
IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MICHAEL MCHALE,

Petitioner,

v.

BRAD CAIN, Superintendent, Snake River Correctional Institution,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

ON PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit correctly deny a certificate of appealability to consider a claim that defense counsel unconstitutionally conceded guilt over petitioner's objection, when (1) defense counsel did not in fact concede petitioner's guilt over his objection, (2) that claim was not raised in the petition, and (3) that claim was procedurally defaulted in state court?

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Although petitioner identifies an interesting and perhaps certworthy question in his petition for a writ of certiorari, this case does not present that question. Petitioner contends that this case presents a similar issue to that in *McCoy v. Louisiana*, No. 16–8255, 584 U.S. ___, 2018 WL 2186174, at *8 (2018), a capital case in which this Court held that defense counsel “may not admit her client’s guilt of a charged crime over the client’s intransigent objection to that admission.” But counsel in this case did not admit petitioner’s guilt, nor did petitioner express his objection to counsel’s chosen strategy. As a result, this case does not present the issue raised in *McCoy*. In any event, this case presents at least two procedural impediments to reviewing the underlying ineffective-assistance question—petitioner failed to plead an ineffective-assistance claim in his federal habeas petition and procedurally defaulted his claim in state court. For that additional reason, this court should deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Petitioner was charged in Lincoln County, Oregon with numerous sexual crimes for sexually abusing two girls, C and Z. As to C, who was between 13 and 14 years old during the charged abuse, the state alleged that

petitioner performed all the crimes by way of forcible compulsion. Docket No. 27-1, at 39–40.¹ In support of its forcible compulsion theory, the state argued that petitioner had hit C in the face, punched her in the stomach, and shoved his finger down her throat. Docket No. 28-7, at 91. As to Z, who was between four and eight years old during the charged abuse, the state alleged both forcible compulsion and lack of consent due to her age. Docket No. 27-1, at 42–44.

In closing argument, defense counsel argued that C and Z were not credible. As to C, counsel argued that her testimony sounded “memorized” and was inconsistent with the lack of any physical findings of abuse during her examination. Respondent’s Appendix (Resp. App.) 7, 10–11. But counsel also had to deal with two pieces of particularly incriminating evidence: first, defendant’s sperm was found on C’s pillowcase and in her underwear; second, petitioner and C had exchanged sexually suggestive emails.

Faced with that evidence, counsel argued that “[i]f anything occurred at any time at any place,” the state had nonetheless not demonstrated forcible compulsion. Resp. App. 24–28. He argued that the emails in particular did not “sound like an interchange of somebody who’s being subjected to forcible compulsion[.]” Resp. App. 27. He also argued that, if the jury believed that C

¹ Docket No. refers to the docket entries in *McHale v. Nooth*, 2:15-cv-01513-PK, out of the United States District Court for the District of Oregon.

was lying with respect to whether petitioner used force, then the jury should distrust all of her testimony. Resp. App. 31. And counsel emphasized that, because the state had alleged all the charges against C as using forcible compulsion, the jury could not find petitioner guilty if it found that petitioner had not used force. Resp. App. 33–34. In rebuttal, the prosecutor agreed, telling the jury that, if it found that petitioner and C engaged in consensual sexual activities, “that’s not what’s pled, and you’d have to find him not guilty.” Docket No. 28-8, at 38–39.

As to Z, counsel argued that she was “all over the place in talking about what happened to her” and that interviewers had asked her leading questions to obtain her accusations. Resp. App. 12–23. He also argued that Z had a motive to lie because C had received a lot of attention after their mother discovered C’s abuse and because petitioner was a disciplinarian, whom the girls wanted out of their lives. Resp. App. 13, 29–30.

Counsel also contended that the state had not presented sufficient evidence that any crimes against Z occurred in Lincoln County, as alleged. The state had presented evidence that petitioner had also sexually abused Z in Gresham, which is in a different county. But the prosecutor explained in closing argument that the only charges that were before the jury concerned the events in Lincoln County and that “[w]hatever happened in Gresham, that is for

another jury to decide.” Docket No. 28-7, at 86. Defense counsel agreed and argued that there was no evidence that petitioner had ever been alone with Z in Lincoln County, so that petitioner had no opportunity to commit the alleged crimes there. Resp. App. 9, 29. He contended that nothing had happened to Z at all but that, even if something had happened elsewhere, nothing happened in Lincoln County. He noted that during her interviews, Z was “talking about Gresham, Gresham, Gresham, Gresham, Gresham, and when she’s asked anywhere else, she says, ‘No,’ until prompted to do so.” Resp. App. 34.

Ultimately, the jury found petitioner guilty on all the charges before it. Docket No. 28-8, at 73.

2. Following those proceedings, petitioner filed a *pro se* petition for post-conviction relief in state court. Among the claims was a claim of “ineffective assistance of trial counsel by cumulative errors,” with several specific allegations. Docket No. 27-1, at 117–20. At the post-conviction hearing, petitioner’s counsel argued, in part, that trial counsel was ineffective for adopting a theory of defense with which petitioner disagreed. Docket No. 27-6, at 173–74. Petitioner testified at that hearing that his counsel had told him that the defense was going to pursue a theory of consensual sexual contact with C, even though petitioner had never admitted to anyone that he had sexual contact with C. Resp. App. 1. Petitioner testified that he had wanted to pursue

“an actual innocence defense” but admitted that he never told his attorney that he did not want to pursue the consent theory. Resp. App. 1, 5.

The state post-conviction trial court denied relief. On appeal, petitioner did not pursue any of his claims of ineffective assistance of trial counsel. Instead, he argued only that the post-conviction trial court had erred by denying his motions for a continuance and by not providing him access to grand-jury records. Docket No. 27-6, at 194–95. The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *McHale v. Nooth*, 270 Or. App. 599, 351 P.3d 89, *rev. den.*, 357 Or. 415, 356 P.3d 638 (2015).

3. Petitioner then filed a *pro se* petition for a writ of habeas corpus in federal district court. His petition did not allege any claims of ineffective assistance of trial counsel. Docket No. 8-2. Petitioner was appointed counsel, who argued in a brief in support of the petition that his trial counsel was ineffective for pursuing, “against [petitioner’s] wishes,” a “dissatisfying venue argument” as to Z and a defense that “ostensibly admitted numerous” serious sex crimes as to C. Docket No. 47, at 17. Petitioner argued that any procedural default of his claim should be excused under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), contending that his state post-conviction trial counsel was ineffective for not raising the claim. Docket No. 47, at 10–16.

The magistrate judge recommended that the district court deny the petition, concluding that it did not allege a federal habeas claim. Petitioner's Appendix (Pet. App.) 10. The magistrate judge noted that petitioner had raised a claim of ineffective assistance in his brief in support of the petition but determined that that claim was not properly before the court because it was not alleged in the petition. *Id.* Petitioner filed an objection to the Findings and Recommendation of the Magistrate Judge, contending that he had raised the claim in ground one of his petition, which alleged "Claims of actual/factual innocence, and accumulated errors." Docket No. 52. The district court adopted the Findings and Recommendation and denied the petition. Pet. App. 4. Both the district court and the Ninth Circuit denied a certificate of appealability. Pet. App. 1, 4, 13. This petition followed.

