

that would indicate male DNA was present on vaginal swabs and was likely from semen. She made this determination because if the sample did not contain sperm, she would have expected a higher male DNA presence in the E-1 Fraction and a more dominant female DNA presence in the E-2 Fraction. Dr. Hampildan, who was called by the defense at the motion hearing as an expert in DNA analysis, found Ms. Turpin's results to be consistent with what one would expect to see in a sexual assault case.

Trial counsel testified that, during trial, he did not believe that Ms. Turpin's testimony was fatal or "game over" to the defendant's case because part of the defense trial strategy involved showing that the girls had falsified allegations as described in the recantation affidavits. This includes explaining that the Defendant's DNA was in Madilynn's vagina because she had put it there in furtherance of her and her sister's plan to frame the defendant for molestation. Though trial counsel now looks upon the testimony and believes it was detrimental to the case, trial tactics as a basis for a claim of ineffective assistance of counsel cannot be judged by hindsight or result. See *Slade v. State*, 270 Ga. 305, 307 (1998). Therefore, the Court finds that trial counsel was not ineffective and the defendant's motion for new trial on this ground is **DENIED**.

Further, the Court specifically notes that Dr. Hampikian testified at length about the risk of contamination that occurs with the current procedure that the Georgia Bureau of Investigation employs for sample testing. The Court agrees that this procedure,

which involves testing samples from the victim and the alleged perpetrator in close proximity to each other, may introduce a small but wholly unnecessary risk of cross-contamination between samples. However, the Court declines to find that this warrants the grant of a new trial to Defendant. Cross-contamination, even if it had occurred, would not have led to a different result, because the defense's theory of the case was that Defendant's DNA was present on vaginal swabs because the victims had schemed to "plant" it there with a used condom that they found in a trash can. Therefore, the Court finds that Defendant's motion for new trial on this ground, raised at the hearing, is also **DENIED**.

VIII. Ms. Alexander's Testimony

Defendant argues that trial counsel provided ineffective assistance for failing to object to the victims' mother's testimony that the girls would not fabricate the allegations.

Trial counsel did not object to the mother's statement that the girls would not make up the allegations, but the attorney's question immediately following the mother's response was "did you ever sign anything saying that the girls told you that they lied about the abuse?" Trial counsel's tactic of leading Ms. Alexander to this contradictory statement and thereby attacking her credibility and impeaching her with Defense Exhibit 4 was a reasonable trial strategy. Therefore, the Court does not believe counsel was ineffective for his failure to object to the mother's statement.

Even if the defendant could show that this failure to object was *not* a reasonable trial strategy, the second prong of Strickland would nonetheless not be met, as the Court finds that the outcome of the case was not likely affected by a mother testifying that her daughters would not lie. Unlike the *Blackman* case defendant cited in the Motion for New Trial, the Court finds that there was overwhelming evidence outside of the victims' statements, including the defendant's DNA inside one victim's vagina and the actions of the victims leading up to the outcry as described by their mother. Therefore, the defendant's motion for new trial on this ground is **DENIED**.

IX. Incest Charges

The defendant argues that the Court improperly denied the motion to dismiss the incest charges because no proof was provided that the defendant was the stepfather as charged by the grand jury.

The indictment charged that the victims were the stepdaughters of the defendant. Evidence adduced at trial was that the girls were his stepdaughters but were later adopted by the defendant. When determining whether the variance between what was alleged in the indictment and what was adduced at trial, courts "no longer adhere to an overly technical application of the fatal variance rule, focusing instead on materiality." *Chambers v. State*, 284 Ga. App. 400 (2007). The true inquiry is "whether there has been such a variance as to affect the substantial rights of the accused."

Id. The underlying reasons for the rule are that “1) the allegations must definitely inform the accused as to the charges against him as to enable him to present his defense and not to be taken by surprise, and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense.” *Id.* If the allegations fail to meet these tests, the variance is fatal.

The Court finds that the variance between the indictment charging the defendant as the stepfather and the evidence revealing him to be the adoptive father was not fatal, because it 1) did not prevent the defendant from being able to prepare his defense for trial nor did it take him by surprise, and 2) the allegations are adequate to protect him from being accused in another prosecution for the same offense. O.C.G.A. § 16-6-22 states that “[a] person commits the offense of incest when such person engages in sexual intercourse or sodomy, [. . .] with a person whom he or she knows he or she is related to either by blood or marriage” which includes “father and child or stepchild.”

