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

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

APPELLANT'S REPLY BRIEF

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CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
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TABLE OF CONTENTS

CHRISTOPHER R. ORAM
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Las Vegas, Nevada 89101

TABLE OF AUTHORITIES

NEVADA CASES

UNITED STATES SUPREME COURT CASES

OTHER CIRCUITS

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
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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.

CHRISTOPHER R. ORAM
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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.**

STATEMENT OF THE CASE

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

STATEMENT OF FACTS

Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

CHRISTOPHER R. ORAM
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ARGUMENT

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.

The State should not have been permitted to unseal the records to use them against Mr. Zana in the instant case. This Court reasoned in Walker v. State of Nevada,120 Nev. 815, 820, 101 P.3d 787 (2004),

> Where, 14 years after petitioner's criminal records had been sealed, he was arrested on new allegations that were not the result of newly-discovered evidence related to the old charge, and the State presented no evidence that the later arrest was in any way connected to his conduct at the time of the earlier charges, subsection 2 of this section did not authorize the district court to unseal the records. Walker v. Eighth Judicial Dist. Court, 101 P.3d 787 (2004).

Mr. Zana would contend his case is on point with Mr. Walker's case. As in Walker, the State has presented no evidence that the Henderson case was in any way connected to the instant case. The district court was not permitted to unseal the records. Mr. Zana's case is very similar to the Walker case. This Court in Walker found:

> Walker was charged with a drug-related crime in 1989, and the criminal records were sealed in 1998. Now, in 2003, the State wants to reopen those criminal records on the basis that Walker is being prosecuted in a federal case for, among other things, a different drug-related charge. Walker was not arrested as a result of newly discovered evidence related to the 1989 charge; instead, he was arrested on entirely new allegations based on conduct occurring in 2003. The State presented no evidence that Walker's 2003 arrest was in any way connected to his conduct in 1989. Therefore, NRS 179.295(2) does not provide the district court with the authority to unseal Walker's 1989 records. Walker, 120 at 820.

In the instant case, the State is attempting to proceed as they did in the Walker case. However, this Court found Walker's arrest in 2003 was in no way connected to his conduct in 1989 and found the district court abused its discretion when it ordered Walker's criminal records unsealed.

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CHRISTOPHER R. ORAM
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The same is true for Mr. Zana's case. Mr. Zana was not arrested as a result of newly discovered evidence relating to the 1999 criminal complaint (Henderson incident). As with Mr. Walker, Mr. Zana was arrested on entirely new allegations. Further, the State presented no evidence that the instant case is in any way connected to his conduct in the 1999 criminal complaint (Henderson incident).

Mr. Zana would also contend the State's argument must fail as the State was attempting to introduce information as they are "same or similar offenses". As in Mr. Walker's case and in Mr. Zana's case, the State argues the statute permits a prosecutor to unseal criminal records if the person has been arrested for the same or similar offense and that there is sufficient evidence. However, the State's contention is misplaced. This Court noted in Walker,

> The trial court erred by interpreting § 179.295(2) to allow a prosecutor to unseal criminal records any time a defendant was charged with a crime that was similar to the crime involved in the sealed records. Section 179.295(3) did not allow a prosecutor to unseal records to obtain information for use against a defendant in a subsequent, unrelated criminal proceeding. As the arrestee was arrested on new allegations that were not the result of newly discovered evidence related to the old charge, Nev. Rev. Stat. § 179.295(2) did not authorize the trial court to unseal the records. Walker v. State, 120 Nev. at 815.

In the instant case, neither the district court or the State were permitted to unseal the records. The State was attempting to unseal the records to obtain bad act information against Mr. Zana in an unrelated criminal proceeding. There was not newly discovered evidence. Even if the Court considered it to be newly discovered evidence, the State's argument must fail as they did not re-charge Mr. Zana as they informed the Court in their March 5, 2007 Motion to Unseal Records (A.A., Vol. 1 pp. 200). In fact, the State is aware of the Walker case and how it is to be applied as they eloquently argue in their Motion to Unseal Records. In the State's Notice of Motion and Motion to Unseal Records (A.A. Vol. I, pp. 200):

> Unlike Walker, in the instant case, the State is seeking to unseal the records from 98 M0193X in order to prosecute the Defendant for that earlier crime. The newly

CHRISTOPHER R. ORAM
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> discovered evidence which has surfaced are the facts from the case C218103 wherein the Defendant is facing charges concerning facts which are strikingly similar to the 1998 incident. It is doubtful that the original 1998 case would have been dismissed had the Sate possessed this new evidence in 1998. Now that this corroboration is available, the State intends to prosecute the Defendant for the 1998 allegations. Therefore, the unsealing of the records in the Henderson Justice Court Case # 98MH0193X is appropriate in the instant situation (A.A., Vol. 1, pp. 203).

