

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**V.**

**MATTHEW LANE DURHAM,**

**Defendant.**

**Case No. 14-CR-231-R**

**DEFENDANT’S MOTION FOR LEAVE TO SUPPLEMENT DEFENDANT’S**  
**RULE 33 MOTION FOR NEW TRIAL AND REQUEST**  
**FOR EVIDENTIARY HEARING**

COMES NOW Defendant, Matthew Durham, and respectfully moves the Court for leave to supplement Defendant's Rule 33 Motion for New Trial [Doc. 371] on the ground that new, important, and material evidence has been discovered. The following post-trial motions and supporting briefs have been filed in this case:

1. Defendant's Motion for Arrest of Judgment [Doc. 369];
2. Defendant's Rule 29 Motion for Acquittal on Counts 10, 11, 13-17 [Doc. 370]; and
3. Defendant's Rule 33 Motion for a New Trial [Doc. 371].

However, new evidence has come to light which provides the Defendant a basis for a new trial. Accordingly, Defendant asks leave of Court to supplement Defendant's Rule 33 Motion for a New Trial [Doc. 371] within fourteen (14) days to investigate this newly discovered evidence. Additionally, though it is the usual practice that post-trial motions involving legal issues do not result in an evidentiary hearing, Defendant hereby requests

an evidentiary hearing on his post-trial motions, and requests this Court make a determination on all post-trial motions prior to sentencing. In support thereof, Defendant states as follows:

### **ARGUMENTS AND AUTHORITIES**

The relevant issues and concerns related to the newly discovered evidence are substantially included in two (2) memoranda attached hereto as Exhibit 1 and Exhibit 2 (the “Memoranda”). These Memoranda were personally delivered to the Court by Oklahoma County District Attorney David Prater on Monday, September 28, 2015. On that same day, the Court sent the Memoranda by email to Lead Defense Counsel Stephen Jones and Assistant United States Attorney Robert Don Gifford, II. On Wednesday, September 30, 2015, Counsel for the Defendant met with United States Attorney Sanford Coats in an attempt to resolve this matter; however, no resolution was achieved.

Defendant’s preliminary analysis of the Memoranda and investigation into the matter indicate the following:

There is a substantial probability that a key expert witness in the Government’s case presented false testimony at trial and that AUSA Gifford knowingly and deliberately failed to correct the testimony. Specifically, the Memoranda detail that AUSA Gifford was informed by a current sitting Assistant District Attorney in charge of sex crimes at the Oklahoma County District Attorney’s Office, who was also a former Assistant United States Attorney, and also by Dr. Ryan Brown, a Pediatrician at the University of Oklahoma Health Sciences Center specializing in Child Abuse Pediatrics, that testimony regarding alleged physical findings of abuse in the alleged victims by the Government’s medical

expert, Dr. Mohamed, was inaccurate and not supported by medical research or the legitimate medical community.

When faced with this indisputable evidence during trial that material evidence presented by the Government was scientifically unsound, AUSA Gifford was duty-bound under the Constitution of the United States and Supreme Court precedent to correct the false testimony. But, Gifford did not correct the false testimony. Instead, Gifford endeavored to evade his duties to the Court, to the Jury, and to the Defendant by speculating wildly as to facts not in evidence and creating an imaginary evidentiary predicate to support his expert's false testimony. As a result, AUSA Gifford not only failed to correct false evidence, but, through testimony he solicited and his closing argument, AUSA Gifford suggested to the Jury, without any support from the evidence at trial, or even a scintilla of support in the record, that Durham was violent and masochistic. AUSA Gifford deliberately deceived the Court and the Jurors by his misconduct and his presentation of known, false evidence, and thereby violated Durham's due process guarantees.

The Memoranda also raise the probability that AUSA Gifford intentionally failed to disclose exculpatory evidence. AUSA Gifford received information from Dr. Brown "that it would be quite rare for 5 individuals to have the same findings on exam in regards to sexual assault," as was the case with regard to the medical reports of the alleged victims in this case, "unless the perpetrator was using some type of instrumentation." (Exhibit 2). Dr. Brown further informed AUSA Gifford "that about 95% of [the] time we will have a normal finding, and of the 5%, 2/3 o[f] the evidence is found on the clothing or bed." (*Id.*)

Gifford was also told “that it is rare to have findings in sexual abuse exams, especially in your preadolescent children.”

