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DIVISION ONE

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NO. 58004-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Appellant.

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STATE OF WASHINGTON
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APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. AN IN-CHAMBERS PROCEEDING BEHIND A “CLOSED” DOOR IS “CLOSED”3

 A. The State’s Concessions3

 B. The State’s Argument Depends on the Notion that Judicial Chambers Are Open. That Contradicts All Existing Case Law, All Existing Dictionary Definitions, and Probably All Existing Judicial Expectations......5

 C. Under *Orange*, the Lack of a Formal Closure Order is the Problem, Not the Solution.....9

 D. The State’s Factual Claims About Whether the Public Could Go In Chambers to this Voir Dire Proceeding Contradict the Record.....12

III. THE RESPONSE FAILS TO SHOW HOW DR. MOMAH’S TOUCHING OF TWO OTHER PATIENTS DURING EXAMS AT REMOTE TIMES, AND OF SEXUAL COMMENTS (WITH NO INAPPROPRIATE TOUCHING) TO A THIRD PATIENT, WERE RELEVANT TO THE ACTS CHARGED HERE; IT ALSO IGNORES THE DUE PROCESS AND “RAPE SHIELD” STATUTE ARGUMENTS.....16

 A. The State Fails to Show How Bad Words – Uttered at Remote Times – Are Admissible Under ER 404(b) to Prove Charged, Bad, Deeds.....16

| | | |
|-----|--|----|
| B. | <u>The State Ignores the Fact that Rape is a Strict Liability Crime, Thus Making the ER 404(b) Evidence Especially Irrelevant as to Them</u> | 17 |
| C. | <u>The State Ignores the Argument That the Plain Language of Washington’s “Rape Shield” Law Makes Prior Sexual History Irrelevant to Prove Later Sexual Acts – For the Defendant, as Well as the Complainant</u> | 17 |
| D. | <u>The State Ignores the Due Process Clause Issue</u> | 18 |
| E. | <u>The State Does Not Argue Harmless Error</u> | 19 |
| IV. | THE STATE DOES NOT DEFEND THE RAPE SHIELD STATUTE’S APPLICATION TO PROFFERED EVIDENCE CONCERNING PHILLIPS’ PRIOR CONDUCT..... | 19 |
| A. | <u>The State Fails to Explore the Plain Language of the Rape Shield Statute; As Explained in the Opening Brief, That Language Does Not Cover The Cross-Examination Attempted at Dr. Momah’s Trial</u> | 19 |
| B. | <u>The State Does Not Address the Constitutional Problem With Exclusion of Such Evidence That is So Relevant to Credibility</u> | 20 |
| 1. | <i>Admissibility of Motive and Bias Evidence Under Constitutional Standards, Regardless of State Rape Shield Laws to the Contrary</i> | 21 |

| | | | |
|-----|----|---|----|
| | 2. | <i>Admissibility of Critical ER 404(b) Evidence Under Constitutional Standards, Regardless of State Laws to the Contrary</i> | 26 |
| V. | | THE STATE DOES NOT DENY THAT NEW EVIDENCE SHOWS THAT A NON-PARTY LAWYER ORCHESTRATED, COACHED, AND EVEN SUBORNED PERJURY OF COMPLAINANTS AGAINST DR. MOMAH, TO FURTHER CIVIL LAWSUITS – IT TAKES THE FORMALISTIC POSITION THAT ONLY ABSOLUTE PROOF OF PERJURY IN THIS CASE WOULD COUNT..... | 26 |
| VI. | | CONCLUSION..... | 31 |

TABLE OF AUTHORITIES

STATE CASES

| | |
|---|---------------|
| <u>Box v. State</u> , 437 So. 2d 19 (Miss. 1983) | 29 |
| <u>Commonwealth v. Black</u> , 487 A.2d 396 (Penn. 1985) | 25 |
| <u>Ehrlich v. Grove</u> , ___ A.2d ___, 2007 WL 93096 (Md. Ct. App. Jan. 11, 2007) | 7 |
| <u>Federated Publications, Inc. v. Kurtz</u> , 94 Wn. 2d 51, 615 P.2d 440 (1980) | 6 |
| <u>In re Orange</u> , 152 Wn. 2d 795, 100 P.3d 291 (2004) | <i>passim</i> |
| <u>In re Rice</u> , 118 Wn. 2d 876, 828 P.2d 1086, <u>cert. denied</u> , 506 U.S. 958 (1992) | 29 |
| <u>McNear v. Rhay</u> , 65 Wn. 2d 530, 398 P.2d 732 (1965) | 21 |
| <u>NBC Subsidiary (KNBC-TV), Inc. v. Superior Court</u> , 20 Cal. 4th 1178, 86 Cal. Rptr. 778 (Cal. 1999) | 6 |
| <u>People v. Cobb</u> , 962 P.2d 944 (Colo. 1998) | 24 |
| <u>People v. Golden</u> , 140 P.3d 1 (Colo App. 2005), <u>review</u> <u>denied</u> , 2006 Colo. LEXIS 568 (2006) | 24 |
| <u>People v. Hackett</u> , 421 Mich. 338, 365 N.W.2d 120 (1984) | 23, 24 |
| <u>Riley v. State</u> , 711 N.E.2d 489 (Ind. 1999) | 7 |
| <u>Spokane v. Lewis</u> , 16 Wn. App. 791, 559 P.2d 581 (1971) | 20 |
| <u>State ex rel. Stecher v. Dowd</u> , 912 S.W.2d 462 (Mo. 1995) | 7 |
| <u>State v. Angevine</u> , 104 Wash. 679, 177 P. 701 (1919) | 6 |
| <u>State v. Brightman</u> , 155 Wn. 2d 506, 122 P.3d 150 (2005) | 5 |

| | |
|---|----|
| <u>State v. Campbell</u> , 125 Wn. 2d 797, 888 P.2d 1115 (1995) | 21 |
| <u>State v. Cauthron</u> , 120 Wn. 2d 879, 846 P.2d 502 (1993) | 21 |
| <u>State v. DeVicentis</u> , 150 Wn. 2d 11, 74 P.3d 119 (2003) | 2 |
| <u>State v. Easterling</u> , 157 Wn. 2d 167, 137 P.3d 825 (2006) | 5 |
| <u>State v. Gaines</u> , 144 Wash. 446 (1927) | 10 |
| <u>State v. Howard</u> , 121 N.H. 53, 426 A.2d 457 (N.H. 1981) | 25 |
| <u>State v. Pulizzano</u> , 155 Wis. 2d 633, 456 N.W.2d 325 (Wis. 1990) | 25 |
| <u>Summit v. State</u> , 101 Nev. 159, 697 P.2d 1374 (Nev. 1985) | 25 |

