Sunny Grove Dr Yerington, NV 89447
18 Jennifer Mccann	Washoe County Child Advocacy Center, 2097 Longley Lane Reno, NV 89502
19 Owen Smith	610 Hwy 95A Yerington, NV 89447
20 H.S.	610 Hwy 95A Yerington, NV 89447
21 Patricia Bernal	610 Hwy 95A Yerington, NV 89447

Case No. 20-CR-00099

Dept. No. I

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2020 JUN -1 PM 1:34

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

**MOTION TO ADMIT VICTIM'S OUT  
OF COURT STATEMENTS TO HER  
MOTHER AND DURING A CHILD  
FORENSIC INTERVIEW**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Matthew K. Merrill, Deputy District Attorney, and hereby submits this MOTION TO ADMIT VICTIM'S OUT OF COURT STATEMENTS TO HER MOTHER AND DURING A CHILD FORENSIC INTERVIEW.

This Motion is based on the attached Memorandum of Points and Authorities, all documents and pleadings on file in this case, and any evidence which may be produced at a hearing on this matter.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

**I. FACTS**

The State of Nevada has charged Thomas J. Bernal by way of Information with three counts of Sexual Assault with a Child under 16, category A felonies. The State alleges that the Defendant did digitally penetrate the vagina of an unnamed juvenile H.S. (DOB: 07/20/2004) on at least three separate occasions.

On or about the 14<sup>th</sup> day of July, 2019, Patricia Bernal, H.S.'s mother, learned that the Defendant had been sexually abusing H.S. The Defendant disclosed to Patricia that he would digitally penetrate H.S.'s vagina while massaging her legs. (Exhibit A, Prelim transcript pg. 37, In 3-6). Patricia spoke with H.S. regarding the allegations. H.S. confirmed the allegations.

1 H.S. was sent to do a Child Forensic Interview ("CFI") on September 04, 2019 wherein  
2 she disclosed, amongst other things, that the Defendant and H.S. were involved in an  
3 argument on or about the 14th day of July, 2019, that precipitated the Defendant's confession.  
4 H.S. confirmed that she had been sexually assaulted by the Defendant on numerous  
5 occasions typically when the Defendant was massaging H.S. legs. (Exhibit A, pg. 6-28).

6 Jennifer McCann conducted the CFI with H.S. at the Washoe County Child Advocacy  
7 Center. The CFI was both audio and visually recorded. Subsequent to the interview, Ms.  
8 McCann issued a Child Advocacy Center Forensic Interview Report on September 20, 2019.  
9 A copy of the recording of the interview and the report were provided to the Defendant. (A  
10 transcript of the CFI is being prepared and will be provided to the Court).

## 11 II. ARGUMENT

12 The decision to admit evidence is within the sound discretion of this court. *Greene v.*  
13 *State*, 113 Nev. 157, 166, 931 P.2d 54, 60 (1997). A district judge's ruling to admit evidence  
14 will not be overturned absent abuse of discretion. *United States v. Patterson*, 678 F.2d 774,  
15 778 (9th Cir. 1982).

16 NRS 51.035 "Hearsay" defined. "Hearsay" means a statement  
offered in evidence to prove the truth of the matter asserted unless:

17 1. The statement is one made by a witness while testifying at the trial or  
hearing;

18 2. The declarant testifies at the trial or hearing and is subject to cross-  
examination concerning the statement, and the statement is:

19 (a) Inconsistent with the declarant's testimony;

20 (b) Consistent with the declarant's testimony and offered to rebut an  
express or implied charge against the declarant of recent fabrication or improper  
influence or motive;

21 (c) One of identification of a person made soon after perceiving the person;  
or

22 (d) A transcript of testimony given under oath at a trial or hearing or before a  
grand jury; or

23 3. The statement is offered against a party and is:

24 (a) The party's own statement, in either the party's individual or a  
representative capacity;

25 (b) A statement of which the party has manifested adoption or belief in its  
truth;

26 (c) A statement by a person authorized by the party to make a statement  
concerning the subject;

27 (d) A statement by the party's agent or servant concerning a matter within  
the scope of the party's agency or employment, made before the termination of  
28 the relationship; or

1 (e) A statement by a coconspirator of a party during the course and in  
2 furtherance of the conspiracy.

3 A. H.S.'s Statements to Jennifer McCann and her mother should be admitted into  
4 evidence at the trial if offered to rebut an express or implied charge of recent fabrication or  
5 improper influence or motive or for impeachment purposes.

6 H.S. made several statements to Jennifer McCann during the forensic interview  
7 involving the Defendant digitally penetrating her vagina. The State anticipates that H.S. could  
8 be cross-examined regarding recent fabrication or improper influence or motive. If the  
9 Defense cross-examines in this manner, the State requests to authenticated and play the  
10 forensic interview either through H.S. or Jennifer McCann. Further, Patricia Bernal may be  
11 offered to rebut to charge of recent fabrication or improper influence or motive as Patricia  
12 Bernal did speak with H.S. after the Defendant made a partial confession to Patricia. The  
13 admissibility of said statements will not implicate the Confrontation Clause of the Sixth  
14 Amendment so long as H.S. testifies and is subject to cross examination.

15 The State seeks to introduce the video recording of the interview to rebut the  
16 Defendant's attack. The video will be properly authenticated by Jennifer McCann.

17 **III. CONCLUSION**

18 Therefore, the State requests this Honorable Court to admit H.S.'s prior consistent  
19 statements made during the forensic interview through Jennifer McCann, the video of the child  
20 forensic interview, and statements made to Patricia Bernal if the Defendant examines H.S.  
21 and either expressly or impliedly charges H.S. of recent fabrication or improper influence or  
22 motive.

23 Pursuant to NRS 239B.030, the undersigned affirms that this document does not  
24 contain any social security numbers.

25 DATED this 26 day of May, 2020.

26 Stephen B. Rye  
27 Lyon County District Attorney

28 By:

  
Matthew K. Merrill  
Deputy District Attorney

**CERTIFICATE OF SERVICE**

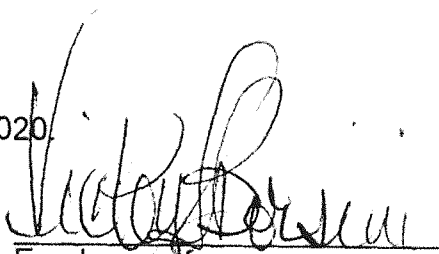
I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the **MOTION TO ADMIT VICTIM'S OUT OF COURT STATEMENTS TO HER MOTHER AND DURING A CHILD FORENSIC INTERVIEW**, by the following:

- ☒ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers \_\_\_\_\_ in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **PERSONAL DELIVERY:** By hand delivering an original or true copy to the individual(s) and/or address(es) listed below
- ☐ **E-FILE:** By electronically filing the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the individual(s) listed below
- ☐ **FACSIMILE:** By faxing an original or true copy to the individual(s) and/or address(es) and fax number(s) listed below
- ☐ **FEDERAL EXPRESS/UPS OR OTHER OVERNIGHT DELIVERY:** By placing an original or true copy in a sealed envelope, postage fully prepaid, with an overnight delivery carrier, addressed to the individual(s) and/or address(es) listed below (Tracking Number: \_\_\_\_\_)

Addressed as follows:

Patrick B.T. Mansfield Esq.  
107 N. Main Street  
Yerington, NV 89447

DATED this 31st day of May, 2020.

  
Employee of  
Lyon County District Attorney's Office

Case No. 20-CR-00099

Dept. No. I

FILED

2020 JUN -1 PM 1:35

*Tanya Scerine*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

**MOTION TO ADMIT CONFESSION  
AND PLAY AUDIO TO JURY**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Matthew K. Merrill, Deputy District Attorney, and hereby submits this MOTION TO ADMIT CONFESSION AND PLAY AUDIO TO JURY.

This Motion is based on the attached Memorandum of Points and Authorities, all documents and pleadings on file in this case, and any evidence which may be produced at a hearing on this matter.

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain any social security numbers.

DATED this 27 day of May, 2020.

Stephen B. Rye  
Lyon County District Attorney

By:

*Matthew K. Merrill*  
Matthew K. Merrill  
Deputy District Attorney



**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

**I. FACTS**

Defendant sexually assaulted a known but unnamed juvenile H.S. (DOB: 07/20/2004) on at least three occasions. On or about the 14th day of July, 2019, Patricia Bernal, H.S.'s mother, learned that the Defendant had been sexually abusing H.S. The Defendant disclosed to Patricia Bernal that he would digitally penetrate H.S.'s vagina while massaging her legs. Patricia spoke with H.S. regarding the allegations. H.S. confirmed the allegations.

H.S. was sent to do a Child Forensic Interview ("CFI") on September 04, 2019 wherein she disclosed, amongst other things, that the Defendant and H.S. were involved in an argument on or about the 14th day of July, 2019, that precipitated the Defendant's confession. H.S. confirmed that she had been sexually assaulted by the Defendant on numerous occasions typically when the Defendant was massaging H.S. legs. Jennifer McCann conducted the CFI with H.S. at the Washoe County Child Advocacy Center. The CFI was both audio and visually recorded. Subsequent to the interview, Ms. McCann issued a Child Advocacy Center Forensic Interview Report on September 20, 2019.

On or about the 21<sup>st</sup> day of October, 2019, the Defendant was interviewed by Detective Messman and Detective Dues in a Lyon County Substation. The interview was recorded. During the course of the interview, the Defendant stated, amongst other things, "I did accidentally. It wasn't an on purpose thing... Yes I accidentally did one time." "I went up her leg and I did accidentally... Haley does not have a hymen.. she broke it on a fence." "I went up her leg with the CBD cream and I accidentally entered her." "Evidently I have been fingering Haley since December" and "I let it slip in once". All these statements and more are referencing the digital penetration by the Defendant upon H.S. (Exhibit A).

**II. ARGUMENT**

**A. Custody**

"The Fifth Amendment privilege against self-incrimination provides that a suspect's statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning." *Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) "In order to admit statements made during custodial interrogation, the defendant must knowingly

1 and voluntarily waive the *Miranda* rights." *Koger v. State*, 117 Nev. 138, 141, 17 P.3d 428, 430  
2 (2001); citing *Echavarria v. State*, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992) (Emphasis  
3 Added). "'Custody' for *Miranda* purposes means a formal arrest or restraint on freedom of  
4 movement of the degree associated with a formal arrest." *Rosky*, 121 Nev. 184, at 191, 111  
5 P.3d at 695.

6 "To determine whether a custodial interrogation has taken place, a court must consider  
7 the totality of the circumstances, including the site of the interrogation, whether the objective  
8 indicia of an arrest are present, and the length and form of questioning." *State v. Taylor*, 114  
9 Nev. 1071, 1081–82, 968 P.2d 315, 323 (1998); citing *Alward v. State*, 112 Nev. 141, 155,  
10 912 P.2d 243, 252 (1996). "An individual is not in custody for purposes of *Miranda* where  
11 police officers only question an individual on-scene regarding the facts and circumstances of a  
12 crime or ask other questions during the fact-finding process, see *Garcia v. Singletary*, 13 F.3d  
13 1487, 1489 (11th Cir.1994), or where the individual questioned is merely the focus of a  
14 criminal investigation. *State v. Taylor*, 114 Nev. 1071, 1081–82, 968 P.2d 315, 323 (1998);  
15 citing *United States v. Jones*, 21 F.3d 165, 170 (7th Cir.1994). A suspect's or the police's  
16 subjective view of the circumstances does not determine whether the suspect is in custody.  
17 *State v. Taylor*, 114 Nev. 1071, 1081–82, 968 P.2d 315, 323 (1998); citing *Stansbury v.*

1 order to determine that the suspect was or was not in custody.” *Id.*, see also *Rosky v. State*,  
2 121 Nev. 184, 192, 111 P.3d 690, 695 (2005).

3 “The test for whether one is in custody is if a reasonable person would believe he was  
4 free to leave.” *Silva v. State*, 113 Nev. 1365, 1370, 951 P.2d 591, 594 (1997) citing  
5 *Rowbottom v. State*, 105 Nev. 472, 480, 779 P.2d 934, 939 (1989). Or in other words, in  
6 looking at the totality of the circumstances, “[a]n individual is deemed ‘in custody’ where there  
7 has been a formal arrest, or where there has been a restraint on freedom of movement of the  
8 degree associated with a formal arrest so that a reasonable person would not feel free to  
9 leave.” *State v. Taylor*, 114 Nev. 1071, 1082, 968 P.2d 315, 323 (1998), see *United States v.*  
10 *Bengivenga*, 845 F.2d 593, 598 (5th Cir.1988); *United States v. Moya*, 74 F.3d 1117, 1119  
11 (11th Cir.1996).

12 Here, the Defendant arrived voluntarily to the Lyon County Substation. The Defendant  
13 was told he was free to leave at the beginning of the interview and that the questioning was  
14 voluntary. The Defendant was allowed to walk down the hall and have a cigarette several  
15 times without supervision by law enforcement. The Defendant was not formally arrested. The  
16 Defendant was free to leave the room at any time and in fact did on several occasions. The  
17 Defendant freely spoke in a conversational manner with the Detectives. Defendant stated he  
18 was treated “fairly well” during the course of the interview. (Exhibit B). Defendant was not  
19 placed into handcuffs during the course of the interview and was able to leave at any point.  
20 Even after the confessions Defendant went to the bathroom unescorted by law enforcement.  
21 The bathrooms are close to the exit door to the office and the Defendant could have left during  
22 anytime. At the conclusion of the interview the Defendant was arrested.

23 The Defendant was not in custody for purposes of *Miranda* based on the above facts  
24 and the testimony likely to be elicited during a hearing on this motion. The Court should find  
25 that an interrogation for purposes of *Miranda* did not occur and thus should permit the State to  
26 allow the Defendant’s confessions to be testified to by the Detectives and played for the Jury.

27 ///

28 ///

**B Interrogation**

In *Miranda*, the Court referred to "interrogation" as actual "questioning initiated by law enforcement officers." 384 U.S., at 444, 86 S.Ct., at 1612. We have since clarified that definition, finding that the "goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to 'its functional equivalent.' " *Arizona v. Mauro*, 481 U.S. 520, 526, 107 S.Ct. 1931, 1935, 95 L.Ed.2d 458 (1987). In *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court defined the phrase "functional equivalent" of express questioning to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*, at 301, 100 S.Ct., at 1689-1690 (footnotes omitted); see also *Illinois v. Perkins*, 496 U.S. 292, 296, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990). However, "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining" what the police reasonably should have known. *Innis*, *supra*, 446 U.S., at 302, n. 8, 100 S.Ct., at 1690, n. 8. "But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 100 S. Ct. 1682, 1690, 64 L. Ed. 2d 297 (1980).

"Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, at 478, 86 S.Ct.,

1 at 1630 (emphasis added). *Rhode Island v. Innis*, 446 U.S. 291, 299–300, 100 S. Ct. 1682,  
2 1689, 64 L. Ed. 2d 297 (1980)

3 In *Rhode Island v. Innis*, a man was arrested after being identified by a taxi-cab driver  
4 who was robbed with a shotgun. The police advised the defendant of his rights under Miranda  
5 at least twice. The defendant stated he understood his rights and wanted to speak to a lawyer.  
6 Defendant was placed into a patrol vehicle and taken back to the station. On the way back to  
7 the station two officers stated, “a lot of handicapped children running around in this area”  
8 because a school for such children was located nearby, and “God forbid one of them might  
9 find a weapon with shells and they might hurt themselves.” *Rhode Island v. Innis*, 446 U.S.  
10 291, 291, 100 S. Ct. 1682, 1685, 64 L. Ed. 2d 297 (1980). The defendant interrupted the  
11 officers conversation and told them where the shotgun was located. The defendant stated he  
12 “wanted to get the gun out of the way because of the kids in the area in the school,” *Rhode*  
13 *Island v. Innis*, 446 U.S. 291, 291, 100 S. Ct. 1682, 1685, 64 L. Ed. 2d 297 (1980). The  
14 defendant was convicted and the Rhode Island Supreme Court set aside the conviction based  
15 on the *Miranda* rationale. The ruling was appealed to the United States Supreme Court.

16 The United States Supreme Court concluded, that the “respondent was not  
17 “interrogated” within the meaning of Miranda.” *Rhode Island v. Innis*, 446 U.S. 291, 302–03,  
18 100 S. Ct. 1682, 1690–91, 64 L. Ed. 2d 297 (1980). The Court reasoned that there was no  
19 express questioning of the defendant by law enforcement as the conversation was between  
20 themselves. The analysis then turns to was the defendant subjected to the functional  
21 equivalent of questioning. The Court concluded that the officers could not have “known that  
22 their conversation was reasonably likely to elicit an incriminating response from the  
23 respondent. There is nothing in the record to suggest that the officers were aware that the  
24 respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of  
25 handicapped children.” *Rhode Island v. Innis*, 446 U.S. 291, 302–03, 100 S. Ct. 1682, 1690–  
26 91, 64 L. Ed. 2d 297 (1980).

27 The Court differentiates this factual scenario compared to a lengthy harangue or that  
28 the comments were evocative. “[T]herefore, that the respondent was not subjected by the

1 police to words or actions that the police should have known were reasonably likely to elicit an  
2 incriminating response from him. *Rhode Island v. Innis*, 446 U.S. 291, 302–03, 100 S. Ct.  
3 1682, 1690–91, 64 L. Ed. 2d 297 (1980).

4 Here, the State does not contend that the Defendant was not interrogated for purposes  
5 of *Miranda*. However, *Miranda* requires both an interrogation and custody of the Defendant.  
6 The Defendant was not in custody prior to the incriminating confessions spoken by the  
7 Defendant.

#### 8 IV. Conclusion

9 The State requests this Court to Grant this motion to admit statements by Defendant  
10 during his interview and find that the following statements were not in violation of *Miranda* and  
11 allowed to be discussed and played for the Jury:

- 12 1. "I did accidentally. It wasn't an on purpose thing... Yes I accidentally did one time."  
13 2. "I went up her leg and I did accidentally... Haley does not have a hymen.. she broke it on a  
14 fence."  
15 3. "I went up her leg with the CBD cream and I accidentally entered her."  
16 4. "Evidently I have been fingering Haley since December"  
17 5. "I let it slip in once" and  
18 6. and other incriminating statements contained within the interview and to be played for the  
19 Court at a hearing for this purpose.  
20

21 DATED this 27 day of May, 2020.  
22

23 Stephen B. Rye  
24 Lyon County District Attorney

25 By:

26   
27 Matthew K. Merrill  
28 Deputy District Attorney

# CERTIFICATE OF SERVICE

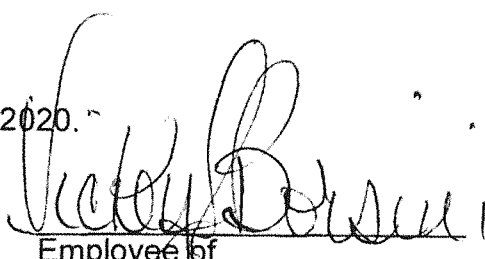
Pursuant to NRCP 5(b), I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the MOTION TO ADMIT CONFESSION AND PLAY AUDIO TO JURY, by the following:

- ☒ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers \_\_\_\_\_ in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **PERSONAL DELIVERY:** By hand delivering an original or true copy to the individual(s) and/or address(es) listed below
- ☐ **E-FILE:** By electronically filing the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the individual(s) listed below
- ☐ **FACSIMILE:** By faxing an original or true copy to the individual(s) and/or address(es) and fax number(s) listed below
- ☐ **FEDERAL EXPRESS/UPS OR OTHER OVERNIGHT DELIVERY:** By placing an original or true copy in a sealed envelope, postage fully prepaid, with an overnight delivery carrier, addressed to the individual(s) and/or address(es) listed below (Tracking Number: \_\_\_\_\_)

Addressed as follows:

Patrick B.T. Mansfield Esq.  
107 N. Main Street  
Yerington, NV, 89447

DATED this 27th day of May, 2020.

  
Employee of  
Lyon County District Attorney's Office

Case No. 20-CR-00099

Dept. No. I

FILED

2020 JUN -2 PM 2:45

CLERK OF DISTRICT COURT  
THIRD JUDICIAL DISTRICT  
*Steph Rye*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

**MOTION TO ADMIT  
PRIOR BAD ACTS PURSUANT TO  
NRS 48.035 and 48.045**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Matthew K. Merrill, Deputy District Attorney, and hereby submits this MOTION TO ADMIT PRIOR BAD ACTS PURSUANT TO NRS 48.035 and 48.045

This Motion is based on the attached Memorandum of Points and Authorities, all documents and pleadings on file in this case, and any evidence which may be produced at a hearing on this matter.

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain any social security numbers.

DATED this 1 day of June, 2020.

Stephen B. Rye  
Lyon County District Attorney

By:

*Matthew K. Merrill*  
Matthew K. Merrill  
Deputy District Attorney



**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

**I. FACTS**

Defendant sexually assaulted a known but unnamed juvenile H.S. (DOB: 07/20/2004) on at least three occasions. On or about the 14th day of July, 2019, Patricia Bernal, H.S.'s mother, learned that the Defendant had been sexually abusing H.S. The Defendant disclosed to Patricia Bernal that he would digitally penetrate H.S.'s vagina while massaging her legs. Patricia spoke with H.S. regarding the allegations. H.S. confirmed the allegations.

H.S. was sent to undergo a Child Forensic Interview ("CFI") on September 04, 2019 wherein she disclosed, amongst other things, that the Defendant and H.S. were involved in an argument on or about the 14th day of July, 2019, that precipitated the Defendant's confession. H.S. confirmed that she had been sexually assaulted by the Defendant on numerous occasions typically when the Defendant was massaging H.S. legs and Patricia Bernal was at work.

Jennifer McCann conducted the CFI with H.S. at the Washoe County Child Advocacy Center. The CFI was both audio and visually recorded. Subsequent to the interview, Ms. McCann issued a Child Advocacy Center Forensic Interview Report on September 20, 2019. H.S. disclosed to Jennifer McCann that other criminal acts besides what has been charged including sexual assaults, lewdness with a child, and grooming behavior began when she was 12 years old and occurred nearly five times a week. H.S. disclosed 3 or 4 specific incidents that the State charged but H.S. referenced several uncharged sexual assaults happening on a frequent basis.

On or about the 21<sup>st</sup> day of October, 2019, the Defendant was interviewed by Detective Messman and Detective Dues in a Lyon County Substation. The interview was recorded. During the course of the interview, the Defendant stated, amongst other things, "I did accidentally. It wasn't an on purpose thing... Yes I accidentally did one time." "I went up her leg and I did accidentally... Haley does not have a hymen.. she broke it on a fence." "I went up her leg with the CBD cream and I accidentally entered her." "Evidently I have been fingering Haley since December" and "I let it slip in once". All these statements and more are referencing the digital penetration by the Defendant upon H.S. (See Exhibit A, Motion to Admit Confession).

## II. ARGUMENT

The State moves to admit evidence as part of the res gestae of the crimes charged. Specifically, the State seeks to admit evidence regarding the following evidence:

a. Additional, behavior by the Defendant that may rise to the level of sexual assaults, lewdness, or grooming behavior that has not specifically charged but will inevitably be discussed by H.S.

### A. The Res Gestae Doctrine

The Nevada Revised Statutes contemplate the admissibility of evidence under what is known as the Res Gestae Doctrine. Specifically, NRS 48.035(3) provides:

"Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission."

The Nevada Supreme Court has recognized and expounded upon this rule in *Allan v. State*, 92 Nev. 318 (1976), saying, "[W]hen several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction, and when full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme." *Allan* at 321 (emphasis added).

Further, under the Res Gestae Doctrine, the determinative analysis is not the weighing of prejudicial effect of prior bad acts against their probative value, but whether or not a witness can describe a crime charged without referring to related uncharged acts. *State v. Shade*, 111 Nev. 887 (1995). Indeed – once such a determination is made, admission becomes compulsory. "If a court determines that testimony relevant to the charged crime cannot be

1 introduced without reference to uncharged acts, it must not exclude the evidence of the  
2 uncharged acts." *Shade* at 331. (emphasis added).

3 "Allan is particularly instructive in this case. In *Allan*, the defendant was charged with a  
4 single unlawful sexual act with a minor, and objected to the admission of other unlawful sexual  
5 acts which occurred around the same time, even with other boys. In ruling the evidence  
6 properly admitted, the Court said, "Allan first objects that it was error for the court to permit the  
7 boys to testify to the acts of fellatio committed by Allan on the boys, and such acts committed  
8 by them on him, except the sole act with which he was charged. He also contends that it was  
9 error to permit the boys to testify that he masturbated in their presence after the other sexual  
10 acts were completed, as such conduct is evidence of another crime, i.e., lewdness with a  
11 minor."

12 "We do not agree. The testimony regarding the additional acts of fellatio, as well as the  
13 act of masturbation, was admissible as part of the *res gestae* of the crime charged. Testimony  
14 regarding such acts is admissible because the acts complete the story of the crime charged  
15 by proving the immediate context of happenings near in time and place. Such evidence has  
16 been characterized as the same transaction or the *res gestae*." *Allan* at 320.

17 Here, the Defendant has been charged with three counts of Sexual Assault on a Child  
18 under 16 years of age. Count I timeframe is based on H.S. disclosure that she was in a  
19 particular class at school. Count II timeframe is based on the sexual assault that occurred just  
20 prior to the investigation origination. Count III timeline is based on the Defendant's admission  
21 that he sexually assaulted H.S. between December 2018 and February 2019.

22 As in *Allen*, there will likely be testimony of other unlawful sexual acts between the  
23 Defendant and H.S. H.S. said during the CFI that these other sexual acts occurred nearly five  
24 times a week. These other unlawful sexual acts will necessarily be discussed as we attempt to  
25 narrow the juvenile's testimony to the three charged acts.

26 ///

27 ///

28 ///

## B. Admissibility for Non-propensity Purposes

Even if the court were to find that evidence of acts of other crimes are not to be admitted under the *res gestae* of this case, they are still admissible for other purposes. NRS 48.045(2) governs the admissibility of evidence of other crimes, wrongs, or acts, saying in relevant part:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In order to overcome the presumption of inadmissibility of evidence of other crimes, wrongs, or acts, the State must establish that: (1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act must be proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *Tinch v. State*, 113 Nev. 1170, 1176 (1997); *Bigpond v. State*, 128 Nev. Adv. Op. 10; 270 P.3d 1244, 1250 (2012). "[E]vidence of 'other crimes, wrongs or acts' may be admitted under NRS 48.045(2) for a relevant nonpropensity purpose other than those listed in the statute." *Bigpond* at 1249.

### 1. The other acts are relevant to the crimes charged

The first prong of the *Tinch* test is satisfied here. The State intends to offer testimony from H.S. that included the Defendant unlawful sexual acts against her that was perpetrated by the Defendant frequently when Patricia Bernal was at work. These events would frequently happen in H.S.'s bedroom and occurred over a period of years. These acts are relevant as they tend to prove that the Defendant had an opportunity to commit his crimes while Patricia Bernal was at work. The Defendant had a plan to commit these acts while Patricia Bernal was away. The Defendant claimed in his interview with Detective Messman that his sexual assault of H.S. was an accident. The Defendant stated, "I did accidentally. It wasn't an on purpose

1 thing... Yes I accidentally did one time." "I went up her leg and I did accidentally... Haley does not  
2 have a hymen.. she broke it on a fence." I went up her leg with the CBD cream and I  
3 accidentally entered her." "Evidently I have been fingering Haley since December" and "I let it  
4 slip in once". Discussion of prior unlawful sexual acts upon H.S. will demonstrate that his acts  
5 were not a mistake.

6  
7  
8 2. Acts proven by clear and convincing evidence

9 Evidence will be introduced in the scheduled evidentiary hearing in this matter and the  
10 Court can find the reported acts are shown by clear and convincing evidence. A preliminary  
11 hearing was held in this Matter a previously attached in a motion.

12 Additionally, this Court is able to place the witnesses under oath and make the  
13 determination that the acts testified to are shown by clear and convincing evidence. The  
14 witnesses will be subject to cross examination that further satisfies the *Tinch* test.

15  
16 3. Probative value not substantially outweighed by unfair prejudice

17 Finally, even if this court concludes that evidence of these other acts fall outside of the  
18 *res gestae* of the case, the probative value of such evidence is not substantially outweighed  
19 by the danger of unfair prejudice. The Statements made by the Defendant and those to be  
20 elicited from H.S. are not substantially outweighed by the danger of unfair prejudice. The  
21 probative value as to the Defendant's plans, motives, preparation to commit his acts, and  
22 absence of mistake are high. These facts tend to show that the Defendant had been  
23 committing the acts for years. The Defendant waited till Patricia Bernal was at work. The  
24 Defendant not only committed the one sexual assault that he confessed that he did  
25 "accidentally" but rather it occurred on a frequent basis.  
26  
27  
28

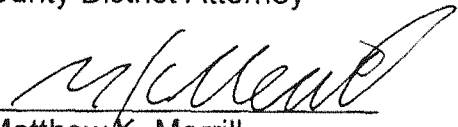
#### IV. Conclusion

The State's witnesses would be unable to testify and describe the acts charged without discussing or referring to the other uncharged acts and crimes that took place. These other acts and crimes are part of the *res gestae* of the entire case. However, even if the Court were to conclude such evidence falls outside of the *res gestae*, it is also admissible for various non-propensity purposes – should the Court so find, the State would request a hearing pursuant to *Petrocelli v. State*, 101 Nev. 46 (1985), et seq. Accordingly, the State of Nevada respectfully request that this court make findings that pursuant to NRS 48.035(3) and the *Res Gestae* Doctrine the above requested evidence be admitted.

DATED this 1 day of June, 2020.

Stephen B. Rye  
Lyon County District Attorney

By:

  
Matthew K. Merrill  
Deputy District Attorney

**CERTIFICATE OF SERVICE**

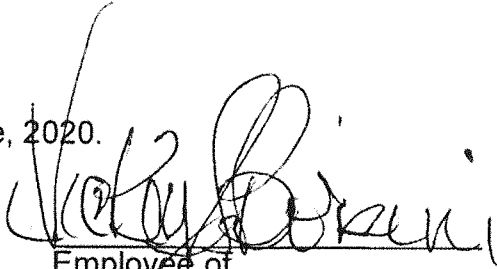
Pursuant to NRCP 5(b), I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the **MOTION TO ADMIT PRIOR BAD ACTS PURSUANT TO NRS 48.035 and 48.045**, by the following:

- ☒ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers \_\_\_\_\_ in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **PERSONAL DELIVERY:** By hand delivering an original or true copy to the individual(s) and/or address(es) listed below
- ☐ **E-FILE:** By electronically filing the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the individual(s) listed below
- ☐ **FACSIMILE:** By faxing an original or true copy to the individual(s) and/or address(es) and fax number(s) listed below
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Addressed as follows:

Patrick B.T. Mansfield Esq.  
107 N. Main Street  
Yerington, NV, 89447

DATED this 15<sup>th</sup> day of June, 2020.

  
Employee of  
Lyon County District Attorney's Office

FILED

Case No. 20-CR-00099

Dept. No. 1

2020 SEP -2 AM 9:30

TANYA SCDING  
COURT ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Andrea Andersen*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

**SUPPLEMENT TO THE MOTION TO  
ADMIT VICTIM'S OUT OF COURT  
STATEMENTS TO HER MOTHER AND  
DURING A CHILD FORENSIC INTERVIEW**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Matthew K. Merrill, Deputy District Attorney, and hereby submits this SUPPLEMENT TO THE MOTION TO ADMIT VICTIM'S OUT OF COURT STATEMENTS TO HER MOTHER AND DURING A CHILD FORENSIC INTERVIEW.

The State filed a MOTION TO ADMIT VICTIM'S OUT OF COURT STATEMENTS TO HER MOTHER AND DURING A CHILD FORENSIC INTERVIEW. Therein the State stated that the Child Forensic Interview transcript would be provided to the Court upon being transcribed.

Please find attached EXHIBIT B, the Child forensic Interview of H.S.

DATED this 31 day of August, 2020.

Stephen B. Rye  
Lyon County District Attorney

By:

*Matthew K. Merrill*  
Matthew K. Merrill  
Deputy District Attorney



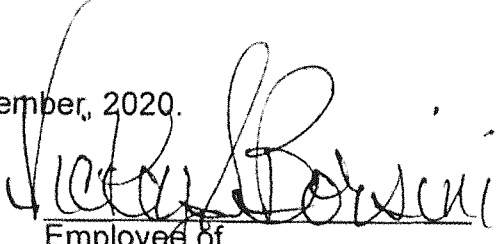
**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the **SUPPLEMENT TO THE MOTION TO ADMIT VICTIM'S OUT OF COURT STATEMENTS TO HER MOTHER AND DURING A CHILD FORENSIC INTERVIEW**, by the following:

- ☒ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers \_\_\_\_\_ in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **PERSONAL DELIVERY:** By hand delivering an original or true copy to the individual(s) and/or address(es) listed below
- ☐ **E-FILE:** By electronically filing the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the individual(s) listed below
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- ☐ **FEDERAL EXPRESS/UPS OR OTHER OVERNIGHT DELIVERY:** By placing an original or true copy in a sealed envelope, postage fully prepaid, with an overnight delivery carrier, addressed to the individual(s) and/or address(es) listed below (Tracking Number: \_\_\_\_\_)

Addressed as follows:  
Jesse Kalter, Esq

DATED this 15<sup>th</sup> day of September, 2020.

  
Employee of  
Lyon County District Attorney's Office

## EXHIBIT B

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THE STATE OF NEVADA,  
Plaintiff,  
vs.  
THOMAS BERNAL,  
Defendant.

INTERVIEW OF HALEY SMITH

SEPTEMBER 4, 2019

RENO, NEVADA

Transcribed by:

Shellie Loomis, RPR

-CAPITOL REPORTERS (775) 882-5322.

1 RENO, NEVADA, WEDNESDAY, SEPTEMBER 4, 2019

2 -o0o-

3  
4 BY MS. McCANN:

5 Q. What school are you at?

6 A. Yerington High School.

7 Q. Oh, okay. Yeah, I'm sure it's a little  
8 different, huh?

9 A. Yeah.

10 Q. How long have you been in school?

11 A. There?

12 Q. Just like this year? When did you guys start?

13 A. We start August 21st.

14 Q. Oh, okay. So not terribly long?

15 A. Yeah. We started later because we got out  
16 earlier, so --

17 Q. Okay. Great. Well, Haley, like (indiscernible)  
18 out there, my name is Jennifer. My job is just to talk to  
19 people and I find out about things that have happened; okay?

20 A. (Nodded head.)

21 Q. And so I want to let you know that when we're  
22 talking and what we talk about is recorded. So there's  
23 cameras in our room. And so there's a camera in that white  
24 and black box. And then there's also one above my head in

CAPITOL REPORTERS (775) 882-5322

1 that bubble on the ceiling. And the only reason it's recorded  
2 is just so that I remember everything that you and I talked  
3 about?

4 I also work with a team of people and they can  
5 hear us. And in a little bit, I'm going to take a break and  
6 check in with them and see if there's anything else they want  
7 me to talk to you about, okay?

8 A. (Nodded head.)

9 Q. Okay. Any questions or comments about any of  
10 that?

11 A. (Shakes head.)

12 Q. Okay. Well, I just met you, Haley, and I don't  
13 know much about you. Tell me some things you like to do for  
14 fun.

15 A. I like to play video games such as like Skyrim or  
16 SledNight, games like that.

17 Q. Um-hum. What's Skyrim about?

18 A. So you make a character and it's a free world,  
19 first and third perspective video game, where you go and kill  
20 monsters and you do quest lines. And there's a whole bunch of  
21 stuff to do.

22 And there's an entire map, and there's like nine  
23 or ten different cities that you can go to and work for like  
24 the higher jarls kind of thing. And so they let you like buy

1 houses when you earn their trust enough.

2 Q. Um-hum. Okay.

3 A. So you can do like -- because there's dark  
4 brotherhood quests that's practically a group of assassins.

5 Q. Um-hum?

6 A. That go kill people, and then there's  
7 a (indiscernible) -- steal stuff from people and like rob  
8 their houses to do all that quest line, too.

9 Q. Oh, okay. All right. And then like is it  
10 ongoing? Like is there different --

11 A. Yeah, there's a whole bunch of -- like the main  
12 quest, you have to kill a Dragon named Alduan.

13 Q. Um-hum?

14 A. And then you get to go like an alternate  
15 dimension when you go and actually kill him. It's called  
16 Sovngarde where all like the north heros died and then they  
17 went there.

18 Q. Oh, okay. And have you done that yet?

19 A. Yeah.

20 Q. Oh, okay.

21 A. I just did it yesterday.

22 Q. Oh, wow. How exciting. And then do you play  
23 with other people or is it --

24 A. No, it's a single player.

1 Q. (Nodded head.)  
2 A. Yeah.  
3 Q. Um-hum?  
4 A. It's a single player, first/third person.  
5 Q. Got you.  
6 A. Kind of thing, so --  
7 Q. Okay. And is it like -- what, like X-box or --  
8 A. PlayStation.  
9 Q. PlayStation. Okay. Cool. And then are there a  
10 few other games that are like that, that you play?  
11 A. Not really. The ones that we have -- or the ones  
12 we had, there's another game I like that's called Doom.  
13 Q. Um-hum?  
14 A. And you get to kill all these demons and do all  
15 that quest line, too. But that one's not like Skyrim.  
16 Q. Got you. Um-hum. Okay. And then is there  
17 something else you like to do for fun?  
18 A. I like to read and write.  
19 Q. Um-hum. Are you reading anything right now?  
20 A. Yeah.  
21 Q. Yeah? What are you reading?  
22 A. It's called The Heart Forager.  
23 Q. Uh-huh. What's that about?  
24 A. It's about this group of people and they're

1     like -- they're good people and they work with like the king.  
2     I'm not that far into it, so I kind of --

3             Q.    Oh, that's okay. And they work with the king and  
4     then --

5             A.    And they defeat like dark demons and danger and  
6     stuff like that.

7             Q.    Uh-huh. Well, that sounds interesting. Okay.  
8     Well, thank you for telling me a little bit about yourself.

9             And so I just want to go over a few things about  
10    our room today. And so I'll ask some questions, and if at any  
11    point you don't -- you do not know the answer to a question,  
12    you can say, I don't know.

13            But if you do know the answer, it's really  
14    important that you share that with me. Okay? Also, I'll  
15    repeat a lot of the things you say just because I want to make  
16    sure I understand everything you're telling me.

17            If I'm not making sense, just let me know. It's  
18    okay to interrupt me in here. You know, although you can say  
19    any kinds of words, any word that you normally would say.  
20    I've heard all kinds of things.

21            Also, it's really important that we get  
22    everything accurate. And so we also have to talk about the  
23    truth and things that have really happened.

24            And so, Haley, tell me the difference between the



1 truth and a lie.

2 A. A lie is when you don't tell the truth, like  
3 if -- like it's like playing a game. Like you tell the truth,  
4 then you're actually telling what actually happened. If  
5 you're telling a lie, you're not telling what happened.

6 Q. Okay. And so when we're talking today, do you  
7 promise to tell me the truth?

8 A. (Nodded head.)

9 Q. Great. Thank you. So I want to try something.  
10 I want you to think of this morning and I want you to tell me  
11 everything that happened this morning until lunch time. And  
12 try and tell me as much as you can remember with as many  
13 details as you can.

14 A. Well, I woke up -- well, my brother woke me up  
15 this morning because he had to go to school today.

16 Q. Um-hum?

17 A. And then mom, she -- I was up when she got back  
18 from the bus stop at like 7:10 or something. And then she  
19 came in. She's like, I'm going to go get more sleep because  
20 she'd only gotten three hours because she worked really late  
21 last night.

22 And then I just stayed up and started playing  
23 Skyrim until about like 10:00, and then I went to do all my  
24 stuff to get ready. And then she got up and then we just went

1 to go pick up Amanda and then we came here.

2 Q. Uh-huh. Okay. And tell me about all the stuff  
3 you did this morning to get ready.

4 A. I put my makeup on. I took a shower, fed my  
5 turtle, fed the cats. All that kind of stuff.

6 Q. Um-hum. Okay. And then tell me about picking up  
7 Amanda.

8 A. Well, she lives further than us. She lives in  
9 town and we don't.

10 Q. Um-hum?

11 A. We live further out of town. That's why we have  
12 to take the bus to school.

13 Q. Um-hum?

14 A. And she lives in town. So I went to go stop by  
15 mom's work because she had to pick up her paycheck to get gas  
16 and stuff to come. And then we went to go pick up Amanda and  
17 then we went -- and then we came to Reno and so --

18 Q. Okay. And then tell me about like the car ride  
19 here.

20 A. I did some of my math homework that I have turn  
21 in -- or I have to turn it in on Friday because it's like a  
22 warm-up thing that we do. And it's due every two weeks on  
23 Friday so we can get that grade in.

24 Q. Um-hum?

1           A.    And on the car ride back, I have to do all the  
2 rest of it, so --

3           Q.    Got you. Okay. And then when you were in the  
4 car coming here, where did you sit?

5           A.    The passenger-side backseat.

6           Q.    Okay. And then what about your mom?

7           A.    She's driving.

8           Q.    And what about -- what was --

9           A.    Amanda.

10          Q.    Amanda?

11          A.    She was in the passenger seat.

12          Q.    Okay. And then describe your mom's car to me.

13          A.    Well, it's a really big car.

14          Q.    Um-hum?

15          A.    It's a Venza, it's a Toyota. So we have like a  
16 three-person backseat and then two in the front. And then  
17 we've got a radio, which is like in it, and it's electronic.  
18 So can you just press on the screen to a different station.

19                And she's got her blinker on the side of her  
20 steering wheel and stuff like that because she lets me drive  
21 sometimes.

22          Q.    Um-hum?

23          A.    Because I'm getting my permit soon, so --

24          Q.    Uh-huh?

1           A.    And then the backseat, it's just me and my  
2 brother most of the time. So he sits on the driver's side in  
3 the backseat.

4           Q.    Um-hum?

5           A.    Our car's kind of messy, though, because we mess  
6 it up when we go on trips, so --

7           Q.    Okay. And what color is your mom's car?

8           A.    It's silver.

9           Q.    Okay. Well, thank you for walking me through  
10 your morning. And so it's really important today when we're  
11 talking to share as much as you remember with as many details  
12 as you can.

13                   So I'll ask a lot of questions about what  
14 happened first and then what happened, and tell me more about  
15 that, and lots of details about, you know, whatever you've  
16 told me. So when we're talking, just keep in mind, like I  
17 said, to share as much as you can. Okay?

18           A.    (Nodded head.)

19           Q.    Okay. So, Haley, tell me what you came to talk  
20 to me about today.

21           A.    Well, my step dad and he sexually assaulted me.

22           Q.    Okay. Tell me about that.

23           A.    Well, define.

24           Q.    I'm sorry?

1           A.    What do you mean? Like what do you want me to  
2 talk about it, like --

3           Q.    Yeah. So tell me about one time that he sexually  
4 assaulted you.

5           A.    Well, all of the time, too. Well, he did it  
6 while mom was at work and then I would -- before I went to bed  
7 like because we had school, and I would come out and say good  
8 night.

9                   And then he'd follow me into my room. And I was  
10 like, why are you following me, I'm going to bed. And then he  
11 would just start doing it to -- yeah.

12           Q.    Okay. So, Haley, I want you to think of one time  
13 that something happened, a time maybe you remember the most.  
14 So it could be the first, the last, anytime you remember the  
15 most. And tell me everything that happened from the beginning  
16 to the end, and try and include as much as you can remember.

17           A.    I had to rearrange my room that night, and I was  
18 just laying down, tired and my back was hurting from moving  
19 everything. I was just playing on my old phone, not my new  
20 one. And so I was just laying there, reading and then  
21 listening to music like I always do and just relaxing on my  
22 bed.

23                   And then he came to my room right after mom had  
24 left and then he'd come into my room -- in and out of my room

1 for the last like two hours. And then he had finally just  
2 come into my room and he's like, what you doing? I'm just  
3 like listening to music and reading.

4 Q. Um-hum?

5 A. And then I put my phone down because it's  
6 something I do when my parents come in my room, to see what  
7 they want or if they need help with anything.

8 Q. Um-hum?

9 A. And then he just like -- because he used to just  
10 like help my legs because school like wore them out and it  
11 started hurting every day after school. And so I'm just like,  
12 can you do my legs for me, my legs are hurting. And then he  
13 just got out of hand with it.

14 Q. Um-hum. Okay. And so the night that you  
15 rearranged your furniture in your bedroom?

16 A. (Nodded head.)

17 Q. It sounds like you were just like hanging out in  
18 your room?

19 A. Um-hum.

20 Q. And he came in?

21 A. (Nodded head.)

22 Q. And did you ask him to do your legs that night?

23 A. No, actually I didn't.

24 Q. Okay.

1           A.    He was actually -- he just did it. And I'm just  
2 like, what are you doing, I didn't ask you to do that.

3           Q.    Okay. So tell me about like when he came in the  
4 room. What was one of the first things that happened?