REASONS TO DENY REVIEW

A. This case does not present the issue raised in *McCoy v. Louisiana*.

Petitioner frames the question presented in this case as whether "a Sixth Amendment claim that defense counsel unconstitutionally conceded guilt over an accused's objection meets the statutory requirement for the issuance of a certificate of appealability" and contends that this Court has "granted certiorari on a similar Sixth Amendment claim in *McCoy v. Louisiana*[" Pet. i. But this case does not present that question both because counsel did not concede

petitioner's guilt and because petitioner did not express an objection to counsel's chosen defense.

Contrary to petitioner's argument, counsel did not concede petitioner's guilt. As an initial matter, counsel did not concede that petitioner had engaged in sexual conduct with either victim. To the contrary, counsel argued first and foremost that the jury should disbelieve the testimony of both victims for various reasons. He also briefly argued that *even if* something had happened to Z in Gresham, the state had not provided sufficient evidence that any abuse occurred in Lincoln County. And, faced with overwhelming evidence of sexual contact with C—including petitioner's sperm on C's underwear and sexually suggestive emails between petitioner and C—counsel again contended that *even if* some sexual contact occurred, it was not forcible and thus the jury could not find petitioner guilty of the charges involving C. *Cf. McCoy*, 2018 WL 2186174, at *3 (reversing when counsel was permitted, “at the guilt phase of a capital trial, to tell the jury the defendant “committed three murders. . . . [H]e’s guilty”).

In any event, even the concessions that petitioner describes would not have conceded guilt as to any charged crimes. As to Z, all the charges involved conduct in Lincoln County, so—as the prosecutor explained—even if the jury believed that sexual abuse occurred in Gresham, it could not find petitioner

guilty based on that conduct. As to C, all the charges involved allegations of forcible compulsion, so—again, as the prosecutor explained—the jury could not find petitioner guilty if it found that petitioner and C had engaged in consensual sex. Thus, even if counsel had conceded that Z was abused in Gresham or that petitioner engaged in “consensual” sex with C, counsel would not have conceded guilt as to any crime for which the jury could convict petitioner. *Cf. McCoy*, 2018 WL 2186174, at *8 (“[C]ounsel may not admit her client’s guilt of a charged crime over the client’s intransigent objection to that admission.”).

Moreover, though petitioner testified in the state post-conviction hearing that he disagreed with counsel’s chosen defense, there is no evidence that petitioner ever told counsel about his concerns. On the contrary, petitioner admitted that counsel discussed the consent defense with him and that he never told counsel that he objected to it. Although this Court recently held in *McCoy* that defense counsel may not concede guilt over his or her client’s express objection, this Court has held that counsel may do so when—as here—counsel explains the proposed strategy and the defendant “neither consents nor objects” to it. *Florida v. Nixon*, 543 U.S. 175, 178, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004). In those circumstances, counsel’s conduct is assessed for reasonableness under the well-established standards of *Strickland v.*

Washington, 466 U.S. 648, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Nixon*, 543 U.S. at 189–90.

As a result, this case does not present a certworthy issue. And because this case presents an entirely different question from *McCoy*, this case does not warrant summary reversal—or an order granting the petition, vacating the Ninth Circuit’s decision, and remanding for further proceedings in light of *McCoy*—based on this Court’s reversal in *McCoy*.

B. The procedural impediments to review render this case a poor vehicle for addressing the merits of petitioner’s constitutional claim.

Even if the ineffective-assistance claim concerning counsel’s closing argument was worthy of further review, this case would be a poor vehicle for addressing it. Petitioner would have to overcome at least two procedural impediments—his failure to plead an ineffective-assistance claim in his federal habeas petition and his procedural default in state court—before this Court could address the merits.

First, petitioner failed to plead a claim of ineffective assistance of counsel in his federal habeas petition, and the district court correctly denied the petition on that ground. Petitioner nonetheless contends that the district court may have had discretion to consider his claim, raised for the first time in petitioner’s brief in support of his petition. Pet. 9–10. But petitioner never asked the district court to exercise its discretion to consider the claim, nor did he raise that

argument in the Ninth Circuit. Instead, petitioner argued only that he had adequately raised the claim in the petition.

In any event, whether a petitioner may pursue a claim that is not raised in the habeas petition is not a certworthy issue, and petitioner does not appear to contend otherwise. Petitioner has not identified a split of authority, citing only one unpublished Ninth Circuit decision that appears inconsistent on its face with the rules governing habeas cases, published Ninth Circuit case law, and this Court's case law. *See* Rule 2(c)(1) of the Rules Governing Section 2254 Cases ("The petition must * * * specify all the grounds for relief available to the petitioner[.]"); *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) (claims not raised in the petition are not cognizable on appeal); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (when district court denies petition on procedural grounds, certificate of appealability should issue only if the petitioner shows, "at least, that jurists of reason would find it debatable whether *the petition states a valid claim* of the denial of a constitutional right" (emphasis added)).

Second, petitioner procedurally defaulted his claim of ineffective assistance of trial counsel by failing to raise it on appeal from the denial of his claims in state post-conviction. He contends that his procedural default is excused under *Martinez v. Ryan*, in which this Court held that "[i]nadequate

assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. But petitioner's counsel in the initial-review collateral proceeding—the state post-conviction trial—*did* raise the ineffective-assistance claim. The default occurred on appeal, when petitioner failed to raise the issue before the Oregon Court of Appeals. *Martinez* thus cannot excuse the procedural default. *Id.* at 16 ("The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings[.]").

At a minimum, this case raises two procedural questions that this Court would be required to resolve before reaching the ultimate constitutional issue that petitioner contends warrants this Court's review. Neither of the procedural questions presents a certworthy issue, and they would instead create impediments to this Court's review. Further, petitioner has not demonstrated that the decision to deny a certificate of appealability based on those procedural impediments is "clearly in error," such that this Court should summarily reverse on that ground. For that additional reason, this Court should deny the petition for a writ of certiorari.

//

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read "Benjamin Gutman", is written over a horizontal line.

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APPENDIX

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TRIAL TO COURT

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1 Q. Okay. Did you ever consult with Mr. Greco about the theory of
2 the defense?

3 A. Uh -- I never consulted with him but he told me that he was going
4 to pursue the consent with the first indictment and let the second
5 indictment "do whatever it was going to do".

6 Q. Could you explain that consent issue?

7 A. Well, he was -- he was under the impression by reading some of
8 the amalgamated email that the prosecution had presented as the older
9 girl actually consenting to a sexual relationship.

10 Q. Did you ever admit to anyone that you had sex or had any
11 inappropriate sexual contact with any of the girls?

12 A. No, sir.

13 Q. So, did you ever tell him that you didn't want him to pursue the
14 consent theory?

15 A. Well, no, sir, I didn't because he -- he had had an amendment
16 that if I didn't like that, the judge was going to make me represent
17 myself.

