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ORIGINAL

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NO: 58004-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Appellant.

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APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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Sheryl Gordon McCloud  
WSBA No. 16709  
1301 Fifth Ave., Suite 3401  
Seattle, WA 98101-2605  
(206) 224-8777  
Attorney for Appellant,  
Charles Momah

Jeffrey L. Fisher, WSBA No. 30199  
Davis Wright Tremaine  
2600 Century Square  
1500 Fifth Avenue  
Seattle, WA 98101-1688  
Attorney for Appellant,  
Charles Momah

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred in closing the courtroom for one full day during voir dire.
2. The trial court erred in admitting evidence of inappropriate touching of three different, uncharged, patients under ER 404(b) – especially since one denied having been inappropriately touched.
3. The trial court erred in denying the motion to sever.
4. The trial court erred in giving Instruction No. 22, on ER 404(b).
5. The trial court erred in excluding evidence that complainant Ms. Phillips told defendant Dr. Momah that she had slept with other doctors.
6. The trial court erred in denying the motion for mistrial following witness Burns' violations of orders on motions in limine.
7. Substantial new evidence – cognizable on judicial notice by this Court – shows the complainants' lawyer's hand in organizing, prompting, and suborning perjury of complainants against Dr. Momah; the state erred in failing to disclose this evidence.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. The trial court held a full day of voir dire in chambers. Is this reversible error, despite the absence of an objection, under Press-Enterprise

Co. v. Superior Court of California, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984), which held that it was reversible constitutional error to close the courtroom during voir dire, and its progeny including In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (courtroom closure for a day of voir dire constitutes reversible error on PRP), State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) (courtroom closure during voir dire constitutes reversible error on direct appeal), and State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) (courtroom closure constitutes reversible error even without a contemporaneous objection)?

2. The trial court admitted testimony of two former patients who claimed that Dr. Momah touched them inappropriately during medical exams, and one who claimed he used inappropriate words but not acts, under ER 404(b), to prove common plan. This evidence concerned different patients, at different, remote, times, and different acts (no claims of rape, and one who claimed no bad *act* at all, just words). Was this irrelevant and prejudicial under DeVincentis<sup>1</sup>; and, under the post-DeVincentis scholarship criticizing that decision, was this propensity evidence violating both ER 404 and the due process clause?

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<sup>1</sup> State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

3. Count I, third-degree rape, involved sexual intercourse where the only disputed issue was consent. The other counts charged inappropriate touching of different patients, at different times, during different exams, which Dr. Momah denied. Did denial of the motion to sever Count I violate CrR 4.3, CrR 4.4, and the right to a fair trial, given the difference in the nature of the crimes and defenses, the victims, the times, the witnesses, and the theories of the case?

4. Instruction No. 22 (CP:457) said that the uncharged crimes could be used to convict Dr. Momah of the charged crimes and was given over defense objection. Did this exacerbate the ER 404(b) and due process clause errors?

5. Although the trial court admitted evidence that Dr. Momah touched two other patients in a sexual manner (and spoke sexually to a third), it excluded evidence that Ms. Phillips – the alleged victim of nonconsensual sex charged in Count I – touched prior doctors in a sexual manner, *i.e.*, by sleeping with them. Did the trial court err in applying two different ER 404(b) standards, depending on which party made the motion?

6. Witness Rena Burns – the complainant on Count IV, second-degree rape – violated two court orders by blurting out inadmissible evidence designed only to prejudice defendant and garner witness sympathy.

Does this warrant reversal of the Burns count under State v. Escalona<sup>2</sup> and the due process clause?

7. Newly discovered evidence (cognizable on appeal via judicial notice) shows that the lawyer for the complainants played a significant, prejudicial, and sanctionable role in orchestrating complainants, shaping their testimony, and even suborning perjury. Does the state's failure to disclose this conduct warrant a new trial under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d. 215 (1963)?

## STATEMENT OF THE CASE

### I. TRIAL

#### A. Heather Phillips Alleges Rape on August 12, 2003

On August 12, 2003, Heather Phillips – a patient of gynecologist Dr. Momah – needed emergency morning-after contraception. She called Dr. Momah three times and asked him to stay late and meet her, after hours, at his office. He agreed. 10/25/05 VRP:41-43; 146-67 (Phillips' testimony).

There was disputed evidence about whether they had had a prior sexual relationship, and disputed evidence about whether Dr. Momah would naturally consider her telephone call for an after-hours meeting, alone, in the darkened office, without staff, as an invitation for a likely

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<sup>2</sup> State v. Escalona, 49 Wn. App. 251, 742 P.3d 190 (1987).

sexual liaison. Id. (Phillips' testimony); 11/5/05 VRP:20-49 (Momah testimony). But there was no dispute about the fact that Phillips and Momah met at his closed office, after hours, at her request, that he examined her, and that he gave her the requested medication – for not just contraception, but also Percocet and Valium. Id., VRP:152..

There was also no dispute that he had sex with her on the examining room table. According to Dr. Momah, it was consensual. 11/5/05 VRP:20-49. According to Ms. Phillips, it was not, and she clearly told Dr. Momah “no.” 10/25/05 VRP:41-43; 146-67.

She left his office and went to the Fred Meyer where her boyfriend worked. She filled her prescriptions for percocet and Valium, and told her boyfriend that she had been raped. She then went to the emergency room at Auburn Regional Medical Center at 8:30 p.m., where she was examined and a “rape kit” was taken. The rape kit ultimately showed that she had sex with Dr. Momah, a matter that he did not dispute. 10/25/05 VRP:170-85. The examination showed no signs of vaginal trauma or bruising and Ms. Phillips denied injuries from the alleged rape.<sup>3</sup> Ms. Phillips appeared extremely upset, though, and obtained morphine at another hospital later

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<sup>3</sup> 10/31/05 VRP:76-78 (Dr. Lewis, who examined her, reported that there was no trauma, abrasions or bleeding on genitalia and no bruising anywhere on body; in fact, there were no injuries at all); id. VRP:79-82 (the only pain she reported was pelvic pain from before the assault, and “She denies any physical injuries from the assault.”).

that night. Id., VRP:177-78 (morphine).

**B. The Publicity Against Dr. Momah Spotlights Plaintiff's Lawyer Harish Bharti, Who Attracts Numerous Patient-Clients**

The hospital called the police; the police interviewed Ms. Phillips; they investigated her allegations; and Ms. Phillips contacted an attorney of her own. She also went on television (with her face shadowed and voice altered) and publicized the allegations. 10/25/05 VRP:191.

Plaintiff's lawyer Harish Bharti quickly became the center of publicity for all allegations against Dr. Momah.<sup>4</sup> As a result, Bharti found scores and scores of former patients to file lawsuits against Dr. Momah seeking money damages. Almost all of the complainants in this case – victims of the charged counts as well as the ER 404(b) complainants – called Bharti, were signed up for civil lawsuits, and considered Mr. Bharti their lawyer when dealing with the prosecutor or testifying in court.

**C. The State Files Charges**

Four of those patients became the source of criminal charges filed against Dr. Momah. Three of them became the “ER 404(b)” witness at that trial.

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<sup>4</sup> E.g., 10/18/05 VRP:50-53 (Shelly Siewert learned about the allegations because of media coverage; she did not call the police, but called the lawyer who had been featured, Harish Bharti). The Superior Court judge in the one recent lawsuit against Dr. Momah that went to trial – who ended up sanctioning Mr. Bharti for lying to the court and suborning witness perjury – characterized him as “addicted to publicity.” Motion for Judicial Notice, Transcript, Appendix B, p. 6.

The state charged Dr. Momah with two counts of indecent liberties and a related count of second-degree rape, each based on the allegation that Dr. Momah touched private parts of the complainant/patient during the course of a medical examination. CP:421-22. Those were counts II-IV. Count I, however, charged Dr. Momah with a crime of a different nature, that is, actual sexual intercourse with Ms. Phillips, outside of normal business hours, without consent. Id. (There were three additional counts alleging violations of the Health Care False Claims Act, but they were severed before trial.)

More specifically, Counts II and III alleged indecent liberties. Count II charged that between September 1, 2002, and August 31, 2003, Dr. Momah had “sexual contact” with patient Shelly Siewert “during a treatment session, consultation, interview or examination,” in violation of RCW 9A.44.100(1)(d). Count III charged the same crime, between April 30, 2003 and June 1, 2003, involving patient Carmen Burnetto. Count IV was similar, but charged second-degree rape, between March 25, 2003 and April 1, 2003, by “sexual intercourse” with patient Rena Burns during a treatment, interview, or examination, in violation of RCW 9A.44.050(1)(d). CP:421-22.

Count I, however, charged rape in the third degree, on or about August 12, 2003. It alleged that Dr. Momah had sexual intercourse with

Heather Phillips; that she did not consent and that the lack of consent was clearly expressed; in violation of RCW 9A.44.060(1)(a). CP:421.

Dr. Momah denied Counts II-IV completely. 11/2/05 VRP:120-47 (Burns); 148-61 (Siewert); 11/7/05 VRP:189-203 (Burnetto). His defense to Count I, however, was that the sex occurred as part of a consensual sexual relationship. 11/5/05 VRP:20-49.

**D. The Three Patients Who Complained of Inappropriate Touching During Exams that Dr. Momah Completely Denied (Counts II-IV) Came Forward After Hearing the Publicity, and Contacted Mr. Bharti**

When the media picked up this story, they highlighted Harish Bharti as lawyer for some of the patient/complainants. Other former patients heard this, and began calling Mr. Bharti.

***1. Siewert***

One of those was Shelly Siewert, the complainant on Count II (indecent liberties). She had been a patient of Dr. Momah's since October of 2002. She described a series of visits to Dr. Momah for extreme pain and bleeding, and described his examinations, treatment and surgery. Dr. Momah's actions were completely appropriate for the first several visits. 10/18/05 VRP:18-32.

She then described severe pain that occurred, following surgery, when she attempted to move a fare box at her work – she was a former truck

driver and a current bus driver.<sup>5</sup> She went to see Dr. Momah for approximately the sixth time, around November of 2002. 10/18/05 VRP:105-06. She testified that during this visit, at his Burien office, she was alone with him in the exam room and while performing an internal examination, he also rubbed her clitoris. He did it for about 6-10 seconds, and then she pulled back. He stopped, and that was the end of it. 10/18/05 VRP:35-45; 91. She stayed to get a doctor's note to bring back to work. Id.

Ms. Siewert acknowledged, however, that she returned to Dr. Momah at least four more times for treatment, including internal exams. 10/18/05 VRP:35-45; 91.<sup>6</sup> Dr. Momah treated her and provided her with pain medication. 10/18/05 VRP:35-40.

It was not until Ms. Siewert heard the publicity about Mr. Bharti's lawsuits against Dr. Momah that she disclosed this inappropriate touching. And she did not initially call the police – she called the featured lawyer,

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<sup>5</sup> 10/18/05 VRP:78.

<sup>6</sup> Ms. Siewert gave contradictory information on this point. When she wrote to the Department of Health, she told them that after Dr. Momah rubbed her clitoris she stopped seeing him. In court, however, she acknowledged that the medical records accurately reflected the fact that she had seen him at least four times after that visit and that those additional visits included internal exams. She accounted for this by saying that she meant she stopped seeing him at his Burien office after the inappropriate touching. 10/18/05 VRP:95. She also testified about a comment that Dr. Momah made to her that “you’re so tight this [exam] will hurt.” She characterized it as a sexual comment at one point, but acknowledged that it was in the course of an exam and preparing her for possible discomfort to come at another point. Id., VRP:98-99.

Harish Bharti. 10/18/05 VRP:53. He filed a civil lawsuit on her behalf. Id., VRP:59-60.<sup>7</sup>

Dr. Momah completely denied any inappropriate touching. 11/2/05 VRP:148-61.

## 2. *Burnetto*

Another patient who came forward after the publicity was Carmen Burnetto, a patient of Dr. Momah's in 2001-02. Ms. Burnetto, who had a history of convictions for theft, drugs, prescription forgery and the like, saw Dr. Momah approximately 20 times. She described his treatment and diagnosis, with nothing inappropriate, at the beginning. 10/19/05 VRP:23-33.

Then she claimed that Dr. Momah began to ask her out and make sexual comments to her. He also started to use the ultrasound wand as a sex toy or dildo, moving it up and down while inside her rather than from side to side. 10/19/05 VRP:35-49. But she did not stop seeing him. She said it was because he took her medical coupons. Id., VRP:50-52. She acknowledged, however, that she could see other doctors, and in fact she was seeing another doctor at the same time that she was seeing Dr. Momah for her breast reduction surgery. Id., VRP:88.

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<sup>7</sup> Ms. Siewert testified that at the moment, "I am not part of it [the lawsuit]." 10/18/05 VRP:59.

She further admitted that she agreed to go out to lunch with him. She denied that it was romantic, and she denied having sex with him. In fact, she claimed that she resented how he treated her, and “I told him I wanted some money or I am going to tell.” She claims that he even paid her off, \$400 once and maybe \$150 thereafter. VRP:53-63. She said that he promised to buy her a couch after they had lunch, but did not do so, and explained in street language how angry that made her. Id., VRP:115-17.

But she denied ever having sex with Dr. Momah. 10/19/05 VRP:120.

Dr. Momah, on the other hand, acknowledged that he had had sex with her on a few occasions, at a time when she was not a patient. 11/2/05 VRP:198-200; 11/7/05 VRP:48-67. But he denied the allegations about inappropriate touching during exams, including with the ultrasound wand. 11/2/05 VRP:203.

Ms. Burnetto at first denied filing a lawsuit filed against Dr. Momah, but eventually acknowledged that Harish Bharti did represent her; that he filed a lawsuit for her; and that she even went on Channel 4 News with Kathy Gertzen with her allegations; 10/19/05 63-82.<sup>8</sup>

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<sup>8</sup> Ms. Burnetto was clearly angry, and her testimony was contentious. She acknowledged telling the prosecutor a different story about the amount of money that Dr. Momah had supposedly given her, explaining: “I was exaggerating and venting. It was not as far as fact.” She admitted that she avoided interviews, because she was angry; once she was angry at the prosecutors for showing up at her house and violating her space, before

### 3. *Burns*

The last patient in this category is Rena Burns, the complainant on Count IV, which alleged intercourse during the course of a medical exam. She began to see Dr. Momah in March of 2003 and continued on with him for three months (or five weeks, it is unclear which, 10/20/05 VRP:60). She described two exams, a surgery, a visit due to complication from the surgery, and then removal of the staples from that surgery. It was all to see if he could reverse the operation in which her tubes were tied. 10/19/05 VRP:171-79.