FEDERAL CASES

| | |
|---|--------|
| <u>Amos v. Minnesota</u> , 849 F.2d 1070 (8th Cir.), <u>cert. denied</u> , 488 U.S. 861 (1988) | 18 |
| <u>Boggs v. Collins</u> , 226 F.3d 728 (6th Cir. 2000), <u>cert. denied</u> , 531 U.S. 913 (2001) | 22, 23 |
| <u>Brady v. Maryland</u> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) | 27 |
| <u>Carter v. Armontrout</u> , 929 F.2d 1294 (8th Cir. 1991) | 18 |
| <u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) | 21 |
| <u>Davis v. Alaska</u> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) | 21, 22 |
| <u>Delaware v. Van Arsdall</u> , 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) | 22 |

| | |
|---|----|
| <u>Globe Newspaper Co. v. Superior Court</u> , 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982)..... | 8 |
| <u>Holmes v. South Carolina</u> , ___ U.S. ___, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)..... | 21 |
| <u>Lewis v. Wilkinson</u> , 307 F.3d 413 (6th Cir. 2002)..... | 23 |
| <u>McGuinness v. Dubois</u> , 891 F. Supp. 25 (D. Mass. 1995)..... | 8 |
| <u>Olden v. Kentucky</u> , 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988)..... | 23 |
| <u>Pennsylvania v. Ritchie</u> , 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)..... | 21 |
| <u>Perry v. Rushen</u> , 713 F.2d 1447 (9th Cir. 1983), <u>cert. denied</u> , 469 U.S. 838 (1984)..... | 21 |
| <u>Press-Enterprise Co. v. Superior Court of California</u> , 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)..... | 5 |
| <u>Richmond</u> , 448 U.S. at 598..... | 8 |
| <u>Sleeper v. Spencer</u> , 435 F. Supp. 2d 204 (D. Mass. 2006)..... | 29 |
| <u>Taylor v. Illinois</u> , 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)..... | 21 |
| <u>United States ex rel. Lee v. Flannigan</u> , 884 F.2d 945 (7th Cir. 1989), <u>cert. denied</u> , 497 U.S. 1027 (1990)..... | 18 |
| <u>United States v. Abel</u> , 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984)..... | 25 |
| <u>United States v. Boyd</u> , 55 F.3d 239 (7th Cir. 1995)..... | 30 |
| <u>United States v. Edwards</u> , 823 F.2d 111 (5th Cir. 1987), <u>cert. denied</u> , 485 U.S. 934 (1988)..... | 8 |

| | |
|---|----|
| <u>United States v. James</u> , 609 F.2d 36 (2d Cir. 1979), <u>cert. denied</u> , 445 U.S. 905 (1980) | 25 |
| <u>United States v. LM</u> , 425 F. Supp. 2d 948 (N.D. Iowa 2006) | 6 |
| <u>United States v. Norris</u> , 780 F.2d 1207 (5th Cir. 1986)..... | 8 |
| <u>United States v. Osorio</u> , 929 F.2d 753 (1st Cir. 1991)..... | 28 |
| <u>United States v. Perdomo</u> , 929 F.2d 967 (3d Cir. 1991)..... | 28 |
| <u>United States v. Shaffer</u> , 789 F.2d 682 (9th Cir. 1986) | 30 |
| <u>United States v. Sipe</u> , 388 F.3d 471 (5th Cir. 2004)..... | 30 |
| <u>United States v. Soto-Beniquez</u> , 356 F.3d 1 (1st Cir.), <u>cert. denied</u> , 541 U.S. 958 (2004) | 30 |
| <u>United States v. Villafranca</u> , 260 F.3d 374 (5th Cir. 2001)..... | 30 |
| <u>United States v. Williams</u> , 81 F.3d 1434 (7th Cir. 1996), <u>cert. denied</u> , 522 U.S. 1006 (1997) | 30 |
| <u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) | 21 |
| <u>Wisheart v. Davis</u> , 408 F.3d 321 (7th Cir. 2005), <u>cert. denied</u> , 126 S.Ct 1617 (2006) | 29 |

STATE STATUTES

| | |
|---------------------|----|
| RCW 9A.44.020 | 19 |
|---------------------|----|

MISCELLANEOUS

| | |
|--|---|
| <i>Black's Law Dictionary</i> 775 (8th ed. 2004) | 7 |
|--|---|

I. INTRODUCTION

The state does not dispute the fact that the trial court held a full day of voir dire in “chambers,” behind a “closed” door, as the transcript said. It does not dispute the fact that if this is considered courtroom closure, then it was impermissible absent findings on the record sufficient to justify it – and no such findings or justifications appear on the record. The state does not even dispute what the transcript makes clear, that is, that behind that “closed” door and in “chambers” were only the parties to the case and the court. And the state does not dispute the accuracy of the transcript’s statements that a closed door separated the public from those inside, that each visitor was announced by the court and transcribed by the court reporter, and that the only visitors were individual jurors, one at a time.

The state’s only argument on this point is that this in-chambers proceeding behind a “closed” door was not closed. But all the cases that have considered whether in-chambers proceedings behind closed doors are actually “closed,” conclude that they are closed.

Finally on this point, the state does not dispute that if in fact the day of voir dire was closed, the remedy is reversal. Section II.