The State did not prosecute Mr. Zana on the 98MH1093X allegations and therefore is not permitted to unseal the records or use any information obtained through the inspection of the sealed records. The State informed the Court it would prosecute Mr. Zana. The State did not provide newly discovered evidence. Mr. Zana would contend the State understands this Court's decision in Walker as they correctly outlined it in their Motion. Mr. Zana would argue the State's only intent to present these two cases is to show Mr. Zana is of bad character.

It appears the State was aware they were not going to prosecute Mr. Zana for the 1998 case and only wanted to use the unsealed records and inadmissable bad acts against Mr. Zana. The State argues, "they should be permitted to offer testimony from those with first hand knowledge of the earlier incidents. . ." (R.A., pp. 2-3) This is not newly discovered evidence and the State was disingenuous in arguing to the Court they "intends to prosecute defendant for the 1998 allegations". (A.A., Vol. 1, pp. 203). Mr. Zana would argue the State did improperly prosecute Mr. Zana for the 1998 case by way of using it as bad act evidence against Mr. Zana.

Once again, Mr. Zana would contend his case is on point with Mr. Walker's. As this Court found:

> NRS 179.295(2) allows a prosecuting attorney to reopen sealed criminal records related to dismissed charges upon a showing that, based on newly discovered evidence, a pers will likely stand trial for the offense. 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.** Moreover, to

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

> allow the prosecution to use the statute as the district court suggests, i.e., any time that a defendant is charged with a similar offense, would essentially be reading the language "upon a showing that as a result of newly discovered evidence" out of the statute.

The State was permitted to use the unsealed records information against Mr. Zana in an unconnected trial. The State is aware of the Walker case and should have known they were not permitted to "use the unsealed records against a defendant in an unconnected trial." In Walker this Court found:

> 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 codefendants 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. Moreover, a brief review of the legislative history supports our reading of the statute. 120 Nev. 815. 821.

This Court further noted in Walker, "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." 120 Nev. 815, 819. The State had no statutory authority permitting them such disclosure. The State also cites Baliotis v. Clark County, 102 Nev. 568, 729 P. 2d 1338 (1986). However, as Mr. Zana noted in the opening brief, this Court in Yllas v. Nevada, 112 Nev. 863, 920 P.2d 1003 (1996), found that Baliotis is only applicable in licensing cases. The State also argues Connecticut v. Morowitz, 200 Conn. 440, 512 A. 2d 175 (1986) but also notes, "[t]here are no Nevada opinions as directly on point as the Morowitz decision." (State's Answering Brief, pp. 12, line 5). Mr. Zana would contend the State can not cite to any Nevada Statues or caselaw to support their proposition. More importantly, the State can not meet any of the requirements enunciated in NRS 179.295(3) or this Court's findings in Walker.

Interestingly enough, the State failed to address the Walker decision. Mr. Zana relied

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

heavily upon this Court's previous decision in Walker in his opening brief and throughout pre-trial pleadings. Yet, the State fails to analyze the legal reasoning adopted by this Court in Walker. Shockingly the State fails to cite to the Walker decision anywhere in their brief.

The State explains, "[t]here are no Nevada opinions as directly on point as the Morowitz decision." (State's Answering Brief, pp. 12, line 5). The State is well aware that the Walker decision is on point with the instant case and that is why they have failed to mention or analyze it in their brief. As was pointed out above, the State was aware of the Walker decision in pre-trial pleadings but doesn't want to address the opinion before this Court.

The State would have this Court rely upon decisions from other jurisdictions rather than this Court's decision in Walker. The State cites to Pennsylvania v. Butler, 448 P.A. Supp. 582, 672 A. 2d 806 (1996) (State's Answering Brief, pp. 10).

Mr. Zana would respectfully request this Court reverse his convictions and grant him a new trial as he 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.

At trial, the district court admitted the prior 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 correct?
Ms. Butler:	That's correct.

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

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).

