APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

CHARLES FARRAR,

Petitioner-Appellant,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections; CYNTHIA COFFMAN, Attorney General, State of Colorado; JAMES FALK, Warden, Sterling Correctional Facility,

Respondents-Appellees.

SCHOLARS OF FEDERAL HABEAS CORPUS,

Amicus Curiae.

No. 18-1005

Filed May 21, 2019

Before BACHARACH, BALDOCK, and EBEL,
Circuit Judges.

OPINION

BACHARACH, Circuit Judge.

Mr. Charles Farrar, a Colorado state prisoner, appeals the district court's denial of his petition for habeas relief. In district court, Mr. Farrar claimed

- actual innocence,
- deprivation of due process based on the recantation of a key prosecution witness, and
- deprivation of due process based on a state appellate decision establishing an overly restrictive standard for a new trial.[1]

The district court denied relief, and we affirm based on three conclusions:

1. Actual innocence does not supply a freestanding basis for habeas relief.
2. A private citizen's false testimony does not violate the Constitution unless the government knows that the testimony is false.
3. The alleged error in the Colorado Supreme Court's decision does not justify habeas relief.

I. Mr. Farrar is convicted and seeks post-conviction relief.

Mr. Farrar's convictions stemmed from complaints of sexual abuse. The victim was Mr. Farrar's stepdaughter, who complained of the alleged abuse when she was in the eighth grade. Based on the girl's account, state officials charged Mr. Farrar with over twenty counts. Mr. Farrar denied the allegations. At

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[1] In district court, Mr. Farrar also presented other habeas claims that are not relevant to this appeal.

the trial, the girl's testimony supplied the prosecution's only direct evidence of Mr. Farrar's guilt. The jury found Mr. Farrar guilty of numerous counts of sexual assault and one count of child abuse, and the state trial court sentenced Mr. Farrar to prison for a minimum of 145 years and a maximum of life.

Mr. Farrar appealed. While the appeal was pending, the girl recanted her trial testimony. Given the recantation, the Colorado Court of Appeals granted a limited remand to the trial court so that Mr. Farrar could move for a new trial. After Mr. Farrar filed that motion, the trial court conducted evidentiary hearings, where the girl testified that she had fabricated her allegations of sexual abuse. Nonetheless, the trial court denied the motion on the ground that the recantation was not credible.[2] Mr. Farrar appealed again, and the Colorado Court of Appeals affirmed the denial of the motion for a new trial.[3]

On certiorari, the Colorado Supreme Court affirmed. *Farrar v. People*, 208 P.3d 702, 709–10 (Colo. 2009). The court deferred to the trial court's

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[2] For example, the court discounted some of the girl's new version of events because it included other "unbelievable" and "far more heinous allegation[s]," including coercion by prosecutors, law enforcement officers, and social workers during the trial. Appellant's App'x, vol. I at 518. The trial court ultimately concluded: "Nothing that the Court heard or saw during this post-conviction proceeding persuades it that the newly discovered evidence would produce a complete acquittal at a new trial. In all probability, another jury would accept some of [the girl's] contentions and reject others." *Id.* at 520.

[3] Mr. Farrar also appealed his convictions and sentence. But those parts of the appeal in state court are immaterial here.

credibility determinations and clarified Colorado's standard for a new trial:

> Rather than merely creating reasonable doubt by demonstrating that the recanting witness has given different and irreconcilable testimony on different occasions, recantation can justify a new trial only if it contains sufficiently significant new evidence, and if it, rather than the witness's inconsistent trial testimony, will probably be believed.

Id. at 707–08 (internal citations omitted).

Mr. Farrar then unsuccessfully sought post-conviction relief in state court, which led to this habeas case.

II. We engage in de novo review without applying 28 U.S.C. § 2254(d).

In habeas cases, we engage in de novo review of the district court's legal ruling. *Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012). When applying de novo review, however, we must consider the applicability of statutory deference under 28 U.S.C. § 2254(d). *See id.* This provision states that a federal court can grant habeas relief only if the state appeals court acts contrary to a Supreme Court precedent, unreasonably applies that precedent, or unreasonably determines the facts. 28 U.S.C. § 2254(d)(1)–(2). If § 2254(d) applies, Mr. Farrar and the amici argue that it would be unconstitutional.

Section 2254(d) does not apply. This section applies only when a state appellate court has adjudicated the merits of a constitutional claim. *Byrd v. Workman*, 645 F.3d 1159, 1164 n.7 (10th Cir. 2011); *Hooks v. Ward*, 184 F.3d 1206, 1223 (10th Cir. 1999).

But the Colorado Supreme Court didn't adjudicate the merits of Mr. Farrar's constitutional claims. Instead, the court simply held that based on Colorado's standard for granting a new trial, the denial of Mr. Farrar's motion had fallen within the trial court's discretion. *Farrar v. People*, 208 P.3d 702, 706–10 (Colo. 2009). Because the Colorado Supreme Court didn't adjudicate the merits of the constitutional claims, we do not apply § 2254(d).[4] *Hooks*, 184 F.3d at 1223.

III. Habeas relief cannot be based on actual innocence, a private citizen's false testimony, or the Colorado Supreme Court's definition of the state-law test for granting a new trial.

Mr. Farrar argues that

- he is actually innocent,
- the girl's false testimony violated his right to due process, and
- the Colorado Supreme Court committed a due-process violation by establishing an overly restrictive standard for the grant of a new trial.

We reject these arguments.

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[4] In its appeal brief, the State asserted a defense of procedural default. In oral argument, however, the State expressly waived this defense.

A. Actual innocence and false testimony by a private citizen do not entitle Mr. Farrar to habeas relief.

Mr. Farrar alleges that he is actually innocent and his conviction was based on false testimony. But even if these allegations are true, they would not entitle Mr. Farrar to habeas relief.

1. Our precedents disallow habeas relief based on freestanding claims of actual innocence.

A distinction exists between claims of actual innocence used as a gateway and as a freestanding basis for habeas relief. As a gateway, a claim of actual innocence "enable[s] habeas petitioners to overcome a procedural bar" in order to assert distinct claims for constitutional violations. *McQuiggin v. Perkins*, 569 U.S. 383, 386, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013). [5] Because gateway claims are "procedural, rather than substantive," they do not "provide a basis for relief." *Schlup v. Delo*, 513 U.S. 298, 314–15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). By contrast, a freestanding claim asserts actual innocence as a basis for habeas relief. *See House v. Bell*, 547 U.S. 518, 554, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).

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[5] For example, a showing of gateway actual innocence can allow an applicant to file an otherwise-barred successive or abusive petition, to avoid a statute of limitations, to overcome a failure to develop facts or observe filing deadlines, or to assert a claim otherwise subject to procedural default. *McQuiggin*, 569 U.S. at 392–93, 133 S.Ct. 1924.

The Supreme Court has repeatedly sanctioned gateway actual innocence claims, but the Court has never recognized freestanding actual innocence claims as a basis for federal habeas relief. To the contrary, the Court has repeatedly rejected such claims, noting instead that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceedings." *Herrera v. Collins*, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In rejecting such claims, the Court has observed that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401, 113 S.Ct. 853.[6]

We have thus held that actual innocence does not constitute a freestanding basis for habeas relief. *See Vreeland v. Zupan*, 906 F.3d 866, 883 n.6 (10th Cir. 2018) (denying a certificate of appealability because freestanding assertions of actual innocence cannot support habeas relief); *LaFevers v. Gibson*, 238 F.3d

[6] The Supreme Court has hypothesized about the possibility of an exception. *See, e.g.*, *Herrera*, 506 U.S. at 417, 113 S.Ct. 853 (assuming, for the sake of argument, that actual innocence might justify habeas relief in a capital case); *House v. Bell*, 547 U.S. 518, 554–55, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) (declining to resolve this issue in a capital case); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009) (declining to resolve whether actual innocence justifies habeas relief in a non-capital case); *McQuiggin v. Perkins*, 569 U.S. 383, 392, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013) (again declining to resolve whether actual innocence justifies habeas relief in a non-capital case).

1263, 1265 n.4 (10th Cir. 2001) ("[A]n assertion of actual innocence ... does not, standing alone, support the granting of the writ of habeas corpus."); *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) ("[T]he claim of innocence ... itself is not a basis for federal habeas corpus no matter how convincing the evidence."). So Mr. Farrar's freestanding claim of actual innocence does not entitle him to habeas relief.

2. The due-process claim (based on the girl's false testimony) fails because Mr. Farrar does not allege that the government knew that the testimony was false.

For habeas relief, Mr. Farrar must show a constitutional violation in his conviction or sentence. 28 U.S.C. § 2241(c)(3). Here, he alleges a denial of due process when he was convicted based on the girl's false testimony.

The Fourteenth Amendment's Due Process Clause prevents the government from knowingly using perjured or false testimony at trial. *See Giglio v. United States*, 405 U.S. 150, 153–54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. People of State of Ill.*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). But here, Mr. Farrar does not allege that the government knowingly elicited any false trial testimony. According to Mr. Farrar, the Second and Ninth Circuits have authorized habeas relief even when the government unwittingly elicits false testimony. *See, e.g.*, *Hall v. Dir. of Corr.*, 343 F.3d 976, 981–85 (9th Cir. 2003). Mr. Farrar asks us to do the same.

But we have rejected that approach. In our circuit, federal habeas relief cannot be based on perjured testimony unless the government knew that the testimony was false.[7] For example, when a witness testified that the defendant had participated in a murder but the witness later recanted, we rejected the viability of a constitutional claim, reasoning that the defendant had "failed to assert any evidence indicating prosecutors knew [the witness's] testimony was false."[8]

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[7] *See Graham v. Wilson*, 828 F.2d 656, 659 (10th Cir. 1987) ("In our habeas corpus consideration of the introduction of false or mistaken testimony, the question of error turns not on the witness' knowledge of falsity, but on the *government*'s knowledge." (emphasis in original)); *McBride v. United States*, 446 F.2d 229, 232 (10th Cir. 1971) ("While use of perjured testimony to obtain a conviction may be grounds for vacation of a conviction, the petitioner has the burden of establishing that ... it was knowingly and intentionally used by the government to obtain a conviction."); *Wild v. State of Okla.*, 187 F.2d 409, 410 (10th Cir. 1951) ("[A] writ of habeas corpus should not be granted upon the grounds that false and perjured testimony was used unless it is shown that it was knowingly used against the defendant by the prosecuting officers in the criminal case."); *Hinley v. Burford*, 183 F.2d 581, 581 (10th Cir. 1950) (per curiam) ("[T]here is evidence to the effect that appellant was convicted on the false testimony of his daughter, the alleged rape. But ... there is no testimony ... that such testimony was knowingly and intentionally used by the prosecution to obtain the conviction. The writ must therefore be denied."); *Tilghman v. Hunter*, 167 F.2d 661, 662 (10th Cir. 1948) (stating that introduction of perjured testimony would not void a criminal judgment unless the government "knowingly, willfully, and intentionally" used the perjured testimony).

[8] *Romano v. Gibson*, 239 F.3d 1156, 1175 (10th Cir. 2001); *see also United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015) ("[T]his court has repeatedly spoken of *Napue* claims as requiring perjury by the witness and the prosecutor's

Our circuit's approach precludes habeas relief based on Mr. Farrar's allegations. He alleges that the girl's testimony was false, but he doesn't allege that the government knew of the falsity. This omission is fatal because the government's knowledge is required for a constitutional violation. We thus reject Mr. Farrar's due-process claim based on the use of false testimony at his trial.

B. Mr. Farrar's challenge to the Colorado Supreme Court's decision does not justify habeas relief.

Mr. Farrar also contends that the Colorado Supreme Court erred in defining the burden for obtaining a new trial based on recanted testimony. Given that the Colorado Supreme Court relied on state law,[9] our first task is to interpret Mr. Farrar's contention. An error in interpreting state law cannot support habeas relief,[10] but federal constitutional

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knowledge of the falsity." (internal citations omitted)); *United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002) ("In order to establish a due process violation [under *Napue*], the [defendants] must show that ... the prosecution knew [the witness's testimony] to be false.").

[9] In his direct appeal, Mr. Farrar relied solely on Colorado law. Thus, the court purported to rely only on Colorado law. In discussing the state's limits on the right to a new trial, the court observed that the United States Supreme Court "ha[d] never suggested that newly discovered evidence impeaching a guilty verdict implicates due process of law." *Farrar v. People*, 208 P.3d 702, 706 (Colo. 2009). But the court made this observation only in the course of stating that creation of the right to a new trial under state law largely entails "a matter of policy" based on a balancing of the interests in finality, fairness, and accuracy. *Id.*

[10] *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

violations can ordinarily support habeas relief.[11] We thus assume for the sake of argument that Mr. Farrar is alleging a federal constitutional infirmity in the Colorado Supreme Court's decision. If so, however, this allegation is insufficient because shortcomings in the Colorado Supreme Court's application of state law would not entail a distinct constitutional violation.

The Constitution does not require states to provide direct appeals. *See Abney v. United States*, 431 U.S. 651, 656, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) ("[I]t is well settled that there is no constitutional right to an appeal."); *United States v. Eggert*, 624 F.2d 973, 974 (10th Cir. 1980) ("It is well established that there is no constitutional right to an appeal."). But Colorado (like all other states) has provided the opportunity to appeal. Here, the appeal involved the denial of a new trial after a recantation of trial testimony. We thus inquire whether the Constitution restricts how far states can go in restricting the grant of a new trial based on recanted testimony. In this inquiry, we are guided by the text of the Constitution and historical practice. *Herrera v. Collins*, 506 U.S. 390, 407–08, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

The Constitution does not refer to new trials. *See id.* at 408, 113 S.Ct. 853 ("The Constitution itself, of course, makes no mention of new trials."). They sprung from the common law, with judges ordering new trials to address particular concerns, such as newly discovered evidence. *See* Francis Wharton, *Criminal Pleading & Practice* 584–92 (8th ed. 1880).

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[11] *See* 28 U.S.C. § 2241(c)(3); *see also* Part III(A)(2), above.

Despite the historical availability of new trials, restrictions existed under the common law. For example, courts have long placed time constraints on new-trial motions. *Herrera*, 506 U.S. at 408–11, 113 S.Ct. 853. And courts—before and after ratification of the Fourteenth Amendment (1868)—have restricted appellate review for the denial of new trials based on matters involving facts or evidence. *See Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 3 Pet. 433, 447–48, 7 L.Ed. 732 (1830) (discussing the unavailability of appellate jurisdiction over the denial of a new trial, which would have required reexamination of the jury's factual findings); *Blitz v. United States*, 153 U.S. 308, 312, 14 S.Ct. 924, 38 L.Ed. 725 (1894) ("The overruling of the motion for new trial is next assigned for error. We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial cannot be reviewed upon writ of error." (citing cases)); *Sparf v. United States*, 156 U.S. 51, 175, 15 S.Ct. 273, 39 L.Ed. 343 (1895) (Gray, J., dissenting) ("[T]he granting or refusal of a new trial rest[ed] wholly in the discretion of the court in which the trial was had, and [could not] be reviewed on error.").[12]

Given the Constitution's silence on new trials and the historical practice under the common law, we conclude that the Constitution did not require Colorado to provide any mechanism for a new trial. *See* Lester Orfield, *New Trial in Federal Criminal Cases*, 2 Vill. L. Rev. 293, 305 (1957) (stating that in

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[12] In *Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), the Supreme Court relied in part on Justice Gray's dissent. *See Herrera*, 506 U.S. at 408, 113 S.Ct. 853.

light of the Constitution's silence on the right to a new trial in criminal cases, "there seems to be no constitutional right to a new trial"). Colorado could thus limit the availability of an appeal over the ruling on a new-trial motion. *McKane v. Durston*, 153 U.S. 684, 687–88, 14 S.Ct. 913, 38 L.Ed. 867 (1894).

Of course, once Colorado authorized procedures for appeals and new trials, the state had to comport with the Fourteenth Amendment's rights to due process and equal protection. *Evitts v. Lucey*, 469 U.S. 387, 393, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). But Colorado's definition of its own test for a new trial cannot be bootstrapped into a distinct constitutional violation triggering a right to habeas relief. *See Herrera v. Collins*, 506 U.S. 390, 407–08, 411, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (concluding that a state's refusal to consider newly discovered evidence eight years after the conviction did not result in a denial of due process).

We have addressed a similar issue with respect to applications for post-conviction relief. Like many circuits, we have held that irregularities in a state appellate court's handling of post-conviction proceedings do not support habeas relief because there is no constitutional right to post-conviction proceedings. *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998); *see also Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993) (holding that a challenge to state post-conviction procedures "would fail to state a federal constitutional claim cognizable in a federal habeas proceeding").

Nor is there a constitutional right to appeal the denial of a new trial. *See* p. 1133–34, above; *see also Allen v. Nix*, 55 F.3d 414, 417 n.5 (8th Cir. 1995) ("To

the extent petitioner attempts to couch his actual innocence claim in terms of a due process violation based upon the state court's denial of his motion for a new trial, petitioner does not allege an 'independent' constitutional violation."). We should thus treat appeals on new-trial motions in the same way that we treat post-conviction appeals. In doing so, we conclude that alleged state-law errors in either kind of appeal would not justify habeas relief. The district court thus did not err in rejecting this habeas claim.

* * *

Mr. Farrar's habeas claims are invalid: Actual innocence and false testimony by a private citizen do not entail constitutional violations triggering habeas relief. Nor can habeas relief be based on the Colorado Supreme Court's definition of the state's test for granting a new trial. We thus affirm the denial of Mr. Farrar's petition for habeas relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01425-RPM

CHARLES FARRAR,

Applicant,

v.

RICK RAEMISCH, Exec Director, Colorado Dept of Corrections, JAMES FALK, Warden, Sterling Correctional Facility, and CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents.

ORDER DENYING MOTION TO ALTER ORDER AND JUDGMENT

On May 31, 2017, Judgment entered denying the Application for Habeas Corpus filed by Charles Farrar pursuant to the Order entered on the same date, (Doc, 59). On June 28, 2017, newly appointed counsel filed a Motion to Alter Order and Judgment pursuant to Fed. R. Civ. P. 59(e) (Doc. 74) and an authorized Supplement was filed on October 27, 2017. (Doc. 79).

The Applicant asserts that this Court erred in failing to find that the Colorado Supreme Court failed to follow clearly established Supreme Court law by affirming a conviction based on false evidence–the testimony of the victim Sarah Brode who recanted her testimony in post-conviction proceedings under Colorado Rule of Criminal Procedure 33.

The trial court hearing the evidence determined that her recantation considered as newly discovered evidence was no more believable that her trial testimony which the jury rejected as to some counts. The Colorado Supreme Court accepted that finding as a finding that the district court was "not reasonably convinced that the victim's testimony at trial was probably false." It then determined that the Applicant's new evidence did not undermine the reliability of the criminal conviction. Three justices dissented in a very persuasive opinion considering that upon hearing both the trial testimony and post trial recanting testimony the jury may have had a reasonable doubt.

This Court denied relief because of the limitations imposed by 28 U.S.C. § 2254(d). The present motion argues actual innocence given how implausible much of the victim's testimony support the verdict was and asserts that the test for a new trial used by the Colorado Supreme Court was inconsistent with due process under the Fourteenth Amendment to the U.S. Constitution.

As in the earlier briefing the Applicant has failed to show clearly established law as determined by the United States Supreme Court to support that contention.

The Applicant in his Supplement argues that the restrictions enacted by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 is unconstitutional as a violation of the separation-of-powers doctrine, the Supremacy Clause and the Suspension Clause.

The Supreme Court has strictly applied the AEDPA in many cases. *See, Harrington v. Richter,* 562 U. S. 86 (2011) as an example.

Under Article III of the Constitution "The judicial power of the United States is vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish." Congress has the authority to define the jurisdiction of these inferior courts and the AEDPA is an exercise of that power.

The Motion to Alter Order and Judgment, as supplemented, is denied.

DATED: December 4, 2017

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01425-RPM

CHARLES FARRAR,

Applicant,

v.

RICK RAEMISCH, Exec Director, Colorado Dept of Corrections, JAMES FALK, Warden, Sterling Correctional Facility, and CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents.

ORDER DENYING APPLICATION FOR HABEAS CORPUS

The question raised by Charles Farrar in this Application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 is whether the refusal to grant him a new trial after the accuser in his sex offender trial has recanted all of her testimony is a violation of his Constitutional right to due process of law under the Fourteenth Amendment.

The case was summarized by the Colorado Supreme Court in *Farrar v. People,* 208 P.3d 702

(Colo. 2009). The four member majority of justices affirmed the trial court's denial of relief after a full evidentiary hearing under Crim. P. 33. A brief recitation is necessary for this analysis of the Applicant's claim.

At age fifteen Sacha Brod claimed that her mother Debbie Brod and stepfather Charles Farrar repeatedly forced her to engage in sexual intercourse and sodomy beginning when she was eleven years old. Both of the accused were charged with multiple offenses. The court ordered separate trials. Charles Farrar was convicted of some of the charges and acquitted of others. He was sentenced to an aggregate 145 years to life. The charges against the mother were dismissed because Sacha Brod did not want to testify at another trial.

At the post trial hearings Ms. Brod testified that before trial she had told the prosecutors and others that her story was not true and that they forced her to testify as she did. The prosecutors and others denied those allegations and the trial judge found that Sacha's allegations were not credible.

That determination is binding on this court. Sacha testified that her accusations and trial testimony were fabrications motivated by her desire to get away from home and live with her grandmother in Oklahoma. She explained the reasons for her extreme unhappiness with the living conditions, none of which related to sexual abuse.

As to this testimony, the trial judge observed that the jury had found the victim's testimony believable as to some counts and not others. Recognizing the serious credibility issues and that the trial testimony

could be used as impeachment at a new trial the court concluded that:

> Nothing that the Court heard or saw during this post-conviction proceeding persuades it that the newly discovered evidence would produce a complete acquittal at a new trial. In all probability, another jury would accept some of Ms. ___ contentions and reject others.
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> Exhibit P.

The Supreme Court majority said:

> Because the district court was not reasonably convinced that the victim's testimony at trial was probably false, it did not abuse its discretion in denying his motion for new trial.
>
> *Farrar, 208 P.3d at 702.*

That statement is not completely correct. The trial judge acknowledged the jury acquitted Farrar on six counts. Those counts involved events that the victim described in graphic detail. There may be a difference between false and not believable but it is telling that the jury accepted general testimony of a hundred or more incidents of sexual activity but rejected those that were told most explicitly.

The majority opinion gave the following statement of the test for a new trial upon discovery of new evidence.

> Whether to grant new trial upon the discovery of new evidence undermining confidence in the reliability of criminal convictions is largely a matter of policy, requiring a balance between the need for finality and the state's interest in

> ensuring the fairness and accuracy of its proceedings. *People v. Schneider,* 25 P.3d 755, 762 (Colo. 2001).
>
> *Farrar,* 208 P.3d at 706.

Surprisingly, there is no mention of the protections of individual liberty provided by the Fourteenth Amendment.

The majority also ruled that the newly discovered evidence must be of sufficient consequence for reasons other than its ability to impeach and that, "It must be consequential in the sense of being affirmatively probative of the defendant's innocence..." and "that it would probably produce an acquittal." *Id.* at 707. In short, the Colorado Supreme Court ruled that the trial court correctly denied the motion for new trial because it did not find that the victim's trial testimony was entirely false.

The dissenting opinion found the appropriate standard to be whether the newly discovered impeachment evidence is of such consequence that it would probably result in an acquittal on retrial and three justices agreed that Ms. Brod's recanting testimony "clearly could and probably would change the outcome of the case." Notably the dissenters recognized that an acquittal may result from a reasonable doubt, not actual innocence.

Under the limitations imposed by 28 U.S.C. § 2254(d), this Court must accept the state court rulings unless they are contrary to clearly established Federal law as determined by the United States Supreme Court or were based on an unreasonable determination of the facts in light of

the evidence presented in the hearings on the motion for new trial.

The Applicant has not produced a U. S. Supreme Court case holding that in the absence of prior knowledge of the victim's recanting her complaints of sexual abuse the presentation of her testimony would violate the Due Process Clause of the Fourteenth Amendment. The district judge who heard the testimony at the hearings on the Rule 33 motion was the same judge who presided at the trial. He observed Sacha Brod testify both times and this Court is unable to say that his assessment of her trial testimony after hearing her recanting testimony was unreasonable.

Other claims of constitutional error were raised but they are rejected for the reasons set forth in the Respondents' Answer [Doc.15].

Accordingly, the application must be denied.

CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253, the applicant has made a substantial showing of violations of the Fourteenth Amendment and that reversal is required. Reasonable jurists could debate this Court's determination to the contrary. Thus, a certificate of appealability is granted.

DATED: May 31, 2017

BY THE COURT:

s/Richard P. Matsch

Richard P. Matsch, Senior District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Senior District Judge Richard P. Matsch

Civil Action No. 15-cv-01425-RPM

CHARLES FARRAR,

Applicant,

v.

RICK RAEMISCH, Exec Director, Colorado Dept of Corrections, JAMES FALK, Warden, Sterling Correctional Facility, and CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents.

JUDGMENT

Pursuant to the Order Denying Application for Habeas Corpus entered by Senior Judge Richard P. Matsch on May 31, 2017, it is

ORDERED AND ADJUDGED that the Application is denied and this civil action is dismissed.

DATED: May 31, 2017

FOR THE COURT:

JEFFREY P. COLWELL, Clerk
S/M. V. Wentz
By_____
Deputy.

APPENDIX E

COLORADO SUPREME COURT

Certiorari to the Court of Appeals 2012CA387
District Court, Arapahoe County, 2001CR505

Supreme Court Case No: 2013SC817

CHARLES FARRAR,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent,

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 14, 2014.

APPENDIX F

COLORADO COURT OF APPEALS

DATE FILED: August 29, 2013

Court of Appeals No.: 12CA0387
Arapahoe County District Court No. 01CR505
Honorable Valerie N. Spencer, Judge

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

CHARLES ARTHUR FARRAR,
Defendant-Appellant.

ORDER AFFIRMED

Division IV
Opinion by JUDGE HAWTHORNE
Webb and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: August 29, 2013

John W. Suthers, Attorney General, Denver, Colorado, for Plaintiff-Appellee

Allison Ruttenberg, Boulder, Colorado, for Defendant-Appellant

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Defendant, Charles Arthur Farrar, appeals the district court's order denying his Crim. P. 35(c) postconviction motion. The People have not filed an answer brief. We affirm.

I. Procedural History

Defendant's stepdaughter (the victim) testified at trial that defendant sexually assaulted her multiple times. A jury convicted defendant of numerous counts of sexual assault on a child - pattern of abuse, position of trust, and force, child abuse resulting in injury, and a crime of violence. While defendant's direct appeal was pending, the victim provided an affidavit indicating that her testimony about sexual abuse by the defendant was fabricated, and defendant filed a motion for a new trial based on her recanting. Following a limited remand from this court, the district court held several evidentiary hearings. Based on the testimony and evidence at those hearings, the district court denied defendant's motion for a new trial and the appeal of that order was incorporated into defendant's direct appeal. As pertinent here, a division of this court affirmed in part and reversed in part the judgment of conviction, but found the court did not abuse its discretion in denying the motion for a new trial. *See People v. Farrar*, (Colo. App. No. 02CA1358, Oct. 4, 2007) (not published pursuant to C.A.R. 35(f)) (*Farrar I*). The

Colorado Supreme Court granted certiorari to review only the division's conclusion that the trial court had not abused its discretion in denying defendant's motion for a new trial, and affirmed that determination. *See Farrar v. People*, 208 P.3d 702 (Colo. 2009) (*Farrar II*).

Thereafter, defendant filed a timely Crim. P. 35(c) motion alleging that (1) he received ineffective assistance from his trial and appellate counsels; (2) the prosecution presented false testimony to secure his conviction; (3) the trial court violated his constitutional right to due process; and (4) his multiple convictions violated double jeopardy. In a detailed written order, the district court denied defendant's motion. This appeal followed.

II. The Court Did Not Err in Denying Defendant's Ineffective Assistance of Trial Counsel Claims Without a Hearing

We review the trial court's summary denial of a Crim. P. 35(c) motion de novo. *See People v. Trujillo*, 169 P.3d 235, 237 (Colo. App. 2007).

A Crim. P. 35(c) motion may be denied summarily if the motion, files, and record clearly establish that the defendant is not entitled to relief. *See* Crim. P. 35(c)(3)(IV); *People v. Flagg*, 18 P.3d 792, 795 (Colo. App. 2000). Summarily denying a postconviction motion is appropriate if the claims raise only a legal issue or if the allegations, even if true, do not provide a basis for relief. *See People v. Rodriguez*, 914 P.2d 230, 255 (Colo. 1996). Likewise, if the claims are conclusory, vague and lacking in detail, refuted by the record, or fail to allege prejudice, the motion may be denied without a hearing. *See id.* at 300; *People v.*

Osorio, 170 P.3d 796, 801-02 (Colo. App. 2007); *People v. Vieyra*, 169 P.3d 205, 209 (Colo. App. 2007).

To establish a claim of ineffective assistance of counsel, a defendant must show not only that counsel's performance was outside the wide range of professionally competent assistance, but also that defendant was prejudiced by counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 693 (1984); *see also Davis v. People*, 871 P.2d 769, 772 (Colo. 1994). To establish prejudice, a defendant must show that there is a reasonable probability that, absent the errors, the proceeding's result would have been different. *Strickland*, 466 U.S. at 694; *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003).

If the defendant fails to affirmatively demonstrate prejudice, the court may resolve the ineffective assistance claim on that basis alone, without considering whether counsel's performance was deficient. *People v. Naranjo*, 840 P.2d 319, 324 (Colo. 1992); *People v. Rivas*, 77 P.3d 882, 893 (Colo. App. 2003).

Here, the district court denied defendant's motion in a detailed order. We have reviewed defendant's postconviction motion, his brief on appeal, the district court's order, the trial court record and the trial and Crim. P. 33 hearing transcripts, and conclude that the court did not err in denying defendant's claims.

A. Disclosure of Confidential Information

Defendant first contends that, prior to trial, his trial counsel disclosed confidential information to the prosecution regarding the victim's intent to recant her allegations instead of sending an investigator to

research those claims, and that counsel's actions created a conflict of interest that resulted in ineffective assistance. We are not persuaded.

When alleging ineffective assistance of counsel based on a conflict of interest, a defendant must demonstrate (1) that his or her counsel was subject to an actual conflict of interest; and (2) that the actual conflict of interest adversely affected counsel's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980); *People v. Castro*, 657 P.2d 932, 943-44 (Colo. 1983).

A defendant has a right to conflict-free counsel. *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002); *People v. Ragusa*, 220 P.3d 1002, 1006 (Colo. App. 2009). Generally, a conflict of interest exists when either (1) an attorney's representation of one client is directly adverse to another client, or (2) when the attorney's ability to represent a client is materially limited by the attorney's responsibility to another client or to a third person, or by the attorney's own interests. *People v. Edebohls*, 944 P.2d 552, 556 (Colo. App. 1996). Counsel also becomes conflicted when his or her "ability to champion the cause of the client becomes substantially impaired." *Ragusa*, 220 P.3d at 1006 (quoting *Rodriguez v. Dist. Court*, 719 P.2d 699, 704 (Colo. 1986)).

