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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE AZUCENA )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 THE STATE OF NEVADA, )  
 )  
 Respondent. )  
 )

No. 74071

Electronically Filed  
Apr 10 2018 04:32 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

APPELLANT'S APPENDIX VOLUME II PAGES 217-437

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**JOSE AZUCENA**  
**Case No. 74071**

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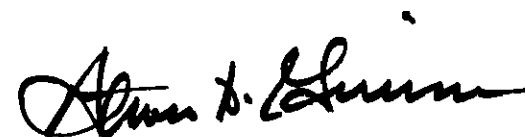
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CLERK OF THE COURT

1 MOT  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 12010  
6 **PUBLIC DEFENDERS OFFICE**  
7 309 South Third Street, Suite 226  
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11 Attorneys for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 )  
11 ) Plaintiff, )  
12 )  
13 ) v. )  
14 )  
15 ) JOSE AZUCENA, )  
16 )  
17 ) Defendant, )  
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CASE NO. C-17-321044-1  
DEPT. NO. II

15 **MOTION TO COMPEL PRODUCTION OF DISCOVERY & BRADY MATERIAL**

16 COMES NOW, the Defendant, JOSE AZUCENA, by and through his counsel,  
17 CARLI L. KIERNY, Deputy Public Defender, and hereby requests that the Court order the State  
18 of Nevada to produce the discovery & Brady material discussed herein **at least 30 days before**  
19 **trial** pursuant to NRS 174.235; NRS 174.285; Kyles v. Whitley, 514 U.S. 419 (1995); Brady v.  
20 Maryland, 373 U.S. 83 (1963) (and their progeny).

21 This Motion is made and based upon all the papers and pleadings on file herein,  
22 the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

23 DATED this \_\_\_\_\_ day of March, 2017.

24  
25  
26 PHILIP J. KOHN  
27 CLARK COUNTY PUBLIC DEFENDER

28 By: /s/ Carli L Kierny  
CARLI L. KIERNY, #12010  
Deputy Public Defender

1 **DECLARATION**

2 CARLI L. KIERNY makes the following declaration:

3 1. I am an attorney licensed to practice law in the State of Nevada and I am  
4 the Deputy Public Defender for the Clark County Public Defender's Office, counsel of record for  
5 Defendant, JOSE AZUCENA, in the present matter;

6 2. I make this Declaration in support of Defendant's Motion for Production  
7 of Discovery & Brady material;

8 3. I am more than 18 years of age and am competent to testify as to the  
9 matters stated herein. I am familiar with the procedural history of the case and the substantive  
10 allegations made by The State of Nevada. I also have personal knowledge of the facts stated  
11 herein or I have been informed of these facts and believe them to be true.

12 I declare under penalty of perjury that the foregoing is true and correct. (NRS  
13 53.045).

14 EXECUTED this \_\_\_\_\_ day of March, 2017.

15  
16 s/s Carli L Kierny  
17 CARLI L. KIERNY

1 **STATEMENT OF FACTS**

2 Jose Azucena is charged with multiple counts of the following crimes: Lewdness with a  
3 Child under the Age of 14; Child Abuse, Neglect or Endangerment; Indecent Exposure, Sexual  
4 Assault with a Minor under 14 Years of Age; Attempt Lewdness with a Child under the Age of  
5 14; and First Degree Kidnapping. On February 1, 2017, a grand jury was convened, and returned  
6 a true bill on these charges. The following summary is based on testimony at this hearing, and  
7 does not constitute an adoption of these facts by the defense.

8 **Y.E.**

9 Maria Estrella is the mother to Y.E. and N.E.. She met Mr. Azucena through his wife,  
10 Elena Azucena, who all live in the same apartment complex. Grand Jury Transcript (GJT). Pg.  
11 9, lines 11-19. Y.E. is the 8-year-old older sister to Nicole. GJT at 14:1,13-14. She is friends  
12 with many of the named victims. GJT at 17:15-25.

13 The first incident happened at the apartment of Jose Azucena, where he used his hands to  
14 touch Y.E. on her stomach, butt, and vagina. GJT at 18:18-25 and 19:10-11;23-24. Another  
15 incident occurred when Mr. Azucena allegedly pulled Y.E. into his apartment and taped her  
16 mouth, arms, and feet. GJT at 20:14-21:6. He proceeded to touch her vagina, butt, and breasts on  
17 his bed. GJT at 21:23-22:20. While digitally penetrating her, Mr. Azucena was showing Y.E.  
18 porn on his phone. GJT at 23:15-25. He proceeded to remove the tape, told her to go home, and  
19 threatened to kill her parents if she told anyone. A third incident happened when Y.E. was  
20 outside with her friends M.M.1, M.M.2, and J.M. by Mr. Azucena's car. GJT at 27:6-16. Mr.  
21 Azucena allegedly showed them all his penis behind the car. GJT at 29:7-25. After that, he  
22 enticed the girls, except for Y.E., to grab Kit-Kats from his pants. GJT at 28:8-25. A fourth  
23 incident occurred when Y.E. and her friends were inside the car with Mr. Azucena. GJT at 30:  
24 16-25. While in the front seat, Mr. Azucena digitally penetrated Y.E.. GJT at 32:7-20. Finally,  
25 Mr. Azucena expressed to Y.E. that he wanted to take the girls to Chuck-E-Cheese without the  
26 moms, and afterwards they were going to go somewhere "far away". GJT at 34: 7-12. Y.E. also  
27 noted that on one of these days, Mr. Azucena kissed her on the mouth. GJT at 39:12-19.



1           **N.E.**

2           Y.E. was sent to find her younger sister Nicole after she went out playing with her  
3 friends. GJT at 35:3-9. She was found in Mr. Azucena's house, and Mr. Azucena was seen  
4 touching her with his body. GJT at 37:17-20. This was around September 2016. GJT at 43:3-5.

5           **M.M.1**

6           M.M.1 is a friend to both Y.E. and Nicole, and she has two sisters: M.M.2 and J.M. GJT  
7 at 50:7-22. All three of them lived in the same apartment at Mr. Azucena. GJT at 53:4-14.

8           Throughout the testimony, M.M.1 described multiple incidents. She stated that outside  
9 Mr. Azucena's apartment with Y.E. and her sisters, Mr. Azucena used his "thing" to touch  
10 M.M.1's "la cosa", which can mean either butt or vagina. GJT at 55:7-18 and 56:15-22. She  
11 describes another incident where he showed M.M.1, her sisters, and Y.E. his penis outside his  
12 apartment. GJT at 55:7-15. She describes another incident where Mr. Azucena showed her, Y.E.,  
13 and her sisters porn on his phone. GJT 57:19-58:8. M.M.1 continued to testify that Mr. Azucena  
14 did offer Y.E., M.M.1, and her sisters Kit-Kats from his pants, but M.M.1 states that none of  
15 them grabbed any. GJT 58:9-59:22. Finally, M.M.1 states that Mr. Azucena told Y.E., her, and  
16 her sisters that he wanted to take them all to Chuck-E-Cheese's and then to somewhere far away.  
17 GJT 59:22-60:4. He also threatened to hurt M.M.1's parents if she said anything. GJT 60:20-  
18 61:1.

19           **J.M.**

20           J.M. is older sister to M.M.1 and M.M.2, who are twins. GJT at 78:18-79:5. They all  
21 lived in the same apartment complex as Mr. Azucena. GJT 75:5-76:13.

22           J.M. testified that Mr. Azucena touched her private parts more than once both outside and  
23 inside his apartment. GJT at 77:2-79:15. She also described a particular incident when Mr.  
24 Azucena showed her his private parts outside his apartment while Y.E., the sisters, and two other  
25 boys were present. GJT at 80:13-81:8. J.M. also described the incident where Mr. Azucena put  
26 the Kit-Kats in his pants; J.M. stated that he pulled them out of his pants for them and they

1 grabbed them with their sleeves over their hands. GJT at 81:12-82:19. Finally, J.M. described an  
2 incident where she was shown porn by Mr. Azucena on his phone. GJT at 82:21-83:11.

3 **M.M.2**

4 M.M.2 is sister to both M.M.1 and J.M. Moiza. GJT at 91:23-92:4. They lived in the  
5 same apartment complex as Mr. Azucena. GJT 93:15-18.

6 M.M.2 described many incidents with Mr. Azucena. She testified that Mr. Azucena  
7 touched her breasts many times. GJT at 8-16. He touched her vagina many times. GJT at 97:20-  
8 23. He touched her butt many times. GJT at 98:12-17. Finally, he kissed her on the mouth once.  
9 GJT at 99:10-13. M.M.2 went on to describe the incident regarding the porn on Mr. Azucena's  
10 phone, but couldn't remember anything about it, only that it made her uncomfortable. GJT at  
11 100:1-21. M.M.2 also testified that he showed her his penis multiple times. GJT at 100:23-  
12 101:15. M.M.1 went on to testify about the Kit-Kat incident, saying he would put them near his  
13 "thing" and asking if they wanted any. GJT at 101:24-102:23. She was told that if she told her  
14 Mom anything, he would kill her. GJT at 103:7-14. Finally, M.M.2 testified about telling her  
15 Mom about Mr. Azucena wanting to take them to Chuck-E-Cheese, and that it made her sad.  
16 GJT at 104:13-105:7.

17 **S.R.**

18 S.R. is a seven-year-old who lives in the same apartment complex as Mr. Azucena. GJT  
19 at 124:10-126:18. Scarlett testified that one time, Mr. Azucena, while standing by his bed in his  
20 apartment, showed her his penis through the doorway while she was standing outside the  
21 apartment. GJT at 126:17-128:1. Mr. Azucena also touched in on her hands and her back. GJT at  
22 128: 2-14.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Prosecutors are required to disclose both inculpatory and exculpatory information, of  
3 which they are in actual or constructive possession, prior to trial.

4 **I. PROSECUTORS MUST DISCLOSE INCULPATORY EVIDENCE**

5 **NRS 174.235** requires prosecutors to disclose evidence "... within the possession,  
6 custody or control of the state, the existence of which is known, or by the exercise of due  
7 diligence may become known," including:

- 8 • written or recorded statements or confessions made by the defendant;
- 9 • written or recorded statements made by a witness the prosecuting attorney intends  
10 to call during the case in chief of the State;
- 11 • results or reports of physical or mental examinations, scientific tests or scientific  
12 experiments made in connection with the particular case;<sup>1</sup> and
- 13 • books, papers, documents, tangible objects, or copies thereof, which the  
14 prosecuting attorney intends to introduce during the case in chief of the State.

15 **NRS 174.235(1)(a)-(c).**

16 **A. Prosecutors must disclose all inculpatory evidence, regardless of whether the**  
17 **material is intended for use in the government's case in chief.**

18 Prosecutors may not lawfully withhold inculpatory material and information from the  
19 defense simply because they do not intend to present the material or information during the  
20 government's case in chief. State v. Harrington, 9 Nev. 91, 94 (1873); People v. Carter, 312 P.2d  
21 665, 675 (Cal.1957); People v. Bunyard, 756 P.2d 795, 809 (Cal. 1988). Any holding to the  
22 contrary would allow prosecutors to engage in unfair surprise by withholding inculpatory  
23

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24 <sup>1</sup>This includes medical data/imaging/films/reports and/or slides, histological, colposcopic, or otherwise.  
25 The Sixth Amendment's right to counsel guarantees obligate defense counsel to conduct "an adequate  
26 pre-trial investigation into... medical evidence." Gersten v. Senkowski, 426 F.3d 588, 605 (2d Cir.  
27 2005). This duty includes obtaining and reviewing pertinent medical imaging even if the testing reveal(s)  
28 no significant findings. Id. at 605, 607-10 (discussing the exculpatory nature of 'normal' medical  
examinations in cases in which a complainant alleges physical harm). Thus, the discovery obligation(s)  
set forth in NRS 174.235(2) require prosecutors to disclose otherwise invasive physical imaging and/or  
testing.

1 material from the government's case in chief, only to surprise the defense by using it in rebuttal.  
2 Thus, prosecutors must disclose all inculpatory evidence of which they are actually or  
3 constructively aware, including material not necessarily intended for introduction in the  
4 government's case-in-chief.

5 **B. NRS 174.235 and fundamental fairness require the production of all statements**  
6 **made by a defendant, regardless of whether the statement(s) are reduced to**  
7 **writing and/or recorded.**

8 While **NRS 174.235** obligates prosecutors to disclose a defendant's written or recorded  
9 statements, fundamental fairness requires the statute extend to unrecorded statements and/or  
10 statements for which a defendant can be held vicariously liable.<sup>2</sup> Courts have recognized the  
11 "fundamental fairness" involved in "granting the accused equal access to his own words, no  
12 matter how the government came by them." U.S. v. Caldwell, 543 F.2d 1333, 1353 (D.D.C.  
13 1974). This includes allowing an accused access to his/her unrecorded words, including  
14 adoptive or vicarious admissions. Since these "admissions" are admissible at trial whether  
15 recorded or not, **NRS 174.235** must be construed to require pretrial disclosure of any unrecorded  
16 statements/admissions, including those for which the defendant can be held vicariously liable.

17 **II. PROSECUTORS MUST DISCLOSE EXCULPATORY EVIDENCE, AS**  
18 **REQUIRED BY THE U.S. AND NEVADA CONSTITUTIONS**

19 The United States and Nevada Constitutions require disclosure of all exculpatory  
20 evidence in the actual or constructive possession of prosecutors. U.S. CONST. AMEND. V, VI,  
21 XIV; NEV. CONST. ART. 1, Sect. 8; Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley,  
22 514 U.S. 419, (1995). A prosecutor's failure to disclose exculpatory evidence violates Due  
23 Process. Jimenez v. State, 112 Nev. 610, 618 (1996). This is true regardless of how a  
24 prosecutorial agency structures its overall discovery process (Strickler v. Greene, 527 U.S. 263  
25

---

26 <sup>2</sup> NRS 51.035(3)(a)-(e) provides that a defendant can be held vicariously liable for statements  
27 made by third parties.<sup>2</sup> See also Fields v. State, 129 Nev. 785, 220 P.3d 709 (2009) (finding  
28 evidence of defendant's silence following wife's complaint that she was in jail because of his  
conduct admissible as an adoptive admission).

1 (1999)), and regardless of the prosecutor's motive in withholding the exculpatory information.  
2 Jimenez, supra.

3 **A. Brady confers upon prosecutors broad disclosure obligations, any issue about**  
4 **which must be resolved in favor of disgorgement.**

5 Exculpatory evidence is information 'favorable to the defendant' that is 'material to the  
6 issue of guilt or punishment'. U.S. v. Bagley, 473 U.S. 667, 675 (1985). Evidence is material  
7 and favorable to the accused if its "non-disclosure [would] undermine confidence in the outcome  
8 of the trial." Kyles, supra, 514 at 434-35. This evidence must be disclosed, even in the absence  
9 of a Brady request.<sup>3</sup> Bagley, supra at 680-82.

10 Ultimately, prosecutors are tasked with a "broad duty of disclosure." Strickler v. Greene,  
11 527 U.S. 263, 281 (1999); cf. U.S. v. Agurs, 427 U.S. 97, 108 (1976) (holding that "the prudent  
12 prosecutor will resolve doubtful questions in favor of disclosure"). As the Nevada Supreme  
13 Court has explained:

14 Due process does not require simply the disclosure of "exculpatory" evidence.  
15 Evidence also must be disclosed if it provides grounds for the defense to attack the  
16 reliability, thoroughness, and good faith of the police investigation, to impeach the  
17 credibility of the state's witnesses, or to bolster the defense case against  
18 prosecutorial attacks. Furthermore, "discovery in a criminal case is not limited to  
19 investigative leads or reports that are admissible in evidence." Evidence "need not  
20 have been independently admissible to have been material."

21 Mazzan v. Warden, 116 Nev. 48, 67 (2000) (internal citations omitted). Thus, any question as to  
22 whether certain material, information, and/or evidence falls within the purview of Brady should  
23 be resolved in favor of disclosure. U.S. v. Agurs, 427 U.S. 97, 108 (1976) (stating "the prudent  
24 prosecutor will resolve doubtful questions in favor of disclosure."); See also Kyles v. Whitley,

---

25 <sup>3</sup> However, a specific Brady request will result in reversal "if there exists a reasonable possibility that the  
26 claimed evidence would have affected the judgment of the trier of fact." Roberts v. State, 110 Nev. 1121  
27 (1994); See also Jimenez v. State, supra; State v. Bennett, 119 Nev. 589 (2003). Absent a specific  
28 request, reversal is warranted, "if there exists a reasonable probability that, had the evidence been  
disclosed, the result of the proceeding would have been different." U.S. v. Bagley, supra, 473 U.S. at 667,  
682, 685 (1985); Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1986). A 'reasonable probability' is a  
probability sufficient to undermine confidence in the outcome. Bagley, 473 U.S. at 678, 685; Ritchie, 480  
U.S. at 57." Roberts, supra, at 1129.

1 514 U.S. 419, 439 (1995) (stating “a prosecutor anxious about tacking too close to the wind will  
2 disclose a favorable piece of evidence.”).

3  
4 **B. “Favorable evidence” includes impeachment information.**

5 The Due Process Clause of the Fifth and Fourteenth Amendments require that the State  
6 disclose, “any information about its witnesses that could cast doubt on their credibility.” U.S. v.  
7 Jennings, 960 F.2d 1488, 1490 (9th Cir. 1992); see also U.S. v. Bagley, supra, 473 U.S. 667  
8 (1985). Accordingly, “favorable evidence” includes impeachment information pertaining to  
9 any/all government witnesses. Giglio v. U.S., 405 U.S. 150, 154 (1972); Youngblood v. West  
10 Virginia, 547 U.S. 867 (2006); U.S. v. Bagley, supra, 473 U.S. at 676 (requiring disclosure of all  
11 impeachment evidence).

12 1. Cooperation agreements and benefits:

13 Impeachment evidence includes any/all cooperation agreement(s) between a government  
14 witness and prosecutors. Giglio v. U.S., 405 U.S. 150, 154 (1972) (requiring disclosure of  
15 cooperation agreement between government witness and prosecutors). It also includes benefits  
16 provided to a State’s witness, regardless of whether an explicit deal is outlined. Browning v.  
17 State, 120 Nev. 347, 369 (2004). It is the witness’ own anticipation of reward, not the intent of  
18 the prosecutor, which gives rise to the required disclosure. Moore v. Kemp, 809 F.2d 702, 726,  
19 729-30 (11th Cir. 1987), *cert. denied*, 481 U.S. 1054 (1987); Duggan v. State, 778 S.W.2d 465,  
20 468 (Tex. Crim. App. 1989) (noting that agreements need not be express or formal arrangements,  
21 and understanding merely implied, suggested, insinuated, or inferred to be of possible benefit to  
22 witness constitutes proper material for impeachment).

23 Notably, “benefits” are not limited to agreements made in relation to the case in which  
24 they are sought. Jimenez v. State, 112 Nev. 610, 622-23 (1996). For example, prosecutors must  
25 disclose evidence that a witness acted as a paid informant on one or more occasions. State v.  
26 Bennett, 119 Nev. 589, 603 (2003). Additionally, “benefits” include travel and/or lodging  
27 compensation, as well as counseling, treatment, or other assistance, including immigration  
28

1 assistance of any kind, whether actual or anticipatory. This is relevant to issues regarding  
2 possible bias, credibility, and motive to lie, all of which constitute impeachment evidence. See  
3 Davis v. Alaska, 415 U.S. 308 (1974).

4 2. Criminal histories:

5 Impeachment material includes evidence relating to a witness's criminal history. Briggs  
6 v. Raines, 652 F.2d 862, 865-66 (9th Cir. 1981)(under Brady, "rap sheet" useful to prove a  
7 witness's history or propensity for a relevant character trait should be produced). This  
8 encompasses information even if it is more than ten (10) years old. See Moore v. Kemp, 809  
9 F.2d 702 (9th Cir. 1987) (finding the entire criminal record should be disclosed). It also includes  
10 criminal history information maintained by law enforcement agencies other than the Las Vegas  
11 Metropolitan Police Department,<sup>4</sup> such as the federal government's National Crime Information  
12 Center ("NCIC") database.<sup>5</sup>

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14 <sup>4</sup> See Odle v. U.S., 65 F. Supp. 2d 1065 (N.D. Cal. 1999), *rev'd on other grounds by Odle v. Woodford*,  
15 238 F.3d 1084 (9<sup>th</sup> Cir. 2001), (holding that "...knowledge may be imputed to the prosecutor, or a duty to  
16 search may be imposed, in cases where a search for readily available background information is  
17 routinely performed, such as routine criminal background checks of witnesses." Id. at 1072 (citations  
18 omitted) (emphasis added); U.S. v. Perdomo, 929 F.2d 967 (3<sup>rd</sup> Cir. 1991) (adopting 5<sup>th</sup> Circuit's rationale  
19 in requiring government to obtain complete criminal history on prosecution witness(es)); Martinez v.  
20 Wainwright, 621 F.2d 184, 187-89 (5<sup>th</sup> Cir. 1980) (defendant entitled to criminal records of state-  
21 government witnesses, including data obtainable from the FBI; prosecutor's lack of awareness of alleged  
22 victim's criminal history does not excuse duty to obtain and produce rap sheet); U.S. v. Thornton, 1 F.3d  
149 (3<sup>rd</sup> Cir. 1993) (prosecutor charged with producing impeachment evidence actually or constructively  
in his possession as "prosecutors have an obligation to make a thorough inquiry of all enforcement  
agencies that had a potential connection with the witnesses..."). But cf. U.S. v. Blood, 435 F.3d 612, 627  
(6<sup>th</sup> Cir. 2006) (no Brady violation where prosecutor did not produce to the defense the printout of the  
NCIC check but disclosed that the witness in question had no criminal history; "the Government is only  
required to disclose its informant's criminal history if he has one").

23 <sup>5</sup> Federal law permits disclosure of NCIC information under circumstances such as that here. 28 C.F.R.  
24 Chapter 1 addresses the U.S. Dept. of Justice and Criminal Justice Information Systems. 28 C.F.R. Sec.  
25 20.33 sets forth the instances in which NCIC information may be disclosed. It provides for NCIC  
26 disclosure "... (1) To criminal justice agencies for criminal justice purposes..." 28 C.F.R. Sec. 20.3(g)  
27 defines criminal justice agencies as: "... (1) Courts; and [other entities set forth in that section]." Additionally, 28 C.F.R. Sec. 20.3 defines the "[a]dministration of criminal justice" to include the  
28 "performance of any of the following activities . . . adjudication . . . ." Therefore, the C.F.R. authorizes  
prosecutors to access and disclose NCIC data pursuant to Court order as part of a criminal case  
adjudication.

1           3. Evidence contradicting statements of government witnesses:

2           Impeachment evidence encompasses prior statements and/or other evidence that  
3 contradicts government witnesses. Accordingly, prosecutors must disclose prior inconsistent  
4 statements by key government witnesses. Lay v. State, 116 Nev. 1185, 1199 (2000).  
5 Prosecutors must also disclose statements and/or evidence that contradict(s) the testimony of  
6 other government witness(es). Rudin v. State, 120 Nev. 121, 139 (2004).

7           4. Confidential records:

8           A witness can be attacked by “revealing possible biases, prejudices, or ulterior motives of  
9 the witnesses as they may relate directly to the issues or personalities on the case at hand. The  
10 partiality of a witness is...always relevant as discrediting the witness and affecting the weight of  
11 his testimony.” Davis v. Alaska, *supra*, at 354; *See also* Lobato v. State, 120 Nev. 512 (2004)  
12 (discussing the “nine basic modes of impeachment”). Accordingly, impeachment evidence can  
13 derive from otherwise privileged and/or confidential material. When this occurs, the privileged  
14 and/or confidential nature of the material at issue must yield to a defendant’s constitutionally  
15 secured right to confront and cross-examine those who testify against him. Davis v. Alaska,  
16 *supra*, at 356 (finding the State’s interest in maintaining confidentiality of juvenile records must  
17 yield to defendant’s right to cross examine as to bias); *see also* U.S. v. Nixon, 418 U.S. 683, 713  
18 (1974) (generalized assertion of privilege must yield to demonstrated, specific need for evidence  
19 in a pending criminal case). Thus, prosecutors must obtain and disclose privileged/confidential  
20 records pertaining to government witnesses when the records contain information bearing on  
21 witness credibility.<sup>6</sup>

22           This includes mental health records. *See* U.S. v. Lindstrom, 698 F.2d 1154, 1166-67  
23 (11th Cir. 1983) (requiring disclosure of government witness’ mental health records); U.S. v.  
24 Robinson, 583 F.3d 1265, 1271-74 (10th Cir. 2009) (requiring disclosure of material portions of

25 \_\_\_\_\_  
26 <sup>6</sup> At a minimum, otherwise confidential or privileged material must be submitted to the Court for an in  
27 camera review. Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (absent statute prohibiting disclosure of  
28 records to prosecution, defendant entitled to have trial court review Child and Youth Services records to  
determine if records contain material information.).



1 confidential informant's mental health records); Wyman v. State, 125 Nev. 592, 607-08 (2009)  
2 (trial court abused discretion by denying defendant's request for certificate of materiality to  
3 obtain accuser's out-of-state mental health records); Burns v. State, 968 A.2d 1012, 1024-25  
4 (Del. 2009) (defendant entitled to therapy records).

5 It also includes Child Protective Services (or the functional equivalent) and school  
6 records. See Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) (defendant entitled to in camera  
7 review of Child and Youth Services records<sup>7</sup>); and State v. Cardall, 982 P.3d 79, 86 (Ut. 1999)  
8 (defendant entitled to complainant's school psychological records indicating she had propensity  
9 to lie and had fabricated prior rape allegations). It is typical, especially in cases involving  
10 allegations of child sexual abuse, for a CPS investigator or school counselor to be the first State  
11 official to interview a minor witness, often under the direction of the Metropolitan Police  
12 Department or the District Attorney. Production of this evidence is required.

13 It further includes parole/probation records, as well as jail/prison records. See U.S. v.  
14 Strifler, 851 F.2d 1197, 1201 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); Carriger v.  
15 Stewart, 132 F.3d 463, 479-82 (9th Cir. 1997) (requiring production of Department of  
16 Corrections file on principle government witness). Juvenile records must also be produced.  
17 Davis v. Alaska, *supra*, at 356. See also State v. Bennett, 119 Nev. 589, 603 (2003) (failure to  
18 disclose co-conspirator's juvenile records in penalty hearing amounted to Brady violation).  
19 Thus, prosecutors cannot lawfully refuse disclosure of impeachment information on the basis  
20 that the information is privileged and/or confidential.

21 5. Prior allegations of sexual misconduct and prior sexual knowledge:

22 In cases involving allegations of sexual misconduct, impeachment evidence includes  
23 evidence that a complaining witness made prior allegations of sexual misconduct. See Jackson v.  
24 State, 688 F.3d 1091, 1096-1101 (9th Cir. 2012) (citing Crane v. Kentucky, 476 U.S. 683, 690

25 \_\_\_\_\_  
26 <sup>7</sup> The Ritchie Court held that the State cannot claim privilege to refuse disclosure of CPS records, unless  
27 there is a statutory scheme that forbids any use, including disclosure to a prosecutor, of such records.  
28 Ritchie, *supra*, 480 U.S. 39, at 57-58 (1987). NRS 432B.290 allows for disclosure of such records to the  
prosecutor and to the court for in camera review.

1 (1986)) (finding defendant entitled to present evidence that complainant made prior contradicted  
2 and/or uncorroborated assault accusations against defendant as “such [extrinsic evidence] was  
3 highly relevant... to... witness’s credibility and motive to lie and bias, and its exclusion  
4 implicates a defendant’s due process rights”). Under Nevada law, prior false allegations of  
5 sexual misconduct amount to an exception to rape shield laws. Miller v. State 105 Nev. 497  
6 (1989) (holding that false allegations are exceptions to rape shield laws). Accordingly, Nevada  
7 law authorizes disclosure of prior false allegations even when made by juvenile complainants.  
8 See **NRS 432B.290(3)** (authorizing child welfare agencies to disclose “... the identity of a  
9 person who makes a report or otherwise initiates an investigation... if a court, after reviewing the  
10 record in camera and determining that there is reason to believe that the person knowingly made  
11 a false report, orders the disclosure.”). See also Fowler v. Sacramento Co. Sheriff’s Dept., 421  
12 F. 3d 1027, 1032-33; 1040 (9th Cir. 2005) (finding it error to exclude evidence of minor’s prior  
13 false sexual assault allegations as the evidence “might reasonably have influenced the jury’s  
14 assessment of [the complainant’s] reliability or credibility . . . [and] ‘the jurors were entitled to  
15 have the benefit of the defense theory before them so that they could make an informed judgment  
16 as to the weight to place on [the complainant’s] testimony.’”) (quoting Davis v. Alaska, 415 U.S.  
17 308, 317 (1974)).