Mr. Zana would argue Ms. Butler's statements lead the jury to believe there were multiple victims. The State contends, "[t]he testimony from the Pennsylvania victim and the Henderson victim were relevant and admissible to show Mr. Zana's motive and that touching in the instant case was not innocent and was not a mistake." (State's Answering Brief, pp. 16). However, the State's argument is misplaced. Mr. Zana is aware the district court permitted the testimony from the Pennsylvania victim and the Henderson victim. The district court did not order that implications of other unknown victims would be permitted. Permitting the State to present this bad act evidence to the jury, clearly implied "other young ladies" ages 10, 12, and 13 had been victimized by Mr. Zana. The State leaves the jury with no choice to infer there are at least three other victims, in addition to Ms. Butler and the Henderson case.

Mr. Zana would also disagree with the State's contention that "the questions were so general in nature that the jury would not have known that the other girls were also Mr. Zana's victims." (State's Answering Brief, pp. 19). The statement **is not** general. The prosecutor clearly implies the "other young ladies in the room with you that day?"are young victims of Mr. Zana. The State woefully argues "the jury would not have known that the other girls were also victims of Mr. Zana." (State's Answering Brief, pp. 19). The State argues, Mr. Zana opened the door by questioning witnesses about the criminal proceeding in the Pennsylvania case. However, the State cites no caselaw or authority for their proposition (State's Answering Brief, pp. 18). Mr. Zana did not open the door. Mr. Zana did not question Ms. Butler regarding these other alleged victims.

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

The State motioned the district court and the court held the necessary motions regarding the bad acts and what information would be permitted. However, the district court did not permit the State to question Ms. Butler regarding "other young ladies". Mr. Zana did not open the door and the State is not permitted to present bad acts without the necessary motions and hearings. More importantly, the State is not permitted to introduce naked and bare allegations. None of the "other young ladies" testified at the Petrocelli hearing.

Mr. Zana would contend the district court erred in permitting the State to present this bad act evidence as Tavares v. State, 1170 Nev. 725, 730, 30 P.3d 1128 1131(2001),

> In order to overcome the presumption of inadmissibility of an uncharged bad act, the prosecutor has the burden of requesting admission the evidence and establishing at a hearing outside the jury's presence that (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

In the instant case, the State did not meet any of the requirements. As the State failed to follow procedure, the Court is unable to determine if the incident is relevant. Secondly, the act was not proven by clear and convincing evidence. There is no information regarding "the other young ladies" other than the State's implication that they are other young victims. Lastly, the probative value is not substantially outweighed by unfair prejudice. Clearly, this information's probative value does not outweigh the prejudice suffered by Mr. Zana.

In Richmond v. State, 118 Nev. 924, 932, 59 P. 3d 1249 (2002), in which this Court found:

> 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." However, 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." Notably, we have held that it is "heavily disfavored" to use prior bad act evidence to convict a defendant "because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges." Our concern has been that this evidence will unduly influence the jury to convict the defendant because, based on that evidence, the jury believes the

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

defendant is a bad person.

The prosecutor was permitted to imply "other young ladies" were present with Ms. Butler, this statement severely prejudiced Mr. Zana. This Court carefully addressed the issue of bad act evidence in Richmond. In the instant case, the State was permitted to imply that Mr. Zana was a bad person as there were "other young ladies". This is unsubstantiated and should not have been presented to the jury. This bad act information was prejudicial and forced Mr. Zana to defend against vague and unsubstantiated claims.

A. Prior Bad Acts Remote in Time

The State also argues "the prior bad acts were not remote in time." (State's Answering Brief, pp. 19). However, Mr. Zana would contend not only are they remote in time but they also involve different conduct from the crime charged. The State cites Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413 (2002), in which this Court found:

> This court has generally held inadmissible prior acts that are remote in time and involve conduct different from the charged conduct. This court has stated that the use of uncharged bad acts is heavily disfavored and is likely to be prejudicial or irrelevant. Prior bad act evidence forces the accused to defend himself against vague and unsubstantiated charges and may result in a conviction because the jury believes the defendant to be a bad person. Thus, using uncharged bad acts to show criminal propensity is forbidden and is commonly viewed as grounds for reversal.

In the instant case, not only were the prior acts remote in time but they also involved conduct that was different from the crime charged. In this case, the facts of the alleged bad act in 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. Based on the dissimilarities between the instant allegations and the Pennsylvania incident, Ledbetter v. State, 129 P. 3d 671, 129 P.3d 671 (2006), is clearly distinguishable.

