MARK R. MOFFAT (#5112)
ANN MARIE TALIAFERRO (#8776)
Attorneys for Defendant
BROWN, BRADSHAW & MOFFAT, L.L.P.
10 West Broadway, Suite 210
Salt Lake City, Utah 84101
Telephone: (801) 532-5297
Facsimile: (801) 532-5298

IN THE SALT LAKE CITY JUSTICE COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

SALT LAKE CITY, Plaintiff, v. XXXXXXXXXX, Defendant.	**DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ISSUING SUBPOENA DUCES TECUM AND IN RESPONSE TO OBJECTIONS AND MOTION TO QUASH** Case No. XXXXXXX (Judge XXXXXXXX)

The defendant, XXXXXXXX, has previously issued a subpoena in this matter for relevant medical records from LDS Hospital. The City and the alleged victim have objected and moved to quash those subpoenas.

For the following reasons, this Court should deny the motion to quash, compel compliance with the subpoenas as authorized by Rule 14 of the Utah Rules of Criminal Procedure, review the documents *in camera*, and provide to the defense the requested information. A hearing on this issue is currently set for May 12, 2011.

The basis for this request has been set forth by prior counsel, and is further supported by the following.

BACKGROUND INFORMATION

Procedural Background of Case

Prior counsel for the Defendant, XXXXXXXXX, has withdrawn from this matter.

Prior to doing so, at a pretrial conference on February 8, 2011, prior counsel explained to the Court that the defense was seeking medical records of the alleged victim and explained the purpose behind doing so. At this hearing, it appears that this Court instructed prior counsel to issue the subpoena to LDS Hospital, to await their response, and then to brief any related privacy issues as needed depending on the Hospital's response. The City made no objection at this time to these orders.

Thereafter, on February 25, 2011, the City filed an Objection and Motion to Quash the subpoena. Prior counsel for the Defendant responded. Thereafter, the Utah Crime Victim's Legal Clinic also filed an Objection and Memorandum in Support of the City's Motion to Quash on behalf of the alleged victim.

Current counsel has since entered an appearance and also requests that this Court allow and compel the subpoena for medical records in compliance with the rules of criminal procedure, but also in compliance with the Defendant's rights to Due Process and a fair trial.

Requested Medical Records

Through subpoena, prior counsel sought any and all medical records from LDS Hospital relating to alleged victim, XXXXXXXX, from August 1, 2010 to October 6, 2010 (a limited two month period).

The alleged domestic violence assault charged in this case occurred October 6, 2010. The

Defendant is aware, because of his relationship with Ms. XXXXXXXXXXX, that in the weeks prior to this incident, Ms. XXXXXXXXXXX presented herself to LDS hospital in an emotional state threatening suicide and self harm. The Defendant is wholly aware that the alleged victim often engages in self-harm (including hitting herself) and self-mutilative cutting behaviors, suffers from depression and has been suicidal in the past. On the night of the alleged incident charged in this case, the Defendant asserts that this self-destructive behavior was occurring on the part of the alleged victim, and that any contact which has been deemed an "assault" by the City took place in order to stop Ms. XXXXXXXXXXX's destructive and self-harming behavior.

Objections to Defendant's Subpoena

The City has posed three main objections in support of quashing the subpoena: 1) That the subpoena is an attempt to circumvent the court hearing as required by Rule 14;[1] 2) the Defendant should have issued a discovery request instead;[2] and 3) that the subpoena is not

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[1]This argument has been addressed by prior counsel, and because a hearing has been set and counsel herein is suggesting the court conduct an in camera inspection of the records, this objection will not be further addressed herein. *See* Defendant's Response to Objection and Motion to Quash Defendant's Subpoena Duces Tecum to LDS Hospital.

[2]Prior counsel has addressed this issue, and has pointed out that the City indicated it would not seek such records. *See* Defendant's Response to Objection and Motion to Quash Defendant's Subpoena Duces Tecum to LDS Hospital.

