

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 30777

KYLEA M. WAGNER,
Petitioner and Appellee,

vs.

RIGO B. TOVAR,
Respondent and Appellant.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Eric Kelderman
Circuit Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record (“SR”) and the numbers assigned by the Clerk, and the pleading and any further designation as appropriate, e.g. “SR 85, Notice of Appeal.” References to the documents in the Appendix will be referred to as, “Document” and Appendix (“App.”) with the appropriate page number or paragraph assigned, e.g. “Permanent Order for Protection, App. at A 001.” Citations to transcripts will be designated by transcript, date of hearing, and page and line number, e.g. “Transcript (7/01/2024), p. 39:18 – 40:2.”

The Appellant, Rigo B. Tovar will be referred to as “Rigo Tovar”. The Appellee, Kyle M. Wagner will be referred to as “Kylea Wagner” or “Ms. Wagner”. The minor children will be referred to collectively as “L.T. and T.T.” or individually as “L.T.” or “T.T.”.

JURISDICTIONAL STATEMENT

This is an appeal from the trial court’s Permanent Order for Protection. Permanent Order for Protection (Domestic Abuse), App. at A 001-004. On July 1, 2024, Kylea Wagner, as the Petitioner¹ and Rigo Tovar, as the Respondent signed the Notice of Entry of Order and Acknowledgment of Personal Service, acknowledging receipt of a copy of the Order for Protection. Permanent Order for Protection (Domestic

¹ Kylea Wagner signed, but did not date the Notice of Entry of Order and Acknowledgement of Personal Service.

Abuse), App. at A 004. On July 31, 2024, Rigo Tovar filed a Notice of Appeal. SR 85, Notice of Appeal. This Court has jurisdiction over this action pursuant to SDCL § 15-26A-3.

STATEMENT OF ISSUES

- I. Whether the circuit court erred when it entered a Permanent Order for Protection.

The circuit court held in the negative.

MOST RELEVANT AUTHORITIES

Pieper v. Pieper, 2013 S.D. 98, 841 N.W.2d 781

Purcell v. Begnaud, 2017 S.D. 23, 895 N.W.2d 346

Schaefer ex rel. S.S. v. Liechti, 2006 S.D. 19, 711 N.W.2d 257

SDCL § 25-10-1(1)

- II. Whether the circuit court erred when it entered a Permanent Order for Protection when it found domestic abuse occurred based upon alleged incidents, some of which allegedly occurred ten years ago.

The circuit court held in the negative.

MOST RELEVANT AUTHORITIES

SDCL § 25-10-1(1)

SDCL § 25-10-3.1

- III. Whether the circuit court erred when it entered a Permanent Order for Protection for the maximum period of five years, prohibiting Rigo Tovar, from any contact with the protected parties and minor children, I.T. and T.T..

The circuit court held in the negative.

MOST RELEVANT AUTHORITIES

Purcell v. Begnaud, 2017 S.D. 23, 895 N.W.2d 346

SDCL § 25-10-5

- IV. Whether the circuit court erred by not modifying the Order for Protection when it heard Respondent's Motion for Order to Modify the Order for Protection at the July 22, 2024 Hearing to Modify the Permanent Order for Protection.

The circuit court held in the negative.

MOST RELEVANT AUTHORITIES

Purcell v. Begnaud, 2017 S.D. 23, 895 N.W.2d 346

SDCL § 25-25-10

SDCL § 25-10-13

STATEMENT OF THE CASE

On May 24, 2024, Kylea Wagner filed a Petition and Affidavit for Protection Order (Domestic Abuse), seeking a Protection order for a period of five years for Kylea Wagner as Petitioner, and for Kylea Wagner and Rigo Tovar's two minor children, I.T. (who is nine years old) and T.T. (who is eight years old). In the Petition and Affidavit for a Protection Order (Domestic Abuse), Kylea Wagner checked the boxes to allege Respondent, Rigo Tovar's actions inflicted fear in Petitioner, Kylea Wagner and/or the other protected parties, I.T., and T.T. and that Respondent, Rigo Tovar was about to cause physical harm or bodily injury to Petitioner, Kylea Wagner or the other protected parties, I.T., and T.T.. The Petition and Affidavit for Protection Order (Domestic Abuse),

further alleged that Respondent, Rigo Tovar pursued a knowing and willful course of conduct which seriously alarmed, annoyed, or harassed Petitioner, Kylea Wagner and/or the other protected parties, I.T., and T.T., with no legitimate purpose. As part of the Petition and Affidavit for Protection Order (Domestic Abuse), Kylea Wagner provided a "Summary of Incidents" alleging incidents from December 20, 2023 until May 22, 2024.

On May 24, 2024, an Ex Parte Order Hearing was held, where the circuit court granted an Ex Parte Temporary Order for Protection.

On June 20, 2024, a Hearing was held that was continued, where the circuit court Granted a Continuance of Temporary Protection Order and Order to Show Cause (Domestic Abuse).

On July 1, 2024, a Permanent Order Hearing was held, where the circuit court entered a Permanent Order for Protection for a period of five years, from July 1, 2024 through July 1, 2029, prohibiting Respondent, Rigo Tovar from coming within one hundred (100) yards of Petitioner, Kylea Wagner and the other protected parties and minor children, I.T., and T.T.. The Order for Protection further prohibits Respondent, Rigo Tovar from any visitation with the protected parties and minor children, I.T. and T.T. for a period of five years. The Order for Protection also prohibits Respondent, Rigo Tovar from any phone calls, emails, or third

party contact with the protected parties, Kylea Wagner, and the minor children, L.T. and T.T. for a period of five years.

On July 2, 2024, Respondent filed a Motion for Order to Modify Order for Protection. On July 22, 2024, a Hearing to Modify the Permanent Order for Protection was held on the Motion for Order to Modify Order for Protection, where the circuit court did not modify the July 1, 2024 Permanent Order for Protection.

STATEMENT OF THE FACTS

Rigo Tovar and Kylea Wagner were previously in a significant romantic relationship. Transcript (7/01/2024), p. 8:22 – 9:2; p. 13:3 – 13:4; p. 177:2. Sometime in 2013, Rigo Tovar and Kylea Wagner entered a consensual domestic relationship, where the parties cohabitated together. Transcript (7/01/2024), p. 15:20 – 15:21. Rigo Tovar and Kylea Wagner have two children together, L.T. (born February 4, 2015, who is nine years old) and T.T. (born February 19, 2016, who is eight years old). Transcript (7/01/2024), p. 177:2; p. 11:17; *see also* Exhibit 102, Verified Motion for Change of Custody, App. at E 001.²

Sometime in 2018, Rigo Tovar and Kylea Wagner separated and no longer cohabitated together. Transcript (7/01/2024), p. 15:24 – 16:8. Around the end of May of 2019, Rigo Tovar and Kylea Wagner reconciled.

² While received by the circuit court into evidence as referenced in the Transcript (7/01/2024), Exhibit 102 is not listed in the Settled Record. See Transcript p. 177:2; p. 11:17.

Transcript (7/01/2024), p. 16:11 – 16:24. Toward the end of 2019, Rigo Tovar and Kylea Wagner again cohabitated together. Transcript (7/01/2024), p. 16:25 – 17:1.

In February of 2024, Kylea Wagner moved out of the residence owned by Rigo Tovar and Kylea Wagner and the parties again separated and began living apart, but maintained contact and Rigo Tovar still saw his minor children, I.T. and T.T.. Transcript (7/01/2024), p. 37:16 – 37:18; p. 98:25 – 99:2; p. 17:2 – 17:3; p. 90:5 – 90:17; p. 145:10 – 145:11. On one occasion on or about April 30, 2024, Rigo Tovar called law enforcement to keep the peace when he went to pick-up the minor children for his parenting time, due to being denied parenting time in the past. Transcript (7/01/2024), p. 152:20 – 153:6; p. 153:16 – 153:23.

Rigo Tovar was invited by Kylea Wagner to go to Florida in March of 2024, with her, the parties minor children I.T. and T.T., and others from the Wagner family, but Rigo Tovar elected not to go. Transcript (7/01/2024), p. 55:15 – 55:23; p. 92:2 – 92:6; p. 162:11 – 162:17. On March 21, 2024, Kylea Wagner invited Rigo Tovar to her parents' house to see the minor children, I.T. and T.T. Transcript (7/01/2024), p. 92:7 – 92:18. On March 22, 2024, Rigo Tovar filed a Verified Motion for Change of Custody in *Kylea M. Wagner v. Rigo B. Tovar*, 51CIV18-000623. Transcript (7/01/2024), p. 99:7 – 99:15. Rigo Tovar's Verified Motion for Change of Custody made various allegations against Kylea Wagner,

including but not limited to her dependency issues related to illicit drugs & alcohol. Transcript (7/01/2024), p. 53:9 – 54:6. Rigo Tovar's Verified Motion for Change of Custody caught Kylea Wagner off guard, because around the time of filing the Motion, Rigo Tovar had a plane ticket to go to Florida with Kylea Wagner, the parties minor children, I.T. and T.T., and others from the Wagner family. Transcript (7/01/2024), p. 99:7 – 99:15; p. 55:15 – 55:23. Approximately two months after Rigo Tovar filed the Verified Motion for Change of Custody, Kylea Wagner filed the Petition and Affidavit for a Protection Order (Domestic Abuse). Transcript (7/01/2024), p. 38:2 – 38:6; *see also* Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 001-024.

On May 28, 2024, Kylea Wagner filed a Petition and Affidavit for a Protection Order (Domestic Abuse), checking boxes to allege that “[r]espondent’s actions inflicted fear in Petitioner and/or any protected parties that Respondent was about to cause physical harm or bodily injury to said Petitioner or protected party” and “[r]espondent pursued a knowing and willful course of conduct which seriously alarmed, annoyed, or harassed Petitioner and/or any protected parties with no legitimate purpose. The pattern of conduct was a series of acts over a period of time, however short, showing a continuing pattern of harassment.” Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 001-002.

Sometime after filing the Petition and Affidavit for a Protection Order (Domestic Abuse), Kylea Wagner posted a picture on her Snapchat story of the residence owned by Rigo Tovar and Kylea Wagner, with the text stating as follows: *“Finally thank you, Lord, for doing the right thing and giving me and my kids our home back that was rightfully mine in the first place.”* (emphasis in original). Transcript (7/01/2024), p. 93:17 – 94:12; *see also* SR Exhibit 108, Snapchat Story of House. As part of the Petition and Affidavit for a Protection Order (Domestic Abuse), Kylea Wagner sought to prohibit Rigo Tovar from being at the residence located at 2925 Orchard Lane, Rapid City, SD 57703, which is the residence owned by both Rigo Tovar and Kylea Wagner. Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 005. Rigo Tovar is prohibited from being within 100 yards of the property located at 2925 Orchard Lane, Rapid City, SD 57703. Permanent Order for Protection (Domestic Abuse), App. at A 002.

On July 1, 2024, a Permanent Order Hearing was held, where the circuit court entered a Permanent Order for Protection for a period of five years, from July 1, 2024 through July 1, 2029. Permanent Order for Protection (Domestic Abuse), A 001-004. On July 2, 2024, Respondent filed a Motion for Order to Modify Order for Protection. SR 80, Motion for Order to Modify Order for Protection. On July 22, 2024, a Hearing to Modify the Permanent Order for Protection was held on the Motion for

Order to Modify Order for Protection, where the circuit court did not modify Order for Protection. SR 082, Notice of Hearing on Motion to Modify and Summons to Appear (Domestic Abuse). This appeal followed.

ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION.

A. STANDARD OF REVIEW³

“We review a circuit court’s decision to grant a protection order for an abuse of discretion. ‘An abuse of discretion is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.’” *Purcell v. Begnaud*, 2017 S.D. 23, ¶ 6, 895 N.W.2d 346, 348–49 (citing *Repp v. Van Someren*, 2015 S.D. 53, ¶ 8, 866 N.W.2d 122, 125); *Shroyer v. Fanning*, 2010 S.D. 22, ¶ 6, 780 N.W.2d 467, 469; *MacKaben v. MacKaben*, 2015 S.D. 86, ¶ 9, 871 N.W.2d 617, 622; *Gartner v. Temple*, 2014 S.D. 74, ¶ 7, 855 N.W.2d 846, 850. “We accept the court’s factual findings as correct unless ‘after reviewing all of the evidence, we are left with a definite and firm conviction that a mistake has been made.’” *Id.* (citing *Repp*, 2015 S.D. 53, ¶ 8, 866 N.W.2d at 125); *Shroyer*, 2010 S.D. 22, ¶ 6, 780 N.W.2d at 469). “If the trial court’s findings of fact are not clearly

³ This Standard of Review is applicable to all arguments, specifically Arguments II. through IV. and any sub-parts therein. To avoid needless repetition, the Standard of Review will not be repeated throughout Appellant’s Brief for Arguments II. through IV..

erroneous, we ‘must then determine whether the trial court abused its discretion in granting or denying the protection order.’” *Schaefer ex rel. S.S. v. Liechti*, 2006 S.D. 19, ¶ 8, 711 N.W.2d 257, 260 (citing *Goeden v. Daum*, 2003 SD 91, ¶ 5, 668 N.W.2d 108, 110).

B. THE PREPONDERANCE OF THE EVIDENCE DID NOT SUPPORT THE PERMANENT ORDER FOR PROTECTION.

SDCL § 25-10-1(1) defines domestic abuse, as the “physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury when occurring between persons in a relationship described in § 25-10-3.1.”

As stated by this Court in *Purcell v. Begnaud*,

A petitioner must ‘allege the existence of domestic abuse[.]’ SDCL 25-10-3(2). The petitioner is also required to submit ‘an affidavit made under oath stating the *specific* facts and circumstances of the domestic abuse[.]’ *Id.* (emphasis added). ‘One seeking relief under the domestic abuse laws must prove abuse by a preponderance of the evidence.’

Purcell, 2017 S.D. 23, ¶ 8, 895 N.W.2d 346, 349 (quoting *Beermann v. Beermann*, 1997 S.D. 11, ¶ 17, 559 N.W.2d 868, 872); SDCL 25-10-5 (emphasis in original). This court has stated that a “[p]reponderance of the evidence’ is defined as ‘the greater weight of evidence.’” *Pieper v. Pieper*, 2013 S.D. 98, ¶ 22, 841 N.W.2d 781, 787 (citing *L.S. v. C.T.*, 2009 S.D. 2, ¶ 23, 760 N.W.2d 145, 151).

This Court in *Purcell* reversed the circuit court regarding the protection order for the minor children, stating as follows:

There are several reasons why the protection order was improper. First, Purcell's petition and affidavit do not allege the children are victims of domestic abuse. The term *domestic abuse* has a specific, statutory definition: 'physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury when occurring between persons in a relationship described in § 25-10-3.1.' SDCL 25-10-1(1). Nowhere in the petition or affidavit does Purcell allege that Begnaud ever attempted to harm or injure their children, let alone succeeded in doing so. Nor did Purcell allege Begnaud has inflicted on their children a fear of imminent harm or injury. Because the petition failed to allege the existence of domestic abuse in regard to the children, it was facially defective in regard to the children.

Id. at ¶ 9, 895 N.W.2d 346, 349 (emphasis in original).

As stated by Kylea Wagner in the Petition and Affidavit for a Protection Order (Domestic Abuse), "[t]he petitioner, Kylea Wagner, has provided a detailed account of the respondent's alarming behavior, substantiating her fear of physical and emotional harm." Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 004, (emphasis added). Kylea Wagner's testimony did not support her allegations and such were not established by a preponderance of the evidence.

In the Petition and Affidavit for Protection Order (Domestic Abuse), Kylea Wagner sought a protection order based on an alleged incidents that occurred between December 30, 2023 through May 22, 2024. Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 003-004. When answering "I AM ASKING THE COURT FOR A

PROTECTION ORDER BASED UPON THE FACTS BELOW” Kylca Wagner alleged that “[o]n or about May 22, 2024 at approximately 7:45 o’clock AM” the following occurred:

- Respondent’s actions inflicted fear in Petitioner and/or any Protected Parties that Respondent was about to cause physical harm or bodily injury to said Petitioner or Protected Party.
- Respondent pursued a knowing and willful course of conduct which seriously alarmed, annoyed, or harassed Petitioner and/or any Protected Parties with no legitimate purpose. The pattern of conduct was a series of acts over a period of time, however short, showing a continuing pattern of harassment.

Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 002-003. The two boxes checked only related to the alleged incident on May 22, 2024 and not to any other alleged incidents.

When asked to “[p]rovide a detailed description of what happened on the above date”, Kylea Wagner stated “please see attached [d]ocuments[.]” Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 002. The attached documents made allegations from December 30, 2023 until the alleged “incident” on May 22, 2024. However, the incidents as alleged in the Petition and Affidavit for Protection Order (Domestic Abuse), go far beyond the date of the alleged incident on May 22, 2024. Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 001-004.

At the July 1, 2024 Permanent Protection Order Hearing, Counsel for Respondent, Rigo Tovar asked Kylea Wagner about her allegation in

the Petition related to his “Rap [sic] sheet” and a “prior simple Assault” [sic] as follows:

Q [by Mr. Nooney]: And you understand that that has nothing to do with your or your children's fear of imminent physical injury or harm, correct?

A [by Ms. Wagner]: It shows that it's repeated. It shows that I'm not his first.

Transcript (7/01/2024), p. 63:23 – 64:2; *see also* Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 002. As testified to by Rigo Tovar, the incident in Deadwood, involved an argument with a male bartender when Rigo Tovar was in his early twenties. Transcript (7/01/2024), p. 139:1 – 139:13. At the time of the July 1, 2024 Permanent Protection Order Hearing, Rigo Tovar was thirty-five years of age. Transcript (7/01/2024), p. 139:14 – 139:15. The “Rap [sic] sheet” and “prior simple Assault” [sic] allegations did not establish by a preponderance of the evidence that domestic abuse occurred or that the alleged incident caused the infliction of imminent physical injury or harm in her, or the minor children I.T. and T.T., as the circuit court found.

When asked about the December 30, 2023 allegation, Kylea Wagner testified in pertinent part as follows:

Q [by Mr. Nooney]: You'd agree with me that you did not see my client leave with the AR-15 during that alleged incident, correct?

A [by Ms. Wagner]: I didn't see him leave, other than a video of him, of the back side of him. I didn't see anything in his hands.

Q [by Mr. Nooney]: So it's your testimony that my client allegedly had taken the AR-15 out of the gun safe while he was in the gun safe room, correct?

A [by Ms. Wagner]: Yes.

Q [by Mr. Nooney]: But that he never actually left with the AR-15, correct?

A [by Ms. Wagner]: I can't say that he didn't leave with it.

Transcript (7/01/2024), p. 64:17 – 65:5; *see also* Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 003. Kylea Wagner testified that she did not call law enforcement related to the alleged incident on December 30, 2023, nor would have there been any reason to do so. Transcript (7/01/2024), p. 61:23 – 62:6. Rather, Kylea Wagner testified she called her father, Jerry Wagner, who testified that he acted as a mediator for Rigo Tovar and Kylea Wagner off and on over a period of more than ten years. Transcript (7/01/2024), p. 61:23 – 62:6; p. 119:20 – 120:1. As it concerns the December 30, 2023 alleged incident, Kylea Wagner did not establish by a preponderance of the evidence that domestic abuse occurred or that the alleged incident caused fear of imminent physical injury or harm in her, or the minor children I.T. and T.T., as ultimately found by the circuit court. Transcript (7/01/2024), p. 195:14 – 195:23.

As it concerns the allegation on January 8, 2024 of Rigo Tovar allegedly locking himself in his bedroom for three consecutive days,

Kylea Wagner testified and admitted that Rigo Tovar “didn’t make any threats, no, except for [sic] to himself.” Transcript (7/01/2024), p. 67:4. This allegation does not amount to domestic abuse, nor could it reasonably create the infliction of fear of imminent physical harm or bodily injury in Kylea Wagner and the minor children. Kylea Wagner again testified that she did not call law enforcement related to the alleged incident on January 8, 2024, nor would have there been any reason to do so. Transcript (7/01/2024), p. 66:10 – 66:13. Rather, Kylea Wagner testified she called Rigo Tovar’s parents and his sister because she was “scared for him.” Transcript (7/01/2024), p. 66:17 – 66:20. As orally stated by the circuit court, “I don’t know that it rebutted anything that Ms. Wagner had said about that. It was about his intoxication. Okay. The intoxication is not itself enough to form a threat”, yet the circuit court erred by orally finding that “domestic abuse did occur.” Transcript (7/01/2024), p. 197:4 – 197:7; p. 195:14 – 195:15.

Regarding the January 14, 2024 allegations regarding a “gun laser”, Exhibit 113 a picture of a hand-held laser pointer in a kitchen drawer was received into evidence. SR 113, Exhibit 113 – Photo Inside of Drawer. The circuit court sought to clarify this on the record, as follows:

THE COURT: Ma’am, I just have -- I just want to clarify something for the record. We’ve been talking about lasers and we’ve been -- I think there was a small bit of a discussion that was about laser pointers. And I’m kind of going back to when Mr. Nooney was asking questions. None of us here are talking about an actual laser that would do

harm, other than perhaps to someone's eyes; we're talking about laser pointers, be they on a gun or a button that you use, like what could be this thing that's in the drawer. That's what we're all talking about, is that true, Counsel?

MR. NELSON: I believe so.

MR. NOONEY: I believe so, yes, Your Honor.

THE COURT: Ma'am, when you're talking about lasers, is that what you're talking about as well?

THE WITNESS [Ms. Wagner]: Yeah. Only these either could be on a weapon or just a pointer, but it was used in a scaring manner.

THE COURT: I just want to make sure we're all on the same page there so... Ma'am, you may step down.

Transcript (7/01/2024), p. 108:24 – 109:18. Kylea Wagner alleged in the Petition and Affidavit for Protection Order (Domestic Abuse) that “his actions left an indelible mark of fear and distress on Kylea and the children, particularly [T.T]”, yet testified that on January 14, 2024, the minor children I.T. and T.T. went with their father, Rigo Tovar to basketball practice after this alleged incident and she did not call law enforcement once Rigo Tovar left the residence, nor did she suggest any reason to do so. Transcript (7/01/2024), p. 33:13 – 33:24; p. 69:16 – 69:22. Kylea Wagner again testified that she did not call law enforcement related to the alleged incident on January 14, 2024, nor would have there been any reason to do so. Transcript (7/01/2024), p. 67:20 – 67:5. If Kylea Wagner truly believed her and the children were placed in imminent fear of physical harm or bodily injury, why would she allow

them to leave with their father, Rigo Tovar, rather than call law enforcement?

Kylea Wagner alleged that on February 9, 2024, she “awoke to find one of their puppies bleeding with a swollen abdomen, evidently from being kicked”. Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 004. Kylea Wagner initially testified that the “puppies were sick” and then testified that “the puppy was hurt.” Transcript (7/01/2024), p. 145:8 – 145:17. When asked questions on cross examination, Kylea Wagner testified the puppies urinated and defecated inside the parties residence, were in a make-shift kennel, and were not in a great environment. Transcript (7/01/2024), p. 73:8 – 73:14; p. 74:13 – 74:17; p. 75:2 – 75:4. The preponderance of the evidence did not establish that domestic abuse occurred as it concerns this unsupported allegation or that Rigo Tovar “evidently [] kicked” a puppy on February 9, 2024.

Regarding the last alleged incident that allegedly occurred on May 22, 2024, the alleged incident occurred at Wilderness Park. Transcript (7/01/2024), p. 145:8 – 145:17. On May 21, 2024, Rigo Tovar had overnight parenting time pursuant to the Court Order regarding parenting time in *Kylea M. Wagner v. Rigo B. Tovar*, 51CIV18-000623. Transcript (7/01/2024), p. 145:10 – 145:12. On May 22, 2024 Rigo Tovar took the minor children, I.T. and T.T., along with their bicycles to Wilderness

Park, where the minor children were to do a bike-to-school day. Transcript (7/01/2024), p. 145:12 – 146:6. The minor children attend private school and I.T. became upset because he did not have his school uniform for the last day of school. Transcript (7/01/2024), p. 145:8 – 145:17. Rigo Tovar encouraged I.T., to ride his bike to school, but despite such, I.T. elected not to participate in the bike-to-school day and stayed at Wilderness Park with his mother, Kylea Wagner. Transcript (7/01/2024), p. 146:10 – 146:20. Rigo Tovar rode his bicycle to school with T.T. and then Rigo rode his bicycle back to Wilderness Park, to his pick-up truck. Transcript (7/01/2024), p. 146:17 – 146:22. When getting ready to leave Wilderness Park, Rigo Tovar noticed Kylea Wagner and I.T. sitting near the playground. Transcript (7/01/2024), p. 146:22 – 146:25. Rigo Tovar approached Kylea Wagner and I.T., so he could give I.T. a hug and encouraged I.T. to go to school. Transcript (7/01/2024), p. 146:25 – 147:9.

Rigo Tovar admitted Exhibit 106, an audio recording of the alleged incident on May 22, 2024, where there was no yelling, no threats, no threatening behavior, and Rigo Tovar did not charge Kylea Wagner or I.T. or act in a menacing manner. Transcript (7/01/2024), p. 160:10 – 162:7, p.148:3 – 148:6; *see also* SR 104, Physical Exhibit List, Exhibit 106, 2 Audio Recordings- Flash Drive. Kylea Wagner testified that she did not call law enforcement related to the alleged incident on May 22, 2024, nor

would have there been any reason to do so. Transcript (7/01/2024), p. 80:14 – 80:16. Rather, once again Kylea Wagner called her father, Jerry Wagner who acted as a mediator for Rigo Tovar and Kylea Wagner off and on for a period of more than ten years. Transcript (7/01/2024), p. 80:14 – 80:16; p. 119:20 – 120:1. At no time on May 22, 2024 or any other alleged incident for that matter, was there any domestic abuse that occurred, neither physical harm or bodily injury, nor any attempt to cause physical harm or bodily injury, nor the infliction of fear of imminent physical harm or bodily injury.

Kylea Wagner did not properly “allege the existence of domestic abuse[;]” did not state “*specific* facts and circumstances of the domestic abuse[;]” and did not “prove abuse by a preponderance of the evidence”. See *Purcell*, 2017 S.D. 23, ¶ 8, 895 N.W.2d 346, 349 (quoting *Beermann*, 1997 S.D. 11, ¶ 17, 559 N.W.2d 868, 872); SDCL 25-10-5 (emphasis in original).

C. THE CIRCUIT COURT DID NOT MAKE A FINDING THAT DOMESTIC ABUSE OCCURRED OR THERE WAS AN INFLECTION OF FEAR OF IMMINENT PHYSICAL HARM OR BODILY INJURY AS IT CONCERNS THE MINOR CHILDREN, I.T. AND T.T..

The circuit court erred when it ordered that the minor children, I.T. and T.T. were named as other protected persons, without making a finding that domestic abuse occurred or there was an infliction of fear of imminent physical harm or bodily injury against the minor children, I.T.

and T.T.. Regarding the minor children, I.T. and T.T., the circuit court erred in its' oral finding as follows:

THE COURT: And I believe that that is sufficient to issue the protection order as to Ms. Wagner and as to both of the children as well. I don't believe that I need to make a finding that the threat was made against all three of them individually in order for all three of them to be eligible or to grant the protection order against them and so I believe that that is sufficient.

Transcript (7/01/2024), p. 198:9 – 198:15.

Despite the testimony and preponderance of the evidence not supporting the Permanent Order for Protection (Domestic Abuse) in the first place, in order for the circuit court to make the minor children, I.T. and T.T. protected parties pursuant to the Permanent Order for Protection as it did, the circuit court needed to make a finding that domestic abuse occurred against the minor children, I.T. and T.T., which it did not, nor did the testimony or evidence support such a finding. Even if the circuit court had made a finding that the minor children, I.T. and T.T. were victims of domestic abuse, which it did not, such a finding would be clearly erroneous based on the record and the specific facts and circumstances alleged by the Petitioner, Kylea Wagner.

II. THE CIRCUIT COURT ERRED WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION WHEN IT FOUND DOMESTIC ABUSE OCCURRED BASED UPON ALLEGED INCIDENTS, SOME OF WHICH ALLEGEDLY OCCURRED TEN YEARS AGO.

Pursuant to SDCL § 25-10-1(1) domestic abuse can be either *physical harm, bodily injury, or attempts to cause physical harm

or bodily injury, or the infliction of fear of imminent physical harm or bodily injury when occurring between persons in a relationship described in § 25-10-3.1.” (emphasis added). SDCL § 25-10-3.1 provides as follows:

Any person who is involved in one of the following relationships with another party:

- (1) Spouse or former spouse;
 - (2) Is in a significant romantic relationship or has been in one during the past twelve months with the abusing party;
 - (3) Has a child or is expecting a child with the abusing party;
 - (4) Parent and child, including a relationship by adoption, guardianship, or marriage; or
 - (5) Siblings, whether of the whole or half blood, including a relationship through adoption or marriage;
- is entitled to apply for a protection order or a temporary protection order pursuant to the provisions of this chapter.

The word “imminent” is defined as “ready to take place” or “happening soon”. MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/imminent>. At the July 1, 2024 Permanent Protection Order Hearing when asked about the “imminent fear or harm” specifically as it concerns the alleged incident on May 22, 2024, Kylea Wagner testified as follows:

Q[uestion by Mr. Nooney]: And you'd agree my client showed up to a baseball practice after this alleged incident on May 22nd of 2024 and stood approximately 10 feet from you, correct?

A[nsWER by Ms. Wagner]: I -- again, I don't know what day this is so I can't agree to anything without looking at a calendar. I know that Rigo showed up to baseball, but in the

last ten years Rigo was not present during -- during activities until April of this year that Rigo started being present.

Q[uestion by Mr. Nooney]: Him not being present at things like baseball practice, that has nothing to do with your allegation --

A[nsWER by Ms. Wagner]: Well, I'm just --

Q[uestion by Mr. Nooney]: -- as it concerns imminent fear or harm, bodily injury, from my client to you or the kids, correct?

A[nsWER by Ms. Wagner]: Correct. I mean, he was just standing there at a game. I believe that it's fear from the actions of what has occurred over the last ten years[.]

Transcript (7/01/2024), p. 79:15 -- 79:19. As testified by Kylea Wagner the "fear", specifically as it concerns the May 22, 2024 alleged incident was not imminent, rather it was alleged fear "from actions of what has occurred over the last ten years[.]" which are not "imminent" *Id.*

III. THE CIRCUIT COURT ERRED WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION FOR THE MAXIMUM PERIOD OF FIVE YEARS, PROHIBITING RIGO TOVAR, FROM CONTACT WITH THE PROTECTED PARTIES AND MINOR CHILDREN, I.T. AND T.T..

Pursuant to SDCL § 25-10-5, "[a]ny relief granted by the order for protection shall be for a fixed period and may not exceed five years." Ultimately, pursuant to SDCL § 25-10-5, a protection order "may not exceed five years." *See* SDCL § 25-10-5 (emphasis added).

In *Purcell*, this Court stated that "even if the circuit court had found that the children were victims of domestic abuse, it

could have protected against such abuse without completely curtailing Begnaud's fundamental rights as a parent for three years.* *Purcell*, 2017 S.D. 23, ¶ 12, 895 N.W.2d 346, 350–51. As further stated by this Court in *Purcell*,

At the very least, it was an abuse of discretion to impose the protection order without exception and without considering visitation. A court that finds domestic abuse has occurred has discretion to '[a]ward temporary custody or establish temporary visitation with regards to minor children of the parties[.]' SDCL 25–10–5(3). Yet, the protection order prohibits *all* contact between Begnaud and his children for three years. Under the order, Begnaud is forbidden from so much as sending a card to his children on their birthdays or asking their grandparents to say 'hello' on his behalf.

Id. (emphasis in original). At the case at hand, the circuit court could have done something different than curtail Rigo Tovar's fundamental rights as a parent for five years, but instead it abused its discretion and elected not to. *See Purcell*, 2017 S.D. 23, ¶ 12, 895 N.W.2d 346, 350–51. The circuit court abused its' discretion imposing the Permanent Order for Protection by not creating an exception or considering any visitation, let alone prohibiting all "phone calls, emails, third party contact, including correspondence, direct or indirect[.]" *See Purcell*, 2017 S.D. 23, ¶ 12, 895 N.W.2d 346, 350–51; *see also* Permanent Order for Protection (Domestic Abuse), App. at A 001-004.

In the Petition & Affidavit for a Protection Order (Domestic Abuse), Kylea Wagner sought a permanent order of protection for a period of five years, which ultimately the circuit court granted. Petition & Affidavit for

a Protection Order (Domestic Abuse), App. at B 005; *see also* Permanent Order for Protection (Domestic Abuse), App. at A 001-004. Pursuant to the Permanent Order for Protection (Domestic Abuse), Rigo Tovar is prohibited from all contact with his minor children, I.T. and T.T., direct or indirect via a third party for a period of five years, from July 1, 2024 to July 1, 2029, which amounts to 1,825 days. Pursuant to the circuit court's Permanent Order for Protection (Domestic Abuse), Rigo Tovar is even prohibited from sending his minor children, I.T. and T.T., or either of them a birthday card or calling them on the phone to wish them a happy birthday. The circuit court abused its' discretion when entering the Permanent Order for Protection (Domestic Abuse), by prohibiting Rigo Tovar from having any contact with his minor children, I.T. and T.T. for a period of five years.

IV. THE CIRCUIT COURT ERRED BY NOT MODIFYING THE ORDER FOR PROTECTION WHEN IT HEARD RESPONDENT'S MOTION FOR ORDER TO MODIFY THE ORDER FOR PROTECTION AT THE JULY 22, 2024 HEARING TO MODIFY THE PERMANENT ORDER FOR PROTECTION.

SDCL § 25-10-10, provides as follows: "Upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection."

As stated by this Court in *Purcell*, "[t]he court could have simply ordered any in-person contact between Begnaud and the children occur in some type of a supervised setting." *Purcell*, 2017 S.D. 23, ¶ 12, 895

N.W.2d 346, 350. While Rigo Tovar Motioned the circuit court to remove the minor children, I.T. and T.T. from the Permanent Order for Protection (Domestic Abuse), given the circuit court would still have jurisdiction over the I.T. and T.T. in *Kylea M. Wagner v. Rigo B. Tovar*, 51CIV18-000623, the circuit court had the opportunity to amend its' Permanent Order for Protection (Domestic Abuse), but did not amend such, which was an abuse of discretion.

At the July 22, 2024 court hearing on Rigo Tovar's Motion to Modify the Permanent Order for Protection, Rigo Tovar made it abundantly clear that that the circuit court's July 1, 2024 Permanent Order for Protection (Domestic Abuse) prohibited Rigo Tovar from having any contact with his minor children, I.T. and T.T. for a period of five years, as follows:

MR. NOONEY: As the current order stands that this Court entered for a permanent order of protection, my client does not see his children for a period of five years. That, of course, would equate to 60 months. And I've done the math, Your Honor. That would be 1,825 days from the date that order was entered. Beyond that, I believe this was discussed on the record previously, but my client had not seen his children since May of 2024. It's already been two months, Your Honor. So [Rigo Tovar is] motioning the Court to consider a modification of the Court's order that was entered on July 1, 2024.

Transcript (7/22/2024), p. 3:8 – 3:18.

The Court understood that even if there were to be a Motion filed in the custody file, *Kylea M. Wagner v. Rigo B. Tovar*, 51CIV18-000623, such order does not modify the Permanent Order for Protection:

THE COURT: [T]here is a child custody matter also pending; is that true?

MR. NOONEY: As this Court knows, in the event my client were to violate the permanent order of protection, that, of course, is a criminalable [sic] offense, a Class 1 misdemeanor for the first occasion.

THE COURT: Sure.

MR. NOONEY: So with that, the permanent protection order, of course, trumps any order the Court would enter in the CIV file, which is –

THE COURT: Of course. I -- I understand. I'm just -- I guess the point that I'm getting at is that we're going to resolve that part some day[.]

Transcript (7/22/2024), p. 3:20 – 3:21; p. 4:4-4:14.

SDCL § 25-10-13, provides for violations and penalties if a person violates a protection order, as follows:

If a temporary protection order or a protection order is granted pursuant to this chapter, if a foreign protection order is recognized pursuant to § 25-10-12.1 or 25-10-25, or if a no contact order is issued pursuant to § 25-10-23 or 25-10-25, and if the respondent or person restrained knows of the order, a violation of the order is a Class 1 misdemeanor.

If the acts constituting a violation of this section also constitute a violation of § 22-18-1, 22-18-1.1, or 22-19A-1, the violation of this section is a Class 6 felony.

If a respondent or person restrained has been convicted of, or entered a plea of guilty to, two or more prior violations of this section, § 21-65-19, or § 22-19A-16, or the comparable

laws of any other state, within ten years of committing the current offense, and the factual basis for the current offense occurred after the date of the second conviction or guilty plea, the respondent or person restrained is guilty of a Class 6 felony for a third offense, a Class 5 felony for a fourth offense, and a Class 4 felony for a fifth or subsequent offense.

Any proceeding under this chapter is in addition to other civil or criminal remedies.

Despite Rigo Tovar being entitled to parenting time pursuant to a Court Order in *Kylea M. Wagner v. Rigo B. Tovar*, 51CIV18-000623, the Permanent Order for Protection prohibits Rigo Tovar from exercising such parenting time and if Rigo Tovar has any contact with the minor children, I.T. and/or T.T., such is a violation of the Permanent Order for Protection, which is a criminal offense. Permanent Order for Protection, App. at A 001-004; *see also* SDCL § 25-10-13.

As the Permanent Order for Protection stands, that “some day” when the circuit court may consider parenting time for Rigo Tovar in *Kylea M. Wagner v. Rigo B. Tovar*, 51CIV18-000623, will have to be after July 1, 2029, because unless the Permanent Order of Protection is modified or this matter is reversed and/or remanded, pursuant to the Permanent Order for Protection (Domestic Abuse) Rigo Tovar cannot see his minor children, I.T. and T.T. until July 1, 2029. Permanent Order for Protection, App. at A 001-004.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellant, Rigo B. Tovar, respectfully requests that this Court reverse the trial court's Permanent Order for Protection.

Dated this 31st day of October, 2024.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney

JARED D. NOONEY

Attorney for Respondent and Appellant
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Rapid City, SD 57709-8030
(605) 721-5846
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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellants' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 6,246 words and 31,172 characters ***with no spaces***. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 31st day of October, 2024.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney
JARED D. NOONEY
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(605) 721-5846
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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

KYLEA M. WAGNER, Petitioner/Appellee, vs. RIGO B. TOVAR, Respondent/Appellant.	APPEAL NO. 30777 CERTIFICATE OF SERVICE
--	---

I, Jared D. Nooney, attorney for the Appellant, Rigo B. Tovar, hereby certify that I served via Odyssey, emailed, and sent one (1) copy of the foregoing *Appellant's Brief* by U.S. Mail, first-class, postage prepaid, on October 31, 2024, to:

GEORGE J. NELSON
GEORGE J. NELSON LAW OFFICE,
P.C.
2640 Jackson Boulevard
Suite 1
Rapid City, SD 57702
Attorney for Petitioner and Appellee,
Kylea M. Wagner
gjnlaw@gmail.com

I further certify that on the 31st day of October, 2024, I served via Odyssey, emailed, and sent one (1) original and one (1) copy of the foregoing *Appellant's Brief* by U.S. Mail, first-class, postage prepaid, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070
scclerkbriefs@ujs.state.sd.us

/s/ Jared D. Nooney
JARED D. NOONEY

APPENDIX

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STATE OF SOUTH DAKOTA)
)
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

<input checked="" type="checkbox"/> DOMESTIC	<input type="checkbox"/> STALKING	ORDER FOR PROTECTION TPO NO. <u>51TPO24-000321</u>
<input type="checkbox"/> EX PARTE TEMPORARY	<input checked="" type="checkbox"/> PERMANENT	
<input type="checkbox"/> MODIFICATION		

PETITIONER

KYLEA WAGNER
First Middle Last

By (name and DOB):

On behalf of a minor child by parent/guardian.

**V.
RESPONDENT**

RIGO TOVAR
First Middle Last

Relationship to Petitioner:

Have had a child or am expecting a child with

Respondent's Address:
2925 ORCHARD LN
RAPID CITY, SD 57703

PETITIONER IDENTIFIERS:

04/22/1993
Date of Birth of Petitioner

Other Protected Persons (name and DOB):

TOVAR, ISALAH 02/04/2015
TOVAR, TEYO 02/19/2016

(See also 2B Additional Orders.)

RESPONDENT IDENTIFIERS:

SEX	RACE	HEIGHT	WEIGHT
M	W	5'11"	240
EYES	HAIR	DATE OF BIRTH	
BRO	BRO	09/04/1988	
DRIVERS LICENSE #		STATE	EXPDATE
01030143		SD	

Distinguishing Features:

CAUTION: Weapon Involved

THE COURT FINDS:

That it has jurisdiction over the parties and subject matter, and the Respondent has been provided with reasonable notice and opportunity to be heard, and that in the case of an ex parte order, the Respondent will be provided with reasonable notice and opportunity to be heard sufficient to protect the Respondent's due process rights.

THE COURT ORDERS:

That the Respondent is restrained from acts of abuse and physical harm, attempted or threatened abuse and physical harm, stalking or harassment.

That the Respondent is restrained from contact with the Petitioner by any direct or indirect means to the extent stated in the following pages.

Additional findings and orders are on the following pages.

This order shall be effective 07/01 2024 through 07/01 2029
Month/Day Year Month/Day Year

Or if a permanent order is issued, until that order is served.

Only this Court can change this order.

VIOLATION OF THIS PROTECTION ORDER IS A CRIMINAL OFFENSE.

WARNING TO RESPONDENT: This order shall be enforced, even without registration, by courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. §2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. §2262).

ADDITIONAL FINDINGS

This matter came before this Court on this day and the following parties appeared personally:

- Petitioner Petitioner's Attorney NELSON, GEORGE J Other
- Respondent Respondent's Attorney NOONEY, JARED D. Other

- 1. This Court **FINDS** that, without admitting to the allegations in the Petition, the Respondent waives further hearing, findings of fact, and conclusions of law, and stipulates to the entry of an Order of Protection on the terms specified below.
- 2. Having considered the evidence presented and any affidavits and pleadings on file, this Court **FINDS**:
 - A. That jurisdiction and venue are properly before this Court;
 - B. That the above-named Petitioner is eligible for a protection order pursuant to SDCL Ch. 25-10.
 - C. By a preponderance of the evidence that "domestic abuse" as defined by SDCL 25-10-1(1) has occurred; and
 - D. That the Respondent had actual notice of the hearing and an opportunity to participate.

ADDITIONAL ORDERS:

- 1) That the Respondent is excluded from the Petitioner's residence listed in 2C.
- 2) That the Respondent shall not come within a distance of 100 Yard(s) from the following persons and places:

A. The Petitioner personally

B. The following minor children named as other protected persons:

Name	Date of birth	Relationship
TOVAR, ISAIAH	<u>02/04/2015</u>	Son
TOVAR, TEYO	<u>02/19/2016</u>	Son

C. The Petitioner's residence

2925 ORCHARD LANE
RAPID CITY SD 57703

D. The Petitioner's place of employment

3234 CALAMITY RD
RAPID CITY SD 57701

E. Other places

3232 DYESS AVE
RAPID CITY SD 57701
519 6TH STREET
RAPID CITY SD 57703
2929 JOLLY LANE
RAPID CITY SD 57703

This distance restriction applies unless otherwise specified in this order.

3) The Petitioner shall have temporary custody of the minor child(ren), whose names are:

4) Temporary visitation for the respondent with the minor child(ren) named above shall consist of:

- Existing order in File # _____
- Supervised at or by _____

Jurisdiction: South Dakota South Dakota tribe Other State Other
 Other Visitation:

5) The Respondent shall pay temporary:

child support in the amount of _____ a month starting on _____
and continuing until further order of the Court;

*Child support shall be paid to: Office of Child Support Enforcement
Kneip Building
700 Governors Drive
Pierre, SD 57501*

spousal support in the amount of _____ a month starting on _____
and continuing until further order of the Court.

Spousal support shall be paid to the Clerk of Courts Office in the county this order was filed.

6) Phone calls, emails, third party contact, including correspondence, direct or indirect, are not permitted,
to a protected person except as follows:

NO EXCEPTIONS

7) The Respondent shall receive parenting classes approved or provided by the Department of Social Services,
pursuant to SDCL 25-10-5, and that a Certificate of Completion of that instruction the parenting classes be
filed by Respondent no later than _____.

8) Respondent is ordered to immediately turn over all weapons and ammunition to local sheriff.

9) Other relief as follows:

WARNING TO RESPONDENT: You can be arrested for violating this protection order even if any person
protected by the order initiates the contact or invites you to violate the order's prohibitions. Only the court
can change the order; the protected person cannot waive any of its provisions. You may also be held in
contempt for ignoring the terms of this protection order.

AND IT IS FURTHER ORDERED THAT: the Petitioner shall, immediately upon the granting of this Order, deliver
two copies of this Order to the sheriff of this county. One copy shall be personally served by the sheriff upon the
Respondent, unless personal service has been acknowledged below.

DATED: 07/01/2024



Service of this order is authorized on any day including Sunday.

[Signature]
JUDGE ERIC KELDERMAN

, Clerk of Courts

By: JSRC10222

, Deputy

**NOTICE OF ENTRY OF ORDER AND
ACKNOWLEDGMENT OF PERSONAL SERVICE**

I acknowledge receipt of a copy of this Order of Protection.

[Signature]
KYLEA WAGNER, Petitioner

Date

[Signature]

RIGO TOVAR, Respondent

7-1-24

Date

UNDER A PERMANENT PROTECTION ORDER: You may be subject to the following federal laws: (1) Effective immediately, you may not possess, carry, ship or transport any firearm or ammunition that has been transported in interstate or foreign commerce while this Protection Order is in effect. Title 18 United States Code Section 922(g)(8). (2) If you violate this Protection Order and are convicted of an offense of domestic violence, you may be forbidden for life from possessing, carrying, shipping or transporting, any firearm or ammunition that has been transported in interstate or foreign commerce. Title 18 United States Code Section 922(g)(9). Violation of these federal laws carries a maximum penalty of ten years in prison, a \$250,000 fine, or both.

FILED
Pennington County, SD
IN CIRCUIT COURT

JUL 01 2024

Amber Watkins, Clerk of Courts

By *[Signature]* Deputy

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

COUNTY OF PENNINGTON)

SEVENTH JUDICIAL CIRCUIT

Hylea Wagner
Petitioner Check here if under 18

TPO NO. 24-321

-vs-

Rigo Tovar
Respondent Check here if under 18

PETITION AND AFFIDAVIT FOR A
PROTECTION ORDER
(DOMESTIC ABUSE)

I, Hylea Wagner & Children the above named Petitioner, or the Parent/Legal Guardian of the minor child Petitioner (the Filer), being duly sworn upon oath, state and affirm the following:

At least one party to the protection order—Petitioner, Respondent (the person against whom I seek this Protection Order), or a Protected Party (a minor child in my custody also victimized by Respondent)—is a resident of South Dakota. Petitioner resides in Penn County, SD (state); Respondent resides in Penn County, SD (state); and any Protected Parties not residing with Petitioner or Respondent, reside in _____ County, _____ (state).