This evidence provided to AUSA Gifford by Dr. Brown is significantly favorable to the Defendant because it essentially disproves Dr. Mohamed’s testimony. It tends to show that not only was Dr. Mohamed’s testimony false, but the records and findings of abuse by medical professionals in Kenya were also false. The Jury heard evidence that each of the female victims, except one, presented with physical signs of sexual abuse. AUSA Gifford was provided evidence during trial that these results were so extraordinary as to lack any indicia of reliability, whatsoever, and AUSA Gifford, with the apparent support of United States Attorney Sanford Coats, who filed an entry of appearance in this case, failed to disclose that exculpatory evidence to the Defendant. Because a jury ordinarily views experts with heightened respect and gives considerable weight to their opinions, this false testimony concerning physical findings of abuse was exceptionally prejudicial, and the Government’s suppression of it undermines confidence in the outcome of the Defendant’s trial and entitles the Defendant to a new trial.

In addition, the Defendant has received credible information that there was serious personal misconduct and inappropriate contact occurring during and after the trial between a member of the prosecution team and a media representative covering the trial on a routine basis and reporting on the trial. Counsel for the Defendant is conducting interviews to determine whether the Defendant was prejudiced as a result. Based on preliminary investigation, Defense Counsel believes it may have been.

## **CONCLUSION**

This a highly unusual matter which directly and substantially impacted the trial and the rights of the Defendant. The integrity of Defendant's trial today is suspect. Though the elected District Attorney for the largest county in Oklahoma personally notified the United States Attorney for the Western District of Oklahoma that there may have been professional misconduct on the part of an attorney or attorneys at the United States Attorney's Office which may have affected the Defendant's rights, the United States Attorney apparently dismissed the concerns and withheld information which was material and favorable to the Defendant. Defendant seeks the opportunity to fully investigate this matter and supplement his previously filed Rule 33 Motion for New Trial.

Finally, Defense Counsel has learned, since the filing of the post-trial motions, of inappropriate contacts between Mrs. Eunice Menja and the court-appointed interpreter which raises possible questions concerning the legitimacy and accuracy of the translations in court. (*See* Exhibit 3: Facebook Posts between Eunice Menja and translator Masuma Chagani). Additionally, Defense Counsel has cause to believe that a medical witness from Kenya has become a consultant or employee as a "medical consultant" of the Upendo Children's Home. We are also investigating these claims here and elsewhere.

## **RELIEF REQUESTED**

WHEREFORE, the Defendant prays this Court:

1. Grant the Defendant leave to supplement his Rule 33 Motion for New Trial [Doc. 371];
2. Hold an evidentiary hearing on Defendant's Rule 33 Motion for New Trial and supplement thereto; and

3. Make a determination on all post-trial motions prior to sentencing.

Respectfully Submitted,

/s/Stephen Jones

Stephen Jones, OBA #4805  
JONES, OTJEN, DAVIS & BLOYD  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 2, 2015, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Sanford C. Coats, Robert D. Gifford, II, David P. Petermann, and Steven Creager.

/s/Stephen Jones

Stephen Jones

EXHIBIT 1

MEMORANDUM PREPARED 8/16/15

Prepared 8/16/15

#### Don Gifford Time Line

-Before the trial began, Matt Dillon asked me if I minded if Gifford called me regarding the case. I told him Gifford could call me anytime

-On the night the government rested its case in chief, Matt Dillon called me and asked if Gifford could call me about the defense expert witnesses. I said yes. Matt said that the government had put on the medical evidence of how the victim's had perforated hymens, and "that type of thing." I did not say anything to Matt about the rarity of physical findings and do not think I mentioned the term perforated hymen being unusual - - - as I know his experience is primarily in drugs and gun prosecutions. I told Matt to tell Gifford to call anytime.