The state’s response to the ER 404(b) argument is that this Court is

bound by State v. DeVicentis¹, faulty though it may be. That much is true. But it ignores the fact that the ER 404(b) evidence was basically words, not deeds; it ignores the fact that the most serious conviction, for rape, is for a strict liability crime on which the ER 404(b) material would be irrelevant; it ignores the due process argument; and it ignores the argument that the plain language of the rape shield statute makes this sort of prior sexual history evidence just as irrelevant when offered against the defendant (as it was in Dr. Momah's case) as when it is offered against a complainant. Section III.

The Opening Brief next argued that the rape shield statute did not bar admission of evidence that complainant Phillips had sexual contacts with other doctors, likely as part of a scheme to obtain prescription drugs – it showed that the rape shield statute's bar on prior sexual conduct did not apply to that sort of conduct. The state does not delve into the statute's language at all. It also fails to respond to the argument that if the rape shield statute does bar cross-examination of this sort, then it is unconstitutional as applied. Finally, the state ignores the argument that precisely the same sort of prior sexual conduct evidence was deemed relevant when offered against Dr. Momah – and if it is relevant as to one witness, it must be relevant and admissible as to another. Section IV.

¹ State v. DeVicentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

Finally, the state does not deny that new evidence shows that lawyer Harish Bharti orchestrated, coached, and even suborned perjury of complainants against Dr. Momah, to further civil lawsuits in which he represented them. It does not dispute that Mr. Bharti represented the complainants on the charged counts in this case, represented the ER 404(b) witnesses, and represented scores of additional former patients of Dr. Momah whose statements he presented to the court at sentencing, in almost copycat cases seeking damages for sexual touching and/or malpractice. The state does not even dispute that all of this – except for the misconduct – was clear from the record in Dr. Momah’s own case, since Bharti was referred to as the victims’ lawyer even by the state, in this very case. Instead, it takes the formalistic approach of saying that we have not proven a sufficient link between that tampering, and this case – without actually denying that any such witness tampering, intimidation, or coaching, occurred here. Such formalism has no place in Brady analysis. The state has a duty to discover, and disclose, any such evidence – not to rest on the formalism that the Opening Brief’s citation to the sanctions order might not technically be subject to judicial notice. Section V.

**II. AN IN-CHAMBERS PROCEEDING BEHIND A
“CLOSED” DOOR IS “CLOSED”**

A. The State’s Concessions

The state does not dispute the fact that the trial court held a full day of voir dire in chambers, behind a closed door. It does not dispute that the transcript says that the door to “chambers” was “closed” while this day of voir dire was occurring, and it does not claim that the transcript – which states both that this occurred in “chambers” and that the “door is closed” is inaccurate. Response, p. 25-27.

The state does avoid using the word “chambers,” and refers to the place in which closed voir dire occurred as just an “adjoining” room. Response, p. 27. But the state does not explicitly deny that this adjoining room was judicial chambers, nor could it – because that is exactly what the transcript says, over and over again.²

The state does not dispute the fact that the in-chambers voir dire covered a full day. Response, pp. 26-28.

The state does not even deny that if this is considered a full day of voir dire in a closed courtroom, then reversal is required, despite the absence

² According to the transcript, this day of voir dire in chambers began first thing in the morning and lasted until the end of the court day in the late afternoon. 10/11/05 VRP:19. The transcript continues that the judge explained, “At this time the Court and counsel adjourned to chambers.” *Id.* These are the transcript’s words, not our gloss: 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.”).

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).

The state's only argument is that this in-chambers proceeding behind a closed door was not closed. We deal with each aspect of that argument below.

B. The State's Argument Depends on the Notion that Judicial Chambers Are Open. That Contradicts All Existing Case Law, All Existing Dictionary Definitions, and Probably All Existing Judicial Expectations

The state's argument depends on the notion that judicial chambers, and judicial chambers proceedings, are open to the public.³

³ Response, pp. 28-29 ("While the door was closed, this was necessary to keep the answers given by the jurors from being heard by the other panel members. Virtually all rooms of the courthouse, whether jury rooms or courtrooms, have doors that are closed during court proceedings. A spectator can open the door of the courtroom and could have opened the door where individual voir dire occurred if they wished to observe individual voir dire.").

That would probably come as a surprise to most judges.

It would certainly come as a surprise to most Washington courts, which treat “chambers” conferences as private or closed.⁴

It certainly contradicts the dictionary definitions of “chambers” proceedings that we offered in the Opening Brief.⁵

It would likely surprise most courts from the sister jurisdictions, since they also characterize “chambers” proceedings as closed or private.⁶

⁴ As we explained in the Opening Brief, this assumption is so ingrained that it has not come up as a disputed issue – but the cases that discuss chambers proceedings always characterize them as closed. 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, 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”).

⁵ <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 (8th 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*.”).

⁶ E.g., United States v. LM, 425 F. Supp.2d 948 (N.D. Iowa 2006) (court balances factors and closes courtroom for particular proceeding: “Accordingly, the court shall exercise its discretion to conduct the Transfer Hearing ‘in chambers,’ i.e., closed to the public, including the victims and their families”); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 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.”) (emphasis added).

In one of the most recent decisions on this subject, Ehrlich v. Grove, ___ A.2d ___, 2007 WL 93096 at *17, n.3 (Md. Ct. App. Jan. 11, 2007), for example, we see the following definition of “in chambers,” which equates such proceedings with “in camera” or private proceedings:

The concept of *in camera* review is familiar to most in the legal profession, but **expanded** *in camera* review is slightly more obscure. *Black's Law Dictionary* defines *in camera* as: “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 chambers.” *Black’s Law Dictionary* 775 (8th ed. 2004). *In camera* inspection is defined as: “A trial judge’s private consideration of evidence.” *Id.* Maryland’s cases generally use “*in camera* review” and “*in camera* inspection” interchangeably. For simplicity, we will use “*in camera* review” herein.