The effect of an adoption is to create the relationship of parent and child as if the adopted individual were a child of biological issue, and because adopted individuals “enjoy every right and privilege of a biological child” they are statutorily protected from incest. See *Edmonson v. State*, 219 Ga. App. 323, 324 (1995), overruled on other grounds by *Collins v. State*, 229 Ga. App. 658 (1997). Here, both stepchildren and children are protected from incest, and the term “children” is meant to include adopted children. The Court finds

that the defense would not have been affected by the girls' being called the defendant's children, adopted children, or stepchildren, nor would the distinction between the terms be enough to take the defendant by surprise. The Court finds that these allegations are adequate to prevent him from being accused in another prosecution for the same offense. Therefore, the defendant's motion for new trial on this ground is **DENIED**.

X. Jury Instructions – Out-of-Court Statements

The defendant argues that trial counsel rendered ineffective assistance by failing to maintain his objection to the Court's jury instruction regarding the use of the victims' out-of-court statements.

During the final jury instructions, the Court charged the jury as follows: "You, the jury, are entitled to consider the alleged victims' out-of-court statements as substantive evidence of defendant's guilt." At the conclusion of the jury instructions, trial counsel correctly voiced an objection to this instruction, and the Court re-charged the jury as follows: "This relates to out-of-court statements. You, the jury, are entitled to consider the alleged victims' out-of-court statements as substantive evidence of the Defendant's guilt. The jury is also entitled to consider a witness's inconsistent statement as it relates to the defendant's innocence." No further objections were made to this jury instruction.

The Court does not believe that the jury was misled, nor does it believe these charges are inconsistent. The Court also does not find that, as the defense argues, the alleged victims' inconsistent statements were treated differently than other witnesses' inconsistent statements. M.A. and Madilynn were both witnesses and alleged victims. Ms. Alexander was a witness. The inconsistent statements of all three witnesses could be considered as related to the defendant's innocence. These out-of-court statements were also inconsistent statements, and therefore could be considered as related to the defendant's guilt or innocence. Therefore, the defendant's motion for new trial on this ground is **DENIED**.

XI. Jury Instructions – Rape

The defendant argues that trial counsel was ineffective for failing to object to the instruction that force for rape crimes may be inferred by evidence of intimidation from a familiar relationship. The defendant also argues that the instruction concerning victims being under 16 unlawfully expanded the bill of indictment and that failure to object was deficient performance that affected the outcome of the case.

Defense counsel has not argued, neither in pleadings filed nor in oral argument at the motion for new trial hearing, why or how trial counsel's failing to object to the intimidation rape instruction constituted ineffective assistance. An instruction providing that force for rape crimes maybe inferred this way is helpful

to the jury when, as in this case, there is not extensive evidence of physical injuries, force, or threats made during the abuse. Moreover, the Court finds that any jury instruction regarding the victims being under 16 years of age was proper and did not expand the bill of indictment. The indictment describes both victims as being under the age of 16. Instructing the jury regarding the victims' age and their legal capacity to consent to sexual contact was proper in helping the jury to determine whether rape had occurred. The Court finds that the instruction was not unlawful and that counsel was not ineffective with regard to this jury instruction. Therefore, the defendant's motion for new trial on this ground is **DENIED**.

XII. Failure to Impeach Ms. Alexander

The defendant argues that trial counsel was ineffective for failing to impeach the victims' mother with her criminal record. The victims' mother had been charged with misdemeanor theft by shoplifting and misdemeanor theft by taking in Hall County in 2001, and pleaded guilty to such charges under the First Offender Act in 2001. The victims' mother was also arrested for misdemeanor obstruction of an officer in Habersham County, and such charges were dismissed and the record restricted in 2010.

A witness may not be impeached by evidence of a first offender guilty plea based on which the offender later completed rehabilitation. See O.C.G.A. § 24-6-609(c)(1). Here, the victims' mother pleaded guilty to

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the above two Hall County charges under the First Offender Act and successfully completed a first offender treatment program in 2013. Therefore, this conviction could not have been used to impeach her at trial. Additionally, a witness may not be impeached with an arrest unless there has been a conviction. O.C.G.A. § 24-6-609(a)(1). Because the charges for obstruction of an officer were dismissed and the victims' mother was never convicted of those, they could not have been used to impeach her. Therefore, trial counsel's failure to use the victims' mother's criminal history to impeach her at trial does not constitute ineffective assistance and the defendant's motion for new trial on this ground is **DENIED**.

XIII. Failure to Vet Dr. Burton

The defendant argues that trial counsel was ineffective for failing to vet Dr. Burton prior to calling him as a witness in the case.

Trial counsel for the defendant testified that Dr. Burton, possibly because of his health in recent years, was "out of his element" at the trial, did not seem to appreciate the severity of the charges, may not have reviewed his file thoroughly in preparation for trial, and overall did not perform as well as trial counsel expected him to. Trial counsel testified at the motion for new trial hearing that Dr. Burton was like "a deer in the headlights" on cross-examination and was "all over the map" in attempting to respond to follow-up questions by the State.