Conflicts are categorized as either actual or potential. *Ragusa*, 220 P.3d at 1006. An actual conflict of interest is one that is real and substantial, whereas a potential conflict is one that is possible or nascent, but in all probability will arise. *Id.*; *see People v. Delgadillo*, 2012 COA 33, ¶ 10 (same). An actual conflict arises when an attorney's representation of the defendant conflicts with some

other interest that the attorney also has professionally undertaken to serve. *Castro*, 657 P.2d at 943.

If a defendant can establish that an actual conflict of interest adversely affected counsel's performance, he need not demonstrate prejudice to obtain a reversal of his conviction. *See People v. Kelling*, 151 P.3d 650, 656 (Colo. App. 2006) (citing *Mickens v. Taylor*, 535 U.S. 162, 170-76 (2002)); *see also Ragusa*, 220 P.3d at 1006.

Here, at the Crim. P. 33 hearing, one of the district attorneys who prosecuted defendant testified that at some point shortly before defendant's trial, he saw defense counsel in the courthouse on unrelated business, and defense counsel "casually, sort of mentioned that he had heard our victim was recanting." The prosecutor also testified that when he asked counsel where he heard that, counsel said, "Well, I'm not at liberty to say."

Defendant now asserts that his counsel's disclosing that information to the prosecution created a conflict of interest such that his performance at trial constituted ineffective assistance. Assuming that the information counsel provided to the prosecution was confidential, we nevertheless conclude that it did not create an actual conflict of interest which would result in ineffective assistance.

Defendant has not alleged how that disclosure adversely impacted counsel's representing him at trial. And, unlike counsel in *Delgadillo*, ¶ 21, here, defense counsel did not disclose trial strategy or the details of his representation. Therefore, we conclude that defendant has not alleged sufficient facts to establish that his counsel had an actual conflict such

that his ability to represent defendant was impaired. Therefore, we reject defendant's assertion. *See People v. Wood*, 844 P.2d 1299, 1301 (Colo. App. 1992) (to make the requisite showing of an actual conflict of interest, the defendant must present at least an arguable basis for the underlying ineffective assistance of counsel claims).

B. Failure to Investigate, Interview Witnesses, Cross-examine Witnesses, and Present a Defense

In his postconviction motion, defendant alleged, in claims two through six, that trial counsel was ineffective for failing to (1) adequately investigate before trial and before sentencing, (2) effectively cross-examine witnesses, (3) interview potential witnesses and raise obvious significant issues, and (4) present a reasonable doubt defense. The district court denied those claims because they were conclusory and failed to allege sufficient facts demonstrating that defendant might be entitled to relief.

On appeal, defendant mentions claims two, three, four and six from his postconviction motion by number. In those claims, he asserted that counsel failed to investigate, effectively cross-examine witnesses, and raise issues. However, his brief on appeal fails to advance any legal argument or authority to support his bare assertion that the court erred in denying those claims. *See* C.A.R. 28(a)(4) (requiring the opening brief to "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on"); *People v. Diefenderfer*, 784 P.2d 741, 752 (Colo. 1989) (the party appealing is required

to inform the reviewing court both as to the specific errors relied on and the grounds, supporting facts and authorities therefor); *People v. Hicks*, 262 P.3d 916, 920 (Colo. App. 2011) (declining to address an argument on appeal where the defendant had "neither articulated a cogent argument for review nor provided supporting legal authority"). Therefore, we will not address them.

Moreover, we note, as did the district court, that the majority of these claims merely reformulate the issues raised and addressed in the Crim. P. 33 hearing on his motion for a new trial. Defendant essentially argues that trial counsel was ineffective for failing to attack the victim's credibility at the trial. However, defendant attacked the victim's credibility at the Crim. P. 33 hearing; and, considering that, as well as the victim's recanting and previous trial testimony, the district court found that it was insufficient to warrant a new trial. That finding was affirmed on appeal. *See Farrar II*, 208 P.3d 702; *Farrar I.* Therefore, we conclude that it is not reasonably probable that the trial's result would have been different had counsel attacked the victim's credibility at trial like it was attacked at the Crim. P. 33 hearing. *See Ardolino*, 69 P.3d at 76. Accordingly, defendant's assertion is insufficient to establish that he was prejudiced by counsel's allegedly deficient performance.

III. Ineffective Assistance of Appellate Counsel

Defendant next contends that his appellate counsel was ineffective because, according to the majority opinion by the supreme court in *Farrar II*, 208 P.3d at 708, appellate counsel "misperceive[d] the

standard for granting a new trial, and thus, was ineffective. We disagree.

In *Farrar II*, the supreme court majority, addressing the newly discovered evidence's effect, said that the district court was required to objectively assess the probable effect of the victim's post-trial testimony on reasonable jurors. And, under that standard, because the district court could not conclude that the victim's recanting testimony was more believable than her trial testimony, it did not err in concluding that the victim's new evidence would probably not result in defendant's acquittal. *Farrar II*, 208 P.3d at 708-09.

Because the dissent in *Farrar II* agreed with defendant's argument as presented by appellate counsel, we are not persuaded that counsel's performance was deficient or that had he argued the standard used by the majority the proceeding's result would have been different. Accordingly, because defendant has not established either deficient performance by appellate counsel or prejudice, we reject his contention. *See Naranjo*, 840 P.2d at 324.

IV. Double Jeopardy, Prosecutorial Misconduct and Jurisdiction

Defendant also re-asserts on appeal claims eleven, twelve and thirteen from his postconviction motion. Those claims, as raised in the postconviction motion allege that (1) his convictions violate double jeopardy, (2) the prosecution engaged in misconduct by presenting perjured testimony, and (3) the court lacked jurisdiction over his pattern counts because the information did not list a predicate offense. However, defendant's brief on appeal fails to advance any legal argument or authority to support his bare

assertion that the court erred in denying those claims. *See* C.A.R. 28(a)(4); *Hicks*, 262 P.3d at 920. Thus, we decline to address those contentions on appeal.

V. Remaining Contentions in Postconviction Motion

To the extent defendant raised additional claims in his postconviction motion that he has not expressly reasserted on appeal, we deem them abandoned and decline to address them. *See People v. Brooks*, 250 P.3d 771, 772 (Colo. App. 2010) (arguments made in a Crim. P. 35 motion that are not specifically reasserted on appeal are abandoned).

The order is affirmed.

JUDGE WEBB and JUDGE RICHMAN concur.

APPENDIX G

DISTRICT COURT, ARAPAHOE COUNTY,
STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

CHARLES A. FARRAR,

Defendant.

Case Number: 01CR505

Division: 26

Filed January 12, 2012

ORDER DENYING DEFENDANT'S PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(C)

THIS MATTER comes before the Court on Defendant's *pro se* Petition for Postconviction Relief pursuant to Colo. Crim. P. 35(c). Additionally, Defendant has moved for the appointment of counsel. The Court has reviewed the motion, Court files, and applicable law in making the following findings and Order.

I. Factual Background and Procedural History

In March 2000, then fifteen-year-old victim S.B. accused her mother and stepfather, Defendant Charles Farrar, of a pattern of sexual and physical abuse over a period of approximately four years. *Farrar v. People*, 208 P.3d 702, 704 (Colo. 2009). The victim estimated the abuse began when she was eleven, and she finally disclosed to a guidance counselor at her school some four years later. After an investigatory period of many months, charges were filed against Defendant in 2001. These charges included over one hundred incidents of touching, oral sex performed on the victim, oral sex the victim was required to perform on the Defendant, and sexual intercourse.

Initially, the Defendant and the victim's mother were charged as co-defendants for these charges, but their cases were severed for trial. The Defendant proceeded to trial first. Ultimately, the charges against the victim's mother were dismissed. On April 1, 2002, the defendant was convicted of numerous counts of Sexual Assault on a Child — Pattern of Abuse in violation of § 18-3-405(1), C.R.S.; numerous counts of Sexual Assault on a Child under 15 — Position of Trust in violation of § 18-3-405.3(1),(2), C.R.S.; and other counts of child sex assault. The District Court merged numerous counts into ten incidents and then sentenced the defendant to 145 years of incarceration in the Department of Corrections ("DOC"). The sentence included an indeterminate sentence of 25 years to life DOC on count 21, which was calculated because of the consecutive nature of the sentence.

Following the trial, the victim came forward and asserted that she falsified her allegations of the abuse because she felt unloved by her parents and wanted to move to Oklahoma to live with her maternal grandparents. *Farrar*, 208 P.3d at 705. The victim further denied being pressured to recant and claimed that prior to trial she tried to tell the prosecutors, her guardian *ad litem*, and the social workers that her accusations were false. The victim claims that these efforts were ignored or met with threats of institutionalization. Following her claims, a motion for a Special Prosecutor was granted and a hearing ensued. *Id.* at 704-05. Several witnesses testified as to the veracity of the victim's recantation and the truthfulness of the victim's original testimony. *Id.* at 705.

On February 14, 2005, the trial court denied Defendant's motion for a new trial. In a lengthy and considered decision, the Honorable John Leopold held that:

> [t]his case is one of the more memorable criminal jury trials at which this Court has presided. The sheer number of allegations and the graphic description of the alleged acts are extraordinary. The Court has a clear memory of [the victim's] testimony at trial and, of course, has had the benefit of her August, 2004 and January, 2005 appearances.

(Order Denying Mtn for New Trial at 2.) The Court concluded that "during the trial, [the victim] testified in a straightforward, unemotional manner. There were no indicia of [the victim's] offering knowingly false testimony at that time." (*See id.* at 6.) Subsequently, the Court denied the victim's

allegations of prosecutorial misconduct. (*See id.*) "In fact, the Court was struck by the similarity in her affect at trial and the post-conviction motion hearing. ... [I]n general, she was an articulate and confident witness at trial and during both of her appearances in this post-conviction hearing." (*See id.* at 2.) Thus, the trial court judge therefore denied the motion for a new trial. The court remained unpersuaded that any newly discovered evidence would produce an acquittal. This decision was affirmed by the Court of Appeals and the Colorado Supreme Court. *Farrar*, 208 P.3d at 705, 708-10.

On October 4, 2007, the Court of Appeals released an unpublished opinion affirming the judgment and sentence in part, reversing in part, and remanding the case with directions. *See People v. Farrar*, No. 02CA1358, slip op. at 43 (Colo. App. July 1, 2009). However, the Colorado Supreme Court granted a writ of certiorari on April 7, 2008, to review the case solely with regard to the defendant's challenge to the denial of his motion for new trial based on newly discovered evidence. The Colorado Supreme Court issued its opinion affirming the judgment of the trial court on May 26, 2009. *Farrar*, 208 P.3d at 704. Jurisdiction was returned to the Colorado Court of Appeals from the Colorado Supreme Court on June 18, 2009. (Mandate at 1, June 18, 2009.) The Colorado Court of Appeals mandated the case back to this Court with directions on July 1, 2009. *People v. Farrar*, No. 02CA1358, slip. op. at 43 (Colo. App. July 1, 2009.) The Defendant's present motion was then timely filed on October 23, 2009.

During appellate proceedings in this action, Judge Leopold retired. The mandate was forwarded to the

new presiding judge in the case's assigned division. The Honorable Carlos Samour immediately recused himself, having been the Special Prosecutor appointed to address the Motion for New Trial. (Recusal Order at 1, July 8, 2009.) By order of Chief Judge William Blair Sylvester, the Motion was referred for random reassignment. (Order re Recusal, July 10, 2009.) On December 9, 2010, the Honorable Valeria Spencer ordered a hearing for resentencing of the Defendant pursuant to the dictates of the Court of Appeals mandate. The hearing was set for January 11, 2011.

In the December 9, 2010 Order, the Court set the framework for the January 11, 2011 resentencing hearing. Specifically, the Court needed to address Defendant's sentence as to Counts 1 and 5 pursuant to the remand directions. The Court of Appeals reversed the judgment and sentence as to count 5 and remanded back to the trial court to correct the mittimus to reflect that Defendant was convicted of Sexual Assault on a Child—not Sexual Assault on a Child —Pattern of Abuse—and to resentence him on that count. *People v. Farrar*, No. 02CA1358, slip op. at 31. Count 1 was remanded for correction of the mittimus to remove the pattern portion of the charge and reduce it from an F3 to an F4, but the underlying conviction and sentence for the count stood. *Id.* at 30.

At the January 11, 2011 resentencing, Defendant was resentenced on Count 5 to 2 years DOC with 3 years mandatory parole, concurrent to all other sentences and *nunc pro tunc* to the original sentencing date. Count 1 was ordered to be amended consistent with the Court of Appeals mandate. An

amended mittimus issued reflecting these changes.

On July 25, 2011, this Court denied Defendant's Motion for Reconsideration of Sentence Pursuant to Crim. P. 35(b) and § 18-1.3-406(1), C.R.S.

On September 26, 2011, Defendant, *pro se*, filed the instant Petition for Post-Conviction Relief pursuant to Colo. Crim. P. 35(c). Defendant raises the following allegations in his 35(c) petition:

(1) "Counsel was ineffective after divulging privileged information to the prosecutor creating a significant conflict of interest[;]"

(2) "Counsel was ineffective for failing to conduct a proper pretrial investigation[;]"

(3) "Counsel was ineffective for failing to conduct effective cross examination[;]"

(4) "Counsel was ineffective for failure to contact important witnesses or raise obvious and significant issues[;]"

(5) "Counsel was ineffective for failing to advance a reasonable doubt defense[;]"

(6) "Counsel was ineffective for not investigating prior to sentencing[;]"

(7) "Defense was clearly ineffective when the errors are considered cumulatively[;]"

(8) "Appellate counsel's performance fell below an objective standard of reasonableness therefore he was ineffective[;]"

(9) "Appellate counsel failed to investigate and prepair [sic] for trial making himself ineffective[;]"

(10) "The defendant's right to due process under U.S. Constitution was violated[;]"

(11) "The defendant's double jeopardy rights under U.S. Constitution was violated [; and]"

(12) The prosecution conducted themselves in an improper manner, in violation of defendant's right under U.S. Constitutional Amendments V, VI and XIV....prosecution may not withhold information — evidence which tends to negate the guilt of the accused [and] the information in this case contained substantive defects that deprived the Court of jurisdiction over certain counts[.]"

II. Analysis and Findings

The Sixth Amendment of the United States Constitution provides every defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 669 (1984). To prove ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense such that but for counsel's deficient performance, there is reasonable probability that the outcome at trial would have been different. *Id.* at 687; *see also People v. Davis*, 849 P.2d 857, 860 (Colo. App. 1992). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at

690-91. "A defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 680 (quoting *Michel v. Louisiana*, 350 U.S. 91 (1955)).

Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003). A defendant's conclusory allegations regarding counsel's allegedly deficient performance are insufficient to demonstrate that the defendant may be entitled to postconviction relief. *See People v. Chambers*, 900 P.2d 1249 (Colo. App. 1994); *People v. Barefield*, 804 P.2d 1342 (Colo. App.1990); *see also People v. Rodriguez*, 914 P.2d 230 (Colo. 1996). To prove the defense was prejudiced, a defendant must show that there is a lack of confidence in the outcome. *See Ardolino*, 69 P.3d at 76.

A defendant requesting post-conviction relief pursuant to Colo. R. Crim. P. 35(c) must assert specific facts, which if true, would provide a basis for relief. *See* Colo. R. Crim. P. 35(c)(3)(IV); *DeBaca v. Dist. Ct.*, 431 P.2d 763, 765 (Colo. 1967); *People v. Rhorer*, 946 P.2d 503, 506 (Colo. App. 1997), *rev 'd on other grounds,* 967 P.2d 147 (1998). A trial court may also deny a postconviction motion without a hearing if the claims are bare and conclusory and lack supporting factual allegations. *People v. Venzor*, 121 P.3d 260, 262 (Colo. App. 2005). Thus, a court may deny a motion for post-conviction relief pursuant to Colo. R. Crim. P. 35(c) without a hearing only when the motion, files, and record in the case clearly

establish that the allegations in a defendant's motion are meritless and do not warrant postconviction relief. *See Ardolino,* 69 P.3d at 77.

a. Claim (1): No conflict of interest

Defendant first asserts his trial counsel was ineffective for divulging privileged information to the prosecutor which created a significant conflict of interest. Specifically, Defendant claims his trial counsel shared with the prosecution information concerning recantation by the victim and therefore had a conflict of interest.

To establish a claim for ineffective assistance of counsel based on an allegation of a conflict interest, a defendant must demonstrate (1) that his or her counsel was subject to an actual conflict of interest; and (2) that the actual conflict of interest adversely affected counsel's performance. *People v. Miera*, 183 P.3d 672, 677 (Colo. Ct. App. 2008) (citations omitted). An actual conflict of interest is real and substantial. *Id.* It arises when an attorney's representation of the defendant conflicts with some other interest that the attorney also has professionally undertaken to serve. This Court need not reach these considerations, because Defendant's first claim lacks factual merit.

Defendant's first claim asserts factual allegations that are inconsistent with the factual allegations previously reviewed by this Court, the Colorado Court of Appeals and the Colorado Supreme Court. As noted by the Colorado Supreme Court, following the trial, the victim came forward and asserted that she falsified her allegations of the abuse. *Farrar*, 208 P.3d at 705. The victim further denied being pressured to recant and claimed that prior to trial

she tried to tell the prosecutors, her guardian *ad litem*, and the social workers that her accusations were false. *See id.* These factual assertions were revealed to Defendant's counsel through the victim's sworn affidavit which his trial counsel received *after* Defendant's trial.

Defendant now claims that it was his trial counsel who went to the prosecutor with information concerning the victim's recantation. This is not consistent with the previous factual allegations utilized by this Court, the Colorado Court of Appeals and the Colorado Supreme Court in reviewing Defendant's motion for new trial based on newly discovered evidence. Based on the sworn affidavit of the victim, it was the victim who allegedly went to the prosecutors with her recantation. This Court considered the issue when it rejected Defendant's contention that the prosecution knowingly submitted perjured testimony at Defendant's trial. Defendant's attempt to rehash the issue by asserting a different factual allegation makes obvious the lack of merit to his first claim. Wherefore, this Court finds Defendant has failed to present any persuasive factual allegation that would lead this Court to consider whether there was a conflict of interest. Defendant's first claim is meritless and does not warrant postconviction relief.

b. Claims (2)-(6): Defendant received effective assistance of trial counsel

Defendant's claims (2)-(6), as outlined above, all concern his trial counsel's investigation of his case, including claims that his counsel did not adequately prepare for cross-examination and counsel failed to investigate and interview potential witnesses. In

claims (2) through (6), the crux of Defendant's contention is the conclusory assertion that his counsel failed to present enough evidence to effectively impeach the veracity of the victim's testimony. Again, Defendant relies solely on the victim's recantation and he asserts his counsel was ineffective in bringing the victim's recantation to light prior to trial.

This Court has previously noted that great pains were taken by the Court to evaluate the victim's recantation and determine which version of her story was truthful and whether this newly discovered evidence warranted a new trial. The Court found that the victim testified in a straightforward, unemotional manner. There were no indicia of the victim's offering knowingly false testimony at the time of the original trial. The Court also considered what it described as "an equally unbelievable" and "far more heinous" allegation in the form of the victim's claim that the prosecutor knowingly and intentionally presented her perjured testimony. The Court also determined that even though the victim had credibility issues, the jurors were able to sift through her testimony, accepting some of it and rejecting other parts. This Court further reasoned that if a new trial was granted, the jurors would hear not only the victim's recanted testimony but her original trial testimony, including her former testimony that detailed repeated descriptions of fellatio and sexual intercourse that she was required to perform with the Defendant. Importantly, this Court concluded that nothing it heard or saw during the previous post conviction proceeding persuaded it that the newly discovered evidence would produce a

complete acquittal at a new trial.

Defendant now attempts to bootstrap the victim's recantation with his claims of ineffective assistance of counsel. The Court is not persuaded by the Defendant's arguments. Defendant's arguments concerning his counsel's investigation and what evidence could have been revealed about the victim are conclusory and lack the requisite specificity to warrant relief, as well are his arguments concerning counsel's cross-examination. Moreover, such conclusory allegations are insufficient to demonstrate that he may be entitled to postconviction relief or that the record might contain specific facts that would substantiate his claims. *See People v. Zuniga*, 80 P.3d 965, 973 (Colo. App. 2003). From reading the repetitive assertions set forth in his Petition, it is clear Defendant is arguing that because the victim recanted his counsel must have been ineffective. This Court does not agree.

Because a presumption of validity attaches to a judgment of conviction, the burden is on the defendant in a Crim. P. 35(c) petition to prove both elements of an ineffective assistance of counsel claim by a preponderance of the evidence. *Davis v. People, supra.* The Court finds that Defendant has failed in meeting this burden. Accordingly, this Court finds Defendant's claims (2) through (6) lack merit and do not warrant postconviction relief.

c. Claim (7): No cumulative error

Defendant next contends his counsel was clearly ineffective when the errors are considered cumulatively. There is no indication that counsel's alleged errors, when considered cumulatively, satisfy the two prong test articulated in *Strickland.*

Defendant fails to show how counsel's alleged errors, when taken together, would amount to deficient performance, or how such performance was so deficient that it changed the outcome of his trial. Thus, Defendant's claim for relief based upon trial counsel's cumulative errors fails. Accordingly, Defendant's claim (7) lacks merit and does not warrant postconviction relief.

d. Claims (8) & (9): Defendant received effective assistance of appellate counsel

In claims (8) and (9), as outlined above, Defendant next asserts that his appellate counsel was ineffective. Specifically, Defendant claims his appellate counsel's argued the wrong standard for obtaining a new trial based upon the victim's recantation and that his appellate counsel failed to investigate and prepare for the Rule 33 hearing. The *Strickland* standard also applies to a claim of ineffective assistance of appellate counsel. To satisfy the prejudice standard where a defendant has received full appellate review of his convictions, the defendant must demonstrate meritorious grounds for reversal. *People v. Valdez*, 789 P.2d 406 (Colo.1990); *People v. Dunlap*, 124 P.3d 780, 795 (Colo. App. 2004).

Defendant's argument that his appellate counsel argued the wrong standard for a new trial is based upon the Colorado Supreme Court's opinion affirming the denial of Defendant's motion for a new trial. Defendant suggests that because the majority of the Colorado Supreme Court disagreed with his counsel's argument that his counsel's performance must have fell below a reasonable standard. The Court notes that the Supreme Court was split 4 to 3

on its decision and that three of the Supreme Court Justices agreed with Defendant's appellate counsel's argument.

As noted by Chief Justice Bender is his dissent:

> The majority holds that a recantation "can justify a new trial only to the extent that it not only impeaches the prior testimony but does so by contradicting it with a different and more credible account." Maj. op. at 708. Such a conclusion overstates our precedent. The appropriate standard that should be applied here is that newly discovered impeachment evidence is sufficient to justify a new trial when it, taken together with all of the other evidence for and against the defendant, is of such consequence that it probably would result in an acquittal on retrial.

Farrar, 208 P.3d at 710. The fact that the majority disagreed with Defendant's appellate counsel is not evidence of deficient performance. Moreover, the fact that three of the Supreme Court Justices agreed with the standard argued for by Defendant's appellate counsel indicates quite the opposite. On this issue, Defendant has failed to make the requisite showing that his appellate counsel's performance was deficient. *Strickland*, 466 U.S. at 669.

Defendant also argues his appellate counsel failed to adequately investigate his case for the purposes of his Rule 33 hearing. Specifically, Defendant argues that his counsel failed to present evidence that the victim recanted in an Oklahoma State Court prior to recanting in Colorado. Defendant argues that evidence that the recantation occurred earlier in another state court would have helped him prevail

on his motion for a new trial. This Court does not agree nor does it comprehend how this alleged error could be imputed upon the performance of Defendant's appellate counsel. Again, Defendant has failed to make the requisite showing that his appellate counsel's performance was deficient. *Strickland*, 466 U.S. at 669.

Accordingly, Defendant's claims (8) and (9) lack merit and do not warrant postconviction relief.

e. Claim (10): No due process violation

Defendant next contends his due process rights under the U.S. Constitution were violated. Specifically, Defendant argues that the prosecution used false testimony at trial to obtain his convictions. This argument is also based on the victim's recantation. This issue has been addressed at great length by the Court's in its order denying Defendant's motion for a new trial. It will not be addressed again. Defendant's claim (10) lack merit and does not warrant postconviction relief.

f. Claim (11): No double jeopardy violation

Defendant next argues that his double jeopardy rights under U.S. Constitution were violated. Specifically, Defendant argues his pattern of sexual abuse convictions should have merged into one conviction with one sentence, because there was only one victim.

The Double Jeopardy Clauses of the United States and Colorado Constitutions protect an accused against being twice placed in jeopardy for the same crime. *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005) (citing U.S. Const. Amend. V; Colo. Const., art. II, § 18; *Boulies v. People*, 770 P.2d 1274, 1277

(Colo.1989)). The Double Jeopardy Clause protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense." *Id.* (citing *Whalen v. United States*, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (quoting *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969))). Notwithstanding these protections, the Double Jeopardy Clause does not prevent the General Assembly from specifying multiple punishments based upon the same criminal conduct. *Id.* (citing *Patton v. People*, 35 P.3d 124, 129 (Colo.2001). In the context of multiple punishments for the same offense, double jeopardy is violated only if violations of the same statutory offense are not factually distinct from one another. *People v. Tillery*, 231 P.3d 36, 48 (Colo. Ct. 2009) *aff'd sub nom. People v. Simon*, 09SC665, 2011 WL 6318965 (Colo. Dec. 19, 2011).

In the instant case defendant's convictions were multiplicitous because the record evidenced that the multiple charges were supported by evidence of distinct acts, thus there was no double jeopardy violation. *Quintano v. People*, 105 P.3d 585, 592 (Colo. 2005); *cf. Woellhaf*, 105 P.3d at 219. Accordingly, Defendant's claim (11) lacks merit and does not warrant postconviction relief.

g. Claim (12): No prosecutorial misconduct

Lastly the Defendant argues that "the prosecution conducted themselves in an improper manner, in violation of defendant's right under U.S. Constitutional Amendments V, VI and XIV ....prosecution may not withhold information — evidence which tends to negate the guilt of the

accused [and] the information in this case contained substantive defects that deprived the Court of jurisdiction over certain counts."

Defendant's jurisdictional argument is a repetition of his Claim (11) which concerned an alleged double jeopardy violation. This argument has been addressed in the previous section. The remaining assertion of Defendant's final claim is a repeated claim that the prosecution offered false testimony to obtain his conviction. As with claim (10), this argument is also based on the victim's recantation, which was addressed in great length by the Court's in its order denying Defendant's motion for a new trial. The fact that the victim recanted after trial does support Defendant's conclusory assertion that there was prosecutorial misconduct. Defendant's claim (12) lacks merit and does not warrant postconviction relief.

III. CONCLUSION

Wherefore, Defendant's claims for relief based upon ineffective assistance of counsel pursuant to Colo. R. Crim. P. 35(c) are DENIED without hearing because they are without merit. As a result, Defendant's request for appointment of counsel is DENIED as moot.

IT IS SO ORDERED.

Done this 12th day of January, 2012.

BY THE COURT:

/s/ Valeria N. Spencer
Valeria N. Spencer
District Court Judge

APPENDIX H

DISTRICT COURT, ARAPAHOE COUNTY,
STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

CHARLES A. FARRAR,

Defendant.

Case Number: 01 CR 505

Division: 26

Filed July 25, 2011

ORDER RE: MOTION FOR RECONSIDERATION OF SENTENCE PURSUANT TO CRIM. P. 35(b) AND 18-1.3-406(1), C.R.S. (2009)

THIS MATTER comes before the Court upon Defendant's Motion for Reconsideration of Sentence Pursuant to Crim. P. 35(b) and § 18-1.3-406(1), C.R.S. 2010. The Defendant, Charles A. Farrar,

requests a reduction in sentence, that the sentences be run concurrent, or that the court exercise its discretion pursuant to section § 18-1.3-1004(2)(a) to suspend the Department of Corrections sentence and impose an indeterminate probationary sentence. The Court has reviewed the Motion, the People's Response thereto, the voluminous court file, [1] relevant transcripts, and applicable authority. Being so advised, the Court enters the following findings and Order.

I. Factual Background and Procedural History

In March 2000, then fifteen-year-old victim S.B. accused her mother and stepfather, Defendant Charles Farrar, of a pattern of sexual and physical abuse over a period of approximately four years.

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[1] The Court takes particular note of the following documents in the determination of this Motion: (1) the trial court's Order Denying Defendant's Motion for New Trial Pursuant to Crim. P. 33(c) based on Newly-Discovered Evidence; (2) the Colorado Supreme Court's opinion affirming the trial judge's denial of a new trial because the victim recanted, *Farrar v. People*, 208 P.3d 702 (Colo. 2009); (3) the Colorado Court of Appeals unpublished mandate affirming the judgment of conviction and sentence as to all but counts 1 and 5, *see People v. Farrar*, No. 02CA1348, slip op. at 43 (Colo. App. July 1, 2009); (4) Defendant's October 23, 2009 Motion for Reconsideration of Sentence Pursuant to Crim. P. 35(b) and § 18-1.3-406(1), C.R.S. 2009; (5) Defendant's Notice of Pending Mandate and Request for Ruling on Motion for Reconsideration of Sentence, which was filed on July 20, 2010; and (6) the People's Response to Motion for Reconsideration of Sentence Pursuant to Crim. P. 35(b) and § 18-1.3-406, C.R.S. 2009, on April 6, 2010.

Farrar v. People, 208 P.3d 702, 704 (Colo. 2009). (*See also* Resp. ¶. 11.) The victim estimated the abuse began when she was eleven, and she finally disclosed to a guidance counselor at her school some four years later. (*See id.*) After an investigatory period of many months, charges were filed against Defendant in 2001. These charges included over one hundred incidents of touching, oral sex performed on the victim, oral sex the victim was required to perform on the Defendant, and sexual intercourse. (*Id.*)

Initially, the defendant and the victim's mother were charged as co-defendants for these charges, but their cases were severed for trial. (*See* Def's Mtn for Reconsideration ¶. 8.) The defendant proceeded to trial first. (*Id.*) Ultimately, the charges against the victim's mother were dismissed. (*Id.*) On April 1, 2002, the defendant was convicted of numerous counts of Sexual Assault on a Child — Pattern of Abuse in violation of § 18-3-405(1), C.R.S.; numerous counts of Sexual Assault on a Child under 15 — Position of Trust in violation of § 18-3-405.3(1),(2), C.R.S.; and other counts of child sex assault. *(See* Mittimus Feb. 23, 2011.) The District Court merged numerous counts into ten incidents and then sentenced the defendant to 145 years of incarceration in the Department of Corrections ("DOC"). The sentence included an indeterminate sentence of 25 years to life DOC on count 21, which was calculated because of the consecutive nature of the sentence. (*See id.* at 2.)

Following the trial, the victim came forward and asserted that she falsified her allegations of the abuse because she felt unloved by her parents and wanted to move to Oklahoma to live with her

maternal grandparents. *Farrar*, 208 P.3d at 705. The victim further denied being pressured to recant and claimed that prior to trial she tried to tell the prosecutors, her guardian *ad litem*, and the social workers that her accusations were false. *See id.* The victim claims that these efforts were ignored or met with threats of institutionalization. *See id.* Following her claims, a motion for a Special Prosecutor was granted and a hearing ensued. *Id.* at 704-05. Several witnesses testified as to the veracity of the victim's recantation and the truthfulness of the victim's original testimony. *Id* at 705. (*See also* People's Resp. ¶¶. 3-6.)

