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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. XXXXXX, Defendant.	MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM PURSUANT TO UTAH RULE CRIM. P. 14(b)(1) AND MEMORANDUM IN SUPPORT Case No. XXX (Judge XXXXXX)
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The Defendant, XXXXX, by his attorneys, hereby moves this Court for an order issuing subpoena duces tecum for school records pursuant to Rule 14(b)(1) of the Utah Rules of Criminal Procedure.

Defendant further moves this Court to conduct its *in camera* review of the records pursuant to U.R.Cr.P. 14(b)(4) and disclose to the defense and prosecution as expeditiously as practicable those portions of the records the court determines the defendant has the right to inspect.

A motion hearing is currently scheduled for October 20, 2014. The proposed subpoenas will be presented to the court at this time.

This Motion is supported by the accompanying memorandum of points and authorities.

REQUESTED EVIDENCE

By this motion, the Defendant requests the issuance of a subpoena duces tecum for the following information:

School records from XXXXX Jr. High School, XXXXX Middle School, and XXXXX High School regarding alleged victim XXX (DOB XXXXXX), including but not limited to:

- a. All records relating to disciplinary actions, suspensions, expulsions, in-school detentions;
- b. Attendance records;
- c. All records relating to any disclosures by K.R. of the alleged sexual abuse by her father;
- d. All transcripts and other records regarding K.R.'s grades.

For the following reasons, this Court should order the issuance of the requested subpoenas duces tecum, conduct an *in camera* review of the records, and disclose to the defense those portions of the records the Court determines the Defendant has the right to inspect.

INTRODUCTION AND RELEVANT BACKGROUND FACTS

Defendant XXXX is charged with XXXXXXXX. The incidences are alleged to have occurred between January 2009 and November 2012, when his daughter was 14 and 16 years of age.¹

Daughter, K.R., admits that she didn't get along with her father (PH at 19), but got along with her mother and her older brothers (PH at 19). K.R. was especially close to her older brother

¹XXXXXXXXXXXX.”

Kevin (PH at 21). In November 2012, K.R. made these accusations against Mr. XXXXX on the heels of an argument with her mother who was threatening to send K.R. to XXXX to live with a relative (PH at 20, 25). K.R. didn't want to be sent to XXXXX, and herself threatened to make these accusations against her father if mother and father didn't turn over guardianship of XXXX to XXXXXX, (PH at 25, 27-28). When mother refused, K.R. immediately walked into her school resource officer at XXXXXX High School and made the accusations of sexual abuse against her father (PH at 21, 23-25, 27). At the preliminary hearing, K.R. first claimed that she was not having "family problems" or problems in school, that served as the basis for her mother's desire to send her to California (PH at 25-26, 28). K.R. thereafter admitted that she was having problems at school and was "probably" sluffing school a lot but "doesn't remember." (PH at 26).

The circumstances surrounding this disclosure provides the major impetus for this request.

ARGUMENT

I. THE REQUESTED SCHOOL RECORDS ARE NOT PRIVILEGED AND ARE RELEVANT AND MATERIAL TO THE PREPARATION OF THE DEFENSE.

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 (emphasis added).

Accordingly, the Defendant is requesting school records of the alleged victim as set forth above. This Court should find that the defendant is entitled to the requested information under Rule 14(b)(1) for the following reasons.

A. The Defendant Has a Constitutional Right 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, sought-after records that would supply impeachment evidence support an element of a Defendant’s defense. *See id.*

In this situation, the Defendant is seeking school records in an effort to show the suspect circumstances surrounding the disclosure in this case as well as the exact nature and allegations made in the disclosure to the Granger High School resource officer. The Defendant is surely entitled to seek such information to aid in the presentation of a defense in his case and interject doubt into the credibility of the State’s case and theory.

B. The Defendant Has a Right to this Information as Contemplated in the Discovery Rules of the Utah Rules of Criminal Procedure, and Implicates Defendant’s Right to Effective Assistance of Counsel.