She claimed that at the first exam, an initial evaluation, Dr. Momah gave her an IV with the strong prescription drug Fentanyl just to relax her. She claims that at that exam, he did a breast exam that involved inappropriate touching and an internal exam with the ultrasound wand in which it was used like a sex toy for 15 to 20 minutes. 10/20/05 VRP:60-69. She claimed that he also talked to her about sexual positions, including oral and anal sex, although this had nothing to do with her stated goal of getting pregnant. *Id.*, VRP:70-72. She said he also touched her clitoris on this first exam, for 15 or 20 minutes. *Id.*, VRP:73. "I guess it was more in a sexual

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noon, while she was still asleep. She refused to answer the defense question about how much money she claimed Dr. Momah gave her, but she did tell the prosecutor that it was \$1000. And in the middle of her testimony, following a break in proceedings, the prosecutor told the court that she threatened not to come back after lunch; she told the prosecutor, that she would return but "she wanted help getting her kid back. She has a custody dispute." 10/19/05 VRP:88-98; 99-102 (describing this to jury).

way than an examination way.” Id., VRP:73. And he even did a rectal exam with the vaginal ultrasound wand. Id., VRP:76.

After that, however, she returned for several more exams. She described inappropriate touching at those exams, also, including rubbing her clitoris, a 15 to 20 minute ultrasound exam, and a rectal exam. 10/20/05 VRP:82-84. She returned for the surgery he recommended, and she returned to have the staples removed. 10/20/95 VRP:85-90. She claimed that it was only after the surgery that Dr. Momah reported that he could not reverse the operation in which her tubes were tied and that he told her he did not do in vitro fertilization. She was furious that he had put her through the surgery, could not even proceed with IVF, and left her with a large bill. Id., VRP:89-91, 10/24/05 VRP:81 (she was so angry over the IVF and the bill that she called Dr. Momah “a fucking idiot” when she left).

Like the other patients, Ms. Burns did not come forward until she heard about attorney Bharti from publicity on KIRO television. She then contacted him and filed a civil lawsuit against Dr. Momah. 10/20/05 VRP:92-96.

Dr. Momah described Ms. Burns’ diagnosis and course of treatment. He denied using Fentanyl at all on the first, initial, examination, explaining what a powerful drug it was and how an anesthetist should be present for that; he denied all allegations of inappropriate touching; he denied lingering

for 15-20 minutes while rubbing her clitoris or using the wand; and he completely denied using it to do any rectal exam. 11/2/05 VRP:120-47.

E. **The One Patient Who Alleged Sexual Intercourse Without Consent, Which Dr. Momah Said Was Consensual (Count I)**

As discussed above, Heather Phillips went to the hospital on August 12, 2003, complaining that Dr. Momah had raped her. She was the one who called him several times on her cell phone that day to set up an appointment that was after normal working hours, in the evening, at his otherwise closed office, without staff. 10/25/05 VRP:41-43; 146-67 (Phillips' testimony).

There was disputed evidence about whether they had had a prior sexual relationship, and disputed evidence about whether Dr. Momah would consider this call an invitation to continue that sexual relationship that evening. Id. (Phillips' testimony); 11/5/05 VRP:20-49 (Momah testimony).

But both patient and doctor agreed that after they met, and after he did an examination, they had sex on the examining room table. Dr. Momah said it was consensual. 11/5/05 VRP:20-49. Ms. Phillips said it was not. 10/25/05 VRP:41-43; 146-67.

Phillips and Momah also agreed that they had a flirtatious relationship in the past. Ms. Phillips admitted that she passed notes to Dr.

Momah about future liaisons to lead him on, in the hope that he would continue to prescribe pain medications for her. Those flirtatious notes were passed during at least five different appointments, when other people were around so they would not overhear Momah and Phillips talking, and the notes referred to promises of future dates and meetings. 10/25/05 VRP:70-88. On one of them, Ex. 61, Ms. Phillips had even written “I’m need to have,” and then the word “sex” is written above two words, “really bad,” and then at the bottom “sex” is underlined. Id., VRP:88. She claimed she recognized all of the note except for the word sex. Id.

Dr. Momah, in contrast, explained that the relationship included more than idle flirting. He said it included consensual sex. And he said that the sex that occurred on August 12, 2003, was also consensual. He denied threatening her, which she had claimed; he acknowledged that they passed notes; and he said that those notes had referred to actual dates and prior sexual liaisons that had really occurred. 11/5/05 VRP:20-49.

Like all the other counts, this one rested on the complainant’s credibility. This complainant not only had a prior conviction for third-degree theft, and a history of drug abuse and of lying to get prescription drugs, 10/25/05 VRP:197-201; she also admitted that she had falsified a document in this very case by altering the date on the Auburn Hospital record of her August 12, 2003, visit. 10/27/05 VRP:92.

F. The Two 404(b) Witnesses Who Complained of Inappropriate Touching During Exams Up to Ten Years Earlier Came Forward After Hearing the Publicity, and Contacted Mr. Bharti

1. *Wood*

Ms. Wood testified that she began seeing Dr. Momah in 1996, and that at the beginning, one of his breast exams did not seem normal. 10/24/05 VRP:175 (1996 date); *Id.*, VRP:181 (at beginning, some breast exams did not seem normal). She testified that in 1997, during one exam, Dr. Momah hurt her, and she jokingly said that he “must make your girlfriends real happy.” *Id.*, VRP:183. On the next visit – one assumes this was still 1997 – she claimed that Dr. Momah asked her to be with him sexually, and she was shocked and said no. *Id.*, VRP:184.

Then, she claimed, that once he opened his new office in Burien around 2000, he started making sexual comments and asking her out, and once when she was on the table, “He asked if he could put his penis inside of me.” *Id.*, VRP:185-87. She claimed that he hinted she should do sexual favors for him for medications, since he did prescribe pain medications for her, but did not place a date on this conduct. *Id.*, VRP:188. She described one manual exam, but did not mention Dr. Momah rubbing her clitoris, though she did say that he hugged and kissed her; this was also undated. *Id.*, VRP:193-94. With respect to the exam

when Dr. Momah allegedly touched her clitoris, she testified that she could not remember the date. Id., VRP:195. Since she saw Dr. Momah from 1996 until 2003, it could have been ten years ago.

Dr. Momah acknowledged that Ms. Wood was a patient and described her treatment, but completely denied inappropriate touching. 11/2/05 VRP:180-89; 1/7/05 69-78.

Wood herself acknowledged that she, like the others, was represented by Mr. Bharti. He filed a civil lawsuit against Dr. Momah for her. 10/24/05 VRP:197-206. She admitted that she continued seeing Dr. Momah after this instance of inappropriate touching, even though she had insurance during much of that time; even though she had the ability to see other doctors; and even though Dr. Momah referred her to other doctors. She further acknowledged that she went to a different doctor for a second opinion, and to another for in vitro fertilization, but returned to Dr. Momah afterwards. Id.

## 2. *Perry*

Ms. Perry (married name Terry) saw Dr. Momah from 1993 to 2003. 10/18/05 VRP:118. The first appointments were normal. Id. She saw him 6-10 times per year for a variety of issues, including her birth, pain management, and endometriosis. Id., VRP:120-21. She listed the different procedures he performed on her, including internal exams,

biopsies and vaginal ultrasounds. Id., VRP:124.

She testified that the examination that was uncomfortable was at his newer Burien office. Id., VRP:134. (We know from other testimony that the newer office opened in 2000, 10/24/05 VRP:185.) She said that she was in the exam room in a gown, with no one but Dr. Momah and her in the room, and he did an internal exam, “And then it seemed to linger for a moment. And I started to feel a warm tingling sensation, like an orgasm or climax.” Id., VRP:135-37; 137 (re feeling an orgasm). She claimed his fingers were then “Inside of my vagina.” When asked which part of her vagina, she responded, “My clitoris.” Id., VRP:140. She claimed this lasted for “Seconds, maybe longer than seconds.” Id. Then she said about four seconds. Id., VRP:141. She also described pulling and tugging inside while this occurred. Id., VRP:143. She continued that when she felt arousal, she asked him to stop. He did after a second, maybe two. She got dressed and left; and she called her sister. Id., VRP:143-44.

But she continued seeing Dr. Momah. She did not complain to the police until she heard the media publicity, either; at that point she contacted the featured lawyer, Harish Bharti. He filed a civil lawsuit for monetary damages on her behalf. 10/18/05 VRP:151-56.

Dr. Momah acknowledged that she was a former patient, but completely denied any inappropriate touching. 11/2/05 VRP:168-79.

G. The One 404(b) Witness Who Said There Was No Inappropriate Touching at All, Just Inappropriately Sexual Language, Came Forward After Hearing the Publicity, and Contacted Mr. Bharti

Ms. Reich began seeing Dr. Momah in 1999. 11/1/05 VRP:36. She saw Dr. Momah at his office 15 to 20 times, and he also performed two surgeries on her. Id., VRP:41. When she began losing weight at the beginning of 2003, she began talking about a sex problem with Dr. Momah – that is, wanting more sex with her husband. Id., VRP:43-44. At that point, Dr. Momah’s questions began to seem inappropriate – asking about sexual positions, and about oral sex. She then told Dr. Momah that things were fine so he would stop asking her about this, but he continued. He said that it was unhealthy for her not to have sex regularly, and he suggested that she have an affair. He asked her about having an affair again, the next time. Three days later he called her at her home; asked if she had thought about what he said; and later suggested having an affair with him. Id., VRP:44-55. In all, he asked her out 3 or 4 times while she was a patient. Id., VRP:55-56. But he never touched her sexually; he always used gloves; he did a vaginal ultrasound, manual exam and breast exam at every appointment, but there was nothing inappropriate about them. Id., VRP:56-59; 72-73.

Nevertheless, when she heard the publicity about Dr. Momah, she

also called the featured lawyer, Mr. Bharti. 11/1/05 VRP:62.

Dr. Momah agreed that he never touched her inappropriately. He did have conversations with Reich about her sex life with her husband, but, after looking at her medical record, he reported that she presented with a concern about STD's because of her husband's infidelity. She also had a sore on her mouth that was not healing, and he was concerned about exposure to an STD. He discussed that concern with her, and discussed in that context her sex activities of different sorts. Dr. Momah acknowledges telling her, don't get mad get even (at her husband), but said it was just a joke. He also testified that given her reporting of pelvic pain, he discussed with her positions for intercourse to alleviate the pain. 11/3/05 VRP:15-20.

## II. SENTENCING

Dr. Momah was convicted as charged. CP:427-30 (verdict forms).

The court set a schedule for briefing for sentencing; it included a special provision for when attorney Bharti's briefing in support of the victim-witnesses should be filed. Sub No. 137.<sup>9</sup> He did file a memorandum. It was hundreds of pages long. Sub No. 139. He described himself as the "Attorney for several Victims of Defendant Momah." Sub No. 139, p. 15.

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<sup>9</sup> Sub Nos. 137 and 139 were not designated. A supplemental designation of clerk's papers will be filed shortly with these documents designated.

He asserted that more than 100 former patients contacted him and that he served or filed lawsuits for over 50 of them. His memo accused Dr. Momah of crimes ranging from child molestation and oral sex while under anesthesia, to fantastic accusations of baby stealing, and torture of patients. Sub No. 139, pp. 2-4.

The state sought a standard range sentence. The defense sought a downward departure. CP:460; 463-69. Both parties, along with third prosecutor Mr. Bharti, appeared at the sentencing hearing. Sub No. 142.<sup>10</sup> The parties agreed that after applying the multiple offense policy (RCW 9.94A.589) to the second degree rape conviction (which was the most serious charge), the offender score was 9 and the standard range was 210-280 months. CP:463-69 (Defendant's Sentencing Memorandum); CP:472-79 (state's Sentencing Memorandum).

The court adopted the parties' recommendations concerning the standard range for each crime, and sentenced Dr. Momah to 60 months on Count I (rape in the third degree); 12 months on each of Counts II and III (indecent liberties); and 245 months on Count IV (rape in the second degree), concurrent. CP:593-602 (Judgment).

#### **SUMMARY OF ARGUMENT**

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<sup>10</sup> Sub No. 142 was not designated. A supplemental designation of clerk's papers will be filed shortly with this document designated.

A closed hearing violates the right to a public trial,<sup>11</sup> whether or not the defendant consents.<sup>12</sup> The right to a public trial extends to all hearings connected with the trial, not just the taking of evidence – the U.S. Supreme Court has held that it applies *to the very portion of the trial at issue here, that is, to voir dire.*<sup>13</sup> The Washington Supreme Court has come to the same conclusion.<sup>14</sup>

Indeed, both the state and U.S. Supreme Courts hold that before a trial court may close a courtroom, four prerequisites must be satisfied: (1) the party seeking closure must show an overriding interest likely to be prejudiced from an open courtroom; (2) closure must be no broader than necessary to achieve that overriding interest; (3) the trial court must consider reasonable alternatives to closure; and (4) the court must make “findings adequate to support the closure.” Waller v. Georgia, 467 U.S. 39, 48; In re Orange, 152 Wn.2d 795.

None of those steps occurred in Dr. Momah’s case. No party sought closure, and no party advanced any interest – much less an overriding one --

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<sup>11</sup> Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (Sixth Amendment right to public trial in criminal case).

<sup>12</sup> Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment ...”) (Court reaches result under Fourteenth Amendment, also).

<sup>13</sup> See Press-Enterprise I, 464 U.S. 501 (voir dire); Waller v. Georgia, 467 U.S. 39, 45 (suppression hearing).

<sup>14</sup> In re Orange, 152 Wn.2d 795; State v. Brightman, 155 Wn.2d 506.

to be advanced by closure. To the extent the trial court hinted at a reason, it seemed to concern the topic of inquiry – questions about sex-related charges and/or publicity. But the record shows that there was no thought given to *any* alternatives, not even the common alternative of leaving the venire in a jury assembly room while individual jurors are brought in to the open courtroom to answer questions. Finally, no findings were made that were adequate to support closure rather than some other alternative; no findings were made at all. The absence of findings alone constitutes error requiring reversal.<sup>15</sup> Argument Section I.