5           A.    He just sat on the end of my bed because my bed  
6 is against a wall. And so my head's against the wall instead  
7 of my head being at the end of the bed. But he just sat --  
8 because I have a very queen sized bed.

9           Q.    Um-hum?

10          A.    And so he sat like right in the middle and my  
11 feet were just over here in the middle of the bed.

12          Q.    Okay.

13          A.    So he just sat there for a few minutes and  
14 then --

15          Q.    Okay. And was this -- when he sat on the bed,  
16 was this the night that -- when you rearranged your bedroom,  
17 and so your bed was like that with your head over here?

18          A.    Um-hum.

19          Q.    Okay. And tell me again where he sat.

20          A.    The like middle, like -- okay. So this is the  
21 front part of the bed.

22          Q.    Um-hum?

23          A.    And this is where the edge is.

24          Q.    Um-hum?

1           A.    Because my bed was against a wall on two sides at  
2   that time.

3           Q.    Okay.

4           A.    So this side was by the window.

5           Q.    Yeah.

6           A.    Because I have two windows in my room. And so my  
7   room -- my bed was like this, that was open. So he was just  
8   sitting like right in the middle where my feet were, but on  
9   the edge.

10          Q.    Got you. Okay. And what was the very next thing  
11   that happened?

12          A.    And then he just started massaging my legs and  
13   start talking to me. I can't remember what it was about,  
14   though.

15          Q.    Um-hum. And then tell me the very next thing  
16   that happened.

17          A.    Then he -- I got back on my phone and then he  
18   just -- he went to get up and then he -- I guess he changed  
19   his mind. And then actually like put his hand here  
20   (indicating). And I'm just like, what are you doing. And he  
21   was just like nothing.

22          Q.    Um-hum. And then what happened?

23          A.    And then he got out of hand with it and just  
24   started doing stuff.



1 Q. Okay. Tell me what stuff he did.  
2 A. It's weird to talk about this.  
3 Q. Um-hum?  
4 A. He started fingering me.  
5 Q. Um-hum?  
6 A. And then got out of hand with that.  
7 Q. Okay. So you had mentioned he put his hand right  
8 here?  
9 A. Um-hum. Then he starts massaging like this and  
10 I'm -- I was just like --  
11 Q. Okay. So then right after he was massaging your  
12 leg, then where did his hand go?  
13 A. Further up.  
14 Q. Okay. And when it went further up, what  
15 happened?  
16 A. I thought he was just trying to like -- because  
17 he usually just hugged me after he started massaging my legs.  
18 And so I was just like, what are you doing? And he's like,  
19 I'm just going to give you a hug.  
20 Q. Um-hum?  
21 A. And I'm just like okay. He doesn't usually do  
22 that.  
23 Q. Okay. And then what happened right after that?  
24 A. And then he didn't give me a hug at all.

1 Q. Okay. And where did his hand go then?  
2 A. To places they shouldn't be.  
3 Q. Right. Tell me about how -- like you had  
4 mentioned he was fingering you, and I don't want to assume  
5 anything in here. So what does fingering mean? Like what was  
6 he doing when he was fingering you that time?  
7 A. I don't know how to explain it that much.  
8 Q. Um-hum?  
9 A. He just -- I can't explain it.  
10 Q. Okay. So were there body parts involved?  
11 A. No.  
12 Q. Okay.  
13 A. Oh, wait. It was his hand.  
14 Q. Okay. And what was his hand doing?  
15 A. Touching places it shouldn't have done -- it  
16 shouldn't have gone.  
17 Q. Okay. And do you have a name for the places he  
18 shouldn't have -- they shouldn't have gotten?  
19 A. I don't want to say.  
20 Q. Okay. So I have a drawing and it's of a girl ,  
21 with no clothes on. Would it be easier for you to circle it?  
22 A. (Nodded head.)  
23 Q. Okay. And so we'll do that. Okay. So this  
24 time, just circle for me where his hand went.

1 A. (Complies.)  
2 Q. Okay. Thank you. And then tell me about how his  
3 hand got here to this part.  
4 A. My leg? He just started doing that and then.  
5 Q. Okay. And how are your clothes when his hand  
6 went to this part?  
7 A. I was just laying in bed with shorts that went  
8 down to here (indicating) and just a tank top on like always  
9 with my sweater over it like always.  
10 Q. Um-hum?  
11 A. What I usually wear to bed, so --  
12 Q. Okay. And like was his hand on top of your  
13 clothes on this part or underneath your clothes?  
14 A. On which part?  
15 Q. When his hand went to this part?  
16 A. It was over and then he went under.  
17 Q. Okay. Tell me about how his hand got underneath  
18 your shorts.  
19 A. Because my shorts were only like this  
20 (indicating) and then he -- and he just went like that.  
21 Q. Okay.  
22 A. And just --  
23 Q. And then when you had said he was fingering the  
24 part or places he shouldn't have, what did you -- what part

1 was that? On here, what part was he fingering?  
2 A. The circled part.  
3 Q. Okay. And what was his finger doing and where  
4 was it at on this part?  
5 A. I can't explain it.  
6 Q. Okay.  
7 A. It's weird.  
8 Q. Okay. And so did you have underwear on when you  
9 were wearing the shorts?  
10 A. Um-hum.  
11 Q. Okay. And what happened to the underwear?  
12 A. They were still on.  
13 Q. Okay. And did they move or change or do anything  
14 different?  
15 A. Hum-um.  
16 Q. Okay. And so then you had mentioned like his  
17 hand and his fingers were touching. Did they touch on the  
18 inside of this part or on the outside of that part?  
19 A. Inside and outside.  
20 Q. Okay. And so when his fingers went on the  
21 inside, where did your underwear go?  
22 A. They just moved to the side.  
23 Q. Okay. And then when he was fingering on the  
24 inside of this part, what did that feel like when that

1 happened?

2 A. Not like -- not nice at all.

3 Q. Okay. And what did -- like what did your body  
4 feel or anything like that?

5 A. My body was just like don't. And then I was just  
6 so tired, I didn't -- I wasn't thinking right because I was  
7 really tired. And when I get tired, I don't think great,  
8 so --

9 Q. Um-hum. Okay. And then you had mentioned he  
10 touched on the inside and the outside --

11 A. Um-hum.

12 Q. -- of this part. When he touched on the outside  
13 what, what was he touching with?

14 A. His fingers.

15 Q. Okay. And then how did his hand and fingers  
16 touching this part stop that time?

17 A. I said stop. And then he just walked out of the  
18 room.

19 Q. Okay. And then while his fingers or his finger  
20 was inside here, tell me everything like you remember him  
21 doing. Like what was the rest of his body doing?

22 A. He was just sitting there, trying to make  
23 conversation with me. And I was just like shutting down and I  
24 was trying not to think about it anymore.

1 Q. Okay. And so while his hand -- like it went up  
2 your shorts, he was trying to make conversation then?

3 A. Like how was your day, how was school and all  
4 that kind of stuff.

5 Q. Um-hum. Okay. And did you reply back at all?  
6 Did you say anything to him when he asked those questions?

7 A. I just -- I said it was good and then shoved, and  
8 then just --

9 Q. Okay. And then did you like hear him do or say  
10 anything else when this was happening?

11 A. He just tried to make conversation. And then  
12 every time he would stop when my brother and the -- we have a  
13 back room kind of and it separates our rooms from the living  
14 room.

15 Q. Um-hum?

16 A. And so when he opened that, my brother, he  
17 knocked on my door and then he stopped and just said what.

18 Q. Okay. So this night when you had rearranged your  
19 bedroom furniture, your brother had knocked on the door?

20 A. Yeah, because he was wondering if he could eat  
21 something, because at our house, we have to ask to eat  
22 something before we eat it.

23 Q. Um-hum.

24 A. To make sure mom doesn't -- hasn't claimed it for

1 her work food or something like that.

2 Q. Um-hum. Okay. And so then backing up just a  
3 little bit, did his -- like when he had his hand up your  
4 shorts, did his clothes change or do anything different when  
5 this was happening?

6 A. Hum-um.

7 Q. Okay. What about like if any other part of his  
8 body moved or did anything different?

9 A. I couldn't tell.

10 Q. Okay. And so then it sounds like he was sitting  
11 the whole time?

12 A. (Nodded head.)

13 Q. Okay. And did he stay sitting the whole time?

14 A. Until my brother knocked on the door, then he got  
15 up.

16 Q. Okay. And then describe to me what you were  
17 wearing when this happened.

18 A. I was wearing this tank top, this sweater and  
19 blue -- like this kind of blue, but a little darker shorts  
20 that went down to here (indicating).

21 Q. Okay. And if you remember like what material the  
22 shorts were or --

23 A. They were like basketball shorts.

24 Q. Um-hum. Okay. And then what about like if you

1 remember what underwear you were wearing?

2 A. Hum-um.

3 Q. Okay. Did you have anything on under that tank  
4 top that time?

5 A. Um-hum.

6 Q. Yeah? What did you have on under that?

7 A. This bra right here.

8 Q. Okay. Did anything happen with your bra?

9 A. Hum-um.

10 Q. Okay. And so then describe to me what was on  
11 your bed. So you kind of told me where your bed was in your  
12 room?

13 A. My sheet, my blanket, my pillow was and a few  
14 stuffed animals.

15 Q. Okay. And then that time, describe the rest of  
16 your room to me like you told me where the bed was.

17 A. So my bed was against the wall.

18 Q. Uh-huh?

19 A. And then my turtle tank I had on a black  
20 entertainment stand that we had thrown down the stairs so it  
21 would break.

22 Q. Uh-huh?

23 A. But I moved it onto my -- her onto my dresser  
24 because I found out my turtle is a girl.



1 Q. Okay.

2 A. And so we moved a -- or I had moved that -- or I  
3 couldn't have moved it by myself, so I just left her on that.  
4 And then my dresser was in this corner of my room, by my  
5 window, which is right here (indicating). And then my -- I  
6 have a green table and it was on this side of my bed.

7 Q. Um-hum. Okay. And then when did this happen if  
8 you remember?

9 A. I don't -- I can't remember.

10 Q. Okay. How old were you when it happened?

11 A. 13.

12 Q. Okay. And if you remember like what you did that  
13 day?

14 A. At school?

15 Q. Yeah, just anything that day at all.

16 A. Well, I mean, I was a freshman. So I had just  
17 had completed a day of school, ended it with one of my  
18 favorite teachers and road the bus home.

19 Q. Okay. And who was your favorite teacher that day  
20 that you were talking about?

21 A. Her name is Mrs. Miller and she was my English  
22 honors teacher last year.

23 Q. Okay. All right. And then you mentioned that  
24 like he was sitting on the bed. What was he wearing?

1           A.    He was wearing his daily clothes. A tank --  
2 well, he wasn't wearing a tank top. No, he was wearing a  
3 t-shirt and shorts, like cargo shorts that went down to here  
4 (indicating).  
5           Q.    Okay. And then your brother knocked on the door?  
6           A.    Um-hum.  
7           Q.    What happened after your brother knocked on the  
8 door?  
9           A.    After that I left my door open because he had  
10 closed it.  
11          Q.    Um-hum?  
12          A.    And then he just left.  
13          Q.    Okay. And did your brother come in the room?  
14          A.    No, I tell him to stay at my doorway.  
15          Q.    Uh-huh?  
16          A.    And he's not allowed to come in my room unless I  
17 tell him he can.  
18          Q.    Okay.  
19          A.    So he was at the doorway, which is like this  
20 doorway.  
21          Q.    Um-hum?  
22          A.    But it's a little more in.  
23          Q.    Uh-huh?  
24          A.    And my door swings this way.

1 Q. Uh-huh?

2 A. But it's a little wooden door, so --

3 Q. Got you. Okay. So did he see anything in the

4 room?

5 A. He could have only seen the turtle or my closet,

6 which was on this side of the room.

7 Q. Okay. And then so he knocked on the door and

8 then it sounds like then this guy stopped and then where did

9 this guy go after?

10 A. He went -- so after you leave my room, you have

11 my brother's room on the right side and then the bathroom

12 straight across. Then you have the door I was talking about

13 that separates it, because we have seven cats right now.

14 We're getting rid of five of them.

15 And we had a couch right here and then we have a

16 TV over here. And then he goes behind the couch and he plays

17 in his little gaming station with his table and all that

18 behind the couch.

19 Q. Got you. Okay. And then what's your brother's

20 name?

21 A. Owen.

22 Q. Okay. How old is Owen?

23 A. He will be 13 in a few months.

24 Q. All right. And then what is your step dad's

1 name?

2 A. TJ.

3 Q. Okay. And then did anything else happen with TJ

4 this -- the night that we're talking about right now?

5 A. No, because I said good night and I shut my door

6 and I turned my light off.

7 Q. All right.

8 A. And I went to bed.

9 Q. Okay. And you had mentioned that your mom had

10 left?

11 A. She worked that night, 5:00 p.m. to 1:00 a.m. in

12 the morning.

13 Q. Um-hum?

14 A. And she -- then they go to bed until 3:00.

15 Q. Um-hum?

16 A. Most nights because she has to wind down and get

17 ready to go to sleep, because most mornings he woke up with

18 us. But some mornings, like Fridays, she woke up with us.

19 Q. Um-hum?

20 A. So she could actually have a few hours to spend

21 with us before we went to school.

22 Q. Got you. Okay. And then this night, where was

23 your mom working?

24 A. Dini's Lucky Club.

1 Q. Okay. Does she work there now still?  
2 A. Yeah.  
3 Q. Okay.  
4 A. It's just her shift changed. And so on Fridays  
5 and Saturdays she works 9:00 to 5:00.  
6 Q. Got you. Okay. And then where was TJ working at  
7 the time?  
8 A. He was unemployed.  
9 Q. Okay. And then let's see. Is -- did this -- the  
10 night that we're talking about right now, did this happen at  
11 the house you live in now or a different one?  
12 A. Um-hum.  
13 Q. The house you --  
14 A. The house we live in right now.  
15 Q. Okay. Where is that at?  
16 A. It's not specific. It's just out in the middle  
17 of the desert on the highway.  
18 Q. Oh, okay. What highway?  
19 A. Highway 95 East.  
20 Q. Okay. And like are you like in Yerington or are  
21 you -- like what city are you considered --  
22 A. We're in Yerington, but we're out on the  
23 outskirts of Yerington on your way to Schurz.  
24 Q. Okay.

1 A. And so we live out that way.

2 Q. Got you. Okay. And then was there another time  
3 that TJ did something like this?

4 A. (Nodded head.)

5 Q. Yeah? Was there a time that it happened in a  
6 different place besides your bedroom?

7 A. Hum-um.

8 Q. Okay. Was there a time that something different  
9 happened?

10 A. (Shakes head.)

11 Q. Okay. Was there a time that like you were a  
12 different age and you weren't 13?

13 A. When I was 14.

14 Q. Okay. Tell me about -- a little bit more about  
15 what happened when you were 14.

16 A. It was the same thing. And mom has Wednesdays  
17 and Thursdays -- she had Tuesdays and Wednesdays off to spend  
18 with us. But most of the time, I went to the Boys and Girls  
19 Club afterward, after school. And he did that when mom was  
20 off work on a Wednesday. So the day before she had to go back  
21 to work.

22 Q. Um-hum. Okay. So then tell me -- you know, kind  
23 of walk me through what happened that time.

24 A. We had just gotten home and we were spending time

1 with mom on the couch. And she just said she wanted to go  
2 take a shower because she was cleaning all day, trying to make  
3 the house smell good like always. And so we were just sitting  
4 on the couch and I went to go to my room and he followed me  
5 and did the same thing.

6 Q. Um-hum?

7 A. And then mom got out of the shower and he left.

8 Q. Okay. And tell me more about like what you were  
9 wearing that time?

10 A. I was wearing -- since I had just gotten home  
11 from school, I hadn't had time to change yet. So I was  
12 wearing black pants and a black t-shirt.

13 Q. Okay. And how did his hand like get to your part  
14 that time?

15 A. He hadn't done it that time. He hadn't fully  
16 done it because mom had gotten out of the shower and she was  
17 in the kitchen, making dinner.

18 Q. Oh, okay. So tell me a little -- like when he  
19 walked in the room, what was the first thing that happened  
20 when he walked in the room?

21 A. He walked in and then he messed with the turtle  
22 for a few minutes, and then sat on my bed.

23 Q. Um-hum. And then what happened after he sat on  
24 your bed?

1           A.    He put his hand on my leg and then started  
2   massaging my leg and the door was closed.  I always close my  
3   door after I go into my room unless it's too hot in my room,  
4   because we have like -- the cooler is in my brother's room.

5           Q.    Um-hum.  Okay.  And then he sat on the bed and he  
6   was massaging your leg, and then what happened?

7           A.    And then mom had gotten out of shower and he was  
8   really mad about that.

9           Q.    How did you know he was mad about that?

10          A.    He was -- he looked really like mad because the  
11   day he was just like really -- he was worse than he was that  
12   morning because he was super tired.

13          Q.    Um-hum?

14          A.    But he was mad, not tired this time.

15          Q.    Got you.  Okay.  Did he say anything to you that  
16   time?

17          A.    (Shakes head.)

18          Q.    Okay.  And then let's see.  Was there another  
19   time that -- so we talked about the one time when you  
20   rearranged your bedroom, he had fingered you.  Was there  
21   another time that he fingered you?

22          A.    (Nodded head.)

23          Q.    Um-hum.  So kind of walk me through another time  
24   that he fingered you?



1           A.    It was the weekend mom had just gone to work and  
2 we were just out. And I was watching Twitch on his computer.  
3 It's a gaming website.

4           Q.    Um-hum?

5           A.    And then there's all these people who play video  
6 games and they stream onto it. So we were watching one of his  
7 friends. I think his name was Ringer.

8           Q.    Um-hum.

9           A.    So his friend's name was Ringer and we were just  
10 watching him playing a game called PlayerUnknown's  
11 Battlegrounds. It's a shooter game.

12          Q.    Um-hum?

13          A.    And you can play with up to four people unless  
14 you make a custom game.

15          Q.    Um-hum?

16          A.    And so we were just watching him do a custom game  
17 with his friend King Stoogy.

18          Q.    Um-hum?

19          A.    And we were just doing all that stuff.

20          Q.    Um-hum?

21          A.    And then I had gone to go to the bathroom and  
22 then I went back into my room because I didn't want to watch  
23 it anymore. He came into my room and I'm just like, what.  
24 And he's like, why are you sitting in here, I thought we were

1 watching Twitch together. I'm just like, I don't want to  
2 anymore.

3 Q. Um-hum?

4 A. And so he sat on the bed again. And I was  
5 wearing shorts again like always on the weekends.

6 Q. Um-hum?

7 A. Or my pajamas all day long.

8 Q. Um-hum?

9 A. And so we were just -- he said -- and he was  
10 like -- wait, I can't remember what he said. He was trying to  
11 talk to me again and I just didn't know what to answer.

12 Q. Um-hum?

13 A. So -- and then he did it again.

14 Q. And so just to clarify, he fingered you again  
15 that time?

16 A. (Nodded head.)

17 Q. Okay. How does his hand get to that part that  
18 time?

19 A. The same way the first time.

20 Q. Okay. And so like he went up the shorts?

21 A. (Nodded head.)

22 Q. And then what happened with your underwear that  
23 time?

24 A. They still stayed there, but they got pushed

1     aside.

2             Q.    Okay.  And then what about -- like the last time,  
3     whether he went on the inside or the outside, this time, did  
4     he go inside or outside this part?

5             A.    It was inside.

6             Q.    Okay.  And what part went inside this time?

7             A.    His finger.

8             Q.    Okay.  And then what about like -- if you  
9     remember him saying or doing anything when his fingers were  
10    inside this time?

11            A.    (Shakes head.)  I can't remember if he said  
12    anything or not.

13            Q.    Okay.  Did you hear like anything at all, like if  
14    he said and -- or did any noises or anything like that?

15            A.    No, I could only hear my brother playing Fortnite  
16    with his friends.

17            Q.    Um-hum.  Okay.  And then how did him fingering  
18    you this time stop?

19            A.    I pushed his -- I pushed his arm away with my  
20    foot.

21            Q.    Um-hum.  And how did he react when you did that?

22            A.    He wasn't very happy about it.

23            Q.    Um-hum.  And tell me more about that.  Like how  
24    did you know?

1           A.    He gets a weird look in his eyes and his eyes  
2    turn different colors.  Instead of like yellow with brown  
3    dots, it turns completely yellow.

4           Q.    Um-hum.  Okay.  Did he say anything to you when  
5    he pushed his hand away?

6           A.    Hum-um.

7           Q.    Okay.  And so tell me this time how your body  
8    position was?

9           A.    I was just laying flat.

10          Q.    Okay.  And what about his body position?

11          A.    He was sitting on the bed again.

12          Q.    Okay.  What part of the bed this time?

13          A.    Well, by that time, I had moved my bed I think  
14    twice more in my entire room.  And so it was against the wall  
15    where my door was and then -- so I had space on each side.  So  
16    only one side was on the wall this time.

17          Q.    Um-hum?

18          A.    And so he was just sitting on this side this  
19    time, right here in the middle.

20          Q.    Okay.  And then you had mentioned you were laying  
21    flat.  Were you like on your back or your side?

22          A.    On my back.

23          Q.    Okay.  And then what shorts were you wearing that  
24    time?

1           A.    The same ones.

2           Q.    Oh, okay.  The blue like basketball shorts?

3           A.    Um-hum.

4           Q.    And then what about your underwear, if you

5 remember what those were?

6           A.    Hum-um.

7           Q.    Okay.  What about your shirt?

8           A.    It was a black shirt that said "I see dumb

9 people."

10          Q.    Okay.  Okay.  And then did you have a bra on or

11 anything underneath it?

12          A.    Um-hum.

13          Q.    Okay.  Did anything happen to your shirt or your

14 bra?

15          A.    Hum-um.

16          Q.    Okay.  What about his clothes?  Did they move or

17 change?

18          A.    No.

19          Q.    Okay.  If you remember what he was wearing this

20 time or the time we're talking about?

21          A.    I think the only thing I can remember that he was

22 wearing -- he was wearing a shirt, but I don't remember which

23 one it was, and he was wearing blue pajama pants.

24          Q.    Okay.  And then when was this that he -- that

1 we're talking about right now?

2 A. I think it was two or three months before my 15th  
3 birthday.

4 Q. Okay. And when's your 15th birthday?

5 A. July 20th.

6 Q. Okay. And so you were 14?

7 A. Um-hum.

8 Q. Okay. And then it sounds like your brother was  
9 home?

10 A. Yeah, he was out in the living room, distracted  
11 when he's playing Fortnite with his friends, which is another  
12 multi-player like shooter game.

13 Q. Um-hum. Okay. And were his friends also at the  
14 house?

15 A. No, he can play online with his friends.

16 Q. Okay.

17 A. And so they're at different houses, but they can  
18 play together and they can speak to each other because they  
19 have head phones.

20 Q. Got you. Okay. And was anyone else in the  
21 house?

22 A. No.

23 Q. Okay. And your mom had gone to work?

24 A. (Nodded head.)

1 Q. Where was she working then?  
2 A. Dini's Lucky Club still.  
3 Q. Oh, the same place?  
4 A. Yeah, she's been working there for four years.  
5 Q. Oh, okay. And if you remember like what her  
6 shift was that time?  
7 A. 5:00 to 1:00 like always.  
8 Q. Okay.  
9 A. Her shift only changed from when she went back to  
10 the cage because at that time she was working the floor.  
11 Q. Um-hum?  
12 A. Helping fix machines and do all that kinds of  
13 stuff. And so that time she was working 5:00 to 1:00 --  
14 working 5:00 to 1:00. And then now she works back in the  
15 cage. And Sundays, Mondays and Tuesdays she works nightshift.  
16 And then Fridays and Saturdays, she works day shift.  
17 Q. Okay. And this time we're talking about right  
18 now is on a weekend?  
19 A. Um-hum.  
20 Q. Do you remember what day or --  
21 A. I think it was Sunday.  
22 Q. Okay. And then what about like if it was in the  
23 same house you guys live in now?  
24 A. Um-hum.

1 Q. Okay. And then if you remember like when this  
2 started, like when TJ first like did something to you or like  
3 fingered you?

4 A. I can't remember.

5 Q. Okay. That's okay. And so -- and it's okay to  
6 say that you can't remember. What about like one of the last  
7 times if you remember?

8 A. I think it was the day before he said something  
9 to mom.

10 Q. Okay. And what happened that time?

11 A. It was the same.

12 Q. Okay. Did he finger you that time?

13 A. (Nodded head.)

14 Q. Okay. What room were you guys in?

15 A. My room.

16 Q. Okay. And what about your clothes that time?

17 A. I was wearing dark blue basketball shorts like  
18 the other ones. And then I can't remember what shirt I was  
19 wearing, but I was wearing this sweater like always under  
20 it -- or over it.

21 Q. Okay. And how did his hand get there that time?

22 A. The same way.

23 Q. Okay. And your underwear, what happened to those  
24 that time?



1           A.    It's the same way.

2           Q.    Okay.  And so like he moved them to the side?

3           A.    Um-hum.

4           Q.    Okay.  And then who was home when that happened

5 that time?

6           A.    Me and my brother and him.

7           Q.    Okay.

8           A.    And then the cats, of course.

9           Q.    Okay.  And if you remember when that was?  Like I

10 know you mentioned it was the day before he said something to

11 your mom?

12          A.    It was the 11th of July.

13          Q.    Oh, okay.  Okay.  And then he mentioned something

14 to your mom like?

15          A.    The day after, it was her birthday and we were

16 supposed to have a good family day.  But she had to go to work

17 that day because she worked on her birthday.

18          Q.    Um-hum?

19          A.    Now I don't think she does.  And she had to

20 work -- no, she actually got called in that night because

21 somebody had called in as sick or something.  And so they

22 weren't at work.  And so she had to fill in for them.

23          Q.    Um-hum?

24          A.    And she was called in for, I think, two to

1 three hours that night. And she got home at like 11:30 to  
2 midnight.

3 Q. Okay.

4 A. Oh, no, no, no. She was -- no, no, no, I got  
5 that wrong. She was actually working her 9:00 to 5:00 shift  
6 this time on her birthday. She had gone to work that morning  
7 at 9:00.

8 Q. Uh-huh?

9 A. Or at 8:20 like always. She always goes in an  
10 hour early.

11 Q. Okay.

12 A. And then she had gotten home.

13 Q. Um-hum?

14 A. And -- because she was going to stay after and  
15 have a drink or two and then come home like she always does  
16 sometimes.

17 Q. Um-hum?

18 A. But now she doesn't. She just has a drink at  
19 home.

20 Q. Okay.

21 A. And so she had -- she wanted to stay out and he  
22 had texted her, I need to tell you something, you need to come  
23 home right now. And she had gotten home. She had gone to her  
24 room to change and get settled in and stuff like that because

1 that's what she always does after work. And then he had gone  
2 in there with his bags packed and told her.

3 Q. Okay. Were you there when he told her?

4 A. (Nodded head.) I was out in the living room. Me  
5 and Owen were just sitting on the couch waiting.

6 Q. Okay. What did he say to her? Like did you hear  
7 him?

8 A. Well, no. But mom had told me that he said that  
9 he had admitted what he was doing to me.

10 Q. Uh-huh. Okay. Did he say anything to you before  
11 your mom got home or before he texted her?

12 A. Two to three hours before, he had come in my room  
13 every like 20 minutes and then he started yelling at me for no  
14 reason.

15 Q. Um-hum?

16 A. Because I wouldn't let him do it and I was sick  
17 of it. So I told him no. And he got super pissed off. He  
18 started yelling and slamming things. And so I was just in my  
19 room, crying on my bed.

20 Q. Um-hum?

21 A. And every time he'd come to check in, he'd be  
22 like are you actually going to talk to me now. And I'm just  
23 like, no, I'm not because you're a sick son of a bitch and you  
24 need to leave.

1 Q. Um-hum. Okay. And how did he reply when you  
2 said that?

3 A. He left every time.

4 Q. Okay. And then you mentioned like he tried to do  
5 it again and he got mad because he couldn't?

6 A. (Nodded head.)

7 Q. Like how did he try to do it that time?

8 A. It's the same way. And I had told -- he was  
9 like, I'm going to do this. And I'm just like, no, you're  
10 not, get out of my room.

11 Q. Um-hum?

12 A. And so he didn't leave my room. He just got up  
13 and started throwing a fit and yelling.

14 Q. Okay. And when he said, I'm going to do this,  
15 what was he doing?

16 A. He's like, I'm going to massage your legs for you  
17 because you said they hurt today, and then all that stuff.  
18 And I'm just like, no, you're not going to because they don't  
19 hurt today.

20 Q. Uh-huh. So then did he touch you at all that  
21 time?

22 A. Hum-um.

23 Q. Okay. And that was -- was that the 12th or  
24 the --

1           A.    That was the day that it happened.  It was the  
2 12th of July.

3           Q.    Okay.  All right.  And then were there other  
4 times that he had talked to you about what he was doing?

5           A.    Hum-um.

6           Q.    Okay.  And then if you know like maybe -- like  
7 about how many times a week this happened or --

8           A.    Mom was at work about six days a week, I think,  
9 maybe seven.  No, she was at work five days a week and then  
10 she had the sixth and seventh day off.  And so it happened  
11 almost five times a week.

12          Q.    Five times a week.  Okay.  And then do you know  
13 how old you were when he started doing this?

14          A.    I think I was 12 because I had just turned 15  
15 two months ago.

16          Q.    Um-hum.  Okay.  And what makes you think you were  
17 12 like when it started?

18          A.    My mom had -- we had just moved into that house  
19 and we had been there almost a year and then he started doing  
20 it.

21          Q.    Um-hum.  Okay.  So almost a year after you moved  
22 into that house is kind of when he started it?

23          A.    Um-hum.

24          Q.    Okay.  And then did it ever happen at a different

1 house?

2 A. Hum-um.

3 Q. Okay. Did it ever happen -- I know I already  
4 asked this, but like in a different place in your room other  
5 than the bed or --

6 A. Hum-um.

7 Q. Okay. And then you had mentioned like he put his  
8 fingers in here. Was there another part of your body that --

9 A. No.

10 Q. -- he touched? Okay. What about -- did he ever  
11 make you do something to him?

12 A. No.

13 Q. Okay. And then how long -- so you mentioned this  
14 is your step dad?

15 A. (Nodded head.)

16 Q. Do you know like how long you -- or him and your  
17 mom were married or --

18 A. Him and mom were married five -- four or  
19 five years and they had known each other for eight.

20 Q. Okay. And so tell me a little bit more about him  
21 and like other -- like if you guys ever did other things  
22 together in your relationship with him?

23 A. Well, sometimes we -- because a few summers ago,  
24 I went to the water park because it was my birthday.

1 Q. Um-hum?

2 A. And so we went to celebrate and we went with  
3 my -- we took my friend with me. And she's like a sister to  
4 me, so we took her with.

5 Q. Um-hum?

6 A. And then when we had gotten back, we were all so  
7 tired and sunburnt and sore. And he was like, you're welcome  
8 for that fun day. And I'm just like, thank you, it's my  
9 birthday.

10 Q. Um-hum?

11 A. And then we -- he picked us up from the club when  
12 mom was at work, because she didn't have time to pick us up  
13 before she went to work.

14 Q. Um-hum?

15 A. Because her work is like 15 minutes away from our  
16 house.

17 Q. Oh, okay. Okay. And then backing up just a  
18 little bit, you had mentioned like you thought you were around  
19 12 when he started doing this?

20 A. Um-hum.

21 Q. If you know, did he ever finger you while you  
22 were 12 years old?

23 A. I can't remember.

24 Q. Okay. And like I said, that's okay to say that.

1           A.   (Nodded head.)  
2           Q.   And so then who have you talked to about this  
3 with?  
4           A.   Mom told me not to talk about it.  
5           Q.   Um-hum?  
6           A.   So I -- nobody.  
7           Q.   Okay. Have you and your mom talked about it?  
8           A.   That night she asked me. When he confessed to  
9 it, she asked me if it was true and I said yes. That's the  
10 only thing that happened.  
11          Q.   Okay. And what about if you've talked to him  
12 since he left?  
13          A.   Hum-um. He left the house. He's actually in  
14 Sparks, I think.  
15          Q.   Okay. Has -- like have you seen or has he  
16 reached out to you like on social media or --  
17          A.   No, he doesn't have -- the social media he has I  
18 don't have because I'm not interested in it.  
19          Q.   Okay. And then do you know where he is in Sparks  
20 by chance or --  
21          A.   No. He's with his mom and dad.  
22          Q.   Um-hum. Okay. Do you know of or have you heard  
23 about like TJ doing this to someone else?  
24          A.   Hum-um.



1 Q. Okay. Has this happened with -- has this  
2 happened to you with someone else?

3 A. (Shakes head.)

4 Q. Okay. Is there, you know, something else you  
5 feel like I need to know about in regards to TJ or anything  
6 else?

7 A. (Shakes head.)

8 Q. Okay. Well, I'm going to take a break. But I  
9 want to just check in and see how you're doing right now. So  
10 how are you feeling right now?

11 A. It's scary talking to somebody about this.

12 Q. Yeah, it's a totally different situation and I'm  
13 asking a lot of hard questions. But I do want to say, you  
14 know, thank you for talking and letting me listen.

15 Do you need anything, like something to drink?

16 A. Yeah.

17 Q. Or use the bathroom? Okay. We have water or  
18 juice?

19 A. Just water.

20 Q. Okay. So you can have this one.

21 A. Thank you.

22 Q. And then do you want a snack or anything?

23 A. No, thank you.

24 Q. Okay.

1           A.    I ate not too long ago.

2           Q.    Okay.  So I'll just be right back.  Okay?

3                   (Short break.)

4  BY MS. McCANN:

5           Q.    All right.  Thanks for waiting, Haley.  Okay.  So  
6  I just have a few more questions just because I want to  
7  clarify and make sure I understand everything.

8                   And so it sounds like on the 12th before TJ said  
9  something to your mom, you guys kind of got in like a little  
10 bit of an argument --

11          A.    Well --

12          Q.    -- or altercation?

13          A.    -- I wasn't even angry.  I was just like stern,  
14 no, you can't do that anymore.

15          Q.    Um-hum?

16          A.    I'm not going to let you.

17          Q.    Uh-huh?

18          A.    And then he started getting really mad at me.

19          Q.    Okay.  And then like you had told him like,  
20 you're a sick son of a bitch.  Like had anything like that  
21 ever happened before?

22          A.    Hum-um.

23          Q.    Okay.  And so then like did he say anything about  
24 like if he was going to tell your mom or if -- why he talked

1 to your mom?

2 A. He said if I told anybody, he would be the one to  
3 go to jail and then I would -- and then he said if you did,  
4 then you would feel really bad about it.

5 Q. Um-hum. Okay. And then did he say anything  
6 about your mom or like --

7 A. He just -- me and my mom would talk sometimes  
8 about like how the day was going. And if I had like a little  
9 anger issues that day, I would break down at the end of the  
10 day and just go to my room and be left alone.

11 But one time my mom came in and so did he. And  
12 he had followed her in because me and her were talking about  
13 what was going on. And then I had yelled at -- I had yelled  
14 at him, that's not the only thing you're doing wrong.

15 Q. Oh, okay.

16 A. And then he was like, that's not true. And he  
17 told mom he -- because it was just supposed to be me and mom  
18 talking.

19 Q. Uh-huh?

20 A. And so mom was just like, what the hell is going  
21 on. And I yelled it again.

22 Q. Um-hum?

23 A. And then he's like, nothing, just leave her  
24 alone, she's throwing a tantrum.

1 Q. Um-hum?

2 A. And I was like, I'm not throwing a tantrum.  
3 You're the one who's sick and you need to get yourself taken  
4 care of, was what I was thinking. And I yelled it and I was  
5 just like, nothing, never mind, it's nothing.

6 Q. So did you yell those things out loud?

7 A. I was thinking the last one, but I yelled the  
8 other one.

9 Q. So tell me what you yelled.

10 A. I was like, no, there's something else that you  
11 need to know, mom. And he -- and she was like, what the hell,  
12 what's going on? What else do I need to know? And she kept  
13 looking over at him and she was just like looking and  
14 searching for an answer and stuff like that.

15 Q. Oh, okay. When was that?

16 A. It actually happened twice because I was really  
17 upset that day and I was just not -- it wasn't one of the good  
18 days.

19 Q. Um-hum?

20 A. And I had, I think, done that once when I was 13  
21 and then once when I was 14.

22 Q. Okay. And your mom was in the room with you?

23 A. Um-hum.

24 Q. Okay. And then was there ever any times that

1     like people saw him in your room?

2             A.     Just Owen.

3             Q.     Okay.

4             A.     Mom thought he was just talking to me.  And

5     that's what he did when he was -- when she was home.

6             Q.     Okay.

7             A.     And -- but most of the time, he just spent at his

8     computer desk.

9             Q.     Okay.  So were there times that like your mom

10    knew he was in your bedroom?

11            A.     Yeah.

12            Q.     Okay.

13            A.     But my door was always open when she was home.

14            Q.     Okay.  What about if anyone saw him like

15    massaging your legs or doing anything like that?

16            A.     Owen was the only one that knew that he was just

17    massaging my legs because of all the acid build-up in them.

18            Q.     Um-hum?

19            A.     He was the only one who knew about that.

20            Q.     Got you.  Okay.  And you had mentioned his name

21    was TJ?

22            A.     Um-hum.

23            Q.     What's his last name?

24            A.     Bernal.

1 Q. Okay. And does he -- like does TJ stand for  
2 anything or --

3 A. Thomas Jason.

4 Q. Oh, okay. So Thomas Jason Bernal. Okay. All  
5 right. Well, Haley, is there anything else that you think  
6 that I need to know about?

7 A. (Shakes head.)

8 Q. Okay. Well, I just want to check in one more  
9 time and see how you're feeling right now about everything?

10 A. I'm just -- it's a little scary to be reminded of  
11 what happened.

12 Q. Yeah. Okay. And so just so you know, one of the  
13 points of coming here is that you only have to tell your story  
14 the one time. And so the people that -- I told you I have a  
15 team of people I work with. They heard it.

16 And so if you would like to tell someone else,  
17 you don't have to tell it again. But certainly if you want to  
18 talk about it again, you can. And so do you have some people  
19 in your life that you feel like you can trust or that you can  
20 talk to?

21 A. Um-hum.

22 Q. Okay. And so I would encourage you to talk to  
23 them. Like I -- you know, you don't necessarily have to go  
24 into detail like --

1           A.    Yeah.

2           Q.    -- you and I did today. But you may want to talk  
3 about how you're feeling.

4           A.    (Nodded head.)

5           Q.    And then I do know that Audry met with your mom  
6 and she may have offered some counseling or therapy that might  
7 be useful for you guys. Okay?

8           A.    (Nodded head.)

9           Q.    Okay. Anything else that you want to let me know  
10 about or ask some questions?

11          A.    (Shakes head.)

12          Q.    Okay. Well, I want to say thank you again for  
13 coming in.

14          A.    (Nodded head.)

15          Q.    And letting me listen. I'm going to give you my  
16 card so you know who you spoke with. My name is on there. In  
17 case you feel like there's anything else I need to know about,  
18 you can let me know. But with all that being said, do you  
19 have any fun or exciting planned coming up?

20          A.    Tomorrow's school.

21          Q.    Yeah. Okay. Do you have different schedules  
22 each day or is it the same one every day?

23          A.    The same schedule each day and then at semester,  
24 it changes. But my schedule doesn't kind of change at

1 semester.

2 Q. Um-hum?

3 A. I have all the same classes all year.

4 Q. Um-hum. Oh, okay. What classes are you taking?

5 A. I have -- my first class is Health Science I. My

6 second is choir.

7 Q. Um-hum?

8 A. My third one is math, Algebra II.

9 Q. Um-hum?

10 A. No, Algebra I, because I had to take a special

11 class last year.

12 Q. Um-hum?

13 A. I had to take two math classes last year. And

14 then I have PE. And then after lunch -- or, no, I have

15 English and then it's lunch. And then I have mythology and

16 biology.

17 Q. Okay. All right. Well, that sounds like a lot.

18 Okay. Well, if there's nothing else, are you ready to head

19 back out?

20 A. (Nodded head.)

21 Q. Okay.

22 (Interview concluded.)

23

24



1 STATE OF NEVADA, )  
2 CARSON CITY. )  
3

4 I, Shellie Loomis, a Certified Transcriber for  
5 the State of Nevada, do hereby certify:

6 That an interview was held on September 4, 2019  
7 and said interview was recorded and was delivered to me for  
8 transcription;

9 That the foregoing transcript, consisting of pages 1  
10 through 54, is a full, true and correct transcript of said  
11 recorded interview performed to the best of my ability.  
12

13 Dated at Carson City, Nevada, this 7th day of  
14 July, 2020?  
15

16  
17 //Shellie Loomis//  
18 Shellie Loomis, RPR  
19  
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21  
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23  
24

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2020 SEP -8 PM 12:16

TANYA SOFIONE  
COURT ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Lindsey M. Bernal*

**IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF LYON**

THE STATE OF NEVADA,

Plaintiff,

Case No. 20-CR-00099

vs.

Dept No. I

THOMAS JASON BERNAL,

Defendant.

**OPPOSITION TO STATE'S MOTION TO ADMIT CONFESSION  
AND PLAY AUDIO TO JURY**

COMES NOW, Defendant, THOMAS JASON BERNAL (hereinafter "Mr. Bernal"), by and through his attorneys, JESSE KALTER LAW, P.C., and hereby opposes the State's Motion to Admit Confession and Play Audio to Jury, filed with this Court on June 1, 2020. This Opposition is made and based upon the following Points and Authorities and upon all pleadings and papers on file herein.

////

////

////

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1 POINTS AND AUTHORITIES

2 FACTS

3 Only the facts relevant to this Opposition are stated herein. Mr. Bernal was told to come  
4 to the police substation in Silver Springs. Detectives told Mr. Bernal "we need you to come in  
5 and answer some questions." Mr. Bernal was driven to the interview by his father. Only the audio  
6 recording of the interrogation was provided by the State. See attached **Exhibit "A."** The video  
7 of the interrogation has been requested but still not provided to date. Mr. Bernal was interrogated  
8 for nearly five (5) hours and was arrested a little over four (4) hours into the interrogation.  
9 **Exhibit "A."** No Miranda rights were read to Mr. Bernal at any point during the interrogation.  
10

11 **Exhibit "A."**

12 During the interview, Mr. Bernal was placed in a tiny room and questioned by two large  
13 sized male detectives – Detective Messman and Detective Dues – both of whom were armed.  
14 Although Mr. Bernal was told that he could leave at any time in the very beginning, both  
15 Detectives sat between Mr. Bernal and the exit. Only the conversation that took place in the  
16 actual interview room was recorded. The conversations between Mr. Bernal and detectives that  
17 took place outside the interview room was not recorded.  
18

19 At the beginning of the interview Mr. Bernal denied that anything sexual occurred between  
20 himself and H.S., the alleged victim in this case. **Exhibit "A."** Mr. Bernal admitted to rubbing  
21 CBD oil on H.S.'s legs as well as the other two members of the family upon request. **Exhibit**  
22 **"A."** H.S.'s mother, Patricia, also admitted to rubbing CBD oil on H.S. and Patricia's son. Law  
23 enforcement kept repeating that maybe one time while Mr. Bernal was rubbing H.S. with CBD  
24 oil, his finger may have accidentally slipped into H.S.'s vagina. **Exhibit "A."** Mr. Bernal  
25 continually denied that allegation for the first four hours of the interview, but the detectives  
26  
27  
28

1 remained between Mr. Bernal and the exit and they never reformed Mr. Bernal that he was free  
2 to leave. **Exhibit "A."**

3 Mr. Bernal explained the only reason H.S. is making this accusation is because he took  
4 away her phone for not completing her chores at home. **Exhibit "A."** H.S. was also upset because  
5 Mr. Bernal and her mother, Patricia, forced her to break up with her boyfriend after H.S. was  
6 caught having sex with him under the bleachers at school. **Exhibit "A."** Mr. Bernal was the  
7 primary disciplinarian for H.S. and her little brother O.S. **Exhibit "A."** This is because Patricia  
8 was always out partying. The cops continued to interrogate Mr. Bernal by telling him that they  
9 can tell something is weighing on him and he will feel better once he tells someone. **Exhibit**  
10 **"A."** Mr. Bernal explained that he was mostly concerned about his relationship with his wife  
11 Patricia and its demise after H.S. made these false allegations. **Exhibit "A."**

14 After Mr. Bernal continued to deny the allegations detectives ask Mr. Bernal to take a truth  
15 verification test to which he initially refused. **Exhibit "A."** Law enforcement convinced him to  
16 take the test by telling him that if Mr. Bernal takes the test it will help with his search for  
17 employment because the results of the truth verification test will pop up in Mr. Bernal's criminal  
18 history. **Exhibit "A."** Law enforcement also told Mr. Bernal that it would help him get his wife  
19 back if he took the truth verification test. **Exhibit "A."** Mr. Bernal reluctantly took the truth  
20 verification test. **Exhibit "A."** After the test was over, law enforcement really began pressuring  
21 Mr. Bernal to give them a different explanation because he allegedly failed the truth verification  
22 test. **Exhibit "A."**

24 B: I don't understand how I failed that one questions when nothing happened.

26 Det: Something did happen. Whatever did happen let's talk about it. (2:37)

27 . . . . .