Further, the discovery rules in no way prevents a criminal defendant from investigating his own case and issuing his own subpoenas. Indeed, a defendant has every right, and his counsel has an absolute duty, to seek information through an independent investigatory process. The City's position forgets that the criminal system is an adversarial process and a defendant is not required to sit idly by and trust the City to seek out and turnover every shred of evidence available in the case. While not contending that City prosecutors purposefully fail to turn over evidence, the City oftentimes fails to know what is important to the defendant and his theory of the case. To know and develop the defendant's theory of the case is a defendant's duty and that of his attorneys. That is why a defendant has a right to the assistance of an attorney, experts and an investigator to investigate on his behalf.

reasonably limited.[3] *See* Objection and Motion to Quash Defendant's Subpoena Duces Tecum to LDS Hospital; Defendant's Response to Objection and Motion to Quash Defendant's Subpoena Duces Tecum to LDS Hospital.

The attorney for the alleged victim has further objected to the disclosure of the requested records asserting that: 1) the court has not held a hearing; 2) the court has not evaluated the records in camera; and 3) the Defendant has not made the necessary showings to support release of the records. *See* Memorandum in Support of City's Motion to Quash at 1-2, 4-13. Ms. XXXXXXXXXXX's advocate continues that the disclosure would also violate the alleged victim's right to privacy, fairness, dignity and respect. *See id.* at 3-4.

In requesting the subpoenaed information, **the defense is not attempting in any way to harass the alleged victim nor treat her with any kind of indignity or abuse**. However, the Defendant has the right to certain information and disclosures necessary to the effective defense of his case to criminal allegations of which he adamantly denies.

For the following reasons, then, this Court should order the issuance of such subpoena, conduct an *in camera* review of the records, and disclose to the defense the requested and other relevant information.

ARGUMENT

THE DEFENDANT IS ENTITLED TO THE REQUESTED RECORDS SINCE THEY ARE MATERIAL TO HIS DEFENSE

As noted above, based upon information known to a reasonable certainty, the Defendant

[3]Prior counsel has addressed this objection. *See* Defendant's Response to Objection and Motion to Quash Defendant's Subpoena Duces Tecum to LDS Hospital at 4-5.

is requesting the disclosure of any and all medical records from LDS Hospital related to the alleged victim's hospitalization known to have occurred in the two-month time frame prior to the charges due to self-destructive and suicidal behaviors.

Utah Rule of Criminal Procedure 14 provides, in relevant part:

> **(b) Subpoenas for the production of records of victim**.
> (b)(1) No subpoena or court order compelling the production of medical, mental health, school, or other non-public records pertaining to a victim shall be issued by or at the request of the defendant **unless the court finds after a hearing, upon notice as provided below, that the defendant is entitled to production of the records sought under applicable state and federal law.**
> (b)(2) The request for the subpoena or court order shall identify the records sought with particularity and be reasonably limited as to subject matter.
> (b)(3) The request for the subpoena or court order shall be filed with the court as soon as practicable, but no later than 30 days before trial, or by such other time as permitted by the court. The request and notice of any hearing shall be served on counsel for the victim or victim's representative and on the prosecutor. Service on an unrepresented victim shall be made on the prosecutor.
> (b)(4) If the court makes the required findings under subsection (b)(1), it shall issue a subpoena or order requiring the production of the records to the court. The court shall then conduct an *in camera* review of the records and disclose to the defense and prosecution only those portions that the defendant has demonstrated a right to inspect.
> (b)(5) The court may, in its discretion or upon motion of either party or the victim or the victim's representative, issue any reasonable order to protect the privacy of the victim or to limit dissemination of disclosed records.
> (b)(6) For purposes of this rule, "victim" and "victim's representative" are used as defined in Utah Code Ann. § 77-38-2(2).

Utah R. Crim P. 14(b) (emphasis added).

Accordingly, the defendant has requested records of the alleged victim related to an emotional condition which is relevant and material to the defense against the offenses charged. Based on the arguments set forth by prior counsel, as well as the additional points and authorities set forth below, this Court should find that the defendant is entitled to the requested information.

A.
THE DEFENDANT HAS A CONSTITUTIONAL RIGHT TO PRESENT A COMPLETE DEFENSE AND TO CONFRONTATION AND CROSS-EXAMINATION.

It is a basic proposition that a "defendant's right to present all competent evidence in his defense is a right guaranteed by the due process clause of our State Constitution." *State v. Harding*, 635 P.2d 33, 33 (Utah 1981). *See also*, UTAH CONST., art. I, § 7. A defendant's right to a "meaningful opportunity to present a complete defense" and to confront and cross-examine his accuser is also rooted in the Due Process Clause of the Fourteenth Amendment, and in the Compulsory Process and Confrontation clauses of the Sixth Amendment. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