In short, the courts that have even considered this an issue have stated that “in chambers” means “in camera” or in private. Riley v. State, 711 N.E.2d 489, 492 n.5 (Ind. 1999) (“*In camera*” is defined as follows: “In chambers; in private. A judicial proceeding is said to be heard *in camera* either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom.” *Black’s Law Dictionary* 760 (6th ed.1990).”); State ex rel. Stecher v. Dowd, 912 S.W.2d 462, 465 (Mo. 1995) (“The term *in camera* means “in chambers” or “in private,” *Black’s Law Dictionary*, 760 (6th ed. 1990), and proceedings that are *in camera* are designed to exclude persons who

should not be privy to the information to be disclosed.”) (emphasis in original); McGuinness v. Dubois, 891 F. Supp. 25 (D. Mass. 1995) (“After all, the phrase “in camera” in reference to judicial or quasi-judicial administrative proceedings usually means in chambers or in private. See BLACK’S LAW DICTIONARY 760 (6th ed. 1990).”).

The state apparently found no cases to the contrary, since it cited none.⁷

In fact, this state argument was already made and rejected in In re the Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291. In that case, the state Supreme Court reversed defendant’s convictions for murder, attempted murder, first-degree assault, and related crimes, due to courtroom closure during a portion of voir dire.

But the “closure” in Orange was not just closure of the doors of the regular courtroom. There was a different type of closure, also: *in-*

⁷ This is the reason why courts use the Press-Enterprise-Richmond-Waller test to determine if closure is constitutional, when presented with a challenge to an in-chambers proceeding – not a test for determining if the courtroom was really open. See, e.g., United States v. Edwards, 823 F.2d 111, 116-17 (5th Cir. 1987), cert. denied, 485 U.S. 934 (1988) (evaluating constitutionality of mid-trial questioning of jurors in chambers about juror misconduct).

This is the reason why courts distinguish between in-chambers conferences that are trivial and administrative and hence not subject to that constitutional test, and in-chambers conferences that are substantive parts of the trial – they never distinguish between in-chambers proceedings that are private and those that supposedly are not. E.g. Richmond, 448 U.S. at 598, n.23; 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 portion of Richmond language with approval); United States v. Norris, 780 F.2d 1207, 1210-11 (5th Cir. 1986) (chambers conference here too trivial to be subject to scrutiny for constitutional violations).

chambers voir dire. In re the Personal Restraint of Orange, 152 Wn.2d 795, 827-28 (“Much of the jury inquiry during the claimed court closure was conducted in chambers.”) (Ireland, J., dissenting).

The Orange court granted relief because of all courtroom closure during voir dire. Thus, it has already decided that “claimed courtroom closure ... in chambers,” which constituted “[m]uch” of the voir dire closure there, is “court closure” that is subject to Press-Enterprise, Bone-Club, and now Orange, standards.

The state’s argument that the in-chambers voir dire in Dr. Momah’s case was too open to be subject to Sixth Amendment analysis flies in the face of all these authorities. Voir dire in chambers is subject to constitutional scrutiny under these controlling, and persuasive, cases.

And the state has already essentially conceded that if the in-chambers voir dire were subject to scrutiny under Sixth Amendment, Waller, Richmond, Press-Enterprise, or Orange, standards, it was unconstitutional.

C. **Under *Orange*, the Lack of a Formal Closure Order is the Problem, Not the Solution**

There is a companion argument advanced by the state in this case that was also rejected by the state Supreme Court in Orange, 152 Wn.2d 795. The Response in Dr. Momah’s case argues that there was no

sufficient, explicit, formal, order, in this case – closure was accomplished by the judge without even the formality of inquiry or an order – and the lack of formality here distinguishes Dr. Momah’s case and means that Orange standards do not apply.⁸

But this argument that the lack of formality preceding closure makes a “closed” door less closed was also rejected in Orange. In that case, the two Justices who wrote in concurrence questioned whether there was a sufficiently formal “order” on the record showing that the courtroom was really and truly closed to the public by an actual order of the court (even though the public had been excluded). The Orange majority responded by explaining that the concurrence’s argument that the lack of formality in the order could somehow excuse the closure, was the same as an argument made 80 years ago in the state Supreme Court, and explained and quoted that argument from that prior case, State v. Gaines, 144 Wash. 446 (1927). Orange, 152 Wn.2d 795, 814, n.2 (citing and quoting Gaines, 144 Wash. 446, 462-63, where court “expressed doubt as to whether the trial court’s order could even ‘be called an order’” of closure).

The majority in Orange then *rejected* this formalistic argument that

⁸ Response, pp. 28, 29 (“All of the Washington cases and the cases relied on by Momah on appeal involved specific rulings by trial judges that excluded either the public, the press, or family members ...”).

the absence of an explicit closure order meant that there was no courtroom closure (in the constitutional sense) despite closed doors:

Gaines was decided more than 50 years before the United States Supreme Court decided *Press-Enterprise* and *Waller* and more than 60 years before this court applied the constitutional guidelines to assess defendant Bone-Club's claimed violation of his right to a public trial. In fact, the two questions that the *Gaines* court had to answer – was there a closure order and, if so, was it followed? – would not have arisen had the trial court in *Gaines* had the prescience to follow the *Bone-Club* guidelines. The guidelines require not simply an order, but a narrowly tailored order issued following a hearing on the competing interests of those advocating and opposing closure, and the very existence of the mandated order creates a strong presumption that the order was carried out in accordance with its drafting. The inquiry in *Gaines* that the concurrence would now impose as a preliminary inquiry here, and presumably in all subsequent closure cases, was necessary there in the absence of the protective guidelines that have since evolved in the line of state and federal cases from *Kurtz* in 1980 to *Bone-Club* in 1995. By excusing a trial court's disregard for the well-settled guidelines, the concurrence's approach not only invites the waste of court resources on posttrial evidentiary hearings but results in unnecessary delays in appellate review.

Orange, 152 Wn.2d 795, 814 (quoting Gaines) (footnote omitted).

The Washington Supreme Court in Orange thus rejected the state's other, companion, argument in Dr. Momah's case. The lack of a formal closure order does not mean the courtroom was not "closed" in the constitutional sense, under Orange.

