ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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MARK R. ZANA ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 50786

FILED

JUN 30 2008

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APPEAL FROM JUDGMENT OF CONVICTION
EIGHTH JUDICIAL DISTRICT COURT
THE HONORABLE JACKIE GLASS, PRESIDING

APPELLANT'S OPENING BRIEF

ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
District Attorney
Nevada Bar No. 0002781
200 South Third Street
Las Vegas, Nevada 89101
(702) 671-2500

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 0003926
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

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ATTORNEY FOR APPELLANT
CHRISTOPHER R. ORAM, ESQ.
Attorney at Law
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

ATTORNEY FOR RESPONDENT
DAVID ROGER, ESQ.
District Attorney
Nevada Bar No. 0002781
200 South Third Street
Las Vegas, Nevada 89101
(702) 671-2500

CATHERINE CORTEZ MASTO
Nevada Attorney General
Nevada Bar No. 0003926
100 North Carson Street
Carson City, Nevada 89701-4717

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

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Las Vegas, Nevada 89101

.UNITED STATES SUPREME COURT CASES

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ERRED WHEN IT PERMITTED TESTIMONY AND FACTS TO BE CONSIDERED BY THE TRIAL JURY AFTER A PENNSYLVANIA COURT AND HENDERSON JUSTICE COURT HAD SEALED/EXPUNGED RECORDS.

II. MR. ZANA IS ENTITLED TO A NEW TRIAL BASED UPON THE INTRODUCTION OF INADMISSIBLE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO PRECLUDE THE STATE FROM INTRODUCING IMPROPER IMPLIED PREJUDICIAL BAD ACTS.

IV. THE DISTRICT COURT SHOULD HAVE GRANTED MR. ZANA'S MOTION FOR A NEW TRIAL.

V. THE DISTRICT COURT ERRED WHEN IT PERMITTED HEARSAY EVIDENCE CONCERNING THE RECOUNTING OF ALLEGED ABUSE BY THE ALLEGED VICTIM'S MOTHER AND GRANDMOTHER IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

VI. THE DISTRICT COURT COMMITTED ERROR WHEN IT FAILED TO SUPPRESS IMAGES OBTAINED OR SEIZED FROM MR. ZANA'S COMPUTER IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE DISTRICT COURT COMMITTED ERROR WHEN IT FAILED TO HOLD A FRANKS HEARING.

VII. THE DISTRICT COURT COMMITTED ERROR WHEN IT FAILED TO GRANT THE DEFENSES MOTION FOR SEVERANCE OF THE ALLEGED CHILD PORNOGRAPHY COUNTS FROM THE ALLEGED SEXUAL MISCONDUCT COUNTS.

VIII. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. ZANA OF POSSESSION OF PORNOGRAPHY DEPICTING A CHILD UNDER SIXTEEN.

IX. THE DISTRICT COURT SHOULD HAVE DISMISSED COUNTS X THRU XXI BASED UPON IMPROPER PLEADING AND NOTICE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

X. THE DISTRICT COURT ERRED WHEN IT PERMITTED SEVERAL INSTANCES OF HEARSAY EVIDENCE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

XI. MR. ZANA'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

STATEMENT OF THE CASE

On December 30, 2005, an Information was filed (A.A. Vol. I, pp. 001-009). On August 6, 2007, Mr. Zana's trial began and concluded on August 13, 2007. (A.A. Vol. VIII, pp. 1865-1864). On August 13, 2007, the jury returned guilty and not guilty verdicts (A.A. Vol. I, pp. 1864). On October 8, 2007, Mr. Zana filed a Motion for New Trial (A.A. Vol. II, pp. 466-476). On December 20, 2007, Mr. Zana was sentenced to Count I; Open and Gross Lewdness; twelve months in the Clark County Detention Center; Count II; Life in the Nevada Department of Corrections with the Possibility of Parole after a minimum term of ten (10) years have been served concurrent with Count I; Count VI, Life in the Nevada Department of Corrections with the Possibility of Parole after a minimum term of ten (10) years have been served consecutive with Count II. Count VII, Life in the Nevada Department of Corrections with the Possibility of Parole after a minimum term of ten (10) years have been served concurrent with Count VI; Count XI, Life in the Nevada Department of Corrections with the Possibility of Parole after a minimum term of ten (10) years have been served consecutive with Count VI. Count XIII, a minimum of twelve (12) months and a maximum term of thirty six (36) months in the Nevada Department of Corrections Consecutive to with Count XI. Count XIV a minimum of twelve (12) months and a maximum term of thirty six (36) months in the Nevada Department of Corrections Concurrent to with Count XIII. Count XV, a minimum of twelve (12) months and a maximum term of thirty six (36) months in the Nevada Department of Corrections Concurrent to with Count XIV. Count XVI a minimum of twelve (12) months and a maximum term of thirty six (36) months in the Nevada Department of Corrections concurrent to with Count XV. Count XVII a minimum of twelve (12) months and a maximum term of thirty six (36) months in the Nevada Department of Corrections concurrent to with Count XVI (A.A. Vol. VIII, pp. 1868-1869).

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

STATEMENT OF FACTS

The Pennsylvania Incident- 1992

In 1992, Christina Butler was 13 years old and living in Pennsylvania (A.A. Vol. VI, pp. 1095-1097). Christina's boyfriend, Buddy, was taking gymnastics lessons from Mark Zana (A.A. Vol. VI, pp. 1097-1098). In 1992, Mark Zana was 25 years old at the time (A.A. Vol. VI, pp. 1098).

On August 8th, 1992, Christina went with her boyfriend to Mark Zana's residence to go swimming (A.A. Vol. VI, pp. 1099-100). Ms. Butler asked to go swimming, but her mother denied her permission (A.A. Vol. VI, pp. 1100). Although her mother was sleeping at one in the afternoon, Ms. Butler snuck out of the home and went to Mr. Zana's residence (A.A. Vol. VI, pp. 1100). At Mr. Zana's residence, another young man was present, but Ms. Butler did not remember his name (A.A. Vol. VI, pp. 1103). At the residence, Christina's boyfriend pushed her in the pool even though she was wearing street clothing (A.A. Vol. VI, pp. 1104). Thereafter, Mr. Zana provided her a change of clothing (A.A. Vol. VI, pp. 1106).

At some point, Mr. Zana, Ms. Butler and her boyfriend were in one of the bedrooms. Ms. Butler claims that Mr. Zana playfully held her on the bed and then lifted her shirt up and touched her breasts (A.A. Vol. VI, pp. 1107). Allegedly, this was in the presence of her boyfriend (A.A. Vol. VI, pp. 1106).

After coming out of the bedroom, Ms. Butler noticed Brian Zana, Mark's brother, and a young lady (A.A. Vol. VI, pp. 1108). (This fact was contradicted by Brian Zana's testimony at the evidentiary hearing. Mr. Brian Zana testified that Mark Zana was never away from him during the relevant time period and he was not with a woman on that day). Thereafter, Mark Zana drove Ms. Butler home (A.A. Vol. VI, pp. 1109). Shortly after, Ms. Butler told her friend Craig about the incident (A.A. Vol. VI, pp. 1110). Ms. Butler went to meet her friend Craig the

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next day but was met by police officers who interviewed her regarding this incident (A.A. Vol. VI, pp. 1111-1112).

Later, Ms. Butler's friend, Curt Larrick, notified her regarding the allegations against Mr. Zana in Clark County (A.A. Vol. VI, pp. 1113). Ms. Butler then provided a statement to Henderson Detective Rod Pena (A.A. Vol. VI, pp. 1113).

Brian Zana the defendant's brother, works for the Department of Parole and Probation, Las Vegas, Nevada (A.A. Vol. VII, pp. 1547). In 1992, Brian was attending the University of Pittsburgh (A.A. Vol. VII, pp. 1548). Brian was at his parents home during the alleged incident described by Christina Butler (A.A. Vol. VII, pp. 1549). Brian remembers that Christina came to the house with two boys and that everyone was swimming. Brian was not in the company of any female companions on that date. Christina came to the house after Brian was already there (A.A. Vol. VII, pp. 1551). Brian remembers that Mark was never alone with Christina Butler at the residence (A.A. Vol. VII, pp. 1552). Brian relayed this information to a Deputy District Attorney when this allegation surfaced in 1992 (A.A. Vol. VII, pp. 1552). Both boys who were with Christina Butler also attended court on behalf of Mark Zana (A.A. Vol. VII, pp. 1553).

The Jillian Lozano Incident-1998.

In 1998, Ms. Jillian Lozano would go to Mr. Zana's classroom after school instead of going to safekey (A.A. Vol. VI, pp. 1130-1134). Mr. Zana asked Ms. Lozano if she wanted a candy out of a jar and then placed it in his pocket (A.A. Vol. VI, pp. 1134). Ms. Lozano placed her hand in Mr. Zana's pocket to obtain a Jolly Rancher candy and felt his penis (A.A. Vol. VI, pp. 1135). At the time, in second grade, Ms. Lozano did not know what his "penis" was (A.A. Vol. VI, pp. 1135). She just got one piece of candy (A.A. Vol. VI, pp. 1136).

At dinner, Ms. Lozano's grandmother asked why she was not hungry and she responded

she had eaten candy earlier in the day (A.A. Vol. VI, pp. 1137). After dinner, Ms. Lozano remembered a detective came by and asked her questions about how she obtained the candy from Mr. Zana's pocket.

Although there were other students in the classroom, Ms. Lozano claimed they were not near the teacher's desk and the other students were "just grading papers" (A.A. Vol. VI, pp. 1134). Ms. Lozano admitted there were more than 10 children in the classroom when she allegedly reached into Mr. Zana's pocket. Ms. Lozano admitted she had difficulty remembering whether it was his right or left pocket when she spoke to the police (A.A. Vol. VI, pp. 1142-1144). Ms. Lozano put her right hand to Mr. Zana's right pocket while he was sitting in a chair (A.A. Vol. VI, pp. 1144). Ms. Lozano does not remember telling her grandmother or father that she actually had five pieces of candy (A.A. Vol. VI, pp. 1146).

CURRENT ALLEGATIONS

Mrs. Ann Marcovecchio is the mother of Melissa who was a fifth grade student of Mr. Zana in 2004 (A.A. Vol. VI, pp. 1213). At the end of her fifth grade year, Melissa and her family moved from Henderson, Nevada to Colorado (A.A. Vol. VI, pp. 1213). According to Mrs. Marcovecchio, Mr. Zana had a good reputation as a school teacher (A.A. Vol. VI, pp. 1215). Mrs. Marchovecchio admitted that her daughter did not relay the information regarding this incident from the time they left Nevada in 2004 until she was in Colorado in September of 2005 (A.A. Vol. VI, pp. 1229).

Melissa Marchovecchio was in Mr. Zana's fifth grade class at Kestersan School (A.A. Vol. VI, pp. 1243). Mrs. Marchovecchio described how Mr. Zana was a very popular teacher. After fifth grade, she left and attended sixth grade in Colorado.

In September 2005, Mrs. Marchovecchio informed her friend Hugo that her fifth grade teacher had made inappropriate contact with her. Melissa told Hugo about the incident. She

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also told him about an incident when her father became angry with her because there were three boys in her house that were not permitted to be there (A.A. Vol. VI, pp. 1246). Melissa remembers telling Hugo that he should tell her mother what occurred between her and Mr. Zana (A.A. Vol. VI, pp. 1251). Melissa relayed that Mr. Zana approached her from behind and placed his hand on her breast area (A.A. Vol. VI, pp. 1259-1260). This lasted approximately 15 seconds. Mr. Zana then allegedly walked away as if nothing had happened. Melissa did not tell anyone this had occurred until more than a year later (A.A. Vol. VI, pp. 1261).

Melissa remembered that Mr. Zana would touch other students, tickling their back or putting his finger along their arms (A.A. Vol. VI, pp. 1266). Melissa also witnessed other students place their hand into Mr. Zana's pocket. These students included Iris Camacho and Summer Dano (A.A. Vol. VI, pp. 1267).

On another occasion, Mr. Zana allegedly put his hands down Melissa's shirt during "reading group time" (A.A. Vol. VI, pp. 1268). After moving to Colorado, Melissa would continue to talk to her friend Danielle Dunn and Iris Camacho (A.A. Vol. VI, pp. 1271). Approximately one month prior to Melissa's revelation, she had a conversation with Danielle Dunn regarding rumors of Mr. Zana being a child molester (A.A. Vol. VI, pp. 1272). Hence, from the time Melissa left Las Vegas until the time she had the conversation about rumors regarding Mr. Zana being a child molester, she had never revealed to anyone she had been inappropriately touched by Mr. Zana (A.A. Vol. VI, pp. 1273). Melissa also admitted she did not believe Mr. Zana was a child molester or that he had done anything wrong to children (A.A. Vol. VI, pp. 1273). Melissa said Mr. Zana always had a rule that there were always two or more students present at the after school program (A.A. Vol. VI, pp. 1285). Melissa also admitted that after the first incident she continued to go to his after school program instead of safe key (A.A. Vol. VI, pp. 1286). Even after the first touching, Melissa admitted she would try

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

to sit as close to Mr. Zana as possible (A.A. Vol. VI, pp. 1287).

Melissa admitted there were seven to ten students near by when she was allegedly touched by Mr. Zana. In fact, the other students would be sitting in a semi circle during reading class and nothing would obscure their vision (A.A. Vol. VI, pp. 1288-1290).

Melissa never reached into Mr. Zana's pocket to get a Jolly Rancher. Although she said Mr. Zana would hand out Jolly Ranchers as a reward (A.A. Vol. VI, pp. 1293). One student attempted to put her hand in Mr. Zana's pocket to grab a hold of his chapstick and Mr. Zana said "stop" (A.A. Vol. VI, pp. 1294). Melissa stated that Mr. Zana actually pulled Iris' hand away and said "stop" (A.A. Vol. VI, pp. 1301). At the last day of school, Melissa wrote "Mr. Zana is the coolest teacher. You know it." (A.A. Vol. VI, pp. 1303).

Lauren Judd was a fifth grade student in Mr. Zana's class at Kesterson Elementary School (A.A. Vol. VI, pp. 1306). Lauren got candy from Mr. Zana's pocket. Lauren also witnessed other students obtain candy from Mr. Zana's pocket (A.A. Vol. VI, pp. 1312). Laruen could not tell who the other students were who reached into the pocket (A.A. Vol. VI, pp. 1312). Lauren stated she wasn't sure how many times she reached into his pocket. While reaching in his pocket, Lauren felt a cell phone (A.A. Vol. VI, pp. 1312-1313).