The trial court admitted testimony of three former patients who claimed that Dr. Momah acted or spoke inappropriately with them during medical exams, to prove common plan, under ER 404(b). Two of them testified about inappropriate touching in 1996 or 1997 and 2000; the charged counts, in contrast, covered 2002 and 2003. Given that this evidence of conduct or just speech with different patients, at different, remote, times, was irrelevant to any element of a charged crime (especially rape, which contains no intent element at all), this evidence was inadmissible even under State v.

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<sup>15</sup> See Press-Enterprise II, 478 U.S. 1, 13-14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (“proceedings cannot be closed unless specific, on the record findings are made” which show closure essential and narrowly tailored); Waller, 467 U.S. at 45, 48, 104 S.Ct. 2210, 81 L.Ed.2d 31 (findings must be sufficient to support closure, may not be “broad and general”); Press-Enterprise I, 464 U.S. 501, 510 (findings must be sufficiently specific for appellate review); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (“Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public”).

DeVincentis, 150 Wn.2d 11, with its broad interpretation of the common-plan exception. Further, DeVincentis has been soundly criticized for misinterpreting the common plan portion of ER 404(b). To the extent those criticisms are correct, and state law permits admission of other-acts evidence that is irrelevant and prejudicial, admission of this evidence also violated the due process clause. The jury instruction permitting consideration of this evidence exacerbated the problem. Argument Section II.

Even the evidence on the different indecent liberties and rape counts was not cross-admissible against each other. In particular, Count I, third-degree rape, involved sexual intercourse where the only disputed issue was consent; the other counts charged inappropriate touching during medical exams, which Dr. Momah completely denied. Given the difference in the nature of the crimes and defenses, the victims, the times, the witnesses, and the lack of cross-admissibility, severance was improperly denied. Argument Section III.

Although the trial court admitted evidence that Dr. Momah had touched three other patients in a sexual manner, it excluded evidence that Ms. Phillips – the alleged victim of nonconsensual sex charged in Count I – had touched prior doctors in a sexual manner, i.e., by sleeping with them. If the common scheme exception applied to the defendant's prior sexual touching of patients, it should have applied to the complainant's prior sexual

touching of doctors. Argument Section IV.

Witness Rena Burns – the complainant on Count IV, second-degree rape – violated two court orders by blurting out inadmissible evidence designed only to prejudice defendant and garner witness sympathy. 10/24/06 VRP:109-10; 10/19/05 VRP:11-14 (first court order); id., VRP:147-48 (second court order). Her flagrant violation of these orders warrants reversal of the Burns count under State v. Escalona, 49 Wn. App. 251, and the due process clause. Argument Section V.

Lawyer Harish Bharti represented almost all of the complainants on the charged counts in this case, as well as the ER 404(b) witnesses, and scores of other patients of Dr. Momah. Bharti represented them in civil, personal injury, lawsuits seeking damages for sexual touching and/or malpractice. Given his extensive role in orchestrating complainants, any attempts on his part at witness coaching or subornation of perjury would certainly be relevant to the credibility of the witnesses in Dr. Momah's case. But such evidence did exist. In fact, a recent Superior Court order sanctions Mr. Bharti for just such conduct. That order – combined with the trial record showing that Mr. Bharti represented almost every one of the patients who testified at Dr. Momah's trial and in civil lawsuits of the same sort as the ones in which the sanctionable conduct occurred – spotlights Mr. Bharti's role in coaching his client-patients who testify.

The state had a duty to disclose Mr. Bharti's underlying conduct in dealing with witnesses against Dr. Momah. Argument Section VI.

## ARGUMENT

**I. UNDER ORANGE, THE RIGHT TO PUBLIC VOIR DIRE IS VIOLATED BY ONE FULL DAY OF IN-CHAMBERS QUESTIONING WITH NO COMPELLING INTEREST IDENTIFIED, NO ALTERNATIVES CONSIDERED, AND NO FINDINGS MADE; THE REMEDY IS REVERSAL.**

**A. The Court Was Closed For a Full Day of Voir Dire**

On October 11, 2005, the trial court adjourned to chambers – a “closed” back room – for individual questioning of jurors. 10/11/05 VRP:19. It stated no compelling or even substantial interest in courtroom closure; considered no alternatives less restrictive than complete closure; and made no findings on the record to justify this closure.

According to the transcript, this began first thing in the morning and lasted until the end of the court day in the late afternoon. *Id.*, VRP:19. (“At this time the Court and counsel adjourned to chambers.”) It was in “chambers,” with the door “closed.” *Id.*, VRP:19-20. (“THE COURT: We have moved into chambers here. *The door is closed.* We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36.”) (emphasis added). Each time a juror came in for individual questioning or left, he or she came in or left through that closed door. *E.g., id.*, VRP:26 (“At this time, Juror Number 2 left

chambers.”); VRP:32 (“At this time Juror Number 7 entered chambers.”); VRP:59 (“At this time Juror Number 19 entered chambers.”).

The lunch break was taken. Id., VRP:104. They resumed behind closed doors in the afternoon, this time using the jury room, but still using it as a closed back room. Id., VRP:106 (Court says: “With that, we are going to adjourn back into the jury room, the lawyers, the defendant, and the court reporter.”) Again, individual jurors came in one at a time and then left. E.g., VRP:107. It lasted that way until the very end of the court day, approximately 3:10 p.m. Id., VRP:141.

**B. Closure of a Day of Voir Dire Violates the Constitutional Right to a Public Trial**

Ever since the first Press Enterprise decision in 1984, it has been clear that closure of voir dire, without sufficient justification or findings, violates the right to a public trial.<sup>16</sup> The Washington Supreme Court applied that rule in In re Orange, 152 Wn.2d 795, granting a personal restraint petition due to closure of less than a day of jury selection in a high profile murder case without findings or sufficient justification – despite the failure to raise this constitutional issue on appeal. The Supreme Court adhered to that rule once again last year in State v. Brightman, 155 Wn.2d 506, and this year in State v. Easterling, 157

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<sup>16</sup> See Press-Enterprise I, 464 U.S. 501 (voir dire); Waller v. Georgia, 467 U.S. 39, 45, (suppression hearing).

Wn.2d 167.

C. **Reversal is Required Even Without a Contemporaneous Objection**

The Washington Supreme Court has even ruled that the constitutional right to an open courtroom is so important that it must be enforced, when raised on appeal, where, as here, there is no contemporaneous objection at trial. State v. Easterling, 157 Wn.2d 167. In fact, in Easterling, one of the defendants actually requested closure. The state Supreme Court held that not even the defense invitation to close the courtroom waived or forfeit this issue on appeal. Id. (defendant requested closure; codefendant permitted to challenge closure for the first time on appeal, and to prevail on this issue).

D. **Holding a Day of Voir Dire In Chambers, Closed to the Public, With No One But the Parties, the Lawyers, the Court, and the Juror, Constitutes Closure Implicating the Constitutional Rights to an Open Courtroom.**

Proceedings that occur in chambers are, by definition, closed to the public. That is the definition of a chambers conference – it is a conference done behind the closed door of the judge’s chambers rather than in the public courtroom. That is what the Washington cases say.<sup>17</sup> That is what

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<sup>17</sup> E.g., Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 59, n.3, 615 P.2d 440 (1980) (equating “chambers conferences” with closed courtroom: “amici ... contend that a literal interpretation of section 10 would wreak havoc with established judicial practices in that it would allow public access to all phases of the administration of justice, including chambers conferences .... Since we do not read section 10 in absolute terms,

decisions from other jurisdictions say.<sup>18</sup> That is what the dictionaries say.<sup>19</sup>

That is even what the Supreme Court says. In Justice Brennan's concurrence in Richmond, he acknowledged that chambers conferences were closed to the public. He went on to discuss when that might be appropriate, indicating that matters traditionally closed to the public might still be maintained in chambers if they were "distinct" from actual trial proceedings while matters that are traditionally open to the public (like jury selection) would be subject to the test for courtroom closure. On this point, he wrote: "Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their

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we need not address this ..."); State v. Angevine, 104 Wash. 679, 682, 177 P. 701 (1919) (in prosecution of reporter for false and misleading reporting of a judicial proceeding, the Information states that the rape trial could not be held "in chambers (meaning in the privacy of the judge's personal quarters), because such proceeding would have been violative of the constitutional rights of the defendant").

<sup>18</sup> E.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4<sup>th</sup> 1178, 1215, n.34, 86 Cal. Rptr. 778, 807, n.34 (Cal. 1999) ("Finally, courts also have approved the holding of closed chambers hearings, or closed courtroom hearings, when trial court findings establish that there is no less restrictive means of accomplishing an overriding interest, such as protection of a continuing law enforcement investigation.").

<sup>19</sup> <http://dictionary.reference.com/browse/chambers> ("chambers A room in which a judge may consult privately with attorneys or hear cases not taken into court."). In BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004), the entry for "in chambers" says "see in camera", and the entry for "in camera" reads: "**in camera** (in kam-<<schwa>>-r<<schwa>>), *adv. & adj.* [Law Latin "in a chamber"] 1. In the judge's private chambers. 2. In the courtroom with all spectators excluded. 3. (Of a judicial action) taken when court is not in session. -- Also termed (in reference to the opinion of one judge) *in chambers*.").

ability to conduct conferences in chambers, *inasmuch as such proceedings are distinct from trial proceedings.*” Richmond, 448 U.S. at 598, n.23 (emphasis added). See also Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609, n.25, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (citing this language with approval).

The key point for our purposes is that proceedings in chambers are, by definition, closed, under all of these authorities.

Thus, when courts are presented with the question of whether an in-chambers proceeding was *improperly* closed to the public, they use the regular test for determining the constitutionality of courtroom closure. See, e.g., United States v. Edwards, 823 F.2d 111, 116-17 (5<sup>th</sup> Cir. 1987), cert. denied, 485 U.S. 934 (1988) (evaluating constitutionality of mid-trial questioning of jurors in chambers about juror misconduct).<sup>20</sup>

One California court collected authorities dealing with this issue; they treat in-chambers conferences as closed courtroom conferences, and apply the constitutional test for whether closure is appropriate:

For example, in Cable News Network, Inc. v. U.S. (D.C. Cir. 1987), 263 App.D.C. 66, 824 F.2d 1046, the trial

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<sup>20</sup> Alternatively, if the closed proceeding is trivial, then the courts might ask, as Justice Brennan said, whether that proceeding is actually a part of the trial or “distinct” from the actual trial. This, however, is a category that excludes voir dire, as the Press-Enterprise, Orange, and Brightman cases make clear. E.g., United States v. Miranda, 746 F. Supp. 1546, 1547 (S.D. Fla. 1990); United States v. Morris 780 F.2d 1207, 1210 (5<sup>th</sup> Cir. 1986) (“[n]on-public exchanges between counsel and the court on ... technical legal issues and routine administrative problems” during which “no fact finding” occurs “ordinarily” do not violate right of public trial).

court permitted the potential jurors to elect, at their unfettered discretion, whether to submit to voir dire in open court or in closed chambers. Because, among other things, the trial court gave no reason for this practice, and made no record supporting the resulting closed chambers voir dire, the reviewing court found the use of closed chambers sessions invalid under the First Amendment. ...

Similarly, in Rovinsky, supra, 722 F.2d 197, over objection, the trial court heard in chambers various motions *in limine* to limit the defendant's cross-examination of prosecution witnesses. Because the trial court gave no reason for holding the proceedings in closed chambers and made no record providing a basis for the practice, the reviewing court found the use of closed chambers sessions invalid under the First Amendment. ...

Times-World, supra, 7 Va. App. 317, 373 S.E.2<sup>d</sup> 474, addressed in a criminal trial a situation similar to that in the present case. The trial court, on its own motion, held all jury voir dire, as well as numerous midtrial substantive hearings and proceedings, in closed chambers. ... On the last day of the three-day trial, and after most of the evidence had been presented, the court finally held a hearing on the closing of portions of the trial. At that point the trial court rejected the press's renewed request for access and explained that closure was based upon its views that there was "insufficient room in chambers to accommodate members of the press," that the media's presence "would have precluded an informal style for the hearings," and that the court "did not 'see anything so pressing about this case that it [could not] be printed after the case [was] decided.'" ...

In holding the trial court's findings inadequate, the reviewing court commented: "The hearings conducted in chambers during the trial consisted of more than mere bench conferences; they included the hearing of disputed testimony, a motion to strike the testimony of a witness, a motion to strike the Commonwealth's case-in-chief, a motion to strike all of the evidence at the end of trial, two

motions for a mistrial, and the selection of jury instructions. We, therefore, reject the Commonwealth's argument that the hearings held in chambers were mere side-bar conferences not subject to the first amendment rights of the public and press." ...

NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4<sup>th</sup> 1178, 1215. After summarizing this state of the law, the NBC court concluded: "In light of these authorities, we reject respondent's assertion that substantive chambers proceedings are categorically not part of the trial process, and are not subject to the First Amendment right of access." Id., 20 Cal.4<sup>th</sup> at 1216.<sup>21</sup>

**E. The Right to an Open Courtroom is Especially Important in High Profile Cases.**

The right to an open courtroom is especially important in high profile cases, such as Dr. Momah's case. One of the critical functions of the open trial right is the process of community "therapy" that it provides, *especially in the cases that are the most highly charged and notorious, such as criminal trials*. "This openness has what is sometimes described as a 'community therapeutic value.' ... Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in

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<sup>21</sup> Closure to even family members is considered a closure that implicates the right to a public trial. State v. Cuccio, 350 N.J. Super. 248, 794 A.2d 880, review denied, 174 N.J. 43 (2002); People v. Taylor, 244 Ill.App.3d 460, 612 N.E.2d 543 (Ill. App. Ct. 2d Dist.), appeal denied, 622 N.E.2d 1224 (Ill. 1993). A fortiori, closure to all members of the public must be considered a closure that implicates the right to a public trial, also.

turn generates a community urge to retaliate and desire to have justice done.” Press Enterprise, 464 U.S. 501, 509 (citations omitted).<sup>22</sup> The Supreme Court has explained:

... When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Id. (citations omitted).

