

**Court of Appeals No. 46091-2-II
Clark County Superior Court No. 10-1-00389-4**

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON, DIVISION II**

In re the Personal Restraint of:

BRUCE LEE FRITZ,

Petitioner.

**REPLY TO PROSECUTOR'S RESPONSE TO
PERSONAL RESTRAINT PETITION**

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TABLE OF CONTENTS

I. Statement of the Case in Reply. 1

II. Argument in Reply 3

A. Use of the God and the Bible as a means to bolster prosecution witnesses or to endorse the prosecution of Mr. Fritz violates State and Federal constitutions, the Rules of Evidence, and applicable case law. 3

B. The Petitioner did not receive effective assistance of trial counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, Section 22 of the Washington Constitution. 6

1. Defense counsel was ineffective for failing to properly object to the introduction of religious testimony 7

2. Petitioner’s trial counsel was ineffective in his handling of the medical testimony presented by the prosecutor’s expert witness 7

3. The Response fails to address the Petitioner’s claim that his trial counsel was ineffective during closing argument. 15

III. Conclusion 16

TABLE OF AUTHORITIES

Washington Cases

<i>Day v. Goodwin</i> , 3 Wn. App. 940 (1970)	5
<i>McKillip v. Union Pacific R.R.</i> , 11 Wn. App. 829 (1974).	5
<i>State v. Dunn</i> , 125 Wn. App. 582 (2005).	8

OTHER AUTHORITIES

<i>Washington Constitution Article I, §11</i>	4, 7
<i>Washington Constitution Article I, § 22</i>	6
U.S. Constitution, Amendment 6	6, 15
Evidence Rule 610	4, 7

OTHER CASES

<i>Holladay v. Haley</i> , 209 F. 3d 1243 (11 th Cir. 2000)	11
<i>Holsomback v. White</i> , 133 F. 3d 1382 (11 th Cir. 1998)	12
<i>Hooks v. State</i> , 416 A. 2d 189 (Del. 1980).	6
<i>Linstadt v. Keene</i> , 239 F. 3d 191. (2 nd Cir. 2001)	7, 11
<i>Lord v. Wood</i> , 184 F. 3d 1084 (9 th Cir. 1999)	15
<i>State v. Brown</i> , 256 Or. App. 774, 302 P. 3d 1214, 1216 (2013)	8
<i>State v Ceballos</i> 266 Com 364, 832 A2d 14 (2003).	4

State v. Towe, 210 N.C. App. 430, 707 S.E. 2d 770 (2011) *aff'd as modified on appeal*, 732 S.E. 2d 564 (2012). 8

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 366 (1985) 7, 15

United States v. Cronin, 466 U.S. 648, 104 S. Ct 2039 (1984) 15

MISCELLANEOUS

State v. Fritz, 169 Wn. App. 1035 (unpublished op. Div. II, 2012). 15

Brief of Respondent to the Court of Appeals, *State v. Fritz*,
No. 41302-7-II 2

I. STATEMENT OF THE CASE IN REPLY

Rather than focusing on the legal issues, much of the Response to Personal Restraint Petition (hereinafter, "Response") is spent simply repeating, in great detail, allegations made by L.M.F. that have previously been described by the trial prosecutor as "horrible", "disturbing" (RP 373) - allegations that would produce a strong emotional reaction in any reader. See, Response at p. 2-12 of 27

Further, the Respondent argues for the first time that the result of the Petitioner's trial was "not close" because the complainant's mother testified that the Petitioner had once "confessed" to her.¹ Response at p. 22. By contrast, both the trial prosecutor and the Respondent on direct appeal recognized that the evidence against the Petitioner at trial was not overwhelming, and that whether Mr. Fritz would be

¹ Mr. Fritz consistently denied ever having had any improper contact with L.M.F. and denied he ever said otherwise. See, RP 168, 434, 436. The "confession" first appeared during trial when L.M.F.'s mother, Regina Fowler, claimed that, after she questioned Mr. Fritz for hours, Mr. Fritz said he improperly touched L.M.F. RP 183. However, Ms. Fowler didn't report the "confession," never changed her personal relationship with Mr. Fritz after he apparently confessed, never mentioned the apparent confession during her pre-trial interviews and, when pressed for details during trial about the confession, Ms. Fowler could provide no additional information. RP 24-25, RP 172.