18 Impeachment evidence in sexual misconduct cases can further include evidence of a  
19 complainant’s prior sexual conduct to show sexual knowledge. Summitt v. State, 101 Nev. 159  
20 (1985); See also Holley v. Yarborough, 568 F.3d 1091, 1099-1100 (9th Cir. 2009) (finding it was  
21 error to exclude evidence that complainant made comments to friends regarding a prior sexual  
22 encounter and claimed other boys expressed a desire to engage in sexual acts with her, as this  
23 evidence revealed complainant’s “active sexual imagination,” and, accordingly, may have altered  
24 jury’s perception of the complainant’s “credibility and reliability of her claims.”). Thus,  
25 prosecutors must disclose evidence of a complainant’s prior accusations of sexual misconduct as  
26 well as evidence of a complainant’s prior sexual conduct in cases where such evidence bears on  
27 the charged crimes.

1           6. Law enforcement personnel files:

2           Under U.S. v. Henthorn, 931 F.2d 29, 31 (9<sup>th</sup> Cir. 1991), prosecutors must examine law  
3 enforcement personnel files upon defense request. See also U.S. v. Cadet, 727 F.2d 1453 (9th  
4 Cir. 1984). A defendant is not required to make an initial showing of materiality before  
5 prosecutors must examine the files — the examination obligation arises solely from the  
6 defendant’s request. Henthorn, 931 F.2d at 31. “Absent such an examination, [the State] cannot  
7 ordinarily determine whether it is obligated to turn over the files.” Id. at 31. Once examined,  
8 prosecutors must “disclose information favorable to the defense that meets the appropriate  
9 standard of materiality.... If the prosecution is uncertain about the materiality of the information  
10 within its possession, it may submit the information to the trial court for an in camera inspection  
11 and evaluation....” Henthorn, 931 F.2d at 30-31 (quoting Cadet, 727 F.2d at 1467-68). Thus, if  
12 requested to do so by the defense, the prosecution must canvass relevant law enforcement  
13 personnel files for information material to the case at bar.

14  
15           **C. “Favorable Evidence” Includes Witnesses with Exculpatory Information.**

16           Prosecutors must disclose the identity of witnesses possessing exculpatory information,  
17 as no legitimate interest is served by precluding the defense from calling such witnesses for trial.  
18 U.S. v. Eley, 335 F.Supp. 353 (N.D. Ga. 1972); U.S. v. Houston, 339 F.Supp. 762 (N.D. GA  
19 1972).

20  
21           **D. “Favorable Evidence” Includes Evidence of Third-Party Guilt.**

22           The U.S. Constitution guarantees a criminal defendant the right to present evidence of  
23 third-party guilt. See Holmes v. South Carolina, 547 U.S. 319 (2006) (holding that refusal to  
24 allow defendant to present evidence of third party guilt deprives him of a meaningful right to  
25 present a complete defense under the 14<sup>th</sup> and 6<sup>th</sup> Amendment of the US Constitution). Thus,  
26 prosecutors must disclose any/all evidence suggesting another perpetrator committed the charged  
27 crime(s). Lay v. State, 116 Nev. 1185, 1195-96 (2000) (State’s failure to disclose evidence of  
28

1 another perpetrator violated Brady). This includes evidence that another individual was arrested  
2 in connection with the charged crime. Banks v. Reynolds, 54 F.3d 1508, 1518 n.21 (10th Cir.  
3 1995). It also includes evidence of investigative leads pointing to other suspects. Jimenez v.  
4 State, 112 Nev. 610, 622-23 (1996) (withholding evidence of investigative leads to other  
5 suspects, regardless of admissibility, constitutes Brady violation). And prosecutors must provide  
6 the actual documents, evidence, and/or reports pertaining to evidence of third-party guilt; it is not  
7 enough for prosecutors to provide the defense with a summary of the information relating to  
8 other suspects. Mazzan v. Warden, 116 Nev. 48, 69 (2000) (summary of prosecutor's  
9 perspective on written reports relating to potential suspects were constitutionally inadequate and  
10 reports should have been disclosed pursuant to Brady); Bloodworth v. State, 512 A.2d 1056,  
11 1059-60 (1986). Thus, prosecutors must disclose any information or evidence indicating  
12 someone other than the instant defendant committed the charged crime(s).

13 **E. "Favorable evidence" includes any/all evidence that may mitigate a defendant's**  
14 **sentence**

15 Favorable evidence also includes evidence which could serve to mitigate a defendant's  
16 sentence upon conviction. Jimenez v. State, 112 Nev. 610 (1996). Accordingly, prosecutors  
17 must disclose any evidence tending to mitigate punishment in the instant matter.

18 **III. THE DISCLOSURE OBLIGATIONS CONFERRED BY NRS 174.235 AND**  
19 **BRADY INCLUDE ROUGH NOTES**

20 Raw notes made by any law enforcement officer or other prosecution agent in connection  
21 with the investigation of instant matter must be disclosed to the defense. See, e.g., State v.  
22 Banks, 2014 WL 7004489 (Nev. S.Ct. Dec. 10, 2014) (unpublished disposition) (court did not  
23 take issue with lower court's order requiring preservation and disclosure of police officer's rough  
24 notes); See also U.S. v. Clark, 385 F.3d 609, 619 (6<sup>th</sup> Cir. 2004) (finding rough notes  
25 discoverable under F.R.C.P. 16); U.S. v. Molina-Guevara, 96 F.3d 698, 705 (3<sup>rd</sup> Cir. 1996)  
26 (remanding on other grounds but noting that, on remand, production of rough notes required  
27 under F.R.C.P. 16); U.S. v. Harris, 543 F.2d 1247 (9<sup>th</sup> Cir. 1976) (noting as important, and  
28

1 requiring preservation of, law enforcement rough notes). Notably, this does not include  
2 information amounting to work product.

3 In Hickman v. Taylor, 329 U.S. 495, 508-11 (1947), the U.S. Supreme Court recognized  
4 the privileged nature of discussions relating to the preparation of a case of trial.<sup>8</sup> The ‘work  
5 product doctrine’ announced in Hickman shelters not only material generated by an attorney in  
6 preparation for trial, but by his/her agent, as well:

7 At its core, the work product doctrine shelters the mental processes of the  
8 attorney, providing a privileged area within which he can analyze and prepare his  
9 client’s case. But the doctrine is an intensely practical one, grounded in the  
10 realities of litigation in our adversary system. One of those realities is that  
11 attorneys often must rely on the assistance of investigators and other agents in  
12 preparation for trial. It is therefore necessary that the doctrine protect material  
prepared by agents for the attorney as well as those prepared by the attorney  
himself. Moreover, the concerns reflected in the work-product doctrine do not  
disappear once trial has begun...

13 U.S. v. Nobles, 422 U.S. 225, 238-39 (1975). Codifying this, NRS 174.235(2) exempts from  
14 discovery by a criminal defendant:

- 15 (a) An internal report, document or memorandum that is prepared by or on  
16 behalf of the prosecuting attorney in connection with the investigation  
17 or prosecution of the case.
- 18 (b) A statement, report, book, paper, document, tangible object or any  
19 other type of item or information that is privileged or protected from  
20 disclosure or inspection pursuant to the constitution or laws of this  
21 state or the Constitution of the United States.

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22 <sup>8</sup> “In performing his various duties, however, it is essential that a lawyer work with a certain degree of  
23 privacy, free from unnecessary intrusion by opposing parties and their counsel... Proper preparation of a  
24 client’s case demands that he assemble information, sift what he considers to be the relevant from the  
25 irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference...  
26 This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental  
27 impressions, personal beliefs, and countless other tangible and intangible ways – aptly... termed... as the  
28 ‘work product of the lawyer.’ Were such materials open to opposing counsel on mere demand, much of  
what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate,  
would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving  
of legal advice and in the preparation of cases for trial. The effect on the legal profession would be  
demoralizing. And the interests of clients and the cause of justice would be poorly served.” Id.

1           Accordingly, only raw notes generated by, or on behalf of, the prosecutor are exempted  
2 from disclosure. Any other raw note(s) compiled during the investigation of this matter must be  
3 turned over pursuant to the disclosure obligation(s) conferred by NRS 174.235 or, in the case of  
4 exculpatory material, Brady v. Maryland, *infra*.

5 **IV. THE DISCLOSURE OBLIGATIONS SET FORTH ABOVE EXTEND TO ALL**  
6 **MATERIAL OF WHICH PROSECUTORS ARE IN ACTUAL OR**  
7 **CONSTRUCTIVE POSSESSION**

8           Prosecutors must turn over all material related to the case in the possession, control and  
9 custody of any government agent or agency. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995)  
10 (stating that exculpatory evidence “cannot be kept out of the hands of the defense just because  
11 the prosecutor does not have it”). Accordingly, prosecutors are responsible for disclosing  
12 evidence in their possession as well as evidence held/maintained by other government agents. *Id.*  
13 at 620; See also State v. Bennett, 119 Nev. 589, 603 (2003) (“We conclude that it is appropriate  
14 to charge the State with constructive knowledge of the evidence because the Utah police assisted  
15 in the investigation of this crime...”).

16           This constructive possession rule even applies to evidence that is withheld by other  
17 agencies: “Even if the detectives withheld their reports without the prosecutor’s knowledge, ‘the  
18 state attorney is charged with constructive knowledge and possession of evidence withheld by  
19 other state agents, such as law enforcement officers.’” *Id.* (citation omitted) (emphasis added).  
20 “Exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor  
21 does not have it, where an investigative agency does.” U.S. v. Zuno-Arce, 44 F.3d 1420, 1427  
22 (9th Cir. 1995). “It is a violation of due process for the prosecutor to withhold exculpatory  
23 evidence, and his motive for doing so is immaterial.” Jimenez, *supra* at 618.

24           In fact, prosecutors have an affirmative obligation to obtain Brady material and provide it  
25 to the defense, even if the prosecutor is initially unaware of its existence. “The prosecution’s  
26 affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20<sup>th</sup>  
27 century strictures against misrepresentation and is of course most prominently associated with  
28 this Court’s decision in Brady v. Maryland...” Kyles v. Whitley, 514 U.S. at 432. This

1 obligation exists even where the defense does not make a request for such evidence. Id. As the  
2 U.S. Supreme Court explained:

3 This in turn means that the individual prosecutor has a duty to learn of any  
4 *favorable evidence known to the others acting on the government's behalf in the*  
5 *case, including the police. But whether the prosecutor succeeds or fails in meeting*  
6 *this obligation (whether, that is, a failure to disclose is in good faith or bad faith),*  
7 *the prosecution's responsibility for failing to disclose known, favorable evidence*  
8 *rising to a material level of importance is inescapable...Since then, the prosecutor*  
9 *has the means to discharge the government's Brady responsibility if he will, any*  
10 *argument for excusing a prosecutor from disclosing what he does not happen to*  
11 *know about boils down to a plea to substitute the police for the prosecutor, and*  
12 *even for the courts themselves, as the final arbiter's of the government's obligation*  
13 *to ensure fair trials.*

14 Kyles, 514 U.S. at 437-38 (emphasis added) (citations and footnotes omitted). See also Carriger  
15 v. Stewart, 132 F.3d 463, 479-82 (9<sup>th</sup> Cir. 1997) (holding that "...the prosecution has a duty to  
16 learn of any exculpatory evidence known to others acting on the government's behalf. Because  
17 the prosecution is in a unique position to obtain information known to other agents of the  
18 government, it may not be excused from disclosing what it does not know but could have  
19 learned." (citations omitted) (emphasis added). Thus, the disclosure obligations outlined above  
20 extend not only to material directly in the possession of prosecutors, but material prosecutors  
21 constructively possess, as well. In short: "I didn't know about it; it was in the detective's file," is  
22 never an excuse.

## 23 **V. AN "OPEN FILE" POLICY DOES NOT OBTVIATE THE DISCLOSURE** 24 **OBLIGATIONS OUTLINED ABOVE**

25 Historically, the Clark County District Attorney's Office (CCDA) has employed an "open  
26 file" policy in which prosecutors allow defense counsel to review the discovery contained in the  
27 government's trial file. While the CCDA currently may not be adhering to this practice, it is  
28 worth noting that an open file policy does not vitiate above-referenced disclosure obligations.  
Strickler v. Green, 527 U.S. 263, 283 (1999) (holding that a prosecutor's open file policy does  
not in any way substitute for or diminish the State's obligation to turn over Brady material). "If

1 a prosecutor asserts that he complies with Brady through an open file policy, defense counsel  
2 may reasonably rely on that file to contain all materials the State is constitutionally obligated to  
3 disclose under Brady.” Strickler, 527 U.S. at 283, n.23. See also Amando v. Gonzalez, No. 11-  
4 56420 at 27 (9th Cir. 2013). McKee v. State, 112 Nev. 642, 644, 917 P.2d 940, 944 (1996)  
5 (reversing a judgment of conviction based on prosecutorial misconduct where the prosecutor did  
6 not make available all relevant inculpatory and exculpatory evidence consistent with the county  
7 district attorney’s open file policy); See also Furbay v. State, 116 Nev. 481, 998 P.2d 553 (2000)  
8 (discussing prosecution’s duty to provide all evidence in its possession where it has promised to  
9 do so). Accordingly, if the defense relies on the government’s assurance of an ‘open file’  
10 policy, the defense is not required to hunt down information otherwise obtained and maintained  
11 pursuant to that policy.

12 **VI. ADJUDICATION OF THE INSTANT MOTION IS NECESSARY FOR**  
13 **PRESERVATION OF ISSUES RELATING TO DISCOVERY DISCLOSURES**

14 NRS 174.235 requires disclosure of (1) written/recorded statements of a defendant or any  
15 witness the prosecutor intends to call in his/her case-in-chief; (2) results/reports of any  
16 examinations or tests conducted in connection with the case at bar; and (3) any document or  
17 tangible object the prosecutor intends to introduce in his/her case in chief – upon the request of  
18 the defense. Additionally, constitutional jurisprudence requires disclosure of any evidence  
19 tending to exculpate the accused. The instant Motion is brought, inter alia, to ensure the  
20 availability of appropriate sanctions should later discovery issues arise. This requires a Court  
21 Order compelling the production of the information and material sought herein.

22 **A. Statutorily-Authorized Discovery and Nevada Law:**

23 Eighth Judicial District Court **Rule 3.24** governs discovery motions in local criminal  
24 practice. It states:

25 (a) Any defendant seeking a court order for discovery pursuant to the provisions  
26 of **NRS 174.235** or **NRS 174.245** may make an oral motion for discovery at the  
27 time of initial arraignment. The relief granted for all oral motions for discovery  
28 will be as follows:



1 (1) That the State of Nevada furnish copies of all written or recorded statements  
2 or confessions made by the defendant which are within the possession, custody or  
3 control of the State, the existence of which is known or by the exercise of due  
4 diligence may become known to the district attorney.

5 (2) That the State of Nevada furnish copies of all results or reports of physical or  
6 mental examinations, and of scientific tests or experiments made in connection  
7 with this case which are within the possession, custody or control of the State, the  
8 existence of which is known or by the exercise of due diligence may become  
9 known to the district attorney.

10 (3) That the State of Nevada permit the defense to inspect and copy or photograph  
11 books, papers, documents, tangible objects, buildings, places, or copies or  
12 portions thereof, which are within the possession, custody or control of the State,  
13 provided that the said items are material to the preparation of the defendant's case  
14 at trial and constitute a reasonable request.

15 (b) Pursuant to NRS 174.255, the court may condition a discovery order upon a  
16 requirement that the defendant permit the State to inspect and copy or photograph  
17 scientific or medical reports, books, papers, documents, tangible objects, or copies  
18 or portions thereof, which the defendant intends to produce at the trial and which  
19 are within the defendant's possession, custody or control provided the said items  
20 are material to the preparation of the State's case at trial and constitute a  
21 reasonable request.

22 Thus, **EDCR 3.24** specifically provides for the discovery motion brought in the instant matter.

23 Not surprisingly, the Nevada Supreme Court has held that a discovery motion (and  
24 corresponding order) is a prerequisite to obtaining relief under **NRS 174.295**<sup>9</sup> for later discovery  
25 violations:

26 Although **NRS 174.295** provides relief for a prosecutor's failure to notify defense  
27 counsel of all discoverable material, that statute is only operative in situations  
28 where a previous defense motion has been made and a court order issued. That  
provision is not applicable to any informal arrangements that are made, as here  
between counsel without benefit of court sanction.

Donovan v. State, 94 Nev. 671 (Nev. 1978) (internal citations omitted).

This comports with other portions of **NRS 174**, which, by implication, suggest that  
criminal discovery is a matter that need be prosecuted by way of motion rather than a simple

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<sup>9</sup> **NRS 174.295** sets forth sanctions (in the form of inspection of material not properly disclosed, trial  
continuance, or exclusion of the undisclosed material) for discovery violations.

1 written or oral request. For example, **NRS 174.285** states that “a request made pursuant to **NRS**  
2 **174.235** or **174.245** may be made only within 30 days after arraignment or at such reasonable  
3 time **as the court may permit**. A party shall comply with a request made pursuant to **NRS**  
4 **174.235** or **174.245** not less than 30 days before trial or at such reasonable later time **as the**  
5 **court may permit.**” (emphasis added). The judicial permission required for late discovery  
6 requests and late compliance contemplates judicial oversight of discovery matters.

7 Similarly, **NRS 174.125** contemplates discovery requests via written motion. **NRS**  
8 **174.125** requires that, any motion “...which by [its] nature, if granted, delay or postpone the time  
9 of trial must be made before trial, unless an opportunity to make such a motion before trial did  
10 not exist or the moving party was not aware of the grounds for the motion before trial.” A  
11 discovery request, depending on the timing and/or nature of the request, may necessarily cause a  
12 trial delay. Accordingly, under **NRS 174.125**, discovery requests should be made via motion  
13 prior to trial.

14 Thus, the statutorily-based discovery requests set forth herein are properly brought before  
15 this Honorable Court and must be adjudicated. Any refusal to adjudicate the Motion obviates the  
16 Defendant’s statutorily created liberty interest in (1) ensuring access to the discoverable material  
17 covered by **NRS 174** and (2) ensuring application of the enforcement/sanction provisions  
18 outlined in **NRS 174**. Such an arbitrary deprivation of a state-created liberty interest violates  
19 Due Process. See Hicks v. Oklahoma, 447 U.S. 343, 346 (1980) (arbitrary deprivation of state-  
20 created liberty interest amounts to Due Process violation).

21 **B. Brady material and relevant authority**

22 Brady and related authority also contemplate pre-trial regulation and adjudication of  
23 prosecutorial disclosures. Brady is not a discovery rule but a rule of fairness and minimum  
24 prosecutorial obligation. Curry v. U.S., 658 A.2d 193, 197 (D.C. 1995) (internal quotations and  
25 citations omitted). It does not require the production of specific documents. It requires the  
26 production of information. This prosecutorial obligation is non delegable – it is not contingent  
27 on, nor is the defense required to make, specific Brady requests. See Strickler v. Greene, 527  
28

1 U.S. 263, 281-82 (setting forth the elements of a Brady claim and clarifying that there is no  
2 requirement that defense make request).<sup>10</sup>

3         However, to prevail on a Brady claim, should one arise, a defendant must establish that  
4 (1) the prosecution was in possession [actual or constructive] of favorable information; (2) the  
5 prosecution failed to disclose this information to the defense in a timely fashion or at all; and (3)  
6 the withheld information was “material” to the outcome of the trial. Strickler, 527 U.S. at 281-  
7 82. The standard for determining “materiality” depends upon whether defense counsel requested  
8 the information at issue and, if a request was made, whether the request was specific or general  
9 in nature. “If a defendant makes no request or only a general request for information, the  
10 evidence is material when a reasonable probability exists that the result would have been  
11 different had it been disclosed.” State v. Bennett, 119 Nev. 589, 600 (Nev. 2003). Yet, “if the  
12 defense request is specific, the evidence is material upon the lesser showing that a reasonable  
13 possibility exists of a different result had there been disclosure.” Id. Accordingly, the fact and  
14 nature of a Brady request is critical to later adjudication of alleged Brady violations.

15         Defense counsel enjoys to the right to prosecute Brady requests – and thereby construct  
16 the record on them -- in the manner counsel sees fit. And the best way to ensure that the record  
17 adequately reflects the nature and scope of a Brady request is via pre-trial discovery motion<sup>11</sup> –  
18 a motion, as set forth above, specifically provided for by Nevada law. See also Myles v. State  
19 WL 6880677 (2011) unpublished opinion (no discovery violation where undisclosed photo not  
20 requested as part of discovery motion).

21         A cursory review of federal discovery jurisprudence reveals the broad authority with  
22 which trial courts are vested to regulate pretrial Brady disclosures and thereby ensure that this

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23 <sup>10</sup> Accordingly, any argument by prosecutors that, “the defense is able to independently seek out any  
24 discovery which they desire... it is not the State’s responsibility to perform investigations or inquiries on  
25 behalf of the defense,” – a common responses to defense discovery motions – is patently wrong.  
26 Strickler, supra (rejecting the argument that defense counsel should have uncovered Brady information);  
Banks v. Dretke, 540 U.S. 668, 695-98 (2004) (“[a] rule... declaring ‘prosecutor may hide, defendant  
must seek’ is not tenable in a system constitutionally bound to accord defendants due process.”).

27 <sup>11</sup> This is especially true given the absence of compelling Nevada or other authority recognizing an  
28 informal Brady request as sufficient to preserve the record on this critical issue.

1 constitutional rule – which exists “to ensure that a miscarriage of justice does not occur,” –  
2 works as it should. U.S. v. Bagley, 473 U.S. 667, 675 (1985); U.S. v. Odom, 930 A.2d 157, 158  
3 (D.C. 2007); See also U.S. v. W.R. Grace, 526 F.3d 499, 509 (9<sup>th</sup> Cir. 2008) (affirming trial  
4 court’s order requiring government to disclose its finalized witness list a year prior to trial as an  
5 exercise of the court’s inherent authority to manage its docket”); U.S. v. Coppa, 267 f.3d 132,  
6 146 (2d Cir. 2001 (acknowledging trial court’s discretion to order pretrial disclosures as a matter  
7 of sound case management); U.S. v. Rigas, 779 F.Supp. 408, 414 (M.D. Pa. 2011 (recognizing  
8 authority of trial court to order pretrial disclosure of Brady material to ensure effective  
9 administration of criminal justice system) (internal quotation and citation omitted); U.S. v.  
10 Cerna, 633 F. Supp. 2d 1053, 1057 (N.D. Cal. 2009) (exercising power to issue Brady order);  
11 U.S. v. Thomas, 2006 WL 3095956 (D.N.J. 2006) (issuing pretrial order regulating, inter alia,  
12 Brady disclosures).

13 Indeed, trial courts must, “as a constitutional matter,” exercise this oversight power. Boyd  
14 v. U.S., 908 A.2d 39, 61 (D.C. 2006) (holding that government’s discretion in determining how  
15 to fulfill Brady obligations “is not unlimited, and courts have the obligation to assure that it is  
16 exercised in a manner consistent with the right of the accused to a fair trial”). See also Smith v.  
17 U.S., 665 A.2d 962 (D.C. 2008) (abuse of discretion for court to refuse to review a transcript in  
18 camera where prosecution concede there were “minor inconsistencies in the testimony as to how  
19 the shooting happened”). As such, judicial oversight of Brady disclosures is commonplace in  
20 federal criminal prosecutions. See, e.g., U.S. v. Johnson, 2010 WL 322143 (W.D. Pa. 2010)  
21 (trial court ordering government to disclose all Brady material [including impeachment  
22 material]... no later than 10 days prior to trial); U.S. v. Lekhtman 2009 WL 5095379 at 1  
23 (E.D.N.Y. 2009) (ordering disclosure of Brady material as it is discovered and Giglio material  
24 two weeks before commencement of trial); U.S. v. Rodriguez, 2009 WL 2569116 at 12 S.D.N.Y.  
25 2009) (ordering government to turn of Brady material as it is discovered and Giglio material 21  
26 days before trial); U.S. v. Libby, 432 F. Supp. 2d 81, 86-87 (D.D.C. 2006) (ordering immediate  
27 production of all Brady material); U.S. v. Thomas, 2006 CR 553, 2006 WL 3095956 (D.N.J.  
28

1 2006) (unpublished) (ordering disclosure within 10 days of order “[a]ny material evidence  
2 favorable to the defense related to issues of guilt, lack of guilt, or punishment... within the  
3 purview of Brady and its progeny”). Thus, the constitutionally-based Brady requests set forth  
4 herein are properly brought before this Honorable Court and must be adjudicated.

5 **VII. THE COURT MUST ADJUDICATE THE INSTANT MOTION REGARDLESS**  
6 **OF WHETHER A DISCOVERY DISPUTE EXISTS**

7 A dispute over the discoverability of certain material is not a prerequisite to compelling  
8 production of discovery and/or exculpatory information. This is because such disputes rarely  
9 occur. With the exception of records that are otherwise privileged (such as CPS or medical  
10 records) prosecutors typically do not inform defense counsel of material they intend to withhold  
11 from the defense. They simply keep the information hidden. The withheld information is later  
12 discovered by the defense either through subsequent defense investigation, fortuitous  
13 circumstances, or during the post-conviction discovery process.

14 Recognizing this, the U.S. Supreme Court has not required defense counsel to divine (and  
15 bring to the Court’s attention) particular information within the government’s file that is being  
16 shielded from defense view:

17 We rejected a similar argument in Strickler. There, the State contended that  
18 examination of a witness’ trial testimony, alongside a letter the witness published  
19 in a local newspaper, should have alerted the petitioner to the existence of  
20 undisclosed interviews of the witness by the police. We found this contention  
21 insubstantial. In light of the State’s open file policy, we noted, ‘it is especially  
22 unlikely that counsel would have suspected that additional impeaching evidence  
23 was being withheld. Our decision lend no support to the notion that defendants  
24 must scavenge for hints of undisclosed Brady material when the prosecution  
25 represents that all such material has been disclosed. As we observed in Strickler,  
26 defense counsel has no ‘procedural obligation to assert constitutional error on the  
27 basis of mere suspicion that some prosecutorial misstep may have occurred.

24 Banks, supra, 540 U.S. at 695-96 (internal citations omitted). Thus, there need not exist a  
25 dispute over the discoverability of a particular piece of information in order for this Court to  
26 entertain motions such as that brought here and enforce the government’s constitutionally-

1 mandated discovery obligations. Accordingly, the Defendant respectfully requests that this  
2 Honorable Court adjudicate his Motion to Compel Production of Discovery.

3 **VIII. PROSECUTORS MUST OPPOSE OR CONCEDE EACH DISCOVERY**  
4 **REQUEST, AND THE COURT MUST ADJUDICATE EACH REQUEST**

5 Prosecutors often respond to discovery requests with some combination of the following:  
6 (1) the government is aware of its discovery obligation and will act accordingly; (2) the  
7 government has complied with the request(s) and/or will facilitate review of discovery as  
8 needed; and/or (3) the request is objectionable as overbroad, immaterial, or not authorized by  
9 law. Only the last of these is responsive to a particular request; the first two are not.

10 Each defense request must be opposed or conceded. Saying, “we have complied,” or,  
11 “we are aware of our discovery obligations,” or “we will facilitate a review of detective  
12 notebooks,” is nothing more than attempt to subvert a ruling enforcing the discovery provisions  
13 mandated by state and federal law. It is a way to goad the court into believing the issue is moot.

14 Discovery and Brady obligations are never moot. Discovery is a continuing obligation; a  
15 criminal defendant is entitled to an order enforcing the discovery provisions outlined by state and  
16 federal law, regardless of whether the prosecutor has already provided certain requested material,  
17 is aware of pertinent discovery rules, and/or is willing to facilitate further discovery review. The  
18 prosecutor must oppose or concede each request, and the Court must rule on each request  
19 accordingly.<sup>12</sup> Failure to do so is a due process violation.

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27 <sup>12</sup> “Combination” responses, which contain conciliatory language in conjunction with some form of  
28 opposition, must be treated as an opposition to a particular request, thereby warranting adjudication by  
this Honorable Court.

1 **IX. DEFENDANT’S SPECIFIC DISCOVERY REQUESTS:**

2 Based upon the foregoing, the instant defendant requests that this Honorable Court enter  
3 an order directing prosecutors to provide the following related to this case<sup>13</sup>:  
4

5 **1. Statements of Defendant and Any Potential Co-Defendant(s)**

6 All statements made by the defendant and any co-defendants, regardless of whether the  
7 statements were written or recorded, including but not limited to:

- 8 a. Comments made at the time of arrest or during transport to the detention center;
- 9 b. Any conversations, telephonic or otherwise, intercepted by any/all law enforcement  
10 agencies, including federal authorities; and
- 11 c. The substance of any statements, conversations, or correspondence overheard or  
12 intercepted by any jail personnel or other inmates which have not been recorded or  
13 memorialized.

