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IN THE SECOND DISTRICT COURT, FARMINGTON DEPARTMENT

IN AND FOR DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. XXXXXXXXXX, Defendant.	COMBINED MOTION FOR ISSUANCE OF SUBPOENA PURSUANT TO UTAH R. CRIM. P.14(b)(1); MOTION FOR DISCLOSURE OF JUVENILE RECORDS and MEMORANDUM IN SUPPORT Case No. XXXXXXXXX (Judge XXXX)

Pursuant to Rule 14(b)(1) of the Utah Rules of Criminal Procedure, the Defendant, XXXX, requests the issuance of a subpoena duces tecum for the information set forth in the attached subpoena, but specifically, for therapy, treatment, and discipline records of alleged victim D.P.

Moreover, the Defendant also requests disclosure of the alleged victim's juvenile court records, including any assessments and diagnoses made while in the juvenile court system.

For the following reasons, this Court should order the issuance of the requested subpoena, order disclosure of the juvenile court records, conduct an *in camera* review of any private records, and disclose to the defense those portions of the records the Court determines the Defendant has the right to inspect.

The basis for this motion is set forth below.

BACKGROUND INFORMATION

General Background of Charges

The Defendant, XXX, is charged with XXXXX. The charges are based on allegations that XXXXXX. *See* Information, probable cause statement.

According to police reports and the probable cause statement, the conduct at issue is alleged to have occurred on the campus of XXXX,. The alleged victim, D.P., was a 16-year-old male who XXXXXXXX.

The Alleged Offense Conduct

Additional facts deleted

D.P's Known Diagnoses

Additional facts deleted.

ARGUMENT

THIS COURT SHOULD ISSUE THE SUBPOENA DUCES TECUM FOR THE ALLEGED VICTIM'S RECORDS AND DISCLOSE THE REQUESTED JUVENILE RECORDS AS REQUESTED BY 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, Defendant XXXX has requested the specified records pertaining to D.P. This Court should find that XXXX is entitled to the requested information for the following reasons.

A. THE REQUESTED RECORDS ARE "RELEVANT" AND "MATERIAL" TO THE DEFENSE.

It is 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.

Initially, 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 discovery rule of criminal procedure applies to required disclosures by the prosecution,[1] 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. By this motion, the Defendant does seek information that tends to negate her guilt and poke significant holes in the credibility of the prosecution's case. Such information, then, should be made available to the Defendant in order for her to adequately and effectively prepare her defense.

Admittedly, Utah's criminal subpoena rule, when it comes to specific types of information concerning an alleged victim, requires the defendant to make a foundational showing that the information sought is "material."[2] Whether information is "material" in the pretrial stages of discovery and investigation under the subpoena rule, then, should be given a similar meaning as that given to the broad criminal discovery rule which is based upon whether the "requested evidence is necessary to the proper preparation of the defense." Utah R. Crim P. 16(a)(5). Thus, a defendant makes a proper showing 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 such 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,

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

[2] *Accord* Utah R. Crim. P 14 (advisory note) ("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") (italics added).

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 above-referenced records are both relevant and material to XXXX's defense against the charges levied against her. The claim against XXXX is based upon D.P.'s statements regarding the event. D.P.'s specific statements, when and how they were made, his credibility and veracity, and the plausibility of those statements, becomes directly at issue. According to police reports, D.P. claims that XXXXXX. D.P. claims XXXXXXXXXXXXX. She then purportedly forced XXXXXX. D.P. then claims XXXXXXXX. XXXXXX denies these allegations and specifically denies that she either invited D.P. to touch her or that she forced him or encouraged him to do so. Also according to police reports, D.P. made statements to his therapist concerning the claims made here, but his version of events has changed.