convicted was dependent on L.M.F.'s credibility, not the assertion by the complainant's mother that the Petitioner had "confessed."²

The facts remain that, although L.M.F. contended she'd been vaginally, anally, and orally assaulted by the Petitioner approximately 50 times (see, Response p. 7, and see RP 290, 291, 293), not a single piece of physical evidence corroborated her claim. Further, although L.M.F. claimed the assaults went on for years, not a single person observed anything out of the ordinary in either L.M.F.'s behavior, Mr. Fritz's actions, or in L.M.F.'s interactions or relationship with Mr. Fritz. RP 118-337.

The testimonial portion of the Petitioner's six-count felony jury trial lasted only one day. Even so, as noted in the Personal Restraint Petition With Legal Argument and

² The trial prosecutor completed her entire initial closing without arguing or mentioning the alleged confession, focusing instead on whether the jury should believe L.M.F. RP 363-374. During rebuttal, when the prosecutor finally did mention L.M.F.'s mother's assertion about a confession, she gave it only a passing mention, again focusing primarily on L.M.F.'s credibility. RP 405-09. On appeal, the Respondent was even clearer in acknowledging the minimal value of Ms. Fowler's description of a confession, stating that, "Notwithstanding the defendant's confession, this case against the defendant came down to whether the jury believed L.M.F. was credible." Brief of Respondent to the Court of Appeals. *State v. Fritz*, No. 41302-7-II, at p. 21.

Authorities (hereinafter, "Petition"), Mr. Fritz's conviction was obtained in violation of the rights guaranteed to him under the State and Federal Constitutions. Furthermore, as established by the exhibits to the previously filed Petition and the exhibit to this Reply, material evidence not previously heard requires vacation of Mr. Fritz's conviction.

II. ARGUMENT IN REPLY

A. Use of God and the Bible as a means to bolster prosecution witnesses or to endorse the prosecution of Mr. Fritz violates State and Federal Constitutions, the Rules of Evidence, and applicable case law.

Contrary to the Response, the Petitioner never claimed testimony the prosecutor elicited from both L.M.F. and her mother inferring God and the Bible endorsed Fritz's prosecution, were simply "a fleeting reference." Response at p. 14. Instead, as addressed in the Petition, not only did the religious statements constitute improper bolstering, but because L.M.F.s credibility was a key issue, those references deprived the Petitioner of a fair trial. Additionally, that the testimonial portion of Mr. Fritz's jury trial lasted only one day served to magnify the prejudicial impact of the improper religious testimony. There was nothing fleeting about it.

The Response fails to address any of the legal authority in the Petition that established that the religious testimony presented to the jury in the *Fritz* trial was improper. See, Petition at p. 9-12, 14, 16. Instead, the Respondent limits their legal analysis to an assertion that it was “notable [the Petitioner] did not cite to a single Washington case to support his argument.” Response at p. 16. The Response ignores the fact that the Petitioner cited to Article I, Section 11 of the Washington State Constitution;³ Evidence Rule 610;⁴ and seven cases from various jurisdictions, including the Ninth Circuit, all of which support the position that the religious testimony presented by the prosecutor’s witnesses in the *Fritz* trial was improper.⁵ In opposition the Response fails to cite to a single contrary authority and does not attempt to distinguish any of the authority or cases provided by the Petitioner.

³ See, Wash. Const. Art I, §11, prohibiting the questioning of any witness in any court “touching upon his religious beliefs to affect the weight of his testimony.”

⁴ ER 610: “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced.”

⁵ E.g. *State v. Cebellos*, 266 Conn. 364, 392, 832 A.2d 14 (2003) (reversing defendant’s conviction for sexual assault of child because testimony from victim that God would punish those who weren’t truthful was used to infer God was waiting to punish the defendant); see also, cases cited in pages 9-12 of the Petition.