18 Q. Why did you feel that the judge was going to not give you an
19 attorney?

20 A. Because he -- he -- he voiced that the judge was tired of fooling
21 with me and that I was his third -- third lawyer already so --

22 Q. Did you ever directly yourself ask any judge to have Mr. Greco
23 replaced by another lawyer?

24 A. No, sir, I did not.

25 Q. Why not?

A. Well, because he had already told me that if -- that I wasn't

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TRIAL TO COURT

1 allowed to communicate with the Court unless I went through him and
2 he had already told me that if I did I -- I wouldn't have a lawyer.

3 Q. So, what kind of things did you want Mr. Greco to do in
4 representing you that he did not do?

5 A. Well, he had received Mr. Reim's entire file so we -- I was just
6 wanting him to pursue everything that we had discussed on that.

7 Q. Do you mean like a motion to consolidate or to change venue?

8 A. Well, we were -- I was still wanting to change venues but that
9 had already been denied. And, I was still wanting to consolidate all
10 the cases to have one trial and have them moved to Multnomah
11 County.

12 Q. Why did you want them to be held in Multnomah County as
13 opposed to Lincoln County?

14 A. Because of the place where I was employed and the amount of
15 citizens in the county that are related or actually employed there, it
16 would have been impossible for -- for them not to have known about
17 this case. Me being from out of town, I had an other than honorable
18 reputation in that town.

19 Q. So, was there anything else that you wanted Mr. Greco to do on
20 your behalf before trial started that he didn't do?

21 A. Well, I feel like he should have -- he should have pursued the
22 bail on his own. And, I feel like that Mr. Reims (sic) also should
23 have pursued the bail on his own. Um -- you know, but as time goes
24 on the more and more pessimistic you get the less you feel like that
25 it's -- it's an actually viable request, especially the amount of bail
they put on me. It effectively -- although these charges are -- are --

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1 allowed bail, you know, and I believe that I could have overcome the
2 standard for -- in a hearing for getting bail, the State actually piled
3 up -- I don't know without a calculator if I can even figure out how
4 much the bail actually was. But, you know, it was basically a
5 distinction without a difference telling me that I had bail and then,
6 however many millions of dollars it would have been to post bail.

7 Q. Did you have some money to post bail?

8 A. I did, in the beginning, yes, sir.

9 Q. Did you explain to -- that would have been Mr. Reynoldson, did
10 you explain to him that you had some money to post bail?

11 A. I did. I asked him to -- to be a power of attorney for me to go to
12 my 401K and withdraw money to post my bail so I could go back to
13 work.

14 Q. How did not being out on bail, how did that affect your ability to
15 assist your attorney or assist in your defense?

16 A. Well, like I've stated before, during primarily all of my stay in
17 Lincoln County I was in segregation. So, you know, this -- this pod
18 wouldn't have been -- wouldn't have had a telephone in it or
19 televisions or anything in it. And, to go into the other areas where
20 the telephone was at you would have run the risk of either assault or
21 chastisement or what have you in addition to, you know, not having
22 any privacy.

23 Q. Um -- let's talk about during the trial. Was there -- what kinds of
24 things did you want Mr. Greco to do during trial that you felt that he
25 did not do?

A. Well, most of it was the -- the structural stuff that I've written in

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TRIAL TO COURT

1 the petition, you know, requesting that, you know, all of the evidence
2 and stuff be looked at prior to going to trial. And, once it was in
3 trial, you know, I feel like he did a lackadaisical job of -- of pursuing
4 my actual innocence. He was so stuck on this consensual that he
5 actually didn't cross-examine a lot of the State's witnesses. He never
6 hired any experts of his own to counter anything that the State's
7 witnesses were stating on the record. He was basically acquiescing to
8 the State's argument and taking the position that -- that everything in
9 the first indictment that I had done and that it was because it was --
10 the -- the young lady had consented to it. And, he actually never
11 really pursued anything in the second indictment.

12 Q. That would be Zoe?

13 A. Yes, sir.

14 Q. How old was Danielle, the older one?

15 A. Cynthia. She was -- I think she was fourteen years.

16 Q. Okay.

17 A. You can't -- that's not even a viable defense in the State of
18 Oregon because of her age. So, he was basically admitting that I was
19 guilty from the start.

20 Q. How old are you -- were you at the time that these allegations
21 were made?

22 A. Uh -- My early forties. I think I was about forty-two.

23 Q. So, there was more than a three year -- three-year age difference?

24 A. Absolutely.

25 Q. Okay. And, Zoe was younger than -- than --

A. Yes, sir.

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TRIAL TO COURT

1 Q. Okay.

2 A. By several years.

3 Q. Um -- is there anything else that you think your attorney should
4 have done during the course of the trial?

5 A. Not that I haven't, you know, stated in the petition.

6 Q. Did you want them to pursue an actual innocence defense?

7 A. Yes, sir. I -- I -- I continue to maintain my actual innocence.

8 Q. I don't have any other questions.

9 JUDGE BILLINGS: Mr. Hadley, do you have any --

10 MR. PEREZ: (INAUDIBLE).

11 JUDGE BILLINGS: I'm sorry. What is it?

12 MR. PEREZ: Could you give me a second. I'm sorry.

13 Could you give me a second to ask Mr. -- um -- can we handle
14 something? (Mr. Perez mutes the microphone momentarily.)

15 JUDGE BILLINGS: Sure. Sure.

16 MR. PEREZ: I apologize, Judge. We don't have any
17 more questions for Mr. McHale.

18 JUDGE BILLINGS: Mr. Hadley, do you have questions?

19 MR. HADLEY: I do -- I do not, Your Honor. Thank
20 you.

21 JUDGE BILLINGS: And, I don't have any additional

22 questions. Mr. Perez, is that the extent of your further testimony in
23 the case?

24 MR. PEREZ: Yes, Judge.

25 JUDGE BILLINGS: All right. I will consider the
testimony and the evidence closed. And, I'm going to ask Mr. Perez

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DEFENSE'S CLOSING REMARKS

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1 And the girls had to come before you and tell you what
2 this man did in order for us to ask you to hold him accountable.
3 And that's what we're doing.

4 I'm going to sit down now. Mr. Greco gets to go
5 because we have the burden of proof. But when I finish my
6 second closing, I'll be asking you to find this Defendant guilty
7 of each and every count.

8 Thank you.

9 THE COURT: Okay. We'll take our afternoon
10 recess. Take up again at, uh, five minutes to the hour and
11 go right on through and get the matter to you. So we'll try and
12 start you by going through Mr. Greco's, and I don't want to
13 (inaudible).

14 MR. GRECO: Thank you, Your Honor.

15 (A recess was then taken.)

16 THE COURT: Okay. Mr. Greco.

17 DEFENSE'S CLOSING REMARKS

18 MR. GRECO: Thank you, Your Honor.

19 Madam Prosecutor.

20 Good afternoon, ladies and gentlemen. On behalf of
21 myself and my client, Robert McHale, uh, we want to thank you,
22 uh, for basically taking a week out of your lives, your jobs,
23 your hobbies to, uh, perform this most important civic
24 function.

