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James Swink; Karen Klucznik; Mark Shurtleff; Attorneys for Appellee.
Mark McBride; Criminal Defense Associates; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, Plaintiff / Appellee, vs. SYDNEY ARTHUR WENGREEN, Defendant / Appellant.	Appeals No. 20051018-CA Dist. Ct. Case No. 021100187

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FIRST JUDICIAL DISTRICT, CACHE COUNTY,

HONORABLE JUDGE WILMORE PRESIDING

Appellant is presently incarcerated in connection with this appeal.

KAREN A. KLUCZNIK
Assistant Attorney General
MARK L. SHURTLEFF
Utah Attorney General
160 East 300 South, 6th
P.O. Box 140854
Salt Lake City, UT 84114

JAMES SWINK
Deputy Cache County Attorney
11 West 100 North, 2nd Floor
Logan, UT 84321

Attorneys for Appellee
State of Utah

MARK MCBRIDE (UTAH BAR No. 08969)
468 North Camden Drive
Suite 211
Beverly Hills, CA 90210
Telephone: (310) 858-5588
Fax: (310) 388-0686

Attorney for Appellant
Sydney Arthur Wengreen

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UTAH APPELLATE COURTS
MAR 13 2007

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160 East 300 South, 6th
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Salt Lake City, UT 84114

MARK MCBRIDE (UTAH BAR No. 08969)
468 North Camden Drive
Suite 211
Beverly Hills, CA 90210
Telephone: (310) 858-5588
Fax: (310) 388-0686
Attorney for Appellant
Sydney Arthur Wengreen

JAMES SWINK
Deputy Cache County Attorney
11 West 100 North, 2nd Floor
Logan, UT 84321

Attorneys for Appellee
State of Utah

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I

THE TRIAL COURT ERRED IN DENYING MR. WENGREEN'S MOTION TO COMPEL DISCOVERY OF THE PROSECUTRIX'S MENTAL HEALTH RECORDS

A. "ELEMENT OF HIS DEFENSE"

Regarding the "element of his defense" prong under Utah Rule of Evidence 506, the State argues that Mr. Wengreen has not met the standards spelled out in *State v. Gonzalez*, 2005 UT 72. With due respect to the State, *Gonzalez* does not quite stand for what the State says it does. The State's position on *Gonzalez* is that that case provides a great bit of clarity on what "element of his defense" means. But that is not so. In the portion of *Gonzalez* relied on chiefly by the State here, the Utah Supreme Court denied Gonzalez's request to review the alleged victim's mental health records primarily because defense counsel had obtained those records fraudulently – and not necessarily because Gonzalez had failed to satisfy the "element of his defense" language.

Gonzalez is a lengthy opinion; it is 76 paragraphs. The State, in its responsive brief, relies chiefly on but four paragraphs in the opinion. Those paragraphs are quoted here in full:

> ¶ 42 Next, Mr. Gonzales argues that he was entitled to review Jessica's mental health records because her mental health is an element or claim of his defense. Utah Rule of Evidence 506, which defines a privilege between a patient and a mental health therapist, excludes communications that concern a patient's condition where the condition is "an element of any claim or defense." This is the same wording that is found on the UNI form that Mr. Montgomery filled out. Mr. Gonzales argues that Jessica's mental health was an element of a claim or defense in the lawsuit, and therefore his

request for the records was proper.

¶ 43 Mr. Gonzales's argument is flawed in two ways. First, his defense is simply "I didn't do it." He wishes to use Jessica's mental health records to impeach her credibility as a witness-part of his defense strategy, but not actually an element of his defense. Second, regardless of whether Jessica's mental health is an "element" of Mr. Gonzales's defense, it is the process by which the records were obtained, not the status of the records as privileged or unprivileged, that prevents Mr. Gonzales from reviewing them. Even if it were true that the records were an element of the defense, or were never privileged in the first place, Mr. Gonzales would still be obligated to obtain them using the proper avenue.