With the nature of the allegations in mind, D.P.'s history of ADHD and impulsive behavior is material and relevant to issues of credibility of D.P.'s claims. Impulsivity has been defined as "predisposition to rapid, unplanned reactions to internal or external stimuli without regard to the negative consequences of these reactions to the impulsive individual or to others." *See* F. Gerrard Moller, M.D., et al., *Psychiatric Aspects of Impulsivity*, American Journal of Psychiatry (Vol. 158, No. 11). In layman's terms, impulsive individuals are prone to act before they think, and before they consider the consequences of their actions. D.P. has a significant history of impulsivity, both prior to and during XXXXXXXXX. XXXXXXXX a significant amount of therapy was directed toward curbing D.P.'s impulsive and anti-social acts. XXXXXXXX, therefore, has the right to discover, obtain and present evidence related to D.P.'s

impulsivity so that the trier of fact can determine the credibility and plausibility of these accusations.

In addition, D.P.'s conduct disorder diagnosis is material and highly relevant. As described above, deception and lying are diagnostic criteria for a conduct disorder diagnosis. It was also well known and documented XXXXXXXXXX that D.P. often lied, manipulated and failed to take accountability for his own actions while XXXXXXXXXX, regularly pushing blame onto others. He has lied to staff and manipulated rules often while XXXXXXXXXX in an attempt to gain his own advantage.

Additional diagnostic criteria of D.P.'s known conduct disorder include physical aggression, physical cruelty, and violation of societal rules and norms. D.P. has exhibited all of these traits. He has been aggressive and engaged in fighting, was constantly rude and disrespectful to staff and violated treatment program rules. Indeed, D.P. violated the basic rights of others through XXXXXXXXXX. His continued disregard for rules and his disregard for staff and others is part of an entrenched pattern of conduct.

D.P.'s diagnosis of a conduct disorder, including his history of XXXXXXXXXX, are critical when assessing the credibility of his claims that he XXXXXXX. Similarly, D.P.'s history of XXXXXXXXX, as well as the other issues identified above, are also all material and relevant to the issue as to whether it was D.P. who was the true aggressor in the incident, and also crucial to an assessment of D.P.'s credibility as to any component of his testimony.

In sum, the requested records are critical to ascertain the credibility of D.P. as his impulsive behavior and known manipulation goes directly to the truthfulness of his accusations

against XXXXXXXXXX. Relatedly, D.P.'s conduct disorder diagnosis is material since, as described above, deception and lying are diagnostic criteria for the disorder. Additional diagnostic criteria of physical aggression and violation of societal rules and norms bear directly upon who may have actually been the perpetrator in this offense. The records are also relevant and material in order to discover statements, if any, made by D.P. concerning XXXXXXX, the overall veracity of D.P., and any motive to fabricate these allegations against XXXXXXXXXX that may exist.

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

Related to the discussion above as to why this information is "material," a criminal defendant has the right to obtain information for impeachment and cross-examination purposes.[3]

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[3]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.

A witness' veracity also comes into play. Utah Rule of Evidence 613 allows for evidence of prior inconsistent statements of a witness. Additionally, specific acts relating to veracity may be allowed into trial for impeachment purposes, again 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."

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).[4]

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 to discover information relevant to the alleged victim's veracity, previous lies and falsehoods, and other incidents of an alleged victim's past history showing untruthfulness or a history of falsity. *Cf. State v. Martin*, 1999 UT 72 (defendant entitled to opportunity to uncover previous false allegations of rape made by victim).

[4]With these principles in mind, "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 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

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, then, **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, as explained in detail above, XXXXXXXXXX seeks the requested records in an effort to show the suspect circumstances surrounding the allegations here; the untruthful, manipulative, and aggressive behavior of D.P (sometimes, sexually aggressive behavior); as well as the motivations that existed (due to his diagnosed disorders) for D.P. to fabricate. Therefore, XXXXXXXXXX is entitled to discovery of the requested information to aid in the presentation of her defense and to interject doubt into the State's theory that she has committed this crime.

(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).

C. THE DEFENDANT HAS MADE THE REQUISITE SHOWINGS FOR THE DISCLOSURE OF PROTECTED RECORDS.

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

First and foremost, any purported privilege does not prevent disclosure of the information in these circumstances on simple due process grounds where a Defendant's constitutional rights are paramount to an evidentiary rule. *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. (emphasis added, italics in original). *See also, Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

Secondly, Utah Rule of Evidence 506 does not prevent disclosure of the requested information here. 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).

