IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. DAVID LEE CHRISTENSEN, Defendant-Appellant,	S.Ct. No. 43671-2018 Ada Co. CR01-17-31362

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE MICHAEL REARDON,
Presiding Judge

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE RULES & STATUTES

II. STATEMENT OF THE CASE

A. *Nature of the Case*

David Christensen is a [redacted] man with no prior criminal history who was convicted of five counts of lewd conduct with a minor. PSI. The Court should vacate the convictions because the trial court abused its discretion when admitting the CARES hearsay statements of developmentally delayed children under I.R.E. 803(4), in part because there was insufficient evidence that the children knew the statements were for the purpose of medical diagnosis or treatment. The court also abused its discretion when it admitted the entire CARES videos without consideration of which particular statements fell within the hearsay exception.

B. *Procedural History and Statement of Facts*

1. Pretrial proceedings

Mr. Christensen was charged by indictment with five counts of Lewd Conduct with a Minor Under Sixteen, I.C. § 18-1508. Counts 1-3 alleged the manual-genital touching of A.M.O. on or between May 27 – 28 of 2017.[1] Count 4-5 alleged that A.G.O. was similarly touched, once on May 27-28, and once on March 18, 2017. R 13-14. Mr. Christensen pleaded not guilty to all counts. R 31.

2. CARES interview videos

The state filed a Notice of Intent to Introduce St. Luke's CARES Medical Records under both the statement for purposes of medical diagnosis exception to the hearsay rule (I.R.E. 803(4)) and the so-called "catch-all" hearsay exception (I.R.E. 803(24)). R 43. Mr.

[1] While the Indictment uses and this brief will use initials, the girls' names were used throughout the court proceedings. T pg. 89, ln. 12-13.

Christensen objected to the admission of the evidence. R 57.

At the hearing on the motion in limine, the St. Luke's "forensic interviewer," Lara Foster, explained that a "forensic interview is a structured conversation utilized to gain information or detail regarding something that the child has experienced or possibly witnessed." T pg. 13, ln. 1-4. The CARES program employs six social workers and eight medical providers. T pg. 22, ln. 5-16. Social workers conduct the forensic interviews. Any medical examinations or treatment are done by the medical providers. *Id*.

She interviewed A.M.O. and A.G.O. Before doing so, she told them the following:

> So when I meet with kids, I talk to them and I initially tell them about the talking room that we're going to be talking in. And I let them know that -- I talk to kids every day and kids talk to me about the things that happen to them. I also explain that they will meet with a medical provider and that me and the people that I work with, it's our jobs to help make sure that their bodies are safe and healthy.

T pg. 15, 10-15.

Both girls told her that inappropriate touching had occurred. T pg. 15, ln. 24 – pg. 16, ln. 1.

Matthew Cox, M.D., testified that after the forensic interview there is "a full head-to-toe medical examination often directed by the information we learn" which "commonly involv[es] a detailed examination of the genitals and the anus[.]" T pg. 35, ln. 13-21. What he hears in the forensic interviews helps to guide his medical examination. T pg. 37, ln. 18-22.

A.M.O. and A.G.O. have a disorder their mother, Lori Northam, calls "a chromosome deletion," which "affects their learning abilities." T pg. 239, ln. 14-24. Chromosomal deletion syndrome causes an intellectual disability where the girls' intellectual and emotional age does not correspond with their biological age. *Id.* Both girls have an IEP

(Individualized Education Plan) at school. Although in ninth grade, the girls think at a third grade level. T pg. 224, ln. 9-20, pg. 225, ln. 2-5.

According to Dr. Cox:

> So they have an abnormality in their genetic makeup. They have a missing piece of their genetics which was causing their developmental delays and their learning problems. So it's a defect in their gene structure that leads to them having problems. Particularly with these girls, significant delays in their development and their cognition.

T pg. 410, ln. 13-21. At the time of the accusations, the girls were developmentally at a second grade level. T pg. 240, ln. 22-25.