Please check this box if there is a custody order in this state or another state regarding the children of Petitioner and Respondent. Please attach a copy of the custody order to this Petition or provide the county and case number. 51 CIV 18-623

The person I am asking the Court to restrain from committing acts of domestic abuse (the Respondent) is, in relation to the Petitioner and any Protected Parties:

(check all that apply):

- a spouse (married) or a former spouse (divorced);
 in a significant romantic relationship or has recently been in one during the past twelve months;
 has a child or is expecting a child with Petitioner or Protected Parties;
 a parent or child;
 a sibling.

I AM ASKING THE COURT FOR A PROTECTION ORDER BASED UPON THE FACTS BELOW:

On or about (month) May (day) 22, (year) 2024, at approximately 7:45 o'clock am (am/pm), Respondent committed the following act(s) of domestic abuse against Petitioner (if not me, my minor child who is related to Respondent) and any Protected Parties (other minor child in my custody related to Respondent):

(check all that apply):

- Respondent caused physical harm or bodily injury.
 Respondent attempted to cause physical harm or bodily injury.
 Respondent's actions inflicted fear in Petitioner and/or any Protected Parties that Respondent was about to cause physical harm or bodily injury to said Petitioner or Protected Party.
 Respondent violated a protection order.

- Respondent willfully, maliciously, and repeatedly followed Petitioner and/or any Protected Parties.
- Respondent pursued a knowing and willful course of conduct which seriously alarmed, annoyed, or harassed Petitioner and/or any Protected Parties with no legitimate purpose. The pattern of conduct was a series of acts over a period of time, however short, showing a continuing pattern of harassment.
- Respondent made a credible threat with intent to cause Petitioner and/or any Protected Parties reasonable fear of death or great bodily injury.
- The person willfully, maliciously, and repeatedly harassed Petitioner and/or any Protected Parties by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication.
- Respondent committed a crime of violence against Petitioner or any Protected Parties.

Provide a detailed description of what happened on the above date: Please see attached Documents

- | | | | | | | |
|-------------------------------------|-----|-------------------------------------|----|--------------------------|------------|--|
| <input checked="" type="checkbox"/> | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Was law enforcement called? |
| <input type="checkbox"/> | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Was Respondent arrested for this incident? |
| <input type="checkbox"/> | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Is Respondent in jail? |
| <input type="checkbox"/> | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Has Respondent violated previous protection orders? |
| | | | | | | If so, against whom _____ |
| <input type="checkbox"/> | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Has Respondent been found guilty of violating previous protection orders? |
| | | | | | | If so, against whom _____ |
| | | | | | | Give the date of the conviction _____ and the county and state of the conviction _____ |
| <input checked="" type="checkbox"/> | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Does Respondent possess guns or weapons? |
| <input checked="" type="checkbox"/> | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Was a weapon used in this incident? |
| <input checked="" type="checkbox"/> | Yes | <input type="checkbox"/> | No | <input type="checkbox"/> | Don't Know | Has Respondent threatened anyone with a weapon? |

Laser

Provide a detailed description of other similar incidents or actions that Respondent has committed and reasons you believe it will continue: (Please see attached documents)

Check his rap sheet I know he has prior simple Assault on a woman involving Alcohol

Summary of Incidents:

Kylea Wagner respectfully petitions this Court for a Protection Order against the Respondent, Rigo Tovar, based on a series of alarming and threatening incidents. The petitioner asserts that the respondent's actions have created a substantial fear of physical and emotional harm to herself and her minor children, Isaiah and Teyo Tovar. The following narrative details the incidents necessitating this petition.

Incident on December 30, 2023:

On the evening of December 30, 2023, the respondent, Rigo Tovar, had been consuming alcohol. At approximately 8:00 PM, the petitioner was alerted by an alarm indicating that the gun safe was being opened. Upon investigating, Kylea discovered Rigo retrieving an AR-15 rifle and attaching a laser sight to the weapon. Concerned and frightened, she inquired about his intentions. Rigo dismissively responded, "You don't need to worry about it." Disturbed by his behavior, Kylea immediately went upstairs, secured her children in her bedroom, and locked the door, isolating them from any potential harm. Shortly after, Rigo left the house. Kylea then contacted Vanessa Tovar, Rigo's sister, to inform her of the unsettling incident. Vanessa expressed concern for Rigo's well-being. Rigo returned about 30 minutes later and slept in his truck parked in the driveway. Kylea did not see him again until January 2, 2024.

Incident on January 8, 2024:

On January 8, 2024, Rigo locked himself in a bedroom for three consecutive days. During this period, he consumed alcohol continuously and neglected personal hygiene. His reclusive and erratic behavior further heightened Kylea's fear for her family's safety and well-being.

Incident on January 14, 2024:

On January 14, 2024, Rigo arrived home and, in an alarming display, pointed the gun laser through the right front door window at Kylea and their children. He then entered the house, attempting to downplay the incident as a joke. Despite her fear, Kylea and the children left for a basketball game with Rigo. However, his actions left an indelible mark of fear and distress on Kylea and the children, particularly Teyo.

Incident on February 9, 2024:

In the early hours of February 9, 2024, between midnight and 1 AM, Rigo returned home visibly intoxicated, as recorded by the Ring camera. Kylea awoke to find one of their puppies bleeding with a swollen abdomen, evidently from being kicked. This act of violence against a defenseless animal was the final straw for Kylea. She immediately left the house with the children, seeking refuge and safety elsewhere. Since then, Kylea and Rigo have remained separated, and custody litigation has been initiated.

Incident on May 22, 2024:

The final incident occurred on May 22, 2024, in a public park. Rigo charged at Kylea and Isaiah in a physically menacing manner, instilling a profound fear for their safety. This aggressive behavior reinforced Kylea's belief that Rigo poses a significant threat to her and the children.

Request for Protection Order:

Given the series of dangerous and irrational behaviors exhibited by Rigo Tovar, including the use of firearms, excessive alcohol consumption, physical violence, and menacing conduct, Kylea Wagner urgently requests this Court to issue a Protection Order. Additionally, she requests that Rigo undergo an alcohol evaluation and participate in anger-management classes to mitigate the risk of future harm.

Kylea Wagner's primary concern is the safety and well-being of herself and her minor children. The issuance of a Protection Order is imperative to ensure their protection from further harm and to provide a secure environment for their emotional and physical well-being.

The petitioner, Kylea Wagner, has provided a detailed account of the respondent's alarming behavior, substantiating her fear of physical and emotional harm. In light of the incidents described, she respectfully requests the Court to grant her petition for a Protection Order and mandate the necessary evaluations and classes for the respondent to address his destructive behaviors.

Respectfully submitted,

Continued from Page 2

REQUEST FOR HEARING AND PROTECTION ORDER

Based upon this Petition and Affidavit in which I truthfully set forth the details of the domestic abuse, I respectfully ask the Court to set a date to hear this matter and after hearing the evidence, to grant Petitioner and any Protected Parties a Protection Order:

- 1) To Restrain Respondent from acts of abuse and physical harm, making threats of abuse, stalking or harassment.
- 2) To Grant the Protection Order for a period of 5 yrs time (no longer than 5 years).
- 3) To exclude Respondent from Petitioner's residence listed in 4C.
- 4) To Order that Respondent shall not come within a distance of 100 YARDS from the following persons and places:

- A. The Petitioner personally
- B. The following minor children named as other Protected Parties More names attached

Name	Date of birth	Relationship
<u>Isaiah TOVA</u>	<u>02/10/2015</u>	<u>Son</u>
<u>Trey TOVA</u>	<u>02/19/2016</u>	<u>Son</u>

Are any of the children related to the Respondent? If so, how? YES Sons

- C. Petitioner's residence (street/apt) 2925 Orchard Lane
(city) RL, (state) SD, (zip) 5703.
- D. Petitioner's place of employment (street) 3234 Calamity Rd & 3032 Dywst Ave
(city) RL, (state) SD, (zip) 5708.
- E. Other places (street/apt) 517 6th Street
(city) RL, (state) SD, (zip) 5703.
(street/apt) 2929 Jolly Lane
(city) RL, (state) SD, (zip) 5703.
(street/apt) _____
(city) _____, (state) _____, (zip) _____.

- 5) To award me temporary custody of our minor child(ren), whose names are _____
- 6) To establish temporary visitation for Respondent with the minor child(ren) named above consisting of:
 - Existing order in File # _____ Supervised at United Family
 - Jurisdiction: South Dakota South Dakota tribe Other State _____ Other _____
 - Other Visitation: _____

- 7) To Order that Respondent shall pay temporary (If you are requesting support, you must provide proof of the monthly income of both parties at the hearing.):
- child support in the amount of \$ _____ a month starting on _____ and continuing until further order of the Court;
*Child support shall be paid to: Division of Child Support
 Knelp Building
 700 Governors Drive
 Pierre, SD
 57501*
 - spousal support in the amount of \$ _____ a month starting on _____ and continuing until further order of the Court.
Spousal support shall be paid to the Clerk of Courts Office in the county this order was filed.
- 8) To Order Respondent receive parenting classes approved or provided by the Department of Social Services, SDCL 25-10-5.
- 9) To Order Respondent to obtain counseling as follows: Anger Management
Alcohol evaluation & to follow Recommendation
- 10) That Respondent be restrained from contact with the Petitioner and any Protected Parties, by any direct or indirect means except as authorized by a court order.
- 11) To Order other relief which I believe is necessary for Petitioner's protection and any Protected Parties' protection, as follows: _____

(If you are requesting an immediate temporary protection order without notice to Respondent and without an opportunity for Respondent to appear, you must state why you believe Petitioner or any Protected Parties will suffer immediate and irreparable injury or damage if you or they have to wait until the hearing.)

**REQUEST FOR IMMEDIATE PROTECTION ORDER
 WITHOUT NOTICE TO THE OTHER PARTY**

- I am not requesting an immediate Temporary Protection Order.
- In addition to what I have requested in sections 1-10 above, I further request that the Court grant Petitioner and any Protected Parties an immediate Temporary Protection Order restraining Respondent from committing acts of domestic abuse based upon the following sworn statements and beliefs:

The reasons Petitioner and any Protected Parties need this order immediately and cannot wait until the scheduled hearing are:

Due to his Irrationality & Unpredictable
behavior

I believe that Petitioner, and/or any Protected Parties will suffer immediate and irreparable injury, loss or damage if not granted an immediate Temporary Protection Order without notifying Respondent and his/her attorney or giving Respondent an opportunity to be heard. The immediate and irreparable injury, loss or damage that I believe will be suffered is:

Emotional & Physical harm

On this 24 day of May, 2024, I swear or affirm under oath that the information I have provided in this Petition and Affidavit are true and correct to the best of my knowledge. I believe Petitioner and any Protected Parties are entitled to the protection I have requested. I am asking for this protection for valid reasons and am not attempting to harass the person I am seeking protection against and am not attempting to abuse or delay the court process or any other legal action.

Kybra Wagner
Your Signature as Filer Only / Petitioner (check one)

Signed and sworn to before me on this 24 day of May, 2024.

Patricia [Signature]
Notary Public/Deputy Clerk of Courts
Commission Expires:



FILED
Pennington County, SD
IN CIRCUIT COURT

MAY 28 2024
Amber Williams, Clerk of Courts
By [Signature] Deputy



B 008

1:28 52"

4G LTE 29%



Vanessa Tovar
Mobile



12/30/23 11:56 PM

I just checked the gun safe. I think everything is there but I'm not sure because he has bought news ones.

Ya I know he just got a new one a few weeks ago.

12/31/23 12:02 AM

Has he answered you

He didn't answer my call but he text me back.

What's he doing. He won't answer because he is hammered.

*me

He didn't say yet

Well keep talking to him. I'm worried a^t him. Something is not right.



1:28 52°

4G LTE 28%

← **VT** Vanessa Tovar
Mobile



Well keep talking to him. I'm worried about him. Something is not right.

12/31/23 12:21 AM

He just pulled into the driveway.

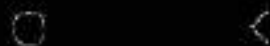
Good.

I'm sure he's upset you told me. You did the right thing Kylea

Did he every talk to you. I texted after I got off the phone with him. Told him I just needed to know the was safe and that it's not cool drinking and driving. He opened it but won't response. I'm just glad he is back in the driveway. Sorry I didn't mean to scare you or anything. I'm just can't handle drinking and driving.

Ya he did respond and I def went off on him a little.

Okay sorry I feel bad like being a snitch or something lol.. but for real at the same He can't do that.



1:28 52°

4G LTE 28%



Vanessa Tovar
Mobile



12/31/23 12:34 AM

Absolutely not. This is fucking ridiculous tbh.

1/6/24 10:16 PM

Someone asked about the puppies. I told her to message you.

You should put your profile to public for a bit so people can message you or share the post

1/9/24 11:15 AM

Okay, sorry I Just seen this message.





Hey have you talked to your brother at he. He has been locked up in the kids bedroom since Friday.. the guys called me asked why rigo didn't come to work today. I told them I had no idea. I'm home now to check on puppies. Stand he is still locked in the room. Like he hasn't showered or even went to the bathroom in three days.

I haven't. I did talk to my parents yesterday though



1:29 52

4G LTE 28%



Vanessa Tovar
 Mobile
 


Like he hasn't showered or even went to the bathroom in three days.

I haven't. I did talk to my parents yesterday though

My mom is leaving for a couple weeks on Wednesday though. If we want to get together and talk to him maybe that would be a good opportunity while she's gone. I told her I didn't think it would be a good idea if she was there cause I know how she is and she can not stay on topic and this is about Rigo. What do you think?

Your mom had suggested maybe a mediator there wouldn't be a bad idea. Idk I guess if you even thing this is a good idea. Clearly each one of up reaching out individually isn't a great idea.

Yes I think that is great.

My parents suggested that sometime away could be an option. Which ya maybe good but def not gonna actually fix anything.

Idk what today Vanessa I really don't. There's nothing more then I ever wanted






1:29 52°

4G 28%



Vanessa Tovar
 Mobile
 


Idk what today Vanessa I really don't. There's nothing more then I ever wanted was a wedding and happy family. But it's to the point where I honestly want to move on but still have a good relationship with rigo where we can still co parent and still do stuff with our kids. I mean it's affecting the kids. Where there telling rigo they hate him. Isaiah snapped on him the other day and was sick of him. It break my heart to now watch my kids express their feelings to him. The kids are at the age where they understand what's going on. Even last week for basketball the kids refused to ride in the same vehicle as rigo. Its heart breaking. But honestly, he is doing him to himself.

To say^

1/8/24 11:36 AM

I think that's what everyone is thinking tbh. My dad pretty much said the same thing. That there is no need to stay together if noone is happy. But I feel like this is def going beyond your guys relationship and like you said it's effecting the kids so if he wants to be a part of there lives there are things that need to change.

What does Vanessa know that I don't?

Everyone wants the best for you guys individually, too. No one is gonna judge you








1:30 52°

4G LTE 28%



Vanessa Tovar
Mobile



I think that's what everyone is thinking tbh. My dad pretty much said the same thing. That there is no need to stay together if noone is happy. But I feel like this is def going beyond your guys relationship and like you said it's effecting the kids so if he wants to be a part of there lives there are things that need to change.

Everyone wants the best for you guys individually, too. No one is gonna judge you for not staying together Kylea. We've already gone through this once and if it does come to it again than hopefully everyone learned for the last time and we can all navigate through it in a healthier way.

Yes, exactly. And I just hope we can all get along still. I don't want lawyers. I don't need visitation, right? I just want everybody to communicate and be a part of their lives. Honestly, our relationship took a big hit back in June. When I caught him having sex with my best friend Brooke in our downstairs bathroom. tried to move on with him. And it just brings more darkness to our lives. I just can't do it anymore. I just want the best for the kids. That's all this comes down to.

Sorry spell check keeps changing my



1:30 52°

4G LTE 28%

← **VT** Vanessa Tovar
Mobile



Ya that makes sense. There is no need to keep dragging this on.

1/8/24 11:49 AM

👍 your right.

1/8/24 1:01 PM

Your mom just called. Said her and your dad are going to the house.

Ya she just called me too

Too

1/8/24 1:29 PM

Well, helpfully, she won't get on my ass for the house being a disaster. 🤔 jk

Lmao. Exact reason I don't like her coming over here

1/8/24 2:22 PM



[Redacted text]



1:31 52°

4G LTE 28%

← **VT** Vanessa Tovar
Mobile



1/8/24 2:22 PM

Haha. Well I was hoping they would be there and gone by the time I got the kids home. Idk if i should stay away from the house for awhile or not.

I know my dad was at work so she had to wait for him to get home.

Oh so it won't be tell after dinner. The boys gave practice at 6 so we will probably be in and out of the house before they get there.

She said they are just getting there.

Oh okay.

1/8/24 4:11 PM

So is rigo staying with your parents or what's going on. They just left and didn't really say anything. I mean they hugged me and said they just didn't say what was going on.

1/8/24 4:43 PM

I haven't heard from them. Did he go with



1:31 52°

4G LTE 28%



Vanessa Tovar
 Mobile
 


I haven't heard from them. Did he go with them?

1/8/24 5:25 PM

Yes he left with them. Hopefully we will stay with them for a couple days. Instead of locking him self up here.

Ya and like I said my mom is leaving Wednesday so it'd just be him and my dad.

I think that will be good for him. Just keep me posted. If I can do anything, let me know.

Sounds good

1/8/24 8:32 PM

Well, that didn't work at all. He should have not came back here. We they talked about made him more of an ass hole. I can't it take anymore. My kids need their room. We need a functional home. Not a parent that acts like this. 🤔

1/8/24 9:10 PM








1:31 52°

4G LTE 28%

← **Vanessa Tovar**
Mobile



like this. 🤔

1/8/24 9:10 PM

Honestly I don't even have any words for you right now. My mom did say they offered for him to stay at the house.

1/8/24 9:43 PM

I'm fine. I'm just over stimulated, I guess, and I totally feel like a failure. Thanks for being supportive. I do want the best. I'm just not perfect. And dont really know how to get through this the best way possible. I don't want rigo and i going separate ways go so badly that it ruins somewhat of a relationship we can have to co parent our children. If that makes any since.

1/15/24 6:49 PM

Was your dad still gonna sit with rigo and talk to him?

1/15/24 6:56 PM

I thought they already did



1/15/24 7:31 PM



4/16/24, 1:33 PM

Screenshot_20240416_133205_Message+.jpg

1:32 52%

4G 28%



Vanessa Tovar
Mobile



I thought they already did

1/15/24 7:31 PM

I thought they were gonna takl after your mom was gone. I know they talked that day when they got him out of the room. I just thought maybe your dad would still talk with him.

I guess it really doesn't matter. it just makes him mad

1/15/24 8:08 PM

I guess I don't really know what they talked about.

Oh... me either. I guess.

No matter what happens between rigo and I. I hope we can keep our relationship open. Especially for the boys. I want you guys to feel welcome to show up for them whenever you want to. Or pick them up after school when you want. We communicate well as far as I know. So no matter what, Im just hoping we can keep that door open.

1/15/24 8:36 PM



1:33 52°

4G LTE 28%



Vanessa Tovar
Mobile



we'll figure it out.

1/15/24 9:36 PM

Agreed

1/16/24 10:51 AM

Just to update on the shit he pulls so your side of the family understands the shit I put up with. The smorning the fridge wasn't working so I woke rigo up and told him. Then I left took the kids to school and came back to see if rigo had looked at the fridge when I got here. He said yup I tried plugging it into a different outlet it doesn't work. So I asked him what are we gonna do. This is what I got he took the gallon milk and the hamburger he bought an left. Said I needed to figure it out. It wasn't his problem. My dad is livid my dad has been looking and working on the fridge for 3 hours. No company in town can come look at the fridge for another week. So now my grandfather has his employees looking into my fridge. My father is pissed my grandfather is pisses and rigo attitude is its not his problem. I don't need a response and I'm sorry to ruin your day. Like I said I'm just saying this stuff as it happens so everyone can understand why I'm leaving rigo. This is not the type on man that ca for his family. And I nor the kids should punished for his uncalled for behavior.



12:16 41°

5G 87%



Rigo Tovar
Mobile



what's yours

12/31/23 12:10 AM

What are you doing? You should not be driving. You know how I am. That's not cool at all.

Hello

I know you're reading my messages.

12/31/23 12:39 AM

Okay

12/31/23 4:08 PM

I'll call you back.

1/2/24 9:48 AM

I can't print the return label for the sheets unless you give me the pw

Okay

Yeah

Wow



← New Conversation

TM Tc Mulloy (M)

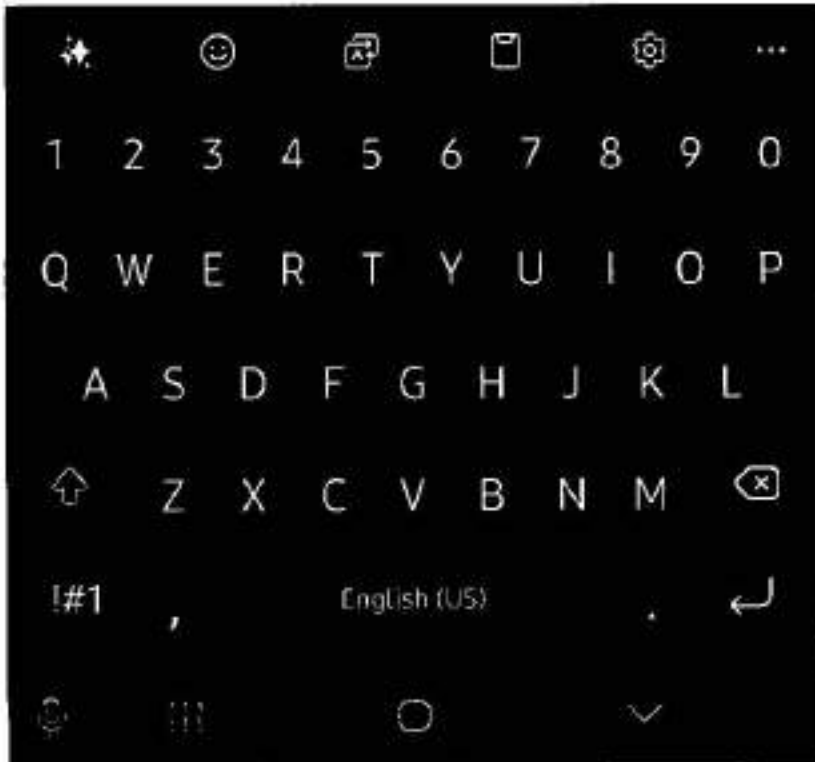


1/15/24 6:46 PM

Would you ever point a red laser on someone for head and think it's funny. After a week ago, that same person got drunk and was think it was funny to play games with AR-15 in your home. Just asking for friend. What your thoughts would be on this.

AR-15

Delivered



DAKOTA HILLS VETERINARY CLINIC

1571 E. HWY 44
 RAPID CITY, SD 57703-2218
 (605) 342-7498

Page 1 / 2

KYLEA WAGNER
 2929 JOLLY LANE
 RAPID CITY, SD 57703

Client ID: 68704
 Invoice #: 634263
 Date: 2/10/2024
 (605) 431-3387
 KYLEA.WAGNER22@GMAIL.COM

Patient ID: 68704-5	Species: CANINE	Weight: 13.60 pounds
Patient Name: BLACK PUPPY	Breed: RETRIEVER GOLD., MIX	Birthday: 12/24/2023 Sex: Male

	Description	Staff Name	Quantity	Total
2/9/2024	Exam Regular	Dr. Jason Shipman, DVM	1.00	\$84.00 T
	IV Catheter SA Placement Long-Term		1.00	\$102.50 T
	Fluids IV		1.00	\$0.00
	Fluids Administration		1.00	\$49.50 T
	Lactated Ringers LRS 1L		1.00	\$11.35 T
	Oral SA Meds		1.00	\$17.00 T
	Biohazardous Waste Disposal		1.00	\$5.25 T
	Panacur suspension per ml		9.00	\$17.25 T
	Metronidazole 100mg/ml (oral)per ml		7.70	\$17.62 T
	Proviabie combo kit (Fel & Sm K-9)		1.00	\$33.80 T
	Fecal Smear and Giardia Test		1.00	\$73.50 T
	Parvo Test SA		1.00	\$93.00 T
	Hosp SA Nursing Care/Overnight		1.00	\$125.50 T
2/10/2024	Daily Patient Assessment		1.00	\$42.00 T
	Fluids Administration		1.00	\$49.50 T
	Oral SA Meds		1.00	\$17.00 T
	Injection SA - Cerenia per ml		0.60	\$45.75 T
	Patient Subtotal:			\$784.52

Patient ID: 68704-4	Species: CANINE	Weight:
Patient Name: GRACE 9 PUPPIES 2023	Breed: RETRIEVER, GOLDEN	Birthday: 12/24/2023 Sex: Other

	Description	Staff Name	Quantity	Total
2/9/2024	Exam Regular	Dr. Jason Shipman, DVM	1.00	\$84.00 T
	Proviabie - Forte Caps 45ct		1.00	\$47.25 T
	Metronidazole 100mg/ml (oral)per ml		60.00	\$35.40 T
	Panacur suspension per ml		85.00	\$36.25 T
	Fluids SQ		1.00	\$58.50 T
	Lactated Ringers LRS 1L		1.00	\$11.35 T
	IV Admin Sets 103" Long Zoetis		1.00	\$6.46 T
	Needle 18g x 3/4" (100ct) per needle		7.00	\$2.87 T
	Patient Subtotal:			\$282.08

Instructions

Your pet was given fluid therapy under the skin. You will notice a swelling where the fluids were administered. This swelling will gradually subside as the fluids are absorbed into the body.

CHECK OUT OUR WEBSITE: www.dakotahillsveterinary.com
 Find information on your pets' health, nutrition, behavior, breed. You can also like Dakota Hills Veterinary Clinic on Facebook for interesting, fun facts and to keep up with our news!
 To contact us after regular business, please call (605) 342-7498.

DAKOTA HILLS VETERINARY CLINIC

1571 E. HWY 44
RAPID CITY, SD 57703-2218
(605) 342-7498

Page 2 / 2

KYLEA WAGNER
2929 JOLLY LANE
RAPID CITY, SD 57703

Client ID: 68704
Invoice #: 634263
Date: 2/10/2024
(605) 431-3387
KYLEA.WAGNER22@GMAIL.COM

Invoice Total:	\$1,066.60
SALES TAX 6.2% :	\$66.14
Total:	<u>\$1,132.74</u>
Invoice Balance Due:	<u>\$1,132.74</u>
Check Check # 5981:	<u>(\$532.74)</u>
Less Payment:	<u>(\$532.74)</u>
Invoice Balance Due:	<u>\$600.00</u>
Balance Due:	\$0.00

CHECK OUT OUR WEBSITE: www.dakotahillsveterinary.com
Find information on your pets' health, nutrition, behavior, breed. You can also like Dakota Hills Veterinary Clinic on Facebook for interesting, fun facts and to keep up with our news!
To contact us after regular business, please call (605) 342-7498.

1 STATE OF SOUTH DAKOTA }
2 COUNTY OF PENNINGTON }

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

4 _____)
5 **KYLEA M. WAGNER,**)
6 Petitioner,)
7 vs.)
8 **RIGO B. TOVAR,**)
9 Respondent.)

51TPO24-321
TPO-Permanent Protection
Order Hearing

11 BEFORE: **THE HONORABLE ERIC D. KELDERMAN**
12 Circuit Court Judge
13 Rapid City, South Dakota
14 July 1, 2024, at 1:00 p.m.

15 APPEARANCES:

16 For the Petitioner: **MR. GEORGE J. NELSON**
17 George J. Nelson Law Office
18 2640 Jackson Boulevard
19 Suite 1
20 Rapid City, SD 57702

21 For the Respondent: **MR. JARED D. NOONEY**
22 Nooney & Solay
23 326 Founders Park Drive
24 Rapid City, SD 57701

I N D E X

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For the Respondent:		
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EXHIBIT 115 - Photo of text messages (marked on Page 98)		

1 (WHEREUPON, the following proceedings were duly
2 had:)

3 **THE COURT:** Good afternoon, everyone. We're here this
4 afternoon for a hearing on a petition -- a motion for a
5 protection order. The matter is Kylea Wagner versus
6 Rigo Tovar, Case Number 51TPO24-321.

7 Counsel, would you note your appearances for the
8 record, please.

9 **MR. NELSON:** Yes, Your Honor. George Nelson on behalf of
10 the Petitioner Kylea Wagner.

11 **THE COURT:** Thank you.

12 **MR. NOONEY:** Good afternoon, Your Honor. Jared Nooney on
13 behalf of the Respondent Rigo Tovar.

14 **THE COURT:** Good afternoon.

15 It appears that the parties are present and there are
16 a number of individuals in the crowd. We will address that
17 in just a moment.

18 This might seem like a fairly clear answer here, but
19 I'm going to ask, Mr. Nelson, does the Petitioner still
20 want to proceed with this hearing?

21 **MR. NELSON:** Yes, Your Honor.

22 **THE COURT:** And, Mr. Nooney, on behalf of Mr. Tovar, the
23 Respondent is able to consent or waive the hearing and
24 allow a permanent protection order to be put in place
25 without having any findings being made in case that might

1 affect any other proceedings down the road. Is that
2 anything that's an option or anything that you wish to
3 speak with your client about?

4 **MR. NOONEY:** No, Your Honor. We have spoken about that and
5 the Respondent would like to proceed today with the
6 evidentiary hearing. Thank you.

7 **THE COURT:** Ms. Johnson, I forgot to turn the microphones
8 on. Now they're on. Now we can all hear each other just a
9 little better.

10 Mr. Nooney, do you agree that your client has been
11 served and, obviously, he's here, he's served and
12 everything is proper; we can proceed today?

13 **MR. NOONEY:** Yes, Your Honor. There's no argument as it
14 concerns service.

15 **THE COURT:** Very well.

16 Is -- we're going to be just addressing what's
17 relevant to this petition today, but I do want to ask the
18 parties -- I just became aware this morning of an order for
19 mediation and custody evaluation that was entered last
20 week. It appears that there was perhaps a hearing on this
21 in a different civil matter, 2018 case, and it appears that
22 you may have had a hearing in May in front of Judge Wipf
23 Pfeifle on that matter and I think she just entered an
24 order last week on that matter.

25 Is that correct from everyone's perspective?

1 MR. NELSON: Yes, Your Honor. And the parties have
2 mediated.

3 THE COURT: They have. You have mediated so that is
4 complete.

5 MR. NELSON: Yes, Your Honor.

6 THE COURT: Do you agree, Mr. Nooney?

7 MR. NOONEY: Yes, Your Honor.

8 THE COURT: All right.

9 MR. NOONEY: That's a fair representation by --

10 THE COURT: So here we are -- I'm sorry. I interrupted.

11 MR. NOONEY: Sorry. That's a fair representation by
12 Mr. Nelson.

13 THE COURT: All right. So the findings I make today
14 regardless of whether they affect this other matter, I
15 guess, I'm going to leave that to the two attorneys and the
16 two of you can figure out where things land at the
17 conclusion of this hearing based on the findings that I
18 make. Is everyone clear that that might be what happens
19 here?

20 MR. NELSON: Yes, Your Honor.

21 MR. NOONEY: Yes, Your Honor.

22 THE COURT: All right. Mr. Nelson, I'm going to ask just
23 for a brief opening statement. It doesn't have to be
24 anything lengthy. I would just like to know where we're
25 headed here.

1 Is there anything else I need to address first?

2 **THE CLERK:** (Shakes head.)

3 **THE COURT:** Okay. Mr. Nelson, if you wouldn't mind, just
4 tell me where we're headed today, will you please.

5 **MR. NELSON:** Yes, Your Honor.

6 Your Honor, I intend to present witnesses.

7 **THE COURT:** Could you get that microphone just a little
8 closer to your mouth, please.

9 **MR. NELSON:** Sure.

10 **THE COURT:** You may remain seated too.

11 **MR. NELSON:** I intend to present witnesses, my client and
12 her parents, to provide the Court with background
13 information in regards to the parties. My client
14 petitioned the Court for a protective order due to the
15 threatening behavior of Mr. Tovar, who is the father of the
16 parties' two minor children. And the behavior has extended
17 over not only to my client, but, also, there's behavior
18 that I think my client has found threatening, harmful to
19 the children, and that's why they're also interested
20 parties or she's here on their behalf.

21 We believe that the preponderance of the evidence by
22 my client will establish to the Court that this behavior,
23 this threatening behavior, threatening towards my client,
24 that involves physical conduct or contact would meet the
25 muster test for this Court to issue a protective order.

1 **THE COURT:** Thank you.

2 Mr. Nooney?

3 **MR. NOONEY:** Thank you, Your Honor.

4 Your Honor, by no way am I trying to underplay a
5 protection order matter because there are circumstances and
6 facts that protection orders matters are very relevant and
7 victims need to have protections. But, Your Honor, the
8 evidence is going to show that the protection order was
9 merely filed to allow Ms. Wagner back in a residence that
10 is mutually owned by Ms. Wagner and Mr. Tovar as well as to
11 alienate the children from my client.

12 As the Court previously noted, there's a civil file,
13 CIV18-623, which is a paternity matter. Your Honor, that,
14 of course, will speak for itself, but so the Court kind of
15 understands, things essentially transpired and led to this
16 after my client filed a verified motion for change of
17 custody on or about March 22nd of 2024.

18 As the South Dakota Supreme Court has established and
19 stated in *Batchelder, B-A-T-C-H-E-L-D-E-R*, 965 N.W.2d 880,
20 a high conflict relationship between the parties does not
21 amount to a Court granting a protection order matter. As
22 Mr. Nelson has already indicated, Your Honor, pursuant to
23 SDCL 25-10-5, the Court must find by a preponderance of the
24 evidence that domestic abuse has taken place or essentially
25 that there's imminent fear of harm.

1 The Supreme Court in *Trumm, T-R-U-M-M, versus Cleaver,*
2 *C-L-E-A-V-E-R, 841 N.W.2d 22* stated, *A Circuit Court may*
3 *grant a domestic abuse protection order if it finds by a*
4 *preponderance of the evidence that domestic abuse has*
5 *taken place. And that, Your Honor, is the Court citing*
6 *SDCL 25-10-58 and, as the evidence will show, we do not*
7 *believe that the Petitioner will establish that burden,*
8 *Your Honor. Thank you.*

9 **THE COURT:** Will you give me the name of that first
10 citation that you gave, the 965 N.W.2d.

11 **MR. NOONEY:** Yes, Your Honor. It's *Batchelder, B-A-T --*

12 **THE COURT:** Thank you.

13 **MR. NOONEY:** --*C-H-E-L-D-E-R, versus Batchelder,*
14 *965 N.W.2d 880.*

15 **THE COURT:** Thank you.

16 And just so everyone is aware, I have read the
17 Petition and Affidavit for a Protection Order that was
18 filed May 28 -- I'm sorry, signed on May 24, looks like it
19 was filed on May 28 of this year. I've read all the
20 allegations and the information contained in that document
21 as well as the related documents in this matter.

22 Simply for -- simply for the purposes of focusing on
23 where we are headed, is there any dispute that the parties
24 were in a significant domestic relationship?

25 **MR. NELSON:** No, Your Honor.

1 **THE COURT:** Any dispute to that in this hearing?

2 **MR. NOONEY:** No, Your Honor.

3 **THE COURT:** Is there any dispute as to the venue and that
4 it's proper in Pennington County in Rapid City,
5 South Dakota?

6 **MR. NELSON:** No, Your Honor.

7 **MR. NOONEY:** No dispute as concerns venue, Your Honor.

8 **THE COURT:** Well, then let's proceed. Mr. Nelson, I
9 believe the burden is on you to prove by a preponderance of
10 the evidence all the elements that include whether domestic
11 abuse occurred as defined in your -- under SDCL 25-10-1.
12 So I turn to you.

13 **MR. NELSON:** Yes, Your Honor.

14 As I stated earlier, I do have a couple other
15 witnesses. I'm not sure if Mr. Nooney has witnesses.
16 Perhaps they should be sequestered. I would move the Court
17 for sequestration.

18 **THE COURT:** I will grant that and order that all witnesses
19 that are going to testify in this matter will be
20 sequestered. That is going to be applicable to both
21 parties. So if you've got people here that are going to
22 testify, I ask you to have them step out of the room. They
23 will not be allowed to testify if they are in here during
24 the rest of the testimony.

25 (Individuals left the courtroom.)

1 **MR. NOONEY:** Your Honor, if I may, this is Kate Anderson.
2 She's our intern so she is just, of course, observing today
3 just so the Court is aware who is behind me.

4 **THE COURT:** Welcome to the Seventh Circuit, Ms. Anderson.

5 Just so the -- just so I'm clear, if these individuals
6 that stepped outside, after they're finished testifying,
7 they may stay in the hearing for the rest of the time.
8 They won't be allowed to testify again if they do come back
9 in, but I just wanted to make sure I was clear on that.

10 Mr. Nelson, please proceed.

11 **MR. NELSON:** Thank you, Your Honor.

12 I'd call Kylea Wagner.

13 **THE COURT:** Ms. Wagner, will you come up and be sworn.

14 **KYLEA WAGNER,**

15 called as a witness, being first duly sworn, testified as
16 follows:

17 **THE COURT:** Is the green light on on that microphone?

18 **THE WITNESS:** Yes, it is.

19 **THE COURT:** Thank you.

20 **MR. NELSON:** May I proceed?

21 **THE COURT:** Mr. Nelson.

22 **DIRECT EXAMINATION**

23 **Q (BY MR. NELSON)** Please state your name, and spell your
24 first and last name.

25 **A** My name is Kylea Mariah Wagner, K-Y-L-E-A W-A-G-N-E-R.

1 **Q** And where do you reside?

2 **A** I reside at 2925 Orchard Lane as well as 2929 Jolly Lane
3 during this time.

4 **MR. NELSON:** Your Honor, may I approach the witness?

5 **THE COURT:** You may. And the attorneys may approach freely
6 without asking permission.

7 **Q (BY MR. NELSON)** Ms. Wagner, I'm going to hand to you
8 what's been marked as Exhibit 1.

9 **A** Okay.

10 **Q** Do you recognize that picture?

11 **A** Yes. This is my home.

12 **Q** And is that address 2925 Orchard Lane, Rapid City,
13 South Dakota?

14 **A** Correct.

15 **Q** Okay. When you say *This is my home*, who else resides
16 there?

17 **A** Isaiah and Teyo Tovar. And Rigo did in the past.

18 **THE COURT:** Mr. Nelson, I hate to interrupt. I want to
19 clarify because I know I'll forget. It says 2921 Orchard
20 Lane at the top of that. Is that where the photo perhaps
21 is being taken from?

22 **THE WITNESS:** Yes. Those are the neighbors. The --
23 there's kind of several trailers that -- we own the road,
24 but the houses are kind of --

25 **THE COURT:** I just wanted to be clear.

1 **THE WITNESS:** Yes.

2 **THE COURT:** Thank you. Please proceed.

3 **Q (BY MR. NELSON)** And for clarification, you didn't take
4 this picture, did you?

5 **A** I did not.

6 **Q** This is a Google Map picture. Would you agree?

7 **A** Correct.

8 **Q** And being Google Map, you -- sometimes you can't go all the
9 way to the end of the street.

10 **A** Correct.

11 **Q** But this -- the maroon house in Exhibit 1 is your
12 residence?

13 **A** Yes.

14 **MR. NELSON:** I'd offer Exhibit 1.

15 **THE COURT:** Any objection?

16 **MR. NOONEY:** No objection, Your Honor.

17 **THE COURT:** It's -- Exhibit 1 is received.

18 **Q (BY MR. NELSON)** Kylea, how old are you?

19 **A** 31.

20 **Q** And how long have you known Rigo Tovar?

21 **A** I met Rigo in August of 2013.

22 **Q** Are you married?

23 **A** No.

24 **Q** Were you guys divorced?

25 **A** No.

1 Q Are you separated?

2 A Yes.

3 Q All right. So you had an intimate relationship --

4 A Yes.

5 Q -- correct?

6 When did that begin?

7 A It began in August of 2013.

8 Q How would you describe the nature of your relationship with
9 Rigo?

10 A At first he was a dream come true. It was beautiful. I
11 believed there was marriage in the future and a beautiful
12 family. Once I got pregnant with our firstborn child,
13 Isaiah, he became a different person. Very distant. Very
14 unpredictable. Alone -- I was alone all the time with the
15 children. I never knew where we stood as a family.

16 Q You've sought a protective order in this matter, correct?

17 A Yes, I did.

18 Q And I'm going to hand to you what's been marked as
19 Exhibit 2.

20 Do you recognize Exhibit 2?

21 A Yes, I do.

22 Q And does Exhibit 2 reflect your petition for the protective
23 order?

24 A Yes, it does.

25 Q The statements that you made in Exhibit 2, do you reaffirm

1 those here today under oath?

2 **A** Yes, I will.

3 **MR. NELSON:** Your Honor, I'd ask the Court to take,
4 obviously, judicial notice of the petition and the exhibits
5 that were originally filed with the exhibit.

6 **THE COURT:** Any objection to that?

7 **MR. NOONEY:** No objection, Your Honor, providing they've
8 already been filed, I think are part of the court record so
9 I'm not going to object to that. Thank you.

10 **THE COURT:** Mr. Nelson, is this -- this is the same
11 document that was filed that we -- that I referred to
12 earlier?

13 **MR. NELSON:** Your Honor, it is.

14 **THE COURT:** Except it doesn't have the -- I'm sorry. I
15 shouldn't have interrupted. It doesn't have the text
16 messages and those things attached to it, but otherwise
17 it's the same?

18 **MR. NELSON:** Correct.

19 **THE COURT:** All right. Hearing no objection, the Court
20 will accept Exhibit 2. It's received.

21 **Q (BY MR. NELSON)** Kylea, did you describe the specific
22 instances that have occurred that have prompted you to seek
23 this protective order?

24 **A** I've -- throughout the years, Rigo has physically threw me
25 up against a wall and pinned me up against the wall in our

1 laundry room as well as a year or so later pinned me up
2 against our bed to where I could not breathe, where I had
3 to slide off of our bed to gain oxygen. During these
4 times, if I confronted him, it was always my fault for his
5 actions that he took, which proceeded me to be in fear of
6 the unpredictable behavior that occurred throughout the
7 many years.

8 Going to the most recent events was, it started off
9 with finding Rigo having sexual intercourse with a female
10 in my house. I tried to seek help mutually between the
11 both of us to seek counsel and try to figure out how to
12 communicate with each other. He was always distant and
13 would never conversate, which proceeded to around October
14 Rigo started sleeping in our children's bedroom and coming
15 home drunk almost all the time.

16 **Q** All right. I'm going to interrupt you. I'm sorry. But
17 just for the purpose of providing the Court with some
18 context chronologically --

19 **A** Uh-huh.

20 **Q** -- your relationship started in 2013?

21 **A** Yes.

22 **Q** And did you initially cohabitate together?

23 **A** Yes, we did.

24 **Q** For how long?

25 **A** I believe I moved in with Rigo around November, December of

1 2013 at 4100 Augusta Drive.

2 **Q** And how long was that -- did that cohabitation last?

3 **A** It lasted until the hearings of 2018.

4 **Q** And that was in the civil file for the custody
5 and parenting time, correct?

6 **A** Correct.

7 **Q** Thereafter was there physical separation?

8 **A** Yes. We separated at that point. I moved back home with
9 my parents for a while. They were in an apartment so I
10 ended up residing at my grandparents' house.

11 **Q** Did there come a time where you and Rigo reconciled and
12 then started cohabiting again?

13 **A** Correct.

14 **Q** When did that start?

15 **A** It started Memorial Day of 2019.

16 **Q** Why did you?

17 **A** It was my holiday with the children. Rigo reached out to
18 me to ask if I was at work and, if I was, if he could see
19 the children. I was not at work that day so I proceeded to
20 tell him that the children and I were on our way out the
21 door to have lunch and we were going to the Air Force Base
22 to go see the airplane museum and I invited him along.

23 **Q** And then you reconnected then?

24 **A** Correct.

25 **Q** And you decided to live together again?

1 **A** We did towards the end of that year.

2 **Q** All right. And how long did that last?

3 **A** Until February of 2024.

4 **Q** So from 20 -- or, what, January of 2020 to February of
5 2024, can we talk about any instances that you feel were
6 abusive and that, I think, you previously referenced. If
7 you could put those into context as to when they may have
8 occurred.

9 **A** The first incident that I was speaking about happened
10 within the first year of Rigo and I coinciding together.
11 We had a argument. I do not remember what the argument
12 was about, but he was angry and pushed me up against our
13 room [sic] in our laundry room and pinned me back with his
14 forearm against my neck.

15 **Q** Okay. When was the next incident?

16 **A** The next incident was about a year later, roughly a year.

17 **Q** What do you recall about that?

18 **A** I recall it was sometime during COVID time period, where
19 he -- it was another argument we were having, where he
20 pinned me up against the bed, was on top of me, where I
21 could not breathe or move to where I started tunnel vision
22 and trying to fight for air, where I pushed myself off the
23 bed and which gave me an opportunity to breathe.

24 **Q** Did -- were either of those incidents reported to law
25 enforcement?

1 **A** No, they were not. They were just discussed with my
2 parents.

3 **Q** Okay. Was there another incident after the second one?

4 **A** No.

5 **Q** You talked about December 30th of 2023. What happened on
6 that day or night?

7 **A** During the day was a New Year's Eve basketball tournament
8 up in Spearfish. Rigo and I were not talking for quite
9 some while and there was arguments where the children
10 begged to not be in a vehicle with Rigo, so we took two
11 separate vehicles to Spearfish for a basketball tournament.
12 On the way home the children in the parking lot refused to
13 get into his vehicle so one got in my dad's and one got in
14 with me. We went to Taco John's that night and came home.

15 When we came home, we came in to Rigo sitting in his
16 chair in the living room drinking Fireball shooters and
17 beer. I tried to just ignore the fact of what he was
18 doing. We weren't speaking to each other. The children
19 wanted to watch a movie that night so we were going to
20 watch a movie, but Rigo was angry because there was a fight
21 that was going to happen, a WWE fight, or boxing, I'm not
22 sure, but he wanted the TV. This started an argument so
23 Rigo proceeded to go back to the back room, which is where
24 our gun safe is. I heard the tones of the beeping to
25 unlock the safe so I walked back there to see what was

1 going on and I witnessed Rigo putting a -- opening a box of
2 a sight laser to be mounted onto an AR-15.