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

Mr. Zana would contend the district court erred in admitting this bad act 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 State argues "Ms. Marchovecchio's pool party testimony was not an implied prejudicial bad act."(State's Answering Brief, pp. 22). However, the State in footnote six states, "In fact, this evidence was highly relevant because the Pennsylvania lewdness charge involved a pool as well." (State's Answering Brief, pp. 23). Mr. Zana would argue this is exactly what he is complaining about. The State was permitted to have Ms. Marchovecchio imply Mr. Zana was involved in some sort of inappropriate behavior with his students during the pool party. As footnote number six established the State is aware they were trying to link this testimony to the bad act evidence of the Pennsylvania incident. If the State was not presenting this evidence to the jury as an implied bad act then why does the State draft a footnote linking this evidence to the bad act evidence. The State is aware they did not present this bad act evidence to the district court at the Petrocelli hearing. Therefore, they claim it is not a bad act.

The State further argues, "the incident in question was not a prior bad act. Mr. Zana committed no crime by being the only adult to swim with the kids at the pool party." (State's Answering Brief, pp. 23). Mr. Zana would disagree. Ms. Marchovecchio was permitted to imply "something didn't look quite right". By the State's own admission "this evidence was highly

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

relevant because the Pennsylvania lewdness charged involved a pool as well." (State's Answering Brief, pp. 23). If the State was going to present this evidence to the jury they were mandated to file the necessary motions and permit the district court to hold a Petrocelli Hearing.

In McMichael v. State, 94 Nev. 184, 577 P. 2d 398, (1978), this Court found, "[t]he rule prohibiting proof of prior misconduct is an application of the general rule; such evidence is admissible only if it is relevant for some purpose other than to show the accused probably committed the crime because he is of a criminal character." Meador v. State, 101 Nev. 765, 711 P.2d 852 (1985).

In the instant case, that is what was implied to the jury. Ms. Marchovecchio testified that "something didn't look right". This testimony combined with the prior bad acts noted above severely prejudiced Mr. Zana. The State also argues, "[t]his event was merely used to elucidate the entirety of the circumstances surrounding the crime and the evidence Defendant's state of mind and relationship with his students." (State's Answering Brief, pp. 23). However, Mr. Zana would disagree. The State was presenting this evidence to show Mr. Zana probably committed the crime because he is of criminal character. We do not know how long Ms. Marchovecchio observed the pool. Was Ms. Marchovecchio at the party from the time the very first person arrived and stayed until the last person left? If that is not the case, Ms. Marchovecchio can not testify Mr. Zana was the only adult swimming with the children. It is Mrs. Marchovecchio's opinion that "something didn't look right" at the time she picked up her daughter. It is also important to remember, that Ms. Marchovecchio's daughter is a victim in this case. It is human nature to perceive that "something didn't look right after" when a person is placed in this type of situation. Therefore, the State's argument that it tended to show the defendant's state of mind with his students is disingenuous.

In order to admit such evidence, the State must establish that (1) the prior act is relevant to

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

the 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 v. State, 113 Nev. 1170, 1176, 946 P. 2d 1061 (1997). The State did not establish any of the factors enunciated in Tinch and therefore, should not have been permitted to present this bad act evidence to the jury.

The State argues Mr. Zana waived this argument by not objecting to it at trial. (State's Answering Brief, pp. 23). Trial counsel objected as to relevancy. Mr. Zana would respectfully request this Court review this argument as plain error. Garner v. State of Nevada, 116 Nev. 770; 6 P.3d 1013 (2000).

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.

The district court should have granted Mr. Zana's Motion for a New Trial, based upon juror misconduct. On October 8, 2007, the Court heard testimony and arguments regarding Mr. Zana's Motion for New Trial. During this hearing, Juror Carol Marques testified (A.A., Vol III, pp. 480). Ms. Marques testified:

> On the last item we had to consider on of the other people said that they had - - it was regarding the video, that they had gone on the internet to research it to see if they could tell the ages, and they couldn't come up with the conclusion of what the ages of the person, or person, were; and that's was what happened." (A.A., Vol. III, pp. 481).

In Meyer v. State of Nevada, 119 Nev. 554; 80 P.3d 447 (2003), during the trial one of the jurors conducted independent research by consulting a Physician's Desk Reference (PDR) and then 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.

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

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. Thereafter, this Court held that considering all of the circumstances, that the average, 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.