On February 14, 2005, the trial court denied Defendant's motion for a new trial. In a lengthy and considered decision, the Honorable John Leopold held that:

> [t]his case is one of the more memorable criminal jury trials at which this Court has presided. The sheer number of allegations and the graphic description of the alleged acts are extraordinary. The Court has a clear memory of [the victim's] testimony at trial and, of course, has had the benefit of her August, 2004 and January, 2005 appearances.

(Order Denying Mtn for New Trial at 2.) The Court concluded that "during the trial, [the victim] testified in a straightforward, unemotional manner. There were no indicia of [the victim's] offering knowingly false testimony at that time." (*See id*. at 6.) Subsequently, the Court denied the victim's allegations of prosecutorial misconduct. (*See id.*) "In fact, the Court was struck by the similarity in her affect at trial and the post-conviction motion hearing.

... [I]n general, she was an articulate and confident witness at trial and during both of her appearances in this post-conviction hearing." (*See id*. at 2.) The trial court therefore denied the motion for a new trial. The court remained unpersuaded that any newly discovered evidence would produce an acquittal. This decision was affirmed by the Court of Appeals and the Colorado Supreme Court. *Farrar*, 208 P.3d at 705, 708-10.

On October 4, 2007, the Court of Appeals released an unpublished opinion affirming the judgment and sentence in part, reversing in part, and remanding the case with directions. *See People v. Farrar*, No. 02CA1358, slip op. at 43 (Colo. App. July 1, 2009). However, the Colorado Supreme Court granted a writ of certiorari on April 7, 2008, to review the case solely with regard to the defendant's challenge to the denial of his motion for new trial based on newly discovered evidence. The Colorado Supreme Court issued its opinion affirming the judgment of the trial court on May 26, 2009. *Farrar*, 208 P.3d at 704. Jurisdiction was returned to the Colorado Court of Appeals from the Colorado Supreme Court on June 18, 2009. (Mandate at 1, June 18, 2009.) The Colorado Court of Appeals mandated the case back to this Court with directions on July 1, 2009. *People v. Farrar*, No. 02CA1358, slip. op. at 43 (Colo. App. July 1, 2009.) The Defendant's present motion was then timely filed on October 23, 2009.

During appellate proceedings in this action, Judge Leopold retired. The mandate was forwarded to the new presiding judge in the case's assigned division. The Honorable Carlos Samour immediately recused himself, having been the Special Prosecutor

appointed to address the Motion for New Trial. (Recusal Order at 1, July 8, 2009.) By order of Chief Judge William Blair Sylvester, the Motion was referred for random reassignment. (Order re Recusal, July 10, 2009.) On December 9, 2010, the Honorable Valeria Spencer ordered a hearing for resentencing of the Defendant pursuant to the dictates of the Court of Appeals mandate. The hearing was set for January 11, 2011.

In the December 9, 2010 Order, the Court set the framework for the January 11, 2011 resentencing hearing. Specifically, the Court needed to address Defendant's sentence as to Counts 1 and 5 pursuant to the remand directions. The Court of Appeals reversed the judgment and sentence as to count 5 and remanded back to the trial court to correct the mittimus to reflect that Defendant was convicted of Sexual Assault on a Child—not Sexual Assault on a Child — Pattern of Abuse—and to resentence him on that count. *People v. Farrar*, No. 02CA1358, slip op. at 31. Count 1 was remanded for correction of the mittimus to remove the pattern portion of the charge and reduce it from an F3 to an F4, but the underlying conviction and sentence for the count stood. *Id.* at 30.

At the January 11, 2011 resentencing, Defendant was resentenced on Count 5 to 2 years DOC with 3 years mandatory parole, concurrent to all other sentences and *nunc pro tunc* to the original sentencing date. Count 1 was ordered to be amended consistent with the Court of Appeals mandate. An amended mittimus issued reflecting these changes. (*See* Mittimus Feb. 23, 2011.) Defendant has now filed a Motion for Reconsideration of Sentence

Pursuant to Crim. P. 35(b) and § 18-1.3-406(1), C.R.S. 2010.

II. Analysis and Findings

A motion under Crim. P. 35(b) gives the trial court the opportunity to reexamine the propriety of the sentence imposed. *People v. Ellis*, 873 P.2d 22, 23 (Colo. App. 1993). Comparatively, Colorado Revised Statutes § 18-1.3-406(1) gives the court significant discretionary authority to act on information provided to it by the Department of Corrections in the case of statutory violent offenders in order to "reconsider and reduce a previously imposed mandatory sentence for a violent crime in the case of exceptional, unusual and extenuating circumstances." *People v. Williams*, 908 P.2d 1157, 1162 (Colo. App. 1995). This statute provides the means for a court to reevaluate a violent offender's sentence in light of DOC's extensive intake evaluation and subsequent diagnostic report. *See §* 18-1.3-406(1). In the instant case, the Defendant argues that the combination Crim. P. 35(b) and §18-1.3-406, C.R.S. provides the Court with the ability to suspend Defendant's DOC sentence and impose an indeterminate probationary sentence. Specifically, the Defendant has requested a sentence modification based upon the unusual circumstance of the victim S.B.'s recantation in conjunction with his conduct while he has been incarcerated. For the following reasons, the Court DENIES the Defendant's request for sentence modification.

A. Crim. P. 35(b) and §18-1.3-406, C.R.S.

The purpose of Crim. P. 35(b) is to allow a trial court to review a sentence to ensure that it is fair in light of the sentencing code. *Ghrist v. People*, 897

P.2d 809, 812 (Colo. 1995). The sentencing code has four purposes: (1) ensuring convicted offenders are punished according to the seriousness of their offense; (2) ensuring that convicted offenders are treated fairly and consistently by eliminating disparities in sentencing, providing fair warning of the sentence to be imposed, and establishing fair procedures for imposing sentences; (3) preventing and deterring crime; and (4) promoting rehabilitation of convicted offenders by encouraging voluntary correctional programs. *See* § 18-1-102.5, C.R.S. 2010. Thus, a trial court may reduce a sentence if, after considering all relevant and material factors, it determines that reducing the sentence will promote one of the purposes of § 18-1-102.5. *See Ghrist*, 897 P.2d at 812. The decision of whether to reduce a movant's sentence under Crim. P. 35(b) is within the sound discretion of the trial court. *See People v. Fuqua*, 764 P.2d 56, 60 (Colo. 1988).

On the other hand, Colorado Revised Statutes section 18-1.3-406 (2009), addresses mandatory sentences for violent crimes. Subsection (1) of this statute requires enhanced sentencing be imposed for defendants who are convicted of a crime of violence. *See* § 18-1.3-406(1)(a). Additionally, subparagraph (b) of subsection (1) requires any defendant convicted of a sex offense that constitutes a crime of violence to be sentenced to an indeterminate sentence of DOC incarceration for a term of at least the midpoint of the presumptive range up to the defendant's natural life. *See* § 18-1.3-406(1)(b). However, subsection (1) also provides a mechanism for the court to modify the sentence of a defendant who is convicted of a crime of violence. *Id.* As the available relief is narrow

in scope and subject to specific statutory requirements, the precise language of the statute is crucial. In pertinent part, § 18-1.3-406 provides that:

> (1)(a) Any person convicted of a crime of violence shall be sentenced pursuant to the provisions of section 18-1.3-401(8) to the department of corrections for a term of incarceration of at least the midpoint in, but not more than twice the maximum of, the presumptive range provided for such offense in section 18-1.3-401(1)(a), as modified for an extraordinary risk crime pursuant to section 18-1.3-401(10), without suspension; except that, within ninety days after he or she has been placed in the custody of the department of corrections, the department shall transmit to the sentencing court a report on the evaluation and diagnosis of the violent offender, and the court, in a case which it considers to be exceptional and to involve unusual and extenuating circumstances, may thereupon modify the sentence, effective not earlier than one hundred twenty days after his or her placement in the custody of the department. Such modification may include probation if the person is otherwise eligible therefor. ... A person convicted of two or more separate crimes of violence arising out of the same incident shall be sentenced for such crimes so that sentences are served consecutively rather than concurrently.
>
> (b) Notwithstanding the provisions of paragraph (a) of this subsection (1), any person convicted of a sex offense, as defined in

> section 18-1.3-1003(5), committed on or after November 1, 1998, that constitutes a crime of violence shall be sentenced to the department of corrections for an indeterminate term of incarceration of at least the midpoint in the presumptive range specified in section 18-1.3-401(1)(a)(V)(A) up to a maximum of the person's natural life, as provided in section 18-1.3-1004(1).

§ 18-1.3-406(1), C.R.S.

A defendant may request sentence reconsideration under §18-1.3-406, C.R.S., through a Crim. P. 35(b) motion. *See People v. Williams*, 908 P.2d 1157, 1162-63 (Colo. App. 1995); *People v. Belgard*, 58 P.3d 1077 (Colo.App. 2002). Notably,

> [t]he plain language of [§ 18-1.3-406(1)(a)] does not provide an avenue, separate and apart from Crim.P. 35(b), by which a defendant may independently pursue a reconsideration of his sentence at any time or in some manner other than by a motion for reduction of sentence pursuant to Crim.P. 35(b). In contrast to the provisions of Crim. P. 35(b), this statute does not authorize a defendant to file a motion for reduction or reconsideration of sentence. Rather, it simply provides that the court may modify an existing sentence imposed for a crime of violence by acting on information provided by the Department of Corrections.
>
> The statute permits a trial court to reconsider and reduce a previously imposed mandatory sentence for violent crime in the case of exceptional, unusual, and extenuating circumstances. *See People v. Wells*, 775 P.2d

> 563 (Colo.1989); *People v. Byrum*, 784 P.2d 817 (Colo.App.1989). The court may either reduce the sentence on its own initiative following the receipt of information from the Department of Corrections or it may do so based on a defendant's motion pursuant to Crim.P. 35(b). However, the trial court cannot consider a motion filed by a defendant for reduction of sentence based solely on [§ 18-1.3-406(1)(a)], as that statutory provision does not trigger the court's jurisdiction to consider a sentence reconsideration motion. It merely authorizes a court to reduce a mandatory sentence imposed for a crime of violence.

Williams, 908 P.2d at 1162-63. Thus, when a defendant pursues sentence reconsideration under §18-1.3-406, C.R.S., through a Crim. P. 35(b) motion, a court is authorized to reduce a mandatory sentence imposed for a violent crime.

In order for a trial court to reduce a previously imposed mandatory sentence for a violent crime under §18-1.3-406, C.R.S., the trial court must determine there were "exceptional, unusual, and extenuating circumstances" present. In determining if "exceptional, unusual or extenuating circumstances" exist in a defendant's case, the trial court is permitted to consider a defendant's prior record (or lack thereof), taking advantage of educational opportunities in prison, the defendant's behavior during his incarceration, his remorseful attitude and the circumstances surrounding the commission of the crime. *People v. Beyer*, 793 P.2d 644, 647 (Colo. App. 1990) *rev 'd* on other grounds.

B. Sentence Modification Not Warranted

A trial court has a duty to exercise its discretion when considering a motion for sentence reconsideration. *See Mikkleson v. People*, 618 P.2d 1101, 1102 (Colo. 1980). When exercising its discretion, the trial court must consider "all relevant and material factors, including new evidence as well as facts known at the time the original sentence was pronounced." *People v. Busch*, 835 P.2d 582, 583 (Colo. App. 1992). A trial court only fails to exercise its judicial discretion where it refuses to consider "any information in mitigation and fails to make findings in support of its decision." *Id.*

The Defendant asks this Court to reconsider his sentence because of "exceptional, unusual, and extenuating circumstances" present in his case. Victim S.B.'s recantation forms the basis of the "exceptional, unusual, and extenuating circumstances" according to the Defendant. Additionally, the Defendant asks that the Court also consider his conduct while he has been incarcerated. Neither of these considerations warrants modification of the Defendant's sentence.

While a victim's recantation of her trial testimony is unusual, it is viewed with great suspicion. As noted by the Colorado Supreme Court:

> Skepticism about recantations is especially applicable in cases of child sexual abuse where recantation is a recurring phenomenon. *See Provost*, 969 F.2d at 621 (1992); *Myatt v. Hannigan*, 910 F.2d 680, 685 n. 2 (10th Cir.1990) (noting that child recanting in sexual abuse case is not atypical); *State v. Tharp*, 372 N.W.2d 280, 282 (Iowa

> Ct.App.1985) (finding "where families are torn apart, there is great pressure on the child to makes things right"); *State v. Gallagher*, 150 Vt. 341, 554 A.2d 221, 225 (1988) (observing "the high probability of a child victim recanting a statement about being sexually abused").

People v. Schneider, 25 P.3d 755, 762-63 (Colo. 2001)(citing *United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992):

In *Provost*, the case cited by the Colorado Supreme Court in *Schneider*, the Eighth Circuit went onto to explain:

> Recantation is particularly common when family members are involved and the child has feelings of guilt or the family members seek to influence the child to change her story. *See State v. Tharp*, 372 N.W.2d 280, 282 (Iowa Ct.App. 1985) (upholding denial of new trial request based on 14 year old victim's recantation and noting that "where families are torn apart, there is great pressure on the child to make things right."); Cacciola, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 U.C.L.A. L.Rev. 175, 184-88 (1986) (noting susceptibility of child victim to family pressure and to recant the testimony to return things to "normal").

Provost, 969 F.2d 617, 621 (8th Cir. 1992).

In the instant case, great pains were taken by the trial court to evaluate the victim's recantation and determine which version of her story was truthful

and whether this newly discovered evidence warranted a new trial. The trial court found that the victim "testified in a straightforward, unemotional manner. There were no indicia of [the victim's] offering knowingly false testimony at that time [of the original trial]." (*Id.* at 6). The trial court also considered what it described as "an equally unbelievable" and "far more heinous" allegation in the form of S.B.'s claim that the prosecutor knowingly and intentionally presented her perjured testimony. (*Id.* at 5-6). The trial court also determined that even though the victim had credibility issues, "the jurors were able to sift through her testimony, accepting some of it and rejecting other parts." (*Id.*). It further reasoned that if a new trial was granted, the jurors would hear not only the victim's recanted testimony but her original trial testimony, "including her former testimony that detailed repeated descriptions of fellatio and sexual intercourse that she was required to perform with the Defendant." (*Id.* at 6-7). Ultimately, the trial court concluded that nothing it heard or saw during the "post conviction proceeding perusad[ed] it that the newly discovered evidence would produce a complete acquittal at a new trial." (*Id.* at 7). Accordingly, the trial court denied the Defendant's motion for a new trial. The trial court's decision was affirmed by both the Court of Appeals and the Colorado Supreme Court.

While S.B.'s recantation gives one pause, the Court is mindful of the level of skepticism it draws. *Schneider*, 25 P.3d 755 at 762-63; *Provost*, 969 F.2d at 621. The Court gives due regard to the same considerations of S.B.'s testimony at trial and at the

post conviction proceeding outlined above, which supported the denial of the Defendant's motion for a new trial. With these concerns, the Court finds that S.B.'s recantation fails to rise to the level of "exceptional, unusual, and extenuating circumstances" which would warrant sentence modification, including any consideration of indeterminate probation.

As for the Defendant's conduct while he has been incarcerated, the Court acknowledges that the Defendant has been productive while incarcerated, *e.g.*, finishing his GED, maintaining work as an upholsterer, holding a good disciplinary record, and making efforts to continue relationships with his family. However, reconsideration of Defendant's sentence cannot be justified by his good conduct at the Department of Corrections alone. Reducing the Defendant's sentence on that basis would not serve any of the sentencing code's identified purposes. *See* § 18-1-102.5, C.R.S.

A court is allowed to consider evidence regarding a defendant's conduct while incarcerated when deciding a Crim. P. 35(b) motion, but it is error for a court to grant a Crim. P. 35(b) motion on that basis alone. *Ghrist*, 897 P.2d at 813. As the Colorado Court of Appeals observed in *People v. Piotrowski*, "[h]owever admirable may be a defendant's desire to demonstrate to the trial court his desire to be rehabilitated . . . [that] fact . . . diverts a trial court from performing its legitimate function . . . [of reviewing] a sentence to determine its fairness based upon the purposes of the sentencing code." 855 P.2d 1, 1-2 (Colo. App. 1992). In fact, the trial court abuses its discretion when it grants reconsideration

of a sentence pursuant to Crim. P. 35(b) based solely upon a defendant's good behavior. Thus, while a defendant's behavior while incarcerated is but one of many factors that this Court may consider in analyzing the present Motion, it cannot be the sole basis for awarding relief pursuant to Crim. P. 35(b).

By the Defendant's own admission, the Defendant does not admit to any wrong-doing and does not seek exoneration from the Court. He still contends that he has been wrongly convicted. As such, the Defendant does not express any remorse or accept any responsibility. As noted in the People's Response, if the Defendant maintains this position, he would not be and could not be successful in the sex offender intensive supervised probation because the Defendant would be required to admit to the sexual abuse that he denies. *(See* People's Resp. at 3.) The Court agrees with the People, as long as the Defendant remains in denial of his actions, treatment would not be a viable option.

Accordingly, the Court finds the Defendant's behavior and educational endeavors during his incarceration also fail to rise to the level of "exceptional, unusual, and extenuating circumstances" which would warrant sentence modification, including any consideration of indeterminate probation.

The Defendant also requests that his sentences be ordered to run concurrently. For the same reasons outlined above, the Court DENIES this request.

C. Hearing Not Warranted

A court may deny a Crim. P. 35(b) motion without a hearing after considering the motion and supporting

documents. *See* Crim. P. 35(b). A trial court must consider all relevant and material factors, including new evidence and facts known at the time of the original sentence. *People v. Ellis*, 873 P.2d 22, 23 (Colo. App. 1993). After reviewing the Motion and supporting documents, the Response, and the file, the Court has considered all relevant and material factors and finds that no hearing is required. The request for a hearing is DENIED.

III. Conclusion

ACCORDINGLY, the Defendant's Motion for Reconsideration of Sentence pursuant to Crim. P. 35(b) is **DENIED.** The Defendant's request for sentence reconsideration under 18-1.3-406 is **DENIED.** The Defendant's request to have his sentences run concurrently is **DENIED.** The Defendant's request for a hearing is **DENIED.**

IT IS SO ORDERED.

Done this 25th day of July, 2011.

BY THE COURT:

/s/ Valeria N. Spencer
Valeria N. Spencer
District Court Judge

APPENDIX I

SUPREME COURT OF COLORADO
EN BANC

CHARLES A. FARRAR,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

No. 07SC983

May 26, 2009

Rehearing Denied June 15, 2009

OPINION

Justice COATS delivered the Opinion of the Court.

Farrar petitioned for review of the court of appeals' judgment partially affirming his multiple sexual assault and child abuse convictions and affirming the denial of his motion for new trial based on newly discovered evidence. While Farrar's direct appeal of his convictions was proceeding in the court of

appeals, the child victim indicated that her testimony of sexual abuse by the defendant was fabricated. After a series of evidentiary hearings, the district court denied Farrar's motion for new trial, and he was permitted to join an appeal of that ruling with the appeal of his convictions. Although the court of appeals reversed portions of the judgment of conviction, it found no abuse of discretion in the district court's denial of his motion for a new trial.

We granted Farrar's petition solely on the question whether the court of appeals erred in affirming the denial of his motion for new trial. Because the district court was not reasonably convinced that the victim's testimony at trial was probably false, it did not abuse its discretion in denying his motion for new trial. The judgment of the court of appeals is therefore affirmed.

I.

In February 2001 the defendant, Charles A. Farrar, was charged with committing multiple sexual-assault-related offenses against his stepdaughter. About a year earlier, when she was fifteen years old, she accused both her mother and her stepfather of continuous acts of sexual abuse, going back more than three years. Although a jury acquitted the defendant of child prostitution and sexual exploitation of a child, as well as several of the counts of sexual assault, it convicted him of numerous other sexual-assault-on-a-child-related offenses, and he was sentenced to 145 years to life imprisonment.

At trial the victim's testimony was the only direct evidence of the assaults, without physical or eyewitness corroboration. About a year after the

defendant's conviction and sentence, while his direct appeal was pending in the court of appeals, the victim provided the defense with an affidavit recanting her allegations of sexual abuse and asserting that she had been threatened and told how to testify by the prosecutors and social workers. The court of appeals granted a limited remand for consideration of a defense motion for new trial based on newly discovered evidence.

Because the motion for new trial included allegations of failure to disclose the victim's pretrial attempts to recant, the district court disqualified the entire district attorney's office and appointed a special prosecutor to represent the People on remand. The district court held a number of evidentiary hearings in connection with the motion and entertained oral and written arguments. In all, it heard from the victim, her maternal grandmother and her maternal uncle; as well as the prosecutors, social workers, guardian ad litem from the parallel dependency and neglect proceedings, and a man whom the victim dated for a number of months around the time of her recantation.

The victim testified that she fabricated the sexual assault allegations because she felt unloved by her parents and wanted to move to Oklahoma to live with her maternal grandparents. She specifically denied that the incidents of sexual abuse she described in her trial testimony ever occurred, and she also disavowed the testimony she gave at her dependency and neglect proceedings. She further denied being pressured to recant and claimed that even before the trial she tried to tell the prosecutors, her guardian ad litem, and the social workers that

her accusations were false, but in each case she was ignored or actually threatened with being locked up in a mental institution if she were to change her account.

The victim's grandmother testified that she was personally rebuffed before trial when she tried to caution the prosecutors about the victim's lack of credibility, and she also insisted that she had actually overheard the victim recanting to one of the prosecutors. The victim's uncle disputed testimony of the guardian ad litem to the effect that he had told the guardian about the victim being pressured to withdraw her allegations of abuse by her mother.

The trial prosecutors and social workers in turn denied the victim's allegations of misconduct and testified that she never told them her accusations of sexual abuse were false. One of the trial prosecutors conceded that defense counsel notified her at one point that the victim was recanting her allegations, but she testified that when she telephoned the victim in Oklahoma for confirmation, the victim denied changing her story and acted angry and upset that the question was even being asked of her. The prosecutor also testified that although the victim did not want her mother to be offered a plea bargain, nevertheless, as the mother's trial date approached, the victim indicated that she simply could not go through another trial.

The victim's former guardian ad litem testified, contrary to the victim's testimony, that he saw the victim as many as a dozen times during the dependency and neglect proceedings but she never suggested to him in any way that her allegations were false. Although it was disputed by the victim's

uncle, the guardian also testified that her maternal uncle had told him that the victim was being pressured to change her allegations of abuse by her mother and that the mother had offered to buy the victim a car.

A boyfriend of the victim testified that she told him she had actually been sexually abused by the defendant, but also that she was going to change her story in order to get her family back together. Although the boyfriend testified that the victim had shown him a journal in which she had written about the abuse, the victim explained that she often kept more than one diary and that this was a largely fictional piece on which she was working. In later testimony, she produced a previously unseen diary, which she claimed to have only recently located, containing entries dated contemporaneously with her outcry and indicating her deliberate fabrication of the assault allegations as part of a scheme to get away from her family and be sent to her grandparents in Oklahoma.

The district court took the matter under advisement and ultimately denied the motion in a lengthy, written order. It found the victim's allegations of prosecutorial misconduct unworthy of belief, and it therefore declined to order a new trial on those grounds. With regard to the recantation of her trial testimony and her new account of her stepfather's conduct, the district court found entitlement to a new trial in this case to turn entirely on the question whether the newly discovered evidence would probably bring about an acquittal at a new trial. Concluding that the victim had substantial credibility issues, with regard to

both her testimony at trial and her testimony supporting the motion for new trial, the district court remained unpersuaded that any newly discovered evidence would produce an acquittal. It found instead that in all probability another jury, like the first, would accept some of the victim's contentions and reject others.

Upon recertification to the court of appeals, the defendant's challenge to the denial of his motion for new trial was joined with his assignments of error at trial and sentencing. The court of appeals found errors involving two counts and remanded for resentencing and correction of the mittimus, but it affirmed the denial of the defendant's motion for new trial. It concluded that the district court applied the correct legal standard, heard and considered all of the evidence concerning the victim's credibility, and did not abuse its discretion in finding that the recantation would not probably have resulted in an acquittal at a new trial.

We granted the defendant's petition for a writ of certiorari solely with regard to his challenge to the denial of his motion for new trial based on newly discovered evidence.

II.

Unlike assertions of prosecutorial subornation of perjury or failure to disclose exculpatory evidence, *see Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), or even assertions that defense counsel was ineffective, *see Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), claims of newly discovered evidence do not draw into question the

constitutionality of a criminal conviction. With the possible exception of an Eighth Amendment limitation on imposing the death penalty notwithstanding a sufficient allegation of actual innocence, *see Herrera v. Collins*, 506 U.S. 390, 401–02, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) (rejecting death row inmate's claim as insufficiently demonstrated even assuming the existence of such a constitutional limitation), the Supreme Court has never suggested that newly discovered evidence impeaching a guilty verdict implicates due process of law. Whether to grant new trials upon the discovery of new evidence undermining confidence in the reliability of criminal convictions is largely a matter of policy, requiring a balance between the need for finality and the state's interest in ensuring the fairness and accuracy of its proceedings. *People v. Schneider,* 25 P.3d 755, 762 (Colo.2001).

Although disfavored, new trials are allowed in virtually every jurisdiction in this country, according to each jurisdiction's own understanding of how and where to strike that balance. Because newly discovered evidence can arise in a multiplicity of circumstances, with widely differing significance, we have long emphasized the discretionary nature of the decision to grant or deny a new trial. *See, e.g., Blass v. People*, 79 Colo. 555, 558, 247 P. 177, 178 (1926). Depending upon such things as the nature of the additional evidence, the circumstances of its discovery, and the strength of the existing evidence supporting conviction, we have at times highlighted different considerations in making the determination and have articulated the applicable standards in a variety of terms.

More recently, however, we have attempted to identify and enumerate the considerations affecting motions for new trial based on newly discovered evidence generally. *See People v. Gutierrez*, 622 P.2d 547, 559–60 (Colo.1981); *Digiallonardo v. People*, 175 Colo. 560, 488 P.2d 1109 (1971). To begin, we have consistently made clear that evidence will be considered newly discovered for purposes of a motion for new trial only if it was both unknown to the defendant and his counsel in time to be meaningfully confronted at trial and unknowable through the exercise of due diligence. *Gutierrez*, 622 P.2d at 559–60; *People v. Scheidt*, 187 Colo. 20, 22, 528 P.2d 232, 233 (1974); *Digiallonardo*, 175 Colo. at 567, 488 P.2d at 1113. As the result of more modern development of the constitutional right to the effective assistance of counsel, however, a failure of counsel to competently investigate will not deprive a defendant of a right to a new trial as much as it will simply alter the terms of the analysis. *See Strickland*, 466 U.S. at 686, 104 S.Ct. 2052.

We have also required that the newly discovered evidence must not only be relevant to material issues at trial but that it must also be of consequence to the outcome. *See Scheidt*, 187 Colo. at 22, 528 P.2d at 233. Moreover, the newly discovered evidence must be of sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial. *Id.*; *Digiallonardo*, 175 Colo. at 567, 488 P.2d at 1113. It must be consequential in the sense of being affirmatively probative of the defendant's innocence, whether that is accomplished by helping to demonstrate that someone else probably committed

the crime; that the defendant probably could not have committed the crime; or even that the crime was probably not committed at all. We have described the required materiality of newly discovered evidence, or the extent to which it must be consequential to the outcome, in various terms, with varying degrees of precision, but at least since *Digiallonardo*, we have specified that it must be such that it would probably produce an acquittal. 175 Colo. at 567, 488 P.2d at 1113.

Newly discovered evidence in this sense can, and often does, arise from the recantation of a witness who testified at trial. Perhaps because a recanting witness, in addition to typically offering a new version of pertinent events, necessarily impeaches his own prior testimony, some jurisdictions treat recantations as a distinct ground for ordering a new trial, subject to different standards of proof altogether. *See Larrison v. United States*, 24 F.2d 82 (7th Cir.1928) (new trial following recantation where the prior testimony is false and without it the jury might have reached a different conclusion); *e.g., United States v. Willis*, 257 F.3d 636, 642–43 (6th Cir.2001) (following *Larrison* for a recantation case, but requiring that new evidence would likely produce an acquittal in other newly discovered evidence cases); *United States v. Lofton*, 233 F.3d 313, 318 (4th Cir.2000) (same). It has even been suggested that convictions shown to have been dependent in some measure on perjured testimony should be subject to reversal on a less stringent basis than would be permitted for other kinds of newly discovered evidence. 6 Wayne R. LaFave, Criminal Procedure § 24.11(d) (3d ed.2007); *cf. United States v.*

Williams, 233 F.3d 592, 594 (D.C.Cir.2000) (criticizing *Larrison*, 24 F.2d 82, and other related cases as too lightly permitting a new trial). Unlike those jurisdictions, however, we have never singled out recantation for this kind of special treatment and have, in fact, long held that a demonstration of false or mistaken testimony can entitle a defendant to a new trial only if the newly discovered evidence would also probably result in an acquittal. *Whipp v. People*, 78 Colo. 134, 141, 241 P. 534, 537 (1925) (new trial if verdict was probably influenced by false testimony *and* result of another trial would probably, or might, be different); *see also Cheatwood v. People*, 164 Colo. 334, 340, 435 P.2d 402, 405 (1967) (expanding *Whipp* to include mistaken testimony).

In *People v. Schneider*, we squarely addressed the concerns inherent in the recantation of an alleged incest or child sexual assault victim. While we made the new standard we created in that case applicable only to convictions resulting from guilty pleas, we discussed more broadly the problem of victim recantation, emphasizing the suspicion with which recantations should be examined and the court's role in making an objective assessment of the recanting witness's credibility. *Schneider*, 25 P.3d at 763. Significantly, we there spelled out the court's duty to assess a recanting witness's credibility, not only with regard to the unique second prong of the guilty plea standard, which mandates a determination whether the charges to which the defendant pled guilty were actually false or unfounded, but also with regard to the generally applicable requirement to determine whether the newly discovered evidence would probably result in acquittal at a new trial. *Id.* at 762.

By contrast with the second prong of the guilty plea standard, we were not required in *Schneider* to create a new obligation to assess the credibility of a recanting witness because that requirement was already inherent, if not always expressly articulated, in our existing standard for granting a new trial based on newly discovered evidence. In fact, we have for some time emphasized that a defendant can be entitled to a new trial as the result of newly discovered evidence only if that evidence would be likely to result in acquittal for reasons beyond simply impeaching the earlier conviction. Rather than merely creating reasonable doubt by demonstrating that the recanting witness has given different and irreconcilable testimony on different occasions, *cf.* CRE 613(a) ("Examining witness concerning prior inconsistent statements for impeachment purposes"), recantation can justify a new trial only if it contains sufficiently significant new evidence, and if it, rather than the witness's inconsistent trial testimony, will probably be believed. *See United States v. McCullough*, 457 F.3d 1150, 1167 (10th Cir.2006).