3 When I asked him what he was doing, I told him that
4 this was unnecessary, because he was angry and drinking
5 alcohol, that I told him that it was scaring me and I would
6 like him to put it away, and he turned back around and told
7 me it was none of my business and I needed to leave the
8 room.

9 **Q** All right. I'm just going to interrupt you there and hand
10 to you what's been marked as Exhibit 8. Do you recognize
11 Exhibit 8?

12 **A** Yes, I do.

13 **Q** How do you recognize that?

14 **A** This is the gun safe that was in my home.

15 **Q** Okay. And where is it located in the house?

16 **A** It is in the back east corner of the house inside the
17 mudroom.

18 **Q** You stated when you heard the beeping sound, is that the
19 beeping sound emitted from the keyboard on the safe?

20 **A** Yes.

21 **Q** And in Exhibit --

22 **MR. NELSON:** Well, I'd offer Exhibit 8.

23 **THE COURT:** Any objection?

24 **MR. NOONEY:** No objection, Your Honor.

25 **THE COURT:** Exhibit 8 is received.

1 **Q** (BY MR. NELSON) In Exhibit 8 there appear to be gun cases
2 to the right of the safe; is that accurate?

3 **A** Correct.

4 **Q** What are those gun cases for?

5 **A** One of them is for a shotgun, I believe. The smaller
6 shorter one is the rifle. And there's another one that you
7 cannot see there.

8 **Q** When you say "rifle," are you talking about the AR-15?

9 **A** Correct.

10 **Q** And I'm going to hand to you Exhibit 7. Do you recognize
11 Exhibit 7?

12 **A** Yes, I do.

13 **Q** And how do you recognize that?

14 **A** This is the rifle that I witnessed Rigo putting the mount
15 onto.

16 **Q** All right. This -- well, this appears to be a manual.

17 **A** It is a manual.

18 **Q** Is it the manual for the rifle?

19 **A** So the -- yes, the manual. Yes. Yes. It's the paper that
20 was inside the gun -- the case.

21 **Q** Okay. Do you have access to the gun safe?

22 **A** No longer I do not. I do not no longer, sorry.

23 **Q** Do you know where the AR-15 is?

24 **A** I do not. I suspect that it is inside that safe. I'm not
25 100 percent sure.

1 **Q** All right. But Exhibit 7, does that depict a gun that you
2 believe is very similar to what is exactly owned by Rigo,
3 the AR-15?

4 **A** Correct.

5 **MR. NELSON:** I'd offer Exhibit 7.

6 **THE COURT:** Any objection?

7 **MR. NOONEY:** No objection, Your Honor. Just, I guess,
8 based on the context that it, in fact, is not the rifle,
9 but that it is an owner's manual identifying multiple
10 Daniel Defense AR-15s.

11 **THE COURT:** Mr. Nelson, I have this?

12 **MR. NELSON:** Yes.

13 **THE COURT:** I couldn't -- so we're clear, it's just -- it's
14 not in color. I saw that there the actual exhibit is in
15 color. It was just a manual. It's not a photograph of a
16 firearm; is that correct?

17 **MR. NELSON:** That's correct.

18 **THE COURT:** Okay. Exhibit 7 is received.

19 **Q (BY MR. NELSON)** All right. We were talking about the
20 incident on December 30th of 2023 and how did that evening
21 end? If you could describe to the Court.

22 **A** After Rigo made his comment, I shut the door. I went and
23 grabbed the children, was trying not to scare them of the
24 situation. We went to my bedroom and locked the door. I
25 turned the TV on and turned on a movie, and I went into my

1 bathroom to call my dad. I proceeded to tell my dad that I
2 was scared and not just for myself, but I was also scared
3 that Rigo may have hurt himself or may well hurt himself
4 with the anger that he has had for the past few months. My
5 dad wanted me to pack my bags and leave the house
6 immediately. I refused to do so because I did not want to
7 scare the children and alert them of what was happening.
8 And so my dad proceeded to come to the house.

9 During this phone call, the doorbell Ring camera
10 alerted me that Rigo was leaving the property so I told my
11 dad that he was drunk and should not be driving, and I was
12 scared for his personal well-being. My dad did want to
13 call the officers, but I explained to him that I wanted him
14 to come over to us first and assess the situation of just
15 scared and really not knowing what to do, more or less,
16 because I was scared to alert the children.

17 **Q** All right. Back up a little bit in regards to the comments
18 made by Mr. Tovar that scared you. Can you be specific?
19 What do you recall?

20 **A** When I proceeded to ask him what he was doing, he told me
21 that it was none of my business, that I needed to leave the
22 room.

23 **Q** And he was in the gun safe room?

24 **A** Yes, he was.

25 **Q** Did he have in his hand any of the weapons?

1 **A** He had the rifle in his hands proceeding to mount a laser
2 onto it.

3 **Q** Did he say what he was going to do with the weapon?

4 **A** No, he did not.

5 **Q** When you described him as having had alcoholic beverages,
6 how did you know that?

7 **A** When I came home, I seen three double shots of Fireball in
8 the cupholder of the chair as well as an open beer.

9 **Q** Up to that point, had you witnessed him drink alcohol
10 before?

11 **A** Yes.

12 **Q** How frequently?

13 **MR. NOONEY:** Objection; irrelevant, Your Honor. It has no
14 bearing to the petition that is sought.

15 **THE COURT:** I'll overrule it for now.

16 **Q (BY MR. NELSON)** The question --

17 **A** Do I answer?

18 **Q** Go ahead and answer.

19 **A** In this time period from October to December, it was almost
20 a nightly thing.

21 **Q** And his behavior would change after drinking?

22 **A** Correct.

23 **Q** Do you think he was intoxicated that night?

24 **A** Yes, I do.

25 **Q** And was there ammunition in the house?

1 **A** Yes.

2 **Q** To your knowledge, were the weapons operable?

3 **A** Yes.

4 **Q** What other weapons were in the house at the time?

5 **A** I'm unaware of the new weapons. During this time period,
6 Rigo was purchasing new weapons consistently behind my
7 back. They were secret.

8 **Q** Are you aware of any other weapons to this date?

9 **A** I am not aware of no new weapons, no.

10 **Q** You stated that he at times has a concealed weapon?

11 **A** Yes. He carries a concealed weapon in his front right side
12 of his pocket.

13 **Q** Why?

14 **MR. NOONEY:** Objection, Your Honor; irrelevance. My client
15 lawfully contains --

16 **THE COURT:** Sustained.

17 **MR. NOONEY:** Okay.

18 **A** Do I answer?

19 **Q (BY MR. NELSON)** Correct.

20 **A** I do?

21 **Q** What -- no.

22 **A** I'm sorry.

23 **Q** Let me ask a question first.

24 **A** Okay.

25 **Q** All right. So you saw Rigo in the gun safe room. You left

1 that room and you went into the bedroom with the children.

2 **A** I did, yes.

3 **Q** And you called your father, correct?

4 **A** Correct.

5 **Q** I believe you stated that Rigo left the premises?

6 **A** Yes. According to the -- I witnessed him leave with the
7 doorbell camera.

8 **Q** And where did you go -- where did you see him go?

9 **A** I just seen him get into his truck and drive down the
10 driveway.

11 **Q** And so in Exhibit 1, it shows the exterior of your
12 residence and there appears to be a car near the front
13 door. Is that where you or Rigo would typically park?

14 **A** Yes. Where his -- on the right-hand side of the picture,
15 you can see the front end of his truck right there. That's
16 where Rigo parks his truck. He got into his truck there
17 and drove down the driveway.

18 **Q** Okay. There appears to be a vehicle with a white front
19 end. Is that the truck?

20 **A** Correct.

21 **Q** Did you see him again that evening?

22 **A** No, I did not.

23 **Q** How long did you and the kids stay in your room?

24 **A** For the rest of the night.

25 **Q** To your knowledge, he never came back?

1 **A** He came back to the property and stayed in his truck with
2 my dad. He -- him and my dad talked that night. I'm not
3 sure if it was in the driveway or where they met, but my
4 dad proceeded to tell me that everything was okay and that
5 I needed to go to sleep with the children. I went to
6 sleep; I did not see him again. I just know he was there
7 in the driveway in his truck.

8 **Q** And to make sure I don't misstate your testimony, but did
9 you indicate that Rigo had expressed himself in a manner
10 that you thought he was thinking about harming himself?

11 **A** I did.

12 **MR. NOONEY:** Objection; calls for speculation.

13 **THE COURT:** It does. That's sustained.

14 You may rephrase.

15 **Q (BY MR. NELSON)** I believe you had prior testimony in
16 regards to what you thought about Rigo's intent about the
17 guns and himself, correct?

18 **A** Correct.

19 **Q** What did he -- has he ever expressed to you in the past an
20 idea of harming himself?

21 **A** He has not to me specifically; to my mother that informed
22 me that he's expressed suicidal thoughts.

23 **MR. NOONEY:** Objection; hearsay.

24 **THE COURT:** Overruled.

25 **Q (BY MR. NELSON)** When did -- so you didn't see Rigo until

1 the next morning?

2 **A** I did not. I seen him the 3rd. It was a day or two later
3 that I seen him physically.

4 **Q** Do you know where he went?

5 **A** I do not.

6 **Q** Was there an incident on January 8, 2024?

7 **A** Yes.

8 **Q** What happened on that day?

9 **A** January 6th, 7th, and 8th, Friday, that Friday evening,
10 Rigo came home late at night drinking. He just went
11 straight to the children's room, locked himself up there.
12 I did not see him for the entire weekend.

13 Monday I was at work and a co-worker contacted me and
14 asked me where the whereabouts of Rigo was. I proceeded to
15 tell him that I was on my way home to go check on the
16 puppies. The -- we had nine puppies at the house. I was
17 on my way there. I went upstairs to the bedroom to find
18 Rigo sleeping with somewhere around 10 to 15 open beer
19 bottles and a bottle of insomnia sleep pills that were
20 opened and empty.

21 **Q** Did the two of you -- were you working together at the
22 time?

23 **A** We both work for my father's company, G&J Asphalt Company.
24 We work in two different departments, but my department
25 coincides with all departments in the business. So I don't

1 physically work on his crew, but I do have to consistently
2 show up there almost on a daily matter.

3 **Q** All right. So when you saw him on this date -- this again
4 was January 8th; is that correct? Or earlier?

5 **A** That Monday. If January 8th is a Monday.

6 **Q** All right. He was incapacitated?

7 **MR. NOONEY:** Objection; irrelevance, Your Honor.

8 **THE COURT:** Overruled.

9 **A** He was sleeping.

10 **Q (BY MR. NELSON)** Okay. Did you wake him up?

11 **A** I did. It took me multiple times to wake him up.

12 **Q** What happened?

13 **A** He was angry. He was mad.

14 **Q** About what?

15 **A** That I was in his business. That I was in there. I needed
16 to stay away from him.

17 **Q** So he didn't like you in the room?

18 **A** He did not.

19 **Q** Was he supposed to work that day?

20 **A** He was.

21 **Q** And were others concerned about him?

22 **A** Yes.

23 **Q** What time of the day was this when you saw him in the room?

24 **A** It was about lunchtime.

25 **Q** And did you leave the room?

1 **A** I did.

2 **Q** What happened next?

3 **A** I called my co-worker that was waiting for him and told him
4 that Rigo was here and that he would not be at work today.
5 And then I contacted his sister Vanessa for help.

6 **Q** Why?

7 **A** Because she was my mutual person between him and his
8 parents during the matter of January as well the
9 January 30th -- or the December 30th incident. She was
10 aware of all these incidents and she was that person that I
11 reached to to seek out for help.

12 **Q** Did she try to assist?

13 **A** She did. She contacted her parents to come get Rigo from
14 the house.

15 **Q** And did you witness that?

16 **A** I did.

17 **Q** About what time of the day was that?

18 **A** They came to my house approximately 4:00-ish. And Vanessa
19 was not with him; it was just his mom and dad.

20 **Q** Before I forget, when you say my house, who owns the house?

21 **A** Rigo and I do together.

22 **Q** Who is in the house at this time?

23 **A** Just myself and Rigo and his parents.

24 **Q** Okay. I'm sorry about that question. I'm trying to put it
25 into context.

1 Are you and the children residing in that house at
2 this time?

3 **A** Yes. Yes.

4 **Q** All right. So his parents came to assist?

5 **A** Uh-huh.

6 **Q** Is that a yes?

7 **A** Yes. Sorry.

8 **Q** Any other contact with him that day?

9 **A** That evening he came home more angry.

10 **Q** How did he display that?

11 **A** He, basically, questioned me on why did I contact his
12 parents and he was angry that I reached out for help and
13 that it was nobody else's business but mine and his.

14 **Q** And when he did that, did he raise his voice?

15 **A** Yes.

16 **Q** Is that how he communicates with you?

17 **A** Yes. It's not screaming; it's just with a very strong
18 straightforward tone.

19 **Q** All right. So did you make it through the night then with
20 him?

21 **A** I did.

22 **Q** And you guys were in separate rooms. You slept in a
23 different bed than you --

24 **A** I did. The children at this time was at my parents' house
25 so it was just myself, and Rigo was in the kids' bedroom.

1 and I was in our bedroom.

2 **Q** When you said he locked himself in the room for three
3 consecutive days, so was that the 6th, 7th, and 8th of
4 January?

5 **A** Yes. It started that Friday evening, which I believe is
6 the 5th. And then Saturday, Sunday, Monday. When his
7 parents got him Monday, he also stayed there Tuesday, but
8 proceeded to go to work Tuesday, I believe, but I'm not
9 sure.

10 **Q** Okay. So after the 8th, when was the next time you saw
11 him?

12 **A** I seen him that Wednesday. I seen him throughout the
13 night -- the week, but it was always at night. It was
14 never really -- there was no conversation between the two
15 of us; it was he would come home, go straight to his room,
16 usually carrying a case of beer or he would sit in the
17 truck and drink a beer. During this time I just did my own
18 thing, trying to take care of the puppies with the children
19 at my parents' house.

20 **Q** Was there an incident that occurred on January 14, 2024?

21 **A** Yes.

22 **Q** What do you remember about that?

23 **A** I was at home with the children. It was a Wednesday before
24 basketball practice. I asked Rigo if he was going to make
25 it home on time to go to practice. He came in -- he pulled

1 into the driveway and we -- the kids and I were putting our
2 shoes on and a red laser came from his truck through the
3 front door onto my son's chest, Teyo's chest first. I
4 grabbed Teyo and moved him to the wall. I got closer to
5 the door and window to try to make eye contact with Rigo
6 and assess the situation. I was frozen and scared. I
7 didn't know what to do, other than I seen in the reflection
8 of the window where the laser was on my chest and slowly
9 moved to my forehead, and I just stood there in fear of not
10 knowing what to do.

11 **Q** Again, looking at Exhibit 1, his vehicle would be parked
12 near the front door?

13 **A** Yes. The gray vehicle that's in the driveway. He was in
14 the driveway at a 45-degree angle facing our front door.
15 If you're looking at my front door, the laser came through
16 that right-hand window of the front door, the rectangle
17 window.

18 **Q** So this -- you were on the first floor then?

19 **A** Correct.

20 **Q** When this occurred what did you do?

21 **A** I moved the kids, as I stated, and was scared. I guess I'm
22 not sure what else you're asking me.

23 **Q** Okay. Did Rigo come into the house?

24 **A** He did not come into the house. We proceeded to walk out
25 of the house and Rigo made it as if it was a joke and I was

1 overreacting.

2 **Q** So he was -- he remained in his vehicle?

3 **A** Yes. He remained inside of his vehicle.

4 **Q** You got out of the house to go to the garage?

5 **A** He -- we got out to go to the vehicle to go to practice
6 with the children.

7 **Q** Where -- where was your vehicle parked at?

8 **A** My vehicle was, I believe, over on the west end of the
9 house, which is the right side of the picture. During this
10 time period -- I don't even know if I had my vehicle that
11 day. I left my vehicle at work a lot and had my Dad drive
12 me home during these time periods.

13 **Q** All right. So you and the children left the house, though,
14 for the purpose of going to an activity?

15 **A** Yes. We went to a basketball practice.

16 **Q** Okay. What time of the day was this?

17 **A** 5:30 at night.

18 **Q** How did you get to the basketball practice?

19 **A** Rigo.

20 **Q** All right. So he was there, you approached him after the
21 laser, and you got into the vehicle with him?

22 **A** I did not; just my children did.

23 **Q** Where did you go?

24 **A** I stayed at home and called my dad.

25 **Q** All right. Other than saying he was just joking, did he

1 say anything else that tried to give you some assurance
2 that he was going to harm anybody?

3 **A** No. He just made me -- just belittled myself and made me
4 feel like that I was overreacting.

5 **Q** All right. Let's talk about the incident of February 9,
6 2024. Tell the Court what happened on that day.

7 **A** The -- I would like to start with the night before, which
8 is February 8th. After the gun laser incident, the
9 children resided with my parents until this time. We would
10 spend the day with my parents, we would eat with my parents
11 as we had no food at our home, and I was struggling trying
12 to take care of nine puppies and two children on my own as
13 well as our house.

14 During this time period, Rigo would not allow the dogs
15 to be in the garage so I was taking care of nine puppies
16 and two dogs inside of our bathroom. So the house was
17 becoming a non-healthy area for the children to be. The
18 kids were sick at this time as well so the kids were with
19 my parents.

20 I went home the night of February 8th, as I did every
21 night, to care for the puppies and left the children with
22 my parents. That night -- February 9th, that Saturday, a
23 gentleman was driving from Montana to purchase one of the
24 puppies so I went home early that night to give all the
25 puppies a bath and I -- it was winter and cold so I'd have

1 to bathe them, blow-dry them, towel them. I would wash the
2 bathroom, make sure everything was clean. I went to bed
3 sometime around 10:00 o'clock that night. I woke up
4 sometime around in between midnight and 1:00 o'clock to
5 being notified by the doorbell camera that Rigo was home.
6 We did not speak to each other or see each other, as I was
7 in my room.

8 That morning at 6:00 a.m. when I woke up to go about
9 my day, the first thing I do in the morning is to get the
10 puppies, clean them, clean their area, take them outside.
11 I walked in to a puppy bleeding all over the bathroom.

12 **Q** And did you try to ask -- did you ask Rigo what happened?

13 **A** Not at first. At first I grabbed the puppy and I just took
14 him straight for medical attention. I did contact Rigo,
15 crying. I was upset. I asked him what happened, if he was
16 around the puppies that night. I was scared. I didn't
17 know what happened. Rigo just said he never even was there
18 or around the puppies at all. I asked him if he hurt one
19 of the puppies. I -- my gut feeling was that he did
20 something to them.

21 **Q** You didn't see anything, other than the blood on the floor?

22 **A** Correct.

23 **Q** And was it a mess?

24 **A** It was a mess.

25 **Q** You -- the two of you, were you raising puppies for sale?

1 **A** Not the two of us, just myself. Rigo denied having
2 animals. He was upset that I had a puppy. He would deny
3 their care, food, anything.

4 **Q** So he wouldn't assist in your effort?

5 **A** Correct. I was having -- my dad and I were working
6 together as a team. Every -- every three hours somebody
7 had to assist the dogs, and we were also trying to work at
8 this time. So my dad and I were alternating caring for the
9 house, the puppies, the children, and myself.

10 **Q** I'm going to hand you Exhibit 3, which has been marked as
11 Exhibit 3. Do you recognize that exhibit?

12 **A** Yes, I do.

13 **Q** How do you recognize it?

14 **A** This is the medical bill for the puppy.

15 **Q** All right. And so it corroborates the incident as far as
16 the puppy being injured?

17 **A** Correct. There was no physical broken bones or anything so
18 say. The vet wanted to do all testings for infections,
19 tests for anything, which she did, and everything came back
20 negative. There was no -- the dogs were never fed nothing
21 toxic. We did a toxic lab test as well as checking for
22 parvo, as she was concerned because one of the symptoms is
23 bleeding. The -- all tests -- all the puppies were tested
24 and not one of them tested positive for any of these
25 things.

1 Q Were there internal injuries for this one particular puppy?

2 A It was just a swollen abdominal stomach.

3 Q Which led to the dog bleeding? Vomiting?

4 A The dog was vomiting, and bleeding from the front end and
5 the back.

6 Q Had that puppy had any other prior experience or problems
7 with --

8 A No.

9 Q -- vomiting?

10 A No.

11 At this time the puppies were seven weeks old. They
12 were all healthy. Everything was good with the puppies
13 until this night -- this morning, I should say.

14 Q Did you continue to reside with Rigo at the residence?

15 A I did not.

16 Q When did you move out?

17 A I moved out immediately when -- the morning of
18 February 9th. I went home; I tried to clean up the mess; I
19 grabbed just a few clothes and I moved to my parents' house
20 in fear.

21 Q Why? Why were you in fear?

22 A I was scared because of the last several years of the
23 repeated unpredictable behaviors of Rigo, that I felt like
24 this was getting more serious as time went on.

25 Q So from February 9th until when had you been out of the

1 residence?

2 **A** Until the protection order.

3 **Q** Which you applied for on May 24th of this year?

4 **A** Correct.

5 **Q** And it was issued May 28th?

6 **A** Correct.

7 **Q** And after it was issued, did you go back to the residence?

8 **A** The children and I went back to the house immediately to
9 find that the house was in major distress. It was filthy.
10 It was dirty. There was a lot of health concerns that I
11 had that the children and I could not sleep there.

12 During this time, the first three days, my dad and
13 myself and my mom went there. We tried to clean. We tried
14 to get groceries. During this time period the carpet
15 smelled like urine and it was a really awful, disgusting
16 smell that we had to tear out the carpet in the house. The
17 third day then Rigo put a pinlock on the thermostat, where
18 we no longer had air conditioning or heating.

19 **Q** Let me back you up a little bit. After the protective
20 order was served upon Rigo and the house was left vacant,
21 did you -- and you inspected the home, did you immediately
22 move back into the house?

23 **A** I did not move immediately back into the house, no. For
24 the best interests of the children, we have went there
25 every single day and we are cleaning the house. We are

1 taking care of the house. It is not a health matter --
2 it's not a healthy area for the children to be in. We
3 would have moved back in within that first few days, but
4 there's no air conditioning and heating.

5 **Q** You heard the opening statement from Mr. Nooney that this
6 motive -- that the motive that you have for this protective
7 order is to regain control of this house.

8 **A** Uh-huh.

9 **Q** Is that accurate?

10 **A** No.

11 **Q** Why isn't it?

12 **A** It's my home. I'm not trying to control anybody. I
13 believe the home is where the children and I should be.

14 **Q** All right. The protective order is related to threatening
15 behavior from another person to you. Were you experiencing
16 that threatening behavior?

17 **A** Yes.

18 **Q** Regaining control of the house was for the purpose of
19 making sure the residence was protected, which both of you
20 own; is that fair?

21 **A** It was for the children and I to go home. It was so we
22 could go home and have our -- our normal lives back. It
23 was -- it's hard living with two children and not having a
24 home. I mean, their clothes are there; their beds are
25 there; their toys are there. Their Christmas presents are

1 still unopened sitting on our table. It was to regain a
2 life, a healthy lifestyle for our children.

3 **Q** But you didn't make up anything in the protective order for
4 the purposes of just getting the home back, did you?

5 **A** No.

6 **Q** Your concern regarding Mr. Tovar's behavior is related to
7 the safety of you and your children?

8 **A** Yes.

9 **Q** After May 28th did you have any other contact with Rigo?

10 **A** What was that date? I'm sorry.

11 **Q** After May 28th of this year, have you had any other contact
12 outside of the courtroom with Rigo?

13 **A** No.

14 **Q** Prior to the protective order being issued, was there
15 another incident that occurred between you and Rigo in a
16 park?

17 **A** Yes.

18 **Q** Describe that to the Court.

19 **A** It was the very day before court. It was the last day of
20 school, Wednesday. Every year I take our children. It is
21 a bike ride where you meet the school and the kids at the
22 park down the street. We met the kids there. Both the
23 kids were different and angry. Isaiah proceeded that he
24 would not go on the bike ride with his father so we stayed
25 back at the park. Teyo took off with his friends, and

1 Isaiah and I stayed back. My dad drove us there in fear
2 that Rigo was going to be there. I was always scared to be
3 alone or in presence of Rigo so my dad was always the one
4 that drove us and was there for my safety, my -- to make me
5 feel like I was going to be safe.

6 My dad dropped us off and had to run back home because
7 Isaiah was upset that he was not in his school uniform. On
8 the last day of school, I do not put my kids in school
9 uniforms. It's a free day to wear clothes, in appropriate
10 school manner clothes, so that's what the children were in.
11 He was upset of this fact so my dad ran home to go give him
12 a school uniform and come back. We were alone. Rigo was
13 already gone. Isaiah and I left the parking lot and went
14 and sat inside the park area where the slides and
15 everything were at.

16 **Q** Which park is this?

17 **A** I don't remember the name of the park. It is -- it's about
18 one mile south of St. Elizabeth Seton. I don't remember
19 what the park is called.

20 **Q** All right. Rigo knew you were there, though?

21 **A** Yes.

22 **Q** How did he know that?

23 **A** Because he had the kids that night. He showed up there
24 with the children and their bikes. I had their helmets as
25 I had to go purchase helmets for the kids as they could not

1 ride the school bike ride without the appropriate gear. So
2 we met. And I do this every year with the children; Rigo
3 has never done this with the children. So it was something
4 that I was consistently trying to stay with.

5 **Q** So you're there in the park with the two children and did
6 you see Rigo?

7 **A** Yes, I did.

8 **Q** What -- where was he at and what was he doing?

9 **A** Rigo was angry over pictures. We were not speaking to each
10 other, but he just had this very stern, angry, trying to --
11 I felt belittled. I wasn't sure how to assess the
12 situation because he was accusing me of stealing pictures.
13 They were basketball pictures that were dropped off at the
14 school that Monday. I did not go get my children from
15 school that day, my parents did. And they did not pick up
16 the school pictures so I did not have them. But he was
17 accusing me of stealing something that I was -- that I did
18 not have. I told him repeatedly through text messages that
19 I did not have the pictures; I was not the one that went
20 and picked up the kids that night. I told him that I would
21 talk to my parents about it just to make sure that my
22 parents didn't accidentally grab all of the pictures. They
23 did not. We did not have my copies of the pictures either.
24 So that Wednesday morning when I seen him, he was angry.
25 He was mad.

1 **Q** Did he express that to you?

2 **A** He expressed it to the children. He was expressing anger
3 with Isaiah being upset over clothes and trying to use
4 Isaiah as a tool to make me feel belittled as a wo- -- as a
5 mother.

6 **Q** Did he approach you?

7 **A** He did not. He kept trying to take my kids. I should
8 rephrase that. Inside the parking lot with the children,
9 he did not. After the bike ride was over, Isaiah and I
10 were still in the park, which this made Isaiah 20 minutes
11 late to school because he did not ride the bike ride as
12 well I didn't have a vehicle. So Rigo got into his truck.
13 When he came -- when Rigo came back, he loaded up the
14 bicycles; he got in his truck. He started driving away
15 from the park. At this time he stopped really fast; he got
16 out of his truck and started approaching me and Isaiah in
17 the parking -- or in the park itself, not in the parking
18 lot.

19 **Q** How did that make you feel?

20 **A** I was scared. He was coming at me with a very aggressive,
21 fast walk trying to demand our son to leave me.

22 **Q** What did -- what conversation did you have with him?

23 **A** I didn't have any conversation. All I did was express,
24 *Please leave us alone. Get back into your truck. Leave us*
25 *alone. You're scaring me.* He kept coming closer so I kept

1 screaming louder.

2 **Q** And how did he react?

3 **A** How did I react?

4 **Q** No. How did he react?

5 **A** He -- at this time as he got closer, I got my cell phone on
6 to record what was happening. The second he realized I had
7 a recording on this, he changed into a smile, and he
8 proceeded to sit down right next to Isaiah and tried to
9 make it go on -- *your mother is just overreacting and this*
10 *is unnecessary that she's doing this*, and just totally
11 changed his behavior 100 percent.

12 **Q** Did you feel that you could trust Rigo?

13 **A** No.

14 **Q** Did you seek the protective order after this instance?

15 **A** Yes, I did.

16 **Q** And you briefly described some of the other incidents that
17 occurred during your relationship. Were there any other in
18 your relation- -- any other instances during your
19 relationship that were physical?

20 **A** There was a time about two weeks after Isaiah was brought
21 home. Isaiah was born premature at 30 weeks with an
22 emergency C-section. I brought him home on Valentine's Day
23 that year, a 3-pound premature baby. Rigo was out with his
24 friends. He was angry at the fact that I was trying to put
25 all my attention towards Isaiah and my health. My health

1 during this time was -- deteriorated from my pregnancy
2 being very difficult. He was angry at that fact and he
3 believed that I was being controlling to him, trying to get
4 him to stay with me as a family to help take care of the
5 kids so he left with his friends. He came home drunk,
6 angry, where we got into an argument, and he beat our
7 bedroom door down to where it was just a big huge hole that
8 you could just walk through it. This caused me to go into
9 the bathroom and call my parents.

10 **Q** And when this occurred, did he injure himself?

11 **A** He did.

12 **Q** How so?

13 **A** If you look at both of his arms, he has multiple scratch
14 marks over both of his arms from punching the door.

15 **Q** Are they --

16 **A** Yes.

17 **COURT REPORTER:** I'm sorry. Mr. Nelson, I didn't hear what
18 you said.

19 **MR. NELSON:** Sorry.

20 **Q (BY MR. NELSON)** Are they still visible today?

21 **A** Yes, they are.

22 **Q** I'm going to hand to you what's been marked as Exhibit 4.
23 Do you recognize Exhibit 4?

24 **A** Yes, I do.

25 **Q** And how do you recognize that?

1 **A** This is a head injury report made by the school nurse at
2 St. Elizabeth Seton.

3 **Q** And what date was that?

4 **A** April 30th.

5 **Q** Do you know what happened to Isaiah?

6 **A** There was an incident on the playground. No adults
7 witnessed what happened. The school supervisor that was
8 out on the park found Isaiah laying on the ground, saying
9 that he was dizzy and that his head hurt. The children
10 around said that another boy that was bullying Isaiah --
11 this boy has bullied him for the past few months -- chucked
12 a base-- -- or chucked a basketball at his head and hit him
13 pretty hard that made him lay on the floor. And the adult
14 that was out there just found Isaiah laying on the ground.

15 **Q** And you were contacted?

16 **A** Yes, I was.

17 **Q** By the school nurse?

18 **A** Yes.

19 **Q** Did you go to the school?

20 **A** I did. I went and picked up Isaiah. She did a full
21 assessment of Isaiah. She told me to take him home, lay
22 him in bed, do not let him fall asleep, but to get rest and
23 drink water, and watch his pupils or changes in his
24 behavior.

25 **Q** About what time of the day was this?

1 **A** This was about 2:00 o'clock in the afternoon.

2 **Q** And did you do that?

3 **A** I did.

4 **Q** And did you notify Mr. Tovar about the incident?

5 **A** I did. I notified him immediately getting in the park --
6 getting back into the car at the school. He was supposed
7 to pick up the children that day so I notified him right
8 away that Teyo was still at school and still needed to be
9 picked up, but I was taking Isaiah home to care for him.

10 **Q** Did you see him later that day?

11 **A** Yes.

12 **MR. NELSON:** First of all, I would offer Exhibit 4.

13 **THE COURT:** Any objection?

14 **MR. NOONEY:** No objection, Your Honor.

15 **MR. NELSON:** And I don't think I previously offered
16 Exhibit 3. I'd offer Exhibit 3.

17 **THE COURT:** Any objection to Exhibit 3?

18 **MR. NOONEY:** I guess, Your Honor, no objection as it
19 concerns the fact that Ms. Wagner, of course, would have
20 the ability to testify as it relates to the contents of
21 Exhibit 3, but if Mr. Nelson is going to offer it to have
22 her provide additional testimony as it concerns any
23 finding, they, of course, did not subpoena the witness or
24 the veterinarian so I'd object in that regard, but I guess
25 I'll just save that objection. So no objection as concerns

1 the actual document itself.

2 **THE COURT:** Exhibit 3 will be received.

3 **Q (BY MR. NELSON)** Later did Mr. Tovar show up at your
4 residence?

5 **A** He showed up at my parents' residence: 2929 Jolly Lane.

6 **Q** Okay. That's where you and the children were staying?

7 **A** Yes.

8 **Q** And he was there for what purpose?

9 **A** He was there to take Isaiah from the house.

10 **Q** Did you, I guess, approach Mr. Tovar and try to explain the
11 situation to him?

12 **A** I did. He showed up at the house with an officer. I
13 proceeded to tell him that it was in the best interests of
14 Isaiah to stay home with his mom. He only had a 3-hour
15 visit that day and so I asked him to go have Dad time with
16 Teyo and allow Isaiah to stay home for care.

17 **Q** All right. So Isaiah is in bed at the time?

18 **A** Yes.

19 **Q** And you explained to him the head injury.

20 **A** Yes.

21 **Q** Despite that, did he still insist about having Isaiah?

22 **A** Yes, he did.

23 **Q** And what happened?

24 **A** He asked the officer to file charges against me and the
25 officer said that there was no charges to be filed as --

1 that he would make a complaint that I was not allowing him
2 to have his child. I proceeded to tell the officer that
3 what was bothering me in this situation, that I believed
4 Isaiah should stay with me, is that Isaiah -- Rigo never
5 showed concern for Isaiah's health. He never asked me how
6 Isaiah was, how he was doing, if he was okay, if he could
7 see him. All he asked -- all he wanted was just to take
8 Isaiah from the home.

9 **Q** I'll hand to you Exhibit 5.

10 Do you recognize Exhibit 5?

11 **A** I do.

12 **Q** How do you recognize it?

13 **A** This is the officer's report.

14 **Q** All right. Is this the incident report that you testified
15 about?

16 **A** Yes.

17 **MR. NELSON:** I'd offer Exhibit 5.

18 **THE COURT:** Any objection?

19 **MR. NOONEY:** No objection, Your Honor.

20 **THE COURT:** Exhibit 5 is received.

21 **Q (BY MR. NELSON)** I'm going to you hand to you what's been
22 marked as Exhibit 6. Kylea, what's Exhibit 6?

23 **A** This is a handgun with a laser attached to it.

24 **Q** Is this a picture of a similar pistol that Mr. Tovar owns?

25 **A** Yes.

1 **Q** What does he do with a handgun? Why does he need a
2 handgun?

3 **MR. NOONEY:** Objection; irrelevance, Your Honor.

4 **THE COURT:** Overruled. I'll let it stand. I know how to
5 evaluate the testimony and what weight to give it.

6 **A** I'm not sure exactly why he needs it. My concerns with
7 having it is when I first met Rigo, he was not able to buy
8 firearms. Every time we went to go purchase something, he
9 was denied. In 2018 he -- during the court proceeding, he
10 got a concealed weapons permit randomly and it was a
11 concern of how he got that due to his past behavior and
12 record. Ever since then he's carried this with him and
13 I'm -- I can't answer why. I just know that it's
14 uncomfortable.

15 **Q** Is he still drinking, to your knowledge?

16 **A** I haven't seen him in the past few months so I'm not sure
17 today.

18 **Q** All right. But his history of drinking concerns you with
19 firearms?

20 **A** Correct.

21 **Q** And you're seeking a protection order, a permanent
22 protection order, for what period of time?

23 **A** Five years.

24 **Q** Why?

25 **A** I believe for myself, safety, and the children.

1 **Q** We haven't talked any great deal in regards to Rigo's
2 behavior around the children. What concerns you about his
3 behavior around the children?

4 **A** That he has hit the kids. He belittles the children. He
5 makes them feel insecure about themselves. He uses them
6 as a tool against adults. He doesn't show up for their
7 well-being. For example, Isaiah -- or Teyo had a surgery
8 done. Rigo refused to come and -- nor did he show up for
9 him in the two weeks of healing, the healing process. He
10 doesn't show up for them when he's needed.

11 **Q** How does he punish them?

12 **A** He punishes them by yelling at them or putting them in a
13 room. I have witnessed him hit Isaiah. And he hit them
14 with a belt when they were younger. This made me very
15 angry, where I told him he was no longer allowed to use any
16 items on the children.

17 **Q** Do you believe he does that to this day?

18 **A** I do.

19 **Q** Why? How -- or why do you believe that?

20 **MR. NOONEY:** Objection; calls for speculation, Your Honor.

21 **THE COURT:** She can answer to the extent she knows.

22 Overruled.

23 **A** What I know about this is that my son has proceeded to tell
24 the child advocacy building.

25 **MR. NELSON:** Okay. I would offer Exhibit 6.

1 **THE COURT:** Any objection?

2 **MR. NOONEY:** No objection, Your Honor.

3 **THE COURT:** Six is received.

4 **Q (BY MR. NELSON)** And in regards to the protection order,
5 what location do you want it to apply to?

6 **A** My residence, the 2925 Orchard Lane. I seek a protective
7 place to go to at 2929 Jolly Lane as well as my three
8 workplaces, which is 3232 Calamity, 3234 Diaz, and
9 519 Sixth Street.

10 **MR. NELSON:** All right. Your Honor, I have no further
11 questions.

12 **THE COURT:** Cross-examination.

13 **MR. NOONEY:** Thank you, Your Honor.

14 **CROSS-EXAMINATION**

15 **Q (BY MR. NOONEY)** Ms. Wagner, I want to start with your
16 Petition and Affidavit for a Protection Order. If you
17 would please turn to that exhibit.

18 **A** (Complied.)

19 **Q** Ms. Wagner, are you at Exhibit Number 2?

20 **A** Yes, I am.

21 **Q** You'd agree with me that there is a pending custody matter
22 before this Court in 51CIV18-623, correct?

23 **A** Yes, I do.

24 **Q** And you're aware of various allegations that my client has
25 made against you within that verified motion, correct?

1 **A** Explain the question.

2 **MR. NOONEY:** Your Honor, if I may approach, I have a
3 proposed exhibit binder for the witness, the Court, as well
4 as counsel.

5 **THE COURT:** You, too, may approach freely.

6 **MR. NOONEY:** Thank you, Your Honor.

7 **Q (BY MR. NOONEY)** Ms. Wagner, I'd ask you to turn to
8 Exhibit Number 102, please.

9 You'd agree with me that Exhibit Number 102 is a fair
10 and accurate copy of a Verified Motion For Change of
11 Custody that was filed in 51CIV18-623, correct?

12 **A** Correct.

13 **Q** And you'd agree with me that you have seen this
14 Verified Motion For Change of Custody prior to today,
15 correct?

16 **A** Yes.

17 **MR. NOONEY:** Your Honor, I'd offer Exhibit 102 into
18 evidence.

19 **THE COURT:** Any objection?

20 **MR. NELSON:** I would object on relevance at this point.

21 **THE COURT:** Overruled. Exhibit 102 is received.

22 **Q (BY MR. NOONEY)** Ms. Wagner, I would direct your attention
23 to Paragraph 5 on Page 2 of Exhibit 102. You'd agree with
24 me that Paragraph 5 states, *The Defendant, Rigo B. Tovar,*
25 *is of information and belief that the Plaintiff, Kyles M.*

1 *Wagner, has dependency issues related to illicit drugs and*
2 *alcohol that have risen to a level that impacts her ability*
3 *to effectively parent the minor children. Correct?*

4 **A** Are you asking if I agree?

5 **Q** I'm asking if that's what it states?

6 **A** It states that.

7 **Q** You'd agree with me that when you read that paragraph, it
8 made you angry, correct?

9 **A** No.

10 **Q** How did it make you feel?

11 **A** It made me feel like he was trying to make me out to be
12 somebody that I'm not.

13 **Q** You'd agree with me that Paragraph 6 states, *The Defendant,*
14 *Rigo B. Tovar, is of information and belief that lack of*
15 *stability in the Plaintiff, Kylea M. Wagner's, current*
16 *mental and emotional state has risen to a level that*
17 *impacts her ability to effectively parent the minor*
18 *children, as reflected in repeated communications from the*
19 *Plaintiff, Kylea M. Wagner, to the Defendant, Rigo B.*
20 *Tovar. These communications include, but are not limited*
21 *to a text message, where the Plaintiff, Kylea M. Wagner,*
22 *has indicated self-harm, while physically having one of the*
23 *minor children in her care. Did I read that correctly?*

24 **A** You did not because I did not have the children in my care.

25 **Q** But you would agree with me you had sent Rigo a text

1 sometime around March of 2024 that you were going to
2 self-harm yourself, correct?

3 **A** I did not state that I was going to self-harm myself. I
4 stated that I -- that what was going on was mentally
5 draining and what he has done, yes, affected my life. And
6 I was seeking my parents. I would never self-harm myself
7 or my children.

8 **THE COURT:** Mr. Nooney, if you're going to read from other
9 paragraphs of this, I'm just going to ask you to slow down
10 a little bit. We all tend to go pretty quickly when we're
11 reading so just keep -- keep the speed down just a little,
12 please.

13 **MR. NOONEY:** I apologize, Your Honor.

14 **THE COURT:** That's fine.

15 **Q (BY MR. NOONEY)** You'd agree with me, Ms. Wagner, when you
16 generally read the allegations in the Verified Motion for
17 Change of Custody that that made you frustrated, correct?

18 **A** I was -- I was caught off guard because during this time
19 period Rigo had a plane ticket to go to Florida with us.
20 He was supposed to be on that airplane. And instead of
21 being on the airplane to go to Florida, he decided to write
22 this instead of actually trying to do what was best for our
23 children and our family.

24 **Q** You'd agree with me that the best interests of the children
25 is something the Court can deal with in the custody matter

1 and that's not pertinent to this pending protection order
2 matter, correct?

3 **MR. NELSON:** Objection as to form.

4 **THE COURT:** Overruled.

5 **A** Can you ask me that question again.

6 **Q (BY MR. NOONEY)** You'd agree with me, Ms. Wagner, that what
7 is in the best interests of the children or what you
8 believe to be in the best interests of the children is for
9 the Court to consider in the civil matter and not in this
10 pending protection order matter, correct?

11 **A** I'm seeking both. I want the Court to see both sides. I
12 want the Court to see what is in the best interests of the
13 children and who gives the best for the children. I
14 believe that the Court should see everything. I -- there's
15 a lot here to take into matter and this whole thing is
16 about the children; it's about Isaiah and Teyo as well as
17 the safety of both of us. I believe Rigo should get the
18 help that he needs to be a good father to his children.

19 **Q** Do you understand that my client has been and is currently
20 going to counseling?

21 **A** I found this out later, yes. And so am I.

22 **Q** And you understand that he went to counseling long before
23 filing this motion for change of custody, correct?

24 **A** I did not know that, no.

25 **Q** And you understand, though, that my client went to

1 counseling prior to you ever filing this Petition and
2 Affidavit for a Protection Order, correct?

3 **A** I did not. I was not aware of this. I sought help from
4 his parents. And when I sought help from his parents, they
5 flipped everything around and tried to separate me from my
6 family. If we would have been aware of this, there -- I
7 have a text message back from, you know, October of last
8 year me trying to seek help for Rigo and myself.

9 **Q** Ma'am, that --

10 **A** So, no, I didn't.

11 **Q** -- doesn't answer my question. If you would please answer
12 the correct question that's directed. Your counsel has the
13 opportunity to redirect. Thank you.

14 Would you agree with me that you filed this petition
15 and affidavit, which you signed on or about May 22nd of
16 2024?

17 **A** Did I -- did I -- say that again. I'm sorry.

18 **Q** I'll direct your attention back to Exhibit 2. I'm not
19 trying to stump you, Ms. Wagner. Just so I can understand
20 the dates --

21 **A** Uh-huh.

22 **Q** -- you'd agree with me that it's dated on or about the
23 22nd day of May of 2024, correct?

24 **A** Yes.

25 **Q** And you had testified previously about various allegations

1 from, roughly, ten years ago where my client allegedly
2 created harm in yourself, correct?

3 **A** It wasn't just ten years ago, it was through -- within ten
4 years. It was repeatedly within ten years.

5 **Q** And you had a -- you'd stated an allegation that my client
6 pushed you against the wall, correct?

7 **A** Yes, I did.

8 **Q** And you didn't call law enforcement as it concerns the
9 alleged incident, correct?

10 **A** I did not.

11 **Q** And you then alleged an incident that occurred, I believe,
12 on the bed where you slid off the bed, correct?

13 **A** Yes, I did.

14 **Q** And you'd agree with me you didn't call law enforcement at
15 that alleged incidence, correct?

16 **A** I did not.

17 **Q** And you don't have any evidence to offer here today, other
18 than your testimony as it concerns those alleged
19 incidences, correct?

20 **A** I have people that have seen the aftermath and the fear.
21 They were not there during the occurrence, other than the
22 children being too small.

23 **Q** But you have nothing to offer as it concerns photographs,
24 for example? Correct?

25 **A** I do not. How do you take photographs of somebody choking

1 you?

2 **Q** Well, you would agree with me you could have called law
3 enforcement as it concerned that alleged incident, correct?

4 **A** I agree I could have, but I seeked help with family members
5 as well as his parents.

6 **Q** You had testified as it concerns an alleged incident where
7 my client allegedly had sexual intercourse with, I believe,
8 it was your best friend, correct?

9 **A** It was.

10 **Q** And, first off, I'll just represent my client takes issue
11 with that allegation, but you understand that even if that
12 happened, that has nothing to do with the safety of
13 yourself or the children, correct?

14 **A** It has everything to do with belittling who I am. It has
15 everything to do with the control of what Rigo does in our
16 house.

17 **Q** Again, I'm taking issue with the allegation, but even if my
18 client did have sexual intercourse with one of your best
19 friends, that doesn't place you in some imminent fear of
20 harm or physical injury, correct?

21 **A** Not physical.

22 **Q** And you'd agree with me that, as it concerns that
23 allegation, that makes you angry, correct?

24 **A** It doesn't make me angry; it makes me hurt.

25 **Q** And I understand it makes you hurt, but that has nothing to

1 do with your physical well-being as it concerns any fear of
2 imminent harm, correct?

3 **A** It has what to do with the -- what it does to your mental
4 well being as a woman, as a mother to the children, and to
5 a man that you love. It has to do with -- it's not
6 physically harming me. It doesn't physically harm by
7 hitting me; it has everything to do with what is also
8 important, which is your inside, of who you are. It
9 controls your family relationship.

10 And what was more concerning to me about it is that
11 Rigo used it as a tactic against me because I wouldn't
12 pleasure him. It was -- I wouldn't pleasure him so he used
13 another woman to come after me. It was -- it was a tool.

14 **Q** And that is one of the reasons you seek a protection order
15 here today then, correct?

16 **A** I guess in a way.