During the October 8, 2007, Mr. Chris Thurman testified regarding his experiments:

The Court:	And did you do any independent research during the jury deliberation?
Mr. Thurman:	I put on pants to put my hand in my pocket to see how easy or hard that was, and I tried to find that website that they had those picture of and I couldn't find it (A.A., Vol. III, pp. 496).

. . .

The Court:	And did you talk to any of the jurors about what you did?
Mr. Thurman:	Yeah (A.A., Vol. III, pp. 496-497).

In conducting their deliberations, "jurors have a duty to consider only the evidence which is presented to them in open court." Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986) (citing Turner v. Louisiana, 379 U.S. 466, 472-73, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965); United States v. Bagnariol, 665 F.2d 877, 884 (9th Cir. 1981) (per curiam), cert. denied, 456 U.S. 962, 102 S. Ct. 2040, 72 L. Ed. 2d 487 (1982)). Evidence not presented at trial, acquired through out-of-court experiments or otherwise, is deemed "extrinsic." See Marino v. Vasquez, 812 F.2d

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

499, 504 (9th Cir. 1987); cf. United States v. Brewer, 783 F.2d 841, 843 (9th Cir.) (magnifying glass, which was not admitted into evidence but which the jurors used to examine photographic evidence, was not "extrinsic evidence" because no one asserted that the jurors understood the magnifying glass itself to have any bearing on the case), cert. denied, 479 U.S. 831, 107 S. Ct. 118, 93 L. Ed. 2d 64 (1986). When extrinsic evidence is presented to a jury that is considering a criminal case, the defendant is entitled to a new trial "if there exist[s] a reasonable possibility that the extrinsic material could have affected the verdict." United States v. Vasquez, 597 F.2d 192, 193 (9th Cir. 1979); see also United States v. Brodie, 858 F.2d 492, 495 (9th Cir. 1988). Such a possibility exists if the extrinsic evidence may have affected the reasoning of even one juror. United States v. Vasquez, 597 F.2d at 194; U.S. v. Hendrix, 549 F.2d 1225, 1227 (9th Cir. 1977). "The 'reasonable possibility' test of United States v. Vasquez is equivalent in severity to the harmless error rule applicable to constitutional errors under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]." Gibson v. Clanon, 633 F.2d 851, 853 (9th Cir. 1980), cert. denied 450 U.S. 1035, 101 S. Ct. 1749, 68 L. Ed. 2d 231 (1981). Thus, the proper inquiry is whether the prosecution has shown beyond a reasonable doubt that the extrinsic evidence did not affect the verdict. Chapman, 386 U.S. at 24; see also Marino v. Vasquez, 812 F.2d at 504. United States v. Navarro-Garcia, 926 F.2d 818 (1991).

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. This information was not presented to the jury in open court. Juror Thurman's experiments should be deemed "extrinsic". Mr. Zana would also contend Juror Thurman's experiments affected the jury's verdict. Juror Loren Becker testified:

Ms. Becker: I just believe the jury was having a hard time - -

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

. . . .

The Court: Okay, and after he made those statements then did the jury as a whole discuss those particular counts in relation to what he said?

Ms. Becker: It made us go back and reexamine the pictures ourselves in greater detail. (521).

By Ms. Becker's testimony it is clear Juror Thurman's experiments had an affect on the jury. Ms. Becker informs the Court "the jury was having a hard time". More importantly, Ms. Becker testified "it made us go back and re-examine the pictures." In Meyer v. State of Nevada,119 Nev. 554; 80 P.3d 447 (2003), this Court found:

> Proving misconduct :
>
> The general rule at common law was that jurors may not impeach their own verdict. However, common law also recognized an exception to that general. Where the misconduct involves extrinsic information or contact with the jury, juror affidavits or testimony establishing the fact that the jury received the information or was contacted are permitted. An extraneous influence includes, among other things, publicity or media reports received and discussed among jurors during deliberations, consideration by jurors of extrinsic evidence, and third-party communications with sitting jurors.

Juror Thurman's misconduct involved extrinsic information and then Juror Thurman's findings were discussed.

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: (1) the occurrence of juror misconduct, and (2) a showing that 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. Meyer, 119 Nev. at 564.

In some cases, an extraneous influence, such as jury tampering, is so egregious that prejudice sufficient to warrant a new trial is presumed. In addition to jury tampering, certain federal circuit courts of appeal have concluded that exposure to any extrinsic influence establishes a reasonable likelihood that the information affected the verdict and prejudice is assumed. In

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

contrast, other circuit courts look to the nature of the extrinsic influence in determining whether the influence presents a particular likelihood of affecting the verdict. Meyer, 119 Nev. at 564.