1 Det: Whatever happened lets just talk about it. (2:52)

2 **Exhibit "A"** at 2:30 – 2:55.

3 Throughout the interview law enforcement refused Mr. Bernal's *request* to go outside and  
4 smoke a cigarette despite his request two hours into the interview. **Exhibit "A."** Mr. Bernal even  
5 had to *ask* detectives to use the bathroom. People who feel free to leave are not refused a request  
6 to go outside and do not ask to use the bathroom. Four hours into the interview, Mr. Bernal gave  
7 in and told detectives what they wanted to hear, i.e. that his finger accidentally slipped into H.S.'s  
8 vagina one time while he was rubbing CBD oil on her legs. **Exhibit "A."** Mr. Bernal was  
9 immediately handcuffed and taken to jail. The State now seeks to introduce Mr. Bernal's  
10 statements during the interrogation at trial.  
11

12  
13 **I. Mr. Bernal should have been read his Miranda Rights.**

14 The Fifth Amendment states that "no person . . . shall be compelled in any criminal case  
15 to be a witness against himself . . ." U.S. Const. amend. V. To protect said right, the U.S. Supreme  
16 Court has declared that prior to any custodial interrogation, the individual must be provided their  
17 Miranda rights which indicate to the individual that they have the right to remain silent as any  
18 statements made by them may be used against them in a court of law, as well as their right to  
19 have an attorney present during said interrogation. Miranda v. Arizona, 384 U.S. 436, 444 (1966).  
20 When custodial interrogation occurs whereat law enforcement fail to first inform a defendant of  
21 his Miranda rights, "no evidence obtained as a result of the interrogation can be used against  
22 him." United States v. Hernandez-Barragan, No. CR 09-2795-TUC-JMR (CRP), 2010 U.S. Dist.  
23 LEXIS 143240, at \*30 (D. Ariz. Dec. 21, 2010) (citing Miranda v. Arizona, 384 U.S. 436, 479).  
24

25  
26 Custodial interrogation requires both custody and interrogation. Each is discussed in  
27 detail below.  
28

1 a. Mr. Bernal was in-custody.

2 An individual is considered in-custody when his/her "freedom of action is curtailed to a  
3 degree associated with formal arrest." Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138,  
4 82 L. Ed. 2d 317 (1984) (internal citation omitted). The unique circumstances of each case dictate  
5 whether an individual is 'in custody' for purposes of Miranda rights. Factors to be considered in  
6 the courts analysis include "(1) the language used to summon the individual; (2) the extent to  
7 which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the  
8 interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain  
9 the individual." United States v. Beraun-Panez, 812 F.2d 578, 580, 1987 U.S. App. LEXIS 3300,  
10 \*4-5 citing United States v. Wauneka, 770 F.2d 1434, 1438 (9th Cir. 1985) (citations omitted).  
11 "A person is "in custody" if a "reasonable person 'would have believed that he was not free to  
12 leave.'" United States v. Doe, 219 F.3d 1009, 1014 (9th Cir. 2000).

15 i. Language used to summon the individual.

16 Mr. Bernal was not given a choice about whether to participate in the interrogation or not.  
17 Mr. Bernal was called by detectives and *told* to come to the substation to answer some questions.  
18 A reasonable person would infer that if they did not come, the police would come for them. Upon  
19 arrival, Mr. Bernal was talked to by detectives prior to entering the interrogation room – said  
20 conversation was conveniently not recorded. Mr. Bernal was led to the interrogation room and  
21 seated in the farthest seat from the exit. Although Mr. Bernal was told one time before the  
22 interrogation started that he was free to leave, both detectives sat between Mr. Bernal and the  
23 exit – making anyone feel like they were not free to leave. "Officers' efforts to remove a suspect's  
24 only means of egress from the scene of the interrogation may indicate that the person was in  
25 custody." United States v. Wesley, 2017 U.S. Dist. LEXIS 216063 \*16 citing Berkemer v.

1 McCarty, 468 U.S. 420, 437-38 (1984). Mr. Bernal was also psychologically restrained which is  
2 just as binding as physical restraints.

3 ii. The physical surroundings of the interrogation.

4 Whether the interrogation is conducted privately or publicly is also significant. United  
5 State v. Beraun-Panez, 812 F.2d 578, 581 (1987). "Questioning at a police station will typically  
6 be more custodial in nature than at a more neutral location." United States v. Wesley, 2017 U.S.  
7 Dist. LEXIS 216063 \*16 citing Orozco v. Texas, 394 U.S. 324, 326-27 (1969). The fact that the  
8 interrogation took place in at the police substation in private supports the contention that this was  
9 a custodian interrogation.  
10

11 iii. The duration of the detention.

12 Mr. Bernal was questioned for nearly five (5) hours. **Exhibit "A."** Two hours into the  
13 interrogation, Mr. Bernal *asked* detectives for a cigarette break which was denied. **Exhibit "A."**  
14 Detectives said they were almost done so Mr. Bernal could wait. **Exhibit "A."** When someone  
15 is free to leave, they do not have to wait. Mr. Bernal even had to request to use the bathroom  
16 which again demonstrates that Mr. Bernal did not feel free to leave at his own will. **Exhibit "A."**  
17 This supports the contention that Mr. Bernal was in custody. If he were free to leave, he would  
18 have just got up and left the room for a cigarette break. Instead, he had to ask for permission to  
19 leave the room and when permission was denied by detectives, he was forced to stay in the  
20 interrogation room. **Exhibit "A."** This is a custodial interrogation that warranted Miranda  
21 warnings!  
22

23 ///

24 ///

25 ///

1 iv. and v. Extent to which the defendant is confronted with evidence of guilt and the  
2 degree of pressure applied to detain the individual.

3 During the first four (4) hours of the interview, Mr. Bernal denied that anything sexual  
4 happened between him and H.S. **Exhibit "A."** Detectives repeatedly told Mr. Bernal that they  
5 did not believe him and continued repeating the same questions over and over again. **Exhibit**  
6 **"A."** From the beginning of the interrogation, detectives told Mr. Bernal exactly what they  
7 wanted to hear; that Mr. Bernal probably just accidentally slipped a finger into H.S.'s vagina  
8 while he was rubbing CBD oil onto her legs. **Exhibit "A."**

10 Approximately two hours into the interview detectives lied to Mr. Bernal to get him to  
11 take the truth verification test (just like the initial lie that he was free to leave). **Exhibit "A."**  
12 Detectives told Mr. Bernal that the results would be posted on his criminal history and that the  
13 truth verification test would help him get his wife back. **Exhibit "A."** Immediately after the test,  
14 detectives told Mr. Bernal that he failed the test and began asserting even more pressure on Mr.  
15 Bernal to tell them what they wanted to hear. **Exhibit "A."** Detectives made clear to Mr. Bernal  
16 that until Mr. Bernal said what they wanted to say, the interrogation would continue. **Exhibit**  
17 **"A."**

19 b. Mr. Bernal was interrogated.

21 "Interrogation includes express questioning and any words or actions from police 'that  
22 the police should know are reasonably likely to elicit an incriminating response from the  
23 suspect.'" United States v. Hernandez-Barragan, No. CR 09-2795-TUC-JMR (CRP), 2010 U.S.  
24 Dist. LEXIS 143240, at \*28 (D. Ariz. Dec. 21, 2010) (citing Rhode Island v. Innis, 446 U.S. 291,  
25 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). Mr. Bernal was interrogated. He was repeatedly  
26 questioned about whether he "fingered" H.S. – and was thus asked questions likely to illicit a  
27 criminal response. **Exhibit "A."**



1 Under a totality of the circumstances, this was no question a custodial interrogation.  
2 Accordingly, Miranda rights should have been read to Mr. Bernal. As Mr. Bernal was not read  
3 his Miranda rights, he did not know that any statements made by him would be used against him  
4 or that he had the right to have an attorney present for his interrogation. As this was a custodial  
5 interrogation and Mr. Bernal's Miranda rights were not waived, all statements made by Mr.  
6 Bernal during the interrogation must be suppressed in accordance with long-established law.  
7

8 **II. Mr. Bernal's confession is inadmissible because it was involuntary.**

9 "Independent from the requirements of Miranda, the Due Process Clause of the  
10 Fourteenth Amendment requires that any confession must be voluntary: a product of 'rational  
11 intellect and a free will.'" Herndon v. State, 2017 Nev. Unpub. LEXIS 300 \*5 citing Passama v.  
12 State, 103 Nev. 212, 213-14 (1987) (quoting Blackburn v. Alabama, 361 U.S. 199, 208 (1960).  
13 District courts must determine whether a confession is voluntary or not prior to its admission at  
14 trial. United States v. Savanh, 2016 U.S. Dist. LEXIS 61754, \*11. "A conviction founded on an  
15 involuntary confession deprives a defendant of due process of law. United States v. Mendiola,  
16 2014 U.S. Dist. LEXIS 117678 \*23 citing Jackson v. Denno, 378 U.S. 368, 375 (1964); United  
17 States v. Tingle, 658 F.2d 1332, 1334 (9<sup>th</sup> Cir. 1981). "Involuntary confessions in state criminal  
18 cases are completely inadmissible under the Fourteenth Amendment" and "cannot be used as  
19 proof of guilt." Hernandez v. Scribner, 2008 U.S. Dist. LEXIS 38193 \*33 citing Blackburn v.  
20 Alabama, 361 U.S. 199, 207 (1960); Harris v. New York, 401 U.S. 222, 224 (1971).  
21

22 The court must consider the totality of the circumstances in determining whether a  
23 confession is voluntary which include the following factors: "the accused's youth, the length of  
24 the accused's detention, the nature and form of questioning, the lack of advisement of the  
25 accused's constitutional rights, the accused's lack of education or low level of intelligence, and  
26  
27  
28

1 the use of physical force or punishment against the accused” such as the deprivation of food or  
2 sleep. Urias-Quintana v. State, 2018 Nev. Unpub. LEXIS 1199 \*3 citing Passama at 214 citing  
3 Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

4  
5 The totality of the circumstances in this case establish that Mr. Bernal’s confession was  
6 involuntary. Mr. Bernal was pressured to the interview by law enforcement and was never  
7 advised of his Miranda rights. **Exhibit “A.”** Thus, Mr. Bernal was never informed that he did  
8 not have to speak to law enforcement and/or that any statements made by him in the interview  
9 would be used against him. This is extremely important in this case because Mr. Bernal was  
10 being investigated for Category A felonies and facing life in prison if charged and convicted. Mr.  
11 Bernal is in his late 30’s and has no criminal history or prior experience with law enforcement.  
12 Thus, he is not knowledgeable about the legal process or his rights. He was not made aware that  
13 he had the right to have an attorney present.  
14

15 Law enforcement coerced Mr. Bernal by forcing him to undergo nearly five (5) hours of  
16 interrogation depriving him of his needs, including Mr. Bernal’s nicotine addiction and need to  
17 smoke a cigarette. **Exhibit “A.”** Two hours into the interview Mr. Bernal asked for a cigarette  
18 but his request was denied by law enforcement who said we are almost done here so just wait.  
19 **Exhibit “A.”** Even if this Court considers that Mr. Bernal’s interrogation was initially voluntary,  
20 the interview eventually turned even more “custodial” when detectives would not allow Mr.  
21 Bernal to leave the room upon request. **Exhibit “A.”**  
22

23 Law enforcement utilized deception to obtain Mr. Bernal’s statements and attempt to  
24 convince Mr. Bernal to take the truth verification test. **Exhibit “A.”** Detectives sat between Mr.  
25 Bernal and the exit, preventing Mr. Bernal from feeling he was free to leave at any time. The fact  
26 that Mr. Bernal asked to use the bathroom indicates that he did not feel free to leave at any time.  
27  
28

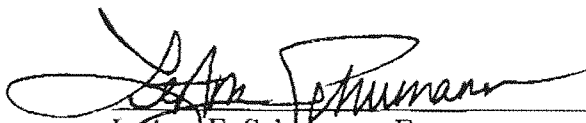
1 **Exhibit "A."** A reasonable person in Mr. Bernal's position would have felt compelled to stay in  
2 the interview room and answer the detective's questions. Detective's clearly intended to keep  
3 Mr. Bernal in that room until he confessed and then arrest him immediately after.

4  
5 For four hours Mr. Bernal continually denied the allegations that he "fingered" H.S.  
6 **Exhibit "A."** It was not until the end of the interview, after Mr. Bernal was repeatedly questioned  
7 for over four (4) hours that Mr. Bernal told detectives what they wanted to hear so the questioning  
8 would cease and so that he could leave the interrogation room. **Exhibit "A."**

9 Under a totality of the circumstances, law enforcement's actions rendered Mr. Bernal's  
10 confession involuntary. Even if the Court believes it was voluntary, it was a result of custodial  
11 interrogation with no Miranda warnings. Therefore Mr. Bernal's confession and the contents of  
12 the interrogation should be suppressed, and the State's Motion should be denied.

13  
14 RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2020.

15  
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17  
18   
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The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

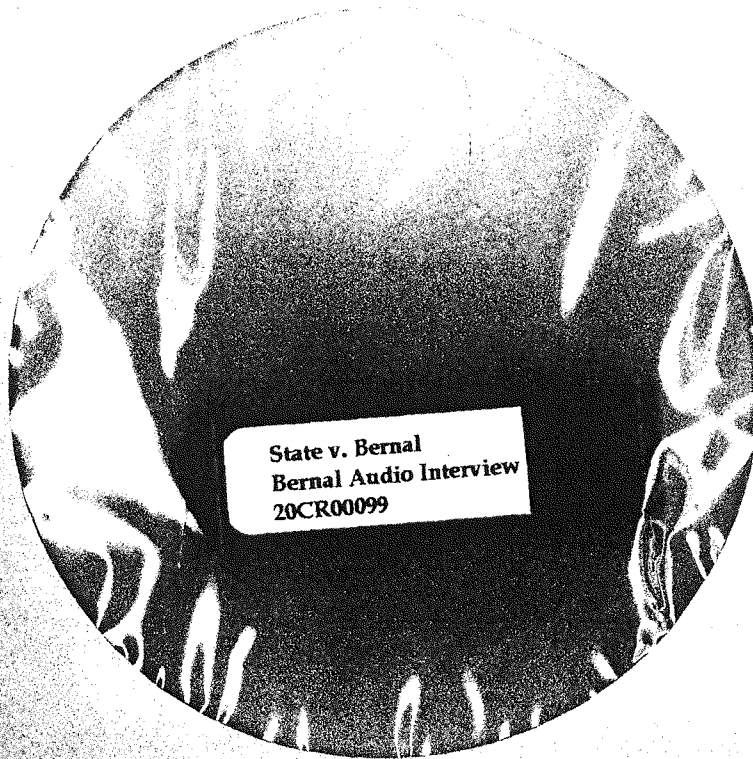
LEANN E. SCHUMANN, ESQ.  
ATTORNEY FOR THOMAS BERNAL

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an employee of JESSE KALTER LAW, P.C., and that on this date I sent via U.S. Mail, at Reno, Nevada, a true copy of the forgoing document, to:

Dated this 4 day of September 2020.

92

# EXHIBIT A



# EXHIBIT A

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FILED

2020 SEP -8 PM 12:17

TANYA SOLEIMNE  
COURT ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Lindsey McCall*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

Case No. 20-CR-00099

vs.

Dept No. I

THOMAS JASON BERNAL,

Defendant.

**OPPOSITION TO STATE'S MOTION TO ADMIT PRIOR BAD ACTS PURSUANT  
TO NRS 48.035 AND 48.045**

COMES NOW, Defendant, THOMAS JASON BERNAL (hereinafter "Mr. Bernal"), by and through his attorneys, JESSE KALTER LAW, P.C., and hereby opposes the State's Motion to Admit Prior Bad Acts Pursuant to NRS 48.035 and 48.045, filed with this Court on June 2, 2020. This Opposition is made and based upon the following Points and Authorities and upon all pleadings and papers on file herein.

////

////

////

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## POINTS AND AUTHORITIES

Within its Motion the State seeks to admit uncharged alleged sexual assaults, lewdness with a child and grooming behavior occurring nearly five (5) times a week since H.S. was 12 years old. The State contends that the prior bad acts are admissible under the res gestae doctrine or in the alternative, admissible for a non-propensity purpose. Each of the State's arguments are discussed in detail below.

a. The prior bad acts are not admissible under the res gestae doctrine.

NRS 48.035(3) states, "evidence of another act or crime which is so closely related to an act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission."

"When several crimes are intermixed or blended with one another, or connected such that they form an indivisible criminal transaction, and when full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme." Allan v. State, 92 Nev. 318, 321 (1976). Said acts complete 'the story of the crime charged by proving the immediate context of happenings near in time and place.' Allan at 320.

The Nevada Supreme Court has interpreted the res gestae doctrine narrowly. Bellon v. State, 121 Nev. 436, 444 (2005) citing Tabish v. State, 119 Nev. 293, 307 (2003). Thus, in order for evidence to be admissible pursuant to the res gestae doctrine, "the evidence must be so interconnected to the crime at issue that it would be impossible for the witness to describe the act in controversy without reference to the other act or crime." Ivy v. State, 2015 Nev. App. Unpub.

1 LEXIS 506 \*16 citing Bellon v. State, 121 Nev. 436, 444 (2005). "If the court determines that  
2 testimony relevant to the charged crime cannot be introduced without referring to uncharged acts,  
3 it must not exclude the evidence of uncharged acts." State v. Shade, 111 Nev. 887, 894 (1995).

4  
5 During her forensic interview, H.S. was able to describe the allegations in this case  
6 without reference to the alleged prior bad acts occurring since she was 12 years old. Thus, it  
7 would not be impossible for H.S. to reference the charges in this case without reference to the  
8 alleged uncharged prior bad acts. The same can be done during trial in this case.

9  
10 H.S. was allegedly fifteen years old when the allegations occurred in this case. Thus,  
11 reference to the uncharged prior bad acts occurring when she was 12 years old – 3 years prior to  
12 the charged offenses are not near in time. The prior bad acts occurring three years ago, and the  
13 charged allegations are not part of the same transaction and are not necessary to complete the  
14 story in this case. Further, they are not within the immediate context of happenings near in time  
15 and place. Accordingly, the uncharged prior bad acts should not be admissible at trial.

16  
17 b. The uncharged prior bad acts are not admissible for non-propensity purposes.

18 In order for prior bad act evidence to be admissible at trial three requirements must be met,  
19 the act was proven by clear and convincing evidence, the act is relevant to some issue in the case,  
20 i.e. motive, intent, identity, lack of mistake or common plan or scheme, and the probative value  
21 of the act outweighs the potential for unfair prejudice. Roever v. State, 114 Nev. 867, 872 (1998)  
22 citing Tinch v State, 113 Nev. 1170, 1176 (1997). The State argues that the prior uncharged bad  
23 acts in this case are admissible for nonpropensity purposes, namely, opportunity and lack of  
24 mistake. However, neither exception is applicable in this case.

25  
26 The State's argument that the uncharged prior bad acts prove his opportunity to commit  
27 his crimes while Patricia Bernal was at work makes no sense. Mrs. Bernal has had the same job  
28



1 since H.S. was twelve. Thus, the uncharged prior bad acts do not make it more likely that Mr.  
2 Bernal committed the allegations in this case.

3 Absence of mistake “applies when ‘the evidence tends to show the defendant’s knowledge  
4 of a fact material to the specific crime charged,’ such as knowledge of the controlled nature of a  
5 substance when such knowledge is an element of the charged offense.” Hubbard v. State, 422  
6 P.3d 1260, 1267 (2018) citing Cirillo v. State, 96 Nev. 489, 492 (1980). Thus, absence of mistake  
7 “may be relevant to proving either the means rea (the defendant concedes performing the act but  
8 claims to have done so mistakenly or with innocent intent) or the actus rea (the defendant  
9 concedes harm or loss but argues it resulted from an accident). Jaramillo v. State, 2019 Nev.  
10 Unpub. LEXIS 395 \*6 citing Hubbard v. State, 134 Nev. Adv. Op. 54 (2018).

11 The State argues that because Mr. Bernal stated he “accidentally” slipped a finger into  
12 H.S.’s vagina, the State should be able to introduce the uncharged prior bad acts to show Mr.  
13 Bernal’s absence of mistake. However, the State has not proven the prior alleged acts even  
14 occurred. There is simply a verbal allegation without any other proof. No investigation has been  
15 conducted regarding the alleged prior bad acts.

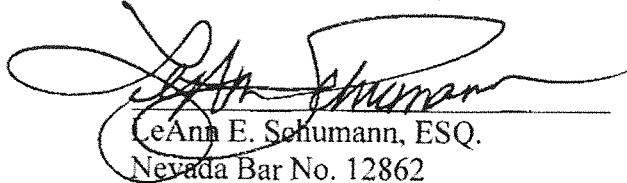
16 Finally, the probative value of the prior bad acts is substantially outweighed by the danger  
17 of unfair prejudice. “Without some resemblance to the charged offense, evidence of the prior act  
18 becomes highly prejudicial and falls outside the exception and tumbles into the purview of the  
19 general rule – inadmissibility.” Cipriano v. State, 111 Nev. 534, 543, 894 P.2d 347, 353 (Nev.  
20 1995), overruled in part, State v. Sixth Judicial Dist. Court, 114 Nev. 739, 964 P.2d 48 (Nev.  
21 1998). This propensity evidence sought by the State will taint the jury and prevent Mr. Bernal  
22 from receiving a fair trial on the charged offenses. Clearly, the only reason the State intends to  
23 introduce said evidence is for propensity purposes, which is prohibited and substantially  
24

1 outweighed by the guaranteed unfair prejudice it will cause Mr. Bernal. Lastly, a limiting  
2 instruction is not sufficient to prevent the jury from treating this as propensity evidence.

3 Based upon the forgoing, the State's Motion should be denied.

4 RESPECTFULLY SUBMITTED this 4 day of September, 2020.

5  
6 JESSE KALTER LAW, P.C.


7   
8 LeAnn E. Schumann, ESQ.  
9 Nevada Bar No. 12862  
10 1150 Selmi Drive, Suite 505  
11 Reno, NV 89512  
12 775.331.3888 (phone)  
13 Attorney for THOMAS BERNAL

14  
15 **AFFIRMATION**

16 Pursuant to NRS 239B.030

17  
18 The undersigned does hereby affirm that the preceding document does not contain the  
19 social security number of any person.

20 DATED this 4 day of September 2020.

21   
22 LEANN E. SCHUMANN, ESQ.  
23 ATTORNEY FOR THOMAS BERNAL

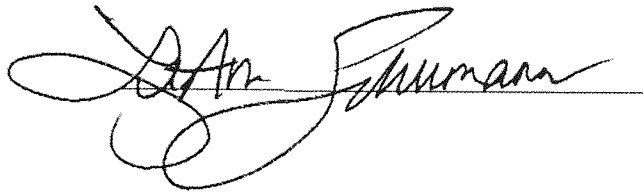
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**CERTIFICATE OF SERVICE**

Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an employee of JESSE KALTER LAW, P.C., and that on this date I sent via U.S. Mail, at Reno, Nevada, a true copy of the forgoing document, to:

Lyon County District Attorney  
ATTN: Matthew Merrill, Esq.  
31 South Main Street  
Yerington, NV 89447

Dated this 4 day of September 2020.



JESSE KALTER LAW, P.C.  
LeAnn E. Schumann, Esq.  
Nevada Bar No. 12862  
1150 Selmi Drive Ste 505  
Reno, NV 89512  
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[leann@jessekalterlaw.com](mailto:leann@jessekalterlaw.com)  
Attorney for Thomas Jason Bernal

FILED

2020 SEP -8 PM 12:17

TANYA SCHEIDT  
COURT ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Lindsay M. Allen*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF LYON

THE STATE OF NEVADA,

Plaintiff,

Case No. 20-CR-00099

vs.

Dept No. I

THOMAS JASON BERNAL,

Defendant.

**OPPOSITION TO STATE'S MOTION TO ADMIT VICTIM'S OUT OF COURT  
STATEMENTS TO HER MOTHER AND DURING A  
CHILD FORENSIC INTERVIEW AND SUPPLEMENT TO MOTION**

COMES NOW, Defendant, THOMAS JASON BERNAL (hereinafter "Mr. Bernal"), by and through his attorneys, JESSE KALTER LAW, P.C., and hereby opposes the State's Motion to Admit Victim's Out of Court Statements to Her Mother and During a Child Forensic Interview, filed with this Court on June 1, 2020, and the State's Supplement to the Motion to Admit Victim's Out of Court Statements to Her Mother and During a Child Forensic Interview, filed with this Court on or about August 31, 2020. This Opposition is made and based upon the following Points and Authorities and upon all pleadings and papers on file herein.

////

JESSE KALTER LAW, P.C. | 1150 SELMI DRIVE, STE 505 | RENO, NV 89512  
(775) 331.3888 (PHONE) | (775) 331.3891 (FAX)  
[www.jessekalterlaw.com](http://www.jessekalterlaw.com)

1 POINTS AND AUTHORITIES

2 Within its Motion the State seeks to admit the alleged victim's forensic interview and/or  
3 statements the alleged victim made to her mother. If the Defense accuses H.S. of fabricating her  
4 allegations, the State can seek to introduce prior consistent hearsay statements to corroborate  
5 H.S.'s testimony. However, "to be admissible, these prior consistent statements must have been  
6 made" before H.S. had motive to lie. Peterson v. State, 103 Nev. 455, 458 (Nev. 1987). In this  
7 case H.S. had motive to lie about being disciplined for inappropriate behavior at school prior to  
8 her making any allegations in this case, prior to attempting to get Mr. Bernal out of the house,  
9 and lastly prior to reporting any of the allegations to her mother and the forensic interviewer.  
10 Thus, H.S.'s forensic interview and statements to her mother are inadmissible hearsay.  
11

12 If this Court does allow admission of the forensic interview or statements to her mother to  
13 rehabilitate H.S.'s credibility, only such portions of these conversations that will rehabilitate  
14 H.S.'s credibility should be admitted, not the entirety of the forensic interview as proposed by the  
15 State nor the entire conversation with her mother. United States v. Wilkinson, 2015 U.S. Dist.  
16 LEXIS 143942.  
17

18 A forensic interview can be admissible if the alleged victim testifies inconsistently. Lee v.  
19 Lizarraga, 2019 U.S. Dist. LEXIS 74436 \*20-21. If H.S. testifies inconsistently from statements  
20 she made to her mother and/or statements she made during her forensic interview, the Defense  
21 can seek to introduce H.S.'s specific inconsistent statements to impeach her credibility. Again, it  
22 would not be the entirety of the forensic interview, only the inconsistent portions of the interview.  
23

24 ///

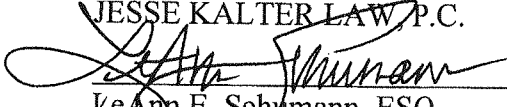
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26 ///

1 Based upon the forgoing, the State's Motion should be denied.

2 RESPECTFULLY SUBMITTED this 4 day of September, 2020.

3  
4 JESSE KALTER LAW, P.C.

5   
LeAnn E. Schumann, ESQ.

6 Nevada Bar No. 12862

7 1150 Selmi Drive, Suite 505

8 Reno, NV 89512

775.331.3888 (phone)

Attorney for THOMAS BERNAL

9  
10 **AFFIRMATION**

11 Pursuant to NRS 239B.030

12 The undersigned does hereby affirm that the preceding document does not contain the  
13 social security number of any person.

14 DATED this 4 day of September 2020.

15  
16   
LEANN E. SCHUMANN, ESQ.

17 ATTORNEY FOR THOMAS BERNAL

18 **CERTIFICATE OF SERVICE**

19 Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an  
20 employee of JESSE KALTER LAW, P.C., and that on this date I sent via U.S. Mail, at Reno,  
21 Nevada, a true copy of the forgoing document, to:

22  
23 Lyon County District Attorney

24 ATTN: Matthew Merrill, Esq.

25 31 South Main Street

Yerington, NV 89447

26 Dated this 4 day of September 2020.

27  
28 JESSE KALTER LAW, P.C. | 1150 SELMI DRIVE, STE 505 | RENO, NV 89512

(775) 331.3888 (PHONE) | (775) 331.3891 (FAX)

[www.jessekalterlaw.com](http://www.jessekalterlaw.com)

FILED

2020 SEP 21 PM 2:11

TANYA SOLAR  
COUNTY ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Andrea Andersen*

IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

Defendant.

**MOTION TO  
EXCLUDE OR LIMIT DEFENSE  
EXPERT WITNESS**

COMES NOW, the State of Nevada, by and through Stephen B. Rye, District Attorney of Lyon County, and Matthew K. Merrill, Deputy District Attorney, and hereby submits this MOTION TO EXCLUDE OR LIMIT DEFENSE EXPERT WITNESS.

This Motion is based on the attached Memorandum of Points and Authorities, all documents and pleadings on file in this case, and any evidence which may be produced at a hearing on this matter.

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain any social security numbers.

DATED this 21 day of September, 2020.

Stephen B. Rye  
Lyon County District Attorney

By:

*Matthew K. Merrill*  
Matthew K. Merrill  
Deputy District Attorney

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION**

**I. FACTS**

Defendant sexually assaulted a known but unnamed juvenile H.S. (DOB: 07/20/2004) on at least three occasions. On or about the 14th day of July, 2019, Patricia Bernal, H.S.'s mother, learned that the Defendant had been sexually abusing H.S. The Defendant disclosed to Patricia Bernal that he would digitally penetrate H.S.'s vagina while massaging her legs. Patricia spoke with H.S. regarding the allegations. H.S. confirmed the allegations.

H.S. was sent to do a Child Forensic Interview ("CFI") on September 04, 2019 wherein she disclosed, amongst other things, that the Defendant and H.S. were involved in an argument on or about the 14th day of July, 2019, that precipitated the Defendant's confession. H.S. confirmed that she had been sexually assaulted by the Defendant on numerous occasions typically when the Defendant was massaging H.S. legs. Jennifer McCann conducted the CFI with H.S. at the Washoe County Child Advocacy Center. The CFI was both audio and visually recorded. Subsequent to the interview, Ms. McCann issued a Child Advocacy Center Forensic Interview Report on September 20, 2019.

On or about the 21<sup>st</sup> day of October, 2019, the Defendant was interviewed by Detective Messman and Detective Dues in a Lyon County Substation. The interview was recorded. During the course of the interview, the Defendant stated, amongst other things, "I did accidentally. It wasn't an on purpose thing... Yes I accidentally did one time." "I went up her leg and I did accidentally... Haley does not have a hymen.. she broke it on a fence." "I went up her leg with the CBD cream and I accidentally entered her." "Evidently I have been fingering Haley since December" and "I let it slip in once". All these statements and more are referencing the digital penetration by the Defendant upon H.S.

At the request of the defense, Dr. William O'Donohue has prepared a Child Sexual Abuse Investigation Report (hereinafter *Report*), dated August 26, 2020, in regards to this case (Attached hereto as Exhibit 1). The State anticipates Dr. William O'Donohue and the contents of his report to be discussed during the trial.



## ARGUMENT

Dr. O'Donohue's report and any accompanying testimony is improper for a variety of reasons. Dr. O'Donohue's report specifically sidesteps the specific language that H.S.'s statements are truthful or untruthful. But rather couches the truthful or untruthness of statements in terms of "it is my opinion that it was spontaneous and only may have occurred because her mother questioned her", "It is my opinion that there may have been parental or caregiver suggestion in this case and this was not adequately explored in the forensic interview", "It is my opinion that outside contamination has the potential to impact children's statements and in this case, there appears to be a significant potential for outside contamination to have occurred especially given that [H.S.] is at an age at which suggestibility is very problematic", "In addition, it is important to note that most details were elicited through closed-ended rather than open-ending questioning. This is particularly problematic because [H.S.] is at an age where she is suggestible", and so forth. (Report pages 50-52).

The Report is not limited to an analysis of the interviewer techniques but rather H.S. could have been unduly influenced by third parties. O'Donahue's opinions really discuss the veracity of H.S.'s statements and thereby assumes the jury's role as finder of fact in determining credibility of the witnesses and is simply argument disguised as expert testimony. Additionally, Dr. O'Donohue's testimony and reports do not meet the assistance qualification set forth in *Hallmark v. Eldridge*, 124 Nev. 492, 500 (2008), as specialized knowledge is not needed, and any probative value is substantially outweighed by the danger of unfair prejudice.

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge. *NRS 50.275*. The admissibility of expert testimony, as well as the qualifications of the expert, lies within the sound discretion of the trial court. *Childers v. State*, 100 Nev. 280, 283 (1984). To be admissible, an expert's testimony must substantially aid the jury in an issue that is beyond the knowledge or understanding of the average juror. *NRS*

50.275<sup>1</sup>; See also *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962)(Expert testimony is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves). The goal is to provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity. *Townsend v. State*, 103 Nev. 113, 117–18 (1987)(citing NRS 48.035(1)). Accordingly, expert testimony must also withstand the challenge to all relevant evidence, i.e., whether probative value exceeds prejudicial effect. *Id.*

Therefore, the admissibility requirement of expert testimony is three-fold: (1) the expert must be qualified in an area of scientific, technical or other specialized knowledge; (2) the specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) the testimony must be limited to matters within the scope of the expert's specialized knowledge. *Perez v. State*, 129 Nev. Adv. Op 90, 313 P.3d 862, 866 (2013). The overarching consideration for trial courts is whether the evidence is reliable and relevant. *Higgs v. State*, 126 Nev. Adv. Op. 1, 222 P.3d 648, 659 (2010). However, "it is generally inappropriate for either a prosecution or defense expert to directly characterize a putative victim's testimony as being truthful or false." *Townsend*, 103 Nev. at 119. Specifically because, it would "invade the prerogative of the jury." *Lickey v. State*, 108 Nev. 191, 196 (1992).

**A. Dr. O'Donohue's report and opinions improperly characterize H.S.'s statements as truthful or untruthful and usurp the jury's role as finder of fact regarding credibility of witnesses.**

Dr. O'Donohue's testimony would elicit comments and opinions on whether H.S.'s prior statements and testimony are truthful, thus improperly assuming the jury's role as finder of fact regarding the credibility of witnesses. This is precisely the type of testimony precluded by *Townsend* and *Lickey*, *infra*. It is for the jury to assess credibility of the witnesses and any potential bias.

Dr. O'Donohue's opinions as to the suggestibility, contamination, logical details, memory, and lack of detail given by H.S. usurps the province of the jury and must not be

<sup>1</sup> The Advisory Committee's Note accompanying Federal Rule of Evidence 702, identical to NRS 50.275, suggests that science will "assist" the jury so long as the untrained layman would not be able to determine the issue by himself.

1 allowed. Allowing Dr. O'Donohue to testify and scrutinize the veracity of H.S.'s statements  
2 would jeopardize the proceedings and prevent the State from receiving a fair trial. Dr.  
3 O'Donohue's report and opinions are credibility determinations embodying the same credibility  
4 factors that a jury would apply and consider—whether H.S. statements were influenced by  
5 suggestibility, or contamination, whether a lack of logical details casts doubt on H.S.  
6 statements, whether her memory was spoiled by her mother speaking with H.S., and whether  
7 a lack of detail shows lack of credibility.

8 Dr. O'Donohue's testimony regarding the inclination of H.S. to testify falsely based on  
9 suggestibility, contamination, logical details, memory, and lack of detail goes directly to the  
10 veracity of H.S.'s testimony, and would consequently be prohibited by *Lickey*, given that it  
11 would usurp the prerogative of the jury to make credibility determinations.

12 Dr. O'Donohue's report starts with a "Reader's Caveat," stating, in part, the following:

13 Evaluations of child forensic interviews are not evaluations of the  
14 veracity of the information provided within interviews. There is no  
15 way to scientifically determine the veracity of such information  
16 without hard data of the event, such as an actual recording of the  
17 event (e.g., videotape, audiotape, photograph, etc.). Therefore, this  
18 evaluation will make no statements about whether alleged events  
19 did or did not occur.

20 *Report*, p. 1.

21 However, after delivering this caveat, Dr. O'Donohue launches into a barrage of why the  
22 information gained from H.S. should not be trusted, i.e., attacking the veracity. In obvious  
23 contradiction of the "Reader's Caveat," Dr. O'Donohue unquestioningly provided defense  
24 counsel the requested conclusion that H.S.'s statements lack veracity.

25 Dr. O'Donohue's report then launches into opinion after opinion regarding the  
26 truthfulness of H.S.'s statements. Dr. O'Donohue renders further opinions, under the heading  
27 "Analysis of the Allegation," that would be improper under *Lickey*:  
28

Outcry: Regarding [H.S.] outcry, it is my opinion that it was  
spontaneous and only may have only occurred because her mother  
questioned her. Additionally, the forensic interviewer failed to  
adequately explore this.

1 Stake Analysis: It is my opinion that this it is unclear whether stake  
2 may have played a role in the allegations being made and the  
forensic interviewer also failed to adequately explorer this.

3 Parental/Caregiver Suggestion: It is my opinion that there may have  
4 been parental or caregiver suggestion in this case and this was not  
5 adequately explored in the forensic interview.

6 Outside Contamination: It is my opinion that outside contamination  
7 has the potential to impact children's statements and in this case,  
8 there appears to be a significant potential for outside contamination  
9 to have occurred especially given that [H.S] is at an age at which  
10 suggestibility is very problematic. Additionally, it is my opinion that  
11 this was not explored in the forensic interview.

12 Amount of Details Provided: In addition, it is important ot note that  
13 most details were elicited through closed-ended rather than open-  
14 ended questioning. This is particularly problematic because [H.S.]  
15 is at an age where she is suggestible.

16 Problematic Logistical Details: According to the documents  
17 reviewed, logistically problematic details may have been present in  
18 the allegation. Specifically, [H.S] reported that her brother was  
19 home during the abuse. Abusers generally seclude children as to  
20 not get caught. Further, abuse is usually traumatic to a child and  
21 they will describe symptoms of trauma after the abuse such as  
22 avoidance of the abuser, fear, nightmares, inability to relax, and  
23 dysphoric emotion. The interviewer did no adequately explore and  
24 resolve problematic logistical details. It is my opinion that  
25 problematic logistical details may have been a factor in the  
26 allegations made. It is also my opinion that these potentially  
27 problematic were not adequately explored and resolved in the  
28 forensic interview.

Suggestive Interviewing Techniques: It is my opinion that the  
scientific literature shows that suggestive interviewing techniques  
can have a distorting effect of children's memory of these ages  
such that they can form false memories. Another concern is that the  
interviewing techniques used do not have well-established  
psychometrics, specifically, their sensitivity or specificity. It is also  
unclear whether any other alternative hypotheses were explored, or  
whether questions were asked to determine whether false  
memories and suggestibility or lying were involved in the case. The  
interviewer also used anatomical diagrams, which are not

1 supported by the research as aids in forensic interviewing and can  
2 be quite suggestive with young children.

3 Memory: Encoding, Storage, & Retrieval: It is my opinion that  
4 memory functions should be considered when examining [H.S.]  
5 allegations considering that: It is my opinion that [H.S.] had  
6 allegedly discussed the allegations with her mother. These were  
7 not explored in the forensic interview.

8 Personological Details: It is my opinion that this should be taken  
9 into consideration when examining [H.S.] allegations. It is also my  
10 opinion that this was not explored by the interviewer.

11 *Report, pgs. 50-52*

12 In *Lickey v. State*, 108 Nev. 191 (1992), the court found it error to allow the State to  
13 have a psychologist testify as to the veracity of a victim. *Id.* at 826. The *Lickey* Court went on  
14 to cite *Townsend v. State*, 103 Nev. 113 (1987), which unequivocally held it improper for an  
15 expert to comment directly on whether the victim's testimony was truthful, because such  
16 testimony would invade the province of the jury. *Lickey*, at 827.

17 If it was error in *Lickey* for the State's expert to testify regarding the veracity of the  
18 victim, then it is certainly error for Dr. O'Donohue to testify in the same manner. Dr.  
19 O'Donohue's testimony regarding H.S.'s suggestibility, contamination, logical details, memory,  
20 and lack of detail goes directly to the veracity of H.S.'s testimony and would therefore be  
21 inadmissible. In *Cordova v. State*, the Supreme Court of Nevada noted the dangerous  
22 "possibility that jurors may be improperly swayed by the opinion of a witness who is presented  
23 as an experienced criminal investigator." *Cordova v. State*, 116 Nev. 664, 669 (2000). That  
24 danger becomes no less severe when it's a defense expert with a Ph.D being called upon to  
25 opine that the child victim lacks the ability to give accurate or truthful testimony. Asking Dr.  
26 O'Donohue to testify regarding the veracity of H.S. would in no way assist the jury to  
27 understand the evidence or determine a fact in issue.

28 All of Dr. O'Donohue's conclusions are matters that should be explored through cross-  
examination but ultimately reserved for the jury to decide. Defendant is not entitled to call a

1 paid expert to deliver conclusions on fact-driven credibility assessments, thus acting as a  
2 thirteenth juror. The analyses made by Dr. O'Donohue are precisely those intended to be  
3 made by the trier of fact. Not only is it impermissible for a defense expert to point out  
4 inconsistencies, suggestibility, contamination, lack of logical details, memory, and lack of  
5 detail in witness testimony, but is it is equally impermissible for Dr. O'Donohue to manufacture  
6 speculative explanations for his invented suggestibility, contamination, logical details,  
7 memory, and lack of detail. Ultimately, it is the function of the jury to determine what weight to  
8 give to witness testimony. Defense counsel will have the opportunity to cross-examine each of  
9 the State's witnesses regarding inconsistencies or technique. Dr. O'Donohue's testimony  
10 regarding either is both improper and unnecessary.

11 **B. Specialized knowledge MUST assist the trier of fact to understand the**  
12 **evidence or to determine a fact in issue.**

13 As previously discussed, expert testimony and the accompanied specialized knowledge  
14 must necessarily assist the trier of fact to understand the evidence or to determine a fact in  
15 issue. *Perez v. State*, 129 Nev. Adv. Op 90, 313 P.3d 862, 866 (2013). With regards to the  
16 assistance qualification, expert's testimony will assist the trier of fact only when it is (1)  
17 relevant and (2) the product of reliable methodology. *Hallmark v. Eldridge*, 124 Nev. 492, 500  
18 (2008). Relevant evidence is "evidence having any tendency to make the existence of any  
19 fact that is of consequence to the determination of the action more or less probable than it  
20 would be without the evidence. *NRS 48.015*. Relevant evidence, however, is not admissible if  
21 its probative value is substantially outweighed by the danger of unfair prejudice, confusion of  
22 the issues or of misleading the jury. *NRS 48.035(1)*. And in determining whether an expert's  
23 opinion is based upon reliable methodology, a district court should consider the following, non-  
24 exhaustive list: whether the opinion is (1) within a recognized field of expertise; (2) testable  
25 and has been tested; (3) published and subjected to peer review; (4) generally accepted in the  
26 scientific community (not always determinative); and (5) based more on particularized facts  
27 rather than assumption, conjecture, or generalization. *Hallmark*, 124 Nev. at 500 – 501. The  
28 factors may not all apply in every case and may be given varying weights by the trial court.  
*Hallmark*, 124 Nev. at 501.

1                   a. Dr. O'Donohue's testimony is not relevant because its probative  
2                   value is substantially outweighed by the danger of unfair prejudice,  
3                   confuses the issues and is misleading to the jury.

4                   The probative value of Dr. O'Donohue's testimony, if any, is substantially outweighed  
5                   by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Dr.  
6                   O'Donohue's review of the case materials, coupled with his thoughts and opinions, provide  
7                   little to no assistance to the trier of fact. However, there is substantial danger of unfair  
8                   prejudice, confusion of the issues, and misleading of the jury in allowing Dr. O'Donohue to  
9                   compare statements out of context, opine as to bias or untruthfulness, and speculate  
10                  regarding witness veracity.

11                 "Expert evidence can be both powerful and quite misleading because of the difficulty in  
12                 evaluating it. Because of that risk, the judge in weighing possible prejudice against probative  
13                 force under Rule 403 of the present rules exercises more control over experts than over lay  
14                 witnesses." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993) (internal  
15                 quotations omitted); *See also, United States v. Curry*, 977 F.2d 1042 (7<sup>th</sup> Cir. 1992) (a district  
16                 court must consider "whether the expert testimony would be misleading or confusing in the  
17                 context of trial."). Where credibility is based on general factors, expert testimony is not  
18                 appropriate. *See U.S. v. Rincon*, 28 F.3d 921 (C.A.9 Cal.)(1994)("given the powerful nature of  
19                 expert testimony, coupled with its potential to mislead the jury, we cannot say that the district  
20                 court erred in concluding that the proffered evidence would not assist the trier of fact and that  
21                 it was likely to mislead the jury."); *See also Johnson v. State*, 272 Ga. 254 (2000)(testimony  
22                 based only on general factors or general knowledge is more confusing and prejudicial than  
23                 probative.).