14 **2. Statements of Potential Witnesses**

- 15 a. Any and all statements (written or recorded) of witnesses and potential witnesses,  
16 including, but not limited to:
- 17 b. Audio and/or video recording of any form collected by investigating officers or any  
18 other law enforcement agent as part of the investigation of this matter, as well as any  
19 related matters;
- 20 c. Notes of interviews that were not later recorded, such as notes of patrol officers, or  
21 notes of phone calls made to potential witnesses, or attempts to contact such witnesses;
- 22 d. Interviews of the following individuals: Maria Barajas, J.M., M.M.2, M.M.1, Amanda  
23 Moiza, Ricardo Rangel, S.R., Y.E., N.E., Yusnay Rodriguez-Estrada, and any other  
24 witness or investigative official involved in the instant matter and any related matter.

25 **3. Records Related to Investigation**

26  
27 <sup>13</sup> Significantly, this request is not in any way intended to be a substitute for the generalized duties  
28 described above.

1 Any and all records of the Las Vegas Metropolitan Police Department and any other law  
2 enforcement agencies involved in the investigation of this or any related matter, including, but  
3 not limited to:

- 4 a. Copies of notes, whether handwritten or otherwise (see Ex. A, attached, for example);
- 5 b. Investigative leads that were not followed up on and any other matter bearing on the  
6 credibility of any State witness;
- 7 c. Information pertaining to this case or any witnesses in this case, no matter what the  
8 form or title of the report, including:
  - 9 1) "Case Monitoring Forms,"
  - 10 2) 911 recordings,
  - 11 3) Dispatch logs, and/or
  - 12 4) Information regarding leads or tips provided to law enforcement or a crime tip  
13 organization such as Crime Stoppers, including any reward or benefit received for  
14 such tip.
- 15 a. This case was widely covered in local media and most news stories included a  
16 plea for "anyone with information about the incidents, or people who believe  
17 their children might be victims, to call Metros' sexual abuse juvenile section or  
18 Crime Stoppers." The defense requests any information recovered from this  
19 media request, whether or not the tip proved fruitful.

20 **4. Crime Scene Analysis, Evidence Collection, and Forensic Testing**

21 Any and all requests, results, reports, and bench notes pertaining to any and all crime scene  
22 analysis, evidence collection and/or forensic testing performed in this case, including, but not  
23 limited to:

- 24 a. **Recordings:** Photographic, video, and/or audio recordings of evidence collection  
25 and/or testing;
- 26 b. **Fingerprint Evidence:** Any/all latent prints recovered in the instant matter (regardless  
27 of their value for identification) as well as exemplars compiled in connection with the



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investigation of this matter, including:

- 1) Photographs, reports, and recordings related to collecting and testing of fingerprints;
- 2) Results of fingerprint collection and comparison, and;
- 3) AFIS (Automated Fingerprint Identification System) searches and/or results;
- c. **DNA Evidence:** DNA testing, raw data and , CODIS (Combined DNA Index System) searches and/or results;
- d. **Scientific Evidence:** toxicological, chemical, biochemical, laboratory, and/or other laboratory/forensic analyses, including trace evidence analyses, crime scene reconstruction/blood spatter analysis; and
- e. **Forensic Analysis:** reports and notes related to any forensic analysis and/or requests for forensic analysis (regardless of the outcome of such request.

**5. Medical Records**

Any and all records, including photos, reports, imaging studies, test results, and notes pertaining to:

- a. Any alleged victim (including J.M., M.M.2, M.M.1, S.R., Y.E., and N.E.) generated pursuant to treatment provided in connection with the instant matter; including, without limitation, all emergency medical, fire department, hospital, or other medical care provider records, including any/all relevant prior medical records;
- b. All pathological, neuropathological, toxicological, or other medical evaluations of J.M., M.M.2, M.M.1, S.R., Y.E., and N.E., including any/all relevant prior medical records.

**6. Preservation of/Access to Raw Evidence**

Access to and preservation of any and all material collected in the investigation of this case to include but not limited to forensic material, raw data, video surveillance, photographic negatives, digital negatives, biological samples and toxicological samples.

**7. Electronic Communications and Associated Warrants**

All intercepted electronic and/or oral communications, as well as communications sent to and

1 from handset and/or telephone and/or computers pursuant to the investigation in this case,  
2 including but not limited to: Audio, Push to Talk, Data, Packet Data, electronic messaging  
3 encompassing Global System for Mobile Communications (GSM), Short Message Service  
4 (SMS), Multimedia Messaging Service (MMS), and Internet Relay Chat, File Transfer  
5 Protocol (FTP), Internet Protocol (IP), Voice Over Internet Protocol (VOIP), Transmission  
6 Control Protocol (TCP) and electronic mail or other internet based communications, obtained  
7 by any law enforcement agency (including federal authorities) via subpoena, interception, or  
8 other means, pertaining to the instant matter or any related matter.

9 **8. Law Enforcement Video or Audio Recordings**

10 All video and/or audio recordings obtained by any Las Vegas Metropolitan Police Department  
11 recording device, including but not limited to:

- 12 a. Dashboard cameras;
- 13 b. Body-mounted officer cameras;
- 14 c. Any other recording equipment operational during the investigation of this case.
- 15 d. Any video footage captured by body cameras worn by Henderson Police Officer  
16 Tschirgi (P#1622), LVMPD Officer S. Narvaez (P#2039), LWMPD Officer Schmidt  
17 (P#15319), or any other officer present for Las Vegas Metropolitan Police Department  
18 Event numbers 161108-0197 and 161017-2593 and any other related/connected Event  
19 Number.

20 **9. Non-Activated Body Camera**

21 The first name, last name, and "P#" of any Metro Officer present for Las Vegas Metropolitan  
22 Police Department Event numbers 161108-0197 and 161017-2593, and any related/connected  
23 Event Number Event Number(s) who is required by department policy to wear, but did not  
24 activate his/her body-worn camera.

25 **10. Monitoring, Tracking, and Associated Warrants**

26 Any and all data, recordings, reports and documentation of the following: voice monitoring  
27 devices, geographic tracking devices, pen register, trap and trace device (installed pursuant to

1 2	interception, warrant or other means), obtained by any law enforcement agency (including federal authorities) pertaining to the instant matter or any related matter.
3 4 5 6 7	<p><b>11. <u>911 and 311 Calls</u></b></p> <p>a. Any and all 911 and 311 recordings to include, but not limited to:</p> <p>b. Car-to-car audio communications,</p> <p>c. Car-to-dispatch radio communications, and</p> <p>d. Unit Log incident print out related to the event.</p>
8 9 10	<p><b>12. <u>Chain of Custody</u></b></p> <p>All relevant reports of chain of custody, including reports of any destruction of any evidence in the case.<sup>14</sup></p>
11 12 13 14 15 16	<p><b>13. <u>Witness Contact Information</u></b></p> <p>All updated witness contact Information, including last known address(es) and phone number(s). This includes the names/contact information for witnesses who may have information tending to exculpate the instant defendant. Presently, the State has not provided any contact information for the following witnesses: Maria Barajas, J.M., M.M.2, M.M.1, Amanda Moiza, Ricardo Rangel, S.R., Y.E., N.E., and Yusnay Rodriguez-Estrada.</p>
17 18 19 20 21 22	<p><b>14. <u>Information Obtained from Confidential Informants</u></b></p> <p>Any and all information obtained by the use of confidential informants for any aspect of the investigation of this case. This includes, but is not limited to, informants who purportedly obtained information about this case while incarcerated, whether the information came from the defendant, a co-defendant, unindicted conspirator, or another source, regardless of whether prosecutors intend to use the informant-related information at the upcoming trial of this matter.</p>
23 24 25	<p><b>15. <u>Alternative Suspect(s)</u></b></p> <p>Any and all information which shows that the defendant did not commit the crime(s) alleged, or which shows the possibility of another perpetrator, co-conspirator, aider and abettor, or</p>

<sup>14</sup> Destruction of evidence can result in dismissal of the case or a jury instruction stating such evidence is presumed favorable to the accused. Crockett v. State, 95 Nev. 859, 865 (1979); Sparks v. State, 104 Nev. 316, 319 (1988); Sanborn v. State, 107 Nev. 399, 409 (1991).

1 accessory after the fact, including the name(s) of those individual(s). This includes, but is not  
2 limited to, any information concerning the arrest of any other individual for the charged crime  
3 and any information suggesting that someone other than the defendant perpetrated one or more  
4 of the charged crimes.

5 **16. Identification and Misidentification**

6 Any and all statements of identification associated with this case, including any information  
7 concerning witnesses who did not identify the defendant as the perpetrator of the alleged  
8 crime(s). This request includes:

- 9 a. Statements identifying another person as the perpetrator of this offense;
- 10 b. Prior non-identifications by eyewitnesses now identifying the defendant as the  
11 perpetrator;
- 12 c. Copies of all photographic lineups shown to any witness (including lineups created  
13 without the defendant) as well as any other identification procedures used to identify  
14 suspects including show-ups, lineups, photo-array lineups, single photo show-ups,  
15 photo compilations and composite drawings. This request includes:
  - 16 1) The identification of each witness who was shown an identification procedure;
  - 17 2) The date and time such procedure(s) occurred;
  - 18 3) The names of all persons who were present when the procedure(s) took place;
  - 19 4) Instructions given to the witness(es) prior to the procedure;
  - 20 5) The results of the procedure, including an accounting of each witness'  
21 statement(s) before, during and after the identification procedure; the amount of  
22 time taken by each witness to make an identification; and any hesitancy or  
23 uncertainty of each witness in making an identification; and
  - 24 6) Whether officers informed any witness that he/she identified the suspect officers  
25 believed committed the crime.

26 **17. General Exculpatory Evidence Request**

27 Any and all information which shows that Amanda Moiza, Maria Estrella-Barajas, Ricardo

1 Rangel, and /or their children may have fabricated their claims against Defendant.

2 **18. Witness Benefits**

3 Disclosure of any and all compensation, express or implied, promises of favorable treatment or  
4 leniency, or any other benefit that any of the State's witnesses may of have received in  
5 exchange for their cooperation with this or any related prosecution. This includes, but is not  
6 limited to:

- 7 a. Records and notes from the CCDA victim witness office, including records of any  
8 expectation of any benefit or assistance to be received, or already received by any  
9 witness in this case;
- 10 b. Monetary benefits received as well as any express or implied promises made to any  
11 witness to provide counseling and/or treatment and/or provide immigration assistance  
12 (including, but not limited to, U Visa documentation) as a result of the witness'  
13 participation in this case;
- 14 c. Names of any and all agencies and workers or other referrals that were given to any  
15 witness and/or his/her family member, relative or guardian in connection with this case  
16 or any related matter;
- 17 d. Estimate of future benefits to be received by any witness during or after the trial,  
18 including travel expenses.

19 **19. Prior Witness Statements**

20 Disclosure of any and all statements, tangible or intangible, recorded or unrecorded, made by  
21 any witness that are in any manner inconsistent with the written and/or recorded statements  
22 previously provided to the defense. This includes, but is not limited to: any oral statements  
23 made to any employee or representative of the District Attorney's office or any other  
24 government employee, local or federal, during pre-trial conferences or other investigative  
25 meetings.

26 **20. Impeachment Information – Law Enforcement Witness**

27 Any and all impeachment information of which the prosecution is aware located in the

1 personnel files of any police witness called to testify at trial or any pretrial hearing in this  
2 matter, including, but not limited to, any Statement of Complaint regarding the witness or this  
3 investigation, any Employee Notice of Internal Investigation, any Internal Affairs Investigative  
4 Report of Complaint, any witness statement, any Bureau Investigation Supervisory  
5 Intervention, and any other document maintained or generated by the Office of Internal  
6 Affairs, Critical Incident Review Panel, or other investigative agency.

7 **21. Criminal History Information**

8 Criminal history information on any witness, actual or potential, relating to specific instances  
9 of misconduct or from which untruthfulness may be inferred and/or which could lead to the  
10 discovery of admissible evidence, impeachment or otherwise. To this end, the defense requests  
11 that, in addition to any other lay witnesses prosecutors intend to call at trial or upon whose  
12 testimony or statements the State will rely during either the guilt or penalty phases of trial, the  
13 District Attorney provide NCIC reports on the following individuals:

- 14 1. Amanda Moiza
- 15 2. Maria Barajas-Estrella.
- 16 3. Ricardo Rangel
- 17 4. Yusnay Rodriguez-Estrada

18 The defense further requests that the NCIC information be provided to defense counsel as soon  
19 as possible, and that prosecutors identify those individuals for whom no NCIC information is  
20 found. While the defense is not insisting that prosecutors run NCICs on expert or law  
21 enforcement witnesses, the defense requests that the State be ordered to comply with any  
22 Brady obligations with respect to these witnesses. The instant criminal history request  
23 includes, but is not limited to:

- 24 a. Juvenile records,
- 25 b. Misdemeanors,
- 26 c. Out-of-state arrests and convictions,
- 27 d. Outstanding arrest warrants or bench warrants, and

1	e. Cases which were dismissed or not pursued by the prosecuting agency, and
2	f. Any other information that would go to the issue(s) of credibility and/or bias, or lead to
3	the discovery of information bearing on credibility/bias, whether or the information is
4	directly admissible by the rules of evidence. <sup>15</sup>
5	<b>22. <u>Significant Public Benefit Parole</u></b>
6	Information indicating whether any witness in the case has been granted Significant Public
7	Benefit Parole (SPBP) in connection with this case. <sup>16</sup>
8	<b>23. <u>U Visas and Related Information</u></b>
9	Information indicating whether any family member of the victim, or any other qualifying
10	person, <sup>17</sup> has applied for a U Visa as a result of this case. This request includes information
11	indicating whether any such individual has consulted with a district attorney, district attorney
12	representative or victim advocate, or any other person acting in a representative capacity of the
13	CCDA's Office, regarding obtaining a U Visa as a result of this case. <sup>18</sup>
14	<b>24.</b> Intentionally Blank
15	<b>25.</b> Intentionally Blank

<sup>15</sup> The State usually is under the mistaken impression that they only must disclose felony convictions from the last 10 years that can be used as impeachment under NRS 50.095. However, in Davis v. Alaska, supra, the US Supreme Court found that a witness can be attacked by "revealing possible biases, prejudices, or ulterior motives of the witnesses as they may relate directly to the issues or personalities on the case at hand. The partiality of a witness is...always relevant as discrediting the witness and affecting the weight of his testimony." Id. at 354. The court found that the State's policy interest in protecting the confidentiality of a juvenile offender's record must yield to the defendant's right to cross-examine as to bias. Id. at 356. See also Lobato v. State, 120 Nev. 512 (2004), discussing the "nine basic modes of impeachment." Therefore, juvenile records, misdemeanors and older criminal records may yield information relevant to many forms of impeachment other than that outlined in NRS 50.095.

<sup>16</sup>SPBP allows a witness, defendant, cooperating source, and immediate family members into the United States for up to one year. "U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement," Dept. of Homeland Sec. (hereinafter "U Visa Guide"), available at: [http://www.dhs.gov/xlibrary/assets/dhs u visa certification guide.pdf](http://www.dhs.gov/xlibrary/assets/dhs_u visa certification guide.pdf) at 16.

<sup>17</sup>The U visa is available to an alleged victim; her unmarried children under the age of twenty-one (21); her spouse; her parents, if she is under twenty-one (21); and unmarried siblings under eighteen (18) years old if the alleged victim is under age twenty-one (21). "U Visa Guide" at 5. Furthermore, when the principal alleged victim is under twenty-one (21) years old, her noncitizen parent can apply for a U Visa as an "indirect victim" regardless of whether the principal alleged victim is a U.S. citizen or noncitizen. Id. at 13.

<sup>18</sup> "Given the complexity of U Visa petitions, petitioners often work with a legal representative or victim advocate," and, in fact, "is usually done with the assistance of an advocate." Id. at 2, 5.

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13	<b>38.</b>	<b><u>Child Protective Services Records</u></b>
14		Any and all Department of Child and Family Services and/or Child Protective Service (or
15		equivalent department in another State) records relating to the instant case, including:
16		a. Notes of caseworkers or their agents/assistants,
17		b. Referrals to therapists by anyone at any of the above mentioned agencies
18		c. Reports prepared for Family Court or any domestic relations proceedings related to the
19		issues or witnesses in the instant matter.
20		This request includes, without limitation, information pertaining to the following individuals:
21		a. J.M.
22		b. M.M.1
23		c. M.M.2
24		d. Y.E.
25		e. N.E.
26		f. S.R.
27	<b>39.</b>	<b><u>Social Worker/Case Work Notes</u></b>
28		Any/all notes of government social workers or case workers, including employees of Child
		Haven, or any governmental agency supervising foster care or any other living arrangement
		made for any alleged victim or witness in the case (even if on a temporary basis), as well as



1 notes on referrals to any physicians, psychologists, psychiatrists, social workers or other  
2 mental health workers (including contract providers) pertaining to the following individuals:  
3 a. J.M.  
4 b. M.M.1  
5 c. M.M.2  
6 d. Y.E.  
7 e. N.E.  
8 f. S.R.

6 **40. Mental Health Worker Records/Notes**

7 Any and all records and notes of any mental health workers who have had contact with the  
8 alleged victim or any other person related to events in this case. This request includes any  
9 records reflecting the mental state/cognitive abilities of the alleged victim or any other  
10 government witness, including the individuals listed herein, that are relevant to each  
11 individual's competency as a witness.<sup>19</sup>

12 **41. Physical Examinations**

13 Any and all notes and records of any physical exams done on the alleged victim or anyone else  
14 in connection with this case, including any photographs, videos, colposcopes or recordings  
15 taken in conjunction with such exam, and any lab or toxicology reports done in conjunction  
16 with such exam. This includes all documents recording what physical evidence was taken in  
17 the case, where it was stored, and any related chain of custody documents.

18 **42. Prior Allegations of Sexual Misconduct**

19 Any and all information known (or which could be known by diligent action) of any previous  
20 allegations of sexual misconduct or physical abuse made by the alleged victim or any material  
21 witness in the case, including, but not limited to the following individuals: Maria Barajas, J.M.,  
22 M.M.2, M.M.1, Amanda Moiza, Ricardo Rangel, S.R., Y.E., N.E., and Yusnay Rodriguez-

23  
24 <sup>19</sup> In addition to the authority outlined above, if such counselors are seeing the alleged victims after being  
25 referred by a State or County agency or worker, or are paid by victim witness or through aid especially  
26 due to status as a "victim" then there is no provider-patient privilege as the information is being sought  
27 with the purpose to disclose to third parties. Further, under general discovery principles, anything  
28 disclosed that bears on the credibility of the witness, on the credibility of any other witness or any  
evidence, that suggests that the defendant did not commit the crime, that someone else may have  
perpetrated the crime, or anything else relevant to discovery, then such information must be disclosed  
under case law cited in this brief.

1 Estrada. This includes any and all information or any possible false accusations made by the  
2 alleged victim or any material witness in the instant case, including those listed herein.

3 **43. Sources of Sexual Knowledge**  
4 Any and all information known or obtainable through the exercise of due diligence indicating  
5 that J.M., M.M.2, M.M.1, Y.E., or S.R. may have had sources of sexual knowledge outside the  
6 events at issue here.

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7	<b>71.</b>	<b><u>Contacting other agencies, including police, S.A.N.E. examiners, CPS, and any other</u></b>
8		<b><u>State actors in order to collect discovery and exculpatory evidence:</u></b>
9		The defendant requests that the Court order the prosecution to contact other agencies or agents
10		acting on behalf of or working with the prosecution, or in any other way a part of the
11		prosecution team, and initiated to ascertain whether any of those agencies or agents possess or
12		know of any material information that would tend to exculpate the Defendant, impeach a
13		prosecution witness, or mitigate the Defendant's possible punishment.
14	<b>72.</b>	<b><u>Media involvement</u></b>
15		The State must disclose whether its attorneys, officers or any other witnesses have cooperated
16		with or been interviewed by any media organizations, the extent of the cooperation, and
17		whether the cooperation is ongoing or planned for the future. This includes, but is not limited
18		to, newspapers and periodicals, radio programs, television shows, Internet and interactive
19		media, or any other form of broadcast. This also includes the District Attorney's "reality"
20		show, Las Vegas Law.

**IX. REQUEST FOR TIMELY DISCLOSURE**

**NRS 174.285(1)** requires that any discovery request pursuant to **NRS 174.235** be made "... within 30 days after arraignment or at such reasonable later time as the court may permit..."

**NRS 174.285(2)** mandates that "A party shall comply with a request made pursuant to **NRS 174.235**... not less than 30 days before trial or at such reasonable later time as the court may permit.

1 Accordingly, the Defendant requests that this Honorable Court enter an order directing  
2 prosecutors to provide the discovery sought herein within a reasonable time in advance of trial so  
3 as to enable counsel to effectively prepare. Further, the Defendant requests that this Honorable  
4 Court order that prosecutors be precluded from admitting at trial any discovery/evidence not  
5 timely produced. See **NRS 174.295** (“If at any time during the course of the proceedings it is  
6 brought to the attention of the court that a party has failed to comply with the provisions of **NRS**  
7 **174.235** to **174.295**, inclusive, the court may order the party to permit the discovery or inspection  
8 of materials not previously disclosed, grant a continuance, or prohibit the party from introducing  
9 in evidence the material not disclosed, or it may enter such other order as it deems just under the  
10 circumstances.”)(Emphasis added).

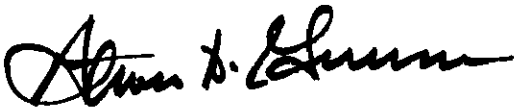
11 **CONCLUSION**

12 Based on the foregoing, the defendant, Jose Azucena, respectfully requests that this  
13 Honorable Court grant the instant motion, and order the timely disclosure of the material sought  
14 herein. NRS 174.235; Brady v. Maryland, 373 U.S. 83 (1963); U.S.C.A. V, VI, XIV; and Nev.  
15 Const. Art. 1 § 8.

16 DATED this \_\_\_\_\_ day of March, 2017.

17  
18 PHILIP J. KOHN  
19 CLARK COUNTY PUBLIC DEFENDER

20  
21 By: /s/ Carli L Kierny  
22 CARLI L. KIERNY, #12010  
23 Deputy Public Defender  
24  
25  
26  
27  
28

  
CLERK OF THE COURT

1 **OPPS**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
3 STACEY L. KOLLINS  
Chief Deputy District Attorney  
4 Nevada Bar #005391  
200 Lewis Avenue  
5 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
6 Attorney for Plaintiff

7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA, )

11 Plaintiff, )

12 -vs- )

13 **JOSE AZUCENA,** )  
14 **#7037259** )

15 Defendant. )

CASE NO: **C-17-321044-1**

DEPT NO: **II**

16  
17 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL**

18 **PRODUCTION OF DISCOVERY AND BRADY MATERIAL**

19 DATE OF HEARING: **MARCH 23, 2017**  
TIME OF HEARING: **9:00 A.M.**

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,  
21 through STACEY L. KOLLINS, Chief Deputy District Attorney, and hereby submits the  
22 attached Points and Authorities in State's Opposition to Defendant's Motion to Compel  
23 Production of Discovery and Brady Material.

24 This opposition is made and based upon all the papers and pleadings on file herein, the  
25 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
26 deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE PERTINENT TO THIS OPPOSITION**

3 Defendant, JOSE AZUCENA, currently charged by way of Criminal Indictment with  
4 the crimes of Lewdness With a Child Under the age of 14 (Category A Felony – NRS 201.230);  
5 Child Abuse, Neglect or Endangerment (Category B Felony – NS 200.508(1); Indecent  
6 Exposure (Gross Misdemeanor – 201.220); Sexual Assault with a Minor Under Fourteen Years  
7 of Age (Category A Felony – NRS 200.364, 200.366); Attempt Lewdness with a Child Under  
8 the Age of 14 (Category B Felony – NRS 201.230, 193.330); and First Degree Kidnapping  
9 (Category A Felony – NRS 200.310, 200.320). The crimes were committed on or between  
10 November 1, 2014 and November 30, 2016. The victims are J.M., M.M.1, M.M.2, Y.E., N.E.,  
11 and S.R.

12 On March 13, 2017, Defendant filed a Motion to Compel Production of Discovery and  
13 Brady Material. The State’s Opposition follows.

14 **LEGAL ARGUMENT**

15 **I. GENERAL LAW RELATED TO DISCOVERY**

16 **A. The Court Can Only Compel “Discovery” Under The Nevada Revised**  
17 **Statutes**

18 Under Common Law, a defendant has no right of discovery. State v. Wallace, 399 P.2d  
19 909, 97 Ariz. 296 (1965). This, of course, can be superseded by statutory enactment and that  
20 is the case in Nevada. Regarding the law of discovery in the State of Nevada, NRS 174.235,  
21 *et. seq.* controls. The Nevada Supreme Court has held that even an accused’s statement is not  
22 constitutionally compelled through pre-trial discovery. Mears v. State, 83 Nev. 3, 7, 422 P.2d  
23 230, 232 (1967), Thompson v. State, 93 Nev. 342, 565 P.2d 1011 (1977).

24 In Franklin v. Eighth Judicial District Court, 85 Nev. 401, 455 P.2d 919 (1969), the  
25 Nevada Supreme Court held that the lower court erred in granting defendant’s Motion to  
26 Discovery, inspect and copy statements of all persons to be called by the prosecution as  
27 witnesses at trial, since NRS 174.245 does not authorize discovery of inspection of statements  
28 made by State witnesses or` perspective State witnesses to agents of the State. Nor does the

1 defendant enjoy a constitutional right to discover them. With regard to the discovery statutes  
2 previously alluded to, the Court stated that:

3 “Those provisions (NRS 174.235-174.295) represent the legislative  
4 intent with respect to the scope of allowable pre-trial discovery and  
are not lightly to be disregarded.”

5 Id.

6 From the aforementioned, it is clear that Nevada’s discovery statutes are to be strictly  
7 construed and adhered to since no Common Law right of discovery existed. It should,  
8 therefore, also be clear that the defendant’s motion, so far as it exceeds the requirements of  
9 NRS 174.235, *et. seq.*, must be denied.

10 NRS 174.235 outlines what discovery is to be provided by the State of Nevada. It  
11 includes:

12 1. Written or recorded statements or confessions made by the  
13 defendant or any witness the State intends to call during the case  
in chief of the State, within the custody of the State or which the  
State can obtain by an exercise of due diligence. (1)(a).

14 2. Results or reports of physical or mental examinations,  
15 scientific tests or scientific experiments made in connection to the  
case, within the control of the State, or which the State may learn  
16 of by an exercise of due diligence. (1)(b).

17 3. Books, papers, documents, tangible objects which the State  
18 intends to introduce during its case in chief, within the possession  
of the State, or which the State may find by an exercise of due  
diligence. (1)(c).

19 The statute makes clear the defense is not entitled to any internal report, document or  
20 memorandum prepared by the State in connection with the investigation or prosecution of the  
21 case. (2)(a). Furthermore, the defense is not entitled to any report or document that is  
22 privileged.

## 23 **II. BRADY MATERIAL AND ITS PROGENY**

### 24 **A. Brady And Its Progeny Does Not Authorize The Court To Order Discovery. 25 They Are Remedies If The State Fails To Disclose An Item Which Is Found To Have Been Required To Be Disclosed Post Trial**

26 The State has an obligation to disclose exculpatory evidence pursuant to Brady v.  
27 Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Giglio v. United States, 405 U.S. 150, 92 S. Ct.  
28 763 (1972), requires that certain impeaching material be disclosed as well. The rule of Brady

1 v. Maryland, 373 U.S. 83 (1963), which requires the State to disclose to the defendant  
2 exculpatory evidence, is founded on the constitutional requirement of a fair trial. Brady is not  
3 a rule of discovery, however. As the Supreme Court held in Weatherford v. Bursy, 429 U.S.  
4 545, 559, 97 S. Ct. 837, 846 (1977):

5           There is no general constitutional right to discovery in a criminal case,  
6 and Brady did not create one... '[t]he Due Process Clause has little to  
7 say regarding the amount of discovery which the parties must be  
8 afforded....' Wardius v. Oregon, 412 U.S. 470, 474, 93 S. Ct. 2208,  
9 2212, 37 L.Ed.2d 82 (1973).

10           In addition, Brady does not require the State to conduct trial preparation and  
11 investigation on behalf of the defense. The obligation is to produce exculpatory information  
12 which the defense would not be able to obtain itself through an ordinary exercise of diligence.