In measuring the credibility of a recanting witness and determining whether that witness's new version would probably be believed, the trial court is not barred from relying on its own experience, but in addition to its own experience and observations of the witness, the court must consider all of the testimony and circumstances, and make findings that will permit appropriate appellate review. *Schneider*, 25 P.3d at 762. In *Schneider*, by describing the court's duty in terms of its being "reasonably satisfied," we intended to communicate the notion of an objective standard—whether a

reasonable person with the appropriate degree of skepticism and awareness of the relevant circumstances, rather than a typical juror, would probably believe the witness's new version of events. *Cf. People v. Wadle*, 97 P.3d 932, 937 (Colo.2004) (distinguishing a typical juror from an objectively reasonable one). By referring to an assessment of the witness's credibility, we clearly did not intend that the inquiry be limited to simply the trial judge's subjective belief in the veracity of a recanting witness or suggest that a trial judge's personal belief could serve as a substitute for a reviewable finding of whether any new evidence produced by the recantation would probably result in an acquittal.

Because new evidence in the form of a witness recantation, whether believed or not, necessarily serves to impeach the recanting witness's credibility to some degree, it can justify a new trial only to the extent that it not only impeaches the prior testimony but does so by contradicting it with a different and more credible account. In addition to probably being believed by reasonable jurors, the witness's new version of events must be of such significance in its own right as to probably cause reasonable jurors to acquit the defendant. While not necessarily true of all recantations, the believability of a child sexual assault victim's recantation of the accusations upon which the charges are based would seemingly be determinative of the outcome in virtually every instance.

The crux of any motion for new trial premised on the post-trial recantation of a child victim's testimony of sexual assault must therefore be an objective assessment of the believability of her new

account of relevant events. After considering all of the circumstances impinging on the recanting witness's credibility, including the existence of her prior inconsistent testimony, the court must determine whether it is more likely than not that reasonable jurors would believe her more recent testimony. Unless the victim's testimony that the defendant did not commit the sexual assault will probably be believed, it cannot be said that reasonable jurors would probably acquit as a result of that testimony.

III.

The defendant asserts that the district court abused its discretion both by failing to properly acknowledge that reasonable doubt must be created by a sexual assault victim's recantation and, in addition, by forcing the defendant to demonstrate that any new trial would probably result in an acquittal on all charges. With regard to the former, the defendant misperceives the standard for granting a new trial in this jurisdiction, and with regard to the latter, he simply misreads the district court's ruling.

In its ruling, the district court initially dispensed with the defendant's allegations of prosecutorial failure to disclose and deliberate proffer of perjured testimony by finding the victim's allegations to be unworthy of belief. In ruling on these due process challenges, the court properly acted as the trier of fact, *see People v. District Court,* 790 P.2d 332, 338 (Colo.1990); *People v. Rodriguez,* 786 P.2d 1079, 1082 (Colo.1989), and there is no suggestion that its refusal to credit the victim's accusations of prosecutorial misconduct was clearly erroneous.

With regard to the effect of newly discovered evidence, however, the district court objectively assessed, as it was obliged to do, the probable effect of the victim's post-trial testimony on reasonable jurors.

The district court considered evidence of the victim's lack of character for truthfulness and other testimony contradicting certain aspects of her post-trial testimony. It also compared the victim's demeanor in testifying both at trial and in post-conviction proceedings. Ultimately, it was unable to conclude that the victim's recantation testimony was any more believable than her trial testimony, and therefore it could not find that the victim's new evidence would probably result in the defendant's acquittal.

The defendant's assertion that the district court had an obligation to actually decide whether the recantation was believable misses the mark. In order to be entitled to a new trial for newly discovered evidence, the defendant bore the burden of demonstrating that new evidence offered by him would probably convince reasonable jurors to acquit him. In the case of recantation, this necessarily requires a demonstration that the jury would probably believe the victim's recantation. In the absence of such a showing, a trial court is required to deny a motion for new trial based on newly discovered evidence.

By the same token, the district court did not abuse its discretion by failing to appreciate, as the defendant contends, that in the absence of corroborating evidence of the assaults, any reasonable juror would have doubts about the

accusations of a subsequently recanting witness. Quite the contrary, the district court properly evaluated the effect of the victim's recantation apart from its impeachment value. It has never been the policy of this jurisdiction to grant new trials on the basis of new evidence challenging the credibility of testimony presented at trial.

In the absence of error at trial, a new trial may be granted only upon the discovery of meaningfully contradictory evidence. Apart from obvious motives to recant, especially in the case of incest or child sexual assault victims, and apart from the danger of subjecting young witnesses to never-ending pressure to recant by too lightly allowing new trials, a jury's credibility determinations are entitled to respect. The fact that any inherent doubts about the trustworthiness of a self-impeaching witness must militate against, rather than in favor of, granting a new trial is embodied in our caution that recantations must be viewed with skepticism. *Schneider,* 25 P.3d at 763; *Digiallonardo,* 175 Colo. at 568, 488 P.2d at 1114.

Finally, the defendant asserts that by using the term "complete acquittal" in its concluding paragraph, the district court demonstrated that it denied the defendant a new trial only because he failed to prove that he would probably be acquitted of all pending charges. It is unnecessary for us to decide whether a new trial for newly discovered evidence might, under some set of circumstances, be appropriate despite failing to justify an acquittal on every charge of which the defendant was previously convicted. Here, the court's choice of language was equally consistent with an attempt to communicate

that even the probability of a hung jury would be insufficient.

Whether or not a failure to make a timely objection could be considered a waiver, it is at least clear that the defendant's failure to seek timely clarification is responsible for any resultant ambiguity in this language. In addition to the fact that the crimes of which the defendant was convicted are not clearly differentiable, and the fact that the defendant has made no attempt to differentiate them for purposes of his motion, we believe the district court's ruling is fairly understood to intend only that a showing of probable acquittal is required.

IV.

Because the district court heard and considered all available evidence bearing on the credibility of the recanting witness and was still not reasonably convinced that the victim's testimony at trial was probably false, it did not abuse its discretion in denying the defendant's motion for new trial. The judgment of the court of appeals is therefore affirmed.

Justice BENDER dissents, and Chief Justice MULLARKEY and Justice MARTINEZ join in the dissent.

Justice BENDER dissents.

The majority holds that a recantation "can justify a new trial only to the extent that it not only impeaches the prior testimony but does so by contradicting it with a different and more credible

account." Maj. op. at 708. Such a conclusion overstates our precedent. The appropriate standard that should be applied here is that newly discovered impeachment evidence is sufficient to justify a new trial when it, taken together with all of the other evidence for and against the defendant, is of such consequence that it probably would result in an acquittal on retrial. In this case, the parties agree that there was no evidence other than the victim's trial testimony to support the defendant's conviction. The trial court found that the victim's trial testimony had "substantial credibility issues." Given this set of circumstances, I conclude that the addition of the victim's recantation would bolster the defense argument for reasonable doubt and probably result in an acquittal on retrial. In my view, justice requires that the defendant receive a new trial. Hence, I respectfully dissent.

Post-trial recantation evidence should be viewed with skepticism. *Blass v. People,* 79 Colo. 555, 557–58, 247 P. 177, 178 (1926). For this reason, evidence serving "merely" to impeach or to cast doubt upon a witness's testimony is an inadequate ground for a new trial. *People v. Scheidt,* 187 Colo. 20, 22, 528 P.2d 232, 233 (1974); *Digiallonardo v. People,* 175 Colo. 560, 567, 488 P.2d 1109, 1113 (1971). The majority states that new impeachment evidence can justify a new trial only when it is of such significance that it would probably bring about an acquittal before a new jury. Maj. op. at 707 (citing *Whipp v. People,* 78 Colo. 134, 141, 241 P. 534, 537 (1925)). While I agree with this reading of our case law, I disagree with the majority's further statement that unless a witness's recantation is more believable

than her trial testimony, it falls into a subset of impeachment evidence that would not here, and perhaps could not ever, bring about an acquittal. Maj. op. at 708–09. This holding fails to account for cases in which the newly discovered impeachment evidence adds more support to an already viable defense case for reasonable doubt. In these cases, perhaps rare, the new evidence does much more than cast doubt upon a witness's credibility—it clearly could and probably would change the outcome of the case.

The facts of this case demonstrate how a witness recantation that is found no more believable than the initial trial testimony can nonetheless result in a probable acquittal. The parties agree that the jury's verdict came down to whether it believed the victim's trial testimony. Citing the jury's decision to convict the defendant on certain counts, but acquit him on others, the trial court concluded that some of the victim's trial testimony was "at least unpersuasive if not unbelievable," and that she had "substantial credibility issues." The victim's subsequent recantation provides an even greater basis to doubt the veracity of her initial testimony. Because virtually no evidence other than the victim's trial testimony supported the defendant's conviction, her full recantation of all the evidence implicating the defendant necessitates the conclusion that an acquittal—or finding by the jury of reasonable doubt as to the defendant's guilt—is at least probable.

While our cases state that "mere impeachment" cannot justify a new trial, I believe this statement expresses the idea that impeachment evidence may be insignificant or highly significant to the outcome

of a case depending on the nature of the impeachment and the particular facts of the case. In those cases where the impeachment strikes at the heart of the conviction, there may exist a sufficient basis for a new trial. *See Miller v. People,* 92 Colo. 481, 489–90, 22 P.2d 626, 630 (1933) (endorsing the rule "that newly discovered impeaching evidence would not warrant a new trial, unless it clearly appears that it would probably change the result in case of a new trial") (internal quotations omitted). Such a reading is consistent with *People v. Gutierrez,* 622 P.2d 547 (Colo.1981), where we enumerated the modern standard for motions for new trials based on newly discovered evidence. There, we framed the relevant inquiry as, whether, "[b]ased on review of all the available evidence," the new evidence would probably produce an acquittal. *Id.* at 560. While the trial judge may apply her own experience in weighing the objective believability of the witness's recantation, she must do so by evaluating the probable impact of the recantation on the prosecution's case as a whole.

The majority relies upon *People v. Schneider,* 25 P.3d 755 (Colo.2001), for the proposition that a trial court must be "reasonably satisfied" that a reasonable person would probably believe the witness's new version of the events in order to grant a new trial. Maj. op. at 707–08. This reliance is misplaced. In *Schneider,* we examined the trial court's responsibility to evaluate a witness's credibility when a defendant requests to withdraw a guilty plea on the basis of a recantation. 25 P.3d at 761–62. A person who "voluntarily and knowingly enters a guilty plea accepting responsibility for the

charges is properly held to a higher burden in demonstrating to the court that newly discovered evidence should allow him to withdraw that plea." *Id.* at 761. In addition to requiring that a defendant seeking to vacate a guilty plea demonstrate that the new evidence probably would result in an acquittal, we also required that the trial court determine that the charges filed against the defendant were "actually false and unfounded." *Id.* at 762. Accordingly, we required that a trial court be "reasonably satisfied" that the earlier accusations were untrue. *Id.*

In contrast to the guilty plea circumstances in *Schneider, Gutierrez* requires that the trial court need only find that the recantation, when considered with all the other evidence, will generate enough doubt to probably produce an acquittal. 622 P.2d at 560. In the circumstances of a conviction after a trial, the trial court need not be reasonably satisfied that the trial testimony is untrue, or even probably untrue. Even if the trial court had found the victim's recantation *less* credible than her trial testimony, it would not necessarily mean that an acquittal was not probable. *See State v. McCallum,* 208 Wis.2d 463, 561 N.W.2d 707, 711 (1997) ("It does not necessarily follow that a finding [that a recantation is] 'less credible' must lead to a conclusion of 'no reasonable probability of a different outcome.' Less credible is far from incredible.").

The majority's new test for recantations is also problematic because it overlooks the weight we are required to give to prior inconsistent statements as compared to other forms of impeachment. Although a witness's recantation has the effect of impeaching

her prior testimony, the evidence here—a complete repudiation of her previous testimony implicating the defendant—constitutes a prior inconsistent statement which is admissible as substantive evidence. § 16–10–201, C.R.S. (2008) (prior inconsistent statements made at trial are admitted as substantive evidence); *see also People v. Tomey,* 969 P.2d 785, 787 (Colo.App.1998) (noting that a hearsay statement allegedly made by the victim to an inmate that was inconsistent with the victim's former testimony would be admitted on retrial as substantive evidence under section 16–10–201, C.R.S.). As the Tenth Circuit has explained, "when a witness recants his testimony, presumably he will testify to the new version at a new trial. Thus, the recantation is substantive evidence." *United States v. Ramsey,* 726 F.2d 601, 604 (10th Cir.1984). Hence, I conclude that a recantation, depending on the circumstances and nature of the recantation and corroborating evidence, may constitute much more than "mere" impeachment.

In sum, I believe that the trial court abused its discretion in denying the defendant a new trial based on the victim's recantation. The trial court found that the jury's verdict came down to whether it believed the alleged victim's testimony. The trial court found that some of the victim's allegations generated reasonable doubt in the jury's mind. The victim's subsequent recantation provides an even greater basis to doubt the truthfulness of the initial allegations which the jury believed. The victim's suspect initial testimony, when coupled with the lack of corroborative evidence in this case, demonstrates that this key witness's recantation would probably

bring about an acquittal. Thus, justice requires a new trial.

Lastly, I note that what the trial court meant when it stated that the newly discovered evidence must produce a "complete acquittal" at a new trial is not relevant to the decision in this case. Nonetheless, the majority suggests in dicta that the defendant may have waived the right to challenge this order on the grounds that the trial court misconstrued the correct legal standard because the defendant did not seek timely clarification as to what the trial court meant by the term "complete acquittal." Maj. op. at 709. This statement appears without citation support, and my research disclosed no Colorado case requiring defense counsel to seek clarification of a trial court's denial of a motion for a new trial before challenging it on appeal.

For these reasons, I dissent.

I am authorized to state that Chief Justice MULLARKEY and Justice MARTINEZ join in this dissent.

APPENDIX J

COLORADO COURT OF APPEALS

Court of Appeals No.: 02CA1358
Arapahoe County District Court No. 01CR505
Honorable John P. Leopold, Judge

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

CHARLES A. FARRAR,
Defendant-Appellant.

JUDGMENT AND SENTENCE AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by: JUDGE MÁRQUEZ
Taubman and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: October 4, 2007

John W. Suthers, Attorney General, Patricia R. Van Horn, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Mark G. Walta, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

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Defendant, Charles A. Farrar, appeals the judgment of conviction entered on jury verdicts finding him guilty of twenty-two counts involving sexual assault on a child. He also appeals the sentence imposed. We affirm in part, reverse in part, and remand with directions.

Defendant was tried on twenty-eight counts involving his stepdaughter: sexual assault on a child – pattern of abuse (counts 1-10); sexual assault on a child under the age of fifteen by one in a position of trust (counts 11-20); sexual assault on a child between the ages of fifteen and eighteen by one in a position of trust – pattern of abuse (count 21); sexual exploitation of a child – inducement or enticement (count 22); inducement of child prostitution (count 23); sexual assault on a child – force (counts 2425); soliciting for child prostitution (count 26); child abuse resulting in injury – criminal negligence (count 27); and violent crime – sexual assault (count 29). The jury found him guilty of all counts except counts 4 ("spring fling" incident), 14 ("spring fling" incident), 22, 23, 24, and 26.

Defendant challenges certain rulings on the admissibility of evidence, the scope of cross-examination, jury instructions, variances in the

information, and his motion for a new trial, as well as his consecutive sentencing.

I. Prior Sexual Misconduct

Defendant contends that the trial court erred in admitting testimony of prior alleged acts of sexual misconduct. We disagree.

Section 16-10-301, C.R.S. 2007, and CRE 404(b) govern the admission of similar transaction evidence in sexual offense cases. *People v. Underwood*, 53 P.3d 765, 769 (Colo. App. 2002). Section 16-10-301(3), C.R.S. 2007, allows the introduction of evidence of other acts of the defendant for purposes of refuting the defense of recent fabrication; showing a common plan, scheme, design, or modus operandi, regardless of whether identity is at issue and whether the charged offense has a close nexus as part of a unified transaction to the other act; or showing motive, opportunity, or intent. CRE 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

When the prosecution intends to introduce such evidence, the trial court shall determine by a preponderance of the evidence whether the other act occurred and whether the purpose is proper. The trial court may determine the admissibility of other acts by an offer of proof. The court shall instruct the jury as to the limited purpose or purposes for which

the evidence is admitted and for which the jury may consider it. § 16-10-301(4)(b), (c), (d); *People v. Garner*, 806 P.2d 366, 373 (Colo. 1991) (a trial court must be satisfied by a preponderance of the evidence that the prior bad act occurred and that the defendant committed the act); *People v. Underwood*, 53 P.3d at 769. To introduce evidence of other sexual acts committed by the defendant, the prosecution also must satisfy CRE 404(b) and the four-part test established in *People v. Spoto*, 795 P.2d 1314 (Colo. 1990). *People v. Underwood*, 53 P.3d at 769.

The *Spoto* test requires the trial court to determine (1) whether the proffered evidence relates to a material fact; (2) whether the evidence is logically relevant; (3) whether the logical relevance is independent of the intermediate inference, prohibited by CRE 404(b), that the defendant has a bad character and acted in conformity with it; and (4) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *People v. Spoto*, 795 P.2d at 1318.

For such evidence to be admissible, it is not essential that the crimes replicate each other, but the trial court should consider the remoteness of the other crime evidence to the crime charged. *People v. Groves*, 854 P.2d 1310, 1314 (Colo. App. 1992). Whether to admit such evidence is within the sound discretion of the trial court, and its decision will be upheld absent an abuse of discretion. *People v. Underwood*, 53 P.3d at 769.

At issue here is the testimony of defendant's two stepdaughters from a previous marriage. At a motions hearing and at trial, the two girls testified as to prior sexual contact with defendant while he

was living with them and their mother. Both of the girls also testified as to threats made by defendant to get them to perform the acts.

The trial court limited the use of this evidence to refuting allegations of recent fabrication and showing modus operandi, opportunity, preparation, knowledge, and motive. Contrary to defendant's contention that none of these purposes was proper given the prosecution's use of the evidence in its closing arguments, we note that the prosecution specifically addressed recent fabrication, a defense asserted here. *See, e.g.*, *People v. Mata*, 56 P.3d 1169, 1173 (Colo. App. 2002).

In *People v. Duncan*, 33 P.3d 1180, 1184 (Colo. App. 2001), a division of this court found that similar transaction evidence "served to rebut defendant's claim that the victim was lying. To the extent that this defense was labeled by the prosecution and the trial court as 'recent fabrication,' we note that there was no objection by defendant to this characterization." *Id*. (citation omitted). Defendant here relies on the concurrence in *Duncan*, which noted that there was no delay in reporting the alleged abuse, and in fact the victim reported the incident immediately in the presence of the defendant. *Id*. at 1186. However, the concurrence did not state that delay in reporting would preclude the admission of similar transaction evidence.

Here, the victim delayed in reporting the multiple incidents of abuse. However, the court, based on record support, applied the tests required by section 16-10-301(4)(b), (c), and (d); CRE 404(b); and *Spoto*. Thus, we conclude that the trial court properly

admitted evidence of prior bad acts for the purpose of rebutting a defense of recent fabrication.

Applying *Spoto* and *Garner*, the trial court found that the testimony had a valid purpose, was relevant to a material aspect of the case, and satisfied CRE 404(b). In addition, the trial court recognized the potential for unfair prejudice and limited the number of witnesses who could testify as to defendant's prior sexual misconduct. Finally, the trial court gave limiting instructions to the jury at the beginning and end of each witness's testimony.

While the trial court did not explicitly find that the prior acts more likely than not occurred and that defendant committed those acts, the lack of such explicit findings does not constitute reversible error as argued by defendant. In admitting the evidence, the trial court implicitly determined that it was satisfied by a preponderance of the evidence that the prior acts occurred and that defendant committed those acts. *See People v. Warren*, 55 P.3d 809, 814 (Colo. App. 2002).

Thus, admission of the testimony about defendant's prior sexual misconduct was not an abuse of discretion.

II. Opinion Testimony

We also disagree with defendant's contention that the trial court erred in admitting the testimony of a forensic interviewer who had not been qualified as an expert witness and whose testimony merely bolstered the victim's credibility.

The interviewer testified about her observations concerning children who were victims of sexual abuse. Defendant made several objections during

direct examination, but, contrary to his assertion, he did not object to the qualification of this testimony as lay testimony. Two objections based on the questions calling for opinion testimony were sustained. One "narrative" objection and one hearsay objection were overruled. Defendant made three relevancy objections. The first was overruled, at which point the trial court stated, "The witness is not qualified as an expert; however, the court finds that this testimony is rationally based upon her perception and it would be helpful to the trier of fact with a clear understanding of her testimony. Accordingly, Rule 701 is satisfied." The second relevancy objection was sustained, and the third was overruled. Defendant cross-examined the interviewer.

Because defendant's objections at trial were not based on the trial court's failure to qualify the interviewer as an expert, we review for plain error. *People v. Ramirez*, 1 P.3d 223, 227 (Colo. App. 1999). Plain error addresses error that is both obvious and substantial. It is error that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *People v. Miller*, 113 P.3d 743, 750 (Colo. 2005).

Under CRE 701, a lay witness may testify in the form of opinions or inferences if the testimony

> is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other

> specialized knowledge within the scope of Rule 702.

CRE 702 provides that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto in the form of an opinion or otherwise."

Relying on *People v. Stewart*, 55 P.3d 107, 123 n.10 (Colo. 2002), defendant argues that the language in CRE 701(c) was a clarifying amendment not in effect at the time of trial, but should be considered by this court in addressing this issue. The People do not disagree. We agree with defendant and consider the amendment in making our determination.

The critical inquiry in determining whether a witness may testify as a lay witness or must be qualified as an expert pursuant to CRE 702 is "whether [the] witness's testimony is based upon 'specialized knowledge.'" *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005). So long as the witness's inferences or opinions do not require any specialized knowledge and could be reached by an ordinary person, the witness may testify as a lay witness. *Id*. In determining whether the opinion could be reached by an ordinary person, the court may consider whether it results from a process of reasoning that is familiar in everyday life or whether it can be mastered only by specialists in the field. *Id*. at 983. Thus, the basis for admission of expert testimony under CRE 702 is "not that the witness possesses a skill in a particular field but that 'the witness can offer assistance on a matter not within the knowledge or common experience of people of

ordinary intelligence.'" *People v. Souva*, 141 P.3d 845, 850 (Colo. App. 2005) (quoting *Scognamillo v. Olsen*, 795 P.2d 1357, 1361-62 (Colo. App. 1997)) (allowing lay testimony from a certified addictions counselor regarding whether defendant was under the influence of drugs).

Testimony about the range of responses and demeanor demonstrated by child sexual assault victims is relevant and helpful to the jury in assessing the victim's testimony and statements. *People v. Rogers*, 800 P.2d 1327, 1330 (Colo. App. 1990). It will help the jury evaluate the credibility of the child and understand the victim's delay in reporting the incident. *People v. Koon*, 713 P.2d 410, 411 (Colo. App. 1985). While defendant argues that *People v. Rogers* should not be relied on because it was decided before the amendment to CRE 701, we note that the decision in *Rogers* as to the admission of the officer's testimony was limited to relevance and helpfulness, with no objection having been made to the qualification of his testimony as lay testimony. We thus limit our reliance on this case to these issues.

The interviewer here testified that she had interviewed approximately 500 children, most having been victims of sexual abuse. Based on her observations during these interviews and the responses given by the children, she testified to the following: children disclose abuse in a variety of ways; children can endure the abuse for months or years before disclosing it; there are several reasons children do not disclose the abuse; children subject to numerous incidents cannot disclose every detail; many children who suffer abuse experience

nightmares; children compartmentalize the abuse so that they can continue in their everyday lives; children have a wide range of feelings toward the perpetrators of the abuse; and children exhibit a wide variety of demeanors when being interviewed.

The interviewer's testimony related her perceptions about how children who are sex abuse victims behave. *See People v. Rincon*, 140 P.3d at 983 (although officer had experience with photo arrays that ordinary citizens would not have had, opinion expressed by officer could be reached by an ordinary person; observation that witnesses are sometimes unable to pick person out of photo array when an incident occurred quickly or when some features are not depicted in the photo depends not on demonstrable expertise but on common sense and logic, a process of reasoning familiar in everyday life); *People v. Souva*, 141 P.3d at 850 (certification as addictions counselor did not cause testimony regarding defendant's drug intoxication to become expert testimony); *People v. Rogers*, 800 P.2d at 1330 (trial court did not err in allowing detective to testify pursuant to CRE 701 that in his experience child sexual assault victims do not report an assault immediately and their emotional state could range from calm and matter-of-fact to extremely upset); *People v. Farley*, 712 P.2d 1116, 1119-20 (Colo. App. 1985) (when witness has personally observed another and summarizes his or her sensory perceptions, the witness's conclusions are admissible), *aff'd*, 746 P.2d 956 (Colo. 1987).

The interviewer's testimony describing the variety of ways children disclose abuse and their behavior when discussing their abuse was relevant and

helpful to the jury in assessing the victim's testimony and statements here. Thus, admission of the testimony as lay testimony pursuant to CRE 701 was not error, much less plain error.

III. Newspaper Articles

We reject defendant's contention that the trial court erred when it allowed the prosecution to use irrelevant newspaper articles to bolster the victim's credibility.

Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. CRE 401. Relevant evidence is generally admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. CRE 402, 403.

A reviewing court may not reverse a trial court's decision to admit evidence absent a showing of abuse of discretion. *People v. Welsh*, 80 P.3d 296, 304 (Colo. 2003) (*Welsh I*). An abuse of discretion occurs only when a trial court's ruling is manifestly arbitrary, unreasonable, or unfair. *People v. Rath*, 44 P.3d 1033, 1043 (Colo. 2002).

Here, the victim was called as a witness by the prosecution. Thus, evidence pertaining to her credibility related to a material fact and was relevant. *See People v. Harris*, 892 P.2d 378, 382 (Colo. App. 1994).

Because the victim's accusations were not corroborated by eyewitnesses, her credibility was at issue. On cross-examination, defendant questioned

her about why she did not include information about the sexual assaults in a letter to her grandparents, and in response the victim expressed concerns about mail tampering occurring at the time she wrote the letters. She expressed these concerns again on redirect examination when asked about letters to her grandparents and her aunt.

In arguments outside of the hearing of the jury, the prosecution sought the admission of certain newspaper articles about mail tampering that was occurring during the same period the sexual assaults allegedly occurred and the victim wrote the letters. The prosecution noted that the victim could not testify they were the exact articles she had read, but that they were of the same type and were offered to corroborate her statements and show that her fear of mail tampering was well founded. Defendant objected.

The trial court did not admit the contents of the articles as exhibits for the jury to read, noting that the contents concerned collateral issues. It nevertheless allowed the prosecution to ask the victim about the titles and dates of the articles and whether they were of the type that she was talking about. The court specifically found that this information supported the prosecution's case.

Rebuttal evidence is used to contradict the adverse party's case and is admitted at the trial court's discretion. *Welsh I*, 80 P.3d at 304. It includes "any competent evidence which explains, refutes, counteracts, or disproves the evidence put on by the other party, even if the rebuttal evidence also tends to support the party's case-in-chief." *Id*. (quoting *People v. Rowerdink*, 756 P.2d 986, 994 (Colo. 1988)).

We conclude that the trial court properly balanced the probative value against the danger of any unfair prejudice or confusion of the issues, allowed the victim to testify only as to the titles and dates of the articles, and did not abuse its discretion in admitting this evidence.

IV. Diary Entries

We also are not persuaded by defendant's contention that the trial court erred in precluding him from cross-examining the victim about the substance of certain of her diary entries.

The right of a criminal defendant to confront witnesses is guaranteed by the United States Constitution and requires that the defendant be given an opportunity for effective cross-examination. *Merritt v. People*, 842 P.2d 162, 165-66 (Colo. 1992). This does not mean, however, that a defendant is to be allowed unlimited cross-examination. *Id*. at 166. CRE 608(b) gives the trial court discretion to allow inquiry on cross-examination concerning specific instances of the witness's conduct which relate to the witness's character for truthfulness or untruthfulness.

The trial court has wide latitude to place reasonable limits on cross-examination based on concerns about such factors as harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that would be repetitive or only marginally relevant. *People v. Gholston*, 26 P.3d 1, 8 (Colo. App. 2000). An abuse of discretion standard generally applies to limits placed on a defendant's cross-examination, unless the restriction is so severe as to constitute a denial of the

defendant's constitutional right. *Merritt v. People*, 842 P.2d at 166-67.

Here, the prosecution questioned the victim about the diaries she kept during the period of sexual abuse. She testified that she had not written about the abuse because she was "trying to pretend it was not going on" and it was her way of "blocking things out." On cross-examination, when asked why she did not write about the abuse, the victim stated that she did not mention it because she was afraid others were reading her diary and, if they were, it might cause difficulties with her mother and defendant.

Defendant then sought to introduce certain entries made in the victim's diary to show that if she put personal experiences in her diaries, she would also put in allegations of sexual abuse.

The trial court ruled that such entries were inappropriate under CRE 403 and 608. However, defendant was allowed to ask the victim about certain activities described in the diary and problems with telling her parents.

Because the trial court allowed certain types of questioning, it did not so severely restrict defendant's questioning about the diary entries as to deny defendant his constitutional right to cross-examination, and we thus review the court's ruling under an abuse of discretion standard.

Defendant's theory -- that because the victim wrote about certain incidents in her diary she would have written about the abuse as well -- is speculative. The trial court found that while truthfulness was a central issue in the case, the personal experiences recorded in the diary which defendant sought to have

admitted were inadmissible under CRE 403 and 608. Because the entries were not related to the abuse and thus were not probative of her truthfulness regarding the abuse, the trial court properly excluded them.

V. Modified Unanimity Instructions

Defendant also contends that the jury's unanimity findings on counts 5 through 10 (sexual assault on a child -- pattern of abuse), and 15 through 20 (sexual assault on a child by one in a position of trust), are legally insufficient, and the modified unanimity instructions given in connection with those counts deprived him of due process of law and his right to a unanimous verdict. We disagree.

A trial court has the duty to instruct the jury correctly on the law applicable to the case. However, the form of the instructions is within that court's sound discretion. Jury instructions framed in the language of the statute are generally sufficient. *People v. Welsh*, ___ P.3d ___, ___ (Colo. App. No. 04CA2581, Apr. 5, 2007) (*Welsh II*).

Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim. § 18-3-405(1), C.R.S. 2007.

When evidence of many acts is presented, any one of which could constitute the offense charged, the trial court must take one of two actions to ensure jury unanimity. The court must either (1) require the prosecution to elect the transaction on which it relies for conviction, or (2) if there is not evidence to differentiate among the acts and there is a

reasonable likelihood that jurors may disagree on the act the defendant committed, instruct the jury that to convict it must unanimously agree that the defendant committed the same act or that the defendant committed all the acts included within the period charged. *People v. Gookins*, 111 P.3d 525, 528 (Colo. App. 2004).

The trial court has discretion to determine whether there is a reasonable likelihood that jurors may disagree on which acts the defendant committed. *Thomas v. People*, 803 P.2d 144, 154 (Colo. 1990).

Because defendant did not object to the instructions at trial, we may reverse only for plain error. *See People v. Miller*, 113 P.3d at 749. In the context of jury instructions, plain error must be both obvious and substantial. It will be found only if the defendant shows that the instruction affected a substantial right and that there is a reasonable possibility that the error contributed to the conviction. Failure to instruct the jury properly does not constitute plain error if the relevant instruction, read in conjunction with other instructions, adequately informs the jury of the law. *Welsh II*, ___ P.3d at ___.