Rather than address the legal and constitutional violations resulting from the improper religious testimony, the Respondent asserts that when Petitioner's trial counsel asked L.M.F. who she told about her allegations, trial counsel "opened the door" to testimony from both L.M.F. and her mother about L.M.F.'s belief that God endorsed her coming forward and that the Bible told her that people who hurt children, like Mr. Fritz, will be punished. Response at p. 16, RP 154-156.⁶ Questions by Mr. Fritz's trial counsel to L.M.F. did not open the door. See e.g. *Day v. Goodwin*, 3 Wn. App. 940, 943 (1970) (asking an officer on cross examination who he interviewed and if he took notes of the interviews does not the open door to the content of the interviews.); also, *McKillip v. Union Pacific R.R.*, 11 Wn. App. 829, 837 (1974).

In order for the prosecutor to secure Mr. Fritz's conviction, it was vital that the jury be absolutely convinced L.M.F. was credible. The trial prosecutor intended to elicit the religious testimony regardless of anything Mr. Fritz's defense counsel said or did during the trial. Accordingly, as early as direct exam during pre-trial

⁶ The Response also states L.M.F. came forward with her allegations after returning from church with Mr. Fritz. Response at p. 3, citing to RP 165-66, 194. The record does not support the story that Mr. Fritz attended church with L.M.F.

hearings, before defense counsel had asked a single question, the prosecutor elicited testimony from L.M.F.'s mother about L.M.F.'s belief that God told her to make her allegations against Mr. Fritz public. RP 17-18.

Introduction by the prosecutor of religious testimony used to bolster the complainant or to infer that either God or the Bible or both endorsed the prosecution of Mr. Fritz was constitutional error. The prejudice resulting from the error had an even greater impact because L.M.F.'s credibility was central to securing a conviction and the testimonial portion of the Petitioner's jury trial was so short, lasting just one day.⁷

B. The Petitioner did not receive effective assistance of trial counsel as guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, Section 22 of the Washington Constitution:

Determining whether a trial attorney's deficient representation resulted in sufficient prejudice to the accused so as to require reversal mandates that a reviewing court consider trial counsel's errors in the aggregate, as opposed to analyzing the several errors standing alone.

⁷ See, e.g. *Hooks v. State*, 414 A.2d 189, 204-207 (Del. 1980) (court on appeal considered that the defendant's trial had been quite lengthy so reversal based on improper references to the Bible by the prosecutor during trial was not required).

Linstadt v. Keene, 239 F. 3d 191, 199 F. 2d Cir. 2001) (citing to *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 366 (1985)).

1. Petitioner's trial counsel was ineffective for failing to properly object to the introduction of religious evidence.

Article I Section 11 of Washington's Constitution, ER 610, and case law cited in the Petition provided Mr. Fritz's trial counsel with ample warning that evidence of a witness's religious beliefs and the introduction of religious evidence used to bolster a witness are improper. Yet, Mr. Fritz's trial counsel did not raise the constitutional prohibition or the evidence rule in an attempt to keep the prejudicial evidence out. That failure constitutes ineffective assistance of counsel and resulted in significant prejudice to the Petitioner.

2. Petitioner's trial counsel was ineffective in his handling of the medical testimony presented by the prosecutor's expert witness.

The failure of Petitioner's trial counsel to properly prepare for and respond to expert medical testimony from prosecution consultant Marsha Stover⁸ was constitutional error, not a trial tactic, as argued in the Response. Response at p.19, 20.

⁸ Ms. Stover was a nurse retained by the prosecution to serve as a consultant/expert witness in cases involving allegations of child sexual abuse prosecuted in Clark County. RP 255-56.