During reading time, Lauren recalled that Mr. Zana would touch her on her upper arms and collar bone area (A.A. Vol. VI, pp. 1318). Lauren never told an adult about this. Lauren only told her friend Edith (A.A. Vol. VI, pp. 1319). Lauren admitted that prior to the police interviewing her, there had been a lot of discussion about allegations made against Mr. Zana (A.A. Vol. VI, pp. 1326).

Lauren admitted that Mr. Zana was very popular (A.A. Vol. VI, pp. 1327). In fact, Lauren would sometimes approach Mr. Zana and hug him (A.A. Vol. VI, pp. 1327). Other students also hugged him (A.A. Vol. VI, pp. 1327). Mr. Zana always had five or ten kids

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surrounding him due to his popularity (A.A. Vol. VI, pp. 1328). Lauren never felt Mr. Zana's "private parts" (A.A. Vol. VI, pp. 1329). Lauren continued to help Mr. Zana in class even after 5th grade finished (A.A. Vol. VI, pp. 1331). She obtained her parents permission to do this (A.A. Vol. VI, pp. 1331). Lauren was not afraid of Mr. Zana (A.A. Vol. VI, pp. 1332).

At the time of trial, Amber Newcomb was 17 years old (A.A. Vol. VI, pp. 1341). Amber's fifth grade teacher was Mr. Zana (A.A. Vol. VI, pp. 1343). Amber remembers Mr. Zana tickled her on the side of her face (A.A. Vol. VI, pp. 1345). During the summer, Amber would help Mr. Zana in the classroom (A.A. Vol. VI, pp. 1346). While helping during the summer, Mr. Zana allegedly touched her breasts on the outside of her blouse (A.A. Vol. VI, pp. 1347-1348). At first he was tickling her and then he grabbed her breasts (A.A. Vol. VI, pp. 1348).

In September/October of 2005, Amber learned of the accusations against Mr. Zana by watching the news (A.A. Vol. VI, pp. 1351). Amber and her mom discussed going to the police after seeing the news accounts (A.A. Vol. VI, pp. 1351). Both Amber and her mother had believed the incident was simply an accident (A.A. Vol. VI, pp. 1354). Amber never observed anyone reaching into Mr. Zana's pocket to obtain Jolly Ranchers (A.A. Vol. VI, pp. 1354). Mr. Zana kept a dish of Jolly Ranchers on his desk (A.A. Vol. VI, pp. 1357). Jade Daniels was present during this incident. Amber believed Jade did not see what had occurred (A.A. Vol. VI, pp. 1355). In fact, Jade confirmed to Amber that she did not observe anything happen (A.A. Vol. VI, pp. 1355). Amber said Mr. Zana was a good school teacher (A.A. Vol. VI, pp. 1355). Mr. Zana was very nice to the students (A.A. Vol. VI, pp. 1356). Amber and Lauren Judd were in the same fifth grade class (A.A. Vol. VI, pp. 1352).

Jill Lattuca is the mother of Alexia Mair (A.A. Vol. VI, pp. 1095-1097). Alexia Mair was 16 at the time of her trial testimony (A.A. Vol. VI, pp. 1363). Mr. Zana was Ms. Mair's

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

fifth grade teacher (A.A. Vol. VI, pp. 1378). Ms. Mair described Mr. Zana as a very good teacher (A.A. Vol. VI, pp. 1095-1097). Alexia said Mr. Zana would hand out Jolly Ranchers during reading time as a reward for good behavior and paying attention (A.A. Vol. VI, pp. 1383). Alexia reached into Mr. Zana's pocket to obtain a Jolly Rancher and felt his penis (A.A. Vol. VI, pp. 1385). This occurred on one occasion (A.A. Vol. VI, pp. 1385). Alexia also claimed Mr. Zana would touch her face and place his fingers in her mouth (A.A. Vol. VI, pp. 1386).

Alexia did not report this to anyone until her freshman year at Foot Hill High School when the police approached her (A.A. Vol. VI, pp. 1388). She did not tell the police about reaching into Mr. Zana's pocket to get a Jolly Rancher claiming she was "nervous and scared" (A.A. Vol. VI, pp. 1389). Alexia further stated, " . . . I trusted him and I didn't want to believe that what happened. . .". Alexia believed it was an "accident" (A.A. Vol. VI, pp. 1389). Alexia failed to tell the police about her claim that Mr. Zana placed fingers in her mouth (A.A. Vol. VI, pp. 1389). However, Alexia then told her mother about these incidents and they went to the police (A.A. Vol. VI, pp. 1392).

Alexia told the police that a bunch of jealous boys had made up these rumors regarding Mr. Zana (A.A. Vol. VI, pp. 1395-1396). Alexia also admitted when she spoke to the police the second time, she said she was swinging her hands around and she grabbed Mr. Zana's hand and put his fingers in her mouth (A.A. Vol. VI, pp. 1399). Yet, at trial, she changed this to reflect that Mr. Zana placed his fingers in her mouth (A.A. Vol. VI, pp. 1399).

Iris Camacho attended Mr. Zana's fifth grade class at Kesterson Elementary School (A.A. Vol. VII, pp. 1432). Iris claimed Mr. Zana took a coin out of his pocket placing it on her head and then she would place the coin back in his pocket (A.A. Vol. VII, pp. 1437). This occurred a couple of times and Iris claimed to feel Mr. Zana's "private parts" during reading

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time (A.A. Vol. VII, pp. 1439). Mr. Zana would allegedly touch the legs and arms of Iris (A.A. Vol. VII, pp. 1440-1441). Iris did not tell anyone including her parents about these allegations (A.A. Vol. VII, pp. 1445-1446). In fact, Iris failed to tell the police this information the first two times she talked to them (A.A. Vol. VII, pp. 1450). Iris admitted that she had observed interviews regarding Mr. Zana on televison before she revealed her allegations to the police during her third interview (A.A. Vol. VII, pp. 1454-1455).

Iris was friends with Melissa Marcovecchio, Danielle Dunn, Shannon Lattuca and Alexia Mair (A.A. Vol. VII, pp. 1456). Iris also spoke to several of her friends between her first and second interview with the police and her last interview where she revealed the allegations (A.A. Vol. VII, pp. 1460). Iris claims she failed to tell the police because she did not remember (A.A. Vol. VII, pp. 1460-1461). After her discussion with Shannon Lattuca, Iris remembered the coin incident (A.A. Vol. VII, pp. 1462). Iris admitted she enjoyed Mr. Zana (A.A. Vol. VII, pp. 1457).

Keisha Ricamona attended Mr. Zana's fifth grade class at Kesterson (A.A. Vol. VII, pp. 1467). Keisha remembered Mr. Zana would touch her back, chest and legs while watching movies (A.A. Vol. VII, pp. 1470-1471). Keisha remembers Mr. Zana touched her chest through the inside of her "sleeve" on one occasion (A.A. Vol. VII, pp. 1472). Mr. Zana allegedly touched her just above her breasts (A.A. Vol. VII, pp. 1473). Keisha reached into Mr. Zana's pocket to obtain candy (A.A. Vol. VII, pp. 1474). Keisha remembers that she felt "a ball" in his pocket (A.A. Vol. VII, pp. 1474). Keisha concluded it was his genitals (A.A. Vol. VII, pp. 1475). When this occurred, Mr. Zana allegedly turned red in his neck area (A.A. Vol. VII, pp. 1475).

Keisha admitted she wrote a note that she would like to kill Mr. Zana (A.A. Vol. VII, pp. 1477). Keisha had significant behavioral problems during this time period (A.A. Vol. VII, pp.

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1478). Keisha had behavior problems including; punching a student at recess and then threatening to punch the student later in the week (A.A. Vol. VII, pp. 1478). Before reporting this incident to the police, Keisha admitted having conversations regarding Mr. Zana and observing reports about allegations.

Michael Zebiegien is the Medial Director of Emergency Services at Sunrise Children's Hospital (A.A. Vol. VIII, pp. 1572). Dr. Zebiegien reviewed the images obtained off Mr. Zana's computers to determine the age of the people depicted (A.A. Vol. VIII, pp. 1574). Dr. Zebiegien only reviewed the images the Saturday before his trial testimony (A.A. Vol. VIII, pp. 1574). In the first video image, the doctor opined that the female was under 16 approximately 12 or 13 years of age (A.A. Vol. VIII, pp. 1578-1579). The doctor made this conclusion based on body size, body parts including the face and development (A.A. Vol. VIII, pp. 1579).

Dr. Charles Hyman a Board Certified Pediatrician testified as a defense expert (A.A. Vol. VIII, pp. 1603-1604). Dr. Hyman reviewed photographs and video taken from the hard drives of the two computers (A.A. Vol. VIII, pp. 1606).

Dr. Hyman concluded that the chronological age of the individuals depicted on the video clips could not be ascertained (A.A. Vol. VIII, pp. 1607). Dr. Hyman explained that objectively there is absolutely no accurate way to determine the age of the models (A.A. Vol. VIII, pp. 1607). Dr. Hyman had evaluated over 100,000 children in the course of his career (A.A. Vol. VIII, pp. 1607).

Dr. Hyman observed the testimony of the State's expert and found the State's expert was simply speculating (A.A. Vol. VIII, pp. 1614-1615). Dr. Hyman showed the jury a copy of a website entitled "Little April" that had young looking models that are actually over 18 pursuant to 18 U.S.C. 2257 (A.A. Vol. VIII, pp. 1619). The doctor concluded that there were thousands of these type of websites (A.A. Vol. VIII, pp. 1621).

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Mark Zana testified on his own behalf (A.A. Vol. VIII, pp. 1635). Both Mr. Zana's parents were school teachers (A.A. Vol. VIII, pp. 1636). While attending college, Mr. Zana taught gymnastics in the evening to pay for his education (A.A. Vol. VIII, pp. 1637). Mr. Zana moved from Pennsylvania to Las Vegas in 1996, and began teaching at Ulis Newton Elementary (A.A. Vol. VIII, pp. 1638). Mr. Zana would voluntarily conduct math tutoring for no extra compensation (A.A. Vol. VIII, pp. 1641). This helped the children (A.A. Vol. VIII, pp. 1641). Mr. Zana was accessible to the parents and encouraged parent involvement in homework assignments (A.A. Vol. VIII, pp. 1642-1643).

Mr. Zana described how he used a reward system to encourage children in their educational endeavors. Part of the reward system was a monthly pizza party for good behavior (A.A. Vol. VIII, pp. 1668). Mr. Zana would also present candy and cookies as rewards.

During reading time, Mr. Zana would sit in a chair and the children would crowd around close together (A.A. Vol. VIII, pp. 1691). Mr. Zana adamantly denied letting any children put their hands in his pockets (A.A. Vol. VIII, pp. 1692). Mr. Zana did admit that he would sometimes touch the students in a "mothering" type of way (A.A. Vol. VIII, pp. 1692-1693). Sometimes, students would approach Mr. Zana and hug him and he would hug them back in a caring way (A.A. Vol. VIII, pp. 1693). Mr. Zana denied touching the chest area of any child (A.A. Vol. VIII, pp. 1694). Mr. Zana denied touching Iris Camacho's leg (A.A. Vol. VIII, pp. 1695).

Mr. Zana purchased a Gateway computer approximately 5 or 6 years prior to his testimony. Mr. Zana purchased a second computer which was built by Mr. Tomsich (A.A. Vol. VIII, pp. 1699). Mr. Zana denied ever knowingly downloading child pornography (A.A. Vol. VIII, pp. 1699). However, Mr. Zana observed an adult porn site (A.A. Vol. VIII, pp. 1699-1700). Mr. Zana denied opening up the files with pornography contained in exhibits Z1-Z10

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(A.A. Vol. VIII, pp. 1700).

Mr. Zana described teaching gymnastics to Buddy (the boyfriend of Christina Butler) from ages 7-15 (A.A. Vol. VIII, pp. 1701). Mr. Zana also knew his family (A.A. Vol. VIII, pp. 1701). Mr. Zana would help the kids practice as some of the parents were single parents (A.A. Vol. VIII, pp. 1702). Mr. Zana adamantly denied attempting to touch Ms. Butler's chest (A.A. Vol. VIII, pp. 1703).

Mr. Zana required parental permission slips in order to permit children to stay after school or come in early before school (A.A. Vol. VIII, pp. 1708). The permission slips were not required by the Clark County School District. Mr. Zana also required more than one student be present in his class with him as part of his own personal policy (A.A. Vol. VIII, pp. 1710). Mr. Zana kept that policy in order to avoid allegations of this nature (A.A. Vol. VIII, pp. 1710).

Mr. Zana denied inappropriately touching any students or letting any students accidently touch him in an inappropriate manner (A.A. Vol. VIII, pp. 1713). Mr. Zana denied all charges in the Amended Information (A.A. Vol. VIII, pp. 1713). Mr. Zana explained he cared about all of his students (A.A. Vol. VIII, pp. 1723).

FACTS ADDUCED AT THE PETROCELLI HEARING

Mark Zana was the gymnastics instructor for Christina Butler's boyfriend in Baden, Pennsylvania (A.A. Vol. II, pp. 266). In 1992, when Ms. Butler was thirteen (13) years old, she went to Mr. Zana's home (A.A. Vol. II, pp. 267). Mark Zana was twenty (25) years old at the time (A.A. Vol. II, pp. 268). Ms. Butler's boyfriend and Mr. Zana invited her to Mr. Zana's home to go swimming (A.A. Vol. II, pp. 269). Ms. Butler's mother did not consent when Ms. Butler requested permission to go swimming at Mr. Zana's home (A.A. Vol. II, pp. 269). When Ms. Butler's mother was sleeping, Ms. Butler left the home and went to Mr. Zana's home (A.A. Vol. II, pp. 269). At one point, Mr. Zana, Ms. Butler and her boyfriend went into Mr. Zana's

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room where he playfully pushed her on the bed. Then, in front of Ms. Butler's boyfriend, Mr. Zana allegedly fondled Ms. Butler's breast (A.A. Vol. II, pp. 274). Another boy was present at Mr. Zana's home, but Ms. Butler did not remember his name (A.A. Vol. II, pp. 275). After her breasts were fondled, Mr. Zana got up and all three left the room (A.A. Vol. II, pp. 275). Later, Ms. Butler informed her friend, Craig what occurred. "Craig" reported the incident to the police and the police were given a brief synopsis by Ms. Butler (A.A. Vol. II, pp. 276).