13           While defense attorneys routinely claim they need to be provided the information in  
14 order to conduct the investigation to determine if there is any exculpatory information; that is  
15 simply not the law. In the Ninth Circuit, the obligation for the prosecution to examine  
16 information is triggered by a defense request with no requirement that the defense make a  
17 showing that the information is likely to contain helpful information. United States v.  
18 Henthorn, 931 F.2d 29, 31 (9<sup>th</sup> Cir. 1990) (holding that the "government is incorrect in its  
19 assertion it is the defendant's burden to make an initial showing of materiality," rather the  
20 "obligation to examine the files arises by virtue of making a demand for their production");  
21 United States v. Santiago, 46 F.3d 885, 895 (9<sup>th</sup> Cir. 1995) ("[u]nder Henthorn, the government  
22 has a duty, upon defendant's request for production, to inspect for material information the  
23 personnel records of federal law enforcement officers who will testify at trial, regardless of  
24 whether the defense has made a showing of materiality") accord Sonner v. State, 112 Nev.  
25 1328, 930 P.2d 707 (1996)(requiring materiality before a review of a police officer's personnel  
26 file.).

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1           **B.     The State Makes The Determination At Its Own Peril If It Will Disclose The**  
2           **Information, Not The Defense Or The Court**

3           This, of course, does not mean that files are produced for the defense. Henthorn  
4 explains that following that examination, “the files need not be furnished to the defendant or  
5 the court unless they contain information that is or may be material to the defendant’s case.”  
6 Id. Thus, the only time disclosure is required is if the State finds information that qualifies as  
7 Brady material. If the prosecutor is unsure, the information should be provided to the court  
8 for review. As the court explained:

9                     We stated that the government must ‘disclose information favorable  
10                    to the defense that meets the appropriate standard of materiality . . . .  
11                    If the prosecution is uncertain about the materiality of information  
12                    within its possession, it may submit the information to the trial court  
                      for an in camera inspection and evaluation. . . .’ As we noted in Cadet,  
                      the government has a duty to examine personnel files upon a  
                      defendant’s request for their production.

13 Id. at 30-31 (internal citation omitted). Despite this procedure, Defendant’s routinely request  
14 the Court to order production of information to them, or to the Court. It is not the Court’s  
15 responsibility under the Constitution. It is the prosecution’s responsibility.

16           Moreover, Brady and its progeny are remedies **post-trial** for the prosecution’s failure  
17 to perform its responsibility. Brady does not support the defense’s request to conduct an  
18 investigation independent of the prosecution, or to ensure the prosecution completes its duty.

19           **III.    TIMING OF DISCLOSURES**

20           **A.    True Brady Material**

21           Traditionally, Brady material is information which indicates that Defendant did not  
22 commit the crime, or his sentence should be less based upon culpability. The State’s duty  
23 under Brady is ongoing. When reviewing cases on appeal, however, courts decide allegations  
24 of tardy Brady disclosures according to the facts surrounding the disclosure and if the alleged  
25 Brady information was used in the trial. The Ninth Circuit has recognized that “Brady does  
26 not necessarily require that the prosecution turn over exculpatory material before trial. To  
27 escape the Brady sanction, disclosure ‘must be made at a time when [the] disclosure would be  
28 of value to the accused.’” United States v. Gordon, 844 F.2d 1397, 1403 (9<sup>th</sup> Cir. 1988). With

1 this precedent, the Ninth Circuit has typically found no prejudice when alleged Brady  
2 information was disclosed at some point before trial. Notwithstanding, whenever the State is  
3 in possession of true Brady material, it is the practice of the undersigned to immediately turn  
4 over such information.

### 5 **B. Impeachment Material**

6 From Brady, a line of cases related to the credibility of testifying witnesses, the Court  
7 established rules and requirements for impeachment material, or Giglio material. The right to  
8 impeach witnesses is based on the Confrontation Clause of the constitution. The United States  
9 Supreme Court has held that the Confrontation Clause is not “a constitutionally compelled  
10 right of pretrial discovery.” Pennsylvania v. Ritchie, 480 U.S. 39, 52, 107 S. Ct. 989, 999  
11 (1987). Instead, the right to confrontation is a trial right, “designed to prevent improper  
12 restrictions on the types of questions that defense counsel may ask during cross-examination.”  
13 It “does not include the power to require the pretrial disclosure of any and all information that  
14 might be useful in contradicting unfavorable testimony.” It guarantees the opportunity for  
15 effective cross-examination, “not cross-examination that is effective in whatever way, and to  
16 whatever extent the defense might wish.” Id. at 53, 107 S. Ct. 999, *citing* Delaware v.  
17 Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 294 (1985).

18 Almost universally, courts have held that there is no Giglio obligation if the witness  
19 does not testify.<sup>1</sup> *See* United States v. Green, 178 F.3d 1099, 1109 (10<sup>th</sup> Cir. 1999) (holding  
20 that Giglio did not apply when the government “did not ever call” its confidential informant  
21 as a witness); United States v. Mullins, 22 F.3d 1365, 1372 (6<sup>th</sup> Cir. 1994) (finding “no  
22 authority that the government must disclose promises of immunity made to individuals the  
23 government does not have testify at trial,” and holding that a grant of immunity could not be  
24 “‘favorable to the accused’ as impeachment evidence because the government did not call [the  
25 witness] and, thus, there was no one to impeach”); *see also* United States v. Pena, 949 F.2d  
26 751, 758-59 (5<sup>th</sup> Cir. 1991) (impeachment evidence regarding a non-testifying witness is an  
27 insufficient basis upon which to grant a new trial); United States v. Storey, 956 F. Supp. 934,

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<sup>1</sup> The exception to this rule is where the witness will not testify, but the witness’ hearsay statement will be admitted, then the witness’ credibility may be in issue. *See* United States v. Jackson, 345 F.3d 59, 70-71 (2nd Cir. 2003).

1 942 (D. Kan. 1997) (holding that while impeachment evidence falls within the Brady rule,  
2 “[s]uch evidence as it pertains to an informant, however is only discoverable if the informant  
3 testifies”); Kowalczyk v. United States, 936 F. Supp. 1127, 1149 (E.D.N.Y. 1996) (holding  
4 that “[t]he Government was not obligated to produce the Janis arrest record, assuming the  
5 prosecution was in possession of such information, as Janis was not a witness at trial”); United  
6 States v. Hill, 799 F. Supp. 86, 90 (D. Kan. 1992), (denying defense request for any  
7 information which could be used to impeach non-witnesses); United States v. Villareal, 752  
8 F. Supp. 851, 853 (N.D. Ill. 1991) (holding that “[a]s for statements by government witnesses  
9 that qualify as impeachment materials, the government is under no obligation to disclose this  
10 information before trial,” and that “the government is under no obligation at any time to  
11 provide impeachment evidence for non-witnesses”); United States v. Coggs, 752 F. Supp. 848,  
12 849, (N.D. Ill. 1990) (holding that the government is not required to produce impeachment  
13 evidence impacting non-witnesses, reasoning that “[r]equiring that the government provide  
14 impeachment evidence for non-witnesses will not further the interest sought to be served by  
15 Giglio-allowing for a meaningful determination of witness credibility”). Finally, evidence of  
16 impeachment of a witness need not be disclosed until the witness testifies. United States v.  
17 Rinn, 586 F.2d 113 (9<sup>th</sup> Cir. 1978) (“[S]ince information concerning “favors or deals” merely  
18 goes to the credibility of the witness, it need not be disclosed prior to the witness  
19 testifying.”). Thus, unless the witness is going to testify, there is no basis to disclose any  
20 impeachment material.

21 On March 14, 2017, defense counsel met with the undersigned for a full file review. At  
22 that time, copies of all medical records and reports; photo line-ups; victim and witness  
23 statements; as well as statements made by Defendant were given to defense counsel, if not  
24 already in defense counsel’s possession.

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1 (a) Written or recorded statements or confessions made by the  
2 defendant, or **any written or recorded statements made by a**  
3 **witness the prosecuting attorney intends to call during the case in**  
4 **chief of the State**, or copies thereof, within the possession, custody  
5 or control of the State, the existence of which is known, or by the  
6 exercise of due diligence may become known, to the prosecuting  
7 attorney;

8 . . . . .

9 (Emphasis added).

10 Brady places upon the State an obligation to produce exculpatory evidence. Giglio  
11 requires that the State disclose certain impeaching material as well.

12 In other words, even in the absence of a motion the State is obligated to turn over the  
13 information requested that falls within the State’s obligations under 174.235, Brady and  
14 Giglio. Defendant has made many sub-requests within the instant request without providing  
15 any indication that the defense has performed any investigation or discovered that the material  
16 actually exists and the State has failed to turn it over. The State asks that this request be  
17 clarified by the defense to address what specific discovery Defendant believes he is missing.  
18 In the absence of such a clarification the State asks that the request be denied as it fails to state  
19 a specific request.

20 **(b) Any audio or video recordings**

21 The State will comply with NRS 174.235 and has provided “any written or recorded  
22 statements made by a witness the prosecuting attorney intends to call during the case in chief  
23 of the State, or copies thereof, within the possession, custody or control of the State, the  
24 existence of which is known, or by the exercise of due diligence may become known, to the  
25 prosecuting attorney.” Further, Brady does not impose upon the State an obligation “to  
26 disclose evidence which is available to the defendant from other sources, including diligent  
27 investigation by the defense.” Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

28 **3. Records Related to Investigation**

Defendant has been provided with a copy of the police reports generated in this matter  
pursuant to NRS 174.235. Defendant requests the notes of various individuals regardless of  
whether they are State witnesses or even agents of the State. This request is not covered by a

1 single line of any discovery statute. If there is exculpatory information, the State obviously  
2 must produce it. However, there is no requirement that the notes of all officers and other  
3 witnesses (or non-witnesses) be produced and the State requests that this Court not expand  
4 the statutory text to include such a requirement.

5 Courts have held that officer notes are not subject to discovery statutes. In State v.  
6 Bray, 569 P.2d 688 (Ore. App. 1977), an officer arrested a suspect on a DUI charge. He  
7 recorded observations in a booklet. He later prepared a report from his penciled notes and  
8 erased the notes. The final report was furnished to the defense. At trial, the court ruled that  
9 because the officer had taken notes while speaking to a witness and those notes had been  
10 destroyed, the State would be precluded from calling the witness at trial. The issue on appeal  
11 was whether the fragmentary notes of the officer constituted a statement within the meaning  
12 of the state discovery statutes. The Appellate Court reversed the trial court:

13 We construe the statute to require production of any “statement”  
14 which is intended by its maker as an account of an event or a  
15 declaration of a fact. The statutory purposes of providing witness  
16 statements are to minimize surprise, avoid unnecessary trial, provide  
17 adequate information for informed pleas and to promote truthful  
18 testimony by allowing examination based on prior inconsistent  
19 statements. . . Requiring preservation and availability of fragmentary  
20 notes intended only as a touchstone for memory would be more likely  
to discourage police officers from taking notes, with a consequent  
reduction in accuracy, than to promote the statutory goals.  
Furthermore, it would be unfair and misleading to allow cross-  
examination of a witness based upon fragmentary or cryptic notes  
which were never intended to express a complete statement. For these  
reasons, we hold that fragmentary notes are not subject to production  
under discovery statutes.

21 Id. at 690; State v. Wrisley, 909 P.2d 877 (Ore. App. 1995) (noting that police notes are not  
22 discoverable when their substance is incorporated into a report disclosed to the defendant);  
23 see also State v. Jackson, 571 P.2d 523 (Ore. App. 1978) (holding that a rough draft of a  
24 report an officer dictated to a stenographer was not discoverable).

25 Any request for 911 recordings, Dispatch Logs and/or Case Monitoring notes in this  
26 matter should be made directly to LVMPD.

27 The State has no knowledge and has been provided no information of any crime tip  
28 organizations being involved in this matter.

1           **4. Crime Scene Analysis, Evidence Collection, and Forensic Testing**

2           All reports by crime scene analysts involved in the processing of scenes and all reports  
3 related to forensic analysis are part of the standard discovery provided in all cases, which  
4 actually exceeds the requirements of NRS 174.235. If the defense wants the underlying case  
5 files related to forensic testing, the State will request the forensic lab to provide the underlying  
6 data and will produce that information to Defendant. If the defense wants raw notes of the  
7 crime scene analyst, the State will request production of those notes, if still in existence, from  
8 the crime lab. As it relates to the Las Vegas Metropolitan Police Department, their photograph  
9 laboratory will honor a defendant's request for the photographs maintained under the event  
10 number.

11           To the extent that Defendant is seeking information broader than that which is contained  
12 *supra*, the State objects to this request as being vague, overbroad, compound, and duplicative.  
13 Additionally, portions of the request fall outside the scope of the State's obligations under  
14 NRS 174.235, as well as Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States,  
15 405 U.S. 150 (1972). To the extent that the request and its multiple subparts fall within the  
16 State's obligations under 174.235, Brady and Giglio, they are not specific requests.

17           **5. Medical Records**

18           The State has previously disclosed any and all medical records to include sexual assault  
19 examination of the victim(s), as it relates to this case, in the State's possession.

20           **6. Preservation of/Access to Raw Data**

21           The State objects to this request as being vague, overbroad, compound, and duplicative.  
22 Additionally, many of the subparts of this request are boilerplate, having nothing to do with  
23 the instant case (ex. the request for "Photographic negatives"). Furthermore, this is not a  
24 request for discovery at all, it is a request that the State not destroy evidence, without  
25 specifically noting what the evidence in question is, and that the State provide "access" to the  
26 evidence, without specifically noting what type of access is being sought. Also, the State is  
27 under legal and ethical obligations not to destroy evidence, even absent an order from this  
28 Court. Given that the instant request is not for discoverable information, and the fact that the

1 defense has not been denied access to any evidence in this case, the State requests that this  
2 Court deny the request outright.

3 **7. Electronic Communications/Associated Warrant**

4 NRS 174.235 does not cover Trap and Trace, Cellular Site, Pen Registers and GPS  
5 Trackers. However, if the State intends to utilize any information during the trial which was  
6 acquired by way of a court order and/or search warrant, the State will provide a copy.

7 **8. Law Enforcement Video or Audio Recordings**

8 **9. Non Activated Body Camera**

9 This request is not covered by a single line of any discovery statute. If there is  
10 exculpatory information, the State obviously must produce it. However, there is no  
11 requirement that requested materials be produced and the State requests that this Court not  
12 expand the statutory text to include such a requirement. Defendant's request for all Law  
13 Enforcement Video or Audio Recordings, to include non-activated body cameral information  
14 should be made directly to Metro.

15 **10. Monitoring, Tracking, Associate Warrants**

16 NRS 174.235 does not cover Trap and Trace, Cellular Site, Pen Registers and GPS  
17 Trackers. However, if the State intends to utilize any information during the trial which was  
18 acquired by way of a court order and/or search warrant, the State will provide a copy.

19 **11. 911 and 311 calls**

20 The State will disclose all 311/911 calls and logs. Defendant is welcome to obtain the  
21 request for car to car audio communications; car to dispatch radio communications and unit  
22 log incident printouts by issuing a Subpoena to LVMPD.

23 **12. Chain of Custody**

24 The State is unaware of any evidence being destroyed in this case. The chain of custody  
25 is on the evidence bag itself. Defense counsel is welcome to visit the evidence vault to review  
26 all chain of custody reports.

27 //

28 //



1           **13.     Witness Contact Information**

2           NRS 174.234 provides the law regarding the notice of witnesses. It provides that both  
3 sides must disclose witness names and addresses that it intends to call in its case-in-chief not  
4 less than 5 judicial days before trial. *See* NRS 174.234(1)(a)(2). Defendant has been provided  
5 information to the extent that it conforms to required statutory provisions of NRS 174.234.

6           **14.     Information obtained by Confidential Informants**

7           NRS 174.234 and NRS 174.235, the applicable discovery statutes regarding the  
8 defendant’s request, do not require the State to disclose the identities of informants, and do not  
9 require the State to specifically identify the information or evidence provided by any  
10 informants. In particular, NRS 174.234(1)(a)(2) states that a prosecutor must only disclose  
11 “the names and last known addresses of all witnesses *the prosecuting attorney intends to call*  
12 *during the case in chief of the State.*” (Emphasis added). Likewise, NRS 174.235(1)(a) only  
13 obliges the State to disclose the “written or recorded statements made by a witness *the*  
14 *prosecuting attorney intends to call during the case in chief of the State.*” (Emphasis added).  
15 Consequently, pursuant to those statutes, if the State does not intend to call the informant as a  
16 witness in its case in chief, this Court cannot compel the State to disclose the identity of any  
17 informant and information obtained from such an informant.

18           **1.     The identities of informers are privileged under Nevada law, and no exception to**  
19           **the privilege applies.**

20           NRS 49.335 affords the State an exclusive statutory privilege to protect the identity of  
21 informers. Under that statute, “[t]he State or a political subdivision thereof has a privilege *to*  
22 *refuse to disclose the identity of a person who has furnished to a law enforcement officer*  
23 *information purporting to reveal the commission of a crime.*” (Emphasis added). This privilege  
24 precludes this Court from ordering the disclosure of the identities of any informants. NRS  
25 49.335, 49.345.

26           The privilege, moreover, is resilient in the face of the defendant’s numerous statutory  
27 and constitutional rights. See NRS 49.365; NRS 174.234(7). First, the defendant’s statutory  
28 discovery rights must yield to the State’s exclusive privilege. NRS 174.234(7). Although the

1 State must disclose the identities of witnesses it intends to call in its case in chief pursuant to  
2 the defendant's statutory rights in NRS 174.234, the State cannot be ordered to disclose the  
3 identity of an informer under that statute because

4 [a] party is not entitled, pursuant to the provisions of [NRS 174.234],  
5 to the disclosure of the name or address of a witness or any other type  
6 of item or information *that is privileged or protected from disclosure  
or inspection pursuant to the Constitution or laws of this state or the  
Constitution of the United States.*

7 NRS 174.234(7) (emphasis added).

8 Second, the State's privilege does not dissipate in light of a defendant's constitutional  
9 rights to a fair trial, to present witnesses on his behalf, and to confront and cross-examine  
10 witnesses. By statute, if the Court finds that an informant is a percipient witness who "can...  
11 supply information constituting a defense [or] rebut a necessary element of an offense," State  
12 v. Stiglitz, 94 Nev. 158, 161, 576 P.2d 746, 747-48 (1978), the court may *dismiss* proceedings  
13 against a defendant if the State thereafter declines to disclose the identity of the informer. NRS  
14 49.365; Sheriff v. Vasile, 96 Nev. 5, 8, 604 P.2d 809, 810 (1980) (district court's dismissal of  
15 charges affirmed when the State refused to disclose the identity of a confidential informant  
16 who was the only independent percipient witness to a drug transaction); Routhier v. Sheriff,  
17 93 Nev. 149, 560 P.2d 1371 (1977) (district court should have dismissed charges against  
18 defendant when the State refused to reveal the identity of a percipient confidential informant  
19 who set up and witnessed the drug transaction leading to the criminal charge); cf. Stiglitz, 94  
20 Nev. at 161, 576 P.2d at 747-48 (the identity of an informant need not be revealed where he  
21 merely introduces a government agent to the defendant); Twigg v. Sheriff, 95 Nev. 112, 590  
22 P.2d 630 (1979) (same). The decision to disclose the informant's identity, however, ultimately  
23 remains in the hands of the State regardless of the Court's determination that a confidential  
24 informant is a percipient witness.

25 The Nevada Supreme Court has recognized that a defendant is entitled to discovery of  
26 an informer's identity when the informer both set up the meeting between the officer and  
27 defendant and witnessed the actual transaction. *See Sheriff v. Vasile*, 96 Nev. 5 (1980). In  
28 Vasile the police officer testified that he was introduced to Vasile through the confidential

1 informant and the informant was present for the actual drug transaction. Vasile requested the  
2 name of the informant from the officer. The State objected under the applicable statutes and  
3 the objection was upheld by the Justice Court. Ultimately, Vasile sought relief in District  
4 Court where the case was dismissed. Thereafter the State appealed. The Supreme Court  
5 affirmed, holding:

6 In Routhier v. Sheriff, the informant set up and witnessed the  
7 transaction which led to the criminal charges. That was precisely the  
8 situation involved in the present case. The informant here was seated  
9 in the undercover police car with Officer Douglas and Vasile. He was  
10 apparently the only independent witness who could hear and see the  
11 transaction in question. He was a material witness whose identity  
12 should have been disclosed. The magistrate's refusal to require  
13 disclosure or dismiss the charges was error. Id. at 8 (emphasis added).

14 The Vasile Court, however, acknowledged that a request for the identity of an informer  
15 need not result in the automatic disclosure of the informer's identity.

16 The identity of an informant need not be disclosed where he is not a material witness,  
17 because he can neither supply information constituting a defense nor rebut a necessary element  
18 of an offense. Id. at 8 (citing Twigg v. Sheriff, 95 Nev. 112 (1979) and State v. Stiglitz, 94  
19 Nev. 158 (1979)). Hence, this Court must determine whether the confidential informant  
20 involved in the present case could provide information that requires disclosure.

21 Finally, although NRS 49.375(1) creates a lone exception to the privilege by requiring  
22 the State to disclose an informer's identity "[i]f information from an informer is relied upon to  
23 establish the legality of the means by which evidence was obtained and the [court] is not  
24 satisfied that the information was received from an informer reasonably believed to be  
25 reliable....," the defendant's boilerplate motion does not claim that the exception applies in this  
26 case. See EDCR 3.20(b) ("a party filing a motion must also serve and file with it a  
27 memorandum of points and authorities in support of *each ground thereof*" and the failure to  
28 do so "may be construed as an admission that the motion is not meritorious, as cause for its  
denial or as a waiver of all grounds not so supported" (emphasis added)). Even then, the  
disclosure may be made *in camera*, and the records of the *in camera* disclosure sealed. NRS  
49.375(2)-(3).

1           **15.    Alternative Suspects**

2           There is no information that shows Defendant did not commit the crimes he is charged  
3 with; nor is there information suggesting other possible perpetrators.

4           **16.    Identification and Misidentification**

5           With the exception of the one victim who was not familiar with Defendant in this case,  
6 identification is not an issue. Defendant received a copy of the color photo line-up that was  
7 used in this case.

8           **17.    General Exculpatory Evidence Request**

9           Giglio, governs what impeachment the State must provide. The State asks the Court to  
10 hold it to that constitutional standard. Defendant’s request is worded in an overbroad manner  
11 to encompass immaterial statements about which the State has no knowledge.

12           **18.    Witness Benefits**

13           The defendant’s specific request for witness compensation and benefits should be  
14 denied for two reasons.

15           First, the request exceeds the scope of Giglio. By law, any witness appearing in a  
16 criminal case in obedience to a subpoena is entitled to compensation, whether the subpoena is  
17 issued by the State or by the defendant. NRS 50.225(1)(a) entitles witnesses “attending the  
18 courts of this State in any criminal case... in obedience to a subpoena... [t]o be paid a fee of  
19 \$25 for each day’s attendance, including Sundays and holidays.” Witnesses are also entitled  
20 to “mileage reimbursement,” NRS 50.225(1)(b) and a per diem allowance, NRS 50.225(2).  
21 Additionally, witnesses residing outside the jurisdiction of the Court are “entitled to  
22 reimbursement for the actual and necessary expenses for going to and returning from the place  
23 where the court is held.” NRS 50.225(3).

24           Here, receipts showing that a State witness received statutorily required witness fees,  
25 travel expenses, or per diem fees are not “evidence affecting credibility” under Giglio, and  
26 consequently, are not discoverable. The fees cannot be favorable to the defendant because a  
27 witness’s credibility cannot be impeached for receiving compensation to which he or she is  
28 legally entitled to receive, and which the county is legally obligated to provide. Lacking

1 impeachment value, the payments are immaterial to both guilt and punishment because their  
2 disclosure cannot affect the outcome of the trial. See United States v. Bagley, 473 U.S. 667,  
3 675 (1985); Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994) (adopting the  
4 “reasonable possibility” materiality test for nondisclosure of evidence favorable to the  
5 defendant after a specific request).

6 Second, the request must be denied because the State bears no burden “to disclose  
7 evidence which is available to the defendant from other sources, including diligent  
8 investigation by the defense.” Steese v. State, 114 Nev. 479, 495 (1998); United States v.  
9 Davis, 787 F.2d 1501, 1505 (11th Cir. 1986). Here, the requested evidence is maintained as a  
10 public record by the Clark County Department of Finance. The defendant may subpoena that  
11 office for these records.

12 Finally, it is important to note that the decision of this Court to preclude discovery of  
13 the requested evidence in no way limits the defendant’s right of cross-examination. The  
14 defendant is aware that a witness is entitled to per diem payments and travel reimbursements;  
15 he can consequently fully cross-examine any witness whether the witness received such  
16 payments or promises of payment. See Davis v. Alaska, 415 U.S. 308, 318 (1974)  
17 (Confrontation Clause violated when defendant denied right to cross-examine a prosecution  
18 witness regarding the witness’s juvenile criminal record) but see Pennsylvania v. Ritchie, 480  
19 U.S. 39, 52-53 (1987) (holding that “the right to confrontation is a trial right, designed to  
20 prevent improper restrictions on the types of questions that defense counsel may ask during  
21 cross-examination... The ability to question adverse witnesses, however, does not include the  
22 power to require the pretrial disclosure of any and all information that might be useful in  
23 contradicting unfavorable testimony.”).

24 Expenses paid to witnesses by the State or its investigative agents, which are not  
25 obligated by statute, constitute an inducement under Giglio and Bagley. See Giglio v. United  
26 States, 405 U.S. 150 (1972); United States v. Bagley, 473 U.S. 667, 683-84 (1985) (wherein  
27 the Court used the terms “promises of reward” and “inducements” to refer to a prosecutor’s  
28 disclosure obligation under Giglio). The State will disclose any such expenses.

1           **19.     Prior Witness Statements**

2           Giglio, governs what impeachment the State must provide. The State asks the Court to  
3 hold it to that constitutional standard. Defendant’s request is worded in an overbroad manner  
4 to encompass immaterial statements about which the State has no knowledge.

5           “Disclosures of any all statements made by any State witness, or any other person, at  
6 any time that are in any manner inconsistent with the written and/or recorded statements  
7 previously provided...” literally has no bounds and no limits as to materiality nor whether or  
8 not the witness will testify. The request for the statements of “any person” are so broad as to  
9 defy any possibility of identifying what an order granting such a request would require of the  
10 State. The State will comply with NRS 174.235 and has provided “any written or recorded  
11 statements made by a witness the prosecuting attorney intends to call during the case in chief  
12 of the State, or copies thereof, within the possession, custody or control of the State, the  
13 existence of which is known, or by the exercise of due diligence may become known, to the  
14 prosecuting attorney.” Further, Brady does not impose upon the State an obligation “to  
15 disclose evidence which is available to the defendant from other sources, including diligent  
16 investigation by the defense.” Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).  
17 The defense is capable of conducting its own pretrial conferences with witnesses, where the  
18 defense can inquire as to any change to the witnesses’ expected testimony that differs from the  
19 statements given to police. This request should be denied.

20           **20.     Impeachment Evidence – Law Enforcement Witness**

21           Certainly, due process mandates the disclosure of favorable evidence, material for  
22 impeachment or exculpatory purposes, to an accused upon request. Brady v. Maryland, 373  
23 U.S. 83 (1963). However, the evidence must be material for one of those purposes in order  
24 for Brady to apply. United States v. Pitt, 717 F.2d 1334, 1339 (11th Cir. 1983).

25           In Pitt, the defense requested the personnel file for the chief case agent to search for  
26 impeachment information, without any showing that evidence material to the defense would  
27 be found in that file. The Court there stated:

28       //

1 We fail to see how, and the appellant has failed to show us how,  
2 the contents of FBI Agent Lewis' personnel file would likely  
3 contain anything material to an alleged threat against Pitt,  
especially when the official records show that the agent was out of  
town on the day the alleged threat was made.

4 The request for the agent's personnel file, under the facts of this  
5 case, was frivolous. Pitt was entitled to fish, but not with this thin  
a pole.

6 Id. at 1339

7 In the Ninth Circuit, the obligation for the prosecution to examine an officer's file is  
8 triggered by a defense request with no requirement that the defense make a showing that a file  
9 is likely to contain helpful information. United States v. Henthorn, 931 F.2d 29, 31 (9<sup>th</sup> Cir.  
10 1990) (holding that the "government is incorrect in its assertion it is the defendant's burden to  
11 make an initial showing of materiality" and that the "obligation to examine the files arises by  
12 virtue of making a demand for their production"); United States v. Santiago, 46 F.3d 885, 895  
13 (9<sup>th</sup> Cir. 1995) (Under Henthorn, the government has a duty, upon defendant's request for  
14 production, to inspect for material information the personnel records of federal law  
15 enforcement officers who will testify at trial, regardless of whether the defense has made a  
16 showing of materiality).