Prior to trial, at the prosecutor's request, Ms. Stover performed a physical exam on L.M.F. Ms. Stover found nothing abnormal and no sign of physical injury consistent with L.M.F. having been the victim of a sexual assault. RP 258-59. Nonetheless, Ms. Stover opined that her absence of findings were consistent with what L.M.F. had reported about being sexually assaulted. RP 254.⁹ Stover's testimony constitutes error requiring reversal of Mr. Fritz's conviction. See, *State v. Dunn*, 125 Wn. App. 582, 593 (2005) (Constitutional error to allow expert to opine child was sexually abused in absence of conclusive physical evidence); *State v. Brown*, 256 Or. App. 774, 778, 302 P.3d 1214, 1216 (2013) (reversible error to admit medical opinion of sexual assault in absence of physical evidence of abuse); *State v. Towe*, 210 N.C. App. 430, 433, 707 S.E.2d 770 (2011), *aff'd as modified on appeal*, 732 S.E.2d 564 (2012) (to allow an expert to testify that complainant fell into category of children who are sexually assaulted but show no physical symptoms of the assault constitutes improper bolstering and is such a "fundamental error" that reversal is proper even if defense counsel failed to object). The Petitioner's trial

⁹ E.g. What L.M.F. had reported was having vaginal intercourse with Mr. Fritz in their apartment "...a lot. Like twenty times." RP 290; see also, RP 291 (L.M.F. explaining she had been sexually assaulted by Mr. Fritz in her house at least 30 times); RP 293 (L.M.F. explaining Mr. Fritz put his penis in "my crotch").

counsel was ineffective for failing object or challenge Stover's testimony.

Of even greater concern, in effort to reconcile L.M.F.'s assertion of having engaged in vaginal/penile intercourse with the complete absence of any physical evidence of sexual assault, Ms. Stover provided Mr. Fritz's jury with inaccurate and misleading information under the guise of expert medical testimony. For example, Ms. Stover explained the absence of any physical sign of sexual assault by testifying that the hymen in a prepubertal child like L.M.F. "stretches," and that only the most severe trauma would cause a tear in a prepubertal child's hymen. RP 248-49. Furthermore, Ms. Stover declared, without providing any verifiable support, that her theory about the hymen of a pre-pubertal girl "stretching" was generally accepted in the medical community. RP 249. In fact, the opposite appears to be true. See Exhibit 1 to Reply, Declaration of Steven R. Guertin, M.D. paragraph 12 (explaining that, contrary to the testimony of Ms. Stover, the hymen of a pre-pubertal child is not "stretchy").¹⁰

¹⁰ The Response argues that Mr. Fritz failed to provide a declaration from Dr. Lifton L.M.F.'s doctor. The Petitioner replies with a declaration from Stephen Guertin, M.D.. See, Exhibit 1 to Reply. Dr. Guertin is not limited by HIPPA privacy laws that would restrict Dr. Lifton. Furthermore, Dr. Guertin's qualifications as an expert in pediatric sexual assault far exceed Ms. Stover's, and likely exceed those of Dr. Lifton. Compare Exhibit 1, paragraphs 2-10 with RP 267, RP 235-38.

Similarly, Ms. Stover informed the Petitioner's jury that L.M.F.'s physical exam also may have appeared "normal" despite L.M.F.'s assertions that she had vaginal intercourse with an adult male several times, because the hymen can "grow right back" even if completely broken out during intercourse.¹¹ Ms. Stover went on to testify that her theory about a torn hymen "growing right back" in a pre-pubertral child following intercourse was generally accepted in the medical community. RP 249, 251, 262; also, Response at p 10. However, it appears there is actually significant question in the medical community, if not total disagreement, with the accuracy of Ms. Stover's theory that a "completely broken" hymen in a pre-pubertral child would "grow back" and leave no evidence of the break, in as little as five weeks. Compare testimony of Ms. Stover RP 262 with Declaration Dr. Guertin, paragraphs 15 and 16 (Exhibit 1, attached) and Declaration of LaMonte Fritz (Petition, Exhibit 3, paragraphs 8-11).

It's clear Petitioner's trial counsel recognized there was something inaccurate about that portion of Stover's testimony. See,

¹¹ See, RP 262, Ms. Stover testifying that if the "whole thing [the hymen] is completely broken out it will heal right back." E.g. Question to Stover: "So if an adult male's penis goes into a six, seven, eight, nine-year-old child's body and breaks the hymen out, it is going to grow right back?" Stover: "Yes."