Rule 506(b) 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). Most 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*.[5]

As such, when it comes to the examination of mental health, diagnoses, and therapy 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. Lenkart,* 2011 UT 27, ¶¶ 47-48; *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,

[5]An exception also exists if an evaluation is conducted by court order. *See* Utah R. Evid 506(d)(3). This exception then, is relevant to Defendant's later request for juvenile records, including any assessments and diagnosis made at the direction of the juvenile court.

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 asserts that she has made the requisite showings here.

1. D.P. 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. *See also Lenkart,*2011 UT 27, ¶ 48. 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 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).

Worthen, 2009 UT 79, ¶ 21.

Here, D.P. has emotional and behavioral "conditions" that have persisted over time which are relevant and material to this case. It is known that D.P. has been diagnosed with ADHD, impulsivity, and most importantly, Conduct Disorder. These conditions directly affect D.P.'s perceptions, behavior and decision making in a way that is relevant to the believability of his version of events, accusations, and court testimony. Accordingly, D.P. has "conditions" as contemplated by Rule 506. *Compare with State v. Worthen*, 2009 UT 79, ¶ 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).

2. D.P.'s Condition Is an Element of a Defense Claim

A second threshold test for determining whether an alleged victim's records are reviewable 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 Worthen*, 2009 UT 79, ¶ 19. An "element" of a claim or defense under Rule 506(d)(1) encompasses any 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.[6]

The defendant here, as in *Worthen*, also asserts that he is innocent. Inherent in the denial of these sexual assault accusations, the defendant asserts more specifically that not only is D.P. not telling the truth about the alleged sexual assault, but his diagnosed conditions, and especially his diagnosis of conduct disorder, give him the absolute motive and ability to fabricate accusations against others to suit his own purposes. As such, rather than a general credibility

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[6]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.

issue, D.P.'s diagnosed conditions and disorders bear directly upon the fact that D.P. is aggressive and manipulative, and likely was in this situation, but his diagnosed conditions and disorders also bear directly upon D.P.'s ability to perceive and tell the truth, rather than fabricating and pushing blame onto others as is a diagnostic trait. Because this evidence will serve to interject reasonable doubt into the elements the prosecution bears the burden to prove, then, this Court must give the Defendant access to the requested records.

3. It Is Reasonably Certain That the Sought-After Records Contain Exculpatory Evidence.

Finally, a defendant must 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 "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 requires a showing with "reasonable certainty" that

"exculpatory" evidence exists which would be favorable to the defense. *Id*.[7] 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 [of mere speculation] 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).

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

Here, unlike in *Blake*, XXXXXXXXXX is not setting forth a general and vague request for all records based only on speculation that some unspecified impeachment evidence *might* exist that *might* be helpful. Rather, the Defendant here requests records not only known to exist but known to contain D.P.'s relevant and specific diagnoses, as well as disciplinary and conduct notations of D.P.'s history of aggression, manipulation, and untruthfulness shown herein to be material and necessary to the defense of this case. Defendant's knowledge and reasonable certainty that records exist are evidenced by the following:

- The Defendant is independently aware, due to XXXXXX, that D.P. was committed to YHA for sexually offending against a minor. She is aware that records exist at the XXXX documenting the reasons for D.P.'s admission, his prior troubles with impulsivity, manipulation, and aggression, and that the records contain a sexual behavior risk assessment ("SBRA") administered prior to his entry into the facility.

- Through her employment, Defendant learned that D.P. has ADHD and has significant problems with impulsivity, including impulsive behavior and outbursts. D.P.'s problems with impulsivity were the focus of much of his therapy. D.P.'s problems with impulsivity were also the source of many of D.P.'s disciplinary problems at XXXXXX as D.P. was often XXXXX because of his acts. The Defendant is aware that records of such events are kept and that they exist with regard to D.P.

