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To: Jennifer Bell
From: Julie L. Germann, J.D.
Date: September 28, 2023
Re: Tabitha Bell Complaint Against Utah Attorney General's Office and Prosecutorial Best Practices

Ms. Bell:

At your request I have reviewed documents relating to the Utah Attorney General's handling of Tabitha Bell's request for review of her criminal case under HB 281.

I reviewed the following documents related to this matter:

1) 1,122 Documents received from a GRAMA request. Some of the specific relevant documents include:
2) Sandy Police Department report SV 2017-59692 dated 11/30/2017.
3) Email from Daniel Bokovoy to Gregory Ferbrache declining case dated 02/23/2018.
4) Gregory Ferbrache response to Dan Bokovoy's declination dated 2/25/2018.
5) Letter from Greg Ferbrache to David Carlson requesting the Utah Attorney General's Office review allegation of sexual assault dated 3/21/2018.
6) Letter to Attorney General Sean Reyes from psychotherapist Sara Fawkes
7) Email dated November 11, 2019, from Greg Ferbrache to Attorney General Craig Barlow re: requests for November 15, 2019, meeting.
8) Letter from Neuroworx Pediatric Physical Therapist Rick Reigle, PT, DPT
9) Letter from Paul Bell summarizing Tabitha Bell's medical condition.
10) Notes from Craig Barlow, Rosemary McDonough, Kevin Pepper, Janise Macanas regarding November 15, 2019, meeting with Tabitha Bell.
11) Report on Polygraph Examination to Sophie Moore/Sheleigh Harding, From Vern Peterson dated 1/6/2018.
12) Email from Jacquie Zacher-Beckker to Che Arguello and Rosemary McDonough dated 1/28/2021.
13) Letter from Attorney General Che Arguello Declining Prosecution dated 4/9/2021.
14) Unified Police Report Co 23-39706 – statement of Alissa Black dated 4/21/2023.

I am basing my opinion on my twenty-one years experience as a lawyer, twelve years as a prosecutor focused on sexual violence, and eight years as a legal consultant teaching prosecutors and law enforcement across the country regarding best practices in investigation and prosecution of sexual assault, domestic violence, and child abuse. I have spoken at the National Sexual Assault Conference, End Violence Against Women International, Conference on Crimes Against Women and numerous other state and local conferences. I am on faculty at the Institute on Domestic Violence and Sexual Assault at the University of Texas where I provided training on the use of expert witnesses in gender-based violence trials involving sexual violence, stalking, domestic violence, and human trafficking. I write and advise curriculum such as the Sexual Assault Response Team Toolkit 2.0 produced by the National Sexual Violence Resource Center. I have created sexual violence response training videos for the Texas Municipal Police Association and for the Institute on Domestic Violence and Sexual Assault. Additionally, I am trained in both child and adult forensic interviewing, and I teach adult forensic interviewing for the Texas Center for Forensic Excellence.

Facts

Tabitha Bell originally reported a sexual assault to the Sandy Police Department on November 30, 2017. The assault had occurred on November 17, 2017. Tabitha Bell participated in a recorded interview at the South Valley Children's Justice Center on December 7, 2017. The case was declined for charges by Dan Bokovoy, Deputy District Attorney, Salt Lake County on February 23, 2018. Tabitha Bell made a request for Attorney General review of the case March 18, 2018. April 10, 2018, the Attorney General Office declined to act on the case. On June 25, 2019, Tabitha Bell requested the Attorney General review her case again under the newly enacted House Bill 281 allowing for the review of first-degree felony cases declined for prosecution by district or county attorney. During the course of reviewing Tabitha Bell's case for possible criminal charges, the Attorney General invited Tabitha for additional questioning on November 15, 2019. To make the experience less traumatic, prior to that questioning, Greg Ferbrache provided Attorney General Craig Barlow with information from Tabitha Bell's therapist and sought permission to have Victim's Advocate Alissa Black present to support her. During that questioning, Tabitha's advocate, AG Craig Barlow asked Alissa Black to leave the room.