It is also a foundational truth that in order to afford an accused the effective assistance of counsel required by the Sixth Amendment, counsel must undertake a thorough investigation and adequately prepare the case in advance of trial. *See Powell v. Alabama*, 287 U.S. 45, 57 (1932);

Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967). Failure to do so will amount to ineffective assistance of counsel. At this stage in proceedings, then, a defendant's right to investigate and to obtain information about the case and the witnesses thereto should be broad.

While a criminal 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.**

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

Although this Rule of Criminal Procedure applies to disclosures by the State, it provides guidance as to what discovery a Defendant should be entitled to, even if he seeks it on his own through the subpoena powers granted in criminal cases. "Good cause" is shown under the discovery rule when the evidence requested is material to an issue to be raised at trial. *Cf. State v. Spry*, 2001 UT App 75, ¶ 24 and n.7. This includes information which may be used for impeachment evidence as this justification "clearly sets forth the legitimate potential value of the requested evidence to the defense, and, therefore establishes the materiality of the evidence to the issues to be raised at trial." *See id.* at ¶ 22. Indeed, information is seemingly deemed "material"

when it concerns information on any witnesses and documents which the defendant or the State intends to use at trial. *See id.* at ¶ 24.

Here, the requested information is highly material to Mr. XXXXXXX's defense. It is anticipated that the alleged victim will assert that she wanted to leave mother and father's home because of the alleged abuse, and therefore, wanted to go live with XXXXXXX. The school records sought will likely establish that this is not the true reason that K.R. was having problems at home—but that she was a troubled young woman who wanted to do what she wanted, when she pleased. She was not doing well, or attending school, but was instead having issues. These problems were the impetus for mother and father to seek to send K.R. out of state to live with relatives. As a response, K.R. lashed out and threatened to make these accusations against her father. She did so, and made her first disclosure of any of these allegations to the XXXX school resource officer. Accordingly, the requested school records are relevant and material to establish Defendant's theory as to why K.R. is fabricating these allegations, but to obtain any records of K.R.'s first disclosures directly to a school official.

C. The Records Are Relevant to the Alleged Victim's Motivation to Fabricate Allegations.

At trial, a Defendant 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's 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 the **discovery of 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, she fabricated rape allegations, that she was mentally and emotionally unstable, and records would show prior false allegations).

As noted above, Mr. XXXXX seeks disclosure of a number of educational records. K.R.'s disciplinary records, attendance records, and grades bear directly on her motive to fabricate the accusations against her father in order to justify leaving her parent's home, under her own terms and conditions, rather than residing in California as desired by her mother.

D. The Records Are Relevant to the Existence of Prior Disclosures and Statements, If Any, as Well as the Alleged Victim's Veracity.

Because these accusations were first made to the XXXXX school officer, the requested information is also relevant to how the disclosure, and what exact disclosure was made, of the alleged abuse. Such information shows whether these initial statements are consistent or inconsistent with the current allegations. Further, the requested records will shed light on the alleged victim's veracity, or lack thereof.

Specifically, Utah Rule of Evidence 613 allows for evidence of prior inconsistent statements of a witness. The Defendant needs records of this first disclosure from which to compare.

Additionally, specific previous acts relating to veracity may be allowed into trial for impeachment purposes under Utah Rule of Evidence 608. Kimball & Boyce explain that "[r]ule 608(b) gives the court discretion to allow the cross examiner to ask the witness about previous acts that reflect rather directly on the witness's veracity." Edward L. Kimball & Ronald N. Boyce, UTAH EVIDENCE LAW (1996), 6-26 to 6-27. In such a situation, "[a] judge may, under

608(b), allow questions about lies (such as falsification of an employment application, calling in sick when not ill, excessive claim on expense account) and dishonest acts.” *Id.* at 6-27.

“‘Dishonest acts’ under Rule 608 is a broader category than crimes of falsity under Rule 609 [and] these may be inquired about” on cross examination and at the discretion of the court. *Id.*

Therefore, at the very least, the Defendant should be allowed discover information relevant to the alleged victim’s previous statements about the alleged abuse now at issue and under what conditions the statements were made, as well as the alleged victim’s past history showing either truthfulness or a history of falsity.² *Cf. State v. Martin*, 1999 UT 72 (Rape

²Further, a **character trait** for untruthfulness may be admissible. Utah Rule of Evidence 404 provides in relevant part:

- (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, **except: ...**
- (2) Character of Alleged Victim. **Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused**, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor...