Subject to a single exception not applicable here, factually inconsistent verdicts of guilt and acquittal are not prohibited and do not constitute grounds for reversal. *See Candelaria v. People*, 148 P.3d 178, 182 (Colo. 2006); *People v. Hoefer*, 961 P.2d 563, 567 (Colo. App. 1998) (inconsistent verdicts of guilt and acquittal are forbidden only where, based on the same evidence, a defendant is acquitted of a substantive offense and convicted of conspiracy to commit that same offense).

A. Insufficient Evidence for Findings

Defendant contends that because the jury found him not guilty of counts 4 ("spring fling" incident), 14 ("spring fling" incident), and 22 (sexual exploitation), which were alleged to have occurred between November 1, 1995 and November 27, 1999, the jury's findings that he "committed all of the acts of sexual contact described between November 1, 1995, and November 27, 1999" necessarily rests on insufficient evidence. We reject this contention.

Here, the prosecution presented evidence of sexual acts by defendant against the victim between November 1, 1995 and November 17, 1999 sufficient to convict him of counts 5 through 10 (pattern of abuse) and 15 through 20 (position of trust). Sexual contact was the only disputed element of sexual assault. Because there was evidence of separate incidents occurring at least twice a week for four years, there was sufficient evidence to support all these counts. *See, e.g.*, *People v. Hansen*, 920 P.2d 831, 836 (Colo. App. 1995) (although a jury may not be able to distinguish readily among the various incidents, it is capable of unanimously agreeing that they took place in the general number and manner described).

B. Jury Confusion

Defendant also asserts that this case did not require modified unanimity instructions, and that the trial court confused the jury by instructing it to "determine if any or all acts occurred beyond a reasonable doubt." We reject this assertion.

Here, the relevant jury instructions read:

> The elements of the crime of Sexual Assault on a Child are that the defendant:
>
> . . .
>
> 3. knowingly,
>
> a. subjected another not his or her spouse,
>
> b. to any sexual contact, and
>
> 4. that person was less than fifteen years of age, and
>
> 5. the defendant was at least four years older than that person,
>
> 6. at the time of the commission of the act,
>
> 7. and the act was part of a pattern of sexual abuse,

and

> The elements of the crime of Sexual Assault on a Child by One in a Position of Trust are that the defendant:
>
> . . .
>
> 3. knowingly,
>
> a. subjected another not his or her spouse,
>
> b. to any sexual contact, and
>
> 4. that person was less than fifteen years of age, and
>
> 5. the defendant was in a position of trust with respect to the victim.

For counts 5 through 10 and 15 through 20, the jury instructions also included the following: "After considering all of the evidence, if you decide the prosecution has proven each of the elements beyond

a reasonable doubt you should find the defendant guilty of [the specified crime]."

The verdict forms for counts 5 through 10 (pattern of abuse) provided the jury the following choices:

> [ ] We, the jury, unanimously find, beyond a reasonable doubt that the defendant committed all of the acts of sexual contact described by the evidence between November 1, 1995 and November 19, 1999
>
> OR
>
> [ ] We, the jury, unanimously find, beyond a reasonable doubt, that, as to this count, the defendant committed the same act of Sexual Assault on a Child – Pattern with the victim described by the evidence between November 1, 1995 and November 27, 1999. The jurors unanimously agree, beyond a reasonable doubt, that this act is a separate and distinct act from any other act for which we have found defendant guilty of Sexual Assault on a Child – Pattern as described in counts one through ten.

The verdict forms for counts 15 through 20 (position of trust) similarly charged the jury.

The trial court did not abuse its discretion in finding a reasonable likelihood that the jurors could disagree as to whether defendant committed the specific acts charged: the first "groping" incident, the first "munching" incident, the first sexual encounter, the "call girl" incident, and the "spring fling" incident. There was testimony of "at least a hundred" sexual encounters within this time period that may have made it difficult for the jury to differentiate

each act. Thus, these jury instructions were warranted.

Defendant also incorrectly asserts that the trial court instructed the jury that for each count, it had to agree unanimously that he committed all the acts allegedly committed during the specified time period. Instead, in Instruction 14, the trial court affirmatively instructed the jury to consider each count separately, stating:

> Each count charges a separate and distinct offense, and the evidence and the law applicable to each count should be considered separately, uninfluenced by your decision as to any other count. The fact that you may find the defendant guilty of one of the offenses charged should not control your verdict as to any other offense charged against the defendant. The defendant may be found guilty or not guilty of any one or all of the offenses charged.

Contrary to defendant's assertion, the trial court did not "exacerbate" any confusion as to the modified instructions. The jury asked a question regarding the jury instructions related to counts 5 through 10: "Are we attempting to determine whether specific acts occurred or whether any and all acts occurred over the 4 year period, even if not at the same time?" The trial court responded, "As to Counts 5-10 (and 15-20) you must determine if any or all acts occurred beyond a reasonable doubt. If you make that determination(s), you must follow the directions in the sections (or interrogatories) for counts 5-10 (and 15-20)." In our view, the trial court simply restated what the jury instructions said and, in any event,

properly referred the jurors to the verdict forms and did not change their wording.

VI. "Ten Years Prior" Language

Defendant next contends that the trial court deprived him of his state and federal due process rights when it failed to instruct the jury that it would have to unanimously find that the pattern incidents of abuse relied upon to support counts 1 through 10 and 21 had to occur within ten years prior to the predicate acts associated with each count. We disagree.

Because defendant did not object at trial to this error in the instructions, our review is for plain error. *See People v. Miller*, 113 P.3d at 750.

Sexual assault on a child is a class three felony if the "actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section." § 18-3-405(2)(d), C.R.S. 2007. "Pattern of sexual abuse" is defined as "the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim." § 18-3-401(2.5), C.R.S. 2007.

A pattern of sexual abuse is a sentence enhancement factor that, like the substantive predicate offense, must be proved beyond a reasonable doubt. *People v. Kyle*, 111 P.3d 491, 501 (Colo. App. 2004); *see* § 18-3-405(2)(d).

A pattern of abuse is established where there is sufficient proof that the defendant committed at least two discrete acts of sexual contact against the same child within a ten-year period and within the period alleged in the charging document. Both the predicate act and the earlier pattern act or acts may

occur within the period alleged in the pattern of sexual assault count of the charging document. *People v. Honeysette*, 53 P.3d 714, 717-18 (Colo. App. 2002).

The failure to include language requiring the jury to find that the act of sexual contact establishing the pattern occurred within ten years prior to the predicate act does not constitute plain error where the period of abuse alleged was less than ten years. When such a period is less than ten years and the jury is given a unanimity instruction, it is impossible for the jury to find a defendant guilty of the pattern of abuse enhancer without finding that the defendant committed at least two separate acts of sexual contact upon the same victim within the period alleged in the charging document. *People v. Kyle*, 111 P.3d at 501.

Here, the period alleged was between November 1, 1995 and November 27, 1999, which is less than ten years. The trial court provided the proper definition of a pattern of sexual abuse, but gave a modified unanimity instruction without referring to the specified ten-year period. However, because the jury was instructed that it had to find at least two acts occurring during a period of less than ten years and that its finding had to be unanimous as to those specific acts, the failure to include the additional language in the instruction cannot amount to plain error.

VII. "Ten Years Prior" Findings

Nevertheless, we agree with defendant's contention that his conviction on count 1, sexual assault on a child – pattern of abuse, is constitutionally infirm because of insufficient evidence. He specifically

asserts that there was no evidence of any incident of sexual abuse committed within ten years prior to the predicate act.

As noted above, because defendant did not object at trial to this error in the instructions, our review is for plain error. *See People v. Miller*, 113 P.3d at 750.

Here, defendant was found guilty of counts 1, 2, and 3 of sexual assault on a child – pattern of abuse. These counts were based on specific incidents: count 1 (first "groping" incident), count 2 (first "munching" incident), and count 3 (first intercourse incident). The victim testified that the first incident of sexual abuse occurred in November 1995, the groping incident charged in count 1. There was extensive testimony as to numerous sexual assaults occurring from late November 1995 to November 1999. However, we have not found any evidence in the record of another act of sexual abuse within ten years *prior* to the first incident. Therefore, the predicate act charged in count 1 cannot be a predicate act of abuse to support the sentence enhancement of a pattern of sexual abuse under section 18-3-405(2)(d). *See People v. Brown*, 70 P.3d 489, 493 (Colo. App. 2002).

Nevertheless, the reversal of a sentence enhancer on appeal does not affect the validity of the underlying conviction for sexual assault on a child. *Id*. Here, the trial court noted the error, removed the pattern enhancer on this count, and properly sentenced defendant to a class four, rather than a class three, felony. Accordingly, on remand, the trial court must correct the mittimus to reflect that defendant was convicted of sexual assault on a child,

a class four felony. Our conclusion does not affect the validity of the other pattern of abuse convictions.

VIII. Verdict Forms

Defendant next contends that the verdict forms associated with counts 1 through 10 are inconsistent with this court's holding in *People v. Brown*. We agree with respect to count 5, but not as to the other counts.

In *People v. Brown*, a division of this court held that jury verdict forms should not include the word "pattern" because a pattern offense is a sentence enhancer and not a separate offense. The division also held that jury verdict forms should require the jurors to determine whether the defendant is guilty of sexual assault on a child and then interrogatories should be used to determine whether the pattern of sexual abuse allegations have been established. The division in *People v. Brown* nevertheless concluded that the mistake was not plain error because there was no reasonable possibility that the error contributed to the defendant's convictions. *People v. Brown*, 70 P.3d at 492.

Here, the jury verdict forms for counts 1 through 10 included the word "pattern." Because defendant did not object to the jury instructions, we review for plain error.

Instruction 24 stated, "Your verdict must be unanimous." Instruction 15 stated, in part, that "the act was part of a pattern of sexual abuse" was an element. Instruction 23 defined pattern of sexual abuse as the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

As noted above, count 1 is remanded for correction of the mittimus, but the underlying conviction of sexual assault on a child stands. As to counts 2 through 5, those associated with specifically named incidents of abuse, we conclude that the inclusion of the term "pattern" in the instruction was error but does not require reversal. Because there was evidence from which the jury could unanimously find that defendant committed at least two incidents of sexual assault within that period, there is no reasonable possibility that the error contributed to defendant's convictions.

However, one of the pattern of abuse counts in counts 5 through 10 must be vacated. These counts did not allege specific instances of abuse and so did not specify a particular predicate act to support the pattern sentencing enhancement. At least one of these acts must have been the predicate act for the other counts of unspecified acts of abuse.

Based on the victim's testimony, there was sufficient evidence to support the underlying crime of sexual assault on a child. Accordingly, the judgment and sentence as to count 5 must be reversed, and the case must be remanded to correct the mittimus to reflect that defendant was convicted of sexual assault on a child, a class four felony, and to resentence him on that count. Our conclusion does not affect the validity of the judgment and sentences as to the other pattern of abuse counts.

IX. Variances from the Information

We are not persuaded by defendant's challenges to alleged variances from the information.

An information is sufficient if it advises the defendant of the charges the defendant is facing so that the defendant can adequately defend and be protected from further prosecution for the same offense. The prosecution cannot constitutionally require a defendant to answer a charge not contained in the charging document. *People v. Rodriguez*, 914 P.2d 230, 256-57 (Colo. 1996).

Two types of variance may arise at trial between the offense in the charging document and the offense of which a defendant is convicted. A constructive amendment occurs when the evidence at trial changes an element of the charged offense and alters the substance of the charging document. A simple variance occurs when the charged elements are unchanged, but the evidence at trial proves facts materially different from those alleged. *People v. Huynh*, 98 P.3d 907, 911 (Colo. App. 2004).

While a constructive amendment to the charges is reversible per se, a simple variance does not require reversal unless it prejudices the defendant's substantive rights. Generally, a variance between the specific date alleged in the charging document and that which is proved at trial is not fatal. *Id*.

We consider the surrounding circumstances when determining whether a simple variance from a charging document caused prejudice. *People v. Pahl*, ___ P.3d ___, ___ (Colo. App. No. 01CA2020, Aug. 24, 2006).

A. Count 21

Defendant contends that the jury instruction and verdict slip associated with count 21 collectively served to deprive him of due process of law because

they effectively described an alleged offense different from that charged in the information. We disagree.

Count 21 of the information alleged that between November 28, 1999 and March 1, 2000 defendant subjected the victim, "a child 15 years of age or older," to sexual contact, and defendant was in a position of trust in violation of section 18-3-405.3, C.R.S. 2007, as part of a pattern of abuse.

However, the jury instruction relating to this count, Instruction 16, stated the alleged victim had to be *less than fifteen years of age* at the time of the assault. This element regarding the age of the victim at the time of the alleged abuse varied from the statutory requirement of count 21. The age requirement to convict defendant of sexual assault on a child by one in a position of trust pursuant to section 18-3-405.3 is less than fifteen for a class three felony and fifteen but less than eighteen years of age for a class four felony.

The verdict form for count 21 indicates that the jury unanimously found that defendant committed the act after November 1, 1998. Although this is not a date alleged in count 21, if the actor commits the offense as part of a pattern of sexual abuse, it is a class three felony. § 18-3-405.3(2)(b), C.R.S. 2007. Under this statute, no specific date need be alleged for the pattern of sexual abuse.

Here, count 21 also alleged that the act occurred as a pattern of abuse. Thus, for that reason, pursuant to the statute, it is also a class three felony. As a result, the trial court correctly entered a judgment of conviction on count 21 as a class three felony.

Because defendant was convicted of a pattern of

abuse, any discrepancy in the dates of the commission of the abuse is not fatal. Defendant was on notice that this was a pattern offense, and he was not denied any substantive rights. There is also no evidence that his defense would have changed based on the age of the victim at the time of the alleged incidents. Therefore, defendant was not prejudiced by the error in the dates in the instruction.

B. Count 25

Defendant contends that his conviction on count 25 must be deemed constitutionally infirm because of an erroneous elemental instruction on the charge and insufficient evidence to support the jury's verdict. We disagree.

Because defendant did not object to this instruction at trial, we review for plain error. *See People v. Miller*, 113 P.3d at 750.

Count 25 charged defendant with sexual assault on a child using force pursuant to section 18-3-405, C.R.S. 2007, which provides as relevant here:

> (1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.
>
> (2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:
>
> (a) The actor applies force against the victim in order to accomplish or facilitate sexual contact . . . .

The factual basis for this count was the first intercourse incident. The victim testified that

another person restrained her while defendant assaulted her. The prosecution argued at trial that the other person's restraint constituted the force required by the statute for defendant's conviction.

Defendant now contends that the statute requires that he personally apply the force. In his view, because the prosecutor argued that another person applied physical force by holding down the victim, Instruction 19 was a constructive variance of the information in that it included as an element, "defendant caused submission of [the victim] by the actual application of the physical force."

The issue turns upon a question of statutory interpretation, which is a question of law subject to de novo review. When the statutory language is clear and unambiguous, there is no need to resort to interpretive rules and statutory construction. *Jones v. Cox*, 828 P.2d 218, 221 (Colo. 1992). If there is any ambiguity in the statute, courts should give effect to all parts of the statute and avoid interpretations that would render a part meaningless. *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990). Courts must not follow a construction that would lead to an absurd result. *Town of Erie v. Eason*, 18 P.3d 1271, 1276 (Colo. 2001).

We conclude that the focus of the statute is whether the defendant used force to accomplish the submission, and not whether the defendant personally applied the force. Nothing in the plain language of the statute suggests that a perpetrator cannot use an accomplice to "apply force" to a victim. The statute simply states "[t]he actor applies force against the victim in order to accomplish or facilitate sexual contact" and does not require that the

perpetrator of sexual assault personally engage in the act that constitutes force.

In addition, defendant argues that the instruction was a constructive variance of the crime charged because it required the jury to find only that the victim's submission was caused by application of force, not that the force was used to accomplish or facilitate the sexual contact. We reject this argument.

The jury instruction directed the jury to find "defendant caused submission of [the victim] by the actual application of the physical force." Thus, the instruction was not a variance requiring reversal of the conviction on count 25. The meaning of "facilitate" is not defined in the criminal code, and no instruction specifically defined it. *Black's Law Dictionary* 627 (8th ed. 2004) defines "facilitate" to mean "[t]o make the commission of a crime easier." Here, it is clear that causing the submission of the victim facilitates the sexual contact in that it makes it possible for the sexual contact to occur.

Finally, because the instruction was not a constructive variance of the statute and the statute does not require defendant personally to apply force to the victim, there was sufficient evidence to satisfy the statutory requirement.

X. Consecutive Sentencing

Defendant contends that his consecutive sentencing resulted from the trial court's misapprehension of the governing law and violated section 18-1-408(3), C.R.S. 2007, and prohibitions against double jeopardy. We do not agree.

Section 18-1-408(3) provides:

> When two or more offenses are charged as required by subsection (2) of this section and they are supported by identical evidence, the court upon application of the defendant may require the state, at the conclusion of all the evidence, to elect the count upon which the issues shall be tried. If more than one guilty verdict is returned as to any defendant in a prosecution where multiple counts are tried as required by subsection (2) of this section, the sentences imposed shall run concurrently; except that, where multiple victims are involved, the court may, within its discretion, impose consecutive sentences.

A defendant convicted of a class three felony of sexual assault on a child shall be sentenced in accordance with the provisions of the crime of violence sentencing statute. § 18-3-405(3), C.R.S. 2007. Pursuant to that statute, "[a] person convicted of two or more separate crimes of violence arising out of the same incident shall be sentenced for such crimes so that the sentences are served consecutively rather than concurrently." § 18-1.3-406(1), C.R.S. 2007.

The term "incident" refers to "'distinct episodes of sexual assault' that are 'separated by time or an intervening event.'" *People v. Bobrik*, 87 P.3d 865, 872 (Colo. App. 2003) (quoting *People v. Woellhaf*, 87 P.3d 147, 149 (Colo. App. 2002)).

The People concede that counts 2 and 3 do not arise out of the same incident. However, in the alternative, they argue that the trial court exercised its discretion to impose consecutive sentences here.

As to counts 5-10, as we have noted above, the jury was correctly instructed that the counts must not have arisen from the same single act. Accordingly, the trial court did not abuse its discretion when it sentenced defendant to consecutive sentences for these counts. *See Robles v. People*, 811 P.2d 804, 806 (Colo. 1991); *People v. Luu*, 813 P.2d 826, 829 (Colo. App. 1991), *aff'd*, 841 P.2d 271 (Colo. 1992).

XI. Cumulative Error

Defendant also contends that the cumulative effect of the above-claimed errors so prejudiced his right to a fair trial as to require reversal. Although we have identified some errors, we conclude those errors, considered cumulatively, did not substantially prejudice defendant's right to a fair trial. Therefore, defendant is not entitled to reversal on this theory. *See Welsh II*, ___ P.3d at ___; *People v. Rivers*, 727 P.2d 394, 401 (Colo. App. 1986); *People v. Roy*, 723 P.2d 1345 (Colo. 1986).

XII. Motion for New Trial

We disagree as well with defendant's contention that the trial court erred in denying his motion for a new trial based on newly discovered evidence in the form of the victim's recantation.

"Motions for new trial based on newly discovered evidence are viewed with disfavor, and a trial court's denial of such a motion will not be overturned absent a clear abuse of discretion." *People v. Tomey*, 969 P.2d 785, 787 (Colo. App. 1998).

To succeed on a motion for new trial based on newly discovered evidence, the defendant must show the evidence was discovered after trial, the defendant and his or her counsel exercised diligence

to discover all evidence favorable to the defendant, the evidence is material to the issues and not merely impeaching or cumulative, and on retrial the newly discovered evidence would probably produce an acquittal. *People v. Gutierrez*, 622 P.2d 547, 559-60 (Colo. 1981). New evidence is likely to produce an acquittal if, considering it with all the other evidence presented at a new trial, a reasonable jury would probably find a reasonable doubt as to the defendant's guilt. *People v. Tomey*, 969 P.2d at 787; *see also Cheatwood v. People*, 164 Colo. 334, 340-41, 435 P.2d 402, 405 (1967).

Recantation testimony is generally viewed by the court with great suspicion, especially in cases of child sexual abuse, but corroboration by other newly discovered evidence is not required for the recantation to be credible. *People v. Schneider*, 25 P.3d 755, 763 (Colo. 2001). However, a court may apply "the standard of its own experience in evaluating credibility [when] determining whether the new evidence would likely bring about an acquittal at a retrial." *Id*. at 762 n.5.

Here, defendant and the prosecution agreed that the applicable test was the four-prong analysis of *Gutierrez*, and that the first three prongs of the test were fulfilled. Consequently, the only issue is whether the trial court erred in finding that the newly discovered recantation evidence would not likely produce a complete acquittal at a new trial. We perceive no error.

In making its determination, the trial court stated that the victim's recantation would be considered under the totality of the circumstances. The trial court heard testimony from several witnesses,

including the victim, about her recantation and evaluated the testimony of the victim both at the original trial and at the hearing on the motion for a new trial. The court noted the jury's opportunity to weigh the credibility of the victim and other witnesses at trial, the disparities between her recantation and the testimony of other witnesses at the motions hearing, and the fact that the victim did not recant until after the trial. The court considered testimony regarding her motivation for recanting, including her being urged to do so or rewarded by her mother. The court also considered her statement that she was motivated solely by remorse at wrongfully causing an innocent man to spend his life in prison. In addition, the court pointed out testimony regarding entries in her diary that indicated a false recantation, her finding dead bodies, various amorous encounters, and conflicting statements to others.

While noting that certain of the victim's claims were "bizarre" and that the victim "has substantial credibility issues," the court determined that at a new trial, the jury would be entitled to hear her original trial testimony by way of impeachment, or it was possible that she would retreat to her original position.

Because the trial court was in the position to assess the victim's credibility, and because it considered the evidence presented both at trial and at the motions hearing, we conclude that the trial court did not abuse its discretion in finding that the recantation would not have resulted in an acquittal in a new trial.

The judgment of conviction and sentence are reversed as to count 5, and the case is remanded for resentencing on that count and amendment of the mittimus as to counts 1 and 5. In all other respects, the judgment and sentence are affirmed.

JUDGE TAUBMAN and JUDGE J. JONES concur.

APPENDIX K

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

CHARLES ARTHUR FARRAR,

Defendant.

Case Number: 01CR505

Div.: 309

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL PURSUANT TO CRIM. P. 33(C) BASED ON NEWLY-DISCOVERED EVIDENCE

THIS MATTER comes on for the Court's ruling concerning Defendant's Motion for New Trial based on newly discovered evidence (Crim. P. 33). The motion alleges that ___ ___ the named victim, gave false testimony at trial; that the prosecution failed to disclose exculpatory evidence prior to trial (this evidence being Ms. ___ alleged recantation of her testimony to Christine Schober, Esq., one of the two deputy district attorneys who prosecuted this case); and that the prosecution's failure to disclose Ms. ___ recantation, as well as her alleged offering of

perjured testimony, constitute outrageous governmental conduct.

On November 14, 2003, the Court considered Defendant's Motion to Disqualify Office of Arapahoe County District Attorney. The motion was based on Defendant's claim that the District Attorney failed to disclose Ms. ___ alleged recantation. The Motion to Disqualify was supported by affidavits of Ms. ___ and of Craig L. Truman, Esq., defense counsel at trial.

At the conclusion of the November 14, 2003 hearing, the Court found that the affidavits were tantamount to testimony for the limited purpose of resolving the motion. The Court found that, since Ms. ___ alleged that she had recanted to Ms. Schober and that Ms. Schober had not disclosed this information to trial defense counsel, Ms. Schober was an indispensable fact witness for the hearing. In addition, if Ms. ___ allegations were found to be accurate, Ms. Schober committed a serious ethical violation. *See Colo. RPC* 3.4; 3.8. Accordingly, the Court granted Defendant's Motion to Disqualify.

Ultimately, the Office of the District Attorney, Second Judicial District, was appointed as prosecutor for the Crim. P. 33 motion.

The hearing on the substantive motion was held on August 30 and 31, September 16, November 15, 2004 and January 21, 2005. Carlos Samour appeared as prosecutor. Defendant was present in custody, represented by Deputy State Public Defenders Mark Walta and Susan Fisch.

This case is one of the more memorable criminal jury trials at which this Court has presided. The sheer number of allegations and the graphic

description of the alleged acts are extraordinary. The Court has a clear memory of Ms. Brod's testimony at trial and, of course, has had the benefit of her August, 2004 and January, 2005 appearances.

The Court is struck by the similarity in her affect at trial and the post-conviction motion hearing. Although Ms. ___ briefly lost her composure and became teary on August 30, 2004 (*Transcript*: 23), in general, she was an articulate and confident witness at trial and during both of her appearances in this post-conviction hearing (August 30, 2004 and January 21, 2005). Mr. Truman was completely professional but also persistent in his cross-examination. Mr. Samour also was thoroughly professional. His approach was somewhat less persistent than was Mr. Truman's.

Ms. ___ was required to testify about allegations that were, in the first instance, revolting in terms of sexual assault and, in the motions hearing, about alleged conduct by an attorney that, if proven, would constitute unethical, unprofessional and felonious behavior. She stated that she understood the gravity of the allegations she was making.

Ms. ___ consulted about her desire to recant her testimony with Scott Reisch, Esq. She told her mother that she wanted to tell the truth. She stated that she had tried to tell others before her testimony but that she had been "blown off and threatened." The threats, attributed to Ms. Schober, included the prospect of spending the balance of her life in a mental institution or time in jail.

The details of the alleged threats are set forth in her affidavit, People's Exhibit 3. "I told district attorney, Christine Schober, that I would not come

and testify, that the allegations were not true, and that I never thought that this situation would go this far (meaning that I never thought people would go to court and possibly prison). Ms. Schober then acted as though she did not hear the statement and said, 'These are the questions we are going to ask you and the answers we want.' For example, Ms. Schober said, 'I will ask you for dates that the sexual assaults took place, but you probably will not remember them because we know that you are repressing the incidents so you won't need to be specific.' I attempted yet again to say that the allegations were false and Ms. Schober said, 'If you say that the allegations are not true, you will be locked up in a mental institution because obviously the trauma is too great for you to handle.'" *(See also Transcript*, August 30, 2004: 46-52)

Ms. ___ also testified that, contrary to the People's post-conviction contention, she did not offer her recantation because her mother urged her to do so; that she did not do so because she expected a reward (for example, a new car); and that she was motivated solely because of her angst over causing an innocent man (her step-father, the defendant) to spend a virtual life sentence in the Department of Corrections.

Ms. Schober and Darren Vahle, the two deputy district attorneys who prosecuted the case at trial, testified that Ms. ___ allegations about their conduct were false. Mr. Vahle testified about a conversation with Craig Truman. Mr. Truman informed Mr. Vahle that Ms. ___ was recanting. Mr. Truman stated he was unable to reveal the source of this information.

Mr. Vahle then called Ms. ___. She informed Mr. Vahle that the alleged sexual assaults had indeed occurred and that she was ready to go to trial. Mr. Vahle stated that he and Ms. Schober also were concerned that the extended family might be pressuring Ms. ___ to change her story. However, "She has never recanted to me in any shape or form any of the allegations." *Transcript* August 31, 2004: 14.

Mr. Vahle stated that Ms. ___ did not recant the charges after the trial against this defendant. Another trial was scheduled against Ms. ___ mother, Debbie ___. That trial did not occur because Ms. ___ reported that "she didn't feel she could go through another trial."

The other lay witnesses either supported Ms. ___ former testimony or her current testimony. They offered little that assists the Court in making its determination.

Defendant contends that he should receive a new trial based on newly discovered evidence. Crim. P. 33. The parties have stipulated that the evidence was discovered after trial; that defendant and counsel exercised diligence to discover all possible favorable evidence before and during trial; and that the newly discovered evidence is material to relevant issues and is not merely cumulative or impeaching. Thus, the only disputed factor is whether the newly discovered evidence would probably bring about an acquittal at a new trial. *People v. Gutierrez*, 622 P.2d 547 (Colo. 1981); *People v. Schneider*, 25 P.3d 755 (Colo. 2001).

In making this assessment, the Court "need not merely measure the credibility of one witness at a

Rule 35(c) hearing based upon her testimony at that hearing. Rather, the trial court may review all statements made by that witness or other witnesses at the time the charges were filed, surrounding circumstances at that time--as well as the testimony offered at the later hearing--to determine who was lying and when." *People v. Schneider* 25 P.3d 755, 762 (Colo. 2001).

As previously noted, Ms. ___ affect, demeanor and presentation were virtually identical at trial and at the hearing. Certain of Ms. ___ allegations, as presented at trial, were difficult to believe. The jury so found, accepting some of her allegations and rejecting others.

Ms. ___ recantation must be considered under the totality of the circumstances. At trial, Ms. ___ presented confidently and withstood rigorous cross-examination. At the hearing, she also was able to testify with self-assurance and, with the one noted exception, without becoming flustered.

On January 21, 2005, she was asked some challenging questions. One issue involved her putting an improper date (2002 as opposed to 2000) in one of her diaries. Counsel suggested that this was an indication of a false recantation. She denied this without any apparent frustration.

The Court has carefully considered all of the testimony and its recollection of the trial. As noted in *People v. Schneider*, *supra*, the Court must view this recantation with great suspicion. "Skepticism about recantations is especially applicable in cases of child sexual abuse where recantation is a recurring phenomenon." *People v. Schneider* 25 P.3d 755, 763 (Colo. 2001). *Schneider* also requires the Court to

determine "whether the original charges filed or pled to were actually false or unfounded, and if the recantation would probably result in a judgment of acquittal in a new trial." 25 P.3d 755, 764 (Colo. 2001). *See also People v. Roark*, 643 P.2d 756 (Colo. 1982).

The parties agree that the *Gutierrez* evaluation of the evidence is required in this case. Defendant suggests that this is less stringent than the test set forth in *Schneider*. Indeed, *Mason v. People*, 25 P.3d 764 (Colo. 2001) draws the distinction between cases in which a guilty plea has entered and those where the conviction was obtained by a jury verdict.

The *Gutierrez* court observes that, "motions for new trial based on newly discovered evidence are not looked on with favor." 622 P.2d 547, 559 (Colo. 1981). The Court then is directed to consider "all of the available evidence." 622 P.2d 547, 560 (Colo. 1981).

The Court's task is made somewhat easier by the jury's verdict. As noted, the jury carefully considered all of the allegations. The District Attorney filed 29 counts, including sentence enhancers, against Mr. Farrar. The jury found him not guilty on six counts and guilty on the remaining 22 substantive counts and 1 sentence enhancer.

Here, the jury determined that Ms. ___ was believable as to some of the counts and not as to others. The Court concludes that, as to the counts on which it found him not guilty, the jury found her testimony to be at least unpersuasive if not unbelievable.

Certain of Ms. ___ claims were bizarre. For example, in the "Spring Fling" incident, she testified

that she wanted to go to a dance. She stated that her mother set forth two requirements. First, she had to obtain good grades. Second, she was required to engage in a sex act with her mother after her mother had had sexual intercourse with Defendant. The jury acquitted Defendant as to that count.

With respect to other counts, Ms. ___ claimed that Defendant had told some of his friends that they could receive sexual favors from her at the price of $5.00 per person. The People alleged that this constituted Sexual Exploitation of a Child (§18-6-403(3)(a) CRS), Inducement of Child Prostitution (§18-7-405.5 CRS) and Soliciting for Child Prostitution (§18-4-702 CRS). Once again, the jury returned "not guilty" verdicts as to these counts.