The court found that the CARES evidence was admissible, noting that "Clearly its hearsay, but I think that it is exempt from the hearsay rule under 803(4)." T pg. 72, ln. 15-21. In support of its ruling, the trial court found that "based on the evidence that I've heard today and what I've seen in 30-odd years, that [CARES'] focus is now primarily a medical procedure intended to address trauma inflicted on children, discover and treat that." T pg. 71, ln. 19-23. In light of that ruling the court did not address the admissibility of the evidence under I.R.E. 803(24). T pg. 72, ln. 15-21. ("I'm not going to address 803(24) because it seems like there is too many factors that go into that and I don't think I have to since I'll find it's admissible under 803(4).")[2]

3. Evidence at trial

On May 30, 2017, A.M.O. told her student-helper, Nicci Curry, that "her Grandpa

[2] Later the Court stated that "on balance it seems to me that the evidence is admissible under 803(24)." But that was a slip of the tongue by the court, given its prior express refusal to address the issue. Further, the court was addressing the question of whether the hearsay was testimonial for purposes of Confrontation Clause analysis and was not conducting the analysis appropriate to admission of the evidence under the catch-all provision. T pg. 74, ln. 11-14.

touched her private parts." Nicci told the vice-principal. T pg. 216, ln. 6-24. The vice-principal asked A.M.O. to share with her what she had told Nicci. T pg. 485, ln. 4-5. The vice-principal then met with the girls' mother, and the police were called and a CARES interview arranged. T pg. 234, lns. 1-25.

CARES interviewed A.M.O. on June 9, and A.G.O. on June 12. T pg. 433, ln. 13-20. Videos of the interviews were admitted at trial. T pg. 435, ln. 13-19; pg. 442, ln. 6-15.

Dr. Cox examined A.G.O. on June 12. T pg. 381, ln. 17-18. He found a transection of the hymen, with a tear. T pg. 388, ln. 2-13. He did not examine A.M.O., but photos taken at her examination showed a transected hymen and two tears. T pg. 396, ln. 11-18.

While these injuries were consistent with the girls' testimony, they were not, by themselves proof of sexual abuse.

> The greatest myth that I encounter is the thought that by strictly examining a patient I can determine whether or not they've had sex and that the hymen is torn the first time there is any sexual contact and that as a doctor I can see that.
>
> And actually the truth is the opposite. Most of the time just by looking I can't tell. It's the words by the patient that are the most important considerations.

T pg. 386, ln. 15-24.

All the transections were "well-healed," meaning that they did not occur recently. Dr. Cox said that "[i]f it's [within] the last few days, I would see swelling and bruising of the tissue if I look." T pg. 399, ln. 25-p. 400, ln. 6; pg. 402, ln. 2-7. There is no way to determine the timing or the mechanism of injury by physical examination alone. T pg. 401, ln. 8- pg. 402, ln. 12.

A.M.O. testified that Mr. Christensen touched her "privacy" "[p]robably three" times.

T pg. 284, ln. 10. Once was on the downstairs couch while A.G.O. was present. T pg. 287, on. 14. She told him to stop and after he did she went into the bathroom. She was "bleeding in the privacy." T pg. 288, ln. 1-22. The second time was on the upstairs couch and she again bled. T pg. 289, ln. 1-8. The third time was in A.G.O.'s bed. T pg. 289, ln. 8-15. Although A.M.O. testified that A.G.O. was present at every touching, A.G.O. did not testify that she was present. T pg. 312, ln. 14-25; pg. 314, ln. 21; p. 333, ln. 24-p. 355, ln. 3; pg. 361, ln. 22-pg. 373, ln. 1. The jury acquitted Mr. Christensen of the charge alleging a touching in A.G.O.'s bed. R 118.

A.G.O. testified that Mr. Christensen touched her while she, he, and Ms. Christensen were all on the downstairs couch. T pg. 366, ln. 1-5. Ms. Christensen testified that this did not occur. T pg. 506, ln. 10. A.G.O. also said that Mr. Christensen touched her when she was on her bed but that A.M.O. was not there. T pg. 367, ln. 9-14.

A.G.O. further testified that in March 2017, Mr. Christensen touched her when she and Ms. Christensen were on the downstairs couch watching the Disney movie *Moana*. T pg. 343, ln. 5-15. Ms. Christensen testified that she was there the entire time and nothing inappropriate occurred. T pg. 501, ln. 5-20; pg. 514, ln. 2-4.