17 **Q** I would direct your attention to Page Number 2. I'm on
18 Exhibit Number 2. And if it's easier, Ms. Wagner, I'm not
19 trying to stump you, but it's also at Exhibit 101, if it's
20 easier to flip to in the binder versus the pages
21 themselves.

22 On Page Number 2 of the Petition and Affidavit for a
23 Protection Order, you'd agree with me that you allege that
24 my client possesses guns and weapons, correct?

25 **A** Yes, he does.

1 Q And you then state when asked *Was a weapon used in this*
2 *incident, you say, Yes. A laser. Correct?*

3 A In that specific incident. With there being multiple.

4 Q And you understand that there is no laser on that AR-15,
5 correct?

6 A I do not. I was watching him install it.

7 Q If I represented to you that that was a Red Dot, do you
8 understand the difference between a Red Dot and a laser?

9 A What's the difference?

10 Q I'm asking you: Do you understand the difference?

11 A I do not. I don't know much about weapons. I don't know
12 much about light lasers, red dots. If a red dot is on you,
13 how would you feel?

14 Q Ma'am, this isn't your time to ask me questions.

15 A I'm not asking you --

16 COURT REPORTER: Um --

17 A -- I'm just saying, how does that make somebody feel?

18 Q You then were asked, *Has Respondent threatened anyone with*
19 *a weapon? You checked the box Yes, correct?*

20 A Yes.

21 Q My client never actually threatened you with a weapon,
22 correct?

23 A I felt threatened by this laser. And I felt threatened on
24 January -- or on December 30th by the demeanor of his body
25 language.

1 Q And the demeanor of his body language was something you
2 subjectively interpreted, correct?

3 A Yes. It was a feeling. It was his emotions.

4 Q And you never called law enforcement on that event either,
5 did you?

6 A I did not. I called my father.

7 Q And your father's not a law enforcement officer, though,
8 correct?

9 A He is not. And he did want to call them. I did not want
10 to scare my children. I didn't know -- I didn't know what
11 to do.

12 Q You'd agree with me on any number of these alleged events,
13 you could have grabbed the children and left if you truly
14 felt fear, correct?

15 A I did. I did leave multiple times throughout the last ten
16 years.

17 Q But as it concerns specifically the alleged incidence on
18 January 30th, you didn't take the children and leave and
19 seek refuge then, correct?

20 A The children -- I seeked refuge for the children. I stayed
21 at home because I had nine puppies also to take care of.

22 Q On Page 2 it says, *Provide a detailed description of other*
23 *similar incidents or actions that Respondent has committed*
24 *and reasons you believe it will continue.*

25 You say *Please see attached documents, correct?*

1 **A** Yes.

2 **Q** And then you state, *Check his rap sheet. I know he has*
3 *prior simple assault on a woman involving alcohol.*

4 Correct?

5 **A** Correct.

6 **Q** You know that not to be true, correct?

7 **A** I don't. I've seen his rap sheet and the paperwork is at
8 my house.

9 **Q** And you're not offering that as any evidence today,
10 correct?

11 **A** I'm not sure. It was given --

12 **Q** That wasn't one of the exhibits you just --

13 **A** It's not. It's not one of the exhibits in here, but it
14 is -- yes, I have -- I did print it. It's \$20. And it's a
15 public information for 20 bucks; you can purchase it. I
16 have a copy of it.

17 **Q** How do you know it was an alleged incident on a female?

18 **A** Because it states that she was a female. She was a
19 bartender at the Saloon 10 and she denied him alcohol. And
20 he went behind the bar, took the bottle, and got into it
21 with her as well as the guard. I was not there during this
22 incident; it was just what I read.

23 **Q** And you understand that that has nothing to do with your or
24 your children's fear of imminent physical injury or harm,
25 correct?

1 **A** It shows that it's repeated. It shows that I'm not his
2 first.

3 **Q** I direct your attention to the Summary of Incidents, which
4 is included within the Petition and Affidavit for a
5 Protection Order. You'd agree with me you did not type
6 this Summary of Incidents, correct?

7 **A** Did I type it?

8 **Q** You'd agree with me you did not type this, correct?

9 **A** I did. I typed it with -- I spoke it as Mr. George Nelson
10 wrote it. But it's my words; I said it.

11 **Q** You'd agree with me there's inconsistencies within these
12 alleged summaries, correct?

13 **A** I do not.

14 **Q** Okay. You'd agree with me that you affirmed under oath
15 that these allegations were correct and truthful, correct?

16 **A** Yes.

17 **Q** As it concerns the alleged incident with the AR-15 on or
18 about December 30th of 2023, you'd agree with me my client
19 only has one AR-15, correct?

20 **A** Yes. That I'm aware of.

21 **Q** You'd agree with me that you did not see my client leave
22 with the AR-15 during that alleged incident, correct?

23 **A** I didn't see him leave, other than a video of him, of the
24 back side of him. I didn't see anything in his hands.

25 **Q** So it's your testimony that my client allegedly had taken

1 the AR-15 out of the gun safe while he was in the gun safe
2 room, correct?

3 **A** Yes.

4 **Q** But that he never actually left with the AR-15, correct?

5 **A** I can't say that he didn't leave with it. I -- when I went
6 back downstairs, I was locked out of the gun safe. I was
7 no longer able to open the gun safe. And at this time I
8 spoke my fear to his sister.

9 **Q** Well, if you turn to Exhibit Number 8, you'd agree with me
10 that those gun cases are quite large, correct?

11 **A** Yes. There's multiple there.

12 **Q** And it's fair to say that if you watched a Ring video of my
13 client leave, you'd be able to see him carrying that gun
14 safe, correct? Strike that. That gun case, correct?

15 **A** The case, not the gun. The gun is long and skinny. You
16 can easily put it in front of your chest and walk outside
17 of the house.

18 **Q** But you didn't see that happen, correct?

19 **A** I did not.

20 **Q** As it concerns the next incident on or about January 8th of
21 2024, you'd agree with me it states that on January 8,
22 2024, Rigo locked himself in a bedroom for three
23 consecutive days. Correct?

24 **A** Correct.

25 **Q** So that would mean that would be January 8th, January 9th,

1 and January 10th of 2024, correct?

2 **A** No. It was the weekend. I believe it was -- Friday would
3 have been the 6th, 7th, 8th, 9th. I think the 8th is a
4 Monday, the 9th is a Tuesday. So it would be the Friday
5 through that Monday.

6 **Q** And it's your testimony that on January 8, 2024, Rigo was
7 still locked in the bedroom and did not leave, correct?

8 **A** He did leave with his parents after I notified them for
9 help.

10 **Q** Did you ever call law enforcement as it concerns your
11 concern with Rigo being allegedly locked in the bedroom?

12 **A** I did not. I thought that it was in our best interests to
13 call his parents first as well as his sister.

14 **Q** So you'd agree with me you didn't have any actual fear of
15 harm with yourself or the children, correct?

16 **A** I do not agree with you.

17 **Q** So if you would have had fear, though, why didn't you call
18 law enforcement?

19 **A** I called his parents in fear for himself. Himself. I
20 called his parents scared for him.

21 **Q** And the fear, though, was for Rigo's safety, not your
22 safety or the children's safety, correct?

23 **A** Throughout the years, Rigo makes me feel that he would hurt
24 me first and then he would let himself go.

25 **Q** But he didn't make any threats on or about February --

1 sorry. Strike that.

2 January 8th, 7th, 6th, or 5th, he didn't make any
3 threats against you or the children, correct?

4 **A** He didn't make any threats, no, except for to himself. But
5 due to the prior incidents that occurred over time, it
6 makes you feel that way when something -- when another
7 situation occurs like this, you put in everything that has
8 happened up to that incident. Up to that incident I was
9 already scared for my life. At this point I'm scared for
10 him and then mine.

11 **Q** You'd agree with me that you allege that my client yells or
12 yelled over the years, correct?

13 **A** Yes.

14 **Q** You'd agree with me that you had yelled at my client over
15 the years, correct?

16 **A** Yes.

17 **Q** You'd agree with me that you've yelled at the children over
18 the years, correct?

19 **A** Yes.

20 **Q** As it concerns the incident on or about January 14th of
21 2024, you never actually saw my client have a firearm as it
22 concerns that alleged incidence, correct?

23 **A** On which date was that?

24 **Q** January 14th of 2024.

25 **A** I did not see the firearm. I just seen that -- if you see

1 Rigo's truck, it is all blacked out and tinted. You cannot
2 see inside the vehicle. The laser was coming through the
3 front window, which you cannot see in.

4 **Q** And at that time you never called law enforcement, correct?

5 **A** I did not.

6 **Q** And you understand Rigo or the boys have laser pointers,
7 correct?

8 **A** My children do not.

9 **Q** You understand that there has been historically a handheld
10 laser pointer in the residence, correct?

11 **A** Before this incident, no. The very next day after this
12 incident, after speaking to my parents and my
13 grandparents -- I spoke to my dad about it immediately
14 after; with my grandma the very next morning, which also
15 everybody -- my family approached Rigo about these
16 incidents and, magically, this laser pointer appeared in my
17 kitchen that I've never seen before until after the matter.

18 **Q** You testified earlier that the house on any number of
19 occasions is frequently in disarray, correct?

20 **A** Right now it is, yes.

21 **Q** And it's historically been, correct, over the years?

22 **A** No.

23 **Q** So it's your testimony that the house is always picked up
24 and tidy?

25 **A** I'm a mom of boys. It's not perfect.

1 Q You'd agree with me there's --

2 A Yes.

3 Q You agree there's --

4 A Yes. Dirty -- yes, from -- you have dirty laundry that you
5 have to do. There's also dishes. But that's a
6 responsibility for both parents to take care of.

7 Q You'd agree with me there is any number of toys in the
8 house, correct?

9 A Yes. My children have toys.

10 Q So is it your testimony that you know where each and every
11 one of the toys is in the house?

12 A Not all the time, no.

13 Q You had testified that as it concerns the incidence on or
14 about January 14, 2024, that you felt scared, correct?

15 A Yes.

16 Q But you'd agree with me that you allowed the children to go
17 with my client, Rigo Tovar, correct?

18 A I did. I allowed the children to go because I did not know
19 what to do. I was frozen. It's hard to call a law officer
20 and say something but not really know what's happening.
21 When something is not -- when you're just scared and you
22 don't know what to do, you're frozen.

23 Q Ma'am, that wasn't my question. I'm asking you answer the
24 question instead of asking. You continue to
25 provide information --

1 **THE COURT:** I don't need your commentary, Mr. Nooney. Just
2 ask your questions and if you have an objection, you can
3 object to her answer.

4 **Q (BY MR. NOONEY)** As it concerns the alleged incidence on
5 February 9, 2024, you had stated, I believe, the night
6 prior -- would that be February 8th of 2024?

7 **A** Yes.

8 **Q** And you had testified there was nine puppies and two dogs
9 in the house, correct?

10 **A** Yes.

11 **Q** And you had testified something to the fact that the house
12 wasn't in a good condition. It wasn't healthy for the
13 children, correct?

14 **A** Yes.

15 **Q** You'd agree with me: Those two dogs are your dogs,
16 correct?

17 **A** They are our dogs.

18 **Q** You'd agree with me that the puppies were your puppies,
19 correct?

20 **A** They are our female's. Ours. Female puppy. They are our
21 family dog.

22 **Q** So it's your testimony that my client has the right to seek
23 one of or both of those dogs?

24 **A** What do you mean by that?

25 **Q** If my client initiated a separate action, he has property

1 rights as it concerns one or both of those dogs, correct?

2 **A** If he wants to. I only have one dog left and all the nine
3 puppies are gone.

4 **Q** You'd agree with me that you previously alleged that my
5 client poisoned one or multiple puppies, correct?

6 **A** I stated that the vet did a toxicology to make sure that
7 they were not poisoned. And, yes, I did ask Rigo in a text
8 message if he would have done something to the puppies
9 because of the actions that were occurring. I didn't
10 accuse; I asked. I asked if he hurt the dogs. I asked him
11 if he kicked the dog because that's what I believe
12 happened.

13 **Q** And if you look at Exhibit Number 3, nowhere within
14 Exhibit 3 is there any language as it concerns the cause of
15 the issues with the puppies, correct?

16 **A** No. It just shows what the vet did. It shows that the dog
17 had to stay in their care for three days.

18 **Q** You'd agree with me those puppies did not or were not in a
19 great condition, correct?

20 **A** They were in a great condition until that night.

21 **Q** So it's your testimony that the puppies were in a clean and
22 sanitary area?

23 **A** Yes.

24 Do I agree with the location of where they were? No.
25 I wanted the puppies to be in the garage because for the

1 best interests of my family and the puppies, it was better
2 for them to be in the garage. Rigo would not allow the
3 puppies to be out there, that I put them in a kennel in our
4 bathroom. But they were clean. Every three hours those
5 puppies were fed, cleaned, and taken care of by myself and
6 my dad.

7 **Q** I would direct your attention to Exhibit Number 111,
8 please.

9 **A** Do I have it?

10 **Q** It will be in the premarked binder.

11 And if you would, please, take a moment to review
12 Exhibit Number 111.

13 **A** Yes. This is the puppies using the bathroom after -- you
14 can see that I opened up the gate to let them out within
15 that three hours. That this is normal for a dog's kennel.
16 That you take them out every three hours, you clean them,
17 you pick up their feces. This would not have been the case
18 if they were allowed to be in a garage, where it was
19 better. In the winter I would have at -- I would have
20 taken them outside. I do not agree with where they were.
21 This was a forced matter.

22 **Q** You'd agree with me that the various photographs in
23 Exhibit 111 are fair and accurate photographs that depict
24 the area that the puppies had been in throughout the home,
25 correct?

1 **A** This was from the older dog that came in and there was
2 garbage at our front door after begging Rigo for multiple
3 days to help me get our Christmas gifts. These are
4 Christmas boxes that were at our front door that he stated
5 for multiple days that he would take out to the dump.
6 These were at my front door. After three days later, the
7 dogs ate the boxes.

8 **Q** We'll go through them individually. I understand what
9 you've testified to as it concerns Tovar 0196.

10 If you'd flip to the previous page, please, Tovar 177,
11 you agree with me that that is a photo of feces and urine
12 or other bodily fluids from either the puppies or the dogs
13 inside the residence, correct?

14 **A** Yes. That's --

15 **Q** And that's a fair and accurate photograph, correct?

16 **A** This is a fair and accurate that is responsible for both
17 parties.

18 **Q** You'd agree with me my client never elected to have
19 puppies, correct?

20 **A** I didn't either.

21 **Q** I'd direct your attention to Tovar 0197 and 0198.

22 You'd agree with me that Tovar 0197 and Tovar 0198
23 depict feces on the carpet in the residence, correct?

24 **A** Wait. What -- where are we at?

25 **THE COURT:** Can you hold on for just a moment.

1 You said Tovar what?

2 **MR. NOONEY:** Your Honor, I'm referring to the Bates, the --
3 just in the bottom right. So Tovar 0197 and Tovar 0198
4 still within Exhibit 111.

5 **THE COURT:** Very well. Thank you.

6 **A** These -- this is a picture of me letting the dogs out and
7 they ate food and they picked it up. In your pictures, it
8 will show in 198 of my carpet cleaner being right there and
9 I cleaned up the matter immediately.

10 **Q (BY MR. NOONEY)** But you'd agree with me those are fair and
11 accurate photographs, correct?

12 **A** Yes.

13 **Q** And then Tovar 0199, still within Exhibit 111, you'd agree
14 with me this would be a fair and accurate photograph of the
15 puppies food and them essentially in a makeshift kennel or
16 crate, correct?

17 **A** Yes. I put them in there because it was winter. It was
18 40 degrees below outside. Rigo would not allow me to put
19 them in our garage so, yes, this is the next best option I
20 had for the best interests of these puppies, trying to keep
21 them alive.

22 **Q** So you'd agree with me, though, the puppies were not in a
23 great --

24 **A** No, they were in a --

25 **Q** Ma'am, if you would please let me finish.

1 **A** Sorry.

2 **Q** That they were not in a great area or surroundings or
3 environment, correct?

4 **A** Yes. I agree that this was not the best for the puppies.

5 **MR. NOONEY:** Your Honor, I'd offer Exhibit Number 111 into
6 evidence.

7 **MR. NELSON:** No objection.

8 **THE COURT:** Exhibit 111 is received.

9 Let's take a -- hold on for just a moment, Mr. Nooney.
10 Okay. Go ahead.

11 **MR. NOONEY:** And, Your Honor, if we need to take a break, I
12 surely do not mind.

13 **THE COURT:** I guess I anticipate this is going to go for a
14 little while yet. Why don't we take just a 5-minute recess
15 and we'll continue on with cross-examination of Ms. Wagner.

16 **MR. NOONEY:** Thank you, Your Honor.

17 (Recess taken from 2:39 p.m. to 2:45 p.m.)

18 **THE COURT:** Mr. Nooney, you may continue.

19 **MR. NOONEY:** Thank you, Your Honor.

20 **Q (BY MR. NOONEY)** Ms. Wagner, you'd agree with me that you
21 previously testified that the puppies and the dogs were
22 your responsibility and your father's responsibility,
23 correct?

24 **A** They were also Rigo's responsibility and he refused to
25 help.

1 Q You'd agree with me that you testified that either your dad
2 or yourself would take care of the puppies every three
3 hours, correct?

4 A Correct. As well as leaving work to do so.

5 Q As it concerns the alleged incident on May 22nd of 2024,
6 you recall that testimony, correct, regarding the park?
7 And is that Wilderness Park?

8 A That sounds familiar, but, like I said, I don't remember
9 the name of the park. I can just explain the location,
10 that it's about a mile and a half south of the school.

11 Q And you had testified previously that both Isaiah and Teyo
12 were angry, correct?

13 A Teyo not so much. Isaiah was more angry than Teyo was.

14 Q But earlier you testified that the kids were angry,
15 correct?

16 A Yes, I did.

17 Q I'd direct your attention to Exhibit 112. Do you recognize
18 Exhibit 112? And I'll just represent to you that given
19 there's minor children, faces -- or other individuals that
20 you can see in close proximity, the faces have been
21 redacted.

22 A Uh-huh.

23 Q But you'd agree with me that you were present at the
24 May 22, 2024, bike rally, correct?

25 A I was present but not at this spot. I was present at the

1 parking lot, which is about a quarter of a mile back, which
2 is where it starts, and that's where the park is at. This
3 is not the park.

4 **Q** You'd agree with me that you were present prior to the
5 actual bike rally, correct?

6 **A** Correct.

7 **Q** And you testified again that the kids were upset, correct?

8 **A** Yes. That's why me and Isaiah stayed behind and Teyo left
9 with his friends.

10 **Q** You'd agree with me that Exhibit 112 is a fair and accurate
11 photograph, which depicts Teyo on the right-hand corner of
12 the photograph, correct?

13 **A** I would agree that Teyo seems like he's happy that he is
14 with his friends.

15 **MR. NOONEY:** Your Honor, I'd offer Exhibit Number 112 into
16 evidence.

17 **MR. NELSON:** No objection.

18 **THE COURT:** 112 is received.

19 **Q (BY MR. NOONEY)** And, Ms. Wagner, you already answered my
20 question, but you'd agree with me that this photograph
21 depicts that Teyo was not upset and in fact is happy,
22 correct?

23 **A** At this time. This is a different time.

24 **Q** And you'd agree with me that it was my client, Rigo Tovar,
25 that biked with Teyo to school, correct?

1 **A** I would agree that Rigo followed the children to ride to
2 school and I did not; I stayed at the park with Isaiah that
3 was upset.

4 **Q** And it's fair to say that when my client took this
5 photograph when he was with Teyo, he was, in fact, happy,
6 correct?

7 **A** If Rigo was the one that took that picture, yes.

8 **Q** It doesn't look like Teyo is scared by any means, correct?

9 **A** No. It looks like he's happy with his friends.

10 **Q** And let's look past the alleged incident that actually
11 occurred at the park or on the way to school on May 22nd of
12 2014 -- 2024, excuse me. You'd agree with me that that
13 night both Isaiah and Teyo had a baseball practice,
14 correct?

15 **A** On which night?

16 **Q** On May 22nd of 2024.

17 **A** On May 22nd was the night that this was filed? I would
18 have to go back to the calendar. There's been lots of
19 practices, lots of baseball games. I can't testify that
20 there was a game that night on this day.

21 **Q** And, Ms. Wagner, I'm not trying to trick you. I'm just
22 trying to get a timeline for the Court.

23 You would agree with me that there would have been a
24 baseball practice sometime after the alleged incident on
25 May 22nd of 2024 that my client would have been present at,

1 correct?

2 **A** They're -- yes. They were in baseball, yes. They're in
3 sports.

4 **Q** And you'd agree my client showed up to a baseball practice
5 after this alleged incident on May 22nd of 2024 and stood
6 approximately 10 feet from you, correct?

7 **A** I -- again, I don't know what day this is so I can't agree
8 to anything without looking at a calendar. I know that
9 Rigo showed up to baseball, but in the last ten years Rigo
10 was not present during -- during activities until April of
11 this year that Rigo started being present.

12 **Q** Him not being present at things like baseball practice,
13 that has nothing to do with your allegation --

14 **A** Well, I'm just --

15 **Q** -- as it concerns imminent fear or harm, bodily injury,
16 from my client to you or the kids, correct?

17 **A** Correct. I mean, he was just standing there at a game.

18 I believe that it's fear from the actions of what has
19 occurred over the last ten years that the children wouldn't
20 even acknowledge that their dad was there. They were
21 forced to say "hi" to him and they would leave. So with
22 what I saw from my children, they weren't concerned that
23 their dad was there.

24 **Q** You had testified, I believe, that there was an audio
25 recording or a video of the alleged incident on May 22,

1 2024, correct?

2 **A** Yes. On my cell phone.

3 **Q** And do you have -- your counsel hasn't offered that as
4 evidence today, correct?

5 **A** I did not see it. It's a really long video that you cannot
6 email. It is on my phone, which is present here, if you'd
7 like to see it.

8 **Q** You had alleged that my client, quote, I believe, charged
9 you, correct?

10 **A** Yes.

11 **Q** And that he, quote, acted in a physical menacing manner,
12 correct?

13 **A** Yes, he did.

14 **Q** You'd agree with me you didn't call law enforcement as it
15 concerns that alleged incident, correct?

16 **A** I did not. I called my dad.

17 **Q** And your dad, again, is not a law enforcement officer,
18 correct?

19 **A** Correct.

20 **Q** And you'd agree with me if you, in fact, truly did believe
21 there was some imminent physical harm -- or risk of
22 physical harm or injury, you, in fact, would have called
23 law enforcement, correct?

24 **MR. NELSON:** Objection.

25 **THE COURT:** Sustained. It's argumentative.

1 Q (BY MR. NOONEY) You then go on to state requests for
2 protection order, correct?

3 A Yes.

4 Q You state that this protection order is imperative,
5 correct?

6 A What does that mean?

7 Q Ma'am, I'm reading your writing. If you would, could you
8 please turn to Exhibit 102. I'm reading what you have
9 alleged under oath within the petition.

10 A Yes. I'm reading that I filed for a protection order.
11 That's -- are you going back to this?

12 THE COURT: I think you said 102. Are you talking about
13 Exhibit 2?

14 THE WITNESS: Yeah.

15 THE COURT: And your Exhibit 101?

16 MR. NOONEY: Yes, Your Honor. It was a misstatement.

17 A Okay. Yes.

18 Q (BY MR. NOONEY) Sorry. Ms. Wagner, I'm not trying to
19 confuse you. That was a misstatement on my part.

20 So Exhibit 101. And I'm on the last page before you
21 can see it says, *Respectfully submitted*.

22 A Uh-huh.

23 Q You'd agree that you allege this protection order is
24 imperative, correct?

25 A Yes. I did it on that day. The day that this -- the park

1 incident occurred, I went straight to George's office. He
2 was busy and I notified him right away of what the action
3 should be taken. I didn't know what to do so I went to
4 legal guidance, to my attorney.

5 **Q** And, ma'am, just so the record is clear, I don't want to
6 know anything that you talked with your counsel about.

7 You'd agree with me generally as it concerns your and
8 Mr. Tovar's relationship over a ten-year period or a little
9 over ten years, correct?

10 Is that fair it's been roughly ten years?

11 **A** It's been roughly ten years, yeah. I agree that there's
12 been ten years of --

13 **Q** Would you agree that at times there's been high conflict
14 within the relationship?

15 **A** A lot more than what normal should happen.

16 **Q** You'd agree with me that you made an allegation about my
17 client punching a door, correct?

18 **A** Correct.

19 **Q** And you'd agree with me that happened actually prior to the
20 children ever being born, correct?

21 **A** No. My newborn son was in the house in the bedroom during
22 this incident.

23 **Q** You'd agree with me that you have punched or kicked holes
24 in any number of doors of the residence, correct?

25 **A** I did. Just previously this year Rigo pushed me on the

1 floor, and my reaction to being pushed on the ground was to
2 get up and I walked upstairs to a private room and punched
3 my door.

4 **Q** And you put a hole in the door, correct?

5 **A** I put a dent in the door. There's not a hole; it's a dent.

6 **Q** You had made an allegation when my client showed up with
7 law enforcement after the incident that occurred at school
8 on or about April 30, 2024, correct?

9 **A** I did what?

10 **Q** You'd provided an exhibit, Exhibit 4 --

11 **A** Yes.

12 **Q** -- regarding the head injury and you testified as concerns
13 that; is that correct?

14 **A** Yes.

15 **Q** Excuse me.

16 You'd agree with me that my client showed up with law
17 enforcement to essentially have his parenting time that you
18 had continued to refuse him after any number of occasions,
19 correct?

20 **A** I've never refused parenting time with Rigo the last few
21 months. I explained to Rigo that it was in the best
22 interests of Isaiah to stay home with his mom that has
23 fully cared for him for the last ten years. Rigo has never
24 proceeded to take care of these children when they were
25 sick, ill, hurt. It was always me.

1 **Q** You'd agree, again, that that's in the best interests of
2 the children, which is in -- for the Court to consider in
3 the custody matter, not a protection order matter as it
4 concerns any alleged fear of imminent harm or physical
5 injury, correct?

6 **A** I believe the Court should look at it as that he didn't
7 care about the well being of his child.

8 **Q** You'd agree with me that my client talked to Isaiah when he
9 came to the house, correct?

10 **A** I invited the officer and Rigo into the home after
11 proceeding to tell the officer I was concerned that Rigo
12 doesn't care about what was going on with his child. I
13 offered the officer to come inside to check on the well
14 being of the child and with him -- he could bring Rigo with
15 him. Rigo went upstairs, never asked him how he was, but
16 just proceeded to say that you needed to go with me.
17 Isaiah was scared and thought the officer was going to
18 arrest me if I didn't go with him -- or if Isaiah didn't go
19 with him.

20 **Q** And you don't know what Rigo had talked with Isaiah about,
21 though, correct?

22 **A** I did. I was standing right there in the room and so was
23 the officer.

24 **Q** You don't know what Isaiah was thinking, though, correct?

25 **A** I could see his body language that he was cocooning and

1 scared and pushing himself away from his dad.

2 **Q** You'd agree with me that he told Rigo and/or the officer
3 that he wanted to go with Rigo and that he was feeling
4 okay, correct?

5 **A** I do not agree with that. Isaiah said that he would go
6 with them out of fear, after asking the officer if the
7 officer was going to arrest me if he didn't come.

8 **Q** You had testified as it concerns some allegations about my
9 client allegedly hitting Isaiah, correct?

10 **A** Yes.

11 **Q** You never called law enforcement at that alleged incident,
12 correct?

13 **A** During these times I was not aware of -- when -- let me
14 restate that. When they were little, and I witnessed the
15 one and only time that he hit Isaiah with a belt, I did not
16 call law enforcement. I proceeded to tell Rigo and family
17 members this was not how we were going to discipline our
18 children.

19 In the future, as time went on, I -- the kids
20 expressed their fear to my parents. They see that their
21 mom goes to their dad for help and they seek help from my
22 dad too. The children went to the child advocacy building
23 and was questioned by them, and that's where a lot of this
24 stuff came out was with the children and the child advocacy
25 building.

1 Q And you weren't present during any of those alleged
2 conversations, correct?

3 A I was not present during any of those things.

4 Q And you had stated the kids come to your parents. You
5 don't know what those discussions are because you weren't
6 present, correct?

7 A Correct.

8 Q You have alleged within -- I'm on Exhibit Number 101.
9 You've alleged that you have called law enforcement
10 previously, correct?

11 A Yes. I have called law enforcement.

12 Q And within the protection order, you have asked the Court
13 to allow supervised visitation at United Families, correct?

14 A I did.

15 Q Do you understand the policies at United Families as it
16 concerns what they will and will not allow supervised
17 visitation for, meaning the facts surrounding it?

18 A I do not. I'm really new to all of this whole court stuff.
19 I don't know all of it, no.

20 Q If I represented to you that in the event there is an
21 allegation of a weapon being involved with a protection
22 order and United Families not allowing supervised
23 visitation, do you have any reason to disagree with that?

24 A To disagree why they're not allowing them? I'm confused by
25 your question.

1 Q It wasn't very well asked.

2 If I represented to you that United Families had a
3 policy in place --

4 A Uh-huh.

5 Q -- when there's a order filed, if there's an allegation
6 regarding weapons, I represented to you based on that
7 allegation Youth & Family Services [sic] will refuse
8 supervised visitation, do you have any reason to disagree
9 with that?

10 A I do not disagree with that. If that was the case, I -- my
11 concern is why was this not brought forward over a month
12 ago, where if he was concerned on actually seeing the kids,
13 there's legal counsel that he could have reached out to and
14 tried to actually see the kids on a different supervised
15 matter or -- I'm not sure how that works, but it's quite
16 odd to me that this is the first time that I'm hearing this
17 over a month of him not seeing his children if he actually
18 really wanted to see them.

19 Q You'd agree with me, though, prior to the protection order
20 matter, my client had unsupervised visitation, correct?

21 A Yes.

22 Q And you understand that given there is a court order, my
23 client cannot see the minor children, correct?

24 A Yes.

25 Q You had stated on Page 4 -- I'm still on Exhibit 101 -- The

1 reasons for Petitioner and any Protected Parties need this
2 order immediately is, quote, Due to his irrationality and
3 unpredictable behavior. Correct?

4 **A** Yeah. Yes. It was repeated consistently all the way up
5 until the day before court. It was odd that the day before
6 he was still being aggressive and controlling and trying to
7 control a situation to affect my behavior here.

8 **Q** And you're referencing that May 22, 2024, alleged incident,
9 correct?

10 **A** I think he was trying to scare me. I think he was trying
11 to get me to come here with fear of him, of fear of what
12 he -- the control of what he could do to use law
13 enforcement and the law against me. Just like he never --
14 I'm referring to if he wanted to play this, the old court
15 order that was previous, when I separated in February, why
16 did it take him over two months to come see his kids? I
17 mean, it was a fear; it was a tactic, a fear of control
18 that was repeated.

19 **Q** Just so the record is clear, you're referring to an order
20 in 51CIV18-623, which is the paternity civil matter,
21 correct?

22 **A** Is that this -- is that in 101? Which one are you
23 referring to? I'm confused on what you're referring to,
24 what you're referencing.

25 **Q** I'm asking the question, ma'am, as it concerns what you

1 just testified to as it concerns the court -- previous
2 court order.

3 **A** Yeah. It was a court order back in 2018 that was not
4 followed for many years. That, all of a sudden, was forced
5 upon me in April after him not even asking or trying to see
6 his children. Even while his son was in the hospital, he
7 didn't show up in February.

8 **Q** But for the purposes of my question, you'd agree with me
9 that is in the paternity --

10 **A** I am --

11 **Q** -- civil matter --

12 **A** I --

13 **Q** -- not the pending protection order matter, correct?

14 **A** Yeah. I agree they're two different things.

15 **Q** On the last page, Page 5 -- and I'm still looking at
16 Exhibit 101, which is the Petition and Affidavit for a
17 Protection Order -- Ms. Wagner, you'd agree with me that
18 you allege you will suffer, quote, *Emotional and physical*
19 *harm*. Correct?

20 **A** Correct.

21 **Q** You'd agree with me that you had offered on any number of
22 occasions to allow my client to come see the kids prior to
23 him filing the Verified Motion for Change of Custody,
24 correct?

25 **A** In my care. I offered him to come to us to see the

1 children that were sick in the home; that he refused to
2 come see his children, which is also a concern why -- why
3 not come see your kids no matter where they are? Who
4 they're with?

5 **Q** I'd direct your attention to Exhibit 103. You'd agree with
6 me, Ms. Wagner, Exhibit 103 is a fair and accurate copy of
7 a text message screenshot between yourself and my client,
8 Rigo Tovar, correct?

9 **A** Yes.

10 **Q** You'd agree with me on or about March 21, 2024, at
11 approximately 7:28 p.m., you had sent a text message to my
12 client, which is -- I think it will be the gray text box,
13 correct?

14 **A** Yes.

15 **Q** You'd agree with me that this is a fair and accurate copy
16 of that text message, correct?

17 **A** Yes. I wrote that.

18 **MR. NOONEY:** Your Honor, I would offer Exhibit 103 into
19 evidence.

20 **MR. NELSON:** No objection.

21 **THE COURT:** 103 is received.

22 **Q (BY MR. NOONEY)** Ms. Wagner, you'd agree with me that, in
23 essence, my client was asking for time with the children
24 before you took the children to Florida, correct?

25 **A** Yes. He was asking at an unreasonable time of the day. He

1 had over a week, multiple times. He was also supposed to
2 be on this flight. He asks at 8:00 o'clock at night, which
3 is not reasonable.

4 **Q** You'd agree with me, though, that's a misstatement of the
5 text message, correct?

6 You'd agree with me --

7 **A** What do you mean?

8 **Q** -- that he sent a text at 5:10 p.m., not 8:00 o'clock,
9 correct?

10 **A** This says 7:28 p.m.

11 **Q** If you look on the right-hand side next to his text, which
12 is in blue, you would agree with me it says 3-21-24
13 5:10 p.m., correct?

14 **A** Yes. I believe it was late and I did not see the text
15 until then. If I went back, I could probably tell you that
16 I was at practice or something and did not see the text,
17 which he could have been there too, but he wasn't.

18 **Q** So you'd agree with me, he, in fact, didn't ask for
19 parenting time at 8:00 o'clock, he asked for parenting time
20 at 5:10 p.m. and you responded at 7:28 p.m., correct?

21 **A** Yes. But why not days before or not even get on the
22 airplane with me? It doesn't make sense.

23 **Q** You'd agree with me that you go on to state, in part,
24 You're more than welcome to come to the house while we get
25 ready. Correct?

1 **A** Yes. I invited him over to spend time with the children.

2 **Q** And you would agree with me then you state, *You also have a*
3 *plane ticket to come with.* And you're referring to the
4 fact that Rigo had a plane ticket to go to Florida,
5 correct?

6 **A** Yes.

7 **Q** And it's your testimony, as you sit here today, that you
8 are fearful of my client, yet you'd invited him over to see
9 the kids at your parents' house on March 21, 2024, correct?

10 **A** I am feared of Isaiah -- or Rigo being alone. I believe
11 I -- when my dad is in the room, Rigo is a different
12 person. I believe that their relationship, he chooses to
13 be somebody else. In the best interests of the children
14 that, no matter what, he is their dad. No matter what, I
15 think he should be a part of their lives, but I think he
16 should be doing it in the best interests in a healthy, safe
17 environment of the children. And I do -- I did invite him
18 over with supervision of my father.

19 **Q** And that was, again, you dictating that, correct?

20 **A** Me saying that he should come over and see his kids? Yes.

21 **Q** And then you state when you offer for him to come to
22 Florida, it's your testimony that you're comfortable with
23 him coming to Florida on a vacation, but as you sit here
24 today, you have fear that my client is going to create or
25 has created physical harm in you and the children, correct?

1 **A** I don't believe that in that -- that exact way, no. I
2 believe that, as I didn't want him to come with and clearly
3 he wasn't coming with over that time, I was trying to make
4 a point that this is not always -- it's a point of, despite
5 my fear of Rigo and the fear of the children, it's also
6 that he doesn't do what's in the best interests of the
7 children, which also causes concern for their well being.
8 If he's not going to come see the children when he has an
9 opportunity to, what's he hiding? What is there on why
10 cannot people, other people, be around? If you're going to
11 come because you're concerned about your children and being
12 with your children, why not be with your children that's
13 supervised by other people to make the environment safe?

14 **Q** You would agree with me that's your subjective speculation
15 or belief, correct?

16 **A** Not only -- not just mine, but yes.

17 **Q** I would direct your attention to Exhibit 108. You'd agree
18 with me that after you filed this Petition and Affidavit
19 for a Protection Order alleging domestic abuse, you posted
20 on Snapchat or on your Snapchat story a photograph of the
21 house, which is depicted in Exhibit 108, correct?

22 **A** I don't see a picture of my house on 108. I see a text
23 that I've never seen before. Am I in the wrong area?

24 **Q** Ma'am, I believe it is the next one. I believe you're on
25 107.

1 **A** Yes. This is a picture that I put on Snapchat to -- on my
2 public privacy of just saying I'm so thankful that I got my
3 house back. What's wrong with that?

4 **Q** And you'd agree with me then you stated, *Finally thank you,*
5 *Lord, for doing the right thing and giving me and my kids*
6 *our home back that was rightfully mine in the first place.*
7 Correct?

8 **A** Yes.

9 **Q** And this is a fair and accurate screenshot of what you had
10 posted on Snapchat of a photo you had taken and a text you
11 had written, correct?

12 **A** Yes.

13 **MR. NOONEY:** Your Honor, I would offer Exhibit 108 into
14 evidence.

15 **MR. NELSON:** No objection.

16 **THE COURT:** 108 is received.

17 **Q (MR. NOONEY)** Ms. Wagner, you'd agree with me that this
18 protection order allowed you to get back into the home and
19 remove my client from the home that you and him own
20 together, correct?

21 **A** I don't agree it was on purpose to remove Rigo. What I
22 agree with is that it was a home which was in the best
23 interests of the children. That we were homeless. We were
24 staying with my parents but we had nothing. When we left
25 there, we had no clothes; we had no toothbrushes; we had no

1 personal hygiene. We hadn't -- we were struggling
2 financially; food. We had to seek refuge for help. I
3 believe that it's in the best interests of the children to
4 be in their home with their things. It's not about -- it's
5 not about if Rigo has a home; it's about if the children
6 have a home.

7 **Q** Understood.

8 **MR. NOONEY:** Your Honor, if I may have just one moment to
9 review my notes?

10 **THE COURT:** Take your time.

11 **MR. NOONEY:** Thank you.

12 **Q (BY MR. NOONEY)** Ms. Wagner, I would direct your attention
13 to Exhibit 110. And there's multiple photographs so I'm
14 going to refer to a Bates stamp. A Bates stamp is just
15 what lawyers use to mark a specific document so I'm on the
16 third page of Exhibit 110. In the bottom corner it will
17 say Tovar 0173 still within Exhibit Number 110. Please let
18 me know when you're there.

19 **A** Yes.

20 **Q** Would you agree with me that Exhibit 110, Tovar 1073, would
21 be a fair and accurate depiction of my client's AR-15 as it
22 concerns the alleged incident that you have provided the
23 Court with on December 30, 2023?

24 **A** Yes. I believe that this is one of them. This is the gun
25 that was used on December 30th. This is not the weapon

1 that was used on January 14th.

2 **Q** And you'd agree with me, to your knowledge, my client only
3 has one AR-15, which is depicted in Tovar 0173, correct?

4 **A** I can't agree with that. I don't know what Rigo has.

5 **Q** You agree with me that he has the right to lawfully own
6 guns, correct?

7 **MR. NELSON:** Objection; asked for a legal conclusion.

8 **THE COURT:** Overruled.

9 **Q (BY MR. NOONEY)** You may answer, if you know.

10 **A** Yes. I believe people can bear firearms, but it's
11 concerning that he couldn't before. He was denied to
12 purchase weapons so how can, all of a sudden, he can
13 purchase weapons?

14 **Q** I would direct your attention, Ms. Wagner, to Exhibit 113.

15 You'd agree with me that Exhibit 113 would be a
16 photograph that was taken as it concerns a drawer in the
17 residence and there's a laser pointer towards the left-hand
18 corner, correct?

19 **A** It looks like a bullet with a button. I can't confirm that
20 that's a laser. This is something -- this was a new item
21 that was in the house. I've never seen this prior.

22 **Q** Is it your testimony that you know the contents of
23 everything in all the drawers in the residence in the
24 house?

25 **A** Do I know everything that's in the house? No.

1 This is my drawer. As you can see, my brother that is
2 passed away driver -- or his ID is there so I do know some
3 items. I know where this drawer is. But this was not in
4 that drawer. As you can see, my brother that is
5 deceased -- his stuff is in this drawer. That was not
6 there. That is new.

7 **Q** But you'd agree with me that this is a fair and accurate
8 photograph of that drawer in the residence, correct?

9 **A** Yes.

10 **MR. NOONEY:** Your Honor, I'd offer Exhibit 113 in evidence.

11 **MR. NELSON:** I don't think there's foundation as to -- I
12 mean, I think this is a picture; she's admitted this is a
13 picture of the drawer in the home, but as far as this item,
14 I don't think she can testify to how that item -- she
15 doesn't recognize it so I object.

16 **THE WITNESS:** Yeah.

17 **MR. NELSON:** Lack of foundation.

18 **THE COURT:** Ma'am, do you recognize this drawer and what's
19 in it?

20 **THE WITNESS:** I recognize the drawer. I recognize some
21 things in the items, but not the item that he's
22 specifically talking about. I do recognize the other items
23 but not that specific item.

24 **THE COURT:** Everything else in there fairly and accurately
25 depicts what's in that drawer, as you remember it?

1 **THE WITNESS:** Yes.

2 **THE COURT:** I will overrule the objection, will receive the
3 exhibit, and I understand her clarification of what's in
4 the photo.

5 **MR. NOONEY:** Your Honor, if I may approach, I'm going to
6 mark as Exhibit 115.

7 **THE COURT:** You may approach.

8 **MR. NOONEY:** I apologize. I understand the Court's already
9 told me I don't need to ask. It's just a habit.

10 **THE COURT:** I know.

11 Do you have copies for everyone?

12 **MR. NOONEY:** Yes, Your Honor.

13 **THE COURT:** Very good.

14 **MR. NOONEY:** And I'll mark the original, Your Honor, as
15 Exhibit 115.

16 **THE COURT:** Sure.

17 **Q (BY MR. NOONEY)** Ms. Wagner, I'd direct your attention to
18 what is marked as Exhibit 115. Would you agree with me
19 that this is a series of text messages, a screenshot, from
20 February 9, 2024 until February 10, 2024?

21 **A** I agree this is text messages, yes.

22 **Q** And would you agree with me that you sent a text message
23 to my client on February 10, 2024, at approximately
24 10:34 a.m., stating, *you're no help on anything.* So
25 that's why we moved out. Correct?

1 **A** I did use those words, yes. But it's not moving out when
2 you don't move out. It's you left. Moving out consists of
3 actually moving your property. I used the words there as
4 being -- as being used as something that wasn't happened.
5 I misused a word. Moving out is actually packing and
6 moving. Leaving is something different.

7 **Q** Well, you'd agree with me that prior to my client filing
8 the Verified Motion for Change of Custody on or about
9 March 22, 2024, you had sent a text on February 10, 2024,
10 stating that my client was no help and that's why you moved
11 out, correct?

12 **MR. NELSON:** I'm going to object that it's argumentative.

13 **A** I don't really see where it says --

14 **THE COURT:** Overruled. Please answer.

15 **A** Yes. I stated that he was no help with anything. This
16 was -- the children were sick; the puppies were sick --
17 well, the puppy was hurt. We moved the puppies this day to
18 my dad's house. I didn't know there was a game. There
19 was -- we were in multiple different leagues so, yes, I
20 state that he is no help. That is a true fact he is no
21 help to his children.

22 **Q** But in that text you didn't state anything alleging that
23 you moved out due to my client's alleged erratic or
24 unpredictable behavior, correct?

25 **A** I don't think during that time that I had to be so

1 explanatory. I think he knew exactly why we ran in fear.
2 I think he knew exactly what was going on. And he knows
3 that we're scared of him and he uses that as a tool, just
4 as why he confronted my entire family to turn against me.
5 It was a repeated thing. He -- I didn't use or explain
6 a lot of these things because he's already aware of them.

7 **Q** You had stated about my client turning you against your
8 family or your family against you?

9 **A** Yes --

10 **Q** Correct?

11 **A** -- I did.

12 **Q** You'd agree with me there were any number of occasions
13 where your father would get in an argument with your mother
14 and then seek refuge at your and Mr. Tovar's residence,
15 correct?

16 **A** No. My dad sought refuge at our home because of mine and
17 his fear, not because of arguments with him and my mother.
18 My mother lost her child and was alone and scared because
19 her child was devastatingly taken from her. She was in a
20 really hard time period. They weren't in -- my parents
21 were never arguing; my parents were trying to stand on
22 their feet after losing their child, and then in fear of me
23 and Rigo.

24 **Q** And, ma'am, I'm not undermining your brother passing away;
25 I feel sympathetic for you. I'm just trying to understand

1 your statement. You'd agree with me there was an occasion
2 where your -- whether it be your dad just leaving the
3 house, but your dad came to your residence and Mr. Tovar's
4 residence, and that your mom blamed my client for allowing
5 that to happen, correct?

6 **A** My mom is upset that Rigo's actions was getting into her
7 marriage. That her husband had to keep leaving her to come
8 stay in the home because we were scared. She -- they were
9 never fighting between the two of them; she was upset that
10 Rigo was getting in the middle of their marriage that was
11 making my dad so scared for his only other living child to
12 come seek refuge with us for our safety.

13 **Q** And that's just your interpretation, though, correct?

14 **A** Yeah. I mean, that's what I seen and what I felt.

15 **MR. NOONEY:** I have nothing further at this time,
16 Your Honor, as it concerns cross-examination with
17 Ms. Wagner.

18 **THE COURT:** Redirect, Mr. Nelson?

19 **MR. NELSON:** Thank you, Your Honor.

20 Just a few questions.

21 **REDIRECT EXAMINATION**

22 **Q (BY MR. NELSON)** Kylea --

23 **A** Yes.

24 **Q** -- how many times did you leave the residence that you were
25 cohabiting with Rigo? How many times have you felt the

1 need to leave the residence with the children because of
2 the situation and the fear?

3 **A** I --

4 **MR. NOONEY:** Objection; leading, Your Honor.

5 **THE COURT:** Overruled.

6 **A** I don't know the exact number, but there's been a good
7 handful of times that I couldn't just get up and leave. My
8 parents would have to come either get me out of a locked
9 bedroom and the children; they would have to come get us
10 because we were scared. There's a good handful of those,
11 but I can't tell you exactly how many.

12 **Q** Okay. At least the numbers -- a number of them that you
13 testified to today?