It is also a basic proposition that "a criminal defendant is, subject to relevancy and other evidentiary requirements, entitled to offer evidence that would cast doubt on any of the elements that the State is required to prove." *State v. Worthen*, 2008 UT App. 23, ¶15. Along these same lines, **a defendant may also seek "evidence that would interject doubt into the State's assertion that he committed the crime**." *Id.* at ¶16 (emphasis added). In this way, the disclosure of the sought-after records would supply material evidence in support of the Defendant's defense. *See id.*

In this situation, the Defendant asserts that any contact he made with alleged victim XXXXXXXXXXX was in an attempt to stop her from self-destructive behaviors, from destroying property, and from possibly harming their child and the defendant himself. Records exist, very close in time prior to this charged incident, where Ms. XXXXXXXXXXX sought hospitalization due to these same self-destructive and suicidal behaviors. Thus, the Defendant is

seeking the hospital records in an effort to show that the alleged victim has engaged in self-destructive behavior in the past, in fact regularly engages in such behaviors, and that the Defendant reasonably believed she was going to do so the evening of the charged incident and tried to stop her from harming herself and others. Accordingly, the Defendant is entitled to seek such information to aid in the presentation of his defense in his case, including the affirmative defense of justification,[4] and interject doubt into the City's theory of an intentional domestic violence assault.

B.
THE DEFENDANT HAS A RIGHT TO THIS INFORMATION AS CONTEMPLATED IN THE DISCOVERY RULES OF THE UTAH RULES OF CRIMINAL PROCEDURE.

Although, as noted above, a Defendant's only means of investigation is not through formal discovery procedures, Rule 16 of the Utah Rules of Criminal Procedure provides in relevant part:

> (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
> (1) relevant written or recorded statements of the defendant or codefendants;
> (2) the criminal record of the defendant;
> (3) physical evidence seized from the defendant or codefendant;
> (4) **evidence** known to the prosecutor **that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment**; and
> (5) **any other item of evidence** which the court determines on good cause shown should be made available to the defendant **in order for the defendant to adequately prepare his defense.**

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[4] *Accord* Utah Code Ann. §76-2-401; Utah Code Ann. §76-2-402 (defense of person); Utah Code Ann. §76-2-405 (defense of habitation); Utah Code Ann. §76-2-406 (defense of property).

Utah R. Crim. P. 16 (emphasis added).

Although this Rule of Criminal Procedure applies to required disclosures by the prosecution,[5] it provides guidance as to what information a defendant should be entitled to, even if he seeks it on his own through the subpoena powers granted in criminal cases. Again, the defendant specifically seeks information concerning Ms. XXXXX's emotional condition which causes self-destructive and other violent harmful behaviors, which occurred in the weeks leading up to the charged incident. Such evidence should be made available to the defendant in order for him to adequately prepare his defense.

C.
THE RECORDS ARE RELEVANT TO THE DEFENDANT'S JUSTIFICATION DEFENSE AS WELL AS THE ALLEGED VICTIM'S PERCEPTIONS, ABILITY TO TELL THE TRUTH AND/OR MOTIVATION TO FABRICATE THE ASSAULT ALLEGATIONS AGAINST DEFENDANT.

As alluded to in Point A above, due process of law under the federal and state constitutions guarantees a defendant the right to present a complete defense and to challenge each and every element of the charges against him.[6] Moreover, "[a] criminal defendant has the right to introduce evidence tending to disprove his or her specific intent to commit a crime." *State v. Lindgren*, 910 P.2d 1268, 1271 (Utah App. 1996). Therefore, when a defendant's case may turn on his or her ability to convince the jury that he or she lacked the intent to commit the charged offense, public policy demands that the defendant be given the opportunity to present evidence of

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[5]In addition to the prosecution's *Brady* duties.

[6]*See, e.g., Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (discussing federal constitutional provisions); *Christiansen v. Harris*, 163 P.2d 314, 317 (Utah 1945) (discussing state constitutional law under Article I, § 7 of the Utah Constitution on the right to present a defense); *State v. Harding*, 635 P.2d 33, 34 (Utah 1981) (same). *See also* Utah Const. Article I, §§ 7 and 12.

such intent or lack thereof. *See id.* at 1272 (citing cases); *State v. Smith*, 728 P.2d 1014, 1015-16 (Utah 1986) (a "defendant should be allowed to introduce evidence which is circumstantially inconsistent with the state of mind required for conviction.. [and a] defendant's lack of motive to commit the crime charged is. . .relevant evidence of innocence which he or she is entitled to place before the jury").