Court proceedings were initiated in Pennsylvania and Ms. Butler attended court on a couple of occassions (A.A. Vol. II, pp. 277). However, she did not actually testify (A.A. Vol. II, pp. 277). Mr. Zana agreed to a plea bargain, wherein, he would not be able to teach minors (A.A. Vol. II, pp. 278). Through a friend, Ms. Butler learned about the instant allegations in Las Vegas and contacted the Henderson Police Department (A.A. Vol. II, pp. 279). Ms. Butler provided a recorded statement to Detective Pena, of the Las Vegas Metropolitan Police Department (A.A. Vol. II, pp. 279). In the Pennsylvania court proceedings, there were three other young ladies present in court (A.A. Vol. II, pp. 302).

In 1992, Curt Larrick, a law enforcement officer was aware of the proceedings against Mr. Zana in Pennsylvania (A.A. Vol. II, pp. 305). In 2005, Mr. Larrick became aware of court proceedings in Nevada, against Mr. Zana (A.A. Vol. II, pp. 305). Mr. Larrick read the Beaver County Times Newspaper and saw an article regarding Mark Zana related to the allegations in Clark County, Nevada (A.A. Vol. II, pp. 306). Mr. Larrick then contacted Ms. Christina Butler to urge her to contact Nevada authorities (A.A. Vol. II, pp. 306).

Ms. Jillian Lozano, is a sixteen (16) year old sophomore at Foothills High School (A.A. Vol. II, pp. 319). When Ms. Lozano was in second grade, Mr. Zana asked her if she wanted a piece of candy to get it out of his pants pocket (A.A. Vol. II, pp. 320). There were other students present when this occurred (A.A. Vol. II, pp. 320). This incident occurred when Mr. Zana was a

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teacher in 1998, in Clark County, Nevada (A.A. Vol. II, pp. 321). The candy was a Jolly Rancher (A.A. Vol. II, pp. 321). Mr. Zana remained sitting while Ms. Lozano put her hand in his pocket to obtain the candy (A.A. Vol. II, pp. 322). While searching for the candy, Ms. Lozano felt Mr. Zana's genitalia (A.A. Vol. II, pp. 322). This occurred once. Ms. Lozano did not understand what had occurred. Ms. Lozano informed her father and grandmother and then police arrived later that night (A.A. Vol. II, pp. 323). Ms. Lozano went to court but did not recall what occurred. Ms. Lozano remembered that her family testified for her (A.A. Vol. II, pp. 324). Ms. Lozano recalled that her first grade teacher, Ms. Dean had to hold a parent teacher conference because of lies Ms. Lozano was making up (A.A. Vol. II, pp. 326).

Ms. Lozano specifically remembers observing her parents testify in court (A.A. Vol. II, pp. 333). She remembered the attorney's questioning her parents while testifying (A.A. Vol. II, pp. 333). In fact, Ms. Lozano's mother, father, and grandmother all testified according to Ms. Lozano. Karen Bjornson is the grandmother of Ms. Lozano (A.A. Vol. II, pp. 340). Ms. Bjornson was eating dinner and remembered Ms. Lozano appeared not to be hungry, complaining she had eaten too many Jolly Ranchers at school (A.A. Vol. II, pp. 342). Ms. Bjornson explained, Ms. Lozano came into her room and asked what the "squishy thing" was in Mr. Zana's pants (A.A. Vol. II, pp. 342). Police responded regarding the allegation (A.A. Vol. II, pp. 344).

Teresa Spence is Ms. Lozano's mother (A.A. Vol. II, pp. 358). Mr. Zana was not Ms. Lozano's school teacher (A.A. Vol. II, pp. 360). When Ms. Lozano explained the incident with the Jolly Ranchers, Ms. Spence contacted school police (A.A. Vol. II, pp. 363). Ms. Lozano did not want to testify and so Ms. Spence believed the court case was "pretty much dismissed"(A.A. Vol. II, pp. 365).

At the Henderson court proceedings, Mr. Zana was represented by Mr. Vince Counsul

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(A.A. Vol. II, pp. 373). Mr. Counsul remembers the matter was set for a court hearing in Henderson Justice Court (A.A. Vol. II, pp. 373). Mr. Counsul had a list of witnesses subpoenaed to testify on behalf of Mr. Zana including Ms. Lozano's first grade teacher (A.A. Vol. II, pp. 375). Mr. Counsul had interviewed five other children in the classroom with Ms. Lozano. Mr. Counsul informed the prosecutor that the five other children stated the Jolly Ranchers were on the table and each student could only take one (A.A. Vol. II, pp. 383). This was obviously inconsistent with Ms. Lozano's rendition of the facts. One student observed Ms. Lozano take two Jolly Ranchers out of the jar on top of the desk. One student observed students trying to reach into Mr. Zana's pocket, and Mr. Zana specifically told him not to do that (A.A. Vol. II, pp. 384). All the student's were present in the court room and were identified to the prosecutor (A.A. Vol. II, pp. 384). Thereafter, the 1998 case was dismissed in Henderson (A.A. Vol. II, pp. 266). A petition for sealing was granted thereafter (A.A. Vol. II, pp. 385). Ms. Lozano had explained her family testified, but that appears to be inaccurate according to the witnesses (none of which explained they testified).

The prosecutor, Ms. Lisa Luzaich, testified the case was dismissed as a result of the family not wanting to go forward based upon their concern with Ms. Lozano (A.A. Vol. II, pp. 401). Ms. Luzaich confirmed that absolutely no witnesses were called to the witness stand in direct conflict with Ms. Lozano's testimony that she observed family members testify (A.A. Vol. II, pp. 402).

In 1992, Brian Zana, Mark's brother, was present in the house during the time that Christina Butler claimed her breasts had been fondled (A.A. Vol. II, pp. 403). Brian Zana was not with a female companion at the house which directly contradicts the testimony of Ms. Butler (A.A. Vol. II, pp. 405). Brian Zana was in the presence of his brother Mark at all times when Christina Butler was over at the house (A.A. Vol. II, pp. 405). According to Brian, Mark was

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never in the bedroom with Christina Butler during the time period he was there (A.A. Vol. II, pp. 406). Mr. Brian Zana was interviewed by the District Attorney at the court in Pennsylvania (A.A. Vol. II, pp. 406). Brian Zana explained the two other boys present at the house were witnesses on the side of Mr. Zana at the court proceedings (A.A. Vol. II, pp. 407). Thereafter, the case was expunged (A.A. Vol. II, pp. 407).

I. THE DISTRICT COURT ERRED WHEN IT PERMITTED TESTIMONY AND FACTS TO BE CONSIDERED BY THE TRIAL JURY AFTER A PENNSYLVANIA COURT AND HENDERSON JUSTICE COURT HAD SEALED/EXPUNGED RECORDS.

On March 5, 2007, the State filed a Notice of Motion and Motion to Unseal Records (A.A. Vol. I, pp. 135). The State filed a Motion to Admit Evidence of Other Crimes in Case C218103. One of the acts concerned the 1998 incident which allegedly occurred in Henderson, Nevada (this alleged bad act was cited in Appellant's Statement of Facts Jillian Lozano Incident-1998.).

On January 26, 1999, a criminal complaint charging Mr. Zana with Annoying a Minor was filed in Henderson, Township in Case Number 98MH0193X. A trial date was scheduled for May 18, 1999. The defendant filed a list of witensses on May 3, 1999 including six students who were present in the safekey program on the day of the alleged incident (a list of witnesses was attached to pleadings filed by the defense)(A.A. Vol. I, pp. 053).

Following a Petrocelli Hearing held by the district court, the district court ruled that witnesses from the 1998 case would be permitted to testify regarding the prior incident. Thereafter, the State filed a Motion to unseal the records concerning the 1998 incident. The motion was filed in Henderson Justice Court and the Motion was granted (the motion to unseal records was filed on March 15, 2007). Thereafter, Mr. Zana filed a Notice of Appeal to the district court objecting to the Henderson Justice Court's unsealing the records.

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The district court heard argument regarding the unsealing of records and issued it's oral decision on March 1, 2007. The district court ruled that the sealing of records does not seal the people involved in the case, but only seals the case itself (A.A. Vol. II, pp. 234). The district court explained that the sealing of records would not prevent the individuals involved in the case from testifying what occurred to them (A.A. Vol. II, pp. 234). The district court further ruled, the witnesses would not be permitted to talk about the court system (A.A. Vol. II, pp. 235). The court held the sealing of records isn't "sealing of the individual memories and experiences" (A.A. Vol. II, pp. 235). The district court erred when it permitted the testimony of witnesses from these two prior alleged bad acts.

Before the district court, Mr. Zana presented evidence as to the potential testimony of witnesses that appeared in the Henderson Court for the 1998 criminal charge against Mr. Zana. The following is a synopsis provided by Mr. Zana in his "Appellant's Opening Brief, filed April 4, 2007)(this opening brief was an appeal from the Henderson Justice Court's decision to permit the State to investigate the sealed matter).

One of the witnesses, Brittany, was prepared to testify that she only saw Ms. Lozano in Mr. Zana's room one time and that she thought she saw Jillian take the Jolly Ranchers from the jar on that day. The other four students were prepared to testify that they never heard Mr. Zana ask any student to put their hand in his pocket and that he kept Jolly Ranchers in a jar on his desk. Witness Kathryn Perry was prepared to testify that Mr. Zana repeatedly told the kids that they could only take one Jolly Rancher from the jar on his desk. She was also prepared to testify that she definitely remembered Ms. Lozano taking candy from the jar and that Ms. Lozano took more than one Jolly Rancher from the jar on that date. Student Michael Sberna, was prepared to testify that he definitely remembers that the limit on Jolly Ranchers was only one from the jar. He was also prepared to testify that while he had seen girls try to reach into Mr. Zana's pockets

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to get the Jolly Ranchers candy, Mr Zana would not let them. Sbema was also prepared to testify that he never saw any student reach into Mr. Zana's pocket to get candy. (See Affidavit of Attorney Vince Consul).

The students appeared in court on May 18, 1999 and were prepared to testify. Prior to the start of the trial, the Deputy District Attorney, approached Defendants' counsel Vince Consul, inquired as to what the witnesses who were present were going to testify too. The Deputy District Attorney then spoke to the complaining witness and her family. The Deputy District Attorney then announced that the State was "not proceeding" with the case. The Defendant moved to dismiss the charges and the motion was granted. (See Reporter's Transcript of Dismissal. The records of this incident were subsequently sealed. (See Order to Seal Records).

A. THE DISTRICT COURT ERRED IN PERMITTING TESTIMONY OF WITNESSES PERTAINING TO MR. ZANA'S PRIOR SEALED RECORDS AS THEY SHOULD NOT HAVE BEEN PERMITTED FOR THE PURPOSE OF ADMITTING PRIOR BAD ACTS BECAUSE IT WOULD BOTH DEFEAT THE PURPOSE OF THE SEALING ORDERS AND WOULD EXCEED THE STATUTORY AUTHORITY OF THE COURT.

Mr. Zana respectfully submits that the unsealing of the records of these prior incidents is unlawful and should not have been permitted. The mere fact that there were witnesses aware of the details of these prior cases, should not suffice to circumvent the prior sealing orders. The district court erred in allowing this evidence of prior sealed cases to be admitted in Mr. Zana's trial and defeated the purpose the sealing orders and ultimately exceeded the statutory authority.

Nevada Revised Statute 179.285 states in pertinent part:

> I. If the court orders a record sealed...
> (a) All proceedings recounted in the record are deemed to never have occurred, and the person to whom the order pertains may properly answer accordingly to any inquiry, including, without limitation, an inquiry relating to an application for employment, concerning the arrest, conviction, dismissal or acquittal and the events and proceedings - relating to the arrest, conviction, dismissal or acquittal (emphasis added.).

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While Nevada recognizes the sealing orders of other states it is pertinent to note that Pennsylvania Statute 35 P.S. § 780-119(b) states:

> Any expunged record of arrest or prosecution shall not hereafter be regarded as an arrest - or prosecution for the purpose of any statute or regulation or license or questionnaire or any civil or criminal proceeding or any other public or private purpose. No person shall be permitted to learn of an expunged arrest or prosecution, or of the expunction, either directly or indirectly. Any person, except the individual arrested or prosecuted, who divulges such information in violation of this subsection shall be guilty of a summary offense and shall, upon conviction thereof, be punished by imprisonment not exceeding thirty (30) days or a fine not exceeding five hundred dollars ($500) or both.

Thus, Pennsylvania has gone so far as to make the divulgence of information of expunged records a misdemeanor crime. The state of Pennsylvania obviously understands the importance of keeping private information contained in an expunged record private, and thus is willing to prosecute those who wish to do otherwise.

In Walker v. State of Nevada,120 Nev. 815, 820, 101 P.3d 787 (2004), this Court held that the State could not unseal a defendant's sealed record in an unconnected trial. In Walker the State was seeking to use evidence that Walker had been involved in a prior drug trafficking case, records of which had been sealed, against Walker in his present case for a similar offense. The Court stated that "where the records of a criminal conviction are sealed by a district court pursuant to specific statutory authority, that conviction may not be disclosed in a public proceeding such as a criminal trial absent specific statutory authority providing for such disclosure." Id. at 818, citing Yllas v. State 112 Nev. 863, 866, 920 P .2d 1003, 1005 (1996). Thus, the issue was not whether Walker "would suffer prejudice by the release of his records, but rather, whether the district court has the statutory authority to unseal Walker's records." Walker at 818-19.

The State argued that under NRS 179.295 it was permitted to unseal previously sealed records if the prior case was for similar charges. NRS. 179.295 states in pertinent part:

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2. If a person has been arrested, the charges have been dismissed and the records of the arrest have been sealed, the court may order the inspection of the records by a prosecuting attorney upon a showing that as a result of newly discovered evidence, the person has been arrested for the same or similar offense and that there is sufficient evidence reasonably to conclude that he will stand trial for the offense.

3. The court may, upon the application of a prosecuting attorney or an attorney representing a defendant in a criminal action, order an inspection of such records for the purpose of obtaining information relating to persons who were involved in the incident recorded.