Tabitha was read statements from the suspect's polygraph examination, which was arranged by the suspect's counsel. The statements were read aloud. Some portions were sexually graphic in nature, providing the suspect's version of the events that led to Tabitha Bell's original report to law enforcement. Four to five months after the November meeting, Attorney General staff created notes of what occurred during the meeting. The Attorney General's Office staffed the charging decision on February 4, 2021. The Attorney General's Office declined prosecution on March 11, 2021, and encouraged Tabitha, though her attorney Bethany Warr, to withdraw her request for review so no formal declination would be issued. The stated reason was to save her the embarrassment of the facts of her case becoming public.

Analysis

The question on which I have been asked to opine is whether the procedure utilized by the Utah Attorney General in the November 15, 2019, interview with victim Tabitha Bell and review and declination of the case was appropriate or best practice. At issue is whether it is appropriate practice to bring a victim of sexual violence in for questioning, remove her advocate from the room and then read a proffer of the defendant's version of the incident. These actions in this case left Tabitha feeling offended, disregarded, and disbelieved by prosecutors.

Initially I will address the questioning of Tabitha at the November 15, 2019, meeting. Several things about this meeting are concerning and fall outside of what would be considered trauma-informed best practice for interacting with a victim of sexual assault.

First, Mr. Barlow had been provided with a letter from Tabitha's therapist, Sara Fawkes, indicating that remembering traumatic events could be damaging to Tabitha's mental health. Ms. Fawkes made six recommendations to minimize the potential harm to Tabitha. Some of those recommendations were accommodated, such as allowing Tabitha's boyfriend and service dog to be present. Other recommendations were not accommodated, such as allowing Tabitha's advocate to be present.

Here, the Attorney General's office was put on notice that Tabitha Bell was particularly sensitive and would be negatively impacted by having to talk about her assault in front of strangers and in front of men. Mr. Ferbrache indicates that he was aware the Attorney General's office is without an advocate and made arrangements for an advocate to attend. Despite this, Alissa Black, the victim's advocate, was asked to leave the room. It is best practice for a victim to have direct access to a victim's advocate, and advocates should be permitted to be present during any part of the process in which the victim desires their participation.[1] There is some mention in the notes obtained through GRAMA that Mr. Barlow was concerned about confidentiality, and therefore dismissed Ms. Black. However, Ms. Black, was the only person in the room who has privilege and cannot be subpoenaed to testify about what a victim said.[2] Tabitha, through her attorney, made efforts to have Alissa Black present to support her. Clearly, it was the desire of Tabitha to have an advocate present and Craig Barlow should not have dismissed her from the room prior to interviewing Tabitha.

Another concerning fact about the November 15, 2019, meeting is that it was not recorded. It is best practice to record a victim's statement, to save them from having to be interviewed multiple times about the same thing. It's important to note that Tabitha gave a recorded statement at the Children's Justice Center on December 17, 2017. In addition to being victim-centered and trauma-informed, recording interviews addresses any Brady concerns that might arise when making required disclosures to defense counsel. If interviews are not recorded, a second-best option would be to have someone take notes contemporaneously. Here the Attorney General staff in attendance neither recorded nor took notes contemporaneously. Instead, they attempted to create written notes of their memory of the November meeting five to six months later. The discrepancies between their written reports and the discrepancies between the Attorney General staff's version of the November 15, 2019, meeting and Tabitha and Mr.

[1] IACP. Sexual Assault Response Policy and Training Content Development Guidelines. (2015). http://www.iacp.org/Portals/0/documents/pdfs/IACPSexualAssaultResponsePolicyandTrainingContentGuidelines.pdf

[2] Utah R. Evid. 512.

Ferbrache's recollection are evidence of why recording is best practice. All these discrepancies are the best argument there is for recording victim interviews.