In fact the point of Orange is that the lack of formality – in making

findings, asking for objections, or entering an order concerning closure that follows – is the problem, not the solution!

D. The State’s Factual Claims About Whether the Public Could Go In Chambers to this Voir Dire Proceeding Contradict the Record

The state then makes several assertions about the in-chambers voir dire day in Dr. Momah’s case that have no support in the record (without cites to the record).

The Response states, “[n]either the trial court nor the parties *believed* that the courtroom had been closed, and the trial court was acutely aware that the defendant was entitled to a public trial at all times.” Response, p. 25 (emphasis added).

This assertion has no supporting citation. The relevant portions of the record show just the opposite. They show that the judge was memorializing for the record the fact that the parties had moved into “chambers,” and that the door of chambers had been “closed” behind them.⁹ To the extent that one’s words provides evidence of one’s beliefs,

⁹ The judge explicitly stated, when they began proceedings in chambers, “At this time the Court and counsel adjourned to chambers.” 10/11/05 TR:19-20. So at least the judge thought that they were “adjourned to chambers.” That same judge even thought that the “door is closed.” We know that because he said so: “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.” *Id.* (emphasis added). How the state can go from the judge explicitly acknowledging that the door is closed and they were in chambers, to saying that no one thought it was “closed,” is baffling. The state does not even deal with the judge’s repeated statements, on the record, each time a juror came in for individual questioning or left, that that juror was

this shows that the judge believed that they were moving into his chambers and that the door to those chambers would be closed. Perhaps more to the point, the parties' beliefs are irrelevant under Press-Enterprise, Orange, and their progeny. What matters is whether the record shows that the courtroom was closed for a constitutionally significant hearing, and whether the proper findings were made.

The courtroom in Dr. Momah's case was closed for a full day of voir dire, with no findings. The subjective belief of the state's prosecutor is irrelevant.

The Response continues, "at no point during the proceedings did the trial court exclude any members of the public or the press ..." Response, p. 25.

But the record does not show that, either. Instead, it shows that the parties and the judge "adjourned" to "chambers" and that each juror had to be summoned individually to come in to "chambers" behind the door that was "closed," to be questioned. The record does not show whether there were any members of the press or public who sought to view voir dire that day, or who would have viewed it if it had been in open court. The best that can be said about what excluded viewers might have thought, is that

entering and leaving "chambers" 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 record is silent on that point.

The Response then goes into a discussion of the number of jurors that had to be called, and how crowded the courtroom would have been. Response, pp. 26-28. The Response thereby implies that the large number of jurors made jury inquiry in the regular courtroom inconvenient. Response, pp. 26-27.

There are two problems with this argument. The first problem is that it lacks support in the record – there was no discussion on the record of a problem for open justice posed by the number of jurors.

The second problem is that courtroom congestion has already been rejected as a reason for courtroom closure. In fact, the trial court judge cited the size of the courtroom and the number of jurors summoned for the venire in the Orange case as a reason for closure. The Washington Supreme Court rejected that justification, holding that the large number of jurors did not justify courtroom closure. Orange, 152 Wn.2d at 809. It rejected the courtroom congestion argument in a case with as much notoriety and press interest as this case, explaining that instead of calling 98 veniremen who took up the whole courtroom, they could have just as easily called 90 and left room for some of the public. Orange, 152 Wn.2d at 809. The same rule that courtroom congestion is an insufficient reason to close the courtroom must apply to Dr. Momah's case. In fact, it should

apply with even greater force here, because the courtroom crowding reason is being proffered by the state only in hindsight, without record support. At least in Orange it was made contemporaneously with closure.

The Response then makes the troubling assertion, “While it is unclear if any spectators observed individual voir dire that occurred in the room connected to E-942, there was nothing that prevented anyone who so desired from watching.” Response, p. 28. The state offers no citation to the record for this assertion.

It is disturbing because it contradicts the record. The transcript says that they “adjourned” to “chambers” and that the “door is closed.” So the thing “that prevented anyone who so desired from watching” (Response, p. 28) was the fact that the trial was in chambers, and there was a “closed” door between the public on one hand, and chambers and the trial on the other hand.

The state’s assertion on this point contradicts the record in another sense, also. The state here essentially claims that someone might have slipped into chambers unnoticed to watch – “it is unclear if any spectators observed individual voir dire that occurred in [chambers].” Response, p. 28. But the court reporter was making a scrupulous record of everyone who was in chambers – the transcript reflects when the door was closed, and explicitly reflects each juror who came in through that door and then

closed it behind them. 10/11/05 TR: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.”).

If the state is arguing that the transcript is inaccurate, they have a responsibility to make that claim explicitly and seek the remedy they deem appropriate. The state has not done so. This Court should reject the Response’s invitation to re-write that record now.

III. THE RESPONSE FAILS TO SHOW HOW DR. MOMAH’S TOUCHING OF TWO OTHER PATIENTS DURING EXAMS AT REMOTE TIMES, AND OF SEXUAL COMMENTS (WITH NO INAPPROPRIATE TOUCHING) TO A THIRD PATIENT, WERE RELEVANT TO THE ACTS CHARGED HERE; IT ALSO IGNORES THE DUE PROCESS AND “RAPE SHIELD” STATUTE ARGUMENTS.

A. The State Fails to Show How Bad Words – Uttered at Remote Times – Are Admissible Under ER 404(b) to Prove Charged, Bad, Deeds

The trial court admitted testimony of two former patients who claimed that Dr. Momah touched them inappropriately during medical exams, and one who claimed that Dr. Momah 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). One of the three ER 404(b) witnesses testified about no objectionable act at all – just objectionable words.

The state does not defend the notion that objectionable words rather than objectionable deeds show a common plan to sexually molest patients. Indeed most authorities would take issue with the assertion that the difference between words and deeds is minor, since it lies at the heart of the actus reus of all criminal conduct.