-Later that night when I was at home, Gifford called me. My sons were home and overheard my part of the conversation. I asked Gifford about the facts of his case. He said there were 5 or 6 or 7 (don't remember the exact number) of female victims ages 6 to 14. All but one of them had a perforated hymen. He indicated this evidence was presented by the government's medical witness. He thought the defense attorney had made a mistake, because the medical provided who actually did the exams did not testify. A reviewing doctor actually testified to the perforated hymens. He said as best as they could tell, the sexual assault exams were done about 6 weeks after the abuse occurred. He said the defense was calling a sexual assault expert, and he did not know what the expert would say. He first said the expert was Lauren Donaldson. Then later said the expert was a SANE nurse that I knew to be a legitimate SANE, named Lisa Dunson. I told him Donaldson is the PA at CHO that does most of the sexual assault exams for our investigations. I told him that I have not heard the term perforated hymen. I told him it is very unusual to have physical findings in children; that it is extremely unusual to have physical findings 6 weeks after the event; that even if there were an injury, it would have healed in that amount of time; and, that it is extremely unusual and almost unheard of to have physical findings in 5 of 6 or 6 of 7 victims. I called Donaldson and joined her for a three-way conversation with Gifford. She told him the same things. We together told him that there are legitimate medical studies showing even pregnant girls have normal exams. Donaldson explained the anatomy and that a perforated hymen is a normal finding. I got the impressions that Gifford had never heard this explanation (but that is an assumption). I told him I know Dunson, and I offered to try to get her phone number and call her so we could also talk. Gifford did not ask me to go ahead and do that. I expressed my opinion to him that that he cannot cross examine the defense expert in good faith on those issues, because medical research and the legitimate medical community share those opinions. I encouraged him instead to contact Dr. Brown to be a rebuttal witness to use to say even if the African exams are incorrect, it still does not mean sexual abuse did not occur. (i.e., the typical evidence the State proffers in almost all of our child sexual abuse cases). I have Gifford Dr. Brown's number.

-Later that night Gifford communicated to me that he talked with Dr. Brown, and Dr. Brown was very helpful.



-The next day I told David Prater about the conversation.

-The following day I began to think there was an exculpatory evidence issues, and I talked to Prater about my concern that Gifford had received exculpatory evidence; and, that that evidence should be disclosed. Scott Rowland, Prater, and I had a lengthy conversation about our concerns and felt we must be missing something about the case or the evidence. After much discussion, Prater called Sandy Coats and expressed his concerns about the perforated hymen evidence. Prater told me Coats' response was that the government has more evidence than the medical evidence, and he was dismissive of our concerns. These conversations were occurring while the Defense was presenting its case in chief. Prater, Rowland, and I decided that I should contact Gifford directly and express our concerns. I texted Gifford, knowing they were set for closing arguments in the morning. It was a Wednesday night, because he called me back when I was at a church building. I told him if the government presented medical evidence that the perforated hymens are corroborative of the girls' disclosures, I am concerned they have presented inaccurate evidence. I was concerned that Dr. Brown's opinions would be deemed exculpatory. Gifford assured me that the Defense expert testified that perforated hymens could be an old medical term for injury to a hymen, and that the expert speculated that if it was referring to injury, then the injury could be caused by trauma to the hymen. Gifford expressed he felt that was a significant admission by the defense expert. I asked Gifford why the defense would not object to that a speculation, and he said the Judge was allowing everything in and overruling most objections. When I asked further if the opinion of Dr. Brown could be deemed exculpatory and whether an incorrect inference was promoted by the government based on government's presentation of the medical evidence, Gifford said that his theory of the case has always been that the defendant was so violent and so masochistic in his abuse that this is a case where the defendant hurt the children intentionally. The defendant's abuse was so bad that 5 of 6 or 6 of 7 did have physical findings, and that the damage was so severe that it could not heal in 6 weeks. He assured me there was evidence to support that -- like the defendant being a wrestler. (The next day I shared that information with Prater and Rowland.)

-I believe the next day, after closing arguments had occurred I called a reporter who I knew was covering the trial and asked if the government had been presenting evidence from the start of the trial that the defendant was a violent masochistic child rapist. She said they had not, except for some indicated he hurt the children on purpose during closing argument.

-In the days/weeks after the guilty verdict was reported in the news, I mentioned on more than one occasion to Prater and Rowland that I am very uncomfortable with the failure to disclose the evidence.

-In the days/weeks after the verdict, I called Dr. Brown and asked him to tell me what he told Gifford during their telephone call before the defense began their case in chief. He told me information consistent with what I and Donaldson told Gifford -- and information consistent with what he later put in his memorandum that I asked him to prepare.