24                 Allowing an expert to testify about the credibility of a witness places the entire trial in  
25                 jeopardy. Allowing an expert to testify would unnecessarily create a risk that the jury might  
26                 place undue value on the expert's testimony and would "abandon its responsibility as the fact  
27                 finder and simply adopt the judgement of the expert, rather than use the expert's testimony to  
28                 assist the jury in making its own determination of credibility," which would be in violation of

1 *Hallmark. State v. Coley*, 32 S.W.3d 831, 835 (citing *State v. Ballard*, 855 S.W.2d 557, 561  
2 (1993).

3 Expert testimony is reserved to assist the trier of fact in understanding the evidence.  
4 Nothing Dr. O'Donohue has to offer will aid the jury in understanding the evidence. The jury is  
5 capable of assessing the credibility of a witness, identifying possible bias, motivation,  
6 inconsistencies, and will be made aware of each of these things through effective cross-  
7 examination.

8 As an example, the State points to the "Analysis of the Allegation" included in Dr.  
9 O'Donohue's report.

10 Further, Dr. O'Donohue's report is filled with speculation and misleading conclusions.  
11 (See Summary and Conclusions p.g. 50). The opinions are misleading and confusing, and in  
12 violation of *Lickey*.

13 Accordingly, what little probative value there is to having a PhD. testify to the jury as to  
14 what they should or should not believe is vastly outweighed by the unfair prejudice to the  
15 victim due to the misleading and confusing nature of the evidence, and it must be excluded.

16 **C. Should this Court allow Dr. O'Donohue to testify, such testimony should**  
17 **be subject to extensive limitations.**

18 The State requests this Court to carefully review Dr. O'Donohue's report and recognize  
19 the several impermissible opinions that it contains. The State further requests that, if this  
20 Court permits the testimony of Dr. O'Donohue, this Court set parameters regarding what Dr.  
21 O'Donohue may testify to. It is permissible for Dr. O'Donohue to objectively discuss what a  
22 forensic interview is and further discuss any factors of suggestibility. It is not, however,  
23 permissible for Dr. O'Donohue to discuss anything related to false allegations. Those are to be  
24 determined by the jury. Dr. O'Donohue should not be permitted to discuss inconsistencies,  
25 caregiver suggestion, outside contamination, lack of details, not spontaneous, logistical  
26 details, suggestive interviewing techniques, memory functions, false memories, and other  
27 opinions that skirt the outright phrase "feigning, lying, making it up, misleading, or H.S.'s  
28 statement lack credibility" within the victim's statement or give manufactured explanations as  
to why he believes there are inconsistencies.



1 This very expert prefaced his entire report with the fact that he cannot determine the  
2 veracity of the information provided within forensic interviews, although that is precisely what  
3 his report attempts to do. Allowing such testimony is not only prejudicial, but also denies the  
4 finder of fact the opportunity to evaluate the testimony of the witness.

5 Therefore, the State requests this Court issue an order in limine allowing and  
6 disallowing the following categories of testimony by Dr. O'Donohue:

7 Allow:

- 8 • Evaluation of the forensic interview and discussion on whether proper tactics were  
9 used.
- 10 • Objective discussion of his eighteen-point factor test for forensic interviews.

11 Disallow:

- 12 • Discussion and/or opinions of inconsistencies within witness statements.
- 13 • Literature review wherein Dr. O'Donohue makes a conclusion regarding H.S.'s  
14 credibility.
- 15 • Outcry analysis, stake analysis, Parental suggestion, forensic interview analysis,  
16 memory analysis, sufficiency of details provided by victim, inconsistency analysis,  
17 logistical detail analysis, or personological analysis.

18  
19 If this Court permits the testimony of Dr. O'Donohue, the State requests that the proper  
20 parameters be laid out prior to trial detailing what Dr. O'Donohue may testify to. Several  
21 sections within Dr. O'Donohue's report are entirely improper.

### 22 23 III. CONCLUSION

24 The testimony of Dr. O'Donohue is inadmissible. Dr. O'Donohue's expected testimony  
25 does not meet the assistance qualification set forth under Nevada law. The small probative  
26 value of the testimony is substantially outweighed by the danger of unfair prejudice, confusion  
27 of the issues and of misleading the jury. Dr O'Donohue's opinions and conclusions are based  
28 on assumption, conjecture, or generalizations. His testimony addresses the veracity of State's

1 witnesses and therefore improperly usurps the province of the jury. Therefore, the State  
2 requests this Honorable Court enter and order preventing the Defendant from calling Dr.  
3 O'Donohue or, in the alternative, extensively limiting such testimony.

4  
5 DATED this 21 day of September, 2020.

6  
7 Stephen B. Rye  
Lyon County District Attorney

8  
9 By: 

10 Matthew K. Merrill  
11 Deputy District Attorney  
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**CERTIFICATE OF SERVICE**

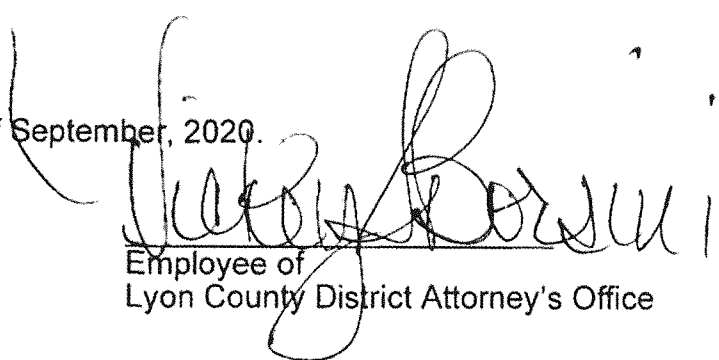
Pursuant to NRCP 5(b), I certify that I am an employee of the Lyon County District Attorney's Office, and that on the date below I served a true and correct copy of the **MOTION TO EXCLUDE OR LIMIT DEFENSE EXPERT WITNESS**, by the following:

- ☒ **MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **CERTIFIED MAIL:** By placing an original or true copy in a sealed envelope, postage fully prepaid, by certified mail with tracking numbers \_\_\_\_\_ in a U.S. Postal Service mailbox addressed to the individual(s) and/or address(es) listed below
- ☐ **PERSONAL DELIVERY:** By hand delivering an original or true copy to the individual(s) and/or address(es) listed below
- ☐ **E-FILE:** By electronically filing the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the individual(s) listed below
- ☐ **FACSIMILE:** By faxing an original or true copy to the individual(s) and/or address(es) and fax number(s) listed below
- ☐ **FEDERAL EXPRESS/UPS OR OTHER OVERNIGHT DELIVERY:** By placing an original or true copy in a sealed envelope, postage fully prepaid, with an overnight delivery carrier, addressed to the individual(s) and/or address(es) listed below (Tracking Number: \_\_\_\_\_)

Addressed as follows:

LeAnn Schumann  
1150 Selmi Drive Ste 505  
Reno, NV 89512

DATED this 21<sup>st</sup> day of September, 2020.

  
Employee of  
Lyon County District Attorney's Office

1 CASE NO.: 20-CR-00099

2 DEPT. NO.: I

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4  
5 IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
6  
7 IN AND FOR THE COUNTY OF LYON  
8  
9

10 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 THOMAS BERNAL,

14 Defendant.  
15 \_\_\_\_\_ /

16 NOTICE OF EXPERT WITNESS

17 JESSE KALTER LAW, P.C., on behalf of the Defendant, THOMAS BERNAL, and  
18 pursuant to NRS 174.234, hereby gives notice that the Defendant intends to call DR. WILLIAM  
19 O'DONOHUE, as an expert witness. DR. O'DONOHUE's office is located at the University of  
20 Nevada, Reno, Reno, Nevada 89557. DR. O'DONOHUE will testify consistently with his  
21 opinions and findings contained within his "Child Sexual Abuse Investigation Report" dated  
22 August 26, 2020. See Exhibit "A" attached hereto and incorporated. Dr. O'Donohue reserves  
23 the right to supplement or modify his report if additional information become available. Dr.  
24 O'Donohue's Curriculum Vitae is attached hereto as Exhibit "B."  
25

26  
27 ///

28 ///

1 DATED this 10 day of September, 2020.  
2  
3

4 JESSE KALTER LAW, P.C.

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6

7 LEANN E. SCHUMANN, ESQ.

8 Nevada Bar No. 12862

9 1150 Selmi Dr. Ste. 505

10 Reno, NV 89512

11 (775) 331.3888

12 Attorney for Defendant

13 CERTIFICATE OF SERVICE

14 Pursuant to NRCP 5(b), I certify that I am an employee of Jesse Kalter Law, P.C., and  
15 that on this date I mailed via US Mail, at Reno, Nevada, a true copy of the foregoing document  
16 to:

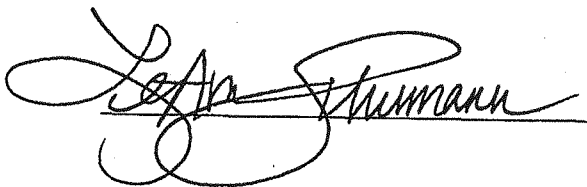
17 Lyon County District Attorney

18 Matthew Merrill, Esq.

19 31 S. Main Street

20 Yerington, NV 89447

21 DATED this 10 day of September, 2020.  
22  
23

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25  
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27  
28

**EXHIBIT "A"**

**EXHIBIT "A"**

WILLIAM O'DONOHUE, PH.D., LLC  
Licensed Psychologist  
4490 Mountaingate Drive  
Reno, NV 89519  
775.750.6082

### CHILD SEXUAL ABUSE INVESTIGATION REPORT

**Case:** State of Nevada vs. Thomas Bernal

**Date:** August 26, 2020

**Accused:** Thomas Bernal

**Attorney:** Jesse Kalter, J.D.

**Referral Question:** Are there any factors such as suggestibility or unusual features of the allegation that may have not been adequately explored in the forensic interview(s), or do these appear to be bias free?

#### *Reader's Caveat*

Evaluations of child forensic interviews are not evaluations of the veracity of the information provided within interviews. There is no way to scientifically determine the veracity of such information without hard data of the event, such as an actual recording of the event (e.g., videotape, audiotape, photograph, etc.). Therefore, this evaluation will make no statements about whether alleged events did or did not occur. Instead, the purpose of this evaluation is to inform those making judicial decisions about the potential for bias on the child's allegations. Specifically, the question addressed in this report is: Were there events that could potentially and reasonably bias the child's report, or were those events controlled and/or assessed by the interviewer? In addition, interviews should explore all reasonable hypotheses that pertain to the child's report and not just focus on a narrow subset. This evaluation will explore these reasonable hypotheses. Finally, it is important to note that the mere presence of potentially biasing behaviors or child experiences never means that the child's report was definitely biased; only that such bias is possible. Some children can experience multiple biasing influences and continue to provide very accurate reports, while other children can be misled by very subtle and unintentional changes in the wording of a question. Further, the presence of bias in one question does not mean that the entire interview was contaminated. For example, a leading question about the time of an alleged event should not be expected to contaminate non-leading questions about other details of the event. Therefore, when using the results of the evaluation, please consider the following points.

1. When all factors are ruled out, the interview should be considered free from basic bias, but that does not mean that the child's report is accurate or inaccurate.
2. When some or all of the biasing influences are identified in an interview, the interview cannot be considered free from potential bias. Once again, the child's testimony can still be accurate or inaccurate regardless of the presence of bias.

**Case Synopsis:** The goal of this report is to examine the allegations made by Hayley Smith (DOB: 07/20/2004) against Thomas Bernal (DOB: 07/18/1982) in the context of the forensic interview.

**Materials Reviewed:**

- Application for a Temporary and/or Extended Order for Protection Against Domestic Violence Dated 07.16.2019
- Domestic Violence Protection Order Information Dated 07.16.2019
- Walker River Justice Court Order for Hearing to Extend, Modify, or Dissolve the Order for Protection Dated 07.16.2019
- Justice Court of Walker River Motion and Affidavit Dated 07.16.2019
- Justice Court of Walker River Motion and Affidavit Dated 07.16.2019
- Declaration of Service Dated 07.23.2019
- Justice Court of Walker River Extended Order for Protection Against Domestic Violence Dated 08.13.2019
- Walker River Justice Court TPO Hearing Transcript of Proceeding Dated 08.13.2019
- Interview with Hayley Smith by Jennifer McCann Dated 09.04.2019
- Female Anatomical Drawing Dated 09.04.2019
- Child Advocacy Center Forensic Interview Report Dated 09.20.2019
- Docket Sheet Dated 10.09.2019
- Declaration of Service Dated 10.09.2019
- Lyon County Sheriff's Office Declaration of Probable Cause and Detention Dated 10.21.2019
- Justice Court of Walker River Township Setting Notice Dated 10.24.2019
- Docket Sheet Dated 10.24.2019
- Deputy Report Supplemental Narrative Dated 10.24.2019
- Justice Court of Walker River Township Criminal Complaint Dated 10.24.2019
- Student Schedule for Hayley Smith Dated 10.28.2019
- Deputy Report Supplemental Narrative Dated 10.28.2019
- Lyon County Sheriff's Office Deputy Report Dated 11.05.2019
- Lyon County Sheriff's Office Law Supplemental Narrative Dated 11.07.2019
- Preliminary Hearing Transcript of Proceeding Dated 01.23.2020
- Third Judicial District Court of the State of Nevada Information Dated 01.28.2020
- Interview with Owen Smith Undated
- Interview with Thomas Bernal Undated



- Lyon County Sheriff's Office Voluntary Statement Undated

### **Summary of Materials Reviewed**

#### **Application for a Temporary and/or Extended Order for Protection Against Domestic Violence Dated 07.16.2019**

According to the document reviewed, an application for temporary order for protection was filed by Patricia Bernal. To support the application, Ms. Bernal detailed the allegations against Thomas Bernal. She wrote, "I found out on Sunday July 14<sup>th</sup>, 2019 that Thomas Bernal has been sexually molesting my 14 year old daughter Hayley Smith for a year. Thomas told me with his own words then I told Thomas to leave after Thomas left I asked Hayley if it was all true. Hayley confirmed Thomas had been molesting Hayley for a year. It all started August 2018, Hayley never told me because Thomas threatened Hayley. Thomas told Hayley if Hayley ever told that I would lose both Hayley and my son, Owen Smith. This has occurred regularly in the home when I, Patricia was at work. The last incident happen Saturday, July 13, 2019."

#### **Justice Court of Walker River Extended Order for Protection Against Domestic Violence Dated 08.13.2019**

According to the document reviewed, an extended order for protection against domestic violence was filed on August 13, 2019. Patricia Bernal is listed as the applicant and Thomas Bernal is listed as the adverse party. According to the order, Mr. Bernal was ordered to stay at least 100 yards away from the applicant's residence and her children's schools and/or day care.

#### **Walker River Justice Court TPO Hearing Transcript of Proceeding Dated 08.13.2019**

According to the document reviewed, a hearing was held to determine the necessity to extend a protection order. Given that there is an ongoing investigation into the allegations, the protection order was extended an additional year.

#### **Interview with Hayley Smith by Jennifer McCann Dated 09.04.2019**

According to the video reviewed, on September 4, 2019, Hayley Smith was interviewed. The interview began with the interviewer explaining that the interview is being recorded and there were people listening to them. The interviewer then asked Hayley (age 15) what she likes to do, and Hayley explained that she likes to play a video game called Skyrim and she detailed what she does in that game. She explained that it is a single player game and she detailed the main objectives of the game as well. Hayley also mentioned that she likes to read and write. The interviewer then said, "I'll ask some questions and if at any point you do not know the answer to a question you can say, 'I don't know.' But if you do know the answer it's really important that you share that with me, ok? Also, I'll repeat a lot of the things you say just because I want to make sure I understand everything you are telling me. If I'm not making sense, just let me know, it's ok to interrupt me in here. Um, although you can say any kinds of words, any words that you would normally say, I've heard all kinds of words. Also, it's really important that we get everything accurate and so we also have to talk about the truth and things that have really happened. And so, Hayley, tell me the difference between a truth and a lie." Hayley replied, "A lie is when you don't tell the truth. It's like playing a game, you tell the truth and then you're telling what actually happened and if you're telling a lie, you're not telling what happened." The interviewer said, "And

so while we are talking today do you promise to tell me the truth?" Hayley nodded affirmative. The interviewer said, "Great, thank you."

The interviewer then asked Hayley to tell her everything that happened that morning until lunch time in as much detail as possible. Hayley explained that her brother woke her up and then she played some Skyrim and then got ready to come to the interview. She also detailed that she fed her pets, put on makeup, and then picked up her friend Amanda. The interviewer then asked how the car ride was and Hayley explained that she did her math homework. Hayley was then asked about the seating arrangement and then was asked to describe the car. Hayley detailed the features of the car, a silver Toyota Venza, and explained the seating arrangement. The interviewer mentioned that details are going to be very important and very helpful and asked Hayley to be as thorough as possible. The interviewer then said, "So Hayley, tell me what you came to talk to me about today." Hayley replied, "Uh, my stepdad. And he sexually assaulted me." The interviewer said, "Ok, tell me about that." Hayley asked, "Define, what do you mean, what do you want me to talk about it?" The interviewer said, "Yeah, so um, tell me about one time that he sexually assaulted you." Hayley replied, "Well, all of the times were he did it while mom was at work and then I would – before I went to bed because we had school, and I'd come out and say goodnight. And then he would follow me into my room, and I would be like, 'Why are you following me? I'm going to bed.' And then he would just start doing it to, yeah." The interviewer said, "Ok Hayley, I want you to think of one time that something happened, um a time that maybe you remember the most. So, it could be the first or the last, any time you remember the most, and tell me everything that happened from the beginning to the end and try and include as much as you can remember." Hayley replied, "I had rearranged my room that night and I was just laying down, tired, and my back was hurting from moving everything. I was just laying, on my old phone, not my new one. I was just lying there reading and listening to music like I always do, relaxing on my bed. And then he came to my room right after mom had left and then he'd come in my room, in and out of my room, for like the last two hours. And then he'd finally just come into my room and he's like, 'Whatcha doing?' And I'm like, 'Listening to music and reading.' Then I put my phone down because that's what I do when my parents come in to see what they want or if they need help with anything. And then he just like, because he used to just like help my legs because school wore them out and they started hurting every day after school. And so, I'm just like, 'Could you do my legs for me, my legs are hurting?' And then he just got out of hand with it."

The interviewer asked, "And so the night where you rearranged your furniture in your bedroom, sounds like you were just hanging out in your room, um?" Hayley replied, "Mm-hmm." The interviewer continued, "And he came in and, did you ask him to do your legs that night?" Hayley replied, "No, actually I didn't. Actually, he just did it and I was like, 'What are you doing? I didn't ask you to do that.'" The interviewer asked, "Ok, so, tell me about when he came in the room, what was one of the first things that happened?" Hayley replied, "He just sat on the end of my bed because my bed is against a wall, so my head is against the wall, my head being at the end of the bed. So, he just sat, I have a very queen-sized bed, so he sat right in the middle and my feet were just over here in the middle of the bed, so he just sat there for a few minutes." The interviewer asked, "And um, was this, when he sat on the bed, was that the night when you rearranged your bedroom, so your bed was like that and your head was over here?" Hayley replied, "Mm-hmm (affirmative)." The interviewer said, "Tell me again where he sat?" Hayley replied, "The like middle, so like this is the front part of the bed and this is where the edge is because my bed was against the wall on two sides at that time. So, this side was by the window because I have two

windows in my room. And so, my bed was like this, that was open, so he was sitting like right in the middle where my feet were but on the edge." The interviewer asked, "Gotcha, ok, and what was the next thing that happened?" Hayley replied, "And then he just started massaging my legs and talking to me, I can't remember what it was about though." The interviewer said, "And then tell me the very next thing that happened." Hayley replied, "And then I got back on my phone and he went to get up and then, I guess he changed his mind and then actually, like put his hand here (pointed to thigh) and I'm just like, 'What are you doing?' And he's just like, 'Nothing.'" The interviewer asked, "And then what happened?" Hayley replied, "Then he got his hand and just started doing stuff." The interviewer said, "Ok, tell me what stuff he did." Hayley replied, "Uh, it's weird to talk about this. He started fingering me and got ahead with that." The interviewer asked, "Ok, so you had mentioned he put his hand right there (motioned to thigh)?" Hayley replied, "Mm-hmm (affirmative) and then he starts massaging like this and then I was just like." The interviewer asked, "So then right after he was massaging your leg then where did his hand go?" Hayley replied, "Further up." The interviewer asked, "Then when it went further up, what happened." Hayley replied, "I thought he was just trying, like usually he just hugs me. After he starts massaging my legs I was just like, 'What are you doing?' He's like, 'I'm just gonna give you a hug.' And I'm like, 'Okay?' He doesn't usually do that." The interviewer asked, "Ok, and what happened after that?" Hayley replied, "And then, he didn't give me a hug at all." The interviewer asked, "And where did his hand go then?" Hayley replied, "To places they shouldn't be."

The interviewer then said, "Tell me about how, like you had mentioned he was fingering you and I don't want to assume anything in here, so, what does fingering mean. Like, what was he doing when he was fingering you that time?" Hayley replied, "I don't know how to explain it that much. He just, I can't explain it." The interviewer asked, "Ok, were there body parts involved?" Hayley replied, "No. Oh wait, it was his hand." The interviewer asked, "Ok, and what was his hand doing?" Hayley replied, "Touching places it shouldn't have done. Going places it shouldn't have gone." The interviewer asked, "Do you have a name for the places it shouldn't have gone?" Hayley replied, "I don't want to say." The interviewer then asked Hayley if it would be easier to circle the place on a diagram of a girl and Hayley nodded (affirmative) and then circled on the sheet (vaginal area). The interviewer then asked, "Um, and then tell me how his hand got to this part?" Hayley replied, "My leg, he just started doing that." The interviewer asked, "And how were your clothes when his hand went to this part?" Hayley replied, "I was, I was just wearing shorts that went down to here (thigh) and just a tank top on like always with a sweater over it like always. It's what I normally wear to bed, so." The interviewer asked, "And was his hand on top of your clothes on this part (pointed to diagram) or underneath your clothes?" Hayley asked, "On which part?" The interviewer said, "On this part (pointed to diagram again)." Hayley replied, "It was over and then he went under." The interviewer said, "Ok, tell me about how his hand got underneath your shorts." Hayley replied, "Because my shorts were only like this (motioned to top of the knee/thigh area) and then he just went like that (motioned up the thigh)." The interviewer asked, "And then, when you said he was fingering the part – or places he shouldn't have, what part was that. On this (diagram) what part was he fingering?" Hayley replied, "The circled part." The interviewer asked, "And what was his finger doing and where was it at on this part (diagram)?" Hayley replied, "I can't explain it, it's weird." The interviewer asked, "Ok, and so did you have underwear on when you were wearing the shorts?" Hayley replied, "Mm-hmm (affirmative)." The interviewer asked, "And what happened to the underwear?" Hayley replied, "They were still on." The interviewer asked, "And um, did they move or change or do anything different?" Hayley

replied, "Uh-uh (negative)." The interviewer asked, "Ok, and then you had mentioned his hands and his fingers were touching, did they touch on the inside of this part (pointed on diagram) or on the outside of that part?" Hayley replied, "Inside and outside." The interviewer asked, "Ok, and so when his fingers went on the inside, where did your underwear go?" Hayley replied, "They just moved to the side." The interviewer asked, "And when he was fingering on the inside of this part, what did that feel like when that happened?" Hayley replied, "Not like, not nice at all." The interviewer asked, "And what did, what did your body feel or anything like that?" Hayley replied, "My body is just like don't, and I was just so tired I wasn't thinking right because I was so tired, I wasn't thinking great, so."

Then the interviewer asked, "Ok and you had mentioned he touched on the inside and outside of this part (pointed to diagram), um, when he touched on the outside, what was he touching with?" Hayley replied, "His fingers." The interviewer asked, "Ok, and how did his hand and fingers touching this part stop that time?" Hayley replied, "I said, 'Stop.' And then he just walked out of the room." The interviewer asked, "And then while his fingers, or his finger, was inside here (pointed to diagram) tell me everything like you remember him doing, what was the rest of his body doing?" Hayley replied, "He's just sitting there trying to make conversation with me and I was just shutting down and I was trying not to think about it anymore." The interviewer asked, "And so, while his hand, like it went up your shorts, he was trying to make conversation then?" Hayley replied, "Like, 'How was your day? How was school?' And all that kind of stuff." The interviewer asked, "Ok, and then did you reply back at all? Did you say anything back to him when he asked those questions?" Hayley replied, "I just said, 'It was good.' And then just shrugged." The interviewer asked, "Ok, and then did you, like, hear him do or say anything else when this was happening?" Hayley replied, "He just tried to make conversation and every time he would stop when my brother opens the - we have a back room, kind of, and it separates our rooms from the living room. And so when he opened that, my brother, he knocked on my door and then he stopped and he just said, 'What.'" The interviewer asked, "Ok, so this night where you had rearranged your bedroom furniture, your brother had knocked on the door?" Hayley replied, "Yeah because he was wondering if he could eat something because at our house we have to ask to eat something before we eat it to make sure mom hasn't claimed it for her work food or something like that." The interviewer asked, "Ok, so backing up just a little bit, did um, did his, like when he had had his hands up your shorts did his clothes change or do anything different when this was happening?" Hayley replied, "Uh-uh (negative)." The interviewer asked, "Ok, what about if any other part of his body moved or did anything different?" Hayley replied, "I couldn't tell." The interviewer asked, "And so then it sounds like he was sitting the whole time?" Hayley nodded (affirmative). The interviewer asked, "And did he stay sitting the whole time?" Hayley replied, "Until my brother knocked on the door then he got up."

The interviewer then said, "And then, describe to me what you were wearing when this happened." Hayley replied, "I was wearing this tank top, this sweater, and blue, this kind of blue (pointed to shirt) but maybe a little bit darker, shorts that went down to here (pointed to thigh/top of the knee)." The interviewer asked, "And um if you remember what material the shorts were or?" Hayley replied, "They were like basketball shorts." The interviewer asked, "And what about like if you remember what underwear you were wearing?" Hayley replied, "Uh-uh (negative)." The interviewer asked, "Did you have anything on under that tank top that time?" Hayley nodded (affirmative). The interviewer asked, "What did you have on?" Hayley replied, "This bra right here (showed bra strap)." The interviewer asked, "Did anything happen with your bra?" Hayley replied,

"Uh-uh (negative)." The interviewer said, "And so then describe to me what was on your bed. You kind of told me where your bed was in your room." Hayley replied, "My sheets, my blanket, my pillows, and a few stuffed animals." The interviewer said, "And then, um, that time describe the rest of your room to me. You told me where the bed was." Hayley replied, "So my bed was against the wall and my turtle tank I had on a black entertainment stand we had thrown down the stairs so it would break, but I moved it – her, onto my dresser because I found out my turtle is a girl. So we moved a, or I had moved that, I couldn't have moved it by myself so I just left her on that, and then my dresser was in this corner of my room by my window which is right here (used hand gesture to show relation) and my, my – I have a green table and it was on this side of my bed." The interviewer asked, "And then, when did this happen? Um, if you remember." Hayley replied, "I can't remember." The interviewer asked, "Ok, how old were you when it happened?" Hayley replied, "Thirteen." The interviewer asked, "And um, if you remember what you did that day?" Hayley asked, "At school?" The interviewer said, "Yeah, just anything that day at all." Hayley replied, "Well, I mean I was a freshman, so I had just completed a day of school, ended it with one of my favorite teachers and rode the bus home." The interviewer asked, "And who was your favorite teacher that day that you were talking about?" Hayley replied, "Her name is Ms. Mueller and she was my English honors teacher last year."

The interviewer then asked, "And you mentioned he was sitting on the bed, what was he wearing?" Hayley replied, "He was wearing his daily clothes, a tank – well he wasn't wearing a tank top. He was wearing a t-shirt and shorts, like cargo shorts that went down to here (motioned past knee)." The interviewer asked, "And then um, your brother knocked on the door? What happened after your brother knocked on the door?" Hayley replied, "Mm-hmm (affirmative) after that I left my door open because he had closed it, and then he just left." The interviewer asked, "And did your brother come in the room?" Hayley replied, "No, I tell him to stay at my doorway and he's not allowed to come in my room unless I tell him he can. So, he was at the doorway, which is like this doorway, but it's a little more in and my door swings this way, but it's a little wooden door so." The interviewer asked, "So did he see anything in the room?" Hayley replied, "He could have only seen the turtle or my closet which was on this side of the room (motioned away from her)." The interviewer asked, "And then, so he knocked on the door and then, um, it sounds like then this guy stopped, and where did this guy go after?" Hayley replied, "He went, so after you leave my room you have my brother's room on the right side and then the bathroom straight across. Then you have the door I talked about that separates it because we have seven cats right now, we are getting rid of five of them. And we had a couch right here and then we have a TV right here and he went behind the couch and he plays at his little gaming station that has his table and all that behind the couch." The interviewer asked, "And then, what's your brother's name?" Hayley replied, "Owen." The interviewer asked, "And how old is Owen?" Hayley replied, "He will be 13 in a few months." The interviewer asked, "And then what is your stepdad's name?" Hayley replied, "TJ." The interviewer asked, "Did anything else happen with TJ this, the night we were talking about right now?" Hayley replied, "No because I said goodnight, shut my door and I turned the light off. And I went to bed." The interviewer asked, "And you had mentioned that your mom had left?" Hayley replied, "She worked that night 5pm to 1 am in the morning. And she doesn't go to bed until three most nights because she has to wind down and go to sleep and most mornings, he woke up with us, but some mornings like Fridays she woke up with us. So, she could actually have a few hours to spend with us before we went to school." The interviewer asked, "And this night, where was your mom working?" Hayley replied, "Deeny's, it's like a club." The

interviewer asked, "Does she still work there now still?" Hayley replied, "Yeah, it's just her shift changed and so on Friday's and Saturday's she works nine to five." The interviewer asked, "And where was TJ working at the time?" Hayley replied, "He was unemployed." The interviewer asked, "Ok, and let's see, did this, the night that we are talking about, did this happen at the house you are living in right now or in a different one?" Hayley replied, "Mm-hmm (affirmative), the house we live in right now." The interviewer asked, "And where is that at?" Hayley replied, "Uh, it's not specific, it's just out in the middle of the desert on the highway." The interviewer asked, "Ok, what highway?" Hayley replied, "Uh, highway 95 east." The interviewer asked, "And like, are you in Yerington like, what city are you considered?" Hayley replied, "Um, we're in Yerington, but we're out on the outskirts of Yerington on your way to Schurz and so we live out that way."

The interviewer then asked, "And then was there another time that TJ did something like this?" Hayley nodded (affirmative). The interviewer asked, "Yeah? Um, was there a time where it happened in a different place besides your bedroom?" Hayley shook her head (negative) and replied, "Uh-uh (negative)." The interviewer asked, "Ok, was there a time where something different happened?" Hayley shook her head (negative). The interviewer asked, "Um, was there a time where you were a different age and you weren't thirteen?" Hayley replied, "When I was fourteen." The interviewer said, "Ok, tell me about – a little more about what happened when you were fourteen." Hayley said, "It was the same thing and mom has Wednesday's and Thursday's, she had Tuesday's and Wednesday's off to spend with us, but most of the time we went to the Boy's and Girl's Club after work, after school. And he did that when mom was off work on Wednesday. So the day before she had to go back to work." The interviewer said, "Ok, so then um, tell me, kind of walk me through what happened that time." Hayley said, "We had just gotten home and we were spending time with mom on the couch and she said she wanted to go take a shower because she was cleaning all day trying to make the house smell good like always, and so we were just sitting on the couch. And then I went to go to my room and he followed me and did the same thing. And then mom got out of the shower and he left." The interviewer said, "And tell me more about what you were wearing that time." Hayley replied, "I was wearing, since I had just gotten home from school, I hadn't had time to change yet so I was wearing black pants and a black t-shirt." The interviewer asked, "Ok and how did his hand get to your part that time?" Hayley replied, "He hadn't done it that time, he hadn't fully done it because mom had got out of the shower and she was in the kitchen cooking dinner." The interviewer asked, "Oh, ok, tell me about him walking in – what was the first thing that happened when he walked in the room?" Hayley replied, "He walked in and then he messed with the turtle for a few minutes and then he sat on my bed." The interviewer asked, "And then what happened after he sat on your bed?" Hayley replied, "He put his hand on my leg again and he started massaging my leg. And the door was closed because I always close my door after I go in my room unless it's too hot because the cooler is in my brother's room." The interviewer asked, "Ok, and then he sat on the bed and he was massaging your leg, and then what happened?" Hayley replied, "And then mom had gotten out of the shower and he was really mad about that." The interviewer asked, "How did you know he was mad about that?" Hayley replied, "Um, he was, he looked really mad because the day he was just really, like he was worse than he was that morning because he was super tired. But he was mad, not tired this time." The interviewer asked, "Gotcha, ok. Did he say anything to you that time?" Hayley shook her head (negative).

The interviewer then asked, "And then, um, let's see. Was there another time, so we talked about the one time where you rearranged your bedroom, um, he had fingered you. Was there



another time where he fingered you?" Hayley nodded (affirmative). The interviewer said, "Mm-hmm, so kind of walk me through another time he fingered you." Hayley said, "It was the weekend and mom had just gone to work and we were just out and I was watching Twitch on his computer, it's a gaming website. And then there's all these people that play video games and they stream onto it. So we were watching one of his friends, I think his name was Ringer, so his friend's name was Ringer and we were just watching him play a game called Player Unknown's Battlegrounds, it's a shooter game and you can play with up to four people unless you make a custom game. And so we were just watching him do a custom game with his friend King Stogie, and we were just doing all that stuff. And then I had gone to go to the bathroom and then I went back in my bedroom because I didn't want to watch it anymore. He came into my room and I'm just like, 'What.' And he's like, 'Why are you sitting in here? I thought we were watching Twitch together.' And I'm just like, 'I don't want to anymore.' And so, he sat on the bed again and I was wearing shorts again, like always on the weekends, in my pajamas all day long. And so, we were just, and he said – and he's like, wait I can't remember what he said. He was trying to talk to me again and I just didn't know what to answer. So, and then he did it again." The interviewer asked, "And um, so, just to clarify, um, he fingered you again that time?" Hayley nodded (affirmative). The interviewer asked, "And how does his hand get there this time?" Hayley replied, "The same way as the first time." The interviewer asked, "Ok, and so like he went up your shorts, and what happened to your underwear that time?" Hayley replied, "They still stayed there but they got pushed aside." The interviewer asked, "And then, what about like, um, the last time whether he went on the inside or outside. This time, did he go inside or outside this part (pointed at diagram)?" Hayley replied, "Inside." The interviewer asked, "And, um, what part went inside this time?" Hayley replied, "His fingers." The interviewer asked, "And then, what about like if you remember him saying or doing anything while his fingers were in there this time?" Hayley replied, "I can't remember if he said anything or not." The interviewer asked, "Did you hear, like, anything at all? Like if he said or did any noises or anything like that?" Hayley replied, "No, could only hear my brother playing Fortnite with his friends."

The interviewer then asked, "And then how did him fingering you this time stop?" Hayley replied, "I pushed his arm away with my foot." The interviewer asked, "And how did he react when you did that?" Hayley replied, "He wasn't very happy about it." The interviewer said, "And tell me more about that, like how did you know." Hayley said, "He gets a weird look in his eyes and his eyes turn different colors instead of yellow with brown dots it turns completely yellow." The interviewer asked, "Did he say anything to you when you pushed his hand away?" Hayley replied, "Uh-uh (negative)." The interviewer said, "So tell me this time how your body position was." Hayley replied, "I was just laying flat." The interviewer asked, "Ok, and what about his body position?" Hayley replied, "He was sitting on the bed again." The interviewer asked, "What part of the bed this time?" Hayley replied, "Um, well by that time I had moved my bed twice more and I think my entire room. So, it was against the wall where my door was and then, so I had space on either side so only one side was against the wall this time. And so he was just sitting on this side, right here in the middle (motioned to her right)." The interviewer asked, "So you mentioned you were laying flat, were you on your back, on your side?" Hayley replied, "On my back." The interviewer asked, "And then what shorts were you wearing that time?" Hayley replied, "The same ones." The interviewer asked, "Oh, ok, the blue basketball shorts?" Hayley replied, "Mm-hmm (affirmative)." The interviewer asked, "And then, what about your underwear if you remember what those were?" Hayley replied, "Uh-uh (negative)." The interviewer asked, "Ok, what about

your shirt?" Hayley replied, "It was, it was a black shirt that said, 'I see dumb people.'" The interviewer asked, "Ok, and then did you have a bra on underneath?" Hayley replied, "Mm-hmm (affirmative)." The interviewer asked, "Did anything happen to your shirt or your bra?" Hayley replied, "Uh-uh (negative)." The interviewer asked, "What about his clothes? Did they move or change?" Hayley replied, "No." The interviewer asked, "If you remember what he was wearing this time, or the time we are talking about?" Hayley replied, "I think the only thing I can remember – he was wearing a shirt, but I don't remember which one it was and he was wearing blue pajama pants."

The interviewer then asked, "And then, when was this, that we're talking about right now?" Hayley replied, "I think it was two or three months before my fifteenth birthday." The interviewer asked, "And when's your fifteenth birthday?" Hayley replied, "July 20<sup>th</sup>." The interviewer asked, "And so you were fourteen?" Hayley nodded (affirmative). The interviewer asked, "And then, it sounds like your brother was home?" Hayley replied, "Yeah, he was out in the living room, distracted, playing Fortnite with his friends which is another multiplayer shooter game." The interviewer asked, "And were his friends also at the house?" Hayley replied, "No, he can play online with his friends and so they're at different houses, but they can play together and they can speak to each other because they have headphones." The interviewer asked, "And was anyone else in the house?" Hayley replied, "No." The interviewer asked, "And your mom had gone to work, where was she working then?" Hayley replied, "Deeny's, like a club still." The interviewer said, "Oh, the same place, ok." Hayley added, "Yeah, she's been working there for four years." The interviewer asked, "And if you remember what the shift was that time?" Hayley replied, "Five to one, like always. Her shift only changed when she went back to the cage because at that time, she was working the floor helping fix machines and do all that kind of stuff. And so that time she was working five to one and now she works back in the cage, Sunday's, Monday's, and Tuesday's she works night shift and then Friday's and Saturdays she works day shift." The interviewer asked, "And this time we are talking about right now was on a weekend?" Hayley replied, "Mm-hmm (affirmative)." The interviewer asked, "Do you remember what day?" Hayley replied, "I think it was Sunday." The interviewer asked, "And then what about, like, was it in the same house you live in now?" Hayley replied, "Mm-hmm (affirmative)."

The interviewer asked, "And then, um, if you remember when this first started – if you remember when TJ first, like, did something to you or like fingered you?" Hayley replied, "I don't remember." The interviewer said, "That's ok, and it's ok to say you can't remember. What about one of the last times, if you can remember?" Hayley replied, "Um, I think it was the day before he said something to mom." The interviewer asked, "And what happened that time?" Hayley replied, "It was the same." The interviewer asked, "Did he finger you that time?" Hayley nodded (affirmative). The interviewer asked, "Ok, what room were you guys in?" Hayley replied, "My room." The interviewer asked, "And what about your clothes that time?" Hayley replied, "I was wearing dark blue basketball shorts, like the other ones, and then I can't remember what shirt I was wearing but I was wearing a sweater, like always, under it – or over it." The interviewer asked, "And, how did his hand get there that time?" Hayley replied, "The same way." The interviewer asked, "And um, your underwear, what happened to those that time?" Hayley replied, "Just the same way." The interviewer asked, "Ok, and so he moved them to the side?" Hayley replied, "Mm-hmm (affirmative)." The interviewer asked, "Ok, and then, who was home that time when that happened?" Hayley replied, "Me and my brother and him, and then the cats of course." The



interviewer asked, "And then, if you remember when that was? Like I know you mentioned it was the day before he said something to your mom." Hayley replied, "It was the eleventh of July."

The interviewer said, "Oh, ok. Um, and then, um, he mentioned something to your mom." Hayley interrupted, "The day after it was her birthday and we were supposed to have a good family day but she had to go to work that day because she had to work on her birthday, now I don't think she does. And she had to work – no she actually got called in that night because someone called in as sick or something, and so they weren't at work and she had to fill in for them. And so she was called in for like two or three hours that night and she got home at like 11:30 to midnight, no, no, no, I got that wrong. She was actually working her nine to five shift this time on her birthday. She had gone to work that morning at nine, or at 8:20 like always, she always goes in an hour early. And then she had gotten home and, because she was going to stay after and have a drink or two like she always does sometimes, but now she doesn't, she just has a drink at home. And so, she wanted to stay out and he had texted her, 'I need to tell you something, you need to come home right now.' And she had gotten home and she had gone to her room to change and get settled in and stuff like that, because that's what she always does after work. And then he had gone in there with his bags packed and told her." The interviewer asked, "Ok, were you there when he told her?" Hayley replied, "I was out in the living room, me and Owen were just sitting on the couch waiting." The interviewer asked, "What did he say to her? Did you hear him?" Hayley replied, "Well no, but mom had replied and told me that he said that he had admitted what he was doing to me." The interviewer asked, "Uh huh, ok, did he say anything to you before your mom got home? Before he texted her?" Hayley replied, "Two to three hours before, he'd come in my room every twenty minutes and he started yelling at me for no reason because I wouldn't let him do it and I was sick of it, so I told him no. So he got super pissed off, he started yelling and slamming things and so I was just in my room crying on my bed and every time he'd come to check in he'd be like, 'Are you actually going to talk to me now?' And I'm just like, 'No I'm not because you're a sick son of a bitch and you need to leave.'" The interviewer asked, "Ok, and how did he reply when you said that?" Hayley replied, "He left every time."

Then the interviewer asked, "And you had mentioned he tried to do it again and got mad because he couldn't, how did he try to do it that time?" Hayley replied, "Uh, it was the same way and he had told, 'I'm gonna do this.' And I'm just like, 'No you're not, get out of my room.' And so he didn't leave my room, he just got up and started throwing a fit and yelling." The interviewer asked, "And when he said, 'I'm gonna do this' what was he doing?" Hayley replied, "He's like, 'I'm gonna massage your legs for you because you said they hurt today.' And all that stuff and I'm just like, 'No, you're not going to because they don't hurt today.'" The interviewer asked, "So then did he touch you at all that time?" Hayley replied, "Uh-uh (negative)." The interviewer asked, "And that was, was that the twelfth or?" Hayley replied, "That day that that had happened was the twelfth of July." The interviewer asked, "Ok, alright, and then, were there other times where he had talked to you about what he was doing?" Hayley replied, "Uh-uh (negative)." The interviewer asked, "Um, and then um, if you know like maybe, about how many times a week this happened or?" Hayley replied, "Mom was at work about six days a week I think, maybe seven. No, she was at work five days a week and then she had the sixth and seventh day off. And so, it happened almost five times a week." The interviewer said, "Five times a week, ok. Um, and then do you know how old you were when he started doing this?" Hayley replied, "I think I was twelve because I just turned fifteen two months ago." The interviewer asked, "Ok, and what makes you think you were twelve when it started?" Hayley replied, "Um, my mom had, we had just moved into that

house and we had been there almost a year. And then he started doing it.” The interviewer said, “Uh-huh, ok, so almost a year after you moved into that house is kind of when he started it?” Hayley replied, “Mm-hmm (affirmative).” The interviewer asked, “Um, and then um, did it ever happen at a different house?” Hayley replied, “Uh-uh (negative).” The interviewer asked, “Ok, um, did it ever happen – I know I already asked this, like in a different place in the room other than the bed?” Hayley replied, “Uh-uh (negative).”

The interviewer then asked, “Um, and then you had mentioned that he put his fingers in here (pointed to diagram), was there another part of your body that he touched?” Hayley replied, “No.” The interviewer asked, “What about did he ever make you do something to him?” Hayley replied, “No.” The interviewer asked, “And then, how long – so you mentioned this was your stepdad, how’d you know, how long were him and your mom married or?” Hayley replied, “Him and mom were married four or five years and they had known each other for eight.” The interviewer said, “Ok, so tell me a little more about him and like, if you guys did other things together or your relationship with him.” Hayley then explained that one time for her birthday her stepdad took her and her friend to a waterpark. She added that he also picked them up sometimes when her mom couldn’t because of work. The interviewer then asked, “So you mentioned you were around twelve when he started doing this, um, if you know, did he ever finger you while you were twelve years old?” Hayley replied, “Um, I can’t remember.” The interviewer asked, “And so then, um, who have you talked to with about this?” Hayley replied, “Um, mom told me not to talk about it, so nobody.” The interviewer asked, “Ok, have you and your mom talked about it?” Hayley replied, “Um, that night she asked me, when he confessed to it, she asked me if it was true and I said yes. That’s the only thing that happened.” The interviewer asked, “And what about if you’ve talked to him since he left?” Hayley replied, “Uh-uh (negative). He left the house, he’s actually in Sparks I think.” The interviewer asked, “Has like, have you, like has he reached out to you on social media?” Hayley replied, “No, he doesn’t have social media. The social media he has I don’t have because I’m not interested in it.” The interviewer asked, “And then do you know where he is in Sparks by chance?” Hayley replied, “No. He’s with his mom and dad.” The interviewer asked, “Ok, um, do you know of or have you heard about, like, TJ doing this to someone else?” Hayley replied, “Uh-uh (negative).” The interviewer asked, “Ok, has this happened to you with someone else?” Hayley shook her head (negative). The interviewer asked, “Is there anything else you think I need to know about TJ or anything else?” Hayley shook her head (negative). The interviewer then asked Hayley how she is feeling and she said that it’s scary to talk about this with somebody. The interviewer then expressed that she knew it was hard but thanked her for talking to her and then gave her some water before leaving the room.