In these post-conviction proceedings, Ms. ___ made an equally unbelievable, and, in this instance, a far more heinous allegation. She contended that, on more than one occasion, she told Ms. Schober that she was not subjected to sexual abuse. She also asserts that Ms. Schober knowingly and intentionally presented her perjured testimony.

The Court concludes that this testimony is not worthy of belief. During the trial, as noted, she testified in a straightforward, unemotional manner. There were no indicia of Ms. ___ offering knowingly false testimony at that time. Her allegations concerning Ms. Schober are no more worthy of belief than was her trial testimony about the "Spring Fling." The Court finds that her assertions about Ms. Schober are without merit.

As a result, the Court finds that there was no outrageous governmental conduct. If a prosecutor had forced Ms. ___ to offered perjured testimony,

Defendant would have been denied fundamental fairness that would be shocking to the universal sense of justice. *People v. Johnson*, 987 P.2d 855 (Colo. 1998). In addition, the purported deliberate proffer of perjured testimony in this case would have visited the kind of prejudice on Mr. Farrar that a new trial would have been mandatory.

The jury heard the testimony of ___ ___ Defendant and Debbie ___ and others, some of whom testified at the hearing. That jury weighed the credibility of all of the witnesses' testimony. The Court considers ___ ___ post-conviction testimony with the skepticism required by the case law.

Other testimony, including allegations that Ms. ___ received a new automobile in exchange for her recantation testimony, her finding four dead bodies at Elitch Gardens, her various amorous encounters and conflicting statements to Juanita Timmons and Robert Barber does not change the Court's determination.

Ms. Timmons testified that Ms. ___ "likes to be the center of attention" and that she has always felt that Ms. ___ has had credibility issues. On the other hand, Michael Cavanaugh, Ms. ___ guardian ad litem in a companion dependency and neglect proceeding, testified that Ms. ___ never recanted her allegations of sexual assault.

She testified that she had minimal contact with Mr. Cavanaugh. He stated that he had met her 10-12 times.

Ms. ___ has substantial credibility issues. Her performance at trial suggests that jurors were able to

sift through her testimony, accepting some of it and rejecting other parts.

The Court must assume that Ms. ___ would testify at a new trial. If she persisted in her recanted testimony, the jury would be entitled to hear her (first) trial testimony by impeachment (at a minimum)[1], including her former testimony that detailed repeated descriptions of fellatio and sexual intercourse that she was required to perform with Defendant.

At the same time, it is entirely possible that Ms. ___ would retreat to her position at trial.

Nothing that the Court heard or saw during this post-conviction proceeding persuades it that the newly discovered evidence would produce a complete acquittal at a new trial. In all probability, another jury would accept some of Ms. ___ contentions and reject others.

[1] The Court cannot speculate as to what issues would be raised in the future and what rulings might be entered concerning the scope of testimony at a new trial.

Defendant's Crim. P. 33 motion is denied.

SO ORDERED.

Done this 14 day of July, 2005.

BY THE COURT:

/s/

John P. Leopold
District Judge

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHARLES FARRAR,

Petitioner-Appellant,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections, et al.,

Respondents-Appellees.

SCHOLARS OF FEDERAL HABEAS CORPUS, et al.,

Amicus Curiae.

Filed August 29, 2019

No. 18-1005

ORDER

Before **BACHARACH**, **BALDOCK**, and **EBEL**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-01425-RPM

CHARLES FARRAR,

Petitioner,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections; JAMES FALK, Warden, Sterling Correction Facility; and CYNTHIA COFFMAN, Attorney General, State of Colorado,

Respondents,

MOTION TO ALTER ORDER AND JUDGMENT

Petitioner Charles Farrar, by and through his court-appointed counsel, Gail K. Johnson of Johnson & Klein, PLLC, respectfully moves this Court pursuant to Fed. R. Civ. P. 59(e) to alter its Order and Judgment (Docs. 69, 70) for the reasons set forth herein and in any supplement to this Motion to Alter that may be filed in the future with leave of the Court.

Background

Undersigned court-appointed counsel for Mr. Farrar has been representing him in this case for only a very short period of time. Counsel entered her

appearance two days ago and was appointed under the Criminal Justice Act yesterday. Therefore, contemporaneously with this Motion to Alter, counsel will be filing an unopposed motion for leave to supplement this Motion to Alter within 90 days.

Discussion

Mr. Farrar asks this Court to alter and amend its Order and Judgment for the several reasons.

Under the Antiterrorism and Effective Death Penalty Act of 1996:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Thus, if *either* section 2254(d)(1) or section 2254(d)(2) is met, then section 2254(d) poses no bar to this Court granting Mr. Farrar's application for federal habeas relief.

Following oral argument and briefing by Mr. Farrar's previous pro bono counsel, this Court ruled:

> The Applicant has not produced a U.S. Supreme Court case holding that in the

> absence of prior knowledge of the victim's recanting her complaints of sexual abuse the presentation of her testimony would violate the Due Process Clause of the Fourteenth Amendment. The district judge who heard the testimony at the hearings on the Rule 33 motion was the same judge who presided at the trial. He observed Sacha Brod testify both times and this Court is unable to say that his assessment of her trial testimony after hearing her recanting testimony was unreasonable.

(Doc. 69 at 4.)

I. The Colorado Supreme Court decision in Mr. Farrar's case was contrary to, or an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court.

A. The meaning of "clearly established" law.

For a principle of law in U.S. Supreme Court case law to be considered "clearly established," it does not need to have arisen in a factual scenario that is similar in most respects with the case at bar. By analogy, the question of whether a constitutional violation is "clearly established" is frequently litigated in the context of the defense of qualified immunity from damages. As the Supreme Court has explained in that context:

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that

> right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (citations and internal quotations omitted). In *Hope*, *id.* at 740-41, the Supreme Court held the standard for clearly established law is analogous to the fair-warning requirement for substantive criminal statutes addressed in *United States v. Lanier*, 520 U.S. 259, 270-71 (1997), where the Court explained that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" Thus, the *Hope* Court explained:

> Our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts.

536 U.S. at 741.

The Tenth Circuit has similarly applied this principle of generality in the excessive-force context:

> The district court believed that the type of restraint used in [the case law] was sufficiently different from that employed on Mr. Weigel that [the case law] did not clearly establish the unconstitutionality of defendants' alleged actions. But our analysis in this case of the constitutionality of the restraint of Mr. Weigel does not require us to compare the facts of [the case law] to the allegations here. It is based on more general principles. The Fourth Amendment prohibits unreasonable seizures. We do not think it requires a court decision with identical facts to establish clearly that it is unreasonable to use deadly force when the force is totally unnecessary to restrain a suspect or to protect officers, the public, or the suspect himself.

Weigel v. Broad, 544 F.3d 1143, 1154 (10th Cir. 2008); *see also Al-Turki v. Robinson*, 762 F.3d 1188, 1194-95 (10th Cir. 2014) (in section 1983 case for deliberate indifference to serious medical needs, rejecting prison nurse's claim of qualified immunity asserted on the ground that no prior case law involved similar facts, and instead finding the law clearly established in a more general manner).

B. Clearly established law regarding actual innocence.

Mr. Farrar respectfully contends that it is clearly established that the wrongful conviction of an innocent man violates the Due Process Clause of the Fourteenth Amendment. In *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976), the Supreme Court stated that one of the purposes of federal habeas relief is "to assure that no innocent person suffers an

unconstitutional loss of liberty." In *Kuhlmann v. Wilson*, 477 U.S. 436, 451-52 (1986), a plurality of the Supreme Court explained "the historic function of habeas corpus" was "to provide relief from unjust incarceration." The *Kuhlmann* plurality further recognized:

> Even where, as here, the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, *a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.*

Id. at 452 (emphasis added); *but see Herrera v. Collins*, 506 U.S. 390, 400-427 (1993) (declining to recognize claim of actual innocence as basis for federal habeas relief where the newly discovered evidence at issue was affidavits containing hearsay that were not provided until eight years after trial) (though recognizing that the execution of an actually innocent person would be unconstitutional). On at least two occasions following *Herrera*, the Supreme Court has assumed that such a freestanding constitutional claim of innocence exists, but then denied relief on the merits. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009); *House v. Bell*, 547 U.S. 518, 55455 (2006).

C. Clearly established law regarding the violation of Due Process that occurs when a criminal defendant is convicted on false evidence.

Although for purposes of AEDPA, clearly established federal law consists only of Supreme Court holdings, "circuit court precedent may be 'persuasive' in demonstrating what law is 'clearly established; and whether a state court applied that law unreasonably." *Maxwell v. Roe*, 628 F.3d 486, 494 (9th Cir. 2010).

Many U.S. Circuit Courts of Appeals have held that federal habeas relief is warranted on the basis of false evidence in the form of perjured witness testimony—even absent proof the prosecution knew about the perjury at the time of trial. For example, in *Maxwell*, contrasting the *knowing* use of perjured testimony, the Ninth Circuit explained, "We have also concluded that a defendant's due process rights were violated, and accordingly granted habeas relief, when it was revealed that false evidence brought about a defendant's conviction." *Id.* at 499 (citing *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002); *Hall v. Dir. of Corrs.*, 343 F.3d 976, 978 (9th Cir. 2003) (per curiam). The *Maxwell* court held: "A new trial is not automatically required when false evidence is discovered. Rather, a constitutional error resulting from the use of false evidence by the government requires a new trial, 'if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972), and *Napue v. Illinois*, 360 U.S. 264, 271 (1959)).

In *Hall*, the Ninth Circuit reversed a state district court's denial of habeas relief where a California jailhouse informant later confessed to perjury and the alteration of evidence. 343 F.3d at 985. In *Killian*, the Ninth Circuit noted that "[A] government's assurances that false evidence was presented in good faith are little comfort to a criminal defendant wrongly convicted on the basis of such evidence. A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness." 282 F.3d at 1209-1210 (relief warranted where "make-or-break witness for the state perjured himself several times, giving rise to reasonable probability that, without all the perjury, the result of the proceeding would have been different).

The Second Circuit has similarly explained that "[i]t is simply intolerable . . . if a state allows an innocent person to remain incarcerated on the basis of lies." *Sanders v. Sullivan*, 863 F.2d 218, 224 (2d Cir. 1988) (reversing denial of habeas relief; holding that petitioner's right to due process was violated by conviction based on material testimony of a witness who recanted); *cf. United States v. Wallach*, 935 F.2d 445, 473 (2d Cir. 1991) (where the government is unaware of witness's perjury, new trial is warranted if the testimony was material and "the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted") (reversing on direct appeal).

D. Clearly established law regarding the constitutional requirement for acquittal if the prosecution presents anything less than proof beyond a reasonable doubt.

Mr. Farrar also asserts that section 2254(d)(1) is met in this case because the Colorado Supreme Court's decision affirming the denial of his motion for new trial is contrary to—and unreasonably applies—federal constitutional law clearly established by the Supreme Court regarding the fundamental due process requirement that the prosecution present proof beyond a reasonable doubt in a criminal case.

The Supreme Court held in *In re Winship*, 397 U.S. 358, 364 (1970) (per curiam) "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *See also Victor v. Nebraska*, 511 U.S. 1, 5 (1994) ("The beyond a reasonable doubt standard is a requirement of due process . . . ."). The standard of proof beyond a reasonable doubt "provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). The *Winship* court explained the fundamental importance of having such an elevated burden of proof in criminal cases, given the extremely high stakes and the need to minimize the risk of error, i.e., the risk of convicting and imprisoning a person who is actually innocent:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall* [357 U.S. 513, 525-26 (1958)]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

397 U.S. at 363-64 (citations and alternations omitted).

The federal constitutional problem with the Colorado Supreme Court's decision in Mr. Farrar's

case is that it ignores and therefore violates this clearly established due-process requirement. Colorado's test for granting a new trial based on newly discovered evidence includes the forward-looking requirement that a court find, based on a review of all the evidence, that if the newly discovered evidence were presented at a new trial, it would probably result in the defendant's acquittal. *People v. Gutierrez*, 622 P.2d 547, 560 (Colo. 1981). In Mr. Farrar's case, decided 4-3, a slim majority of the Colorado Supreme Court adopted a special rule in cases of recanting child-sex-assault witnesses that required him, to demonstrate he would probably be acquitted, to show not just that the recantation, considered along with the original trial evidence, would probably result in *a reasonable doubt*, but instead that the jury would probably believe the recantation:

> In order to be entitled to a new trial for newly discovered evidence, the defendant bore the burden of demonstrating that new evidence offered by him would probably convince reasonable jurors to acquit him. In the case of recantation, this necessarily requires a demonstration that the jury would probably believe the victim's recantation. In the absence of such a showing, a trial court is required to deny a motion for new trial based on newly discovered evidence.

Farrar v. People, 208 P.3d 702, 709 (Colo. 2009). The *Farrar* majority also stated that "new evidence in the form of a witness recantation, whether believed or not, . . . can justify a new trial only to the extent that it not only impeaches the prior testimony but does so

by contradicting it with a different and more credible account." *Id.* at 708; *see also id.* at 707-708 ("Rather than merely creating reasonable doubt by demonstrating that the recanting witness has given different and irreconcilable testimony on different occasions, recantation can justify a new trial only if it contains sufficiently significant new evidence, and if it, rather than the witness's inconsistent trial testimony, will probably be believed."). Here, the Colorado Supreme Court found that the state district court "was unable to conclude that the victim's recantation testimony was any more believable than her trial testimony, and therefore it could not find that the victim's new evidence would probably result in the defendant's acquittal." *Id.* at 709. Under its new test, which is contrary to and unreasonably applies the federal due-process standard that anything less than proof beyond a reasonable doubt must result in an acquittal, the Colorado Supreme Court affirmed the denial of a new trial. *Id.*

The three dissenting justices understood the problem perfectly:

> [The majority's] holding fails to account for cases in which the newly discovered impeachment evidence adds more support to an already viable defense case for reasonable doubt. In these cases, perhaps rare, the new evidence does much more than cast doubt upon a witness's credibility—it clearly could and probably would change the outcome of the case.
>
> The facts of this case demonstrate how a witness recantation that is found no more believable than the initial trial testimony can

> nonetheless result in a probable acquittal. The parties agree that the jury's verdict came down to whether it believed the victim's trial testimony. Citing the jury's decision to convict the defendant on certain counts, but acquit him on others, the trial court concluded that some of the victim's trial testimony was "at least unpersuasive if not unbelievable," and that she had "substantial credibility issues." The victim's subsequent recantation provides an even greater basis to doubt the veracity of her initial testimony. Because virtually no evidence other than the victim's trial testimony supported the defendant's conviction, her full recantation of all the evidence implicating the defendant necessitates the conclusion that an acquittal—or finding by the jury of reasonable doubt as to the defendant's guilt—is at least probable.

Id. at 710 (Bender, J., Mullarkey, C.J., and Martinez, J., dissenting); *see also id.* at 711 ("Even if the trial court had found the victim's recantation less credible than her trial testimony, it would not necessarily mean that an acquittal was not probable.") (citing *State v. McCallum*, 561 N.W.2d 707, 711 (Wis. 1997) ("It does not necessarily follow that a finding [that a recantation is] 'less credible' must lead to a conclusion of 'no reasonable probability of a different outcome.' Less credible is far from incredible.")). The relevant question in determining whether there would probably be an acquittal is whether the jury would probably find it has a reasonable doubt about the veracity of the recanting victim's *trial testimony*—the only evidence against the defendant.

Thus, the *Farrar* dissenters would have concluded "that the addition of the victim's recantation would bolster the defense argument for reasonable doubt and probably result in an acquittal on retrial" and that "justice requires that the defendant receive a new trial." 208 P.3d at 710.

Because the Colorado Supreme Court majority in *Farrar* is contrary to—or an unreasonable application of—federal law as clearly established by *Winship*, section 2254(d) poses no bar to this Court granting Mr. Farrar federal habeas relief.

II. The Colorado Supreme Court decision in Mr. Farrar's case was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The *Farrar* majority reasoned that, to entitle a defendant to a new trial, "newly discovered evidence must be of sufficient consequence for reasons other than its ability to impeach, or cast doubt upon, the evidence already presented at trial." 208 P.3d at 706-707. Through its analysis and holding, the majority opinion implicitly found that the newly discovered recantation evidence here was merely impeaching. *Farrar*, 208 P.3d at 707-709. On the record in this case, this was an unreasonable determination of the facts.

As the state district court recognized in its order denying Mr. Farrar a new trial, the prosecution in this case *stipulated* the first three prongs of Colorado's four-prong test for obtaining a new trial, including "that the newly discovered evidence is

material to relevant issues and is not merely cumulative or impeaching." (Doc. 15-16 at 3-4.)[1]

Therefore, because the standard of section 2254(d)(2) is met, it is not necessary for this Court to find that the Colorado Supreme Court's decision was contrary to or an unreasonable application of federal law as clearly established by the U.S. Supreme Court in order to grant relief.

III. No procedural default is applicable here because such defenses were waived, and in any event, Mr. Farrar's claims should be allowed to pass through the actual-innocence gateway.

Procedural-default defenses can themselves be waived, and Respondents have done so here.

In any event, this Court may nonetheless adjudicate Mr. Farrar's claims through the actual-innocence gateway. *See Schlup v. Delo*, 513 U.S. 298 (1995).

IV. Application of AEDPA in this case to deny federal habeas relief to a man who is actually innocent of the crimes for which he is incarcerated would be unconstitutional.

Denying federal habeas relief here under AEDPA where this Court would otherwise be inclined to grant it indicates that AEDPA violates the separation-of-powers doctrine of Article III of the

---

[1] This concession appears in the reporter's transcript for the state-court hearing held on January 21, 2005, at p. 108. Due to counsel's recent entry into the case, counsel is not yet sure where this resides in the record before this Court.

U.S. Constitution. Judicial power is vested solely in this Court, and Congress cannot change that.

Denial of the writ here would also violate the Supremacy Clause. U.S. Const. art. VI, cl. 2.

Denial of the writ here would also violate the Suspension Clause. U.S. Const. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it.").

Certification of conferral with opposing counsel under D.C.Colo.L.Civ.R. 7.1(a)

Undersigned counsel has conferred with Assistant Attorney General Ryan A. Crane, who states that Respondents oppose this Motion.

Conclusion

For all these reasons, Mr. Farrar respectfully asks this Court, after considering the arguments set forth herein as well as those that may be made in a supplement permitted to be filed in the future, to alter its Order and Judgment and to grant his application for relief under 28 U.S.C. § 2254.

Respectfully submitted this 28th day of June, 2017.

JOHNSON & KLEIN, PLLC

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Attorney for Charles Farrar

APPENDIX N

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

v.

CHARLES ARTHUR FARRAR,

Defendant.

Case No. 01CR505

COURT REPORTER'S TRANSCRIPT

The hearing in this matter commenced on January 21, 2005, before the HONORABLE JOHN P. LEOPOLD, Judge of the District Court.

* * *

A P P E A R A N C E S

FOR THE PEOPLE:	CARLOS SAMOUR Reg. No. 19955
FOR THE DEFENDANT:	MARK WALTA Reg. No. 30990
FOR THE WITNESS SACHA BROD:	CHARLES ELLIOT Reg. No. 10471

* * *

[Testimony of Sacha Brod, pp. 3:1, 8:12-10:16]

* * *

AFTERNOON SESSION, JANUARY 21, 2005

* * *

SACHA BROD

called as a rebuttal witness for the Defense herein, was sworn and testified as follows:

DIRECT EXAMINATION

BY MR. WALTA:

Q Good afternoon, Ms. Brod.

A Good afternoon.

Q My name is Mark Walta. I think we have met before. I'm Charles Farrar's attorney. I'm going to be asking you some questions. Ms. Brod, when did you go to Scott Reisch's office to prepare the affidavit recanting your allegations of sexual abuse against Mr. Farrar?

A Honestly I couldn't tell you when it was at this point. I know I had come out here to actually try to talk to my mom at that point and had told her then that I'm going to do it, because I had a hard to time getting a hold of her from Oklahoma.

Q If I show you a copy of your affidavit, would that refresh your recollection?

A Yes, it would. You did that.

MR. SAMOUR: For the record, I think this had been admitted as People's Exhibit 3.

THE COURT: As what, please?

MR. SAMOUR: People's Exhibit 3, I believe, Your Honor.

THE COURT: Yes, that's correct. Thank you.

Q (By Mr. Walta) Having reviewed that affidavit, does that refresh your recollection as to when?

A Yeah.

Q When was that?

A It was June 3rd.

Q Of what year?

A Of -- it would be 2003.

Q In the year and a half since that time, have you changed your mind about whether your prior allegations against Mr. Farrar are true or false?

A No, I have not changed my mind.

Q Did Mr. Farrar sexually assault you?

A No.

Q Was your testimony at Mr. Farrar's trial concerning the alleged sexual abuse true or false?

A False.

Q Do you remember sitting in that same seat in August of 2004 and offering testimony about your recantation?

A Vaguely.

Q All right. Has that testimony, to the best of your knowledge, been truthful? Has your testimony in this court been truthful?

A This time, yes.

Q Are you still concerned about the possibility of being prosecuted for lying at Mr. Farrar's trial or any

of the other legal proceedings associated with your false allegations of abuse?

A It is kind of scary, yes.

* * *

APPENDIX O

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

v.

CHARLES ARTHUR FARRAR,

Defendant.

Case No. 01CR505

COURT REPORTER'S TRANSCRIPT

The hearing in this matter commenced on August 30, 2004, before the HONORABLE JOHN P. LEOPOLD, Judge of the District Court.

* * *

A P P E A R A N C E S

FOR THE PEOPLE:	CARLOS SAMOUR Reg. No. 19955
FOR THE DEFENDANT:	SUSAN FISCH Reg. No. 16855
	MARK WALTA Reg. No. 30990

FOR THE WITNESS
SACHA BROD: SCOTT REISCH
Reg. No. 26526

* * *

[Testimony of Sacha Brod, pp. 4:1, 18:16-29:23]

* * *

MORNING SESSION, AUGUST 30, 2004

* * *

SACHA BROD,

called as a witness for and on behalf of the Defendant herein, was sworn and testified as follows:

THE COURT: Ms. Fisch, you may inquire.

MS. FISCH: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. FISCH:

Q Good morning, Ms. Brod.

A Good morning.

Q Would you state your full name and spell your last name?

A Sacha Faith Brod, B-R-O-D.

THE COURT: S-A-C-H-A, right?

THE WITNESS: Yes.

THE COURT: Continue.

Q (By Ms. Fisch) Sacha, how old are you?

A Nineteen.

Q When you did turn 19?

A November of this last year.

Q Where are you currently living?

A I'm living in Thornton right now.

Q When did you move from Oklahoma to Colorado?

A It was either April or May of -- it's been almost two years -- two years.

Q Was it 2003 or 2002?

A 2003.

Q Just so everyone is clear -- this is kind of an obvious question. You're the same Sacha Brod that testified in the trial of Charles Farrar, correct?

A Yes, I am.

Q Just to refresh everyone's memory, what is your relationship to Mr. Farrar?

A He's my stepdad.

Q He was married to your mother or is married to your mother?

A I'm not exactly sure on that one.

Q Who is your mother?

A Debra Brod.

Q Ms. Brod, do you know why we are here today?

A Yes, I do.

Q Why are we here?

A Because the fact I recanted my story.

Q And are you saying that you recanted what you testified to at trial?

A Yes, I am.

Q Is that what you're referring to your story?

A Yeah.

Q How did you do that initially? How did you recant your story?

A I ended up with a lawyer to go talk to the lawyer.

Q Let's talk about that. What is your lawyer's name?

A Scott Reisch.

Q And when you first came to know Mr. Reisch, were you living in Oklahoma or were you living in Colorado?

A I was living in Oklahoma at the time.

Q And how did it come about that you got together with Mr. Reisch?

A I, at one point, had called my mom and told her can you find me a lawyer out there because I couldn't afford to go long distance for it.

Q Did you tell your mom why you needed a lawyer in Colorado?

A Yep, I did.

Q What did you tell her?

A I told her I wanted to tell the truth about what had actually happened.

Q What was your mother's reaction when you said I want to tell the truth about what actually happened?

A She kind of let it set I guess because I didn't really hear from her until I called her a couple of days well, actually I called my brother, and he told me that she was coming out to visit.

Q How long of a period of time was there between the time that you told your mom that you

wanted to finally tell the truth and the time that you talked to her again?

A About three, four weeks.

Q Were you still living in Oklahoma?

A Yes, I was.

Q And who were you living with?

A The guy I was dating at the time.

Q Did you have a close relationship with your mom at the time that you called her and said you wanted to finally tell the truth?

A No.

Q Had you ever had a close relationship?

A Maybe at one point.

Q When we are talking about your mother, are we talking about Debbie Brod?

A Yes.

Q Was it your mother that found Mr. Reisch?

A Yeah, they called me back eventually after I called her and found out she was coming down to stay and told me she had found a lawyer. I didn't know who it was at that time.

Q Did she have the money to pay Mr. Reisch?

A No. She found a friend of the family that would loan me the money to pay the retainer.

Q So the friend loaned you money that you were supposed to pay back, is that right?

A Yeah, and I still haven't been able to because I have a hard time finding jobs because of my age.

Q Was that arrangement made for any reason that you would actually pay back the friend the

money?

A There was no set thing done on when or how because with my work situation and the fact I was out there and at the time I was still in school and --

Q Let me ask you this. Was the arrangement to pay Mr. Reisch made so that your mother could stay out of paying him any money?

A Basically.

Q Did you fly to Colorado and meet with Mr. Reisch?

A Actually I didn't. I drove out.

Q Okay. You came here from Oklahoma to meet with him?

A Yeah.

Q How many times would you say that you met with Mr. Reisch until today? You can guess.

A Probably close to a dozen.

Q And when you first met with him, what did you tell him?

A I told him about the fact that it wasn't true, and that I had tried to talk to people about it before and kind of been blown off or threatened.

THE COURT: I'm sorry. You were blown off or threatened?

THE WITNESS: They told me they would get back to me and never would get back to me, wouldn't answer the phone call. It became a huge fiasco whether I would finally hear back and was always told I would either spend life in a mental institute or in jail or whatever.

Q (By Ms. Fisch) Did you tell him in the first

meeting with him?

A Yeah.

Q When you say that you told Mr. Reisch that it was not true, what were you referring to as it?

A The sexual allegations.

Q Did that include your testimony at trial?

A Yes, it did.

Q How -- what happened after that initial meeting with Mr. Reisch?

A He faxed me over a copy of my recantation to re-read, double-check that I would need to sign and take back to him. Well, I needed to go back in and after I checked it and sign the original.

Q Let's slow down a little bit. Did you write something up for Mr. Reisch?

A Well, he went over the details, and he wrote the details down. He went ahead and wrote the actual -- typed it up, but I had given him all the details and facts that he -- facts that he went off of.

Q If I said that affidavit ended up in an affidavit, does that word make sense to you?

A Yes, it does.

Q You gave him the details, he typed up the affidavit, he had you re-read it and sign it?

A Yes.

Q That affidavit that you signed and you remember re-reading before you signed it, was it accurate?

A Yes, it was.

Q Now, there is some allegations in that

affidavit about conversations that you had with Ms. Schober, the district attorney?

A Yes.

Q Did you and Mr. Reisch have a discussion about those specific allegations?

A Yes, we did.

Q What did Mr. Reisch talk to you about as related to what you were saying about the prosecutor in this case?

A That it was very serious charges, and that need to be absolutely sure.

Q Okay. Did he tell you anything more that you remember?

A Not really.

Q Did he impress upon you the seriousness of what you were saying about Ms. Schober?

A Yes, he did.

Q Were you scared about writing this affidavit?

A Yeah, I was.

Q Why were you scared about writing the affidavit?

A Because it wouldn't -- from what everyone was telling me when I finally would get answers from people tried to talk to, it would mean a life sentence for me in either a mental institute or in jail.

THE COURT: And perhaps the record should reflect that Mr. Reisch has arrived in the courtroom.

MS. FISCH: Yes, he did, and I'll inform the court he had matters that were scheduled earlier this morning.

THE COURT: Let's continue.

Q (By Ms. Fisch) Let me rephrase that question, Sacha. Were you scared about coming forth now and saying that your testimony at trial was not true?

A No, because I knew I had to do what was right.

Q Were you in fear that you yourself might be prosecuted?

A Yes, I was.

Q And what fear did you have about that?

A Just the fact that, you know, I have ruined somebody's life earlier, and now I was facing the fact basically I would spend the rest of mine in a cage.

Q Did it seem worth it to you or not worth it to you?

A It was worth it because I couldn't live with myself considering what I had done to somebody else.

Q Did you meet with Mr. Reisch and do this affidavit because your mother, Debbie Brod, was pressuring you to do this?

A No, I did not.

Q Did you meet with Mr. Reisch and do this affidavit because your grandmother Nita Timmons was pressuring you to do this?

A No.

Q Did you do this because Mr. Farrar in any way was pressuring you to do this?

A No.

Q Did you come forward to tell the truth because Mr. Farrar's parents were pressuring you to do this?

A No.

Q Has anybody pressured you to come forth and tell the truth now?

A No.

Q Now, you've been made aware by us that your Uncle Kenny Timmons is saying that you, in fact, were pressured to come forward, right?

A I heard that recently, yes.

Q And you have been told that he said that your mom was going to buy you a new car if you came forward?

A I've been told he said that, yes.

Q Is that true?

A No.

Q Has your mom promised to buy you a car if you came forth and testified here today?

A No.

Q Did you, in fact, get a new car?

A I did at one point, yes.

Q And how did you get that new car?

A First time buyer's program.

Q What does that mean?

A It means that because it was my first car, I was buying my first car. I could get approved because I had no credit.

Q So you were able to get a car on your own?

A Yes, it does.

Q Are you aware that your Uncle Kenny Timmons has told the prosecution and ourselves that your mom brought a video camera in Oklahoma so that you could do a recantation?

A I was told he said that.

Q Is that true?

A No.

Q Did your mom ever bring a video camera to Oklahoma so you could do this?

A Not to do this, no.

Q Did you do the affidavit and are you here today to make your mom happy?

A No.

Q Are you here because you had a falling out with your grandmother in Oklahoma?

A No.

Q Why are you here?

A I'm here because I need to set the record straight because I messed up other people's lives, and too, I can't hardly sleep anymore knowing what I did.

Q It's affected you physically?

A Yes, it has.

Q Did you tell Mr. Samour that you were here to tell the truth?

A Yes, I did.

Q Is that what you've told your lawyer?

A Yes.

Q Why now, Sacha? You did the affidavit in June of 2003, right?

A Right.

Q Why then after the trial and conviction and sentence of Mr. Farrar, did you come forward?

A Because I finally decided that no matter what the consequences were, I had to do what was right.

* * *

APPENDIX P

AFFIDAVIT

I, Sacha Faith Brod, date of birth, November 28, 1984, do hereby swear and affirm that I am not now under the influence of any drug, alcohol or prescription medication and that 1 am making the following statement completely voluntarily and not as the result of any undue influence or coercion by anyone and that the following statement is true and correct:

I am the daughter of Debbie Lynn Brod (hereinafter "Mother") and Richard Dale Brod. My stepfather is Charles Farrar (hereinafter "Stepfather"). I met my Stepfather in 1994 when I was ten years old. We moved into an apartment with my Stepfather in 1994.