¶ 44 Mr. Montgomery used a flawed subpoena process to obtain privileged records. His authority to examine those records, however obtained, depended on approval of the trial court following an in camera review. Drawing on a United States Supreme Court case, *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), we made this clear in *State v. Cardall*, 1999 UT 51, 982 P.2d 79. We stated: In *Ritchie*, the Supreme Court held that where an exception to privilege allows a defendant access to otherwise confidential records, the defendant does not have the right to examine all of the confidential information or to search through state files without supervision. However, if a defendant can show with reasonable certainty that exculpatory evidence exists which would be favorable to his defense, *Ritchie* gives him the right to have the otherwise confidential records reviewed by the trial court to determine if they contain material evidence.

...

[W]here "a defendant is aware of specific information contained in the file ..., he is free to request it directly from the court, and argue in favor of its materiality." *Cardall*, 1999 UT 51 at ¶¶ 30, 32, 982 P.2d 79 (citations omitted).

¶ 45 Here, Mr. Montgomery was obligated to seek an in camera review of Jessica's mental health records before searching through them. Because he did not follow proper procedures in subpoenaing the records or requesting an in camera review, we affirm the trial court's conclusion that the subpoenas must be quashed.

State v. Gonzalez, 2005 UT 72, at paras 42-45 (footnotes omitted) (emphasis added).

The underlined language above is extremely telling regarding the concept of "element of his defense." One: the Court denied Gonzalez's request principally because defense counsel obtained the records improperly. That is to say: it appears that the *Gonzalez* Court really did not reach, in the substantive sense, whether Gonzalez had made the requisite "element of his defense" showing. Indeed, the Court's header regarding the above-quoted section speaks not to an "element of his defense," but reads: "B. Failure to Turn over Records to Court for In Camera Review." And, toward that end, the *Gonzalez* Court bounces back to the language in *Cardall*, which in turn uses the *Ritchie* language, to establish the standards used to determine whether a litigant may inspect a witness's mental health records.

B THE MENTAL HEALTH RECORDS WERE PROPERLY SHOWN TO BE EXCULPATORY

1. Sufficient Outside Sources

The narrow question here is whether the alleged victim's own discussions, as well as the documents drafted about her, which were conveyed to the officer assembling the presentence report, constitute a sufficient outside source under *State v. Blake*, 2002 UT 113. Clearly they do.

On this topic, *Blake* reads:

> Where a defendant's request for in camera review is accompanied by specific facts justifying the review, a court will be much more likely to find "with reasonable certainty that exculpatory evidence exists which would be favorable to his defense." Id. at ¶ 30. However, when the request is a general one, such as the request in this case for any impeachment material that might happen to be found in the privileged records, a court ought not to grant in camera review. At a

> minimum, specific facts must be alleged. These might include references to records of only certain counseling sessions, which are alleged to be relevant, independent allegations made by others that a victim has recanted, or extrinsic evidence of some disorder that might lead to uncertainty regarding a victim's trustworthiness. This listing is not intended to be exclusive, but is only an example of the type and quality of proof needed to overcome the high Cardall hurdle.

Blake, at para. 22 (emphasis added).

Here, and even putting aside the letters provided to the sentencing officer, none other than the prosecutrix *herself* revealed facts, on the heels of trial, that her story at trial could very well have been inaccurate. It is Mr. Wengreen's position that when the alleged victim provides facts which make his / her trial story unlikely (as well as letters provided to the presentence officer), the sufficient outside sources requirement in *Blake* has been met.

3 It is Reasonably Certain that the Records Would Have been Exculpatory

The *Blake* Court discusses the various types of information which could properly be seen as exculpatory: "This situation differs markedly from cases where a criminal defendant can point to information from outside sources suggesting that a victim has recanted or accused another of the crime alleged or has a history of mental illness relevant to the victim's ability to accurately report on the assault." *Blake*, *supra*, at para. 21 (emphasis added).