That Court has emphasized this value of the open courtroom, in the context of the most “shocking” and high profile cases:

When a shocking crime occurs, a community reaction of outrage and public protest often follows. ... Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful “self-help,” as indeed they did regularly in the activities of vigilante “committees” on our frontiers.

Richmond Newspapers, 448 U.S. 555, 571 (citations omitted). “The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done

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<sup>22</sup> Although Press-Enterprise was a First Amendment case, the Sixth Amendment test for closure is exactly the same. In re Orange, 152 Wn.2d 795, 824, n.1 (citing U.S. Supreme Court authority).

in a corner [or] in any cover manner.” Id. (citations omitted).

This was just such a high profile case. Media coverage was extensive. The parties and the court acknowledged this. See, e.g., 10/11/05 VRP:23 (beginning of voir dire on publicity); Sub No. 104<sup>23</sup> (Order on Media Coverage, filed October 17, 2005, given extensive publicity, limiting cameras and requiring media to use pooling arrangement and share video feed); Sub No. 126 (correspondence re: media coverage). A brief review of the media coverage confirms it.<sup>24</sup> And the subject was indeed “shocking.” In America, cross-racial conflicts between black and white predictably produce volatile responses.<sup>25</sup> But

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<sup>23</sup> Sub Nos. 104 and 126 were not designated. A supplemental designation of clerk’s papers will be filed shortly designating these documents.

<sup>24</sup> KOMO TV Five News, “Employees and Patients Sue Doctor Accused of Rape,” 9/14/03, available at <http://www.komotv.com/news/story.asp?id=27180>; King Five News, “More Misconduct Charges Surface Against Federal Way Ob-Gyn,” 9/15/03, available at [http://www.king5.com/topstories/NW\\_091503WABmomahlawsuit.2ff8a70.html](http://www.king5.com/topstories/NW_091503WABmomahlawsuit.2ff8a70.html); Noel S. Brady, KING COUNTY JOURNAL, “Gynecologist Faces Civil Suit,” 9/16/03; NBC News, *The Today Show*, “Jolie Campbell, Alleged Victim, and Attorney Harish Bharti Discuss Jolie’s Alleged Rape by Dr. Charles Momah,” 9/26/03; Noel S. Brady, KING COUNTY JOURNAL, “Momah Lawsuits Mount,” 9/27/03; Angie Leventis, THE NEWS-TRIBUNE, “State Suspends Doctor Suspected of Rape,” 9/27/03; Associated Press, “Suspended Doctor Was Accused Three Years Ago,” 9/28/03; NBC News, *The Abrams Report*, 9/29/03; CBS News, *The Early Show*, “Raped by One’s Obstetrician?,” 9/30/03; King Five News, “More Accusations, But No Arrest for Ob-Gyn,” 10/9/03, available at [http://www.king5.com/topstories/NW\\_100803HEKmomahKC.2de92ff.html](http://www.king5.com/topstories/NW_100803HEKmomahKC.2de92ff.html); Noel S. Brady, KING COUNTY JOURNAL, “Doctor Faces 46 Lawsuits,” 10/19/03; King Five News, “Suspended Doctor Faces a Dozen New Accusations,” 1/23/04, available at [http://www.king5.com/health/stories/NW\\_012304WABmomahKC.46d20fd9.html](http://www.king5.com/health/stories/NW_012304WABmomahKC.46d20fd9.html); Julia Summerfeld, THE SEATTLE TIMES, “Gynecologist Facing 6 New Sex Counts,” 1/23/04; Noel S. Brady, KING COUNTY JOURNAL, “Doctor Accused of Witness Tampering,” 1/23/04; and Associated Press, “Suspended Doctor Faces a Dozen New Accusations,” 1/24/04.

<sup>25</sup> See United States v. Koon, 34 F.3d 1416, 1425 (9th Cir. 1994), aff’d in part, rev’d in

few incidents are more volatile than the criminal trial of a black man for a serious sexual crime against a white woman.<sup>26</sup> In this case, there were several white women who alleged just such sexual crimes by Dr. Momah, an African-American man from Nigeria.<sup>27</sup>

The justification for an open courtroom was at its zenith in here.

**F. Closure Can be Justified Only by Detailed Findings, on the Record, Showing a Compelling Government Interest, No Less Restrictive Alternatives, Closure that is as Limited as Possible, and a Serious and Imminent Threat to the Compelling Interest.**

The U.S. Supreme Court lists four prerequisites to closure: (1) an overriding interest likely to be prejudiced from an open courtroom; (2) closure must be no broader than necessary to achieve that overriding interest; (3) the trial court must consider reasonable alternatives to closure; and (4) the court must make “findings adequate to support the closure.” Waller v.

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part, Koon v. United States, 518 U.S. 81, 116 (1996) (detailing the facts of the Rodney King beating by four police officers, captured on videotape); Tom Wolfe, A Bonfire of the Vanities. New York: Farrar, Straus and Giroux, 1987.

<sup>26</sup> See generally, Press-Enterprise I, 464 U.S. 501, 521-22 (Marshall, J., concurring) (because this was a cross-racial sexual assault and murder case, the extremely long voir dire was understandable; “Given the history and continuing legacy of racism in our country, that fact alone should suggest that a greater than usual amount of inquiry may have been needed in order to obtain a fair and impartial jury in this case.”); Harper Lee, To Kill A Mockingbird, Philadelphia, PA: J. B. Lippincott, 1960; Eldridge Cleaver, Soul on Ice, New York: McGraw-Hill Book Company, 1968. See also the notorious Scottsboro Boys trial and appeal, Powell v. Alabama, 287 U.S. 45, 69-71, 53 S.Ct. 55, 77 L.Ed. 158 (1932), holding that due process clause requires appointment of counsel to indigent criminal defendant in capital case.

<sup>27</sup> 11/2/05 VRP:99 (re: Nigerian background).

Georgia, 467 U.S. at 48. Accord In re Orange, 152 Wn.2d 795 (prerequisites to closure under state and U.S. Constitutions). The overriding interest must be “a compelling” one. Press-Enterprise I, 464 U.S. 501, 510.

G. **There Was No Compelling Government Interest Here, No Less Restrictive Alternatives Considered, and No Findings on the Record.**

There was no compelling government interest stated on the record here. The most the Court ever said is, “There are a number of you that have indicated that you would like to have private questioning about some aspect of the case and other issues. So we are going to have some of you stay this morning, and we are going to question you one at a time.” 10/11/05 VRP:16. The Court continues by talking about doing individual questioning. Id., VRP:18-19. But it says nothing about reasons for doing the individual questioning *in chambers* before stating, without asking input from the parties, “We will take Juror 36 first. Let’s go in the back room.” Id., VRP:19.

The absence of a compelling government interest or findings on the record alone makes closure unconstitutional. See Press-Enterprise II, 478 U.S. 1, 13-14 (“proceedings cannot be closed unless specific, on the record findings are made” which show closure essential and narrowly tailored).

There was no consideration of less restrictive alternatives. This

also makes closure unconstitutional, due to the absence of narrow tailoring. See Richmond Newspapers, 448 U.S. 555, 580-81 (trial court failed to consider alternatives to closure and made no findings to support closure); Press-Enterprise II, 478 U.S. 1, 13-14.

Nor were there findings on the record here about closure. This, too, makes the closure unconstitutional. Waller, 467 U.S. at 45, 48 (findings must be sufficient to support closure, may not be “broad and general”); Press-Enterprise I, 464 U.S. 501, 510 (findings must be sufficiently specific for appellate review); Richmond Newspapers, 448 U.S. 555, 581 (“Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public”) (emphasis added).

Courts adhere to this rule today, even where the concern is publicity or jury contamination (as it seems to have been, in part, here, see 10/11/05 VRP:23, showing questioning on this subject). For example, in State v. Cuccio, 350 N.J. Super. 248, 794 A.2d 880 – a homicide case – the court ruled that it was structural error for the trial judge to exclude spectators, including the defendant’s and victim’s families, during jury selection. The appellate court summarized the reasons given there, which were insufficient to justify closure – and they included avoidance of contamination of jurors with publicity:

... The trial judge’s stated reasons for clearing the

*courtroom were that he wished to avoid spectators mingling with the potential jurors because he did not know what type of conversations might occur and there was no room for spectators in the courtroom. ...*

Cuccio, 794 A.2d at 890 (emphasis added). None of these reasons amounted to compelling interests and, even if they did, there were other “reasonable alternatives” to closure to accomplish those goals. Cuccio, 794 A.2d at 890 (emphasis added).

The Cuccio Court canvasses decisions of the sister states on the remedy for closure of voir dire, even in cases where, as here, the charges included sexual assault, the case received extensive coverage, and/or there was a concern about eliciting truthful yet sensitive and private information; they all come to the conclusion that we advance here. Cuccio, 794 A.2d at 889-90 (numerous supporting citations omitted).

There was no compelling interest for the closure in Dr. Momah’s case; there were no less restrictive alternatives to closure considered; and there were no findings on the record. This closure violated the state and U.S. Constitutions.

**II. THE COURT ADMITTED SUBSTANTIAL ER 404(b) EVIDENCE OF DR. MOMAH’S SUPPOSEDLY SEXUAL TOUCHING DURING TWO OTHER PATIENTS’ EXAMS YEARS EARLIER, AND OF HIS SEXUAL COMMENTS (WITH NO INAPPROPRIATE TOUCHING) WITH A THIRD PATIENT – MATTERS IRRELEVANT TO WHETHER HE TOUCHED OTHER WOMEN, AT REMOTE TIMES.**

A. **The Trial Court Allowed Substantial Evidence and Argument About Dr. Momah's Sexual Touching and Sexual Comments With Other Patients at Other Times.**

The state moved to admit substantial evidence that Dr. Momah had sexual contact with complainants other than the ones who were the subjects of the charged crimes. Sub No. 92A<sup>28</sup>. The defense opposed. CP:282-362.

The trial court admitted evidence concerning sexualized touching (or comments) during examinations of three different, uncharged, patients (Wood, Reich, and Perry), covering a time period of ten years (1993-2003). 10/4/05 VRP:84-89.

The state elicited this evidence, introduced it in opening statement, and argued it in closing, for example, as follows:

What they all do say, though, is that the plan, the overarching idea, is the same; that the defendant brings them into the office, he finds a vulnerability, he begins to look for a way to sexualize the relationship, he pushes the envelope, as Carmen Burnetto described pretty well. He pushes the envelope, pushes the line, pushes the line. If they say no or they object in a way he knows he can't ignore then he moves on. Cheryl Reich. Karen Terry maybe. If he feels he can go further he does. Heather Phillips, Carmen Burnetto, Cheryl Wood, sexualizes the relationship more and more. . That is a common scheme or plan.

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<sup>28</sup> Sub No. 92A was not designated. A supplemental designation of clerk's papers will be filed shortly designating this document.

11/9/05 VRP:70. The state continued: “It is not that every touching is the same. It is not that every exam was the same. It is that the overarching plan, the overarching idea is always the same. And you can use that to determine the credibility of each of these women. And you should.” Id. He thus used the numerous counts and 404(b) witnesses to bolster the weak testimony of the other witnesses, and told the jury that they could use the evidence of those other counts to determine not just “overarching plan,” but also “to determine the credibility of each of these women,” an impermissible purpose, and to find that if he did it to one he’s likely to have done it to them all.

There were almost as many of these witnesses (three) as there were witnesses on charged counts (four). The evidence took up a substantial amount of trial time and argument time. It was obviously very powerful.

**B. Admission of Such Prejudicial, Inflammatory Evidence Violated ER 404(b).**

**1. *Under DeVincentis, There Was Insufficient Proof of a Common Plan Where the 404(b) Crimes Involved Different Victims, Different Conduct – Some Not Even Acts, But Speech – Different Times, and No Relevance to Any Element Especially on the Strict Liability Rapes***

In State v DeVincentis, 150 Wn.2d 11, the Court held that evidence or prior bad *acts* may be admitted under ER 404(b) as evidence of common plan if four prerequisites are satisfied:

The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition. ... Lough, 125 Wn.2d 847, 889 P.2d 487. The prior acts must be “(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial” ...

DeVincentis, 150 Wn.2d at 18 (citation omitted). The Court rejected the argument that the prior bad acts must show a pattern or plan with marked similarities to the facts of the case before the trial court. Instead, it ruled that where the issue was whether the crime of rape and sexual molestation occurred, and the evidence was not relevant to a particular element or to identity, then “the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative.” It further ruled that the prior bad acts may be admissible “to show a plan or design if they satisfy the substantial threshold articulated in Lough.”<sup>29</sup> Id., 150 Wn.2d at 18-19. The prior acts need not be uniquely similar to the charged crimes; a general similarity is enough. Id.

Thus, the DeVincentis Court chose sides in the debate over whether the common scheme must be one overarching criminal objective of which the prior acts are a part (such as a scheme to rob a bank, of which prior crimes of obtaining tools, transportation, etc., are a part), or could simply be

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<sup>29</sup> State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995).

commission of separate but similar, crimes, with no overall separate objective at all. The Washington Supreme Court said that either sort of plan would do.<sup>30</sup> “In sum, admission of evidence of a common scheme or plan requires substantial similarity between the prior bad acts and the charged crime. ... sufficient similarity is reached only when the trial court determines that the ‘various acts are naturally to be explained as caused by a general plan ....’” DeVincentis, 150 Wn.2d at 21.

**a. *The Missing Prerequisite of a Prior “Act”***

With respect to Cheryl Reich, the element that is most clearly missing is evidence of a prior bad “act.” She testified about inappropriate speech – sexual innuendo and invitations to have an affair – but explicitly denied that Dr. Momah had committed any bad acts upon her – no inappropriate touching of intimate parts, no clitoral rubbing.

**b. *The Missing Prerequisite of Helping to Prove “An Element or Defense,” Especially on the Rapes***

The other two women who gave 404(b) testimony did claim inappropriate touching. Two of the prerequisites to admissibility, however,

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<sup>30</sup> State v. DeVincentis, 150 Wn.2d 11, 19 (prosecution for child rape; upholding admission of evidence that defendant was convicted 15 years before of similar crime); State v. Lough, 125 Wn.2d 847 (prosecution of paramedic for rape; upholding admission of evidence of plan to drug girlfriends and anally rape them); State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994), review denied, 126 Wn.2d 1016 (1995) (prosecution for murder of wife to collect insurance proceeds; upholding admission of evidence that prior wife died under suspicious circumstances).

are: “(3) relevan[ce] to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.”