- Defendant has learned through XXXXX that D.P. has a Conduct Disorder diagnosis and that records exist at XXXXXXXXX evidencing the diagnoses.

- Defendant is independently aware that D.P. has a history of problems relating to

his conduct disorder diagnosis. Specifically, D.P. has a history of aggression XXXX is aware that D.P. was removed from one or more of his schools for fighting and aggressive behavior. While at XXXXXX, D.P. was placed XXXXX for fighting with another XXXXXXXXXXXX. In addition, D.P. XXXXXXX. The Defendant is aware that records of such events are kept at XXXXXXX and that they exist with regard to D.P.

- Defendant is independently aware that D.P. has a history of destruction of property. XXXXXXXXis aware that D.P. was placed XXXXXXX because he started a fire XXXXXXX. The Defendant is aware that records of such events are kept XXXXXX and that they exist with regard to D.P.

- Defendant is independently aware that D.P. has a history of manipulative behaviors XXXXXXXXX. D.P. was repeatedly admonished for manipulation of others and XXXXXXXXXX. D.P. also struggled with issues related to honesty and truthfulness while in the program. D.P. was constantly admonished and placed on restriction a number of times. The Defendant is aware that records of such events are kept XXXXXXXX and that they exist with regard to D.P.

- Defendant is independently aware, XXXXX that XXXXXXXXXX kept extensive records relating to D.P. and other XXXXXXX of the program. These records include, but are not limited to, therapeutic records, disciplinary records, monthly compliance/update records, incident reports, and treatment plan records.

- Finally, Defendant is aware from police reports and discovery provided in this

matter that D.P. made statements to his therapist specifically concerning the allegations in question. The Defendant is aware that the therapist would take notations and document such events and those records are kept at XXXXXXXX

Accordingly, there is a reasonable certainty that the requested records not only exist and are kept in the regular course of business at XXXXXXXX, but that they will document D.P.'s diagnosed conditions, his state of mind, impulsivity, aggression, manipulation, and motive to fabricate these offenses against the defendant in an effort to blame others for his own wrongdoing. As such, rather than a mere vague request "for any impeachment evidence" which is, admittedly, insufficient, the Defendant here has set forth abundant facts and shown to a reasonable degree of certainty that relevant records do exist that will help exculpate her and bolster her defense to these allegations. Consequently, XXXXXXX is entitled to disclosure of that exculpatory evidence.

D. THE DEFENDANT ALSO HAS A RIGHT TO ACCESS D.P.'S JUVENILE COURT RECORDS.

On a separate but related request for records involving D.P., this Court should also order disclosure of D.P.'s juvenile court records, especially any court ordered evaluations, assessments, and treatment or disciplinary notes.

Again, the Sixth Amendment to the United States Constitution, as well as Article I, section 12 of the Utah Constitution, guarantees the right of an accused in a criminal prosecution confront the witnesses against him. The right to confrontation also embodies the right to cross-examination. *See e.g., Davis v. Alaska*, 415 U.S. 308, 315 (1974) ("Confrontation means more than being allowed to confront the witness physically. . .a primary interest secured by it is the

right of cross-examination"); *State v. Maestas*, 564 P.2d 1386, 1387 (Utah 1977) ("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").

Importantly, in a setting such as the present one, "**the right of confrontation is paramount to the State's policy of protecting a juvenile offender**." *Davis v. Alaska*, 415 U.S. at 319 (emphasis added). This is because "[w]hatever temporary embarrassment might result to [the juvenile] or his family by disclosure of his juvenile record–if the prosecution insist[s] on using him to make its case– is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial. . .witness." *Id*. Thus, any State policy interest "in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id*. at 320. It follows course, then, that if a defendant has the right to confront and cross-examine a juvenile on his relevant criminal records and probationary status, the prosecutor and/or the Court must allow disclosure to the defense of those very juvenile records.[8]