Notwithstanding defense counsel's comment's at the quash hearing (which the State frames as concessions), it is Mr. Wengreen's position that, under the "history of mental illness" language in *Blake*, he has demonstrated that the mental health records

contain, with reasonable certainty, exculpatory evidence. Specifically, it is highly unlikely that the alleged victim in this case does not have a history of mental illness. It is highly unlikely that her statements, post-trial, which were fantastic and contradictory, simply popped up out of the blue. Her statements, post-trial, indicate an individual who suffers from a mental disorder which affects her ability to relay facts accurately, and which affects her ability to judge what did or did not happen between her and Mr. Wengreen.

II

THE NEW TRIAL MOTION SHOULD HAVE BEEN GRANTED

The bottom line is whether there is, as the State essentially argues, a procedural bar on granting a new trial when the alleged victim explains at trial that she was touched only on the buttocks, but then, just after trial, reports contact of a much more serious nature. There is of course no such bar in Utah's case law, and the new trial motion should have been granted.

In State v. Pinder, 2005 UT 15, the State requested that the Supreme Court adopt a very rigorous standard when discussing whether new trial motions should be granted. The Pinder Court responded: "

> The State would have us adopt the newly discovered evidence test recently utilized in situations involving petitions for post-conviction relief. See Wickham v. Galetka, 2002 UT 72, ¶¶ 9, 13, 61 P.3d 978; Julian v. State, 2002 UT 61, ¶¶ 15, 20, 52 P.3d 1168. In Wickham and Julian, we applied the language of the Post-Conviction Remedies Act, which states that newly discovered evidence does not warrant post-conviction relief if the new evidence is "merely impeachment evidence." Utah Code Ann. § 78-35a-104(e)(iii) (2002). Despite potentially misleading dicta to the

> contrary, we have never held that "mere" impeachment evidence is insufficient in all situations to justify the granting of a new trial in the course of regular appellate review.
>
> . . .
>
> Therefore, we reaffirm that newly discovered impeachment evidence can justify the granting of a new trial in certain situations. See Montoya, 2004 UT 5 at ¶ 11, 84 P.3d 1183.
>
> [22] [23] ¶ 67 As a result, it is proper for the trial court, when confronted with a motion for a new trial due to newly discovered evidence, to consider the credibility of new witnesses as well as the manner in which new evidence meshes or clashes with evidence presented at trial. See id.

Pinder, supra, at n.11 and para. 67 (emphasis added).

Even putting aside in the instant case the principle that the alleged victim's post-trial revelations speak to her ability to tell the truth (and they certainly do), there is no bar – and there should be no bar here – to a situation where egregious impeachment evidence is grounds for a new trial. Of course, Mr. Wengreen attached to his new trial motion a trenchant discussion from a therapist regarding the victim's mental health, which discussed her very ability to report even bare facts, but clearly the jury would have like to have heard the victim's dramatic change in stories. It was first: he touched me on the buttocks; then it was conduct of a much more severe nature. Which is it? There is clearly a difference between the two stories, and this new evidence should get to the jury.

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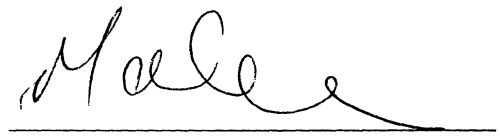
III

CONCLUSION

Based on the foregoing, Mr. Wengreen's convictions should be reversed.

RESPECTFULLY SUBMITTED this 9th day of March, 2007.

LAW OFFICES OF MARK MCBRIDE, P.C.



Mark McBride

Attorney for Appellant

CERTIFICATE OF SERVICE

On this 9th day of March, 2007, I hereby certify that true and correct copies of the foregoing Appellant's Reply Brief was sent to the following parties, via the United States Postal Service:

Utah Attorney General's Office (2 copies)
Appeals Division
P.O. Box 142320
Salt Lake City, UT 84114-2320

James Swink, Esq. (1 copy)
Deputy Cache County Attorney
11 West 100 North, 2nd Floor
Logan, UT 84321

Mark McBride