Ms. Christensen testified that she and Mr. Christensen visited her daughter's family over Memorial Day weekend in 2017. T pg. 502, ln. 3-12. They watched the children on Saturday while her daughter and her husband went to a wedding. T pg. 505, ln. 2-21. Ms. Christensen was at the house the entire weekend and did not see anything inappropriate happen. The "girls just wanted to be close to him and me. And at no time during the weekend did they act like they didn't want to be around either of us. They behaved normally." T pg. 506, ln. 10-14. When the Christensens left on Monday, "[t]he

girls were lovable, hugging us, saying they can't wait to see us again. They were excited to make plans to come for the summer." T pg. 508, ln. 11-14.

The girls' mother testified that when they are hurt, they "come to mom." But, neither came to her Memorial Day Weekend to complain of injury or bleeding. T pg. 474, ln. 13-21. And, when she and her husband came home from the wedding, the girls seemed fine. T pg. 474, ln. 23-pg. 475, ln. 3.

Mr. Christensen testified. T pg. 527, ln. 24. He testified that he did not inappropriately touch the girls. T pg. 555, ln. 1-pg. 556, ln. 12.

In June 2017, Yakima police contacted him about the allegations. T pg. 5661, ln. 8-21. He voluntarily met with a detective and gave a statement even after being given his *Miranda* warnings. T pg. 564, ln. 8-18. Consistent with his trial testimony, he told the police that he did not inappropriately touch the girls. T pg. 565, ln. 21-24.

Mr. Christensen was found guilty of Counts 1, 2, 4 and 5, and not guilty of Count 3. R 116-120. The court imposed a sentence of 20 years with eight determinate on each count of conviction and ran all sentences concurrent to one another. R 160-161.

He filed a timely Notice of Appeal. R 164.

III. ISSUES PRESENTED ON APPEAL

1. Did the trial court abuse its discretion in admitting the CARES interviews as statements made for a medical purpose without considering the factors set forth in Idaho case law, including whether the developmentally delayed children understood their statements were made for a medical purpose?

2. Assuming any portion of the videos are admissible, did the court abuse its discretion in admitting the entirety of the interviews without considering which particular

statements fell within the hearsay exception?

IV. ARGUMENT

A. *Introduction*

The trial court has discretion in determining the admissibility of evidence. *State v. Smith*, 117 Idaho 225, 232, 786 P.2d 1127, 1134 (1990). A decision to admit or deny such evidence will be overturned on appeal upon a clear showing of abuse of that discretion. *Id*. To determine if a trial court abused its discretion, this Court will consider whether the trial court (1) perceived the issue as one of discretion, (2) acted within the outer boundaries of that discretion, (3) acted consistently with the
legal standards applicable to the specific choices available to it, and (4) reached its decision by an exercise of reason. *Lunneborg v. My Fun Life,* 163 Idaho 856, 863, 421 P.3d 187, 195 (2018). As explained below, the trial court abused its discretion by admitting the CARES videos because it did not act consistently with the applicable legal standards.

B. *The trial court abused its discretion in admitting the CARES interviews as statements made for a medical purpose without considering the factors set forth in Idaho case law, including whether the developmentally delayed children understood their statements were made for that purpose.*

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. I.R.E. 801(c); *State v. Gomez*, 126 Idaho 700, 704, 889 P.2d 729, 733 (Ct. App. 1994). Hearsay is inadmissible unless otherwise provided by an exception in the Idaho Rules of Evidence or other rules of the Idaho Supreme Court. I.R.E. 802.

The Idaho Rules of Evidence provide an exception for "statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably

pertinent to diagnosis or treatment." I.R.E. 803(4). The rule is premised on the assumption that such statements are generally trustworthy because the declarant is motivated by a desire to receive proper medical treatment and will therefore be truthful in giving pertinent information to the physician. *See State v. Kay*, 129 Idaho 507, 518, 927 P.2d 897, 908 (Ct. App. 1996) ("[T]he generally acknowledged rationale behind this hearsay exception, [is] that 'the declarant's motive to disclose the truth because his treatment will depend in part on what he says, guarantees the trustworthiness of the statements.'") *quoting*, Report of Idaho State Bar Evidence Committee, C. 803, p. 6 (1983) *and citing White v. Illinois*, 502 U.S. 346, 356 (1992); *Gonzales v. Hodsdon*, 91 Idaho 330, 332, 420 P.2d 813, 815 (1966); *Hillman v. Utah Power & Light Co.,* 56 Idaho 67, 76, 51 P.2d 703, 706 (1935). Here, the trial court abused its discretion because it did not consider whether A.M.O. and A.G.O. were informed of or otherwise appreciated the importance of speaking truthfully to the CARES interviewer which is required for such statements to be admissible under Rule 803(4).