25 This hasn't been an easy case, I'm sure, for any of

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1 you, nor has it been an easy case for Ms. Sanders, nor I, nor
2 anybody that's been present in the courtroom.

3 You may recall, however, that when I asked you
4 questions at the beginning of the case, I just asked you to make
5 me one promise and one promise alone, and that was that you
6 would follow the law, the law that the Judge gives to you.

7 Ms. Sanders is a very talented speaker, and she
8 weaves a very nice story from start to finish. It is smooth.
9 It goes very clearly from Point A to Point B to Point Z. Um,
10 I would submit, ladies and gentlemen, that the evidence that
11 you've heard in this case is not the same as the scenario in
12 which she presented it to you.

13 And one of the things that she did in her discussion
14 when she was standing in front of you was talk to you about how
15 difficult it must be for the two children to come up here and
16 testify in court. And she wanted to point out to you that the,
17 uh -- Cynthia, for example, was smiling. And she wants you to
18 believe, well, that's nerves on her part. Well, is it nerves
19 on her part? Did her testimony sound authentic or did it
20 sound like she memorized the Pledge of Allegiance?

21 But what I -- This is part of an instruction the Judge
22 will give you -- and I know you've all probably already read it
23 because I've been watching your eye. It says,

24 "Do not allow bias, sympathy, or prejudice
25 to take any place in your, any place in your

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1 deliberations. Do not decide this case on guesswork,
2 conjecture, or speculation."

3 And -- Now there's nothing wrong with being
4 sympathetic. There's nothing wrong with feeling sympathy for
5 the girls having to come forward and talk in front of a bunch
6 of strangers. But the law says, do not allow any sympathy or
7 prejudice to take place when you're deliberating and deciding
8 this case.

9 None of us are in favor of child sex abuse. I'm not.
10 Mr. McHale's not. You're not. I mean, nobody's in favor of
11 that. That's a bias that we all have is that we find that type
12 of activity abhorrent and we're repul -- we're repulsed by it.
13 And therefore, our elected representatives have passed criminal
14 laws punishing people for engaging in that conduct.

15 But this is not about holding somebody accountable.
16 The prosecutor said, 'Hold Mr. McHale accountable.' That is
17 not your function. You will not hear the word 'holding some-
18 body accountable' in any of the jury instructions of the law
19 that the Judge will give you.

20 Instead -- and you've already seen this -- the Judge
21 is going to tell you that even at this moment Mr. McHale is
22 innocent until he is proven guilty beyond a reasonable doubt.
23 And the burden is on the State to prove the guilt of the
24 Defendant beyond a reasonable doubt.

25 A reasonable doubt's based on common sense and

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1 reason. And reasonable doubt means an honest uncertainty as
2 to the guilt of the Defendant. An honest uncertainty.
3 Reasonable doubt exists when, after careful and impartial
4 consideration of all the evidence, you're not convinced to a
5 moral certainty that the Defendant is guilty.

6 And the only things that you are to consider is
7 whether he's guilty of the charges brought before you today.
8 As Ms. Sanders indicated -- and I agree -- this case is not
9 about anything that occurred in Portland, Gresham, Timbuktu.
10 It's whether, on or about the dates alleged, he committed
11 criminal acts in Lincoln County, Oregon.

12 And what -- Another interesting thing that Ms. Sanders
13 mentioned. She said, 'Well, if we've proven to you that the
14 trailers that were depicted in Exhibits 1 and 2 were in Lincoln
15 County, we've proven Lincoln County.'

16 When you look at the jury instructions -- and she's
17 shown you a version of them very close to what you're going to
18 get -- the State has to prove that the act, the criminal act,
19 occurred in Lincoln County, not that his residence or trailer
20 was in Lincoln County.

21 Yes. At the beginning of the case --

22 May I have a marker? Oh, I'm sure you're (inaudible)
23 marker.

24 MALE SPEAKER: Here we go. Here we go.

25 MR. GRECO: Oh! There's a marker. Okay.

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1 At the beginning of the case, I said, what, if any-
2 thing, occurred? And Ms. Sanders focused on May 13th in her
3 initial remarks.

4 What occurred? What occurred on May 13th? I have
5 a piece of evidence, a piece of evidence I want you to consider
6 that Ms. Sanders didn't raise in her closing argument. Now she
7 gets to talk last. This is my one and only chance to talk to
8 you. And I'm expecting it'll be brought up.

9 But Cynthia O'Kelley told you that she had sexual
10 intercourse with an adult man twenty to thirty times. And yet
11 when Cynthia O'Kelley is examined at Emmanuel Hospital, there
12 is absolutely no sign that she has been engaging in sexual
13 intercourse. Her hymen is still intact. When she's examined by
14 Dr. Wrazen, her hymen is still intact.

15 Now the doctors want to say, 'Well, that's okay. We
16 don't have any physical evidence. You know, that doesn't mean
17 that there wasn't sexual abuse.'

18 But we're not talking about a one-time, purported one-
19 time act of sexual intercourse. We're talking about long-term,
20 ongoing -- according to Cynthia O'Kelley -- for a period of
21 three years. And yet, her physical examination is completely,
22 absolutely normal on two physical exams. One physical exam
23 which occurs ten hours after the purported act of intercourse.
24 After the purported act of intercourse, and there's no lesions,
25 no abrasions, no tears, no anything other than only what Cynthia

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1 O'Kelley says.

2 Was there sexual intercourse between Robert McHale
3 and Cynthia O'Kelley on May 13th? Cynthia O'Kelley says that
4 there was, in fact, a full act of intercourse. And she told
5 you, and told Kim Penna, that he ejaculated inside of her body.

6 What did Dale Purcell of the Oregon State Crime Lab
7 tell you? There were cervical slides, vaginal slides. Cervical
8 swabs and vaginal swabs. And there was no biological evidence
9 of semen or spermatozoa inside of Cynthia Kelley for the
10 swabbing and slides that were taken ten hours after the act.

11 Now again, of course, the State of Oregon, who has the
12 burden of proof, wants to, you know, back up and ask Dale
13 Purcell, 'Well, are you going to always find -- are you going
14 to -- always going to find spermatozoa or semen on these swab-
15 bings when you do a rape kit?' And he goes, 'No. You won't
16 always find that.'

17 But then what did he say were the reasons for that?
18 No ejaculation, uh, a vasectomy, no sperm, a condom, or no, or
19 no ejac -- no ejaculation at all or no ejaculation within the
20 female. He didn't give any other reason why that wouldn't be
21 there. Yet Cynthia O'Kelley is telling you that there was
22 ejaculation inside of her.

23 Was there sexual intercourse with Zoe? What happened
24 with Zoe? We're still dealing with what, if anything, occurred.

25 I don't know that you really want to take the time to

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1 watch the videos all over again because they took a great part
2 of yesterday morning and even part of yesterday afternoon. But
3 if you examine the video, little Zoe is all over the place in
4 talking about what happened to her. And you do have the
5 benefit of the transcripts. And I do ask you to take a look at
6 those, and look at the interviewing technique and how it
7 worked.

8 What happened was, is Zoe would say something, and
9 the, and the investigator would repeat it and confirm it and
10 reinforce it and keep her going down the road. And I'm going
11 to show you some examples from the transcript of where that
12 occur.