17 This, of course, does not mean that files are produced for the defense. Henthorn  
18 explains that following that examination, "the files need not be furnished to the defendant or  
19 the court unless they contain information that is or may be material to the defendant's case."  
20 Id. Thus, the only time disclosure is required is if the State finds information that qualifies as  
21 Brady material. If the prosecutor is unsure, the information should be provided to the court  
22 for review. As the court explained:

23 We stated that the government must 'disclose information favorable  
24 to the defense that meets the appropriate standard of materiality . . . .  
If the prosecution is uncertain about the materiality of information  
25 within its possession, it may submit the information to the trial court  
for an in camera inspection and evaluation. . . . As we noted in Cadet,  
26 the government has a duty to examine personnel files upon a  
defendant's request for their production.

27 Id. at 30-31.

28 //

1 Different than Henthorn, the Nevada Supreme Court issued an opinion that requires  
2 some showing of materiality on the part of the defense before it could gain access to a  
3 personnel file. The file concerned an officer who was murdered and obviously would not be  
4 testifying. Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996). The defense made no  
5 showing that there may have been favorable information in the file. Instead, the defense  
6 asserted a general right to search the file. The court rejected this assertion of a right to a  
7 generalized, unfocused search, but allowed for the possibility that a file could be accessible  
8 under some circumstances. The court reasoned, “[i]f Sonner had presented a foundation for  
9 believing that [the victim] had a reputation for being an ‘aggressive’ trooper who, consistent  
10 with his reputation, provoked Sonner’s action, this might have been sufficient to warrant  
11 discovery of corroborating evidence” in the file. Id. at 1341, 930 P.2d at 716. This reasoning  
12 suggests that if that type of evidence had been in the file, the State would be required to  
13 produce it.

14 Additionally, the LVMPD has serious concerns regarding the disclosure of material  
15 from personnel files. Confidentiality is one of the chief requirements in maintaining the  
16 effective ability to investigate complaints against officers. Confidentiality ensures that both  
17 police officers and citizens will freely contact the department without fear. As one court has  
18 stated:

19 It is clear a very real and very important need exists to maintain  
20 confidential integrity of the internal investigation in the police  
21 division. To do otherwise would seriously inhibit the chief in his  
22 control over the members of the division and their wide-ranging duties  
23 and responsibilities. This stream of information available to the chief  
24 and the persons within and without the division would diminish to a  
bare trickle if the source or sources of this information were stripped  
of its confidential character. That such an event would serve to defeat  
the general public good is supported by a logic almost tautological in  
its persuasiveness -- for the desirability of an efficient well disciplined  
police force is manifest.

25 McMillan v. Ohio Civil Rights Comm’n, 315 N.E.2d 508, 515 (Ohio 1974).

26 Personnel files are confidential. All witnesses, including police officers, are assured  
27 that the information provided by them will not be voluntarily disclosed and that all legal  
28 means will be employed to protect this confidentiality. Police officers are compelled to



1 cooperate with internal affairs investigations. Failure to cooperate can result in termination.  
2 Officers, knowing that their statements were subject to disclosure, would be less likely to  
3 completely cooperate. The knowledge that statements compelled from officers could later be  
4 disclosed to third parties for other cases would also act as disincentive for the department to  
5 fully investigate. As one court noted:

6           The members of a police department must be able to rely on their  
7 confidential records and notations being preserved for their internal  
8 use ... for if it were otherwise, the knowledge that some of the  
9 confidential information recorded might later be exposed to outside  
parties would have a certain and chilling effect upon the internal use  
of such record-making.

10 City of Los Angeles v. Superior Court, 109 Cal. Rptr. 365, 369 (Ct. App. 1973).

11           Based on Nevada law, Defendant in the instant case is required to advance a foundation  
12 that the Personnel File of the officer is likely to bear information material to the defense.  
13 Defendant's motion is simply an attempt to fish for information. As a result, the instant motion  
14 should be denied. Alternatively, the State asks the Court to order the State to review the file  
15 and produce any information it deems discoverable.

## 16           **21. Criminal History Information**

17           The State objects to the extent this request seeks juvenile records, misdemeanors and/or  
18 any other information or material outside the rules of evidence.

19           Although a witnesses' criminal record may be material under some circumstances, it is  
20 not always relevant. Hill v. Superior Court, 112 Cal Rptr. 257, 518 P.2d 1353 (1974). In Hill  
21 the defense sought production of a witness's felony conviction record. Because the witness  
22 was the only eyewitness other than the defendants, and the corroboration of his report was not  
23 strong, the court found the requisite materiality and granted the defense motion. However, the  
24 court concluded, "[w]e do not hold that good cause exists in every case in which a defendant  
25 charged with a felony seeks discovery of any felony convictions any "rap sheet" of prosecution  
26 witnesses." Id. at 1358.

27 //

28 //

1 In the present case, Defendant has essentially requested that the State perform a National  
2 Crime Information Center (NCIC) inquiry on all possible State witnesses and provide that  
3 inquiry to the Defendant. The State has not run an NCIC inquiry on any witnesses, nor does  
4 it plan to do so in this matter, particularly given that some witnesses are children. The State  
5 has no legitimate reason to make such an inquiry and strenuously objects to defense requests  
6 that the State provide this information.

7 Although Defendant liberally touts Brady v. Maryland, 373 U.S. 83 (1963) as the basis  
8 for his NCIC request, the defense has failed to establish that the requested NCIC information  
9 falls within the scope of Brady, that is, that it might in some way be exculpatory or that it  
10 might somehow constitute impeachment evidence. Moreover, Defendant has not shown how  
11 such information might be "material." In other words, the defense has failed to show that the  
12 lack of any State witnesses' NCIC information will somehow result in an unfair trial or will  
13 produce a verdict that is not worthy of confidence. See Kyles v. Whitley, 514 U.S. 419, 434  
14 (1995).

15 The Supreme Court has stated that information is considered material if there is a  
16 "reasonable probability that, had the evidence been disclosed to the defense, the result of the  
17 proceeding would have been different." U.S. v. Bagley, 473 U.S. 667, 682 (1985). The  
18 Supreme Court defined reasonable probability as probability sufficient to "undermine  
19 confidence in the outcome" of the trial. *Id.* In addition, the Court in Bagley, stated that  
20 "[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the Brady rule." *Id.*  
21 at 675. The Court defined impeachment evidence as "evidence favorable to an accused . . . so  
22 that, if disclosed and used effectively, it may make the difference between conviction and  
23 acquittal." *Id.* (internal quotes omitted).

24 In the present case, Defendant has failed to articulate even an arguable use of the  
25 witnesses' NCIC information that would comport with the requirements as outlined by the  
26 Supreme Court in Brady, Kyles and Bagley. Defendant is simply looking for any information  
27 that he can use to cloud the facts of the case at bar and to cast aspersions on those witnesses.

28 //

1 Pursuant to 28 C.F.R. §20.33(b) as codified under 28 U.S.C.A. § 534 (2002), criminal  
2 history information may only be disseminated to law enforcement agencies, those hired by law  
3 enforcement agencies and to those who have entered into signed agreements for the specific  
4 and authorized use of criminal background information. Pursuant to 28 C.F.R. §20.25,

5 “Any agency or individual violating subpart B of these regulations  
6 shall be subject to a civil penalty not to exceed \$10,000 for a violation  
7 occurring before September 29, 1999, and not to exceed \$11,000 for  
8 a violation occurring on after September 29, 1999. In addition,  
9 pursuant to 28 C.F.R. §20.38,”

10 Access to systems managed or maintained by the FBI is subject to cancellation in regard to  
11 any agency or entity that fails to comply with the provisions of subpart C of this part.

12 If the State is forced to disseminate such information to the defense in this matter, the  
13 State and/or the individual who actually provides the NCIC information runs the risk of civil  
14 penalties and loss of future access to the NCIC system. In addition, the Multi-System Guide  
15 4 (MSG4) published by the Las Vegas Metropolitan Police Department (LVMPD) states that  
16 “[d]ata stored in each of our criminal justice systems . . . must be protected to ensure correct,  
17 legal and efficient dissemination and use.” P. 21. The MSG4 further states that  
18 “[d]issemination of CHI [Criminal History Information] that does not belong to the LVMPD  
19 or is obtained through NCIC, NCJIS or NLETS is prohibited.” Id.

20 As a user of the National Crime Information Center (NCIC) database, the State is  
21 prohibited from disseminating criminal history information to non-criminal justice agencies as  
22 defined by Title 28 Code of Federal Regulations (CFR)§ 20.33, which describes a criminal  
23 justice agency as: (1) Courts; and (2) a government agency or any subunit thereof which  
24 performs the administration of criminal justice pursuant to a statute or executive order, and  
25 which allocates a substantial part of its annual budget to the administration of criminal justice.  
26 Unless specifically authorized by federal law, access to the NCIC/III for non-criminal justice  
27 purposes is prohibited.

28 A 1989 United States Supreme Court case looked at this issue from the standpoint of  
an invasion of privacy and ruled accordingly:

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1 “Accordingly, we hold as a categorical matter that a third party's  
2 request for law enforcement records or information about a private  
3 citizen can reasonably be expected to invade that citizen's privacy, and  
4 that when the request seeks no "official information" about a  
5 Government agency, but merely records that the Government happens  
6 to be storing, the invasion of privacy is "unwarranted."

7 United States Department of Justice v. the Reporters Committee for Freedom of the Press, 109  
8 S.Ct. 1468, 1485 (1989).

9 Criminal defense attorneys, public or private, are not within the definition of “criminal  
10 justice agency,” nor is the criminal defense function considered a “criminal justice purpose.”  
11 Therefore, Defendant is not entitled to the criminal history information he seeks.

12 If the District Attorney runs an NCIC inquiry on a witness and that NCIC inquiry is in  
13 our file, the FBI has NO policy prohibiting us from disclosing that NCIC inquiry. If, on the  
14 other hand, we have not run the NCIC report already, it is a violation of FBI regulations to run  
15 it on request of defense counsel, or court order.

16 In short, if the State already has it, the State will decide--pursuant to our obligations  
17 under Brady and Giglio--whether or not to divulge any information contained in the NCIC  
18 report. If the State doesn't have the NCIC report in our file, the defense has to follow FBI-  
19 outlined procedures to get it.

20 Defense must obtain an order from the judge directed to the FBI requested describing  
21 specifically what they need. The FBI then reviews the judge's order and almost always  
22 complies with it, but the FBI sends the NCIC report to the judge, who then reviews the  
23 information and decides on its admissibility before turning anything over to the defense.

## 24 **22. Significant Public Benefit Parole**

25 The State has not been provided with any information that would indicate any witness  
26 in this has been granted SPBP benefits in connection with this case.

## 27 **23. U-Visa and Related Information**

28 There is no statutory requirement that requested materials be produced and the State  
requests that this Court not expand the statutory text to include such a requirement. Defendant  
is certainly entitled to issue Subpoena's to the USCIS, in order to ascertain if the requested  
items exists as related to victim or her immediate family members.

1           **24 -37 Intentionally left blank by Defendant**

2           **38.    CPS Records**

3           **39.    Social Worker/Case Worker Notes**

4           Defendant requests that the State provide Defendant with privileged or confidential  
5 information, including child protective services records pertaining to any State witness.  
6 Beyond the fact that such a request far exceeds the statutory requirements under NRS 174.235,  
7 such a request also violates the privacy rights of said individuals and the relevant statutes that  
8 would protect against the release of said information if it existed. In addition, the State does  
9 not possess such information pertaining to any State witness and does not have access to said  
10 information. Further, such information is entirely irrelevant. Defendant has not provided any  
11 authority to support such a broad discovery request and therefore, the discovery request  
12 violates Nevada law under NRS 174.235 and should be denied.

13           As to the defense's request for documents/records/oral statements pertaining to  
14 witnesses' interactions with outside, agencies, the State objects. While, the State  
15 acknowledges that its Brady obligations not only apply to materials in its possession, but also  
16 extends to materials in the hands of its agents, the State maintains that rather than being  
17 accountable for all evidence in the hands of all State agencies, it is only accountable for that  
18 evidence in the hands of State agencies who are actually acting on its behalf in the investigation  
19 and prosecution of the case. See, Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 1567  
20 (1995)(“This in turn means that the individual prosecutor has a duty to learn of any favorable  
21 evidence known to the others *acting on the government's behalf in the case, including the*  
22 *police.*”); Carriger v. Stewart, 132 F.3d 463, 479 (9<sup>th</sup> Cir. 1997)(“[T]he prosecution has a duty  
23 to learn of any exculpatory evidence known to others *acting on the government's behalf.*”).

24           Additionally, the State objects to this request on grounds that it is not the holder of  
25 specific CPS or DFS records or mental health records. Therefore, the defense must utilize their  
26 own resources, including requesting Court orders, to obtain any additional records that they  
27 may desire. Furthermore, should the Court order the release of any CPS, DFS, or Mental  
28 Health Records, the Court must also order those records to be turned over to the Court for in-

1 camera review. Defendant has not provided any authority to support such a broad discovery  
2 request and therefore, the discovery request violates Nevada law under NRS 174.235 and  
3 should be denied.

4 **40. Mental Health Worker Records/Notes**

5 While the State does refer witnesses to pertinent third-party counseling agencies from  
6 time to time, these referrals cannot be deemed material evidence bearing on the credibility of  
7 a witness under Brady and Giglio. Given that the witness may participate in the third-party  
8 counseling program irrespective of the witness's cooperation with the criminal prosecution of  
9 the defendant, there exists no "reasonable possibility" that a mere referral to an outside agency  
10 "will affect the judgement of the trier of fact, and thus the outcome of the trial." Roberts v.  
11 State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994) (adopting the "reasonable possibility"  
12 materiality test for nondisclosure of evidence favorable to the defendant after a specific  
13 request).

14 The aforementioned requests are privileged pursuant to NRS 174.235(2)(b), and the  
15 following Nevada Revised Statutes as indicated:

16 NRS 49.209:

17 A patient has a privilege to refuse to disclose and to prevent any  
18 other person from disclosing confidential communications  
19 between himself and his psychologist or any other person who is  
participating in the diagnosis or treatment under the direction of  
the psychologist, including a member of the patient's family.

20 NRS 49.252:

21 A client has a privilege to refuse to disclose, and to prevent any  
22 other person from disclosing confidential communications among  
23 himself, his social worker or any other person who is participating  
in the diagnosis or treatment under the direction of the social  
worker.

24 Defendant is not entitled to the records and notes of any mental health workers who  
25 have had contact with the victim or her family. Moreover the therapy records are not within  
26 the sole custody of the State. Defendant may exercise his efforts and resources to obtain such  
27 records if they exist. Furthermore, should the Court order the release of any Mental Health  
28 Records, the Court must also order those records first be turned over to the Court for in-camera

1 review before disseminating any records deemed relevant by the Court.

2 Defendant has failed to show that any mental health records even exist. This request is  
3 too broad. Regardless, the mental health records of the victim are protected as previous stated  
4 in subsection (2) herein. Lastly, these records are not within the sole custody of the State.  
5 Defendant is encouraged to utilize his own efforts and resources in obtaining such documents.

6 **41. Physical Examination**

7 Defense counsel has been provided with the medical records relating to the sexual  
8 assault examinations of the victim(s) in this case. Any photographs and/or videos taken in  
9 conjunction with the medical examination, should they exist, will be provided upon the State's  
10 receipt of the same. The State is not in possession of any medical records of other witnesses  
11 in this case, nor is the State under any obligation to acquire them under statutory or  
12 constitutional authority. NRS 174.235(2)(b) precludes this information from being the subject  
13 of discovery without a court order and notice to the subject of the request:

14 **2.** The defendant is not entitled, pursuant to the provisions of this  
15 section, to the discovery or inspection of:

16 **(a)** An internal report, document or memorandum that is prepared by  
17 or on behalf of the prosecuting attorney in connection with the  
18 investigation or prosecution of the case.

18 **(b)** A statement, report, book, paper, document, tangible object or  
19 any other type of item or **information that is privileged or protected  
from disclosure or inspection pursuant to the constitution or laws  
of this state or the Constitution of the United States.**

20 (Emphasis added).

21 Also, NRS 49.225 provides as follows:

22 A patient has a privilege to refuse to disclose and to prevent any other  
23 person from disclosing confidential communications among himself,  
24 his *doctor* or persons who are participating in the diagnosis or  
treatment under the direction of the doctor, including members of the  
patient's family.

25 Thus, should Defendant seek this information which is not in the possession of the  
26 State, they should file a motion with the Court with notice to the subject so they can interpose  
27 their objections, if any.

28 //

1           **42. Prior Allegations of Sexual Misconduct**

2           NRS 50.090 states:

3                     In any prosecution for sexual assault or statutory sexual seduction or  
4                     for attempt to commit or conspiracy to commit either crime, the  
5                     accused may not present evidence of any previous sexual conduct of  
6                     the victim of the crime to challenge the victim’s credibility as a  
7                     witness unless the prosecutor has presented evidence or the victim has  
8                     testified concerning such conduct, or the absence of such conduct, in  
9                     which case the scope of the accused’s cross-examination of the victim  
10                    or rebuttal must be limited to the evidence presented by the  
11                    prosecution or victim.

12           The State would further point out that there are very limited exceptions to the rape-  
13           shield law. One of those would be if the defense was alleging that there was a prior false  
14           allegation. In Miller v. State, 105 Nev. 497, 779 P.2d 87, (1989), the Supreme Court of Nevada  
15           ruled that the district court had properly excluded evidence the defense attempted to elicit  
16           regarding prior sexual abuse allegations made by the complaining witness. The court held that  
17           the defendant must prove, by a preponderance of the evidence, the following three elements:(1)  
18           the accusation or accusations were in fact made;(2) that the accusation or accusations were in  
19           fact false;(3) that the evidence is more probative than prejudicial. Id at Nev. 502, P.2d 90  
20           (emphasis supplied). Should the State become aware of any false accusations made by the  
21           victim in this case, the State will disclose the information to the defense. Information of  
22           previous allegations of physical or sexual abuse of material witnesses in this case is irrelevant  
23           and is not required to be turned over to the defense under Brady or the codified rules of  
24           discovery in the State of Nevada.

25           **43. Source of Sexual Knowledge**

26           Any information in the State’s possession that is potentially responsive to this request  
27           has been provided through reports, witness interviews and other discovery. Outside of that  
28           material, the State is not aware of or in possession of any such materials.

          The State objects to the extent this inquiry requires the State to perform investigation  
for Defendant. Kyles, requires that the State “has a duty to learn of any favorable evidence  
known to the others *acting on the government’s behalf* in the case.” Kyles v. Whitley, 514  
U.S. at 437, (emphasis added). The Court did not, however, require the State to actively learn



1 of possible evidence known to those acting outside the government.

2 Additionally, Brady does not require the State to disclose evidence which is available  
3 to a defendant from other sources through a diligent investigation by the defense. Stockton v.  
4 Murry, 41 F.3d 920, 927 (4th Cir. 1994); *accord* U.S. v. Davis, 787 F.2d 1501 (11th Cir. 1986).  
5 While the State will gladly comply with legally required discovery obligations pursuant to  
6 statute and Brady, the State is not obligated to indulge the defendant's request for the State to  
7 investigate for the defense.

8 ***44-70 intentionally left blank by Defendant***

9 **71. Contacting other Agencies**

10 The State understands that it must disclose exculpatory information. The State will  
11 comply with such. However, Defendant must also exercise diligence in investigating the case.  
12 This general, blanket request is not specific. Defendant must first exercise his efforts in  
13 determining if these agencies have any information related to the case. Defendant's request  
14 here is premature and will require the State to potentially spend limitless hours contacting the  
15 hundreds of government agencies to determine if they possess any evidence related to this  
16 case; let alone whether the evidence is actually relevant to the case.

17 **72. Media Involvement**

18 There is no statutory requirement that requested materials be produced and the State  
19 requests that this Court not expand the statutory text to include such a requirement.

20 **RECIPROCAL DISCOVERY REQUEST BY THE STATE**

21 NRS 174.245 states in pertinent part that:

- 22 1. Except as otherwise provided in NRS 174.233 to 174.295  
23 inclusive, at the request of the prosecuting attorney, the defendant  
24 shall permit the prosecuting attorney to inspect and to copy or  
25 photograph any  
26 (a) Written or recorded statements made by a witness the  
27 defendant intends to call during the case in chief of the  
28 defendant, or copies thereof, within the possession,  
custody or control of the defendant, the existence of which  
is known, or by the exercise of due diligence may become  
known, to the defendant;

28 //

1 (b) Results or reports of physical or mental examinations,  
2 scientific tests or scientific experiments that the defendant  
3 intends to introduce in evidence during the case in chief of  
4 the defendant, or copies thereof, within the possession,  
5 custody or control of the defendant, the existence of which  
6 is known, or by the exercise of due diligence may become  
7 known, to the defendant; and

8 (c) Books, papers, documents or tangible objects that the  
9 defendant intends to introduce in evidence during the case  
10 in chief of the defendant, or copies thereof, within the  
11 possession, custody or control of the defendant, the  
12 existence of which is known, or by the exercise of due  
13 diligence may become known, to the defendant.

14 The State formally requests that the defense provide all discovery consistent with the  
15 requirements of NRS 174.245 in a timely manner and well before the trial in the instant case.  
16 This request includes copies of all reports, tests, videos, photographs or any other item or items  
17 prepared by or produced from any noticed defense expert witnesses pursuant to NRS 174.234.

### 18 CONCLUSION

19 In general the defense request for discovery is vague, overbroad and is completely  
20 outside the scope of what required by the State under Brady and its progeny. Not only is the  
21 defense fully within its ability and power to independently request and/or subpoena the  
22 evidence they seek without the intervention of the State, the requests the defense makes are  
23 without focus or direct relationship to this case. The defense has not even attempted to  
24 articulate the materiality or exculpatory nature of the evidence they seek. The defense has  
25 filed a generalized discovery motion and/or is simply on a fishing expedition hoping to find  
26 something on which they may build a defense. Furthermore, while it may be possible in some  
27 cases to introduce a witness's criminal background information to reasonably aid in the  
28 defense of the accused, this is not one of those cases. Allowing the defense access to every  
witness's NCIC information would be an abomination and a clear violation of their privacy  
rights. The State cannot be forced to provide a witness's background information without  
some justifiable and legitimate reason for doing so. The defense has access to its own  
investigators and is free to conduct any legitimate inquiry it sees fit. It does not have the right,  
however, to use State time and resources to further victimize the very person for which the

1 State is seeking justice and especially those who are simply general fact witnesses.

2 Based upon the above and foregoing Points and Authorities, Defendant's Motion for  
3 Discovery should be denied to the extent any of the requested information does not comply  
4 with the discovery statutes and/or is privileged or irrelevant as to the guilt or punishment of  
5 Defendant.

6 DATED this 16th day of March, 2017.

7 Respectfully submitted,

8 STEVEN B. WOLFSON  
9 Clark County District Attorney  
Nevada Bar #005391

10  
11 BY /s/ STACEY L. KOLLINS  
12 STACEY L. KOLLINS  
13 Chief Deputy District Attorney  
14 Nevada Bar #003814

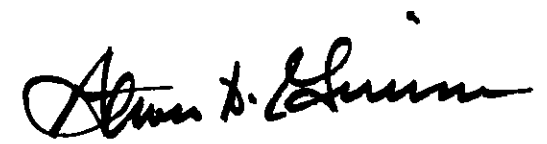
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19 **CERTIFICATE OF SERVICE**

20 I hereby certify that service of the above and foregoing was made this 16th day of  
21 MARCH 2017, to:

22 CARLI KIERNY, DPD  
23 harrolah@ClarkCountyNV.gov

24  
25 BY /s/ HOWARD CONRAD  
26 Secretary for the District Attorney's Office  
27 Special Victims Unit

28 hjc/SVU



CLERK OF THE COURT

1 NOTC  
PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
3 NEVADA BAR NO. 12010  
**PUBLIC DEFENDERS OFFICE**  
4 309 South Third Street, Suite 226  
Las Vegas, Nevada 89155  
5 Telephone: (702) 455-4685  
Facsimile: (702) 455-5112  
6 Attorneys for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 Plaintiff, )  
11 v. )  
12 JOSE AZUCENA, )  
13 Defendant, )

CASE NO. C-17-321044-1  
DEPT. NO. II

14 **DEFENDANT'S NOTICE OF EXPERT WITNESSES, PURSUANT TO NRS 174.234(2)**  
15 **TO: CLARK COUNTY DISTRICT ATTORNEY:**

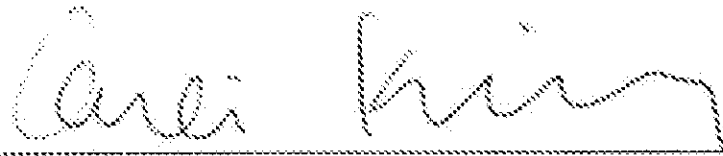
16 You, and each of you, will please take notice that the Defendant, JOSE  
17 AZUCENA, intends to call the following expert witnesses in his case in chief:

- 18 1. **Cari Caruso**, 4225 Valley Fair, Suite #105 Simi Valley, California 93063:  
19 Ms. Caruso will testify as to her interpretation of medical findings in this case,  
20 including the SANE exam.
- 21 2. **Mark J. Chambers Ph.D.**, 8275 S. Eastern Ave., Ste. 200, Las Vegas, NV  
22 89123: Dr. Chambers will testify regarding child competency, child  
suggestibility and child psychology.
- 23 3. **Professor Michael Kagan**, 4505 S. Maryland Pkwy., Las Vegas, NV 89154-  
24 1001: Professor Kagan will testify regarding U-Visas, asylum, and other  
25 immigration benefits available to victims of crime who are in the country  
illegally.