Here, all the forensic interviewer said was, "it's our jobs to help make sure that their bodies are safe and healthy." T pg. 15, 10-15. From this, it cannot be determined whether the girls understood the statements were made for purposes of medical diagnosis or treatment. Further, there is no indication in the record that either girl was told or understood that they would be given a medical examination after the statements to the forensic examiner.

The absence of such evidence is especially troubling because the children, while 13 years old, were developmentally delayed and function at a "six-or-seven-year old" level. T pg. 411, ln. 16-22. "Where an adult is the hearsay declarant, the motive to speak the truth

to a physician in order to advance a self-interest in obtaining proper medical care for the declarant or another is generally assumed." *Id*. However, a "dilemma arises in attempting to apply to children evidentiary rules which were drafted with adults in mind." *State v. Kay,* 129 Idaho 507, 518, 927 P.2d 897, 908 (Ct. App. 1996) *Id., quoting State v. Dever*, 596 N.E.2d 436, 440 (Ohio 1992). To resolve that dilemma, the *Kay* Court concluded that where the declarant is of tender years, the trial court should consider the totality of the circumstances surrounding the hearsay statement to determine whether a young child's statement was "made for purposes of medical diagnosis or treatment." *Id.*

Under *Kay*, the court may consider any factors which bear upon the likelihood that the child made the statement for that purpose, including evidence indicating whether the child understood the need to speak truthfully to the physician and factors that otherwise indicate the reliability of the statements. Circumstances to be considered may include: 1) the child's age; 2) whether the child understands the role of the physician in general; 3) whether the child was suffering pain or distress at the time; 4) whether the child's statements were inappropriately influenced by others, as by leading questions from the physician or a previous suggestive interrogation by another adult; 5) whether the examination occurred during the course of a custody battle or other family dispute; 6) the child's ability and willingness to communicate freely with the physician; 7) the child's ability to differentiate between truth and fantasy in the examination itself and in other contexts; 8) whether the examination was initiated by an attorney (which would suggest that its purpose was for litigation rather than treatment); and 9) the timing of the examination in relation to the trial. *Id.*

When the *Kay* factors are considered, many militate against admission of the CARES

hearsay. First, the children function at about a six to seven year old level. This weighs against admission. There was no evidence that they understood the role of the physician in general or that their statements would be used by a medical profession for diagnosis or treatment. Neither child was suffering pain or distress at the time of the interviews. The court did not know whether the children's statements were inappropriately influenced by others, but it did know they were questioned by other adults prior to the CARES interview. And, while the interview did not occur during the course of a custody battle or other family dispute, there was a criminal investigation proceeding at the time. Thus, the interview was initiated by a person who had the possibility of litigation in mind. Other *Kay* factors, such as the timing of the interview, appear to be neutral.

Since the court did not apply the relevant legal factors and because when those factors are applied they weigh against admission, this Court should vacate the convictions and remand for a new trial.

C. *The court abused its discretion by admitting the entirety of the interviews without determining which particular statements fell within the hearsay exception.*

Assuming that any of the statements were admissible, Mr. Christensen also objected to the introduction of any statements made during the CARES interviews which were not directed to medical diagnosis or treatment. He wrote, "[t]he CARES interview is based on a protocol outlined by the NICHD which explicitly states that the interview questions are designed to build rapport and establish trust between the CARES social worker and the child. These questions are not for the expressed purpose of medical diagnosis or even relevant to medical diagnosis or treatment. Therefore, based on the Rules of Evidence, any conversation for the purpose of building trust or establishing rapport is not relevant to

or for the purpose of medical treatment." R 68.