13 She doesn't say anything to a soul until May 13th or
14 later. And what happened on May 13th? Mother was hysterical.
15 Apparently, she was screaming. And you heard that Mother didn't
16 exactly characterize it as screaming. She was trying to remain
17 calm. But those children got terrorized by their mother being
18 upset about what she believed she discovered.

19 What did Mother do on the ride from Newport to
20 Gresham? Mother says that although she would have -- said --
21 this is before she got drunk, apparently. Mother said that
22 she kept trying over and over again to tell Cynthia that every-
23 thing was all right. 'You aren't in trouble. I'm going to
24 support you.'

25 Now they were having a problem, apparently, with

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1 Cynthia not telling the truth and lying and getting in trouble
2 a lot. You heard that. And that there were discipline
3 problems. Even Mother admitted there were discipline problems.
4 Didn't have anything really to do with, with, uh, this. She
5 was having problems sneaking -- she snuck out of the house one
6 time.

7 Well, now Cynthia is going to be, if not rewarded, is
8 going to be a center of attention. She's going to be comforted.
9 She's going to have the whole cadre of support groups that, uh,
10 the State of Oregon has to offer. And apparently, you know,
11 little eight-year-old Zoe sees this.

12 Now another interesting thing that occurred in the
13 testimony. If you recall, I asked Cynthia, 'Did you tell your
14 sister what had happened to you?' And Cynthia testified, 'No,
15 I didn't. I just asked her if -- asked her what happened to
16 her.'

17 And yet, if you remember the video -- and of course
18 Cynthia says -- Yeah. Zoe says it the other way. Zoe says,
19 'He did the same thing to me that he did to Cynthia.' 'Did
20 the same thing to me that he did to Cynthia.' And Zoe's
21 implying that Cynthia has told Zoe all about it.

22 Let's look at the, uh, Zoe transcripts for a minute --
23 portions of them. I didn't paraphrase them. I tried to repro-
24 duce them.

25 "What was happening?"

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1 "Uh, about Mick and Cynthia?"

2 "Yeah."

3 "Who is Mick?"

4 "My mom's boyfriend who did the thing to
5 Cynthia."

6 "Okay. Who's Cynthia?"

7 "My sister."

8 "Your sister and Mick and Mom's -- Mick's your
9 mom's boyfriend? The one who did the thing to
10 Cynthia?"

11 So now what's the investigator done? The investigator
12 has now told Zoe that it's a fact accompli that he did the thing
13 to Cynthia.

14 "Yeah? How do you know that?"

15 And then you see what happens with Zoe. She starts
16 talking about what happened at her -- with her mom because it
17 was fairly traumatic for her.

18 And they talk about where the trailer is. Okay. Uh,
19 and she talks about -- and then question,

20 "What happened?"

21 "Um, I don't remember really. I don't remember."

22 "And your mom woke up and you heard your mom
23 scream?"

24 "Yeah."

25 Well, they're having trouble, a little child. And

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1 then she's concerned about being spanked. But this is another
2 part of her testimony.

3 "That's all that spanked your butt?"

4 "Oh, and once when I was in a car going to a
5 soccer game, and he was teaching me how to, uh, count
6 money, and he hit me on the stomach."

7 This is, this is the State's forcible compulsion
8 argument.

9 "What did he use?"

10 "Just the back of his hand."

11 "Um, the back of his hand?"

12 See how she repeats, 'The back of his hand'?

13 "Felt really bad. After I did it, I was crying."

14 "So you were in whose car?"

15 "My mom's."

16 "It was your mom's car? You were going to a
17 soccer game?"

18 "Mm-hmm."

19 "Where?"

20 "I don't know, but it was after school."

21 And she talks about, uh, running around the track.

22 Well, let me keep going.

23 "How come you had to go around the track two
24 times?"

25 "Uh, wanted to se -- he said, 'Yeah, come back

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1 and tell us how much -- you made fifty cents in a
2 dollar'."

3 Et cetera. Et cetera.

4 Now here's -- Remember, Danielle Phillips said this
5 didn't happen.

6 "Yes. My mom was in the back seat and my brother
7 and sister were in the back seat too."

8 "What did your mom say when he hit you in the
9 stomach?"

10 "Oh, nothing. She was trying to help me do my
11 homework and Mick hit her on the head and told her to
12 shut up."

13 Now this is what the child relates that the mother
14 doesn't recall.

15 Let's talk about when did it occur. The State says
16 that something happened on May 13th. Once again, it's not
17 entirely borne out by the physical evidence. We'll talk about
18 that a little bit more la -- later.

19 What about the other times? Can you really, ten of
20 you, agree as to when something happened?

21 Now if you go back to the videotape of Cynthia, she
22 talks about something at the end of July. Does anybody know
23 about fireworks at the end of July? Somehow, after that inter-
24 view, it's now been reconfabulated to have, have to have been
25 around the 4th of July 'cause there were fireworks. Once again,

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1 it's kind of concocting it after the fact.

2 I would submit, if you look at the transcript of Zoe,
3 you can't tell when anything happened. And I'm, I'm going to
4 talk about that in, in a second.

5 Another thing I want you to note is did you notice --
6 Now what happens here? The State creates these videotapes.
7 Okay? The videotapes go to the prosecutor. And the prosecutor
8 gets to spend -- and du -- did spend -- three days with this
9 family getting them ready to come to court.

10 Did you notice that as far as the testimony part was
11 concerned, it was like they all had been talking about the same
12 book. That's why I urge you to look at the videotapes. And
13 again, I'm, I'm going to go over them a little bit more because
14 the videotapes don't come out like the way they came out in
15 court.

16 Talk about where.

17 "Now, Zoe, you told me when you were five he
18 started putting his thingie in your mouth."

19 "Yes."

20 "And swallowing and stuff."

21 "Yeah."

22 Now watch how this goes. A leading question.

23 "And that happened in your mom's bedroom and
24 also in the shower?"

25 "Yeah. And my mo -- and my room and Cynthia's

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1 bathroom and Jake's room."

2 "So also your room?"

3 "Yeah."

4 "Cynthia's bathroom and Jacob's room?"

5 Look at this one.

6 "Did it happen at any other places?"

7 "No."

8 'No.' Can't leave it at that though.

9 "Well, okay. Any other houses, trailers, apart-
10 ments or cars?"

11 "Oh, in his trailer, um, in, in his bathroom."

12 You see what happens? She says, 'No.' Where did it
13 happen? If it happened at all, where did it happen?

14 Here's another one. And this is Page 21 and 22 of
15 the transcript.

16 "Okay. Did he lick that part one time or more
17 than one time?"

18 "More than once."

19 "Okay. So you told me that one time was in your
20 mom's bed."

21 "Yes."

22 "Did it happen in any other places?"

23 "Yes. In my mom's bathroom."

24 "In your mom's bathroom too? Okay. Did it
25 happen in any other places?"

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1 "No."

2 'No.'

3 "Oh, okay. Did he ever -- Oops. I'm sorry. Did
4 he ever lick that part that you had pointed between
5 your legs and called it a tush?"