At trial, a defendant also has the right to present evidence and show bias, prejudice, and a motivation to misrepresent on the part of witnesses and alleged victims. This trial right is established by both the Utah Rules of Evidence as well as state and federal constitutional guarantees. For example, Utah Rule of Evidence 608(c) provides:

> Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Utah R. Evid. 608.

Moreover, "the right to cross-examine is an invaluable right embodied in Article I, Section 12 of the Utah Constitution and in the Sixth Amendment of the United States Constitution which assures the right to confrontation."*State v. Maestas*, 564 P.2d 1386, 1387 (Utah 1977). The United States Supreme Court guides:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony is tested. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. 308 (1974).

Normally, then, a cross-examiner is granted wide latitude in exposing a witness' potential bias. *See, e.g., Salt Lake City v. Struhs*, 106 P.3d 188, 191 (Utah. App. 2004); *State v. Ramos*,

882 P.2d 149, 155 (Utah. App. 1994); *State v. Maestas*, 564 P.2d 1386 (Utah 1977). This is so because the "exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *State v. Leonard*, 707 P.2d 650, 656 (Utah 1985) (quoting *Greene v. McElroy*, 360 U.S. 474, 496 (1959)).

Accordingly, Utah courts **have granted a defendant the ability to discover records of a victim or other witness where the evidence is directed toward revealing possible biases, prejudices, or ulterior motives of the witness**. *Cf State v. Worthen*, 2008 UT App. 23, ¶¶19-22 (*in camera* inspection appropriate where "Defendant is claiming innocence and he is seeking specific evidence that would reveal. . .motivation to fabricate. . .[which] if believed by the fact finder, could affect" the outcome of the trial); *State v. Cardall*, 1999 UT 51, ¶ 29 (granting defendant's request for *in camera* review based, in part, on defendant's assertion that victim was habitual liar; that she fabricated rape allegations; that she was mentally and emotionally unstable; and that records would show prior false allegations).

In this case, the Defendant asserts that Ms. XXXXXX has a history of raging, self-mutilative and self-harming behaviors. This history is important to first evidence the Defendant's reasonable belief that Ms. XXXXXX's harmful actions would exacerbate on the evening in question and that he was justified in any contact that he might have made. Accordingly, the records from LDS hospital are important to support the defendant's reasonable belief and evidence Ms. XXXXXX's history of self harm.

The Defendant also asserts that on the evening from which he was charged, Ms. XXXXX was emotionally charged, was not thinking clearly, he believed she was seeking to harm herself

and do so in front of a minor child, and sought to prevent Ms. XXXXXXX from doing so. The Defendant also asserts that on this evening, in her angered state, Ms. XXXXXXXX threatened that she was going to get the defendant in trouble. Ms. XXXXXXX obviously has a different version of events, and wishes to hide her own actions and wrongdoing in this situation. Ms. XXXXXX's emotional instability on this evening presents her motivation to fabricate and protect herself from culpability–instead falsely accusing the Defendant of criminal assault.

Based on these circumstances, the defendant is entitled to the records documenting a similar event occurring just weeks prior, as they are relevant to showing the alleged victim's perceptions when in her emotionally charged state, showing a motive to fabricate the allegations or bias against the defendant, as well as the Defendant's reasonable perception on this evening that she would do harm to herself or others. Since the medical reports sought will likely memorialize and evidence her emotional distress and self destructive behavior, they are highly relevant to this case and discoverable.

D.
THE DEFENDANT HAS MADE THE REQUIRED SHOWINGS FOR THE DISCLOSURE OF MEDICAL RECORDS.

Importantly, the Defendant has made the necessary showings when the disclosure of an alleged victim's medical or mental health records are at issue.

First, any purported privilege does not prevent disclosure in these circumstances and the Defendant asserts his constitutional right to the evidence sought. *See* Edward L. Kimball & Ronald Boyce, Utah Evidence Law at 5-16 (1996). Kimball and Boyce explain:

> *Accused's due process right to evidence*. It may be that a criminal defendant has a constitutional right to evidence that the privilege rules make inaccessible to him.