-During a trip to Montana in July, I shared this ethical issue with prosecutors there and they agreed the evidence was exculpatory -- Bill Fullbright and Rusty Parks.

- In July, 2015, I called Dr. Brown and asked him to put in a memo what he told Gifford. I told him why it was an ethical issue for me as a prosecutor and that it was exculpatory evidence. I also asked him to have Donaldson prepare a memo of our conversation with Gifford. I asked Dr. Brown the following week??? if he had had a chance to do it. On July 22, 2015, I received the memo Dr. Brown prepared at my request. As of August 6, 2015, I have not yet received the memo from Donaldson.

-During the 2015 DAC conference at the Hard Rock Hotel in Tulsa, I took the ethics speaker, Roger Canniff (a friend from New York City who has presented with me at other conferences) to dinner. I shared with him the ethical issue. I understand he incorporated the issue into his presentation without making reference to the Oklahoma City case. I did not attend his presentation.

-I provided a copy to Rowland. On August 4, I told Rowland I was meeting with Gifford and was going to give him the memo and tell him it needs to be disclosed.

-On August 8, 2015, I met with Gifford. I gave him the memo and directly told him I am concerned and believe the opinion Dr. Brown provided regarding the medical evidence in the case was exculpatory. I told him I believe Dr. Brown's opinion to be consistent with the opinions of the defense's medical expert (as Gifford has represented to me they were). I told him I was concerned for him that he avoid any possible accusation of wrongdoing or failure to disclose the evidence. I told him it was my opinion that this memo and this evidence should be disclosed to the defense. I asked him when the sentencing was, and he said it was not scheduled yet as the defense has asked for continuances. Gifford said he would look into it and get back to me.

-On August 6, 2015, I received two voice messages on my cell phone from Gifford. One said he did not see anything in the memo, and indicated his bosses were concerned that Judge Graves had a part in the memo being created. The other primarily discussed meeting with Dr. Brown and an email he was sending to arrange a meeting. He later sent a text message regarding meeting.

## EXHIBIT 2

MEMORANDUM BY DR. RYAN BROWN

I had introduced myself and offered up my services to answer any questions that he may have had. We had discussed what a perforated hymen meant to me. I had told him that to me, it meant that the hymen had a hole in it, which is normal. I didn't know if that was what the African physician had meant by it, but we don't normally use that language to describe hymens here in the US. He had told me that he had a P-SANE nurse, that I knew, that was going to testify and she had said the same thing as me. I told him that I knew the P-SANE nurse and trusted her opinion. I had also stated that an imperforate hymen, is still normal, but is actually not a common finding. He had stated to me that the African physician had stated that he had found 5 of the 6 young ladies in the case to have perforated hymens and that the physician was calling that an abnormal finding. I spoke with him that actually it is rare to have findings in sexual abuse exams, especially in your preadolescent children. I told him that about 95% of time we will have a normal finding, and of the 5%, 2/3 or the evidence is found on the clothing or bed. I also reiterated that a normal exam does not rule in or rule out a sexual encounter. Also, that it would be quite rare for 5 individuals to have the same findings on exam in regards to a sexual assault, unless the perpetrator was using some type of instrumentation. I also spoke about how quickly findings on exams can heal, IF there were findings to begin with. Unless we did a forensic exam within 1-3 days, some of the findings may have healed by then. I told him that we do not use hymenal opening sizes anymore, and I also stated that all females have a hymen and quoted a study about such. Again, I stated that it would be a small chance to have abnormal findings on a preadolescent sexual abuse exam, and that to have multiple children with the same finding, other than normal, would be rare. I also stated again that time is of the essence and rape exams done after a week could be normal even if there was a finding to begin with since the tissue heals so quickly. I again stated that I didn't know what the African physician meant by a perforated hymen and they use that verbage over there to describe it, but he informed me that the African physician meant it as forensic findings. He thanked me for his time and offered to buy me a beer sometime when this was all said and done. The length of the conversation was about 10-12 minutes.

Ryan Brown, MD

EXHIBIT 3

FACEBOOK POSTS BETWEEN EUNICE MENJA AND  
TRANSLATOR MASUMA CHAGANI



Eunice Menja

June 27 ·

I met a new sister, from another mother, in the last two weeks. She happened to be the voice for our little ones in the courtroom. #respect4translators #upendostrong — with Masuma Chagani.