26 CVs Attached

DATED this 27 of March, 2017.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By:   
CARLI L. KIERNY, #12010  
Deputy Public Defender

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Case Name: Jose Azucena

Case No.: CourtNum

Dept. No.: II

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing was served via electronic e-filing to the Clark County District Attorney's Office on the 27<sup>th</sup> day of March, 2017 by

Electronic Filing to:

District Attorneys Office  
E-Mail Address:  
[Jaclyn.Motl@clarkcountyda.com](mailto:Jaclyn.Motl@clarkcountyda.com)

*/s/ Anita H Harrold*  
Secretary for the Public Defender's Office

Case Name: Jose Azucena  
Case No.: CourtNum  
Dept. No.: II

## Curriculum Vitae

Cari Caruso RN SANE-A  
Registered Nurse  
Forensic Nurse Examiner  
Board Certified Sexual Assault Nurse Examiner

### *Forensic Nurse Professionals, Inc.*

4225 Valley Fair, Suite #105  
Simi Valley, California 93063  
Office: 805 522-9939  
Fax: 805 522-9936  
Email office: [fnpi@sbcglobal.net](mailto:fnpi@sbcglobal.net)  
Website: [www.fnpi.net](http://www.fnpi.net)

### Member of the Los Angeles County Panel of Experts

- \*Has conducted forensic evidentiary examinations on reported victims and suspects of sexual assault events
- \*Serves as a consultant and expert witness for prosecutors and defense attorneys
- \*Instructor of Forensic Nursing Courses: University of California Riverside Extension:
  - Sexual Assault Nurse Examiner: Adult/Adolescent
  - Sexual Assault Nurse Examiner: Pediatric
  - Human Abuse Injuries
  - Elder Abuse
- University of California, Riverside, Extension  
UCR Instructor Excellence Award 2012 Recipient
- \*DUI Checkpoints and Saturations with Law Enforcement
- \*Lecturer and Program Presenter
- \*Continuing Education Provider, CA BRN: CEP 14377
- \*Reviewer for Publishing Company Elsevier
- \*Reviewer for the Journal of Forensic Nursing/Wolters/Lippincott, Williams & Wilkins

### Organizations:

- Charter Member of the International Association of Forensic Nurses 1993-present

- Southern California Regional Representative of the International Association of Forensic Nurses, Emeritus
- International Association of Forensic Nurses: Co-Chair SANE Council 2004-2006
- International Association of Forensic Nurses: Education Committee 2005-2006 Co-Author
- International Association of Forensic Nurses: Standards Committee 2005-2007 Co-author
- Founding & Charter Member of the Southern California Chapter of the International Association of Forensic Nurses 1999
- Southern California Chapter of the International Association of Forensic Nurses: Board of Directors Advisor 2000 to present (4<sup>th</sup> Official Chapter)
- Secretary/Treasurer for Southern California Chapter IAFN 2008-2010
- Treasurer for Southern California Chapter IAFN 2008-present
- California Sexual Assault Investigators Association ~1999-2008
- Los Angeles County Sexual Assault Coordinating Council (LAC+SAC) 1998-2003, no longer in existence
- LAC-SAC: Standards & Protocol Committee 2001-2003
- National Nurses in Business Association 2003-present

#### Educational History:

1969-1971	Los Angeles Health Department San Vicente Free Clinic West Hollywood, California Clinical Assistant-Volunteer
1971-1974	Los Angeles Valley College Van Nuys, California Associate of Arts degree Graduate Registered Nurse
1974	CCU Certificate Serra Memorial Hospital, Sun Valley
1980	Emergency Department Nursing Daniel Freeman Hospital, Inglewood
1988	Psychosocial Nursing Assessment & Intervention
1989	Prenatal Care
1990	Child Abuse  Pediatric Nursing



- Newborn Assessment
- 1991 Children in Violent Environments
- 1992 Becoming a Preceptor
- Pediatric Advanced Life Support Certification
- Adolescent Suicide
- 1993 How to Detect & Respond to Suicidal Patients
- SART Institute  
Sexual Assault Response Team Training Institute  
Santa Cruz, California  
Certificate: Sexual Assault Nurse Examiner
- The Sexual Assault Response Team Process
  - Role of the Advocate: the Victim/Witness program
  - Working with Law Enforcement
  - Special Needs of the Victim
  - The Forensic Interview
  - Forensic Evidence Collection, Packaging & Documentation
  - Profiling Sex Offenders
  - Pediatric Examination
  - Medical Legal Examination of the Adult Patient
  - Overview of the Judicial System
  - Courtroom Testimony
  - Males as Survivors
- 1994 Sexual Abuse of Children & Adolescents
- Pals renewal
- Patient & Family Education
- International Association of Forensic Nurses: Second Scientific Assembly  
"From Trauma to Trial"  
Tyson's Corner, Virginia  
Quantico, Virginia
- Clinical Forensic Pathology
  - Forensic Photography
  - Forensic Anthropology
  - Profiling Rapists
  - Stalking
  - Poisoning
  - Evaluation of the Gunshot Wound

Blunt & Sharp Traumatic Injuries  
Amnesia & Traumatic Injury  
False Memory Syndrome  
Practical Aspects of Forensic Nursing: Medical Evidence, Statistics  
The Adolescent Victim  
Violent Offenders  
Unusual Cases & Tour of the FBI Academy, Quantico, VA

1995      Typology of the Sex Offender  
Medical/Legal Examination of the Pediatric & Adolescent Sexual Assault  
Victim  
San Bernardino, California Sheriff's Station  
    Pediatric Sexual Assault Examinations  
    Adolescent Sexual Assault Examinations  
    Serial Rapist Typologies  
    Criminal Sexuality

Conscious Sedation

International Association of Forensic Nurses: Third Scientific Assembly  
Louisville, Kentucky  
    Nursing Jurisprudence  
    The Expert Witness  
    Chain of Custody & Rules of Evidence  
    Documentation & the Forensic Nurse  
    The Autopsy: Office of the Coroner, Louisville, Ky.  
    Forensic Mental Health  
    Evidentiary Significance of the Human Bite Mark  
    Historical Forensic Investigations  
    Contemporary Forensic Science  
    Evaluation of the Adolescent Hymen  
    The Interrelationships of Forensic Specialties  
    Autopsy observation & assisting: ME office Louisville, Ky.

1996      PALS Renewal

Pain Management

International Association of Forensic Nurses: Fourth Scientific Assembly  
Kansas City, Missouri  
    Nurse Jurisprudence  
    Interview & Documentation  
    Ethical Practices in Forensic Science  
    Sudden Cardiac Death: A Forensic Nursing Assessment  
    Physical Evidence Impacting Forensic Nursing  
    Forensic Nurses Conducting a Psychological Autopsy

Family & Domestic Violence  
The Forensic Nurse as an Assistant to the Medical Examiner  
Crime Scene Reconstruction  
The Future & the Forensic Nurse  
Genetic Evidence & the Forensic Nurse Examiner  
Tour of Lansing Correctional Facility

Medical Legal Consulting

1997

First Annual Forensics Symposium  
University of Southern California  
Los Angeles, California  
Violence in Today's Society  
Role of the Forensic Nurse  
Legal Implications  
The Expert Forensic Examiner  
Violence & Abuse: The Impact on Families, Society & the Health Care System

Injuries & Death Investigation  
Through the Eyes of the Forensic Nurse  
Joseph H. Davis Center for Forensic Medicine  
Metropolitan Dade County  
Miami, Florida  
Role of the Medical Examiner  
Poisons  
Principles of Investigation  
Changes in the Body after Death: Morgue Observation  
Family Violence  
Evidence Collection: Techniques & Documentation  
The Crash of ValuJet #592  
Santeria & Palo Mayombi  
Bite Mark Evidence: Collection of Specimens & Photography  
Bite Marks: Morgue Observation  
Mechanical Asphyxiation  
Fatal Distraction: Auto Erotic Mechanical Asphyxia  
Rape/ Homicide Investigation  
Unusual Cases  
Traumatic Deaths: Morgue Observation  
Trauma in the Emergency Room  
Tour of the Dade County Medical Examiner's Office

International Association of Forensic Nurses: Fifth Scientific Assembly  
Irvine, California  
Forensic Photography  
Drugs & Sexual assault: Rohypnol, Ketamine, GHB, ETOH

Clinical & On-Scene Photo Documentation  
Terrorism in Oklahoma City: Mass Fatalities Plan  
Lethal Injuries in Children  
Sudden Infant Death Update  
Evidence Collection in the Clinical Setting  
The Forensic Interview  
Tattoos & Gang Graffiti  
Female Genital Anatomy throughout the Life Stages  
Bite Marks & Making Bite Impressions  
Surviving a Hostage Situation  
Medico-Legal Documentation  
Case Reviews

1998

Pals Renewal

Advanced Cardiac Life Support Certification

International Association of Forensic Nurses: Sixth Scientific Assembly  
Pittsburgh, Pennsylvania

Advanced Sexual Assault Examiners Workshop  
Danger Signs: Forced Sex in Intimate Partner Relationships  
Role of the Forensic Nurse in Burn Triage  
Psychosocial Profile of the Burn Abusing Adult  
Application of Forensics in the Investigation of Burn Injuries  
Forensics in the Graduate & Undergraduate Education  
SIDS vs Gentle Smothering: A case History  
Sudden Infant Death Investigation  
Teenage Suicide: Guidelines for Determining Manner  
Necrosearch: Detection of Clandestine Graves  
A Study of Forensic Nursing Role Behaviors  
Forensic Health Programs in Hospitals  
Rape Prevention Education: Why Focus Needs to be on  
Adolescents  
Responding to Adolescent Victims of Sexual Assault  
Defining the Role of the Forensic Nurse in Disaster Response  
Courtroom Survival: Tips From the Trenches  
Testifying Techniques  
Forensic Scientific Evidence: Some of My Most Interesting Cases:  
Cyril Wecht MD JD  
Interviewing for Investigation of Sexual Abuse of People with  
Developmental Disabilities  
Child Abuse: The School Nurse Assessment  
Non-Physician Child Abuse Examiners: Standards & Systems  
Homicide Bereavement  
Patterns of Anal/Rectal Injury in Sexual Assault

Seroprevalence of HIV & Other STDs in Sexual Assault Suspects & Victims

Forensic Investigation: The Nursing Perspective

Case Reviews

1999

International Association of Forensic Nurses: Seventh Scientific Assembly  
Scottsdale, Arizona

International Developments in Forensic Nursing

Biomechanics for Traffic Collision Reconstruction

Genital Examination of the Sexual Homicide Victim

Death in Custody: A Case History

Child Protection Team Investigation Strategies

Investigating Ritual Homicide & Abuse

Staff Patient Boundary Violation

Emergency Contraception Update

Domestic Violence in Indian Country

The Columbine Tragedy

Healing of Acute Anal/Genital Injuries

Computer Animation Morphing

Forensic Colposcopy

Case Reviews

2000

ACLS Recertification

Courtroom Communications

California Medical Training Center

Domestic Violence: Evidence Collection & Prosecution

Unfounded Allegations in Sexual Assault

Trafficking of Persons for Forced Labor & Slavery-like practices

Coalition to Abolish Slavery & Trafficking

International Association of Forensic Nurses: Eighth Scientific Assembly  
Calgary, Alberta, Canada

SANE/SART Research Development and Utilization

Sexual Assault Council Meeting

Swiss Air 111: Reflections & Perspectives of a Forensic Professional

Forensic Nursing: Offender Focus

Child Prostitution: Strategies for Recovery

Estrogen Effect on the Hymen Membrane Across the Lifespan

Genital Injury Patterns in Adolescent Females post Vaginal Rape

Sperm & Acid Phosphatase Findings in Adolescent Post-Vaginal Sexual Assault  
Recognition of Child Sexual Abuse: Conditions Commonly Mistaken for Abuse  
A Global Perspective on Human Rights  
Surviving & Thriving as an Expert Witness  
Female Homicide Victims: Twenty Years Experience in Seattle, King County  
Client's Experience with a Specialized Sexual Assault Service  
Providing Services to Victims of Drug Facilitated Sexual Assault  
Guidelines for Community Needs Assessment for a SANE Program using the Neuman Model  
Implementation of the Domestic Violence Pilot Projects at Seven Sexual Assault Centers  
Motivating Factors of Rapists  
High Risk High Need Sex Offender Programming: A Pilot Study  
Maintaining Viability of your Forensic Program  
Effects of Prior Relationship Between Victims of Rape & Their Assailants on Injury Outcomes  
Strangulation Injury: A Tool for Documentation  
Globalization of Forensic Nursing

2001

Los Angeles County Sheriff Scent Dogs  
Metro Meeting  
California Hospital Medical Center

Healthcare Response to Domestic Violence

First National SART/SANE Conference  
San Antonio, Texas  
Healthcare Response to Domestic Violence  
San Gabriel, California

Sexual Deviancy  
Los Angeles, California

American Indian Violence and Intervention  
San Diego, California

International Association of Forensic Nurses Ninth Annual Assembly  
Orlando, Florida  
Violent Deaths: Gunshot Wounds, Asphyxia and Stabbing  
Forensic Use of Search and Rescue Dogs  
Homicide of Children  
This Patient Needs a Forensic Nurse

Beyond Masters and Johnson: What do we really know about the Sexual Human Response?  
 Evolution of Rape Law and Forensic Evidence: A Historical Perspective  
 Excellence in Forensic Practice: Retaining Forensic Nurse Examiners with a Clinical Ladder Based on the Benner's Novice to Expert Framework  
 Domestic Violence: Obtaining Consistency in Data Collection, Intervention and Referrals  
 The Rave Subculture and Today's Dance Scene  
 Regional of Practice for Interdisciplinary SART- Pitfalls and Promises  
 Expanding Forensic Services to Meet the Needs of the Community  
 DNA on Bodies: Where Has It Come From?  
 Fire and Behavior: Making the Connection-Quenching the Flames  
 Foley Catheter Techniques for Visualizing the Hymen in Adolescent Sexual Assault Victims  
 Significance of Toluidine Blue Positive Findings Following Speculum Examination for Sexual Assault  
 Is the SANE an Advocate: Issues?  
 Forensic Nursing: A Concept Analysis for the United Kingdom  
 \*\*\* Terminology for the Forensic Nurse Examiner (presenter)  
 Sexual Transmission of Hepatitis: An Underappreciated Threat  
 From Exam Room to Court Room - Nurses and Lawyers Working Together

Rape and Rave Drugs  
 Bell Gardens, California

False Victimization in Sexual Assault Cases-Dr. Chris Mohandie  
 Los Angeles, California

2002 Pilot Data Conference  
 Minneapolis, Minnesota

Civil Recourse for Victims of Sexual Assault-Mark Keligian  
 Anaheim, California

Internet Predators  
 Los Angeles, California

Cold Hit Cases: LASD Crime Lab  
 San Gabriel, California  
 Ken Sewell  
 Lai Chwa

International Association of Forensic Nurses Tenth Annual Scientific  
Assembly

Minneapolis, Minnesota.

Forensic Photography Workshop: Digital Imaging for Forensic  
Nursing Professionals.

Sexual Assault, Then and Now

Denial and Deceit of the Perpetrator

Deaths Due to Excited Delirium

Final Exit Deaths: Suicide and Assisted Suicides

Death Investigations: Domestic Violence

Speculum vs Non-speculum Assisted Swabs

When a Victim Can't Remember

Elder Sexual Assault

Sexual Homicide of Elderly Females

\*\*\*\* The Well Organized Sexual Assault Exam (presenter)

Physical Findings after First Consensual Intercourse.

Police Canine Units

Forensic Wound Pathology

Forensic Photography

Long Beach, California

Firearms Evidence

SCCIAFN, Bell Gardens, California

2003 Second SANE/SART Training Conference

New Orleans, Louisiana

DNA Evidence: Enhancing Law Enforcement's Impact from Crime  
Scene to Courtroom and Beyond.

How Sex Offenders Fool People

New Techniques in Processing DNA Evidence and How They Impact  
Collection, Investigation and Prosecution

Forensic Markers in Elder Abuse: Assessing the Trauma

Drug Facilitated Sexual Assault: Why we Fail; How we can Succeed

Forensic Photography: Yes or No to Going Digital

Adolescent Victims of Sexual Assault: A Strategic Response to the  
Realities of Prosecution.

Being a Sleuth: Differentiating Accidental from Intentional Injury

Batterers Treatment Programs

Vanda Yung, Chinatown Service Center

The Role of the Nurse in the Coroner's Setting

Barbara Nelson, Los Angeles County Coroner's Office

DNA Databank 2003 Legislative Update



Lisa Kahn, Deputy District Attorney Los Angeles County

International Association of Forensic Nurses Eleventh Annual Scientific Assembly

Las Vegas, Nevada

- Co-Chair SANE Council
- Postmortem Sexual Assault Examinations
- SANE Peer Review Session
- Preventing Violence Against Women
- The Victim's Perspective: The Debbie Smith Act
- Biological Evidence and DNA Profiling
- Death Investigations: Integrating Forensic Nursing at the Harris County Medical Examiner's Office
- Train Fatalities
- Asphyxia Events Related to Ligatures
- Efficacy of SANE Evidence Collection: A Study in Colorado
- Adolescent Sexual Assault: Epidemiology and Patterns of Anogenital Injury
- Evidence Collection at a Rape Homicide Scene
- Forensic Nursing: A Response to Global Violence
- Is the Defense, Defendable?
- The Innocent, What Have We Learned?
- From Forensic Examination to Prosecution
- There's Enough Work for All of Us
- Behavior Analysis of Violent Crime Scenes

2<sup>nd</sup> Annual Southern California Chapter IAFN Forensic Conference

Long Beach, California

- Forensic Art: Composite Drawings, Age Enhancement, Cold Cases
- Gang Identification: Behaviors, Tattooing, Gang Signs, Tagging
- Internet Horror: The Connection and Apprehension of the Suspect
- Fingerprint ID
- Human Living Vampires
- Suicides
- Child Abuse: Child Development Issues-Normal Sexual Behavior in Each Developmental Age: Cognitive, Physical, Emotional
- Child Interviewing
- Into to Death Investigation
- SIDS vs Overlay-Child Death Review
- Elder Abuse: When the Golden Years Aren't so Golden

2004

California Sexual Assault Investigators Association Spring Training  
Shell Beach, California

- Case-Murder Homicide in Hawaii  
Sharon Pagaling-Hagan California Bureau of Investigation

Reporting and Investigation of sexual assault in the Gay and Lesbian Community

Delena Couchman

Interview and Investigation of the Cary Staynor Case

Jeff Renik, Special Agent for the FBI

Forensic Nurses Peer Review

"Operation Hamlet" International Internet Child Exploitation Ring

Sgt. Gentry, Sgt. Casida, Corporal McFaddon, Clovis PD

Drug Facilitated Sexual Assault-What's new?

Marc LeBeau, Chief Toxicologist FBI Lab. Quantico, Va.

What We Learned from the Westerfield Case

Lt. C. Collins, San Diego Police Department

SCCIAFN Chapter Meeting

Cold Hit Cases

Robert Taylor, Supervising Criminalist, LA Scientific Services Bureau

SCCIAFN Chapter Meeting

Legal Aspects of Forensic Exams

Kathy Cady Pasadena Deputy District Attorney

SCCIAFN Chapter Meeting

Domestic Violence Exams

Andrea Welsing, Dr. Carolyn Sachs MD, Malinda Waddell-Wheeler

International Association of Forensic Nurses, Twelfth Annual Scientific Assembly

Chicago, Illinois

Co-Chair SANE Council

Research Based Expert Testimony

The Undetected Rapist-Part 1 & 2

Male Sexual Assault Victims

Sexual Assault in Post Menopausal Women

Trace Evidence from Bodies

Toluidine Blue Dye Procedure and Current Issues

Forensic Evidence Collection from Bodies and Crime Scenes

Post Mortem Sexual Assault Exams

Death Investigation of Sex Crimes

Case Review

Developmental and Forensic Pediatrics

Child Sexual Abuse and Courtroom Testimony

Evaluating the Effectiveness of SANE Programs

SANE Peer Review

Forensic Delegation in China

International Forensic Nursing

Child Forensic Interview Specialist Training  
Simi Valley, California

2005 Child Abuse Mandated Reporter Training  
On-Line  
Cal. Dept. of Social Services, Office of Child Abuse Prevention  
California Institute on Human Services, Sonoma State University

SANE-SART 3<sup>rd</sup> National Conference  
San Francisco, California  
Overcoming the Consent Defense: Special Investigation and Prosecution  
Issues  
Everything, Especially DNA, is Necessary Evidence to Overcome Consent  
Defenses  
The Military Responds to Sexual Assault  
Military SART Advance: Air Force, Navy, Army  
Technology and the SART: Telemedicine, Case Tracking, On-Line Training  
Measuring SART Success, Tools, Data Collection, Victim View  
SART on the Indian Reservation  
Is It An Isolated Assault? Serial Rapists/Crimes Clearinghouse  
What is SART Success?  
The Aftermath of Silence: A Survivor's Story  
Miss America by Day: A Journey of Recovery from 13 Years of Incest  
Nobody Will Believe Me!

The McMartin Preschool Trial  
Long Beach, California  
SCCIAFN

International Association of Forensic Nurses, 13<sup>th</sup> Annual Scientific  
Assembly, Arlington, Virginia  
Co-Chair SANE Council  
Anatomy of a Criminal Case: Crossroads of Science and the Law  
The Belmont Shore Rapist  
The Polygraph: An Investigative Tool  
Crawford v Washington  
Male Sexual Assault  
Alcohol and Adult Sexual Assault  
Pediatric Sexual Abuse Findings in the Absence of Disclosure  
Care of the Pregnant Sexual Assault Patient  
National Center for Missing and Exploited Children  
Ethical Forensic Nursing Practice: A Matter of Relationship  
Forensic Investigation of Suicide in Harris County, Texas  
Preparing for Courtroom Testimony

Predictors of Injury with Rape  
Identification and Interpretation of the Adult/Adolescent  
Anogenital Exam  
Nurses on the Frontline in Addressing Violence and the Continuum of  
Sexual Assault  
International Forensic Nursing

SCCIAFN 4th Annual Fall Conference

Long Beach, California

Stalking-The Dynamics of Pursuit Behaviors  
Court Testimony in Sexual Assault Cases  
Peer Review  
Justice for All: The Belmont Shore Rapist  
Child Pornography & Internet Chat Rooms  
The Night Stalker: The Richard Ramirez Case

2006

Munchausen Syndrome By Proxy  
On-line Merion Publications

Do's and Don't of Trace Evidence  
Long Beach

False Reporting: A Case Study  
Det. Phil Worts, SDPD  
San Diego

International Association of Forensic Nurses, 14<sup>th</sup> Annual Scientific  
Assembly, Vancouver, British Columbia, Canada

Notorious Psychiatric Cases, Globally: Cases that Changed the Laws  
Pediatric Sexual Abuse Training Institute  
Workplace Violence  
Human Trafficking  
Child Pornography  
Patterns of Knowing as a Method of Assessment and Intervention  
Genital Examinations: Variations on a Theme  
Forensic Evidence: Recovery and Analysis: Speaking for the Dead  
Cultural Approach to Violence  
Legal Autopsy of the Medical Chart  
Sexual Assault of Gay, Lesbian and Transgendered Youth  
Dissecting of a Criminal Case: Insights from the Defense Perspective  
Disasters/Multiple Fatalities  
Justice, Truth and Rights  
Peer Review and Slide Evaluation  
SANE Council  
LNC Council

Southern California Chapter IAFN 5th Annual Fall Conference  
Child Investigative Interviewing: Research Based Approach for  
Maximizing Accuracy and Completeness  
Practical and Real Duties of the Coroner/Death Investigator  
Body Found in Water Death Investigations

2007 Recovering from Rape, Community Services-SCCIAFN  
Tiara Brock, CSP

International Association of Forensic Nurses, 15<sup>th</sup> Annual Scientific  
Assembly, Salt Lake City, Utah  
Unto the Third Generation: A Call for the End of Child Abuse in 120  
Years  
Strangulation in Intimate Partner Relationships (and beyond)  
Photo Review (case presenter)  
Risk of Injuries during Sexual Assault  
Patterns of Injury in Women Sexually Assaulted while Incapacitated  
Primary Prevention of Violence against Women  
Factors that Predict Prosecution of Adult Sexual Assault Cases  
Response to Sexual Assault Patients with Disabilities  
Healing of Genital Injuries in the Pre-Pubertal and Adolescent  
Patient  
Fostering Violence Free and Socially Just Communities  
Forensic Nursing in the Netherlands  
The Effect of Hurricane Katrina on Homicide Rates in Harris County  
Impact of co-victims in Homicide and Unexpected Death  
Forensic Nursing in Germany  
Health and Human Rights for Afghan Women  
Ethical Issues in Forensic Nursing  
Drug Facilitated Sexual Assault  
SANE Council

2008 International Association of Forensic Nurses, 16<sup>th</sup> Annual Scientific  
Assembly, Dallas, Texas  
The Forensic Nurse and the Criminal Defense Team  
Research Presentation-Ano-Genital Photography  
Pediatric SANE: Partnering to Provide Comprehensive Care to Child  
and Adolescent Victims of Sexual Abuse/Assault  
Vigorous Wiping, Self Mutilation, Rough Sex, or Sexual Assault?  
Evidence based Interpretation of Genital Injury  
SANE Photo Review/Slide Night  
Let's Take to Daubert Challenge! An Exploration into Forensic  
Nursing Science (Part 1)  
Let's Take to Daubert Challenge! An Exploration into Forensic  
Nursing Science (Part 2)

Research Presentation-Forensic Nurse's Experience of Receiving  
Child Abuse Disclosure  
Research Presentation-Is Skin Color a Source of Health Disparity in  
the Forensic Sexual Assault Examination?  
The Stakes are High! Recognizing Conditions that May Mimic Child  
Abuse  
Death Investigation Photography  
Research Presentation-Injuries to the Cervix Following Sexual  
Assault  
SANE Council

SCCIAFN-Southern California Chapter IAFN Meeting 11-8-08  
Mission Viejo, California  
"Can the Sexual Assault Forensic Examiner Determine Consent?"  
Malinda Wheeler

SCCIAFN-Southern California Chapter IAFN Meeting 9-12-09  
San Diego, California  
"Effective SART Practice and Testimony"  
DDA Gretchen Means

2009 International Association of Forensic Nurses, 17<sup>th</sup> Annual Scientific  
Assembly, Atlanta, Georgia  
Celebrating Leadership in Forensic Nursing: Strategies for  
Maximizing the Voice of Forensic nursing Practice Worldwide  
Innovative Techniques Infant Death Investigation: Role of the  
Forensic Nurse  
Ano-Genital Warts and Ano-Genital Herpes in Children (Audio)  
The Good, the Bad, and the Ugly: Legal Nurse Consulting Case  
Analysis From the Defense Perspective  
Suspicious Deaths and Elder Mistreatment-Hiding in Plain Sight  
Forensic Nurses Needed in the Clinical Care of Victims of Partner  
Abuse  
Capital Case Mitigation: Anew Role for the Forensic Nurse  
The Skeleton Crew: A Nurse's Guide to Skeletal Remains  
SANE Council  
\*\*\*Legal Workshop (All Day Session-Presenter)

2010 SCCIAFN-Southern California Chapter IAFN Meeting 4-12-10  
San Diego, California  
"DNA Typing and Sexual Assaults"  
Judge George "Woody" Clarke

International Association of Forensic Nurses 18<sup>th</sup> Annual Scientific  
Assembly, Pittsburgh, Pennsylvania

Dr. Cindy Christian Forensic Pediatric Physician: Unusual  
Manifestation of Child Abuse  
Beyond the Genitals: Something's Just Not Right  
Straddle Injury or Sexual Assault  
Identification of Decedents and Notification to Legal Next of Kin:  
...What every Forensic Nurse Should Know  
Human Trafficking and the Role of the Forensic Nurse  
Assessing Patients for Domestic Violence: What Registered Nurses  
in a Rural Community Perceive as Barriers  
Wrong Place; Wrong Time: Trauma and Violence in the Lives of Young  
Black Men  
Inter Personal Violence Council Meeting  
Prosecution v Defense: Utilization of the Forensic Expert  
Social Networking Patterns of Adolescents, Young Adults, and  
Offenders  
Infant and Fetal Abduction  
False Confession or Murder

SCCIAFN-Southern California Chapter IAFN Meeting 11-13-10  
San Gabriel, California  
"Effective Interview for the Forensic Medical Professional"  
Patrick Flood, Retired Detective

2011 SCCIAFN-Southern California Chapter IAFN Meeting 4-9-11  
San Diego, California  
"NAMBLA-North American Man/Boy Love Association, Pedophilia and  
other Deviant Sexual Practices"  
Bob Hamer, Retired FBI Undercover Agent

International Association of Forensic Nurses 19<sup>th</sup> Annual Scientific  
Assembly, Montreal, Quebec, Canada  
Physical, Sexual, and Financial Elder Abuse  
Elder Abuse and Related Injuries in the Emergency Department  
Pediatric Sexual Assault Nursing Practice and Regulation  
Sudden Unexplained Infant Death Investigation: From Analysis to  
Action  
Motor Vehicle Collision Investigation and Reconstruction  
Extinguishing the Mystery of Inflicted Burns  
'Bones on Boxes:' The Unidentified Human Remains Project  
Lessons Learned from Hurricane Katrina Five Years Later  
Licking your Wounds: Responding to the Peer Review Process  
Forensic Nurses Performing QI Studies in Forensic, Criminal Justice  
and Investigative Settings  
Scene Investigation: Evidence Recognition, Protection, and  
Documentation  
Genital Warts in Children: Do You Report or Not?