Of course, some types of extrinsic influences are, by their very nature, more likely to be prejudicial. Direct third-party communications with a sitting juror relating to an element of the crime charged or exposure to significant extraneous information concerning the defendant or the charged crime fall into this category. This is because the nature of the extrinsic information alone establishes a reasonable probability that the extrinsic contact affected the verdict. Meyer, 119 Nev. at 565.

However, other types of extrinsic material, such as media reports, including television stories or newspaper articles, generally do not raise a presumption of prejudice. Jurors' exposure to extraneous information via independent research or improper experiment is likewise unlikely to raise a presumption of prejudice. In these cases, the extrinsic information must be analyzed in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict. Meyer, 119 Nev. at 565.

If a juror has personal knowledge of the parties or of the issues involved in the trial that might affect the verdict, the communication of that knowledge to other jurors is considered extrinsic evidence and a form of misconduct. Likewise, if a juror considers and communicates a past personal experience that introduces totally new information about a fact not found in the record or the evidence, this would constitute extrinsic evidence and improper conduct. Personal experiences are to be used only to interpret the exhibits and testimony, not as independent evidence. Meyer, 119 Nev. at 568.

The State argues that Juror Thurman's, "alleged misconduct tended to undermine the State's case rather than prejudice the Defendant."(State's Answering Brief, pp. 28, lines 4-6). However, within two hours after revealing Juror Thurman's independent investigation, the jury

CHRISTOPHER R. ORAM
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returned guilty verdicts exposing Mr. Zana to multiple life sentences. 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 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.

Mr. Zana has proven all of the factors enunciated in Meyers v. State, 119 Nev. 554, 80 P. 3d 447; (2003) and would respectfully request he be granted a new trial.

As demonstrated above, Mr. Zana's case is on point with the Meyer case. One of Mr. Zana's jurors completed independent experiments causing the jury to consider extrinsic information. Mr. Zana has also demonstrated this extrinsic information caused him severe prejudice. One juror noted, "[i]t made us go back and reexamine the pictures ourselves in greater detail."(521). The jury's experiments clearly affected the verdict.

Jurors are prohibited from conducting an independent investigation and informing other jurors of the results of that investigation.

Mr. Zana would respectfully request this Court grant him a new trial based upon 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.

In the instant case, over defense counsel's objection, the State was permitted to introduce testimony from Ms. Karen Bjornson, the grandmother of Ms. Jillian Lozano. Additionally, Jillian's mother, Ms. Teresa Spence was permitted to testify regarding conversations that occurred between them and Jillian Lozano. Additionally, as the State admitted in their answering brief, "Ms.

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

Spence's testimony did briefly mention the conversation with her mother. But that conversation was discussed simply to lay a foundation and not to offer hearsay testimony." (State's answering brief, pp. 30). The State freely admits that they paraded in the mother and the grand mother to reiterate prior consistent statements of Ms. Lozano (State's Answering Brief, pp. 30-31).

In Mr. Zana's opening brief he cited to Tome v. United States, 513 U.S. 150; 115 S. Ct. 696; L.Ed 2d. 574 (1995). (See Appellant's Opening Brief, pp. 46-47). In Tome, the United State's 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 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.

Mr. Zana specifically complained the State should not be permitted to parade sympathetic incredible witnesses' who did no more than recount Ms. Lozano's out of court statements. Although the grandmother and mother's statements may have been probative they shed little light on whether Ms. Lozano had a charged motive to fabricate.

Interestingly enough, the State failed to analyze or even cite to Tome v. United States. In fact, Tome v. United States was the sole case cited and relied upon by Mr. Zana in his opening brief and the State failed to analyze/distinguish the Tome decision from the instant case.

Although the district court did make a finding that there was sufficient guarantees of trustworthiness pursuant to NRS 51.385, the district court's decision directly conflicts with the legal rationale enunciated by the United States Supreme Court in Tome v. United States. Based

CHRISTOPHER R. ORAM
520 South Fourth Street, Second Floor
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on the foregoing, Mr. Zana would respectfully request this Court reverse his convictions based upon violations of the Fourth, Sixth, and Fourteenth Amendments 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.

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

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. 554; 119 P.3d 107; (2005); see also, Garrettson v. State, supra, at 1068.