The Court in Walker held that NRS 179.295(2) allows the State to review the criminal records to see whether there is now sufficient evidence to bring the person to trial on the dismissed charges. The use of the phrase "similar offense" allows the State to review the records even if the newly discovered evidence shows that perhaps the person committed a slightly different crime than the one for which he was previously charged. It does not, however, permit the State to use the unsealed records against a defendant in an unconnected trial. Walker at 820 (emphasis added).

Further the Court held that a plain reading of NRS 179.295(3) indicates that the court may permit a prosecuting attorney or defendant in a criminal action to inspect a sealed record for the purpose of obtaining information relating to co-defendants or other persons who were involved in the case that is the subject matter of the sealed record. That section does not, as the State suggests, permit "any prosecuting attorney to apply for an inspection of [sealed] records - to obtain information" that will be used against a defendant in a subsequent criminal proceeding. Walker at 821 (emphasis added). Therefore, the Court ruled that the State could not unseal Walker's prior sealed record to use the information against him in his present trial. Id. at 822.

In the instant case, the State was permitted to circumvent the sealing orders of the previous courts by introducing testimony of witnesses whom have prior knowledge of the sealed

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events. The district court permitted witnesses to testify as to the events surrounding the two prior incidences, even though the records of such incidences have been ordered sealed by a court. This in essence is the same effect as unsealing the prior records.

Absent statutory authority, the district court should not have permitted testimony regarding Mr. Zana's prior sealed records. See Walker at 818. Thus, the State should not have been permitted to call witnesses to testify about the events surrounding these sealed incidents as there was no statutory authority. The State did not meet this burden because there is no Nevada statute which permitted the State to proceed in such a manner. In fact, NRS 179.285 states that the events and proceedings relating to sealed incidents are "deemed never to have occurred." Thus, under the statute, it was error for the district court to permit these witnesses' testimony.

Further, as this Court held in Walker, the prosecutor may only unseal records for two purposes under NRS 179.295. The first is to determine whether newly discovered evidence may be used to prosecute the defendant of the prior sealed incident. Walker at 820. However, that is not the case here. The State was not attempting to use newly discovered evidence to prosecute Mr. Zana for the previous two incidents, rather the State charged Mr. Zana with wholly unrelated charges. The second circumstance that a prosecutor may unseal records is to obtain information about co-defendants involved in the prior sealed case. Id. at 821. Once again, that is not the situation in the instant case, there were no prior co-defendants that the State was interested in obtaining information about.

As this Court in Walker stated, Nevada statute does not allow a prosecutor to inspect sealed records "to obtain information that will be used against a defendant in a subsequent criminal proceeding." Walker at 821. Hence, the State may not seek to use information from Mr. Zana's prior sealed records against him in his upcoming criminal proceeding. That is exactly what the State was permitted to do.

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The State may cite to Baliotis v. Clark County, 102 Nev. 568, 729 P.2d 1338 (1986) in an attempt to convince this Court that it is allowed to use information from Mr. Zana's prior sealed records against him in trial, because it has information known independently of looking at the sealed records, namely testimony of witnesses involved. However, in Baliotis, the court stated that the Las Vegas Metropolitan Police Department could withhold its approval of an application for a private detective's license based on a felony conviction, even though the records of that conviction had been sealed under NRS 179.245. Baliotis at 570. This Court explained that "there is no indication that the statute was intended to require prospective employers or licensing authorities to disregard information concerning an applicant that is known independently of the sealed records." Id.

However, this Court in Yllas v. Nevada 112 Nev. 863, 920 P.2d 1003 (1996), explained that Baliotis is only applicable in licensing cases. Thus, this Court found that Baliotis has no bearing in criminal cases. Since the instant case is a criminal proceeding, this Court should not follow any rulings of Baliotis and therefore should follow the case law of Nevada dealing with criminal proceedings as detailed above.

It is apparent, as detailed throughout this brief that both Nevada case law, and Nevada statute dictate that it was error for the district court to permit the State to introduce evidence surrounding sealed events of Mr. Zana. Allowing witnesses to testify as to details of these sealed events had the same effect as unsealing the records. Since the records were not to be unsealed in the instant case, it must follow that the State may not call witnesses to testify as to the events detailed in the sealed records. Therefore, it was error for the district court to permit any testimony in regards to Mr. Zana's sealed records.

The district court permitted the introduction of these witnesses. It is important to remember, the witnesses and the State were unable to comply with the district court's order.

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There was to be no mention regarding the court system. Yet, that is exactly what occurred. It would be patently obvious to the jury that there had been court proceedings. The prosecutor asked Ms. Bjornson how Ms. Lozano was behaving at the proceeding and Ms. Bjornson made it clear that it was a court room proceeding, and Mr. Zana had a "entourage" (A.A. Vol. VI, pp. 1165). This was objected to by defense counsel. Ms. Bjornson even referred to "the lady that was representing us" (A.A. Vol. VI, pp. 1165). The jury was excused.

In fact, having cleared the jury, the court admonishes the witness that nothing is to be said about the prior court hearing. The defense moved for mistrial on this issue (81).

The introduction of this testimony during trial violated Pennsylvania Statute 35 P.S. § 780-119(b) and the pertinent Nevada Revised Statue. Nevada successfully circumvented the clear intent of Pennsylvania Legislature. The State completely ignored Pennsylvania law. Mr. Zana was denied his right to due process and a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

II. MR. ZANA IS ENTITLED TO A NEW TRIAL BASED UPON THE INTRODUCTION OF INADMISSIBLE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS.

Outlined in the statement of facts was a comprehensive summary of the facts relating to the 1992, Pennsylvania case as well as the 1998 case. On June 27, 2006, the State filed a Motion to Admit Evidence of Other Crimes (A.A. Vol. III, pp. 644-660). On July 18, 2008, Mr. Zana filed a formal Opposition. The court heard oral arguments on July 25, 2006 and ordered a Petrocelli Hearing (A.A. Vol. III, pp. 644-660). On February 9, 2007, a Petrocelli Hearing was held. On March 1, 2007, the court ruled:

> Regarding the issues of clear and convincing, and prejudice, and 48.045(2), my ruling is as follows: that the other bad acts meet the clear and convincing test, that it is certainly relevant evidence, and that when this court looks at these issues and takes into consideration, the prejudice, which would be unfair prejudice, I find that it is - - it would not unfairly prejudice the defendant that this goes to show

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the motive, and what motivated Mr. Zana to do what he is accused of doing in this case and so it's coming in. (A.A. Vol. II, pp. 235).

A. Evidence of Other Crimes, Wrongs or Acts is Not Admissible to Prove the Character of a Person in Order to Show That He Acted in Conformity Therewith.

The general rule under Nevada's Rules of Criminal Evidence is that, "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." NRS 48.045(2). Such evidence may be admissible for a purpose not related to the character of the defendant, such as "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." Id. However, this Court has repeatedly held that it is "heavily disfavored" to use prior bad act evidence to convict a defendant" because bad acts are often irrelevant and prejudicial. It forces the accused to defend against vague and unsubstantiated charges. Tavares v. State, 117 Nev. 725, 730,30 P.3d 1128, 1131 (2001); See also; Walker v. State, 116 Nev. 442, 445, 997 P.2d 803, 806 (2000). This Court's concern has been that such evidence will unduly influence the jury to convict the defendant because, based on that evidence, the jury believes that the defendant is a bad person. Tavares, at 730. A presumption of inadmissibility attaches to all prior bad act evidence. Tavares, at 731.

B. The Pennsylvania Incident.

The court had admitted the prior alleged bad act of the defendant concerning a 1992 allegation with the alleged victim, Christina Butler. During re-direct examination of Ms. Butler at trial, the prosecutor elicited that Ms. Butler had attended court in Pennsylvania regarding this incident. The following question and answer occurred:

The Prosecutor:	Mr. Pitaro asked you about Buddy going somewhere as a witness for Mr. Zana. Do you remember that question that was just asked?
Ms. Butler:	Yes.
The Prosecutor:	You said that he wasn't in the room with you, is that

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	correct?
Ms. Butler:	That's correct.
The Prosecutor:	Where was that at?
Ms. Butler:	At the courthouse.
The Prosecutor:	And were there any other young ladies in the room with you that day?
Ms. Butler:	There were three that I knew.
The Prosecutor:	Roughly what age?
Ms. Butler:	One the same age as me.
Mr. Pitaro:	Your Honor, could we approach? (A.A. Vol. VI, pp. 1126).

Previously, at the evidentiary hearing, Ms. Butler had made the same statement about other young ladies being present at the court. During the Petrocelli hearing, it was clear that she was implying that these other young ladies were victims of Mr. Zana. The State, having heard this at the Petrocelli hearing proceeds to introduce this in front of the jury. Now, all the jurors know that there were at least three other alleged victims in Pennsylvania against Mr. Zana. This was introduced to prejudice Mr. Zana. Pursuant to the qualifications for introduction of bad acts enunciated by this Court in Tinch, 113 Nev. 1170, 1176 (1997), the State failed to prove by clear and convincing evidence that any bad acts occurred with these three alleged unknown victims. There was no clear and convincing proof to the allegations. This was an implied bad act that could not be defended by Mr. Zana.

In anticipation, Mr. Zana expects the State will argue this was innocuous and they did not attempt to introduce these "three" anonymous unknown victims and allegations. However, that is precisely what the State did. There is no rationale reason to introduce this as evidence and it violated every aspect of this Court's ruling in Tinch. After the bench conference, the State was permitted to introduce that the three other girls were ages 13, 12, and 10 (A.A. Vol. VI, pp. 1127).

Pursuant to the requirements in Tinch, the State is not permitted to introduce naked and bare allegations implying significant bad acts against the defendant. The statements by Ms.

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Butler that the other girls were ages 13, 12 and 10, substantiate that these girls were also in line to make serious allegations against Mr. Zana. This was unsubstantiated at best. Not one of these alleged victims testified at a Petrocelli hearing. There is no evidence that these young women had any claims against the defendant. Not a scintilla of proof. Additionally, none of the girls were brought into court to testify to these facts.

Beginning with the overwhelming presumption that evidence of prior sexual bad acts is highly disfavored and should be excluded unless an exception applies, then one can only presume that the state seeks admission of this incident to prove that Defendant had a motive to entice illegal contact by the current victims. However, this Court in Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249 (2002), said that the motive exception generally applies to establish the identity of a criminal or to prove malice or specific intent. The motive exception may also be applicable where the charged crime was motivated by a desire to hide the prior bad act. In this case, there is no question as to the identity of the Defendant, Mark Zana. All the victims identified Mark Zana at the preliminary hearing and the Defendant's defense has nothing to do with mistaken identity. With regard to a desire to hide the prior bad act there is simply nothing about Mark Zana's conduct as charged in this case that would indicate that he was trying to hide his prior bad acts from 14 years ago in Pennsylvania. In fact, such an argument is simply absurd.

The State may argue the common plan exception. However, this Court has stated that for the common plan exception to be applicable, each crime should be an integral part of plan explicitly conceived and executed by the defendant. Richmond v. State, supra, at 933. The emphasis in the analysis is upon a preconceived plan which resulted in the commission of the current crime. This would involve committing a crime in a similar location or in a similar manner in close proximity to the charged crime. In this case, the facts of the alleged bad act in

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Pennsylvania in 1992 have no similarity to the alleged acts which occurred in Henderson, Nevada, 12 years later. The alleged incident in Pennsylvania occurred at home after a swimming incident in the presence of the alleged victim's boyfriend. The Pennsylvania incident has nothing to do with school, students, or any other similarities to the instant case.

Most importantly, this Court has held that events which are remote in time from the charged incident have less relevance in proving a later intent. Phillips. v. State, 121 Nev. Adv. Op. 58, p. 9, 1 2 (Sept. 15, 2005). This Court has specifically held that events which were 6 and 10 years old were too remote in time to be admissible to prove any sort of common scheme or plan or motive. Walker v. State, 116 Nev. 442,447 (2000). In those cases, this Court cited to the concern which is central in these types of cases, that is, the danger of unfair prejudice far outweighing the probative value of such evidence which can lead to an abuse of discretion by the court.

C. The Jillian Lozano Incident-1998.

It was error for the district court to permit the alleged Lozano incident as it is remote in time. This event occurred in September 1998. This was several years prior to the time of trial. This Court has held that prior crimes or bad acts 8 and 10 years old are so remote in time as to not be admissible to establish an exception to the general rule that evidence of prior bad acts is not admissible to prove the character of a person. Bosky v. State, 121 Nev. Adv. Op. 22, pp. 7-8; Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413 (2002). This Court in Bosky and Braunstein exclude this prior crime or bad acts evidence on the basis that it is too remote in time.

The district court should have prohibited testimony regarding the Lozano incident based upon the common scheme or plan exception. The test with regard to the common scheme or plan exception is not whether the offense charged has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan (emphasis added), which resulted in the commission of that crime. 122 Nev. Adv. Op, p. 8, 1 2 (May 26, 2005). In fact, this

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Court in Richmond v. State, supra, noted that even a sexual assault perpetrated in the same location and manner a month before the assault at issue may not establish a common plan.

In , Ledbetter v. State, 122 Nev. Adv. Op. 22 (May 22, 2006), at pp. 6-7, this Court confirmed that the common scheme or plan test is not whether the other offense has certain elements in common with the crime charged, but whether it tends to establish a preconceived plan which resulted in the commission of that crime. In this case, the Lozano incident was separated by several years from the incidents alleged in this complaint. That fact alone weighs in favor of the Defendant's alleged actions being the result of random opportunity, rather than a preconceived overarching plan. See Ledbetter v. State, supra, a17.

The admission of this evidence of the alleged Lozano incident created the very sort of situation that the character evidence rules were devised to prevent. That is, the creation of a mini-trial within the overall trial on the alleged Lozano incident. The same analysis is applicable to the Pennsylvania incident and in fact, the Pennsylvania incident is more remote in time. Under Tinch v. State, 113 Nev. 1170, 1176 (1997), following the three-prong test: That the prior bad act is relevant to the crime charged; The act is proven by clear and convincing evidence; and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."Tinch, supra, at 1176.

D. Ledbetter v. State of Nevada, is not applicable because the facts of the instant case are not similar and that case did not change the law in Nevada dealing with the admission of prior bad acts.

