IN THE SUPREME COURT OF THE STATE OF NEVADA

GUILLERMO RENTERIO-NOVOA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 61865

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST. ATTY.
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

CATHERINE CORTEZ MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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CATHERINE CORTEZ MASTO
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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STATEMENT OF FACTS

In December, 2009, 16 year-old Roxana Perez disclosed that her mother's boyfriend, Guillermo Renteria-Novoa, had been molesting her for the preceding 5 years. At the time of her disclosure, Roxana was illegally residing in the United States, pregnant[1], and had been hiding the fact that, at approximately age 12, she carried on an incestuous relationship with her first cousin, Yahir. She was under a 'lot of stress'; on the verge of having to own up to conduct that would cause a great deal of strife for her and her family. V 1086. With her allegations of abuse, the family's focus quickly shifted to Guillermo and his purported misdeeds. See generally V, VI.

Roxana moved to the United States from Mexico in 2002 with her mom, Rosa; her sister, Perla; and her Aunt Janet. V 966. Roxana was approximately eight years old at the time.[2] V 965-66. The family resided together in a Las Vegas condominium. V 967. In 2003, Rosa, Perla, and Roxana moved out and into a nearby apartment. V 968. There, Rosa met Guillermo. V 968. The two began dating. V 969. In 2004, Rosa, Roxana, Perla, and Guillermo moved into an apartment at the University Apartments with Roxana's uncle, Manuel, and her 18-year old cousin, Yahir. V 969-70.

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[1] Prosecutors successfully excluded evidence of the pregnancy. See, infra.
[2] Roxana was born on August 30, 1993. V 965.

Sometime thereafter, when she was approximately 12 years old, Roxana began carrying on an intimate relationship with her cousin, Yahir. V 972-73. She and Yahir would often 'make out'. V 973. On one such occasion, when Roxana and Yahir were laying on the floor together, Guillermo walked in on them. V 973-74. Roxana did not become aware of this until some time later.

In 2005, the group moved a three bedroom apartment at the University Apartments. V 974-75. Roxana's Aunt joined them. V 975. While living at the three-bedroom apartment, Guillermo told Roxana that he walked in on her and Yahir when they were laying on the floor together. V 975-76. Roxana was "scared" that Guillermo would reveal her secret. V 976-77.

According to Roxana's trial testimony, sometime after this revelation, Guillermo began a pattern of sexually abusing her. V 978-79. Roxana testified that the encounters began in the afternoons after she returned home from school, while her mom was working. V 978; 984. Roxana claimed that Guillermo threatened to disclose her incestuous relationship with Yahir if she did not comply with his sexual requests. V 978-79; 985.

The First Incident

Roxana testified that, one afternoon when the encounters began, Guillermo took Roxana into a bedroom and told her to "put her shorts down."

V 979. He then touched her with his hands and mouth. V 979. She testified that his hands touched her 'boobs' and her vagina; that he would put his fingers inside of her vagina. V 980. Roxana indicated that Guillermo put his tongue inside her vagina and, after he turned her around and 'put her on her knees and her hands,' inside of her anus. V 982-83. She testified that Guillermo touched her in this way approximately two-three times a week. V 984.

The Second Incident

Roxana testified that, on another occasion, Guillermo summoned her to his room and licked her vagina, anus, and boobs. V 985. She indicated that he also put his fingers in her vagina and anus. V 985.

The Third Incident

Sometime in 2006, Roxana moved to the Andover Apartments with her mom and sister. V 988-89. The family lived at the Andover Apartments until the end of 2007. V 1000-01. Notably, Roxana turned 14 years old on August 30, 2007, while living at Andover. V 997. Although Guillermo did not move to Andover with the family, he would come visit. V 990. Sometimes he would come over when Roxana's mom was still at work. V 990. On one such occasion, Roxana claimed that Guillermo came over and

forced her into a bedroom by "pushing her" and "touching her butt while she was walking around." V 990-91.

Roxana indicated that, once inside the bedroom, Guillermo made her pull down her shorts and began licking inside of her vagina. V 992. He touched her boobs and put his fingers inside of her vagina. V 992. He also put his fingers and tongue inside of her anus. V 992-93.

Roxana testified that, at some point, Guillermo moved in to the Andover apartment. V 993-94. Thereafter, Guillermo slept in the same bed as Roxana and her mom. V 994. Roxana claimed that Guillermo slept in the middle. V 994. On one such occasion, Roxana indicated that Guillermo rubbed her butt on top of her clothes. V 994. She added that he "tried to touch her vagina." V 994.

The Fourth Incident

One weekend at the Andover apartment while no one was home, Guillermo purportedly licked Roxana's vagina and her anus; touched her boobs; and put his fingers inside of her vagina and anus. V 995. Roxana explained that Guillermo's tongue actually penetrated her anus; and that he did so after having her get on her hands and knees. V 995-96.

Roxana added that, at some point while she was living at the Andover apartment, Guillermo directed her to touch his penis. V 996. According to

Roxana, Guillermo had her touch his penis outside of his clothes; then he would "get it out" and tell her to touch it. V 997. Eventually, Guillermo masturbated to ejaculation. V 997.

The Fifth Incident

Roxana testified to another encounter while the family was living at Andover; however, unlike the other incidents for which she offered no date specifications, Roxana indicated that this encounter occurred after she turned 14. V 998-99. According to Roxana, Guillermo touched her boobs, vagina, and anus with his hands. V 999-1000. She added that he licked her vagina and the inside of her anus. V 1000. She further testified that Guillermo asked her to lick his penis, but she declined. V 1000.

Roxana testified that, at the end of 2007, she moved to the Tamarus Part Apartments with her mom, and her cousin, Maritza. V 1000-01. She indicated that, while residing there, Guillermo continued to communicate with her, but that she "did not let him touch her." V 1001-03. Then, in 2008, Roxana, Rosa, and Rosa's friend moved to the Southern Cove Apartments. V 1003-04. Around this time, Roxana got a cell phone (the number for which she could not recall). V 1004. Guillermo began calling and texting her. V 1004-05. Roxana knowingly took his calls. V 1130. She sometimes called him. V 1116. Guillermo often contacted her after school to ask if she was

home and let her know he was going to come over. V 1005. Roxana would let him into her apartment, purportedly because she was concerned Guillermo would tell her family about Yahir if she did not. V 1129-31.

The Sixth Incident

Roxana claimed that, on one occasion while she was living at Southern Cove, Guillermo again touched her. V 1010. Roxana testified that he placed her on the bed, then licked the inside of her vagina and anus. V 1010. She indicated that he put his fingers inside of her vagina and anus, and touched her boobs. V 1010-11. Finally, Roxana testified that, on another occasion while she was living at Southern Cove, Guillermo "tried to put her hand on his penis." V 1012. She indicated that Guillermo eventually took out his penis and masturbated to the point of ejaculation. V 1012.

The Seventh Incident

After she turned 16, Roxana moved to the Riverbend Village Apartments. V 1013. While there, Roxana claimed that Guillermo again touched her. V 1014. She recounted an incident in November, 2009 – the last time Guillermo supposedly touched her -- in which she came home from school to find Guillermo waiting for her. V 1016. Roxana indicated that, once inside the apartment, Guillermo followed her around, trying to touch her butt. V 1016. He eventually took her into her bedroom and put her on the

bed. V 1019. According to Roxana, Guillermo licked the inside of her vagina and anus, and inserted his fingers into both her vagina and anus. V 1020. He also directed her to touch his naked penis with her hand(s). V 1021.

According to Roxana, Guillermo continued to call and text her. Roxana quit responding; at which point Guillermo called Roxana's cousin, Maritza, and told Maritza to tell Roxana that things would 'get worse' if she did not return his calls. V 1022. Maritza confronted Roxana about this and Roxana told her Guillermo was "harassing" her. V 1023. Roxana said nothing about her sexual interactions with Guillermo. V 1023.

Martiza then told Roxana's Aunt, Janet. V 1023. When Janet confronted Roxana, Roxana disclosed the fact of her relationship with Yahir as well as the fact that Guillermo had been touching her sexually. V 1024. The following day, Roxana's cousin, Jeimi took her to see a counselor. V 1026. Janet told Roxana's mom, Rosa, what was going on. V 1028. The family then summoned authorities. V 1029. Roxana provided a written statement describing her interaction(s) with Guillermo. 1030-31.

Therafter, Det. Ryan Jaeger went to Roxana's school to interview her. V 1032-33. Roxana provided Det. Jaeger with her cell phone containing voicemails and texts from Guillermo. V 1033. The voicemails and texts

revealed that, in the time preceding her disclosure(s), Guillermo had been trying to contact her, threatening to reveal her relationship with Yahir if she continued to avoid him. V 1038-43. He also sent a picture of her underwear. V 1039-42. However, none of Guillermo's recorded communications were sexual in nature. V 1130.

While Roxana's trial testimony involved a lengthy tale of extortion-based abuse spanning a period of years, such was not always her story. She told her cousin, Maritza, that Guillermo was just harassing her. V1092. She told her Aunt only that he 'touched her.' V 1092. Roxana told the counselor that Guillermo had abused her for only one year. V 1090. She did not say anything about Guillermo touching her breasts, licking her vagina and/or anus, or masturbating in front of her. V 1091. She told the counselor that Guillermo touched her vagina on only three occasions. V 1092.

In her written statement to police, Roxana indicated that Guillermo touched her private parts, but mentioned nothing about him licking her vagina and/or anus, touching her breasts, or masturbating in front of her. V 1094. Roxana told Det. Jaeger that Guillermo often abused her when others were present in their apartment. V 1111. She also told Det. Jaeger that, on the last such incident, Guillermo only touched her butt and breasts. V 1113. It was not until Guillermo's preliminary hearing, when Roxana met with the

prosecutor, that she disclosed anything about vaginal and/or anal licking. V 1125-26.

Roxana indicated in her written statement that Guillermo had threatened to disclose her incestuous relationship with Yahir. V 1094. But she later told Det. Jaeger that her cousin, Maritza, actually knew about the affair with Yahir. V 1096. At trial, Roxana explained that she and Maritza had had a conversation about it, during which Maritza counseled her to stop because 'it was wrong.' V 1160. Maritza denied any such conversation and denied knowing about Roxana's relationship with Yahir. VI 1174-75; 1178.

Roxana admitted that, during her relationship with Guillermo, she "would tell him to buy [her] stuff," including a cell phone, clothes, shoes, and backpacks. V 1131-32. Guillermo complied. V 1132. Roxana also acknowledged that, as a result of her allegations against Guillermo, she and her mother were able to apply for and obtain 'U visas,' which allowed them to stay in the United States. V 1084-85; 1133.

Roxana's cousins, Maritza and Jeimi, testified that, during the time Guillermo was around their family, Roxana never indicated he was abusing her. V 1179-80; VI 1204. Maritza added that she never noticed anything out of the ordinary between Roxana and Guillermo; and that they appeared to have a 'normal' relationship, "like between a father and a daughter." V 1179.

Roxana's mother, Rosa, and her aunt, Janet, both testified to never having observed or suspected anything inappropriate between Roxana and Guillermo. VI 1192; 1195; 1224.

STATEMENT OF THE CASE

Prosecutors ultimately charged Guillermo with 36 Counts of Sexual Assault With a Minor Under the Age of 14 and 16; Lewdness with a Child Under the Age of 14; Sexual Assault; and Open and Gross Lewdness. I 1-3; 23-29; 40-55; 112-26; II 241-51. A jury convicted him of all counts. II 281-90. The instant appeal follows.

ARGUMENT

I. THE PROSECUTOR'S EXCLUSION OF MINORITY PANELISTS FROM GUILLERMO'S JURY VIOLATED HIS FEDERAL AND STATE CONSTITUITONAL RIGHTS.