RP 262. However, it's likewise clear he had not prepared to rebut Stover's inaccurate medical testimony with either the necessary medical knowledge or the use of a qualified expert medical witness. The law makes clear that defense counsel is ineffective in a child sexual assault prosecution for failing to contact an expert when, as occurred here, there is an absence of any medical evidence corroborating the claim that the victim had been sexually assaulted. *Linstadt v. Keene*, 239 F.3d 191, 201 (2nd Cir. 2001); see, also *Holladay v. Haley*, 209 F.3d 1243, 1251-52 (11th Cir. 2000).

As the declarations of Dr. Geurtin and of nurse LaMonte Fritz establish, Ms. Stover's medical testimony was in material part medically inaccurate and therefore misleading to Mr. Fritz's jury. Defense counsel was ineffective for failing to consult with and present available medical evidence that would have shown Ms. Stover's testimony for what it was. As the result of defense counsel's failure, Mr. Fritz's jury based their verdict on inaccurate and contested medical theory, causing Mr. Fritz to suffer substantial and overwhelming prejudice.

The Response also argues that Mr. Fritz's trial counsel was not ineffective for failing to call Dr. Lifton, a medical doctor who examined

L.M.F., because Dr. Lifton, like Ms. Stover, failed to find any physical evidence L.M.F. had been sexually assaulted. Response p. 23. However, the reason defense trial counsel was ineffective for failing to call Dr. Lifton was because Dr. Lifton's examination, unlike Ms. Stover's, occurred during the period L.M.F. alleges she was actually being sexually assaulted. Dr. Lifton's testimony would have cast even further doubt on Ms. Stover's theory that the reason Stover failed to find physical signs L.M.F. had been abused was that L.M.F.'s hymen had "grown back" during the five week period between the last sexual assault and Ms. Stover's exam. See also, *Holsomback v. White*, 133 F. Wd. 1382, 1387-88 (11th Cir. 1988) (on appeal court determined defendant's trial counsel was ineffective for failing to interview and call complainant's family doctor in light of fact no physical evidence corroborated child victim's claims of sexual abuse). Although Mr. Fritz's trial counsel recognized that Dr. Lifton's testimony was both consistent with Mr. Fritz's innocence and of great value, rather than call Dr. Lifton as a witness, it appears Mr. Fritz's counsel believed it

was the prosecutor who had the duty to produce Dr. Lifton.¹²

In addition, Mr. Fritz's trial counsel could have called LaMonte Fritz, a nurse with 40 years experience who practiced in obstetrics and gynecology in the medical community where L.M.F. asserts she was sexually assaulted. See Petition, Exhibit 3, Declaration of LaMonte Fritz. Ms. Fritz was on the Petitioner's witness list. *State v. Fritz*, Clark County No. 10-1-0389-4, Amended Defendant's Witness List, dated July 26, 2010. Furthermore, she was present at the Petitioner's trial. Petition, Exhibit 3, paragraph 8. It is clear from her declaration that Ms. Fritz would have provided testimony contradicting both Ms. Stover's theory that a broken hymen quickly grew back and that Stover's theory was generally accepted in the medical community. She also could have provided some factual information beneficial to the defense. *Id.* at paragraph 12.

Notably, the Response takes no issue with the substance of what Ms. Fritz would have testified to and, likewise, does not attack any of the medical facts or reasoning presented by Ms. Fritz in her

¹² See RP 400, Mr. Fritz's trial counsel argued during closing, "The people that were in this case, Dr. Lifton. Where is Dr. Lifton? Dr. Lifton actually did a medical exam before this occurred closer in time to when the events supposedly occurred. Dr. Lifton should have been consulted, should have been brought here. Where the heck is that doctor?"

declaration. Instead, the Response simply declares that “it is inconceivable that a competent attorney would call this woman,” and that it was “absurd” that any attorney would call Ms. Fritz as a witness. Response at p. 24, 25. It appears the only reason the Response asserts that it would have been “inconceivable” and “absurd” to call Ms. Fritz to testify is that she was a relative of the accused. That reasoning did not disqualify Ms. Fritz from testifying, just as it failed to prevent the trial prosecutor from calling the complainant’s grandmother as a trial witness. See, RP 192, testimony of Darvie Luce. Nor did that reasoning negate the accuracy of Ms. Fritz’s medical knowledge.