In the State's Motion to Admit Evidence of Other Crimes they put heavy emphasis on Ledbetter v. State of Nevada, 129 P.3 d 671, 122 Nev. Adv. Rep. 22 (2006), in an attempt to persuade the District Court that the testimony should be admitted. The State has argued that Ledbetter sets a new precedence on the law of prior bad acts in the State of Nevada. It did not. Ledbetter was decided, as this Court stated, on its own narrow facts.

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520 South Fourth Street, Second Floor
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The case of Ledbetter dealt with the admission of prior acts of egregious rape and sexual assault on the defendant's young daughter and granddaughter in a case where he was being charged with raping and sexually assaulting another daughter. The facts of Ledbetter are highly disturbing and dealt with extreme forms of sexual abuse on his daughters and granddaughter. This Court in reaching their decision stated: "In reaching this conclusion we cautioned the State that our decision is dependant upon the particular facts of this case and that the use of prior acts evidence to establish motive pursuant to NRS 4R045(2) should always be approached with circumspection." Id. at 679-80. This Court continued to state that "[T]his court's jurisprudence in Braunstein and Richmond requires that the admissibility of prior act evidence must always be determined under the three factor test articulated in Tinch. Our decision today continues to adhere to this view." Id.

The allowed testimony in Ledbetter dealt with constant abuse of a similar nature which took place over a span of several years. The proposed testimony in the instant case deals with two isolated incidences, each of which only occurred one time. The facts of Ledbetter are of no comparison to the instant case and should not have been admitted.

As this Court in Ledbetter stated, the three prong test of Tinch must still be met. As has been argued extensively, the State has not met this burden and therefore this Court should not allow the testimony to be admitted.

Based upon the above and foregoing, Mr. Zana respectfully requests this Court remand his case for a new trial based upon the district court's error in admitting this evidence.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO PRECLUDE THE STATE FROM INTRODUCING IMPROPER IMPLIED PREJUDICIAL BAD ACTS.

During direct examination of Mrs. Marchovecchio the prosecutor asked whether there was a school party at the end of the year. The prosecutor further asked:

The Prosecutor: Upon going into the back yard, did you see anything you thought didn't look quite right?

Ms. Marchovecchio: Yes.

Objection by the defense (A.A. Vol. VI, pp. 1223-1224).

The Prosecutor then argued it was relevant to show the "dynamics of the situation (A.A. Vol. VI, pp. 1224). Over the defense objection, the court permitted the witness to state the class party was odd because Mr. Zana was the only adult present with the other children (A.A. Vol. VI, pp. 1225).

NRS 48.045(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

See NRS 48.045(2); see also Tinch v. State, 113 Nev. 1170, 1176 (1997). In order to admit such evidence, the State must establish that (1) the prior act is relevant to he crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative values of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch, 113 Nev. at 1176. The admissibility of prior bad acts is within the sound discretion of the trial court and will not be overturned on appeal unless found to be manifestly wrong. Tinch, 113 Nev. at 1176.

Once the court's ruled that evidence is probative of one of the permissible issues under NRS 48.045(2), the court must decide whether the probative value of the evidence is substantially outweighed by its prejudicial effect.

NRS 48.045 states, "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. See, Taylor v. State, 109 Nev. 849, 853, 858 P.2d 843, 846 (1993). See also, Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989). However, an exception to this general rule exists. Prior bad act

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evidence is admissible in order to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See, NRS 48.045(2). It is within the trial court's sound discretion whether evidence of a prior bad act is admissible.... Cipriano v. State, 111 Nev. 534, 541, 894 P.2d 347, 352 (1995). See also, Crawford v. State, 107 Nev. 345, 348, 811 P.2d 67, 69 (1991).

"The duty placed upon the trial court to strike a balance between the prejudicial effect of such evidence on the one hand, and its probative value on the other is a grave one to be resolved by the exercise of judicial discretion.... Of course the discretion reposed in the trial judge is not unlimited, but an appellate court will respect the lower court's view unless it is manifestly wrong." Bonacci v. State, 96 Nev. 894, 620 P.2d 1244 (1980), citing, Brown v. State, 81 Nev. 397, 400, 404 P.2d 428 (1965).

In the instant case, the following bad acts were inadmissible. These alleged bad acts were not discussed at the Petrocelli hearing and therefore should not have been admitted. The State failed to follow any of the procedures ennunicated in Tinch. Mrs. Marchovecchio testified at the Petrocelli hearing. Why did the State fail to introduce this at the Petrocelli hearing? Over defense objection this information was heard by the jury.

The prosecutor argued information was being brought out to demonstrate the "dynamics"of the situation. "Dynamics" need to be addressed at a Petrocelli hearing. On cross-examination, Mrs. Marchovecchio is forced to admit that there were "many adults" at the pool party. The purpose of a Petrocelli hearing is to find out if the evidence is substantially outweighed by the prejudicial effect. The court did not have an opportunity to hear it before trial. Now, during trial, the prosecutor should have known the prejudicial effect was severe.

In fact, Mr. Guy Dano's daughter attended Mr. Zana's fifth grade class. At the conclusion of the school year, Mr. Dano held a pool party at his home. Mr. Dano's wife

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personally sent out invitations to all the kids in Mr. Zana's class (A.A. Vol. VIII, pp. 1632). There were other adults (parents of the children) present at the swimming party.

Based on the foregoing argument, Mr. Zana is entitled to a new trial based upon violations of his constitutional rights.

IV. THE DISTRICT COURT SHOULD HAVE GRANTED MR. ZANA'S MOTION FOR A NEW TRIAL.

On August 30, 2007, Juror Carol Marques called chambers with concerns regarding events that took place during deliberations. The district court heard arguments and entertained extensive briefing on this issue. Thereafter, the district court denied Mr. Zana's Motion for New Trial. On September 4, 2007, the defense received a memorandum from Ms. Elana Pitaro, secretary to the Honorable Jackie Glass. On September 10, 2007, Mr. Zana filed a Motion for New Trial based upon juror misconduct (A.A. Vol. II, pp. 466-476). On October 8, 2007, this Honorable Court held an evidentiary hearing where all of the deliberating jurors testified.

STATEMENT OF PERTINENT FACTS FROM THE EVIDENTIARY HEARING

The Court specifically stated during the evidentiary hearing, the Court had reviewed portions of the trial and had specifically admonished the jurors there was to be no independent research (A.A. Vol. III, pp. 504).

Mr. Chris Thurman surfed the internet in an effort to observe pornographic websites to determine the ages of the females depicted (A.A. Vol. III, pp. 506-507). After conducting the internet research to determine the age of the females depicted in pornography, Mr. Thurman reported back to the other jurors what he had discovered and investigated (A.A. Vol. III, pp. 508). Additionally, Mr. Thurman placed his cell phone and keys in his pocket and then sat down and attempted to see if he could stick his own hands in his pocket (A.A. Vol. III, pp.

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508). [1]

Juror Carol Marques contacted Judge Glass' secretary on August 30, 2007, regarding her concerns (A.A. Vol. III, pp. 480). Ms. Marques waited for a period of time to complain to the Court about the juror misconduct because she was "bugged" by the situation.

Jury deliberations began on Friday afternoon (A.A. Vol. III, pp. 482). Jury deliberations reconvened on Monday at approximately 8:30 or 9:00 in the morning (A.A. Vol. III, pp. 482). Ms. Marques said that Mr. Thurman told all the jurors, "[y]eah, he said he just did the video business but that was it. But you know, the porno thing, the child stuff, to see if he could determine ages" (A.A. Vol. III, pp. 482). Ms. Marques stated that one juror explained that the Court had admonished them not to go to the internet for any investigation.

Juror Geraldine Bensing explained that the jurors discussed the internet research for approximately 15 minutes (A.A. Vol. III, pp. 537).

Juror Davida Parachuelles explained that when Juror Thurman revealed his internet research, Juror Thurman and another juror began "barking at each other"(A.A. Vol. III, pp. 549-550). Juror Parachuelles testified the conversation regarding the internet lasted approximately 5 minutes (A.A. Vol. III, pp. 554). Juror Shane Koehler testified that the discussion regarding internet research lasted approximately 20 minutes (A.A. Vol. III, pp. 530). Juror Koehler remembered that there were a "few jurors" that told Juror Thurman that he should not have done the research.

However, there appeared to be a consensus amongst the jurors that the independent investigation conducted by Juror Thurman was discussed and heard by the other jurors. There

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[1] Mr. Thurman was of the opinion there should be a not guilty verdict as to the child pornography charges (A.A. Vol. III, pp. 510). However, within approximately two hours the jury had returned guilty verdicts, exposing Mr. Zana to multiple life sentences.

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is also a consensus that at least one juror and possibly more admonished Mr. Thurman that this investigation was against the Court's order. In fact Juror Judy Sheets, explained her feelings when she learned about the independent investigation, stating,"I don't think the judge would appreciate hearing about that, because I have been on previous cases in California and it was something- - your not to do your own investigating; and that's all I can remember. . ."(A.A. Vol. III, pp. 512-513).

Juror Chris Thurman admitted he conducted independent research in connection with the jury deliberations (A.A. Vol. III, pp. 496). Mr. Thurman admitted that his independent investigation led him to internet research as well as an experiment. In this experiment, Mr. Thurman "put on pants to put my hand in my pocket to see how easy or hard it was and I tried to find out that website that they had those pictures of and I couldn't find it." (A.A. Vol. III, pp. 496). Juror Thurman was attempting to experiment to determine whether the accusers had any credibility with regard to placing their hand in the defendant's pants. Mr. Thurman informed the other jurors of this experiment as well as his internet research. Shortly after the jury discussed Mr. Thurman's experiments and research the verdict was returned (at approximately 11:00 a.m. on Monday) (A.A. Vol. III, pp. 497). Mr. Thurman believed his outside investigation was discussed by jurors for up to 10 minutes (A.A. Vol. III, pp. 498).

Jurors also informed the district court that at least one juror was observing children at her church in order to determine the age of children in general (A.A. Vol. III, pp. 538, 541, 494). Juror Geraldine Bensing informed the trial court that at least one juror was comparing "girls" in casinos to determine if he could tell their age (A.A. Vol. III, pp. 540). Juror Davida Paracuelles informed the Court that an "older lady" on the jury, told jurors ". . .she was at church, you know, she noticed that some of the girls in her congregation looked younger than what they really are." (A.A. Vol. III, pp. 551).

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In sum, Juror Chris Thuman conducted independent research on the internet via different pornographic sites in an effort to determine one of the essential elements in the instant case. Additionally, at least one juror (Mr. Thurman) conducted a physical experiment wherein he made attempts to determine the probabilities of the accuser's testimony. Another juror decided to view children at her church to determine if she could ascertain the ages of the people she was observing. Yet, another juror was observing females at a casino in order to determine their age. Apparently, all of this outside information was discussed during deliberations.

A. JUROR THURMAN'S CONDUCT OF PERFORMING INDEPENDENT RESEARCH ON HOW TO DETERMINE THE AGE OF THE GIRLS AND DISCUSSING IT WITH THE JURY PANEL CONSTITUTED PREJUDICIAL JUROR MISCONDUCT AND THEREFORE ZANA IS ENTITLED TO A NEW TRIAL.

Juror Thurman's actions in conducting independent research and discussing his findings with the other members of the jury panel was clear prejudicial juror misconduct. Judge Glass admonished the jurors specifically not to conduct any form of independent research. Juror Thurman disregarded this admonition and took it upon himself to conduct independent research on a material issue in the case. This conduct was highly prejudicial to Mr. Zana and cannot stand. This Court should order that Mr. Zana be entitled to a new trial based on this clear juror misconduct.

This Court has adopted a standard for appellate courts to consider in determining juror misconduct. See Meyer v. State of Nevada, 119 Nev. 554, 561 (2003). "Juror misconduct" falls into two categories: (1) conduct by jurors contrary to their instructions or oaths, and (2) attempts by third parties to influence the jury process. The first category includes jurors failing to follow standard admonitions not to discuss the case prior to deliberations, accessing media reports about the case, conducting independent research or investigation, discussing the case

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with non-jurors, basing their decision on evidence not admitted, discussing sentencing or the defendant's failure to testify, making a decision on the basis of bias or prejudice, and lying during voir dire. It also includes juror incompetence issues such as intoxication. The second category involves attempts to influence the jury's decision through improper contact with jurors, threats, or bribery. Meyer v. State of Nevada, 119 Nev. 554, 561 (2003).

The Nevada Legislature codified the common-law rules regarding admission of jury testimony to impeach a verdict in NRS 50.065. This Court, interpreting NRS 50.065, has stated that a motion for a new trial may only be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental processes of any juror. Before a defendant can prevail on a motion for a new trial, based on juror misconduct, the defendant must present admissible evidence sufficient to establish the occurrence of misconduct and whether the misconduct was prejudicial. Once such a showing is made, the trial court should grant the motion. Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict. Id. at 563-64.

To determine whether there is a reasonable probability that juror misconduct affected a verdict, a court may consider a number of factors. For example, a court may look at how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning shortly before verdict, after verdict, etc.). Other factors include whether the information was ambiguous, vague, or specific in content; whether it was cumulative of other evidence adduced at trial; whether it involved a material or collateral issue; or whether it involved inadmissible evidence (background of the parties, insurance, prior bad acts, etc.). In addition, a court must consider the extrinsic influence in light of the trial as a whole and the weight of the evidence.

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These factors are instructive only and not dispositive. Id at 566.

Finally, the district court's factual inquiry is limited to determining the extent to which jurors were exposed to the extrinsic or intrinsic evidence. The district court must apply an objective test in evaluating the impact of the extrinsic material or intrinsic misconduct on the verdict and should not investigate the subjective effects of any extrinsic evidence or misconduct of jurors. That is, the district court must determine whether the average, hypothetical juror would be influenced by the juror misconduct. Affidavits or statements by jurors about the actual effect of the misconduct on the deliberations or their individual decisions are not admissible to determine the impact of the misconduct upon a verdict.

In Meyer, a material issue at trial was the source of the victim's bruises and whether or not they were caused by the Defendant, or if they were a reaction to certain medicine (Accutane) she was taking, or falling down. During the trial one of the jurors conducted independent research by consulting a Physician's Desk Reference (PDR) on the side effects of Accutane, and then she discussed her findings with other jurors at the beginning of deliberations. This Court held that the jurors actions constituted juror misconduct because this was the introduction of extrinsic evidence. Id. at 571-72. "Jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation." Id. at 572. This Court found that this was clearly an extraneous influence upon the jury, and thus misconduct.