The Wood and Perry testimony does not help prove any element. The fact that there was inappropriate touching before does not prove that Dr. Momah did it again – that is the type of propensity evidence that is explicitly excluded by ER 404.

Nor does it help to prove any intent element, especially on the rapes. We say that because rape has no intent element – it is a strict liability crime.<sup>31</sup>

For that reason, other courts considering whether Rule 404(b) evidence is admissible to prove crimes with no mens rea consistently rule that the answer is no.

One of the seminal federal decisions to consider this issue is Sparks v. Gilley Trucking Co., 992 F.2d 50 (4<sup>th</sup> Cir. 1993). In that case, Sparks – the driver of a red Corvette who was headed up a mountain – sued Gilley Trucking Co. – the owner of the logging truck that came down the mountain in the opposite direction, alleging negligence. Sparks lost control of his car, hit a tree, and was injured. He alleged that the truck

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<sup>31</sup> State v Ciskie, 110 Wn.2d 263, 281-82, 751 P.2d 1165 (1988); State v. Elmore, 54 Wn. App. 54, 57, 771 P.2d 1192 (1989) (rejecting argument that rape in the third degree has implied intent element – it is “a strict liability offense”). See State v. Chhom, 128 Wn.2d 739, 743-44, 911 P.2d 1014 (1996) (rape of child in first degree contains no mental element).

was negligently driving in the middle of the road, and the trucking company alleged that Sparks was speeding and in the middle of the road, and contributorily negligent. Id., 992 F.2d at 51. The jury found that both drivers were negligent and, “as required by North Carolina law, rendered judgment for the defendant trucking company.” Id. The key issue on appeal was “whether the fact that Sparks was convicted of speeding on prior occasions had a ‘tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” Id. (quoting Fed.R.Ev. 401).

The appellate court ruled that the answer was no. It began by explaining that Rule 404(b) “provides that evidence of prior ‘crimes, wrongs or acts’ may be admitted to prove a relevant fact except when it is offered solely to ‘prove the character of a person in order to show action in conformity therewith.’” Sparks, 992 F.2d at 52. It continued that “when *intent* to commit a crime is at issue, we have regularly permitted the admission of prior acts to prove that element.” Id. (emphasis in original).

But the Fourth Circuit concluded that negligence actions were different: “In a common law negligence case, however, the issue is generally not the defendant’s state of mind. Rather the factfinder must determine whether the defendant was acting as a reasonable person would

have acted in similar circumstances.” Sparks, 992 F.2d at 52. In this case in particular, the trucking company “was attempting to prove that Sparks was speeding or racing at the time of the accident and therefore driving in a negligent manner that contributed to the resulting accident.” Id. For that reason, the Rule 404(b) evidence was irrelevant: “Yet proof of negligence does not require a showing of intent or plan, the stated purposes for which the prior speeding tickets were admitted by the district court.” Id.

The facts of Dr. Momah’s case are comparable. The charged crimes of rape contain no element of intent, knowledge, or plan. Instances of prior allegedly bad acts are therefore just as irrelevant to the ultimate issue of strict liability for penetration as were the instances of prior bad driving by the Corvette driver in Sparks.

The Sparks court even explained that the prior speeding tickets could tend to show only “a trait about Sparks, that he tended to speed, and to suggest that because he speeded on prior occasions, he was speeding at the time of the accident.” Sparks, 992 F.2d at 53. But admission of evidence to show such trait or propensity is “specifically prohibited by Rule 404.” Id.

The Fourth Circuit’s analysis of this Rule 404(b) has been followed by other courts. Villalba v. Consolidated Freightways Corp., \_\_\_ F. Supp.2d \_\_\_, 2000 WL 1154073 (N.D.Ill. 2000), at \*7-8 (evidence of

prior and subsequent accidents of truck driver involved in accident with car inadmissible in negligence accident under Rule 404(b), following Sparks); Walker v. Yellow Freight Systems, \_\_\_ F. Supp.2d \_\_\_, 1999 WL 955364 (E.D. La. 1999), at \*2, \*4 (claim by parents that son died when tractor trailer backed into truck on which their son was working and crushed him; Rule 404(b) bars admission of truck driver's prior accidents and of Yellow Freight drivers' prior speeding (no mention of Sparks case)).

Indeed, courts consistently note that plaintiffs who file a lawsuit that lacks an intent element, typically try to include a "negligent entrustment" claim to gain admission of the driver's prior acts of speeding or negligence – because those prior acts are inadmissible to prove the claim based purely on negligence.<sup>32</sup>

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<sup>32</sup> See, e.g., Bowman v. Norfolk Southern Railway Co., 832 F. Supp. 1014, 1021 (D.S.C. 1993), aff'd, 66 F.3d 315 (4<sup>th</sup> Cir. 1995) (unpublished) ("Obviously, plaintiff's motivation behind his negligent entrustment theory is to get the engineer's prior driving record into evidence. Such evidence would otherwise be inadmissible under Fed.R.Evid. 404(b), but would be admissible in a negligent entrustment action to show notice on the part of the railroad company."); Cole v. Alton, 567 F. Supp. 1084, 1085 (N.D. Miss. 1983) (wrongful death action arising out of car-truck collision; "The practical effect of plaintiffs proceedings against the employer under a negligent entrustment theory as well as under the doctrine of respondeat superior would be to allow plaintiffs to introduce at trial evidence of the driver's prior traffic violations, otherwise inadmissible under Fed.R.Evid. 404(b)."); Daniels v. Loizzo, 178 F.R.D. 46, 48 (S.D.N.Y. 1998) (evidence of individual defendants' past misconduct admissible to prove municipal employer's liability for negligent hiring, supervision, etc., but inadmissible against individual defendants). Cf. Crawford v. Yellow Cab Co., 572 F. Supp. 1205 (N.D. Ill. 1983) (summary of driving records of 4,400 past and present drivers of defendant inadmissible under Rule 404(b) even on negligent entrustment claim; but driver's own prior driving

Thus, even if the ER 404(b) evidence has some relevance to proving a plan to commit indecent liberties “knowingly,” it has no relevance at all to proving the separate, strict liability, crimes of rape. See also State v. Salterelli, 98 Wn.2d 358, 655 P.2d 697 (1982) (evidence of rape of different woman 4½ years earlier inadmissible on current rape conviction under 404(b) to show motive or intent, where neither of those things were at issue since defendant admitted act of intercourse).

*c. The Missing Prerequisite of “More Probative than Prejudicial”*

The final prerequisite to admissibility under DeVincentis is that the prior bad acts be more probative than prejudicial.

There is a line of persuasive authority holding that the prejudice is greatest where the improperly admitted information is about a prior criminal act similar to the current charge – that is the type of evidence that jurors have the most trouble ignoring.<sup>33</sup> The Wood and Perry testimony of prior inappropriate touching, during exams, on surprised patients who did

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record relevant to prove “willful and wanton entrustment,” because this places that driver’s character in issue).

<sup>33</sup> Jeffries v. Wood, 114 F.3d 1484, 1490 (9<sup>th</sup> Cir.), cert. denied, 522 U.S. 1008 (1997); United States v. Bagley, 772 F.2d 482, 488 (9<sup>th</sup> Cir. 1985) (noting “human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again”), cert. denied, 475 U.S. 1023 (1986); United States v. Field, 625 F.2d 862, 872 (9<sup>th</sup> Cir. 1980).

not feel empowered to object, is most similar to the inappropriate touching described in Counts II-IV.

On the other hand, there is line of cases saying that where the crimes are different and the elements and defenses are different, the prior crimes evidence is least admissible in the first place. DeVincentis, 150 Wn.2d 11, 20-21 (citations omitted). That makes admission of the ER 404(b) testimony most improper with respect to the rape charged in Count I, which was penile-vaginal intercourse outside of normal office hours that Dr. Momah claimed was consensual.

Either way, there is much prejudice to consider when balancing the probative value of remote, sometimes dissimilar, acts (and sometimes non-acts but speech) against the prejudicial impact of such obviously repulsive conduct by a doctor.

**2. *Even if this Type of 404(b) Evidence is Theoretically Admissible in General, the Specific Instances Here Were Inadmissible Because They Were Either So Remote (1996, 1997 and 2000) or So Dissimilar (Involving Legal Words Not Illegal Deeds)***

The third-degree rape charged in Count I occurred on our about August 12, 2003. Counts II and III alleged indecent liberties. Count II charged that this occurred between September 1, 2002, and August 31, 2003. Count III charged the same crime, between April 30, 2003 and June

1, 2003. Count IV, second-degree rape, alleged a period between March 25, 2003 and April 1, 2003.

The only 404(b) testimony anywhere near this time period was from Cheryl Reich. But she was the one who testified that Dr. Momah never did inappropriate touching – just inappropriate comments.<sup>34</sup>

The 404(b) testimony of Ms. Wood and Ms. Perry did involve inappropriate touching. But it was about incidents occurring much earlier.

Ms. Wood testified that she began seeing Dr. Momah in 1996. 10/24/05 VRP:175 (1996 date). She testified about comments made in 1997 and 2000. Id., VRP:183-84, 195. But she could not remember the date of the exam when Dr. Momah allegedly touched her clitoris. Id., VRP:195. Since she saw Dr. Momah from 1996 until 2003, it could have been ten years ago.

Ms. Perry saw Dr. Momah 1993 to 2003. 10/18/05 VRP:118. She testified that the examination in which he allegedly stimulated her to orgasm was at his newer Burien office. Id., VRP:134-43. (We know from other testimony that the newer office opened in 2000, 10/24/05 VRP:185.)

Because the perhaps 1996, or undated, and 2000 touchings, to which ER 404(b) witnesses Wood and Perry testified, occurred so many

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<sup>34</sup> See summary of Reich testimony, supra, pp. 19-20. See also 11/1/05 VRP:36-73.

years earlier, they were too remote in time to be admissible.<sup>35</sup>

Because the ER 404(b) evidence all involved different people (Wood, Reich and Perry) – not different instances with the alleged victims of the charged counts – that evidence was not sufficiently related to the charged counts.<sup>36</sup>

Additionally, the 404(b) evidence was of a different sort than the

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<sup>35</sup> See State v. Lough, 125 Wn.2d 847 (lapse of time may erode similarity of acts; continuity of those similar acts throughout a lengthy period, though, is admissible); State v. Salterelli, 98 Wn.2d 358 (evidence of rape of different woman 4½ years earlier inadmissible on current rape conviction under 404(b) to show motive or intent, where neither of those things were at issue since defendant admitted act of intercourse); United States v. Zelinka, 862 F.2d 92, 98-99 (reversing cocaine distribution conviction because trial court admitted testimony of FBI agent that defendant had cocaine on him at the time of his December, 1986 arrest, one year after the charged conspiracy, for failure to satisfy Rule 404(b)); United States v. Bakke, 942 F.2d 977 (6th Cir. 1991) (admission of evidence that defendant, charged with conspiracy to possess and distribution of marijuana based on transportation of drug from Florida to Michigan, was arrested six months after the charged conspiracy ended on an unrelated drug transaction, reversible error); United States v. Hodges, 770 F.2d 1475, 1478-80, n.4 (9th Cir. 1985) (admission of extortion of co-conspirators, occurring five months after the last act of the conspiracy was reversible error; “Our decisions have consistently recognized that proximity in time is a factor that must be considered in assessing the potential relevancy of other related acts.”) (citations omitted); United States v. Jimenez, 613 F.2d 1373, 1376 (5th Cir. 1980) (one year lapse between charged offense of possession of heroin and subsequent extrinsic act of possession of cocaine makes subsequent act irrelevant); United States v. Gordon, 987 F.2d 902 (2d Cir. 1993) (arrest 16 months earlier for possession of crack should not have been admitted at trial for importing 12 kg. cocaine). But see State v. DeVincentis, 150 Wn.2d 11 (prosecution for child rape; upholding admission of evidence that defendant was convicted 15 years before of similar crime).

<sup>36</sup> See State v. Salterelli, 98 Wn.2d 358, 655 P.2d 697 (1982) (evidence of rape of different woman 4 ½ years earlier inadmissible on current rape conviction under 404(b) to show motive or intent, where neither of those things were at issue since defendant admitted act of intercourse); State v. Harris, 36 Wn. App. 746, 677 P.2d 202 (1984) (two rapes not part of common scheme or plan where the only similarity was that both victims voluntarily entered cars with assailants and assailants then drove them against their will to locations where rapes occurred; instead they showed only propensity, which evidence is explicitly prohibited). Cf. United States v. Bakke, 942 F.2d 977 (different, unrelated transaction); Zelinka, 862 F.2d 92 (different coconspirators).

evidence on the charged counts. Two of the 404(b) witnesses – Wood and Perry – testified about sexualized behavior such as clitoral touching done almost surreptitiously during the course of scheduled exams, touching that the defendant denied. But Count I was a charge of actual penile-vaginal rape, involving an admitted act of sexual intercourse. One of the 404(b) witnesses – Reich – completely denied inappropriate touching. She testified about inappropriate words, not deeds, and words are pretty different than deeds – because inappropriate words are not criminal while inappropriate deeds are. Because the 404(b) evidence was so dissimilar to Count I, that 404(b) evidence was not admissible as to that count.<sup>37</sup>

3. ***Even if this Type of 404(b) Evidence is Theoretically Admissible in General, the Legislature Has Determined That Such Evidence of Prior Sexual History Has Little to no Probative Value on Whether a Current Crime Occurred***

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<sup>37</sup> State v. Hall, 40 Wn. App. 162, 166, 697 P.2d 597, review denied, 104 Wn.2d 1001 (1985) (prior assaultive conduct dissimilar from conduct involved in current rape – “The defendant did not show a knife to Witness A, he did not ask her about drugs, he did not drag her to a secluded spot, and he did not rape or rob her. He did, however, do all these things to Victims One and Two.”; admission under ER 404(b) was error); United States v. Alfonso, 759 F.2d 728, 739-40 (9th Cir. 1985) (error to admit testimony of agent that, in 1978, defendant had asked for assistance in offloading quantity from boat; this proved little about “intent to execute a dissimilar act” in 1983); United States v. Bramble, 641 F.2d 681, 682-83 (9th Cir. 1981) (reversible error to admit evidence in cocaine distribution trial that defendant had previously been convicted of possession of marijuana), cert. denied, 459 U.S. 1072 (1982); United States v. Hernandez-Miranda, 601 F.2d 1104, 1109 (9th Cir. 1979) (admission of evidence that defendant had been convicted of smuggling marijuana erroneous in heroin importation trial; no prejudice).