When the interviewer returned to the room she explained that she had a few more questions. The interviewer asked, “So it sounds like on the twelfth before TJ said something to your mom, you guys kind of got in an argument or altercation?” Hayley replied, “Well, I wasn’t even angry, I was just stern, ‘No, you can’t do that anymore, I’m not gonna let you.’ And then he started getting really mad at me.” The interviewer asked, “And then you had told him, ‘You’re a sick son of a bitch.’ Had anything like that happened before?” Hayley replied, “Uh-uh (negative).” The interviewer asked, “And then, so like, um, did he say anything about like if he was going to tell your mom or if, why he talked to your mom?” Hayley replied, “He said if I told anybody he would be the one to go to jail. And then he said, ‘If you did you would feel really bad about it.’” The interviewer asked, “And then did he say anything about your mom or?” Hayley replied, “Me and my mom would talk sometimes about how the day was going and if I had like a little anger issues

that day I would break down at the end of the day and would just be left alone. And one time my mom came in and so did he, he had followed her in because me and her had been talking about what was going on and I had yelled at him, 'That's not the only thing you're doing wrong.' And then he was like, 'That's not true.' And then he told mom, because it was just supposed to be me and mom talking, and so mom was just like, 'What the hell is going on?' And I yelled it again, and then he's like, 'Nothing, just leave her alone, she's throwing a tantrum.' And I was like, I'm not throwing a tantrum, you're the one who is sick and you need to get yourself taken care of, was what I was thinking. And I yelled it, and I was like, 'Nothing, never mind, it's nothing.' The interviewer asked, "So did you yell those things out loud?" Hayley replied, "I was thinking the last one but I yelled the other one." The interviewer said, "So tell me what you yelled." Hayley replied, "I was like, 'No, there's something else that you need to know, mom.' And she was like, 'What the hell, what the hell is going on?' And she kept looking over at him and just, like, looking and searching for an answer and stuff like that." The interviewer asked, "Ok, and when was that?" Hayley replied, "It actually happened twice because I was really upset that day and it just wasn't one of the good days. And I think I had done that once when I was thirteen and once when I was fourteen." The interviewer asked, "Ok, and your mom was in the room with you?" Hayley replied, "Mm-hmm (affirmative)."

The interviewer then asked, "And then um, was there ever any times where people saw him in your room?" Hayley replied, "Just Owen. Mom thought he was just talking to me and that's what he did when she was home, but most of the time he just spent at his computer desk." The interviewer asked, "So were there times where your mom knew he was in your bedroom?" Hayley replied, "Yeah. But my door was always open when she was home." The interviewer asked, "Ok, what about if anyone saw him massaging your legs or doing anything like that?" Hayley replied, "Owen was the only one that knew that he was massaging my legs because of all the acid buildup in them. He was the only one who knew about that." The interviewer asked, "And then, you had mentioned his name is TJ, um, what's his last name?" Hayley replied, "Bernal." The interviewer asked, "And does TJ stand for anything?" Hayley replied, "Thomas Jason." The interviewer then asked if Hayley had anything else that she thought she needed to know and Hayley shook her head. Once again, the interviewer asked Hayley how she was feeling, and she expressed that it was scary to have to remember everything. Hayley then told Hayley that she should talk to people that she is close with about how she is feeling and also mentioned a counselor. The interviewer then thanked Hayley for talking to her and then they talked briefly about her upcoming school day and what classes she is taking before escorting her out of the room.

#### **Female Anatomical Drawing Dated 09.04.2019**

The anatomical drawing utilized in the forensic interview of Hayley Smith is provided. There is a circle located on the female genital area.

#### **Child Advocacy Center Forensic Interview Report Dated 09.20.2019**

According to the document reviewed, a report was created by Jennifer McCann following the interview of Hayley Smith. A description of the interview is provided, please see the transcript of the forensic interview for more detail.

#### **Lyon County Sheriff's Office Declaration of Probable Cause and Detention Dated 10.21.2019**

According to the document reviewed, Thomas Bernal was arrested on October 21, 2019 on probable cause for the listed offense: Sexual Assault Against Child. It is noted that Deputy Nicholas Greenhut responded to a complaint of sexual assault. When he arrived at the scene, Patricia Bernal informed Deputy Greenhut that her daughter, Hayley Smith, was sexually assaulted by Thomas Bernal, her stepfather. It is noted that on September 4, 2019, a forensic interview of Hayley Smith was conducted and a summary of the interview was provided. Please see the transcription of the interview for more detail. It is reported that on October 21, 2019, Thomas Bernal arrived at the Lyon County Sheriff's Office for an interview. It is noted that Mr. Bernal admitted that "while TJ was massaging Hayley's legs, he accidentally penetrated Hayley's vagina with his fingers."

#### **Deputy Report Supplemental Narrative Dated 10.24.2019**

According to the document reviewed, Patricia Bernal was contacted on August 8, 2019 regarding scheduling a forensic interview for Hayley Smith. On September 4, 2019, a child forensic interview was conducted with Hayley Smith. A summary of the interview is provided. Please see the transcript of the interview for more detail. On October 7, 2019, a call was made to Patricia Bernal to advise her that photographs needed to be taken of her residence and to request an interview with her son, Owen. On October 10, 2019, Detective Messmann visited Patricia Bernal's home and photographed various rooms. On the same day, Owen Smith was interviewed. A summary of the interview was provided. Please see the transcript of the interview for more detail. On October 21, 2019, Thomas Bernal arrived to the police substation. He was then interviewed. A summary of the interview is provided. Please see the transcript of the interview for more detail. Following the interview, Mr. Bernal was placed under arrest and taken into custody.

#### **Justice Court of Walker River Township Criminal Complaint Dated 10.24.2019**

According to the document reviewed, Thomas J. Bernal was charged with the following: sexual assault of a person who is under the age of 16. The document specifies, "Defendant digitally penetrated the vagina of known but unnamed juvenile H.S."

#### **Deputy Report Supplemental Narrative Dated 10.28.2019**

According to the document reviewed, Detective Messmann visited Hayley's school to obtain a copy of her class schedule.

#### **Lyon County Sheriff's Office Deputy Report Dated 11.05.2019**

According to the document reviewed, Thomas Bernal is listed as the suspect, Patricia Bernal is listed as the complainant, Hayley Smith is listed as the victim, and Katie Sabado and Charles Sabado are listed as witnesses. It is noted that Thomas Bernal was arrested for one count of sexual assault against a child.

According to the included narrative, Deputy Greenhut was dispatched for a report of sexual assault. Upon arrival, Patricia Bernal reported that on July 14, she received a text message from her husband, Thomas Bernal stating that he needed to talk to her when she returned from work. Katie Sabado, Ms. Bernal's friend, arrived at their residence and Mr. Bernal admitted to "fingering" their 14-year-old daughter, Hayley Smith. It is then reported that Mr. Bernal then packed a bag and left. Ms. Bernal later spoke with Hayley and confirmed that she was sexually

assaulted by Thomas Bernal. It is reported that Hayley stated that Mr. Bernal had been assaulting her for approximately one year.

#### **Lyon County Sheriff's Office Law Supplemental Narrative Dated 11.07.2019**

According to the document reviewed, Thomas Bernal agreed to have a Computerized Voice Stress Analysis conducted on October 21, 2019. A description of this test is provided. According to the results, it was found that Thomas was deceptive on the question worded, "Have you ever fingered Hayley?"

#### **Preliminary Hearing Transcript of Proceeding Dated 01.23.2020**

According to the document reviewed, Jennifer McCann was called to the stand and discussed the details of a child forensic interview including the CornerHouse protocol and her training. She was then questioned regarding her interview of Hayley Smith. She was asked who she met with prior to the interview, to describe the layout of the interview room, whether the interview was recorded, and how the interview with Hayley began. Ms. McCann proceeded to describe the interview and was asked about various details of the interview.

The next witness called was Patricia Bernal. It is reported that Ms. Bernal received a text message on July 14 from Thomas Bernal stating that they needed to talk. Ms. Bernal stated that when she returned home, "We went into the bedroom, and he had proceeded to tell me that he had done something, the only thing that I would never forgive him for. And he told me that apparently he had been touching my daughter inappropriately for over a year, and I didn't know. He had his bags packed already before I even came home." Ms. Bernal reported that Mr. Bernal stated that he had used his fingers, but did not touch Hayley with anything else. Ms. Bernal stated that she then asked Hayley if it was true and Hayley confirmed that it was.

Detective Messman was called as the next witness. Detective Messman described various details of the investigation. Detective Messman reported that he visited Hayley's school to retrieve her school schedule in order to establish a time frame of the abuse. Detective Messman then detailed his interview with Mr. Bernal. Please see the summary of the interview for more details.

#### **Third Judicial District Court of the State of Nevada Information Dated 01.28.2020**

According to the document reviewed, Thomas Jason Bernal has committed the following offenses. Count 1: Sexual Assault on A Child Under the Age of 16 Years, Not Causing Substantial Bodily Harm on or between the 1<sup>st</sup> day of August, 2018 to the 30<sup>th</sup> day of June, 2019. Count 2: Sexual Assault on A Child Under the Age of 16 Years, Not Causing Substantial Bodily Harm on or between the 1<sup>st</sup> day of July, 2019 to the 11<sup>th</sup> day of July, 2019. Count 3: Sexual Assault on A Child Under the Age of 16 Years, Not Causing Substantial Bodily Harm on or between the 1<sup>st</sup> day of December, 2019 to the 28<sup>th</sup> day of February, 2019.

#### **Interview with Owen Smith Undated**

According to the audio reviewed, an interview was conducted with Owen Smith (12), the younger brother of Hayley. The interviewer asked Owen if he knew why he was there and then explained what they were going to talk about. The interviewer then asked Owen if he understood the difference between a truth and a lie and if he promised to tell the truth and Owen said he would. The interviewer then explained that he wanted to talk to Owen about what a typical day in the

house would be like after his mom left for work. Owen explained that the three people at the house would be him, his sister, and TJ and TJ would play video games until later in the night. Owen then said, "Once it got a little closer to night he would go into Hayley's room and he told me he would massage her legs because she's always been having pains." The interviewer asked, "So, how often would he do that?" Owen replied, "Um, I believe every night." Owen then explained that he and Hayley's rooms are adjacent and connected by a hallway and TJ would have no reason to be in that part of the house unless he was going into one of their rooms. The interviewer asked, "When TJ would go into Hayley's room, would he ever go into your room as well?" Owen replied, "No, usually in the mornings I was outside in the living room playing." The interviewer asked, "And when he would go into Hayley's room, do you know how long approximately he would be in there?" Owen replied, "Um, usually until Hayley got mad at him but I don't know how long that was." The interviewer asked, "How do you know she got mad at him?" Owen replied, "Because I would hear Hayley raise her voice and then he would walk out all pissed." The interviewer asked if TJ ever told him why they were fighting, and Owen said that it was because Hayley felt like everything weighed on her. Owen mentioned that Hayley acts that way and TJ told him that and that is why he believes that.

The interviewer then asked if it was minutes or hours that TJ would be in Hayley's room and Owen said that he didn't know but that he wouldn't go in there for an hour because Hayley would get mad at him fast. The interviewer asked, "And when he would go in there do you know if the door would be open or closed?" Owen replied, "Yeah, it stayed wide open." The interviewer asked, "Was there any times where he would go in there and the door would be closed?" Owen replied, "No. Unless she was watching a movie and she didn't want to be interrupted and she had the door closed." The interviewer asked, "Would he go in there and watch movies with her?" Owen replied, "Yeah, but every time I'd ask him if I could like have Doritos or something, I'd pop my head in and Hayley would be laying down and he would be massaging her legs. Every time I popped my head in he would stop." The interviewer asked, "Like stop massaging your legs you mean?" Owen replied, "Yeah." The interviewer asked, "So you have seen him massage her legs?" Owen replied, "Yes." The interviewer asked, "Can you describe that to me?" Owen replied, "Um, uh, can you – how would I describe it to you?" The interviewer said, "You know, like, where were they, what kind of clothes were they wearing, like, how." Owen stated, "It was mostly on weekends, she would be wearing shorts and when he'd go in there he would massage right under the butt." The interviewer asked, "So, she would be on her stomach then?" Owen replied, "Yeah, she would be playing on her phone." The interviewer asked, "So you have seen him massaging basically right underneath her butt?" Owen replied, "Yeah, like upper thigh." The interviewer asked, "Is that a common place that she experience pain?" Owen replied, "Uh, yes, it's her legs because she has to carry around her backpack. And her back." The interviewer asked if it was weird to see him massaging that part of the leg and Owen said no. The interviewer asked Owen if he ever massaged her legs and he said no, the interviewer then asked the mother if she ever had and she said that she had a couple of times but only started doing it when Hayley said she didn't want him to do it anymore. The interviewer asked Owen, "So for the most part you remember him going in almost nightly?" Owen replied, "Mm-hmm (affirmative)."

The interviewer then asked Owen what else would happen after his mom would go to work. Owen explained that he had a very bad attitude when TJ was home and Hayley would spend most of her time in her room. Owen said he thought he had a bad attitude because he played games too much and there was nothing between him and TJ to cause that. Owen also admitted that when he



played video games, he would not pay attention to anything else. Owen then explained which games TJ would play and mentioned that he would spend a lot of time on his computer. Owen then explained that TJ would let him and Hayley play games on his computer using his account sometimes, but he would supervise them when they played. Owen mentioned that he wasn't allowed to be on the computer for anything other than to play games and that he did not know the login. Owen then volunteered that TJ would watch a lot of anime and the mom said that she would sometimes make the children walk away when it got too sexually explicit.

The interviewer then asked Owen if he thought of anything else that the interviewer needed to know, and he said that he didn't. They then discussed what Owen's plans for the rest of the day are and he explained that he was going to play video games and then they were going to a friend's house for dinner. They then talked about how the interviewer didn't have video games and television to occupy him as a kid and then recommended that Owen spend less time on the video games and more time outside with his friends. They then talked more about the interviewer's childhood and growing up in Henderson. They discussed that times are different now and the rules are different, but it is still important to make your own fun. Owen then talked about how he doesn't live by any of his friends and the interviewer explained that he found plenty of things to do by himself like catching lizards but warned him to make sure which lizards and snakes were ok to catch and which were not. At this point the interview concluded and they all left the room together.

#### **Interview with Thomas Bernal Undated**

According to the audio reviewed, Thomas Bernal participated in a voluntary interview to discuss allegations of sexual molestation. The interview began by Mr. Bernal providing his personal information and explaining some details about himself and his current situation. Mr. Bernal stated that his only prior criminal offense was marijuana paraphernalia. Mr. Bernal explained that Hayley got mad that he tried to take her phone away and threatened to tell her mom that he was molesting her, and that it was the second time she had done so. He also explained that he packed a bag because he planned to cool off at his dad's house and texted his wife, Patty, and asked her to come home. Mr. Bernal stated that when he told Patty that Hayley was going to accuse him of molesting her she kicked him out of the house and did not let him explain anything. Mr. Bernal denied ever touching or fingering Hayley but conceded that he massaged Hayley's legs two to three times a week because she complained about growing pains and added that he also massaged Owen and Patty. Mr. Bernal explained that he believed Hayley wanted him out of the house because he had been unemployed and that is why she came up with these claims. Mr. Bernal also explained that Hayley is very smart but tends to lie and is manipulative.

Mr. Bernal then explained that the first time Hayley had threatened to accuse him of molest came several months prior, around the time Hayley got caught having sex with her boyfriend under the bleachers, and it was actually the boyfriend, that CJ, was spreading the rumor that Mr. Bernal was molesting Hayley. Mr. Bernal added that it was another time where he had Hayley's phone, and noted that Hayley never talked to him about it or told him why CJ was spreading that. Again Mr. Bernal denied all of the claims and explained that he is just upset that he has lost his family and wife over false allegations. He also stated that because of his role as a disciplinarian he understands that Hayley would be mad at him and he believes that she is pissed because he took things away from her.

Mr. Bernal then explained his relationship with Owen Smith and when the interviewer stated that Owen said that Mr. Bernal would be in Hayley's room alone Mr. Bernal reiterated that

nothing ever happened. He admitted that he tried to rebuild his relationship with Hayley by talking to her and occasionally tickling her feet. Mr. Bernal admitted that the only thing that could be remotely close to the allegations would be an accidental poke of the butt cheek when massaging the back of the thigh but denied ever going into her groin area. Mr. Bernal expressed hesitation when he was asked if he would take a lie detector test. Mr. Bernal then said that he almost killed himself and has been going to therapy because of this process and he thought he was too stressed to take a test. While discussing the lie detector test, Mr. Bernal noted that it may have accidentally happened while they were roughhousing as the three of them, Owen, Hayley, and Mr. Bernal, would wrestle often. They then discussed how the test would work for about thirty minutes as Mr. Bernal would argue with many of the statements made by the interviewers. After a while, Mr. Bernal agreed to take a voice stress analysis test but admitted that he was very nervous. Mr. Bernal stated that Patty, his wife, was molested and 'hooked out' by her stepfather when she was younger, so he thought that could impact this case. He added that he and Patty once discussed the possibility of Hayley and Owen being molested previously by an aunt or cousin, and that is how Patty told him about her past.

The interviewer then explained the parameters of the test and prepared Mr. Bernal. During the interview Mr. Bernal noted that he would wrestle Hayley sometimes while Owen was not there, but typically he would be there wrestling with them. Mr. Bernal reiterated that Hayley was never undressed while they were wrestling. He also admitted to 'body slamming' Hayley which required him to grab her and pick her up. Mr. Bernal denied ever touching Hayley's bare vagina while wrestling and he then denied ever fingering Hayley. Following the exam Mr. Bernal asked if he passed or failed and the interviewer replied that he was going to have a third examiner review it. When the interviewer returned, he explained some more about how to read the results and showed the results to Mr. Bernal and explained to him that there was a problem with his answer to whether he fingered Hayley or not and that he 'failed' that question. Mr. Bernal again denied ever fingering Hayley and stated that there was never a time where he did anything remotely close. After a while Mr. Bernal explained that he had dreams about Hayley, like once he dreamt that Hayley was bearing his child and the dream had some sexual tones, but again he denied ever doing anything like that to Hayley. Mr. Bernal also admitted to having conscious thoughts of fingering Hayley because she would wear pink booty shorts that were short enough where he could see her vaginal area. Mr. Bernal then noted that the last time he massaged Hayley was a week before he left the house and she was wearing blue basketball shorts.

Mr. Bernal then admitted that he wasn't telling the full truth about the argument that occurred with Patty before he left the house. Mr. Bernal then explained that he told Patty that he didn't know what to do and was sick of the allegations and that's why he packed the bag. He also stated that he regretted packing the bag and leaving and cites it as the biggest mistake he made as it implies guilt. The interviewers then returned to the argument Mr. Bernal mentioned earlier. He said it was twenty minutes long and he then changed the timeline to closer to ten minutes but noted that he has tried to not remember it. They discussed that Mr. Bernal was contradicting himself and the interviewers asked him to describe the argument. Mr. Bernal continued to contradict himself and he mentioned that Hayley heard their argument and yelled out that he was lying, but Mr. Bernal could not identify where Hayley was during the argument. Mr. Bernal also stated that Patty gave him an ultimatum of, 'You leave, or I will.'

After a brief conversation about the argument, the discussion switch to Mr. Bernal being worried about the book being thrown at him. Mr. Bernal then explained that in January or February



Hayley came on to him and that one time during a massage he accidentally did one time, but it was not his intention. He said that at that time he told Patty and suggested counseling and he claimed that it was not intentional, and he wasn't seeking anything. When asked to clarify Mr. Bernal stated that Hayley doesn't have a hymen and one time he accidentally, "Went up her leg and entered her." He continued to state that it was an accident, but the only time occurred in January, way after the boyfriend situation occurred. Mr. Bernal was then asked to retell his account of the argument that occurred with Patty. He explained that he admitted to Patty that he fingered her once on accident and suggested therapy, but Patty told him to leave or she would. Mr. Bernal also stated that this incident occurred when she was wearing long pajamas and he went from the bottom up, but he was massaging her thigh and his hand slipped. He noted that he apologized and freaked out.

The interviewers then asked Mr. Bernal some questions about the interview and the process as a whole. Mr. Bernal explained that he did not tell the truth at first because he was ashamed and it was an accident, not intentional. The interviewers offered Mr. Bernal the opportunity to write an apology letter to Hayley, but he denied that because Patty would read it. Mr. Bernal was then placed under arrest for 'sex assault' based on the information provided and he asked to smoke one more cigarette before being taken to the jail. The interviewers obliged and escorted him out of the room.

#### **Lyon County Sheriff's Office Voluntary Statement Undated**

According to the document reviewed, Patricia Bernal provided a voluntary statement. It is noted that upon getting off work, Ms. Bernal received a text message from Thomas Bernal stating that they needed to talk. When she arrived home, they went into their room and Mr. Bernal had his bag packed. Mr. Bernal stated that he had done "a bad thing" and admitted to molesting her 14-year-old daughter for about a year. It is noted that Ms. Bernal told him to leave and to not return. She then discussed the matter with Hayley who confirmed everything.

#### **Evaluation of the Forensic Interviews**

Forensic interviews of children have been subject to scientific study. A major concern is to make sure that these are done well so that they accurately gain all relevant information from the child. Interviews can range from being very problematic and biased to being well done. Interviews ought to be objective—the interviewer ought to have no bias regarding certain possible forensic events but be neutral and convey this neutrality to the child. There have been well-documented concerns in the past that forensic interviews have been conducted in a way that conveys to the child the interviewer's bias and that they don't seek to gain any information from the child on plausible alternative hypotheses.

It is best practice for the interviewer to be neutral. It is important to note that in this case the interviews were done by law enforcement as opposed to an independent agent.

Partly in response to the question of quality of the interview, interview protocols have been developed (see Cirlugea & O'Donohue, 2015 and Lamb, Hershkowitz, Orbach, & Esplin, 2008 for reviews of the major interview protocols). The basic idea behind the development and use of an interview protocol is to provide some standardization—certain stages or moves in the interview will always occur—certain moves will be avoided, and a certain temporal sequencing

will occur. Without this standardization psychometric properties cannot be determined—e.g., reliability and validity (roughly speaking the accuracy) need to be of some relatively fixed measurement process. Interview protocols attempt to decrease heterogeneity in these interviews. If interviewing were a “free for all”—any interviewer could make up anything as they go along—there would simply be no fixed process that can be evaluated for its strengths and weaknesses. It is important to note that a certain amount of forensic interviews of children do not follow any protocol—they are in fact—“make it up as you go” and a weakness of this is that the accuracy of these is entirely unknown. A final caveat is called for—if an interview protocol is modified—then its psychometrics are also unknown. That is, if some entity modifies a known protocol, the interview becomes different and one cannot assume the psychometrics of the original protocol remain unchanged.

In addition, the basic idea is that these interview protocols would also contain the “best practices” about how these interviews of children ought to be conducted so that accuracy is maximized—e.g., the best practices suggest that it is important to initially establish rapport with the child so this is a first stage in most interview protocols; and the best practices generally include the importance of avoiding suggestive questioning, so interview guidelines define suggestibility and define strategies to avoid this. However it is also important to note that all these interviews protocols are what is called *semi-structured*—these do not contain an invariant script that the interviewer must follow. Rather, some flexibility and hence heterogeneity must be allowed to accommodate the wide range of unique values of key variables encountered in the interview (e.g., the child’s prior answers, the developmental level of the child, the nature of the abuse itself, unique difficulties the child may have—e.g., difficulty responding to open ended questions, etc.).

One other preliminary matter ought to be quickly addressed. First, some might claim that these interviews of children ought not to be evaluated—these are simply “hearing what the child has to say”. This view is false and more than a bit naïve for three reasons: 1) this ignores the vast scientific literature of child suggestibility as well as the past record of problematic interviews resulting in false conclusions about child abuse status. Interviewing is a complex, protracted, interpersonal process that involves memory, information processing, interpersonal influence, and other psychological processes in an entity of varying developmental levels; and 2) this view ignores the fact that even if the interview is construed as “just hearing what the child has to say” this is still a measurement task—we want to detect “what the child has to say” and we can make errors in doing this. It is a basic principle of psychometrics that all measurement contains error—although certainly some contain more than others—and the goal of psychometrics is to understand the kind and degree of error of any measurement task—even if the measurement task is “just hearing what the child has to say” (Haynes, Smith, & Hunsley, 2011). Finally, the view that there is little concern about the degree of accuracy of these interviews is perplexing because it assumes that no matter what the interviewer does, the interview will invariably and inevitably produce accurate information from the child. This seems implausible particularly because we know that children can contradict themselves across interviews and by logic contradictory statements cannot all be true.

#### Evaluative Criteria for a Forensic Interview

How should forensic interviews of children who may have been sexually abused be evaluated? Is it sufficient to show that if the interviewer has earned some sort of general professional credentials that the interview was sound—and if so, what credentials—a mental health license in the state, a certificate of some sort of training completion? Is it sufficient for some interviewer to simply show that they have some sort of general past experience in some area relevant to interviewing children who may have been sexually abused, say in child sexual abuse or clinical interviewing? These seem to be the *de facto* standards of competence in the field —perhaps because these kinds of credentials generally can pass legal muster during a *voir dire* process. However, psychometrically these seem quite inadequate.

One can raise obvious questions about these sorts of standards:

1. Which credentials exactly? No credentials have been shown to actually assure accuracy of the forensic interview of the child.
2. To what extent does the typical generic training in a variety of professions (social work, clinical psychology, pediatrics, police work) actually make one a competent forensic interviewer of children? Most of this generic training would give short shrift to this particular domain and thus would be unlikely to produce competence.
3. How much training in the forensic interviewing of children who may have been sexually abused is sufficient? No training has been shown to be necessary or sufficient for assuring accuracy of these interviews.
4. Does this training need to be refreshed—as drift is often the case in faithfully following protocols? Very little information is available on the durability of training on interview fidelity.
5. Ought there be some sort of rigorous test to show that the training was at least initially successful---and if so what is an adequate test of this competence and what should the cut score for competence be? Again, these sorts of questions have been ignored in the literature and in practice. No test score on any test has been shown to assure forensic interview accuracy.
6. Which of the variety of interview protocols ought interviewers be trained in, and why? How psychometrically sound is the protocol? Cirlugea and O'Donohue (2015) point out the vast amounts of missing psychometric information on the protocols used to interview children who may have been sexually abused.
7. Does one become globally competent after this training—that is, competent to interview a child of any age, any child from any culture, and even a child with any special circumstances (e.g., being developmentally delayed)? This question has very little data and is unsettled.

These are tough questions that are generally ignored in the “x was trained in a protocol” or the “x is a licensed professional with some sort of experience in child sexual abuse” views of competency. Thus, we conclude that this standard of evaluation is unsatisfactory.

#### An interview protocol's sensitivity and specificity

Typically in medicine a fairly quick and dirty evaluation of a test's overall quality can be given by the metrics of *sensitivity* and *specificity*. A measure's sensitivity is the probability that it will detect x if x is actually present. That is, it is the probability that if x is present (say cancer) that the test will indicate that the cancer is present. Alternatively, a test's sensitivity can be said to be the probability of a false negative—a test has failed to be sensitive if it says that no cancer

is present, when in fact cancer is present. Obviously in this case, a forensic interview would fail to be sensitive if it concludes that abuse has NOT occurred, when in fact it has.

Specificity is the converse and equally important. A test can assure perfect sensitivity if the test always indicates “X is present”—after all if the test says x is always present then the measure would never miss an actual incidence of presence. However, the problem with this strategy is that the test would produce a number of false positives—the test would indicate that x is present when it is in fact not. The probability of a false positive is a test’s *specificity*—a desirable characteristic for a test to have is to say x is NOT present when in fact x is NOT present. Obviously in a forensic interview with children who may have been sexually abused it is important to conclude that the child has not been sexually abused when the child has not been sexually abused.

As Cirlugea and O’Donohue (2016) have pointed out as a field we do not know the sensitivity or the specificity of the protocols we use to interview children who may have been sexually abused. This is a serious gap in our knowledge. As previously stated this gap becomes even more of a concern when interviews are made up on the fly—i.e., that the interviewer fails to follow any protocol—because in principle this *ad hoc* process can have no known sensitivity or specificity—it is not sufficiently constant or fixed to become an object of study. Thus, currently, if an interviewer is questioned along the following lines:

- What is the rate of false negatives of the interview you administered?
- What is the rate of false positives of the interview you administered?

The interviewer unfortunately would simply have to say, “These are unknown”. This is quite problematic as we do not know if one or both of these is high—and perhaps so high as to render serious concerns about the interview’s error rates. Moreover, as a field we don’t know which is higher for a particular protocol—false negatives or false positives and this for a variety of reasons seems important to know. If for example, when false negatives of an interview protocol are high—we ought to be more cautious about concluding a child has not been abused even though this is the conclusion of the interview.

In addition, it must also be recognized that there actually might be a series of sensitivities and specificities of a forensic interview protocol that ought to be known. For example, in oncology there is not simply a single sensitivity of biopsies, the sensitivity can vary to the type of cancer—the size of the mass examined, etc. There is a parallel situation here—there may be a range of sensitivities and specificities depending on variables such as the age of the child being interviewed, the experience of the interviewer, the severity of the abuse, the relationship between the abuser and the child, etc.

Finally, it must be recognized that the use of a particular protocol actually involves two separate issues: 1) the sensitivity and specificity of the interview protocol but also 2) evidence that the interviewer faithfully followed the interview protocol. Thus, the actual interview must be examined to determine the extent to which it faithfully followed the interview protocol. It is a difficult question—and again unsettled in the field—of how much deviation is permissible? More basically there is little known about how to assess fidelity to a protocol. However, it should not simply be assumed that a particular interviewer faithfully followed a protocol. What is probably most concerning currently is that there has not been and there currently seems to be little urgency in the field for addressing this critical knowledge gap. Forensic practice seems to be relatively complacent with the ignorance of the sensitivity and specificity of forensic interviews of children who may have been sexually abused. Admittedly, this research can be

difficult to conduct—but the question raised in a clinical science approach to practice—is, “Are these research difficulties sufficient to excuse practice that may contain a level of error that is injurious to our consumers?” This is particularly perplexing because the Daubert criterion of legal admissibility is that the instrument or theory must have a known error rate and these interview protocols do not meet this criterion, yet surprisingly these interviews are routinely admitted in court.

#### Other important psychometric properties

It is fair to say that the Standard for Educational and Psychological Testing (APA, 2014) is an important but underutilized document in the field of interviewing children who may have been sexually abused. This document lists several other important evaluative criteria that ought to be known about any measure including:

- interrater reliability (the extent to which two different interviewers will arrive at the same conclusions)
- test-retest reliability (the extent to which two interviews given at two different times will have the same results)
- split half reliabilities (the extent some half of a test agrees or is consistent with some other half)
- construct validity (the extent to which the score of this measure agrees with the score of another measure of the same construct—there can be a variety of constructs involved in a forensic interview of a child—rapport, truth knowledge, prepositional competence, etc.)
- post-dictive validity (the extent to which the score of the measure agrees with some criterion in the past—e.g., actual abuse history)
- incremental validity (the extent to which some measure adds or subtracts to the accuracy of some criterion—for example the extent to which the forensic interview adds or subtracts accuracy from other information such as medical tests)

Cirlugea and O'Donohue (2015) reviewed psychometric information on several of the protocols and find much missing information although clearly the NICHD protocol has the most known psychometrics known at this point in time. Again, it must be emphasized that “adaptations” of some known protocol—or free form interviews would be missing this key evaluative information.

In addition, the Standards for Educational and Psychological Testing (2014) suggest other key information ought to be present for a measure. For example:

1. A manual that will aid the administrator in proper administration procedures, offer information on limitations of the test, and provide information on correct scoring and interpretation.
2. The provision of information related to fair testing and limitations of this (e.g., perhaps testing with some cultural groups results in decreased validity).
3. In general there are two other issues raised by the Standards for Educational and Psychological testing. First, there is little information about proper scoring and interpretation of the results of the forensic interview with children who may have been sexually abused. For example, consider the following situations:
4. A child in the initial part of an interview says that she has not been sexually abused but in a later part of the interview says that she has been abused. How is the interviewer to

interpret this inconsistency? What if the sequencing were reversed—initially the child says she was abused but in a subsequent part of the interview she says she was not? Does this order affect the conclusions? How is the interviewer to interpret these inconsistencies?

5. How is the interviewer to interpret a child's report that contains fantastical details—e.g., a teacher touched them inside their underwear and while this was occurring real witches were flying around the room?
6. What kind of conclusions is the interviewer to make in an interview in which the child gives very little detail about the abuse, e.g., "My stepfather touched my chest" but can elaborate no further—cannot recall the number of times, who was present in the home when this allegedly occurred, how many times this occurred, how long it occurred, and cannot give a time of day or date, etc. How much does this lack of detail affect the conclusions of the interview? Of course it would seem that this would partly depend on the child's age but exactly how? Exactly how much detail can we expect from an average 5 year old vs. an average 9 year old?
7. What kind of conclusions is the interviewer to make in an interview in which implausible details are given, e.g., when a four-year-old child reports that an adult anally penetrated him or her but that he or she felt no pain?
8. How is an interviewer to interpret an interview when a parent or another adult possibly engaged in suggestive interviewing practices before the interview took place (e.g., repeatedly asking several dozen times if an uncle touched them before the child made an outcry)?
9. What kind of conclusions is the interviewer to make in an interview in which a child claims that he or she completely forgot the abuse for several years but then suddenly remembered all of the abuse—a so called "recovered memory" (McNally, 2012)?
10. How is the interviewer to interpret a child's denial of abuse when several other witnesses say they saw the child being abused?
11. What kind of conclusions is the interviewer to make in an interview that contains a child's responses when English is not their first language and he or she displayed some difficulties either comprehending or expressing themselves in English—yet there was no interpreter in their native language available?
12. Finally, how does an interviewer interpret a child's statements in the interview when the child has a rather extensive history of lying—perhaps even displayed in the interview about topics other than abuse (e.g., prizes the child has won)?

These are difficult questions—and no doubt depend on a number of other details surrounding the particular case. However, it is too infrequently recognized that there is in fact an interpretation task at the end of a forensic interview of a child who may have been sexually abused—and these interpretations have a potential for error. Rarely do these interview data "speak for themselves". These conclusions can even be more problematic if the interviewer has a bias—is prone to interpret data in one way or another (exculpatory vs. incriminating)—this issue will be discussed more below).

The second issue to be recognized is there are actually multiple components of an interview and each of these can have their own psychometric properties. Psychometrics refers to the accuracy of inferences being made and a typical interview actually results in a number of

inferences. This of course adds considerably to the complexity of an evaluation of the forensic interview with a child who may have sexually abused. For example, a forensic interview protocol of a child who may have been sexually abused has several components and inferences can be made about each of these—and these inferences can be correct or incorrect.

- Rapport building phase of the interview— can result in the inference, “Adequate report was established”
- Knowledge of the truth—can result in the inference, “Adequate knowledge was displayed”
- Propositional competence phase—can result in the inference, “The child knew key propositions such as ‘inside’ and ‘underneath’”
- “I don’t know” responses are permissible—can result in the inference, “The child knew that it was permissible and important to say that they did not know an answer to a question, when in fact they don’t know”

Each of these inferences can be correct or incorrect. Note there are several other key elements in most protocols (e.g., the special importance of saying the truth in this context, the importance of correcting the interviewer if they say something wrong, etc.). It is important to note that inferences concerning each of these components can have their own psychometrics.

#### Was the interviewer unbiased?

Another way a forensic interview can be evaluated is to ask, “Was the interviewer objective and unbiased?” This question has been too infrequently asked and may be a core reason why some cases have gone so awry—the interviewer was working for a side that had a vested interest and may have been intentionally or unintentionally attempting to please their employer. Ideally, an interviewer ought to have no allegiance to any side—say the prosecution or the defense—they ought to be fully committed to finding out the truth and what the child has to say. However, not all interviewers in all situations may meet this standard and the degree to which this standard of objectivity is met needs to be assessed.

Bruck, Ceci, Melnyk and Finkelberg (1999, as cited by Bruck & Ceci, 2011) indicated how a biased interviewer can unintentionally influence children to provide false statements. Subjects were 120 preschool children, 90 of whom attended a birthday party with a visitor. The remaining 30 children did not attend the party but instead spent time coloring with a visitor. Interviewers were graduate students from social work and counseling programs who knew that the children had participated in an activity with a visitor but not what it was. Each interviewer individually questioned four children to discover what the child had done with the visitor. Unknown to the interviewer, the first three children that he or she interviewed had been at the birthday party but the fourth had not.

This study found that interviewers, after questioning the first three children who had attended the party, wrongly assumed that the fourth child had also attended the party. The interviewers then (unintentionally) engaged in biased questioning with the fourth child in an apparent attempt to confirm their faulty preconceptions. What is particularly interesting is that in response to these suggestive interviews, 60% of children who had not actually attended the birthday party made false claims to have been there, and 85% of interviewers wrongly concluded that all four of the children they questioned had attended the party. Thus, even well intentioned child interviewers can become biased based on their expectations and background beliefs and then use suggestive techniques to extract false statements from children. A key question is, to



what extent does this sort of phenomena occur in centers that routinely interview children who may have been sexually abused? What steps can occur to assure that it does not?

Another study by White, Leichtman, and Ceci (1997) can depict that these sorts of problems can occur even before the forensic interview takes place. It is often the case that other professionals have contact with the child—perhaps to hear their initial outcry before the forensic interview takes place. In this study, two professionals, a teacher and social worker, were given a list of activities that had supposedly occurred during a play session in a group of preschoolers. Unknown to these professionals, half of the activities had not really occurred. These professionals then questioned the children to learn what had happened during the play session. Data from the study indicated that interviewers repeatedly used suggestive questions to ask the children about the bogus activities. In response, these children falsely agreed that they had engaged in about 30% of these bogus activities, some of which involved bodily touch. Further, some children who initially denied that the bogus event occurred later changed their accounts and provided false details about it. This study shows that accounting for the possible biases of any adult who interviews the child can be critical and again shows the inculcating of false memories by biased professionals.

One other study shows the importance of bias in adults. Poole & Lindsay (1995) had preschool-aged children witness four science demonstrations in a university laboratory. Four months later parents were mailed stories that contained descriptions of their children's visit to the lab. Two of the stories were true and two were false (i.e., described experiments that the children had not seen). Each story finished with a fabricated account of what happened when it was time to leave the lab: "Mr. Science wiped (child's name) hands and face with a wet-wipe. The cloth got close to (child's name) mouth and tasted really yucky." Parents read the story to their children three times. Later, children told the experimenters that they had participated in demonstrations that they had not (i.e., the false stories read by their parents). More than half of the participants said that Mr. Science had wiped their mouths and many elaborated on their "yes" answers. When asked if Mr. Science had actually wiped their mouths or did their mother just read the story 71% of the children maintained that it really happened. This study was replicated (Poole & Lindsay, 1996) using children from a wider age range (3-8 year olds). Findings were similar except they found that when asked if Mr. Science wiped their mouths or if their mother just read the story the older children tended to recant their claims and said that their mother told them.

Thus, ascertaining potential biases of anyone who has questioned the child about their possible abuse seems important. Duke and Wood recommend that the forensic interview be expanded so that the individual or individuals who heard the child's initial outcry be interviewed to understand if their questions could have been suggestive and thus biasing. In addition, it should be asked, who is the interviewer working for? Who is paying the interviewer?

#### "McMartin Mistakes" vs. Suggestive Pathways Before the Forensic Interview

Another incorrect view currently held in the field seems to be along the lines of "if no McMartin type mistakes—repeated questions, conformity press, suggestive questions are made then the interview is good". We shall argue that this view is incorrect—it sets too low of a bar. We argue that this is a necessary criterion of adequacy but not a sufficient one. The interview also needs to meet two other criteria.



First, it must attempt to understand and resolve any problems in the key dimensions of the allegation. O'Donohue, Benuto & Cirlugea (2013) suggested that a forensic interview with a child who may have been sexually abused in order to be comprehensive must attempt to understand the following dimensions:

1. Outcry analysis—the general circumstances of the child's initial accusations should be determined and analyzed for possible bias
2. Stake analysis—whether or not anyone who had significant contact with the child has a hidden agenda relevant to a guilty or not guilty verdict towards the accused should be established
3. Parental/Significant Other suggestion—whether or not a caregiver or parent has made leading statements or engaged in leading questioning with the child and thus the child has developed a false memory should be evaluated
4. Forensic Interview analysis—whether or not biased interviewing techniques were practiced should be evaluated
5. Memory analysis—whether or not memory errors (e.g., errors of omission or commission) may have occurred should be determined
6. Sufficiency of details provided by the child—whether the child can describe in an age appropriate manner events that occurred before, during, and after in a way that makes a coherent, understandable, narrative should be assessed
7. Inconsistencies analysis—a contradictory statement by logic contains falsehoods, thus whether or not the child has provided inconsistent core details between or within statements should be assessed
8. Logistical detail analysis—whether or not the allegation contains logistical implausibilities should be assessed. For example, claims that the child was anally raped but did not experience pain would make the report logistically problematic
9. Fantastical details analysis—the presence or absence of fantastical details in the allegations should be examined
10. Personological analysis—whether the child suffers from any mental health problems or history that may indicate an increased probability of either truth telling or problematic reports should be assessed

The basic idea is that these dimensions of a sexual abuse allegation are central to understanding what the child is indeed saying or attempting to say. Children, due to a variety of factors, may not be able to articulate clearly what happened and the interviewer needs to be mindful and probe key dimensions of a possible sexual abuse allegation so that the interview provides as much clarity and as much detail as possible. Moreover, problems with the child's statements need to be identified and disclosed and not ignored or swept under the rug—doing this is not consistent with objectivity. Thus, the degree to which the interview actually addresses these dimensions and attempts to resolve any problems with these, and objectively admits any of these in the conclusions is part of a forensic interview's being comprehensive and objective.

**In this case there is no evidence that the interviewer used any protocol that met the psychometric conditions described above. Additionally, the sensitivity (false positives), specificity (false negatives), and interrater reliability (whether similar information would have been gained by another interviewer) of the assessment instrument are all unknown.**

### Protocol for the Evaluation of Forensic Interviews with Children (PEFIC)

Eighteen specific factors have been identified in the empirical research<sup>1</sup> related to potential bias in forensic interviews of children. The following report details the presence of these factors in available materials in the above-named proceedings. This review and report is limited insofar as it is limited to the materials available for review. The presence of additional information not available for review (e.g., video recordings of additional interviews) is not available for review (e.g., video recordings of additional interviews).

**Interview with Hayley Smith by Jennifer McCann Dated 09.04.2019*****FACTOR 1) Establishing Rapport (RULED OUT)***

A good interview will begin by building rapport with the child. This should be an experience for the child where interaction with the interviewer is perceived as pleasant. This is very important due to the potential impact rapport can have later, particularly on the child's willingness to provide answers to difficult or uncomfortable questions without being directly cued. Moreover, good rapport is important so that the child can feel as comfortable as possible to resist leading questions, or to tell the interviewer about outside contaminating influences. It should be noted that while a child may smile and seem comfortable at the beginning of an interview, limitations in trust often emerge when the child reports the details of a sexual abuse event. At this point, if rapport is lower than expected, the child may find it extraordinarily difficult to report honestly and accurately, particularly about sensitive topics. The child may feel responsible for some of the event, and may not want to talk about things that may make him/her seem 'bad' or 'dirty'.

Therefore, it is better to spend sufficient time building rapport at the beginning of the interview as well as intermittently throughout the interview.

The rapport section of a forensic interview with a child serves several purposes; first, rapport is hypothesized to promote truthful and detailed disclosures. It is recommended that interviewers "build rapport with children by asking open-ended questions about neutral, everyday events before questioning them about sensitive topics" (Lamb, Hershkowitz, Orbach, & Esplin. 2008, p. 58). This leads to a second benefit in that it allows for the opportunity to assess the quality of rapport early in the interview (e.g., is the child providing curt responses, expansive answers, is the child able to participate in a question/answer interchange). It is recommended that the interview be suspended until a later date before questioning about sensitive topics, if the child is showing poor responsiveness during rapport building (Lamb et al., 2008).

The interviewer spent time building rapport with Hayley at the beginning of the interview. The interviewer asked Hayley open-ended questions about neutral topics like things she enjoys and doesn't enjoy doing, video games she plays, and books she likes to read. Therefore, rapport problems can be ruled out as a potential source of bias.