We ultimately moved to our home in Aurora. Around this time, I felt as though I did not belong with the family. I was very resentful of my younger stepbrothers Charlie and Eric. I felt as though Charlie and Eric were given more love and attention by my Mother and Stepfather. I was forced to do everything for Charlie and Eric. For example, I had to share my belongings with them and had no privacy. When I would not share with Charlie and Eric I would be punished by having my belongings removed from my room by my Mother and Stepfather. Around the time I made the sexual assault allegations against my Mother and Stepfather, I had only a bed and a dresser in my room as all of my other belongings had been taken.

Many of the problems I had with Charlie and Eric were a result of my Stepfather's mother June Monica Farrar, who moved into our home. June Farrar attempted to take control of the house and acted as though I did not exist.

Growing up I would describe myself as a loaner with few friends. I spent much of my time reading. However, I was very close to my grandfather, Lloyd Timmons (hereinafter "Grandfather") who lived in Oklahoma. A family dispute erupted between my Mother and my Grandfather regarding me being home schooled by my Mother, because of my poor grades and performance in school. As a result of the family dispute, I was no longer permitted to speak with my Grandfather. Not being able to have contact with my Grandfather made me very angry towards my Mother and Stepfather.

I came up with an idea that I thought would result in me being able to stay with my Grandfather in Oklahoma. The way that I went about this was to fabricate a story that both my Mother and Stepfather had sexually assaulted me. These allegations were completely false. Neither my Mother, nor my Stepfather, ever subjected me to any sexual abuse. I was also aware of the allegations made against my Stepfather, by his stepchildren from a previous marriage. I was aware of these allegations from conversations that took place in the family.

I originally made allegations of sexual abuse to my school counselor on or about March 6, 2000, and again the following day to a social worker. I was placed into foster care almost immediately. My foster parent was Linda Mitchell. While in foster care, I met another girl, whose name I do not recall, who

was in foster care for making allegations of a sexual assault. I confided with this girl and explained to her that I had fabricated the story of the allegations. We both agreed that if I let someone know that the allegations were false that l would not get to live with my grandparents. I said nothing at that time to anyone else regarding the allegations being false.

I had two social workers when I was under the care and custody of the Department of Human Services, Keri Hanson and Kim Mauthe. When Kim Mauthe became one of the social workers on my case, I approached Kim Mauthe and I asked her, “What if, I had fabricated the allegations?" Kim Mauthe responded that, “I would be locked up in a mental institution.” On or about June 14, 2001, I left for Oklahoma to stay with my Grandmother. Two or three months prior to that visit, I told Keri Hanson that I had fabricated the whole story. As we got closer to court, I again attempted to tell Keri that the allegations were false.

I attempted to discuss the issue with my therapist, Pamela, whose last name I cannot recall, about the allegations being false, but was always dismissed by her. According to her, she did not want me to relive the trauma of the alleged assault. I attempted to do this on several occasions but was unable to disclose the truth.

Prior to coming to court for the trial of my Stepfather, I met with the district attorneys handling the case. I told district attorney, Christine Schober, that I would not come and testify, that the allegations were not true, and that I never thought that this situation would go this far (meaning that I never thought people would go to court and possibly

prison). Ms. Schober then acted as though she did not hear the statement and said, "These are the questions we are going to ask you and these are the answers we want." For example, Ms. Schober stated, "I will ask you for dates that the sexual assaults took place, but you probably will not remember them because we know that you are repressing the incidents so you won't need to be specific." I attempted yet again to say that the allegations were false and Ms. Schober stated, "If you say that the allegations are not true, you will be locked up in a mental institution because obviously the trauma is too great for you to handle."

I ultimately testified against my Stepfather at his trial because I was scared by the threats of being placed in a mental institution and not being able to live with my grandparents. My testimony was not truthful at my Stepfather's trial.

I also tried to speak with my Guardian Ad-Litum, Mike Cavanaugh, regarding the issue. However, we only met three times throughout the court proceedings and he was always accompanied by a social worker and I did not feel comfortable having the social worker present.

I am now 18 years of age and have not had the Department of Human Services in my life for nearly 8 months. I have had trouble sleeping since I made these allegations. When I do sleep, I have nightmares about ruining innocent lives. I am coming forward now because I have sent an innocent man to jail, destroyed my Mother's life, and the life of my stepbrother, brothers and sister by false allegations made by me when I did not have enough courage to tell the truth.

I am sure that there are many questions that will be asked of me, and I realize that I may not have stated everything regarding my untruthful statements regarding my Mother's and Stepfather's cases in this affidavit, but I am prepared to do so in the future.

/s/ Sacha F. Brod
Sacha Faith Brod

June 3, 2003
Date

Signed in my presence this 3rd day of June 2003.

/s/ Susan B. Griffin
Notary Public

My Commission Expires 4-16-04

[seal]
Notary Public
Susan B. Griffin
State of Colorado

APPENDIX Q

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

v.

CHARLES ARTHUR FARRAR,

Defendant.

Case No. 01CR505
Division 11

REPORTER'S TRANSCRIPT
[Monday, March 25, 2002]

A P P E A R A N C E S:

FOR THE PEOPLE:

DARREN VAHLE, Reg. No. 28107
CHRISTINE SCHOBER, Reg. No. 30039

FOR THE DEFENDANT FARRAR:

CRAIG TRUMAN, Reg. No. 5331

This matter came on for trial to jury on Monday, March 25, 2002, before the Honorable John P. Leopold, District Judge.

This is a transcript of the testimony of Sacha Brod given in this case on that date.

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[Testimony of Sacha Brod, pp. 2:1-34:20, 40:23-44:25, 49:3-52:23]

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MORNING SESSION, MONDAY, MARCH 25, 2002

(Proceedings were had and recorded, but are not herein transcribed, and the following proceedings were had:)

THE COURT: Thank you, counsel. Thank you very much.

People may call their first witness.

MS. SCHOBER: People call Sacha Brod.

THE COURT: Very well.

Ms. Brod, come forward, please.

Over here, please. Could you please raise your right hand.

(The witness was duly sworn by the court.)

THE COURT: Please be seated.

Ms. Schober.

MS. SCHOBER: Thank you, Your Honor.

SACHA BROD,

called as a witness by the People, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SCHOBER:

Q Good afternoon.

A Good afternoon.

Q Could you please state your name and spell both your first and last name for the record?

A My name is Sacha Brod. S-a-c-h-a, B-r-o-d.

Q How old are you, Sacha?

A Seventeen.

Q And before I go on, are you more comfortable with me calling you Sacha or Ms. Brod?

A Sacha.

Q Okay. You're 17. What's your birthday?

A 11/28/84.

Q And what grade are you in?

A I'm a sophomore.

Q Where do you live?

A In Sand Springs, Oklahoma.

Q If I can have you do me a little favor and pull that microphone a little bit closer so we can hear you or you lean forward.

Who do you live with in Oklahoma?

A I live with my grandma.

Q Okay. What's your grandma's name?

A Nita Timmons.

Q I'm sorry?

A Nita Timmons.

Q Does anybody else live with you?

A Me, the oldest of my brothers, and my younger sister.

Q What are their names?

A Dustin and Brittany.

Q Okay. Before you lived in Oklahoma, did you live somewhere else?

A Yes.

Q Where did you live?

A I lived with my biological mom, Debbie, for a few years on and off or I spent almost two years in foster care.

Q Okay. You talk about when you lived with your biological mom and I want to talk about just before you moved to Oklahoma. Who else did you live with?

A Um, her boyfriend, his parents, his two kids, and then my brother Dustin and sister Brittany and my youngest brother Austin.

Q Okay. Where was that?

A In Aurora, Colorado, on Iola Street.

Q On Iola Street?

A (Nods head.)

Q And do you recall the exact address?

A I think it was 480.

Q Okay, and is Iola -- can you spell that, do you recall?

A I-o-l-a, I think.

Q So you and your biological mother, what do you want to call her?

A Debbie.

Q Okay. Her boyfriend, what was his name?

A Charles.

Q Okay, and your brother Dustin, sister Brittany?

A (Nods head.)

Q Who else?

A My youngest brother Austin, his two boys Charlie and Eric, and then his parents.

Q Okay, and when you say his two boys and his parents, who are you referring to?

A Charles's two sons, Charlie and Eric, and then his parents June and Andrew Farrar.

Q Charles's parents?

A Yes.

Q Okay. How long did everybody live together at 480 Iola Street?

A Um, let's see, we moved in right before I started my fifth grade year and then, let's see, my fifth grade year, my sixth grade year I missed two years of school which I was supposedly being home schooled my seventh grade year and part of my eighth grade year.

Q That whole time were his parents there as well?

A They moved in shortly before the first Christmas.

Q Would that have been in '95 then?

A I think so. Either '95 or '96.

Q Okay. Was there something that happened that caused you not to live at that house any more?

A Yes, there was.

Q Okay, and I want to talk about that. Tell us just briefly what happened that caused you not to live there anymore.

A Around the time I turned eleven, probably within a day or two before or after my birthday, they began sexually abusing me and my mom had emotionally abused me for years. She has a history of abusive boyfriends and after awhile it just began to eat me away from the inside out.

Q Okay, and when you say they, I need to know who you're talking about. When you say they began to sexually abuse you, who are you talking about?

A Debbie and her boyfriend, Charles.

Q And I want to get into that a little more, but let me ask you just a couple questions to get up to that point.

When did Charles, the defendant, come into your life? How old were you?

A Um, it was towards the end of my fourth grade year when him and Debbie started dating.

Q Is that in Colorado or somewhere else?

A Colorado.

Q Okay, and when did he begin to live with you?

A I had gone to -- no, it was to Texas at the time to visit my grandparents, came back, they flew me back, Charles and Debbie did, and it was at that time I found out that they were living together.

Q Okay. Do you recall how long that was after they met or what grade you were in?

A It was right after my fourth grade year. It was

the summer after my fourth grade year. They'd only been dating at that point a couple months.

Q So how old were you at that time?

A About nine.

Q Okay. Okay, and from the time then that you came back and they were living together, they continued to live together; is that correct?

A Yes.

Q Okay. When then, tell us again, when did the sexual abuse begin?

A Either a day or two before or after my 11th birthday.

Q Okay, and how are you able to remember that that's when it started?

A Because my birthday like it may have actually landed on Thanksgiving that year and it was either Thanksgiving or the day or two before or after.

Q Okay, and do you remember what grade you were in at the time?

A Fifth grade.

Q How long then did it last?

A Until I left.

Q Okay.

A So -- I don't know, probably about four and a half years.

Q How old were you when you left?

A Fifteen.

Q I want to ask you generally and then I'm going to ask you to give us a little bit more detail, but generally what types of things would happen over

that four years?

A Um, it started out where I didn't know what was going on. I was told to come down one night about my 11th birthday and when it started and it started out with just groping and I was really uncomfortable with it, but I was too scared to tell anybody what was going on, and it later progressed to intercourse and I did not know what to do about it. I was terrified because at that point I had been informed if I ever told anybody, I would be put six foot under, that was not a threat, that was a promise.

Q Okay, and when you say what you just said, are those exact words?

A Yes, that was exact words.

Q From who?

A Charles.

Q When would he say that to you?

A Just times he caught me alone when we -- he would pull me aside for a conversation or something and it would -- sometimes would come up and sometimes it wouldn't and so at that point I didn't feel I had much of a choice.

Q Okay. Okay. So you talked about there was groping and then there was sexual intercourse. What other types of things would happen over the years?

A There was one time that he took both me and Dustin out to the deck of the pool and he beat me up on the deck of the pool.

Q Okay. I want to talk about that a little bit later. As far as sexual abuse, though, what other types of things would happen?

A That basically covers the general gist of it.

Q Okay, and do you recall what date -- well, strike that. Let me back up.

I want to go now and talk about some of the times in more detail, okay?

Over that four years can you estimate for us about how many times there was sexual contact?

A I have no clue.

Q Okay. Was it often, not often?

A It would just vary depending on the times and what was going on at the time .

Q Okay. Would you say it was a lot of times or a few times?

A It was a lot of times.

Q Okay, and when it would vary, what would cause it to vary?

A Um, different conditions. It would just really depend on people's moods, um, time of the month.

Q Okay.

A Um -- just it really a lot of things played in a factor on it.

Q Sometimes was it more often than not?

A Yes.

Q Sometimes less?

A (Nods head.)

Q Okay. Let's talk about the first time anything ever happened, okay? You said that you were told to go down to their room.

A Yeah.

Q How did that happen, where were you, who told you?

A I was up in my room. It was about nine o'clock at night and I had gone to my room. I turned my radio on and as usual I was sitting in bed reading a book.

Q Okay, and then what happened?

A Um, about nine o'clock Debbie came into the room and told me that about 10, 10:30 she wanted me to be down in their room, but she wanted to talk to me.

Q Okay.

A I had no clue what about, so about 10, 10:30 I went downstairs. They told me to come in and all they had for a door at the time was a sheet and I don't think it changed much over the time.

Q Okay.

A And I went in and they told me to lay down. They had me get between them and so she kind of held me down while he started groping and that was about as far as it went that night and I went back upstairs late and ended up crying myself to sleep that night.

Q Okay. So you went downstairs and tell me what you saw when you got downstairs.

A They were just both laying in bed.

Q Okay. What was their bedroom like?

A Um, we guess the last people had used it for an indoor greenhouse or something. There was a small closet that had like a sump pump in it that he used for his work and then that was to the left side of the room and then their bed was in the center and

pushed back against the back wall and then to the right was a long walk-in closet that was her closet and had a freezer and a fridge I think in the closet.

Q Any other furniture in the room?

A Not that I can recall.

Q Okay. So when you walked down there in bed, what kind of bed is it?

A It was a water bed.

Q Okay. Do you know sizes of beds?

A I think it was a king.

Q Okay, and so what happens once you walked down and they're in bed?

A They told me to climb into the bed with the m and so I did, I didn't know why, and that's when it started.

Q Okay. When you got into the bed, where was everybody positioned?

A He was on the -- if you're facing the bed from the doorway, he was on the right side, I believe, and she was on the left.

Q Okay, and where did you go?

A They had me lay down between them.

Q Do you remember what you were wearing?

A Just a really oversized T shirt that came down to my knees and my undergarments.

Q And do you know what they were wearing?

A Nothing.

Q And then what happened once you got in the bed?

A She kind of put her arm around me and then

he started groping me and she kind of held me still so I couldn't move and was really too terrified to do anything about it.

Q When you say groping, can you tell us what you mean by that?

A He was grabbing me in my genital area and my breasts.

Q Over your clothes or under your clothes?

A At first over them and then under them.

Q Was anybody talking saying anything while this was going on?

A I really can't recall.

Q Okay. How long did that last?

A To be honest, I don't know. I kind of tried to shut myself down at that point.

Q And then at some point you said it ended and you were able to go back upstairs?

A Yes.

Q How did it end?

A They just told me I could go back to bed at that point and so I went back up and --

Q At that point when this is the first time, did the defendant's parents live in the home yet or was it sometime just --

A Yes.

Q Okay, and where were they?

A They were in their room next door to mine.

Q Okay, and can you give us a description of the house, how many levels it is and at that point where everybody's bedroom was?

A It was a two-level with an attic. Upstairs was the kitchen, one living room, the dining room, Dustin's bedroom was upstairs at the time, then in the corner of the house was Charles's parents and then my room, the bathroom, and it was kinds of an L-shape, so then if you walked slightly down the hall and took a left turn, you were back in the dining room near the front door.

Q And then downstairs, and was downstairs main level or basement or what was that?

A Basement.

Q Okay. What was downstairs?

A Um, once you got down the stairs you immediately walked into what was supposed to be an office area that we just kind of left for storage.

Q Okay.

A Um, then right to the right if you turn right and went straight was their room and then if you turned completely right, there was a hallway that led into a second living room that we had split into a living room slash office and then if you went past that, there was the laundry room right off of the office area, then there was the bathroom and then there was on the right hand side of the hall there was my room and on the left-hand side there was Dustin's.

Q Okay. Now I think you said that your and Dustin's room were upstairs?

A Charlie and Eric and Brittany's, 'cause they later moved us downstairs.

Q At the time of the first incident then --

A Yeah, Brittany was in the room I would later

occupy and Charlie and Eric had the other room.

Q When that happened, you said the defendant's parents were upstairs in the bedroom?

A Yes.

Q Where were the other children?

A Their rooms.

Q And do you know whether they were asleep? Was it bedtime?

A It was -- usually they were in bed by -- we were in bed by 9, 9:30.

Q You mentioned that while this was happening you kind of tried to shut yourself down. And I know it's been awhile because you're 17 now and we're talking about when you were 11. Do you remember what you were thinking when this started to happen?

A I was thinking why me, what did I do.

Q Okay. How did it feel then?

A It was terrifying. It was -- I felt like it was my fault, I had done something wrong to deserve it.

Um, I felt like my mother and I had never been close and so I felt like I'd really done something wrong this time for her to do this to me.

Q Okay. How else did it make you feel? And I mean comfortable, uncomfortable, any words you can --

A I was really uncomfortable, I was scared, I was confused.

Q After that first time, then, when was the next time, do you remember?

A I don't know.

Q At some point did this contact progress into something other than just groping?

A Yes. I'm not even sure at this point even how long it took.

Q Okay.

A Probably about six months, but it did eventually involve into intercourse.

Q Okay. Let's talk about that.

Do you remember the first time it evolved into intercourse?

A Not too well. It was just at that point it was all dragging into one long, blurrish nightmare.

Q Okay. Let's try and talk about what you do remember about that, okay?

Were you still eleven?

A At this point I'm not even sure any more.

Q Okay. You said it was maybe six months after the first time.

A About, probably about six months to a year, so I was either 11 or 12 at the time.

Q Okay, and at the time of the first time that he had intercourse with you, was everybody still situated in the same bedrooms?

A I think at that time we had already rearranged the rooms and I had been moved back downstairs.

Q At that time just tell the jury who lived upstairs and who lived downstairs.

A At that point it would have been Charlie and Eric in the room that had previously been Dustin's and Brittany in the room that had been mine.

Q Okay. So downstairs you and Dustin, Charles and Debbie.

A Yes.

Q And then upstairs, the other kids.

A And Charles's parents.

Q Okay, and before I go on, how old are the other kids in relation to you?

A Um, Dustin is about two and a half years younger than me, Brittany is seven years younger almost to the day, Austin is almost 13 years younger, and Eric's six years younger, and I think Charlie is five years younger than me.

Q Okay. So how old were you when Austin was born?

A I was almost 13 years old.

Q Okay. So at the time we're talking about then, the first time there was sexual intercourse, Austin is not born yet; is that right?

A Right.

Q Do you remember on that first time then what it was?

A just know it was late at night.

Q Where was everybody else?

A In bed.

Q And where did this happen?

A In Charles and Debbie's room.

Q Who was in their room?

A Charles , Debbie, and I.

Q Okay, and how did it come to be that you were in that room that night?

A I had yet again been told to come down and because of being scared, I didn't know what else to do.

Q Okay. What happened then once you got in there?

A It started the same way it usually did with groping and then she ended up holding my shoulders down and trying to tell me to calm down and -- 'cause I was at that point shaking really bad and almost in tears already.

Q Okay, and then what happened?

A He penetrated me and --

Q When that happened, what was Debbie doing?

A She was still holding my shoulders, trying to tell me to calm down.

Q Was there any other discussion at that point?

A Not really.

Q How many more times after that did sexual intercourse occur?

A I have no clue. I didn't count. It was -- it would vary from time to time depending on what was going on.

Q Okay, and so up to that point, tell me if I'm right, there had been groping?

A Yes.

Q And about six months later sexual intercourse begins.

A Yes.

Q After that, what types of things would happen? Would it be sometimes groping, sometimes intercourse?

A After that it was just usually both combined.

Q Okay. Was there ever any other type of sexual contact, other body parts touching?

A Not really that I can recall.

Q Okay. Did the defendant ever put his mouth on your body anywhere?

A Yes.

Q Tell us about that.

A Urn, the breast area and then my genital area.

Q Okay. When did that start happening?

A I don't know, probably about three months after it all began.

Q Okay, and tell us what would happen.

A Um, the first time it happened Debbie was again holding my shoulders trying to tell me to calm down, which did not really work, but --

Q Do you know why she was holding your shoulders?

A I have no clue.

Q Okay.

A At this point I don't bother trying to understand anything she does any more.

Q Okay. Were you trying to leave or anything like that or --

A I was too scared to do anything.

Q Okay. So when that would happen then to the first time she was holding you down, what did the defendant do?

A Um, it started out groping as usual and then he had removed my panties and he placed his mouth

on my genital area and --

Q What did he do?

A He began licking my genital area and such and at that point I think I was already in tears. I'm not for sure at this point any more.

Q Okay. About how long did that last, that first time?

A I don't know. I didn't pay much attention to time. I was too scared. I was confused. I didn't really know what to do.

Q Okay, and then that time, the first time that that happened, how old were you?

A Eleven.

Q Do you have a name for what that is, do you call that anything in particular?

A Not really.

Q Okay. Do you know what that's called?

A No.

Q Okay. In the past have you used the word munching?

A That's what he would call it and --

Q Okay.

A I don't know. It's the only thing I could come up to describe at the time. I was still in shock.

Q Okay. So that's a word that you got from the defendant.

A Yes.

Q Was there ever a time that your mouth went somewhere on his body?

A I -- Debbie did talk me into doing the same

thing to him. I was really uncomfortable about it. I did not want to do it. It was just kind of -- she would -- she had once come into the room and when I wouldn't, had threatened to beat me for it. She had threatened to burn me with her cigarettes. It was just -- she was mad because at the time I think at the point that it really got to the ultimate point 'cause she felt that --

MR. TRUMAN: Excuse me, Your Honor. I'm going to object here as speculation.

THE COURT: Well, let's have another question. The jury will disregard the partial comment. Go ahead.

MS. SCHOBER: Sure.

THE COURT: I'm not sustaining this objection, I just need another question.

Q (BY MS. SCHOBER) I think we were talking about how you got talked into or coerced into doing this and Debbie would threaten to do things to you?

A Yes.

Q How did it come about that it eventually happened then?

A I became too terrified to tell her no anymore because the fact she did have a very violent temper. I had seen it in the past.

Q Do you remember the first time that happened, the first time that you had to put your mouth on him?

A I'm not sure when it was. It was after awhile. Like I said, it began to blur into just one long nightmare.

Q Okay. Do you know about how many times

that happened?

A No, I do not.

Q I want to talk - - and I'm kind of focusing on specific times so that I can ask you some detail about specific times.

Do you remember the last time any sexual contact happened?

A It was probably within a week of me finally being able to get a hold of the school counselor.

Q And do you remember when that was?

A Beginning of March.

Q Of what year?

A Um, it was my -- probably '98, '99, somewhere in there.

Q Okay. Let's think about how old were you when you were able to get a hold of the school counselor.

A It was my eighth grade year. So I was 15.

Q Okay, and you're 17 now?

A Yes.

Q So if now is 2002, when you were 15, would it have been 2000?

A Well, except the years changed since my birthday and I think it was short -- may have been 2000.

Q Okay. In any event, it was about a week within the time that you got a hold of your school counselor?

A Yes.

Q Do you remember that counselor's name?

A Ken Jahner. I think Ken was his first name.

Q Do you remember what happened the last time?

A Not really. It was just at that point I was getting quite good at shutting myself down, according to my therapist. I started seeing --

MR. TRUMAN: I'll object to that.

THE COURT: Sustained. The jury will disregard that comment.

Q (BY MS. SCHOBER) Sacha, I know it's hard to give us a number of how many times things like this happened, but can you estimate?

A I'd say at least a hundred.

Q Okay, and that's over the four years.

A Yes.

Q Okay, and when I say these things, does that mean the groping, the munching, your mouth on his penis and intercourse?

A Yes.

Q And we've talked about these things would happen in their bedroom?

A Yes.

Q Would they happen anywhere else?

A Um, from time to time it would occur in my room or he had taken to buying, fixing up and reselling, um, dilapidated properties and sometimes it would happen there.

Q Okay. About how many times do you think?

A I have no clue. Probably about 15 percent of it happened at either my room or at the other houses.

Q Okay. 50 or 15?

A Fifteen.

Q So about 85 percent in their room?

A Yes.

Q When we talk about your room and their room, is that always at 480 Iola Street?

A Yes.

Q When it would happen in their room, who would be there?

A Um, Debbie, Charles, and I. Sometimes Debbie was not there, especially after Austin was born she would be in the living room rocking him.

Q Okay. So Austin was born when you were 13?

A Yes.

Q Okay. So was Debbie there more from 11 to 13 and then less for 13 to 15?

A Yes.

Q Okay. When it would happen in your room, who would be there?

A At that time it usually I think there was only one time she was in there, but the rest of the time it was just Charles and I.

Q And at the fix-up houses.

A It was usually just Charles and I those times.

Q And where in those houses would it happen?

A Back rooms, just rooms that usually didn't have a window that had no view that anybody could see.

Q Okay. You talked about with some of the specific times we've talked about that it was late at

night.

A Yes.

Q Did it ever happen any other time of the day or night?

A Yes, it would sometimes happen during the broad daylight depending on what was going on and where we were at. If it was at his houses, it was sometimes day, it was sometimes night, and just depended.

Q Okay. Sacha, was there something that developed over those four years that you called the usual procedure?

A It was just basically it started out groping and then progressed to the intercourse.

Q And was the intercourse -- was it performed in different ways or was there a particular way that that would happen?

A Um, either with me sitting on top of him or me on my back.

Q Okay.

A Just depended.

Q Okay, and I kind of differentiated these things and talked about groping and the munching and then your mouth on his penis and intercourse, would it be these things separately or sometimes would a couple of these things happen during an incident?

A It would usually -- a couple of them would happen during the same incident.

Q Okay. You talked about a couple of those times. The first time that there was groping and the first time there was munching and the first time that

there was intercourse your mom was holding you down?

A Yes.

Q Did that -- when she was there with you, did she always hold you down or was it just sometimes?

A No, it just depended on what was going on at the time.

Q Okay. About how many times would you say she actually held you down?

A Probably about four or five.

Q Okay. Did your mom ever do anything else?

A There was one incident -- one of the incidents that she was quite involved in.

Q And, I'm sorry, I missed that, one or more?

A One or two incidents that she was quite involved in.

Q Can you describe those for us?

A There was a couple times that she groped me. There was a couple times that she had her mouth in my genital area. It just -- I guess it kind of caught her fancy at the time.

Q Okay. When you say she would grope you, where would she grope you?

A My genital area, my breast area.

Q Is there -- was there a particular time that you wanted to do something at school, but there was some conditions?

A Yes. The spring dance my sixth grade year, I was kind of blackmailed into them videotaping it in order for me to go, but - -

Q Okay -- go ahead.

A But for me it meant a few hours away from them, away from the house, where I could actually pretend I had a normal life, and so I ended up letting them videotape it.

Q Let's start with this spring dance. What was that?

A It was just a bunch of middle school kids getting together and basically it was more of a social, everybody kind of talked. They kind of made up dance moves as we went.

Q Did it have a name?

A Um, I know it did, but I can't remember at this time.

Q Okay. Does the Spring Fling sound right?

A That may be it.

Q And when was that?

A Probably in March.

Q Of what year?

A My sixth grade year, so '96, '97.

Q Was this something that you had to get permission to be able to go to?

A Well, we didn't have parental permission to get in, but I had to have parental permission to be out of the house.

Q So did you ask Debbie and the defendant if you could go?

A Yes, I did.

Q And how did that go?

A They told me they would think about it and

then later returned to me with their conditions.

Q Okay. Did they come back with conditions?

A Yes.

Q What were those conditions?

A One was that they would be able to videotape one of the incidents that would occur with both of them involved before spring break, the spring dance, and the other one was at that point I was passing all my classes.

Q Okay. Do you recall the first condition that you talked about, was it described to you before it happened in more detail?

A Not really. I didn't know what was going on. They kind of played it by ear, so I didn't really know what was happening.

Q Okay. So there was going to be a videotape.

A (Nods head.)

Q And who was going to be involved in being filmed?

A Debbie, Charles, and I.

Q Okay, and do you know what everybody was supposed to do on the videotape?

A Not really. It was just whatever happened, happened.

Q And do you remember what happened?

A Um, it started with him munching on me and then - - and intercourse and she ended up munching on me.

Q After intercourse with the defendant.

A Yes.

Q And that was videotaped.

A Yes.

Q When you were in sixth grade at the time of the Spring Fling, do you remember what year that was?

A It was ’96 or ’97.

Q What was that incident taped with?

A A video recorder that she had received for either her birthday or Christmas the previous year.

Q Okay. Were there any other videotaped incidents, sexual incidents?

A No.

Q Have you ever seen that video camera before?

A I had seen the camera before.

Q Okay, and what was it used for other than that incident?

A Birthday parties, Christmas, just different things.

Q Okay. Do you know what happened with that tape, Sacha?

A No, I don’t.

Q Okay. Did you ever watch it?

A No, I did not.

Q Do you know whether they ever watched it?

A He had mentioned -- the defendant had mentioned watching it to me a couple times.

Q What did he say about it?

A He said it was really a turn-on and that he wanted me to watch it with him.

Q When he mentioned the tape to you, was that close in relation to the time it was made or farther out?

A It was farther after.

Q Okay. So about when in relation to when it was made?

A Probably six months to a year later.

Q And at that time you were how old, do you remember?

A Probably about 12.

Q Okay.

A Maybe 13 at that point.

Q By the time that you told in March of 2000, had he mentioned the tape recently, close to the time that you told?

A I honestly can't recall him mentioning it, but he may have. I don't remember too much of the time. I spent most of my time either asleep or reading.

Q Okay. Sacha, was there ever a time that the defendant mentioned other people becoming involved?

A There was one time that he had wanted me to do a party for a few of his friends.

Q Um-hum. Tell us about that.

A Um, I didn't know too much about it. There was about six or seven guys that were just getting together to drink beer and wanted a, um, basically a call girl there and so he --

Q Is that the word --

A -- he kind of volunteered me.

Q Is that the word he used with you, a call girl?

A No, that's just kind of my word for it. Basically they wanted a prostitute, just somebody that they could pay for and have their way with.

Q Okay. So how did it come up then? How did it get discussed with you?

A He just brought it up and mentioned to *me* one day when we were downstairs in the office. I think I had been sitting on the couch reading or something.

Q What did he say?

A He mentioned he wanted to talk to me and he brought it up and asked me if I'd be interested in doing it and I told him I didn't know and from that point on I came up with excuse after excuse to get out of it.

Q Okay. Were you going to get anything out -- were you going to get anything for it?

A They were supposed to pay me. I don't know how much any more. I don't really care. It was just my main thing was see if I couldn't get out of it somehow.

Q So did that ever happen?

A No.

Q When we're talking about the four year time span that this was all happening, when did that offer or suggestion come up to you?

A Probably late my seventh grade year.

No, it had to have been early my eighth grade year.

Q So were you 14 or 15?

A I was, yeah, about 14 or 15 at the time.

Q All right. This went on for quite some time.

A Yes.

Q Did you ever want to tell somebody?

A Yes. There was one point somebody I almost told and days before I had the chance to mention it or tell him, he passed away in a motorcycle accident.

Q Who is that?

A It was the defendant's brother Andy.