6 "Yeah."

7 "Did he ever lick that part in his trailer?"

8 Answer,

9 "No."

10 I like this exchange.

11 "Okay. You told me he put his thingie in your
12 mouth."

13 And we keeping doing -- just keep telling her and
14 reinforcing her what it is that supposedly happened.

15 "Yes."

16 And then,

17 "Did his thingie go on any other parts of your
18 body?"

19 "Uh, no."

20 Now one of the charges is, is that his thingie did
21 go up against part of her body. But she says, 'No.'

22 "So either -- you told me that your hand touched
23 his thingie."

24 "Yeah."

25 "Did his thingie touch your face?"

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1 "No."

2 Now his thingie never touched her face but she had
3 oral sex with him. Well, I don't know. I guess maybe she's
4 too immature to, to relate face to mouth.

5 "Did his thingie touch your chest?"

6 "No."

7 "Did his thingie touch your tush?"

8 "Yes."

9 After she says, 'No.' But again, let's go through
10 all the body parts here.

11 One more time. This is all -- These are not repeat --
12 this is not the same part of the transcript over and over again.
13 These are different parts of the transcript. This is 28 and 29.
14 Okay?

15 "How old were you the last time something like
16 this happened?"

17 "Eight."

18 "You were eight? And where were you the last
19 time it happened?"

20 "In my mom's tub."

21 "In your mom's tub? Okay. How old were you
22 when this happened?"

23 "About six and a half."

24 "Six and a half is the first time his thing --
25 thingie touched your tush?"

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1 "Mm-hmm."

2 "And where was that the first time?"

3 "In my mom's bathroom."

4 "In your mom's bathroom. Okay. Now did it
5 happen in any other place besides your mom's bath-
6 room?"

7 "In my mom's bed."

8 "In your mom's bed?"

9 "Oh, and my sister's bed."

10 "Um, and anywhere else?"

11 "No."

12 "Uh, okay. Did it ever happen in your room?"

13 "Uh, once."

14 "Uh, in your room? Did it ever happen in his
15 trailer?"

16 "Um, yeah. Twice."

17 Um, so you see what's going on here is what's -- how
18 reliable is this child when she has to be prompted into
19 describing where certain acts occurred?

20 Now remember we do not have to prove that this didn't
21 happen. I think the Judge mentioned to you at the very begin-
22 ning of the case -- he does this in all of his cases -- that
23 in Europe, if you're a defendant, you're presumed to be guilty
24 and you've got to prove that you didn't do anything.

25 But that's not the case in America. In America, the

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1 State has to prove beyond a reasonable doubt that the criminal
2 activity occurred. And we're talking about beyond a reasonable
3 doubt in a situation where Zoe, in particular, has said 'No'
4 on three separate occasions on the tape that anything happened
5 in Lincoln County until she's then prodded further by the
6 investigator.

7 Don't forget, oh, yes, Zoe testified. Zoe testified
8 after she and the prosecutor, they could look at the tape,
9 they could spend three days going over it, and she's coming in
10 here just like a good little fourth grader and telling you what
11 she's supposed to say 'cause they brought her here.

12 What happens when the children go off script? Okay?
13 I'm going to talk about that for a second. Because we went off
14 script a couple times during the testimony.

15 You may recall -- And the State's not telling you
16 that this is one of the alleged incidents. But you probably
17 recall the testimony -- well, she talked about it -- about Zoe
18 apparently observing Cynthia performing oral sex on Mr. McHale
19 while they were both in the shower. Now that would be something
20 that I would assume that a child -- would stick out in a child's
21 mind, independent -- independently.

22 This is from Cynthia's transcript at Page 27.

23 "Has anyone else walked in or seen what
24 happened?"

25 "I don't think so, but there could have been."

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1 "Oh, okay. Does something make you think that
2 someone saw what happened?"

3 "I don't know."

4 So she doesn't know when she's interviewed by
5 Ms. Penna that apparently she's in the shower doing this with
6 her sister present? And yet -- Then when she testified, of
7 course -- after the three days of prep -- when she testified,
8 she said, 'No. That didn't happen in Newport. That happened in
9 Gresham.'

10 What did Zoe say? Zoe said -- In fact, I think it
11 was on redirect that they asked Cynthia that question. I was
12 finished with my cross-examination, and I recall specifically --
13 you can go by your recollection -- but that -- that's -- Cynthia
14 was adamant with me, 'No. That didn't happen in Newport. That
15 didn't happen in Newport.'

16 Ms. Sanders comes back and says, 'Oh, did that happen
17 in Gresham?' And she says, 'Oh, yeah. It was in Gresham.' And
18 Zoe comes back a day later and says that it happened in Newport
19 in one of the trailers.

20 How did it occur? I would submit, ladies and gentle-
21 men -- and I'm going to talk about this once again in the end --
22 that Zoe's testimony and what you see on the videotape and what
23 has happened and transpired here with this family, her testi-
24 mony is not reliable, and not reliable enough to establish
25 proof beyond a reasonable doubt.

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1 Now with regard to Cynthia, it may be a different
2 story. So now we're going to talk about how.

3 Once again, I don't think we really know what happened
4 in the trailer on May 13th. We know that apparently Mr. McHale
5 did ejaculate. And we know -- we're not comp -- disputing the
6 fact that there is sperm or seminal fluid on a pillowcase and
7 on some underpants.

8 But now if he had intercourse with her, um, Mom didn't
9 say that when they went to the bathroom that Cynthia had her
10 underpants off. Did she put them back on? Is that how the
11 St -- I assume the State's theory is, is that it flowed down
12 into the underpants. That's how it got there.

13 But it's on the pillow. If she did have intercourse
14 with him, were her underpants on or off when she had the inter-
15 course? Does she touch --

16 We talk about cross-contamination. When you just need
17 to know that if you put the two items in a paper bag together
18 and they touch that you can go from pillowcase to, uh, under-
19 wear quite easily. That's why the Crime Lab and police officers
20 don't do that sort of thing.

21 But more importantly, do we know if there was
22 ejaculate on the pillowcase, did Cynthia touch it? Did Cynthia
23 touch it before or after or any way handling her underwear? We
24 don't know.

25 But let's talk about how did it occur. If it

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1 occurred. If anything occurred at any time at any place.

2 You saw this when Ms. Sanders showed it to you. I'm
3 going to show it to you again. Forcible compulsion.

4 Now we're the defense. We don't issue the charges.
5 We don't make the determination of what to put in an Indictment.
6 That's left to Ms. Sanders and Ms. Barnett and the people who
7 work for them.

8 They have chosen in this case to charge Robert McHale
9 with engaging in all of this sexual conduct with Cynthia
10 O'Kelley by forcible compulsion. And I -- you're going to have
11 to look at this over and over again.

12 "The use of physical force, a threat, express
13 or implied, that places a person in immediate -- or
14 in fear of immediate or future death or physical
15 injury."