14 **A** Yes.

15 **Q** And did -- was -- on the pistol that Rigo has, is there a
16 laser on the pistol?

17 **A** Yes.

18 **Q** Now the house, again, is a home that the two of you own as
19 joint tenants with right of survivorship, correct?

20 **A** Yes.

21 **Q** And the parties are in discussions on selling that house,
22 correct?

23 **MR. NOONEY:** Objection; relevance, Your Honor.

24 **THE COURT:** Overruled.

25 **A** We are -- I'm -- we are trying to buy one or the other out,

1 and I would like to keep the house for myself and the
2 children.

3 **Q** Okay. But --

4 **A** But, yes, there is a matter there.

5 **Q** All right. Again, the purpose of these proceedings isn't
6 to gain some advantage over the house, correct?

7 **A** Correct. This has nothing to do with the house.

8 **Q** Because you both are on the title, the deed to the home --

9 **A** Yes.

10 **Q** -- correct?

11 **A** Yes.

12 **Q** And until there's a -- either a petition action or a
13 settlement agreement between the parties to transfer the
14 asset, you are not getting Rigo's share of the house
15 through these proceedings, correct?

16 **A** Correct.

17 **MR. NOONEY:** I'm just going to renew my objection on
18 irrelevant.

19 **THE COURT:** We've been far afield all afternoon; we're just
20 going to finish this up. Overruled.

21 **Q (BY MR. NELSON)** All right. The other question I had was
22 if you look at Exhibit 101, first page. Excuse me, the
23 first page after your petition, I believe -- or after your
24 narrative. First colored photo.

25 Again, what is that a picture of?

1 **A** This is a picture of the blood in the bathroom from the
2 puppy.

3 **Q** All right. And then if we'd turn to Exhibit 111 and the
4 last photo of Exhibit 111.

5 When your puppy was injured, you took it to the vet.
6 The puppy was in this kenneled area?

7 **A** Yes.

8 **Q** All right. The puppy, was it vomiting? Is that correct?

9 **A** He never -- I didn't see him vomit. There was just blood.

10 **Q** All right.

11 **A** So it was -- there was blood and just a puppy laying there.

12 **Q** All right. And to get into the kenneled area, is there a
13 gate?

14 **A** Correct.

15 **Q** Is that close to the exit of the bathroom?

16 **A** Yeah. Where the picture is taken is standing -- you can
17 see the gate right where this picture is taken. That gate
18 has to be open for somebody to get into it or the puppies
19 to get out of it.

20 **Q** So is that the bottom right corner or top left or --

21 **A** The bottom, the bottom right is the gate.

22 **Q** All right. And so the blood was near the wall by the vent?

23 **A** Correct. It was directly straight across where you could
24 see the vent up against that east wall of the house.

25 **Q** All right. And so for a puppy to be injured, somebody

1 would go in -- would have to go into that gated area?

2 **A** Correct.

3 **MR. NOONEY:** Objection; calls for speculation.

4 **THE COURT:** She can answer to the extent she knows.

5 Overruled.

6 **A** Yes. Somebody would have to go inside the kennel for the
7 puppy to get hurt.

8 **Q (BY MR. NELSON)** And I'm curious, how does a person use the
9 toilet then?

10 **A** They don't. There is two other bathrooms in this house.

11 **Q** Okay.

12 **A** This bathroom was only used just for the puppies during
13 this time period, as we used the other restrooms.

14 **Q** Now you've been made aware of, apparently, the first time
15 about counseling, an effort by Rigo to receive counseling;
16 is that accurate?

17 **A** Today. What -- ask that again.

18 **Q** Today is the first you've heard of Rigo, Mr. Tovar,
19 receiving counseling?

20 **A** The first time that I know that there was any counseling
21 was my children because he took the children with him to
22 have counseling and the children told me. That this was --
23 and I don't know exactly that date.

24 **Q** All right.

25 **A** I know that it was just recent.

1 Q All right. And are you happy about that?

2 A Yes. I'm happy that he's seeking counsel.

3 Q Have you asked him to do so in the past?

4 A Yes. Multiple times I asked him to do counsel by himself,
5 that I would do counsel myself. I also asked if we could
6 do couple counseling and he would refuse any type of help.

7 MR. NELSON: All right. I have no further questions.

8 THE COURT: Anything else?

9 MR. NOONEY: Just very briefly, Your Honor.

10 **RE-CROSS-EXAMINATION**

11 Q (BY MR. NOONEY) Just so the record is clear, Ms. Wagner,
12 you have -- your counsel has offered and it has been
13 received Exhibit Number 6, which is a photograph or a
14 screenshot of a Smith & Wesson pistol, correct?

15 A Yes. It was just something that I found that looks
16 something similar to what he has because I -- like I stated
17 before, I don't know weapons very well. I don't know if
18 this is the exact weapon, but this is exactly what it looks
19 like with a laser clipped to the bottom of it.

20 Q And as it concerns your allegation related to the laser
21 incident on or about January 14th of 2024, again, you never
22 saw my client actually point this gun into the house with
23 the laser, correct?

24 A I'm -- yes. I did not see the gun itself. As I stated
25 before, that his truck is 100 percent blacked out. You

1 cannot see through the front or the side windows of his
2 truck. This gun is held either in his pocket or inside the
3 truck at all times so that's why I'm assuming this was the
4 gun.

5 **Q** As it concerns the allegation regarding the puppies, you
6 would agree with me, you're not a medical veterinarian,
7 correct?

8 **A** No. That's why I took them to the vet immediately.

9 **Q** And you're not even a veterinarian technician, correct?

10 **A** No. That's why I seeked help.

11 **Q** So you have nothing from a skill, knowledge, experience,
12 education, training to provide this Court with any
13 certainty as it concerns why the puppy or puppies were, in
14 fact, bleeding, correct?

15 **A** I have a Wilderness First Responder. I do have medical
16 attention for humans but not puppies. So I believe that
17 they're very similar. And when you have a gut incident on
18 a human, you do have bleeding from bowels from a human. I
19 believe that animals are very similar to humans.

20 **Q** But you have nothing to proffer as it concerns a canine,
21 for example, to the Court, correct?

22 **A** I do not. That's why I seeked help.

23 **MR. NOONEY:** Nothing further. Thank you, Your Honor.

24 **MR. NELSON:** One follow-up, Your Honor. I'm sorry.

25 **THE COURT:** One question.

FURTHER REDIRECT EXAMINATION

1
2 **Q (BY MR. NELSON)** In regards to Mr. Nooney's questioning on
3 the laser -- and if you would look at Exhibit 113 before
4 you --

5 I think you've testified before that that item, the
6 silver -- it looks like maybe a silver bullet with a key
7 chain at the bottom. Is that the item you've never seen in
8 that drawer before?

9 **A** Yes.

10 **Q** Would you ever be afraid of a -- just a plain laser if it
11 was directed at you?

12 **A** Yes. If there was a laser pointed on my chest and my
13 forehead, yes, that's something to be very scared of.

14 **Q** If it was attached to a gun?

15 **A** It doesn't matter. Even if it's attached to a gun or not,
16 I believe it to be threatening, especially after the last
17 ten years of incidents that held -- or occurred. Even
18 if -- even if it physically wasn't a gun, if a laser is
19 coming through a window, yes, that's very frightening.

20 **Q** Had you seen any other type of laser in your house, other
21 than ones attached to guns?

22 **A** No, I have not.

23 **MR. NELSON:** No further questions.

24 **THE COURT:** Ma'am, I just have -- I just want to clarify
25 something for the record. We've been talking about lasers

1 and we've been -- I think there was a small bit of a
2 discussion that was about laser pointers. And I'm kind of
3 going back to when Mr. Nooney was asking questions. None
4 of us here are talking about an actual laser that would do
5 harm, other than perhaps to someone's eyes; we're talking
6 about laser pointers, be they on a gun or a button that you
7 use, like what could be this thing that's in the drawer.

8 That's what we're all talking about, is that true,
9 Counsel?

10 **MR. NELSON:** I believe so.

11 **MR. NOONEY:** I believe so, yes, Your Honor.

12 **THE COURT:** Ma'am, when you're talking about lasers, is
13 that what you're talking about as well?

14 **THE WITNESS:** Yeah. Only these either could be on a weapon
15 or just a pointer, but it was used in a scaring manner.

16 **THE COURT:** I just want to make sure we're all on the same
17 page there so...

18 Ma'am, you may step down.

19 **THE WITNESS:** Thank you.

20 (Witness excused.)

21 **THE COURT:** Counsel, we've gone for two and a half hours
22 and we've gotten through one witness. It looked to me like
23 there was about nine people that went out. Where are we
24 here?

25 **MR. NELSON:** I've got two witnesses and her parents should

1 be relatively short. Famous last words.

2 **THE COURT:** Yeah. I understand. I guess I understand
3 that Ms. Wagner's would have been -- is likely to be the
4 longest testimony or the longest witness and I get that. I
5 just kind of want to know where we are as we proceed here.
6 Do we think we're going to be able to get done here this
7 afternoon?

8 **MR. NELSON:** I don't believe so.

9 **MR. NOONEY:** Depending on how long Mr. Nelson needs,
10 Your Honor, I'll be fairly quick with my client. I do have
11 some audio recordings I'd like to offer as testimony. I,
12 of course, need him to lay the foundation. That's why I
13 didn't use them with Ms. Wagner. Depending on the
14 allegations, Your Honor, my primary focus is just to call
15 my witness. I'm not going to give the Court some assurance
16 that I'm not going to call another witness.

17 **THE COURT:** I understand. I'm just looking for a little
18 guidance on where we are.

19 Well, let's carry on.

20 Mr. Nelson.

21 **MR. NELSON:** I would call Jerry Wagner.

22 **JERRYJAY WAGNER,**

23 called as a witness, being first duly sworn, testified as
24 follows:

25

DIRECT EXAMINATION

1
2 **Q (BY MR. NELSON)** Please state your name and spell your
3 first name.

4 **A** Jerryjay Wagner, J-E-R-R-Y-J-A-Y.

5 **Q** And, Mr. Wagner, how are you related to the parties here?

6 **A** I'm her father.

7 **Q** Whose father?

8 **A** Kylea's father.

9 **Q** All right.

10 **THE COURT:** Sir, will you pull that microphone just a
11 little closer to your mouth.

12 **THE WITNESS:** (Complied.)

13 **THE COURT:** I mean, yeah, you can just bend it down.

14 **THE WITNESS:** (Complied.)

15 **Q (BY MR. NELSON)** And how long have you known Rigo Tovar?

16 **A** Since late 2013.

17 **Q** And during the time that you've known him, have you
18 observed any threatening behavior that he's exhibited
19 towards your daughter?

20 **A** I have, yes.

21 **Q** Can you relate to the Court those incidents, if there are
22 one or more.

23 **A** There was, yeah, more than one instance.

24 **Q** Was there an incident on December 30th of 2023?

25 **A** Yes.

1 Q What do you recall about that?

2 A The -- I'm trying to remember exactly what that was.
3 December 30th.

4 Q On that date, to your knowledge, late in December of 2023,
5 did Kylea call you out of a concern she was expressing to
6 you in the evening?

7 A Yes. She called concerned that -- that Rigo had taken out
8 a gun and was worried that something might happen, he might
9 do something to himself or -- or he'd been drinking so she
10 wasn't sure and she was just simply scared.

11 Q And when she's scared, can you describe her appearance,
12 Kylea's.

13 A Describe what?

14 Q When Kylea is scared, can you describe to the Court her
15 appearance.

16 A Yeah. It's mostly distraught, worried, and scared, and
17 fear.

18 Q Did you show up at their residence?

19 A I did, yes.

20 Q Do you recall what happened?

21 A There is so many. I'm trying to remember exactly this
22 incident so...

23 Q Did it involve a gun?

24 A That particular -- that particular night was, you know, she
25 was worried that he had taken a gun out of the safe and, of

1 course, he'd been drinking so she was basically scared that
2 he was going to do something to himself is the way she
3 explained it to me.

4 **Q** And did she stay in the house?

5 **A** She did, yes.

6 **Q** Did you take the kids?

7 **A** Yes, I did take the kids.

8 **Q** Have there been other occasions where she's asked your
9 assistance?

10 **A** There's been several, yes.

11 **Q** Related to the -- their domestic situation, their
12 relationship?

13 **A** Yes.

14 **Q** And in those incidents has she expressed fear for her
15 safety?

16 **A** Yes. Each time.

17 **Q** Have you made any observations about Mr. Tovar and his
18 demeanor and his ability to invoke fear in other people?

19 **MR. NOONEY:** Objection; calls for speculation.

20 **THE COURT:** Overruled. It's based on his observation.

21 **A** The few instances that I have seen these reactions from
22 her, one instance when -- I'm thinking 2014, 2015, where I
23 had to -- where she was calling and telling me that her and
24 her newborn baby was locked in their bathroom in the first
25 home that Kylea moved in with Rigo at, and that he had been

1 threatening her and was beating the door down. And she
2 told me she was locked in with the baby in the bathroom so
3 I got in my vehicle and drove straight to her house to get
4 them.

5 **Q (BY MR. NELSON)** Was that here in Pennington County?

6 **A** Yes. I was not in Pennington County, but they were. I was
7 in Summerset so that would be Meade County.

8 **Q** All right. So you traveled to their residence to basically
9 investigate?

10 **A** Yeah. Well, to pick up my daughter and the newborn baby is
11 what I went there for. I was -- all I cared about was
12 their safety. So I wasn't interested in anything else,
13 except for getting them out of the harm that I thought that
14 they were in.

15 **Q** At that time did you confront Mr. Tovar?

16 **A** I mostly just, you know, asked him what he was doing.

17 **Q** And what was his response on that instance?

18 **A** He just didn't understand why I was -- why I was there. He
19 was acting like I didn't, you know, have any concern
20 there and that nothing was wrong.

21 **Q** Okay. So you picked up Kylea and -- was it just Isaiah or
22 your other grandson?

23 **A** At this point it was just Isaiah. It was the first
24 incident that I had to go and pick them up. Isaiah was
25 just a newborn baby and he was not very old at all.

1 **Q** Was there another incident that perhaps occurred when Kylea
2 and Mr. Tovar were on the West Coast?

3 **A** When they were on the West Coast?

4 **Q** No. Near the West Coast. Nevada.

5 **A** The other incident was -- this was when my daughter was
6 still pregnant with Isaiah. He -- my daughter was at that
7 particular time having really hard times with keeping food
8 down with her nutrition. She was supposed to be in bed
9 most of the time. I had to sometimes feed her several
10 different things in one setting just to go ahead and make
11 sure that she wasn't throwing it up and to get nutrition in
12 her body for her and the baby.

13 **Q** And did something occur in Reno, Nevada?

14 **A** Yes. I went ahead and got a phone call from my daughter.
15 She was stating that she was very sick; she didn't know
16 what to do.

17 **Q** Who was she with at the time?

18 **A** Rigo was down in the casino. I would imagine that that's
19 where he was at.

20 **MR. NOONEY:** Objection; calls for speculation.

21 **A** I could hear --

22 **THE COURT:** Overruled.

23 **A** I could hear the bells ringing so -- I know what a casino
24 sounds like. I asked him what he was doing; why he wasn't
25 getting my daughter any food; why he was -- why he left her

1 up in the room that particular time.

2 **Q** (BY MR. NELSON) What did he say?

3 **A** Well, he said that he went ahead and bought her -- he got
4 her a couple things and she wouldn't eat them, wouldn't eat
5 what he got her, and, basically, that he'd done all he was
6 going to do.

7 **Q** You did find her in the room?

8 **A** I did not. I was in Rapid City -- or I was in Casper,
9 Wyoming, and, of course, they were in Reno.

10 **Q** Did you go to get her?

11 **A** I asked Rigo, since he was -- he informed me that he wasn't
12 going to help her out in any other way to go ahead and make
13 her feel better and get some nutrition in her body for her
14 and the baby, that if he was not going to do that, that I
15 wanted him to send her -- to get her a plane ticket and
16 send her home to me right away.

17 **Q** Is that what happened?

18 **A** He called me back a little bit later, maybe 30 minutes,
19 said that he had gotten a ticket for her and he was going
20 to be sending her home the next morning.

21 **Q** Okay.

22 **A** So I took that as though that he was not going to go ahead
23 and help her in any way at that point.

24 **Q** All right. And this was early in their relationship.

25 **A** Yes. This is -- this is when she was pregnant with Isaiah.

1 Q All right. And then as the years went by, were there other
2 incidents?

3 A Yes. There was another incident where I got a phone call
4 stating that her and both boys this time was scared; they
5 didn't know what to do. Rigo was in the house at one point
6 and they couldn't find him. There was banging on the
7 floors and on the walls and on the windows to the point to
8 where both her and the boys were scared. I could -- you
9 know, she was just telling me, *I don't know what to do and*
10 *I'm scared.*

11 Q To make sure I understand your testimony, you're on the
12 phone with Kylea and you could hear the noise?

13 A I could not hear the noise, I could only go ahead and hear
14 the babies scared, because trying to go in, they were
15 saying my name, you know, *Papa*, you know, trying to get my
16 attention on the phone. I was mostly talking to Kylea on
17 the phone. She was the one telling me, but I could hear
18 the boys scared and upset.

19 Q All right. So did you come to get her --

20 A I did.

21 Q -- and the children?

22 A I did.

23 Q Do you know approximately when this was?

24 A In the evening --

25 Q Of what year?

1 **A** -- are you talking about or --

2 **Q** Let's start with the year.

3 **A** This would have been approximately '16, '17. I don't know
4 the exact month. Somewhere in there, year '16, '17.

5 **Q** Okay. And did you see Rigo on this incident?

6 **A** I did.

7 **Q** What was he doing?

8 **A** He came -- basically he was -- he had been nowhere to be
9 found when I went in, first got there. But when I got, you
10 know, to the house, Kylea had the boys ready to go. They
11 were wrapped up in blanket -- blankets and we were getting
12 ready to leave and I turn around and Rigo was standing in
13 the hallway.

14 **Q** Did he say anything?

15 **A** Just asked me what I was doing there. Basically the same
16 situation as the first time when I went to go get the
17 kids -- or Kylea and Isaiah. He didn't understand how come
18 I was there. I basically told him, *Well, that's a good*
19 *question because I can't understand why I would have to*
20 *come and get my daughter and my two grandchildren from your*
21 *house with them being scared.*

22 **Q** Have you had a discussion with Mr. Tovar about his behavior
23 and it being alarming or threatening to your daughter?

24 **A** I did basically just stating the fact that I didn't
25 understand where he was coming from. Why he thinks that it

1 was something that he should participate in, do.

2 **Q** Did he ever deny his threatening behavior?

3 **A** He basically just told me that it was -- that he was joking
4 and it was not -- he wasn't trying to go ahead and scare
5 them, but it was -- you know, I was overreacting.

6 **Q** And was there an incident involving Kylea and the children
7 in the home and a laser light was shown?

8 **A** I was not there at that incident, but I know what happened
9 through the boys telling me so and my daughter.

10 **Q** Did you go get the boys?

11 **A** I did. Not that -- not that evening, no.

12 **Q** Later?

13 **A** Later, uh-huh.

14 **Q** Have you ever been involved in any incidents that involved
15 law enforcement and Mr. Tovar?

16 **A** I -- not personally, no.

17 **MR. NELSON:** I have no further questions, Your Honor.

18 **THE COURT:** Cross?

19 **CROSS-EXAMINATION**

20 **Q (BY MR. NOONEY)** Mr. Wagner, you'd agree with me that over
21 the course of more than ten years when Rigo and your
22 daughter have dated off and on, you've essentially served
23 as a mediator for both of them, correct?

24 **A** I have, yes.

25 **Q** I'm sorry, sir?

1 **A** I have, yes.

2 **Q** You'd agree with me there's been any number of occasions
3 where my client, Rigo Tovar, had called you with concerns
4 with Kylea or arguments that they'd had between the both of
5 them, correct?

6 **A** That's right, yes. There was one incident where he did,
7 yes.

8 **Q** You'd agree with me just recently in March of 2024, my
9 client had reached out to you based on a text message that
10 your daughter had sent, where my client interpreted that
11 Kylea may kill herself, correct?

12 **A** That what?

13 **Q** That Kylea may kill herself, correct?

14 **A** He did not state that, no. He just stated that he was
15 worried.

16 **Q** Worried that she may harm herself, correct?

17 **A** He was worried that the text message -- what the text
18 message said.

19 **Q** So that would be at least one incident?

20 **A** He just wanted me to know, basically, *Are you -- do you*
21 *know that she's sent this text message?*

22 **Q** And that'd be one incident where you, in fact, served as a
23 mediator between the two of them, correct?

24 **A** Be one of them.

25 **Q** As it concerns the allegation on the incident that was

1 alleged on December 30, 2023, you never saw my client with
2 a gun, correct?

3 **A** Never saw him with a gun.

4 **Q** You never saw my client, in fact, consume any alcohol,
5 correct?

6 **A** No. But I spoke with him on the phone to know that he was
7 because he told me so.

8 **Q** You never saw my client leave the residence with a firearm,
9 correct?

10 **A** No. I was not there.

11 **Q** You never called law enforcement as it concerns that
12 alleged incident, correct?

13 **A** I did not want to go ahead and involve the law with
14 something I thought was a quarrel between my daughter and
15 Rigo.

16 **Q** But you'd agree with me you inserted yourself into that
17 situation, correct?

18 **A** I did out of concern of Rigo and my daughter, yes.

19 **Q** You'd agree with me that that next evening, you, Rigo, and
20 Kylea spent the evening together on New Year's, correct?

21 **A** Yes. Yeah.

22 **Q** At Mr. Tovar's parents' house, correct?

23 **A** No.

24 **Q** But you spent the evening together, the next evening,
25 correct?

1 **A** We spent a little bit of time together, yeah.

2 **Q** I'm sorry, at their home, meaning Rigo's home and your
3 daughter's, correct?

4 **A** Right. Yeah.

5 **Q** You'd agree with me that you, in fact, had gifted my client
6 a firearm in the past, correct?

7 **A** I do not remember gifting him a firearm.

8 **Q** It's not your testimony that you gifted him a .280
9 Remington rifle?

10 **A** Oh. Yes. Yes. Sorry.

11 **Q** As it concerns the alleged incident in 2014 and 2015, you
12 weren't present during that alleged incident, correct?

13 **A** I'm sorry, which -- what are you saying now?

14 **Q** I believe there was an alleged incident, you said, with a
15 newborn baby when Kylea was allegedly in a bathroom. You
16 weren't present during that alleged incident, correct?

17 **A** I was only present there to pick him up and to see the
18 damage done to the house and why she was scared.

19 **Q** You had testified about an alleged incident in Nevada. You
20 were not present during that alleged incident, correct?

21 **A** I was not there.

22 **Q** And you said that was when your daughter was pregnant with
23 Isaiah and that would have been more than ten years ago,
24 correct?

25 **A** No. She was -- Isaiah was already there.

1 Q So is it your testimony that Isaiah was in Nevada?

2 A Oh, Nevada. Sorry. I thought you said the bathroom.

3 Sorry. No. Isaiah was not -- yeah. She was by herself in
4 Nevada.

5 Q And I'm not trying to stump you, sir; I'm just trying to
6 get a timeline for the Court.

7 A Uh-huh.

8 Q That would have been more than ten years ago then, correct?

9 A Yes. Uh-huh.

10 Q You had testified as it concerns allegations where your
11 daughter has stated that she believes the behavior is
12 threatening or alarming, correct?

13 A Uh-huh.

14 Q You haven't been present during those alleged incidences,
15 correct?

16 A No. No, I have not.

17 Q Isn't it fair to say, sir, that during the ten years the
18 parties have had a relationship with conflict?

19 A Yeah. Like any other relationship, there would be
20 conflict.

21 Q Has there ever been a time, sir, that you and your wife
22 would have a disagreement or an argument, where you then
23 went to Mr. Tovar and your daughter's residence?

24 A Yes. Yeah. Sure.

25 Q And then would you agree with me then, your wife has

1 reached out to Rigo and he gets stuck in the middle of
2 that?

3 **A** Oh, I have no idea. But I don't know why my wife would
4 reach out to Rigo but --

5 **Q** But is it fair to say you --

6 **A** -- it's possible.

7 **Q** Sorry.

8 -- got in an argument with your wife and then left and
9 went to Rigo and your daughter's residence?

10 **MR. NELSON:** Objection; beyond the scope of direct.

11 **THE COURT:** Overruled.

12 **A** Say the question again, please.

13 **Q (BY MR. NOONEY)** I just want to -- sorry, sir. I just want
14 to make sure I understand your testimony. Is it fair to
15 say that there's been at least one occasion where you and
16 your wife got in a disagreement and you have left your
17 marital home to go to my client and your daughter's home?

18 **A** Yeah. Yeah. Uh-huh.

19 **MR. NOONEY:** Nothing further. Thank you, Your Honor.

20 **MR. NELSON:** I have no further questions.

21 **THE COURT:** You may step down. Thank you.

22 (Witness excused.)

23 **THE COURT:** Counsel, I just want to clarify what I was
24 talking about a minute ago. And you can call your next
25 witness or have your next witness come into the courtroom,

1 Mr. Nelson. I'll just clarify in a moment -- or I'll do it
2 first. When I said we've been far afield, what I'm getting
3 at is we've been going in and out of this custody matter
4 all afternoon so I'm not going to start sustaining
5 objections that we're outside the scope; we've been talking
6 about it the whole time so that's my point so -- when I
7 said that.

8 Go ahead and call your next witness.

9 **MR. NELSON:** Jeanne Wagner.

10 **MR. NOONEY:** Your Honor, if I may, I'm just going to put
11 this original notebook up front.

12 **JEANNE WAGNER,**

13 called as a witness, being first duly sworn, testified as
14 follows:

15 **DIRECT EXAMINATION**

16 **Q (BY MR. NELSON)** Please state your name and if you would
17 spell your first name.

18 **A** Uh-huh. Jeanne Wagner, J-E-A-N-N-E.

19 **Q** And what is your relationship to the parties here?

20 **A** Kylee is my daughter.

21 **COURT REPORTER:** Please pull that mic down in front of you.

22 **THE WITNESS:** Okay.

23 **COURT REPORTER:** Thank you.

24 **THE WITNESS:** Is that better?

25 **COURT REPORTER:** Yeah.

1 **A** Kylea is my daughter.

2 **Q** (BY MR. NELSON) And do you know Mr. Tovar?

3 **A** I do.

4 **Q** How long have you known him?

5 **A** Probably ten years. About ten years.

6 **Q** So when did you first meet him?

7 **A** Eleven years maybe. Summer of 2013.

8 **Q** What was your initial impression of Mr. Tovar?

9 **A** He was pleasant enough. I just -- I didn't really have
10 any -- she brought him out to meet us. I think they had
11 been speaking on the phone quite a bit and spending time
12 together. And initially I just -- I didn't think he seemed
13 like the kind of boy that she had formerly dated and he
14 seemed a lot older and I knew he worked out of town, but he
15 was pleasant enough.

16 **Q** How did their relationship progress the following months?

17 **A** Well, he was gone a lot, but it seems like it was -- it
18 moved pretty rapidly. That he wanted her to move in, you
19 know, pretty quickly.

20 **Q** So have you ever made any observations about Mr. Tovar and
21 his temperament?

22 **A** Of course. Well, initially, I mean, I think Rigo was just
23 a really quiet person, and just very polite and nice and --
24 in relevance to what exactly, like?

25 **Q** Does he have a short temper?

1 **A** He does. He does.

2 **Q** Have you ever witnessed him get angry at Kylea?

3 **A** The first time that I really saw him get angry and be angry
4 was, roughly, after Isaiah was born. And we were called in
5 the middle of the night and she was crying and we drove out
6 to their house in the Elks Golf Course, and he was -- he
7 was very irrational and unpredictable. He was very angry.

8 **Q** Over what?

9 **A** I -- I honestly have no idea. I just know that the -- I
10 don't know what started it. I just know that the door was
11 broken down and the kids -- she and the baby were locked in
12 the bathroom. And he was -- he directed his anger
13 initially at us, you know, that we needed to mind our own
14 business. But there wasn't a lot of conversation with him.
15 He was -- he was intoxicated, and then we just got Kylea
16 and the baby and we left.

17 **Q** Are you aware of any physical abuse between Kylea and
18 Mr. Tovar?

19 **A** Just -- her just recently telling us about her chok- -- him
20 choking her. That's all I've witnessed directed towards
21 Kylea.

22 **Q** Did you witness it or did you hear about it?

23 **A** I heard about -- I heard about it from Kylea that he choked
24 her.

25 **Q** Was it related -- when you heard about it, was it

1 immediate? Was it near the time of the incident?

2 **A** No, it wasn't. Kylea had really not been sharing a lot of
3 what would have -- what had been going on at her home. I
4 think the majority of what we really started to be
5 concerned is we were unaware of anything that was really
6 going on, except they just weren't getting along. And
7 that's happened many times so...

8 But when my brother and sister-in-law and their kids
9 were at our house, we were playing games -- they came for
10 like a post-Christmas event -- and during that, she kind of
11 just broke down to my brother and to my -- to our family as
12 a whole and told us what was going on. And it was just
13 kind of shocking just to -- just to hear.

14 **Q** All right. As to the relationship between Kylea and
15 Mr. Tovar --

16 **A** Uh-huh.

17 **Q** -- what have you observed, if anything, in regards to
18 Mr. Tovar's treatment of your grandchildren?

19 **A** Well, it's not that I see -- I don't see him really
20 interact that -- like, he doesn't really show emotion so
21 it's hard to really determine what you're trying to ask me.
22 I just know that he has a very strict way of managing the
23 kids and he's very -- it's very important to him to
24 maintain the same kind of situations that he grew up with.
25 You know, like, as far as he doesn't like them to have too

1 much, too much of anything, and it does really get him
2 upset.

3 I did witness him slap Isaiah across the face when he
4 was about 18 months old. It was very upsetting and I got
5 really angry with him at that time. And there was several
6 people there that seen this. He's just -- he just -- he
7 can be dark.

8 **Q** I'm sorry, I can't hear you.

9 **A** Mr. Tovar can be dark --

10 **Q** All right.

11 **A** -- you know.

12 **Q** Have the children reacted in a manner that is concerning to
13 you when they're in Mr. Tovar's presence?

14 **A** They mind him; that's all I can say is they don't really
15 act up around him. He's -- they're very much a part --
16 they follow his rules, his guard. They are very much -- an
17 example, like I've taken them shopping before and they have
18 said to me that they don't want to take their clothes in or
19 their -- you know, their stuff because they will get in
20 trouble for bringing in belongings that I buy them. I know
21 that he's just very strict about what they do but...

22 **Q** Have they ever informed you of any type of corporal
23 punishment?

24 **A** Yeah. Several times when I -- I babysat them a lot over
25 the years and it's pretty much been Isaiah's ongoing

1 conversation throughout the years that his dad does not
2 like him. He's told us that several times. He says his
3 dad hits him. And I've just watched Rigo, you know, now
4 that you're -- I'm thinking about it, yeah, he's harsh and
5 he doesn't spare words. And his idea of joking around
6 is -- can be very hurtful, but he's able to laugh about it.
7 He finds the things that he does and says funny. So it's
8 very off -- it puts you off because you're not really sure
9 how to respond or act because Rigo is very -- he laughs
10 about inappropriate things and you're just -- and he's
11 quick to get angry and to set a tone. I don't know how to
12 explain this. It's just -- it's hard to say with words.
13 It's just -- he has a way about him that is just -- he
14 just -- it's his way or the highway. He pouts.

15 **Q** When you confront him about your concerns, does he admit
16 to, I guess, the incidents that the children relay to you?

17 **A** The conversation that he -- the one conversation that
18 sticks in my mind that Rigo and I had with each other,
19 that's the only thing that I can really think of in this
20 situation because I'm so nervous, but when we were leaving
21 the football game last fall, he told me that he has a hard
22 time with his temper and that he just -- he said, *I don't*
23 *feel that close to Isaiah and as much as I do to Teyo.* And
24 he was like, *I just lose my -- I just lose my temper. I*
25 *just -- I don't know how to get it together.* And I was

1 like, *Well, you just get -- you need to go -- you need to*
2 *talk to a counselor. You need to do something. And I told*
3 *him then that, you know, that -- I've talked to Rigo,*
4 *actually, a couple of times, but he's mentioned being*
5 *suicidal and he's mentioned having anger problems himself*
6 *to me specifically.*

7 **Q** How recent were those conversations?

8 **A** That -- the most recent one was in the summer and fall of
9 last year because I have rarely seen him or spoken to him.
10 He stopped really being around us at all, other than when
11 the kids were at sports. I noticed it a lot in June
12 because that's the anniversary of my son's death and we
13 always get together as a family. And he actually did show
14 up for that, but he was -- he didn't hardly talk or
15 anything. We sat by the fire, but he didn't really have
16 anything to add. And I've really hardly spent any time
17 with him at all. But as far as that conversation that is
18 prevalent in my mind right now, that happened at Box Elder
19 at the football game when he was talking about his own
20 temper and --

21 **Q** Okay. So was it unrelated to alcohol?

22 **A** Well, yeah. We were at a football game. There was no
23 alcohol there that day, of course.

24 **Q** So he was stone-sober?

25 **A** Yeah.

1 Q And he was expressing to you some of his mental thoughts?

2 A Yep. And he's told me, too, that he's been depressed many
3 times.

4 MR. NELSON: All right. I have no further questions,
5 Your Honor.

6 THE COURT: Cross?

7 CROSS-EXAMINATION

8 Q (BY MR. NOONEY) Ms. Wagner, some of your allegations stem
9 back more than ten years ago, correct?

10 A Which allegation are you assuming or --

11 Q The various allegations that you've testified to just now.

12 A Your question is unclear. Can you be more specific?

13 Q I'll do it this way. You'd agree with me the parties have
14 been together approximately ten years, correct?

15 A Yeah. Ten, eleven. Yeah. The summer of 2013. And I
16 think in '18, they took a year-and-a-half break where there
17 was another proceeding.

18 Q So is it fair to say they've been together off and on for
19 approximately 11 years?

20 A Yeah.

21 Q You'd agree with me that you're aware of my client going to
22 counseling, correct?

23 A Yeah. The kids let me know that he was going to
24 counseling, uh-huh.

25 Q And as it concerns your allegation of what Mr. Nelson has

1 identified as corporal punishment, just because my client
2 has certain expectations of the children, that's just a way
3 of parenting, correct?

4 **A** That's -- that is true, uh-huh.

5 **Q** And just because you believe something is harsh, that's in
6 your subjective belief, correct?

7 **A** Not really. I would say that -- I'm glad that you
8 mentioned this. So about -- I think it's been about four,
9 five weeks ago, six weeks ago, I can't -- but my grandson
10 Isaiah asked me if I wanted to take him for a drive and I
11 said, Sure. And while we were driving, he said, *I want to*
12 *tell you something, Cookie, about -- but I don't want you*
13 *to overreact or get upset.* And I agreed to that. And he
14 told me that his dad had been beating him with a gun belt.
15 Now I don't -- I don't know anything about gun belts or
16 what a gun belt is, but that was his words, that he had
17 been beating him with a gun belt. So I think that that
18 would be irrational and beyond normal parenting punishment.

19 **Q** You've never witnessed that, though, correct?

20 **A** No. But I believe my grandson.

21 **Q** And while we're talking about parenting, you understand
22 that your daughter uses illicit drugs, correct?

23 **A** Illicit drugs?

24 **Q** Correct.

25 **A** What would those be?

1 Q You agree that she smokes marijuana, correct?

2 A Sure.

3 Q You agree that she occasionally uses cocaine, correct?

4 A Yeah. So does Rigo.

5 Q That's not my question.

6 You understand my client has a CDL --

7 A I've never ever seen her use cocaine, no. Ever. Never
8 even heard about it.

9 Q But based on that, that's okay to parent while you're under
10 the influence of marijuana, correct?

11 MR. NELSON: Objection.

12 A I've never seen her under the influence of anything
13 caring -- for a parent, she's an amazing mom.

14 Q You've mentioned the football game. That alleged
15 conversation took place a year ago, correct?

16 A In the fall festival, yeah. In the fall, yeah. Not quite
17 a year.

18 Q You'd agree with me that you have left a voicemail on my
19 client's phone as it concerns frustrations with my client
20 allowing your husband to come to their house when you and
21 your husband had been in an argument, correct?

22 A Oh, I have no idea what -- what -- that would be years ago.
23 So I have no idea what Rigo's collected in information or
24 what my relationship with my husband has anything to do
25 with relevance to this situation.

1 Q But you'd agree with me then, you've inserted Rigo in that
2 situation, correct?

3 A Absolutely not, huh-uh. I do know that my husband has had
4 to spend a lot of time at their house. Something -- and
5 interestingly enough is that that was brought up today, is
6 that they had a protocol, I guess is what they said, set up
7 is that when her dad had a key to their house and his shoes
8 were at the bottom of the door, she would be safe. So I
9 know that Jay stayed at their house a lot and that used to
10 frustrate me because I didn't really know why Jay had to go
11 over there and stay a lot, but yeah.

12 And we lost a child and I'm not sure if you understand
13 that, but we -- we've been put through a lot so yes. And
14 a lot of times parents don't make it; they don't stay
15 married after they lose a child. So there is no doubt that
16 we have our problems.

17 Q And I'm sympathetic --

18 A And I have no idea what they have to do with this.

19 Q I'm sympathetic for that, ma'am, but you had testified --

20 A I'm sure you are.

21 Q -- as to concerns of what you believe to be Rigo's
22 parenting style so I'm asking you those questions.

23 A You didn't ask me Rigo's parenting style at all.

24 Q During any alleged incidences, have you called law
25 enforcement?

1 **A** I have not.

2 **MR. NOONEY:** Nothing further, Your Honor.

3 **THE COURT:** Redirect?

4 **MR. NELSON:** I have nothing further.

5 **THE COURT:** All right. Ma'am, you may step down. Thank
6 you.

7 (Witness excused.)

8 **MR. NELSON:** Your Honor, and these witnesses can stay in
9 the courtroom?

10 **THE COURT:** With the understanding they won't be called
11 back or they can't be called back, they may stay in the
12 courtroom now, yes.

13 **MR. NELSON:** What if they're rebuttal, though?

14 **THE COURT:** Nope.

15 **MR. NELSON:** They have to stay out?

16 **THE COURT:** They got to stay out.

17 **MR. NELSON:** I have no other witnesses, Your Honor.

18 **THE COURT:** All right. Mr. Nooney, do we need to take a
19 little break here to organize? I mean, are you calling
20 witnesses? What do you plan to do?

21 **MR. NOONEY:** Your Honor, let me just proceed just for
22 judicial efficiency --

23 **THE COURT:** That's fine.

24 **MR. NOONEY:** -- to try and be as efficient as we can, I'm
25 ready to call my first witness.

1 **THE COURT:** Very good. Call your first witness.

2 **MR. NOONEY:** Can you ask -- Your Honor, I don't know if the
3 door is going to be open or --

4 **THE COURT:** Well, Mr. Nelson, what did you decide or, I
5 guess --

6 **MR. NELSON:** I'm not going to call them back even as
7 rebuttal.

8 **THE COURT:** Okay. I think, ma'am, were you just waiting
9 for your husband to come back?

10 **THE WITNESS:** Yeah.

11 **THE COURT:** Okay. Yeah. You can go ahead and go grab your
12 witness.

13 **MR. NOONEY:** I'm going to call my client, Your Honor.

14 **THE COURT:** Very well.

15 **MR. NOONEY:** Thank you.

16 **RIGO TOVAR,**

17 called as a witness, being first duly sworn, testified as
18 follows:

19 **DIRECT EXAMINATION**

20 **Q (BY MR. NOONEY)** Please state your name for the record.

21 **A** Rigo Tovar, R-I-G-O.

22 **Q** And, Rigo, are you the Respondent in this current matter?

23 **A** Yes, sir.

24 **Q** And, Rigo, there's a premarked exhibit binder in front of
25 you. I would direct your attention first to Exhibit Number

1 104. Are you aware of an allegation that you didn't leave
2 the home for roughly three days?

3 **A** I am.

4 **Q** Is that true?

5 **A** False. It is not true.

6 **Q** And is it fair to say there's a various timeline and based
7 on the allegations that, apparently, now is predating
8 January 8th, but did you leave the home on January 8th?

9 **A** Yes, I did.

10 **Q** And is it a fair and accurate copy of the various dates
11 that would be a timeline and a screenshot from your phone
12 identifying your location?

13 **A** Yes. That is an accurate timeline from my phone that goes
14 everywhere with me.

15 **Q** Did you modify that?

16 **A** Nope.

17 **Q** Do you have the ability to modify it?

18 **A** I don't believe so. It's a Google Map thing that's on
19 anybody's phones.

20 **MR. NOONEY:** Your Honor, I would offer Exhibit 104 into
21 evidence.

22 **MR. NELSON:** No objection.

23 **THE COURT:** 104 is received.

24 I'm sorry. Exhibit 104 is received.

25 **Q (BY MR. NOONEY)** Rigo, I'd direct your attention to

1 Exhibit Number 101. On Page 2 there's an allegation as it
2 concerns your rap sheet. Have you ever been charged of a
3 simple assault for simply -- for simply assaulting or
4 assaulting a female?

5 **A** No, I have not.

6 **Q** Do you have a previous criminal matter where there was an
7 argument at a bar with a bouncer?

8 **A** Yes, I do.

9 **Q** How long ago was that?

10 **A** It was early twenties. Well, before I met Kylea. It was
11 in Deadwood. It was a male bartender. There was no harm.
12 I just was over intoxicated; got pepper-sprayed, went to
13 jail. Released myself the next day from jail.

14 **Q** And you're 35 years old, correct?

15 **A** Correct.

16 **Q** So that incident happened a long time ago, correct?

17 **A** Correct.

18 **Q** There's a series of summaries of incidents that would be on
19 the next page, Rigo. There's not a page number. Have you
20 heard the allegations as it concerns an alleged incident of
21 you retrieving an AR-15?

22 **A** Yes.

23 **Q** What, in fact, were you doing?

24 **A** This is the one on?

25 **Q** January -- December 30 of 2023.

1 **A** December 30 of 2023, we were at a kids' basketball
2 tournament in Spearfish, a New Year's Eve tournament. The
3 children, Jerryjay was there, Kylea, and myself. Upon
4 leaving that tournament, the kids had three options of
5 vehicles to jump in. It wasn't anything I had done towards
6 the kids or anything. They chose to go with their mother.
7 And I stopped at McDonald's and got myself something to
8 eat. I got two Fireball shots and I think, like, a
9 six-pack of beer. I drank one of those Fireball shots when
10 I got home. Then I proceeded to go to the back room. Me
11 and Kylea were already not agreeing and getting along at
12 the time. I went and put a battery in this red dot, not a
13 laser, a Red Dot scope that is on that AR-15. Then I put
14 the gun away. It was a five-minute deal.

15 **Q** You were just by yourself during that incident; you didn't
16 bring the gun out in front of the children?

17 **A** No. I stood at the gun safe directly in front of the door
18 with it and it went right back in the safe and locked it.

19 **Q** And it's your practice to have that AR locked in a secure
20 safe, correct?

21 **A** Yes. That's where it is today.

22 **Q** Unless you're using it, correct?

23 **A** Correct.

24 **Q** You never pointed that gun at Kylea, correct?

25 **A** Correct. I never pointed it.

1 Q You have never pointed a gun at Kylea, correct?

2 A I have never pointed a gun at anybody.

3 Q As it concerns the alleged incident on January 8th and the
4 three days, you, in fact, never threatened Ms. Wagner or
5 the children, correct?

6 A Correct. I never made no threats.

7 Q And you, in fact, had left the house, despite her
8 positions, correct?

9 A Yeah.

10 MR. NELSON: Your Honor, I'm going to object on the leading
11 nature of the questions.

12 THE COURT: Cut down on the leading, please. Go ahead and
13 ask that question again.

14 Q (BY MR. NOONEY) As it concerns the January 8, 2024,
15 incidence, do you take issue with her allegations?

16 A No, I do not. I did not lock myself in a bedroom for three
17 days.

18 Q But my question is, do you take an issue -- like do you
19 take issue with her allegations?

20 A Yeah, I have an issue with it.

21 Q And why?

22 A Because they're false accusations.

23 Q As it concerns the alleged incident on January 14, 2024,
24 what happened during that alleged incident?

25 A The only laser I can think of with that incident is that

1 laser pointer that I was showed a picture of in the drawer.
2 I was at Menards with my children. They had laser pointers
3 for like 98 cents, I think, in January sometime. Me and
4 the kids bought them to play around with Kylea's dogs and
5 to tease the dogs, you know, like you do with cats. And
6 other than that laser pointer, I don't know where this
7 could have came from.

8 **Q** Do you recall ever pointing a laser pointer at Kylea or the
9 children?

10 **A** No, I do not.

11 **Q** And I direct your attention to Exhibit 113.

12 What is Exhibit 113?

13 **A** It looks like a .45 Smith & Wesson.

14 **Q** No, 113.

15 **A** Oh.

16 Oh, that's why.

17 In that drawer that is a laser pointer on a key chain,
18 the same kind of laser pointer I had in my possession in
19 the truck.

20 **Q** That --

21 **A** You push a button and it displays a laser.

22 **Q** Is that intended to be mounted on a firearm?

23 **A** No, it is not.

24 **Q** I would direct your attention to Exhibit 110.

25 There's three photographs, Rigo. What is the first

1 photograph as is depicted on Exhibit 110?

2 **A** The first photograph is a picture of my AR-15 the day I
3 picked it up from Scheels sports.

4 **Q** And I'm on the first photo so you got to go to the
5 Bates stamp, Rigo. Tovar --

6 **A** That is --

7 **Q** -- 171.

8 **COURT REPORTER:** 71?

9 **THE WITNESS:** Sorry.

10 **MR. NOONEY:** Yes. 0171.

11 **A** That is a picture of the scope that is mounted to that
12 AR-15.

13 **Q (BY MR. NOONEY)** And then what do photographs Tovar 0172
14 and 0173 depict?

15 **A** Those are pictures that I took the day I picked up that
16 firearm at Scheels in the back seat of my pickup because it
17 would no longer fit in the case once they mounted that
18 scope on it for me.

19 **Q** Are these fair and accurate photographs of the Red Dot and
20 the AR-15?

21 **A** Yes. That is a Red Dot, not a laser.

22 **MR. NOONEY:** I would offer Exhibit 110 into evidence,
23 Your Honor.

24 **MR. NELSON:** No objection.

25 **THE COURT:** 110 is received.

1 **Q** (BY MR. NOONEY) Rigo, have you ever had a laser mounted on
2 that AR-15?

3 **A** No, I have not. That is the only scope I have ever had on
4 there, who Scheels at the sporting goods section for the
5 firearms mounted for me. That firearm still sits in the
6 same -- with the same scope combo kit in that safe today.