***FACTOR 2) "I don't know" Responses (NOT RULED OUT)***

Children may not understand that they are allowed to state, "I don't know." They may feel that they have a responsibility to provide details, even when they are unsure.

The interviewer told Hayley that she could say, "I don't know" if she did not know the answer to a question. For instance, the interviewer then said, "I'll ask some questions and if at any point you do not know the answer to a question you can say, 'I don't know.' But if you do know the answer it's really important that you share that with me, ok." However, the interviewer did not practice this with Hayley. Therefore, this potential source of bias cannot be ruled out.

***FACTOR 3) Truth Meaning (RULED OUT)***

It is important to determine the child's knowledge of this concept, and it is beneficial to do this prior to any detail collection. Children may have skewed or unusual ideas about what it means to tell the truth. Without information related to this, it is impossible to determine whether the child's belief about the truth is correct. Extended truth-lie discussions (TLD) have been shown to lead to more accurate reporting in children (Huffman, Warren, & Larson, 1999). The American Professional Society on the Abuse of Children (APSC) (2002) note that clarifying the child's ability to differentiate truth and lie prior to beginning abuse-specific questions can indicate aspects of the child's competence and credibility.

The interviewer assessed Hayley's ability to differentiate between truth and lie. For instance, the interviewer said, "Also, it's really important that we get everything accurate and so we also have to talk about the truth and things that have really happened. And so Hayley, tell me the difference between a truth and a lie." Hayley replied, "A lie is when you don't tell the truth. It's like playing a game, you tell the truth and then you're telling what actually happened and if you're telling a lie, you're not telling what happened." Therefore, this potential source of bias can be ruled out.

#### ***FACTOR 4) Truth Importance (RULED OUT)***

Stating the actual truth has different importance in varying situations and children may confuse the relative importance in the interview setting. For example, stating the truth (related to reality) is not valued while playing games (e.g., cops and robbers, etc.). Moreover, there are other situations where truth can have easily confused importance. When a loved-one asks for an opinion regarding a recent hair cut even adults may have difficulty determining where to place truth in terms of importance. Children are exposed to this type of determination being made by others and being increasingly asked of them as they mature. Therefore, it is vital to assess where children have placed the importance of truth in the interview setting.

The interviewer assessed the degree of importance Hayley placed on telling the truth. For example, the interviewer said, "And so while we are talking today do you promise to tell me the truth?" Hayley nodded affirmative. The interviewer said, "Great, thank you." Therefore, truth importance can be ruled out as a potential source of bias.

#### ***FACTOR 5) Role/Purpose (NOT RULED OUT)***

Children may have a skewed or inaccurate idea about their role in the interview, or the purpose of the interview itself. They may believe that their role is to convict someone or to protect someone. Likewise, they may believe that the purpose of the interview is to convict or protect someone. These beliefs may affect the child's willingness or ability to provide accurate information. Lamb et al. (2008) state "interviewers must be sensitive to children's perceptions of their knowledge and status. To facilitate comprehensive and accurate reporting by children, for example, interviewers should emphasize that they do not know what the children experienced, and that it is thus important for the children to tell as much as they know (Sternberg et al., p. 23).

The interviewer asked Hayley why she thought she was there that day, but did not ask her what she thought the purpose of the interview was. The interviewer then said, "So Hayley, tell me what you came to talk to me about today." Hayley replied, "Uh, my stepdad. And, he sexually assaulted me." Therefore, this potential source of bias cannot be ruled out.

***FACTOR 6) Disclosure Inhibition (NOT RULED OUT)***

Disclosure inhibition concerns willingness to discuss certain subject matter. Sometimes, children might feel afraid to discuss particular topics, such as parts of her body. Therefore, this might interfere with children's abilities to openly disclose certain information.

The interviewer did not assess Hayley's level of comfort in talking about her experiences. Therefore, this potential source of bias cannot be ruled out.

***FACTOR 7) Threats/Bribes (NOT RULED OUT)***

Children may have been exposed to experiences that can affect their willingness to provide some details or their willingness to tell the truth. A child may be threatened with harm to self, to loved-ones, to pets, or to personal property, if they provide a specific detail or class of details. Also, the same pressures may be experienced because the child was promised special things (i.e. bribes) to provide or not provide specific details or classes of details. The interviewer has a responsibility to assess for these possible influences. This may be done through simple, non-leading questions.

The interviewer did not assess if any bribes or threats could have possibly influenced the disclosure. Thus, this potential source of bias cannot be ruled out.

***FACTOR 8) Use of Open-ended Questions (NOT RULED OUT)***

The form of some questions can make it seem as though only specific responses are wanted, even if the direction of the responses is not hinted. For example, yes/no questions often seem to require yes/no responses, even when accurate responses do not clearly fall in either category. For example, if a child is asked, "Did your step father touch you in a bad way?" and that this sentence structure implies to the child that a yes or no answer is required they may not ask for clarification when they are confused whether placing certain lotions on parts of their body is acceptable. In addition, research has shown that free narratives and open-ended prompts are the best way to gain accurate information from a child (e.g., Dent & Stephenson, 1979; Goodman et al., 1991), and that close-ended questions result in significantly more inaccurate answers than open-ended questions. It is important that the interviewer structure the questioning so this mode of questioning is most frequent. In an interview setting, children should feel free to answer in a manner, which makes them feel most comfortable. The best way to determine how free they feel in providing their answers is to ask them about this, and provide examples.

APSAC (2002) recommends asking open invitation questions (i.e. "tell me everything about..." (p. 7) rather than closed questions such as who, what, where, when, and why questions. Lamb et al. (2008) recommend a "funnel approach" to interviewing in which open-ended questions are

asked first to elicit free narratives from the child and in which close-ended questions are used sparingly to clarify content. Closed questions limit the options of responses available to the child, and the child may feel that she can only answer from options provided.

Some of the questions in this interview were open-ended prompts, however many of the questions were closed-ended prompts. For example, the interviewer asked, "And he came in and, did you ask him to do your legs that night?" The interviewer asked, "Ok, and so did you have underwear on when you were wearing the shorts?" The interviewer asked, "Ok, so this night where you had rearranged your bedroom furniture, your brother had knocked on the door?" The interviewer asked, "And so then it sounds like he was sitting the whole time?" The interviewer asked, "Did you have anything on under that tank top that time?" The interviewer asked, "And did your brother come in the room?" The interviewer asked, "Does she still work there now still?" The interviewer then asked, "And then was there another time that TJ did something like this?" The interviewer asked, "Yeah? Um, was there a time where it happened in a different place besides your bedroom?" The interviewer asked, "Ok, was there a time where something different happened?" The interviewer asked, "And um, so, just to clarify, um, he fingered you again that time?" The interviewer asked, "Oh, ok, the blue basketball shorts?" The interviewer asked, "Ok, and then did you have a bra on underneath?" The interviewer asked, "Did anything happen to your shirt or your bra?" The interviewer asked, "What about his clothes? Did they move or change?" The interviewer asked, "And so you were fourteen?" The interviewer asked, "And this time we are talking about right now was on a weekend?" The interviewer asked, "And then what about, like, was it in the same house you live in now?" The interviewer asked, "Did he finger you that time?" The interviewer asked, "Ok, and so he moved them to the side?" The interviewer asked, "So then did he touch you at all that time?" The interviewer said, "Uh-huh, ok, so almost a year after you moved into that house is kind of when he started it?" The interviewer asked, "Um, and then um, did it ever happen at a different house?" The interviewer asked, "Ok, um, did it ever happen – I know I already asked this, like in a different place in the room other than the bed?" The interviewer then asked, "Um, and then you had mentioned that he put his fingers in here (pointed to diagram), was there another part of your body that he touched?" The interviewer asked, "What about did he ever make you do something to him?" The interviewer then asked, "So you mentioned you were around twelve when he started doing this, um, if you know, did he ever finger you while you were twelve years old?" The interviewer asked, "Ok, have you and your mom talked about it?" The interviewer asked, "Ok, um, do you know of or have you heard about, like, TJ doing this to someone else?" The interviewer asked, "So did you yell those things out loud?" The interviewer asked, "Ok, and your mom was in the room with you?" The interviewer asked, "So were there times where your mom knew he was in your bedroom?" Thus, this potential source of bias cannot be ruled out.

#### ***FACTOR 9) Authority Pleasing (NOT RULED OUT)***

Children, especially young children, sometimes seek to please adults who appear to them as authority figures. This is often reinforced by parents and teachers and is often not a problem of any sort. However, it can be a problem in forensic interviews of children, or in the testimony of children. The task for the child in such a setting should be to relate the remembered details of a potential event, without regard to what others wish to hear. However, in pure form, this is not always 100% likely with adults, and perhaps less so with children. The job of the interviewer is

to assess for this influence. The interviewer should ask about it and provide corrective information and assurances when called for.

The interviewer did not fully assess whether Hayley would acquiesce to a press of the interviewer. The only mention was during this exchange, the interviewer said, "Also, I'll repeat a lot of the things you say just because I want to make sure I understand everything you are telling me. If I'm not making sense, just let me know, it's ok to interrupt me in here." However, there was no practice. Therefore, this potential source of bias cannot be ruled out.

#### ***FACTOR 10) Leading Questions (NOT RULED OUT)***

The term 'leading questions' requires some clarity in definition. Questions that require the endorsement of some antecedent information in order to be answered are the clearest example. For instance, the question, "While he was in your room, what was he wearing?" can be a perfectly acceptable question, or a leading question. If the child previously stated that the man was "in the room," the question is not leading. However, if the first piece of information was not provided, the question is problematic. To answer the question, "What was he wearing?" the child implicitly endorses the statement, "While he was in your room." This can happen even if the child states, "I don't remember." In fact, it not only implies that the man was there, but the child may incorporate the detail in future reports. Such leading questions should be avoided.

The interviewer asked many leading questions in this interview. For example, the interviewer asked, "And so the night where you rearranged your furniture in your bedroom, sounds like you were just hanging out in your room, um?" The interviewer asked, "And he came in and, did you ask him to do your legs that night?" The interviewer asked, "Ok, were there body parts involved?" The interviewer asked, "Ok, and what was his hand doing?" The interviewer asked, "Um, and then tell me how his hand got to this part?" The interviewer said, "Ok, tell me about how his hand got underneath your shorts." The interviewer asked, "And what was his finger doing and where was it at on this part (diagram)?" The interviewer asked, "And what happened to the underwear?" The interviewer asked, "And um, did they move or change or do anything different?" The interviewer asked, "Ok, and then you had mentioned his hands and his fingers were touching, did they touch on the inside of this part (pointed on diagram) or on the outside of that part?" The interviewer asked, "Ok, and so when his fingers went on the inside, where did your underwear go?" The interviewer asked, "And when he was fingering on the inside of this part, what did that feel like when that happened?" The interviewer asked, "And what did, what did your body feel or anything like that?" The interviewer asked, "Ok and you had mentioned he touched on the inside and outside of this part (pointed to diagram), um, when he touched on the outside, what was he touching with?" The interviewer asked, "Ok, and how did his hand and fingers touching this part stop that time?" The interviewer asked, "And then while his fingers, or his finger, was inside here (pointed to diagram) tell me everything like you remember him doing, what was the rest of his body doing?" The interviewer asked, "Ok, so backing up just a little bit, did um, did his, like when he had had his hands up your shorts did his clothes change or do anything different when this was happening?" The interviewer asked, "Ok, what about if any other part of his body moved or did anything different?" The interviewer asked, "And so then it sounds like he was sitting the whole time?" The interviewer asked, "Did

anything happen with your bra?" The interviewer asked, "Did anything else happen with TJ this, the night we were talking about right now?" The interviewer then asked, "And then was there another time that TJ did something like this?" The interviewer asked, "Yeah? Um, was there a time where it happened in a different place besides your bedroom?" The interviewer asked, "Ok and how did his hand get to your part that time?" The interviewer then asked, "And then, um, let's see. Was there another time, so we talked about the one time where you rearranged your bedroom, um, he had fingered you. Was there another time where he fingered you?" The interviewer asked, "And how does his hand get there this time?" The interviewer asked, "Ok, and so like he went up your shorts, and what happened to your underwear that time?" The interviewer asked, "And, um, what part went inside this time?" The interviewer asked, "And then, what about like if you remember him saying or doing anything while his fingers were in there this time?" The interviewer asked, "Did you hear, like, anything at all? Like if he said or did any noises or anything like that?" The interviewer then asked, "And then how did him fingering you this time stop?" The interviewer asked, "And then, what about your underwear if you remember what those were?" The interviewer asked, "Did anything happen to your shirt or your bra?" The interviewer asked, "What about his clothes? Did they move or change?" The interviewer asked, "Did he finger you that time?" The interviewer asked, "So then did he touch you at all that time?" Therefore, this potential source of bias cannot be ruled out.

#### ***FACTOR 11) Disconfirmation (RULED OUT)***

Children sometimes respond to being told that they are incorrect. If a child disagrees, this is usually apparent in the child's verbalizations. However, if the child accepts the assertion that she has actually made a mistake, they may re-evaluate their recall and make alterations to match the authority's assertion. If it is believed that a child is being incorrect in her recall a direct disconfirmation does not clarify the issue of fact, because it is simply more likely to establish a correlation with the disconfirmer's belief.

Hayley's responses were not disconfirmed in this interview. Therefore, this potential source of bias can be ruled out.

#### ***FACTOR 12) Inappropriate Reinforcement (RULED OUT)***

Basic and well-established principles of behavior theory indicate that the behavior following reinforcement will increase and those that are punished or not reinforced will decrease. This applies to child interviews as well. It is important to consider very carefully how to respond to specific types of responses that a child may provide. For example, if an interviewer never looks interested in details, which can be used to show guilt, but pays particular attention to the details, which can be used to acquit, the child may begin to provide only exculpatory information, and vice-versa. In essence, the interviewer may shape not only the information the child provides, but also the way the child recollects additional information. The goal for an interviewer should be to respond very neutrally to different types of information, but reinforce talking and participating in general.



Hayley's answers were not inappropriately reinforced during this interview. Therefore, this potential source of bias can be ruled out.

***FACTOR 13) Repetitive Questions (NOT RULED OUT)***

Repetitive questions are problematic with children. They can alter a child's response rather than to increase the accuracy of the response. The child should be asked questions only one time. Repeated statements that are false can contribute to a non-veridical memory in a child. Moreover, asking a question several times when no responses are given may indicate to the child that non-responses are not sufficient and that something must be said. However, the child may be non-responding simply because of uncertainty and the non-response is then functionally accurate. If they later provide a detail, there is as much reason to be suspicious of the detail as there is to believe it. In the case of non-responses, it is imperative to assess why the child is not responding.

The interviewer asked repetitive questions in this interview. For example, the interviewer asked, "And then, so like, um, did he say anything about like if he was going to tell your mom or if, why he talked to your mom?" Hayley replied, "He said if I told anybody he would be the one to go to jail. And then he said, 'If you did you would feel really bad about it.'" The interviewer asked, "And then did he say anything about your mom or?" Therefore, this potential source of bias cannot be ruled out.

***FACTOR 14) 'Total Response' Confusion (RULED OUT)***

Humans respond to queries and generate communication in three forms: verbal, para-verbal, and non-verbal. Verbal communication refers to the words chosen. Para-verbal communication refers to the tone of voice, pitch, and volume of the delivery. Non-verbal communication refers to the body posturing and body language surrounding the communication. All three forms of communication are important. In fact, some tests indicate that in normal interpersonal face-to-face exchanges, non-verbal is the most important, followed by para-verbal, and verbal is the least important. Additionally, these modes can transmit different messages simultaneously. Saying, "I love you" in a disdainful tone of voice is an excellent example. Another example is stating, "I did that," in a questioning tone of voice. Lack of information about possible confusion is problematic. Also, a lack of follow-up inquiry when such potential confusions are identified is also problematic. This is one of the more powerful rationales for videotaping interviews.

Because the document reviewed was in video recording form, this potential source of bias can be ruled out.

***FACTOR 15) Encouraging Speculation (NOT RULED OUT)***

The purpose of the forensic interview should be to generate as much information about reliable memory of experienced events as possible. The concept of guessing or speculating is contrary to that goal. In addition, children may be more likely to incorporate details that they speculate about

into their actual event recall or reported memory. Therefore, not only should speculation not be encouraged, it should actively be discouraged.

The interviewer did not discuss speculation or guessing with Hayley nor did she practice with her. Therefore, this potential source of bias cannot be ruled out.

***FACTOR 16) Conformity Press (RULED OUT)***

People are likely to desire to be consistent with each other or with their previous positions, even when they are unsure of the accuracy of those people or positions. Therefore, if the best independently remembered recall is sought, then children should not be made aware of the reports of others and should not be reminded of their previous statements. However, it is acceptable to ask open-ended questions about inconsistent statements the child has previously provided.

Conformity press was not an issue in this interview. Therefore, this potential source of bias can be ruled out.

***FACTOR 17) Response Class Focus (RULED OUT)***

Occasionally, interviewers can respond differently to details provided about one individual or about one type of event. For example, if Mr. X is thought to have committed a crime, but the child says something about Mrs. X., interviewers sometimes make statements like, "But I want to know about Mr. X." In this case, the child has just received information that other information is not sought. Other people who may be guilty may now not be implicated, and other information that may be exculpatory may be overlooked. Similarly, a lack of follow-up questions about Mrs. X., and a multitude of follow-up questions about Mr. X. can function to communicate to the child that the interviewer is only interested in Mr. X.

Practice guidelines for professional conducting forensic interviews of children recommended that interviewers "should approach the interview with an open mind about what may have happened. An interviewer's determination to confirm a particular hypothesis, without consideration of plausible, alternative explanations, may impair the capacity to receive and objectively interpret information from the child and may lead to substantial interviewer error (Sorensen, Bottoms, & Perona, 1997; APSAC, 2002, p. 5).

Response class focus was not a problem in this interview. Therefore, this potential source of bias can be ruled out.

***FACTOR 18) Outside Contamination (NOT RULED OUT)***

Rarely is a child interviewed only once about an alleged illegal event that happened to them, or that they witnessed. Parents and teachers may wish to thoroughly interview the child to determine if they should call the authorities; likewise, therapists working with children with alleged histories of abuse may prompt for details as part of the therapeutic process. However,

this questioning has as much potential to influence the child's reported memory, as do subsequent professional interviews. Furthermore, bias in early interactions or interviews may later influence a child's memory to the degree that it becomes ingrained and, in subsequent interviews, the incorrect information seems like truthful recollection to the child. Without knowledge of previous interviews' contents, even a perfect previous contact others have had with the child, and to determine (as well as possible) the contents of those contacts. If previous bias can be ruled out, the current interview is considerably stronger.

Hayley discussed her allegations with her mother prior to the interview. Therefore, this potential source of bias cannot be ruled out.

### **Analysis of the Allegation**

**Outcry Analysis:** According to the documents reviewed, Hayley made her outcry to her mother, Patricia Bernal, after Thomas Bernal informed Ms. Bernal of the abuse. Ms. Bernal reported that she questioned Hayley about the abuse prior to the disclosure. Outcry was not adequately explored in the forensic interview.

**Stake Analysis:** According to the documents reviewed, it is unclear whether stake is a source of bias. This was not adequately explored in the forensic interview.

**Parental/ Caregiver Suggestion:** According to the documents reviewed, there may have been parental or caregiver suggestion in this case. Specifically, Hayley spoke about the allegations with her mother prior to the interview and the content of this conversation is unknown. Parental/caregiver suggestion was not adequately explored in the forensic interview.

**Outside Contamination:** The potential for outside contamination to have occurred is significant as Hayley spoke about the allegations with her mother. This potential source of contamination was not adequately explored in the forensic interview.

**Amount of Details Provided:** According to the documents reviewed, amount of details provided was normative for the alleged victim's age. However, many details provided in the forensic interview were the result of direct questioning rather than open-ended questioning by the interviewer.

**Problematic Logistical Details:** According to the documents reviewed, logistically problematic details may have been present in the allegation. Specifically, Hayley reported that her brother was home during the abuse. Abusers generally seclude children as to not get caught. Further, abuse is usually traumatic to a child and they will describe symptoms of trauma after the abuse such as avoidance of the abuser, fear, nightmares, inability to relax, and dysphoric emotion. The interviewer did not adequately explore and resolve problematic logistical details.

**Interview problems (PEFIC):** There were multiple problems in the interview that was conducted with Hayley. Please see the evaluation of the interview for specifics. It is not clear if

the interviewer followed an evidence-based interview protocol. Another concern is that the interviewing techniques do not have well-established psychometrics; specifically, their accuracy is unknown. The interviewer also used anatomical diagrams, which are not supported by the research as aids in forensic interviewing. Additionally, there is no basis to understand the protocol's error rates, including the sensitivity (the ability to detect abuse if abuse is present) or specificity (ability to detect nonabuse, if abuse is actually absent). Questions remain regarding: 1) an attempt to understand problematic details; 2) an attempt to understand outcry; 3) an attempt to understand parental suggestion and outside contamination. Finally, this interview appeared to have a confirmatory bias: there were no questions aimed at understanding whether false memories and suggestibility or lying could be involved in the case. It is not apparent that any other alternative hypotheses were explored.

**Memory: Encoding, Storage, & Retrieval:** Because disclosure of sexual abuse involves a past event and because children are questioned about the past event, the child's memory and how the child processes information is very important. Hayley had allegedly discussed the allegations with her mother. I do not know how/if the above impacted her memory. Additionally, Hayley reported that she could not remember when the abuse began. The interviewer asked, "And then, um, if you remember when this first started – if you remember when TJ first, like, did something to you or like fingered you?" Hayley replied, "I don't remember." These were not adequately explored in the forensic interview.

**Fantastical Details:** According to the documents reviewed, fantastical details do not appear to have been present in the allegations.

**Personological Details:** According to the documents reviewed, personological factors do not appear to have been present in the allegations.

### Literature Review

#### **Vulnerability to Suggestion**

According to the documents reviewed, biased interviewing techniques were practiced (e.g., failure to discuss "I don't know" responses, role/purpose, disclosure inhibition, authority pleasing, outside contamination, encouraging speculation, threats/bribes, and use of closed-ended/leading/repetitive questions). Several studies have been conducted that are relevant to the consideration of children's event recall. For example, Ceci et al. (1990) found that children were significantly more likely to make recall errors when incorrect, biased information was used in the questioning procedure. In addition, these children were also more likely to make recall errors when the person presenting the incorrect information was an adult, rather than a child. The experimenter concluded that when information (even incorrect information) was presented by an adult, who is viewed as a credible source of information, the child is more likely to incorporate new information in their verbal report. In general, research suggests that preschool children are more susceptible to misleading or incorrect post-event information including that which is

included in biased interviewing techniques than older children and adults (Ceci & Bruck, 1993; McAuliff, Kovera, & Viswesvaren, 1998) although biased interviewing techniques are problematic with older children as well. In fact, some argue that younger children are not more susceptible to bias when the act in question is significant, when the child is a participant (as opposed to a bystander), or when the report is a free narrative as opposed to prompted (e.g., Fivush, 1993; Goodman, Rudy, Bottoms, & Aman, 1990). Ceci and Bruck (1995) agree that children are less prone to suggestions about actions to their own bodies, however they review numerous studies that demonstrate that bodily acts are not impervious to distortion (e.g., Bruck, Ceci, Francoeur, & Barr, 1995; Lepore & SESCO, 1994; Ornstein, Gordon, & Larus, 1992; Poole & Lindsay, 1996).

### The susceptibility of older children and adolescents to suggestion

Research suggests that yield and shift to interrogative suggestibility generally decreases with age, but that leading questions can impact responses across all ages. Cohen and Harnick (1980) completed a study to find whether age differences exist in susceptibility to suggestion. They asked 36 participants (12 from grade 3, 12 from grade six and 12 college students) to watch a movie depicting a petty crime. Session one, which consisted of 22 questions asked in a suggestive manner (that contained false information about an event in the movie) or nonsuggestive manner, was conducted right after the movie. The authors carried out session two a week later in which 22 multiple choice questions were asked, and one of the incorrect answers for each question was directly linked to the "information contained in the suggestive form of the question used in the first session" (p. 205). The results of the first session showed that the third grade participants performed significantly more poorly and were more suggestible than the other two groups when nonsuggestive questions were used. There wasn't a significant difference in suggestibility and performance between the sixth graders and the college students. Session two demonstrated that once again, the third graders answered wrong significantly more times than the two older groups. However, an analysis of wrong responses showed that all three groups chose the response that was in agreement with the misleading knowledge from the first session. The authors concluded that sixth grade children are just as "capable of perceiving, interpreting, and reporting an event" (p. 209) as older adults. They also noted that persons of all ages can be affected by leading or suggestive questions, primarily because these provided an answer when the person doesn't remember an event. These results suggest that leading questions should be avoided not just with young children, but also with persons of all ages as they increase the rates of wrong responses. Finally, the authors pointed out that while third grade children may not have been as accurate when remembering events, they still were "good sources of eyewitness information" (p.209).

In terms of specifics, when the participants were exposed to misleading suggestions during the first session, 75% of third grader responses were made in the direction of the suggestion, with that number decreasing to 30% for 6<sup>th</sup> graders. 20% of college student statements were made in the direction of the suggestions if exposed to the suggestible questions during the first session. In sum, it can be concluded that the grade 3 subjects gave a poorer memory performance than the older students, in the case of the nonsuggestive questions. Further, the grade 3 students showed a much greater tendency to accept (false) suggestion, than did the older subjects, although all three

groups were influenced to some extent. From the point of view of both the straightforward memory test (nonsuggestive questions) and the degree of susceptibility to suggestion (suggestive questions), the grade 6 subjects and the college subjects can be regarded as equivalent.

Other studies have suggested that while adolescents and older adolescents (age 16 and older) demonstrate similar rates of yielding to leading questions to young adults, adolescents are more likely to be susceptible to interrogative pressure. Specifically, adolescents are more prone to shifting answers in response to negative feedback than are their adult counterparts (McLachlan, Roesch & Douglas, 2011). In a study conducted by Redlich and Goodman (2003), 3 age groups were examined; 12-13 year-olds, 15-16 year-olds, and young adults. Participants were instructed to use a computer and told that they would be typing letters on a keyboard read by the experimenter. Participants were told not to press one of the keys as it would shut down the computer. After 115 letters were pressed, the computer stopped functioning and participants were asked if they had hit the key to shut down the computer. All participants denied hitting this key. Half the participants were provided with false evidence, in which the experimenter returned with a printout suggesting the participant had hit the key to shut down the computer. Compliance was measured by asking participants to sign a handwritten statement stating that they had hit the key and caused the computer to crash. Internalization was assessed by asking the degree to which participants actually believed they hit the key to shut down the computer. Finally, confabulation was assessed by asking participants to "retrace their steps," and show the experimenter which keys they had hit. In total, 69% of participants confessed to hitting a key they had not touched, 29% internalized this false evidence, and 9% engaged in confabulation by demonstrating how they had done so. Younger participants (12-13 year-olds) were more likely to engage in compliance by signing the false confession than were older adolescents and young adults (Redlich & Goodman, 2003).

### **Parental/ Caregiver Suggestion**

Parents can subtly suggest false information to their children who end up believing and making false allegations. **According to the documents reviewed, there may have been parental or caregiver suggestion in this case. Specifically, Hayley spoke about the allegations with her mother prior to the forensic interview. Parental/ caregiver suggestion was not adequately explored in the forensic interview.** Poole & Lindsay (1995) had preschool-aged children witness four science demonstrations in a university laboratory. Four months later parents were mailed stories that contained descriptions of their children's visit to the lab. Two of the stories were true and two were false (i.e., described experiments that the children had not seen). Each story finished with a fabricated account of what happened when it was time to leave the lab: "Mr. Science wiped (child's name) hands and face with a wet-wipe. The cloth got close to (child's name) mouth and tasted really yucky." Parents read the story to their children three times. Later, children told the experimenters that they had participated in demonstrations that they had not (i.e., the false stories read by their parents). More than half of the participants said that Mr. Science had wiped their mouths and many elaborated on their "yes" answers. When asked if Mr. Science had actually wiped their mouths or did their mother just read the story 71% of the children maintained that it really happened. This study was replicated (Poole & Lindsay, 1996) using children from a wider age range (3-8 year olds). Findings were similar except they found that when asked if Mr. Science wiped their mouths or if their mother just read the story the older

children tended to recant their claims and said that their mother told them. **Research findings demonstrate that children are significantly more prone to memory errors created by false, misleading information, than are adolescents or adults. Children can be divided into three groups (young childhood, middle childhood, and adolescence), with the younger children most susceptible to bias, followed by middle-aged children, followed by adolescents and parents have the ability to bias their children's memory.**

### **Children's Credibility**

Children and adolescents do not always tell the truth. It is not the case that there are special topics—such as their own abuse—in which children and adolescents are incapable of lying. As a field we know little about the variables that cause children or adolescents to lie or tell the truth. Researchers have suggested that personality variables, habit (Lowenstein, 1994), a developing central nervous system, a congenitally acquired defect in the central nervous system (CNS), the presence of an emotional disturbance, the desire to please others (i.e., parents, therapists, lawyers) (Kaplan, 1990), and behavioral disorders (such as conduct disorder and oppositional defiant disorder; Webster-Stratton & Dahl, 1995) may contribute to a child lying and thus result in an invalid statement. Although lying is not a frequent pathway; lying about child sexual abuse does occur. Children at times recant (see Bradley & Wood, 1996). Thus, children sometimes claim that they have previously lied or at least were mistaken. **According to the documents reviewed, personological details do not appear to have been present in the allegations.**

### **Inconsistencies within and/or between Statements**

When children are suggestively interviewed their subsequent false reports are consistent with the suggestions (Bruck et al., 1995, 1997). Subsequent ratings by trained professionals reveal that these children are credible and these professionals cannot discriminate accurate from inaccurate reports as a result of suggestive interviewing (Leichtman & Ceci, 1995; Ceci et al., 1994a; Ceci, Loftus, Leichtman, & Bruck, 1994b). Also, linguistic markers do not consistently distinguish true from false reports that emerge from problematic interviews (Bruck et al., 1997). In the Bruck et al. (1997) study children were more likely to repeat the same details across interviews when their narratives were true as compared to when they were false. Two measures did differentiate true from false narratives. False stories tended to expand or sometimes change with each retelling as the children included new details. The number of aggressive, exaggerated, or fantastical details increased for false narratives as compared to true narratives for some children subjected to repeated suggestive interviews.

### **Memory Recall: Including Memory Errors due to False, Misleading Information**

Even though experimental methodologies are varied (i.e., testing many types of memories, witnessed events, and cuing strategies), the results generally agree that children are significantly more prone to memory errors created by false, misleading information, than are adolescents, than are adolescents, who are more prone than adults. However, it should be noted that older children and adults are also susceptible to bias (see Ceci & Bruck, 1995, for a review). Notwithstanding these conclusions, children, even preschoolers, are capable of accurately reporting events *in the absence of suggestive techniques* (e.g., Fivush, 1993; Goodman, Batterman, Faunce, & Kenney, 1992, for reviews).



The effects of the above patterns of children's information processing and event recall have been studied in ways that are directly relevant to the issue of children's testimony subsequent to interviews with professionals. The following section will investigate some of these highly relevant studies.

A study that highlights the problems of child witnesses who are interviewed for testimony is the "Sam Stone" study conducted by Ceci and Liechtman (1992). Young children were told that a visitor, Sam Stone, was clumsy and always broke things that were not his. When "Sam" came to visit he did not touch or break anything. The next day the children saw a soiled stuffed bear and a torn book. Even though no child had seen Sam do anything, when asked, 25% hinted that he might have had a part in the problem. Over the next ten weeks they were asked misleading questions/statements by the first interviewer such as, "I wonder if Sam Stone got the teddy bear dirty on purpose or by accident?" On the tenth week, a second (seemingly independent) interviewer asked what had happened to the toys. 72% of the children overtly accused Sam of having ruined the toys, and 45% reported remembering having seen Sam do it.

Another study conducted by Clark-Stewart et al. (1989) sought to determine whether or not a reported memory for observed events could be changed by suggestions made by an authoritative adult. Three groups of children observed a janitor, Chester. One group saw a working janitor, the second group saw a playing janitor, and the third group saw a janitor who was playing mildly suggestively with a doll. The 'playing' Chester bribed the children with candy not to tell his boss that he had been playing instead of working. Shortly thereafter, the children were questioned by Chester's boss. The children were asked what Chester had been doing. Initially, gentle suggestions were made opposite to the child's actual observations. If the child observed a working Chester the boss suggested he might have been playing, and vice-versa. 25% of the children changed their story after the initial suggestions. After stronger suggestions were made, every child changed stories to be inconsistent with their observations and consistent with the suggestion. In fact, they did not revert their stories when later asked about the incident by their parents, who were unaware of the child's actual observations or the direction of the suggestions made. This indicates that not only did the children respond to the suggestion, but also they have seemed to have incorporated the details into their report on a longer-term basis.

In a similar study, Bruck and colleagues (1997) examined the impact of repeatedly interviewing children with a combination of suggestive procedures. Preschool children were asked to tell about two true events (a recent punishment and helping a visitor who had hurt her ankle) and about two false events (helping a lady find her monkey in the park and witnessing a thief steal food from the day-care facility). Children were interviewed on five different occasions about the four events. In the first interview, the children were asked if the event had occurred and if so to provide as many details as possible about the event. The next three interviews included suggestive interviewing techniques (i.e., the use of peer pressure, guided imagery techniques, repeating misinformation, and providing selective reinforcement) and during the fifth interview, a new interviewer questioned each child about each event in a non-suggestive manner. While across the five interviews all the children consistently assented to the true-helping event, children were at first reluctant to talk about the true-punishment event, many denying that it had occurred. With repeated suggestive interviews, however, the children agreed that the punishment had occurred. With regard to false events, children initially denied the false events, but with repeated suggestive interviews they began to assent to these events. In fact, by the third interview, almost all the children had assented to all true and false events. The results from this



study clearly demonstrate that the combination of suggestive techniques produced high assent and research has demonstrated that while older children (i.e., seven-year-olds) are more accurate younger children (i.e., four-year-olds) this age difference is not relevant when misleading questions are used (Rudy & Goodman, 1991). In fact, Rudy and Goodman (1991) examined the accuracy of children's reports after they had been participants in an event that was reminiscent of some types of sexual abuse. Pairs of four-year-old and seven-year-old children were left in a trailer with a stranger and one child played a game with the stranger, who dressed the child in a clown's costume and lifted and photographed him/her and the other child was instructed to observe this event as a bystander. Afterwards (10 days later) children were interviewed, first with open-ended questions, and then with 58 questions that were either direct or misleading. Results from this study indicated that seven-year-olds were more accurate than four-year-olds for all types of questions except misleading questions that implied abuse (e.g. "He took off your clothes, didn't he?"). Thus while there may be age differences in suggestibility for non-central features of an event, there are no age differences when children are asked misleading questions about central salient events.

Gulotta and Ercolina (2000) interviewed 53 children (ages 6-8) about an event that had taken place in their classrooms. Children were initially asked 6 open-ended, non-suggestive questions and subsequently 20 suggestive, close-ended questions. Results from this study indicated that generally, children interviewed with non-suggestive open-ended questions accurately recounted the classroom event. However, when asked close-ended and suggestive questions children authenticated events that had never actually occurred. Results also demonstrated that when children are asked certain questions twice (repeated questions), they altered their previous answers. This study illustrates that children can be misled by adults such that they sanction untrue information that is suggested to.

The above studies are important because they may illuminate the effects of post-event suggestion made by adults to children. The Sam Stone study incorporated less authoritative questioning styles, while the Chester study used more authoritative styles. However, both studies included misleading questioning that in turn altered the reported memories of the children. As previously mentioned, research findings demonstrate that children are significantly more prone to memory errors created by false, misleading information, than are adolescents. **Given that Hayley was repeatedly asked about the allegations by a number of people it is important to consider the above scientific literature.** A discussion of memory processes follows.

### **Memory Encoding, Storage, & Retrieval**

Because disclosure of sexual abuse involves a past event and because children are questioned about the past event, the child's memory and how the child processes information is very important. O'Donohue and Fanetti (1996) discuss the information processing of children as it applies to childhood sexual abuse. They summarize the five steps of information processing: sensation, perception, encoding, storage, and retrieval.

#### **Sensation**

In the sensation step, the individual's sense organs receive input from the environment about changes that have occurred. Sensation occurs in all five senses and does require that one attend to or understand the input. This information is then transferred to other areas of the body to be used. Sensation does not involve the integration of present experiences with other experiences, or the interpretation of the experience in any manner.

### *Perception*

In the perception step, the stimuli that have been sensed are brought into attentional awareness and interpreted. Meaning, past experience, or memory and judgment are involved in allowing the individual to better understand what they are sensing. *Schemas* (perceptual mechanisms that organize social sensory information) become useful in this step. Prior experience, knowledge, or expectation come into play at this stage. In fact, research has demonstrated that children and adults use event-related schemata, or scripts, to interpret new experiences. Scripts may impact which aspects of a given event call attention from the observer. New or unexpected stimuli often draw greater attention than do typical or expected stimuli (Crockett, 1988). Scripts may also be useful when information is ambiguous or difficult to understand (Bargh, 1988; Crockett, 1988). Because the amount of information that is available for interpretation is always too much for the receiver to take in, scripts can be used to direct attention to stimuli that are relevant for the given interaction. This decreases the amount of processing needed for understanding and results in selective attention. Details that are interpreted as irrelevant are not processed further and may be unavailable for encoding and storage. The script that is used may also facilitate the explanation of the ambiguous stimuli in arbitrary terms dictated by the script itself. O'Donohue and Fanetti (1996) site the following example,

"Bobby was told that nobody should ever be allowed to touch his 'private parts,' and if they do, it is sexual abuse. During a routine medical examination, the doctor does just that. The conclusion by Bobby that the doctor is a sexual abuser may be more likely. If Bobby had been told about medical examinations beforehand, other conclusions by Bobby might have been more likely."

### *Encoding and Storage*

Encoding and storage follow sensation and perception. The encoding and storage process are greatly dependent on the way in which the information was perceived. These processes may be thought of as a filing process for our memories. In the example provided above, the examination conducted by the physician may be perceived and then encoded differently depending on the script that was used. The encoding process influences how information is stored in long-term memory.

### *Retrieval*

The last stage in processing information is retrieval and involves accessing information that is stored in long-term memory. Information might be sought by using cues (other details that were encoded and stored at the same time). O'Donohue and Fanetti (1996) provide the following example:

"People sometimes report that after losing their 'train of thought,' they can sometimes remember their point by retracing the prior discussion. The other details of the discussion may serve as temporal cues for the target information. However, due to the notion that scripts contain information about the way events usually occur, as well as information about the way a specific event occurred, cues may contaminate the recall of details for a specific event."

In fact, this may impact the accuracy of memories and will be elaborated in a later section on suggestibility.

O'Donohue and Fanetti (1996) go on to emphasize that if information is never sensed, perceived, encoded or stored, it cannot be recalled. They stress that every stage of information processing must be considered in any memory investigation.

Retrieval failures can result in an inability to recall or recognize details of an event (failure of omission) and can be caused by 1) a failure in any stage of information processing whereby the information never reaches storage, 2) faulty retrieval, and 3) degenerative mechanisms such as memory decay. An additional way in which information processing can go awry is when an individual recognizes or recalls details that never occurred (failures of commission). These errors may be caused by proactive interference (when details of prior experiences are intermingled with the details of the target experience) or retroactive interference (when details experienced after the target event are intermingled with the details of the target event). In reference to proactive interference the experiences that served to create schemata may also add interfering information to memories of the target experience. In fact, children's use of scripts may have an impact on memory as the more experience an individual has with a certain type of event, the more difficult it is to recall specific details about one target event. Postevent suggestion can actually create retroactive interference (Cohen & Harnick, 1980; Cole & Loftus, 1987; Dale, Loftus, & Rathburn, 1987; Davies, 1989; King & Yuille, 1987; Peters, 1987). **In this case Hayley spoke about the allegations to her mother. These conversations were not adequately explored in the forensic interview.** While the above emphasizes the child's sensing, perceiving, encoding, storing, and retrieving of any possible abusive experience it is also important to note that any event, question, or test item presented to the child in the assessment process also is processed by the child. Thus, errors or biases that enter into the assessment-as-an-information-processing-event also are very relevant and must be considered. A literature review on problematic interviewing techniques follows.

### Problematic Interview Techniques

- *Interviewer bias.* Interviewer bias occurs when interviewers hold antecedent beliefs about the occurrence of certain events and therefore conduct the interview in such a way to maximize disclosures from the interviewee that are consistent with the interviewer's beliefs (Bruck & Ceci, 1999). Interviews do not explore alternative explanations for allegations (e.g., suggestion of their parents versus actually witnessing the event), do not assess events that may be inconsistent with their hypotheses (e.g., if anyone else touched the child), do not question the authenticity of the child's report (e.g., establishing the importance of telling the truth), and ignore inconsistent or bizarre evidence or interpret within the framework of the original hypotheses (Bruck & Ceci, 1999) are considered problematic. **In this case, biased interviewing techniques (e.g., "I don't know" responses, role/purpose, disclosure inhibition, threats/bribes, closed-ended/leading/repetitive questions, authority pleasing, encouraging speculation, and outside contamination), were practiced in the interview with Hayley.**
- *Emotional tone of the interview.* Interviewers of children place particular importance on building rapport with their young clients so they feel relaxed and unthreatened. They may spend time talking or playing with the child before beginning the actual interview and may spend time talking about school or after-school activities. Interview statements with the intention of building rapport and providing support can become problematic. Specifically, statements such as "we know something bad happened," "it isn't good to let people touch you," "you'll feel better once you tell," or "don't be afraid to tell" can be reliability risks as they can create an accusatory tone. In interviews where statements such as these were used, children were more likely to fabricate reports of past events,

even in cases when they had no memory of an event occurring (Ceci & Bruck, 1995). **Rapport problems could be ruled out as a source of bias in the forensic interview conducted with Hayley.**

- Leading Questions.** To obtain confirmation of their suspicions, interviewers may not ask children "open ended" questions, but resort to very specific questions which may be repeated or leading. Ceci, Ross and Toglia (1987) grouped 3-12 year olds in groups of 10-20 to listen to a story about a girl's first day of school. Pictures were used to illustrate the story (which lasted approximately 2.5 minutes). The day following, children were interviewed individually using either biased or unbiased questions. Two days after that, children were given a forced-choice recognition test by an adult involving four total pictures and were told to pick the two pictures that accompanied the story. Results indicated that all children had high percentages of correct responses to unbiased questions (84% for children aged 3-4, 87% correct for children ages 5-6 and 95% correct for children ages 7-12), however, percentage of correct responses to biased questions was much lower, with only 37% correct for 3-4 year olds, 58% correct for 5-6 year olds, 67% correct for 7-9 year olds and finally 84% correct for 10-12 year olds. Roberts (2002) sought to determine how well memory recall and the confidence of that recall are correlated as well as how this can be affected by question format (unbiased vs. misleading) and age. The study included total of 183 participants from 3 age groups, 65 children in the 8-year-old group, 61 children in the 10-year-old group and 57 adults. The children were shown a video in small groups and were individually questioned 6 weeks later. The children were questioned in either an unbiased or misleading condition. After answering each question, participants rated their confidence level on a pictorial scale of 1-5. Results indicate that under suggestive questioning, there was no differentiation in confidence ratings between correct and incorrect answers showing that children's metacognitive monitoring abilities are impaired. Results indicate that children age 3 and 4 assent to misleading abuse-analogue questions as much as 20% of the time in related studies, whereas older children do so much less often (Goodman, Bottoms, et al., 1991; Goodman, Rudy, Bottoms & Aman, 1990). **Hayley was asked leading questions.**
- Repeated Questioning.** Repetitive questions are problematic with children. They can alter a child's response rather than to increase the accuracy of the response. The child should be asked questions only one time. Repeated statements that are false can contribute to a non-veridical memory in a child. Moreover, asking a question several times when no responses are given may indicate to the child that non-responses are not sufficient and that something must be said. However, the child may be non-responding simply because of uncertainty and the non-response is then functionally accurate. If they later provide a detail, there is as much reason to be suspicious of the detail as there is to believe it. In the case of non-responses, it is imperative to assess why the child is not responding. There are a plethora of scientific research studies that have demonstrated that repetitive questioning can be extraordinarily problematic. For example, Poole and White (1991) included 4-, 6-, and 8-year olds as well as adults (N = 133) in their study who had individually witnessed an ambiguous incident (a man bursts into the experiment room in need of a pen where a woman was guiding the subject through a questionnaire – the man takes the pen from the subject, engages in a playful argument with the woman, kisses her on the cheek and then leaves). Half were interviewed immediately after and then again 1

week later, and the other half were only interviewed a week later. Inconsistencies in open-ended questions were relatively similar between *all age groups*, with the number of inconsistencies decreasing as age increased. Two years after the 1991 study, the same subjects were interviewed again about the same ambiguous event. Children were less consistent than adults across sessions on yes-no questions, less accurate in response to open-ended questions, and more likely to fabricate answers to a question (e.g., inaccurate responses included: 10-year old reported that the man came to return the pen he borrowed, another 10-year old reported that the man found the pen in the drawer, and finally an 8-year old and 1 adult reported that the man wrote with the pen during the session). Most subjects did not mention that the man grabbed the pen from them. Repeated questioning also increased the number of subjects who speculated inappropriately – some children credited action to the wrong individual (Poole & White, 1993). Hayley was asked repetitive questions in her forensic interview. Repetitive questions also occurred across conversations as Hayley had discussed the allegations with other individuals prior to the interview. This was not adequately explored in the forensic interview.