Q Okay. How old were you when you wanted to tell him?

A I'd say probably about 13 or 14 years old.

Q Why was that somebody that you wanted to tell?

A I just trusted him. I figured I could trust him to find some way to get me out without me ending up hurt.

Q So you wanted to tell him and he passed away.

A Yes.

Q Were there other times that you wanted to tell but were not able to?

A There were plenty of times I wanted to tell, but I was either too scared or I didn't feel I had somebody I could turn to.

Q Why were you scared?

A Because he had told me if I ever told, he would put me six foot under.

* * *

Q Okay. Was there anything else that happened that kind of not caused you to go along with this, but that -- that they did meaning the defendant and your mother?

A They --

Q To help you go along with this?

A They were paying me hush money. The main thing was I was terrified for my life and after awhile it got to the point where I'm not even sure it mattered to me any more if I lived through it or not.

Q Okay. Tell me about the money.

A Um, usually about $20 per time.

Q And how did that happen? Would they finish and say here's some money or how did that happen?

A I'd usually receive the money about two days after the fact whether it was just me and them or --

Q Okay.

A It just varied.

Q Did you receive money from the time you were 11 to the time you were 15 or did that start somewhere in the middle?

A Started not at the beginning, but later on.

Q Okay. About when?

A Probably about the time the intercourse actually started.

Q Okay. Who would give you the money?

A Um, it just depended if he was busy with one of the his houses and wasn't there for a couple days, Debbie would give me the money or sometimes Charles would give me the money. It just depended.

Q Would they say anything?

A Not really. They told me not to tell the others where I got the money, I'd gotten it from a friend or school or if possible not to even let them know I had

the money.

Q Did they tell you this is for letting us do what we did the other night?

A Yes.

Q They did? Okay, and just so that we're clear, are you sure that's what it was for or was this just your allowance for chores or thing like that?

A We did not receive an allowance.

Q Meaning any of the kids?

A None of the kids received an allowance.

Q Did that happen every time an incident would happen or just sometimes?

A It would just vary from time to time. They would save the money up and give it to me in a larger lump sum. Sometimes it was each time. It just really varied depending on circumstances.

Q Okay. Sacha, we talked about how you were afraid to tell, how there was somebody you wanted to tell that he passed away. You did finally tell, right?

A Yes, eventually I'd spent about a week and a half trying to get a hold of the school counselor.

Q Okay.

A And I didn't want to leave a note explaining why it was so important that I saw him, but eventually I just kind of went up to there at my lunch and sat up there at lunch and did not go back to class after lunch because he had come in. I explained it was urgent, I needed to speak with him, at which point the night before I had gotten a hold of my grandma which Debbie and Charles did not have knowledge of. I had spoken to my aunt on an

occasion or two before that.

Q Okay. So who was the first person that you told?

A My grandma.

Q And what -- tell us her name.

A Nita Timmons.

Q That's the grandma that you live with now?

A Yes.

Q And when you were able to tell her, you were at school or where were you?

A Yes, it was after school hours. Dustin thought I was phoning a guy that I liked that I had met one day on the way home from school.

Q Okay.

A And because I couldn't -- I didn't trust him enough to tell him who I was calling.

Q Where was your grandma at the time?

A They were living in Sand Springs, Oklahoma, I believe, at the time.

Q Okay. Why couldn't Dustin know that you were phoning your grandma?

A Because we were not allowed to have contact with our grandparent.

Q Why?

A Debbie and Charles had forbidden it about the time I started in home schooling and they cut off all contact with them.

Q Do you know why they cut contact?

A I do not know.

Q But it was around the time you started home schooling.

A Yes.

Q When did you start home schooling?

A Um, I completed my regular sixth grade year, but I passed all my classes barely, but I had passed, and they decided that wasn't good enough. They pulled me out of school and I was supposed to be in home schooling for the year but really was not.

Q Okay. Let's talk about this a little bit more and then we'll get back to when you told.

How long were you out of school before you got to go back to school?

A An entire school year.

* * *

Q Okay. Now if you -- we talked about that. You talked to Mr. Jahner in March?

A Mr. Jahner.

Q I'm sorry. In March. Is that the date or before?

A It's April -- okay. February before.

Q February you relocated the phone number?

A Yes.

Q And how did you call your grandparents?

A I believe I called collect or I may have actually had change. I don't remember. May have been left over from lunch money or something.

Q Okay. So from school.

A Yes.

Q And who did you talk to?

A My grandmother.

Q Okay, and without telling us what you told her, were you able to tell her what had been going on?

A I could give her a vague idea. I was standing in the middle of the lobby. There was a bunch of kids milling around after school. There were a lot of after school activities including extra choir practices for choir , a lot of the clubs met after school. There was a drama club that met in the auditorium right outside the lobby.

Q So what do you mean by vague idea? Did you give her a couple sentences, one sentence?

A I kind of gave -- I kind of told her that they were abusing me and then she started asking questions I could give a yes or no answer to so she could get a little bit clearer idea of what was going on and the next day I finally got a hold of Mr. Jahner.

Q Okay. Did your grandma suggest that she would do something or suggest for you to do something?

A I told her I was trying to get a hold of a counselor. She suggested I do that. She said if I couldn't get a hold of them before tomorrow, she would call, tell him what she knew and try to get him to pull me out of class and get me into the office.

Q Okay. When you say that you were trying to get a hold of your counselor and that you tried a couple times, what would happen that you would try and you weren't able to get a hold of him?

A He would be out of the building for the day. He would be in meetings all day.

Q Was this something where you were going to his office, he wasn't there, you would try back another time?

A Yes.

Q Okay, and then one day you went and made an appointment?

A One day I just marked the note urgent. We were supposed to write a comment about why it was so urgent, but really did not want to do that being as I knew the secretaries in the office read that and I didn't really want more people knowing than had to at the present time.

Q Did you put down any reason why it was urgent?

A No, I did not.

Q You just wrote urgent?

A Yes, at which point my grandma had managed to get a hold of him sometime that morning.

Q Okay.

A So shortly after lunch I believe because I went there at lunch to sit there and see if I could catch him and he came in shortly before the end of my lunch and I ended up speaking to him.

Q Okay. Was that the same day you left the note or the day after?

A It was the same day I left the note.

Q Okay. When you went in to talk to Mr. Jahner, do you remember how much you told him?

A I think I just gave him a general idea of what was going on. I didn't go into too many details because of the point I was very emotional about it. I

do remember I broke down crying a couple times trying to tell him.

Q Okay. So you gave him some of the details, but not all of the details?

A Yes.

Q What did he do?

A He called social services and the police pulled me out of class. I did not return to class until after the fact to pick up my backpack.

Q Okay.

A No, wait, they told me to bring my backpack with me. I returned the next day or the day after to clean out my locker.

Q Okay. What happened after -- were you going -- why did you have to clean out your locker?

A Because I had moved to a foster home outside of the school district, they were moving me to a new school.

Q Okay. Sacha, why after so many years or how were you able to finally tell somebody?

A I'm not really sure. It just finally got to the point where if I didn't, it was going to completely destroy me and at which point I realized I could not let it do that and that point I realized if I didn't do something soon, Brittany night be next.

* * *

APPENDIX R

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

v.

CHARLES ARTHUR FARRAR,

Defendant.

Case No. 01CR505
Division 11

REPORTER'S TRANSCRIPT
[Tuesday, March 26, 2002]

A P P E A R A N C E S:

FOR THE PEOPLE:

DARREN VAHLE, Reg. No. 28107
CHRISTINE SCHOBER, Reg. No. 30039.

FOR THE DEFENDANT FARRAR:

CRAIG TRUMAN, Reg. No. 5331

This matter came on for continued trial to jury on Tuesday, March 26, 2002, before the Honorable John P. Leopold, District Judge.

This is a transcript of the proceedings had in this case on that date.

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* * *

[Testimony of Sacha Brod, pp. 4:1, 5:16-9:22, 26:16-31:23, 44:2-3, 44:11-12, 86:2-90:25]

* * *

MORNING SESSION, TUESDAY, MARCH 26, 2002

* * *

SACHA BROD,

called as a witness by the People, having been previously duly sworn, continued testimony as follows:

DIRECT EXAMINATION (CONTINUED)

BY MS. SCHOBER:

Q Good morning, Sacha. How are you?

A Good morning.

Q Good morning. Yesterday you remember we left off talking about when you reported to your counselor, Mr. Jahner. Do you recall that?

A Yes.

Q And I think the last question I asked you is why did you finally decide to tell.

A I'd actually been trying to for awhile. I couldn't find anybody I trusted enough to tell for a long time, but then when I did, it was just a hard time getting a hold of Mr. Jahner because he was a very busy man.

Q Okay. Now I want to talk about that a little bit. When you thought about telling, you said that you wanted to tell someone you trusted.

A Yes.

Q And who would you consider someone you trust?

A It's kind of more of a gut instinct than characteristics I look for in somebody.

Q Is that usually someone you've known for awhile as opposed to someone --

A Yes.

Q When you went to see your counselor, Mr. Jahner, do you recall whether you immediately started talking about the sexual abuse or whether you talked about something else?

A He had talked me how my day was going at that point first and then we went into it.

Q Okay. Did you talk about your day at all?

A I said that my day was going fairly well.

Q Okay. Do you remember talking about some sort of fight you had with one of your brothers?

A Not really.

Q Okay. Is that possible that happened that day?

A It's possible. It was just kind of an overwhelming end to a day.

Q After you talked to him, what happened?

A After I talked to him, he told me he would take care of the matter and told me he would probably call me back down sometime during the day and sent me back to class.

Q Okay. At some point were you called back down?

A Yes, I was.

Q And was that that same day?

A Yes.

Q What happened when you were called back down?

A I spoke to a police officer and an intake worker I believe named Stacia.

Q Do you remember the police officer's name?

A No, I don't.

Q Was it a man or a woman, do you remember?

A I honestly don't remember.

Q Was it one police officer and an intake worker named Stacia?

A Yes.

Q Do you know if Stacia was from social services?

A I believe she was.

Q When you spoke with them, was it just those two or was anyone else there?

A I believe it was just the three of us in the room.

Q Okay, and when you spoke with them, what did you talk about?

A The abuse.

Q So at that point you had talked briefly to your grandmother?

A (Nods head.)

Q You have to answer out loud for the court reporter.

A Yes.

Q And to guidance counselor Jahner.

A Yes.

Q And you spoke to the social services person Stacia and the police officer?

A Yes.

Q When you spoke with Stacia and the police officer, did you speak to them for a longer period of time, gave them more detail?

A I believe so.

Q Okay, and specifically did you give them more detail than you gave to guidance counselor Jahner?

A Yes.

Q And did you give them more detail than you gave to your grandmother?

A Yes.

Q When you spoke to each of these people, and let's start with Stacia and the police officer, did you tell them the truth to the best of your ability?

A Yes.

Q And did you tell them as much as you could remember?

A Yes.

Q Okay. When you spoke to guidance counselor Jahner, again did you tell him the truth?

A Yes.

Q Same with your grandma.

A Yes.

Q Okay. I want to talk a little bit about your memory 'cause here we are in 2002 and you're 17 and we're talking about things that happened from the time you were 11 to 15, right?

A Yes.

Q Okay. Do you think that your memory was more clear about this when you talked to your guidance counselor and the officer and the social service worker or do you think it's more clear today?

A It was more clear then.

* * *

Q Okay. Okay. I want to go back and talk about the progression of sexual activity that happened and see if we can just narrow that down a little bit more, okay?

So right around your eleventh birthday is when it started; is that right?

A Yes.

Q And that's November 28th?

A Yes.

Q Of --

A Yes.

Q So that would have been '95.

A Yes.

Q And first thing that started was groping, touching, things like that.

A Yes.

Q How long did those incidents, recall each time it happened as an incident, how long did that go on until it progressed into something different?

A Probably six months to a year.

Q Okay. Just groping and touching.

A Yes.

Q And then what happened next, what was the next progression or the next step?

A Um, him putting his mouth into my genital area and breast area.

Q And that's what he called munching.

A Yes.

Q And how long did that happen? How many -- how long did those incidents happen before the intercourse happened?

A Probably about three to four months.

Q Okay, and are you guessing on the time frames or is it clear in your mind?

A It's -- they're approximate.

Q And then I think you said that once the intercourse started, sometimes it would be intercourse and sometimes it would be oral and intercourse, sometimes just one, sometimes groping, just kind of became a mix then?

A Yes.

Q Okay. The first time, we talked a little bit about that yesterday and you said that they had you come downstairs and then had you get in the bed.

A Yes.

Q Do you recall whether Charles touched you before you got in the bed?

A No, I do not.

Q Okay. Do you remember at Sungate the yellow house telling Jody that he touched you before you got in the bed?

A I don't remember too much about my interview at Sungate.

Q Okay. How much do you remember specifically about that first time?

A Um, at this point it's just kind of blurry.

Q Okay. Part about being in the bed, though, is pretty clear?

A Yeah.

Q Okay. Okay. Yesterday we talked about when it would happen and you said often late at night and then sometimes in broad daylight.

A Yes.

Q Okay, and I believe I asked you if you remembered talking to Jody about the usual procedure. Do you remember if I asked you that? I may not have asked you that.

A I don't remember.

Q I think I just asked you if there was something called the usual procedure or something you called the usual procedure. Was there?

A At this point not that I can really recall.

Q Okay. Did it ever happen early in the morning?

A Um, usually if it did, it was just before he went to work and that wasn't very often.

Q Okay. Do you remember telling Jody at Sungate that at times you would get up in the morning and go into his room?

A I don't remember telling her that, but, yes it did happen a couple times.

Q Okay. Tell us about that.

A There were times when I would be told when I was woke up by Debbie that I needed to go in there that morning and just kind of -- because I didn't know what else to do. I would kind of -- it was more like walking in my sleep than anything else at that point because it was more of a never-ending nightmare.

Q When you would go in, who would be in there?

A I think once or twice she was in there, but the rest of the times it was just Charles and I.

Q And when you would get in there, what would he be doing?

A Usually just lying on the bed.

Q Okay, and then what would happen?

A Um, I would be told to get in the bed and things would progress from there.

Q How would they progress?

A It would just depend on his mood.

Q Were there times that you had to, and pardon the term I'm going to use, but suck him into an erection?

A Yes.

Q When would that happen?

A Just later on. It was basically became an ordeal every time.

Q Meaning that that's what would happen first?

A Yes.

Q What would happen after that?

A It would just vary with his mood.

Q Okay. Examples of what would happen.

A Sometimes it would move on to groping, sometimes it would move on to him munching me. Other times it was just go straight to the intercourse.

Q Okay. When these things would happen, how would you know what to do?

A He would usually tell me what I was supposed to do or I just kind of played it by ear and what not.

Q Okay. Did Debbie ever tell you what to do or help you?

A Yes, there were times that she was involved.

Q Okay, and specifically can you give us some examples of how she told you what to do or how she --

A She would come in beforehand and tell me what I was supposed to do that night or what not and then she would usually be in the living room with us and I would go in at those times.

Q Times she would tell you she wouldn't, then later be in the room?

A It was usually after Austin was born that she had to take care of Austin.

Q Before that then when she was in the room you mentioned that some of the time she would be holding you down.

A Yes.

Q Other times what would she be doing when she was in the room?

A Sometimes she would just watch.

Q Other times?

A Sometimes she would tell me what I was supposed to do while watching.

* * *

Q These things, did they really happen to you?

A Yes.

* * *

CROSS-EXAMINATION

BY MR. TRUMAN:

* * *

Q All right. Now, let's talk a little bit about the family that lived at 480 Iola Street. That was your address.

A Yes.

Q And when you first moved in there, you lived upstairs.

A No.

Q When you first moved in there you lived downstairs.

A Yes.

Q And in the downstairs of that particular house all the time that you lived there was in a remodeling circumstance.

A The room I had never had a door. The rest of the house he fixed up.

Q Well, the room that you had didn't have a door, correct?

A Correct.

Q And the room Mr. Farrar and Ms. Brod shared downstairs didn't have a door?

A It did when they moved in. He removed it.

Q And certainly it was removed before any of these incidents that you've talked about occurred?

A No.

Q Well, you told Ms. Schober that the first time it happened there was no door there, didn't you?

A The door was open the first time I went down. I mentioned I had not had to open a door.

Q In fact, you told Ms. Schober there was a sheet?

A Over my door he had sheets in the room. I believe the door was still there the first time.

Q Do you remember talking with Jody Curtin at Sungate on March the 15th, '00?

A Vaguely.

Q Did you remember her asking about the doors?

A Um, no.

Q Do you remember you telling her there's never been a door downstairs on the bedroom that Mr. Farrar and Ms. Brod shared?

A I do not remember telling her that. At the time I may have because I was still in shock.

Q Now, you and Dustin always lived on the same floor at 480 Iola.

A Yes.

Q And sometimes Brittany lived on your floor and sometimes she did not?

A Incorrect.

Q Well, did Brittany live on your floor?

A No.

Q Ever.

A Not the same time I did.

Q Well, Brittany had nightmares, didn't she?

A Yes, she did.

Q And sometimes during those nightmares she did get up in the middle of the night and go into Mr. Farrar and Ms. Brod's bedroom?

A Um, I was not in there those nights, but the nights I was I was told to go into Debbie's closet.

Q So when Brittany would have nightmares the middle of the night and she would come into the Farrar/Brod bedroom while you were in there having these incidences, correct?

A Yes.

Q You were instructed to hide in the closet.

A Yes.

Q And you did that?

A Yes.

Q How many times did that happen?

A I don't know. I didn't count.

Q And I'm sure that hiding in the closet was something that you remembered when you spoke with Officer Williams, then known as Officer Capron?

A I don't know if I mentioned it, but I may have.

Q And certainly hiding in the closet while Brittany came in was something that you told Jody Curtin on videotape on March 15th?

A I'm not sure if it was asked about, so I'm not sure I mentioned it.

Q Well, you were trying to give Ms. Curtin the entire story, weren't you?

A At the time, yes.

Q And there's nowhere in the videotape that you talked with her about -- there's nothing that you ever told her about hiding in the closets, was there?

A I don't know.

Q Well, let's go back to the first time around Thanksgiving in the year 1995. Do you remember that?

A Vaguely.

Q Had there been anything else that occurred prior to the time that you were summoned to the bedroom of Mr. Farrar and Ms. Brod?

A Not that I can recall.

Q There had been no big traumatic incidents before that?

A Not that I recall.

Q When you spoke with Officer Capron, now known as Officer Williams, on March the 7th, you said that during Thanksgiving of your eleventh birthday Mr. Farrar had thrown you around by your hair?

A That had been one of the room cleaning incidents. As I said, I do not recall too many details at this point.

Q And so that was traumatic, wasn't it?

A Yes.

Q But you didn't remember that today.

A Too many incidents. The dates are not clear in my head any more.

Q Well, certainly you didn't like getting thrown around by your hair.

A No, I did not.

Q So you cleaned up your room.

A I attempted. Like I said, I have no storage in the room.

Q But other than that, your room was clean.

A It was hard to clean the room when you had no place to put things.

MR. TRUMAN: May I go to the witness?

THE COURT: All right.

Q (BY MR. TRUMAN) Let me show you what I've marked as Defendant's Exhibit D for delta. Can you tell me what that is?

A The room with very limited storage. Most of that had been pulled out of the closet because I had been told to find something or I may have been looking for a shoe because I had no place to store shoes separately. I had boxes upon boxes of belongings piled in the closet floor. In a hurry in the mornings I would go through and I often did not keep the room clean or often I just did not feel like

cleaning it because of the fact I was tired and had no energy.

* * *

[Testimony of Stacia Schmied, pp. 195:15-208:15]

* * *

STACIA SCHMIED,

called as a witness by the People, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SCHOBER:

Q Good afternoon. Could you please state your name and spell both your first and last name for the record?

A It's Stacia Schmied. S-t-a-c-i-a. The last name is S-c-h-m-i-e-d, as in David.

Q Ms. Schmied, where do you work?

A Arapahoe County Department of Human Services.

Q And how long have you worked there?

A Three and a half years.

Q Do you have a title or --

A I'm considered a Caseworker C.

Q Okay. Can you describe for the jury what your duties are as a Caseworker C?

A Sure. I'm a child abuse investigator. I primarily work in one particular area in my job and I investigate the referrals that initially come in when they're alleging abuse of -- allegations of abuse or neglect. I'm the intake worker who goes out to assess

and determine what services needs to be put in place or what action may be necessary with the family.

Q How do these referrals come in to the Department of Social Services?

A We have one particular unit that we refer to as our screeners. There's approximately eight people in there who take the phone calls that come in from the community all for Arapahoe County and they take every phone call that comes in.

Q Okay. So mostly phone calls?

A Um-hum.

Q Okay.

THE COURT: Yes or no, please.

THE WITNESS: Yes.

Q (BY MS. SCHOBER) And that is because Ms. Heymans has to type down everything you say.

On March 7th of the year 2000 did you receive a referral regarding sexual abuse of a girl by the name of Sacha Brod?

A Yes, I did.

Q Okay, and do you recall who that referral was from?

A Um, yes, the reporting party is normally confidential unless directed otherwise by the court.

Q That's okay. We don't have to go there.

As a result of that referral did you do something?

A Yes, I was notified of the referral and responded to the school.

Q Okay.

A Where the child attends.

Q Okay. Also did a police officer go to the school?

A Yes.

Q And did you call the police officer or do you know how that came about?

A I contacted the Aurora Police Department.

Q Okay, and is that normal course?

A Yes, it is.

Q Okay. Do you recall what school?

A South Middle School.

Q Okay. When you got there, then, did you have a chance to meet with the child Sacha Brod?

A Yes, I did.

Q And where did this meeting take place?

A In one of the conference rooms in the front office of the school.

Q Okay. Who else was there for that meeting?

A Myself and the Aurora police officer.

Q Do you remember that person's name?

A Yes, Jacki Capron.

Q Okay, and she is now Jacki Williams?

A Yes, Capron Williams.

Q But we will talk about Officer Capron since that was her name at the time.

A Right.

Q Did then an interview -- was an interview conducted with yourself, Officer Capron, and Sacha Brod?

A Yes, it was.

Q Okay. Before we get into what was said, can you tell us the circumstances of the interview, who was asking questions, things like that?

A Primarily the officer proceeded with asking the questions and, you know, I asked questions throughout the interview as necessary.

MS. SCHOBER: Okay. Judge, I would ask that you read the instruction.

THE COURT: Ladies and gentlemen, once again you're about to hear statements made by Sacha Brod outside of the courtroom. It is for you to determine the weight and credit to be given to these particular statements. In making that determination, you shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other factor you deem relevant or appropriate.

Thank you and let's continue.

Q (BY MS. SCHOBER) Going into the interview, what information did you have?

A Actually before I asked her any questions?

Q Yes.

A I had been told that Sacha had made allegations of sexual abuse by her stepfather and she was concerned about remaining in her home.

Q Okay. Can you now tell the jury what Sacha told you about what had been happening?

A Um, Sacha explained to the officer and I that after a few days after her 11th birthday she had been asked by her mother to come into the bedroom of her parents and at that time she was standing next to a

bed and both her mother and father were lying naked in the bed and her stepfather began to grope her in the groin area and on her breasts.

Q Okay. What did she say happened next?

A She does not recall how long the situation lasted. She went back to her bedroom or she went to sleep and it was approximately I believe she said two weeks after that that the next incident occurred.

Q Okay. Still talking about that first incident and then we'll move on.

A Okay.

Q Do you recall whether she said anything about having to get into the bed with them?

A I believe she said she was asked to get into the bed and lie in between them.

Q Okay, and what happened in the bed?

A Her stepfather continued to grope her on her breast and in her groin area and I believe she said that her mother had kept telling her to relax at that time.

Q Okay, and then you said that she said she wasn't sure how long it lasted, but then she went back to her bedroom?

A Correct.

Q Okay. Did she tell you how many times that type of sexual contact occurred?

A All together or just -- over the years she said it was many, many times.

Q Okay. Did she discuss with you that at some point the sexual contact progressed into something else?

A Um-hum.

THE COURT: Yes or no, please.

THE WITNESS: Yes. I'm sorry. Yes, she did.

Q (BY MS. SCHOBER) What did she tell you?

A That approximately I believe it was two months after the initial incident where she described the groping that it progressed into what she referred to as her stepfather munching her.

Q Okay. What was she talking about?

A She described oral sex.

Q Okay, and did she discuss with you how many times that had occurred?

A Um, she said it was more than once. She reported there were times when this would frequently happen a couple times during the week and then there were times where it would go a whole month before there was any new activity.

Q And right now are you specifically talking about munching or just sexual contact in general?

A I believe that was the munching and the groping in general.

Q Okay. Did she go on to describe that that then progressed into further sexual contact?

A Yes, approximately six months after the first incident she had stated that it progressed into sexual intercourse.

Q Did she describe for you and Officer Capron what sexual intercourse was?

A She -- she described how it progressed was she was to go into the room and suck him into an erection and then she was to climb on top of him and

she described that as his penis becoming stiff and bigger.

Q Okay. She say when these things would happen?

A Late at night. I recall her saying late at night after the other children were in bed or early in the morning like before school at five in the morning.

Q Okay. Did she talk to you about her mother being present?

A She did.

Q What did she say?

A Um, she described her mother being present from the first incident and I believe she was there for the second incident where it progressed into munching and then also the sexual intercourse and then she said there were oftentimes the mother would be out in the living room with the younger children watching them and other times she would actually be in the bedroom and be present.

Q And just so that I'm clear, was it your understanding that there was a groping incident and then the second incident was munching or there was some groping and then --

A As I recall, it was groping and then progressed into munching approximately two months.

Q Okay.

A To the best of my recollection.

Q Okay. Did she talk to you about a time when her mother was present that her mother actually physically did anything?

A Yes, she described one of the munching incidents, that's how she kept referring to it, that her mother had pinned her or held her arms down while in the bed while her stepfather proceeded.

Q And did she tell you how many times that happened?

A I don't recall.

Q Okay. Did you write a report about this conversation that you had with Sacha Brod?

A Yes, I did.

Q Would it refresh your memory to look in the report?

A Yes.

MS. SCHOBER: May I approach, Your Honor?

THE COURT: Yes, counsel.

MS. SCHOBER: Counsel, this is page 70 of discovery.

MR. TRUMAN: Thank you.

Q (BY MS. SCHOBER) And I'm just going to help you and point to a line, if you can read that, tell me if that helps you remember and I'll ask you a question again?

A During --

THE COURT: No, no read it to yourself.

THE WITNESS: Oh. Sorry. Okay.

Q (BY MS. SCHOBER) Does that help you refresh your memory?

A Yes.

Q How many times did her mom participate by holding her down?

A At least two. It refers to a couple.

Q Okay. Did Sacha Brod talk to you about her stepfather, her mother's boyfriend asking her to engage in sex with anybody else?

A She did. She described an incident where she said her stepfather approached her about getting a friend and her and her friend providing sexual favors to some of his work buddies, I believe.

Q Okay, and did she -- did she say sexual favors or did she phrase that in a different way?

A She might have phrased it, I remember specifically she said that he offered to pay her to provide some sort of sexual acts.

Q Okay.

A But I don't recall her specifically saying what they might have been.

Q Okay. If you have the word do in quotation marks?

A Um-hum.

Q Would that be her word?

A Yes.

Q And do you recall how much he said he would pay her?

A I do not.

MS. SCHOBER: Okay. May I approach, Your Honor.

THE COURT: Yes.

MS. SCHOBER: Same page. 70.

THE WITNESS: Okay.

Q (BY MS. SCHOBER) Does that refresh your recollection?

A Yes.

Q How much?

A $30.

Q Okay.

A Per person.

Q Per guy?

A Per guy.

Q Did she tell you whether she ever did that?

A She said she did not.

Q Did she talk to you at all about receiving money for the sexual incidents that were happening with her stepfather and mother?

A Um-hum. She, Sacha, has stated that she initially was paid a couple days after these things would happen. I believe she reported it started out at like $10 and then progressed and had received as much as $20.

Q Did she talk at all about when the last time was that something of this nature had occurred?

A Um, I interviewed her -- I would like to say I think it had been as soon as two weeks prior to my interview with her.

Q On March 7th.

A Yes.

Q What was Sacha's demeanor when you and Officer Capron were speaking with her?

A Um, she was upset visibly. She had been crying. Her face was splotchy. She was a very

forward -- she just kind of started pouring stuff out as we asked questions. And she made a lot of really good eye contact, but she was very visibly upset by what she was reporting.

Q Okay. When you talk about the questions that you asked her --

A Um-hum.

Q -- are you aware of the difference of what an open-ended question is as opposed to a leading question?

A Yes.

Q What's a leading question?

A Um, a leading question would be, say, if you were to use the alleged perpetrator's name in the question versus saying has anyone ever.

Q Okay.

A Or instead of saying did so and so touch you.

Q And what type of questions do you use when you're trying to gain information from children?

A We're required to use open-ended questions.

Q Why is that?

A Because for purposes such as these. The training we receive in regards to performing the interviews clearly tell you leading questions does not give a child a chance to make a clear disclosure about what has happened.

Q And in your interview with Sacha Brod, what types of questions did you use?

A Open-ended question.

Q And Officer Capron, what type of questions did she use?

A Open-ended questions.

MS. SCHOBER: Okay. May I have a moment, Your Honor?

THE COURT: Yes.

Q (BY MS. SCHOBER) And I might not have clarified this enough, but when we talk about when Sacha initially started talking about the groping and then talked about it progressing into what she called munching?

A Correct.

Q Did she talk about the groping happening several times before the munching or do you remember?

A Several times before the munching incident occurred.

Q Okay, and just in general sexual contact over the four years, how long did she say or, I'm sorry, how many times did she say that happened?

A I don't recall her giving a specific number of times, but, um, it was a lot.

Q Okay.

A I'm sorry.

Q And you had mentioned before she said a -- two or three times a week?

A Um-hum.

Q Okay.

THE COURT: Yes or no, please.

THE WITNESS: Yes.

MS. SCHOBER: I have no further questions. Thank you.

* * *

APPENDIX S

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO

THE PEOPLE OF THE STATE OF COLORADO,

v.

CHARLES ARTHUR FARRAR,

Defendant.

Case No. 01CR505
Division 11

REPORTER'S TRANSCRIPT
[Monday, April 1, 2002]

A P P E A R A N C E S:

FOR THE PEOPLE:

DARREN VAHLE, Reg. No. 28107
CHRISTINE SCHOBER, Reg. No. 30039

FOR THE DEFENDANT FARRAR:

CRAIG TRUMAN, Reg. No. 5331

This matter came on for continued trial to jury on Monday, April 1, 2002, before the Honorable John P. Leopold, District Judge.

This is a transcript of the proceedings had in this case on that date.

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* * *

[Closing argument of Mr. Vahle, p. 25:11-23]

* * *

Ladies and gentlemen, this case comes down to credibility. At the beginning of this case when I stood up in voir I told you at the end of this matter I would ask you to come back and believe Sacha Brod.

We talked about physical evidence, we talked about fingerprints, some of the things that are typically not found in sexual assaults on children.

We talked about how videotapes, even if they're taken, don't usually get in the hands of law enforcement. Those things get hidden, thrown away, or destroyed, and I told you I would ask you to believe Sacha and this case comes down to do you believe the defendant and what he said on the stand or do you believe Sacha. That's what it comes down to.

* * *