7 **Q** Is this the only AR-15 you own?

8 **A** Yes, it is.

9 **Q** Can you explain to the Court how a Red Dot works.

10 **A** Yes, I can. A Red Dot is a dot that only projects -- you
11 only see the dot in the lens when looking through the glass
12 lens. It does not project a laser and point. And a red
13 dot does not appear at an object you're pointing at.

14 **Q** As it concerns the alleged incident, Rigo, and back on
15 Exhibit Number 101, which is the Petition and Affidavit for
16 Protection Order filed by Ms. Wagner, if you would please
17 turn -- it will be the second page of the Summary of
18 Incidents. I'm at the top on incident alleged on
19 February 9, 2024.

20 What do you take issue with as concerns the allegation
21 on February 9, 2024?

22 **A** That statement on February 9, 2024, is also false.

23 **Q** Had you ever kicked one of the puppies or the dogs?

24 **A** I never had anything to do with those dogs from the
25 beginning from the time she got -- even brought, introduced

1 the female dog that had the puppies, I never had anything
2 to do with them. I didn't want them in my house. They
3 destroyed the house. They made it messy. After the
4 puppies were born, I never had any part to do with the
5 puppies and I let her know that the day they were born.

6 **Q** Did you ever poison the puppies?

7 **A** I never went around the puppies. No, I did not.

8 **Q** As it concerns the alleged incidents on May 22, 2024, what
9 happened the morning of May 22, 2024?

10 **A** The morning of May 22nd -- I had the boys the night of the
11 21st overnight per my parenting agreement. They spent the
12 night with me. I got them ready for school in the morning.
13 I packed their bikes in my pickup, went down to Wilderness
14 Park where they do a bike-to-school day. I started
15 unloading the bikes. Kylea was standing at the rear of my
16 pickup truck talking to another mother and her kids there
17 at the parking lot at Wilderness Park.

18 As I'm unloading things, Isaiah is not getting out of
19 the pickup. I didn't really know what was going on. Kylea
20 proceeded to ask me, *Well, where's Isaiah?* And I said, *Oh,*
21 *he's in the truck.* So I walked over, opened up the door to
22 the cab of the pickup. I said, *Isaiah, what's going on?*
23 Isaiah was upset because she did not pack uniform clothes
24 as these kids go to pub- -- or private school. I had
25 informed Isaiah that that last day of school they were

1 supposed to wear school uniform. He didn't believe me. So
2 I told him *I'm not going to get into it with you guys.*
3 *When we get to the playground or to the park, you'll see*
4 *everybody else in uniform.* So Isaiah got upset when we
5 pulled up to the parking lot because he did not have his
6 uniform. Jay pulled into the parking lot, I believe,
7 exactly one or two vehicles behind me because I seen him on
8 West Chicago Street when I turned on the street to go
9 there. He dropped Kylea and her bike off.

10 Isaiah finally -- after talking to him, I get him to
11 get out of the cab of the vehicle and I'm trying to talk
12 him into going on a bike ride, telling him, *It's your last*
13 *day of school, buddy, let's go and make it a good day.*

14 Isaiah decides to confront Kylea about this, about not
15 packing school clothes, and they got into it. All said and
16 done, they had their little disagreement. It lasted
17 five minutes or however long. Then Kylea decides she was
18 going to stay so I pedaled my bike to that next parking lot
19 over, which is where Teyo was, and then I rode my bike from
20 there all the way to the school. The bell rang. Teyo had
21 to go in there for class. I rode back -- my bike by myself
22 back to the park, loaded my bike. Kylea was sitting on
23 this, like, 2-foot ledge around the playground with Isaiah.
24 I was going to leave and I noticed she was still there and
25 I was trying to get Isaiah to go to school. So as I'm

1 driving by, I had my window down -- the weather was really
2 nice out -- and I said, *Isaiah, come here really quick,*
3 *please.* I wanted to give him a hug and try to motivate him
4 to go to school. When I started asking for Isaiah to come
5 here, Kylea yelled at me and said *He will not come over*
6 *here; he will not go over there; he's not going over there,*
7 and just kept repeating herself. And I put my truck in
8 park. I was just trying to get him to come so I could give
9 him a hug and trying to get him to go to school. And so I
10 put my truck in park, but I didn't approach to leave the
11 parking lot, I walked over, walked around Kylea, and began
12 talking to Isaiah. The whole time I sat there talking to
13 Isaiah, trying to get him to go to school, just having a
14 conversation with him. I wasn't over there even to talk
15 about Kylea. She claimed that I tried talking to her about
16 pictures; I never said anything about pictures. She's the
17 one that brought that up. I reminded her that I was not
18 there to talk to her. I proceeded to try to talk to
19 Isaiah. And then at the end of it, I said -- Isaiah looks
20 at me and he said, *Dad, we don't need no problems.* I said,
21 *I know, buddy, that's why I tried to get you to come to the*
22 *truck.*

23 And then when all that was said and done, she allowed
24 him to walk back to the vehicle with me, where I gave him a
25 hug and a kiss and said, *Go have a good day at school.* And

1 that was the incident. There was no hands. No, I never
2 tried to talk to her, nothing.

3 **Q** Did you ever charge at Kylea and Isaiah?

4 **A** I did not.

5 **Q** Did you ever in a menacing manner approach Kylea or Isaiah?

6 **A** I did not.

7 **Q** The evening of May 22, 2024, what occurred then?

8 **A** That evening -- that happened in the morning. We were
9 supposed to be at that bike park at 7:30 for the bike ride.
10 Later that evening school got out, the kids had baseball
11 practice at West Middle School field. I showed up to
12 practice at 5:30 because bat practice went from 5:30 to
13 7:00 p.m. Kylea showed up half an hour late with the boys.
14 I was up at the cage helping the coaches with practice.
15 Kylea showed up 30 minutes late; the boys grabbed their
16 gear, ran out there, started practicing. And I would
17 always help, you know, just catch the ball and stuff.

18 And Kylea got out of her vehicle for that entire
19 practice and stood within 10 feet of me. This was from --
20 the ball park incident happened at 8:30, earlier that
21 morning after the bike ride, and she came over and stood
22 within 10 feet of me that whole hour of practice that she
23 was there for, from 6:00 to 7:00 p.m.

24 **Q** Did she ever tell you to get away from her?

25 **A** No. And we never exchanged words.

1 **Q** To your knowledge, was law enforcement ever called on that
2 alleged incident on May 22, 2024?

3 **A** No.

4 **Q** There's been various allegations about a belt. Have you
5 ever whipped the boys with a belt?

6 **A** So, yes, I have once. And in the last parenting agreement
7 when we separated in 2018, there's a section in there that
8 says no physical abuse or no spanking the children, however
9 it's worded. That's basically what it's stating. When
10 Kylea and I got back together in 2019, it got to a point
11 where she would get frustrated with the children, and she
12 looked at me one day and she said *You need to spank the*
13 *kids*. Because I got home from work and she was all worked
14 up so she begged and begged me to spank the kids. I
15 reiterated to her at that point, *I thought I wasn't*
16 *supposed to. That's what this agreement says from when we*
17 *went through our problems in 2018*. So I spanked the kids
18 per her request.

19 After a time went by, I stopped because pretty soon I
20 started to realize that it was becoming a normal thing that
21 she would ask me to do it. And it was a matter of maybe
22 making the kids think I'm a bad guy and she never lays a
23 hand on them, but it was her requesting it.

24 **Q** There was an alleged incident where you slapped Isaiah when
25 he was 18 months old. Is there any truth to that?

1 **A** False.

2 **Q** When was the last time you saw the minor children?

3 **A** I believe it was May 23rd after we were -- that afternoon
4 we were in here for the custody court.

5 **Q** As it concerns you ever spanking the children, when was the
6 last time you would have ever spanked the children?

7 **A** It's been years ago.

8 **Q** Rigo, I direct your attention to Exhibit 107. What is
9 Exhibit 107?

10 **A** That is me reaching out to United Services [sic] to see if
11 I could have a supervised visitation to -- with my
12 children.

13 **Q** And is this a fair and accurate copy of that conversation
14 you had with United Families?

15 **A** Yes.

16 **MR. NOONEY:** Your Honor, I would offer Exhibit 107 into
17 evidence.

18 **MR. NELSON:** No objection.

19 **THE COURT:** 107 is received.

20 **Q (BY MR. NOONEY)** Rigo, what were you told by
21 United Families as it concerned supervised visitation given
22 this pending protection order?

23 **A** Well, it states it here, right here, because of the
24 restraining order and the allegation involving guns that
25 they would not take me as a client.

1 **Q** And given that, have you been able to see either of the
2 children?

3 **A** I have not seen the children for five to six weeks.

4 **Q** How has that been for you?

5 **A** Heartbreaking.

6 **Q** I would direct your attention to Exhibit 109. There's two
7 screenshots. What is Exhibit 109?

8 **A** That is Teyo, my youngest son, attempting to call me.

9 **Q** What is the second exhibit, Rigo, that's Tovar Bates stamp
10 0208?

11 **A** That is after me not being able to answer because of the
12 order in place.

13 **Q** Are --

14 **A** Him trying to get ahold of me through text.

15 **Q** Are these screenshots fair and accurate copies of the
16 screenshot of the phone call you did not answer and the
17 text message of him saying to you that you did not respond
18 to?

19 **A** Yes, because of the temporary protection order.

20 **MR. NOONEY:** Your Honor, I would offer Exhibit 109 into
21 evidence.

22 **THE COURT:** Mr. Nelson?

23 **MR. NELSON:** No objection.

24 **THE COURT:** 109 is received.

25 **Q (BY MR. NOONEY)** Rigo, what is your belief within your

1 opinion of why this protection order was filed?

2 **A** I believe it was to alienate me from the kids because
3 that's all I've seen since Kylea moved out of the house
4 since February 9th. I've attempted through text messages
5 many times to see my children and just to be told no. And
6 for her to get back in the house.

7 **Q** Just so the Court understands, prior to the protection
8 order being filed, who resided in the residence?

9 **A** I did.

10 **Q** And when you had parenting time, is that where you and the
11 boys would reside?

12 **A** Correct. At 2925 Orchard Lane.

13 **Q** There was an allegation as it concerns the alleged head
14 injury on or about April 30th of 2024. Do you recall that
15 testimony?

16 **A** Yes, I do.

17 **Q** What, if anything, do you take issue with Ms. Wagner's
18 testimony as it concerns that incident?

19 **A** Ask that again.

20 **Q** I'll ask it this way. Was law enforcement present when you
21 went to go pick up Isaiah?

22 **A** Yes, it was. So that day I was supposed to have visitation
23 from 3:00 to 8:00 p.m., a five-hour visit. She sent me a
24 copy of that same picture from the school nurse. I reached
25 out to her and I said, *Hello. I will be over there at*

1 3:00 o'clock to pick them up. I was picking up -- supposed
2 to pick them up from school anyways, but then since that
3 incident happened with Isaiah, he was in Kylea's care. I
4 called law enforcement because I knew there was going to be
5 issues getting him once I arrived at their house so I
6 called law enforcement to just basically keep the peace.

7 Upon arrival, Jeanne opened the door, and there was
8 some confrontation there between me and her, the way she --
9 it just -- that's beside the point. Kylea finally came to
10 the door minutes later and started to argue with the
11 officer that he was not -- she was not to let me take him.
12 And I said, I'm a -- I'm a parent. I can take care of him
13 just like you are, even if it means I go back to my house
14 to hang out with him. To me it was valuing the time I was
15 going to get with him that I very rarely got.

16 She's used these excuses prior to this that they were
17 ill to keep them from me and I just wasn't going to have it
18 one more time. So that's why I took the steps I did, to go
19 over with law enforcement. And even the officer
20 re-informed her and restated to her, *If you have a custody,*
21 *I can't do anything; this is a civil matter. I would*
22 *usually suggest to people that you follow the agreement*
23 *that you have.*

24 And then finally she invited us to go in the house. I
25 looked at the officer and I said, *I won't go in the house*

1 *by myself. I refuse to get cornered in a home that's not*
2 *mine, where her parents are in and she is and outside of my*
3 *comfort zone. Well, then once the officer had an invite,*
4 *that was my, Okay. I'm going to be accompanied by him. We*
5 *went inside. Kylea stood in the bedroom 5 feet from me.*

6 I walked up to Isaiah and I asked Isaiah, *How are you*
7 *feeling?* He kind of like tucked a little bit in the sheets
8 and he was like, *Well, I'm all right. I mean, he was kind*
9 of giving an answer. And I said, *Well, you're supposed to*
10 *have time with Dad today, buddy. Do you want to go with?*
11 And next thing I knew, he jumped out of -- he jumped up in
12 the bed as if nothing -- he never showed signs of me to --
13 that anything was serious. If he was that hurt, he should
14 have went to the hospital and got x-rays if it was a head
15 trauma deal.

16 I said -- I told Isaiah, *Well, we got to get going or*
17 *we want to get going, you know. Teyo's going with me. If*
18 *you want to come with me, you have to make a decision. He*
19 looks at me and says *I want to go*, and he jumped out of bed
20 and went with me. By the time we get to -- we got to the
21 house, hung out for a little bit, and the boys had a
22 baseball game that afternoon. I reached out to their
23 baseball coach and told him what had happened with Isaiah
24 and he said he had already spoke to Kylea. So, therefore,
25 Kylea had already spoken to the baseball coach so they knew

1 to look for any signs if there was anything really wrong
2 with him. He played in the baseball game that whole
3 afternoon, never showed signs of anything. I never heard
4 anything of this after.

5 **Q** You heard allegations from Ms. Wagner's mother, correct?

6 **A** Correct.

7 **Q** Have you ever told her that you were suicidal?

8 **A** No.

9 **Q** Have you ever told her that you have an anger problem?

10 **A** No.

11 **Q** Did you ever get stuck in the middle of Kylea Wagner's
12 parents when they'd get in arguments and you had to then
13 mediate between both of them?

14 **A** Yes.

15 **Q** Do you believe that that caused tension between you and
16 them?

17 **A** Yes.

18 **Q** Was there -- were there ever any times when you reached out
19 to Jerry Wagner as to concerns, issues, that you and Kylea
20 had?

21 **A** Yes, I did.

22 **Q** When was the last time you would have done so?

23 **A** I believe it was early Dec- -- early to mid-December. I
24 met him at the Open Bible Church parking lot. I parked my
25 pickup there and jumped in his. We drove around for

1 approximately an hour. That's all the time he had because
2 he had to get home to his wife. I talked to him as mine
3 and Kylea's relationship was already on rough terms. All
4 I basically told him was *I need advice on how to make*
5 *things work with your daughter. I need to understand her*
6 *more.* And that's all our conversation was, was me trying
7 to get somebody else's view, somebody that knew her better
8 than I did, which is her dad.

9 **Q** Was there ever a time you reached out to Jerry Wagner as to
10 concerns you believing Kylea was going to harm herself?

11 **A** Yes, I did.

12 **Q** And what happened during that interaction?

13 **A** I received a message from Kylea. She had possession of
14 Teyo. I was walking around at Sioux Park with Isaiah and
15 she sent me a message that was suicidal -- I believed was
16 suicidal. I called Jerryjay and I told him because I had
17 spoke to somebody else -- it had to be a fast thing because
18 you see something and sometimes you only have so much time
19 to react. I could have called law enforcement or I -- but
20 I chose to call him and give them the benefit of the doubt.

21 I asked him, *When did you last talk to Kylea?* He
22 said, *It's been an hour.* He was at Menards when I talked
23 to him, actually. And then I said, *Well, have you talked*
24 *to Kylea at all?* So he said, *Hold on. Let me call her.* I
25 read that direct text message to him so he knew exactly

1 what she told me in the text message. He -- I let him get
2 off the phone so he could reach out to her. He called me
3 back and said, *Everything's fine. Her and her mom just got*
4 *into an argument. Tensions are tight. Jeanne's been sick*
5 *and there's just -- she needed to get out of the house.*

6 **Q** Beyond law enforcement being called essentially to keep the
7 peace, has there ever been law enforcement called as it
8 concerns any allegation of you harming or potentially
9 harming Ms. Wagner and the boys?

10 **A** No.

11 **MR. NOONEY:** Your Honor, I have an audio recording.

12 I know the Court's already told me I can approach, but
13 I'm going to grab what's been premarked as an exhibit
14 within the original binder. I'm hopeful that --

15 **THE COURT:** Do what you need to do.

16 **MR. NOONEY:** -- I can operate the technology. I've done it
17 in front of Judge Wipf Pfeifle so I'm hoping it will work
18 today.

19 **THE COURT:** Sure.

20 **MR. NOONEY:** (Complied.)

21 **THE COURT:** Do you need a microphone or anything for that
22 or --

23 **MR. NOONEY:** Your Honor, I -- I have it plugged into
24 Source 2. It does not want to seem to play. I guess since
25 there is just a speaker, if I could just plug in.

1 **THE COURT:** Well, let's do this. You need to lay
2 foundation for it with your client -- or I'm assuming it's
3 with Mr. Tovar here. Why don't you take care of that part
4 and then we'll see if we can figure out the technical part.

5 **MR. NOONEY:** Thank you, Your Honor. I apologize for the
6 inconvenience.

7 **THE COURT:** You're fine.

8 **Q (BY MR. NOONEY)** Rigo, I'm going to play an audio
9 recording. If you would please listen to this audio
10 recording.

11 **A** Yes.

12 **THE COURT:** Well, let's do the foundation first. See if
13 there's an objection before you play it.

14 (Audio recording published at this time.)

15 **MR. NELSON:** Objection, Your Honor. I'd have it stopped
16 and get the foundation first.

17 **THE COURT:** I think he's just doing that with his client
18 right here.

19 Why don't you hit the pause button.

20 **MR. NOONEY:** (Complied.)

21 **THE COURT:** How long is it?

22 **MR. NOONEY:** It is 2 minutes and 57 seconds, Your Honor.

23 **THE COURT:** Mr. Nelson, have you seen this or heard this
24 recording? Are you familiar with it?

25 **MR. NELSON:** I don't believe so, no.

1 **MR. NOONEY:** Your Honor, if I may lay some foundation?

2 **THE COURT:** Please.

3 **Q (BY MR. NOONEY)** Rigo, did you record audio on or about
4 May 22, 2024?

5 **A** Yes, I did.

6 **Q** When did you record it and where were you at?

7 **A** I recorded it the morning at Wilderness Park. I was by my
8 pickup trying to talk Isaiah into getting out of the
9 pickup.

10 **Q** Beyond that audio recording, did you record then an
11 incident that followed that?

12 **A** Yes, I did. Once I returned from the school and rode back
13 and was at the park speaking to Isaiah when he was sitting
14 next to his mother on the -- at the playground, I recorded
15 that.

16 **MR. NOONEY:** Your Honor, if I may just briefly play
17 Audio Recording Number 2 to lay additional foundation.

18 **THE COURT:** I guess that's what I thought you were doing
19 there.

20 **MR. NOONEY:** There's two recordings, Your Honor.

21 **THE COURT:** Okay. Yeah, go ahead.

22 (Audio recording published at this time.)

23 **THE COURT:** Is that enough, sir, for you to be familiar
24 with it, Mr. Tovar?

25 **THE WITNESS:** Yes.

1 (Audio recording stopped at this time.)

2 **THE COURT:** All right.

3 **Q (BY MR. NOONEY)** Are both audio recordings, Rigo, fair and
4 accurate depictions of what was recorded during the time
5 you took the audio recording?

6 **A** Yes.

7 **Q** Do you have personal knowledge as it concerns the
8 incidences that led to these recordings?

9 **A** Yes.

10 **MR. NOONEY:** Your Honor, I would offer Exhibit 106, which
11 are the two audio recordings that I have played for
12 Mr. Tovar to listen to.

13 **MR. NELSON:** No objection.

14 **THE COURT:** Mr. Nelson?

15 **MR. NELSON:** No objection.

16 **THE COURT:** I guess -- so you think that you have played it
17 and been able to plug it in and get it to come over the
18 speakers here -- or tell me this. Is it going to be clear
19 enough? If you just bend the microphone over that thing,
20 are we going to be able to hear it well enough?

21 **MR. NOONEY:** I hope so, Your Honor.

22 **THE COURT:** Let's try it.

23 **MR. NOONEY:** Okay.

24 (Audio recording published at this time.)

25 **Q (BY MR. NOONEY)** Rigo, what were you trying to accomplish

1 during the audio recording?

2 **A** I was trying to get Isaiah motivated to go to school and
3 continue the bike ride we set to do that morning.

4 **Q** Why did you record this incident?

5 **COURT REPORTER:** Please pull that mic in front of you.

6 **THE WITNESS:** (Complied.)

7 **A** At this point Kylea had already been confrontational with
8 me so I got to the point where I started recording any time
9 I was around her.

10 **MR. NOONEY:** Your Honor, if I may play the second audio
11 recording.

12 (Audio recording published at this time.)

13 **THE COURT:** Can you start it over, please.

14 **MR. NOONEY:** (Complied.)

15 (Audio recording published at this time.)

16 **Q (BY MR. NOONEY)** Rigo, what was the purpose of you going
17 back to the park on May 22, 2024?

18 **A** My pickup was there. I parked there, unloaded the bike,
19 rode the bike to the school, had to return to my vehicle to
20 proceed to go to work.

21 **Q** Who was present when you returned to the park?

22 **A** Kylea and Isaiah sitting on the edge of the playground.

23 **Q** Did you ever yell at her?

24 **A** No, I did not.

25 **Q** Did you ever yell at Isaiah?

1 **A** No, I did not. I only asked for him in this same voice to
2 come over and talk to me, please.

3 **Q** Just so it's clear, is the female in the audio recording
4 Kylea Wagner?

5 **A** Yes, it is.

6 **Q** And the male, the deeper voice, would be yourself, correct?

7 **A** Correct.

8 **Q** Was law enforcement ever called as it concerns that
9 incident, if you know?

10 **A** Not to my knowledge.

11 **Q** The day prior to you filing the Verified Motion for Change
12 of Custody, were you invited to go to Florida?

13 **A** Yes, I was.

14 **Q** Who invited you to go to Florida?

15 **A** Kylea Wagner.

16 **Q** And had you previously been invited?

17 **A** Yes.

18 **MR. NOONEY:** I have nothing further on Direct at this time.

19 **THE COURT:** Cross?

20 **MR. NELSON:** Thank you.

21 **CROSS-EXAMINATION**

22 **Q (BY MR. NELSON)** Mr. Tovar, how many times did Kylea ask
23 you to leave the park there on that audio?

24 **A** Two. Three. I don't remember. A few.

25 **Q** How much do you weigh?

1 MR. NOONEY: Objection; irrelevant, Your Honor. First off
2 that's --

3 THE COURT: Overruled.

4 MR. NOONEY: -- inappropriate to ask the Court -- to ask.

5 THE COURT: Overruled.

6 Q (BY MR. NELSON) How much do you weigh?

7 A 280.

8 Q Have you ever thrown Kylea down and choked her?

9 A No, I have not.

10 Q You're physically able to do that, though, aren't you?

11 A Yeah. If you're going off size. I being a male versus a
12 female.

13 Q So when Kylea asks you to do something and you don't do it,
14 does she fear you?

15 MR. NOONEY: Objection; calls for speculation.

16 THE COURT: He can answer to the extent he knows.
17 Overruled.

18 A Ask that again.

19 Q (BY MR. NELSON) When Kylea asks you to do something and
20 you don't do it, can she become fearful of you?

21 A She never told me she was fearful of me.

22 Q Well --

23 A She could if you're going off size and gender, but she
24 never told me she was fearful of me.

25 Q So for you to understand her after, what, 11 years of a

1 relationship, she has to verbally express herself before
2 you understand her? Is that what you want this Court to
3 believe?

4 **A** I -- say that again.

5 **Q** What I heard you say that you -- to understand her being
6 fearful of you, she would have to say something to you?

7 **A** Most of the times -- I guess because we were still in a
8 relationship or at that point we weren't, but we'd known
9 each other for years. I would have thought if there was an
10 issue, you would have brought it up.

11 **Q** You mean her?

12 **A** Yeah. Verbally she should have said something.

13 **Q** All right. On December 30th of 2023, had you been
14 consuming alcohol?

15 **A** I had a Fireball shot that I bought in Spearfish when I
16 left from that basketball tournament, for New Year's Eve
17 tournament, of the children.

18 **Q** I think you also said you bought a six-pack.

19 **A** Yeah. And I don't recall how much of that I drank.

20 **Q** All right.

21 **A** I don't know if I drank one or two or --

22 **Q** Or six?

23 **A** Yeah.

24 **Q** Is that a yeah?

25 **A** I didn't say I drank six. I said it could be one to six.

1 Q All right. And how does alcohol affect you?

2 A Well, as a heavysset person, more alcohol probably would
3 affect -- I don't know. The same way it affects everybody.

4 Q Do you have inhibitions?

5 A You change. Just like with drugs and alcohol, it changes
6 your mentality. It affects everybody the same.

7 Q All right. And how regularly had you consumed alcohol?

8 MR. NOONEY: Objection; relevance, Your Honor.

9 THE COURT: Overruled.

10 A Very rarely.

11 Q (BY MR. NOONEY) During your relationship with Kylea, have
12 there been other times in which you've consumed alcoholic
13 beverages?

14 A Yes. I've consumed alcohol throughout the years.

15 Q All right. And would there be arguments between the two of
16 you?

17 A I wouldn't say be -- there was arguments involving alcohol
18 and not involving alcohol.

19 Q All right. But at times when the alcohol is involved, do
20 you become more argumentative?

21 A No.

22 Q So it doesn't affect you in that respect?

23 A Well, I'm sure it does. It affects your state of mind.
24 That's what alcohol does.

25 Q Oh, okay. All right. So on this evening, December 30th of

1 2023, you'd been drinking and you were in the room where
2 the gun safe was, correct?

3 **A** Yes. Alone.

4 **Q** But she heard you open up the gun safe.

5 **A** Yes.

6 **Q** And you pulled out the AR-15.

7 **A** I already had it out.

8 **Q** All right. Well, you had it in your hands then.

9 **A** Yes.

10 **Q** And you had been arguing, the two of you?

11 **A** We hadn't really spoken that day, other than a few words at
12 the tournament. From the time I got home, I don't recall
13 speaking to her.

14 **Q** Okay. So you were angry with her.

15 **MR. NOONEY:** Objection; misstatement of the testimony,
16 Your Honor.

17 **THE COURT:** Overruled.

18 **A** I wouldn't say I was angry. By this point I had already
19 been sleeping in my children's room to avoid confrontation
20 with her.

21 **Q (BY MR. NELSON)** But you weren't at this time, though?

22 **A** I wasn't sleeping, but I was keeping to myself to prevent
23 confrontation in front of the children.

24 **Q** Oh. So instead of trying to avoid having a confrontation
25 with Kylea, you're saying that you weren't in her face, but

1 you said you went to a gun safe after drinking alcoholic
2 beverages and got out an AR-15.

3 **A** Yeah. The scope. Yeah.

4 **Q** All right. You had the gun, though, too --

5 **A** Yes.

6 **Q** -- didn't you?

7 **MR. NOONEY:** Objection; asked and answered.

8 **THE COURT:** Overruled.

9 **Q (BY MR. NELSON)** And so if you were holding this and --

10 could you understand how a person looking at another person
11 with a gun can be fearful?

12 **A** Yeah, I understand that.

13 **Q** So do you think she was fearful of you at -- on that
14 moment?

15 **A** I don't believe so.

16 **Q** Okay. Let's go back to the park. You get out of your
17 truck; you're walking towards her. She's on the bench,
18 correct?

19 **A** Correct.

20 **Q** And she really has asked you not to be in her space
21 basically, correct?

22 **A** Yeah. It was an act, I believe.

23 **Q** And she asked that a number of times, correct?

24 **A** Correct.

25 **Q** So instead of walking away, you continue to approach her,

1 right?

2 **A** I didn't approach her; I approached Isaiah.

3 **Q** Oh. Well, they were together, right?

4 **A** Yeah. I -- you even heard in the recording where I told
5 her that I was not talking to her; I was talking to Isaiah.

6 **Q** All right. But, Mr. Tovar, Kylea and Isaiah are there on
7 the bench together, and you're approaching both of them.

8 **A** Yes. Isaiah, who stayed the night with me the night prior
9 so I thought I had a right to approach my child --

10 **Q** Okay.

11 **A** -- because he just spent the night with me.

12 **Q** I'm just -- I'm trying to get into your, I guess, rationale
13 for approaching her when she's asked you please not to come
14 near her.

15 **A** The part you didn't get before that audio recording, I put
16 the truck in park. I asked Isaiah from afar while I was
17 still in the pickup, *Isaiah, come here, please. I want to*
18 *get a hug and kiss, and say goodbye,* and try to talk him
19 into going to school. She started yelling and saying, *No.*
20 *He's not coming over there.* So I attempted to have him
21 come over to my vehicle to give him a hug prior to that.

22 **Q** Okay. Did you ask her to bring him over?

23 **A** No. She just directly started responding that, no, he's
24 not going over there and yelling across the park.

25 **Q** All right. Mr. Tovar, did you ask her to direct Isaiah to

1 go give your daddy a hug?

2 **A** I said, I just want to talk to him; just have him come over
3 here.

4 **Q** All right. I just want -- I want to make sure we
5 understand what was going on here because it's just an
6 audio, right, that you have?

7 **A** Yes, that's true.

8 **Q** And on that audio we can hear how many times she asked you
9 not to come towards her and you still did, though, correct?

10 **A** Correct.

11 **Q** The January 8, 2024, situation -- I want to make sure I
12 understand what your testimony -- the effect of it, what
13 you think the effect of your testimony is on Direct. Are
14 you saying on January 8, 2024, you left the house on your
15 own volition?

16 **A** Under what?

17 **Q** On January 8, 2024, you left the house that you were
18 residing in with Kylea and you left on your own volition,
19 correct?

20 **A** I was at work that day. Following work -- I did not get
21 home at 1:00 a.m. I went to Founders Park and walked. At
22 that age -- at that point in time, I'd been seeing a
23 counselor and he suggested I start exercising, taking care
24 of my health. I had just gotten home from a walk and
25 actually got home at about 8:32 p.m. the night of the 8th.

1 When I got home, Kylea and the boys were sleeping in the
2 bedroom. So those accusations are false.

3 **Q** Okay. I'm still trying to follow you. January 8, 2024, is
4 Monday, correct?

5 **A** I don't have a calendar in front of me to know what day of
6 the week it was.

7 **Q** Well, Exhibit --

8 **A** January or February 8th?

9 **Q** January 8th.

10 Wasn't this the weekend that you --

11 **A** Oh, sorry. I was on a different subject.

12 **Q** All right. So January 8th, this was the weekend that you
13 came home on a Friday and you were drinking that weekend,
14 correct?

15 **A** Yeah. I had drinks Friday night probably.

16 **Q** And Saturday?

17 **A** No.

18 **Q** You didn't go to work on the 8th, though, did you?

19 **A** No. I don't work weekends.

20 **Q** No. The 8th is a Monday.

21 **A** The 8th I did go to work. No. I didn't stay in the room
22 three consecutive days and the reason for me staying in
23 that bedroom three consecutive days, once again, was to
24 avoid confrontation.

25 **Q** Because you're afraid of what you might do to Kylea?

1 **A** Not because I'm afraid, because I was trying to avoid those
2 kind of arguments in front of the children as they were
3 ongoing.

4 **Q** You're afraid of what you might do to the kids?

5 **A** I'm not. Those are my children. I would protect them with
6 everything.

7 **Q** Do you get angry?

8 **A** Everybody gets angry so, yeah, I do.

9 **Q** And you've gotten angry at Kylea before?

10 **A** Yes. As she does with me.

11 **Q** All right. And with your anger, you physically hurt her?

12 **A** No.

13 **Q** You get violent, though, don't you?

14 **A** No, I would not say that.

15 **Q** You've hit objects, haven't you?

16 **A** In the past.

17 **Q** You've hurt your arms, haven't you?

18 **A** Yeah. And those accusations of the scars on my arms --
19 I've worked in the drone industry for 12 years of my life.
20 And if anybody has worked around the drone industry, you'll
21 understand the scars that a person has.

22 **Q** You own a pistol.

23 **A** Correct.

24 **Q** It's got a laser on it.

25 **A** Correct.

1 Q And you have a -- what, a concealed weapons permit? Is
2 that even --

3 A Yes, I do.

4 Q Is that even necessary nowadays?

5 A I --

6 MR. NOONEY: I object, Your Honor; speculation, relevance.

7 THE COURT: Overruled.

8 A I got -- I got my concealed carry permit before it was a --
9 before South Dakota was a right-to-carry state so it was
10 relevant at the time I got it.

11 Q (BY MR. NELSON) All right. You don't need one today,
12 though?

13 A That's like getting rid of my driver's license because I
14 don't think I need it.

15 Q All right.

16 A I do -- I choose to carry one because -- I mean, to carry
17 in South Dakota you don't need it, but if I go to Wyoming,
18 I can still conceal carry so, yes, I do use it.

19 Q Okay. You go to Wyoming then.

20 A Yes. I have friends there.

21 Q Okay. I'm just trying to understand where you are at with
22 this need for this weapon, this concealed weapon. It's a
23 pistol.

24 A Yeah.

25 Q With a laser on it.

1 **A** Correct.

2 **MR. NOONEY:** Objection; asked and answered.

3 **Q (BY MR. NELSON)** And --

4 **THE COURT:** Overruled.

5 **Q (BY MR. NELSON)** And with the laser on it, it directs a
6 beam.

7 **A** With the laser.

8 **Q** Correct. And that beam can go through windows?

9 **A** Don't know. I guess I've never tested it. It works the
10 same way as a handheld laser pointer.

11 **Q** I'm trying to understand. Why would you take a picture of
12 a drawer that was a drawer for Kylea and she kept her
13 memorabilia from her brother, take a picture of a drawer
14 for what purpose?

15 **A** Because when I was filed this order, the allegations were
16 on there and right when something was said about a laser, I
17 knew exactly what was being talked about.

18 **Q** So you would have taken the picture when?

19 **A** I can't give you a date unless it's on it.

20 **Q** So you don't know when you took the picture?

21 **A** I don't remember the exact date.

22 **Q** And the -- what you're claiming to be in that drawer was a
23 pointer, a laser pointer, correct?

24 **A** Yes.

25 **Q** You didn't bring that with you here today, did you?

1 **A** No. I don't have it. It's still in that same spot at the
2 residence.

3 **Q** Okay. Well, you -- I think you testified you got it at
4 Menards or something?

5 **A** Correct. When I was with the two children.

6 **Q** All right. And you didn't get another one for today's
7 testimony, did you?

8 **A** No.

9 **Q** You don't have any other samples, do you, of these lasers?

10 **A** No.

11 **Q** Okay. Well, you don't collect these, do you?

12 **A** No. That's -- I bought one at that time because I didn't
13 own one.

14 **Q** Oh. So you bought one for the purpose of making this
15 picture to defend against this allegation?

16 **A** False.

17 **MR. NOONEY:** Objection, Your Honor; that's a misstatement
18 of the testimony.

19 **THE COURT:** Overruled. He can answer if he knows.

20 **A** False.

21 **Q (BY MR. NELSON)** All right. Then on December -- or, excuse
22 me, February 9, 2024, you were intoxicated again, correct?

23 **A** I do not recall being intoxicated at that time.

24 **Q** You were home that -- that evening.

25 **A** February 9th, that is the evening that I said I got home at

1 8:30, and Kylea and the boys were passed out in her bedroom
2 when I got home.

3 Q When you --

4 A I did not get home at 1:00 a.m., as this states.

5 Q When you say "passed out," you mean they were sleeping.

6 A They were sleeping, correct.

7 Q All right. And you had the puppies in the house, correct?

8 A I don't know where the puppies went. I got home and I went
9 directly upstairs. If that's what I did, then I didn't
10 pass the bathroom where the puppies were.

11 Q But the puppies --

12 A The puppies were never my responsibility so I had no reason
13 to check them. I -- that was the -- something we talked
14 about from the time they were born.

15 Q And you get angry about that, don't you?

16 A I feel being accused of false accusations would anger most
17 people.

18 Q Well, you didn't like the puppies. I guess that's my
19 question.

20 A I didn't like what they were doing to our home.

21 Q Okay. Instead of allowing Kylea to put them in the garage,
22 you forced her just to put them in the bathroom.

23 A I did not tell Kylea she could not put them in the garage.
24 The garage was full. There was no open floor space. I
25 told her if she would put them in there, she had to go out

1 there and make room for them herself because they were not
2 my puppies to be doing anything with.

3 **Q** That's the -- and that's the type of relationship you had
4 with Kylea, isn't it?

5 **A** We were already on our falling-out at that point, sir.

6 **Q** You don't help each other out, do you?

7 **A** It got to the point where we wouldn't. That's why we
8 parted ways.

9 **Q** Yeah. You knew that long before this incident in the park,
10 correct?

11 **A** At the incident in the park, she was already moved out of
12 the residence.

13 **Q** Yeah. In other words, she didn't trust you then, did she?

14 **A** As I did not trust her.

15 **Q** Well, you knew that, didn't you?

16 **A** Knew what?

17 **Q** That she didn't trust you.

18 **A** I did not know that.

19 **Q** Oh. So on the 20 -- what is it -- the 22nd of May of this
20 year, you thought she trusted you?

21 **MR. NOONEY:** Objection; argumentative.

22 **THE COURT:** Sustained. Rephrase that.

23 **Q (BY MR. NELSON)** On May 22, 2024, did you believe Kylea
24 trusted you?

25 **A** Yeah. She had never -- she had never told me otherwise.

1 Q Well --

2 A We have two children together. You would think you would
3 mutually trust each other enough for the sake of the
4 children.

5 Q Okay. But you said you were on the outs; you were arguing,
6 correct?

7 A Correct.

8 Q And so you were arguing because there were things that you
9 guys didn't see eye to eye on.

10 A Correct. We had common relationship arguments and
11 disagreements.

12 Q All right. But they would end up in shouting matches,
13 correct?

14 A Sure.

15 Q And you'd get frustrated?

16 A Sure.

17 Q And during those frustrations, you would express anger?

18 A Incorrect.

19 Q Oh. Okay. So you're -- you don't get angry when you're
20 frustrated?

21 A I do, but it depends what level of anger you're speaking
22 of. I get upset.

23 Q You mean --

24 A "Anger" is a strong word. I would say I get more upset.

25 Q All right. You get upset.

1 **A** Yeah.

2 **Q** And you got upset when you hit that door that one evening
3 when you were upset with Kylea.

4 **A** Eleven years ago?

5 **Q** Well, sure. Let's start there first.

6 **A** Sure.

7 **Q** Because we can go through a lot of other --

8 **A** Yeah.

9 **Q** All right. So you get angry and you express yourself by
10 physically hitting something.

11 **A** Yes.

12 **Q** Okay. And you've gotten angry with her in the past when
13 she really wasn't wanting to have sex with you, correct?

14 **A** No. That wasn't really the case.

15 **Q** Oh.

16 **MR. NOONEY:** Objection; beyond the scope of Direct,
17 Your Honor.

18 **THE COURT:** Overruled.

19 **Q (BY MR. NELSON)** So sexual relations are important in a
20 relationship, correct?

21 **A** Correct.

22 **Q** Okay. And there are times when she wasn't wanting to have
23 sex, but you did. Would you agree?

24 **A** It worked both ways; that's correct.

25 **Q** Okay. And you forced yourself on her when those moments

1 occurred.

2 **A** False.

3 **Q** Well -- all right. Let's say you got angry with her and
4 you hit her. Would you agree?

5 **A** No. I've never hit her.

6 **Q** You've choked her.

7 **A** No.

8 **Q** You pushed her down on the bed.

9 **A** No.

10 **Q** You pushed her off the couch, that other incident. Do --

11 **A** False.

12 **Q** -- you remember that?

13 You used a belt on the children.

14 **A** Per her request.

15 **Q** And that's -- yeah. That's -- I'm glad you brought that
16 up. You said that her request is for you to punish the
17 children with a belt. Is that what you're saying?

18 **A** Yes.

19 **Q** Okay. How many times has that happened?

20 **A** I don't recall how many times, but I have not done it in
21 years because I started noticing that it was a common
22 occurrence and --

23 **THE COURT:** Mr. Tovar -- I'm sorry. I'll let you finish
24 your sentence. Go ahead.

25 **A** And I was not going to be the only parent -- it was

1 starting to -- I was starting to see what was going on,
2 where I would get home and there would be issues going on,
3 and she would just directly tell me, she'd say *You need to*
4 *whoop those kids; they get on my nerves,* and just angry
5 herself and making -- asking me to do it. And it got to a
6 point after doing that several times, I started seeing what
7 was going on. I said, *I can't continue to do this. I*
8 *can't continue to make my kids hate me because of something*
9 *I'm doing for their mother that she doesn't want to do*
10 *herself.* She has a way of painting a picture in the kids'
11 minds and I quit doing it.

12 **THE COURT:** Mr. Tovar, wait until Mr. Nelson is finished
13 asking the question before you start to answer. All right?

14 **THE WITNESS:** Okay. Sorry.

15 **THE COURT:** Yep. No problem.

16 **Q (BY MR. NELSON)** So -- all right. Now I get this picture
17 that you're trying to paint that Kylea had requested
18 numerous times for you to beat the kids with a gun belt,
19 right?

20 **A** I don't even believe it was a gun belt.

21 **Q** Was it some type of --

22 **A** Probably just a regular -- there's nothing special about a
23 gun belt. We just call it a belt. I typically wore a belt
24 as I have one now.

25 **Q** All right. But it's your testimony that Kylea is the one

1 that is the instigator behind this type of punishment?

2 **A** Yes.

3 **Q** And you've never raised that issue before, have you?

4 **A** As -- reword that.

5 **Q** Well, you filed a petition with the Court, didn't you?

6 **A** Yeah.

7 **Q** You never brought that up, did you?

8 **A** No. I'm just speaking my part now.

9 **Q** Oh. Something that important, don't you think you would
10 put it in a petition for custody?

11 **MR. NOONEY:** Objection; calls for speculation, Your Honor.
12 Beyond the scope of Direct.

13 **THE COURT:** Overruled. He can answer if he knows.

14 **Q (BY MR. NELSON)** If it really happened, don't you think you
15 would have put that in your petition?

16 **A** If -- reword that.

17 **Q** Your testimony is that Kylea is the one that instigates all
18 this corporal punishment on your children in defense of her
19 claim that, no, you do it. That's why we are here is a
20 petition to protect the children and her --

21 **A** Yeah.

22 **Q** -- and in your defense now you've turned it around, haven't
23 you?

24 **A** Yeah.

25 **MR. NOONEY:** Objection; argumentative.

1 **THE COURT:** He can answer if he knows. Overruled.

2 **Q (BY MR. NELSON)** You've turned that around, haven't you?

3 **A** I've only answered questions truthfully.

4 **Q** Oh. But, again, something that important you didn't put in
5 your petition for custody. Are you making it up?

6 **A** I guess I didn't know I was going to get accused of hitting
7 the kids with a belt to do that prior to today.

8 **Q** Well, you've admitted you've done that, though.

9 **A** Yeah. As you're questioning me, but I didn't know prior to
10 today to put it into this paperwork.

11 **Q** Now you're -- you're going to counseling.

12 **A** Correct.

13 **Q** For what?

14 **A** To -- because since February, since she moved out with the
15 children, I'm having a hard time as I've gotten very little
16 to no visitation, as you know. Now I've had no visitation
17 for almost six weeks, and it's been mentally tough and hard
18 for myself to be stripped of my children when they're the
19 world to me, as it would be to any parent.

20 I decided to go to counseling because it's somebody
21 neutral to vent to, somebody that can coach you to become a
22 better person. Just like I stated earlier, he told me to
23 start exercising and taking care of myself and I did.

24 Sometimes venting to friends and family doesn't cut it.

25 You got to have a mutual person and that's why I reached

1 out to counseling.

2 **Q** Well, and I personally respect that and I think that
3 sometimes we all can use counseling, right?

4 **A** Correct.

5 **Q** And so you, obviously, felt the need for some type of
6 feedback from somebody that might be trained, right?

7 **A** I don't know if I was looking for feedback at the
8 beginning. It was just somebody to vent to, explain my
9 problems to.

10 **Q** All right. The -- will you agree that Kylea was seeking
11 that from you for a number of times -- a number of years in
12 the past?

13 **A** As I had told her also in the past, I'd requested for her
14 to go to counseling also.

15 **Q** Oh. So you believe that you have not been able to see
16 your child-- -- you haven't been able to see your children
17 for five or six weeks because of these allegations in the
18 petition; is that correct?

19 **A** Correct. Because of the temporary protection order.

20 **Q** Did you seek any other alternative forum or supervisor for
21 your parenting time?

22 **A** To my knowledge, when I was given the paperwork by the
23 deputies for the protection order, I understood the terms
24 of the protection order. I followed the guidelines of the
25 protection order and reached out to United Families.

1 Outside of that, I didn't play around with because that was
2 the only legal information on the order. I was not going
3 to get myself in a bind that could end me in jail and
4 violate the protection order.

5 **Q** No. I wasn't asking for that. You've had legal counsel
6 for a number of months now, haven't you?

7 **A** Correct.

8 **Q** All right. So there were other remedies available to you,
9 though, like getting the order changed to accommodate you
10 and the children?

11 **A** Yeah. And I tried that.

12 **Q** Oh. Did you file a motion?

13 **MR. NOONEY:** Objection; argumentative, Your Honor.

14 **MR. NELSON:** Well, maybe I missed something.

15 **THE COURT:** He just asked if he filed a motion. Overruled.

16 **Q (BY MR. NELSON)** Did you file a motion to modify the order?

17 **A** Yes, we did.

18 **Q** Okay. On the protection order?

19 **A** On the custody.

20 **Q** On the protection order?

21 **A** No.

22 **Q** All right. So your theory about these proceedings here
23 today is that Kylea is trying to gain some advantage over
24 you over the house. Is that your theory?

25 **A** That is a result of what she did.

1 Q Well, I don't know how that's accurate, in that you both
2 still own the house and you had possession of it for a
3 number of months.

4 Somebody has to take care of the house, correct?

5 A Yeah. As I was prior to this TPO.

6 Q Well, I just want to understand -- I'm trying to understand
7 your theory of the motivation that Kylea has for these
8 proceedings. You don't believe that they're sincere or
9 based upon any of the past; you believe it's some
10 fabrication on her part to gain access to the house and
11 have control over it. Is that your theory?

12 A Correct.

13 MR. NELSON: All right. I have no further questions,
14 Your Honor.

15 THE COURT: Redirect?

16 MR. NOONEY: Nothing further on redirect, Your Honor.

17 THE COURT: You may step down, sir.

18 (Witness excused.)