> *Chambers v. Mississippi* firmly established **that evidence rules cannot be allowed to stand in the way of a fair trial.** If a defendant can show that a privileged communication is reasonably likely to contain substantial exculpatory information, he should be entitled at least to have the court conduct an in camera inquiry into the content of the communication, in order to get an assessment whether due process entitles overriding the privilege.

See id. See also, Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (emphasis added).

Secondly, Utah Rule of Evidence 506 does not protect the requested information. Rule 506 provides:

> **General Rule of Privilege.** If the information is communicated in confidence and for the purpose of diagnosing or treating the patient, a patient has a privilege, during the patient's life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist, including guardians or members of the patient's family who are present to further the interest of the patient because they are reasonably necessary for the transmission of the communications, or participation in the diagnosis and treatment under the direction of the physician or mental health therapist.

Utah R. Evid. 506 (b) (emphasis in original).

Admittedly, Rule 506(b) of the Utah Rules of Evidence generally protects as privileged communications between a health care or mental health provider and a patient if the communications are offered in confidence and for the purpose of diagnosing or treating the patient. *See* Utah R. Evid. 506(b). **However, the privilege is not absolute and there are exceptions**. *See* Utah R. Evid. 506(d). Relevant here, Rule 506(d)(1) states that the "privilege does not exist" if the patient's "physical, mental, or emotional condition" is relevant "in any proceeding in which any party relies upon the condition as an element of [a] claim or defense." *Id.*

As such, when it comes to the examination of health records, the Utah Supreme Court has found that in order to access otherwise privileged communications between a patient and a therapist, the inquirer "must show, with reasonable certainty, that the sought-after records actually contain 'exculpatory evidence. . .which would be favorable to his [or her] defense.'" *State v Blake,* 2002 UT 113, ¶ 19. *See also State v. Worthen*, 2008 UT App 23, ¶19; *State v. Cardall*, 1999 UT 51, ¶ 30. Moreover, notwithstanding the deliberately difficult nature of the reasonable certainty test, *see Blake,* 2002 UT 113, ¶ 19*,* "in the event the protection of victims prevents a fair trial of those accused ...**the right to a fair trial must be preserved**." *Id.* ¶ 10 (emphasis added).

The Defendant asks this Court to find that the Defendant has made the requisite showing in this case.

1. The Alleged Victim has A Relevant Physical, Mental or Emotional Condition

The first threshold test of a Rule 506(d)(1) exception "is whether the party seeking in camera review of privileged records has sufficiently alleged that the witness' mental or emotional condition itself is an element of any claim or defense." *State v. Worthen*, 2009 UT 79, ¶19.[7] As such,

> A useful tool that may be used to differentiate between phenomena that rises to the level of a condition and those that do not is temporality. A condition is not transitory or ephemeral. **A mental or an emotional condition is a state that persists over time** and significantly **affects a person's perceptions**, **behavior**, **or decision making in a way that is relevant to the reliability** of the person's testimony. Professor Wigmore developed this thought in his treatise, in which he

[7] *Worthen* deals only with a mental or emotional condition. The case here also deals with relevant "physical" conditions.

> stated, "An interpretation that most readily comes to mind is the reading that 'condition' denotes a longer-lasting ... mental state than momentary 'emotion,' 'feeling,' or 'pain.' " *Wigmore on Evidence: Evidentiary Privileges* § 6.13.3, 991, 1001 (2002).

Id. at ¶21.

Here, Ms. XXXXXXX has an emotional and behavioral "condition" that has persisted over time which is relevant to this case. It is known that she regularly has engaged in self destructive behaviors, including hitting herself and cutting, sometimes in view of her own child. When she is in a "rage," or on the other hand, in a severe depressed state, she does not think clearly and her perceptive abilities are impacted. She tends to increase her self-harm in severity in relation to the reaction she generates from those around her, and specifically, the Defendant. Indeed, Ms. XXXXXXX's condition affects her perceptions, behavior and decision making in a way that is relevant to her version of events, accusations, and court testimony. Accordingly, Ms. XXXXXXX has a "condition" as contemplated by Rule 506. *Compare with State v. Worthen*, 2009 UT 79, at ¶29 (finding that alleged victim's "frustration with, and hatred toward" her parents is an emotional condition contemplated by the rule, explaining that victim demonstrated persistent hostility and repeatedly expressed desire to leave home).