The forensic interviewer testified that the interview protocol was developed by the National Institute of Child Health and Human Development. T pg. 13, ln. 9-13. "These guidelines lay out ten questions that can be utilized to elicit a disclosure. There is sort of a funnel approach to it, so it starts very open ended and then this funnels down into more direct questions that may include information that the child has already said." T pg. 16, ln. 5-10.[3] In this case, the interview started with some introductory questions. These questions were directed to whether the child was competent to testify. Exhibit 9 (Timestamp 00:01 – 03:22); Exhibit 10, (00:01-03:13). These had nothing to do with medical diagnosis.[4]

The forensic interview moved on to a series of questions designed to build rapport with the children. This phase included questions eliciting information about what the child likes to do. Exhibit 9 (3:22 – 9:25); Exhibit 10 (3:14 – 6:57). Again, these had nothing to do with medical diagnosis. Further, the questions had the effect of building trust and confidence in the later statements of the girls when the defense did not have an equal opportunity to interview the girls pretrial.

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3 The list of questions are found in The National Institute of Child Health and Human Development (NICHD) Protocol: Interview Guide (Appendix). http://nichdprotocol.com/NICHDProtocol2.pdf

4 In addition, permitting the jury to view questioning intended to demonstrate competency violates the statutory requirement that a child-witness competency determination be "conducted outside the presence of the jury[.]" I.C. § 19-3024(1), *abrogated in other part by State v. Zimmerman*, 121 Idaho 971, 974, 829 P.2d 861, 864 (1992) ("To the extent that this statute attempts to prescribe the admissibility of hearsay evidence and is in conflict with the Idaho Rules of Evidence, it is of no force or effect."). The procedural requirement that a child competency hearing be held outside the presence of the jury was not abrogated by *Zimmerman*. *See also*, I.C. § 9-202(2) (requiring "in chambers" competency hearing for children under ten years of age.)

The third phase of the interview consisted of training in episodic memory, where the forensic interviewer identified a recent event and then asked questions designed to elicit details about that event. These questions had nothing to do with a medical diagnosis. Exhibit 9 (9:25 – 14:14:24); Exhibit 10 (6:57 – 15:30).

It is not until the final phase of the interview that the substantive questions are posed. Until this point, none of the questions were directed toward information that could be used for a medical diagnosis. Thus, those answers are not admissible.

As might be obvious, "[o]nly out-of-court statements necessary for medical diagnosis and treatment are admissible under I.R.E. 803(4)." *State v. Zimmerman*, 121 Idaho 971, 974, 829 P.2d 861, 864 (1992). In *Zimmerman*, this Court found that statements made by a child to a psychologist were not admissible under 804(4) because she "did not make her statements to Dr. Krasnec for the purposes of medical treatment. Therefore, it was error to admit them pursuant to this hearsay exception." *Ibid.* The 803(4) hearsay exception is based upon the common sense idea that statements made for purposes of medical diagnosis are generally trustworthy due to the desire to receive proper medical treatment. *State v. Kay,* 129 Idaho at 518, 927 P.2d at 908. That rationale only holds true for those statements which are actually directed toward medical diagnosis. Here, however, the CARES interviews were filled with answers to questions which had nothing to do with medical diagnosis or treatment, but were asked for other purposes such as establishing competency and building rapport. They also included statements made by the forensic interviewer which were not designed to elicit information within the scope of the hearsay statement. For example, the forensic interviewer elicited statements from A.M.O. that A.G.O. said that she had been abused too. Exhibit 9 (46:30 –

46:58). That statement was hearsay under I.R.E. 801(c).

A similar situation was recently addressed in *State v. Robins*, --- Idaho ----, 431 P.3d 260, 273-74 (2018), where a long written statement by a co-defendant was introduced at a joint trial as a statement against interest. The Court acknowledged that such statements are considered to be reliable but also wrote:

> Yet, inherent in this notion is a narrow definition of "statement" such that the exception "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory." *Id*. at 600-01. This is so because "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts." *Id.* at 599.

State v. Robins, 431 P.3d at 273-74, *quoting Williamson v. United States*, 512 U.S. 594, 596-97 (1994)

The *Robins* Court explained further that non-inculpatory statements may not be presumed to be self-inculpatory for purposes of the exception solely because they are part of a narrative that contains such statements. Thus, it required the court to "consider each statement included in a broader narrative to determine whether it is in fact genuinely self-inculpatory against the declarant." *Id*. And when so parsed, the Supreme Court found only one statement which truly inculpated the co-defendant. As in *Robins*, the court should have considered each statement to determine whether the hearsay exception applied. Finding otherwise would disregard the specific nature of the statements in CARES videos and would, in turn, undercut "the careful standard that must be employed when applying the hearsay exception." *State v. Robins*, 431 P.3d 274-75.