In light of the absence of any physical evidence corroborating L.M.F.’s allegations, and the inaccurate medical evidence presented by Ms. Stover when she testified, along with the availability of witnesses with qualifications and experience equal to or exceeding that of Ms. Stover’s, defense counsel was ineffective for failing to object to Ms. Stover’s testimony, and was ineffective for failing to consult with, and/or call a medical expert to refute what appears to be inaccurate,

but material testimony.¹³

3. The Response fails to address the Petitioner's claim that his trial counsel was ineffective during closing argument.

The Petitioner denied having any improper contact with L.M.F. RP 434, 436. Accordingly, it was error for petitioner's trial counsel to argue in closing that "the issue here is not whether it happened or not. There is a big issue as to time there." RP 374.

Unless a client first consents or the evidence of guilt is overwhelming, defense counsel is ineffective when he expressly or impliedly argues to the jury that his client is guilty. *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2039 (1984).

Similarly, Fritz's trial counsel failed to object to misconduct arguments presented by the prosecutor during her closing. See, *State v. Fritz*, 169 Wn. App. 1035 (unpublished op. Div. II, 2012)

Examining the errors and omissions of Fritz's trial counsel confirms the Fritz did not receive the effective assistance of counsel the constitution requires. See, *Strickland* at 466 U.S. at 695-96. For example, Mr. Fritz's trial counsel failed to object to improper religious

¹³ See e.g. *Lord v. Wood*, 184 F.3d 1084 (9th Cir. 1999) (a lawyer who fails to adequately investigate and introduce information that demonstrates his client's factual innocence or that raises sufficient doubt as to that question to undermine confidence in the verdict, rendered deficient performance).

testimony from prosecution witnesses, failed to prevent the admission of improper medical opinion evidence, failed to object or rebut inaccurate medical testimony from a prosecution expert and was ineffective in his own closing and for failing to prevent the prosecutor from presenting misconduct arguments in the prosecutor's closing. See Petition, p. 27-29. As a result, Mr. Fritz suffered substantial prejudice such that the confidence in the outcome of Fritz's trial is undermined.

III. CONCLUSION

Mr. Fritz's trial was not a case where the effects of the errors described herein were "diluted" by days or weeks of testimony that led jurors to the inescapable conclusion that, regardless of the errors, the accused was guilty. In fact, just the opposite is true.

The testimonial portion of Mr. Fritz's felony jury trial lasted all of one day. The key issue in Fritz's trial, acknowledged by the prosecutor, was whether the complaining witness, L.M.F. was credible. See, *infra* p.2, fn. 2.

L.M.F.'s credibility was bolstered by evidence presented by the prosecutor that L.M.F. believed God and/or the Bible supported her

accusations of Mr. Fritz. The Petitioner's jury considered that improper evidence in determining whether L.M.F. should be believed.

The Petitioner's jury also considered misleading medical evidence from a prosecution expert that L.M.F. could have had intercourse with Fritz but her hymen remained intact because the hymen of a pre-pubertal girl is "stretchy." The Petitioner's jury was also left to consider that the reason there was no sign of L.M.F. having had intercourse with the Petitioner is that L.M.F.'s hymen "grew back" and that that phenomenon is commonly accepted among those in the medical community. Yet that testimony, unchallenged by the defense, was misleading. Furthermore, the prosecutor's expert consultant explained to the Petitioner's jury that a complete absence of any medical evidence that L.M.F. had been sexually assaulted was consistent with L.M.F.'s contention that she'd had vaginal intercourse with a grown man on several occasions.

Added to that, Fritz's trial counsel was ineffective in his own closing and allowed Fritz's jury to consider inflammatory, improper argument by the prosecutor when asking the jury to convict Fritz.

As noted herein, Mr. Fritz's conviction was obtained through the violation of his Constitutional rights.