In the instant case, Mr. Zana specifically complained to numerous misstatements of fact in the application in support of the search warrant.

In the State's Answering brief, the State appears to concede that there were numerous incorrect statements in the application in support of the search warrant. Specifically, the State

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

acknowledges that the warrant application appears to be wrong regarding who was present when Mr. Zana allegedly touched a young female student. The State acknowledges that the warrant application is inaccurate (State's Answering Brief, pp. 32, lines 19-22).

Next, the State acknowledges that the warrant application was inaccurate when it indicated the victim's mother told the police the defendant had used email to communicate with her daughter. (State's Answering Brief, pp. 33). The State acknowledges that the warrant application is incorrect and that the mother did not tell the police that the defendant was emailing her daughter. This would appear to have given rise to the reviewing magistrate that the defendant was actually communicating by way of computer with the alleged victim. When in fact, this was inaccurate. Clearly, the mother had stated that Mr. Zana had emailed a neighbor's daughter. There is nothing criminal about speculation that Mr. Zana had emailed a neighbor's daughter. However, the point is clear, the warrant application inaccurately provided information to the reviewing magistrate. The State acknowledges this error in the warrant application.

The warrant application also insinuates the defendant has taken inappropriate digital photographs of students. Yet, the evidence clearly demonstrated that Mr. Zana was responsible for the annual yearbook. Hence, his role in preparing the yearbook required the taking of photographs. This occurs in every single school in the United States there is nothing remotely criminal about this activity. Hence, it was clear Detective Pena sought to imply a sinister intent on behalf of Mr. Zana regarding taking photographs of children. In fact, this was clearly innocent and part of Mr. Zana's responsibilities.

The statements made by Anne and Melissa Marchovecchio, make no reference to the use of child pornography by Mr. Zana. In fact, neither of the statements made by Anne or Melissa made reference to the computer usage at all (other than the alleged email between a neighbor child and Mr. Zana; the email was not described as pornographic in any way).

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

The warrant application provided that Detective Pena believed that Mark Zana had accessed child pornography. Yet, Mr. Zana had denied accessing child pornography in his interview to the police. However, Mr. Zana admitted to viewing one adult porn website.

The State acknowledges that the remedy for false statements within a warrant application is to disregard the false statements and view the rest of the information enunciated in the application to determine whether there was support for finding of probable cause. Franks v. Delaware, 439 U.S. 154, at 171-172 98 S.Ct 2674 (1978). (See also Doyle v. State, 116 Nev. 148, 159, 995 P. 2d 465 (2000). (State's Answering Brief, pp. 37). Mr. Zana established sufficient evidence of material misrepresentations in the warrant application which should have resulted in a Franks hearing.

If this Court views the warrant application without the false statements made by the affiant, there is no probable cause to seize the computers. What probable cause has the State provided that there was any criminal activity occurring on the computer. Students had alleged they had been fondled in the classroom. The police were aware Mr. Zana was in charge of the yearbook and therefore took pictures to place in the yearbook. Mr. Zana made a CD for students based upon those pictures. Mr. Zana may have communicated by way of email with "a neighbor's daughter". Nothing in the email was speculated to be involving child pornography. Mr. Zana had denied accessing child pornography. This was the information detailed within the warrant application. What probable cause was provided to demonstrate that the fruits of criminal activity would be located on the computers.

The State artfully informs this Court, "and, the affiant advised the magistrate that sexual predators are known to keep trophies of their crimes and it was **possible** the defendant had keep such trophies of his victim." (State's Answering Brief, pp. 39, lines 22-24). The State explains there was a possibility the defendant kept trophies of his victims on the computer. The State has

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

to provide the magistrate with proof of probable cause not "possible" cause. The very next sentence in the State's answering Brief, concludes, "the totality of the information constitutes a substantial basis for the magistrate to have issued a warrant." (State's answering brief, pp. 39, lines 24-25). Hence, the State informs this Court there was a possibility the defendant had kept trophies of his crimes. Then, the State boldly concludes there was a substantial basis for the magistrate to issue the warrant. Apparently, the State believes that the possibility that contraband maybe present is enough for probable cause. The State's conclusion in their answering brief provides this Court with the proof the State lacked any probable cause to seize the computers.

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 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). Although, the State contends "defendant's motion was untimely", Mr. Zana would contend he still motioned the district court for severance based upon NRS 173.115. 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

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

2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

In the instant case, the State can not meet either of the factors enunciated by NRS 173.115.