Strangulation: Updates and Issues  
From the Bed to the Bench: Identifying Factors Affecting the  
Female Genital Environment in Post Coital DNA Recovery  
Suicide: Methods, madness, and the Notes They Leave Behind. A  
Forensic Nursing Perspective  
The Science and Art of Criminal Profiling: It Doesn't Look Like  
Television

2012. IAFN Educational Webinar 1.5 hours 7-25-2012  
Child Sexual Abuse Examinations: Interpreting Acute and Chronic  
Physical Findings, Marie Ann Marino EdD, RN, PNP
- National Child Abuse Defense and Resource Center- 9-6 to 8-2012  
Las Vegas, Nevada
- \*\*\*Presenter: The Pediatric Forensic Sexual Assault Examinations  
How Medical Experts Do Their Best for You-D. Marshall JD
- Biomechanics of Shaken Baby Syndrome-F. Bandak PhD & L. Zaner  
JD  
Non-accidental Injury (NAI) Abusive Head Trauma (AHT): Issues  
and Controversies-P. Barnes MD  
Medical Advocacy: Crossing the Line-C. Hyman MD  
"Scenes of a Crime," Documentary demonstrating coerced confession  
of an alleged shaken baby criminal case, Troy New York-R. Ofshe  
PhD  
Defending Allegations of Sexual Abuse: An overview-R. Lougee JD  
Teamwork: State of Missouri v Mohler-G. Jones JD & K. Benjamin JD  
Divining Testimony from Children: Versions of a 4000 Year Old  
Technique in Cases Today-Debra Poole PhD  
Coercion in Adult Suspect Interviews-R. Ofshe  
Limitations in Expert Witnesses: Realistic Expectations-K. London  
PhD  
Ethical Considerations in Dealing with Problems Unique to Public  
Defenders and Court Appointed Attorneys-G. Piccolo  
Computer Forensics & Digital Evidence: A Primer for the Computer  
Impaired-J A H Bell JD  
Questioning Kids in Court-T. Manning JD  
Dolls, Drawings, Interviewing Protocols-Debra Poole PhD & Jay  
Milano JD  
\*\*\*Relationship between the Attorney and Expert-Debra Poole PhD,  
Jay Milano JD, Cari Caruso RN  
Demonstration: How to Cross a Prosecution Mental Health Expert-  
Kami London PhD & Lorin Zaner JD  
How to Utilize a Defense Mental Health Expert-Phillip Esplin EdD &  
Thomas Manning JD



International Association of Forensic Nurses 20<sup>th</sup> Annual Scientific Assembly, Fajardo, Puerto Rico

The Phenomenon of Recantation in Child Sexual Abuse  
Death by Starvation: A Case of Child Neglect  
Analysis of Descriptive Terminology with the Pediatric Sexual Assault/Abuse Genital Assessment  
Sexual Boundary Violations in Forensic Nursing: 'A Real Eye Opener'  
Expert for the Prosecution vs Expert for the Defense: Can You Remain Friends?  
Image Review for Pediatric Sexual Abuse: A Case Based Review of Interesting Cases  
Exploring the Impact of Physical and Sexual Violation  
Cervical Findings: Non-Forensic Variations Interfering with Forensic Accuracy  
Medical Findings in Child Sexual Abuse: What they DO and What they DO NOT Mean  
Understanding and Managing Medical Child Abuse (formerly known as Munchausen Syndrome by Proxy)  
Making the Most of 'It's Normal to be Normal'  
Sexual and Physical Abuse Potpourri  
The Forensic Nurse as a Member of Child Death Review Team  
The Forensic Evaluation of Gunshot Wounds and Evidence Collection: The Role of the Forensic Nurse Examiner

2013

SCCIAFN-Southern California Chapter IAFN Meeting-April 13, 2013  
The Story behind the Murders of Teenagers Chelsea King and Amber DuBois by John Gardner, Caitlin Rother

The International Association of Forensic Nurses, 21<sup>st</sup> International Conference on Forensic Nursing Science and Practice, Anaheim, California  
Clinical Forensic Nursing Evaluation in the Strangulation Patient  
Physical Examination, Findings, and Children's Understanding of Anogenital Anatomy in Cases of Child Sexual Abuse  
Pediatric SANEs: Self Perceived Competence, Certification, Facilitating Factors, and Barriers  
Female Aggression and Related Injuries in Elder Abuse  
Child Death Review Process  
Pediatric Potpourri: Child Sexual Maltreatment Case Studies  
Keynote: "Healing Neen," Tonier Cain  
Autoerotic Deaths: Challenges for Death Investigators  
Incorporating Joyce Adams Criteria into your Practice  
The Neurobiology of Trauma

SCCIAFN-Southern California Chapter IAFN Meeting-November 9, 2013  
Sexual Assault Cases through the Lens of a Defense Attorney  
Mary Ellen Attridge

Case Review: Patty Secor, et al

2014

SCCIAFN-Southern California Chapter IAFN Meeting April 5-2014

Voices and Faces

Katie Feifer

New Skeletal Survey Guidelines for Fractures in Toddlers 8-12-2014

Medscape CE

Violence in Elderly Patients with Dementia 8-12-14

Medscape CE

Examination Findings in Child Sexual Abuse: Normal or Not? 9-8-14

Joyce A. Adams, MD with CCFMTC and CDAA

Are Sexually Transmitted Infections in Children Always Sexually  
Transmitted? 9-15-14

Joyce A. Adams, MD with CCFMTC and CDAA

17<sup>th</sup> International Conference of the National Child Abuse Defense Resource  
Center, 10-16 to 10-18-2014

Ethically Representing the Accused Sex Offender-John Wesley Hall JD

The Memory Factor-Elizabeth Loftus PhD

Misuse of Delayed Disclosure and Indicator Testimony-Kami London PhD

Accuracy and Reliability of Children's Memory and Reports-Maggie Bruck  
PhD

Defense of Analog Research on Children's Testimony: Very Cool Findings-  
Deb Poole PhD

Coercion in Adult Suspect Interviews-Richard Ofshe PhD

Panel: Learned Experts can Differ from a Trial Strategy- Phillip Esplin  
EdD, Richard Lougee JD, Lorin Zaner JD, Nancy Hollander JD, Michael  
Esplin JD

Ethics and Standard of Care Issues in Medical Neglect and Abuse  
Litigation-Michael Cronkright JD

Update on Issues and Controversies in Imaging of Non-Accidental Injury  
(NAI) and the Mimics in the Era of Evidence-based Medicine-Patrick  
Barnes MD

Medical Evaluation of Sexual Abuse: Fact v Fiction-Stephen Guertin MD

Medical and Legal Consequences of Not Recognizing Inborn Errors of  
Metabolism-Piero Rinaldo MD

Pediatric Ophthalmology: Retinal Hemorrhages-Khaled Tawansy MD

The Evolution of Radiological Fact in the 21<sup>st</sup> Century-Greg Shoukimas JD

Anatomy and Dissection of the Physical Abuse Case-Brian Ward- MD, PhD

Ethics Hour-Jay Milano JD

Biomechanics of Shaken Baby Syndrome (Abusive Head Trauma)-Faris  
Bandak JD

Fighting and Preventing DNA Errors-Greg Hampikian PhD  
Computer Forensics and Digital Evidence: A Primer-James A. H. Bell JD

International Conference on Forensic Nursing Science and Practice (IAFN)  
October 22 to 25<sup>th</sup>, 2014

Structural and Interpersonal Violence: Nurses can Make a Difference in  
an Individual, Organizational, and Social Levels

State of the Science on Alcohol Induced Memory Loss

Legal Challenges to Forensic Nursing Testimony: Medical Hearsay and  
Other Critical Pretrial Motions

Navigating military Justice: The Forensic Nurse's Role as Witness and  
Expert Consultant

The 'Justice Gap' for Sexual Assault Victims: What are we Going to Do  
About It?

The Next Wave: Male 'Survivors' of Childhood Sexual Abuse

Justice From Beyond the Grave and the Sixth Amendment

Special Considerations for Adolescent Victims of Sexual Assault

The SANE Approach to Sexual Exploitation and Trafficking: A New  
Medical Forensic Exam Model

The Detroit Sexual Assault Kit Action Research Project: Lessons Learned  
in a Multidisciplinary Collaboration

Guess What Day it is? Case Review Day!

What is that? A Look at Pediatric Sexual Abuse Differential Diagnoses

Pediatric Forensic Nursing: More than Just an Ano-Genital Examination  
'Raped' or 'Seduced' How Language Helps Shape our Response to Sexual  
Violence

SCCIAFN-Southern California Chapter IAFN Meeting 11-8-2014-San Marcos, CA

The Commercial Sexual Exploitation of Children

Laura McLean

University of California Riverside-40 Hours CEU Forensic Sexual Assault Examiner  
Course-Pediatric, October 7, 2014 to December 15, 2014

2015 Title IX for Forensic Nurses-5-21-2015

SAFEta Webinar Rebecca Leitman Veidlinger, Esq.

Interpreting the Child Abuse Evidentiary Examination: When the Findings are  
Inconclusive for Abuse, 7-28-15

Joyce A. Adams MD with CCFMTC and CDAA

NCADRC International Conference August 2 & 3, 2015

Orlando, Fl. --speaker--

International Conference on Forensic Nursing Science and Practice (IAFN)  
October 28 to November 1, 2015

Treating Violent Behavior as a Contagious Disease  
 Intentional Poisoning in Domestic Violence  
 Suicide has no Cultural Boundaries: A Case Study of a Young Somali Man's Death  
 Human Trafficking in the Pediatric Population  
 The New Street Corner: Online Advertisements of Sex Trafficking  
 Suspect Exams and the role of the Forensic Nurse  
 Research Council Meeting  
 "Y" Change? Forensic Nursing Practice Implications of Touch DNA and Y-STR DNA Analysis Methods  
 Internet Child Pornography: Role of the Forensic Nurse in Determining Age and Writing a Consultation Report  
 Crucial Evidence of Brain and Body Trauma in Family Violence Cases  
 BDSM [Bondage, Domination/Discipline, Sadism, Masochism], Kink, Rough Sex, or Assault: Do You Know the Difference?  
 Threats of Violence and the Duty to Warn: Nurse's Role in Working with Dangerous Patients  
 Beyond Bodily Injury: Sustained and Selected Abuse of a Child  
 Documentary Film: The Hunting Ground (without including challenges or the condemnation reports)

**Employment History:**

1969-1971 Los Angeles Free Clinic-Clinical Assistant  
 West Hollywood, California [Volunteer for one year]

1971-1974 Kaiser Permanente-Clinical Assistant: Surgical Emergency  
 Panorama City, California

1974 Received my Registered Nursing License: June 1974

1974 to 1989 Various positions as a Registered Nurse including:  
 Surgical Floor-Charge Nurse  
 Emergency Department  
 Pediatrics Unit  
 Pediatrics Emergency/Urgent Care  
 GI Lab  
 CCU  
 Post Op Unit  
 Med-Surg

Private Office RN to Nurse Practitioner/Recovery Nurse

Camp Nurse in Residence (30 years)

1989-1993 Olive View/UCLA Medical Center

- Pediatric Ward  
Pediatric Emergency/Urgent Care/Sexual Assault Exams
- 1993-Present Forensic Nurse Examiner  
Sexual Assault Nurse Examiner, Consultant, Lecturer
- 1994-1998 Providence Holy Cross Medical Center, GI Lab  
Mission Hills, California
- 1987-1998 Bureau of Jewish Education  
Camp Nurse in Residence
- 1998-2008 Los Angeles Hebrew High School  
Camp Nurse in Residence
- 1991-2001 Instructor in CPR  
EMSA Approved Mandatory Pediatric Courses for Child Care Providers
- 1998-2001 Violence Intervention Program  
LAC+USC Sexual Assault Center  
Los Angeles, California  
Forensic Sexual Assault Nurse Examiner
- 1998-2000 Mission Community Hospital  
Panorama City, California  
Forensic Sexual Assault Nurse Examiner
- 2000-2001 California Hospital Medical Center  
Los Angeles, California  
Forensic Sexual Assault Nurse Examiner
- 2000-2003 San Gabriel Valley Medical Center  
San Gabriel, California  
Forensic Sexual Assault Nurse Examiner  
Developed and implemented a new SANE Program  
Clinical Forensic Coordinator: Director of the Sexual Assault Response Team  
Domestic Assault Response Team
- 2003-Present: *Forensic Nurse Professionals, Inc.*  
President/CEO/Director  
**Consulting, Education, Expert Witness**  
Forensic Evidentiary Exams: For Reported Victims and Suspects of Sexual Assault Events, from 1990 to 2009  
**Consulting and expert witness for defense counsel and prosecutors since 2000.**

**Instructor of Forensic Sexual Assault Examiner Courses  
Adult/Adolescent/Pediatric, Human Abuse Injuries, Elder Abuse  
2005-Continuing Education Provider, California BRN  
Member of the Los Angeles County Panel of Experts**

2005-Present University of California, Riverside Extension

Instructor:

Sexual Assault Nurse Examiner Course-Adult/Adolescent  
Forensic Approach to Human Abuse Injuries  
Elder Abuse  
Sexual Assault Nurse Examiner Course-Pediatric

2007-2013 American Institute of Forensic Education

Instructor:

Sexual Assault Examiner Course-Adult/Adolescent  
Sexual Assault Examiner Course-Pediatric

#### **Musical and Art Ventures**

#### **Presentations Include:**

Aspects of the Medical Legal Forensic Examination & Evidence Collection for the  
Pediatric Resident

Introduction to Forensic Nursing  
Trauma Skills Lab  
Simi Valley, California

Forensic Nursing  
Alemany High School  
Professor Franklin's Anatomy & Physiology Class

Forensic Nursing in the Clinical Arena

Forensic Nursing in the Community

SART Training and Education for the Forensic Nurse Examiner

"Terminology for the Forensic Nurse Examiner"  
IAFN Conference Presentation, Orlando, Florida, 2001

"Choices" Rate your Risk for Sexual Assault and Interpersonal Violence  
Cal Poly, Pomona  
Other venues

The Well Organized Sexual Assault Exam  
IAFN Conference Presentation, Minneapolis, Minnesota

Domestic Violence through a Cultural Eye

WINGS: Crossover between Sexual Assault and Domestic Violence  
Ongoing trainings, 2x/year-YWCA WINGS-Ongoing to present

Sexual Assault and Interpersonal Violence

Preventing Burnout

Sexual Assault and Domestic Violence Awareness for Teens  
Chaminade Prep  
And Other Schools  
Forensic Nursing and Recognizing Child Abuse

Introduction to Forensic Nursing  
Pasadena City College School of Nursing  
East Los Angeles College School of Nursing  
Pierce College School of Nursing  
Other Nursing Students

Consulting as the Sexual Assault Nurse Examiner  
American Association of Legal Nurse Consultants

Sex Crimes and Physical Evidence-The sexual Assault Examination  
California State University, Los Angeles 2008

Instructor: Sexual Assault Examiner Course, Adult/Adolescent, 2005 to present  
University of California, Riverside, Extension, On-Line

Instructor: Forensic Approach to Human Abuse Injury, 2008 to present  
University of California, Riverside, Extension, On-Line

Forensic Nursing  
National Association of Hispanic Nurses-LA  
Los Angeles, California

Instructor: Sexual Assault Examiner Course, Adult/Adolescent, 2007 to present  
The American Institute of Forensic Education, On-line  
Palm Springs, California

Instructor: Sexual Assault Examiner Course, Pediatric, 2008 to present  
The American Institute of Forensic Education, On-Line  
Palm Springs, California

Grand Rounds for Pediatricians: Olive View-UCLA Medical Center, 2007

California State University, Los Angeles, January 2008  
Sex Crimes and Physical Evidence  
Session: The Forensic Sexual Assault Examination and Evidence Collection

National Defense Investigators Association Conference, April 2008  
Las Vegas, Nevada

San Bernardino Public Defender: Training, May 2008  
San Bernardino, California

Forensics of Sexual Assault  
Road Scholar Programs for Elderhostel  
Mission Inn Riverside, California, 4 times /year

Responding to Sexual Assault  
Mount San Antonio College  
Walnut, California 9-2008

Riverside Public Defender Training, November, 2008-12-11  
Riverside, California

Orange County Defenders Seminar, May 2010  
Santa Ana, California

North County Defense Attorneys Workshop, September 28, 2010  
Vista, California

Texas Criminal Defense Lawyers Association Conference, October, 2010  
Dallas, Texas

Los Angeles County Public Defenders Webinar  
Los Angeles, California

National Child Abuse Defense & Resource Center  
Las Vegas, Nevada

Riverside Public Defenders: Presentations January 18, 2013  
Riverside, CA

UCR Forensic CSI Community Lecture Series  
"The Forensic Nurse"  
Riverside, CA

Pediatric and Adolescent Examinations  
Los Angeles County Juvenile Public Defenders



Sylmar, CA

CALI California Association of Legal Investigators Conference 6-7-2014  
Rancho Mirage, CA

National Child Abuse Defense & Resource Center 8/3-4/2015  
Orlando, FL

Various lectures and presentations for legal, medical, & law enforcement  
professionals

Various lectures and presentations for allied professionals, community groups, and  
students

Publications:

Lynch, Virginia, with Janet Barber: *Forensic Nursing*, 2005 (1<sup>st</sup> Edition),  
Elsevier/Mosby, "Testifying as a Forensic Nurse."

Lynch, Virginia, with Janet Barber: *Forensic Nursing Science*, 2010 (2<sup>nd</sup> Edition),  
Elsevier/Mosby, "Testifying as a Forensic Nurse" "Sexual Assault Evidence  
Recovery"

Sexual Assault Nurse Examiner Council, Committee Member for the revision of the,  
*IAFN Scope and Standards of Forensic Nursing Practice*, 2006

*Sexual Assault Nurse Examiner Education Guidelines*, Committee Member, 2005-  
2008

10-29-2013: This CV is updated at least once a year.

## Curriculum Vitae

### **MARK J. CHAMBERS, PH.D.**

8275 S. Eastern, Ste. 200

Las Vegas, NV 89123

(702) 614-4550

LICENSURE NV License No. PY267

### EDUCATION

1979	Stanford University	B.A. (Psychology)
1980	Stanford University	M.A. (Education)
1988	Northwestern University	Ph.D. (Clinical Psychology)

### ACADEMIC HONORS

Undergraduate:	Phi Beta Kappa; B.A. with Distinction
Graduate:	Northwestern University Presidential Fellowship, 1984-85 Walter Dill Scott Fellowship, 1986

### PROFESSIONAL ASSOCIATIONS

Diplomate, American College of Forensic Examiners  
Diplomate, American Academy of Sleep Medicine

### FORENSIC EXPERIENCE

1000+ forensic evaluations for public and private agencies over the past 15 years; qualified as an expert witness in District and Federal Courts for both civil and criminal litigation. Areas of expertise include: competency to stand trial; criminal responsibility; risk of sexual reoffending; false sexual abuse allegations; false confessions; recantation of domestic violence allegations; psychological effects of personal injury incidents; eyewitness unreliability; child custody and parental fitness; sleep-related accidents.

### CLINICAL EXPERIENCE

1999-present: Private Practice

Evaluation and treatment of childhood behavior disturbances, attention deficit hyperactivity disorder; parental skills training, family therapy; evaluation and treatment of adult mood and anxiety disorders; stress management training; behavioral medicine; psychological testing; educational evaluations; sleep disorders.

CLINICAL EXPERIENCE (cont.)

2000-2004: American Sleep Diagnostics

*Clinical Director*

Responsibilities: Coordination of all clinical activities; assessment of patients, interpretation of test data; supervision of technical staff; consultation to referring physicians; community education, public relations

1993-1999: The Sleep Clinic of Nevada

*Clinical Director*

Responsibilities: Coordination of all clinical activities; assessment of patients, interpretation of test data; training and supervision of technical staff; behavioral management of clinic patients; consultation to referring physicians; community education, public relations

1988-92: Stanford University Medical Center

*Program Director*

Responsibilities: Coordination of assessment and treatment of patients; clinical research; program budget analysis; psychophysiological testing

1987-88: Dallas Child Guidance Clinic

*APA-Approved Clinical Internship*

Responsibilities: Psychological assessment, psychotherapy (family, group, and individual play therapy; behavior therapy and parental skills training)

1986-87: Outpatient Psychiatry, Evanston Hospital

*Clinical Practicum*

Responsibilities: Clinical assessment, psychotherapy (individual adult and child therapy)

TEACHING EXPERIENCE

1994-2001: University of Nevada-Las Vegas

*Instructor*

Courses: Introductory Psychology

1990-92: Pacific Graduate School of Psychology

*Associate Professor*

Courses: Research Methods, Statistics I, Statistics II, Research Group

OTHER PROFESSIONAL EXPERIENCE

1992-1999: Legal Psychology Consulting

*Director*

Responsibilities: Independent consultation to attorneys, district attorney's office, government agencies, judges, on cases involving psychological issues.

1989-92: Pacific Graduate School of Psychology

*Clinical Supervisor*

Responsibilities: Clinical supervision of graduate students in first-year practicum placements

1986-87: Leo Burnett Company

*Research Associate*

Responsibilities: Primary and secondary research concerning the effects of children's advertising and related issues

REFERENCES

Richard Bootzin, Ph.D.

Department of Psychology  
University of Arizona  
Tucson, AZ 85721  
(602) 621-7447

Kenneth L. Lichstein, Ph.D.

Department of Psychology  
University of Memphis  
202 Psychology Building  
Memphis, TN 38152  
(901) 678-4692

Charles Rasmussen, Ph.D.

Chair, Department of Psychology  
University of Nevada-Las Vegas  
4505 Maryland Parkway  
Las Vegas, NV 89154  
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# MICHAEL KAGAN

University of Nevada, Las Vegas, William S. Boyd School of Law  
4505 S. Maryland Pkwy, Las Vegas, NV 89154-1001, (702) 895-2675

## ACADEMIC POSITIONS

### University of Nevada, Las Vegas, William S. Boyd School of Law

*Professor of Law* (2016 - Current)  
*Immigration Clinic Director* (2016 - Current)  
*Associate Professor of Law* (2011–2016)  
*Immigration Clinic Co-Director* (2011 - 2016)

**Courses:** Administrative Law, Immigration Law, Professional Responsibility, International Human Rights, and Immigration Clinic.

**Clinic Leadership:** Guided student attorneys in offering vigorous defense to immigrants facing deportation, including litigation at the administrative level and in the federal Courts of Appeals. Cases involved asylum issues, criminal law, family law, constitutional due process, and gender equality.

In 2013, established a partnership with the Clark County Public Defender through which the Immigration Clinic provides advice on immigration consequences of criminal convictions.

In 2016, strengthened a program providing legal aid to unaccompanied child refugees in Nevada, integrating it with the student-led clinic, and establishing the Edward M. Bernstein & Associates Children's Rights Program.

In partnership with a local legal aid organization, established an asylum pro bono project focusing on removal defense in Immigration Court, and establishing a Self-Help Center for *pro se* immigrants at the Las Vegas Immigration Court, staffed by law students and attorneys.

**Grants and Honors:** Faculty Opportunity Award (\$29,959) for *Gender, Judging and Deportation: The Immigration Appeals Database Pilot Study* (2015-2016) (with Rebecca Gill and Fatma Marouf).

Named 2013-2014 Bellow Scholar (Association of American Law Schools) for empirical research into the adjudication of immigration appeals in the federal courts.

**Selected Service:** Elected by the faculty to Dean's Advisory Committee (2012-2013, 2013-2014, 2015-2016).

Appointed to the Nevada Indigent Defense Commission (2016 – Present).

### Other Academic Affiliations

*Reflaw.org* Editorial Advisory Board (University of Michigan Law School Program on Refugee and Asylum Law) (current).

Tel Aviv University, Faculty of Law, Refugee Rights Clinic (guest instructor, 2014).

Northwestern University, Center for Forced Migration Studies, Affiliated Faculty (Summer Institute) (2012-2014).

American University in Cairo Center for Migration and Refugee Studies, Short course: *Palestinian Refugees* (February 2012).

### American University in Cairo

*Senior Fellow in Human Rights Law (2007-2009)*

**Courses:** International Refugee Law, Comparative Migration Law (developed as a new course), Palestinian Refugee Issues (interdisciplinary graduate seminar). Supervised masters thesis research. Taught intensive short course on International Refugee Law in summer 2007.

**Tel Aviv University Faculty of Law (Refugee Rights Clinic)**

*Instructor (2004 – 2006)*

Helped lead the development of Israel's first legal aid program devoted to advocating the rights of asylum-seekers and refugees, including the development of a new curriculum. Taught refugee law to 20 students each year, and developed the academic curriculum for the clinic. Supervised student-led legal aid in some of Israel's earliest asylum cases.

Established a program supported by the UN Voluntary Fund for Victims of Torture to provide legal, medical and mental health services to asylum-seekers who are victims of torture.

Organized and taught Israel's first training seminars in asylum law for private lawyers.

Minerva Center for Human Rights grant to research the history of the enemy nationals doctrine in the Middle East (2004-2005).

**American University in Cairo**

*Adjunct Faculty (Forced Migration and Refugee Studies) (2002 - 2003)*

Taught graduate practicum on Refugee Status Determination in Spring 2002, involving students in preparing live client refugee cases.

Taught intensive short course in Advanced Refugee and Human Rights Law (2003).

**EDUCATION**

**University of Michigan Law School**

Juris Doctor *Cum Laude* 2000

Bates Overseas Fellowship	2001
Colloquium on Challenges in International Refugee Law (Rapporteur)	2001
Michigan Fellow in Refugee and Asylum Law	2000
Research assistant to Prof. James C. Hathaway	1999-2000
Colloquium on Challenges in International Refugee Law (Student participant)	1999
Graduate Student Instructor (GSI); teaching assistant in undergraduate cinema and American history courses.	1998-2000

**Northwestern University College of Arts and Sciences**

B.A. *Cum Laude* 1997

Majors in Political Science and American Studies (departmental honors).

Phi Beta Kappa Society

**PUBLICATIONS AND PAPERS**

*Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEORGETOWN LAW JOURNAL \_\_\_\_  
(forthcoming 2017) (with Fatma Marouf and Rebecca Gill).

*The Public Defender's Pin: Untangling Free Speech Regulation in the Courtroom*, 111 NORTHWESTERN UNIVERSITY LAW REVIEW \_\_\_ (forthcoming 2017).

*Shrinking the Post-Plenary Power Problem*, 68 FLORIDA LAW REVIEW FORUM 59 (2016) (invited essay).

*When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 BOSTON COLLEGE LAW REVIEW 1237 (2016).

*Limiting Deterrence: Judicial Resistance to Detention of Asylum –Seekers in Israel and the United States*, 51 TEXAS INTERNATIONAL LAW JOURNAL 191 (2016) (symposium essay).

*The New Era of Presidential Immigration Policy*, 55 WASHBURN LAW JOURNAL 117 (2016) (symposium essay).

*Binding the Enforcers: The Administrative Law Struggle Behind Pres. Obama's Immigration Actions*, 50 UNIVERSITY OF RICHMOND LAW REVIEW 665 (2016).

*Plenary Power Is Dead! Long Live Plenary Power!* 114 MICHIGAN LAW REVIEW FIRST IMPRESSIONS 21 (2015).

*Immigration Law's Looming Fourth Amendment Problem*, 104 GEORGETOWN LAW JOURNAL 125 (2015). *Republished (pending) in IMMIGRATION AND NATIONALITY LAW REVIEW*.

*Chivalry, Masculinity and the Importance of Maleness to Judicial Decision Making* (with Fatma Marouf and Rebecca Gill) (2015, working paper). Available at SSRN: <http://ssrn.com/abstract=2616502>.

Research profiled by Joe Palazzolo, *In Federal Appeals Courts, Chivalry Is Not Dead*, THE WALL STREET JOURNAL, LAW BLOG, June 12, 2015, <http://blogs.wsj.com/law/2015/06/12/in-federal-appeals-courts-chivalry-is-not-dead/>.

*Speaker Discrimination: The Next Frontier of Free Speech*, 42 FLORIDA STATE UNIVERSITY LAW REVIEW 765 (2015).

For commentary, see *First Amendment: Speech -- Doe v. Harris*, 128 HARV. L. REV. 2082 (2015).

*Do Immigrants Have Freedom of Speech?* 6 CALIFORNIA LAW REVIEW CIRCUIT 84 (2015).

*Immigrant Victims, Immigrant Accusers*, 48 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 915 (2015).

*A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASHINGTON UNIVERSITY LAW REVIEW 1083 (2015).

*Refugees and Israel's Shifting Concept of the 'Enemy National.'* in REFUGEES IN ISRAEL (Tally Kritzman-Amir, ed.) (Hebrew, Kibbutz Meuchad — Van Leer Institute) (solicited chapter, translated for publication) (2015).

*Believable Victims: Asylum Credibility and the Struggle for Objectivity*, 16 GEORGETOWN JOURNAL OF INTERNATIONAL AFFAIRS 123 (Winter/Spring 2015).

*"Unelected Faculty:" Schuette v. Coalition and the Limits of Academic Freedom*, 5 CALIFORNIA LAW REVIEW CIRCUIT 326 (2014).

*Must Israel Accept Syrian Refugees?* 50 TEXAS INTERNATIONAL LAW JOURNAL FORUM 1 (2014).

*Buying Time? False Assumptions About Abusive Appeals*, 63 CATHOLIC UNIVERSITY LAW REVIEW 679 (2014) (with Fatma Marouf and Rebecca Gill).

For commentary, see Jill E. Family, *Removing the Distraction of Delay*, 64 CATH. U. L. REV. 99, 100, 110 (2014).

*Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO STATE LAW JOURNAL 337 (2014) (with Fatma Marouf and Rebecca Gill). *Republished in* IMMIGRATION AND NATIONALITY LAW REVIEW.

Research findings highlighted in Fatma Marouf, Michael Kagan and Rebecca Gill, *A Stay on Deportations*, THE WASHINGTON POST (2 August 2015).

For commentary, see Christopher J. Walker, 75 OHIO ST. L. J. FURTHERMORE 29 (2014) and Chris Walker in YALE JOURNAL ON REGULATION NOTICE AND COMMENT, <http://www.yalejreg.com/blog/marouf-kagan-gill-on-empirical-realities-of-immigration-stays-adlaw-bridge-series-by-chris-walker> (16 October 2014); Kevin J. Lynch, *The Lock-In Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 811-812 (2014).

CREDIBILITY ASSESSMENT IN ASYLUM PROCEDURES – A MULTIDISCIPLINARY TRAINING MANUAL, Hungarian Helsinki Committee (2013), available at: <http://www.refworld.org/docid/5253bd9a4.html> (Gábor Gyulai, Ed.; with Jane Herlihy, Stuart Turner, Lilla Hárdi & Éva Tessa Udvarhelyi).