B. The State Ignores the Fact that Rape is a Strict Liability Crime, Thus Making the ER 404(b) Evidence Especially Irrelevant as to Them

The state then fails to respond to the argument concerning the most serious charges, of second- and third-degree rape. Those are strict liability crimes. The state's argument that the prior ER404(b) acts or words help prove an element of rape therefore fails. The only possible element to which the other acts or words might be relevant, is the defendant's mental state – that is, the notion that if he did it before and it was purposeful, rather than a mistake, then he would do it again, and it would be purposeful, rather than a mistake. But that is not an element of strict liability rape at all.

Thus, on the rapes – the most serious charges – the ER 404(b) evidence could only have been considered for the inadmissible purpose of propensity.

C. The State Ignores the Argument That the Plain Language of Washington's "Rape Shield" Law Makes Prior Sexual History Irrelevant to Prove Later Sexual Acts – For the Defendant, as Well as the Complainant

Further, the state fails to mention two parts of the ER 404(b) argument. The first part of that argument that the Response ignores is that under the language of the “rape shield” statute, the state legislature has determined that evidence of prior sexual history has little to no probative value on whether a current sex crime occurred. Opening Brief, pp. 52-53.

The state does not discuss this. As a question of first impression on a constitutional issue, it does at least bear some analysis – especially since one of the four DeVincentis prerequisites to admissibility is that the prior acts evidence be more probative than prejudicial. Since such evidence is not really probative at all, prejudice is bound to outweigh it.

D. The State Ignores the Due Process Clause Issue

The other argument on the ER 404(b) witnesses that the state fails to mention is the fact that admission of objectionable evidence in a criminal trial implicates not just ER 404(b), but also the due process clause, if the evidence admitted is so lacking in probative value and laden with prejudice that it renders the trial fundamentally unfair and jeopardizes the right to due process of law.¹⁰ The state does not respond to this, either.

¹⁰ As we explained in the opening brief, substantial federal authority supports this federal due process point: 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

E. The State Does Not Argue Harmless Error

If the state errs – and its failure to defend the probative value of the ER 404(b) evidence seems to suggest that it does – then the error requires reversal. The state has not even suggested that if any of this evidence was admitted in error, that it could be excused as harmless.

IV. THE STATE DOES NOT DEFEND THE RAPE SHIELD STATUTE’S APPLICATION TO PROFFERED EVIDENCE CONCERNING PHILLIPS’ PRIOR CONDUCT.

A. The State Fails to Explore the Plain Language of the Rape Shield Statute; As Explained in the Opening Brief, That Language Does Not Cover The Cross-Examination Attempted at Dr. Momah’s Trial

The Opening Brief explained that Dr. Momah sought to cross-examine complainant Ms. Phillips about her prior sexual contact with other physicians. It explained that the rape shield statute did not bar such inquiry, because the evidence was not offered to show her credibility or propensity to engage in a future sexual act. We further explained that RCW 9A.44.020 limits admission of *certain* prior sexual history of the complaining witness –

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”).

“marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards” – but not all prior sexual history, and hence that it should not affect the admissibility of sexual history of touching other doctors since it is not marital history, divorce history, reputation evidence of promiscuity or nonchastity, or even evidence of sexual mores contrary to community standards.

In fact, we explained that the proffered sexual history of Ms. Phillips was offered for an entirely different purpose: as evidence of other consensual affairs, likely for the overall scheme of obtaining drugs.

The state does not quote the language of the rape shield statute. It does not analyze what that statute excludes or admits. It simply tries to throw everything into the trial court’s “discretion.” Response, pp. 42-43.

It does, however, cite to procedural requirements in that statute. But that is only if the proffered material falls within the language of the statute and, as we explained in the Opening Brief, it does not.

Finally, we note that the application of an evidentiary rule is often reviewed for abuse of discretion – but where, as here, the issue concerns the proper construction of the language of an evidentiary statute, review is de novo. See Spokane v. Lewis, 16 Wn. App. 791, 559 P.2d 581 (1971).

B. The State Does Not Address the Constitutional Problem With Exclusion of Such Evidence That is So Relevant to Credibility

The state does not mention the constitutional problems with exclusion of the proffered cross-examination, either. There are several, as we explained in the Opening Brief: the right to present a defense, Holmes v. South Carolina, __ U.S. __, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); the right to “compulsory process,”¹¹ and the Sixth Amendment right to confrontation.¹²

The state does not mention any of these guaranties. But they are likely dispositive.¹³ The proffered cross-examination testimony is both ER 404(b) evidence concerning Ms. Phillips’ scheme for trying to obtain drugs and/or sexual favors, and evidence showing that she has a reason to lie – to conceal such an illegal scheme to obtain unnecessary prescription drugs. Either way, the constitution bars its exclusion.

1. Admissibility of Motive and Bias Evidence Under Constitutional Standards, Regardless of State Rape

¹¹ Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984).

¹² See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); 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 (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).

¹³ They are also reviewed under the more stringent, de novo, standard of review applicable to constitutional claims. State v. Campbell, 125 Wn.2d 797, 888 P.2d 1115 (1995) (court reviews issue of law de novo); McNear v. Rhay, 65 Wn.2d 530, 398 P.2d 732 (1965) (de novo review of constitutional issues). See also State v. Cauthron 120 Wn.2d 879, 846 P.2d 502 (1993) (court reviews even the results of Frye evidentiary hearing de novo).

Shield Laws to the Contrary

Both sorts of evidence are admissible, even if a state statute would exclude them. The Sixth Circuit explained this in Boggs v. Collins, 226 F.3d 728, 737 (6th Cir. 2000), cert. denied, 531 U.S. 913 (2001), a rape case in which the appellate court had to decide whether the excluded cross-examination was permissible bias/credibility inquiry, or prohibited inquiry on prior victim sex acts touching only generally on credibility.