Guillermo objected to the government's peremptory excusal of minority jury panelists Ms. Martinez (69), Mr. Aguilar (68), and Ms. Temple (64).[3] IV 897. The trial court overruled the objection. IV 904-20. This violated his Federal and State Constitutional rights. **U.S.C.A. VI, XIV; Nev. Const. Art. 1, Sect. 3, 8.**

[3] Defense counsel also objected to the excusal of Ms. Quince (55). However, subsequent inquiry into Ms. Quince's race revealed she was not an ethnic minority.

The United States and Nevada Constitutions provide for the right to a trial by a fair and impartial jury. **U.S.C.A. VI, XIV; Nev. Const. Art. 1 Sec. 3, 8**. Accordingly, racial and gender discrimination in the selection of jury members violates the defendant's rights, the jurors' rights and the state's rights to receive an impartial trial. **Batson v. Kentucky**, 476 U.S. 79 (1986). A *Batson* challenge involves the following three-step inquiry:

> There are three stages to a *Batson* challenge—(1) the opponent of the peremptory challenge must show 'a prima facie case of racial discrimination'; (2) the proponent of the peremptory challenge must then present a race-neutral explanation; and (3) the trial court must determine whether the parties have satisfied their respective burdens of proving or rebutting purposeful racial discrimination.

Hawkins v. State, 256 P.3d 965, 967 (Nev. 2011).

1. Prima facie case of racial discrimination.

The prosecutor used roughly one-third of her peremptory challenges to excuse minority panelists. Accordingly, the defense made out a prima facie case of racial discrimination.

2. Race-neutral explanations for the excusals.

The prosecutor claimed she struck Ms. Martinez because:

> ... she said at one point in time, if the State can't decide their case how can I. You went on to ask her, well, you know it's the State's burden, yes, and could you find him not guilty, yes. But her body language to me and when she said that, if the State can't decide their case how can I, it told me that she was not comfortable with the process and that she was uncomfortable with the idea of having to determine guilt on a person. And I

> don't know if it was the language barrier or if that's how she felt, but I need a juror who is able to deliberate and is able to weigh the evidence and is able to then go make a determination...

IV 899.

With respect to Mr. Aguilar, the prosecutor noted that she unsuccessfully tried to challenge him for cause. IV 898. The prosecutor claimed that Mr. Aguilar had a difficult time answering the questions even with the assistance of an interpreter, and that he appeared confused, nervous, uncomfortable, and unable to comprehend "what was going on." IV 898.

Finally, the prosecutor claimed that Ms. Temple's excusal was "more of a strategic decision based upon who was already on the panel." The prosecutor expressed concern that, until questioned by defense counsel, Ms. Temple withheld the fact that she knew of two individuals who claimed to have been sexually abused. IV 901. One of those individuals, a teenager, fabricated the abuse allegations. IV 901. The prosecutor claimed that Ms. Temple's failure to disclose these relationships until defense counsel's voir dire precluded further inquiry on the subject by the State. IV 901. This, together with Ms. Temple's initial failure to disclose the relationships, made the prosecutor "uncomfortable having her on my jury." IV 901.

3. Proof of purposeful discrimination.

The prosecutor's claimed reasons for excusing these jurors were merely a pretext to justify the race-based excusals. While the prosecutor claimed to have excused Ms. Martinez and Mr. Aguilar based upon, *inter alia*, language barrier issues, the prosecutor actually expressed satisfaction with each panelist's comprehension and communication skills early in the voir dire process:

> ... I don't know if they're [Ms. Martinez and Mr. Aguilar] not under – I mean, they've answered the questions thus far. I don't know if they're saying we don't fell comfortable sitting on a sexual assault trial because there's going to be complicated topics that we might not understand. But, you know, if one has lived here for 10 years and one for 12 years, and they've understood some things thus far, I think it seems though they can at least answer the basic questions that are being posed.

III 577. The trial court agreed. III 577.

Indeed, when questioned on the issue, Ms. Martinez indicated that, even without the assistance of an interpreter, she was able to understand all of the questions asked of the panelists. III 580-81. Mr. Aguilar indicated that he also understood most of the questions posed of the panelists without the assistance of an interpreter. III 582. When questioned with the help of court interpreters, both Ms. Martinez and Mr. Aguilar appeared capable of understanding the questions put to them. III 582-85; IV 791-800; 862-71.

The prosecutor declined the trial court's invitation to question Ms. Martinez and/or Mr. Aguilar regarding their ability to comprehend questions

asked of them. III 586. Indeed, "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." **Miller-El v. Dretke,** 125 S. Ct. 2317, 2329 (2005) (citations omitted); See also **Diomampo v. State**, 185 P.3d 1036, 1038 (2008).

With respect to the prosecutor's claimed concern over Ms. Martinez' statement: "...if the State can't decide their case how can I," Ms. Martinez actually clarified, *at the prosecutor's request*, that she understood the government's proof burden; and that she could return a guilty verdict upon a finding of proof beyond a reasonable doubt, as well as a not guilty verdict upon a finding that such proof was lacking. IV 865-71. And the prosecutor offered no specifics regarding Ms. Martinez' purportedly disturbing body language, nor did the trial court make any findings affirming the prosecutor's representations. See IV 908-910. Without an explicit finding by the trial court, this Honorable Court should not credit the prosecution's body language claim. See **Snyder v. Louisiana**, 128 S. Ct. 1203, 1209-12 (2008).

The prosecutor's 'concern' over Mr. Aguilar's 'discomfort' with the prospect of being involved in the instant trial was unique to Mr. Aguilar. At least one other panelist, Ms. Stiperski (62), expressed similar discomfort with

the charges. IV 828-29. And at least two others, Panelist 31 and Mr. Iverson (49), expressed concern over the nature of the charges given that each had 11 year-old daughters. IV 693-98; 700-01; 884. Mr. Garwood (48), also indicated discomfort with the instant charges, stating that, as the father of two girls, it would be hard for him to be fair and impartial. IV 720-22. The prosecutor did not attempt to excuse any of these panelists.[4] The prosecutor's failure to dismiss these non-minority panelists suggests that the claimed reasons for the minority dismissals were pretextual. **Diomampo**, supra 185 P.3d at 1038.

The prosecutor claimed to have excused Ms. Temple because of her failure to disclose her association with the two young sexual abuse complainants when initially canvassed by the trial court. But Ms. Temple did not withhold that information. During her initial canvass, the trial court asked Ms. Temple whether "she or anyone *close* to her" had ever been the victim of a crime, sexual in nature or otherwise. IV 781 (emphasis added). Ms. Temple mentioned that her son was the victim of an attempted murder. IV 781.

[4] While the defense ultimately exercised a peremptory challenge to excuse Mr. Iverson, the record indicates that he was the defense's final excusal. IV 889; 893. Accordingly, it appears as though prosecutors declined to exercise a peremptory challenge to excuse Mr. Iverson. IV 889; 893.

Later, when questioned by defense counsel, Ms. Temple disclosed that she knew of two individuals who made allegations of sexual abuse: a 5 year old and a 16 year old. IV 853. According to Ms. Temple, the 16 year old fabricated the abuse allegations. IV 853-54. But Ms. Temple did not claim a close association with either complainant. IV 853-55. In fact, she indicated the 16 year old was a friend of her son's. IV 854. So, there was nothing deceitful about Ms. Temple's failure to mention these two individuals when questioned by the trial court about 'close' association(s) with crime victims.

Additionally, nothing in the record suggests the prosecutor was denied an opportunity to question Ms. Temple about this claimed concern. While the prosecutor requested leave to conduct follow up voir dire on *other* panelists (See, e.g., IV 868), she did not ask to question Ms. Temple on the disclosures revealed during the defense voir dire. See generally IV. The prosecutor's failure to do so suggests that her claimed concern in this regard was nothing more than a sham. **Miller-El,** supra, 125 S. Ct. at 2329 (citations omitted); **Diomampo**, supra, 185 P.3d at 1038.

Finally, the trial court's reliance on the fact that several minority panelists remained on the jury does not immunize the State against equal protection claims. IV 906. "Rather, under Batson, the striking of one [minority] juror for a racial reason violates the Equal Protection Clause, even

where other [minority] jurors are seated, and even when valid reasons for the striking of some [minority] jurors are shown." **U.S. v. David**, 803 F.2d 1567, 1571 (11th Cir. 1986). In removing three minorities from the jury for unsupported reasons, prosecutor's violated Guillermo's Federal and State Constitutional rights. **U.S.C.A. VI, XIV; Nev. Const. Art. 1, Sect. 3, 8.**

4. Structural error.

Discriminatory jury selection in violation of *Batson* generally constitutes "structural" error that mandates reversal. **Diomampo**, supra, 185 P.3d 1031. Thus, the instant prosecutor's exclusion of minority panelists from Guillermo's jury warrants reversal.

II. THE INFORMATION FAILED TO ALLEGE WITH ADEQUATE SPECIFICITY THE ACTS CONSTITUTING THE CHARGED CRIMES, THEREBY VIOLATING GUILLERMO'S CONSTITUIONAL AND STATUTORY RIGHTS.

"There are a lot of dates in this case. And fortunately, we are able to tie dates with places that Roxana lived. She moved, basically, on a yearly basis, and so that helps us in determining her age at certain times."

- ***Prosecutor Nick Graham in closing argument.***

So prosecutors knew when certain acts charged in the Information occurred. VI 1380-92. But they chose not to allege as much, instead charging a blanket (5) year window of time (between February 1, 2005 and December 31, 2009) within which the 36 nearly identical charged crimes occurred. II 242-45. The trial testimony ultimately disclosed a series of

sexual encounters. With limited exception(s), prosecutors charged multiple offenses for each encounter. Because the encounters usually involved the same series of acts, each set of charges was virtually identical. The government's failure to plead the charges with any date specification(s) made correlating offense(s) to allegation(s) a virtual impossibility, thereby impairing Guillermo's ability to defend the case both at trial and on appeal. This violated Guillermo's Federal and State Constitutional rights, as well as Nevada law. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8; NRS 173.075**.

The Sixth Amendment to the U.S. Constitution provides that a criminal defendant is entitled to be informed of the nature and cause of any and all accusations against him. **U.S.C.A. VI, XIV.** Codifying this, **NRS 173.075(1)** requires that an indictment or information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." See also **Sheriff v. Levinson**, 95 Nev. 436 (1979).

> Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law.

Simpson v. District Court, 88 Nev. 654, 660 (1972). Indefinite pleading allows prosecutors freedom to change theories at will, thus denying an

accused the fundamental rights the Nevada legislature intended a definite Indictment to secure. Id.

Under **Simpson**, the instant Information failed to allege with adequate specificity the misconduct giving rise to the instant charges. One need do no more than try to match Roxana's trial testimony to each of the charged crimes in order to see the problems engendered by the vagaries in the Information. It is exceedingly difficult to identify with certainty which charges pertain to which of Roxana's allegations. This, in turn, made it exceedingly difficult for Guillermo to present any type of cogent defense to the numerous charges stemming from different dates.

Knowing Roxana could narrow the time frame for each encounter (by describing the residence where each encounter occurred), prosecutors could have divided the charges by approximate offense date. They did not. By instead pleading a 5 year time frame with multiple, identical charges, prosecutors reduced Guillermo's defense to little more than guesswork. Under the authority outlined above, this violated his Federal and State constitutional rights, as well as Nevada law. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8; NRS 173.075**. As such, this court must reverse.

III. THE TRIAL COURT VIOLATED GUILLERMO'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS BY REFUSING TO ALLOW HIM TO PRESENT EVIDENCE CRITICAL TO HIS DEFENSE.