Even if this type of ER 404(b) evidence might theoretically be admissible, there is another problem. The state legislature has already determined that evidence of prior sexual history has little to no probative value on whether a current sex crime occurred. The rape shield statute, RCW 9A.44.020, shows a legislative determination that a person's prior sexual history – even his or her prior promiscuous or inappropriate (under community mores) sexual activity – is irrelevant to proving whether a person should be believed when testifying about sex at another time and place.

Certainly, the statute is limited to “victims.” But the reason it has been upheld against constitutional challenge, is that the inadmissible material – prior sexual history with others – has so little probative value in proving consent or credibility of a witness concerning a later sexual encounter that the defendant loses nothing of value when he loses the ability to offer it. State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983).

But the exact same evidence cannot be treated as highly probative on precisely the same point that the Supreme Court said in Hudlow, that it was not probative – assessing the credibility of a witness concerning a later sexual encounter – just because it is offered against the defendant, rather than the complainant. The policy of protecting the two might differ; but the conclusion that this type of evidence has little to no probative value must – logically – remain constant. See State v. Cotton, 113 Ohio

App.3d 125, 680 N.E.2d 657 (1996) (other sexual acts of defendant-medical professional with victims other than those in present case admitted against him under ER 404(b) in prosecution for rape and other sexual crimes; evidence inadmissible under rape shield statute which protects both parties against admission of sexual history evidence concerning others; convictions reversed).

One of the four DeVincentis prerequisites to admissibility is that the prior acts evidence be more probative than prejudicial. Since the Hudlow Court held that such evidence has little to no probative value, this must be factored into the prejudicial versus probative weighing.

C. **DeVincentis' Holding That the Common Plan Exception Encompasses Prior Acts Not Part of an Overarching Plan Has Been Harshly Criticized; Its Application Here Violates Due Process, as Underscored *Estelle v. McGuire*<sup>38</sup>**

In Wright & Graham, *Federal Practice & Procedure – Federal Rules of Evidence*, 22 Fed. Prac. & Proc. Evid. § 5244, the authors use DeVincentis as the poster-child example of “misuse” of the doctrine of common scheme or plan. *Id.*, n. 6 (citing DeVincentis and commenting, “use of similar mode of approaching child in both crimes; no question of identity so could only be used to prove the defendant did molest child by inference to his character as a pedophile though court manages to convince

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<sup>38</sup> Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d. 385 (1991).

itself otherwise”). They use it again as an example of courts that have a problem distinguishing permissible uses of the common plan exception from impermissible ones. Id., n. 19.1.

In fact, this treatise discusses one of the Washington cases that preceded DeVincentis in text to highlight the analytical problem with using the common plan exception to admit prior acts that were not part of a single plan:

A recent Washington case illustrates the problem many courts have in distinguishing between “plan” and “modus operandi” as grounds for admission of other crimes. The defendant was charged [in State v. Bennett, 36 Wn. App. 176, 672 P.2d 772 (1983)] with two counts of statutory rape and two uncharged crimes were admitted. In all of these, the defendant had enticed teenage runaways into exchanging sex for food and shelter. This common modus operandi was said to be admissible under 404(b) to prove that defendant had engaged in intercourse as part of a plan to take advantage of runaways in this fashion.

This is evidence of propensity, not plan. But the opinion suggests that what misled the court as to read “plan” to mean something like a blueprint. Proof that the witch had constructed one gingerbread house will support an inference that she has the “plans” for this type of architectural endeavor but it does not prove whether or not she will ever use the blueprint to construct another lure for lost children. It is only when we can infer a plan for a subdivision to be called “Gingerbread Acres” that we can infer from the plan that the witch also construed a second house.

To say that the defendant had a “plan” to seduce every runaway he could may not do violence to the language but it does undermine the policy of Rule 404(b) by permitting the use of propensity to prove conduct. To be properly

admissible under Rule 404(b) it is not enough to show that each crime was “planned” in the same way; rather, there must be some overall scheme of which each of the crimes is a part.

22 Fed. Prac. & Proc. § 5244.

If Wright & Graham’s criticism is correct, then the ER 404(b) evidence admitted here was irrelevant. It was not probative on any element; its only function was on the prohibited theme of propensity.

It might not be error to admit such irrelevant and prejudicial evidence under Washington law, post-DeVincentis. But it is error under the due process clause.

The admission of objectionable evidence in a criminal trial can implicate much more than a state evidentiary rule – it can implicate a constitutional guaranty.<sup>39</sup> Evidentiary errors establish a federal constitutional claim when the violation of the state evidentiary rule is so

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<sup>39</sup>E.g., Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967) (admission into evidence of men’s shorts with reddish brown stain held error warranting federal habeas corpus relief, because state knew at time of trial that the stain was not blood and, hence, conviction obtained by knowing use of false evidence); Thomas v. Lynaugh, 812 F.2d 225, 230 (5th Cir.), cert. denied, 484 U.S. 842 (1987) (dicta) (admission or exclusion of evidence may be actionable if the affected evidence is a “crucial, critical, or highly significant factor in the context of the entire trial”); Walker v. Engle, 703 F.2d 959, 963 (6th Cir.), cert. denied, 464 U.S. 962 (1983) (where the violation of state’s evidentiary rule has resulted in denial of fundamental fairness, habeas corpus relief will be granted); Dickson v. Wainwright, 683 F.2d 348, 350 (11th Cir. 1982) (fundamentally unfair state evidentiary rulings are basis for habeas relief).

egregious that it renders the trial fundamentally unfair and jeopardizes the right to due process of law.<sup>40</sup>

The erroneous admission of ER 404(b) evidence in this case fits right into that category. In Estelle v. McGuire, 502 U.S. 62, 65, the Supreme Court was asked to consider whether admission of prior injury evidence, in a prosecution for murder of defendant's infant daughter, violated due process. The Supreme Court held that evidence of the victim's battered child syndrome was relevant to establishing the defendant's intent; since it was relevant, it was not improperly admitted under the due process clause. Id., 502 U.S. at 68-69. (There is, of course, no intent element on the rape counts in Dr. Momah's case.) The Court continued, "Concluding, as we do, that the prior injury evidence was relevant to an issue in the case, we need not explore further the apparent assumption of the Court of Appeals that it is a

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<sup>40</sup> Carter v. Armontrout, 929 F.2d 1294, 1296-1300 (8th Cir. 1991) (admission of inadmissible evidence is ground for habeas corpus relief if it renders whole trial fundamentally unfair and if, absent the evidence, "the verdict probably would have been different"; admission of hearsay not grounds for relief here because trial court sustained petitioner's objection and gave curative instruction and because properly admitted evidence provided overwhelming proof of guilt) (numerous citations omitted); United States ex rel. Lee v. Flannigan, 884 F.2d 945, 953 (7th Cir. 1989), cert. denied, 497 U.S. 1027 (1990) (claim based upon "other crime" evidence not cognizable because error did not violate fundamental fairness); Amos v. Minnesota, 849 F.2d 1070, 1073 (8th Cir.), cert. denied, 488 U.S. 861 (1988) ("Questions concerning the admissibility of evidence are ... reviewable in federal habeas corpus proceedings to the extent that the alleged error infringed upon a constitutionally protected right or was so prejudicial that it constituted a denial of due process").

violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial.”<sup>41</sup>

Dr. Momah’s case presents precisely that issue. The prior acts and non-acts-but-speech evidence that was admitted in his case was not relevant to an element (as discussed above); it was essentially evidence of propensity. The question is whether such irrelevant evidence that shows propensity is so unfair and prejudicial as to violate the due process clause.

Other courts that have considered this question have said that the answer is yes – improper admission of “other crimes” evidence *does* violate the due process clause, when its impact is highly prejudicial.<sup>42</sup>

**D. The 404(b) Jury Instruction Exacerbated the Problem**

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<sup>41</sup> Id., 502 U.S. at 70. See also Id., 502 U.S. at 75, n.5 (“Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of ‘prior crimes’ evidence to show propensity to commit a charged crime.”).

<sup>42</sup> Garceau v. Woodford, 275 F.3d 769 (9<sup>th</sup> Cir. 2001), rev’d on other grounds, 538 U.S. 202 (2003) (using other crimes evidence to infer propensity to commit current crime violates due process; granting writ of habeas corpus; reversed for unrelated reasons; on remand, dismissed due to death of habeas petitioner); Tucker v. Makowski, 883 F.2d 877, 878, 881 (improper admission of “other crimes” evidence rose to level of due process violation); United States ex rel. Lee v. Flannigan, 884 F.2d 945, 953 (7<sup>th</sup> Cir. 1989), cert. denied, 497 U.S. 1027 (1990). Cf. State v. Bartholomew (Bartholomew II), 101 Wn.2d 631, 639, 683 P.2d 1079 (1984) (consideration of evidence of other crimes of which defendant had not been convicted, at penalty phase, violated cruel punishment and due process protections of state Constitution; holding about reach of state due process clause now questionable).

The court then gave an instruction defining how the ER 404(b) evidence might be used – over defense objection. 11/8/05 VRP:96-103. It stated:

You have heard evidence of alleged sexual misconduct beyond those counts charged by the State. You must not consider this evidence to prove the character of the defendant in order to show that he acted in conformity therewith. You may consider this evidence only for the following limited purpose(s):

- (1) To determine whether or not a common scheme or plan exists among different acts, including the charged acts; and
- (2) If such common scheme or plan does exist, you may (but are not required to) use its existence in determining whether or not the charged crime(s) occurred.
- (3) You must not consider this evidence for any other purpose.

To establish a common scheme or plan, the evidence of sexual misconduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crimes and the uncharged sexual misconduct are the individual manifestations.

This Instruction (CP:457) told the jury that it could consider the evidence of Dr. Momah's prior sexual conduct in deciding whether he committed all of the charged crimes, the rapes included. It was error, for the same reasons that admission of the evidence itself was error.

**III. DENIAL OF SEVERANCE OF THESE FOUR CRIMES, INVOLVING SEPARATE VICTIMS, SEPARATE ACTS, DISTINCT DEFENSES, AND TESTIMONY THAT WAS CONTRADICTORY AND WEAK, VIOLATED CrR 4.3, 4.4, AND THE DUE PROCESS CLAUSE.**

**A. The Trial Court's Rulings on Severance**

The trial court early on granted (CP:274) the defense motion to sever the sex-related counts from three fraud-related counts. But it denied the motion to sever Counts I-IV from each other. 10/17/05 VRP:12.

**B. Dr. Momah Was Entitled to Severance to Avoid Prejudice On Count I, Rape, Involving the Defense of Consent, From the Additional Unrelated Charges of Essentially Surreptitious Touching During Exams**

The standards for joinder and severance were reiterated in State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993):

CrR 4.3(a) permits two or more offenses of similar character to be joined in one trial. Offenses properly joined under CrR 4.3(a), however, may be severed if “the court determines that severance will promote a fair determination of the defendant’s guilt or innocence of each offense.” CrR 4.4(b). The failure of the trial court to sever counts is reversible only upon a showing that the court’s decision was a manifest abuse of discretion. Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy.

Id., 121 Wn.2d at 537 (quotations and citation omitted). In making this decision, the court must consider “the jury’s ability to *compartmentalize* the evidence, the *strength* of the State’s evidence on each count, the issue

of *cross admissibility* of the various counts, whether the judge instructed the jury to decide each count separately, and ... the concern for judicial economy.” Id. (Emphasis added.)

**1. *The Prejudicial Spillover Effect of Evidence of Indecent Liberties, Which Was Not Cross-Admissible On the Rape Counts, Warranted Severance***

As discussed above, each of the four counts involved a different complainant, with acts occurring at a different time. The indecent liberties counts involved allegations that Dr. Momah acted with intent; the rape counts did not. Evidence of indecent liberties at different time would have been inadmissible against Dr. Momah, under ER 404(b), as discussed above – because they involve dissimilar acts, at dissimilar times, and because rape is a strict liability offense on which there is no element of *mens rea* to prove or defend against. Hence, the indecent liberties evidence should have been inadmissible on the rape counts – and joinder was therefore error.

**2. *The Prejudicial Spillover Effect of Rule 404(b) Evidence Potentially Relevant to Indecent Liberties Warranted Severance***

On the other hand, some of the ER 404(b) evidence presented at trial concerned inappropriate touching during medical exams. None of it concerned an admitted act of sexual intercourse, in which the only

disputed issue was consent. Just as that ER 404(b) evidence was especially inadmissible on Count I, charging third degree rape, the indecent liberties evidence (on Counts II-III) was especially inadmissible on Count I.

**3. *The Paucity of the Evidence on the Burns Count Cannot be Underestimated***

The paucity of the evidence on the Burns count – Count IV, rape in the second degree – cannot be underestimated, either. That is the count on which the complainant gave such inherently contradictory and incredible testimony, as claiming that she was in the exam room with Dr. Momah for hours; claiming that he massaged her clitoris for about 20 minutes without her saying anything; and claiming that he used the large ultrasound wand for anal penetration for a significant amount of time, also. It is the count on which she purposely blurted out the inadmissible and prejudicial comments, discussed in Section V below. The state Supreme Court directs us to consider the strength of the evidence when considering whether denial of severance was prejudicial; the weakness of the Burns count cannot be underestimated.

**4. *Jury Instructions Could Not Cure a Problem This Big***

The likelihood that instructions could make the jury ignore substantial non-cross admissible evidence that is irrelevant – especially to

Count I – is virtually nonexistent. Instructions might help the factfinder compartmentalize otherwise inadmissible evidence where the crimes charged are clear and the evidence is simple.<sup>43</sup> But multi-count crime cases involving different defenses and almost as much 404(b) evidence as regular evidence are not simple. This is the worst possible situation for jury instructions on compartmentalizing evidence to cure prejudice.