The Court finds that trial counsel's allowing Dr. Burton to testify did not constitute ineffective assistance. At the hearing on the motion for new trial, trial counsel for the defendant testified that Dr. Burton did present his qualifications at length to the jury, reviewed and discussed the alleged victims' healthcare records, and even brought in diagrams of female genitalia to contradict the SANE exam results and describe the defense's theory to the jury. Dr. Burton's testimony supported the defense theory of the case, which the jury chose not to believe. The Court finds that although Dr. Burton did not perform as well as trial counsel expected him to perform on cross-examination, counsel was not ineffective in allowing him to testify. As stated previously, trial tactics as a basis for a claim of ineffective assistance of counsel cannot be judged by hindsight or result. *Slade v. State*, at 307. Therefore, the defendant's motion for new trial on this ground is **DENIED**.

In conclusion, the Court declines to find that Defendant's trial counsel was ineffective, and Defendant's Motion for New Trial is hereby **DENIED** on all grounds set forth above.

SO ORDERED this 25th day of June, 2019.

/s/ Currie M. Mingledorff
Currie M. Mingledorff, II, Judge
Superior Court of Banks County
Piedmont Judicial Circuit

APPENDIX D
IN THE SUPERIOR COURT OF BANKS COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)
v.) CASE NO. 14-CR-487M
STEPHEN FLOYD) JUDGE MINGLEDORFF
ALEXANDER,)
Defendant.)

AMENDED MOTION FOR NEW TRIAL

(May 10, 2018)

COMES NOW Defendant, Mr. Stephen Alexander, by and through undersigned counsel and hereby files this Amended Motion for New Trial in the hopes of the granting of same. In support of this Amended Motion for New Trial, Mr. Alexander shows as follows:

1.

Mr. Alexander wanted to be present and exercise his Constitutional right pursuant to Article I, Section I, Paragraph XII of the Georgia Constitution and be present at every critical stage of his proceedings. (See Trial Transcript, hereinafter "T," page 8). Without lawful authority, Mr. Alexander's trial counsel waived Mr. Alexander's right to be present and this Honorable Court held discussions with the venire panel including preliminary questions. (T. 33-39). See Taylor v. State, 320 Ga. App. 596(4), 740 S.E.2d 327 (2013); Robertson v. State, 268 Ga. 772(4), 493 S.E.2d 697 (1997); Pennie

v. State, 271 Ga. 419, 520 S.E.2d 448 (1999). Hence, since there is presumption of harm, Mr. Alexander's Motion for New Trial must be granted.

2.

Mr. Alexander's Constitutional right to a public trial was violated when this Honorable Court closed the Courtroom, without making any findings and unlawfully, not only during the testimony of the alleged victims, but during testimony of the forensic interviewer. (T. 53-55, 70, 102-103, 181-182, 225-226). See O.C.G.A. § 17-8-54; Weaver v. Massachusetts, ___ U.S. ___, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017); Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). This Honorable Court also violated O.C.G.A. § 17-8-54 by removing all persons, including the media and Mr. Alexander's family members from these proceedings. Since this is structural error, Mr. Alexander's Motion for New Trial must be granted. Alternatively, Mr. Alexander received ineffective assistance of counsel for his lawyers failing to raise a valid objection to the closure of the Courtroom without lawful cause. Therefore, Mr. Alexander's Motion for New Trial must be granted.

3.

Mr. Alexander's trial counsel rendered ineffective assistance by failing to object to writings that one of the alleged victims wrote during her counseling meetings and same were entered into evidence as State's Exhibit Number 15. This writing by the alleged victim does not qualify under the Child Hearsay statute as it

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is not a statement to another and is simply bolstering. See O.C.G.A. § 24-8-820; Jackson v. State, ___ Ga. App. ___(2a), ___ S.E.2d ___ (Case Number A17A2064, decided February 20, 2018). This document also presumably went out with the jurors and thus, violated the Continuing Witness Rule which prejudiced Mr. Alexander. (See State's Exhibit Numbers 15 and 16; T. 88-91). These writings are improper bolstering and thus, Mr. Alexander's Motion for New Trial must be granted.

4.

The prosecution failed to provide Mr. Alexander with notice that it would seek to introduce child hearsay statements pursuant to O.C.G.A. § 24-8-820. (T. 132-138). Hence, all of the child hearsay should have been excluded from trial and Mr. Alexander's trial counsel rendered ineffective assistance by failing to object to same. Therefore, Mr. Alexander's Motion for New Trial must be granted.