First, that court explained the constitutional distinction between the two categories – exposure of a witness’ motive or bias in testifying versus fishing for general credibility information :

In Van Arsdall¹⁴, the Court emphasized that Davis¹⁵ and prior decisions recognized that “the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross examination.” ... The Court therefore criticized the trial court’s refusal to allow Van Arsdall to cross-examine a key prosecution witness about the fact that charges of public drunkenness had been dismissed in exchange for his testimony. ... This limitation foreclosed investigation into an event “that a jury might reasonably have found [to have] furnished the witness a motive for favoring the prosecution in his testimony,” and therefore violated the Confrontation Clause. ... Courts after Davis and Van Arsdall have adhered to the distinction drawn by those cases and by Justice Stewart in his concurrence – *that cross-examination as to bias, motive or prejudice is constitutionally protected, but cross-examination as to general credibility is not.*

¹⁴ Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

¹⁵ Davis v. Alaska, 415 U.S. 308.

Boggs v. Collins, 226 F.3d 728, 737 (emphasis added).

Using this distinction, the Supreme Court has ruled that it is impermissible to bar defense counsel from cross-examining an alleged rape victim concerning an extramarital relationship – when the relationship would have shown the victim’s bias or motivation to lie to protect that relationship. Olden v. Kentucky, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988). Using this distinction, the federal appellate courts have ruled that it is unconstitutional to bar admission of portions of a rape victim’s diary under a state’s rape shield law, where that diary included comments such as “I’m sick of myself for giving in to them ... I’m just not strong enough to say no to them. I’m tired of being a whore.” Lewis v. Wilkinson, 307 F.3d 413 (6th Cir. 2002). Such statements constitute a “particularized attack on witness credibility directed at revealing possible ulterior motives, as well as implying her consent,” so they should have been admitted. Id., 307 F.3d at 417-18.

State courts use the same distinction. In People v. Hackett, 421 Mich. 338, 365 N.W.2d 120 (1984), for example, the Court explained:

... We recognize that in certain limited situations, such evidence (prior sexual conduct) may not only be relevant, but its admission may be required to preserve a defendant’s constitutional right to confrontation. *For example, where the defendant proffers evidence of a complainant’s prior sexual conduct for the narrow purpose of showing the complaining witness’ bias, this would almost always be material and should be admitted.* ... Moreover, in certain circumstances, evidence of a

complainant's sexual conduct *may also be probative of a complainant's ulterior motive for making a false charge. ...* Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past.

Hackett, 421 Mich. at 348 (citations omitted) (emphasis added).¹⁶

Under this line of cases, evidence that complainant Ms. Phillips had previously solicited sex from other physicians, likely as part of a plan to obtain medications, should have been admitted. It was not general evidence about her reputation or sexual habits, but a “particularized” inquiry about discrete sexual encounters which would have undermined “witness credibility” and certainly would have explained “possible ulterior motives” for soliciting sex with Dr. Momah. It also “impl[ie]d her consent” to sex with Dr. Momah. Under federal constitutional standards, such cross-examination was just as admissible in Dr. Momah’s case as it was in Olden v. Kentucky, Lewis v. Wilkinson, and the state appellate court cases cited above.

That is the reason that other state courts have ruled that their rape

¹⁶ See also People v. Cobb, 962 P.2d 944, 951 (Colo. 1998) (evidence of sexual assault victim’s prior conduct, relevant to defense theory, not inadmissible under rape shield statute: “While the jury conceivably might have inferred that [the 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.”); People v. Golden, 140 P.3d 1, 4, 5 (Colo App. 2005), review denied, 2006 Colo. LEXIS 568 (2006) (evidence that victim was in “committed romantic relationship” at time of alleged crime admissible despite rape shield statute, because it bore on question of her credibility and possible motive for telling her roommates that she had been sexually assaulted).

shield statutes were unconstitutional as applied, when applied to bar admission of similarly critical evidence of credibility, bias or motive. E.g., Commonwealth v. Black, 487 A.2d 396 (Penn. 1985) (insofar as rape shield law barred demonstration of witness bias, interest or prejudice, it unconstitutionally infringed upon the defendant's confrontation clause rights under state and federal law); Summit v. State, 101 Nev. 159, 697 P.2d 1374 (Nev. 1985) (defendant denied right to confrontation where the proffered use of prior sexual history of complainant was to challenge credibility); State v. Howard, 121 N.H. 53, 426 A.2d 457 (N.H. 1981); State v. Pulizzano, 155 Wis. 2d 633, 456 N.W.2d 325 (Wis. 1990) (probative value of prior sexual abuse of child victim by other adults material to the case and therefore constitutionally protected).

The federal constitutional rule is that evidence that is inadmissible on other grounds may still be admissible for the purpose of showing bias.¹⁷ Thus, the fact that Ms. Phillips' prior sexual contacts with physicians may not have been admissible under the "rape shield" law has no bearing on whether they are admissible, in context, to prove motive to lie.

¹⁷ United States v. Abel, 469 U.S. 45, 55, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (although specific instances of conduct inadmissible under ER 608(b) for purpose of showing "character for untruthfulness," still admissible to show bias); United States v. James, 609 F.2d 36, 46-47 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); 5A Teglund § 607.10 at 331 ("When acts of misconduct or criminal convictions are offered to show bias (as opposed to a general tendency towards untruthfulness), the restrictions in Rules 608 and 609 are inapplicable.")

2. *Admissibility of Critical ER 404(b) Evidence Under Constitutional Standards, Regardless of State Laws to the Contrary*

The same analysis applies to the evidence about Ms. Phillips' prior sexual conduct with other physicians, if it is analyzed under ER 404(b). If the ER 404(b) evidence presented by the state at trial was relevant as to Dr. Momah, regardless of whether it technically violated the rape shield law's blanket rule that such prior conduct was not relevant, then this same sort of evidence proffered at the trial by the defense had to be relevant as to Ms. Phillips. Both were offered as evidence of prior sexual touchings to show a common scheme or plan. With respect to Phillips, the alleged scheme was to satisfy doctors in a sexual manner, likely in hopes of obtaining drugs; with respect to Momah, the evidence was proffered to show an alleged scheme to satisfy himself.