### Videotaped Interviews

A video of the forensic interview conducted with Hayley was available for review. Experts recommend interviews with children be recorded, preferably by videotape. Finally, while written summaries of the police questioning were provided, research has shown that written summaries of interviews are often inaccurate. Below please find a review of relevant scientific literature.

#### *Expert Recommendations Concerning Videotaping*

Several organizations and child sexual abuse researchers recommend that interviews with children be recorded, preferably by videotape.

Recommendation	Source
"Videotaping, when possible, can serve several useful purposes..."	American Academy of Child & Adolescent Psychiatry (1990). Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse.
"If possible, audiotape or videotape the interview."	American Academy of Child & Adolescent Psychiatry (1997). Practice Parameters for the forensic evaluation of children and adolescents who may have been sexually abused.
"Videotape, or at least audiotape, all contacts with the child from introduction to farewell."	Annon, J. (1994). Recommended guidelines for interviewing children in cases of alleged sexual abuse. <i>Issues in Child Abuse Accusations</i> , 6,
"Live and/or videotaped supervision and viewing of one's own videotapes are a useful safeguard against biased behavior." "Audiotaping is an	Bourg, W., Broderick, R. Etc. (1999). <i>A Child Interviewer's Guidebook</i> . Thousand

excellent choice for field interviewing situations and when video is unavailable or not workable for a particular child."	Oaks London New Delhi : SAGE publications
"Although one would excuse such missing data [no interview] when the allegation was first made to parents, one would hope that it would be normal procedure for the police, social workers, and therapists to have recorded all interviews with the children, if the purpose of the interview could—even remotely—be considered "forensic." If videotaping is mandated, all interviews should be recorded.	Ceci, S., & Bruck, M. (1995). <i>Jeopardy in the Courtroom</i> . Washington, DC: American Psychological Associations.
In many cases it is a good idea to make audio/video tapes of the interviews.	Gardner, R. (1995). <i>Protocols for the Sex-Abuse Evaluations</i> . New Jersey : Creative Therapeutics
In many cases it is a good idea to make audio/video tapes of the interviews.	Gardner, R. (1992). <i>True and False Accusations of Child Sex Abuse</i> . New Jersey: Creative Therapeutics
"It is proposed that video recorded interviews should take place ...1) children giving evidence in sexual offence cases, and 2) children giving evidence in cases involving an offence of violence, abduction, or neglect, child witness cases, unless the child objects, and/or there are insurmountable difficulties which prevent video recording taking place (this may include that the child has been involved in abuse involving video-recording or photography).	UK Home Office Communication Directorate (2000). Achieving best evidence in criminal proceedings: Guidance for vulnerable or intimidated witnesses, including children.
Videotaping is one of the seven reforms considered "best practice" for child sexual abuse investigations: "Many professionals consider it best practice to videotape child forensic interviews, and hundreds of jurisdictions routinely videotape interviews."	Jones, M., Cross, T. P., Walsh, W. A., & Simone, M. (2005). Criminal investigations of child abuse: The research behind "best practices". <i>Trauma, Violence, and Abuse</i> , 6, 3, 254-268.
Experts from Europe, North America, & the Middle East met at a conference in 1993 and co-signed this statement: "...It is desirable to tape record—preferably in video format—all primary investigative interviews."	Lamb, M. E. (1994). The investigation of child sexual abuse: An international, interdisciplinary consensus statement. <i>Family Law Quarterly</i> , 28, 1, 151-162.
"Eyewitness researchers generally favor videotaping all interviews (e.g., Ceci & Bruck, 1995; Lamb, 1994), a policy that has been in practice for some locations for years."	Poole, D., & Lamb, M. (1998). <i>Investigative Interviews of Children: A Guide for Helping Professionals</i> . Washington, DC: American Psychological Association.

Forensic assessment requires interviews designed to complete information from a child in the form of a tape-recorded statement. An interview must be recorded in it's entirely, preferably on videotape with equipment located unobtrusively.	Rakin, D., & Esplin, P. (1991). Statement validity assessment: interview procedures and content analysis of children's statements of sexual abuse. <i>Behavioral Assessment</i> , 13, 266-291.
"Our goal should not be to hide poor interviews, for it is important that the adequacy of the methods used to obtain children's evidence be assessed...It is in the best interest of the child reduce the number of interviews and only recordings can accomplish this goal."	Yuille, J. , Hunter, R., Joffe, R., & Zaparniuk, J. (1993). Interviewing Children in Sexual Abuse Cases. In Goodman G., & Bottoms, B. (Eds.), <i>Child Victims, Child Witness</i> (pp. 95-101). New York : The Guilford Press.

### ***Research Concerning Written Summaries of Interviews***

Another reason that interviews should be recorded is that research has shown that written summaries of interviews are often inaccurate. According to Ceci and Bruck (1994), "Written summaries of unrecorded interviews are subject to a number of distortions, especially if the interviewer is questioning a number of children and parents. If the interviewer has bias that the child was sexually abused, this can color his interpretation of what the child said or did; it is this interpretation that can appear in the summary in lieu of a factual account of what transpired" (p. 242). Several studies have demonstrated the limitations of written summaries of interviews:

- There is substantial literature to document that verbatim memory for conversations fades within seconds (Ceci & Bruck, 1994). Therefore, it is not possible to remember the forms of all questions asked and answers provided, their contexts and antecedents, and the emotional tone of participants (Ceci & Bruck, 1994).
- Bruck, Ceci, and Francoeur (1999) had mothers interview their children (ages 3-5) about a structured play activity that had occurred earlier when their mothers were absent. Three to four days later mothers reported on the conversation. Mothers accurately represented the meaning of information disclosed by their children but misrepresented conversational structure by failing to mention their own prompts and misquoted a number of statements.
- Bruck, Ceci, and Melnyk (1999) had mental health trainees interview four children about experienced events. Interviewers had difficulties remembering which children made certain statements and could not remember which details were produced spontaneously and which were prompted using leading questions.
- Warren and Woodall (1999) conducted an analogue study with experienced interviewers, who claimed to have asked few if any leading questions of five-year-old children. However, 80% of the questions they asked were specific or leading. Also, interviewers made notes after the interview and these notes included only 20% of the questions the interviewers actually asked.
- Lamb and colleagues (Lamb, Orbach, Sternberg, Hershkowitz, & Horowitz, 2003) compared audio recordings of 20 forensic interviews of alleged CSA victims to the notes made by youth investigators in Israel. They found that 25% of forensically relevant details were omitted from notes. Only .004% of the details noted by investigators were contraindicated by the audio recordings, suggesting that errors or commission were rare but errors of omission were frequent. All types of interviewer utterances (e.g., invitation, directive, option-posing, and suggestive) were under reported in interviewers' notes.



Only 44% of the informative details in the audio recordings were attributed to the correct eliciting utterance. More specifically, interviewers had a tendency to misattribute details to more open-ended than focused prompts.

### Summary & Conclusions

- **Outcry:** According to the documents reviewed, Hayley made her outcry to her mother. Ms. Bernal had questioned Hayley to determine if she had been abused by Mr. Bernal after he admitted to touching her.
  - *Regarding Hayley's outcry, it is my opinion that it was spontaneous and only may have occurred because her mother questioned her.*
  - *Additionally, the forensic interviewer failed to adequately explore this.*
- **Stake Analysis:** According to the documents reviewed, it is unclear whether someone may have had a stake in the allegations being made.
  - *It is my opinion that it is unclear whether stake may not have played a role in the allegations being made and the forensic interviewer also failed to adequately explore this.*
- **Parental/ Caregiver Suggestion:** According to the documents reviewed, there may have been parental or caregiver suggestion in this case. Specifically, Hayley spoke about the allegations with her mother prior to the forensic interview.
  - *It is my opinion that there may have been parental or caregiver suggestion in this case and this was not adequately explored in the forensic interview.*
- **Outside Contamination:** According to the documents reviewed, the potential for outside contamination to have occurred is significant as Hayley discussed the allegations with her mother prior to the forensic interview.
  - *It is my opinion that outside contamination has the potential to impact children's statements and in this case, there appears to be a significant potential for outside contamination to have occurred especially given that Hayley is at an age at which suggestibility is very problematic.*
  - *Additionally, it is my opinion that this was not explored in the forensic interview.*
- **Amount of Details Provided:** According to the documents reviewed, amount of details provided was normative for her age..
  - *In addition, it is important to note that most details were elicited through closed-ended rather than open-ended questioning. This is particularly problematic because Hayley is at the age where she is suggestible.*



- **Problematic Logistical Details:** According to the documents reviewed, logistically problematic details may have been present in the allegation. Specifically, Hayley reported that her brother was home during the abuse. Abusers generally seclude children as to not get caught. Further, abuse is usually traumatic to a child and they will describe symptoms of trauma after the abuse such as avoidance of the abuser, fear, nightmares, inability to relax, and dysphoric emotion. The interviewer did not adequately explore and resolve problematic logistical details.

- *It is my opinion that problematic logistical details may have been a factor in the allegations made.*
- *It is also my opinion that these potentially problematic were not adequately explored and resolved in the forensic interview.*

- **Suggestive Interviewing Techniques:** There were multiple problems in the interview that was conducted with Hayley. Please see the evaluation of the interview for specifics. It is not clear if the interviewer followed an evidence-based interview protocol. Another concern is that the interviewing techniques do not have well-established psychometrics; specifically, their accuracy is unknown. The interviewer also used anatomical diagrams, which are not supported by the research as aids in forensic interviewing. Additionally, there is no basis to understand the protocol's error rates, including the sensitivity (the ability to detect abuse if abuse is present) or specificity (ability to detect nonabuse, if abuse is actually absent). Questions remain regarding: 1) an attempt to understand problematic details; 2) an attempt to understand outcry; 3) an attempt to understand parental suggestion and outside contamination. Finally, this interview appeared to have a confirmatory bias: there were no questions aimed at understanding whether false memories and suggestibility or lying could be involved in the case. It is not apparent that any other alternative hypotheses were explored.

- *It is my opinion that the scientific literature shows that suggestive interviewing techniques can have a distorting effect of children's memory of these ages such that they can form false memories.*
- *Another concern is that the interviewing techniques used do not have well-established psychometrics; specifically, their accuracy is unknown. There is no basis to understand their error rates, including sensitivity (its ability to detect abuse if abuse is present) or specificity (its ability to detect nonabuse, if abuse is actually absent).*
- *It is also unclear whether any other alternative hypotheses were explored, or whether questions were asked to determine whether false memories and suggestibility or lying were involved in the case.*
- *The interviewer also used anatomical diagrams, which are not supported by the research as aids in forensic interviewing and can be quite suggestive with young children.*

- **Memory: Encoding, Storage, & Retrieval:** Because disclosure of sexual abuse involves a past event and because children are questioned about the past event, the child's memory and how the child processes information is very important.

- *It is my opinion that memory functions should be considered when examining Hayley's allegations considering that:*
  - *It is my opinion that Hayley had allegedly discussed the allegations with her mother..*
  - *These were not explored in the forensic interview.*
- **Personological Details:** According to the documents reviewed, there were no personological details present in the allegations.
  - *It is my opinion that this should be taken into consideration when examining Hayley's allegations.*
  - *It is also my opinion that this was not explored by the interviewer.*
- **Interviewer Training.** *It is my opinion that it is unclear whether the interviewer was trained in an evidence-based forensic interview, which protocols were the focus of training, and whether there are fidelity checks for compliance.*

William O'Donohue, Ph.D.  
Licensed Psychologist

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Attorney for Thomas Jason Bernal

FILED

2020 SEP 23 AM 10:34

CLERK OF DISTRICT COURT  
THIRD JUDICIAL DISTRICT

*Yindsey McEl...*

**IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR THE COUNTY OF LYON**

THE STATE OF NEVADA,

Plaintiff,

Case No. 20-CR-00099

vs.

Dept. No. I

THOMAS JASON BERNAL,

Defendant.

**OPPOSITION TO STATE'S MOTION TO EXCLUDE OR LIMIT**  
**DEFENSE EXPERT WITNESS**

COMES NOW, Defendant, THOMAS JASON BERNAL (hereinafter "Mr. Bernal"), by and through his attorney, LEANN E. SCHUMANN, ESQ. of JESSE KALTER LAW, P.C., and hereby opposes the State's Motion to Exclude or Limit Defense Expert Witness, filed with this Court on or about September 21, 2020. This Opposition is made and based upon the following Points and Authorities and upon all pleadings and papers on file herein.

**POINTS AND AUTHORITIES**

a. The State's Motion should be denied because its untimely.

All pretrial motions were supposed to be filed by each side on or before September 7, 2020. We are nearly twenty (20) days past the pretrial deadline. The trial is scheduled in less than

1 six (6) weeks. The State has had a copy of Dr. O'Donohue's report since September 14, 2020  
2 (and is also well aware of his areas of expertise) and has had ample time in which to file its  
3 Motion. Instead, the State is waiting until the eve of the Motion Hearing to file its Motion  
4 attempting to limit Mr. Bernal's defense expert. Based upon the fact that the State's Motion is  
5 untimely, it should be denied.  
6

7 b. Dr. O'Donohue's testimony is proper.

8 Even if the Court considers the State's Motion it should still be denied based upon the  
9 merits. Three requirements must be met for expert testimony to be admissible at trial: "(1) [the  
10 expert] must be qualified in an area of 'scientific, technical or other specialized knowledge' (the  
11 qualification requirement); (2) his or her specialized knowledge must 'assist the triers of fact to  
12 understand the evidence or to determine a fact in issue' (the assistance requirement); and (3) his  
13 or her testimony must be limited 'to matters within the scope of [his or her specialized]  
14 knowledge' (the limited scope requirement)." Perez v. State, 129 Nev. 850, 856 (2013) citing  
15 Hallmark v. Eldridge, 124 Nev. 492, 498 (2008) (quoting **NRS 50.275**); see also Higgs v. State,  
16 126 Nev. 1, 18 (2010). Dr. O'Donohue meets all three (3) requirements in this case.  
17  
18

19 First, Dr. O'Donohue qualifies as an expert, if not "the expert", in his respective field.  
20 Several factors are used to determine whether "a witness 'is qualified in an area of scientific,  
21 technical, or other specialized knowledge'" including "(1) formal schooling and academic  
22 degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized  
23 training." Perez at 856-57 citing Hallmark at 499. Dr. O'Donohue specializes in Mental Health  
24 service delivery, integrated care, human sexuality (sexual harassment; assessment and treatment  
25 of victims and pedophiles), forensic psychology, management and administration, behavior  
26 therapy. Currently, he is a professor at the University of Nevada Reno and has testified hundreds  
27  
28

1 of times as an expert in court proceedings. Within its Motion, the State does not contest Dr.  
2 O'Donohue's qualifications as an expert.

3 Second, Dr. O'Donohue's testimony will provide assistance to the jurors. For testimony  
4 to provide assistance it must be "relevant and the product of reliable methodology." Perez at 858  
5 citing Hallmark at 500. Relevant evidence makes the existence of any fact more or less probable.  
6 Id. Dr. O'Donohue's testimony will assist the jurors to understand the forensic interview issues  
7 in this case, including procedures that should have been followed but were not and outstanding  
8 questions that were never explored by the forensic interviewer. Dr. O'Donohue's observations  
9 are relevant to the case, i.e. whether the forensic interview was conducted correctly or not and  
10 based upon reliable methodology which is cited to in his report. He also addresses "best practices"  
11 which should be utilized by forensic interviews to improve accuracy. Further, all of Dr.  
12 O'Donohue's opinions are supported by an approved scientific method in his field which is  
13 referenced throughout his report.

14 Third, Dr. O'Donohue's testimony will be limited to his specialized knowledge, i.e. issues  
15 with the forensic interview. Dr. O'Donohue will not be testifying to any fact not within his  
16 specialized knowledge. Dr. O'Donohue makes it clear in his report that he is only giving an  
17 opinion about the forensic interview performed on H.S. Dr. O'Donohue points out the  
18 inconsistencies/issues that should have been further explored by the forensic interviewer but were  
19 not. Report, pp. 50-52. It is proper for Dr. O'Donohue to point out issues with the forensic  
20 interview based upon his expertise especially if the State calls the forensic interviewer.

21 The State cites to Lickey vs. State within its Motion. 108 Nev. 191, 196 (1992). Within  
22 Lickey, the State's psychologist testified positively to the alleged victim's veracity as well as her  
23 mental condition being consistent "with someone who had been sexually abused." Id. The Court  
24

1 cited to **NRS 50.345** which allows a treating healthcare professional to testify that “the victim’s  
2 behavior or condition is consistent with that of a sexual assault victim” but indicated that the  
3 State’s psychologist testified beyond what was permitted under the statute. Id.

4  
5 This case is entirely distinguishable from Lickey. Nowhere in his report does Dr.  
6 O’Donohue give an opinion as to whether H.S. is being truthful in this case. In fact, to the  
7 contrary, Dr. O’Donohue provides a disclaimer at the very beginning of his report that he will  
8 not make statements about whether alleged events did or did not occur. Report, pp. 1. Dr.  
9 O’Donohue’s limited testimony will not encroach upon the triers of fact determination(s) in this  
10 case and it does not confuse issues for the jury.

11  
12 The State’s arguments go to the weight of the evidence, not admissibility. The State will  
13 have the opportunity to rebut Dr. O’Donohue’s testimony through cross-examination and with  
14 the State’s expert, Dr. Piasecki, whose report has not been disclosed yet. According to the State,  
15 they can call an expert witness, but the Defense should not be able too. Mr. Bernal is facing life  
16 in prison if convicted of the charges in this case. He is entitled to present a defense which includes  
17 Dr. O’Donohue’s testimony. The same credibility determination applies to H.S. The jury will  
18 ultimately determine which witnesses are credible and render a verdict based upon those  
19 conclusions.  
20

21 It’s unreasonable and contradictory for the State to say that the Defense can just cross-  
22 examine the State’s witnesses to make its case at trial - instead of having Dr. O’Donohue testify  
23 - but in the same breath say that the State’s cross-examination of Dr. O’Donohue is not sufficient,  
24 so his testimony should be excluded.  
25

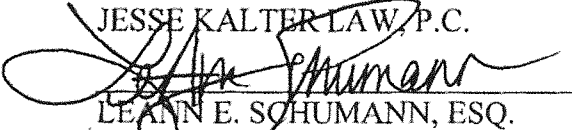
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1 Accordingly, the State's Motion should be denied as it is untimely and lacks merit.

2 RESPECTFULLY SUBMITTED this 24 day of September 2020.

3 JESSE KALTER LAW, P.C.

4   
LEANNE E. SCHUMANN, ESQ.

5 Nevada Bar No. 12862

6 1150 Selmi Drive, Ste 505

7 Reno, NV 89512

8 775.331.3888 (phone)

Attorney for JACOB YOUNG

9 **AFFIRMATION**

10 Pursuant to NRS 239B.030

11 The undersigned does hereby affirm that the preceding document does not contain the  
12 social security number of any person.

13 DATED this 24 day of September 2020.

14   
LEANNE E. SCHUMANN, ESQ.

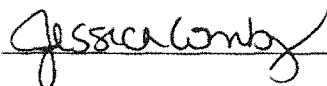
16 ATTORNEY FOR THOMAS BERNAL

17 **CERTIFICATE OF SERVICE**

18 Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify that I am an  
19 employee of JESSE KALTER LAW, P.C., and that on this date I sent via U.S. Mail, at Reno,  
20 Nevada, a true copy of the forgoing document, to:

21  
22  
23 Lyon County District Attorney  
24 ATTN: Matthew Merrill, Esq.  
25 31 South Main Street  
26 Yerington, NV 89447

27 Dated this 25 day of September 2020.

28 

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FILED

Case No. 20-CR-00099

2020 OCT 19 AM 10:40

Dept No. I

TANYA SCORINE  
COURT ADMINISTRATOR  
THIRD JUDICIAL DISTRICT

*Andrea Anderson* JURY

**IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF LYON**

THE STATE OF NEVADA,

Plaintiff,

vs.

THOMAS JASON BERNAL,

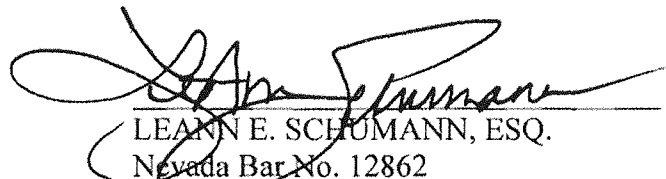
Defendant.

**REPLY IN SUPPORT OF DEFENSE PROPOSED INSTRUCTION**

COMES NOW, THOMAS JASON BERNAL (hereinafter "Mr. Bernal"), by and through his attorneys, JESSE KALTER LAW, P.C., hereby replies to the State's Opposition to Defense Proposed Instruction, filed on or about October 15, 2020. This Reply is made and based upon the following Points and Authorities.

DATED this 16 day of October, 2020.

JESSE KALTER LAW, P.C.



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1 POINTS AND AUTHORITIES

2 Defense Proposed Instruction - "child victims of sexual assault are required to testify with  
3 at least some particularity regarding the assault in order to uphold a conviction" - is a correct  
4 summary of applicable caselaw. The language for the proposed instruction comes directly from  
5 Bradley v. State (109 Nev. 1096 (Nev. 1993)) citing LaPierre v. State. (108 Nev. 528 (Nev. 1992))  
6 – "we have previously required child victims of sexual assault to testify with at least some  
7 particularly regarding the assault in order to uphold a conviction." Within LaPierre, the Nevada  
8 Supreme Court held:  
9

10 We have repeatedly held that the testimony of a sexual assault victim alone is  
11 sufficient to uphold a conviction. *See, e.g., Deeds v. State*, 97 Nev. 216, 217, 626  
12 P.2d 271, 272 (1981); *Henderson v. State*, 95 Nev. 324, 326, 594 P.2d 712, 713  
13 (1979). However, the victim must testify with *some* particularity regarding the  
14 incident in order to uphold the charge. We are cognizant that child victims are often  
15 unable to articulate specific times of events and are oftentimes reluctant to report  
16 the abuse to anyone until quite some time after the incident. *Cunningham v. State*,  
17 100 Nev. 396, 400, 683 P.2d 500, 502 (1984). We also understand that it is difficult  
18 for a child victim to recall exact instances when the abuse occurs repeatedly over a  
19 period of time. We do not require that the victim specify exact numbers of incidents,  
20 but there must be some reliable indicia that the number of acts charged actually  
21 occurred.

22 LaPierre at 531. Accordingly, the Nevada Supreme Court has established that "child victims of  
23 sexual assault are required to testify with at least some particularity regarding the assault in order  
24

25 ////

26 ////

27 ////

28 ////

////

////

1 to uphold a conviction." Accordingly, Mr. Bernal's proposed jury instruction should be included  
2 in this case.

3 RESPECTFULLY SUBMITTED this 16 day of October, 2020.

4 JESSE KALTER LAW, P.C.

5  
6  
7 

8 LEANN E. SCHUMANN, ESQ.

9 Nevada Bar No. 12862

10 1150 Selmi Drive, Suite 505

11 Reno, NV 89512

12 Attorney for THOMAS JASON BERNAL

13  
14  
15 **AFFIRMATION**

16 Pursuant to NRS 239B.030

17 The undersigned does hereby affirm that the preceding document does not contain the  
18 social security number of any person.

19 DATED this 16 day of October 2020.

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23 

24 LEANN E. SCHUMANN, ESQ.

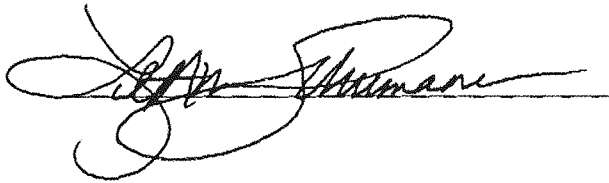
25 ATTORNEY FOR THOMAS BERNAL

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b), I certify that I am an employee of JESSE KALTER LAW, P.C.  
3 and that on this date I sent via first class mail, a true copy of the foregoing document addressed to  
4

5 Lyon County District Attorney's Office  
6 ATTN: Matthew Merrill, Esq.  
7 31 South Main Street  
8 Yerington, NV 89447

9 DATED this 16 day of October, 2020.

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1 CASE NO. 20-CR-00099

2 DEPT. I

3  
4 THE THIRD JUDICIAL DISTRICT COURT - THE STATE OF NEVADA

5 IN AND FOR THE COUNTY OF LYON

6 THE HONORABLE JOHN P. SCHLEGELMILCH, DISTRICT JUDGE,

7 PRESIDING

8  
9  
10 THE STATE OF NEVADA,

11 PLAINTIFF,

12 v.

13 THOMAS J. BERNAL,

14 DEFENDANT.  
----- /

15  
16  
17 TRANSCRIPT OF PROCEEDINGS

18 PRETRIAL HEARING

19 SEPTEMBER 28, 2020

20 COURTHOUSE

21 YERINGTON, NEVADA

22  
23  
24 REPORTED BY:

KATHY TERHUNE, CCR 209

1 APPEARANCES:

2 FOR THE STATE:

MATT MERRILL  
Deputy District Attorney  
Courthouse  
Yerington, NV. 89447

5 DEFENDANT PRESENT IN COURT.

6 FOR THE DEFENDANT:

JESSE B. KALTER, ESQ.  
LEANN SCHUMANN, ESQ.  
Jesse Kalter Law  
1150 Selmi Drive, #505  
Reno, NV 89512

9 NO OTHER APPEARANCES.

12 \* \* \* \* \*

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INDEX PAGE

STATE'S WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
MICHAEL MESSMANN	5	36	48	50
MARTY DUES	51	61	71	
PATRICIA BERNAL	72	86		
HS	94	112	127	

EXHIBITS

	Marked	Admitted
State's Exhibit 1 -----	22	
2 -----		78
3 -----		104

1 SEPTEMBER 28, 2020; 2:00 P.M.; YERINGTON, NEVADA.

3 -o0o-

4 TRANSCRIPT OF PROCEEDINGS

5  
6 THE COURT: All right. So, this is  
7 20-CR-00099, State of Nevada versus Bernal. This time  
8 set for motions and pretrial. The Court has reviewed  
9 the motions that were filed in this particular matter.

10 So, which ones do you want to start with first?

11 MR. MERRILL: Your Honor, the State would like  
12 to start with the suppression of the statements.

13 MS. SCHUMANN: That works for us, Your Honor.

14 THE COURT REPORTER: What did you say?

15 MS. SCHUMANN: That works for us.

16 THE COURT: That works for you?

17 MS. SCHUMANN: Yes, Your Honor.

18 THE COURT: Which basically it's -- the State  
19 filed a motion to admit them, and they filed a motion  
20 to suppress them. So...

21 MR. MERRILL: Right. I beat her to the --

22 THE COURT: To the punch, so to speak.

23 MR. MERRILL: -- punch.

24 MS. SCHUMANN: That happens occasionally.

1 THE COURT: What?

2 MS. SCHUMANN: That happens occasionally.

3 THE COURT: All right. So, okay. Might as  
4 well start there. So, go ahead. Who wants to argue  
5 first?

6 MR. MERRILL: Your Honor, we have --

7 THE COURT: Because you have two counter  
8 motions. You have a motion to admit and a motion to  
9 suppress.

10 MR. MERRILL: The State has Detective Messman  
11 that we'd like to put on prior to argument. So...

12 THE COURT: Okay.

13 MR. MERRILL: Okay. Let me go get him.

14 THE COURT: Yeah, you can go.

15 That's what we're here for.

16 (Witness sworn.)

17 THE COURT: Detective, have a seat over there,  
18 please.

19

20 MICHAEL MESSMANN,  
21 called as a witness herein by the State,  
22 having been first duly sworn, was examined  
23 and testified as follows:

24



DIRECT EXAMINATION

BY MR. MERRILL:

Q Good afternoon.

A Good afternoon.

Q Please state your full name, and spell the last name for the record.

A My name is Michael Messman. Last name is M-E-S-S-M-A-N-N.

Q And where do you work?

A Lyon County Sheriff's Office.

Q And how long have you -- how long have you been with the Lyon County Sheriff's Office?

A Short answer is a little over 12 years.

Q Okay. What's your current position?

A I'm a detective in Major Crimes.

Q And how long have you been detective for?

A Three and a half years.

Q And what do your job duties involve?

A Primarily in Major Crimes we investigate crimes against persons. So, primarily sexual assaults, batteries with deadly weapon, attempted homicides, and homicides.

Q And did you come to investigate a case regarding Thomas Bernal?

1           A       I did.

2           Q       And how did you get involved?

3           A       So, patrol usually responds initially. And so,  
4       at some point after -- some point, honestly, the report  
5       is sent to, like, my supervisors, who eventually send  
6       it to me. So, that's how I became involved in this  
7       investigation. Because it was a case that was  
8       forwarded to me from one of my supervisors.

9           Q       Okay. Once you receive a case, what did you  
10       begin to do?

11          A       So, I review -- essentially, I review patrol's  
12       report and the initial claims contained in that report.  
13       And then once I determine that there is need for  
14       further investigation, in this case I contacted the  
15       victim's mother to set up a child forensic interview.

16          Q       Okay. And do you recall the victim's name?

17          A       HS.

18          Q       Okay. And the mother that you contacted, do  
19       you recall her name?

20          A       Her name is Patricia, or she goes by Patty. I  
21       think her name at the time, last name at the time was  
22       Bernal.

23          Q       So, you contacted Patricia Bernal. And how  
24       did -- what happened after that point?

1           A       So, I contacted her, and I explained that I  
2       would like to schedule a child forensic interview of  
3       HS, to which she agreed. And so, we scheduled a  
4       forensic interview to occur at the Child Advocacy  
5       Center which is located in Reno, Nevada.

6           Q       And do you recall approximately when that was?

7           A       I don't recall specifically what date that was,  
8       no.

9           Q       Was it towards the end of 2019?

10          A       Yeah, I believe -- it was -- I believe, just  
11       off my recollection, it was sometime in September of  
12       2019, if I recall accurately.

13          Q       Okay. Now, after the interview at -- in  
14       Reno --

15          A       Uh-hum.

16          Q       -- were you part of that interview at all?

17          A       Well, yeah. So, I was there. I observed the  
18       interview from a separate room. But basically, via a  
19       closed circuit television system.

20          Q       Did you have any involvement with interviewing  
21       HS or anyone else at that point in Reno on that day?

22          A       I -- at the conclusion of HS's interview, I did  
23       speak with Patricia briefly after the interview had  
24       finished in a -- in a separate room altogether. It was

1 just -- I believe it was just Patricia and I that  
2 spoke. And, like, that probably conversation was ten  
3 minutes or less.

4 Q Okay. Now, did you have an opportunity to  
5 speak with Thomas Bernal?

6 A Eventually, yes. After I essentially concluded  
7 other parts of the investigation, then yes, I did speak  
8 with him.

9 Q Okay. At what point did you decide that you  
10 wanted to speak with Thomas Bernal?

11 A So, typically the suspects are always the last  
12 person. So, after I had determined that there was  
13 enough veracity in HS's statements, I determined that  
14 it would be appropriate to speak with Thomas.

15 Q Okay. And how did you contact the defendant?

16 A I contacted him by phone.

17 Q And tell me how that interaction went.

18 A So, I explained to him that I wished to speak  
19 with him. And if I recall accurately, I had asked if  
20 he could meet me on a particular day, to which he said  
21 he wasn't able to, but he suggested another day, to  
22 which we both agreed that -- to meet at the Silver  
23 Springs substation.

24 Q Okay. And was that October 21st of 2019?

1           A     Yes.

2           Q     How long did your phone call last with the  
3 defendant?

4           A     The initial phone call setting this up was  
5 probably less than five minutes.

6           Q     Did you make any threats to him on that phone  
7 call?

8           A     No.

9           Q     Was it a voluntary request for him to come  
10 down?

11          A     Yes.

12          Q     Did you have any other phone contact with him  
13 or any other contact with him prior to the interview?

14          A     I don't believe so, no.

15          Q     Okay. Now, what time was that interview  
16 scheduled for?

17          A     I believe it was scheduled for 10:00 a.m.

18          Q     And before we get into the interview, can you  
19 describe the set up of the place where you met with the  
20 defendant?

21          A     The Silver Springs substation?

22          Q     Yes, please. If you could describe the layout  
23 of the Silver Springs substation?

24          A     Sure. So, there's a public entrance at which

1     there's a small lobby area. And when you enter that  
2     door, there's two different people you can speak to.  
3     One is the -- essentially, the admin personnel for  
4     Social Services side because we share the building with  
5     social -- Lyon County Social Services. The other  
6     person is the sheriff's office personnel.

7             So, when people come in, they basically --  
8     depending on who they're there to see, they will speak  
9     to one of them and advise them of their purpose of  
10    their visit. So, after that lobby area, there's a  
11    secure door, and that you enter into basically all of  
12    the Social Service's side. And there's numerous  
13    offices in there. And then you'd have to travel down a  
14    hallway to another secured door, which would gain you  
15    access to this sheriff's office side of the building.

16            On that side of the building there's some  
17    holding cells. There's the detective's office.  
18    There's a narcotics detective's office. There's a  
19    squad room. There's our interview room. And then  
20    there's the detective sergeant's office and the  
21    detective lieutenant's office all located in that side  
22    of the building.

23            Q     Okay. Now, on that side of the building, the  
24    sheriff's side of the building, are there exits to the

1 outside from there?

2 A There is -- so, there is. There is one exit  
3 that takes you into the rear parking lot area. That is  
4 a secured parking area. So, there's a gate access code  
5 required to open that particular gate. And then  
6 there's always the exit that would take you back to the  
7 Social Service's side. So, when you exit -- from that  
8 side of the building, you can go through any of those  
9 doors without any sort of access code. Those are all,  
10 you just push through those doors to exit.

11 Q Okay. So, you don't need a key or anything  
12 else to get back through exits at the front of the  
13 building?

14 A No. No, you just have to basically push  
15 your -- it's similar to these doors here that are in  
16 the Court. You just push the handle and let yourself  
17 through.

18 Q Okay. Now, let's go back to October 21st of  
19 2019. Did Mr. Bernal, did he arrive at the scheduled  
20 time?

21 A I believe he was a little bit early, actually.  
22 I think he was about ten minutes early, but yes.

23 Q Okay. And tell me how you were informed that  
24 he arrived.

1           A       The Silver Springs, the admin support personnel  
2 notified me by telephone that he was there.

3           Q       And what did you do in response?

4           A       I advised her to notify him that I'd be able to  
5 greet him. So, after probably a couple of minutes, I  
6 went to that front lobby area that I described  
7 previously and greeted Mr. Bernal in that lobby area.

8           MR. MERRILL: And, Judge, are you looking at  
9 the audience?

10          THE COURT: Uh-hum.

11          MR. MERRILL: Just for -- this is -- Ma'am,  
12 what is your name?

13          THE ADVOCATE: My name is Cray Waller  
14 (phonetic). I'm the advocate with the Advocates to End  
15 Domestic Violence.

16          THE COURT: Okay. I was -- I was just  
17 wondering. I was wondering if you're a witness.  
18 That's all.

19          THE ADVOCATE: No, sir. I'm here just to be  
20 here for the victim's family.

21          THE COURT: Fair enough. Thank you.

22 BY MR. MERRILL:

23          Q       Thank you, Detective. Sorry.

24                 So, he was out in the waiting room, and you



1       came out; is that correct?

2           A       Correct.

3           Q       Okay. Do you recall where he was at when you  
4       first came out to the waiting room?

5           A       Not with specificity. I mean, he was somewhere  
6       in that lobby area, because I had to open a door to  
7       physically greet him.

8           Q       I see. And to get into that lobby area do you  
9       need a key card or anything of that nature?

10          A       From the side that he was on you'd need the  
11       access code, yes. But from my side, no. Because you  
12       could just turn the doorhandle and open the door.

13          Q       Okay. But if someone comes in from the parking  
14       lot at the Silver Springs substation can the person  
15       just open the front door?

16          A       The exterior front door, yes. But the door  
17       that I opened to greet him, no.

18          Q       Okay. When you met him, tell me how that  
19       interaction went.

20          A       I pretty much introduce myself. He introduced  
21       himself. And I asked him to follow me back to the  
22       basically our side of the building.

23          Q       And was the defendant with anyone else at that  
24       point?

1           A     No, he was not.

2           Q     Okay. Were there any officers or any deputies  
3 or any other law enforcement that were standing there  
4 besides yourself?

5           A     No. I'm pretty sure I was by myself.

6           Q     All right. So, describe you and the defendant  
7 walking back to the interview room.

8           A     So, as we walked back, tell you honestly, I  
9 believe I asked him for my safety and his if I could  
10 just basically do a quick pat search just to make sure  
11 he wasn't in possession of any weapons, which he agreed  
12 to. So, after I did just a real brief search of his  
13 person for any weapons, then I opened the door using  
14 the access code to get onto our side of the building  
15 and directed him to where our interview room is.

16          Q     Did you place cuffs on him at that point?

17          A     No, I did not.

18          Q     Okay. Any sort of restraints or anything else  
19 that you put on Mr. Bernal as you walked back to the  
20 interview room?

21          A     No.

22          Q     Did you remove anything from Mr. Bernal's  
23 possession prior to moving -- going back to the  
24 interview room?

1           A       I didn't -- I think he maybe handed me some of  
2 his personal stuff during that pat search, but I handed  
3 it back. I didn't take anything from him during that  
4 pat search. If there was any of his possessions that I  
5 had control of, it was just for a brief moment in time.  
6 Which I handed him all of his stuff back before I went  
7 back to the interview room.

8           Q       Okay. So, you didn't have possession of his  
9 cell phone or keys or any --

10          A       No.

11          Q       -- other items?

12          A       No. Absolutely not.

13          Q       Okay. So, tell me about this interview room.  
14 How is the layout of that room?

15          A       So, in that room there's a table and usually  
16 anywhere between three and four plastic chairs. The  
17 table would have been up against -- from the entrance,  
18 it would have been up against the back wall. And then  
19 one chair would have been roughly towards the corner of  
20 one of the back corners, and then two chairs would have  
21 been placed in front of the table.

22          Q       Okay. Is this room -- tell me about how the  
23 lighting is in the room.

24          A       Oh, there's probably, I think, a couple of like

1 fluorescent type lights in the room. So, it's --  
2 there's no windows or anything like that in the room.  
3 It's just the door to come in and some fluorescent  
4 lighting to light the room itself. And then the  
5 furniture that I've already described.

6 Q Okay. And was there anyone else with you that  
7 assisted in the interview?

8 A Yes. Detective Marty Dues assisted me with  
9 that -- with this interview.

10 Q Now, tell me about what you were wearing during  
11 this interview.

12 A I believe I was just wearing like dress type  
13 pants and a button, colored shirt and a tie.

14 Q Okay. Do you have a firearm on you?

15 A Yes.

16 Q At that time?

17 A Yeah.

18 Q What about Detective Dues, what is he wearing,  
19 if you recall?

20 A I -- he would have been wearing something  
21 similar as far as professional dress with a tie. I  
22 don't know if he -- Detective Dues wears a shoulder  
23 harness, so sometimes he's wearing them during  
24 interviews, sometimes he's not. So, I don't -- I don't

1 recall if he was wearing his firearm at that time or  
2 not.

3 Q Now, tell me how the interview began and how  
4 you approached the interview.

5 A So, I asked -- I asked Mr. Bernal some just  
6 basically general type questions. I think even before  
7 that I had asked him about any need of any refreshments  
8 or anything like that. And then after just the general  
9 type questions, I'd asked him if he was aware of his  
10 reason for me asking him to be there.

11 Q Okay. Did you read Miranda to Mr. Bernal?

12 A I did not. I -- so, at the beginning of this  
13 interview I informed him that he was free to leave, and  
14 the door was closed merely for our privacy, and that he  
15 could leave at any -- at any point.

16 Q Okay. Did he respond to that?

17 A He acknowledged that he understood my  
18 statements.

19 MR. MERRILL: And Your Honor, I believe it's  
20 stipulation for the purposes of this hearing, but we'd  
21 like to play video from the interview room showing this  
22 encounter.

23 MS. SCHUMANN: We have no objection, Your  
24 Honor.

1 THE COURT: Okay.

2 (Video played.)

3 MR. MERRILL: You can stop right there.

4 BY MR. MERRILL:

5 Q Detective Messmann, I'm showing you video  
6 beginning at 8:55 a.m. Do you see that there in the  
7 top left-hand corner? Timestamp?

8 A Yeah, so --

9 THE COURT: There it is small.

10 THE WITNESS: -- this is --

11 THE COURT: Turn his screen on. He's going to  
12 testify to a video, you got to make sure all these  
13 things are on.

14 THE WITNESS: Okay.

15 BY MR. MERRILL:

16 Q Do you see that there?

17 A Yes, I do.

18 Q Okay. What are we looking at here?

19 A So, this is the interview room. As I was  
20 describing, the table is pushed up against that back  
21 wall. This is the doorway. And then currently there's  
22 four chairs. And actually they aren't plastic. They  
23 do have a cloth cushion to them, so. But essentially  
24 more or less this is the interview room just prior to

1 us beginning the interview.

2 Q Okay. Thank you.

3 I'll continue playing this.

4 (Video played.)

5 THE COURT: Pause it. Okay. So, do you have  
6 your volume on too?

7 MR. MERRILL: My -- it's not playing out of the  
8 speakers on the computer. It's not --

9 THE COURT: So, what's all the echo? Why is it  
10 playing twice?

11 THE CLERK: The HDMI cable.

12 MR. MERRILL: I don't know. We played it at  
13 the office, and it was no echo. So, I can unhook this  
14 and just play it for the Court on the stand.

15 THE COURT: All right. So, it's just going  
16 through the system?

17 MR. MERRILL: Yeah, it's just going -- I mean,  
18 I can -- I'll turn it off and just double check here.

19 THE COURT: All right.

20 MR. MERRILL: And there's no --

21 THE COURT: There's no volume? So, it's  
22 picking up a mic somewhere. So, the question is, where  
23 is it picking up a mic to echo it back into the  
24 courtroom?

1 MR. MERRILL: Is it mine?

2 THE CLERK: Probably.

3 MR. MERRILL: So, it's not coming out of the  
4 speakers here, but I can turn this off while we're --

5 THE COURT: Yeah. Then you have to hold it.  
6 And then it's picking up a mic, and it's echoing back.  
7 So, you're hooked directly to the cart?

8 MR. MERRILL: Yes.

9 THE COURT: Why don't you hook into the...

10 MR. MERRILL: We tried to hook in. It  
11 didn't -- it wasn't working before. That's why we  
12 ended up hooking straight up to the cart. But  
13 Ms. Schumann had indicated that she would -- if the  
14 Court doesn't want to hear this, or is unable to hear  
15 it rather, we can just submit.

16 THE COURT: Well, I can hear it, but the echo  
17 is falling over the statements.

18 MR. MERRILL: Right.

19 THE COURT: So, I don't know why it's echoing  
20 like that. It shouldn't be. It should just be coming  
21 through the system. So, it's picking up a mic  
22 somewhere and pushing back through the system, so. And  
23 doubling up somehow. So, I don't know what's going on  
24 because I've never had that issue ever before. So --



1 MR. MERRILL: I don't know. I can just submit  
2 the thumb drive with all the videos on it that we'll  
3 talk about with Detective Messmann while he's on the  
4 stand, and it appears that counsel will stipulate to  
5 the admission of the videos.

6 MS. SCHUMANN: That's correct, Your Honor.

7 THE COURT: Okay. Yeah, I don't -- I just  
8 don't know what's going on.

9 MR. MERRILL: Yeah.

10 THE COURT: That's going to have to get figured  
11 out.

12 Okay. Mark this as State's 1, which is the  
13 video interview.

14 (Whereupon, State's Exhibit 1 was marked for  
15 identification.)

16 THE COURT: So, you're going to have to figure  
17 out what's going on with the system, why it's echoing  
18 back like that. Because it shouldn't be.

19 MR. MERRILL: All right. Thank you. We'll  
20 continue, Your Honor.

21 BY MR. MERRILL:

22 Q Detective Messmann, you indicated that you did  
23 talk to him, and you informed him that he was free to  
24 leave?

1           A     Yes.

2           Q     Is that correct?

3           A     Yes.

4           Q     Okay. And in response to that, he indicated  
5     that he understood; is that correct?

6           A     Yes.

7           Q     Okay. Now, tell me how you began the  
8     conversation about the accusations and why he was  
9     there.

10          A     I'd asked -- I'd asked him, and he responded  
11     that to his understanding he was there to speak to me  
12     about the accusations of molestation of HS by him.