At trial, the defense sought to introduce evidence that, at the time she told authorities Guillermo abused her, Roxana also revealed she was pregnant. III 423-75. She had been hiding her pregnancy as well as her incestuous relationship with Yahir. III 423-75. Roxana told Det. Jaeger that the abuse allegations involving Guillermo came because she had to tell her mother about the pregnancy. III 424-25. At the same time, she also admitted to the incestuous sexual relationship with her cousin. III 425.

Portraying herself as the hapless victim of Guillermo's sexual misdeeds could, and probably did, assuage her family's anger over her incestuous and (arguably) promiscuous behavior. III 424-77. This, the defense argued, amounted to a very clear motive to fabricate the allegations against Guillermo. III 424-77. The trial court refused to allow the defense to admit evidence of Roxana's pregnancy.[5] III 475. This violated Guillermo's Federal and State constitutional rights. **U.S.C.A. V, VI, XIV; Art. 1, Sect. 3, 8.**

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[5] Defense counsel immediately motioned the trial court for a stay of the proceedings in order to challenge the court's ruling via a Petition for Writ of Mandamus/Prohibition to his Honorable Court. III App. 475-477. The trial court denied the stay request. III App. 477. This Honorable Court ultimately declined to hear the matter on an extraordinary Writ. VII.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." **Chambers v. Mississippi**, 410 U.S. 284, 302 (1973). Precluding a defendant from presenting evidence tending to exculpate offends Sixth Amendment jury trial, right to counsel, and confrontation clause guarantees. See **Taylor v. Illinois**, 484 U.S. 400, 409 (1988) (defendant's right to present evidence "stands on no less footing than any other Sixth Amendment right"). It also abrogates Fourteenth Amendment Due Process guarantees, which "assure an accused the right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case." **Vipperman v. State**, 96 Nev. 592, 596 (1980) (citations omitted); **Crane v. Kentucky**, 476 U.S. 683, 690 (1986).

The pregnancy evidence was central to the defense case theory, as defense counsel explained:

> In the declaration of warrant the officer says Roxana had just told her mother she was pregnant... She's blaming Mr. Novoa for raping her to get her out of trouble for being pregnant by somebody else. If she tells her mom that she's pregnant, she's going to get in trouble. But if she says at the same time, oh, and I've been sexually abused by your ex-boyfriend for years, that's going to minimize any amount to trouble she would have gotten in for being pregnant in the first place.

III 426-28. Thus, under the authority outlined above, the trial court's exclusion of the pregnancy evidence violated Guillermo's Federal and State constitutional rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 3, 8.**

Additionally, **NRS 50.085(3)** provides that: "specific instances of the conduct of a witness... may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness..." While Roxana's pregnancy amounted to more of a status than conduct, the point is the same: Guillermo was entitled to introduce that evidence as it bore on her motive to fabricate and, hence, her truthfulness. Thus, under **NRS 50.085(3)**, Guillermo was entitled to introduce evidence of Roxana's pregnancy.

The trial court excluded the evidence under **NRS 50.090**, Nevada's Rape Shield law. **NRS 50.090** precludes introduction of "... any previous sexual conduct of the victim of the crime to challenge the victim's credibility..." However, **NRS 50.090** did not apply to the issue at bar. First, defense counsel did not seek to inquire about Roxana's prior sexual conduct. Counsel sought to inquire about her pregnancy status. While Roxana's pregnancy certainly *implied* prior sexual conduct, this was not the evidence defense counsel sought to elicit. Second, defense counsel did not want to elicit the pregnancy evidence in order to challenge Roxana's credibility by showing her to be unchaste, as is the point of **NRS 50.090**. Rather, as

defense counsel explained at length, the Roxana's pregnancy and her disclosure of the same provided a motive to contrive the abuse allegations against Guillermo. Accordingly, **NRS 50.090** did not prevent admission of the pregnancy evidence.

Regardless, **NRS 50.090** cannot be applied in a way that impedes a defendant's constitutional right to present his theory of defense. See **Michigan v. Lucas**, 500 U.S. 145, 149 (1991). "In the absence of any valid state justification, exclusion of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." **Crane**, supra, 476 U.S. at 690-91. Thus, **NRS 50.090** must yield to a defendant's right to present his theory of defense. And as defense counsel made clear, Guillermo's defense theory centered upon the argument that Roxana conceived the abuse allegation(s) against him in an attempt to minimize her culpability for, and/or the impact of, her pregnancy. Accordingly, the trial court erred by excluding the pregnancy evidence under **NRS 50.090**.

The improper exclusion of the pregnancy evidence warrants reversal. Defense counsel explained at length the critical nature of the evidence, indicating that the trial court's ruling "gutted" the Guillermo's defense, requiring counsel to re-prepare the defense voir dire, opening statement, and

cross-examinations. III 424-81. Had Guillermo been able to present this compelling evidence of Roxana's motive to fabricate the charges against him, the resulting verdicts may have been very different. Thus, the trial court's exclusion of the pregnancy evidence warrants reversal.

IV. THE TRIAL COURT'S ADMISSION OF ROXANA'S PRIOR, OUT-OF-COURT STATEMENT(S) VIOLATED GUILLERMO'S CONSTITUTIONAL AND STATUOTRY RIGHTS.

On cross-examination, defense counsel questioned Roxana about numerous inconsistencies in her various accountings of the purported abuse. See, e.g., V 1084-1133. On re-direct, the prosecutor went through several of Roxana's prior statements and asked her to adopt those portions that were consistent with her trial testimony. See, e.g., V 1133-53. Over defense objection,[6] the trial court allowed the prosecutor to read/recount these selected portions of Roxana's prior statement(s) to the jury. V 1133-53.

The prosecutor began by asking Roxana several questions about what she told her counselor. V 1133-38. At points, the prosecutor questioned Roxana by reading from the counselor's notes:

> ...The counselor went on to say that you had told him that you were sexually abused for the past... year, and that you had been threatened by your mom's boyfriend since you were 13. Tell me what you told the counselor in terms of what had happened with the defendant and for how long?

[6] Defense counsel interposed objections after the prosecutor asked several questions in this fashion about Roxana's prior statement(s). V 1139; 1152.

V 1136.

The prosecutor then asked Roxana about her statement(s) to police. V 1138. The prosecutor went through each statement, asking Roxana to acknowledge those portions that were consistent with her trial testimony. For example, with respect to her handwritten statement, the prosecutor asked such questions as:

> So in that statement, then, to the police, the written one, you also specifically told the officer that he has also touched you in your private parts and that he put his hand inside of you. Do your remember saying that?

V 1145. This type of inquiry continued with respect to Roxana's statement to Det. Jaeger, with the prosecutor asking such questions as:

> You told him [Det. Jaeger] on Page 13 that the last time he would start – he was following you around and that he would start touching your ass and your boobs, that he asked you, oh, are you ready? Do you remember telling him that?

V 1148-49.

In precisely this same manner, the prosecutor then asked Roxana about her preliminary hearing testimony. V 1149-53. The prosecutor began by eliciting testimony that Roxana only revealed the *complete* details of the abuse to the prosecutor who handled the matter at the preliminary hearing. V 1149-50. Thereafter, the prosecutor asked: "There [the preliminary hearing] you testified to everything that you testified today?" to which Roxana

responded in the affirmative. V 1150. Then came the specifics, with such questions as:

> So at preliminary hearing you were asked, did he ever want you to touch his penis, and you said yes. That he asked you to move your hand around. That you – you were asked, 'Did you actually use your hand to touch his penis at Andover?' You said 'He would grab my hand and put it there, you know.' Then go on to say that you moved it around and he ejaculated. 'Question: Okay. Did he ejaculate? Answer: With my hand? Question: Yes.' And then you said, 'no. When he would – when he would do that, he would use his hand.'

V 1151. After answering in the affirmative, Roxana went on to explain herself further. V 1151-52.

The trial court's admission of Roxana's prior out-of-court statements, and the leading and sometimes narrative fashion in which the prosecutor elicited them, violated Guillermo's constitutional and statutory rights.[7] **USCA VI, XIV; Nev. Const. Art. 1, Sect. 8; NRS 51.035; NRS 50.115.** "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..." **U.S.C.A. VI; XIV**. Codifying the above, **NRS 51.035** (the hearsay rule) excludes from evidence hearsay testimony. "Hearsay" is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted." **NRS 51.035**.

[7] Appellant challenges all of the out-of-court statements admitted on re-direct examination.

Roxana's prior statements and preliminary hearing testimony amounted to hearsay. They were out-of-court statements offered to prove the truth of the matter(s) asserted: that Guillermo abused her in the manner alleged at trial. Thus, the trial court erred by admitting Roxana's numerous prior out-of-court statements.

The trial court further erred by allowing the prosecutor to elicit such statements by essentially reading them into the record, and asking Roxana to simply adopt them as true. With this, the prosecutor improperly led her own witness -- sometimes utilizing narrative questions -- a method of examination prohibited by **NRS 50.115** (leading questions prohibited on direct examination absent permission of the court).

The improper admission of the prior statement evidence, as elicited throughout Roxana's entire redirect examination, warrants reversal. The prosecutor used the prior consistent statements to bolster Roxana's trial testimony. Such bolstering proved sufficient to tip the scales in favor of conviction on each of the charged crimes. Thus, the error occasioned by the admission of Roxana's numerous hearsay statement(s) warrants reversal.

V. REPEATED REFERENCES TO ROXANA AS A 'VICTIM' VIOLATED GUILLERMO'S DUE PROCESS RIGHTS.

Prior to trial, Guillermo motioned the trial court to exclude any/all references to Roxana as a 'victim'. I 140-50. This, Guillermo contended, was

a determination left solely to the jury. I 140-50. The trial court denied the motion. II 350.

Reference to Roxana as a 'victim' occurred both during the trial and in the jury instructions. It began when prosecutors introduced themselves to the jury and summarized the charges as well as their case. The presenting prosecutor told panelists that: "... the *victim* in this case, Roxana Perez, is the same *victim* in all of the counts..." III 501 (emphasis added). During jury selection the prosecutor, when questioning a panelist about serving on a sexual assault case, asserted that, often in such cases, "there's only the *victim* and the suspect..." III 677 (emphasis added). The prosecutor later informed jurors that "... the *victim* in this case is now a 19 year old woman." III 685 (emphasis added). Thereafter, the prosecutor told panelists that "... the age around when the State has alleged that this starts is when the *victim's* about 11..." IV 695 (emphasis added).

During Det. Jaeger's testimony, both the prosecutor and the detective referred to Roxana as a 'victim.' See VI 1259 ("Did you get a case forwarded to you at that point in time reference *victim* Roxana Perez?") (emphasis added). The prosecutor and the detective repeatedly used the term 'victim' to describe sexual assault complainants such as Roxana. See, e.g., VI 1259-61 ("So will a *victim* be identified... and then a case will get

forwarded to you...?"; "And is that how it happened in this case with Roxana Perez?"; "And what is the first thing that you do when you get a sexual assault case, basically just the name of the *victim*?"; "...[T]hen you call the *victim*, schedule an appointment to talk to the *victim*...?") (emphasis added). Then, in the critical jury instruction defining sexual assault, the trial court stated:

> Instruction 8 [defining sexual assault] stated: "A person who subjects another person to sexual penetration... against the alleged victim's will or under conditions in which the perpetrator knows or should know that the *victim* is mentally or physically incapable of resisting or understanding the nature of his conduct is guilty of Sexual Assault.

II 256 (emphasis added).

The repeated references to Roxana as a victim at trial violated Guillermo's Due Process rights. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 3, 8.** Whether Roxana was, indeed, a victim was the sole issue at trial. The prosecutor's use of the term 'victim' amounted to a *de facto* interjection of the prosecutor's personal opinion that Guillermo was guilty of the charged crimes. This is improper, as "an injection of [a prosecutor's] personal beliefs... detracts from the 'unprejudiced, impartial, and nonpartisan role that a prosecuting attorney assumes in the courtroom." **Collier v. State**, 101 Nev. 473, 480 (1985). Likewise, by referring to Roxana as a 'victim,' the investigating detective essentially opined that Roxana had, indeed, been

victimized by Guillermo as she claimed. Such vouching is improper. See **Lickey v. State**, 108 Nev. 191 (1992) (improper for a witness to vouch for another).