16 On May 13th, two children were within two feet of
17 Mr. McHale and Cynthia O'Kelley. Zoe and her brother were right
18 there in the same room. Her mother was close by enough to
19 overhear the conversation within from here to the end of counsel
20 table -- I think that's what she said -- to hear the discussion
21 of Cynthia saying, 'How did that get on there?' 'How did that
22 get on?' Doesn't sound too much like, like she's being
23 threatened with physical force or being forced. 'How did that
24 get on there?'

25 And Mother hears no struggle, no 'Ow,' no 'I

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1 don't ...' -- Oh, and I think Cynthia told you she said repeat-
2 edly, 'Stop, stop, stop, stop, stop.' Neither Mother nor
3 brother nor sister hears that.

4 They say -- Cynthia says she was bit on the lip, and
5 the State wants to tell you that a bite on the lip was physical
6 force or a, a express or implied threat of future physical
7 force. And yet, did we hear Dr. Vardanega, who examined
8 Cynthia ten hours later, tell us there was any type of mark
9 whatsoever on Cynthia O'Kelley's lip? That was ten hours
10 later.

11 Now we know that Dr. Wrazen, a month later, didn't
12 see anything. Didn't seen anything in her throat. Didn't see
13 any mark on her lip. Presumably it would be healed. But not,
14 not ten hours later. Unbelievable.

15 You know, I guess, I guess you can read these e-mails
16 any way you want to. I was, I was quite impressed with the
17 tone of voice that Ms. Sanders chose to use when she reads the
18 e-mails to you, um, somehow, I guess, suggesting that they,
19 that they show a terrorized child who's quite clearly afraid of
20 future physical injury. That's why she runs --

21 Yeah. So the safe -- so that, uh -- (inaudible). I'm
22 just going to, I'm just going to use hers now.

23 "Yep. Yep. Yep. Yep. I do. I know it's
24 going to take a few more times. But -- Yeah."

25 I mean, I could read it differently.

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1 "But -- Yeah."

2 Um,

3 "Kiss, kiss, kiss. Hug, hug, hug to you. Love
4 you too."

5 "Hmm. Maybe you'll get to or maybe not. I
6 don't know."

7 I mean, I can read it differently. Um,

8 "Yeah, kinda. But my mommy will be home this
9 weekend. So how about some other time, like in a
10 couple of weeks or something. I don't know. When
11 mommy will be home, we don't want to do it then."

12 "Uh, well, I want to wait till like in a couple
13 of weeks. Is that okay with you or not? Just
14 asking."

15 Um, she goes,

16 "Oh, but like I'm already on my period, so it's
17 like, yeah, on my period. Like gets over on like
18 Friday. So, yeah. I don't know."

19 Does that sound like an interchange of somebody who's
20 being subjected to forcible compulsion? The State wants to
21 tell you --

22 The State has the burden of proving beyond a reason-
23 able doubt. Beyond a reasonable doubt that there's forcible
24 compulsion. Look at the exhibit. I'm holding two pages of
25 reasonable doubt right here in my hand.

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1 What did her mother say about what happened on the
2 night of the 13th? She acted like she'd gotten caught. She
3 acted like she got caught. Not like she had been being abused,
4 but she had gotten caught.

5 Her mother's freaking out. Screaming. Upset. She
6 got in trouble. But, of course, then her mother says, 'Well,
7 you're not in trouble. You're not in trouble. You're not in
8 trouble.'

9 And what better way to stay out of trouble than to
10 make it worse? 'Mom, I didn't do this willingly.' 'Mom, he
11 forced me.' 'Mom, he forced me.' She's trying to stay out of
12 trouble.

13 And, again, the e-mail -- And I think one of the
14 jurors asked what was the date of the string. I think the,
15 uh, the computer guy said he couldn't date them all, but, um,
16 apparently -- and you'll see this on the exhibit so I'm just
17 reading off the exhibit -- Wednesday, January -- It says,
18 'Wednesday, 12 January, 2005.' So this is, this is the inter-
19 change going on before she gets caught. She had problems with
20 lying. We talked about that.

21 Where's this dildo that we, that we heard about? Um,
22 she didn't say she threw it away. Uh, they apparently rummage
23 through her computers. They rummaged through the computers.
24 They managed to find newspaper articles. They didn't find
25 that.

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1 Not -- That's not, that's not, you know, anything
2 outstanding alone that that is the key to the case, but there
3 are all of these problems, the physical evidence lacking. The,
4 the e-mails. There's all these problems that basically create
5 doubt as to whether these were crimes that were committed in
6 Lincoln County.

7 Supposedly, Mr. McHale is engaging in these activities
8 with Zoe while her mother's present. And this is a tiny
9 trailer. We're talking Lincoln County. These are tiny
10 trailers. And she's feet away.

11 And we also know that apparently when they're in the
12 trailer, Mom can open up the shower door and walk on in, 'cause
13 that's what she testified that she did, she did on the 13th.

14 You know, there really is no evidence in Lincoln
15 County that Mr. McHale ever was alone with Zoe. There's this
16 testimony that Cynthia was alone with him, but not Zoe. The,
17 uh, purported July incident, the two kids are together. And
18 you didn't hear any opportunity that he had where there was no
19 one around to be able to do these types of things to her.

20 You know what Zoe knows and you know what Cynthia
21 knows? And, and I'm going to talk about this fairly briefly.
22 The kids know Mister, Mister McHale's the disciplinarian.
23 They're getting in trouble and he's timing them out and he's
24 punishing them. They talk about that a lot. And they don't
25 particularly like it. Their dad died when they were young kids,

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1 and here comes this replacement bully who's now going to be
2 enforcing discipline.

3 One thing the kids do know, and that is, is that
4 these stories get rid of him. He gets out of their life
5 forever. What Zoe doesn't know -- I'm sure Zoe doesn't have
6 any clue to this unless Ms. Sanders told her -- and that is if
7 Zoe tells these tales, that Mr. McHale is looking at having his
8 life wrecked. She doesn't know that.

9 You know, I don't, I don't, I don't for one minute
10 think that Zoe -- And what does that mean? 'Cause Zoe really
11 doesn't -- In the consequence that Zoe would have that would
12 be in her mind, these statements and the -- this testimony that
13 she would give would be it gets rid of the bully.

14 And that brings me to this instruction that the Judge
15 will give you. And I, I want to talk about it a little because,
16 uh, I think the word 'false' has a slightly different meaning
17 in a case such as this. This Witness False in Part.

18 "A witness who lies under oath in some part of
19 his or her testimony is likely to lie in other parts
20 of his or her testimony. Therefore, if you find that
21 a witness has lied in some part of his or her testi-
22 mony, then you may distrust the rest of that witness's
23 testimony."

24 Now I would not tell you that Zoe is an intentional
25 liar. I would tell you that Zoe is been influenced here and

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1 that her testimony and her statements are not trustworthy.
2 Because of that -- I mean, who told the truth about the two of
3 them in the shower? Which one? Who told the truth? Because
4 they told diametrically different stories.

5 So if that testimony's not true -- Okay? Let's just
6 use the word 'untrue' -- then you can distrust the remainder of
7 the testimony. That's the law. And that's the promise that I
8 asked you to make was to follow the law.