13          Q     Okay. And as you got that out of the way, how  
14     did the rest of the interview go?

15          A     Essentially there was a lengthy conversation.  
16     Initially, Mr. Bernal denied the accusation. And then  
17     eventually at the end of the interview, he admitted to  
18     essentially penetrating HS's vagina with his finger on  
19     one occasion is what he explained to me.

20          Q     Okay. So, how long did this interview last  
21     for?

22          A     Like four and a half hours approximately.

23          Q     And during that time did he ever get up and  
24     want to take a break?

1           A       Yeah, I -- from my recollection, it was three  
2       to four times that he requested to use the restroom.  
3       And every -- each and every time he made that request,  
4       he was allowed to do so.

5           Q       Was he ever placed into cuffs at all during  
6       that interview?

7           A       No. During the course of interview? No, he  
8       was not until the very, very end of the interview when  
9       I informed him he was under arrest. But during the  
10      course of all this other four and a half hours of the  
11      interview, no, he was not.

12          Q       And do you recall how many breaks Mr. Bernal  
13      requested?

14          A       I believe it was three to four over the course  
15      of that time, the entire time.

16          Q       And what type of breaks were those four?

17          A       Restroom breaks. He was requesting to use the  
18      restroom. Because there was -- early on in the  
19      interview I know we had shared some pastries with  
20      Mr. Bernal. And then I think there was some -- a  
21      couple of bottles of water that were drank. So, it was  
22      kind of, to me, normal that he was requesting to use  
23      the restroom, especially after we'd eaten and drank  
24      some fluids, so.

1           Q     Now, where's the bathroom located in relation  
2     to this interview room?

3           A     So, it's back across on the Social Services  
4     side of the building. So, which is -- so, the  
5     bathrooms are somewhat located across from -- it's kind  
6     of a hallway, but it's not really a hallway. But the  
7     bathrooms are located across from this kind of pseudo  
8     hallway from the main entrance that he came through  
9     initially when he first entered into the building.

10          Q     Okay. And did you follow him into the  
11     bathroom?

12          A     I did not. So, when he needed to use the  
13     restroom, I explained to him because of the secure door  
14     for our side of the building, that I would wait for him  
15     at that door. So, he would go to the bathroom and  
16     return to the point that I was waiting for him at the  
17     secured door to get back on to the sheriff's side of  
18     the building.

19          Q     And how far is that secured door where you  
20     waited to the bathrooms?

21          A     Oh, it's probably -- approximately 30 feet down  
22     a hallway from where he would have exited the bathroom  
23     and then entered into this like pseudo hall area. He  
24     would have had to make -- he could have continued

1 straight through the front door that he entered from,  
2 or you turn right to go down this hallway where I was  
3 waiting about 30 or so feet.

4 Q And when he took these breaks and went to the  
5 bathroom, did you lose eye contact with him?

6 A I did. I lost, yeah, visual contact of him  
7 altogether.

8 Q And how long did these breaks last for,  
9 typically?

10 A I'd say anywhere between five and at most ten  
11 minutes.

12 Q Now, you mentioned pastries. Did you offer  
13 Mr. Bernal pastries?

14 A We did. Actually, Detective Dues' wife had  
15 made some pastries, homemade pastries like the day  
16 before. So, we were all interested in having some, and  
17 he actually shared some of those pastries with us.

18 Q The defendant and you?

19 A Yes, he did.

20 Q Okay. What about, did you offer some water?

21 A Yes.

22 Q And did he take any water from you?

23 A I believe he did. I -- honestly, I almost  
24 always offer water. So, especially for the duration of

1       this interview, I'm pretty sure he did take water, yes.

2           Q       Now, you mentioned originally he denied some  
3       accusations, and then towards the end he admitted some;  
4       is that correct?

5           A       Yes.

6           Q       Okay. I want to talk about those. What  
7       specifically did he tell you he had done?

8           A       Specifically, he advised me that while he was  
9       massaging HS's leg, that it was an accident, wasn't  
10      purposeful on his intent, that he -- his hand had  
11      slipped and a finger had entered into her. And  
12      subsequent to what he'd explained, I did ask a couple  
13      of questions to clarify what his statement was and that  
14      he did admit that a finger had entered into her vagina.

15          Q       Did he tell you when this occurred?

16          A       I think -- I believe he said it was sometime in  
17      January or possibly February of 2019.

18          Q       After he gave you that admission, what did you  
19      do at that point?

20          A       I continued to speak with him. And that I know  
21      that I asked him some basically questions that I ask at  
22      the end of interviews. And I know before I asked him  
23      those questions, he had even requested to use the  
24      bathroom at that time.

1           So, essentially he gave me the admissions, he  
2       went to use the bathroom, he came back, and then I  
3       asked him these, basically, questions that I end the  
4       interviews with.

5           Q       What type of questions do you end interviews  
6       with?

7           A       Essentially, just kind of feedback questions  
8       for my part as far as how the interview went, how he  
9       felt about the interview, how he felt about us as far  
10      as the detectives, how his treatment was during the  
11      interview. Similar questions to those.

12           MR. MERRILL: Okay. Now, Judge, I'm going to  
13      try to one more time to play a different clip of the  
14      video just to see if it --

15           THE COURT: Okay.

16           MR. MERRILL: -- works for the admissions.

17                    (Video played.)

18           MR. MERRILL: Yeah, it's echoing, so we're not  
19      going to play it.

20           THE COURT: Yeah, and I don't understand why.  
21      I still don't understand why.

22           BY MR. MERRILL:

23           Q       So, okay. So, he gives admissions, then you  
24      ask some exit questions; is that fair to say?

1           A       Yes.

2           Q       Okay. Why are you asking those kind of exit  
3 questions?

4           A       I ask them because quite honestly I am a  
5 feedback person. So, I like to ask those questions to  
6 learn from the interview itself and any changes that I  
7 can make in the future in future interviews of  
8 basically anyone else that I may interview.

9           Q       What question did you ask?

10          A       I don't remember exactly the questions I asked.  
11 I do remember I asked him essentially how he felt about  
12 just any feedback he wanted to give about myself, the  
13 room or Detective Dues. I think I asked him about how  
14 he felt like he was treated during the interview. I  
15 think I asked him like at least four questions, but I  
16 don't -- those are the only two that I can recall off  
17 the top of my head.

18          Q       Okay. And after he gave you these questions,  
19 did you then arrest the defendant?

20          A       Yeah, I think after -- so, I know we spoke a  
21 little bit about an apology letter, which he said he  
22 would write, except for he didn't want Patricia to read  
23 it, so therefore he didn't want to. And then somewhere  
24 after these questions, I know -- I think he asked about



1 being in to custody, and I explained to him he wasn't  
2 in custody or under arrest until that very moment. So,  
3 then I -- and then that's when I placed handcuffs on  
4 him, and then did a search of his person incident to  
5 arrest.

6 Q Prior to being arrest -- well, let me rephrase  
7 that. Prior to placing cuffs on Mr. Bernal, could he  
8 have left prior to that?

9 A Absolutely. He -- quite honestly, like I  
10 explained previously, he'd given me admissions already,  
11 and then had asked to use the restroom. And when he  
12 went to use the restroom even after those admissions  
13 that he provided me, I didn't escort him to the  
14 bathroom. I had lost visual contact of him at that  
15 time. He voluntarily had gone down to the restroom  
16 after the admissions and then returned. So, it was  
17 literally at that moment in time that I advised him he  
18 was under arrest, that was when he was under arrest.

19 Q During this interview was the -- I guess what  
20 was the tone of questioning? That make sense?

21 A No different than our conversation that you and  
22 I are having now. There was some times that, you know,  
23 we would confront Mr. Bernal with the inaccuracies of  
24 his statements or just contradictions, and these were

1 based on his own statements to us throughout the  
2 interview. So, we would just re-ask him and point out  
3 to him like well, you explained this to us, but that  
4 doesn't make sense. So, it's basically just a back and  
5 forth like how we are talking now.

6 Q On your behalf or -- on your behalf or on  
7 Detective Dues' behalf, was there any yelling?

8 A No.

9 Q Any swearing, cussing?

10 A There might have been some curse words used,  
11 but no different than essentially in the course of like  
12 a conversation that we're speaking now. Like, it would  
13 have been just as a matter of just the language that  
14 was used, but just conversationally, not in any anger  
15 or derogatory meanings.

16 Q At any point did Mr. Bernal refuse to answer  
17 any questions?

18 A I don't -- no, I don't remember him refusing to  
19 answer any.

20 Q Was there any point that he said he would not  
21 answer any additional questions?

22 A Not to my recollection, no.

23 Q Was there any point during that interview that  
24 he just refused to answer or was quiet after a

1 question?

2 A No.

3 Q Now, there's two detectives, yourself and  
4 Detective Dues, in that room. Were you trying to use  
5 any tactics, like a good cop, bad cop sort of tactics  
6 on this interview?

7 A No. We were basically just three individuals  
8 having a conversation, no different than what's  
9 occurring now.

10 Q Now, did you get into at all the family dynamic  
11 with Mr. Bernal?

12 A I -- yeah, I'm pretty sure I did speak to him  
13 about family life and basically the dynamics of the  
14 marriage.

15 Q Did he indicate to you there was any problems  
16 in the marriage?

17 A I remember him talking about basically there  
18 was a strain in the marriage caused after pretty  
19 much -- essentially it goes back to Deputy Greenhut's  
20 initial report. So, when -- there was some information  
21 contained in that report that Mr. Bernal is referring  
22 to, and he said from that date afterwards, there was --  
23 because he had moved out of the residence at that time.  
24 So, those were, from my recollection, basically the

1 strains on the marriage that he spoke about during the  
2 interview.

3 Q And when did he tell you that he moved out of  
4 the residence?

5 A I don't remember the specific date, but it was  
6 basically upon a conversation him and Patty had on her  
7 arrival home pertaining to specifically these  
8 allegations.

9 Q Now, getting back to the interview room, that  
10 door that you closed, is that door lockable?

11 A No. No, I -- no. I'm going to have to go with  
12 no. I don't -- I've never locked it, and I don't --  
13 I'm not aware of it being able to be locked.

14 Q Okay. And you didn't lock it in this case?

15 A No.

16 Q Were there any throwing of objects or anything  
17 of that nature?

18 A No.

19 Q Now, lunch. There's a period of time where you  
20 guys eat lunch during the interview, or you offered  
21 lunch?

22 A I remember offering him lunch because I  
23 remember being hungry. And I -- he refused lunch. So,  
24 I know that Detective Dues and I, I think, had some

1 chips that were -- you know, snacks that were in the  
2 office. So, we ate those while we were doing the  
3 interview.

4 Q Now, these admissions where he told you what  
5 happened with the massaging of legs --

6 A Uh-hum.

7 Q -- of HS's, did that occur on a regular basis,  
8 the massaging?

9 A Yeah, he -- I believe he explained that he  
10 massaged her legs approximately once a week, and  
11 occasionally more, but at least with a frequency of  
12 once a week.

13 Q And he indicated to you that he used a finger  
14 and entered her?

15 A Yeah. He said that was on just one occasion.  
16 On accident was what he explained.

17 Q Did he describe what he was wearing at that  
18 time?

19 A I don't -- I don't recall if he did or not.

20 Q Did he describe what HS was wearing?

21 A He -- yeah. I remember him describing at least  
22 what pants she was wearing.

23 Q Okay. All right. So, after he was cuffed,  
24 what happened at that point?

1           A     After he was cuffed, he was searched. His  
2 person was searched, like I said, an incident to  
3 arrest. And then he was placed in a -- one of the  
4 holding cells. It's there on basically our side of the  
5 building.

6           Q     Okay. And was there anyone -- well, you said  
7 his father brought him to the substation?

8           A     Yes. His father actually had waited for him  
9 the entire time. And so, I believe it was after he was  
10 in the holding cell, I went out and spoke with his  
11 father.

12          Q     And what did you tell his father?

13          A     I explained that Mr. Bernal was under arrest.  
14 And from my recollection, there was some of his  
15 personal property because we discussed whether he  
16 needed to take all of his personal property to the jail  
17 with him. And I believe I released some of his -- per  
18 his direction, some of his personal property to his  
19 father.

20          Q     Mr. Bernal's property?

21          A     Yes.

22               MR. MERRILL: Your Honor, I don't have any  
23 further questions.

24               THE COURT: Ms. Schumann.

1 MS. SCHUMANN: Thank you, Your Honor.

2

3 CROSS-EXAMINATION

4 BY MS. SCHUMANN:

5 Q Good afternoon, Detective.

6 A Hi. Good afternoon.

7 Q So, when you initially contacted Mr. Bernal,  
8 you said you called him; is that right?

9 A Yes, that's correct.

10 Q Do you know what day you called him?

11 A I don't. I'd have to look at my phone records  
12 to --

13 Q Like a couple of days prior to the interview?  
14 Was it like the week before?

15 A No, it would have been at least a week before.  
16 Because initially I believe, if my recollection is  
17 correct, I had initially wanted to do this interview on  
18 October 15th. So, it would have been at least a week  
19 before. Because he advised that he couldn't make  
20 that -- the time that I had suggested, and he was the  
21 one that suggested the 21st.

22 Q Okay. So, when you called him to talk to him  
23 about the interview, did you say, "I want to speak with  
24 you" or "I wish to speak with you"?

1           A     Something to that effect. I would have --

2           Q     Okay.

3           A     Typically, I let them know that their name has  
4 come up in an investigation, and I'd like to speak with  
5 them.

6           Q     Okay. So, you didn't tell him "You don't have  
7 to talk to me," you said "I need to speak with you"?

8           A     I don't know if I would have said that. I  
9 would have been "I'd like to speak with you."

10          Q     Okay. But you didn't tell him he had the  
11 option of saying no?

12          A     No. It's just a general question. Of course,  
13 he can answer yes or no.

14          Q     But you said "I wish to speak to you"?

15          A     "I'd like to speak with you."

16          Q     Okay. So, which one did you you say?

17          A     I don't -- honestly, I don't know. But, I  
18 mean, it's -- it would have been something similar to  
19 that.

20          Q     Okay.

21          A     If I would have called you, for instance, I  
22 would say, Hey, your name came up in an investigation,  
23 and I'd like to speak with you." Or "I wish to speak  
24 with you." Something to that effect. I don't use the



1 same exact language each and every time.

2 Q Do you say it sternly? Do you think you said  
3 it sternly or --

4 A No. Just how you and I are speaking now.

5 Q Okay. Now, going to the interview room,  
6 there's only one exit in that room, correct?

7 A That's correct.

8 Q And so, when you walked into that interview  
9 room you guys were saying something. What were you  
10 guys talking about?

11 A Oh, I don't -- I don't even know. Probably  
12 just general conversation. Because I had spoke with  
13 him initially while I was -- you know, I greeted him,  
14 and then -- as we did the pat search for any possible  
15 weapons. So, I don't know exactly what was being said,  
16 but it would have just been general conversation.

17 Q Okay. And some of that was caught on the  
18 recorded interview room, correct?

19 A No, it was not.

20 Q So, then heading into the interview room, why  
21 did you place Mr. Bernal in the far corner?

22 A There was no specificity as why. It's just  
23 that's the way the room was set at that time.

24 Q Okay. So, he was in the chair farthest from

1 the exit, correct?

2 A That would be correct.

3 Q And you and Deputy Dues were sitting between  
4 him and the exit, correct?

5 A Correct.

6 Q And then you only told Mr. Bernal he was free  
7 to leave at the very beginning of the interview?

8 A Yes.

9 Q You didn't repeat that throughout the  
10 interview, correct?

11 A No. It was unnecessary.

12 Q But you said that he asked you to leave the  
13 restroom -- to leave to use the restroom?

14 A Yeah. He asked to use the restroom numerous  
15 occasions, yes.

16 Q Okay. How many occasions did he ask you to use  
17 the restroom?

18 A At least three or four.

19 Q Okay. And then he also asked you for a  
20 cigarette break, correct?

21 A Yes, I believe he did. I believe that was -- I  
22 think he was already in custody during the cigarette  
23 break. So, we provided that to him prior to him being  
24 transported to the jail.

1 Q No. He actually asked two hours into the  
2 interview, and you told him no. Do you remember that?

3 A I don't recall that.

4 Q You told him "No, we're almost done here."

5 A Okay.

6 Q But you still let him use the restroom?

7 A Yeah. That's my recollection, yes. That he  
8 used the restroom.

9 Q So, why would you allow him to use the restroom  
10 but not have a cigarette break?

11 A Honestly, I don't -- I don't know of the  
12 reasoning other than -- I would have to review the  
13 video to put context to it. Because I don't know what  
14 we were speaking of at the moment in time that that was  
15 discussed.

16 Q Now, as far as the truth verification test, who  
17 administered that? Was that you or Deputy Dues?

18 A Detective Dues administered that.

19 Q Why did Deputy Dues administer that if it was  
20 your case?

21 A So, we don't -- so, if I'm the case agent, I  
22 don't administer the CVSA on cases that I'm the case  
23 agent. It basically removes bias on my part. Since  
24 I'm the one investigating the case, we have another

1     detective, in this instance Detective Dues,  
2     administered the CVSA. And to further remove any bias  
3     on my part, I don't do what's called the cold call on  
4     the charts. Another detective altogether does the cold  
5     call on those charts to remove me altogether from that  
6     CVSA.

7           Q     Okay. What's the call cold? What are you  
8     talking about there?

9           A     So, a cold call is essentially the charts are  
10    provided to another CVSA examiner. They don't know the  
11    questions. They don't know -- basically, they don't  
12    know anything other than they examine the charts and  
13    look for if there's deception or no deception indicated  
14    on the chart. So, that's what a cold call is.

15          Q     But Deputy Dues had sat in for the entire  
16    interview with you, correct?

17          A     Yes. He had sat in in the interview with me,  
18    yes.

19          Q     So, he knew the facts of this case before he  
20    administered the test?

21          A     I'd say he knew some of the facts. He didn't  
22    know -- he didn't know the facts the way I know the  
23    facts.

24          Q     Okay. Did Mr. Bernal fail that test?

1           A       I was advised the examination showed deception,  
2       yes.

3           Q       Okay. Do you know anything else about the  
4       test, or was that all Deputy Dues?

5           A       Well, I -- no, I mean, Detective Dues is the  
6       one that administered it. So, yeah, he'd have to speak  
7       to that examination.

8           Q       Okay. Did he discuss the results with you?

9           A       During the interview when I came back into the  
10      room at the conclusion of that CVSA examination, he  
11      indicated to me that the charts showed deception.

12          Q       Okay.

13          A       Pretty much the extent of that conversation.

14          Q       On how many questions?

15          A       Again, you'd have to -- you'd have to speak  
16      with Detective Dues about it.

17          Q       Now, you said you were armed during the  
18      interview, correct?

19          A       I was.

20          Q       Was that visible to Mr. Bernal, or did you have  
21      it concealed?

22          A       Oh, I'm sure it was visible. I'm left handed,  
23      and he was sitting on my left.

24          Q       Now, isn't it true that Mr. Bernal initially

1 denied taking the truth verification test?

2 A Initially said that he didn't want to?

3 Q Yes.

4 A Probably. I don't recall specifically, but  
5 yes.

6 Q Okay. But then you told him that it would show  
7 up in his criminal history he passed the test?

8 A No.

9 Q You don't remember saying that?

10 A That it would show up in his criminal history?

11 Q Yes. That would help for employment purposes?

12 A No, I -- no, I don't recall saying anything to  
13 that fact.

14 Q What about that if Mr. Bernal took the test it  
15 would help him get his wife back?

16 A No.

17 Q You didn't say that either?

18 A The way you're saying it, no.

19 Q Did you imply either of those things in  
20 different wording?

21 A No.

22 Q Did Deputy Dues imply either of those things?

23 A Not that I recall, but you'd have to ask him.

24 Q Now, leading into the interview, didn't you

1 have enough to arrest Mr. Bernal?

2 A No. I don't -- I don't believe so.

3 Q But you had done the forensic interview, right?  
4 You were there for that?

5 A Correct.

6 Q And you had spoken with Patricia Bernal, right?

7 A Correct.

8 Q So, he was the last piece of the puzzle?

9 A Correct. Yeah. So, I don't -- I don't make  
10 arrests prior to actually interviewing the suspect  
11 themselves. So, your question is before the interview?  
12 No. My investigation is incomplete at that point.

13 Q Okay. So, if Mr. Bernal had continued denying  
14 the allegations, would you still have arrested him at  
15 the conclusion of the interview?

16 A No.

17 Q You wouldn't have?

18 A If he would have denied them, no, I would not  
19 have. I would have submitted -- I would have submitted  
20 the case to the district attorney's office.

21 Q Okay. Now, for the first four hours Mr. Bernal  
22 denied that anything happened, correct?

23 A He -- the specific time, I don't know. But  
24 yeah, for the large portion or the beginning portion of

1 the interview, he denied, yes.

2 Q Okay. But he did tell you that he rubbed CBD  
3 oil on her legs, right?

4 A As a part of his admission, yes, I believe he  
5 explained that.

6 Q He said that at the beginning of the interview  
7 though too, right?

8 A It's possible. I don't recall. But yeah, it's  
9 possible he said that.

10 Q And then you had suggested that perhaps when he  
11 was rubbing her legs his finger might have slipped up  
12 there?

13 A Again, I'd have to review the interview itself  
14 to know specifically what I said.

15 Q Do you remember -- so, you don't remember  
16 suggesting that at the very beginning of the interview?

17 A I don't.

18 Q And then you continued applying pressure on  
19 Mr. Bernal -- right? -- like you testified to on  
20 direct?

21 A Yeah. So, he would -- based on his statements,  
22 then yes, we would confront him with some of his  
23 statements that did not make sense to us, yes.

24 Q So, he would deny, and then you would go back



1 and you'd pressure him to give you a different answer?

2 A No. I think we would explain to him what he'd  
3 said to us and what our interpretation of those facts  
4 were, and we present it back to him, and then ask for  
5 another explanation because of what he'd said to us  
6 just did not make sense.

7 Q Why didn't you just tell him that the interview  
8 was concluded and he was done after he denied the  
9 allegation?

10 A Because the interview wasn't -- we were still  
11 talking just like -- you know, what I mean? Like, the  
12 interview hadn't come to its natural conclusion at that  
13 point. So, I'm not going to stop an interview or a  
14 conversation when we're still conversating.

15 Q So, it wasn't done until you said it was done,  
16 right?

17 A That's not -- that's not correct, no.

18 Q That's kind of what you just explained.

19 A So, naturally when people have a conversation,  
20 like, sometimes conversations come to a natural  
21 conclusion. So, in this instance, we are conversating  
22 about a subject, and it just hadn't reached its natural  
23 conclusion. It had nothing to do with my determination  
24 of the end of the conclude -- of the conversation. It

1 just had to do with we were still talking about facts  
2 and circumstances and different subject matters would  
3 come up, and so, we just kept speaking.

4 Q For four hours?

5 A Yeah. That's not the -- it's not the first  
6 time I've spoke with someone for four hours.

7 Q Okay. And then the interview didn't conclude  
8 until Mr. Bernal told you what you wanted to hear,  
9 correct?

10 A That's not correct.

11 Q Well, didn't you end the interview after he  
12 admitted?

13 A We did end the interview shortly after, but it  
14 had nothing to do with what I wanted to hear. It's  
15 what he told us.

16 Q After you planted the seed?

17 THE COURT: After what?

18 MS. SCHUMANN: After he planted the seed.

19 THE WITNESS: I don't recall planting any  
20 seeds, no.

21 MS. SCHUMANN: I'll pass the witness, Your  
22 Honor.

23 THE COURT: Okay.

24 MR. MERRILL: Just a few follow up, Your Honor.

REDIRECT EXAMINATION

BY MR. MERRILL:

Q At the beginning of the interview, did Mr. Bernal tell you that he texted Patricia?

A I believe he did, yes.

Q What did he tell you about that?

A That essentially that there was, I think, like kind of an argument between him and HS, and that she had threatened to make accusation of him. So, he had texted Patricia to come home because they need to speak.

Q And did he tell you what he told Patricia when he got home -- or she got home?

A Yes, he did.

Q And what was that?

A That he initiated a conversation with the fact that, something to the effect of that's -- the way he explained it -- so, I'm probably not going to do it justice, but the way he explained it, it was kind of like a sarcastic tone. Like, apparently I've been molesting HS. That's the way he initiated the conversation. But he said that conversation as it continued ended up in an argument between him and Patricia, which resulted in him ultimately pack -- oh,

1 well, he'd actually packed a bag prior. But  
2 ultimately, he left the house.

3 Q How far into the interview was that?

4 A So, that -- that conversation that he had  
5 between him and Patricia was like in different parts of  
6 the interview. So, like -- because we kept referring  
7 to it in different parts, so it was almost like towards  
8 the beginning there was probably parts of it we talked  
9 about, and then at the end we talked about it as well.  
10 So, I mean, it's kind of a theme throughout the  
11 interview.

12 Q But you were -- were you discussing it towards  
13 the beginning of the interview?

14 A Yeah, I believe he mentioned it towards the  
15 beginning, and then, like I said, it's just one of  
16 those subjects that kept coming back up.

17 Q Now, in your opinion, did you force Mr. Bernal  
18 to take a CVSA?

19 A No.

20 Q Could he have refused at that point?

21 A Certainly he could have.

22 Q At the substation there, are there cameras that  
23 record in the hallway outside the interview room?

24 A Yeah, so there's one or two cameras in the

1 squad room, and then there's several cameras on the  
2 Social Services side as well. But yeah, there's  
3 cameras throughout the building, yes.

4 Q Prior to getting into the interview room after  
5 you met with Mr. Bernal out in the waiting room, was  
6 there any discussion about the case and the ultimate  
7 issues?

8 A No. No, we weren't -- no.

9 Q Were there any threats between the waiting room  
10 and the interview room the camera didn't pick up?

11 A No.

12 MR. MERRILL: Nothing further, Your Honor.

13 THE COURT: You have anything else,  
14 Ms. Schumann?

15 MS. SCHUMANN: Just one question.

16  
17 RECROSS EXAMINATION

18 BY MS. SCHUMANN:

19 Q So, Detective, after the voice stress analysis  
20 you still interrogated Mr. Bernal, correct?

21 A We continued the interview, yes.

22 Q Okay.

23 MS. SCHUMANN: No further questions, Your  
24 Honor.

1 THE COURT: Okay. Thank you, Detective.

2 MR. MERRILL: Nothing further of this witness.  
3 May I approach, Your Honor?

4 THE COURT: Sure.

5 (Discussion at the bench.)

6 THE COURT: Is there any reason?

7 MR. MERRILL: He's in the bathroom, Your Honor.

8 THE COURT: Well, that could take all day.

9 Court's going to take a recess.

10 (Recess.)

11 THE COURT: Okay. Go ahead, Mr. Merrill.

12 MR. MERRILL: Detective Dues.

13 (Witness sworn.)

14 THE COURT: Come on up here and have a seat,  
15 please. Mr. Merrill.

16

17 MARTY DUES,

18 called as a witness herein by the State,

19 having been first duly sworn, was examined

20 and testified as follows:

21

22 DIRECT EXAMINATION

23 BY MR. MERRILL:

24 Q Good afternoon, Detective Dues.

1           A     Good afternoon, sir.

2           Q     Please state your full name and spell your last  
3 name for the record.

4           A     My full name is Marty Dues.   D-U-E-S.

5           Q     And how are you employed?

6           A     I'm a detective for the Lyon County Sheriff's  
7 Office.

8           Q     And how long have you worked at Lyon County  
9 for?

10          A     Going on 13 years.

11          Q     And how long as a detective?

12          A     Eight.

13          Q     And what are your physical job duties?

14          A     I usually investigate crimes that are beyond  
15 the scope of the average patrol deputy.  I work in  
16 Major Crimes Division.

17          Q     And what type crimes are those?

18          A     Normally sexual crimes and homicides.

19          Q     And did you assist in the Thomas Bernal case?

20          A     I did.

21          Q     And how did you assist in that case?

22          A     I sat in on the interview conducted by  
23 Detective Messmann, and I also conducted a CVSA  
24 examination.

1 Q And was that the interview on October 21st of  
2 2019?

3 A It was.

4 Q As you spoke -- prior to the interview with the  
5 defendant here, did you have any conversation with him  
6 prior to this?

7 A With who? With the defendant?

8 Q With the defendant?

9 A No.

10 Q So, the first time you met him was on  
11 October 21st?

12 A Yes, it was.

13 Q Now, did you ever threaten the defendant during  
14 the course of that interview?

15 A No.

16 Q Did you ever cuss at or yell at the defendant?

17 A No.

18 Q Now, you mentioned a CVSA?

19 A Yes.

20 Q What is that?

21 A Computerized voice stress analysis.

22 Q And how are those administered?

23 A It's a specialized computer and -- with a  
24 microphone that is connected to the person being



1 examined, and it has a very specific set of software on  
2 it.

3 Q Okay. Now, how did the CVSA, how was that  
4 brought up during the course of the interview?

5 A It was offered to the defendant, Mr. Bernal.  
6 It was -- it's a -- it's a -- you have to agree to do  
7 it. So, it was offered up to him.

8 Q And on this case why was it specifically  
9 offered to the defendant?

10 A Oh, we'll offer it in a criminal case if they  
11 want to show they're -- that they're trying to show  
12 their innocence, and we provide the test for them and  
13 explain to them that the test could help them.

14 Q Okay. Did you -- prior to actually doing the  
15 CVSA, was there conversation about how it worked with  
16 the defendant?

17 A Little bit. I do a lot of that after the -- if  
18 they agree to do the CVSA, there's a lot more  
19 explanation into how it works. There was a little bit  
20 up to prior to the test. Which is just basically that  
21 we have a -- we have a system. It's kind of like a  
22 polygraph, but it's not. And so, then we -- and then  
23 we offer the exam to, whether it be a new employee or  
24 let's say somebody in a criminal case.

1 Q Okay. How often do you perform these exams?

2 A Preemployment and criminal, four or five a  
3 month.

4 Q Now, Mr. Bernal, did he want to take this test?

5 A He did. Yes, he did agree to it. It was  
6 offered, and he stated that he wanted to take it.

7 Q Did he ever indicate that he did not want to  
8 take the CVSA?

9 A He stated that he was feeling a little jittery  
10 about taking the exam. And I did explain to him that  
11 that will have no effect on the end result of the test.

12 Q Did he in any way refuse physically from taking  
13 this exam?

14 A No.

15 Q Did he have any sort of bathroom break or smoke  
16 break prior or after the CVSA was administered?

17 A I believe -- well, I believe he had a bathroom  
18 break prior to it, and he had a smoke break, but that  
19 was at the very end of the interview.

20 Q So, this test is administered with just a  
21 microphone?

22 A Correct.

23 Q How -- where does the microphone go?

24 A Normally, it -- it depends on what piece of

1 clothing the person is wearing, whether it be button up  
2 shirt or a T-shirt. Somewhere around two to three  
3 inches below their chin area. Like a -- like a lapel  
4 mike.

5 Q Something that fits closer to the face?

6 A Yes. Probably like three or four inches below  
7 the jawline.

8 Q Okay. Was he aware at all that he didn't have  
9 to take the test?

10 A Yeah. We just offered it to him and told him  
11 you can take it. At no point was he told he had to  
12 take it.

13 Q Okay. Now, was the room changed in any way for  
14 the CVSA?

15 A Yes.

16 Q How was it changed?

17 A When we -- we did -- when Detective Messmann  
18 was doing the initial interview it's a basic square  
19 room, probably 12 by 12. We have a table and a couple  
20 of very basic chairs in there. During the interview  
21 the table was pushed all the way against the wall. But  
22 for a CVSA, we sit across from each other. So, the  
23 room was rearranged to move all the excess chairs out  
24 of the way and just the one table in the middle, and

1       then a chair on each side.

2           Q       And physically how was the room rearranged?  
3       Who did that?

4           A       Myself and Mr. Bernal. He offered to help.

5           Q       Mr. Bernal actually helped you move the table?

6           A       Yes.

7           Q       What about the chairs?

8           A       I don't remember him moving the chairs because  
9       I don't think he knew where they were going to be  
10      positioned. But he did help me with the table.

11          Q       Now, after conclusion of the CVSA was the  
12      equipment put away?

13          A       Yes.

14          Q       Where does it go?

15          A       Well, when we do it -- when we do a CVSA,  
16      whether it be a preemployment or a criminal CVSA, we  
17      have another certified examiner read the charts. We  
18      take the machine, and we either -- if we don't have  
19      anybody in-house, we send it out. Or we have somebody  
20      else read the charts. They can't see the questions.  
21      They can't see anything except for the waveforms  
22      themselves. And they do what's called a cold call.  
23      And then so, what we do is we disconnect power,  
24      microphone, mouse. So, basically it's just a laptop

1     now, and we have it cold called. And then when we come  
2     back to the room, we don't hook anything back up to the  
3     machine.

4           Q     I see. Was the microphone still out?

5           A     It was -- everything was on the table when I  
6     came back in.

7           Q     Okay. Did you ask Mr. Bernal about the results  
8     of the CVSA?

9           A     Yes.

10          Q     Okay. Did he make any comments about the  
11     results of the CVSA?

12          A     Yes. We try to get people to understand this  
13     is not a polygraph. It's not -- there's -- you don't  
14     have things strapped to you, blood pressure cuffs and  
15     chest -- and things on your fingers and everything else  
16     like that. So, the whole goal of a CVSA is to get  
17     people to relax, not to stress them out.

18                 So, during the course of explaining it, I like  
19     the person that's being examined to understand how it  
20     works, how it looks, how the waveforms look. So, when  
21     we do calibrations or things, I turned it so he could  
22     see everything on the screen. We went over the  
23     questions three or four times so that the person knows  
24     that I'm not asking like a trick question. So, it's --

1     like I said, the whole thing is to get the person to  
2     relax, not to stress them out.

3           Q     Okay. Now, during the calibration part are  
4     questions asked of the defendant?

5           A     Yes. I usually ask them what their favorite  
6     foods are. I ask them -- I ask them to provide me  
7     three of their favorite foods. And what I'll do is,  
8     this allows them to see how the system works, the  
9     timing of the system between the question, clicking the  
10    mouse, answer the question. It also allows me to  
11    adjust the microphone settings to -- because each  
12    person has their own individual rise and inflection of  
13    their voice. So, when I get it tuned in, it's going to  
14    give me a signal. Then I know it's tuned in for that  
15    person.

16          Q     During the course of the calibrations did  
17    Mr. Bernal ever refuse to answer any of those  
18    questions?

19          A     No.

20          Q     Did he ever indicate that during the CVSA  
21    calibration or the actual exam that he wanted to get up  
22    and use the bathroom or --

23          A     During the actual exam?

24          Q     Yes.

1           A     No.

2           Q     Did the defendant, did he get a chance to look  
3     at the charts himself?

4           A     He did.

5           Q     Okay.

6           A     Both the calibration and the final ones.

7           Q     Okay. Now, for the final results, did he make  
8     any specific statements to you?

9           A     Yes, that he -- well, when you do the  
10    calibration, you show them the difference between  
11    what's a deceptive waveform and a non-deceptive  
12    waveform so they understand what they're looking at.  
13    After the actual test was completed, I turned the  
14    laptop to Mr. Bernal, and I asked him, I said do you  
15    remember what we talked about? So, which waveforms  
16    appear to be deceptive in nature? And Mr. Bernal  
17    pointed to number seven.

18          Q     And what was number seven?

19          A     Number seven was had he fingered HS.

20          Q     And so, the results were that picked up  
21    deception?

22          A     I'm sorry?

23          Q     The results were that it picked up deception --

24          A     Yes. Yes.

1 Q -- the CVSA? Okay.

2 Any other comments made about question number  
3 seven?

4 A He basically, when I told him what the -- when  
5 I told him what the answer was, he just went "oh". And  
6 then he kind of kept looking at the charts, and then  
7 pointed to number four. He was like well, this one I  
8 said -- well, no you were honest on this one. And, so  
9 we went over that as well.

10 Q All right.

11 MR. MERRILL: Nothing further, Your Honor.

12 THE COURT: Okay. Ms. Schumann.

13

14 CROSS-EXAMINATION

15 BY MS. SCHUMANN:

16 Q Good afternoon, Detective.

17 A Good afternoon.

18 Q Did you tell Mr. Bernal that he should take the  
19 test because it would help with employment purposes?

20 A No.

21 Q You didn't say it would pop up in his criminal  
22 history?

23 A Did I say what?

24 Q Did you say it would pop up in his criminal



1 history?

2 A No.

3 Q Did you tell him --

4 A I'm sorry. What -- that what would pop up,  
5 that he took it or didn't take it?

6 Q Yes. From the lie --

7 A No.

8 Q -- detector test. The results of the lie  
9 detector test?

10 A No. No.

11 Q Okay. Did you tell Mr. Bernal that if he took  
12 the test it would help him get his wife back?

13 A No.

14 Q So, you said it was number seven that showed  
15 detective (sic), right? Question number seven?

16 A That showed deception, yes.

17 Q Yes. None of the other questions indicated  
18 deception?

19 A Well, number two and number eight did. And  
20 I'll explain that if you want me to.

21 Q Yes, if you can.

22 A We have them intentionally lie to two  
23 irrelevant questions on the -- on the exam.

24 Q Okay.

1           A       And this is for every exam we ever give, and  
2       it's always the same two questions.   It's number two.  
3       It's number eight.

4           Q       Okay.

5           A       Question that we ask them, two -- and they have  
6       nothing to do with the case itself.   Number two is  
7       always is your date of birth and we give them their  
8       actual date of birth.   And number eight is I always ask  
9       them have you ever driven over the posted speed limit.  
10      If they tell me they have, whether they got a ticket or  
11      got caught or not, I tell them to answer no to those  
12      two questions.

13          Q       Okay.

14          A       And that's just the protocol of the system  
15      itself.   And so, those two show deception as well.   And  
16      I explained to him that's because I told you -- he --  
17      when he picked -- kind of picked those ones, I said  
18      that's because I told you to lie.   He's like okay.

19          Q       How do you measure deception?

20          A       What happens is the way I described this and  
21      I -- it's the same way I described it to Mr. Bernal,  
22      and anybody else I do a CVSA for.   I explain it as in a  
23      guitar string.   When you strum a guitar string and you  
24      take the key and you turn it and you tighten it, the

1 sound goes up. Well, it's the same thing that happens  
2 with the human vocal cord. But the human vocal cord,  
3 it's beyond this -- the range of human hearing. So,  
4 the computer will pick this up. And so, the easiest  
5 way for, I guess, people to understand this is I said  
6 when you're a little kid or when you're being immature  
7 and you hide around the corner, and your big, bad buddy  
8 who's got the big, deep football voice comes down the  
9 hall and you jump out and you -- and you scream, what  
10 happens to his voice?

11 It goes about four octaves high. And that's  
12 because of stress. And then the next thing out of  
13 their mouth their voice drops four octave. When I  
14 explain it, that's how CVSA works. There's a -- when  
15 you -- when you're being deceptive, especially when  
16 there's jeopardy involved in the question, that's when  
17 stress is showing.

18 Q So, is there like a threshold, and if they're  
19 above the threshold, then it's deception?

20 A Yes. Yes, we can -- we're taught to read the  
21 charts from anywhere from no deception indicated to  
22 what's called a hard block, which is a very squared off  
23 waveform. So, we have basically no deception, a  
24 tendency, which we will not call as deception. It just

1 means you have a tendency to lie. A medium block or a  
2 hard block. And a medium block or hard block shows  
3 deception.

4 Q And which one was Mr. Bernal?

5 A A medium block.

6 Q Now, you confronted Mr. Bernal with those  
7 results, correct?

8 A I did.

9 Q What did you say to him exactly, if you  
10 remember?

11 A After I -- we were looking at the waveforms as  
12 I -- as I explained earlier, and when he picked out  
13 number seven as being what he believed to be deceptive  
14 and I said yes, that is correct. And he asked me what  
15 the question was pertaining to waveform number seven.  
16 And I -- so, this is where I have to explain question  
17 number seven is what's called an irrelevant question.

18 So, let me explain this. If you've ever seen a  
19 polygraph, even on TV, you see two needles. The first  
20 one is for the relevant question. The second needle is  
21 offset by about five seconds. And so, number seven was  
22 actually an irrelevant question. Six was the relevant  
23 question, "Have you fingered HS?" And it showed no  
24 deception. Seven wasn't a relevant question. I forget

1     what it was. But it could have been am I wearing  
2     glasses? And that hard -- and that medium blocked.  
3     And what's that called is carryover stress. His stress  
4     didn't hit his answer until the second question. It's  
5     a -- I don't know how else to explain it. That's why  
6     we ask -- we ask irrelevant for every -- every relevant  
7     question has an irrelevant.

8           Q     Okay. So, just so I understand.

9           A     Uh-hum.

10          Q     The question "Did you finger HS?", he actually  
11     passed that?

12          A     No. Because the questions are in pairs. He  
13     failed the question because the relevant and irrelevant  
14     go together always.

15          Q     Okay.

16          A     They're never -- they're never individually  
17     calculated.

18          Q     But the deception occurred on the second part  
19     of the question?

20          A     Correct.

21          Q     Which was what?

22          A     I would have to look at it. I would have to  
23     look at what that question was. But it could have  
24     been -- normally, I go do I have a goatee? Am I

1 sitting down? Are the lights on? Is this room  
2 carpeted? Do I have a watch on? They're all very  
3 irrelevant questions.

4 Q And you're saying that's tied to the fingering  
5 question?

6 A Uh-hum, correct.

7 Q And then you base your analysis on the answer  
8 to both of the questions?

9 A Correct. And he -- and what they teach us --

10 Q Okay.

11 A What they teach us in the certification is any  
12 relevant -- any deception shown on any relevant or its  
13 corresponding irrelevant shows deception.

14 Q Okay. So, is it fair to say that a deception  
15 would be projected?

16 A No. Not on these tests.

17 Q Okay. What's the threshold then? Like, how do  
18 you know -- how do you gauge the deception? If I were  
19 an average person, and I said, you know, if you pass  
20 the test, you have a 90 percent, how would I know if he  
21 passed or failed?

22 A There's -- it's simply by the individual  
23 waveforms.

24 Q All right.

1           A     And each test -- like, Mr. Bernal's test only  
2     had nine questions in it.

3           Q     Okay.

4           A     Because there were only two relevant questions  
5     to this case. We've had -- we have tests up to 31  
6     questions. Nine is -- nine questions, which is what  
7     Mr. Bernal had, is the minimum questions you can give  
8     on CVSA test. So, there's no percentage because it  
9     could be 9, 11, 13, 15, 17, so on and so forth all the  
10    way up to 31.

11          Q     So, do you have someone else look at the  
12    results --

13          A     Yes.

14          Q     -- to see if they identify deception? Did you  
15    have Detective Messmann look at the results too?

16          A     It was actually Detective Kusmerz. And then  
17    Detectives Messmann looked at them as well.

18          Q     Okay. Okay. Now, you said you had to  
19    rearrange the room, correct?

20          A     Correct.

21          Q     And did you place yourself between Mr. Bernal  
22    and the exit when you administered the voice stress  
23    test?

24          A     I was -- I was on the side of the door.

1 Q Okay.

2 A Yeah.

3 Q Well, why wouldn't you put Mr. Bernal by the  
4 exit?

5 A The whole -- the whole thing was based on --  
6 and it's in the video. The whole thing was based  
7 because I had to figure out where my outlet was.  
8 Because my power goes this way. If not, that power  
9 cord would have crossed all the lines. You don't want  
10 what's -- they're called magnetic powers of flux. And  
11 you don't want them on a microphone because they  
12 actually will cause the microphone to misread. So, I  
13 always push it so my cord goes left, and I always put  
14 my person to the right so that the cords never touch  
15 each other.

16 Q It's a pretty small room, correct?

17 A Oh, yeah. This is -- it's like a 12 by 12.

18 Q So, you could have easily done it the opposite  
19 way and put Mr. Bernal closest to the exit?

20 A No because my outlet was on the side. If I --  
21 if I switched, my outlet -- my cord came off my laptop  
22 this way, and his microphone would have gone this way,  
23 and the cords would have crossed.

24 Q Okay. Were you armed during the interview?





REDIRECT EXAMINATION

BY MR. MERRILL:

Q Real quick. During the CVSA when you switched sides, did you block the exit, the door?

A Block it physically?

Q Right.

A No.

Q Did you put your body, the chair in front of the door?

A No. It's in fact the table and the two chairs are smack dab in the middle of the room.

MR. MERRILL: Nothing further.

MS. SCHUMANN: Nothing on that, Your Honor.

THE COURT: Okay. Thank you, Detective.

MS. SCHUMANN: And, Your Honor, we did a full copy of the interview of Mr. Bernal's interview that we submitted with our opposition. There's a stipulation to admit that. So, the Court can see the entire interview if they want.

THE COURT: Is that correct?

MR. MERRILL: That's correct.

THE COURT: So, the transcription that was submitted with the opposition?

MS. SCHUMANN: Your Honor, it's a video of

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd.,  
P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing  
document to be delivered to all parties to this action by



E-flex delivery of the Nevada Supreme Court

Stephen Rye  
Lyon County District Attorney

DATED this 23rd day of September, 2021.

  
\_\_\_\_\_  
KARLA K. BUTKO, Esq.