19 MR. NOONEY: Your Honor, if I may just have one moment with
20 my client --

21 THE COURT: Sure.

22 MR. NOONEY: -- please.

23 THE COURT: Sure.

24 (Off the record.)

25 THE COURT: We're going to take a five-minute recess.

1 We'll be back in -- we'll be back at 5:25.

2 (Recess taken from 5:21 p.m. to 5:27 p.m.)

3 **THE COURT:** Sorry for the delay. I just wanted to talk
4 with court staff a little logistically about what needs to
5 happen, but I guess the question of the hour, Mr. Nooney,
6 is are you calling any more witnesses?

7 **MR. NOONEY:** Your Honor, I am done with the Respondent. If
8 I may just make a very brief argument -- or if the Court is
9 going to allow it, I'll just make quick argument and then
10 the Respondent will rest, Your Honor.

11 **THE COURT:** Well, my plan is this. Mr. Nelson, are you
12 calling your client in rebuttal? If that's the case, I
13 guess then, I mean, that's procedurally where we would be.

14 **MR. NELSON:** We're good, Your Honor.

15 **THE COURT:** Okay. So then where we stand is basically I'm
16 just going to ask the -- just like I asked for an opening
17 earlier, I'm going to ask for a brief closing argument from
18 the attorneys. Is five minutes each sufficient?

19 Mr. Nelson, I'll give you the, you know, brief rebuttal
20 too, if you'd like, because you have the burden of proof.
21 But, I guess, that's where we are and if we just want to go
22 into a closing argument, then what's going to happen is
23 we'll get finished with those and we're going to take a
24 brief recess and I'm going to go over my notes and I plan
25 to come back and issue a ruling yet tonight. So if

1 that's -- if everyone is in agreement, then let's do that.
2 Yeah, let's go that route.

3 Mr. Nooney?

4 **MR. NOONEY:** Understood, Your Honor.

5 **THE COURT:** Okay. Are you good with that?

6 **MR. NOONEY:** Yeah. And I -- famous last words. I don't
7 even think I'll need five minutes.

8 **THE COURT:** Okay. That's fine. I just want to make sure
9 that everybody is good with that plan and want to hear
10 everyone out and make sure that everyone's been able to
11 give their side and say their piece.

12 If so, Mr. Nelson, go ahead.

13 **MR. NELSON:** Okay. Yes, Your Honor.

14 Do you mind if I remain seated?

15 **THE COURT:** Not at all.

16 **MR. NELSON:** You can hear me better.

17 Your Honor, I believe my client and her witnesses have
18 testified about some incidents that involved a situation --
19 you know, a relationship between parties that are here,
20 have cohabitated together for a number of years and their
21 relationship became strained for a variety of reasons.
22 Both parties have testified as to, you know, whose fault it
23 was or it's not just my fault, it could be the other
24 person's fault as far as why we're here. But what I think
25 is also important, not only the context of their testimony

1 and the history of their relationship, but the facts or
2 what has been said that what makes sense and what doesn't
3 make sense.

4 I believe that Mr. Tovar has provided the Court with
5 inconsistent testimony, testimony that doesn't make sense,
6 that would provide my client the ammunition for the
7 basis -- you know, her basis for a protective order here.
8 Mr. Tovar provided the Court with audio indicating that my
9 client on a number of times requested that he not come into
10 her presence. There was no protection order in place at
11 the time, but there was a strained relationship and the
12 parties have provided the Court with background as to how
13 that strained relationship has come about over the years.

14 In that setting and in that park, in a public place,
15 even though it's public and there are other people around,
16 my client expressed herself on a number -- a number of
17 times requesting Mr. Tovar to keep his distance, he doesn't
18 need to come in her presence, nonetheless he did so. And
19 his excuse is because he was there for his son. And he had
20 a number of different options available to him that he
21 didn't exercise. His reasoning, his testimony, is I think
22 incredible and so we put that in context with the testimony
23 of my client about the separate incidents that occurred
24 over the years and the recent incidents that have occurred
25 since December of 2023. And I think it provides the Court

1 with a better understanding of why a person like my client
2 could be in fear of Mr. Tovar and why she seeks this
3 protective order.

4 So the fear that she's felt in the testimony that
5 she's provided the Court about past physical contact
6 between the parties, domestic violence between the parties,
7 I think provides the Court by a preponderance of the
8 evidence to award my client with a protective order one to
9 five years at the Court's discretion.

10 I have nothing further.

11 **THE COURT:** Mr. Nooney?

12 **MR. NOONEY:** Thank you, Your Honor.

13 As this Court has already cited, SDCL 25-10, of
14 course, is what this Court must consider for the purposes
15 of whether or not to issue a protection order. Some of
16 the alleged incidences are, of course, just alleged,
17 Your Honor. There is no proof. There are no police
18 reports. If there were something that actually said this
19 happened, that would be one thing, but these are merely
20 allegations by Ms. Wagner against Mr. Tovar. Some of those
21 allegations stemmed more than 11 years ago. Most of the
22 allegations, Your Honor, dealt with, really, what would be
23 in the best interests of the children. As this Court is
24 well aware, Your Honor, what is in the best interests of
25 the children is to be dealt with in the civil paternity

1 matter 51CIV18-623.

2 Rather all -- or most of the allegations and things
3 such as, you know, Rigo being in Nevada and not allowing
4 Kylea to get rest or to consume food to help nourish the
5 baby, which I understand is important, Your Honor, but my
6 point is that's for the Court to consider in the custody
7 matter, not something to consider for purposes of him
8 allegedly creating harm or fear of harm.

9 Mr. Nelson asked my client, *Well, why weren't there*
10 *certain things you put in -- or why didn't you put certain*
11 *things in the motion for change of custody?* Your Honor, a
12 motion for change of custody could be a hundred pages if
13 there was each and every allegation between the parties.

14 I think it's undisputed, Your Honor, that the parties
15 have had some conflict. And as the Court in *Batchelder*
16 *versus Batchelder* cited to -- again that's
17 *B-A-T-C-H-E-L-D-E-R*, 965 N.W.2d 880 -- a high conflict
18 relationship does not allow a Court to grant a protection
19 order, Your Honor.

20 Mr. Nelson has, unfortunately, faulted my client for
21 going to counseling on his own volition. It's not as if
22 this Court ordered my client to go to counseling. That is
23 something that Mr. Tovar has elected to do, not even based
24 on my recommendation. It's something he'd done way before
25 he'd seen me. Mental health shouldn't be something that we

1 point fingers at people to say, *Well, why are you going to*
2 *counseling?* That's absolutely uncalled for.

3 The mere fact that Mr. Nelson wants to say Mr. Tovar
4 is a large man and could inflict fear, that's not evidence,
5 Your Honor. They have not met their burden -- or
6 Ms. Wagner has not met her burden nor has her counsel to
7 state anything or identify any evidence beyond a
8 preponderance of the evidence.

9 Mr. Nelson continues to argue to this Court, as he
10 just did in his closing argument, that there has been,
11 quote, a strained relationship, Your Honor. I'm not here
12 to say -- tell the Court that there's not been a strained
13 relationship, but a strained relationship, Your Honor, does
14 not provide a reason for this Court to grant a permanent
15 protection order. As this Court is aware, a permanent
16 protection order has some serious repercussions for any
17 individual who finds themselves in the place of the
18 respondent, as does my client.

19 Mr. Nelson wants to continue to mold the facts and
20 change the facts as it concerns the allegation at the park
21 on or about May 22nd of 2024. As my client had testified
22 to, Your Honor, he had went to the park to take both the
23 boys on a bike ride to school. Isaiah elected not to go on
24 the bike ride. There was, of course, then an argument that
25 pursued between Isaiah, the minor child, and his mother

1 that my client got stuck in the middle of. My client then
2 elected to go on the bike ride to take their youngest son
3 Teyo and his pickup, of course, was at the park. My client
4 didn't just, all the sudden, show up at Ms. Wagner's
5 doorstep. My client came back to get his pickup and had
6 wanted to say goodbye to his son that he's had very minimal
7 time with, Your Honor. Mr. Wagner -- sorry, Mr. Nelson
8 wants to point the finger at my client to say, She asked
9 you to leave. He did leave, Your Honor. He wanted to say
10 goodbye to his son. There was not even one time within the
11 audio recording where there was yelling or screaming.
12 That, Your Honor, does not amount to allow this Court to
13 grant the permanent protection order as sought by the
14 Petitioner Ms. Wagner.

15 For those reasons, Your Honor, we'd respectfully
16 request that this Court deny the permanent protection
17 order. Thank you.

18 **THE COURT:** Thank you.

19 Mr. Nelson, any rebuttal? Just --

20 **MR. NELSON:** Yes. Just shortly -- short, Your Honor.

21 Again, like most of these cases, you have a he
22 said/she said situation, although my client did bring two
23 other witnesses to testify about the history between the
24 parties. Again, I ask the Court to carefully consider not
25 just my client's testimony but Mr. Tovar's own testimony

1 and the inconsistencies in his statements about what
2 happened in the park, how often the kids are hit, who
3 instigated this idea of corporal punishment, and whether
4 his statements are consistent, whether they make sense. I
5 submit to the Court credibility weighs in my client's favor
6 and against Mr. Tovar.

7 **THE COURT:** I have a couple of questions for counsel now.
8 We don't have a jury here. I'm just going to ask these.

9 Mr. Nelson, first of all, do you agree that the
10 protection order, if one were to issue, it must be based on
11 the allegations that are in the petition and not anything
12 outside of that?

13 **MR. NELSON:** I would agree.

14 **THE COURT:** For example, this door incident from ten years
15 ago or more, that's not a matter -- I could not find that
16 that would cause a fear of violence or be considered
17 domestic abuse. Do you agree?

18 **MR. NELSON:** I believe so, yes, Your Honor.

19 **THE COURT:** Mr. Nooney, do you agree with that?

20 **MR. NOONEY:** I'd agree, Your Honor. And beyond that, I
21 think, just so the Court knows and the Court is well aware
22 there was testimony of both parties punching doors, kicking
23 doors.

24 Again, I -- the position of the Respondent is that
25 does not amount to allow the Court to enter a protection

1 order.

2 **THE COURT:** Understood. I'm just clarifying that what this
3 is about, what it ultimately comes down to is what's in
4 this petition. It's not -- I mean, these other things --
5 and the reason I let the testimony come in was that's
6 background and that's information that led us to where we
7 are today, but it has to be based on the incidents that are
8 alleged in the petition. Everyone agree on that?

9 **MR. NELSON:** Yes, Your Honor.

10 **MR. NOONEY:** Yes, Your Honor. And beyond that, I'd allege
11 that clearly my client didn't have notice as concerns some
12 of these allegations to offer witnesses to rebut such.

13 **THE COURT:** Like I said, everyone went into it; we're
14 talking about background, but it's just these incidents.

15 **MR. NELSON:** Correct.

16 **MR. NOONEY:** Yes, Your Honor.

17 **THE COURT:** Give me about ten minutes here, roughly. I'm
18 going to go collect my thoughts and write some things down,
19 and I will be back in and issue a ruling.

20 (Recess taken from 5:40 p.m. to 5:59 p.m.)

21 **THE COURT:** Thank you for your patience, ladies and
22 gentlemen. I know it was more than ten minutes there.

23 I'm going to state my findings on the record. I'm
24 going to try to do them in an order that makes sense to
25 everyone and that you can follow me.

1 First of all, I find that jurisdiction and venue are
2 proper based on the stipulation of the parties. That is
3 that this is the correct place and that the parties resided
4 in Rapid City in Pennington County and the state of
5 South Dakota.

6 I'm going to find that Ms. Wagner is eligible for a
7 protection order and what that means is that the parties
8 were involved in a significant romantic relationship in the
9 last year. That was also stipulated to by the parties.
10 Also, under that same subsection of the statute, the
11 parties have children together and so that meets subsection
12 c, meaning that Ms. Wagner is eligible for a protection
13 order.

14 And I'm going to find that in this situation domestic
15 abuse did occur in this case. I'm going to grant the
16 protection order and I'm going to explain why. Domestic
17 abuse under the statute 25 -- SDCL 25-10-1 Domestic abuse,
18 physical harm, bodily injury, or attempts to cause physical
19 harm or bodily harm -- and here's the relevant part here --
20 or the infliction of fear of imminent physical harm or
21 bodily injury when occurring between persons engaged in a
22 relationship as we described earlier. That is what is
23 necessary for the finding in this case.

24 I find that domestic abuse did occur, specifically the
25 infliction of fear of imminent physical harm or bodily

1 injury. The facts, excuse me, supporting that are
2 primarily the incident. It was an incident that occurred
3 on February 9, 2024, and it was that incident where -- I'm
4 sorry, it was not that date. I apologize. It was in
5 January. It was on January 14th, where Mr. Tovar arrived
6 and he pointed a gun laser -- he pointed a laser through
7 the front window. Ms. Wagner said she couldn't see it, but
8 there was a laser pointed at -- I believe the testimony was
9 her son Isaiah. It was one of the sons. And I'll get that
10 right in just a moment here when I find it in my notes, but
11 regardless it was at one of the sons; then it was at her
12 chest and then it was at her forehead. If it's debatable
13 about whether that was threatening conduct or whether that
14 was something that caused her to -- reasonably caused her
15 to be in fear, there's other context. There's other
16 context and it's incidents that were alleged in the
17 petition in this matter. The incidents were and I find --
18 I find Ms. Wagner to be credible. I find her to be a
19 credible witness and I believed her testimony. She was
20 detailed and she explained exactly what happened and in
21 extensive detail. And because I find her credible, that's
22 why I'm going to issue the protection order in this case.

23 But there were other incidents. There was evidence
24 related to the Defendant -- I'm sorry, the Respondent
25 locking himself in a bedroom for three consecutive days.

1 Even his evidence showed that he came out of that bedroom
2 and it looked like his phone left -- as far as I can tell
3 from the exhibit, his phone left their residence at
4 3:55 p.m. I don't know that it rebutted anything that
5 Ms. Wagner had said about that. It was about his
6 intoxication. Okay. The intoxication is not itself enough
7 to form a threat.

8 But there was a lot of other incidents here. On
9 December 30, 2023, or thereabouts, the Defendant had been
10 consuming alcohol. When he was asked about the alcohol
11 during cross-examination, he said, *one shot*. And then he
12 failed to mention the beer, and then he said -- *one beer or*
13 *six?* And, he said, *One to six*. I find that he was being a
14 little evasive in that answer.

15 But more importantly, it seems that it's undisputed
16 that he did have the AR-15 rifle in his hand out of the
17 safe and I believe the testimony also was it was -- if it
18 was not undisputed, I do believe Ms. Wagner's testimony
19 that he attached or he was handling a laser sight for that
20 weapon. Be it a Red Dot or whatever other sight, there was
21 something that he was doing with a sight for that weapon.
22 Whether he left with it is really meaningless because this
23 is background information as to what led up to January 14.

24 The Defendant, by his own admission, I believe,
25 handled and carries frequently a handgun that does have a

1 laser sight on it. So I believe it was reasonable for
2 Ms. Wagner to believe that in some way that laser being
3 pointed at her through the window was meant to threaten
4 her, was meant to intimidate her, and it was meant to put
5 her in fear of imminent physical harm or bodily injury. I
6 also find that this was reasonably meant to do the same to
7 the son and, again, I'll find that name in just a moment
8 here.

9 And I believe that that is sufficient to issue the
10 protection order as to Ms. Wagner and as to both of the
11 children as well. I don't believe that I need to make a
12 finding that the threat was made against all three of them
13 individually in order for all three of them to be eligible
14 or to grant the protection order against them and so I
15 believe that that is sufficient.

16 We are -- I have considered *Batchelder*. I tried to
17 read it very quickly while I was in the back. And this was
18 not just a high-conflict relationship, this was a situation
19 where the Defendant undertook -- I'm sorry, the Respondent
20 undertook a number of acts that were or could reasonably be
21 perceived to have threatened or caused Ms. Wagner to be in
22 fear of imminent bodily harm.

23 And I did allow the parties to go into quite a bit of
24 background. I am making clear on the record that I only
25 considered the matters in the petition. That's what I

1 addressed with counsel before we went in the back. And I
2 did allow that testimony to come in. It seemed to me that
3 everyone, both parties, wanted to go into the history of
4 this so I allowed that, but the findings here are made
5 based on the record of what happened as alleged in the
6 petition.

7 I just have a few more notes here that I need to make
8 sure that I cover.

9 My last finding that I need to make is that the
10 Respondent Mr. Tovar had actual notice and opportunity to
11 participate, he did participate, and he was here in person,
12 and I believe the Respondent stipulated or his counsel
13 stipulated that he was properly served with notice for this
14 hearing.

15 The time is -- as I keep talking here, I keep looking
16 through my notes to find the name of the correct child. I
17 believe it was Isaiah.

18 Counsel, would either of you care to enlighten me to
19 make sure or see if I'm saying that wrong.

20 **MR. NELSON:** Isaiah is correct, Your Honor. And Teyo was
21 the other.

22 **THE COURT:** Was it Isaiah that the initial laser was
23 pointed at or the -- whatever the laser was?

24 **MR. NELSON:** I believe it was Teyo, T-E-Y-O.

25 **THE COURT:** So I was saying the wrong name. And I'm sure I

1 have it written here, I just don't see it right now.

2 Regardless, like I said, it didn't have to be pointed
3 at both children, it was pointed at one of them and I
4 believe that's sufficient to enter the protection order
5 against -- or related to all three of those individuals.

6 I can also do a number of things under the statute
7 here with regard to -- I can restrain the parties from
8 committing acts of domestic violence. I will order that --
9 that is under 25 -- SDCL 25-10-5.

10 Mr. Tovar, you are restrained from doing any such
11 thing like that, committing any acts of domestic violence.

12 I'm going to order that the parties remain a minimum
13 of 100 yards away from each other. I believe that was the
14 request in the petition. I find that that's appropriate.

15 You're not to dwell with each other.

16 There is a separate custody matter that we've talked
17 about a number of times during this hearing. I'm going to
18 leave custody and related matters as far as child support,
19 custody, and the -- really pretty much all other matters
20 related to the children, I'm going to leave that for
21 another day because, again, I believe that that case has
22 been reopened for addressing those matters.

23 Counsel, do you agree? Mr. Nelson?

24 **MR. NELSON:** Yes, Your Honor.

25 **THE COURT:** Mr. Nooney, is that true?

1 **MR. NOONEY:** Yes, Your Honor.

2 **THE COURT:** Reopened?

3 Thank you.

4 **MR. NELSON:** And, Your Honor, I'm sorry to interrupt you.
5 I believe the Court has a custody evaluator appointed as
6 well.

7 **THE COURT:** That's true. I think that was done -- I think
8 Judge Wipf Pfeifle did that last week, if I remember
9 correctly.

10 Was that the same order that ordered mediation?

11 **MR. NELSON:** I think so.

12 **THE COURT:** Or was it a separate order?

13 **MR. NELSON:** I believe it's the same one.

14 **THE COURT:** Regardless, I'm going to leave those matters
15 for that time.

16 The other thing that -- another thing that I find
17 supports and bolsters Ms. Wagner's testimony is on the
18 incident from May 22, there was a recording there. And I
19 know -- I know things can get heated when it comes to
20 domestic affairs, but Ms. Wagner did ask Mr. Tovar to leave
21 a number of times and I just find that that helps bolster
22 her credibility. She was trying to de-escalate the
23 situation and I believe that she has acted in a way that is
24 simply trying to diffuse all conflict in this case. And I
25 believe that a protective order in this case is appropriate

1 for those purposes.

2 I am not going to address counseling. I believe that
3 is a matter that Mr. Tovar has undertaken on his own. I
4 don't think that there's anyone who contradicts that so I'm
5 just going to take him at his word that he has done that.

6 Mr. Nelson, is there anything that I have not
7 addressed -- I'm going to grant the protection order for a
8 period of five years. Again, child custody and child
9 support matters are going to be taken up in that -- in the
10 appropriate hearing, where we hear testimony about incomes
11 and living situations and things like that.

12 That the parties are not to have contact. A written
13 order will issue regarding all of the specifics about that
14 and about my ruling.

15 Mr. Nelson, is there anything else that has been
16 requested that I have not addressed yet?

17 **MR. NELSON:** No, not that has been requested in the
18 petition.

19 My client does want the children to see their father.
20 The United Families' facility is, obviously, monitored and
21 used frequently in situations where supervised parenting
22 time is requested, but I believe Mr. Nooney is correct that
23 their policy is such that they will not allow the facility
24 to be used if there's an allegation of a gun in a petition.
25 I'm not sure how to remedy that, unless the Court in its

1 findings determines that the threat was made based upon a
2 laser and that was sufficient rather than a gun to mitigate
3 the situation with United Families.

4 I -- my client does want the children to see their
5 father as soon as possible.

6 **THE COURT:** So I guess I'll ask both counsel -- Mr. Nooney,
7 I'm not asking you to agree with my decision, but my
8 decision is what it is. Now, do you have any suggestions
9 as to what can be done to allow Mr. Tovar to see his
10 children? Do you have any other alternatives that you have
11 in mind?

12 **MR. NOONEY:** I don't, Your Honor.

13 **THE COURT:** Okay. Mr. Nelson?

14 I mean, I'm amenable -- I'm agreeable to the parties
15 finding a way to do that to allow Mr. Tovar to have contact
16 in one way or another. I know that the protection order is
17 to keep them apart, but if it's supervised -- I suppose
18 that is also part of the child -- child custody matter in
19 some ways.

20 **MR. NELSON:** My client's willing to allow -- if
21 Mr. Tovar --

22 **THE COURT:** How about this? Let me cut you short. I'm
23 sorry.

24 **MR. NELSON:** Sure.

25 **THE COURT:** I just issued a protection order. I'm going to

1 keep that in place. We're going to have this in place for
2 a while. When is the next hearing on that custody matter?

3 **MR. NELSON:** I don't think we have one set and that's
4 because the evaluator was just appointed.

5 **THE COURT:** Let's see if we can get that done, set up, in
6 short order. And as I understand it, the statute allows me
7 to modify this to allow for such things to happen, but for
8 right now we're going to have no custody -- or, I'm sorry,
9 no contact and we're going to have a protection order in
10 place. The faster we can get this taken care of on the
11 custody side or child support side or whatever is all
12 remaining, the faster we'll be able to address these
13 things.

14 **MR. NELSON:** Understood.

15 **THE COURT:** Anything else for the record in this matter?
16 Mr. Nelson?

17 **MR. NELSON:** I have nothing.

18 **THE COURT:** Mr. Nooney?

19 **MR. NOONEY:** Nothing, Your Honor.

20 **THE COURT:** We'll be adjourned.

21 (Hearing concluded at 6:17 p.m.)
22
23

24 * * * * *
25

1 STATE OF SOUTH DAKOTA }
2 COUNTY OF PENNINGTON } SS. CERTIFICATE

3
4 I, KIMBERLY K. JOHNSON, RPR, an Official Court
5 Reporter and Notary Public in the State of South Dakota,
6 Seventh Judicial Circuit, do hereby certify that I reported
7 in machine shorthand the proceedings in the above-entitled
8 matter and that Pages 1 through 204, inclusive, are a true
9 and correct copy, to the best of my ability, of my
10 stenotype notes of said proceedings had before the
11 HONORABLE ERIC D. KELDERMAN, Circuit Court Judge.

12 Dated at Rapid City, South Dakota, this 13th day
13 of September, 2024.

14
15
16 /s/ Kimberly K. Johnson

17 _____
18 KIMBERLY K. JOHNSON, RPR
19 Official Court Reporter
20 My Commission Expires: 6/17/28
21
22
23
24
25

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1 STATE OF SOUTH DAKOTA }
2 COUNTY OF PENNINGTON }

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

4 KYLEA M. WAGNER,
5 Petitioner,
6 vs.
7 RIGO B. TOVAR,
8 Respondent.
9

51TPO24-321
TPO-Modify Permanent Order
Hearing

11 BEFORE: **THE HONORABLE ERIC D. KELDERMAN**
12 Circuit Court Judge
13 Rapid City, South Dakota
14 July 22, 2024, at 4:00 p.m.

15 APPEARANCES:

16 For the Petitioner: **MR. GEORGE J. NELSON**
17 George J. Nelson Law Office
18 2640 Jackson Boulevard
19 Suite 1
20 Rapid City, SD 57702

21 For the Respondent: **MR. JARED D. NOONEY**
22 Nooney & Solay
23 326 Founders Park Drive
24 Rapid City, SD 57701
25

1 (WHEREUPON, the following proceedings were duly
2 had:)

3 **THE COURT:** We are on the record in 51TPO24-321 and it's
4 Wagner versus Tovar.

5 (To Mr. Nelson and the Petitioner) Come on in. I
6 just walked in, folks. Have a seat.

7 Counsel, will you note your appearance for the record,
8 please.

9 **MR. NELSON:** Yes, Your Honor. George Nelson on behalf my
10 client Kylea Wagner.

11 **MR. NOONEY:** Yes, Your Honor. Jared Nooney on behalf of
12 the Respondent Rigo Tovar.

13 **THE COURT:** Very well.

14 We're here on -- what I see in the file is a motion
15 for an order to modify the order for protection. It was
16 the order for protection that was issued on July 1 of this
17 year, I believe. I know that there has been some email
18 communications that I have seen; some at my request. I
19 believe this is something to do with child visitation.

20 There are no children in the room. Okay.

21 Mr. Nooney, I believe this is your motion. Am I
22 correct?

23 **MR. NOONEY:** Correct, Your Honor.

24 **THE COURT:** Can you just enlighten me as to where we're
25 going with this?

1 **MR. NOONEY:** Yes, Your Honor. And if I may just kind of
2 give the Court an update.

3 **THE COURT:** Please.

4 **MR. NOONEY:** As the Court had reached out regarding the
5 motion, Mr. Nelson and myself had discussed where we were
6 at with this. The parties have not reached a modified
7 stipulation for an agreement as it concerns the Court's
8 order entered on July 1 of 2024. As the current order
9 stands that this Court entered for a permanent order of
10 protection, my client does not see his children for a
11 period of five years. That, of course, would equate to
12 60 months. And I've done the math, Your Honor. That would
13 be 1,825 days from the date that order was entered. Beyond
14 that, I believe this was discussed on the record
15 previously, but my client had not seen his children since
16 May of 2024. It's already been two months, Your Honor. So
17 we're motioning the Court to consider a modification of the
18 Court's order that was entered on July 1, 2024.

19 **THE COURT:** Just before we move on -- Mr. Nelson, I'll hear
20 from you in just a moment -- are we -- there is a child
21 custody matter also pending; is that true?

22 **MR. NELSON:** Yes, Your Honor. There is a civil file
23 that -- I can give you the file number here.

24 **THE COURT:** That's okay. When is that scheduled to be
25 heard?

1 **MR. NELSON:** There is no current hearing date set.

2 **MR. NOONEY:** There is not, Your Honor. We have --
3 Mr. Nelson and I have talked about where that case is at.
4 As this Court knows, in the event my client were to violate
5 the permanent order of protection, that, of course, is a
6 criminalable offense, a Class 1 misdemeanor for the first
7 occasion.

8 **THE COURT:** Sure.

9 **MR. NOONEY:** So with that, the permanent protection order,
10 of course, trumps any order the Court would enter in the
11 CIV file, which is --

12 **THE COURT:** Of course. I -- I understand. I'm just -- I
13 guess the point that I'm getting at is that we're going to
14 resolve that part some day and I -- well, Mr. Nelson, let
15 me let you speak first. Go ahead.

16 **MR. NELSON:** Yes, Your Honor.

17 I thought that there would be a proposed stipulation
18 for my client to sign and that would allow Mr. Tovar to see
19 the children at United Families. That stipulation would
20 represent to the Court that the parties were in agreement
21 that the existing protection order would be modified to
22 that extent. The parties would do the orientation at
23 United Families and a schedule would be, I guess, agreed
24 upon for there to be father/children contact. I haven't
25 received the stipulation yet. I was expecting to put that

1 on the record here today at the time of this hearing, but
2 maybe I'm missing something here.

3 **THE COURT:** So, Mr. Nooney, I guess the parties' positions
4 are a little bit of two ships passing in the night. Is
5 there -- it sounds like Mr. Nelson is saying that we could
6 reach an agreement; you're saying we haven't reached an
7 agreement. Are we -- is it something where you've
8 negotiated and you just can't agree on the terms or where
9 are we on this?

10 **MR. NOONEY:** Your Honor, the proposal essentially that I
11 made initially and just so -- I can represent to the
12 Court -- I think Mr. Nelson will agree -- we've had any
13 number of conversations. Essentially the proposal was to
14 remove the children from the protection order matter.
15 Essentially the terms were never agreed to on a
16 stipulation. I had reached out to Mr. Nelson last week as
17 it concerns where we were at and the fact of where their
18 proposal was and my client was not agreeing to various
19 terms that were proposed. So with that, it is my belief,
20 Your Honor, on behalf of the Respondent, that the parties
21 are not going to enter a stipulation because the terms are
22 not agreeable to by both parties.

23 **THE COURT:** So just as to that portion, Mr. Nelson, do you
24 agree with what Mr. Nooney said?

25 **MR. NELSON:** Yes. I mean, I'm still taken a little aback

1 because there are a number of other issues that aren't
2 related to the TPO that there have been discussions about
3 and, honestly, I don't recall there being a rejection of my
4 client's offer for Mr. Tovar to see the children at
5 United Families. I may have missed that. It was over the
6 holiday.

7 Again, if -- my client would enter into even a
8 temporary stipulation. If the concern for Mr. Tovar is
9 that he is losing his bond with his children, my client
10 does not want that, but she does want it to be in a
11 setting. I think -- what is it -- as my memory gets
12 refreshed here -- the issue she had was whether, you know,
13 he would show up at United Families wearing a belt and my
14 client wanted to avoid that and so that was the condition
15 that was placed on this and I thought that was agreeable.
16 And so, therefore, I thought we really did have an
17 agreement on this. If we don't, we don't and we'll just
18 leave it as it is.

19 **THE COURT:** Do I need to ask for clarification of what this
20 belt issue is or is it -- is it an important thing that I
21 need to know about?

22 **MR. NELSON:** I believe it is related to a criminal
23 investigation.

24 **THE COURT:** All right. Any more clarity you can provide
25 than that?

1 **MR. NELSON:** It's my understanding that the children would
2 receive punishment and it would involve a belt.

3 **THE COURT:** Very well. I didn't know if it meant a belt
4 with a gun in it or something like that or if it meant --

5 **MR. NELSON:** I believe it was a gun belt.

6 **THE PETITIONER:** Yes.

7 **MR. NELSON:** Yeah.

8 **THE COURT:** Mr. Nooney, Mr. Nelson, both of you, any chance
9 that I can give you five minutes and you'll reach an
10 agreement or is that not going to happen here?

11 **MR. NOONEY:** I do not believe it's going to happen here,
12 Your Honor.

13 **THE COURT:** What are you asking for, Mr. Nooney?

14 **MR. NOONEY:** It's kind of a double-edge sword, Your Honor.
15 I mean, the position from the Respondent would be to have
16 the children entirely removed from the protection order,
17 but that, of course, is up for this Court to determine.

18 **THE COURT:** Mr. Nelson, what -- okay. Mr. Nooney, then I'm
19 going to come back to you first. Children are removed from
20 this, then what do you want?

21 **MR. NOONEY:** I mean, then it would go back to the current
22 order that my client had prior to the protection order
23 being in place and we would move forth within that CIV
24 file, Your Honor, with everything else that had predated
25 this. And that, of course, was the child custody

1 evaluation and then eventually, of course, an evidentiary
2 hearing in front of this Court.

3 **THE COURT:** But that's not currently set for any hearings
4 at this point?

5 **MR. NOONEY:** It is not, Your Honor.

6 **THE COURT:** Okay.

7 **MR. NOONEY:** I can apprise the Court that the easiest thing
8 probably to explain to the Court in a long-winded way is
9 the protection order matter kind of took over everything
10 because then my client couldn't see the children. So
11 that --

12 **THE COURT:** Understood.

13 **MR. NOONEY:** -- essentially the other matters are on pause
14 or on hold.

15 **THE COURT:** Of course. Understood.

16 Mr. Nelson, let's just say for -- let's just say for
17 the sake of argument that I was going to modify this and do
18 something more than what you have proposed. Is your line
19 just absolutely at this United Families' thing?

20 **MR. NELSON:** As far as supervised parenting time for
21 Mr. Tovar?

22 **THE COURT:** Or for any kind of parenting time.

23 **MR. NELSON:** {Conferring with client.}

24 Your Honor, I had referenced a criminal investigation
25 pending and my client's position would change if that

1 criminal investigation resulted in no charges and she would
2 be open to proceeding with some type of guideline parenting
3 time, but she's fearful of -- again, she is -- you know,
4 we've got a protective order in place; the Court has made
5 its ruling as to the need for it. It included my client
6 and the children. She believes that if there is to be
7 parenting time for the father and the children, it should
8 be at least initially supervised. She's offered -- she's
9 proposed United Families. We have not received any
10 counteroffer to some other supervision.

11 **THE COURT:** This criminal file you talk about, is it
12 pending right now?

13 **MR. NELSON:** There is not a criminal file; there's just
14 criminal investigation. You know, there are no charges
15 against either party and -- but it does concern the
16 children.

17 **THE COURT:** Very well.

18 **MR. NELSON:** Your Honor, if I may propose something?

19 **THE COURT:** Sure.

20 **MR. NELSON:** That we continue this matter for 60 days.
21 That there be a court order for the Court to receive from
22 law enforcement the status of any type of investigation.

23 **THE COURT:** Well, we can do that. I don't have a problem
24 doing that, but, in the meantime, I think Mr. Nooney's
25 point is there ought to be something.

1 **MR. NELSON:** And my client, Your Honor, has proposed
2 something, is willing to do something. If there were a
3 counteroffer to consider, I don't know what that is.

4 **THE COURT:** And maybe -- any maybe I should have finished
5 that sentence because Mr. Nooney's point is there should be
6 something. I know that he's asking for more than you're
7 willing to agree to or that you don't want to stipulate to
8 that. But it does seem like your client is amenable to
9 some visitation in some way and so what I'd like to do is
10 just to come up with something that everybody could live
11 with for a month. And then perhaps we set this and we
12 revisit it again; we see what we can find out about this
13 criminal matter; we maybe see if we can get that civil case
14 back on track.

15 I'm going to let Mr. Nooney and Mr. Tovar visit for a
16 moment. You two can visit too, if you need to.

17 **MR. NELSON:** Your Honor, there's another option my client's
18 putting on the table that is instead of United Families,
19 that the grandfather, the maternal grandfather, my client's
20 father, supervise -- would supervise during that time
21 period, Mr. Tovar's parenting time.

22 **THE COURT:** Okay. I'm just trying to think of what order I
23 should go in and who I ask these questions of, but I'll
24 ask you first because you just said that. Do they get
25 along?

1 **MR. NELSON:** They have in the past, yes. I know of no --
2 no serious conflicts or confrontations between the two, but
3 I may be wrong. I don't know of any.

4 **THE COURT:** Mr. Nooney, I'll hear you out in just a moment,
5 but do you mind if I ask your client a question first?

6 **MR. NOONEY:** That's absolutely fine, Your Honor.

7 **THE COURT:** Mr. Tovar, that gentleman back there is
8 Ms. Wagner's father, correct?

9 That's you, sir?

10 **MR. WAGNER:** (Nods head.)

11 **THE COURT:** Do you get along with him?

12 **THE RESPONDENT:** I no longer get along with him.

13 **THE COURT:** Okay. If he's there when you are spending time
14 with your kids, how would you feel about that?

15 **THE RESPONDENT:** I'd feel like I was being robbed of my
16 time.

17 **THE COURT:** Okay.

18 **THE RESPONDENT:** I wouldn't get true -- to spend my time
19 with my children how I would want to.

20 **THE COURT:** Sure.

21 Mr. Nooney, go ahead with -- I think you were taking
22 some notes and you two were having a conversation. Any
23 ideas from your side?

24 **MR. NOONEY:** Your Honor, I've made my record on this. I'm
25 just going to let my record stand.

1 **THE COURT:** Okay.

2 **MR. NOONEY:** Thank you.

3 **THE COURT:** I'm going to grant a modification to this
4 extent. It's going to be small at this point, but it's
5 going to be visitation at United Families.

6 Now, I seem to remember from the last hearing that --
7 was there an issue with United Families or is that -- is it
8 a problematic place for some reason or not?

9 **MR. NELSON:** My understanding is they would not allow the
10 supervised parenting time because of a pending criminal
11 matter and that is why, again, I thought we had a
12 stipulation to avoid that. If there was to be a
13 stipulation entered by the parties for this court file,
14 that they would accept that, to allow the facility to be
15 used. But currently they -- without that, their policy is
16 not to be a facility to have to conduct those types of
17 parenting times when criminal matters are pending.

18 **THE COURT:** So the answer is?

19 **MR. NELSON:** Unless there's a stipulation, that's my
20 understanding. I might be -- I might be wrong on that.
21 I'm not the one that has been talking to United Families,
22 it's been my client or I thought Mr. Nooney.

23 **THE COURT:** Mr. Nooney, have you talked to United Families?

24 **MR. NOONEY:** No, Your Honor, because as the current court
25 order stands, my client was not even allowed for supervised

1 visitation.

2 **THE COURT:** Have you ever in the past?

3 **MR. NOONEY:** Not in a case like this, no, Your Honor.

4 **THE COURT:** I'm trying to work something out here. I'm
5 trying to find some way where -- because nobody's walking
6 out of here happy about the situation, I am certain of
7 that. But I'm trying to come up with something where I --
8 giving Mr. Tovar a little time with his children because --
9 and the reason I'm doing that is because I don't believe
10 that the Petitioner is completely against that. So I'm
11 trying to give just a little bit here, but I don't know, I
12 don't know what to suggest, I don't know what to order,
13 without a little bit of guidance.

14 Mr. Nelson, anything else?

15 **MR. NELSON:** Yeah. I'm still confused because I thought at
16 the evidentiary hearing the Respondent provided the Court
17 with a text message indicating that they would not
18 facilitate or conduct any United Family visitations pending
19 a -- I guess a matter that involved a gun or a criminal
20 investigation. There was an exhibit that was offered to
21 this Court and I believe it came from the Respondent. So
22 there was communications, there had been communications
23 between the Respondent and United Families. So I need
24 some -- I'm confused at this point. I thought that's where
25 we were getting our information as to why we were trying to

1 set this up with United Families.

2 **MR. NOONEY:** Your Honor, if I may clarify for the record,
3 please?

4 **THE COURT:** I would love for you to clarify.

5 **MR. NOONEY:** I believe the Court had asked the question if
6 I had contacted United Families. My client had contacted
7 United Families when the temporary protection order was
8 entered by Judge Wipf Pfeifle. My client has not since, to
9 my knowledge, contacted United Families nor have I, as I
10 just represented to the Court, because as the current court
11 order stands, my client is not even entitled to that. And
12 just for purposes of my record, I just want to make it
13 clear we're not conceding or agreeing to that, but I
14 understand the Court's potential modification and what that
15 looks like.

16 **THE COURT:** Well, so pretty much all or nothing for you?

17 **MR. NOONEY:** I wouldn't say that, Your Honor. I just
18 would -- for the purposes of the motion that's in front of
19 the Court, the Respondent would be asking that the children
20 be entirely removed from the protection order. That, of
21 course, would then require some additional -- tweaking is
22 probably not the right word, but it would have to be some
23 order that would then not only remove the children but
24 allow for exchanges, for example, for my client to pick up
25 the kids. He, of course, then would seek to be able to

1 attend sporting events, if he kept his distance
2 intentionally from --

3 **THE COURT:** Sure.

4 **MR. NOONEY:** -- Ms. Wagner.

5 **THE COURT:** Yep. Okay.

6 Mr. Nelson, you're not going to go for that or are you
7 having the children removed from the protection order?

8 **MR. NELSON:** Not at this time, Your Honor, due to the
9 pending criminal investigation.

10 **THE COURT:** Yes.

11 **MR. NELSON:** My client would be open to -- if that was, I
12 guess, found to be without any validity or any concerns by
13 law enforcement, there would be a different situation for
14 her.

15 **THE COURT:** We can keep this matter at the fore on all
16 these different issues. I would really like to know if
17 United Families would allow some visits there. I'd like to
18 know the answer to that question. I will -- I will
19 consider -- I will start, I guess, with some visits there
20 and then we can see where things go because sometime
21 hopefully in the near future at some point we are able to
22 come up with a determination of what's happening in a
23 potential criminal, pardon me, investigation.

24 So for right now I'm not -- I'm not comfortable taking
25 the children out of the protection order for the reasons

1 Mr. Nelson outlines. And I know that that's not what the
2 Respondent wants, of course, Mr. Nooney, but I'm just
3 trying to come up with just something where we could little
4 by little come up with a solution or even if it's not
5 little by little, but it's just little, it's something.

6 I'll hear from the parties again a week from now. We
7 can do it -- we can do it in seven days from now at the
8 same time and have another hearing, or if you -- if someone
9 can just make some phone calls and find out if it will work
10 there, that's the answer I need. That's really the answer
11 I needed for this hearing, but I understand we didn't --
12 you know, nobody was on the same page as far as exactly
13 where we're headed so I'm not trying to chastise anyone,
14 but I think that's a big thing that we need to know first.
15 And I'm willing to start there. And then as we sort out
16 and as we determine where things are going, then at some
17 point we'll have to determine this child custody matter and
18 see if there are some other things and other modifications
19 that we can make.

20 Mr. Nooney, because the order is in place and because
21 of the findings that I made already, I believe the onus is
22 probably on you to show why a modification should be made.
23 So I guess I'm going to put it on you to make a phone call
24 and find out.

25 Mr. Nelson, I'm sure -- I don't know, I guess the way

1 that it appears to me in this hearing that because they
2 wouldn't be so opposed to such an idea, it doesn't seem
3 like it's a bad idea for you to work on it together.

4 But you're the one seeking modification here so I
5 think that starts with you then. Do you disagree?

6 **MR. NOONEY:** A difficult thing, I think, Your Honor, is as
7 the current order stands, prior to today -- again, we're
8 not conceding to this, but there was not even supervised
9 visitation. So my understanding is United Families is
10 going to ask for the permanent order of protection. If we
11 provide the permanent order of protection, they're going to
12 say, *There is no supervised visitation.* We'd be in
13 violation of the court order if the children were to have
14 supervised visitation at United Families.

15 **THE COURT:** So you don't think you can have a conversation
16 with them and say, *Here's a hypothetical: Just imagine*
17 *that the judge is going to let him have visits.*

18 **MR. NOONEY:** Yes. We have a hypothetical, Your Honor. I
19 just -- I was trying to understand from the Court's
20 perspective if we need to provide the order, if there's
21 going to be a modification, or if the Court would just like
22 my office or my client to reach out to United Families and
23 get that information.

24 My concern, Your Honor, is I think it's going to be
25 dependent on what the Court's order is, but we can have the

1 hypothetical conversation with them.

2 **THE COURT:** That's all I want to know. You guys -- you
3 gentlemen can email me, tell me what you find out. I just
4 think it's -- I think it's a lot easier if you do it
5 together or if you're in on the conversation together or
6 try it together. I don't know, maybe that's me being a
7 little too optimistic. But, yeah, just find out if they
8 would do it. If they would do it, what I would like to do
9 is to start there. Then we can figure out what else we
10 need to do because this civil matter is stalled and we may
11 need to wait on a criminal investigation and we aren't
12 going to have those results immediately so I'm trying to
13 just come up with something to -- something to do for now
14 just for a short period of time.

15 And I say and I turn to you, Mr. Nooney, because
16 you're the one that was seeking the modification and that's
17 why I wanted you to initiate the conversation, but if
18 Mr. Nelson does it with you, I think that's going to help
19 everyone. So that's all. That's what I meant with -- just
20 find out if it's a possibility if this man right here can
21 go there next week if I order it.

22 **MR. NOONEY:** Understood. I apologize, Your Honor, I
23 misunderstood what the Court was asking.

24 **THE COURT:** Very well. And I don't mean to -- I'm not
25 trying to chew anyone out, I'm just -- I guess I thought it

1 was pretty simple and maybe I just wasn't very clear. So
2 that's all I'm looking for.

3 I'll have a hearing -- we can have a hearing next week
4 if the two of you think that you can get in contact with
5 them or whenever you propose.

6 **MR. NELSON:** Your Honor, Mr. Nooney and I can discuss
7 briefly outside afterwards to maybe set up a conference
8 call with United Families and try to get clarification from
9 them and then report back to the Court.

10 **THE COURT:** I appreciate that. If you -- yeah, just let me
11 know what you find out. If it looks like we can get
12 something done here and maybe even an agreement between the
13 two of you or among all of you, I'll entertain it, I'll
14 entertain a modification for that purpose. I think that it
15 makes some sense and we've got that civil file out there so
16 let's see what we can do in that respect. And then over
17 time perhaps we'll find out about this criminal matter and
18 we can figure out where it goes in the future.

19 So for right now I'm not going to set it for next
20 week. I'll wait to hear. And you can feel free to just do
21 it by email communication with me and tell me what you find
22 out and let's see where we can go from there.

23 Mr. Nooney, anything you need to know -- anything else
24 you need from my end?

25 **MR. NOONEY:** Just so the record is clear, Your Honor, I

1 mean, the allegation for criminal investigation, that's the
2 first time I've heard of it. But beyond that, nothing
3 further from the Respondent, Your Honor.

4 **THE COURT:** I don't know anything about it either,
5 Mr. Nooney, so I guess we're going to see where that goes.

6 So anything else, Mr. Nelson?

7 **MR. NELSON:** I have nothing, Your Honor.

8 **THE COURT:** Okay. We'll be adjourned in this matter.

9 (Hearing concluded at 4:57 p.m.)

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1 STATE OF SOUTH DAKOTA }
2 COUNTY OF PENNINGTON } SS. CERTIFICATE

3
4 I, KIMBERLY K. JOHNSON, RPR, an Official Court
5 Reporter and Notary Public in the State of South Dakota,
6 Seventh Judicial Circuit, do hereby certify that I reported
7 in machine shorthand the proceedings in the above-entitled
8 matter and that Pages 1 through 20, inclusive, are a true
9 and correct copy, to the best of my ability, of my
10 stenotype notes of said proceedings had before the
11 HONORABLE JANE WIPF PFEIFLE, Circuit Court Judge.

12 Dated at Rapid City, South Dakota, this 13th day
13 of September, 2024.

14
15
16 /s/ Kimberly K. Johnson

17 _____
18 KIMBERLY K. JOHNSON, RPR
19 Official Court Reporter
20 My Commission Expires: 6/17/28
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STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

KYLEA M. WAGNER,

Plaintiff,

vs.

RIGO B. TOVAR,

Defendant.