This Court in Meyer, next had to determine whether or not this juror misconduct established prejudice. To demonstrate prejudice, Meyer had to prove that there was a reasonable probability that the PDR reference affected the jury's verdict. In determining the issue, this Court found that side effects of Accutane was a material issue in the case and the information tended to undermine Meyer's theory that the victim's physical marks were caused by a reaction to medication or falling. This Court held that considering all of the circumstances, that the average,

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hypothetical juror could have been affected by this extraneous information, and there is a reasonable probability that the PDR information affected the verdict. Thus, Meyer met his burden of establishing prejudice. Based on the juror misconduct this court ordered a new trial for Meyer.

The Ninth Circuit has held, "[w]e do not have a bright line test for determining whether a defendant has suffered prejudice from an instance of juror misconduct, but instead weigh a number of factors to determine whether the jury exposure to extraneous information necessitates a new trial." These factors include:

> (1) whether the material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. Dixon v. Sullivan, 849 F.2d at 406. See also Sassounian v. Roe, 230 F.3d. 1097, 1109 (9th Cir. 2000).

"Because the ultimate question is whether it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict, no one of these factors is dispositive. Dixon v. Sullivan, 849 F.2d at 406. (Citing Bayramoglu v. Estelle, 806 F.2d 880, 886-87 (9th Cir. 1986)).

In the instant case, jurors committed several acts of misconduct. A juror conducted internet research. As noted during the evidentiary hearing, the jurors were admonished not to conduct independent investigation. Juror Thurman completely ignored this Order. Mr. Thurman decided he was in a position to conduct independent research without Mr. Zana having an opportunity to confront the information obtained by Juror Thurman on the internet. Undoubtedly, the State would argue that Juror Thurman claimed the information he obtained caused him to lead towards a not guilty verdict. However, within two hours after revealing Juror Thurman's independent investigation, the jury returned guilty verdicts exposing Mr.

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Zana to multiple life sentences. It is important to remember that at least one juror admonished Juror Thurman that it was improper to conduct outside investigation. Yet, none of the jurors informed the Court of this misconduct.

The reason jurors are not permitted to conduct independent investigation is specifically because it violates the confrontation clause of the United States Constitution. Independent investigation fails to give the defendant an opportunity to confront the evidence being used during deliberations. More importantly, Juror Thurman's independent investigation obviously caused him to lose credibility with the other jurors. Most of the jurors at the evidentiary hearing were aware Juror Thurman's conduct was improper. Hence, Juror Thurman would have lost credibility with the other jurors. Perhaps, the knowledge that other jurors were aware of his misconduct would cause Juror Thurman to re-evaluate his position based upon his personal concerns as opposed to his duty as a juror. This is why independent investigation by jurors is not permitted. First, it can cause a contamination of the jury as a whole. Second, it violates the confrontation clause of the United States Constitution. Third, it may give a juror an unfair advantage during deliberations. Four, a juror who conducts independent investigation may feel ridiculed by other jurors. Based on the realization his or her actions have constituted misconduct and put the whole proceedings in jeopardy.

In the instant case, it appears that jurors did conduct independent investigations. That jurors independent investigation failed to give Mr. Zana an opportunity to confront the outside information.

Considering the factors enunciated by the Federal Court of Appeals for the Ninth Circuit in Dixon, Mr. Zana is entitled to a new trial.

Second, Juror Thurman introduced this outside investigation early on Monday morning. The length of time the outside investigation was considered by the jury came at a

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particularly important time during deliberations. The information was available early on Monday morning and within a short period of time Mr. Zana had suffered the consequence of improper jury conduct.

Juror Carol Marques reported this to the trial court because it "bugged"her. It is interesting, that Ms. Marques was unable to simply carry on with her normal life. Ms. Marques was "bugged" by this information to the extent she found it necessary to inform the Court about this misconduct. This fact establishes the misconduct must have been significant. A juror remembering the misconduct and being "bugged" by the misconduct for such a lengthy period of time before reporting the matter speaks volumes. It is rare that a trial court becomes aware of a single incident of juror misconduct. It is even more surprising that so much misconduct occurred in a trial where a defendant is facing the rest of his natural life in prison.

Taken as a whole, this Court has held that the misconduct of a single juror may result in a reversal of a trial. Canada v. Nevada, 113 Nev. 938; 944 P.2d 781(1997). In Canada, the defense became aware of misconduct on behalf of a single juror. The Motion for New Trial and Evidentiary Hearing was held before the Honorable Joseph T. Bonaventure. As a result of the evidentiary hearing, the district court denied the Motion for New Trial and affirmed the defendant's murder conviction. On appeal, this Court reversed citing the district court's abuse of discretion. Id. In Canada, this Court stated, "[a] new trial must be granted unless it appears, beyond a reasonable doubt, that no prejudice has resulted." 113 Nev. 938, 941. (Citing to Lane v. State, 110 Nev. 1156, 1164, 881 P.2d 1358 at 1364). In considering whether jury misconduct was harmless error, this Court should consider "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." See Rowbottom v. State, 105 Nev. 472, 486, 779 P.2d 934, 943 (1989). (Quoting

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Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

In the instant case, the issue of innocence and guilt was close. Mr. Zana was not convicted of all counts. The quantity and character of the error is significant as it involved multiple instances of independent investigation conducted in direct violation of the district court's order. The gravity of the error charged is very serious.

Mr. Zana does not complain that he is entitled to a perfect trial, but he is entitled to a fair trial, free of extensive juror misconduct in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

V. THE DISTRICT COURT ERRED WHEN IT PERMITTED HEARSAY EVIDENCE CONCERNING THE RECOUNTING OF ALLEGED ABUSE BY THE ALLEGED VICTIM'S MOTHER AND GRANDMOTHER IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Ms. Karen Bjornson is the grandmother of Ms. Lozano (A.A. Vol. VI, pp. 1159). Over the strenuous objection of defense counsel, Ms. Bjornson, was permitted to testify regarding conversations that occurred between herself and Ms. Lozano, where Ms. Lozano revealed the allegations against Mr. Zana (A.A. Vol. VI, pp. 1160). While eating dinner, Ms. Bjornson, Ms. Lozano, Ms. Bjornson's husband and her son-in-law were all present when Ms. Lozano told her about reaching into Mr. Zana's pocket for a Jolly Rancher. Ms. Bjornson explained that during a subsequent conversation with Ms. Lozano, she said "Mr. Zana told me to get the Jolly Rancher out of his pocket. . . but what was that squishy thing in his pocket?" (A.A. Vol. VI, pp. 1163). Ms. Bjornson then contacted police (A.A. Vol. VI, pp. 1164). Ms. Teresa Spence is the mother of Jillian Lozano (A.A. Vol. VI, pp. 1186). Over the objection of defense counsel, Ms. Spence was permitted to testify regarding statements made to by Ms. Lozano against her allegations regarding Mr. Zana (A.A. Vol. VI, pp. 1186). Ms. Spence described in detail how Ms. Lozano had requested permission from her to attend Mr. Zana's class after school instead of going to

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safe key (A.A. Vol. VI, pp. 1189-1190). Although, Ms. Spence was not present at the dinner when Ms. Lozano revealed these allegations, she was permitted to testify that her mother, Ms. Bjornson, told her what she had been told by Ms. Lozano. In essence, hearsay upon hearsay (A.A. Vol. VI, pp. 1190-1191). The following question and answer occurred:

> The Prosecutor : And in the course of that discussion with your mother, did you learn what the allegations were or what had Jillian had stated?
> Ms. Spence: Yes (A.A. Vol. VI, pp. 1191).

Then, Ms. Spence had a conversation with Ms. Lozano which she was permitted to testify to (A.A. Vol. VI, pp. 1191). According to Ms. Spence, Ms. Lozano had received five Jolly Ranchers from Mr. Zana but she had to reach into his pocket to get them. Ms. Lozano wanted to know why it felt "squishy" (A.A. Vol. VI, pp. 1191-1192). Ms. Spence explained that Ms. Lozano would discuss the incident periodically (A.A. Vol. VI, pp. 1195). Ms. Spence admitted telling her girlfriend about her daughter's allegations. Ms. Spence's girlfriend then told her husband who in turn may have told others (A.A. Vol. VI, pp. 1198).

This issue was considered by the United States Supreme Court in Tome v. United States, 513 U.S. 150; 115 S. Ct. 696; L.Ed 2d. 574 (1995). In Tome, the Petitioner was charged with sexual abuse of his four year old daughter. The defense countered that the daughter recently fabricated the charges to live with her mother who was in a custody battle with the defendant. Id. As a result, the government proceeded to present six witensses who recounted out of court statements made by the young girl about the alleged assault. Id. The United States Supreme Court reasoned:

> The case before us illustrates some of the important considerations supporting the Rule as we interpret it, especially in criminal cases. If the Rule were to permit the introduction of prior statements as substantive evidence to rebut every implicit charge that a witness' in-court testimony results from recent fabrication or improper influence or motive, the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones. The present case illustrates the

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point. In response to a rather weak charge that A. T.'s testimony was a fabrication created so the child could remain with her mother, the Government was permitted to present a parade of sympathetic and credible witnesses who did no more than recount A. T.'s detailed out-of-court statements to them. Although those statements might have been probative on the question whether the alleged conduct had occurred, they shed but minimal light on whether A. T. had the charged motive to fabricate. 513 U.S. 150, 165.

The Court reversed based on the trial court's introduction of declarant's consistent out of court statements being permitted. The court determined the out of court statements to rebut a charge or recent fabrication or improper influence or motive are admissible only when those statements were made before the charged recent fabrication or improper influence or motive. Id. At 167.

In the instant case, the district court made a finding that there was "sufficient guarantees of trustworthiness and those can be admitted under 51.385." (A.A. Vol. VI, pp. 1093).

In the instant case, the State was permitted to parade the mother and grandmother of one of Mr. Zana's alleged victim's to testify and recount Jill's story. Interestingly enough, Jill had not yet testified at trial and there had been no attack upon her motive in the trial. [2] In the instant case, there is limited indicia of reliability. In fact, much of the testimony recounted appeared to be contradictory. More importantly, the safe guards considered by the United States Supreme Court in Tome were not followed. Mr. Zana is entitled to a new trial.

VI. THE DISTRICT COURT COMMITTED ERROR WHEN IT FAILED TO SUPPRESS IMAGES OBTAINED OR SEIZED FROM MR. ZANA'S COMPUTER IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE DISTRICT COURT COMMITTED ERROR WHEN IT FAILED TO HOLD A FRANKS HEARING.

On September 22, 2005, a search warrant was served on Mr. Zana's residence, wherein

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[2] Counsel is aware that the witnesses had previously testified at the Petrocelli hearing and were cross-examined regarding motivation.

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computers were seized (A.A. Vol. VII, pp. 1491-1501). Mr. Zana was cooperative. One computer was located on a desk the other computer was a Gateway located in the closet (A.A. Vol. VII, pp. 1500). The hard drive of both computers were analyzed (A.A. Vol. VII, pp. 1503). Both computers contained many pornographic pictures (A.A. Vol. VII, pp. 1513). The computer located on the desk, contained ten short video clips that depicted pornographic acts (A.A. Vol. VII, pp. 1513). The video files appeared to have been downloaded on September 10th and 11th 2005 (A.A. Vol. VII, pp. 1517-1518). The last time file appears to be accessed was September 18, 2005 (4 days before the search warrant was executed) (A.A. Vol. VII, pp. 1519). These folders were saved as Z1-Z10 (A.A. Vol. VII, pp. 1520).

Mr. Aaron Tomsich is a software engineer (A.A. Vol. VII, pp. 1536). Mr. Tomsich built Mr. Zana's computer which was located on his desk in June/July of 2005 (A.A. Vol. VII, pp. 1537). Installed in Mr. Zana's computer was an eraser program (A.A. Vol. VII, pp. 1537). Mr. Tomsich places eraser programs in all the computers he builds (A.A. Vol. VII, pp. 1537).

Mr. Tomsich explained that on peer to peer networks like limewire, you can search for a subject like "Ferarri" and might obtain 100 or 200 files but when reviewing the files they have nothing to do with Ferarri but could include pornography (A.A. Vol. VII, pp. 1539). Hence, if he did not view the downloaded file/video you may not even know what is on your computer (A.A. Vol. VII, pp. 1539). According to the detectives log, there were never any tasks created to actually erase anything on Mr. Zana's hard drive (A.A. Vol. VII, pp. 1542).

On February 8, 2007, Mark Zana filed a Motion to Suppress the Evidence Seized from Mr. Zana's computer. Additionally, the defense requested a Franks hearing. On March 1, 2007, over the objection of the defense, the district court denied the Motion to Suppress and no Franks hearing was ordered. The district court erred.

A. THE DISTRICT COURT ERRED WHEN IT FAILED TO SUPPRESS THE

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520 South Fourth Street, Second Floor
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EVIDENCE SEIZED BASED UPON THE FAILURE TO ENNUNICATE PROBABLE CAUSE IN THE WARRANT AND IT'S AFFIDAVIT IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As there was no evidentiary hearing held, Mr. Zana relies directly upon the Motion to Suppress and oral arguments. [3] In the instant case, there was no probable cause provided to the magistrate to permit a search of Mr. Zana's computer based upon information gathered and listed in the affidavit.

On Wednesday, September 21, 2005, Anne Marcovecchio and her 12-year old daughter, Melissa Marcovecchio, went to the Broomfield Police Department in Bloomfield, Colorado, to report that Melissa had been inappropriately touched by the Defendant, Mark Zana, some 15 months earlier, in July 2004. Both Anne and Melissa Marcovecchio provided a handwritten "Witness Statement" reporting the incident. The Witness Statement of Melissa Marcovecchio described two incidents where the Defendant allegedly inappropriately touched her. Melissa Marcovecchio made no mention of any computer usage by the Defendant, Mark Zana, nor any computer contact between her and the Defendant. There was also no mention of child pornography in the Witness Statement of Melissa Marcovecchio (A.A. Vol. I, pp. 099-100).

The Witness Statement of Anne Marcovecchio also made no mention of any child pornography and no mention of any computer contact between the Mark Zana and her daughter, Melissa Marcovecchio (A.A. Vol. I, pp. 096).