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[8]Again, and to provide further guidance, "It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie,* 480 U.S. 39, 57, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987). A prosecutor's failure to disclose evidence violates a defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as due process under the Utah State Constitution. *See, e.g., Brady v. Maryland,* 373 U.S. 83, 86 (1963); *Kyles v. Whitley*, 514 U.S. 419, 423-33 (1995); *United States v. Agurs*, 427 U.S. 97 (1976); *Walker v. State*, 624 P.2d 687, 691-92 (Utah 1981); U.S. Const. amend XIV; Utah Const. art. I, §7. This obligation applies equally to impeachment evidence and to evidence that was not requested by the defense. *United States v. Bagley*, 473 U.S. 667, 676 (1985). The Supreme Court again explained the basis for applying a prosecutor's duty to disclose to impeachment evidence in *Giglio v. United States*, 405 U.S. 150, 154 (1972). The court reasoned: "When the 'reliability of a given witness may well be determinative of guilt or innocence' non-disclosure of evidence

Additionally, Utah Rule of Evidence 609 permits the introduction of prior convictions for the purpose of attacking the credibility of a witness if the conviction was for a felony or a crime that involved dishonesty. *See* Utah R. Evid. 609(a). Specific to juvenile adjudications, Rule 609(d) governs the use of prior juvenile adjudications to attack credibility in a criminal case. *See* Utah R. Evid. 609(d); *State v. Gonzales*, 125 P.3d 878, 888 (Utah 2005). Under this subsection, juvenile adjudications are admissible when three conditions are met: the witness against whom the adjudication is offered is not the accused; the adjudication is for an offense that would be admissible if committed by an adult; and the Court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence. *See* Utah R. Evid. 609(d). Also, and in line with *Davis v. Alaska*, juvenile adjudications are admissible if the defendant is not making a general attack on the witness' credibility, but can "connect the adjudications to bias, prejudice, or motive to lie." *Davis v. Alaska*, 415 U.S. at 890.

Here, the Defendant requests discovery of D.P.'s juvenile records and adjudications, including any evaluations completed (again, an SBRA) and/or diagnoses made as part of court ordered treatment and probation. *Also accord* Utah R. Evid 506(d)(3) (exception to privilege exists if evaluation conducted by court order). Although this requested information may consist of primarily "court records" rather than records actually in the possession of the prosecutor, since the State would have the obligation to disclose this information, and since the defendant has the

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affecting credibility falls within th[e] general rule of *Brady*." 405 U.S. at 154. In *Bagley*, 473 U.S. at 676, the court explained that "such evidence is 'evidence favorable to an accused,' [citation omitted], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal."

right to cross-examine the witness in this case based upon this information related to bias, prejudice, or motive to lie, it follows that this Court must allow disclosure. Indeed, this Court must at least allow the inspection of the requested juvenile records and delinquency history summaries as the defendant has a "legitimate interest in [those] proceedings" in order to avail herself of her state and federal rights to due process, cross-examination, and confrontation in her own criminal trial where her own liberty is at stake. *See* UTAH CODE ANN. §78A-6-209(3) (noting that with the consent of the judge, juvenile court records may be inspected by persons having a legitimate interest in the proceedings).[9]

CONCLUSION

Based on the foregoing, this Court should issue the subpoena as requested, conduct an appropriate in camera review, and thereafter, disclose the requested material records to the Defendant. This Court should likewise order the disclosure to the defendant of D.P.s juvenile court records.

DATED this _____ day of June 2012.

MARK R. MOFFAT
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[9]*See State v. Blake*, 63 P.3d 56 (Utah 2002) (noting that defendant made no request under then codified Utah Code Ann. §78-3a-206).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing COMBINED MOTION FOR ISSUANCE OF SUBPOENA PURSUANT TO UTAH R. CRIM. P.14(b)(1); MOTION FOR DISCLOSURE OF JUVENILE RECORDS and MEMORANDUM IN SUPPORT was hand-delivered to XXXXXXXXXXX on this _____ day of June 2012.

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K:\AMT\Subpoena memo (priv records).wpd