Finally, by using the term 'victim' in the jury instruction(s), the trial court implied that a crime had been committed; that there was, in fact, a victim; and that Guillermo's contention to the contrary lacked merit. This, too, was improper. See, e.g., **State v. Nomura**, 903 P. 2d 718 (Haw. App. 1995) ("...jury instructions referencing the complainant as a 'victim' are "... inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness,,, was acted upon in the manner required under the statute to prove the offense charged.")

Thus, the use of the word 'victim' by the prosecutor, an investigating official, and/or the trial court, either in whole or in part, infected the trial with unfairness and minimized the prosecution's proof burden in violation of Guillermo's Due Process rights. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 3, 8.** Whether Roxana was, indeed, a 'victim' was a determination left solely to jurors. The repeated use of that term implied that Guillermo perpetrated crimes upon Roxana, and that guilty verdicts were but a foregone conclusion. Accordingly, this Court must reverse.

VI. THE ADMISSION OF GUILLERMO'S STATEMENT TO POLICE VIOLATED HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

Prior to trial, Guillermo motioned the lower court to exclude evidence of his statement to Det. Jaeger. I 180-218. At the hearing on the motion, Det. Jaeger testified that, after interviewing Roxana, he contacted Guillermo. II 387-96. The two initially spoke over the phone, at which time Det. Jaeger told Guillermo about Roxana's accusations. II 387-96. Det. Jaeger informed Guillermo that, if he did not tell 'his side of the story,' the case would get submitted for prosecution with only Roxana's version of events, and a warrant would issue for his arrest. II 396-97. Not surprisingly, Guillermo agreed to meet with Det. Jaeger at the LMVPD detective bureau. II 389.

Det. Jaeger conducted the interrogation in an interview room "no bigger than a closet with a table in it and two chairs. There is one door in the room, no windows. It's a pretty small room." II 390. Det. Jaeger did not recall telling Guillermo he could leave the if he wanted. II 400-01. Det. Jaeger conducted the interrogation in English, despite the fact that Guillermo expressed concern that his "English was not good." II 391; 398. In this regard, Det. Jaeger declined to summon an interpreter, something that would have required nothing more than a "phone call." II 399. Det. Jaeger then *Mirandized* Guillermo in English, declining to ask him if he agreed to waive

his rights. II 400. Guillermo never indicated he wanted to speak to Det. Jaeger about Roxana; he just began talking. II 400. Det. Jaeger then proceeded to question him about his interaction(s) with Roxana. II 390-409. At one point, Guillermo, speaking in English, did not make any sense. II 402.

The admission of this statement at trial violated Guillermo's Federal and State constitutional rights. **USCA V, XIV; Nev. Const. Art. 1, Sect. 8.**

1. Guillermo did not freely and voluntarily confess.

A criminal defendant is deprived of due process of law if his conviction is based, in whole or in part, upon an involuntary confession, even if there is ample evidence aside from the confession to support the conviction. **Jackson v. Denno**, 378 U.S. 368, 376 (1964). Thus, a confession is admissible only if it is freely and voluntarily made.[8] **Steese v. State**, 114 Nev. 479, 488 (1998). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Id (quoting **Blackburn v. Alabama**, 378 U.S. 368, 376 (1960)).

Whether a confession is the product of "rational intellect and a free will" hinges not only on the means by which the confession was extracted,

[8] The prosecution must prove the voluntariness of a confession by a preponderance of the evidence. **Stringer v. State**, 836 P.2d 609, 612 (Nev. 1992.

but the subjective effect that such extrication methods have on *a particular defendant*. **Miller v. Fenton**, 474 U.S. 104 (1985). "[C]certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive... that they must be condemned under the Due Process Clause of the Fourteenth Amendment." **Passama v. State**, 735 P.2d 323 (citations omitted).

This Court requires a 'totality of the circumstances' analysis to determine the voluntariness of a confession. **Steese**, supra. While the Court considers many factors in this analysis (such as an accused's lack of education/low intelligence) confessions obtained by physical intimidation or psychological pressure are inadmissible. **Steese**, supra, 114 Nev. at 488. Promises made by the police to a suspect are crucial to a determination of voluntariness. Id. If promises made, implicit or explicit, trick a confessant into confessing, the confession is involuntary. **Franklin v. State**, 96 Nev. 417, 421 (1980).

Here, Det. Jaeger coerced Guillermo into confessing by telling him he would be arrested if he did not talk. This falsely implied that Guillermo would not be arrested if he simply told 'his side of the story.' Accordingly, the arrest warrant threat amounted to nothing more than trickery designed to elicit a confession. As such, Guillermo's confession was not the product of a

rational intellect and free will and, therefore, was not freely and voluntarily given. **U.S. v. Rogers**, 906 F. 2d 189, 191 (5th Cir. 1990) (confession involuntary partly due to assurance that defendant would not be arrested if he cooperated). The subsequent admission of his statement at trial violated Guillermo's constitutional rights. **U.S.C.A. V; XIV; Nev. Const. Art. 1, Sect. 8.**

2. Guillermo did not knowingly and voluntarily waive his *Miranda* rights.

The Fifth Amendment privilege against self-incrimination provides that "[n]o person... shall be compelled in any criminal case to be a witness against himself. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sec. 8.** "[T]he accused must be adequately and effectively apprized of his rights and the exercise of those rights must be fully honored." **Miranda v. Arizona**, 384 U.S. 436, 467 (1966). Thus, a suspect's statements made during a custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning. **Taylor v. State**, 114 Nev. 1071 (1998) (citing **Miranda**, supra, 384 U.S. at 469-473).

'Custodial interrogation' is defined as "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" **Mejia v. State**, 134 P.3d 722 (Nev. 2006) (internal citation omitted). 'Custody' for Miranda

purposes means a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest." **Casteel v. State**, 131 P.2d 1 (Nev. 2006). If there is no formal arrest, the pertinent inquiry is whether a reasonable person in the suspect's position would feel "at liberty to terminate the interrogation and leave." Id. 'Interrogation' is defined as "express questioning or its functional equivalent." **Rhode Island v. Innis**, 446 U.S. 291 (1980).

Guillermo was custodially interrogated. His interrogation took place inside a closet-sized room at the police department. He was not told he was free to leave. He was misled to believe that his refusal to provide a statement would result in a warrant issued for his arrest. No reasonable person in like circumstances would have felt free to resist and/or terminate the interrogation. Det. Jaeger expressly questioned Guillermo about Roxana's allegation(s). Accordingly, Guillermo was the subject of a custodial interrogation for which a proper *Miranda* warning and waiver was required.

Before introducing a defendant's incriminating statement, the government must prove by a preponderance of the evidence that the accused voluntarily, knowingly, and intelligently waived his/her Miranda rights. **Colorado v. Connelly**, 479 U.S. 157, 169-70 (1986). The government must establish that any waiver was "voluntary in the sense that it was the product

of a free and deliberate choice rather than intimidation, coercion, or deception" and that the defendant had a "full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it." **Moran v. Burbine**, 475 U.S. 412, 421 (1986). "Merely giving warnings to an accused does not satisfy the duties of an interrogating officer or make any statement the accused might make then admissible. The officer [needs to] go further and make sure the accused, knowing his rights, voluntarily relinquishes them." **U.S. v. Rodriguez**, 931 F. Supp. 907 (D. Mass. 1996). Additionally, "language difficulties may impair the ability of a person in custody to waive [his Miranda] rights in a free and aware manner." **U.S. v. Heredia-Fernandez**, 756 F.2d 1412, 1415 (9th Cir. 1985).

Guillermo did not knowingly and intelligently waive his *Miranda* rights. Guillermo is a native Spanish speaker. He expressed concern over transacting the interrogation in English, stating that his English skills 'were not good.' While Guillermo answered affirmatively when queried as to whether he understood his rights, prosecutors failed to demonstrate that the English *Miranda* warning, with its legal concepts and vernacular, did, indeed, survive Guillermo's limited English-speaking abilities. Det. Jaeger admitted that, on at least one occasion, Guillermo's English response to a question posed during the interrogation made no sense. Thus, prosecutors failed to

establish that Guillermo knowingly and intelligently waived his *Miranda* rights. See **U.S. v. Garibay**, 143 F.3d 534 (9th Cir. 1998) (no valid *Miranda* warning and waiver where investigating officer assumed that defendant, a native Spanish speaker who graduated from a U.S. high school, understood sufficient English to knowingly and intelligently waive his rights).

Finally, Guillermo never specifically waived his rights. A valid waiver "cannot be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was ultimately obtained." **Miranda**, supra, 384 U.S. at 475 (1966). Again, Guillermo thought that waiving his rights was necessary to prevent authorities from issuing a warrant for his arrest. Thus, Guillermo did not knowingly and intelligently waive his *Miranda* rights. As such, the trial court's admission of his statement to Det. Jaeger violated his Federal and State constitutional rights. **U.S.C.A. V; XIV**; **Nev. Const. Art. 1, Sect. 8.**

3. **Reversible error.**

Absent trial court's errant admission of Guillermo's statement to Det. Jaeger, the resulting verdicts likely would have been very different. Guillermo admitted to engaging in sexual acts with Roxana. Little evidence is more damaging than an accused's own admission(s) to engaging in various sexual acts with a minor. Accordingly, the prejudice occasioned by the trial

court's admission of Guillermo's statement(s) to Det. Jaeger warrants reversal.

VII. THE TRIAL COURT'S REFUSAL TO DECLARE A MISTRIAL FOLLOWING THE REVELATION OF EXCULPATORY EVIDENCE VIOLATED GUILLERMO'S FEDERAL AND STATE CONSTITUIONAL RIGHTS.

Prior to trial, Guillermo filed a Motion for Discovery requesting, *inter alia*, any/all material exculpatory to the defense, including "any information regarding immigration benefits received by the complaining witness and/or family members as a result of allegations in this case." I 160-69 (Specific Request No. 15). At the hearing on the Motion, the prosecutor denied providing Roxana or her family any such benefits. II 361. When defense counsel pointed out that another agency may have done so, the trial court ordered the prosecutor to inquire of Roxana as to whether she was receiving any immigration benefits as a result of her allegations in the instant case. II 360-61.

Later, just before the defense cross-examined Roxana, the prosecutor moved to exclude mention of Roxana's status as an illegal immigrant. V 1051-56. Defense counsel opposed this, indicating that counseling records prosecutors provided to the defense just prior to trial suggested Roxana and

her mother obtained U visas as a result of Roxana's allegations.[9] V 1056-57. Defense counsel noted that, pursuant to the trial court's ruling on the defense discovery motion, prosecutors were obligated to canvass Roxana on this issue and disclose any such benefit(s) prior to trial. V 1056-57. Defense counsel expressed his intent to cross-examine Roxana regarding any U visa or other immigration benefit(s) she and/or her family may have received pursuant to her allegations in the instant matter. V 1056-57.

The trial court then took testimony from Roxana outside the presence of the jury. During that hearing, Roxana admitted that, at the time of her disclosures in the instant case, she was illegally residing in the United States. V 1068. After reporting the instant offense, both Roxana and her mother applied for work permits, referred to as a U visas. V 1067-72. Both women obtained the U visas as a result of Roxana's status as a crime victim. V 1069-72.

Following these revelations, defense counsel motioned the trial court for a mistrial, citing the prosecution's failure to provide the defense with the exculpatory U visa information. V 1076. The trial court denied the mistrial motion, but allowed defense counsel to cross-examine Roxana about any

[9] Defense counsel had additional reason to believe this based on privileged information obtained in preparation for trial. V 1056-70.

immigration benefits she received as a result of her allegations in the instant case. V 1083. The trial court's refusal to grant a mistrial warrants reversal.