Utah Rule Evid. 404(a)(2) (emphasis added).

Moreover, Utah Rule of Evidence 405 allows for inquiry into specific instances of conduct when the character trait is necessary for a defense. Rule 405 provides:

- (a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. **On cross-examination, inquiry is allowable into relevant specific instances of conduct.**
- (b) Specific Instances of Conduct. In cases in which character or a **trait of character of a person is essential element of a charge**,

defendant was entitled to opportunity to uncover previous false allegations of rape made by victim).

II. THE DEFENDANT IS NOT REQUIRED TO MEET THE “REASONABLE CERTAINTY” STANDARD REQUIRED FOR PRIVILEGED INFORMATION.

By this motion, the Defendant is not seeking “privileged” records. Thus, Defendant is not required to meet the “reasonable certainty” test applicable to privileged information.

As noted above, at this pre-trial and information-gathering stage in proceedings, a Defendant’s right to investigate and to obtain information about a case and the witnesses thereto should be broad. Admittedly, however, when it comes to specific types of non-public information concerning an alleged victim, Utah’s Criminal Subpoena Rule does require *a minimal* showing that: 1) the information is not privileged, and 2) that the information is “material.” The Advisory Committee Notes to Rule 14 notes:

Subsection (b)(4) provides that once the defendant has made **the threshold showing** under subsection (a), **records must be sent directly to the court for an in camera review by the court**, whereupon the court will release any information material to the defense. **This ...requires a defendant to make a threshold showing that no privilege applies and of materiality before obtaining even an in camera review.**

Utah R. Crim P. 14 (advisory com. notes) (emphasis added).

claim, or defense, proof may also be made of specific instances of that person's conduct.

Utah R. Evid 405 (emphasis added).

The question whether an item sought is “material” during this pretrial stage of “discovery” and investigation, then, should be similar to Utah’s broad criminal discovery rule³ and based simply upon whether the “requested evidence is necessary to the proper preparation of the defense.” As such, a Defendant meets the threshold standard **for non-privileged items** when the evidence is material to an issue to be raised at trial. *Cf. State v. Spry*, 21 P.3d 675 (Utah App. 2001).⁴ This includes information which may be used for impeachment evidence. *See id.* Indeed, information is material when it concerns any information on witnesses and documents which the Defendant or the State intends to use at trial. *See id.*

While the Defendant acknowledges the burden to obtain records is higher when an accused seeks access to records in which an actual privilege applies, such as medical, mental health or other treatment records,⁵ the higher burden for privileged medical and mental health records must not be confused with the lesser threshold showing of materiality for general subpoenaed and non-privileged information. Consequently, it is simply not the case that a defendant must meet the “reasonable certainty” requirement for every request made concerning an alleged victim.

³As well as the broad information a Defendant is constitutionally entitled to discover under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

⁴Under the Utah Discovery Rule’s general provision, a court may order discovery upon a showing of “good cause.” *See* Utah R. Crim. P. 16. “Good cause” in this context corresponds to a showing of “materiality.” *See State v. Spry*, 21 P.3d 675 (Utah App. 2001) (“Good cause” to discover defendant’s records means that the state must establish the materiality of the requested records to the case”).

⁵*Accord* Utah Rules of Evidence 501-509.

CONCLUSION

Based on the foregoing, this Court should issue the subpoenas as requested and allow disclosure of the requested school records to the Defendant.

DATED this 3rd day of October 2014.

/s/ Ann Marie Taliaferro _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2014, a true and correct copy of the foregoing MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM PURSUANT TO UTAH RULE CRIM. P. 14(b)(1) AND MEMORANDUM IN SUPPORT was electronically filed with the Clerk of Court using the e-filing system, which sent notification of such filing to the following:

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Salt Lake City, Utah 84111

/s/ Tamara Johnson _____