V. THE STATE DOES NOT DENY THAT NEW EVIDENCE SHOWS THAT A NON-PARTY LAWYER ORCHESTRATED, COACHED, AND EVEN SUBORNED PERJURY OF COMPLAINANTS AGAINST DR. MOMAH, TO FURTHER CIVIL LAWSUITS – IT TAKES THE FORMALISTIC POSITION THAT ONLY ABSOLUTE PROOF OF PERJURY IN THIS CASE WOULD COUNT.

The state's Response does not defend lawyer Harish Bharti's conduct in orchestrating, coaching, and even suborning perjury of complainants against Dr. Momah, to further civil lawsuits in which her

represented them. The state does not dispute that Mr. Bharti represented the complainants on the charged counts in this case, represented the ER 404(b) witnesses, and represented scores of additional former patients of Dr. Momah whose statements he presented to the court at sentencing. The state does not deny that he represented them in civil, personal injury, lawsuits seeking damages for sexual touching and/or malpractice.¹⁸ The state does not even dispute the fact that all this was clear from the record in Dr. Momah's own case, since Bharti was referred to as the victims' lawyer even by the state, in the context of this very case.

Further, the Response does not deny that Mr. Bharti was recently sanctioned by the court for lying to the court and suborning perjury in a case with allegations eerily similar to those pressed in this case. Response, p. 51.

Instead, it characterizes as "speculation" the possibility that "Mr. Bharti [also] improperly influenced any witness in this case" Response, p. 51.

But the state is not obligated to disclose only absolute proof that its witnesses were tampered with. Instead, under Brady,¹⁹ the state is

¹⁸ 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).

¹⁹ Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194., 10 L.Ed.2d 215 (1963).

obligated to disclose evidence material to guilt or innocence – including evidence bearing on witness credibility – and to seek out such evidence from its witnesses and others working on its behalf,²⁰ when there is a reasonable probability that it might affect the outcome.²¹

So the Response recites the wrong legal standard. It is not enough for the state to lean back and say that despite the evidence that the witnesses' lawyer has tampered with other witnesses in a very similar case, the Opening Brief did not cite direct evidence that the exact same thing occurred in this case. As the Opening Brief explained, the state actually has a duty to discover and then disclose sanctionable conduct of its witnesses, whether or not that conduct resulted in a criminal conviction, and to seek such information out.²²

Finally, the Response says that “Momah’s claim that Mr. Bharti should be considered part of the prosecution ‘team’ merely because he represented several witnesses in civil litigation is absurd.” Response, pp. 51-

²⁰ See Opening Brief, pp. 77-78.

²¹ See Opening Brief, pp. 80-81.

²² United States v. Perdomo, 929 F.2d 967, 980 (3d Cir. 1991) (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 753, 760 (1st Cir. 1991) (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).

52. But the state provides no citations saying that this is absurd. In fact, it provides no citations to any case of any kind anywhere in this section.

We did.²³

The key point, though, is not really whether Mr. Bharti was part of the prosecution team or not. The fact is that it was the state's *witnesses* – the ones whose credibility was outcome-determinative – who were saddled with a sanctioned, lying, lawyer. Such *witness* exposure to a tampering lawyer must be disclosed, even if the lawyer's connection to the prosecution would otherwise be irrelevant.

Must the state disclose that exposure – that risk that the *witnesses* were tainted by Mr. Bharti's representation because of his impermissible conduct in other, related, cases?

The answer, from the sister jurisdictions, is yes – the state must disclose not just actual, finalized, influences on witness testimony, like completed agreements, but also the risk posed by other, more nebulous influences, such as implied or tacit understandings, that might influence witness testimony. See Wisehart v. Davis, 408 F.3d 321, 323-24 (7th Cir.

²³ 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). See also 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).

But see Sleeper v. Spencer, 435 F. Supp.2d 204 (D. Mass. 2006), appeal granted on other grounds, 2006 U.S. Dist. LEXIS 86496 (2006) (state's outside expert witness not member of prosecution team for Brady purposes).

2005), cert. denied, 126 S.Ct 1617 (2006); cf. United States v. Villafranca, 260 F.3d 374, 380 (5th Cir. 2001) (implicit agreement to reward witness with a promise of money contingent on defendant's conviction counts under Brady).²⁴

Even the existence of an atmosphere of cooperation that might impact bias or credibility must be disclosed.²⁵ Certainly, the witnesses' exposure to a tampering, lying, sanctionable, lawyer, who committed ethical violations in a related case, fits into that category.

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²⁴ Even facts allowing the jury to conclude that *there might have been* an implied or tacit understanding must also be disclosed. For example, the fact that a government witness retained substantial assets that were likely forfeitable could be considered by the jury as evidence of a tacit understanding even where there is no express of agreement of any kind that the witness would receive favorable treatment in that regard; hence, such evidence must be disclose. United States v. Shaffer, 789 F.2d 682, 689 (9th Cir. 1986).

²⁵ See United States v. Boyd, 55 F.3d 239, 243-45 (7th Cir. 1995) (citations omitted) (fact that government lavished benefits such as sex, long-distance calls, and cash on its incarcerated snitch-witnesses counted as Brady material, even though there was no quid pro quo); United States v. Williams, 81 F.3d 1434, 1438 (7th Cir. 1996), cert. denied, 522 U.S. 1006 (1997) (citations omitted) (same); United States v. Sipe, 388 F.3d 471, 488-90 (5th Cir. 2004); United States v. Soto-Beniquez, 356 F.3d 1, 41 (1st Cir.), cert. denied, 541 U.S. 958 (2004) (Brady covers the fact that illegal alien witnesses were "given ... significant benefits, including Social Security cards, witness fees, permits allowing travel to and from Mexico, travel expenses, living expenses, some phone expenses, and other benefits").

VI. CONCLUSION

For the foregoing reasons, all convictions should be reversed.

Dated this 2nd day of February, 2007.

Respectfully submitted,



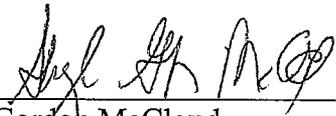
Sheryl Gordon McCloud, WSBA No. 16709
Attorney for Appellant, Charles Momah

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of February, 2007, a copy of the APPELLANT'S REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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