Next, I will address the reading of the suspect's version of events proffered for a polygraph examination. Although it is not unusual for a prosecutor to address a suspect's version of events with a victim either while making a charging decision or more likely while preparing for trial, this should be done in a supportive, non-threatening manner that would allow the victim to respond to the statements of the suspect. Typically, a prosecutor would be preparing for this questioning from the statement the suspect made to law enforcement. In this case, the suspect declined to speak to law enforcement. The practice of questioning a victim of violence is something that must be handled in a sensitive and trauma-informed way. Though asking difficult questions of victims is necessary to gather information and investigate a complaint, prosecutors should consider when and how those difficult questions are asked. While "trauma-informed" may sound like a buzz word, for prosecutors, being trauma-informed means fully acknowledging that trauma is an individual response to physically or emotionally harmful events. This requires interacting with victims in a manner that minimizes re-traumatization and maximizes engagement with the criminal justice system. Experts in the field agree that not only law enforcement but others who conduct investigative interviews, such as Title IX investigators, civil attorneys and prosecutors should understand the implications of trauma and apply trauma-informed interviewing principles. Trauma-informed interviewing would include:

- Sincere efforts to establish trust, rapport and comfort for the victim.
- Acknowledgment of the victim's trauma and/or pain.
- Creating an environment that feels physically and emotionally safe for victims.
- Communicating in language the victim will understand and be comfortable with.
- Use of non-leading questions and other open-ended prompts (e.g., "Tell me more about that," or "What were you thinking/feeling at that point?").
- Encouragement of narrative responses with pauses, and without interruptions.
- Focus on what the victim can recall thinking and feeling throughout the experience.
- Particular emphasis on emotional and sensory experiences (five externally focused senses plus internal body sensations).

- Expressions of patience, empathy, and understanding throughout the interview.
- No necessity for information to be provided in a sequential or "logical" order.
- Instruction not to guess at any answers, and to say "I don't know" when needed.
- Not asking victims "why" they did or did not do something during the assault, but rather inquiring in ways that convey a non-judgmental desire to understand their experiences, reactions, and (often automatic) decisions (e.g., "Tell me what you were thinking/feeling/experiencing when you got in the suspect's car?").[3]

If the prosecutor in this case truly believed this statement of the suspect needed to be addressed by the victim before a charging decision could be made, it could have been done in a trauma-informed way. First, Mr. Barlow was asked to provide the questions or topic areas in advance by Mr. Ferbrache. Allowing Tabitha to prepare with her advocate or therapist for the expected questions would have kept her from feeling blindsided. If a prosecutor must present the statements of a suspect or the likely defense that will be raised, the traumatic impact could be lessened by advising the victim that these were the statements of the suspect, that the prosecution doesn't believe them, and that she would have an opportunity to respond to them. Not giving the victim the questions in advance or even advising her that the purpose of the meeting was to address the suspect's likely defense is interrogative not investigative. There is no reason to use the element of surprise or interrogate a victim. Mr. Barlow also could have questioned her carefully, paraphrasing the suspect's version, without reading the proffer verbatim. Here the proffer for the polygraph described a consensual encounter between Tabitha and the suspect. In the suspect's version, Tabitha was participatory, encouraged the suspect to go without a condom, and commented in a complimentary way about the size of his penis. Rather than reading that to her, the questions would have been simple, for example:

The broad question:

"Do you recall saying anything to the suspect during the assault?"

[3] Becoming Trauma-Informed: Learning and Appropriately Applying the Neurobiology of Trauma to Victim Interviews December 2022 Lonsway, Hopper, Archambault, End Violence Against Women International www.evawintl.org.

The more focused question:

“Did you ever make any comments about his penis?

It is certainly true that a victim could be unintentionally traumatized by being asked to remember and discuss her experience of sexual assault even when questioning is done in a trauma-informed way. In this instance little effort was made to be sensitive to Tabitha’s trauma. The practice of bringing a victim in for questioning, dismissing her advocate from the room and then reading a proffered statement provided by the defense aloud to the victim left her feeling offended, disregarded, and disbelieved by the prosecutors. Treating Tabitha in this manner not only provides evidence of gender bias and undermines the very reason the second-look committee was created. It also contravenes national standards for prosecutors.