1. The prosecutor's failure to disclose the U visa information prior to trial violated Guillermo's Federal and State constitutional rights.

Prosecutors must provide all exculpatory evidence in their actual or constructive possession prior to trial. Failure to do so violates the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, as well as Article 1, Section 8 of the Nevada Constitution. **Brady v. Maryland**, 373 U.S. 83 (1963). "It is a violation of due process for the prosecutor to withhold exculpatory evidence, and his motive for doing so is immaterial." **Jiminez v. State**, 112 Nev. 610, 618 (1996).

By failing to obtain and disclose the U visa information as ordered by the trial court prior to trial, the prosecutor violated Guillermo's Due Process rights. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 8.** A complaining witness' receipt of a U visa as a direct result of the allegations levied here amounts to exculpatory evidence under the authority outlined above. This evidence directly relates to the complainant's motive to fabricate and, hence, her credibility. See **Mazzan v. Warden**, 116 Nev. 48, 67 (2000) (Due Process requires disclosure of evidence that can be used to "impeach the credibility of the state's witness or to bolster the defense case against

prosecutorial attacks."). Thus, by willfully failing to obtain and disclose the U visa information prior to trial, prosecutors violated Guillermo's Federal and State constitutional rights.

2. The trial court erred by refusing to declare a mistrial following the prosecutor's *Brady* violation.

"A... mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." **Rudin v. State**, 120 Nev. 121, 141 (2004). "Whenever the ends of justice might otherwise be defeated, it is the duty of the trial judge to declare a mistrial." **Napoli v. Supreme Court of New York, et. al.**, 40 A.D. 2d 159, 161 (N.Y. App. 1972).

Once the trial court learned of the prosecution's *Brady* violation, the court had no choice but to grant the defense mistrial request. As defense counsel made clear:

> It [the U visa evidence] would still be part of a defense theory. We're entitled to present our theory of defense no matter how slight the evidence. It would still be a benefit she received. It's still by definition exculpatory.

V 1082. Guillermo had the right to build the critical U visa evidence into his defense case from the inception of the trial until the matter was submitted to jurors. Asking questions of Roxana about the U visa on the spur of the moment as the trial proceeded shortchanged Guillermo's right to integrate the

U visa – and all of its implications – into his defense case. Had he done so, the jury's verdicts may have been very different. Thus, the trial court's refusal to grant a mistrial following the exculpatory U visa revelations warrants reversal.

VIII. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF GUILLERMO'S PHONE RECORDS AS WELL AS ROXANA'S PHONE NUMBER(S).

At trial, prosecutors presented evidence of Guillermo's cell phone records. VI 1227-35. Prosecutors admitted the records through AT&T employee Connor McCoy with no objection from the defense. VI 1227-35. Once in evidence, prosecutors asked Mr. McCoy about the contents of the records. VI 1227-35. Mr. McCoy explained that, in November 2009, there were several calls from Guillermo's cell to phone number 702-426-9416. VI 1234. However, at that point in the proceedings, no one had identified the individual to whom that number belonged.

Following Mr. McCoy's direct examination, defense counsel interposed an objection to the admission of the phone records. VI 1234-47. Defense counsel explained that, absent Roxana's identification of one of the phone numbers as hers, the records were not relevant. VI 1234-47. The trial court overruled the defense relevance objection, and allowed prosecutors to proceed. VI 1234-37; 1245-47.

Since Roxana could not recall and, hence, did not testify to her phone number, prosecutors attempted to elicit that information from Det. Jaeger. Over defense objection (VI 1268), the trial court allowed Det. Jaeger to testify as to the phone number(s) Roxana described as being hers.[10] VI 1283-84. According to Det. Jaeger, Roxana identified her cell number as 702-426-9416, and her home number as 702-731-0612. VI 1284. The admission of Guillermo's phone records, together with Det. Jaeger's phone number testimony, amounted to error.

NRS 48.025 prohibits the admission of evidence that is not relevant. **NRS 48.015** defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." **NRS 48.035** excludes relevant evidence that is more prejudicial, confusing, or misleading than it is probative. At the time prosecutors admitted Guillermo's phone records, they had not established a connection between the records and the instant matter. Absent such evidence, the records were irrelevant. Accordingly, the trial court should have excluded them pursuant to defense counsel's [admittedly late] objection.

[10] Det. Jaeger testified that he called Roxana several times at the phone number(s) she provided. VI 1276-83.

Additionally, the trial court erred by admitting Det. Jaeger's testimony regarding Roxana's phone numbers. Roxana's out-of-court statement(s) regarding her phone number(s) amounted to inadmissible hearsay. The Sixth Amendment to the U.S. Constitution states that: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..." **U.S.C.A. VI; XIV**. The Confrontation Clause compels automatic exclusion of "testimonial" witness statements unless the declarant is available for cross examination at trial, or 2) if the declarant is unavailable, the statement was previously subjected to cross examination. **Crawford v. Washington,** 124 S. Ct. 1354, 1374 (2004). Statements to police are "testimonial" statements. Id.

Additionally, **NRS 51.035** excludes from evidence hearsay testimony. "Hearsay" is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted." **NRS 51.035**.

Roxana's statement(s) to Det. Jaeger describing her phone number(s) amounted to hearsay, the admission of which violated both the Sixth Amendment and **NRS 51.035**. Roxana's description of her phone number(s) to an investigating detective constituted a 'testimonial' statement. While Roxana testified at trial, she did not testify as to her phone number. Thus, where the phone number evidence was concerned, Roxana was *de facto*

unavailable. Accordingly, Det. Jaeger's phone number testimony violated Guillermo's Confrontation Clause rights under **Crawford**.

The phone number testimony also amounted to hearsay under **NRS 51.035**. Det. Jaeger testified to Roxana's out-of-court statement(s) describing her phone numbers. Those out of court statements were offered to prove the truth of the matter asserted – that the phone numbers were, indeed, Roxana's. Thus, Det. Jaeger's phone number testimony amounted to hearsay, the admission of which constituted error.

The error occasioned by the trial court's admission of the phone records and Roxana's contact information warrants reversal. Prosecutors used this evidence to bolster Roxana's claim that Guillermo placed numerous, unwanted phone calls and sent numerous unwanted text messages to Roxana's phone. Absent this evidence, prosecutors would have been left with nothing but the testimony of a young woman who gave varying accounts of the abuse she purportedly suffered; who had at least two compelling reasons to fabricate the allegations of abuse; and who repeatedly took gifts from the individual she later called her rapist. Thus, the constitutionally improper admission of the phone record/number evidence warrants reversal.

IX. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT GUILLERMO COMMITTED APPROXIMATELY 600 ACTS OF UNCHARGED SEXUAL ABUSE.

Roxana testified that Guillermo abused her by engaging in the same series of sexual acts (mouth on vagina, mouth on anus, hands on vagina, hands on anus) two to three times a week for a period of years. The admission of this uncharged bad act evidence amounted to error.

NRS 48.045(2) prohibits the admission of "evidence of other crimes, wrongs, or acts... to prove the character or a person in order to show that he acted in conformity therewith..." Thus, "A presumption of inadmissibility attaches to all prior bad act evidence." **Ledbetter v. State**, 129 P. 3d 671, 677 (Nev. 2006). The presumption of inadmissibility may be overcome only after a finding by the trial court, outside the presence of the jury and prior to the admission of the evidence, that the bad act evidence is: (1) relevant; (2) clear and convincing; and (3) more probative than prejudicial. Id.

First, the trial court failed to hold the required pre-trial hearing regarding the admissibility of the bad act evidence described above. This is because prosecutors failed to file the necessary pre-trial motion requesting admission of this evidence. Accordingly, the trial court erred by admitting the bad act evidence in the absence of the required pre-trial motion and hearing.

Second, had the trial court held the required hearing, the court would have excluded reference(s) to the uncharged misconduct. Roxana offered no specifics to support her claim that Guillermo committed various acts of sexual abuse "2-3 times per week." Accordingly, prosecutors could not establish the Guillermo committed the uncharged misconduct by clear and convincing evidence. Additionally, the numerous instances of misconduct were exceedingly prejudicial in that they cast Guillermo in an even more insidious light, thereby increasing the likelihood of conviction on the charged crimes.

The trial court further erred by failing to proffer an instruction limiting the jury's consideration of the above-referenced bad act evidence, either upon its admission or in the jury instructions. This Court requires a limiting instruction upon the admission of prejudicial bad act evidence and in the jury instructions. **Rhymes v. State**, 107 P.3d 1278, 1281-82 (Nev. 2005). The instant trial court gave neither. This left jurors to speculate as to Guillermo's propensity to commit acts of sexual abuse, and the corresponding likelihood that he was guilty as charged. Thus, the trial court erred by admitting evidence that Guillermo committed some unspecified number of acts of misconduct.

The admission of the above-referenced bad act evidence warrants reversal. As set forth above, the bad act evidence cast Guillermo in a "negative light, prejudicially suggesting that he has a dangerous and criminal character." Even worse, the prosecutor used the uncharged misconduct to exhort jurors into convicting on the comparatively smaller number of charged offenses:

> ... So in looking at this, the State had the opportunity to charge him two times a week for several years. Well, that would be, you know, 600 counts.

VI 1384-85. It worked. Jurors convicted of each and every of the 36 counts charged in the Information. Absent the prejudice occasioned by the 600 instances of uncharged misconduct, the jury's verdicts may have been very different. Accordingly, this Court must reverse.

X. THE PROSECUTION FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN GUILLERMO'S CONVICTIONS.

"The Due Process Clause of the United States Constitution requires that an accused may not be convicted unless each fact necessary to constitute the crime with which he has been charged is proven beyond a reasonable doubt." **Rose v. State**, 123 Nev. 194, 202 (2007). Whether due process requirements are met turns on an analysis of "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of

fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319 (1979).

While a complainant's testimony in sexual assault cases is alone sufficient to uphold a conviction, "'... the victim must testify with *some* particularity regarding the incident in order to uphold the charge.'" **Rose**, 123 Nev. at 203. Thus, "to support multiple charges of sexual abuse over a period of time, a child victim need not specify exact numbers of incidents, but there must be some reliable indicia that the number of acts charged actually occurred." Id (internal quotation omitted).

Here, prosecutors failed to present sufficient evidence to sustain Guillermo's 36 convictions. Prosecutors presented little, if any evidence, to corroborate Roxana's allegations of sexual misconduct. She never disclosed the purported misconduct until she faced the humiliation of having to reveal her teenage pregnancy and incestuous relationship with her cousin. While she maintained that Guillermo coerced her into engaging in the sexual relationship by threatening to reveal her affair with her cousin, the idea that she would chose enduring repeated sexual assaults over the embarrassment associated with revealing her relationship with Yahir, defies logic. Moreover, Roxana claimed that at least one family member, Maritza, already knew about the relationship with Yahir. Equally confounding is Roxana's

willingness to demand and accept gifts from her purported rapist, as is the notion that she would give her rapist her cell phone number (assuming that is how he obtained it).[11]

Finally, Roxana's varying accounts of the alleged misconduct, together with her inability to describe the encounters with particularity, failed to provide the evidence necessary to sustain Guillermo's multiple convictions. Roxana gave varying accounts of what happened to her. Her trial testimony lacked particularity beyond rote descriptions of the sexual acts and the apartments in which they occurred, despite the fact that she was an adult at the time she testified. She could not provide even general details regarding each episode, beyond describing that Guillermo touched/licked her breasts; touched/licked her vagina; then turned her over and touched/licked her anus. In many of the encounters she described, she indicated she was wearing shorts. Presumably, this included encounters that occurred in the winter. Thus, Roxana's testimony lacked the particularity and reliability sufficient to sustain Guillermo's convictions.