8/6/2015

Eunice Menja



Share

79 people like this.



Mwaura Nick Thank you sista for being the voice for those young ones...

June 27 at 9:47pm



Star Sierra-Carmona This woman has such a beautiful spirit. I hope you got her contact info.

June 27 at 11:05pm



Eunice Menja I did. She does have a beautiful heart. Even with religious difference, she was very professional and loving. That makes me love her more.

1 · June 28 at 10:46am



Naomi Wathimu If the heart is as beautiful as outside, then she's cute

1 · June 28 at 4:20am



Eunice Menja Masuma Chagani, what happened to the nice post you had on here? I loved it. Miss you.

July 13 at 9:43pm



Masuma Chagani replied · 1 Reply



Masuma Chagani Thank you Eunice for the kind words. I don't really deserve all the praise. Thank you Maura Nick, Thank You star Sierra Carmona, Thank you Naomi Wathimu & Thanks to all those that were in the Court Room with us, I could not do this without your support. I thought the Lenya/Tanzania Bombing case was tough, I must say now this was the most difficult case I have ever done so far. My heart was breaking as I watched those little innocent babies cry as they told their stories over n over. I thought I would cry with them, but had to be strong for them and remembered how brave n strong you and Josephine had been as you patiently waited for that final day to come. We did this together, it was our voice

July 21 at 12:28am

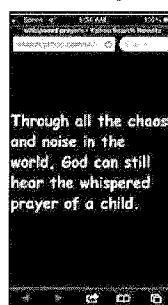


Masuma Chagani Where there is faith there is miracles. I put my praymat and prayed to Allah, while you all called out to God. He is one The Almighty. As we all waited patiently for the verdict. And God gave justice to those little one's.

July 21 at 12:34am



Masuma Chagani



July 21 at 12:38am



Masuma Chagani

Eunice Menja



July 21 at 12:39am



Eunice Menja Thanks friend. I told everyone how sweet you are. I never lied. God bless you.

July 21 at 12:50am



Masuma Chagani You have a big heart Eunice! And thanks to all those who opened their doors to bring some sunshine n love to them. I had such a great time, What a it pleasure it was being around all my friends from Africa, every morning as I walked to the lobby of my hotel I was greeted by my sisters n brothers. Thank you Dr, Alavia, I miss you, n Dr Peter, and all of you for keeping me company while I was away from my family. Then when I got to the Court I was greeted by yourself, Josephine, Robert, Aunt n Uncle not only that you had a big heart to bring Chai n mandazi's and all that food for everyone every day for 17 days!

Though I could not taste your pillow and other food due to the meat restrictions, however everything looked n smelled just like our home cooking. Then came Ramadhan, I thank my Allah, I was able to perform my obligations, even while traveling in a different country, but Only thing is I was sad, because you stopped bringing me the Mandazi and Chapati's you promised. I could have had it for my Futur. Thank You for everything Eunice Menger. I hope to meet with you sometime in future again, maybe you will invite me to Upendo.

I miss n love you too. My hello to Robert n your girls. & Congratulation on your daughter's achievements.

I would like to share this newspaper Amy sent it to me. Enjoy

July 21 at 1:02am



Judy Hancock Mullins She was a precious person. Even shared her sweater with me during court. Thank u for all you did

July 21 at 12:41pm



Masuma Chagani Sometimes our light goes, but its blown into flames by another human being. Each if us owes deepest thanks to those who rekindle this light. Therefore, no one achieves success without the help of the other. Alas! Only the wise and confident, acknowledges it with gratitude. Thanks my dear for the good words, you are such sweetheart. I hope we cross our roads again one day. I am honored to have met with you.

1 · July 21 at 6:00pm



Eunice Menja Masuma Chagani, was the best court translator I have ever seen. Great heart! I would recommend you a million times. I miss you sister from another mother.

July 21 at 12:42pm



Masuma Chagani Thank you again.



1 · July 22 at 4:10pm



Eunice Menja  
June 27 ·

God's Grace is Sufficient...

Because of the surpassing greatness of the revelations, for this reason, to keep me from exalting myself, there was given me a thorn in the flesh, a messenger of Satan to torment me-- to keep me from exalting myself!