9 "And sometimes witnesses who are lying -- who are
10 not lying may give incorrect testimony (inaudible).
11 They may forget matters or they may contradict
12 themselves. Also, different witnesses may observe or
13 remember an event differently. You have the sole
14 responsibility to determine what testimony or portions
15 of testimony you will or will not rely on in reaching
16 your verdict."

17 And let me bring that back. Let me bring that back
18 to Cynthia O'Kelley. Was she telling you the truth about being
19 forced to do anything? Look at the e-mails. Listen to what her
20 mother said about her getting caught. Think of the circum-
21 stances in that trailer where everybody's all together. If
22 there was sexual activity, was she telling the truth about
23 force? I would submit she was not. And if not, you should
24 distrust the rest of her testimony.

25 Just talk real briefly about, uh -- Ms. Sanders

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1 basically took different lines of what Mr. McHale had to say,
2 and she put them before you to weave her version of the events.
3 But tell me this.

4 And you, you heard, you heard, you heard the, the
5 audio. Um, they weren't the nicest people in the world to him.
6 And it was real apparent that what they were trying to do was to
7 get him to make an admission that he never made.

8 So now what they do -- if you talk to the police, you
9 learn this one -- they're going to take the things that you say
10 that are not intended by you to be incriminating and they're
11 going to incriminate you with them, because that's what
12 Ms. Sanders has attempted to do.

13 But was he a prophet? Remember when he said -- even
14 though Detective Teague -- she was a detective then -- even
15 though she kept saying, 'We're going to find your semen on
16 those swabs. You ejaculated in her and that's what happened.'
17 And what did he say over and over and over again? He said,
18 'That's not possible.'

19 Well, how about that? Even though she didn't know,
20 and even though she made it up, he was right. There was no
21 semen or sperm on any of those swabs. Why was he right?
22 Because Cynthia's not telling the truth.

23 Now I'm almost finished. I want to just comment a
24 little bit, if my computer will fire up -- and sometimes it
25 doesn't. Um, I just want to look at my notes here and see if

DEFENSE'S CLOSING REMARKS

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1 there's anything I want to say about what Ms. Sanders had to
2 say. I may have covered -- Oh. Yeah.

3 Cynthia said -- part of this forcible compulsion
4 thing -- that, 'He would hold me down.' Well, if there was
5 something going on in Gresham that day where Mom walked in,
6 she was on top. I believe that was what the testimony was.
7 He wasn't holding her down. What does that go to? It goes to
8 the forcible compulsion issue.

9 Um, hitting her in the head. Um, don't re -- forget
10 that that happened apparently afterwards in the shower, not --
11 Forcible compulsion is compelling somebody to do the illegal
12 act.

13 Counsel says that defense would like you to believe
14 that there was transferring of the bodily fluids, um, and now
15 our theory is, is that he began to pull out and he spurted it
16 all over the place.

17 Well, I'm not trying to have you believe anything.
18 In other words, I don't have to prove that there was trans-
19 ference of anything. I've got to always keep in mind the fact
20 that the State has to prove beyond a reasonable doubt. They
21 can tell you a great story, but it has to be backed up by the
22 evidence beyond a reasonable doubt. And my whole purpose here
23 is to point out to you parts of the evidence in this case that
24 simply do not add up. And they're important parts.

25 Again, the how. Was there forcible compulsion?

DEFENSE'S CLOSING REMARKS

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1 You've got to find that on every count with regard to Cynthia.

2 The where. If something happened to Zoe -- and we
3 submit it did not -- but if something happened to Zoe, did it
4 happen in Lincoln County? Remember, she's talking about
5 Gresham, Gresham, Gresham, Gresham, Gresham, and when she's
6 asked anywhere else, she says, 'No,' until prompted to do so.
7 Reasonable doubt. Let Gresham take care of it.

8 Counsel says, well, there are a number of things that,
9 that Zoe told you that she wasn't paring -- par -- parroting
10 Cynthia. She talked about a couple of things about Cynthia --
11 about Zoe's statements that couldn't have come from Cynthia.
12 Well, that's really speculation.

13 Remember the very first, uh, instruction I showed you
14 was don't speculate, because we don't know how much Cynthia,
15 and what, Cynthia said to her. But we know she said something,
16 even though she said she didn't in court.

17 I'll get it and be out of your way here in a minute.
18 Probably the last one in the stack. I just want to show it to
19 you one more time. No. It's probably over here. Here we go.
20 You're not supposed to help me.

21 Proof beyond a reasonable doubt. You know, the
22 State's going to tell you, it's not proof beyond all doubt.
23 It's not proof beyond any doubt. It's not all doubt in the
24 whole wide world. But you have to understand, as you well know,
25 from what you've heard and the way Ms. Sanders characterizes it,

STATE'S REBUTTAL CLOSING REMARKS

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1 that this is some very, very serious charges and some very
2 serious accusations.

3 And, once again, you had a chance to hear and see how
4 they testified. You can hear the inconsistencies and the dis-
5 agreements in the video, and there is no physical evidence.
6 Despite the fact that the State's going to tell you, 'Well, you
7 don't need it, we don't need it, we don't need it.' It's sil --
8 still not there.

9 I would submit, ladies and gentlemen, that there is
10 a reasonable doubt on all of these charges, each and every one.
11 And you have to find beyond a reasonable doubt if you're going
12 to follow the law.

13 So in closing, I'm going to ask you to keep your
14 promise that you made to me and listen to the Court's instruc-
15 tions. Apply those to the evidence. Not what Ms. Sanders says
16 and not what I say, but apply the law to the evidence that
17 you've heard, and do the right thing and find my client not
18 guilty.

19 Thank you.

20 THE COURT: Ms. Sanders.

21 STATE'S REBUTTAL CLOSING REMARKS

22 MS. SANDERS: Thank you, Your Honor.

23 Ladies and gentlemen, I just have some brief final
24 remarks. You've sat here for four days. But, ladies and
25 gentlemen, when it comes to deciding the case, when they talk

No. 17-7804

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MICHAEL MCHALE,

Petitioner,

v.

BRAD CAIN, Superintendent, Snake River Correctional Institution,

Respondent.

PROOF OF MAILING: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on May 17, 2018, in compliance with Rule 29, I mailed the brief of Brad Cain, Superintendent, Snake River Correctional Institution, as respondent in the above-entitled case, by depositing 10 copies thereof in the United States Postal Service mailbox, express mail, postage prepaid, addressed to the Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543.



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Attorney for Respondent

No. 17-7804

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT MICHAEL MCHALE,

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v.

BRAD CAIN, Superintendent, Snake River Correctional Institution,

Respondent.

PROOF OF SERVICE: RESPONDENT'S BRIEF IN OPPOSITION

I, Benjamin Gutman, a member of the Bar of the Court, hereby certify that on May 17, 2018, three copies of the brief of Brad Cain, Superintendent, Snake River Correctional Institution, as respondent in the above-entitled case were served upon Kristina Signe Maria Hellman, attorney for petitioner, by mail delivery to, 101 SW Main Street, Suite 1700, Portland, Oregon 97204. I further certify that all parties required to be served have been served.



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