5.

Mr. Alexander's trial counsel rendered ineffective assistance by failing to object when the forensic interviewer explained that the "contextual details" made it likely that the alleged victim was not making up her allegations against Mr. Alexander. (T. 108, 203-205, specifically, T. 203, lines 17-21). This comment by this expert invaded the province of the jury and thus, Mr. Alexander's Motion for New Trial must be granted.

6.

Victim impact evidence came into this trial with both alleged victims being taken to and seeking counseling. (See Entire Trial Transcript, specifically, T. 215-219, 230-234, 258-259). See Woodard v. State, 269 Ga. 317, 320, 496 S.E.2d 896 (1998); Cowart v. State, 294 Ga. 333(4a), 751 S.E.2d 399 (2013); Tome v. United States, 513 U.S. 150, 158, 115 S.Ct. 696, 130 L.Ed.2d 574 (1995); Daniels v. State, 306 Ga. App. 577(4), 703 S.E.2d 41 (2010); Colon v. State, 275 Ga. App. 73(2), 619 S.E.2d 773 (2005); Mattis v. State, 282 Ga. App. 49(4a), 637 S.E.2d 787 (2006). This is improper victim impact evidence and since Mr. Alexander's trial counsel failed to object, Mr. Alexander received ineffective assistance of counsel. Thus, Mr. Alexander's Motion for New Trial must be granted.

7.

Mr. Alexander's trial counsel rendered ineffective assistance by failing to properly put forth competent evidence that the GBI Forensic Biologist Turpin gave testimony that was not scientifically accepted concerning the DNA allegedly found on the swabs. (T. 182-184, 186-189, 190-191). Specifically, there is no way that the GB1 expert could have opined that Mr. Alexander's DNA was from semen. (T. 190-191, 526-528, 607-608). Expert Hampikian will be present to testify and educate this Honorable Court on this matter. Dr. Hampikian will discuss that the State's expert had no basis for claiming that semen or sperm was found on the swab; Mr. Alexander's DNA was found on the

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cervical swab; and Mr. Alexander's DNA could have been found during the SANE Nurse's collection of evidence from non-sexual methods. (See Curriculum Vitae of Dr. Greg Hampikian, attached hereto). Thus, Mr. Alexander's Motion for New Trial must be granted.

8.

Mr. Alexander's trial counsel rendered ineffective assistance by failing to object when the alleged victims' mother testified that the alleged victims would not make up this false allegation against Mr. Alexander. (T. 259-260). This is improper bolstering and vouching for the credibility of the alleged victims. See Blackmon v. State, 336 Ga. App. 387, 785 S.E.2d 59 (2016). Hence, Mr. Alexander's Motion for New Trial must be granted.

9.

This Honorable Court improperly denied the Motion to dismiss the incest charges against Mr. Alexander because there was no proof to satisfy the Grand Jury's allegation that Mr. Alexander was the step-father of the alleged victims. (T. 418-420, 462-469, 615, 621-622, 625). See Jackson v. State, 301 Ga. 137, 800 S.E.2d 356 (2017).

10.

This Honorable Court erred when it instructed the petit jury that the alleged victims' out-of-Court statements could be used as substantive evidence of Mr. Alexander's guilt. This instruction was objected to by Mr. Alexander's trial counsel and is preserved for appeal. (T. 607, lines 18-20; 625-631; 829). However, assuming

arguendo that this issue is not preserved for appellate purposes, Mr. Alexander received ineffective assistance of trial counsel. Thus, Mr. Alexander's Motion for New Trial must be granted .

11.

Mr. Alexander's trial counsel rendered ineffective assistance by failing to object to this Honorable Court's instruction that force for the crime of rape may be referred by evidence of intimidation from a familial relationship. (T. 610-611). Moreover, the instruction concerning the alleged victims being under the age of 16 concerning the offense of rape unlawfully expanded the Bill of Indictment and thus, Mr. Alexander's trial counsels' failure to object to this instruction was deficient performance which prejudiced the outcome of the case. Thus, Mr. Alexander's Motion for New Trial must be granted.

12.

Any and all other issues that have merit to grant Mr. Alexander's Motion for New Trial.

WHEREFORE, Mr. Alexander respectfully requests a hearing on this Motion and at the conclusion of same, asks this Honorable Court to grant the above-requested relief.

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This 10th day of May, 2018.

Respectfully submitted,

/s/ Brian Steel
BRIAN STEEL
GA Bar No. 677640
Attorney for Defendant

[Certificate Of Service Omitted]

APPENDIX E

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION (U.S. CONST. AMEND. VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