The conduct of the prosecutor in this case appears to fall below national standards for prosecutors established by the National District Attorney’s Association and the American Bar Association. The National District Attorneys Association’s standards, for example, require prosecutors to keep victims informed about their cases, to “be mindful of the possibility of intimidation and harm arising from a witness’s cooperation with law enforcement,” and to the extent feasible and appropriate, to provide assistance and protection to the witnesses of crime.”[4] Indeed the NDAA commentary to these standards states that “effective prosecution includes a sound understanding of the value of victims and witnesses within the criminal justice system,” and that prosecutors have an obligation “to facilitate the relationship with victims and witness” to encourage victims to report crime and “follow [ ] through with identifications, statements and testimony.”[5]

Next, I will address the charging decision process utilized by the Attorney General’s Office. Prosecutors wield a great deal of power: truth be told, more than judges. They have the power to file charges against someone - something no one else in the criminal justice system can do. This decision of whether to file charges has historically been protected from any kind of meaningful review by the concept of prosecutorial

[4] Nat’l Dist. Att’ys Ass’n, National Prosecution Standards Pt. II §§ 2-9.7, 2-10.6, 2-10.7 (4th ed. Rev. 2023).
[5] Nat’l Dist. Att’ys Ass’n, National Prosecution Standards Pt. II cmt. to §§ 2-9. & 2-10 (4th ed. Rev. 2023).

discretion. Charging decisions lie within a prosecutor's discretion and are not subject to review by a court or other authority. This unfettered discretion is especially problematic in the prosecution of sexual assault as it leaves prosecutorial decisions vulnerable to gender bias and other forms of discrimination. Sexual assault is a gendered crime that is disproportionately perpetrated by males against females. The Center for Disease Control estimates that approximately 1 in 5 women have been the victim of attempted or completed rape at some point in their lifetime. Despite the estimated 25.5 million victims in the United States, the rate of prosecution of sexual violence cases is abysmally low. Approximately 80% of sexual assaults that occur are never reported to law enforcement and for every 100 sexual assaults that are reported to police, approximately six will be prosecuted.[6] Victim's reasons for not reporting are as varied as the people themselves but include fear, embarrassment, or a belief that the criminal justice cannot or will not help them. Many victims feel more traumatized by their involvement with the system than by the rape itself. The problem of sexual assault case attrition has been studied and documented over many decades.[7]

This is all to say that it is difficult to definitively state that a prosecutor's use of their discretion violated some standard of professionalism or ethics because charging discretion has so rarely been challenged or reviewed by anyone. In the Department of Justice (DOJ) investigation into a prosecution office's handling of sexual violence cases in Missoula, Montana, the DOJ examined the office's processes. DOJ did not second-guess prosecutorial discretion but looked for evidence of impermissible gender bias.[8] One of the ways to evaluate charging decisions for bias is to examine the facts considered as part of that decision.

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[6] Morabito, M.S., Williams, L.M., & Pattavina, A. (2019) Decision Making in Sexual Assault Cases: Replication Research on Sexual Violence Case Attrition in the U.S.: Final Technical Report #252689. Washington, DC: U.S. Department of Justice.

[7] McCahill, T., Meyer, L. C., & Fischman, A. (1979). The aftermath of rape. Lexington, MA: Lexington Books. LaFree, G. D. (1981). Official reactions to social problems: Police decisions in sexual assault cases. Social Problems, 28(5), 582-594. Spohn, C., & Spears, J. (1996). The effect of offender and victim characteristics on sexual assault case processing decisions. Justice Quarterly, 13(4), 649-679. doi:10.1080/07418829600093141

[8] U.S. Department of Justice Findings Letter – Missoula County Attorney's Office https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_ltr_2-14-14.pdf

In determining the strength of a case and whether to file charges, prosecutors rely on a variety of factors including legal variables (statutory elements of the offense, severity of the crime, type, strength and admissibility of evidence, culpability of the defendant), extra-legal variables (socio-demographic personal characteristics of the victim and defendant, relationship between victim and defendant, assessment of victim's character and reputation and deviation from normative gender and moral codes), and "blame-and-believability" variables (victim's moral character, victim's risk-taking behavior, resistance to the attacker, time taken to report the offense).[9] The exercise of discretion that is least impacted by impermissible bias is the one that focuses solely on the legal variables. Extra-legal variables and blame-and-believability variables leave room for both explicit and implicit bias to enter the decision-making process.

The exercise of discretion to decline prosecution in the current case is concerning both for the legally irrelevant and prejudicial evidence that was considered and for legally relevant evidence that was ignored.