In the instant case, Counts X-XXI are not based upon the same act or transaction nor are they based upon a common scheme or plan. 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). [1] Mr. Zana requested severance between Counts I thru IX from Counts X thru XXI.

Interestingly missing from the State's brief is their analysis of Mr. Zana's citation to this Court's finding in Tabish and Murphy, 119 Nev. 293; 304, 72 P.3d 584 (2003). In the instant case, the incident is not relevant to the crime charged. In not severing the count the district ocurt committed error by subjecting Mr. Zana to undue prejudice.

In Tabish and Murphy, 119 Nev. 293; 304, 72 P.3d 584 (2003),

> In assessing the potential prejudice created by joinder of charges, the test is whether joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever. When some potential prejudice is present, it can unusually be adequately addressed by a limiting instruction to the jury. The jury is then expected to follow the instruction in limiting it's consideration of the evidence.

The State can not meet either factor enunciated by NRS 173.115. Counts X-XXI are not based on the same act or transaction and the acts are not based on a common scheme or plan. In

---

[1] 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).

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

trying these counts together, the State subjected Mr. Zana to unfair prejudice. Based on the foregoing, Mr. Zana would respectfully request this Court 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,

> 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. Zbiegien testified he reviewed the images obtained off the computers to determine the age of the people depicted (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).

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

The district court provided:

> 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).

However, the State presented Dr. Zbiegien. Dr. Zbiegien was the State's expert. Mr. Zana would agree with the district court the State has not proven their case. There is insufficient evidence. In reviewing the evidence in the light most favorable to the State, Mr. Zana would

CHRISTOPHER R. ORAM
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Las Vegas, Nevada 89101

contend a rational trier of fact could not have found essential elements of the crimes beyond a reasonable doubt. Dr. Zbiegien was unable to determine the children's ages with certainty (as Mr. Zana will demonstrate below).

The State argues, "furthermore, without citation, defendant alleges, that "the State's expert witness admitted the only real way to determine a person's age is by knowing their date of birth."

Defense counsel questioned Dr. Zbiegien:

Mr. Pitaro:	When we determine chronological age, chronological age, you will agree, would have to be done either by birth certificate or someway to knowing the day the person was born, correct?
Dr. Zbiegien:	If you wanted to know years - -
Mr. Pitaro:	The chronological age. Yes.
Dr. Zbiegien:	Years, months and days (A.A., Vol. VIII, pp. 1588).

Throughout the doctor's testimony he consistently testifies he is unable to determine the child's ages.

The Prosecutor:	Doctor, the particular photograph, are you able to offer an opinion as to the age of the child in that photograph?
Dr. Zbiegien:	Not with any certainty. No. (A.A., Vol. VIII, pp. 1580).

Dr. Zbiegien based his opinions on "her body size, comparing let's say for example her hand to his erect penis. Her face to the faces in the video clips. The child-like face that she has. The lack of certain parts of development." (A.A., Vol. VIII, pp. 1580).

Dr. Zbiegien further indicated he had difficulty determining the children's ages:

The Prosecutor:	And do you have an opinion as to the age of the child in that photograph?
Dr. Zbiegien:	The picture is a little bit better, but again, there's still enough missing data that I wouldn't feel comfortable (A.A., Vol. VIII, pp. 1580).

Mr. Zana would contend his case was very close. 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,

CHRISTOPHER R. ORAM
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pp. 1606).

Dr. Hyman concluded that the chronological ages 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 ages 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 the 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 types of websites (A.A. Vol., VIII, pp. 1621).

In the instant case, the State's expert was unable to determine the children's ages by any reasonable degree of medical certainty. There was insufficient evidence in the light most favorable to the State to convict Mr. Zana. Based on the foregoing, Mr. Zana would respectfully request this Court reverse his convictions and grant him a new trial.

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.

This argument is submitted as enunciated in the opening brief.

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.

This argument is submitted as enunciated in the opening brief.

///

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

This issue is submitted as enunciated in Appellant's Opening Brief.

CONCLUSION

Therefore, based upon the arguments herein, Mr. Zana would respectfully request that this Court grant him a new trial, based upon the fact that defendant did not receive a fair trial as afforded by the United States Constitution's Amendments V, VI, and XIV.

DATED this 26 day of January, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this 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 26 day of January, 2009.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 26 day of January, 2009, 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 REPLY BRIEF**, addressed to:

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