Furthermore, material evidence refuting expert medical evidence proffered by the prosecutor was not presented during Fritz's trial. Had that evidence been presented, there is a high likelihood Fritz would not have been convicted. Therefore the interests of justice require that Mr. Fritz's conviction be vacated.

DATED this 30th day of September, 2014.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Eric W. Lindell", written over a horizontal line.

Eric W. Lindell, WSBA # 18972
Attorney for Petitioner Fritz

EXHIBIT 1 TO REPLY

I, Steven R. Guertin, MD, hereby declare as follows:

1. I am over the age of 18 years and am a citizen of the United States. I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts at trial.
2. I am a physician licensed to practice medicine in Michigan. I have been licensed to practice medicine for approximately 40 years. I am board certified in the field of pediatrics.
3. I am an Associate Professor of Pediatrics at Michigan State University's College of Human Medicine and have been the physician member of the Child Safety Program (child abuse evaluation team) at Sparrow Hospital in Lansing, Michigan since 1983. My duties include teaching child abuse diagnosis and treatment to rotating medical students, residents from the Pediatric training program, residents from the Emergency Medicine training program and residents from the Family Practice training program. I also have participated in helping to train our local SANE nurses and am consulted by nurses from the SANE program for difficult cases appearing in the Emergency Department.
4. As a physician I have received a number of honors and awards including but not limited to: the Child Abuse Prevention Services "Service to Children Award;" the AH Robbins and Wyeth Labs "Miracle Makers Award;" the Michigan State Medical Society "Community Service Award;" the Michigan Hospital Association "Physician Leadership Award;" the Michigan State Medical Society "Doctors and their Families Make a Difference in Michigan Award;" and am the recipient of Sparrow Hospital's first "Physician of the Year" award. I have been named to the 2014 Best Doctors in America list in the field of Pediatrics and Human Development.
5. I have served as a presenter at a variety of conferences including a statewide conference sponsored by the Michigan State Police, providing education to the State Police in the areas of both physical and sexual abuse. I have also participated in statewide conferences sponsored by the Michigan Prosecuting Attorneys Association and the State of Michigan Family Independence Agency. These conferences were directed towards educating State police, fellow physicians engaged in child abuse evaluation and treatment, as well as social workers, physicians-in-training and prosecutors. As well, I have presented at a number of venues for defense bar associations.
6. I have also worked for the State of Michigan's Children's Ombudsman on an *ad hoc* basis, evaluating difficult cases of suspected child abuse. In addition, I was a consultant for the regional "Angel House" forensic center/children's shelter.

7. Each year I see approximately 200 children who are referred from a five county area in the State of Michigan for suspected abuse. Over 90% of those referrals are because of suspected sexual abuse.
8. I have been qualified and have testified as an expert witness in the field of pediatrics and child abuse in a number of counties in my home state of Michigan including: Marquette; Alpena; Antrim; Roscommon; Saginaw; Sanilac; Lapeer; Shiawassee; Isabella; Genesee; Ingham; Oakland; Wayne; Washtenaw; Livingston; Jackson; Calhoun; Eaton; Clinton; Gratiot; Montcalm; and Ottawa. In addition, I have testified in Tribal Court and in Federal Court.
9. In addition to qualifying and testifying frequently in Michigan, I have been qualified and have testified as an expert in child abuse in approximately twenty States and have twice been qualified in courts in Canada as an expert on sexual abuse.
10. I have been qualified as an expert on child abuse and have testified as an expert on child abuse in the State of Washington at Fort Lewis, Washington.
11. I reviewed a summary of the facts and allegations contained in the case of *State v. Fritz*, No. 10-1-00389-4, a criminal case filed in Clark County Superior Court in the State of Washington. I am aware that the named defendant, Bruce Fritz, is an adult male and that the victim in that case, identified to me as L.M.F., was a pre-pubertal female child at the time she alleged she had been sexually abused. In addition to the factual summary, I read the trial transcript of the direct, cross, and re-direct examinations of Marsha Stover, a nurse/consultant who testified in the *State v. Fritz* trial.
12. Preliminarily, I note that contrary to the testimony presented by Ms. Stover during the *Fritz* trial, the hymen of a pre-pubertal child is not distensible and is therefore much easier to tear than it would be post-pubertal.
13. I am also aware that studies establish that the upper limit of normal (those in the 95th percentile) hymenal opening of a child in the age group of L.M.F. would be 10.5 mm wide. The average adult erect penis is 35.6 mm wide. Because the hymen of a pre-pubertal child, like L.M.F. is not distensible, full penile vaginal intercourse occurring between a pre-pubertal female and an adult male would likely result in a transection of the hymen, which is a tear all the way to the base of the hymen. This conclusion is supported by numerous experts. (e.g. McCann, John, M.D. (1998) ("When the vagina of a prepubertal girl is penetrated by a large object, such as an erect male penis, there is usually a complete transection of this membrane."); D.M. Paul, past president of the British