First, the prosecutor's obvious reliance on a partial polygraph report is concerning. Polygraphs are generally not admissible in court including Utah's courts.[10] The reason is because polygraph tests are not considered sufficiently reliable to satisfy the requirements of Rule of Evidence 702 which governs the admissibility of "scientific, technical, or other specialized knowledge." Polygraphs are considered particularly suspect when the investigator or prosecutor is not involved in the selection of the polygraph provider or the creation of the questions. Here the suspect declined an interview with law enforcement but took a polygraph examination on the advice of his counsel. It does not appear that law enforcement or prosecution participated in the polygraph examination in any way. Further, determining credibility of witnesses is considered the exclusive province of the factfinder in a case. Jurors have long been considered competent to gauge the credibility of live witnesses without resort to expert

[9] Wentz EA. Funneled Through or Filtered Out: An Examination of Police and Prosecutorial Decision-Making in Adult Sexual Assault Cases. Violence Against Women. 2020 Dec;26(15-16):1919-1940. doi: 10.1177/1077801219890419. Epub 2019 Dec 23. PMID: 31868129.

[10] State v. Crosby, 927 P.2d 623 (Utah 1996); State v. Brown, 948 P.2d 337 (Utah Ct. App. 1997).

opinion.[11] This is particularly important in sexual assault cases where the sole issue may be one of consent. It is up to the factfinder to determine which witness is more credible concerning consent. The prosecutor's reliance on the polygraph examination is evident because he felt the need to read it aloud to Tabitha, before making a charging decision. Even though her recorded statement contradicted the suspect's statement, Mr. Barlow felt it critical to have Tabitha hear the statement. And while the suspect's statement in the polygraph does paint a contrary and consensual picture of the encounter, this is not to be unexpected. The most common defense to sexual assault between acquaintances is consent. By all accounts no one in the Attorney General's Office challenged the suspect's self-serving statement, but instead used it to confront and discredit the statement made by Tabitha Bell.

The second variable - a blame-and-believability variable that appears to have impacted the prosecutor's decision making - is information about the victim's prior sexual history. It's not hard to imagine how a young sexual assault victim would feel when asked to disclose other sexual experiences to a room full of unknown adults. Tabitha likely felt embarrassed, ashamed, and judged for her prior sexual history. What is hard to imagine is: why would a prosecutor ask for such information? A rape complainants' prior sexual behavior or sexual disposition is typically inadmissible under laws referred to as Rape Shield.[12] Prior to the passage of rape shield laws, the common-law rule admitted evidence of the victim's prior sexual conduct on the theory that if a woman was unchaste than it could be inferred that she consented to sex with the defendant. Historically a woman's sexual history was used to undermine her credibility to a jury. Since the passage of rape shield laws, it is impermissible to present evidence of a woman's sexual history to demean her credibility. There are a few exceptions to the general bar provided by the rape shield. An exception to the prohibition on the admission of sexual history evidence is prior sexual history with the accused that may be admitted concerning the issue of consent.[13] Here, Tabitha had disclosed a three-year old prior sexual history with the

[11] *262. Polygraphs—Introduction at Trial | JM | Department of Justice*, https://www.justice.gov/archives/jm/criminal-resource-manual-262-polygraphs-introduction-trial.
[12] Utah R. Evid. 412.
[13] Utah R. Evid. 412(b)(2).

accused. This sexual history would be important to discuss with Tabitha at some point prior to trial. Although there are valid arguments for the prosecution to make that her prior history shouldn't be admitted under the exception to the rape shield law, there is always the chance that the judge would admit it. However, during the November 2019 meeting, Mr. Barlow went further than asking Tabitha about her history with the accused, asking her about other sexual history. There is no legally defensible reason for him to ask this, as it clearly would not be admissible at trial. It's also something the defense would likely be unaware of until disclosed by the prosecution under discovery rules. This was a traumatic question that led to Mr. Barlow receiving information about Tabitha's sexual history that would not be considered a legally relevant variable to consider for a charging decision.

The other concern that arises from the exercise of discretion in this case is the legally relevant evidence that did not appear to be considered and a failure to take an offender-focused view of the evidence that was available.