Because the court did not apply the applicable legal standard to each hearsay statement in the videos, it abused its discretion under *Lunneborg v. My Fun Life*, *supra*.

D. *The evidence was not admissible under I.R.E. 803(24).*

As the I.R.E. 803(4) ruling was in error, this Court will look to see if the court can be affirmed on an alternative basis. "When a decision is 'based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.'" *Brown v. Greenheart*, 157 Idaho 156, 165, 335 P.3d 1, 10 (2014), *quoting Andersen v. Prof. Escrow Servs*., 141 Idaho 743, 746, 118 P.3d 75, 78 (2005). Here, the state also argued the evidence was admissible under the "catch-all" exception to the hearsay rule, but the court declined to address that exception as it had ruled the evidence was otherwise admissible under I.R.E. 803(4). T pg. 72, ln. 15-21. Thus, the admission of the evidence should not be affirmed under the catch-all provision because the decision to admit the evidence was not based upon that alternative ground. *Brown v. Greenheart*, *supra*.

In addition, the evidence does not fall within the catch-all exception. Idaho Rule of Evidence 803(24)(A), allows the admission of hearsay when:

i the statement has equivalent circumstantial guarantees of trustworthiness.
ii it is offered as evidence of a material fact;
iii it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
iv admitting it will best serve the purposes of these rules and the interests of justice.

Here, the CARES videos were not admissible under this rule because both girls were able to testify to the charged allegations. Consequently, subsection (A)(iii) was not met.

E. *The error is not harmless beyond a reasonable doubt.*

"A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have

the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho 209, 222, 245 P.3d 961, 974 (2010).

Mr. Christensen has met his burden of proving error, but the state cannot meet its high burden of proof. First, the case otherwise was not strong. The physical evidence did not provide independent proof of the accusations. The girls seemed fine when the parents returned from the wedding and neither girl told their mother that she had been bleeding, even though they routinely went to their mother when injured. Mr. Christensen testified that he did not inappropriately touch the girls and Ms. Christensen corroborated his testimony. In addition, the videos improperly corroborated the girls' testimony by acting as prior consistent statements. This corroborating effect was improper because prior consistent statements may only be introduced "(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground." I.R.E. 801(d)(1)(B). Neither of those circumstances are present here. The evidence also exposed the jury to questioning designed to demonstrate the girls' competency.

The prejudicial effect of the CARES videos may be best illustrated by noting the state's reliance upon it in its argument to the jury. Although the girls testified at trial, their testimony was very brief, vague, and unpersuasive. The prior statements made in the CARES videos were much more persuasive then the testimony. The prosecutor recognized this and used the CARES videos to great effect in closing argument saying "if you had that sick feeling when you watched [A.G.O.'s] CARES, if you had that feeling and you did that when she was

testifying, you know it's true. And if you believe her, then he is guilty." T pg. 603, ln. 5-9. Defense counsel recognized the emotional impact and attempted to blunt its effect, but had no adequate response: "I mean, I saw you folks watching the video, the CARES videos. They are so cute in their way. They have a way about them individually and collectively that's truly unique. And there is an emotional assessment of watching that video as well as an intellectual assessment." T pg. 610, ln. 7-15. The prejudicial effect was so powerful, that the prosecutor referred to the CARES tape at least twelve times during his arguments. *Id*; T pg. 598, ln.25; pg. 600, ln.8 ("Now, [A.M.O.'s] CARES, again, it happened right after and in a safe space.) and 12; pg. 601, ln. 3 ("She goes into great detail about all of that in the CARES video."); pg. 602, ln. 10 ("she said that four times in her CARES video"); pg. 605, ln. 13 and 20; pg. 622, ln. 24; pg. 624, ln. 20; pg. 627, ln. 1-2 ("They couldn't have fooled CARES. They couldn't have fooled Lara Foster.") and 25. In light of the weakness of the state's case without the CARES evidence and its reliance upon the videos during closing arguments, any argument by the state that the CARES videos were not the most important pieces of evidence in its case would be disingenuous.

V. CONCLUSION

In light of the above, Mr. Christensen asks the Court to vacate the judgments and sentences, and remand the case for a new trial.

Respectfully submitted this 27th day of February, 2019.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for David Christensen

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 27th day of February, 2019.

/s/Dennis Benjamin
Dennis Benjamin