Academy of Forensic Sciences (1990)("Invariably there is a rupture of the hymen with obvious bleeding and friable edges of the hymen...the tears of a ruptured hymen tend to extend to the periphery of the hymen."); Merritt (2003)("When a prepubertal girl is subjected to blunt forceful penetrating vaginal trauma, she usually sustains hymenal and vaginal lacerations. The thin non-estrogenized tissues of the introitus, hymen and vagina tend to tear on frontal penetration. The vaginal mucosa, because of its limited distensibility, is often lacerated along with the hymen."). Consistently those opinions express that in a prepubertal child a large object like an adult penis would be expected to cause a complete tear of the hymen during penile-vaginal intercourse.

14. There is evidence in some studies, like McCann's 2007 study, that abrasions, swelling and petechiae of the hymen and adjacent structures can heal within 21 days of injury. Had L.M.F. suffered only a superficial injury (as opposed to the transection of the hymen that would be expected in a prepubertal girl who experienced penile-vaginal intercourse with an adult male), those superficial injuries could have healed by the time L.M.F. was examined by Ms. Stover.
15. Had transection occurred, as would be expected in a pre-pubertal child who sustained full penile-vaginal intercourse by an adult male, evidence of that injury most likely would have persisted and been present at the time of Ms. Stover's examination. The edges of the tear would have likely rounded off, but the transection itself or a residual deep notch most likely would persist; that is, the examination would most likely remain abnormal. A variety of studies support this conclusion. (Finkel in 1989 followed a prepubertal girl with a transection. It was persistent. McCann and Voris in 1992 followed three prepubertal girls with transections that persisted into adolescence. Slaughter in 1997 followed 18 adolescents and 4 adults with transections. None had reunited at follow-up. Heger in 2003 followed 17 transections. In every case involving non-surgical repair, the transection persisted. McCann showed in 2007 that only 4%-8% of follow up exams of transection in pre-pubertal girls could be interpreted as normal or near normal, meaning more than 90% of follow up exams showed residual abnormality and at least 84% of the cases would have remained abnormal.)
16. Based on the information provided to me, my experience as described above, and considering the various studies on the topic as referenced herein, I am confident to a reasonable degree to medical certainty that if "true" penile-vaginal intercourse occurred when L.M.F was ages 6 through 10 years old and pre-pubertal, a transection of the hymen would almost certainly have occurred and reliable signs of the "old" injury would be expected at least 84% of the time in any subsequent exam; including an exam occurring 4 to 6 weeks after the most recent occurrence.

17. Based upon the information provided, my experience as described herein and numerous studies involving child sexual abuse, the fact that Ms. Stover did not observe any abnormality in her exam of L.M.F. likely means that: L.M.F. intended to describe some type of lesser form (than penile-vaginal intercourse) of genital-to-genital contact, and true penile-vaginal intercourse as the lay-public understands it, did not occur.

I CERTIFY, under the penalties of perjury, under the laws of the State of Washington, that the above is true and correct.

Dated this 29th day of September 2014 in Lansing,
Michigan.



Stephen R. Guertin, M.D.

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Dated this 30th day of September 2014.

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ERIC W. LINDELL, WSBA#18972

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PROOF OF SERVICE-- 2

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