In United States v. Jones, 16 F.3d 487 (2d Cir. 1994), for example, the court considered the appeal of a defendant who was convicted of several counts relating to robbery and possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g)(1). The court reversed the robbery convictions because of prejudice that spilled over from the ex-felon evidence. It explained that in spite of the general rule that jurors follow their instructions, the “presumption that a jury will adhere to a limiting instruction evaporates where there is an overwhelming probability that the jury will be unable to follow the court’s instructions and the evidence is devastating to the defense.”<sup>44</sup>

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<sup>43</sup> Bean v. Calderon, 163 F.3d 1073, 1085 (9<sup>th</sup> Cir. 1998), cert. denied, 528 U.S. 922 (1999); United States v. Monks, 774 F.2d 945, 949 (9<sup>th</sup> Cir. 1985) (“evidence was straightforward and easy to follow” and “presented in only two days of trial” in this eyewitness identification plus confession bank robbery case, so jury instructions could easily cure prejudice from joint trial).

<sup>44</sup> Id. (citing Greer v. Miller, 483 U.S. 756, 766, n.8, 107 S.Ct. 3102, 97 L.Ed.2d. 618 (1987)). Accord United States v. Dockery, 955 F.2d 50 (D.C. Cir. 1992) (reversing multiple drug-related convictions for failure to sever from felon in possession of firearm count; one jury instruction did not cure prejudice).

Similarly, in United States v. Lewis, 787 F.2d 1318, 1321, as amended, 798 F.2d 1250 (9<sup>th</sup> Cir. 1986), the defendant charged in a multi-count indictment argued that it was prejudicial for the district court to join the felon-in-possession count with his larceny, killing to avoid apprehension for larceny, and conspiracy counts, because his prior record would have been otherwise been inadmissible. Id., at 1321. The appellate court agreed that joinder was error, explaining the prejudice caused when joinder results in introduction of evidence that would otherwise be inadmissible against a defendant. Id.<sup>45</sup>

This is especially true of sex cases; where the joined charges are sex crimes, the risk of prejudice is at its highest. See State v. Coe, 101 Wn.2d 772, 780-81, 684 P.2d 668 (1984); State v. Bythrow, 114 Wn.2d 713, 718-19, 790 P.2d 154 (1990).

**IV. WHILE ADMITTING EVIDENCE THAT DR. MOMAH TOUCHED OTHER PATIENTS IN A SEXUAL MANNER ON OTHER OCCASIONS, THE TRIAL COURT EXCLUDED EVIDENCE THAT COMPLAINANT PHILLIPS TOUCHED OTHER DOCTORS IN A SEXUAL MANNER; EXCLUSION VIOLATED EVIDENCE RULES AND THE RIGHT TO PRESENT A COMPLETE DEFENSE.**

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<sup>45</sup> In assessing the prejudicial effect of a joint trial, the primary consideration is whether “the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants, in view of its volume and the limited admissibility of some of the evidence.” United States v. Douglass, 780 F.2d 1472, 1479 (9<sup>th</sup> Cir. 1986) (citations omitted).

**A. The Trial Court's Ruling Excluding Evidence Of Complainant Phillips' Prior Conduct With Other Doctors**

The trial court admitted extensive evidence that Dr. Momah touched other (uncharged) patients in a sexual manner on other occasions, under ER 404(b), to show a common scheme of some sort to prove that he initiated and wanted the current alleged touching. Defense counsel offered precisely the same type of evidence concerning Heather Phillips, the complainant on Count I, rape – evidence that she touched other doctors in a sexual manner, *i.e.*, that she slept with them, on other occasions in the past, to show that she initiated and wanted the current touching as part of her common scheme or plan for getting drugs. Defense counsel proffered this evidence based on Phillips' prior comments to Dr. Momah that she had slept with other doctors (although she later denied that). 10/25/05 VRP:63. Defense counsel argued that the evidence was relevant to show that the sex was consensual. *Id.*

The trial court excluded it as irrelevant to showing that this particular sexual encounter was consensual. 10/25/05 VRP:63.

**B. Exclusion Violates ER 404(b) and the Right to Present a Complete Defense**

“[T]he Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Holmes v. South Carolina, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006) (citations omitted). It is rooted in

the due process right to present a defense, the Sixth Amendment right to “compulsory process,”<sup>46</sup> and the Sixth Amendment right to confrontation.<sup>47</sup>

The Washington courts have ruled that the right to present a defense is subject to the following limitations: “(1) the evidence sought to be admitted must be relevant; and (2) the defendant’s right to introduce relevant evidence must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.” State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), review denied, 131 Wn.2d. 1011 (1997). The U.S. Supreme Court recently clarified, however, that a simple balancing won’t do – “the Constitution permits judges to exclude evidence that is *repetitive* ..., only *marginally relevant* or poses an *undue risk* of harassment, prejudice, or confusion of the issues.” Holmes, 126 S.Ct. at 1732 (citations and quotes omitted) (emphasis added).

If the ER 404(b) evidence presented at trial was relevant on Dr. Momah, then this evidence had to be relevant on Ms. Phillips. Both were offered as evidence of prior sexual touchings to show a common scheme or

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<sup>46</sup> Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984)).

<sup>47</sup> See Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Accord Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798, rehearing denied; 485 U.S. 983 (1988) (fundamental Sixth Amendment right to present witnesses and a defense); Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

plan. With respect to Phillips, the alleged scheme was to satisfy doctors in a sexual manner; with respect to Momah, the evidence was proffered to show an alleged scheme to satisfy himself.

ER 404(b)'s provisions are not limited to defendants; they apply to all witnesses. ER 404(b) therefore applies to Phillips as much as to Momah.

The ER 404(b) evidence on Phillips would not implicate the state's "rape shield" law. That statute, RCW 9A.44.020, limits admission of *certain* prior sexual history of the complaining witness – "marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards" – but not all prior sexual history. It should not affect the admissibility of sexual history of touching other doctors – where, as here, such history is not marital history, divorce history, reputation evidence of promiscuity or nonchastity, or even evidence of sexual mores contrary to community standards. And that is precisely how the sexual history was offered in this case: as evidence of other consensual affairs, likely for the overall scheme of obtaining drugs. It was not offered to show promiscuity or the like.

The rape shield statute also limits admission of prior sexual history of a complaining witness in rape cases where it is offered to prove credibility or consent. RCW 9A.44.020(2), (3). The trial judge ruled that the exact same sort of prior sexual touching evidence was admissible under ER 404(b)

against Dr. Momah, but not on the issues of credibility or consent. He ruled it was admissible to show common plan. If it was admissible for that non-credibility purpose against Momah, then it was just as admissible for the same non-credibility purpose against Phillips.

It is true that evidence offered for a permissible purpose may also tend to disclose a witness's sexual history. That does not make the evidence inadmissible under the rape shield statute. It just shows the limits of a rape shield statute's reach.<sup>48</sup> Any other conclusion would render the rape shield statute unconstitutional – because a state evidentiary rule, even a longstanding and well-respected one, cannot abridge the right to present a defense. Holmes, 126 S.Ct. 1727 (exclusion of defense evidence of third-party guilt, pursuant to a state evidentiary rule, unconstitutional).

If the prior plan evidence regarding sexual touching of others was not relevant to show the defendant's plan, then we agree that it is not relevant to show the complainant's plan. But if it is relevant to show Dr. Momah's supposed plan, that the same sort of evidence must be relevant to show the complainant's plan.

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<sup>48</sup> People v. Cobb, 962 P.2d 944, 951 (Colo. 1998) (evidence of prior conduct of complainant in sex assault case, which was relevant to defense theory, not inadmissible under rape shield statute just because it might also shed light on her sexual history: "While the jury conceivably might have inferred that [victim] was engaged in an act of prostitution, evidence does not become inadmissible under either Rule 404(b) or the rape shield statute simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct.").

V. **COMPLAINANT BURNS VIOLATED TWO COURT ORDERS BY BLURTING OUT INADMISSIBLE EVIDENCE THAT THE COURT HAD EXCLUDED AS PREJUDICIAL.**

A. **The Trial Court Excluded Evidence that One of Burns' Twins Died, and Concerning Her Mother's Decline and Death – and She Blurted Those Facts Out Anyway**

Rena Burns was the complainant on Count IV, charging the most serious crime: second degree rape. Her testimony was strained, contentious, and impeached by numerous prior and contemporaneous (in court) inconsistent statements. Yet it formed the basis for the most serious charge, resulting in the lengthiest sentence, against Dr. Momah.

In pretrial hearings, the court excluded two key items concerning her background that were designed only to garner sympathy – and that were irrelevant to the crimes charged. The first item was the death of one of her twins; the second was the cause of her mother's decline and death. 10/19/05 VRP:11-14.

Despite this clear ruling, Ms. Burns blurted out the inadmissible evidence on first one, and then the other, topic. 10/24/05 VRP:109-10; *id.*, VRP:136. The defense objected each time; the objection was sustained and the inadmissible evidence was stricken; but a motion for mistrial (as to the first violation) was denied. *Id.*, VRP:113-114.

**B. Admission of Such Inadmissible and Highly Charged Evidence on this Most Serious Count Was Prejudicial, Regardless of the (Assumed) Good Faith of the Prosecutor**

**1. *The Testimony About the Inadmissible Evidence Constituted Witness Misconduct and Violation of a Motion in Limine***

The witness violated two court orders on motions in limine.

Since those motions in limine were hard-fought and clearly adjudicated, it must be assumed that the prosecutor told his witness about the outcome. 10/19/05 VRP:11-14; 147-48. It thus appears – from the fact that the transcript shows that the witness’s prejudicial statements were not elicited, and from the rule that the prosecutor presumably cautions its witnesses about the results of such motions in limine – that the witness took it upon herself to purposely violate the court’s orders. 10/24/05 VRP:109-10.

It is misconduct for a witness to give improper, unsolicited, testimony, even if the prosecutor does not ask for it. State v. Escalona, 49 Wn. App. 251, 254-55 (reversed due to witness blurting out fact of defendant’s prior conviction).

**2. *Given the Paucity of the State’s Evidence and the Critical Importance of Burns’ Testimony as the Sole Witness on Count IV, Reversal is Required Under the Applicable Test***

In deciding whether the error requires reversal, the reviewing court considers the seriousness of the irregularity; whether it was merely cumulative or not; and whether the error was curable. State v. Escalona, 49 Wn. App. 252, 254-55.

The irregularity in this case was very serious, and not at all cumulative.

The state's case on this Count was extremely thin. It called only one witness. There was no physical evidence. There was nothing to corroborate the witness's statements and opinion.

In fact, other statements of this witness were highly incredible. 10/20/05 VRP:67-69 (at her first visit, Dr. Momah moved the wand in and out of her vagina for 15-20 minutes without her saying anything); id., VRP:72-73 (he touched clitoris for 15-20 minutes); id., VRP:83-84 (at second visit he moved the wand in and out for 15-20 minutes); 10/24/05 VRP:11 (he spent 15 to 20 minutes going from clitoris and back to vagina); id., VRP:30 (vaginal wand was in her anus "a few minutes.").

Given the obvious importance of Ms. Burns' credibility to the jury; the absence of *any* other evidence; and the relatively slim case on this Count that was presented; there is a substantial likelihood that the comment did affect the verdict.

The only remaining question, under the Escalona test, is whether

the error could have been cured by a timely request. There was an *immediate* defense objection. It was sustained. A motion to strike was granted. The motion for mistrial, however, was denied. And the witness then violated another order. Obviously, the Court's instructions were ineffectual as to Ms. Burns. She was still able to engage in repeated ploys for sympathy.

**VI. NEW EVIDENCE SHOWS THAT A NON-PARTY LAWYER ORCHESTRATED, COACHED, AND EVEN SUBORNED PERJURY OF COMPLAINANTS AGAINST DR. MOMAH, IN ORDER TO FURTHER CIVIL LAWSUITS IN WHICH HE REPRESENTED THEM. THIS EVIDENCE – UNDISCLOSED BY THE STATE – CASTS DOUBT ON THE CREDIBILITY OF KEY STATE WITNESSES.**

**A. The Role of Third-Party Attorney Harish Bharti in the Criminal Prosecution**

Harish Bharti represented complainants on the charged counts in this case, the ER 404(b) witnesses, and scores of additional former patients of Dr. Momah whose statements he presented to the court at sentencing. He represented them in civil, personal injury, lawsuits seeking damages for sexual touching and/or malpractice.<sup>49</sup> This was clear from the record in Dr. Momah's case; both before, during, and after trial, he

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<sup>49</sup> Shellie Siewert (Ct. II) (05-2-42073-1 KNT); Carmen Burnetto (Ct. III) (03-2-36146-1 KNT, dismissed 3/10/05); Rena Burns (Ct. IV) (03-2-37381-8 KNT, dismissed; 05-2-40236-9 KNT, pending); Sheryl Wood (404(b) witness) (03-2-36146-8 KNT, dismissed 6/1/06); Cheryl Reich (404(b) witness) (03-2-36467-3 KNT, dismissed 6/1/06); Karen Perry (404(b) witness) (03-2-36098-8 KNT, dismissed 6/1/06).

was referred to as the victims' lawyer even by the state. 9/16/04 VRP (Bharti appears at bail hearing to represent victims); 10/6/05 VRP:46 (state refers to Bharti as Burns' lawyer); 10/18/05 VRP:53 (Siewert says he was her lawyer); 10/18/05 VRP:126 (same, re: Terry); 10/19/05 VRP:74 (same re: Burnetto initially having Bharti as her lawyer); 10/20/05 VRP:93 (Burns says Bharti is her lawyer); 10/24/05 VRP:200 (same, re: Wood); 11/1/05 VRP:41 (same, re: Reich). Mr. Bharti himself spoke to the court and submitted extensive documentation on behalf of complainants in this case. E.g., Sub No. 139<sup>50</sup> (hundreds of pages of sentencing memo); Sub No. 142 (clerk's minutes reflect that Bharti represents victims and witnesses); CP:461-62 (additional sentencing memo submitted by Bharti); CP:470-71 (court order indicating which portions of Bharti filings it will consider).