Additionally, prosecutors failed to prove certain elements of several of the charged crimes. Count 6 charged Guillermo with Sexual Assault/Minor Under 14 for penetrating Roxana with his tongue. II 243. This Count

[11] Roxana could not recall whether she gave Guillermo her phone number or whether he obtained it from someone else.

presumably pertained to the second incident Roxana recounted at the University Apartments. VI 1374-92. However, Roxana testified that, during this encounter, Guillermo licked her vagina. V 985. She never indicated that his tongue penetrated her sufficient for a sexual assault. V 985. Accordingly, prosecutors failed to meet the critical element of penetration in Count 6. Count 7 charged Guillermo with Lewdness With a Minor for touching Roxana's breasts with his hands during the same encounter. II 244. VI 1374-92. However, she did not testify that Guillermo touched her breasts with his hands; only that licked her breasts, as charged in Count 8. V 985-86. Thus, prosecutors failed to prove that Guillermo fondled Roxana's breast(s) as charged in Count 7.

Count 11 charged Guillermo with Open and Gross Lewdness for "masturbat[ing] his penis in view of Roxana." II 245. However, Roxana indicated that, during the incident in question, Guillermo never removed his penis from inside of his clothes; only that he touched it outside of his pants. V 987. Thus, prosecutors failed to prove that Guillermo masturbated his penis in front of Roxana.

Counts 12-15 each charged Sexual Assault/Minor Under 14 for various acts of vaginal and anal penetration. Those acts pertained to the third incident Roxana recounted, while she was living at the Andover Apartments.

VI 1374-92; V 990-94. However, Roxana turned 14 on August 30, 2007, while she was living at Andover. While Roxana later testified to incidents that occurred *after* her 14th birthday, she failed to specify that the encounter which gave rise to the allegations contained in Counts 12-15 occurred prior to her 14th birthday. Thus, Guillermo's convictions for Sexual Assault/Minor Under 14, as alleged in Counts 12-15, cannot stand. See **Gay v. Sheriff**, 89 Nev. 118 (1973) (victim's age a material element of Lewdness With a Minor Under 14).

Count 16 charged Guillermo with Lewdness with a Minor for "us[ing] his hands and/or fingers to touch and/or rub and/or fondle the genital area and/or buttocks of Roxana..." II 246. This Count presumably pertained to an incident Roxana described at the Andover Apartments in which she was laying in bed with her mom and Guillermo. V 994. First, Roxana testified that Guillermo only touched her buttocks *over* her clothing, and that he only 'tried' to go inside her clothing and touch her vagina. V 994. Second, Roxana turned 14 on August 30, 2007, while she lived at Andover. Like the conduct charged in Counts 12-15, she did not specify that this incident pre-dated her 14th birthday. V 994. Thus, prosecutors failed to present sufficient evidence to sustain Count 16. **Gay**, supra.

COUNTS 17, 18, 20, and 21 charged Guillermo with Sexual Assault/Minor Under 14 for penetrating Roxana's vagina with his mouth (Count 17), her anus with his mouth (Count 18), her anus with his finger (Count 20), and her vagina with his finger (Count 21) while at Andover. VI 1374-92. Again, like the previous encounter(s), Roxana did not specify that this encounter occurred before she turned 14. V 995-96. Additionally, she did not disclose that Guillermo's tongue penetrated her vagina sufficient to sustain his Sexual Assault conviction on Count 17. V 994-96. Thus, Guillermo's convictions of Counts 17, 18, 20, and 21 cannot stand.

Count 19 charged Guillermo with Lewdness With a Minor for fondling Roxana's breast during the encounter which gave rise to Counts 17, 18, 20, and 21. Again, Roxana failed to specify that this occurred before her 14th birthday. V 994-96. Accordingly, this conviction cannot stand.

Count 22 charged Guillermo with Lewdness With a Minor for "caus[ing] and/or direct[ing] Roxana to use her hands and/or fingers to touch and/or rub and/or masturbate his penis..." while Roxana lived at Andover. VI 1374-92; II 247. However, as with the previous Andover incidents, Roxana did not specify that this incident occurred before she turned 14. V 995-97. Accordingly, prosecutors failed to present sufficient evidence to sustain this conviction.

Count 24 charged Guillermo with Sexual Assault/Minor Under 16 for penetrating Roxana's vagina with his mouth. II 248. This incident presumably pertained to a fifth encounter Roxana described that occurred at the Andover apartment. VI 1374-92; V 999-1000. However, Roxana testified that Guillermo licked her vagina. V 1000. She did not indicate that his tongue penetrated her genitalia sufficient to sustain a Sexual Assault conviction. Accordingly, prosecutors failed to present sufficient evidence to sustain Guillermo's conviction on Count 24.

Counts 25 and 26 charged Guillermo with Sexual Assault/Minor Under 16 for penetrating her vagina and anus with his finger(s), presumably during the fifth encounter at Andover. VI 1374-92; II 248. However, Roxana testified only that Guillermo's hands went "in her vagina" and "anus." V 999-1000. Absent specification that his fingers actually penetrated her vagina and anus, prosecutors failed to present sufficient evidence to sustain his Sexual Assault convictions on Counts 25 and 26.

Thus, based on the foregoing, prosecutors failed to present sufficient evidence to sustain Guillermo's 36 convictions.

XI. GUILLERMO'S MULTIPLE CONVICTIONS ARISING FROM SINGLE EPISODES VIOLATE DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES.

Prosecutors convicted Guillermo of multiple offenses arising from single episodes of sexual conduct. These multiplicitous convictions violate Double Jeopardy and redundancy principles. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 8.**

The Double Jeopardy Clauses of the U.S. and Nevada Constitutions provide that no person shall twice put in jeopardy. **U.S.C.A. V, XIV; Nev. Const. Art. 1, Sect. 8.** The clauses prohibit multiple punishments for the same offense. **Whalen v. U.S**, 445 U.S. 684, 688 (1980). "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." **Larson v. State**, 102 Nev. 448, 449 (1986). Likewise, redundancy principles prohibit multiple 'units of prosecution' for a single course of conduct. **Jackson v. State**, 128 Nev. Adv. Op. 55 (2012) ("...Nevada's redundancy case law has also captured 'unit of prosecution' and alternative-offense challenges within its sweep, neither of which we question.") (further citations omitted).

Prosecutors here did precisely that: divided one continuous act into multiple, separate crimes. In each encounter, Roxana described that

Guillermo licked and touched her vagina; and licked and touched her anus. In most encounters she described that he also touched and/or licked her breasts, as well. The record is rather unclear as to the manner in which these events unfolded. Roxana did not describe the encounters in a narrative fashion. Rather, the prosecutor usually questioned her about each encounter by breaking up each episode into the various forms of touching: hand on breasts; mouth on breasts; hand on vagina; mouth on vagina; hand on anus; mouth on anus. Aside from Roxana's testimony that the encounters usually began with her on her back and ended with her on her hands and knees, we know little about the order in which the acts giving rise to the multiple charges occurred. However, we *do know* that Roxana never described any interruption in any of the episodes. Accordingly, the record discloses that each encounter was singular and uninterrupted.

Where one act blends with another to facilitate an entire lewd encounter, prosecutors may not divide portions of the act to obtain multiple convictions. **Townsend v. State**, 103 Nev. 113 (1987). Accordingly, in **Crowley v. State**, 120 Nev. 30, 34 (2004), this Court rejected dual convictions for Lewdness and Sexual Assault where the defendant fondled the minor victim's penis before fellating him. The **Crowley** Court reasoned that, because the fondling was meant to predispose the victim to the

subsequent fellatio, the acts were part of single encounter for which multiple convictions were not proper. Id.

Under **Crowley**, Guillermo's multiple convictions stemming from each uninterrupted sexual encounter cannot stand. Like **Crowley**, any touching that occurred prior to the ultimate act(s) of sexual penetration was nothing more than an attempt to predispose Roxana to a willingness to engage in the sexual conduct. Accordingly, this Court must dismiss Guillermo's convictions for Lewdness With a Minor (Counts 3, 7, 8, 19) alleging fondling that occurred as part of an episode resulting in sexual penetration. See also **Gaxiola v. State**, 119 P.3d 1225 (2005); **Ebeling v. State**, 120 Nev. 401 (2004).

Likewise, this Court must dismiss certain of the multiple Sexual Assault offenses charged in connection with each episode. Like the fondling, certain of the sexually assaultive acts were meant to predispose Roxana to further sexual conduct. In this regard, the record suggests that the vaginal and anal licking were intended to predispose Roxana to the ultimate act of digital penetration of each orifice. Accordingly, this Court must dismiss Guillermo's convictions for Sexual Assault with a Minor alleging oral vaginal and anal penetration that occurred as part of an episode resulting in

the subsequent digital penetration of Roxana's vagina and anus, respectively. See, e.g., Counts 1, 2, 5, 6, 12, 13, 17, 18, 23, 24, 27, 30, 32, 33.

XII. THE COURT VIOLATED GUILLERMO'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS BY REJECTING PROPOSED DEFENSE INSTRUCTIONS AND BY PROFFERING CERTAIN INSTRUCTIONS THAT WERE CONFUSING, MISLEADING, AND/OR MISSTATED THE LAW.

A. The victim-specific instructions.

The instant trial court proffered a number of jury instructions pertaining specifically to complainants in sex-offense cases. Two of those instructions involved child complainants. The instructions informed jurors that (1) child sexual abuse complainants need not specify the date upon which the acts of misconduct occurred, even when the age of the complainant (and, hence, the date of the offense) is a material element of the charge; (2) child sexual abuse complainants need only testify with 'some particularity' as to the acts amounting to the charged sexual misconduct; and that (3) a sexual abuse complainant's testimony need not be corroborated, regardless of any infirmities in the witness' testimony. These instructions, singularly or in combination, lessened the prosecution's burden to prove the charged crimes beyond a reasonable doubt. In so doing, they also left jurors with the misapprehension that certain evidentiary deficiencies, such as a complainant's failure to provide compelling details regarding and/or

approximate dates for the charged misconduct, could not amount to reasonable doubt. Accordingly, each instruction compromised the integrity of the trial to such an extent as to render the resulting verdicts unreliable, thereby requiring reversal.

1. The 'no date required' instruction, *Part One.*

Over defense objection (VI App. 1342-43), the trial court proffered Instruction No. 16, which informed jurors: "Where a minor has been the victim of sexual assault and/or lewdness with a minor, and does not remember the exact date of the act, the State is not required [sic] prove a specific date, but may prove a time frame within which the act took place." II App. 264. This amounted to error.

First, Instruction 16 did not apply to the case at bar. The instruction derives from **Cunningham v. State**, 100 Nev. 396 (1984), in which this Court refused to require that a 14-year old complainant provide precise dates on which various acts of molestation occurred some 5-6 years earlier, when the complainant was 8 and 9 years old. However, unlike the **Cunningham** complainant, Roxana was an adult at the time of trial; she was an adolescent when the acts about which she testified purportedly occurred. And, as evidenced by her relationship with her cousin and her subsequent pregnancy, she revealed herself to be a mature teenager/adult. Accordingly, she was

capable of providing more specific time frames for the misconduct she alleged. Thus, the proffered instruction did not apply to the instant case.

Second, Instruction 16 improperly lessened the prosecution's proof burden and invaded the jury's sacred province to determine witness credibility in violation of Guillermo's Federal and State constitutional rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8.** The instruction informed jurors that child complainants need not specify *when* certain acts of misconduct occurred, provided they provide some general time frame for them. At best, this suggested that a child's inability to describe the approximate dates on which acts of misconduct occurred should not vitiate that witness' credibility. At worst, it suggested that reasonable doubt cannot derive from a child's failure to recall the date(s) of the alleged misconduct.