51CIV18-000623

**VERIFIED MOTION FOR CHANGE
OF CUSTODY**

COMES NOW the Defendant, Rigo B. Tovar, by and through his undersigned counsel, and hereby respectfully moves this Court for an Order Modifying Custody in the above-captioned matter, establishing a visitation schedule and child support consistent with any such modification. This Motion is made upon the following grounds:

1. On or about April 18, 2018, a Verified Complaint for Paternity, and Custody was filed with this Court. *See Verified Complaint for Paternity, and Custody.*

2. On or about March 22, 2019, the Court entered the Court Order Approving Parenting Plan, where the Court ordered that the parties shall share joint legal custody and the Plaintiff, Kylea M. Wagner, shall continue as the primary physical custodian of the two (2) minor children, Isaiah Tovar (then age 3) born February 4, 2015, and Teyao Tovar (then age 2) born February 19, 2016, providing the Defendant, Rigo B. Tovar, with parenting time. *See Court Order*

Approving Parenting Plan. A true and correct copy of the Court Order Approving Parenting Plan is attached hereto as Exhibit A.

3. The Plaintiff and the Defendant reside in Pennington County, South Dakota, giving this Court jurisdiction over this matter.

4. The Defendant, Rigo B. Tovar, provides the minor children with consistency, structure, and guidance, that is not available when the minor children are with the Plaintiff, Kylea M. Wagner.

5. The Defendant, Rigo B. Tovar, is of information and belief that the Plaintiff, Kylea M. Wagner, has dependency issues related to illicit drugs and alcohol, that have risen to a level that impacts her ability to affectively parent the minor children.

6. The Defendant, Rigo B. Tovar, is of information and belief that lack of stability in the Plaintiff, Kylea M. Wagner's, current mental and emotional state has risen to a level that impacts her ability to affectively parent the minor children, as reflected in repeated communications from the Plaintiff, Kylea M. Wagner, to the Defendant, Rigo B. Tovar. These communications include, but are not limited to a text message, where the Plaintiff, Kylea M. Wagner, has indicated self-harm, while physically having one of the minor children in her care.

7. The Defendant, Rigo B. Tovar, is further concerned about lack of consistency and stability for the minor children when they are in the care of the Plaintiff, Kylea M. Wagner, particularly the amount of school tardies and school absences the minor children have had and may have in the future.

8. A substantial change in circumstance has occurred since the Court Order Approving Parenting Plan that was entered by the Court on or about March 22, 2019.

9. At the time the Court entered the Court Order Approving Parenting Plan, the Defendant, Rigo B. Tovar, worked as an underground core driller, where he worked and lived remotely outside of Pennington County, South Dakota, often in other states such as Arizona, Alaska, Nevada, Michigan, and Utah, where he would work for 28 consecutive days out of state and be off for 14 days, living in state.

10. In June of 2019, on or about June 20, 2019, the Defendant, Rigo B. Tovar, resigned from his employment as an underground core driller, in order to work and to reside in Pennington County, South Dakota for the purpose of providing consistency, structure, and guidance for his two (2) minor children.

11. While Kylea M. Wagner and Rigo B. Tovar were never legally married, on or about June of 2020, the parties reconciled, living together and mutually providing support for the minor children under one household.

12. In February of 2024, the parties ended such relationship, where the Plaintiff, Kylea M. Wagner, removed the minor children from the residence where the Plaintiff, Kylea M. Wagner, and the Defendant, Rigo B. Tovar, and the two (2) minor children resided at since approximately June of 2020.

13. The best interest of the minor children will be served by a change in custody as set forth above.

WHEREFORE the Defendant, Rigo B. Tovar, respectfully asks this Court to enter an Order as follows:

1. That the Defendant, Rigo B. Tovar, be granted primary physical custody of the parties' minor children;
2. That the Court enter an Order designating the Plaintiff, Kylea M. Wagner, with visitation privileges and support obligations with respect to the minor children;
3. The Court enter further Orders as necessary in the best interest of the minor children, including, but not limited to ordering that the Plaintiff, Kylea M. Wagner, refrain from drinking alcohol and using illicit drugs while the minor children are in her care;
4. For the recovery of the Defendant, Rigo B. Tovar's, costs and disbursements associated with this action, including reasonable attorney fees as permitted by South Dakota law; and
5. For such other and further relief as the Court deems just and equitable.

Dated this 22nd day of March, 2024.

NOONEY & SOLAY, LLP

/s/ Jared D. Nooney

JARED D. NOONEY

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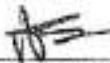
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VERIFICATION


STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF PENNINGTON)

Rigo B. Tovar, being first duly sworn upon his oath, deposes and states that he is the Defendant in the above-referenced Motion for Change of Custody and that he has read the same and knows the contents thereof to be true to his own knowledge, except to those matters therein stated on information and belief and, as to those matters, he believes them to be true.



RIGO B. TOVAR, Defendant

Subscribed and sworn to before me by Rigo B. Tovar this 21 day of
March, 2024.



Notary Public - South Dakota
My Commission Expires:

SEAL
JARED D. NOONEY
Notary Public
SOUTH DAKOTA

My Commission Expires
September 19, 2025

CERTIFICATE OF SERVICE

I, Jared D. Nooney, attorney for Plaintiff, hereby certifies that a true and correct copy of the foregoing was served on this 22nd day of March, 2024, by electronic service through Odyssey File & Serve, to:

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JARED D. NOONEY

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 30777

KYLEA M. WAGNER,
Petitioner and Appellee,

vs.

RIGO B. TOVAR,
Respondent and Appellant.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Eric Kelderman
Circuit Court Judge

APPELLEE'S BRIEF

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NOTICE OF APPEAL FILED JULY 31, 2024

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PRELIMINARY STATEMENT

For ease of reference, citations to the pleadings will be referred to as Settled Record ("SR") with the numbers assigned by the Clerk. References to the documents in the Appendix will be referred to as "App." with the appropriate page number. Citations to transcripts will be designated by transcript, date of hearing, and page and line number, e.g., "TR (7/01/2024), pp. 39:18–40:2." "Permanent Order for Protection" is sometimes identified as "Permanent Protection Order."

Appellant Rigo Tovar will be referred to as "Mr. Tovar" or "Appellant." Appellee Kylea Wagner will be referred to as "Ms. Wagner" or "Appellee." The minor children will be referred to as "I.T. and T.T." where the context is collective, or if the context is individual the reference to the specific child will be "I.T." or "T.T.," as the case may be.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to SDCL § 15-26A-3.

STATEMENT OF ISSUES

I. Whether the circuit court erred when it entered a Permanent Order for Protection.

The circuit court correctly entered the Permanent Order for Protection.

Most Relevant Authorities:

- *Parker v. Parker*, 2017 S.D. 37, 898 N.W.2d 735
- SDCL § 25-10-1(1)

II. Whether the circuit court erred when it entered a Permanent Protection Order against Mr. Tovar, finding that domestic abuse occurred by him based on incidents, some of which occurred ten years ago.

The circuit court properly considered the history of domestic abuse.

Most Relevant Authorities:

- *Parker v. Parker*, 2017 S.D. 37, 898 N.W.2d 735
- SDCL § 25-10-1(1)

III. Whether the circuit court erred when it entered a Permanent Order for Protection for the maximum period of five years, prohibiting Mr. Tovar from contact with the protected parties and minor children, I.T. and T.T.

The circuit court did not abuse its discretion in issuing the Permanent Order for Protection for five years.

Most Relevant Authorities:

- *Parker v. Parker*, 2017 S.D. 37, 898 N.W.2d 735
- SDCL § 25-10-5

IV. Whether the circuit court erred by not modifying the Order for Protection when it heard Respondent's Motion for Order to Modify the Order for Protection at the July 22, 2024 Hearing to Modify the Permanent Order for Protection.

The circuit court did not err in denying the motion to modify the Permanent Order for Protection.

Most Relevant Authorities:

- *Batchelder v. Batchelder*, 2021 S.D. 60, 965 N.W.2d 880
- SDCL § 25-10-10

STATEMENT OF THE CASE

Due to Mr. Tovar's ongoing acts of domestic abuse, on May 24, 2024 Ms. Wagner filed a Petition and Affidavit for Protection Order (Domestic Abuse) seeking protection for herself and the minor children, I.T. and T.T. (App. 1–5). The circuit court granted an Ex Parte Temporary Order for Protection. (App. 6–8). After hearings on June 20, 2024 and July 1, 2024, the circuit court entered a Permanent Order for Protection for a period of five years, prohibiting Mr. Tovar from contacting Ms. Wagner and the children. (App. 9–13).

On July 2, 2024, Mr. Tovar filed a Motion to Modify the Order for Protection. (App. 14–16). A hearing was held on July 22, 2024, where Mr. Tovar requested that the children be removed from the protection order to allow him unsupervised parenting time. (TR (7/22/2024), p. 6:13–15; p. 7:19–23).

Due to a pending criminal investigation involving Mr. Tovar's alleged abuse of the children, Ms. Wagner opposed any modification in the Protection Order. (TR (7/22/2024), pp. 6:22-25; 8:8-14). The circuit court denied Mr. Tovar's motion to modify, expressing concern about the children's safety and the ongoing criminal investigation. (TR (7/22/2024), pp. 12:24 -13:4).

Mr. Tovar now appeals the circuit court's entry of the Permanent Order for Protection, as well as the circuit court's denial of his Motion to Modify it.

STATEMENT OF THE FACTS

Ms. Wagner and Mr. Tovar began a significant romantic relationship in August 2013 and have two children together, I.T. and T.T. (TR (7/01/2024), pp. 8:22–9:2; p. 13:3–4). Throughout their relationship, Mr. Tovar engaged in a pattern of domestic abuse, including physical harm, threats, and harassment, causing Ms. Wagner and the children to fear for their safety.

Physical Abuse Incidents:

1. **First Incident (2013-2014):** Within the first year of their romantic relationship Mr. Tovar physically assaulted Ms. Wagner by using his forearm against her neck to push her against a wall, and pin her there. Ms. Wagner testified:

"We had an argument... he was angry and pushed me up against our... laundry room and pinned me back with his forearm against my neck." (TR (7/01/2024), p. 15:11-14)

Her father, Jerry Wagner, corroborated this pattern of abuse. He testified about an incident where Ms. Wagner and their newborn baby were locked in the bathroom while Mr. Tovar was "beating the door down":

"She was calling and telling me that her and her newborn baby was locked in their bathroom... and that he had been threatening her and was beating the door down." (TR (7/01/2024), pp. 92:23-93:2)

2. **Second Incident (Approximately 2015):** About a year later, Mr. Tovar pinned Ms. Wagner on the bed, restricting her breathing:

"He... pinned me up against the bed, was on top of me, where I could not breathe or move... I started tunnel vision and trying to fight for air." (TR (7/01/2024), p. 15:19-23)

3. **Choking Incident:** Ms. Wagner disclosed to her mother, Ms. Jeanne Wagner, that Mr. Tovar had choked her:

"I heard about it from Kylea that he choked her." (TR (7/01/2024), p. 115:23-24)

Abuse Towards the Children:

Ms. Wagner and her parents testified about Mr. Tovar's abusive behavior towards the children, including physical harm and emotional abuse.

- **Physical Punishment:**

- o **Mr. Tovar's Admission:** During cross-examination, Mr. Tovar admitted to using a belt to discipline the children:

"Q: You used a belt on the children.

A: Per her request." (TR (7/01/2024), p. 178:13-14)

He acknowledged that he had spanked the children with a belt multiple times:

"Q: How many times has that happened?

A: I don't recall how many times, but I have not done it in years..." (TR (7/01/2024), p. 178:20-22)

- o **Ms. Wagner's Testimony:** She testified that Mr. Tovar has hit the children and used a belt when they were younger:

"He punishes them by yelling at them or putting them in a room. I have witnessed him hit Isaiah. And he hit them with a belt when they were younger." (TR (7/01/2024), p. 60:12-16)

- o **Witness Testimony:** Jeanne Wagner witnessed Mr. Tovar slap I.T. across the face when I.T. was only a toddler:

"I did witness him slap Isaiah across the face when he was about 18 months old." (TR (7/01/2024), p. 117:3-4)

- o **Children's Disclosures:** I.T. told his grandmother that Mr. Tovar had been "beating him with a gun belt":

"He told me that his dad had been beating him with a gun belt." (TR (7/01/2024), p. 121:11-12)

- **Emotional Abuse:**

- o Ms. Wagner testified that Mr. Tovar emotionally abused the children:

"He belittles the children. He makes them feel insecure about themselves. He uses them as a tool against adults." (TR (7/01/2024), p. 60:4-6)

- o The children expressed to their grandmother that their father does not like them:

"It's pretty much been Isaiah's ongoing conversation throughout the years that his dad does not like him. He's told us that several times." (TR (7/01/2024), pp. 117:25-118:2)

- **Neglect and Lack of Concern:**

- o Ms. Wagner noted that Mr. Tovar does not show up for the children's well-being, and refuses to assist when they need him:

"He doesn't show up for them when he's needed... For example, Isaiah—or Teyo had a surgery done. Rigo refused to come and—nor did he show up for him in the two weeks of healing, the healing process." (TR (7/01/2024), p. 60:6–10)

Pending Criminal Investigation:

At the July 22, 2024 hearing, it was revealed that there is a pending criminal investigation involving Mr. Tovar's alleged abuse of the children. (TR (7/22/2024), p. 8:8–14). Ms. Wagner expressed concern about the children's safety and opposed removing them from the protection order while the investigation is ongoing:

"My client would change her position if the criminal investigation resulted in no charges... She's fearful... She believes that if there is to be parenting time... it should be at least initially supervised." (Ms. Wagner's counsel's statements, TR (7/22/2024), p. 8:9–14)

Mr. Tovar's counsel acknowledged that this was the first time he heard of the criminal investigation:

"Just so the record is clear... the allegation for criminal investigation, that's the first time I've heard of it." (TR (7/22/2024),pp. 20:25–21:2)

Circuit Court's Consideration of Motion:

The circuit court considered Mr. Tovar's motion to modify the protection order but ultimately denied it, citing concerns about the children's safety and the pending investigation:

"I'm not comfortable taking the children out of the protection order for the reasons Mr. Nelson outlines." (TR (7/22/2024),pp. 12:24–13:2)

The court attempted to facilitate supervised visitation at United Families, but practical issues prevented immediate implementation. (TR (7/22/2024),pp. 10:24–11:3).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION.

A. Standard of Review

The Supreme Court reviews a circuit court's decision to grant a protection order using a two-step process: (1) determining whether the circuit court's findings of fact were clearly erroneous; and (2) if the findings are not clearly erroneous, determining whether the circuit court abused its discretion in granting the protection order. *Parker v. Parker*, 2017 S.D. 37, ¶ 9, 898 N.W.2d 735, 738.

An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Bruggeman by Black Hills Advocate, LLC v. Ramos*, 2022 S.D. 16, ¶ 10, 972 N.W.2d 492, 496.

B. The Circuit Court's Findings Were Not Clearly Erroneous.

The circuit court found that Mr. Tovar committed domestic abuse against Ms. Wagner and the children. Under SDCL § 25-10-1(1), domestic abuse includes "physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury."

Substantial Evidence of Domestic Abuse:

1. **Physical Assaults:** Ms. Wagner provided detailed testimony of multiple physical assaults by Mr. Tovar, including being pinned against a wall and choked. (TR (7/01/2024), p. 15:11–23). Her father corroborated these incidents, recalling

rescuing her from the home where Mr. Tovar was "beating the door down." (TR (7/01/2024),pp. 92:23–93:2)

2. **Abuse Towards the Children:** The circuit court heard substantial evidence of Mr. Tovar's abusive behavior towards the children, which constitutes domestic abuse under SDCL § 25-10-1(1).

- o **Physical Harm:** Both Ms. Wagner and her mother testified about Mr. Tovar physically harming the children, including hitting them and using a belt. Mr. Tovar himself admitted to using a belt on the children:

"Q: You used a belt on the children.

A: Per her request." (TR (7/01/2024), p. 178:13–14)

He acknowledged multiple instances of this punishment:

"Q: How many times has that happened?

A: I don't recall how many times, but I have not done it in years..." (TR (7/01/2024), p. 178:20–22)

- o **Emotional Harm:** Testimony indicated that Mr. Tovar belittles the children and undermines their self-esteem.

"He belittles the children. He makes them feel insecure about themselves." (Ms. Wagner's testimony, TR (7/01/2024), p. 60:4–5)

- o **Ongoing Risk:** Ms. Wagner believes the abusive behavior continues.

"Q: Do you believe he does that to this day?

A: I do." (TR (7/01/2024), p. 60:17–18)

The circuit court overruled objections and allowed this testimony, recognizing its relevance.

3. **Threatening Behavior with Firearms:**

- On December 30, 2023, Mr. Tovar, while intoxicated, accessed an AR-15 rifle, attaching a laser to it despite Ms. Wagner's pleas to stop:

"I told him that it was scaring me and I would like him to put it away... He turned back around and told me it was none of my business and I needed to leave the room." (TR (7/01/2024), p. 23:4-7)

Mr. Tovar admitted to handling the firearm after consuming alcohol:

"Q: On this evening, December 30th of 2023, you'd been drinking and you were in the room where the gun safe was, correct?

A: Yes. Alone." (TR (7/01/2024), pp. 171:25-172:2)

He acknowledged having the gun in his hands:

"Q: You had the gun, though, too—

A: Yes." (TR (7/01/2024), p. 172:8-9)

The court found Mr. Tovar's testimony evasive regarding his alcohol consumption:

"I find that he was being a little evasive in that answer." (TR (7/01/2024), p. 203:13-14)

- Ms. Wagner's father testified about her fear during this incident:

"She called concerned that Rigo had taken out a gun... she was just simply scared." (TR (7/01/2024), p. 89:7-10)

4. Pointing a Laser at Ms. Wagner and the Children:

- On January 14, 2024, Mr. Tovar pointed a laser at Ms. Wagner and T.T., causing severe fear:

"A red laser came from his truck... onto my son's chest... the laser was on my chest and slowly moved to my forehead." (TR (7/01/2024), p. 36:2-9)

The circuit court concluded that this act constituted domestic abuse:

"I believe that that is sufficient to issue the protection order as to Ms. Wagner and as to both of the children as well." (TR (7/01/2024), p. 204:10–12)

- Ms. Wagner testified she had not seen any other lasers in the house besides those attached to guns:

Q: Had you seen any other type of laser in your house, other than ones attached to guns?

A: No, I have not." (TR (7/01/2024), p. 86:20–22)

- The trial judge sought clarification and ensured understanding that these lasers were potentially attached to firearms. (TR (7/01/2024), p. 86:12–17)

5. Aggressive Confrontation at the Park:

- On May 22, 2024, Mr. Tovar aggressively approached Ms. Wagner and I.T. at Wilderness Park:

"He was coming at me with a very aggressive, fast walk trying to demand our son to leave me... I was scared." (TR (7/01/2024), pp. 53:22–54:1)

Despite her requests for him to stay away, he continued to approach:

"Q: How many times did Kylea ask you to leave the park there on that audio?

A: Two, Three, I don't remember. A few." (TR (7/01/2024), p. 167:23–25)

6. Harm to Pets as Intimidation:

- Ms. Wagner suspected Mr. Tovar of harming their puppy, which was found bleeding internally without external injuries:

"Somebody would have to go inside the kennel for the puppy to get hurt." (TR (7/01/2024), p. 82:6–7)

Credibility Determinations:

The circuit court is in the best position to assess the credibility of witnesses.

Parker v. Parker, 2017 S.D. 37, ¶ 14, 898 N.W.2d at 739. The court found Ms. Wagner's testimony credible and detailed:

"I find Ms. Wagner to be credible. I find her to be a credible witness and I believed her testimony. She was detailed and she explained exactly what happened and in extensive detail." (TR (7/01/2024), p. 202:18–22)

Conversely, the court found Mr. Tovar evasive:

"I find that he was being a little evasive in that answer." (TR (7/01/2024), p. 203:13–14)

C. The Circuit Court Did Not Abuse Its Discretion in Granting the Protection Order.

Given the credible evidence of domestic abuse, the circuit court acted within its discretion in granting the Permanent Order for Protection. The court's decision was based on substantial evidence and was neither arbitrary nor unreasonable.

In *Parker v. Parker*, the Supreme Court upheld the issuance of a protection order where there was sufficient evidence of a series of acts that harassed and intimidated the petitioner. 2017 S.D. 37, ¶ 20, 898 N.W.2d at 741. Similarly, the evidence here supports the circuit court's findings.

II. THE CIRCUIT COURT PROPERLY CONSIDERED THE HISTORY OF DOMESTIC ABUSE.

Mr. Tovar contends that the court erred by considering incidents from ten years ago. However, the court properly considered the full history of abuse to assess the ongoing threat posed by Mr. Tovar.

Under SDCL § 25-10-1(1), domestic abuse encompasses a pattern of abusive behavior. The statute does not limit consideration to recent incidents. In *Parker v. Parker*, the court acknowledged that past conduct is relevant in determining whether a protection order is necessary. 2017 S.D. 37, ¶ 15, 898 N.W.2d at 740.

Relevance of Historical Abuse:

- **Establishing a Pattern:** The history of abuse demonstrates a pattern of controlling and threatening behavior by Mr. Tovar. The incidents from 2013 onwards show a consistent pattern that has escalated over time.
- **Ongoing Fear:** Ms. Wagner testified that the past incidents contribute to her current fear:

"I was scared because of the last several years of the repeated unpredictable behaviors of Rigo, that I felt like this was getting more serious as time went on." (TR (7/01/2024), p. 46:23–25)

- **Children's Well-being:** The history of abuse has impacted the children. They have expressed ongoing fear, and they have reported recent instances of physical harm.

The circuit court appropriately considered this history in granting the protection order, recognizing the ongoing nature of the abuse.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PROTECTION ORDER FOR FIVE YEARS AND PROHIBITING MR. TOVAR TO HAVE CONTACT WITH THE CHILDREN.

Under SDCL § 25-10-5, "any relief granted by the order for protection shall be for a fixed period and may not exceed five years." The circuit court was within its statutory authority to impose a five-year protection order.

A. The Inclusion of the Children in the Protection Order Was Justified.

Under SDCL § 25-10-1(1), domestic abuse includes acts that inflict physical harm or the fear of imminent physical harm upon family or household members, which includes children. The evidence adduced at the hearing demonstrated that Mr. Tovar's abusive behavior had a direct and detrimental effect on the children. This justified their inclusion in the protection order.

Evidence Supporting Inclusion:

- **Physical Abuse:** Testimony from Ms. Wagner and her mother included telling of multiple instances of physical harm to the children, including

Q: "You used a belt on the children?"

A: "Per her request." (TR (7/01/2024), p. 178:13–14)

- **Emotional Harm:** The children expressed feelings of fear of being disliked by their father, and fear of him due to his abusive actions.
- **Risk of Future Harm:** The circuit court found that the incident involving the laser pointed at T.T. demonstrated a direct threat to the children's safety:

"I believe that that is sufficient to issue the protection order as to Ms. Wagner and as to both of the children as well." (TR (7/01/2024), p. 204:10–12)

- **Pending Criminal Investigation:** At the July 22, 2024 hearing, it was disclosed that there is a criminal investigation involving Mr. Tovar's alleged abuse of the children. (TR (7/22/2024), p. 8:8–14). The court expressed concern about modifying the protection order in light of this investigation:

"I'm not comfortable taking the children out of the protection order for the reasons Mr. Nelson outlines." (TR (7/22/2024), pp. 12:24–13:2)

In *Parker v. Parker*, the Supreme Court upheld a protection order that included minor children when there was evidence that the respondent's actions endangered their safety. 2017 S.D. 37, ¶¶ 20–21, 898 N.W.2d at 741.

B. The Five-Year Duration Was Within the Court's Discretion.

Given the severity and ongoing nature of the abuse, the circuit court did not abuse its discretion in issuing the protection order for the maximum period allowed under SDCL § 25-10-5.

Ms. Wagner expressed the necessity for a long-term protection order:

"Q: And you're seeking a protection order, a permanent protection order, for what period of time?

A: Five years.

Q: Why?

A: I believe for myself, safety, and the children." (TR (7/01/2024), p. 59:21–25)

The court's decision to grant a five-year protection order was reasonable and supported by the evidence, reflecting the need to ensure the safety and well-being of Ms. Wagner and the children.

IV. THE CIRCUIT COURT DID NOT ERR IN DENYING MR. TOVAR'S MOTION TO MODIFY THE PERMANENT ORDER FOR PROTECTION.

A. Standard of Review

The decision to modify a protection order is within the circuit court's discretion. Under SDCL § 25-10-10, "upon application, notice to all parties, and hearing, the court may modify the terms of an existing order for protection."

B. The Circuit Court Acted Within Its Discretion in Denying Mr. Tovar's Motion to Modify.

At the July 22, 2024 hearing, Mr. Tovar requested that the children be entirely removed from the protection order, allowing him to resume unsupervised parenting time. (TR (7/22/2024), p. 6:13–15; p. 7:19–23). Due to a pending criminal investigation involving Mr. Tovar's alleged abuse of the children, Ms. Wagner opposed removing the children from the protection order. (TR (7/22/2024), p. 6:22–25; p. 8:8–14). She expressed a willingness to allow supervised visitation at United Families, but Mr. Tovar did not agree to the terms she proposed. (TR (7/22/2024), p. 5:22–6:3; pp. 11:25–12:2).

The circuit court denied the motion to modify, stating:

"I'm not comfortable taking the children out of the protection order for the reasons Mr. Nelson outlines... because of the findings that I made already, and given the pending criminal investigation." (TR (7/22/2024), pp. 12:24–13:4)

The court emphasized the need to protect the children and considered the ongoing investigation:

"We may need to wait on a criminal investigation and we aren't going to have those results immediately." (TR (7/22/2024), p. 18:11–13)

The circuit court acted within its discretion in denying Mr. Tovar's motion to modify the protection order. Under SDCL § 25-10-10, the court may modify the terms of an existing order for protection upon application and hearing. However, the decision to modify lies within the court's sound discretion, considering the safety and well-being of the protected parties.

In this case the court had previously made detailed findings supporting the inclusion of the children in the protection order, based on evidence of domestic abuse

involving them. (*See* Argument Section III, *supra*). At the July 22 hearing, the court considered the arguments and positions of both parties and determined that modification was not warranted at that time given the pending criminal investigation and the ongoing concerns for the children's safety.

The court's decision was reasonable and aimed at safeguarding the well-being of the children, which is consistent with the purposes of the protection order statutes. *See Batchelder v. Batchelder*, 2021 S.D. 60, ¶ 18, 965 N.W.2d 880, 886 ("The protection order statutes are intended to prevent further abuse and protect victims from future harm.").

Moreover, the court attempted to facilitate some contact between Mr. Tovar and the children by suggesting supervised visitation at United Families, but practical issues prevented that from occurring at the time. (TR (7/22/2024),pp. 10:24–11:3; p. 13:11–20). The court encouraged the parties (through their counsel) to explore options for supervised visitation, demonstrating a balanced approach that considered both the children's safety and Mr. Tovar's desire for contact.


Therefore, the circuit court did not abuse its discretion in denying the motion to modify the protection order.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court affirm the circuit court's Permanent Order for Protection, as well as the circuit court's decision to deny Appellant's motion to modify the Protection Order.

Dated this 13th day of December, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 3,853 words. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 13th day of December, 2024.

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CERTIFICATE OF SERVICE

I certify that on the 13th day of December, 2024, I caused to be served via electronic service a true and correct copy of *Appellee's Brief* to:

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/s/ George J. Nelson
George Nelson

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

APPEAL NO. 30777

KYLEA M. WAGNER,
Petitioner and Appellee,

vs.

RIGO B. TOVAR,
Respondent and Appellant.

ON APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Eric Kelderman
Circuit Court Judge

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ARGUMENT

I. THE CIRCUIT COURT ERRED WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION.

Kylea Wagner makes allegations of “[p]hysical [a]ssaults” and “[p]hysical [h]arm” in Appellee’s Brief, which are beyond the *specific* facts and circumstances of the [alleged] domestic abuse” *See Appellee’s Brief*, pp. 7-8. As stated by this Court in *Purcell v. Begnaud*,

A petitioner must ‘allege the existence of domestic abuse[.]’ SDCL 25–10–3(2). The petitioner is also required to submit ‘an affidavit made under oath stating the *specific* facts and circumstances of the domestic abuse[.]’ *Id.* (emphasis added). ‘One seeking relief under the domestic abuse laws must prove abuse by a preponderance of the evidence.’

Purcell, 2017 S.D. 23, ¶ 8, 895 N.W.2d 346, 349 (quoting *Beermann v. Beermann*, 1997 S.D. 11, ¶ 17, 559 N.W.2d 868, 872); SDCL 25–10–5 (emphasis in original). The circuit court erred by considering any allegation beyond the “specific facts and circumstances” as alleged by Kylea Wagner in the Petition & Affidavit for a Protection Order (Domestic Abuse). *See Purcell*, 2017 S.D. 23, ¶ 8, 895 N.W.2d 346, 349 (quoting *Beermann*, 1997 S.D. 11, ¶ 17, 559 N.W.2d 868, 872); SDCL 25–10–5 (emphasis in original); *see also* Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 001-024.

Kylea Wagner did not allege “specific facts and circumstances of [] domestic abuse” in the Petition and Affidavit for a Protection Order

(Domestic Abuse). *Id.* In fact, when asked “I AM ASKING THE COURT FOR A PROTECTION ORDER BASED UPON THE FACTS BELOW”, and when informed to “*check all that apply*”, Kylea Wagner only checked the following boxes:

I AM ASKING THE COURT FOR A PROTECTION ORDER BASED UPON THE FACTS BELOW:

On or about (month) May (day) 22 (year) 2024 at approximately 7:45 o'clock AM (am/pm), Respondent committed the following act(s) of domestic abuse against Petitioner (if not me, my minor child who is related to Respondent) and any Protected Parties (other minor child in my custody related to Respondent):

(check all that apply):

- Respondent caused physical harm or bodily injury.
- Respondent attempted to cause physical harm or bodily injury.
- Respondent's actions inflicted fear in Petitioner and/or any Protected Parties that Respondent was about to cause physical harm or bodily injury to said Petitioner or Protected Party.
- Respondent violated a protection order.

Form UJS-091A If Adult
Form UJS-091AJ If Juvenile
Rev. 07/21

- Respondent willfully, maliciously, and repeatedly followed Petitioner and/or any Protected Parties.
- Respondent pursued a knowing and willful course of conduct which seriously alarmed, annoyed, or harassed Petitioner and/or any Protected Parties with no legitimate purpose. The pattern of conduct was a series of acts over a period of time, however short, showing a continuing pattern of harassment.
- Respondent made a credible threat with intent to cause Petitioner and/or any Protected Parties reasonable fear of death or great bodily injury.
- The person willfully, maliciously, and repeatedly harassed Petitioner and/or any Protected Parties by means of any verbal, electronic, digital media, mechanical, telegraphic, or written communication.
- Respondent committed a crime of violence against Petitioner or any Protected Parties.

Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 001-002. The two boxes checked only relate to the alleged incident on May 22, 2024 and not to any other alleged incidents.

On the Petition and Affidavit for a Protection Order (Domestic Abuse), as is referenced above, Kylea Wagner did *not* check the following boxes:¹

- Respondent caused physical harm or bodily injury.
- Respondent attempted to cause physical harm of bodily injury.
- Respondent willfully, maliciously, and repeatedly followed Petitioner and/or Protected Parties.
- Respondent made a credible threat with intent to cause Petitioner and/or any Protected Parties reasonable fear of death or great bodily injury.
- The person willfully, maliciously, and repeatedly harassed Petitioner and/or any Protected Parties by means of verbal, electronic, digital media, mechanical, telegraphic, or written communication.
- Respondent committed a crime of violence against Petitioner or any Protected Parties.

Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 002-003. Nor did Kylea Wagner state “under oath [] the *specific* facts and circumstances of [] [alleged] domestic abuse” in the Petition and Affidavit for a Protection Order (Domestic Abuse), as required. *See Purcell*, 2017 S.D. 23, ¶ 8, 895 N.W.2d 346, 349 (quoting *Beermann*, 1997 S.D. 11, ¶ 17, 559 N.W.2d 868, 872); SDCL 25–10–5 (emphasis in original). For these reasons, any argument of “[p]hysical [a]ssaults” and “[p]hysical [h]arm” is improper and beyond “the *specific* facts and

¹ Again, which the Petitioner is to “*check all that apply*”. Petition and Affidavit for a Protection Order (Domestic Abuse), App. at B 002 (emphasis in original).

circumstances [alleged]" in the Petition and Affidavit for a Protection Order (Domestic Abuse). *Id.*

As argued by Kylea Wagner in Appellee's Brief, the circuit court considered "[s]ubstantial [e]vidence of [d]omestic [a]buse" including alleged "[p]hysical [a]ssaults" and "[p]hysical [h]arm". *See Appellee's Brief*, pp. 7-8. At the July 1, 2024 Permanent Protection Order Hearing, the circuit court stated as follows:

THE COURT: [W]hat it ultimately comes down to is what's in this petition. It's not -- I mean, these other things -- and the reason I let the testimony come in was that's background and that's information that led us to where we are today, but it has to be based on the incidents that are alleged in the petition. Everyone agree on that?

MR. NELSON: Yes, Your Honor.

MR. NOONEY: Yes, Your Honor. And beyond that, [] my client didn't have notice as concerns some of these allegations to offer witnesses to rebut such.

Transcript (7/01/2024), p. 194:3 – p. 194:12 (emphasis added). The circuit court erred by considering allegations of "[p]hysical [a]ssaults" and "[p]hysical [h]arm". As cited by Kylea Wagner in Appellee's Brief, "[a]n abuse of discretion is 'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Appellee's Brief*, p. 7 (citing *Bruggeman by Black Hills Advoc., LLC v. Ramos*, 2022 S.D. 16, ¶ 34, 972 N.W.2d 492, 504); *Field v. Field*, 2020 S.D. 51, ¶ 15, 949 N.W.2d 221, 224. It was an "abuse of discretion [and] [] 'a fundamental error of

judgment” when the circuit court considered allegations of “[p]hysical [a]ssaults” and “[p]hysical [h]arm”, which was “a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.” See *Bruggeman by Black Hills Advoc., LLC*, 2022 S.D. 16, ¶ 34, 972 N.W.2d 492, 504; see also *Field*, 2020 S.D. 51, ¶ 15, 949 N.W.2d 221, 224.

Kylea Wagner argues to this Court that “the [circuit] court found Ms. Wagner’s testimony credible and detailed[.]” See *Appellee’s Brief*, p. 11. When the circuit court stated that “I find that he was being a little evasive in that answer[.]” it was in regard to a question about how many beers Rigo Tovar had consumed. Transcript (7/01/2024), p. 197:13 – 14. The circuit court did not state that Rigo Tovar was not credible, just that his answer to one question was “a little evasive”. *Id.* Rigo Tovar consuming alcohol is not a basis for a circuit court to grant a permanent order for protection, such as the circuit court did here.

II. THE CIRCUIT COURT ERRED WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION WHEN IT FOUND DOMESTIC ABUSE OCCURRED BASED UPON ALLEGED INCIDENTS, SOME OF WHICH ALLEGEDLY OCCURRED TEN YEARS AGO.

SDCL § 25-10-1(1) defines “domestic abuse”, as follows:

“Domestic abuse,” physical harm, bodily injury, or attempts to cause physical harm or bodily injury, or the infliction of fear of imminent physical harm or bodily injury when occurring between persons in a relationship described in § 25-10-3.1. Any violation of § 25-10-13 or chapter 22-19A or any crime of violence as defined in subdivision 22-1-2(9)

constitutes domestic abuse if the underlying criminal act is committed between persons in such a relationship[.]

Kylea Wagner argues that SDCL § 25-10-1(1) “encompasses a pattern of abusive behavior”. *See Appellee’s Brief*, p. 12.

As stated by this Court in *Farm Bureau Life Ins. Co. v. Dolly*, “[w]hen interpreting a statute, we begin with the plain language and structure of the statute.” *Farm Bureau Life Ins. Co.*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 199–200 (citing *Magellan Pipeline Co. v. S.D. Dep’t of Revenue & Reg.*, 2013 S.D. 68, ¶ 9, 837 N.W.2d 402, 404) (quoting *In re Pooled Advoc. Tr.*, 2012 S.D. 24, ¶ 32, 813 N.W.2d 130, 141). Given this, this Court shall interpret SDCL § 25-10-1(1) by its’ “plain language and structure”. *See Farm Bureau Life Ins. Co.*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 199–200. Nowhere in SDCL § 25-10-1(1) (again which defines “domestic abuse”) did the Legislature define, let alone mentioned what “encompasses a pattern of abusive behavior”. The plain language and structure of SDCL § 25-10-1(1) did not allow the circuit court to consider “a pattern of [alleged] abusive behavior”, as argued by Kylea Wagner. *See Appellee’s Brief*, p. 10; *see also Farm Bureau Life Ins. Co.*, 2018 S.D. 28, ¶ 9, 910 N.W.2d 196, 199–200; SDCL § 25-10-1(1). More specifically, the circuit court erred when it granted the permanent order for protection and found domestic

abuse occurred by considering alleged incidents that allegedly occurred ten years ago.

Kylea Wagner further argues that “[i]n *Parker v. Parker*, the court acknowledged that past conduct is relevant in determining whether a protection order is necessary.” *Appellee’s Brief*, p. 12 (citing *Parker*, 2017 S.D. 37, ¶ 11, 898 N.W.2d 1, 4)². When this Court considered a “course of conduct” in *Parker*, it dealt with an allegation of “harassment”. *Id.* As stated by this Court in *Parker*,

“SDCL 22-19A-4 defines ‘harasses’ as a ‘knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose.’ ‘Course of conduct’ is also defined in SDCL 22-19A-5 as ‘a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of course of conduct.’ Here, although the court did not use the statutory language when issuing its findings of fact, those findings nonetheless support that Jordan knowingly and willfully engaged in a series of acts that repeatedly harassed Abigail.”

Id. The case at hand is distinguishably different than *Parker*. In the case at hand, the circuit court did not find that Rigo Tovar “harassed” Kylea Wagner, as this Court found occurred in *Parker*. *Id.*; *see also* Permanent Order for Protection (Domestic Abuse),

² Kylea Wagner incorrectly cites to ¶ 15 of this Court’s decision in *Parker*, but ¶ 15 is the “[c]onclusion” section. *Appellee’s Brief*, p. 12. This Court dealt with the pattern of conduct in ¶ 11 of the *Parker* decision. *See Parker*, 2017 S.D. 37, ¶ 11, 898 N.W.2d 1, 4].

App. at A 002. For these reasons, the circuit court erred when it considered alleged incidents, some that allegedly occurred ten years ago.

III. THE CIRCUIT COURT ERRED WHEN IT ENTERED A PERMANENT ORDER FOR PROTECTION FOR THE MAXIMUM PERIOD OF FIVE YEARS, PROHIBITING RIGO TOVAR, FROM CONTACT WITH THE PROTECTED PARTIES AND MINOR CHILDREN, I.T. AND T.T..

Kylea Wagner argues that this Court in *Parker*, “upheld a protection order that included minor children when there was evidence that the respondent’s actions endangered their safety.” *See Appellee’s Brief*, p. 14. This argument made by Kylea Wagner is misleading at best, as *Parker* makes *no* reference to minor children being protected parties pursuant to the protection order. *See generally Parker*, 2017 S.D. 37, 898 N.W.2d 1. The only reference to minor children in this Court’s decision in *Parker*, related to Petitioner, Abigail Parker and Respondent, Jordan Parker having children together, Abigail Parker having another child, Jordan Parker helping care for the children in April of 2025 when Abigail Parker was sick, and general references to SDCL § 25-10. *Id.* at ¶¶ 2, 5.

Kylea Wagner argues that “[t]he circuit court was within its statutory authority to impose a five-year protection order.” *See Appellee’s Brief*, pp. 12-14. The circuit court abused its discretion in granting the Permanent Order for Protection (Domestic Abuse) for a period of five years. As this Court stated in *Purcell*, “even if the circuit court had found

that the children were victims of domestic abuse, it could have protected against such abuse without completely curtailing Begnaud's fundamental rights as a parent for three years." *Purcell*, 2017 S.D. 23, ¶ 12, 895 N.W.2d 346, 350–51. Similarly to *Purcell*, the circuit court could have protected against the minor children I.T. and T.T. "without completely curtailing [Rigo Tovar's] fundamental rights as a parent for [five] years[;]" however, in the case at hand, the circuit court abused its' discretion imposing the Permanent Order for Protection by not creating an exception or considering any visitation, let alone prohibiting Rigo Tovar from all "phone calls, emails, third party contact, including correspondence, direct or indirect" with his children, I.T. and T.T. for a period of five years. See *Purcell*, 2017 S.D. 23, ¶ 12, 895 N.W.2d 346, 350–51; see also Permanent Order for Protection (Domestic Abuse), App. at A 001-004.

IV. THE CIRCUIT COURT ERRED BY NOT MODIFYING THE ORDER FOR PROTECTION WHEN IT HEARD RESPONDENT'S MOTION FOR ORDER TO MODIFY THE ORDER FOR PROTECTION AT THE JULY 22, 2024 HEARING TO MODIFY THE PERMANENT ORDER FOR PROTECTION.

Kylea Wagner cites to *Batchelder v. Batchelder*, to argue that the circuit court's "decision was reasonable and aimed at safeguarding the well-being of the children[.]" See *Appellee's Brief*, p. 16; see generally *Batchelder*, 2021 S.D. 60, 965 N.W.2d 880. This Court in *Batchelder*, reversed the circuit court's order granting a permanent protection order,

holding that “[p]ermanent protection orders, like all other judicial orders, must rest upon sufficient factual and legal support. The circuit court’s order in TPO 20-726 had neither.” *Batchelder*, 2021 S.D. 60, ¶ 28, 965 N.W.2d 880, 887. Ultimately, the preponderance of the evidence did not support the circuit court granting a Permanent Order for Protection (Domestic Abuse), prohibiting Rigo Tovar from seeing his minor children, L.T. and T.T. for a period of five years.

As it concerns the alleged “criminal investigation” as raised by Kylea Wagner, Kylea Wagner cherry picks portions of the testimony and argument from the July 22, 2024 court hearing on Rigo Tovar’s Motion to Modify the Permanent Order for Protection. *See Appellee’s Brief*, pp. 6, 13, 15. The “criminal investigation” was an allegation and not something what was “revealed”:

MR. NOONEY: Just so the record is clear, Your Honor, I mean, the allegation [of a] criminal investigation, that’s the first time I’ve heard of it. But beyond that, nothing further from the Respondent, Your Honor.

THE COURT: I don’t know anything about it either, Mr. Nooney, so I guess we’re going to see where that goes.

Transcript (7/22/2024), p. 3:8 – 3:18. It should further be noted that the alleged “criminal investigation” was an allegation by Kylea Wagner’s attorney, George Nelson, and such was not testimony under oath by Kylea Wagner.

Kylea Wagner argues to this Court that “[d]ue to a pending criminal investigation involving Mr. Tovar’s alleged abuse of the children, Ms. Wagner opposed removing the children from the protection order.” *See Appellee’s Brief*, p. 15 (citing Transcript (7/22/2024), p. 6:22-25; p. 8:8-14). In denying the Motion for Order to Modify the Order for Protection, the circuit court based its’ decision on the *alleged* “criminal investigation”, again which was merely an allegation by Kylea Wagner’s attorney, George Nelson and not testimony under oath by Kylea Wagner. Transcript (7/22/2024), p. 18:11; p. 3:8 – 3:18. The circuit court erred by considering an *alleged* criminal investigation and not granting the Motion for Order to Modify the Order for Protection.

Kylea Wagner further argues that

[T]he court attempted to facilitate some contact between Mr. Tovar and the children by suggesting supervised visitation at United Families, but practical issues prevented that from occurring at the time. (TR (7/22/2024), pp. 10:24-11 :3; p. 13: 11-20). The court encouraged the parties (through their counsel) to explore options for supervised visitation, demonstrating a balanced approach that considered both the children’s safety and Mr. Tovar’s desire for contact.

See Appellee’s Brief, p. 16. United Families was not an option for supervised visitation of the minor children, I.T. and T.T.. Petition & Affidavit for a Protection Order (Domestic Abuse), App. at B 002-004. Beyond this, the circuit court erred given that it did *not* grant Rigo Tovar’s Motion to Modify Order for Protection that came before the circuit court on July 22, 2024. More specifically, the Court erred when it did not

enter a Modified Permanent Order for Protection (Domestic Abuse), given that the Permanent Order for Protection (Domestic Abuse) provides that “[p]hone calls, emails, third party contact, including correspondence, direct or indirect are not permitted [by Rigo Tovar], with [I.T. and T.T.]” for a period of five years, with “NO EXCEPTIONS[.]” See App. Permanent Order for Protection (Domestic Abuse), App. at A 001-004.

It cannot be forgotten that the Notice of Entry of Order and Acknowledgement of Personal Service of the Permanent Order for Protection (Domestic Abuse) was executed by Rigo Tovar on July 1, 2024, immediately following the Permanent Order Hearing. See App. Permanent Order for Protection (Domestic Abuse), App. at A 004. Pursuant to SDCL § 15-26A-6 “[a]n appeal from a judgment or order must be taken within thirty days after the judgment or order shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party.” Rigo Tovar had a tight window to appeal (thirty days from July 1, 2024), which prohibited “explor[ing] options for supervised visitation” as suggested by Kylea Wagner. See *Appellee’s Brief*, p. 16. Unless the Permanent Order of Protection is modified or this matter is reversed and/or remanded to the circuit court, pursuant to the Permanent Order for Protection (Domestic Abuse), Rigo Tovar is prohibited from any contact with his minor children, I.T. and T.T. until July 1, 2029. Permanent Order for Protection, App. at A 001-004.

CONCLUSION

For the foregoing arguments and authority set forth herein, the Appellant, Rigo B. Tovar, respectfully requests that this Court reverse the circuit court's Permanent Order for Protection.

Dated this 13th day of January, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that this Appellants' Reply Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 2,818 words and 14,630 characters **with no spaces**. I have relied on the word and character count of our word processing system used to prepare this Brief.

Dated this 13th day of January, 2025.

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

KYLEA M. WAGNER, Petitioner/Appellee, vs. RIGO B. TOVAR, Respondent/Appellant.	APPEAL NO. 30777 CERTIFICATE OF SERVICE
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I, Jared D. Nooney, attorney for the Appellant, Rigo B. Tovar, hereby certify that I served via Odyssey, emailed, and sent one (1) copy of the foregoing *Appellant's Reply Brief* by U.S. Mail, first-class, postage prepaid, on January 13, 2025, to:

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I further certify that on the 13th day of January, 2025, I served via Odyssey, emailed, and sent one (1) original and one (1) copy of the foregoing *Appellant's Reply Brief* by U.S. Mail, first-class, postage prepaid, to:

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