**B. The New Evidence About Attorney Bharti's Sanctionable Conduct in Orchestrating and Coaching Witnesses, and Suborning Perjury**

Given Mr. Bharti's extensive role in orchestrating complainants, any attempts at witness tampering or subornation of perjury on his part would certainly be relevant to the credibility of the witnesses in Dr. Momah's case.

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<sup>50</sup> Sub Nos. 139 and 142 were not designated. A supplemental designation of clerk's papers will be filed shortly designating those documents.

But that is just what was occurring. This is not our opinion; a recent court order sanctioned Mr. Bharti for his conduct in orchestrating and coaching witnesses, suborning perjury, and lying to the tribunal in a case against Dr. Momah with virtually identical allegations. That order (Appendix A) and the supporting transcript (Appendix B) showing the basis for the ruling are attached to the contemporaneously filed Motion to Take Judicial Notice.

The Findings of Fact in support of the order of sanctions against Bharti states, in relevant part: “this Court finds that Harish Bharti knowingly and in bad faith lied to this court at the April 18, 2006, pretrial conference.” Appendix A, Findings and Conclusions, p. 12. It finds that his sanctionable conduct began much earlier: “Harish Bharti had reason to know, prior to his filing the complaint in this action, that the Saldivars’ claims not well grounded in fact.” Id., p. 14, paragraph 30. That judge characterized the allegations in that other lawsuit against Dr. Momah as “frivolous.” Appendix B, Transcript, p. 5. With respect to the finding that Bharti lied, the court stated in court: “I am not accustomed to having attorneys stand in front of me and lie to me.” Id., p. 5. The court noted Bharti’s apparent “addiction to publicity.” Id., p. 6. With respect to his witness tampering in particular, the court stated: “For him [Bharti] to say he was relying on statements of his client when he already knew many of

his clients were lying, or perhaps manipulated by him, is unconscionable.”  
Transcript, p. 4.

That court even explained, with respect to Bharti’s client who lied on the stand about critical information asked by the court, “And when she was asked about it she said it was with Mr. Bharti’s assistance.” Id., p. 9. “Now maybe she is lying about that. I don’t think so ...” Id. The court therefore imposed sanctions against Bharti; awarded attorneys fees; ordered him to pay \$250,000 to Dennis Momah, against whom Bharti had made the unsupported allegations; and ordered him to pay \$50,000 to the court. Id., pp. 10-11. That court’s ultimate finding about Bharti’s coaching of witnesses was: “This Court was persuaded by [plaintiff] Perla Saldivar’s own admission and the circumstantial evidence that attorney Harish Bharti actually participated in the construction of Perla Saldivar’s false sworn statement ...” Appendix A, Findings and Conclusions, p. 11, paragraph 26.<sup>51</sup>

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<sup>51</sup> See also Appendix A, Findings and Conclusions, p. 14, paragraphs 30-31:

30. This Court finds that Harish Bharti had reason to know, prior to his filing the complaint in this action, that the Saldivars’ claims were not well grounded in fact. In addition, this Court finds that Harish Bharti was an active and knowing participant in the fabrication of Perla Saldivar’s ever changing accusations against Dennis Momah made to the Federal Way Police Department, the Washington State Department of Health, and this Court.

31. This Court finds that Harish Bharti signed the complaint and amended complaints in this matter without a reasonable belief that

These findings – combined with the record showing that Mr. Bharti dealt with almost every one of the former patients who testified at Dr. Momah’s trial and represented them in civil lawsuits of the same sort as the ones in which the sanctionable conduct occurred – highlight Bharti’s role in coaching his client-patients. In fact, comments by the deputy prosecutors during trial seem to indicate that they were aware that this third prosecutor – Bharti – might actually become a liability. E.g., 10/6/05 VRP:58 (“I’m sure it is [defense counsel] Mr. Allen’s greatest dream that we would call Mr. Bharti as a witness.”).

C. **The State Had a Duty to Disclose Information About Attorney Bharti’s Sanctionable Conduct in Dealing with Witnesses Against Dr. Momah**

The state had a duty to disclose any information in its possession about attorney Bharti’s sanctionable conduct in dealing with witnesses against Dr. Momah. The government must disclose sanctionable conduct of its witnesses, whether or not that conduct resulted in a criminal conviction, *and the government has an affirmative duty to seek this information out.* United States v. Perdomo, 929 F.2d 967, 980 (government failure to disclose prior arrest and conviction record of main witness was Brady violation requiring reversal; prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d

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the allegations asserted against the defendant by Perla Saldivar were well grounded in fact.

753, 760 (government erred in failing to disclose that its witness had been involved with trafficking drugs for 18 months prior to trial, even though a different A.U.S.A., not the one trying the case, was the one with knowledge of that criminal background).

We understand that Mr. Bharti was not himself a witness. Actually, he was more like a prosecutor. He represented complaining witnesses in civil lawsuits, and to further that representation by also trying to participate in the criminal lawsuit. He appeared in the criminal case at various proceedings; he was introduced by the prosecutor as someone who was working with the witnesses; and he submitted buckets full of information to the trial court to consider with respect to the supposed harm suffered by his patient-clients, particularly at sentence.

He should therefore be considered part of the prosecution “team.” The Brady/Kyles disclosure obligation applies to members of the prosecution team whether or not they are prosecutors, or members of a prosecuting agency. It applies to the state Crime Laboratory, when it does work on a case, even though that is not an arm of the prosecutor. In re Brown, 17 Cal.4<sup>th</sup> 873, 72 Cal. Rptr. 2d 698, 702, 952 P.2d 715, cert. denied, 525 U.S. 978 (1988); Damian v. State, 881 S.W.2d 102, 107 (Tex. App. Houston 1<sup>st</sup> Dist. 1994) (both cited with approval in In re the Personal Restraint of Brennan, 117 Wn. App. 797, 806 n. 17, 72 P.3d 182 (2003). It

applies to government agencies wholly independent of the prosecutor's office. United States v. Bin Laden, 397 F. Supp.2d 465, 481 (S.D.N.Y. 2005) (prosecutor has constructive knowledge, for Brady disclosure purposes, of any information held by those whose actions can be fairly imputed to him; WitSec, a separate, independent, government agency for witness protection, falls into that category in this case).

It even applies to outside professionals who are helping the prosecutor. See In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992) (treating state-retained psychiatrist, Dr. Harris, as member of prosecution team for Brady analysis, but denying relief because no evidence state knew that he made an arguably exculpatory diagnosis) (for discussion of whether state must have such actual knowledge or not, based on authority decided after Rice, see below); Box v. State, 437 So.2d 19, 25 n.4 (Miss. 1983) (members of prosecution team, for Brady purposes, includes not just police but also prosecution witnesses).

Since he should be considered part of the prosecution team, the state had an independent duty to disclose Bharti's sanctionable conduct – particularly as it affected witness testimony against Dr. Momah, that is, the heart of this very case. Kyles v. Whitley, 514 U.S. 419, 437 (prosecution duty to learn of favorable evidence known to the others working on the

government's behalf in the case, including the police).<sup>52</sup>

Even if this evidence is characterized as bearing solely on credibility, it still should have been disclosed. Impeachment evidence, no less than evidence of other sorts, falls within the disclosure mandate of Brady.<sup>53</sup>

There is no requirement that the prosecutor have actual knowledge of the impeachment evidence. In United States v. Bagley, 473 U.S. 667, for instance, the Supreme Court held that the prosecutor's failure to disclose evidence that might have been helpful to the defendant for impeachment

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<sup>52</sup> United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); United States v. Brooks, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992) (government duty to search other agencies includes duty to search police department and Internal Affairs file); United States v. Perdomo, 929 F.2d 967, 980 (prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d 753, 760; United States v. Deutsch, 475 F.2d 55 (5<sup>th</sup> Cir. 1973) (government duty to search personnel file of Postal employee who testified against defendants).

<sup>53</sup> United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1984) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule."); Benn v. Lambert, 283 F.3d 1040 (9<sup>th</sup> Cir.), cert. denied, 537 U.S. 942 (2002) (granting writ of habeas corpus after defendant learned that state withheld material facts affecting credibility of police informant who implicated defendant); United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1993) ("The jury, not the prosecutor, has the duty to sift through the inconsistencies of testimony, to weigh the credibility of witnesses and to resolve any ambiguities in the evidence"; reversing, because there was reasonable probability that had memorandum been disclosed, "the result of the proceeding would have been different such that our confidence in the outcome is undermined"); United States v. Endicott, 869 F.2d 452 (9th Cir. 1989) ("the obligation under Brady to produce evidence material to a defendant's guilt or punishment includes production of impeachment evidence"); Hart v. United States, 565 F.2d 360, 362 (5th Cir. 1978) (remanding for hearing on 28 U.S.C. § 2255 motion alleging that key government witness and informant lied about not facing federal charges; "arrests may be admissible to show that an informer might falsely testify favorably to the government in order to put his own cases in the best light possible"); In re Personal Restraint of Delmarter, 124 Wn. App. 154, 167, 101 P.3d 111 (2004) (Brady evidence includes impeachment).

during cross-examination amounted to constitutional error, despite the fact that the prosecutor did not even know it existed. See also United States v. Perdomo, 929 F.2d 967, 969-70 (“It is well accepted that a prosecutor's lack of knowledge does not render information unknown for Brady purposes”); United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir.), cert. denied, 493 U.S. 858 (1989) (“The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant”); United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985) (prosecutor’s ignorance of a police worksheet did not justify State’s failure to provide information); United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980) (prosecutor chose not to run NCIC (National Crime Information Center) check on witness due to shortness of time; prosecutor’s lack of knowledge not an excuse for a Brady violation: “In the interests of inherent fairness,” prosecution is obligated to produce evidence actually or constructively in its possession or accessible to it); United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979) (for purposes of Brady rule, prosecutor’s office and investigators in case are treated as “prosecution team”).<sup>54</sup>

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<sup>54</sup> United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978) (“The prosecution is responsible for the nondisclosure of assurances made to his principal witnesses *even if such promises by other government agents were unknown to the prosecutor*. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure.”) (emphasis added).

This means that the deputy prosecutors had an affirmative duty to scour the prosecution team for any potentially exculpatory evidence.<sup>55</sup> The state Supreme Court's earlier holdings to the contrary on this point, *e.g.*, State v. Judge, 100 Wn.2d 706, 717, 675 P.2d 219 (1984), conflict with Bagley and its most recent progeny.

**D. Since the Undisclosed Evidence Was Material, the Convictions Must be Reversed – No Further Proof of Prejudice is Required**

The duty to disclose arises if the evidence is material. Evidence is material if “there is a reasonable probability” that “the result of the proceeding would have been different” had disclosure occurred. Carriger v. Lewis, 132 F.3d 463, 479 (9<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998).

A “reasonable probability” does not require proof by a preponderance of evidence. Singh v. Prunty, 142 F.3d 1157, 1161 (9<sup>th</sup> Cir. 1998); Carriger v. Lewis, 132 F.3d 463, 479. It requires only proof of a probability. See Kyles, 514 U.S. 419, 507 & n.9; In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

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<sup>55</sup> See United States v. Wood, 57 F.3d 733, 737 (FDA must, in criminal trial, disclose contents of Investigational New Drug applications that bear on safety of drug defendant is charged with dispensing unlawfully); United States v. Brooks, 966 F.2d 1500, 1502-03 (government duty to search other agency files includes duty to search police department and Internal Affairs file; new trial ordered because government failed to check Internal Affairs Division files regarding police officer's credibility); United States v. Perdomo, 929 F.2d 967, 980 (prosecution team with duty to disclose includes both investigative and prosecution personnel); United States v. Osorio, 929 F.2d 753, 760; United States v. Deutsch, 475 F.2d 55 (prosecutor has duty to search personnel file of Postal employee who testified against defendants and disclose adverse information found there).

The sufficiency of other, admitted, evidence, has no bearing on the prejudice inquiry when a Brady violation is at issue. The test for materiality “is not a sufficiency of evidence test. ... One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles, 514 U.S. 419, 506.

The undisclosed impeachment evidence was material under this test because the testimony by the former patients was the key – indeed, the only – evidence of Dr. Momah’s guilt. Anything bearing on their credibility is relevant. And whether their lawyer attempted to orchestrate and coach their testimony, or suborn their perjury, as the sanctions orders show that he did with other clients, certainly bears on whether their testimony was subject to improper influence.<sup>56</sup>

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<sup>56</sup> Withholding this evidence also deprived Dr. Momah of his right to confront and cross-examine witnesses. “The sixth amendment guarantees criminal defendants the right to cross-examine adverse witnesses to uncover possible bias and to expose the witness’s motivation in testifying.” Reiger v. Christensen, 789 F.2d 1425, 1433 (9th Cir. 1986). Cross-examination about adverse witness’ motives for testifying – including whether there had been improper coaching – falls within that guaranteed confrontation right. Maryland v. Craig, 497 U.S. 836, 851-52, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (being able to determine whether child witness in sex case had been coached is part of confrontation clause right); Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); United States v. Turning Bear, 357 F.3d 730, 736 (8<sup>th</sup> Cir. 2004) (same); State v. Vincent, 159 Ariz. 418, 429-30, 768 P.2d 150 (1989) (same). Indeed, even the state has the right to cross-examine about whether a witness was coached by a lawyer, since it is so critical to evaluating credibility. State v. Delarosa-Flores, 59 Wn. App. 514, 516-17, 719 P.2d 736 (1990), review denied, 116 Wn.2d 1010 (1991) (even prosecution has right to cross-examine about whether

**VII. CONCLUSION**

For the foregoing reasons, all convictions should be reversed.

Dated this 2<sup>nd</sup> day of November, 2006.

Respectfully submitted,



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Sheryl Gordon McCloud, WSBA No. 16709  
Attorney for Appellant, Charles Momah

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witness was coached, citing Geders v. United States, 425 U.S. 80, 89, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2<sup>nd</sup> day of November, 2006, a copy of the APPELLANT'S OPENING BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

King County Prosecuting Attorney  
Appellate Division  
W554 King County Courthouse  
516 Third Ave.  
Seattle, WA 98104

Charles Momah, M.D.  
DOC # 888910  
MCC - Twin Rivers  
P.O. Box 888  
Monroe, WA 98272-0888

  
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Sheryl Gordon McCloud

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