Prosecutors are free to argue that a child witness' lack of specificity is endemic to children, in general, and not dispositive of credibility. But an instruction from the Court stating as much suggests a lack of specificity should be forgiven as a matter of law – and, therefore, cannot amount to reasonable doubt. And factors amounting to reasonable doubt are solely within the province of the jury to determine. Thus, Instruction 16

undermined the prosecution's proof burden[12] and infringed upon the jury's sacred function(s) to adjudicate witness credibility.

Third, Instruction 16 further lessened the prosecution's proof burden by telling jurors that "... [T]he State is not required [sic] prove a specific date, but may prove a time frame within which the act took place..." A victim's age, when alleged as part of a crime, is a material element of that offense. See, e.g., **Gay v. Sheriff**, 89 Nev. 118 (1973) (victim's age a material element of Lewdness With a Minor). Accordingly, proof of a crime perpetrated on a person of a particular age necessarily requires proof beyond a reasonable doubt that the crime occurred *within a certain* time frame (i.e., when the victim was the age alleged in charged offense). Telling jurors that *any* time frame is sufficient vitiates the prosecution's burden to prove beyond a reasonable doubt the complainant's age at the time of a charged offense. Accordingly, Instruction 16's 'time frame' language lessened the prosecution's proof burden in violation of Guillermo's Federal and State constitutional rights. See n.16, supra. Thus, the trial court erred by proffering the above-referenced instruction.

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[12] See **In re Winship**, 397 U.S. 358, 364 (1970) (The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense.); **Sandstrom v. Montana**, 442 U.S. 510 (1979) (Jury instructions relieving States of this burden violate a defendant's due process rights.).

2. **The 'no date required' instruction, *Part Deux.***

In addition to the 'no date required' instruction discussed above, the trial court also gave the following instruction:

> For the crimes of sexual assault and lewdness with a child, there is no absolute requirement that the State allege the exact date of the offense charged, but may instead give the approximate date on which it believes the crime occurred. However, the alleged victim must testify with some particularity regarding the incident in order to find the defendant guilty of sexual assault and/or lewdness with a child."

II 265 (Instruction No. 17). This, too, amounted to error.

The language of Instruction 17 which, like Instruction 16, informed jurors that prosecutors need only provide an 'approximate date on which it believes a crime occurred,' lessened the prosecution's burden to prove the elements of the charged age-based offenses beyond a reasonable doubt, and invaded the jury's sacred province to determine witness credibility.[13] These constitutionally significant flaws were only exacerbated by Instruction 17's requirement that a complainant need only testify with 'some particularity' regarding acts of charged misconduct. This further undermined the government's proof burden and invaded the jury's exclusive function to adjudicate witness credibility. A jury instruction cannot tell jurors that, as a matter or law, 'some particularity' amounts to proof beyond a reasonable

[13] Appellant realleges and reincorporates the authority set forth for the preceding section, pertaining to Instruction 16.

doubt. Indeed, it does not. And since jurors are singularly vested with the power to determine the adequacy of witness testimony, an instruction cannot obligate a jury to find that a particular level of specificity passes beyond-a-reasonable-doubt-muster.' Thus, Instruction 17, like Instruction 16, violated Guillermo's Federal and State constitutional rights.

3. The *LaPierre* 'reliable indicia is enough' instruction.

The trial court instructed jurors that:

> To find the defendant guilty of more than one count of sexual assault or lewdness with a minor, you must first find that the State has proven beyond a reasonable doubt that there is some 'reliable indicia' that the number of acts actually occurred. Mere conjecture on the part of the alleged victim as to the number of acts is not enough. 'Reliable indicia' may include such evidence as the victim describing the incident(s) with particularity, or any other evidence that indicates that the acts that are alleged actually occurred.

II App. 266 (Instruction No. 18). This amounted to error.[14]

The instant instruction lessened the prosecution's proof burden in violation of Guillermo's Federal and State constitutional rights. **U.S.C.A. V, VI, XIV; Nev. Const. Art. 1, Sect. 8**. The language of Instruction 18 derives from **Lapierre v. State**, 108 Nev. 528, 531 (1992), in which this Court held that, while child victims are often unable to articulate specific dates/times: "We do not require that the victim specify exact numbers of incidents, but

[14] Admittedly, the record is unclear as to the genesis of the instant instruction. Remand may be necessary to clarify as much.

there must be some reliable indicia that the number of acts charged actually occurred." (emphasis added). At issue in **Lapierre** was whether sufficient evidence existed to support the defendant's multiple sex-offense convictions where the 9-year old complainant, after describing various sexual acts perpetrated by the defendant, stated that she was assaulted by him "ten or more" times. Id. The **LaPierre** Court held that the vagaries in the 'ten or more' testimony did not provide the specificity necessary to sustain Lapierre's numerous convictions.

The **LaPierre** sufficiency of the evidence language did not a proper jury instruction make. First, the **LaPierre** instruction informed jurors that prosecutors need prove beyond a reasonable doubt "that there is some 'reliable indicia' that the number of acts actually occurred." This undermined the prosecution's proof burden by implying that mere 'reliable indicia' of multiple acts was sufficient for conviction. See n. 16, supra. Additionally, this sentence is profoundly confusing. The sentence instructs that prosecutors have to prove 'reliable indicia' beyond a reasonable doubt. This makes no sense. Accordingly, the 'proof-of-reliable-indicia-beyond-a-reasonable-doubt' sentence served nothing more than to confuse (and ultimately undermine) the prosecution's proof burden.

Second, Instruction 17 vitiated the prosecution's proof burden by stating that: "Mere conjecture on the part of the alleged victim as to the number of acts is not enough." So something slightly *beyond* mere conjecture *is* enough? No. Again, only proof of the alleged acts beyond a reasonable doubt is enough. But the instruction does not stop there. It goes on to state: "Reliable indicia may include such evidence as the victim describing the incidents with particularity, or any other evidence that indicates that the acts that are alleged actually occurred." This implied that proof beyond a reasonable doubt may be found as long as the charged incidents are described with particularity *or* as long as any evidence indicates that the charged misconduct 'actually occurred.' A good liar can confabulate with particularity. Particularity does not equal proof beyond a reasonable doubt. Nor does 'actually occurred.' Accordingly, the instant instruction relieved prosecutors of their burden to prove the charged crimes beyond a reasonable doubt. At a minimum, it confused the issue. Thus, Instruction 18 violated Guillermo's constitutional rights. See n. 16.

4. The 'no corroboration' required instruction.

Over defense objection, the trial court instructed jurors that: "There is no requirement that the testimony of an alleged victim of a sexual offense be corroborated, and her testimony, standing alone, if believed beyond a

reasonable doubt, is sufficient to sustain a verdict of guilty." II App. 263 (Instruction 15); VI App. 1341-43. The trial court proffered this instruction over the alternative proposed by the defense:

> It is not essential to a conviction in this case that the testimony of the alleged victim be corroborated by other evidence. It is sufficient if, from all the evidence, you believe beyond a reasonable doubt that the crime of sexual assault was committed by the defendant as alleged.

II App. 235. This amounted to error.

While this Court has approved the instruction proffered here,[15] Appellant urges the Court to revisit the issue in the context of the instant case. The instruction unfairly focuses the jury's attention on, and highlights, a single witness's testimony. "It is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence..." **Hutchins v. State**, 110 Nev. 103, 109 (1994). Other jurisdictions have rejected this instruction as it abrogates this basic principle. See **Ludy v. State**, 784 N.E.2d 459, 461 (Ind. 2003). At a minimum, the trial court should have proffered the defense-proposed instruction. See **Mays v. State**, 89 Nev. 277, 279 (1973).

Unlike the trial court's instruction, the defense-proposed language directed jurors to consider *all of the evidence* in determining whether

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[15] **Gaxiola v. State**, 119 P.3d 1225, 1233 (Nev. 2005).

prosecutors met their proof burden. Instead, the trial court's instruction unfairly singled out the complainant's testimony without reminding jurors of their obligation to consider her testimony in conjunction with the other testimony and evidence presented at trial. Accordingly, the trial court's rejection of the defense-proposed instruction in favor of the 'no corroboration" instruction given here amounts to error.

5. **Reversible error.**

This error occasioned by the instructions discussed above, either singularly or in combination, amounts to structural error requiring reversal. "Structural error results from a constitutional deprivation that so infects the entire framework of the trial that the result is no longer reliable." **Garcia v. State**, 117 Nev. 124, 127 (2001) (citing **Arizona v. Fulminante**, 499 U.S. 279, 309-11 (1991)). When an erroneous instruction infects the entire trial, the resulting conviction violates due process. See **Estelle v. McGuire**, 502 U.S. 62, 72 (1991).

An instruction relieving prosecutors of their proof burden or, at a minimum, confusing the issue, infects a trial framework to such an extent that the result in unreliable. The same is true of an instruction that invades the jury's sacred fact-finding function. Thus, the instructions discussed above, either singularly or in combination, compel automatic reversal.

B. The non witness-specific instructions.

1. **The 'multiple acts as part of a single encounter' instruction.**

Over defense objection, the trial court instructed jurors that: "Where multiple sexual acts occur as part of a single criminal encounter a defendant may be found guilty for each separate or different act of sexual assault and/or lewdness." VI 1331-39; 1344; II 267. The trial court proffered this instruction over the defense-requested instruction, which read:

> Where multiple sexual acts occur as part of a single criminal encounter, a defendant may be found guilty for each separate or distinct act of sexual assault and/or lewdness. However, when the sexual acts are part of the same episode, the defendant may be found guilty of only one count of sexual assault or lewdness. When there is no interruption between the acts, or any interruption amounts to merely a hypertechnical division of a single act, the sexual acts are part of the same episode. Additionally, when the sexual act is done merely to predispose the alleged victim to a subsequent act[s], the acts are part of the same episode and the defendant may be convicted of only one count of sexual assault or lewdness.

II 239. This amounted to error.

As this Court has made clear, a sexual act done to predispose a victim subsequent sexual conduct amounts to single episode for which multiple charges cannot stand. See **Crowley v. State**, supra, 120 Nev. at 34. Multiple sexual acts committed without interruption during a single episode cannot give rise to multiple offenses. Id. The trial court's instruction, unlike the defense-proposed instruction, failed to inform jurors of this critical

information. As such, the trial court's instruction failed to properly inform jurors of the circumstances under which they could convict for multiple sexual acts committed during a single episode.

The trial court's errant instruction warrants reversal. The missing language explaining the limited circumstances under which jurors could convict for multiple acts occurring during a single encounter was critical here. Roxana never indicated that the different sexual acts were interrupted in any fashion. To the contrary, her testimony revealed successive acts committed during single episodes. Certain of the acts within a given encounter were likely intended to predispose her to others. An instruction accurately informing jurors of the limited circumstances upon which they could convict of multiple offenses arising from a single episode may have dramatically altered the outcome of the instant case. Thus, the trial court's instruction which, unlike the defense-proposed instruction, failed to adequately apprise jurors of the indivisible nature of certain sexual episodes, was not harmless beyond a reasonable doubt. See **Cortinas v. State**, 124 Nev. 1013 (2008) (reversal required where instructional error not harmless beyond a reasonable doubt). Accordingly, the errant instruction warrants reversal.

2. **The 'witness credibility' instruction.**

Over defense objection (VI 1345), the trial court gave the following instruction guiding the jury's determination of witness credibility:

> The credibility or believability of a witness should be determined by his manner on the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections. If you believe that a witness has lied about any material fact in the case you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

II 275 (Instruction No. 27). In so doing, the trial court rejected the defense-proposed credibility instruction, which offered a far more comprehensive and detailed recitation of the factors bearing witness credibility. See II 236.[16] This amounted to error.