The next day, Thursday, September 22, 2005, Detective Rod Pena of the Henderson

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[3] Attached to the Defendant's Motion to Suppress were witness statements of Anne Maureen Marcovecchio and Melissa Marcovecchio which were attached as exhibits one and two in the Motion to Suppress. Also attached was the application and affidavit of search warrant. Lastly, attached as exhibit three were portions of Mr. Zana's recorded statement where he repeatedly denied accessing any child pornography website. (A.A. Vol. I, pp. 102-108).

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Nevada, Detective Pena asked the Defendant if he had been to any adult website or adult pornography sites on his computer. Mark Zana admitted that he had been to an adult web porn site on his home computer. However, Zana repeatedly denied accessing any child pornography website. In fact, Zana told Detective Pena that there was only one website that he had gone to on occasion (A.A. Vol. I, pp. 102-108).

Later in the afternoon of Thursday, September 22, 2005, Detective Pena swore out his Application and Affidavit for Search Warrant. Under the section entitled "Probable Cause," which begins on page 2 of the Application and Affidavit for Search Warrant, Detective Pena referred to the Witness Statements of Anne and Melissa Marcovecchio. At page 4, paragraph 4, Detective Pena swears in his Affidavit that Anne Marcovecchio stated that Mark Zana had used email to communicate with her daughter, Melissa (A.A. Vol. I, pp. 110-120). Anne Marcovecchio's handwritten statement makes no reference to email communication between Zana and Melissa Marcovecchio. Anne Marcovecchio's Witness Statement referred to email between Mark Zana and a neighbor's daughter named Angela. Detective Pena also swore in his Affidavit that Mark Zana taught Melissa Marcovecchio when she was in first grade, as well as fifth. Anne Marcovecchio's handwritten Witness Statement states that Melissa Marcovecchio was not in Mark Zana's class in the first grade. Pena's Application and Affidavit for Search Warrant also states, under oath, that when the inappropriate touching occurred Mr. Zana's classroom was empty except for Melissa Marcovecchio and one other female student. (A.A. Vol. I, pp. 110-120) Melissa Marcovecchio's statement says that she was in Mr. Zana's room with Zana and a male student named Arlan. (A.A. Vol. I, pp. 099-100) Pena's Affidavit continues on to state that Melissa's desk was next to Mr. Zana's desk in the classroom. Melissa's handwritten statement did not make any reference to her desk being next to Mr. Zana's desk and stated that she was "leaning up against his desk."

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The balance of Detective Pena's Affidavit relates to a conversation he had with Detective Leath of the Henderson Police Department and Detective Pena's "training and experience" regarding sex offenders. At the preliminary hearing on December 13, 2005, Detective Leath testified that he did not prepare an affidavit. Leath admitted that he spoke to Detective Pena over the phone. Detective Leath was not present at the interview of Mark Zana. Detective Leath was provided with the Witness Statements of Melissa and Anne Marcovecchio. Leath admitted that there was nothing in those Witness Statements relating to child pornography. (A.A. Vol. I, pp. 122-129) Leath also admitted that he was not on the telephone interview which occurred between Detective Pena and Melissa and Anne Marcovecchio. (A.A. Vol. I, pp. 122-129) Leath further admitted that he had no independent knowledge that Mark Zana was involved with child pornography. (A.A. Vol. I, pp. 122-129) Leath further admitted that everything that he knew about the case he had obtained from Detective Pena. (A.A. Vol. I, pp. 122-129)

B. THE DISTRICT COURT ERRED IN PERMITTING ANY EVIDENCE OBTAINED FROM DEFENDANT'S COMPUTER BECAUSE THE LACK OF TRUSTWORTHY FACTS AND CIRCUMSTANCES IN ITS ENTIRETY PROVIDES NO SUBSTANTIAL BASIS FOR THE JUDGE'S FINDING APPROVING THE SEARCH WARRANT.

The Nevada Constitution and the United States Constitution require all government searches to be reasonable and all warrants to be based upon probable cause. Nevada Constitution, Art. I, § 18; U.S. Constitution, Amd. IV. No warrant shall be issued unless based upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized. Nev. Constitution, Art. I, § 18; State v. Allen, 118 Nev. 842, 846, 60 P.2d 475 (2002). Probable cause requires trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are subject to seizure and at the place to be searched. Keesee vs. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994). This

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Court will not overturn a magistrate's finding of probable cause for search warrant unless the evidence in its entirety provides no substantial basis for the Magistrate's finding. Garrettson v. State, 114 Nev. 1064, 967 - P.2d 428 (1998); Keesee v. State, 110 Nev. 997, 1002 (1994).

In this case, the Application and Affidavit in support of the search warrant did not have a sufficient statement of probable cause in its entirety to provide a substantial basis for the Magistrate's finding. In reviewing Detective Pena's Application and Affidavit, the main target of the search warrant was Zana's computer. What was the basis for the alleged probable cause to seize and search that computer? There are basically four areas of facts which Detective Pena attempted to rely upon in establishing probable cause.

First, are the Witness Statements of Anne and Melissa Marcovecchio. Neither Anne Marcovecebio's statement, nor Melissa Marcovecchio's statement, make any reference to the use of child pornography by Mark Zana. In fact, Melissa Marccovecehio's statement makes no reference to computer usage at all. (A.A. Vol. I, pp. 099-100) The only reference to computer usage in Anne Marcovecchio's statement is an allegation that the child of one of her neighbors exchanged email with Mr. Zana. However, that email is not described as pornographic in any way, shape or form. The Witness Statements of Anne and Melissa Marcovecchio simply describe an allegation of inappropriate touching by the Mark Zana, of Melissa Marcovecchio. Those statements talk about two separate incidents, neither of which involve computer usage or child pornography.

The second fact, which Detective Pena relied upon, is the representation made by Detective Pena that he believes Mark Zana may have accessed child pornography. However, the only factual information obtained by Pena, as of September 22, 2005, proves exactly the opposite. During Pena's interview of Mark Zana, Zana admitted to accessing one adult site on a couple of occasions. However, Zana repeatedly denied any access of child pornography sites.

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The third fact, which Detective Pena attempts to rely upon in his Statement of Probable Cause, is that Mr. Mark Zana, took photographs of his students and may have stored them on his computer. However, the actual information obtained by Detective Pena was that Mark Zana was in charge of preparing the school yearbook for his elementary school and that he took pictures all year long to place in the yearbook. Thus, while Detective Pena seeks to attach nefarious intent or criminal conduct to Mark Zana's photograph taking activities, the evidence, which Detective Pena had in his possession on September 22, 2005, when he swore out his Affidavit, indicated exactly the opposite. Rather, that Zana's photographic activities were related to producing a yearbook at the elementary school. In fact, Detective Pena had also verified the fact that Defendant Zana was in charge of the school yearbook and taking pictures for the school yearbook when he interviewed student, Summer Dano early in the afternoon of September 22, 2005.

The fourth area of information which Detective Pena attempts to rely upon is his conversation with fellow Detective, Daniel Leath. However, the only thing Leath did was to provide Pena with technical understanding of how computers operate, and the procedures that Pena should follow in seizing the Defendant's computer. In other words, Leath simply explained the operations of a computer to Pena who admittedly is "as dumb as a box of rocks when it comes to that stuff."

C. A PROBABLE CAUSE FINDING SHOULD BE OVERTURNED WHERE THE EVIDENCE IN ITS ENTIRETY PROVIDES NO SUBSTANTIAL BASIS FOR THE MAGISTRATE'S FINDING.

A close review of Detective Pena's Application and Affidavit reveals that Detective Pena reached the conclusion that Mark Zana's computer would contain images of child pornography based solely upon Zana's statement that he had accessed an adult-oriented pornography website. Nowhere in Detective-Pena's Application and Affidavit is there any factual foundation for the

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possession of child pornography by Mr. Mark Zana. There is nothing in the Marcovecchio Witness Statements, there is nothing in the recorded statement of Mark Zana, and there is nothing from Detective Leath's involvement in the case. Detective Pena, in his Application and Affidavit, simply made an incredible illogical leap from a statement made by Mark Zana that he had accessed a legal adult site to the conclusion that a person who accesses legal adult sites must also then access illegal child pornography sites.

In this case, Detective Pena's leap and analysis from the fact that a person accessed an adult website to the conclusion that that person must have also accessed a child pornography website does not provide the" trustworthy facts and circumstances" which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are seizable and will be found in the place to be searched. Keesey v. State, supra, at 1002. The probable cause finding in this case should be overturned because the evidence in the Application and Affidavit of Detective Pena, in its entirety, provides no substantial basis for the Magistrate's finding. Weber v. State, 121 Nev. Adv. Op. 57, p. 23 (Sept. 15, 2005). In Weber, this Court clearly proved the corollary, that where a court finds that the evidence in its entirety provides no substantial basis for the Magistrate's findings, then the reviewing court can overturn a probable cause finding. Weber, supra, at 23; see also, Garreason v. State, supra, at 1069; and Keesey v. State, supra, at 1002.

First, Detective Pena's Affidavit includes a false statement that Mark Zana taught Melissa when she was in the first grade as well as the fifth grade. Second, Detective Pena's Affidavit includes the statement that Mark Zana used email to communicate with Melissa Marcovecchio. This is clearly false based upon the handwritten statement of Anne Marcovecchio. Third, Detective Pena states that when Melissa Marcovecehio was in Mark Zana's classroom, that there was one other female student present, apparently in an effort to

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convince the reviewing judge that Mark Zana had a habit of having only females in his classroom after school. In truth, Melissa Marcovecchio's statement says she was in the room with Zana and a male student named Arlan. Fourth, Detective Pena's Affidavit states that Melissa Marcovecchio's desk was next to Mark Zana's desk, apparently in an effort to show that Mr. Zana was playing favorites with Melissa. Once again, this was either an intentional or reckless falsehood, because Melissa Marcovecchio's statement did not say anything about her desk being next to Mr. Zana's. She stated that she was "leaning up against his desk" at the time of one of the alleged inappropriate touchings. Fifth, Pena attempts to impress upon the reviewing judge that Mark Zana frequents several adult sites. This again is a reckless material falsehood in that the Mark Zana in response to Detective Pena's question, stated, "There's only one website that on occasion I've gone to."

When a defendant has made a preliminary showing and an offer of proof that there were intentional or reckless material falsehoods in the Affidavit, then the Defendant is entitled to an evidentiary hearing under Franks v. Delaware; supra; and, Weber v. State, 121 Nev. Adv. Op. 57, p. 25 (Sept. 15, 2005); see also, Garrettson v. State, supra, at 1068.

The district court erred in permitting into trial, evidence seized from Defendant Mark Zana's computer because of the lack of trustworthy facts and circumstances.

E) District Court's Ruling

The district court found that there was probable cause and there was not "leap of faith"

The court ruled that when you have lewdness allegations and the taking of photos of young children it would lead the court to believe the authorities should look at the defendant's computer and that the allegations seemed to go "hand in hand".

Mr. Zana was charged with inappropriate touching and permitting children to feel his genitals. There was no allegation that Mr. Zana's computer was in any way connected or

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furthered evidence of these allegations. This was just a generalized search and there was no probable cause provided. In sum, the Court applied an unreasonable application of the Federal Constitution to the instant case in violation of the Fourth and Fourteenth amendments to the United States Constitution.

VII. THE DISTRICT COURT COMMITTED ERROR WHEN IT FAILED TO GRANT THE DEFENSES MOTION FOR SEVERANCE OF THE ALLEGED CHILD PORNOGRAPHY COUNTS FROM THE ALLEGED SEXUAL MISCONDUCT COUNTS.

On August 6, 2007, the defense formally moved for severance between counts citing NRS 174.165 (A.A. Vol. IV, pp. 676).

In the instant case, the pornography charges did not follow the lewdness charges. The pornography charges are something that occurred afterwards.

In the instant case Mr. Zana would argue the photographs were obtained through an unlawful search warrant, and his trial attorney should not have been forced to defend during trial and during voir dire, address the issues of alleged sexual misconduct, and the allegations of child pornography that were not connected.

NRS 173.115 provides:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:
>
> 1. Based on the same act or transaction; or
>
> 2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Decisions to join or sever are left to the discretion of the trial court and will not be reversed absent an abuse of discretion. Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990). An error arising from this joinder is subject to harmless error analysis and warrants reversal only if the error had "A substantial and injurious effect or influence in determining the

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jury's verdict. Robins v. State, 106 Nev. 611, 619 798 P.2d 558, 564 (1990) (quoting United States v. Lane, 474 U.S. 438, 449, 88 L.Ed. 2d 1814, 106 S.Ct.725 (1986).

"Even if joinder is permissible under NRS 173.115, the trial court should sever the offenses if the joinder is unfairly prejudicial." Middleton v. State, 114 Nev. 1089, 1107, 968 P.2d 296, 309 (1998).

The Ninth Circuit Court of Appeals has held that the refusal to sever charges was not manifestly prejudicial where the prosecution and court took great pains to avoid emphasizing the charges were somehow connected. U.S. v. Smith, 795 F.2d 841 851 (9th Cir. 1986).

This Court has expressed, "In assessing the potential prejudice created by joinder, this Court has held that the test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of this court's discretion to sever." (quotations omitted). Tabish and Murphy, 119 Nev. 293; 304, 72 P.3d 584 (2003) (citing to United States v. Brashier, 548 F.2d 1315, 1323 (9th Cir. 1976).

In Tabish and Murphy, this Court considered the view of the United States Court of Appeals for the Ninth Circuit. This Court quoted the Ninth Circuit, wherein joinder may be so prejudicial. "that the trial judge is compelled to exercise his discretion to sever. Prejudice created by the district court's failure to sever the charges is more likely to warrant reversal in a close case because it may prevent the jury from making a reliable judgement about guilt or innocence." Tabish and Murphy, 119 Nev. 293; 305 (citing Zafiro v. United States, 506 U.S. 534, 539, 122 Led. 2d 317, 113 S.Ct. 933 (1993); see also Lewis, 787 F.2d at 1322 (considering relative strength of evidence underlying joined charges as factors showing undue prejudice).

In Tabish and Murphy, supra, this Court reversed, holding, "[I]n our view, however, the district court would have manifestly abused its discretion in finding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice." This Court, in

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Tabish and Murphy found that the Casey Counts and the Binnion Murder Count should have been tried separately because the charges were not based on common scheme or plan and trying the charges together were unconstitutionally prejudicial. 119 Nev. 293; 301, 302.