Further, the alleged victim's "physical" conditions are relevant here. It is anticipated that the City will make an effort to show photographs of the alleged victim on this evening as evidence of harm caused by the Defendant.[8] However, because of Ms. XXXXXX's emotional and self-harming behaviors, her emotional and physical conditions are material to the defense to

[8]Defendant will pose further objections at a later time.

defend that any such purported "injuries" were self-inflicted.

2. The Alleged Victim's Condition Is An Element Of A Defense Claim Here

A second threshold test for determining whether an alleged victim's health records are admissible is whether the party seeking the in camera review has alleged that the witness' condition itself is an element of any claim or defense. *See State v. Worthen*, 2009 UT 79, at ¶19. An "element" of a claim or defense under rule 506(d)(1) encompasses evidence that interjects reasonable doubt into the elements the prosecution bears the burden to prove. *See id.* at ¶¶30-31. Notably, evidence which qualifies as "impeachment" evidence may also qualify as an "element" of a defense. *See id.* at ¶¶30-37.[9]

The Defendant here, as in *Worthen*, also asserts that he is innocent. Inherent in his adamant denial of these assault accusations, the Defendant asserts more specifically that Ms. XXXXXXX is not telling the truth about the alleged assault, that she was in a rage, and that he reasonably perceived that she was going to harm herself or others as she has done often in the past due to her emotional issues and self harming behaviors. When she gets into this state, her perceptions are compromised, and on this occasion, she threatened to call police officers with fabricated accusations of an assault–upon which she eventually followed through. As such, rather

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[9]The Court reasoned:

> Mr. Worthen is not simply arguing "I didn't do it," but rather is making the claim that B.W. has a mental or emotional condition of extreme hatred, which has caused her to fabricate abuse allegations. Mr. Worthen's defense has narrowly defined B.W.'s motive to lie, not her general credibility as a witness, as a crucial element of his defense.

State v. Worthen, 2009 UT 79, ¶37.

than a general credibility issue, Ms. XXXXXX's condition (both emotional and the self-inflicted physical) bears not only directly upon her own ability to perceive and tell the truth, but bears directly upon the Defendant's reasonable belief of her violent behaviors and his affirmative defense to the charges in this case.

Additionally, and as noted above, her physical condition bears upon the issue of who inflicted any alleged injuries (bruising, scarring, etc.). Because Ms. XXXXX regularly engages in self-harm (which will likely be documented in the requested records), her physical condition is relevant to any injuries the Defendant is accused of inflicting.

3. It is Reasonably Certain That The Sought-After Records Contain Exculpatory Evidence.

Finally, a Defendant must also show with reasonable certainty that the sought-after records contain exculpatory evidence which would be favorable to his defense. *See e.g., Worthen*, 2009 UT 79 at ¶38. The Utah appellate courts have construed this requirement in a number of cases. *See e.g.*, *State v. Blake,* 2002 UT 113; *State v. Cardall*, 1999 UT 51.

In *State v. Blake,* 2002 UT 113, the Utah Supreme Court clarified the requirements for access to medical or mental health information. In *Blake*, the Court concluded that a general and "mere speculation" offered by a defendant that a victim's counseling records "might contain exculpatory evidence" useful to his case was not enough to warrant an in camera review of that evidence by the district court. The *Blake* court acknowledged, however, that "there are situations in which otherwise privileged communications between a crime victim and her therapist might be subject to an in camera review and disclosure" *Blake,* 2002 UT 113 at ¶19 (citing *State v. Cardall*, 1999 UT 51). Such disclosure is limited and requires a showing with "reasonable

certainty" that "exculpatory" evidence exists which would be favorable to the defense. *Id.* at ¶19.[10] The "reasonable certainty standard lies more on the stringent side of 'more likely than not.'" *Id.* at ¶20.

Therefore, *Blake* establishes that **mere speculation** that counseling records **might contain** exculpatory evidence useful to the case is not enough to warrant in camera review. *Blake* distinguished, however, that "this situation differs markedly from cases where a criminal defendant **can point to information** from outside sources suggesting that a victim has recanted or accused another of the crime alleged **or has a history of mental illness relevant to the victim's ability to accurately report on the assault**." *Id.* at ¶¶19-20. *Blake* also held that:

> Where a defendant's request for in camera review is **accompanied by specific facts justifying the review**, the court will be more likely to find 'with reasonable certainty that exculpatory evidence exists which would be favorable to the defense,' however when the request is a general one, such as the request in this case for any impeachment material that might happen to be found in the privileged records, a court ought not to grant in-camera review. **At a minimum, specific facts must be alleged**. These might include references **to records of only certain counseling sessions which are alleged to be relevant**, independent allegations made by others that a victim has recanted**, or extrinsic evidence of some disorder that might lead to uncertainty regarding a victim's trustworthiness. This listing is not intended to be exclusive, but is only an example of the type and quality of proof needed to overcome the high *Cardall* hurdle**.