Sexual violence cases that turn on consent have long been referred to as "he said, she said" cases. This is a dangerous and enduring myth that when a woman or girl accuses a man or boy of sexual assault and the man or boy denies it, there is no way to discern the truth. A sex assault prosecutor's job is to go beyond the parties' contradictory statements and find evidence suggesting which statement is true. The earliest rape laws in this country required that the victim's statement be corroborated. Understanding the nature of sexual assault as a crime that requires secrecy to commit, the Utah Supreme Court has ruled that a conviction can rest on the testimony of the victim alone.[14] And although, there is no requirement for prosecution to present corroborating evidence, corroborating a victim's statement will bolster her credibility with the factfinder and make conviction more likely.

The Attorney General's Office requested, received, and ignored a significant amount of corroborative evidence in Tabbitha's medical records. Those records, as well as Tabitha's and her mother's statements about Tabitha's medical condition, a rare

[14] State v. Studham, 572 P.2d 700, 702 (1977) citing State v. Ward, 347 P.3d 865 (1959).

neuromuscular disease called Charcot-Marie-Tooth disease, should have been considered in assessing the credibility of the suspect's statement and in terms of Tabitha's overall vulnerability to sexual assault. If those records were considered in analyzing the plausibility of the suspect's version of events, his statements would have been rejected as highly unlikely if not impossible. A review of Tabbitha's medical records would reveal that at the time of the assault, Tabitha was recovering from a recent surgery. Tabitha could not walk without the assistance of crutches or her support dog. Additionally, Tabitha's physical therapy evaluations indicate that in terms of her neurological, muscular and balance abilities she scored lower than the average 80–89-year-old person. One of Tabitha's fitness and therapy providers even contacted the Attorney General's Office in January of 2021 indicating that Tabitha was too weak to complete even one sit-up, could not defend herself, and that provider indicated a willingness to testify to that fact. Even to this day, Tabitha doesn't always have the strength and dexterity required to pull a zipper or remove her own shoes. At a minimum, these medical records should have caused the prosecutor to question the credibility of the suspect's statements about Tabitha's enthusiastic consent and unfastening of the suspect's pants.

Prosecutors have often focused too narrowly on what appear to be negative victim characteristics and behavior in sexual violence cases. What she was wearing, what she drank, what she did or did not do during and after the assault. This kind of focus ends up producing the victim blaming that allows rapists to avoid all accountability. Instead of investigating the case, the facts, or the offender, the focus turns to disproving or discrediting the victim. That lack of investigation and victim focused analysis can be seen in this case. Instead of viewing evidence of Tabitha's disability in terms of how it would impact her ability to express non-consent or ability to resist an assault, the Attorney General's Office scoured her social media for "proof" that she wasn't as disabled as she claimed. The PowerPoint slides for the final case charging review conducted by the Attorney General's Office mentions that she is an "Olympic" equestrian but fails to state that she participates in the Paralympic Games for athletes with disabilities.

Another focus of the prosecutors in case review is the text message evidence that they received from the suspect's attorney. The text messages are viewed by the

prosecutors as evidence that Tabitha was behaving normally toward the suspect after the assault. It is the worst kind of victim blaming to say if you didn't behave in a particular way post-assault then you aren't a victim. Aside from that clearly biased and victim-blaming perspective, the Attorney General's Office conducted no independent investigation and accepted this document created by defense counsel as fact. This document is clearly not evidence. Evidence would be in the form of phone records from the phone provider or even screen shots of the texts. This document is not a record created by a phone service provider when records are sought with a search warrant. If this had been a full record from the phone service provider, it would show phone numbers and it would show all the suspect's texts and calls for the relevant time period. This instead is a "cherry-picked" document created by defense counsel showing only what defense wanted to show. Digital evidence is crucial in these kinds of cases. Search warrants should have been issued for the suspect's phone and social media accounts immediately when the assault was reported. The Attorney General's Office undertook almost no independent investigation in this case. National standards for prosecutors recognize that the investigation of crimes, both independently and through oversight of police investigators is one of the core functions and duties of a prosecutor's office. The American Bar Association provides that while "[a] prosecutor's office ordinarily relies on the police … for investigation, … the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies."[15] Even if the retrieval of digital information was no longer possible when the Attorney General's Office received the case, they should not accept defense-created evidence, which is likely inadmissible, as fact and use it as a way to discredit the victim.