The defense-proposed instruction derives directly from California Criminal Jury Instruction No. 105. See **CALCRIM No. 105**. This language has been approved by the California Courts as properly guiding a jury's consideration of witness testimony. See, e.g., **People v. Lawrence**, 177 Cal. App. 4th 547, 554-55 (Cal. App. 5th Dist. 2009). Indeed, the proffered

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[16] Appellant's originally-submitted Opening Brief contained the full text of the defense-proposed instruction for ease of this Court's review. However, in an effort to comply with this Honorable Court's type/volume limitations, Appellant excised the full text of the instruction in favor of reference to the instruction in the record.

instruction provided an accurate and thorough recitation of the numerous factors bearing upon witness credibility.

The same cannot be said of the trial court's instruction. The court's instruction omitted factors critical to the instant defense where Roxana's credibility was concerned. Such factors include(d) inconsistencies in witness testimony; whether other evidence proved or disproved any fact about which the witness testified; whether the witness engaged in conduct that reflects on his or her believability; and/or whether the witness's testimony was influenced by a fact such as bias or prejudice and/or a promise of leniency in exchange for his/her testimony.

As the record reveals, Roxana gave varying accounts about the purported abuse. Roxana's testimony that Maritza knew about her relationship with Yahir was directly contravened by Maritza, herself. Roxana had ample motivation levy rape accusations against Guillermo as such would lessen the impact of her pregnancy and incest revelations, and facilitate acquisition of U Visas for both her and her mother.

This Court has emphasized the importance of granting defense-specific instructions in addition to State-proffered instructions on the same subject matter **Crawford v. State**, 121 Nev. 746, 754 (2005). Nevada and federal law mandate *adequate* instruction on the defense theory of the case. **Runion**

v. State, 116 Nev. 1041, 1050 (2000); **Brandley v. Duncan**, 315 F.3d 1091 (9th Cir. 2002); **U.S.C.A. V, VI, XIV**. Had jurors been specifically instructed to consider factors such as these in determining Roxana's credibility, the jury's verdicts here likely would have been very different. Thus, the trial court's refusal to proffer the defense-requested credibility instruction over that offered by prosecutors cannot be deemed harmless beyond a reasonable doubt. Accordingly, this Court must reverse.

3. The circumstantial evidence/'two reasonable interpretations' instruction.

Over defense objection (VI 1344), the trial court proffered the following instruction guiding the jury's consideration of the evidence:

> The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel. There are two types of evidence, direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty of not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence should be considered by you in arriving at your verdict...

II 274 (Instruction No. 26). The trial court proffered this instruction over an alternative instruction proposed by the defense. See II 237.[17] The defense instruction guided the jury's consideration of circumstantial evidence, requiring that it be subject to stricter scrutiny than other evidence. II 237. The trial court's rejection of the defense-proposed instruction in favor of the instruction given here amounted to error.

Admittedly, this Court has rejected the notion that circumstantial evidence should be subject to stricter scrutiny than testimonial evidence. See, e.g., **Bailey v. State**, 94 Nev. 323, 325 (1978). However, the **Bailey** Court cautioned that: "... where the jury is properly instructed on the standards for reasonable doubt... an additional instruction on circumstantial evidence is confusing and incorrect..." **Bailey**, supra (citations omitted). Accordingly, absent an inadequacy in the reasonable doubt and other instructions, an instruction discussing the nature and quality of the evidence presented is neither required nor proper. **Bailey**, supra (citations omitted).

Here, the reasonable doubt standard was covered by other instructions. Thus, the trial court erred by proffering an instruction that elaborated unnecessarily upon the distinction between circumstantial and direct

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[17] Again, Appellant excised the full text of the defense-proposed instruction was excised in favor of reference to the instruction in the record in order to comply with this Court's type and volume limitations.

evidence. The instruction given here was at best confusing; at worst misleading. The instruction defined circumstantial evidence as "a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty." In other words, the trial court defined circumstantial evidence as... circumstantial evidence. This did nothing to distinguish circumstantial evidence from its evidentiary counterpart. Moreover, the instruction *required* that jurors consider circumstantial evidence to the same extent as the other evidence presented ("... all of the evidence... including the circumstantial evidence, *should be considered by you* in arriving at your verdict.") (emphasis added). This invaded the jury's sacred province to consider, reject, and weigh evidence as they deem appropriate.

If the trial court deemed such an instruction necessary, the court should have proffered the defense-proposed instruction. See **CALCRIM No. 224**. It reminded jurors of their obligation to find proof beyond a reasonable doubt of circumstantial evidence before considering such evidence. II 237. And it required that jurors convict based upon circumstantial evidence only if there was no other rational explanation for the evidence. To this end, the instruction directed jurors to adopt any reasonable conclusion from the circumstantial evidence that points toward innocence. This Court has held

that it is not error for a trial court to give this 'two reasonable interpretations' language when appropriate. **Bails v. State**, 92 Nev. 95 (1976).

This was precisely such a case. Roxana's story at trial was not consistent with her disclosures to family and investigating officials. She had ample motivation to portray herself as a victim. She demanded and received gifts from the man she claimed molested her. So jurors readily could have interpreted the evidence in a manner consistent with the defense theory. Thus, to the extent the trial court gave any instruction discussing the various types of evidence presented, the court should have given the defense-proposed instruction, which included the 'two reasonable interpretations' language. Had the trial court instructed jurors to adopt the reasonable conclusion that Roxana was not abused to the extent claimed, the instant verdict(s) likely would have been very different. Thus, the trial court's rejection of the evidentiary instruction proposed by the defense in favor of that provided by prosecutors cannot be deemed harmless beyond a reasonable doubt. As such, this Court must reverse.

4. **The 'innocence' vs. 'not guilty' language.**

Over defense objection, the trial court proffered instructions informing jurors they were tasked with determining Guillermo's guilt or innocence. VI 1344-45. Defense counsel objected to the 'guilt or *innocence*' language in

Instruction Numbers 24, 25, 29. VI 1344. The trial court's use of the term 'innocent' rather than 'not guilty' amounted to error.

The 'guilt or innocence' language improperly undercut the presumption of innocence and the prosecution's proof burden, as it misled jurors to believe that they could convict where the evidence, though inadequate to prove guilt beyond a reasonable doubt, nonetheless indicated that the defendant may not have been 'innocent.' **U.S. v. Deluca**, 137 F.3d 24, 34-35 (1st Cir. 1998). Accordingly, the instant instruction, which misarticulated the jury's function in a way that infringed upon other constitutional mandates, was improper. **U.S. v. Andujar**, 49 F.3d 16, 24 (1st Cir. 1995).

The trial court's use of the term 'innocent(ce)' in place of 'not guilty' warrants reversal. As set forth above, given Roxana's motive to fabricate, her delayed disclosure(s), and her inconsistent reporting of the alleged misconduct, this case was very close. Thus, the errant language discussed above may have been more than enough to tip the scales in favor of conviction. Accordingly, the trial court's use of the term 'innocent' in place of 'not guilty' warrants reversal.

5. **The 'use your common sense' instruction.**

Over defense objection (VI 1345), the trial court instructed jurors that: "Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. *Thus, you are not limited solely to what you see and hear as the witnesses testify...*" II 276 (Instruction 28) (emphasis added). This amounted to error.

As defense counsel correctly pointed out, the improper language invited outside research; consideration of extrinsic evidence and/or arguments; and/or improper speculation about the evidence disclosed at trial. VI 1345. Such speculation can be particularly insidious in cases such as that here, where the charges include allegation(s) of child molestation. Here, jurors convicted on all of the 36 charged sex offenses. Accordingly, any improper research and/or speculation occasioned by the above-referenced instruction helped ensure Guillermo's conviction of the charged crimes. Thus, the errant language given here warrants reversal.

XIII. THE PROSECUTOR COMMITTED VARIOUS ACTS OF MISCONDUCT IN CLOSING ARGUMENT, THEREBY DEPRIVING GUILLERMO OF HIS FAIR TRIAL AND DUE PROCESS RIGHTS.

Over defense objection, the prosecutor argued that no young girl would want to have a sexual relationship with Guillermo: "She's a beautiful young woman and she's going to have sex with *this* man?... She's going to have sex

with a 48 year old man who was helping raise her, who had been having sexual relationships with her mother? Of course she wasn't okay with it." VI 1414-15. The prosecutor later argued: "Consensual sexual relationship, let's again just go with the off chance that she's really making these deals with him, okay? *It's ridiculous*." VI 1412 (emphasis added). These comments improperly disparaged the defendant and ridiculed the defense.

Prosecutors may not disparage a defendant, his counsel and/or defense arguments before the jury. **Earl v. State**, 111 Nev. 1304; **Pickworth v. State**, 95 Nev. 547, 550 (1979) (prosecutor's reference to defense theory as 'red herring' improper). By belittling the Guillermo's physical stature, age and appearance, and by condemning the defense theory as 'ridiculous,' the prosecutor violated this mandate. Accordingly, the prosecutor's comments amounted to misconduct.

Additionally, over defense objection the prosecutor argued:

> Well, if a story is scripted, there aren't going to be inconsistencies because you have a script and you know it by heart, you've memorized it. But when you're telling the truth and you're recalling what has happened to you in your life, there's of course, going to be small inconsistencies... The fact that she didn't tell anybody about the anal licking or the cunnilingus until she came into our office where she was talking with a female DA who does this every single day, that shows how credible she is. She was terrified..."

VI 1415-16. This amounted to improper vouching.

"It is improper for the prosecution to vouch for the credibility of a government witness." **Lisle v. State**, 113 Nev. 540, 553 (1997). This constitutes an unfair use of the imprimatur of the prosecutor's office, and a violation of the Nevada and United States Constitutions. **State v. Teeter**, 65 Nev. 584, 647 (1948). This type of opinion evidence also infringes on the duty of jurors to make witness credibility determinations and implicates the Sixth Amendment right to a fair trial. **U.S. v. Sanchez**, 176 F.3d 1214, 1220 (9th Cir. 1999).

In a case in which witness credibility is paramount, as here – where there existed little/no physical evidence corroborating the allegations of misconduct constitutes error affecting the substantial rights of the defendant and the fairness, integrity, and public reputation of the proceedings. **U.S. v. Geston**, 299 F.3d 1130, 1137 (9th Cir. 2002). Accordingly, the improper vouching outlined above amounted to misconduct requiring reversal.

XIV. CUMULATIVE ERROR WARRANTS REVERSAL OF GUILLERMO'S CONVICTIONS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AS WELL AS ART. 1, SECT. 8 OF THE NEVADA CONSTITUTION.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. **Big Pond v. State**, 101 Nev. 1, 3 (1985). Even where the State may have presented enough evidence to convict in an otherwise fair trial, where one cannot say without reservation

that the verdict would have been the same in the absence of cumulative error, then this Court must grant a new trial. **Witherow v. State**, 104 Nev. 721, 725 (1988). Viewed as a whole, the combination of errors in this case warrants reversal of Guillermo's convictions. Accordingly, the nature and magnitude of the error in this case compels a cumulative error reversal.

CONCLUSION

For the reasons set forth herein, Appellant GUILLERMO RENTERIA-NOVOA respectfully requests that this Honorable Court reverse his convictions entered below.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Nancy L. Lemcke*
NANCY L. LEMCKE, #5416
Deputy Public Defender

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the 17,000 word type-volume limitations imposed pursuant to this Honorable Court's Order entered July 26, 2013, as it the brief:

Proportionately spaced, has a typeface of 14 points or more and contains 16,985 words.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 26th day of August, 2013.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By */s/ Nancy L. Lemcke*
NANCY L. LEMCKE, #5416
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 26th day of August, 2013. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

GUILLERMO RENTERIO-NOVOA
NDOC No. 1092343
c/o High Desert State Prison
P.O. Box 650
Indian Springs, NV 89018

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office