Id. at ¶22 (emphasis added).

With regard to what is "exculpatory," *State v. Bakalov*, 1999 UT 45, ¶30, also provides guidance. In *Bakalov*, in the context of discussing the State's obligation to produce exculpatory evidence, the Utah Supreme Court noted that "**[e]vidence showing a witness's inability to**

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[10]The *Blake* Court acknowledged that "[s]tandards such as 'reasonable certainty' or 'reasonable probability' elude quantification." *Id.* at ¶20.

accurately perceive, recall, or relate events at issue in a trial may be crucial to establishing the truth ...[and] [e]vidence of mental illness is material when it 'may reasonably cast doubt on the ability or willingness of a witness to tell the truth." *Id.* at ¶32.

Here, unlike in *Blake*, the Defendant is not setting forth a general request for all records based only on speculation that impeachment evidence might exist that might be helpful. Rather, the Defendant is requesting records from one specific admission to LDS hospital in the weeks very close in time to the charged date.

Further:

- The Defendant is independently aware, due to his relationship with her, that Ms. XXXXX has a long history of self mutilating, self-harming and violent behaviors;
- The Defendant is independently aware and it is known that in the weeks prior to the charged incident (although the specific date is unknown), Ms. XXXXX was suicidal and had engaged in self harm;
- The Defendant is independently aware that on one occasion, in the weeks prior to the charged incident, the Defendant actually drove Ms. XXXXX to the hospital, but she did not go in;
- The Defendant is independently aware that on a second occasion, in the weeks prior to the charged incident, Ms. XXXXXX took herself to LDS hospital due to suicidal and self-harm behaviors. The Defendant stayed home with the couple's minor child while she did so. It is known that she was in an upset and emotional state. It is records of this evening and this hospital admission that the Defendant seeks;

- There is a reasonable certainty that the records of LDS Hospital on this specific evening will document Ms. XXXXX's emotional state on this evening and detail her state of mind, coherency and ability to perceive;

- There is a reasonable certainty that the records of LDS Hospital and their examination will include statements from Ms. XXXXX as to how she obtained any injuries and scarring on her body, and the LDS Hospital records will likely document those injuries. Documentation of any injuries, bruising, scarring or self mutilation will be important to compare with the purported injuries the Defendant is accused of inflicting;

- There is a reasonable certainty that, because she was suicidal and attending providers would question, the records of LDS Hospital will include statements from Ms. XXXXXX concerning her relationship with the defendant and his abuse, or lack thereof, toward her. These statements will either confirm a lack of abuse on the part of the Defendant, or show a bias and possibly untruthful statements on the part of the alleged victim against the defendant.

As such, rather than a mere request "for any impeachment evidence" which is insufficient, the Defendant has shown to a reasonable degree of certainty that relevant medical records do exist that will help exculpate the Defendant and bolster his justification defense to these allegations. Ms. XXXXXXXXXXX's condition is also relevant to her skewed perceptions when in a rage and attempting harm. Consequently, the Defendant is entitled to disclosure of that exculpatory evidence.

CONCLUSION

Based on the foregoing and arguments made by prior counsel, this Court should issue the

subpoena as requested and allow disclosure of the requested records to the defendant.

DATED this _____ day of April 2011.

MARK R. MOFFAT
ANN MARIE TALIAFERRO
Attorneys for Defendant

MAILING CERTIFICATE

I hereby certify that on this _____ day of April, 2011, a true and correct copy of the foregoing DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ISSUING SUBPOENA DUCES TECUM AND IN RESPONSE TO OBJECTIONS AND MOTION TO QUASH was mailed, postage prepaid, to:

The Salt Lake City Prosecutor
349 South 200 East, #500
Salt Lake City, Utah 84111

Lorie Hobbs
Utah Crime Victim's Legal Clinic
124 South 400 East
Salt Lake City, UT 84111

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