In the instant case, the defense asked for severance based upon the prejudicial "spillover"(A.A. Vol. IV, pp. 678). The child pornography did not allege that any of the victim's depicted were the alleged victim's accusing Mr. Zana of sexual misconduct. It should be noted that defense counsel volunteered to try the two sets of counts in back to back trials (A.A. Vol. IV, pp. 678). [4] Mr. Zana requested severance between Counts I thru IX from Counts X thru XXI.

In the instant case, Mr. Zana is in a similar situation to Tabish and Murphy. As in Tabish and Murphy, there was little correlation between the Casey Counts and the Binnon murder. In the instant case, there is no real correlation between the allegations of sexual assault and the seizure of the alleged child pornography later. Mr. Zana was prejudiced by trying the counts together and suffered prejudice which undermined the fairness of the proceeding. The pornography charges are something that occurred afterwards. Therefore, Mr. Zana would respectfully request this Court reverse his convictions and grant him a new trial.

VIII. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. ZANA OF POSSESSION OF PORNOGRAPHY DEPICTING A CHILD UNDER SIXTEEN.

In the instant case, there was insufficient evidence adduced at trial to convict Mr. Zana of counts X thru XXI.

This Court has stated that when the sufficiency of evidence is challenged on appeal,

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[4] Mr. Zana was charged by way of Information with Lewdness with a Child Under Fourteen in Counts I-IX. Mr. Zana was charged with Possession of Visual Presentation Depicting Sexual Conduct Under the Age of 16 in Counts X-XXI. (A.A. Vol. VIII, pp. 1864)

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> The relevant inquiry for this Court is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of a fact could have found essential elements of the crime beyond a reasonable doubt. Koza v. State, 100 Nev. 245, 250 ,681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319,61 LED. 2d 560, 99 S.Ct. 2781 (1979)).

In the instant case, Dr. Zebiegien testified he reviewed the images obtained off the computers to determine the age of the people depicted (A.A. Vol. VIII, pp. 1574). Dr. Zebiegien only reviewed the images the Saturday before his trial testimony (A.A. Vol. VIII, pp. 1574). In the first video image, the doctor opined the female was approximately 12 or 13 years of age (A.A. Vol. VIII, pp. 1578-1579). The doctor made this conclusion based on body size, body parts including the face and development (A.A. Vol. VIII, pp. 1579).

Exhibit "Z-3", the person on the video clip was allegedly under the age of 16 based upon the doctor's conclusion that "sorry, not enough information compared to the previous clips, but my over all feeling is that they were definitely under the age of 16 and . . ." During the doctor's testimony, the defense objects (A.A. Vol. VIII, pp. 1582). The defense objects on the basis that opinion rendered is not to a reasonable degree of medical certainty (A.A. Vol. VIII, pp. 1582).

On exhibit "Z-9", the doctor concluded that the female individual was over the age of 16 (A.A. Vol. VIII, pp. 1583). Dr. Zebiegien did not prepare a report in this matter (A.A. Vol. VIII, pp. 1585).

The tanner staging maturation scale is used to determine the maturation or age of a female by looking at developmental stages (A.A. Vol. VIII, pp. 1586). The doctor admitted the only real way to determine the age of an individual would be by knowing their actual date of birth (A.A. Vol. VIII, pp. 1587). The doctor agreed there was also no scientific literature to permit pediatricians to rely upon determining the age of individual by comparing the size of a female to a male (A.A. Vol. VIII, pp. 1589). More importantly, Dr. Zebiegien admitted his opinion was not based on any objective scientific or medical evidence (A.A. Vol. VIII, pp.

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1590).

Although the doctor concluded that one of the females depicted was under age because she did not have pubic hair, the doctor freely admitted he had never looked at adult website where many of the models shaved their pubic areas. The doctor was unaware of this fact (A.A. Vol. VIII, pp. 1590-1591). The tanner scale also dictates that breast development is not to be used to determine chronological age (A.A. Vol. VIII, pp. 1593). For example, women who are thirty, forty, or fifty may well have small breasts (A.A. Vol. VIII, pp. 1594).

This was the first time the doctor had testified in any case with this type of content (A.A. Vol. VIII, pp. 1596). In anticipation for his testimony, the doctor revealed he had never reviewed adult sites to determine if they sometime used models that appeared younger than 18 (A.A. Vol. VIII, pp. 1596). Dr. Zebiegien admitted that there was no scientific study that he consulted prior to testimony that would help him render his opinion. His opinion was based simply on his experience (the same individual who had never observed an adult website nor was he aware that many female models shave their pubic hair).

However, Dr. Zebiegien clearly testified that he could not determine the ages of these individuals to any degree of medical certainty other than his own opinion. There was no evidence introduced as to the chronological age of the individuals depicted. The State's expert's reliance upon the height and breast size of the individuals, admittedly were unreliable under the Tanner standards. Most importantly, the doctor admitted there was no reasonable degree of medical certainty as to this testimony. The defense's expert explained in detail that there could be no proof as to the age of these individuals.

Even the district court admitted the State would have to produce an expert who was able to state the images depicted a person under the age of sixteen (16) (A.A. Vol. IV, pp. 691).

The district court provided:

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> I would think that there would have to be somebody to come in and be able to distinguish a sixteen year old from a seventeen year old and some sort of testimony so that a - - and if they don't, then the State hasn't proven their case. I think they're going to - - I think an expert - - I think somebody has to come in and say I've examined this and based upon my knowledge and expertise, this is what I think. (A.A. Vol. IV, pp. 693).

The State's expert admitted the only real way to determine a person's age is by knowing their date of birth.

Additionally, at trial Dr. Charles Hyman, a Board Certified Pediatrician, testified as a defense expert (A.A. Vol. VIII, pp. 1603-1604). Dr. Hyman reviewed photographs and video taken from the hard drives of the two computers (A.A. Vol. VIII, pp. 1606).

Dr. Hyman concluded that the chronological age of the individuals depicted on the video clips could not be ascertained (A.A. Vol. VIII, pp. 1607). Dr. Hyman explained that objectively there is absolutely no accurate way to determine the age of the models (A.A. Vol. VIII, pp. 1607). Dr. Hyman had evaluated over 100,000 children in the course of his career (A.A. Vol. VIII, pp. 1607).

Dr. Hyman observed the testimony of the State's expert and found that there was no objective evidence and the State's expert was simply speculating (A.A. Vol. VIII, pp. 1614-1615). Dr. Hyman showed the jury a copy of a website entitled "Little April" that had young looking models that are actually over 18 pursuant to 18 U.S.C. 2257 (A.A. Vol. VIII, pp. 1619). The doctor concluded that there were thousands of these type of website (A.A. Vol. VIII, pp. 1621). In the instant case, the State's expert was unable to determine the age by any reasonable degree of medical certainty. There was insufficient evidence in the light most favorable to the State to convict Mr. Zana of Counts X thru XXI.

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520 South Fourth Street, Second Floor
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IX. THE DISTRICT COURT SHOULD HAVE DISMISSED COUNTS X THRU XXI BASED UPON IMPROPER PLEADING AND NOTICE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the instant case, the defense moved to dismiss Counts X thru XXI (possession of visual presentation depicting sexual conduct of a person under the age of sixteen) based on improper pleading and notice. (A.A. Vol. VII, pp. 1085-1086); (A.A. Vol. IV, pp. 683-687).

The State had charged the defendant by way of Criminal Complaint and Information with depicting a "child under 16" (A.A. Vol. IV, pp. 684).

The State amended all of the counts to reflect a "person under sixteen" instead of a child as a result of the defense complaining about the defective charging document which failed to comply with the statute. The State recognized the defense was correct that the pleading was defective (A.A. Vol. IV, pp. 684). Defense complained the State was being permitted to amend the charging document on the eve of trial (A.A. Vol. IV, pp. 685). There was no evidence produced at the preliminary hearing that the pictures depicted a person under sixteen. The State's pleading was defective and an the important element was not considered at the preliminary hearing.

In essence, the State failed to properly plead each and every essential element of the crime charged and only remedied the matter on the first day of trial. "[T]he indictment . . . must be plain, concise and definite written statement of the essential facts constituting the offense charged." An indictment, standing alone, must contain : 1) each and every element of the crime charged; 2) the facts showing how the defendant allegedly committed each element of the crime charged. State v. Hancock, 114 Nev. 661 955 P.2d 183 (1998); See also United States v. Hooker, 841 F. 2d 1225, 1230 (4th Cir. 1988). This Court has held an indictment is deficient unless it "sufficiently apprise defendant of what he must be prepared to meet" Hancock, 114

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Las Vegas, Nevada 89101

Nev. 161; 164. See also Leslie v. United States, 369 U.S. 749, 763, 8 L.Ed 2d 240, 82 S.Ct. 1048 (1962).

In the instant case, the State failed to properly plead the criminal complaint and information. The State failed to properly provide notice to the defendant in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Mr. Zana would respectfully request that this Court dismiss convictions Counts X thru XXI.

X. THE DISTRICT COURT ERRED WHEN IT PERMITTED SEVERAL INSTANCES OF HEARSAY EVIDENCE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the instant case, the district court permitted several instances of hearsay in addition to the argument cited above. The district court erred when permitted the following instances of hearsay:

A) The State was permitted to call, Jill Lattuca the mother of Alexia Mair (A.A. Vol. VI, pp. 1366-1367).

Over the objection of defense counsel, Ms. Lattuca was permitted to describe a conversation with her daughter wherein her daughter was describing what other students said regarding Mr. Zana. The hearsay statement included:

> Ms. Lattuca: She told me in the car the detective had talked her during school, and called her in, and that some of the kids, were saying that Mr. Zana was - - had been inappropriate with them.

Later, over defense objection, the witnesses stated:

> Ms. Lattuca: I told Lexi that if one person said it, it might not be true, but if a bunch of kids said it then it probably was, and that in this country we have a right to a fair trial and that I hope that what ever she had said to the detective was the truth and that was the most important thing (A.A. Vol. VI, pp. 1366-1367).

51.035. "Hearsay" defined.

"Hearsay" means a statement offered in evidence to prove the truth of the matter

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

"Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:

In Crawford, the Court considered the issue of whether the out of court statement may be admitted as long as it has adequate indicia of reliability or falls within a firmly rooted hearsay exception. The United State's Supreme Court explained that "[t]he right to confront ones accusers is a concept that dates back to Roman times." (Crawford, pp. 13, citations omitted). In Crawford, the U.S. Supreme Court carefully examined the history of the Confrontation Clause. The Court reasoned that,

First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex-parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding -era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind. Id. at 26. (Crawford, pp. 9, citations omitted).

In Crawford, the United State Supreme Court considered the issue of whether an out of court statement had been determined to be reliable. The Court provided that, "[w]e have no doubt that the courts believe they were acting in upmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safe guard the rights of the people; the likes of the dread Lord Jeffreys were not yet to distant a memory. They were loath to leave much discretion in judicial hands." (Crawford, pp. 18, citations omitted).

In the instant case, the State was unable to meet any of the factors ennunciated by NRS 51.035. The State was permitted to call Mrs. Ann Marcovecchio. Mrs. Marcovecchio was permitted to testify that she had received a phone call from Hugo Aguire stating that Melissa was upset because her fifth grade teacher had toucher her (A.A. Vol. VI, pp. 1216). This was not objected to.

Mrs. Marchovecchio was then permitted to testify to the subsequent conversations she had with Melissa regarding the events that occurred (A.A. Vol. VI, pp. 1217-1218).

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520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

NRS 51.035. "Hearsay" provides:

"Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless: . . .

B) During direct examination of Ann Marchovecchio, the prosecutor questioned Ms. Marchovecchio over her handwritten statement to police (A.A. Vol. VI, pp. 1221). Defense counsel objected to hearsay and asked for a hearing outside the presence of the jury. The prosecutor asked whether Ms. Marchovecchio had relayed personal information regarding Mr. Zana to the police. The prosecutor stated it was not being offered for the truth of the matter (A.A. Vol. VI, pp. 1222). Thereafter, the prosecutor asked:

The Prosecutor: Did you provide the police in your handwritten statement any information regarding possible computer usage of Mr. Zana.

Mrs. Marchovecchio: Yes. He'd been emailing and giving his email address out to students (A.A. Vol. VI, pp. 1222).

Thereupon, the defense objected and requested a hearing outside the presence of the jury. After the bench conference the prosecutor asked:

The Prosecutor: You were telling us about some of the things you had put in your handwritten statement.

Mr. Pitaro: Your Honor, that's hearsay. We've just had it at the bench. It's hearsay.

The Prosecutor: I'm moving on (A.A. Vol. VI, pp. 1223).

The jury should not have been permitted to hear information that Mr. Zana had been giving out his email to students as it was hearsay. More importantly, the prosecutor claimed it wasn't being used for the truth of the matter asserted which is exactly what he was using it for. This evidence should have been excluded in trial.

XI. MR. ZANA'S CONVICTIONS MUST BE REVERSED BASED UPON A CUMULATIVE EFFECT OF THE ERRORS DURING TRIAL.

In Dechant v. State, 116 Nev. Ad. Op. Number 100; 10 P.3d (2000), this Court reversed the murder conviction of Amy Dechant based upon the cumulative effect of the errors at trial. In

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

committed at trial denies the appellant his right to a fair trial, this Court will reverse the conviction. Id. at 113 citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). This Court explained that there are certain factors in deciding whether error is harmless or prejudicial including whether 1) the issue of guilt or innocence is close, 2) the quantity and character of the area, and 3) the gravity of the crime charged. Id.

As demonstrated above and based on numerous errors, Mr. Zana would respectfully request that this Court reverse his conviction based upon cumulative errors at trial.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CONCLUSION

Therefore, based upon the arguments herein, Mr. Zana would respectfully request the reversal of his convictions based upon violations of Amendments Five, Six and Fourteen of the United States Constitution.

DATED this 17 dated this June, 2008.

Respectfully submitted:

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702)384-5563

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amended appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17 day of June, 2008.

Respectfully submitted by,

CHRISTOPHER R. ORAM, ESQ.
Nevada Bar No. 004349
520 S. Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563
Attorney for Appellant

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 17 day of June, 2008, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S OPENING BRIEF**, addressed to:

David Roger
District Attorney
200 S. Third Street, 7th Floor
Las Vegas, Nevada 89155

Catherine Cortez Masto
100 North Carson Street
Carson City, Nevada 89701

An employee of Christopher R. Oram, Esq.

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
Las Vegas, Nevada 89101