Finally, for the final screening review conducted on February 4, 2021, by the Attorney General's Office, Che Arguello and Craig Barlow created PowerPoint slides regarding the evidence in Tabitha's case.[16] What is concerning about the presentation is that some of the facts presented may not be accurate. The PowerPoint developed for the third review indicates that Tabitha's statements made during the November 15, 2019

[15] See Amer. Bar Ass'n, Prosecutorial Function Stand § 3-3.1(a).
[16] GRAMA Document UT AG 22-231 Vetter 1211 – 1222.

interview contradicted her three prior statements in significant ways.[17] Three of the four Attorney General staff present at that meeting indicate in the notes created five to six months later that Tabitha changed her statement. Special Agent Kevin Pepper does not indicate that Tabitha changed her statement. Both Tabitha and her attorney Greg Ferbrache have stated that Tabitha did not change her statement during the interview. It is interesting to note that the alleged changes to Tabitha's statement closely mirror the statement of the suspect's polygraph exam which was read aloud during the interview. Unfortunately, this situation cannot be definitively settled because the interview was neither video nor audio recorded. If the prosecutor staffing the case provided inaccurate information, then that would be both unethical and a denial of justice for Tabitha.

The best practice would be to take an offender-focused approach, carefully considering all offender conduct, behaviors, and characteristics. The focus on suspect behavior emphasizes the importance of identifying predatory conduct, such as the targeting of vulnerable victims, the selection of location, and timing of offense. According to Justice Department data, girls and women with disabilities are sexually assaulted at a rate seven times higher than that of people without disabilities. The review conducted by the Attorney General's Office is so far from offender-focused that only one slide even mentions the original statements made by Tabitha about the offender's behavior. There is no analysis of the evidence to see what available evidence would corroborate Tabitha's statement and support charges. There is no offender focused investigation by the AG's Office to attempt gathering even the original evidence of the case. The AG's office simply accepts the original, and potentially biased, case declination - and materials provided by the defense counsel. The slides in detail discuss Tabitha's actions, not the offender's actions. Contrary to the legally-mandated purpose of the "second-look" committee, this was not a review to consider possible charges but a review designed to discredit a victim's report.

The prosecutor's decision not to charge the case was discretionary, though the method by which the decision was reached is not defensible. Recognizing that not all cases will or can be charged, the greater issue here is the evidence of gender bias and

[17] GRAMA Document UT AG 22-231 Vetter 1222

the treatment that Tabitha endured. The Attorney General's second look committee's refusal to properly investigate or file charges in cases of sexual assault has an adverse effect not only on survivors of sexual assault but also on the safety of women in Utah as a whole. Since the majority of sexual assaults are committed by repeat offenders, the effect is compounded because perpetrators who escape prosecution remain in the community to reoffend.[18] While it is true that not every crime that is reported can be prosecuted, prosecutors still have an obligation to treat every victim with dignity, respect, courtesy and sensitivity.[19] At the very least the process of engaging the criminal justice system should not do more harm than the original offense. It is my opinion that the procedure and conduct of the Utah Attorney General's Office in the Tabitha Bell case departs from the national standards for prosecutors and common prosecutorial practices across the nation.[20]

[18] M. Claire Harwell & David Lisak, Why Rapists Run Free, Sexual Assault Report, Vol. 14, No.2, at 17-27 (Nov.lDec. 2010) (research "clearly demonstrates that most rapes are in fact committed by serial offenders").

[19] Utah Code of Criminal Procedure 77-31-1(1).

[20] See Model Response to Sexual Violence for Prosecutors: An Invitation to Lead https://aequitasresource.org/wp-content/uploads/2020/01/RSVP-Vol.-I-1.8.20.pdf and National Sexual Violence Resource Center Best Practice for Prosecution https://www.nsvrc.org/sites/default/files/publications/2018-09/Best%20Practices%20for%20Prosecution.pdf