*Dubious Deference: Re-Assessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL LAW REVIEW 101 (2012).

*The UN “Surrogate State” and the Foundation of Refugee Policy in the Middle East*, 18 UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 307 (2012).

*Shared responsibility in a new Egypt: A strategy for refugee protection*, American University in Cairo Center for Migration and Refugee Studies (2011), available at: <http://www.aucegypt.edu/gapp/cmrs/documents/kaganrefugeepolicyegypt1109.pdf>.

*Refugee Credibility Assessment and the “Religious Imposter” Problem*, 43:5 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1179 (2010).

*Is There Really a Protection Gap? UNRWA’s Role vis-à-vis Palestinian Refugees*, 28 REFUGEE SURVEY QUARTERLY 511 (2010).

*The (relative) Decline of Palestinian Exceptionalism and its Consequences for Refugee Studies in the Middle East*, 22:4 JOURNAL OF REFUGEE STUDIES 417 (2009).

*Rights, Needs and Responsibility: Challenges to Rights-Based Advocacy for Non-Palestinian Refugees’ Health and Education in Lebanon* (with Samira Trad), in FORCED DISPLACEMENT: WHY RIGHTS MATTER? (Lyla Mehta and Kasia Grabska, editors) (Palgrave Press 2008).

*Nowhere to Run: Gay Palestinian Asylum-Seekers in Israel*, Tel Aviv University Public Interest Law Program (2008), available at [http://www.law.tau.ac.il/Heb/\\_Uploads/dbsAttachedFiles/NowheretoRun.pdf](http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/NowheretoRun.pdf) (with Anat Bendor).

*Restitution as a Remedy for Refugee Property Claims in the Israeli-Palestinian Conflict*, 19:2 FLORIDA JOURNAL OF INTERNATIONAL LAW 421 (2007).

*Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East*, 38:2 COLUMBIA HUMAN RIGHTS LAW REVIEW 263 (2007).



*Legal Refugee Recognition in the Urban South: Formal v. De Facto Refugee Status*, 24:1 REFUGEE: CANADA'S PERIODICAL ON REFUGEES 11-26 (2007).

*Politically-Preferred Solutions and Refugee Choices: Applying the Lessons of Iraq to Palestine*, in PALESTINIAN REFUGEE REPATRIATION: GLOBAL PERSPECTIVES at 250 (Michael Dumper, ed.) (Routledge 2006).

*Setting Standards of Ethics, Competence and Accountability for Legal Aid in the Context of UNHCR RSD, Asylum Access* working paper (2006) (available at <http://rsdwatch.files.wordpress.com/2010/05/kaganethicswpproposal.pdf>).

Became the basis for the Nairobi Code: Model Rules of Ethics for Legal Advisors in Refugee Cases, 19:4 INT'L J. OF REFUGEE L. 736 (2007).

*Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt*, 19:1 JOURNAL OF REFUGEE STUDIES 45 (2006).

*The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination*, 18:1 INTERNATIONAL JOURNAL OF REFUGEE LAW 1 (2006).

Was the most cited article in the history of the journal, as of March 1, 2014 (see <http://ijrl.oxfordjournals.org/reports/most-cited>.)

Included as a "core" reading in REFUGEE LAW READER, [www.refugeelawreader.org](http://www.refugeelawreader.org), and in JAMES C. HATHAWAY (ED.), HUMAN RIGHTS AND REFUGEE LAW (2014).

*Do Israeli Rights Conflict with the Palestinian Right of Return? Identifying the Possible Legal Arguments*, Badil Resource Center or Palestinian Residency and Refugee Rights Working Paper No. 10 (2005) (available at <http://www.badil.org/en/al-majdal/item/936-do-israeli-rights-conflict-with-the-palestinian-right-of-return-identifying-possible-legal-arguments>).

*Falling Through the Cracks: Legal and Practical Gaps in Palestinian Refugee Status – A case study of unrecognized refugees in Lebanon*, legal consultant on report by Frontiers Association (Beirut, Lebanon) (2005).

*Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEORGETOWN IMMIGRATION LAW JOURNAL 367 (2003).

Cited in *Kadia v. Gonzales*, 501 F.3d 817 (7th Cir. 2007) (J. Posner) and *J. Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005) (J. Berzon).

Cited by the High Court of Israel, HCI 8870/11 *Gonzalez v. Ministry of Interior* [2013] (Isr.).

Included as a "core" reading in REFUGEE LAW READER, [www.refugeelawreader.org](http://www.refugeelawreader.org).

Translated to Spanish by the UN High Commissioner for Refugees in 2007 for use by adjudicators and lawyers in Spain.

For praise of this article, see, e.g., James P. Eyster, *Searching for the Key in the Wrong Place: Why "Common Sense" Credibility Rules Consistently Harm Refugees*, 30 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 1, 14, FN 61 (2012) ("Kagan's thoughts and conclusions about credibility determinations expressed in this article have guided most subsequent research and analysis on the topic."); James A. Sweeney, *Credibility, Proof and Refugee Law*, 21 INT'L J. REFUGEE L. 700 (2009); Rosemary Byrne, *Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals*, 19(4) INT'L J. REFUGEE L. 609 (2007); and Deborah Anker and Mathew Muller, *Book Review*, 19 INT'L J. REFUGEE L. 599, 600 (2007).

*Assessment of Refugee Status Determination Procedure at UNHCR's Cairo Office 2001-2002*, American University in Cairo Forced Migration and Refugee Studies Working Paper No. 1 (2002), (available at <http://www.aucegypt.edu/academic/fmrs>).

*Persecution in the Fog of War: The House of Lords' Decision in Adan*, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 247 (2002) (with William P. Johnson).

## SELECTED OTHER WRITING

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### Op-Ed Writing

*Teaching Immigration Law in the Age of Trump*, THE CHRONICLE OF HIGHER EDUCATION (January 2017).

*A Stay on Deportations*, THE WASHINGTON POST (2 August 2015) (with Fatma Marouf and Rebecca Gill).

*On one hand, Obama applauds immigrant activists – as a Texas case argues that unauthorized immigrants have no First Amendment rights*, SALON (4 May 2015), available at [http://www.salon.com/2015/05/14/on\\_one\\_hand\\_obama\\_applauds\\_immigrant\\_activists\\_a\\_s\\_a\\_texas\\_case\\_argues\\_that\\_unauthorized\\_immigrants\\_have\\_no\\_first\\_amendment\\_rights/](http://www.salon.com/2015/05/14/on_one_hand_obama_applauds_immigrant_activists_a_s_a_texas_case_argues_that_unauthorized_immigrants_have_no_first_amendment_rights/).

*The Conservative Case for DACA: The Intriguing Legal Theory You Won't Hear on Fox News*, SALON (19 February 2015), available at [http://www.salon.com/2015/02/19/the\\_conservative\\_case\\_for\\_daca\\_the\\_intriguing\\_legal\\_theory\\_you\\_wont\\_hear\\_on\\_fox\\_news/](http://www.salon.com/2015/02/19/the_conservative_case_for_daca_the_intriguing_legal_theory_you_wont_hear_on_fox_news/).

*When Peace Seems Impossible*, THE DAILY BEAST (21 May 2012).

*Refugees and Obama's American Values*, SEATTLE POST-INTELLIGENCER (Guest Op-Ed Column, 9 December 2008).

*Stop Subsidizing Occupation*, SEATTLE POST-INTELLIGENCER (Guest Op-Ed Column) (25 January 2005).

### Legal Blogging

*Chevron's Immigration Exception, Revisited*, NOTICE AND COMMENT (Blog, YALE JOURNAL ON REGULATION) (10 June 2016), <http://www.yalejreg.com/blog/chevron-s-immigration-exception-revisited-by-michael-kagan>.

*Does Chevron Have an Immigration Exception?*, NOTICE AND COMMENT (Blog, YALE JOURNAL ON REGULATION) (19 May 2016), <http://www.yalejreg.com/blog/does-chevron-have-an-immigration-exception-by-michael-kagan>.

*U.S. v. Texas: Some Observations as Briefing Begins*, NOTICE AND COMMENT (Blog, YALE JOURNAL ON REGULATION) (9 March 2016), <http://www.yalejreg.com/blog/u-s-v-texas-some-observations-as-the-briefing-begins>.

*Immigration Law is Torn Between Administrative Law and Criminal Law*, NOTICE AND COMMENT (Blog, YALE JOURNAL ON REGULATION) (12 February 2016), <http://www.yalejreg.com/blog/immigration-law-is-torn-between-administrative-law-and-criminal-law-by-michael-kagan>.

*DAPA's Unlawful Presence Problem*, NOTICE AND COMMENT (Blog, YALE JOURNAL ON REGULATION) (6 February 2016), <http://www.yalejreg.com/blog/dapa-s-unlawful-presence-problem-by-michael-kagan>.

*What If Donald Trump Had Plenary Power?* IMMIGRATIONPROF BLOG (7 December 2015), [http://lawprofessors.typepad.com/immigration/2015/12/what-if-donald-trump-had-plenary-power-by-michael-kagan.html#\\_msoanchor\\_1](http://lawprofessors.typepad.com/immigration/2015/12/what-if-donald-trump-had-plenary-power-by-michael-kagan.html#_msoanchor_1).

*The Uses and Abuses of Notice and Comment*, IMMIGRATIONPROF BLOG (On-Line Symposium on Texas v. United States) (22 November 2015), <http://lawprofessors.typepad.com/immigration/2015/11/on-line-sypoium-on-texas-v-united-states-michael-kagan-.html>.

*Immigration Arrests Violate the Fourth Amendment*, CRIMMIGRATION.COM (12 November 2015), <http://crimmigration.com/2015/11/12/immigration-arrests-violate-the-fourth-amendment/>.

*Married, But Separated (Symposium on Kerry v. Din)*, IMMIGRATIONPROF BLOG (On-Line Symposium on Kerry v. Din) (18 June 2015), available at <http://lawprofessors.typepad.com/immigration/2015/06/symposium-on-kerry-v-din-married-but-separated-by-by-michael-kagan.html>.

*Guest Blog: When UNHCR Does the State's Job: Coping with the reality of mandate status determination*, UN HIGH COMMISSIONER FOR REFUGEES: GLOBAL VIEWS (11 December 2014), available at <http://blog.unhcr.org/globalviews/when-unhcr-does-the-states-job-coping-with-the-reality-of-mandate-status-determination/>.

*Guest Blog: UNHCR Faces an RSD Crisis*, REFLAW.ORG (University of Michigan Law School) (10 November 2014), available at <http://www.reflaw.org/unhcr-faces-an-rsd-crisis/>.

*Guest Blog: Commentary on Scialabba v. Cuellar de Osorio*, HAMILTON AND GRIFFIN ON RIGHTS (11 June 2014), available at <http://hamilton-griffin.com/guest-blog-professor-michael-kagan-scialabba-v-cuellar-de-osorio/>; featured on SCOTUSBLOG <http://www.scotusblog.com/2014/06/wednesday-round-up-234/#more-212871>.

*Why Do We Still Have Refugee Camps*, URBANREFUGEES.ORG (8 October 2013), <http://urban-refugees.org/debate/why-do-we-still-have-refugee-camps/>.

*Response on LGBT Asylum and Refugee Law*, NYU LAW REVIEW OPINIO JURIS (online) (March 29, 2012) available at: <http://opiniojuris.org/2012/03/29/follow-up-to-nyu-jilp-symposium-on-lgbt-asylum-and-refugee-law/>.

## Foreign Policy Commentary

*Decade of Exile: Syria and the Middle East's Refugee Crisis*, WORLD POLITICS REVIEW (23 June 2015), available at <http://www.worldpoliticsreview.com/articles/16070/decade-of-exile-syria-and-the-middle-east-s-refugee-crisis>.

*Safe Harbor: Shoring Up the Norm of Nonrefoulement*, WORLD POLITICS REVIEW (3 December 2013), available at <http://www.worldpoliticsreview.com/articles/13410/safe-harbor-shoring-up-the-norm-of-nonrefoulement>.

*Darfur*, entry in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 2<sup>ND</sup> EDITION (MacMillan Reference 2008).

*UN Reform for the Rest of Us: An Agenda for Grassroots Accountability*, FOREIGN POLICY IN FOCUS ([www.fpif.org](http://www.fpif.org)) (14 April 2006).

*Israel Tries to Tighten Immigration by Following Europe*, AL MAJDAL (Quarterly magazine of the Badil Resource Center for Palestinian Residency & Refugee Rights) No. 27 (Autumn 2005).

*UN Decision-Making on Refugee Status: Implications for American Asylum Policy* (with Emily Arnold-Fernandez), AMERICAN BAR ASSOCIATION IMMIGRATION AND NATURALIZATION COMMITTEE NEWSLETTER (Summer 2005).

*The Missing Third Leg of UN Accountability*, FOREIGN POLICY IN FOCUS (<http://www.fpif.org/fpifxt/468>) (23 June 2005).

*At the UN, Palestinian Democracy Tests American and Israeli Limits*, THE ELECTRONIC INTIFADA (available at: [electronicintifada.net/v2/article3882.shtml](http://electronicintifada.net/v2/article3882.shtml)) (26 May 2005).

*Book Review: Rights in Exile — Janus-Faced Humanitarianism* (by Guglielmo Verdirame and Barbara Harrell-Bond), 18 JOURNAL OF REFUGEE STUDIES 241 (2005).

*Protecting the Rights of Refugees in Africa: Beginning with the UN Gatekeeper* (with Barbara Harrell-Bond), PAMBAZUKA NEWS 182 (11 November 2004); republished in AFRICAN VOICES ON DEVELOPMENT AND SOCIAL JUSTICE (Mkuki Na Nyota Publishers 2005).

*Building Lives on the Edge of War: Sudanese Refugees in Northern Uganda Struggle in Limbo*, THE NEXT AMERICAN CITY (July 2004) (<http://americacity.org/magazine/article/building-lives-on-the-edge-of-war-sudanese-refugees-kagan/>).

*Promises Without Solutions: Iraqi Refugees Left in the Lurch in Lebanon* (with Bashir Osmat and Samira Trad), 18 FORCED MIGRATION REVIEW 42 (2003).

**Personal Blog** : RSDWATCH.COM (*dormant since 2016*).

Established in 2005 to provide independent information about the way the UN refugee agency conducts refugee status determination, and promoting due process reforms.

## SELECTED ACADEMIC PRESENTATIONS

*Presidential Immigration Law and Endemic Policy Instability*, University of Arizona James E. Rogers College of Law, Rehnquist Center Symposium “Immigration Federalism,” (February 2017).

*The End of Refugee Status Determination?* Connecticut Journal of International Law, Symposium on the Global Refugee Crisis, University of Connecticut School of Law (April 2016); International Association for the Study of Forced Migration (Poznan, Poland) (July 2016).

*Empirical Scholarship and Community Engagement*, American Association of American Law Schools Conference on Clinical Education (panel presentation) (May 2016).

*Nowhere to Run: Gay Palestinian Asylum-Seekers in Israel*, University of Arizona Center for Judaic Studies, Sally & Ralph Duchin Campus Lecture Series (February 2016).

*Finding Refuge: Can Non-Jews Seek Asylum in the Jewish State?* University of Arizona, Pozez Family Lecture (February 2016).

*The State, the UN and the Fragile Foundations of Refugee Policy in the Middle East*, Cornell University Law School, Conference: Beyond Survival (November 2015).

*When Immigrants Speak*, LatCrit 2015 (October 2015).

*The Limits of Deterrence*, Constitutional Conflicts in Comparative Perspective, Cardozo School of Law (May 2015).

*Masculinity, Chivalry, and the Gender Gap in Immigration Appeals* (with Fatma Marouf and Rebecca Gill), Western Political Science Association Annual Conference (April 2015).

*Immigrant Victims, Immigrant Accusers*, Symposium: Immigration Reform at 59, University of Michigan Law School (February 2015).

*Dangerous Women and Children*, Symposium: Immigration and Freedom of Movement, University of Texas Law School (February 2015).

*Padilla in Practice: An Immigration Clinic as a Partner in improving the quality of Criminal Defense*, American Association of American Law Schools Conference on Clinical Education (panel presentation) (June 2014).

*Gendered Justice: The Complex Relationship Between Gender-of-Judge, Gender-of-Attorney, and Gender-of-Litigant Effects in Immigration Appeals on the US Courts of Appeals*, Midwest Political Science Association Conference (April 2014) (with Rebecca Gill and Fatma Marouf).

*We Know We Can't Spot a Liar, But Does the Law Care?* UNLV Saltman Center Conference on Psychology and Lawyering (February 2014).

*Refugee Status Determination in the Middle East and Africa*, UC San Diego Center for Comparative Immigration Studies, Workshop on "Determinants of Refugee and Asylum Admissions Policy in Comparative Perspective" (November 2013).

*The UN Surrogate State Beyond the Camp and the Challenge of Accountability*, University of Connecticut, Human Rights Institute 10<sup>th</sup> Anniversary Conference (September 2013) (Video available at: <http://mediasite.dl.uconn.edu/Mediasite/Play/197fea52d67047d8b7abe5055c5385d21d?catalog=6f479054-e121-4600-b980-33e99276e98b>).

*The Price of a Day in Court (Empirical Study of Immigrant Access to the Federal Courts)*, Association of American Law Schools Mid-Year Meeting on Poverty, Immigration and Property (June 2013) (with Fatma Marouf).

*Urban Displacement and The Value of the UN Surrogate State*, Humanitarian Policy Group conference on Urban Displacement and Development (Copenhagen, Denmark) (invited presentation, February 2013).

*The Double Life of Temporary Protection*, panel presentation, Conference on the Israeli Asylum System, The Center on Law and Business (Tel Aviv, Israel – presentation via Skype) (November 2012).

*Civil Rights and Immigration*, National Bar Association panel discussion and CLE, NBA National Conference (July 2012).

*We Live in a Country of UNHCR: The UN Surrogate State as an Alternative Basis for Refugee Rights*, International Conference on Law and Society, Honolulu (June 2012).

*Teaching About Sexual Identity in a Clinical Context*, Immigration Law Teachers Workshop at Hofstra University (May 2012) (with Fatma Marouf).

*Balancing Deference: Appellate Review of Factual Adjudication by Administrative Agencies*, University of San Francisco School of Law (April 2012).

*Should a Clinic Have an Ideology?* Southwest Junior Clinicians Conference (March 2012) (with Fatma Marouf).

*Refugees to and from the Arab Spring*, American University in Cairo Center for Migration and Refugee Studies (February 2012).

*Dubious Deference: Appellate Review in Factual Adjudication by Administrative Agencies*, Rocky Mountain Junior Scholars Forum (Brigham Young University, September 2011).

*Refugees and Israel's Shifting Concept of the Enemy National*, invited lecture and book chapter in progress, Van Leer Institute (Tel Aviv University, April 2010).

*The State of Refugee Protection in Israel and the Role of the Judiciary*, 8<sup>th</sup> World Conference of the International Association of Refugee Law Judges (Cape Town, January 2009).

*Presentations in Favor of the Palestinian Right of Return and Right to Seek Asylum*, Tel Aviv University conference on the development of an Israeli asylum system (Tel Aviv, April 2008).

*Responsibility Shift: The Challenge of Defining UN and Government roles in Refugee Policy in the Middle East*, American University in Cairo Forced Migration and Refugee Studies seminar (Cairo, March 2008).

*Irregular Refugees and Irregular Refugee Policy in the Middle East*, plenary panel at the eleventh bi-annual International Association for the Study of Forced Migration conference (Cairo, January 2008) (available at [blog.forcedmigration.org/category/podcast](http://blog.forcedmigration.org/category/podcast)).

*For the Palestinian Right of Return*, debate forum sponsored by Nakhba60, School of Oriental and African Studies (London, January 2008).

*How Well-Founded Should be the Well-Founded Fear of Persecution?*, presentation to Seminar on Credibility Assessment in the Spanish Asylum System (sponsored by UNHCR & Spanish Interior Ministry) (Madrid, November 2007).

*The Decline of Palestinian Exceptionalism: Observation of a Trend*, presentation to American University in Cairo conference on Migration and Refugee Movements in the Middle East and Northeastern Africa (Cairo, October 2007), and at the eleventh bi-annual International Association for the Study of Forced Migration conference (Cairo, January 2008).

*Migration Flows in Egypt*, presentation to International Federation for Human Rights (FIDH) Regional Conference on Migration (Doha, June 2007).

*Underreported: Sudanese Refugees in Israel*, appearance on WNYC's The Leonard Lopate Show (May 31, 2007) (available at <http://www.wnyc.org/shows/lopate/2007/may/31/underreported-sudanese-refugees-in-israel/>).

*The Refugee from My Enemy is My Enemy: The Detention and Exclusion of Sudanese Refugees in Israel* (with Anat Ben-Dor), Minerva Center for Human Rights, Biannual Conference on Human Rights in Israel (Tel Aviv, December 2006).

*Legal Aid and UNHCR: Current Issues*, American University in Cairo Forced Migration and Refugee Studies Seminar (Cairo, September 2006).

*Presentations on UNHCR refugee status determination procedures and means of expanding legal aid and advocacy for refugees and asylum-seekers*, Turkish Refugee legal aid training seminar organized by the Helsinki Citizens Assembly Refugee Legal Aid Project (Istanbul, October 2005).

*Turkey's Emerging Refugee Law in the Context of International Standards*, Speaker on "International Refugee and Human Rights Law" and workshop moderator on "Refugee Status Determination," Conference organized by the Heinrich Boll Foundation (Istanbul, April 2005).

*Should UNHCR Conduct Refugee Status Determination?* American University in Cairo Forced Migration and Refugee Studies Seminar (Cairo, February 2005).

*Politically-Preferred Solutions and Refugee Choices*, paper presentation, Transferring Best Practice: An international workshop on the comparative study of refugee return programmes with reference to the Palestinian context, University of Exeter (Exeter, June 2004).

*Introduction to Refugee Law*, Guest lecture in graduate seminar on Migration and the Law, American University in Beirut (Beirut, January 2004).

*Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt*, International Association for the Study of Forced Migration bi-annual conference (Chiang Mai, January 2003).

*Legal Aid and UNHCR*, American University in Cairo Forced Migration and Refugee Studies Seminar (Cairo, November 2002).

*Advanced Topics in Refugee Law*, graduate seminar lecture, University of Casablanca Faculty of Law (Ain Chock, May 2002).

## **PROFESSIONAL EXPERIENCE**

### **Asylum Access (San Francisco, CA)**

*Policy Director* (Volunteer 2006-2009; Paid November 2009 – May 2011)

Originally part of a small group of activists that co-founded Asylum Access in 2005, and worked pro bono in different capacities for the organization until joining headquarters staff in November 2009.

Coordinated global policy advocacy activities for a young US-based international refugee rights organization operating legal aid programs on three continents, involving pro bono law firms, law student interns and staff. Developed strategic plans for Washington and Geneva-focused advocacy and led the organization in building key relationships with US and UN officials. Developed training materials on policy advocacy strategy for Asylum Access. Spearheaded continuing advocacy to improve standards of due process in UNHCR's refugee status determination procedures, leading UNHCR to revise a long-standing policy that had blocked disclosure of evidence to asylum-seekers. Represented Asylum Access at annual UNHCR consultations in Geneva.

From November 2009 to July 2010, served as headquarters liaison with Asylum Access' legal aid program in Thailand, supervising staff and budget planning, legal aid policy, and guiding the program through security crises in Bangkok.

Helped organize the first Southern Refugee Legal Aid Conference (SRLAC) in Nairobi, Kenya, in 2007, and wrote initial drafts for the Model Rules of Ethics for Legal Advisors in Refugee Cases (Nairobi Code) which was promulgated at the conference. Instrumental in initiating the Southern Refugee Legal Aid Network (SRLAN).

### **Africa Middle East Refugee Assistance (AMERA) (Cairo, Egypt)**

*Egypt Country Director (Acting)* (2008)

*Programmes Director* (2007)

Managed the daily operations of a UK-based refugee legal aid organization serving more than 1100 refugees per year with a budget of more than \$400,000, 20-25 paid staff, 30

interpreters and between 10 and 15 volunteers. Led efforts to integrate legal aid, psycho-social services and community outreach to refugees into a coherent program, and helped deepen organizational relationships with the UN High Commissioner for Refugees.

In 2007, chaired the Senior Management Team during a year of institutional transition, taking lead responsibility for handling personnel matters and strategic planning. Asked by the Board of Directors in 2008 to return as acting country director to restructure management. Over a five-month period I restructured office management, hired a new financial manager and supervised the establishment of new financial monitoring systems, and laid groundwork for a stable local management system to go into place in 2009.

#### **Negotiations Support Unit (Adam Smith International) (Ramallah, West Bank)**

*Legal Consultant* (Occasional from 2004 – 2009)

Commissioned in 2004 to prepare a legal opinion on property restitution rights of Palestinian refugees. Occasional consultation subsequently on international legal issues related to the Israeli-Palestinian conflict.

#### **Frontiers Association (Beirut, Lebanon)**

*International Legal Consultant* (December 2002 - February 2004)

Working with a group of Lebanese human rights activists, participated in the planning and founding of a new NGO focusing mainly on refugees, until work was obstructed in September 2003 by the arrest on political charges of the center director. Designed a legal counseling program for asylum-seekers, trained and supervised the counseling staff, and wrote research and advocacy reports. Planned research about the voluntariness of Iraqi repatriation. Participated in general managerial decision-making, including recruitment and personnel decisions, budgets, and fundraising.

Conducted legal analysis of the rights of Palestinian refugees in Lebanon who are not registered with UNRWA or Lebanese authorities, published in a report called *Falling through the Cracks* (2005).

#### **Musa'adeen Refugee Project (Cairo, Egypt)**

*Legal Adviser & Coordinator* (August 2001 - November 2002)

Supported by Yale Initiative for Public Interest Law Fellowship.

Developed and coordinated program to train and organize refugees to help other refugees prepare refugee claims to the UN refugee agency (UNHCR) to protect them from being deported and to access resettlement to the US, Canada and Australia.

Helped develop a supervisory system to improve the quality of casework, established regular information sessions taught by refugees to refugees, organized informational meetings for refugee community leaders, and obtained small grants to support the program.

The program provided individual assistance to more than 200 asylum-seekers over a 12-month period, and taught informational classes to approximately 700.

#### **Egyptian Organization for Human Rights Refugee Legal Aid (Cairo, Egypt)**

*Consulting Lawyer* (August 2001 - November 2002)

Organized efforts to document refugee protection practices in Egypt in order to promote improvements in refugee policy. This began in late 2001 with a joint letter from Egyptian human rights groups asking for UNHCR to provide rejected asylum-seekers reasons for rejection, and led in Fall 2002 to the initiation of a series of periodic working papers researched and published by the American University in Cairo.

Initiated and supervised early research on protection of unaccompanied minors and detention of asylum-seekers in Egypt. Also provided general assistance supervising legal aid casework.



**Amnesty International, International Secretariat (London, England)**

*Refugee Policy Consultant (March - July 2001)*

Wrote an Amnesty International policy on the disputed refugee law doctrine called the internal protection alternative (“internal flight alternative”).

**Amnesty International, International Secretariat (London, England)**

*Refugee Team Intern (Summer 2000)*

**Honigman Miller Schwartz and Cohn (Detroit, Michigan)**

*Summer Associate (2000)*

**American Civil Liberties Union of Washington (Seattle, Washington)**

*Law Clerk (Summer 1999)*

Conducted legal research to support litigation in separation of church and state cases, including a school district teaching “intelligent design” creationism in a biology class. Researched systemic inadequacy of criminal defense in Washington State. Drafted legal responses to speech restrictions in preparation for the 1999 World Trade Organization conference in Seattle.

**Center for Human Rights Legal Aid (Cairo, Egypt)**

*Constitutional Project Intern (June - December 1998)*

Researched international and regional human rights law related to freedom of political association. This research led to the publication of a book series in Arabic, Freedom of Association and Political Parties in Egypt (2003).

Represented an Algerian man seeking refugee protection, and continued to provide advocacy for around two dozen asylum-seekers after leaving Egypt, working by e-mail with refugees in Egypt and with staff at the American University in Cairo.

**PROFESSIONAL CREDENTIALS**

Member of the New York State Bar

Admitted for limited clinical practice in the State of Nevada

Admitted to practice in the Ninth Circuit Court of Appeals

CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
NEVADA BAR NO. 0556  
2 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
NEVADA BAR NO. 12010  
3 **PUBLIC DEFENDERS OFFICE**  
309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
Telephone: (702) 455-4685  
5 Facsimile: (702) 455-5112  
*Attorneys for Defendant*

6 **DISTRICT COURT**  
7 **CLARK COUNTY, NEVADA**

8 THE STATE OF NEVADA,  
9   
10 Plaintiff,  
11   
12 v.  
13 JOSE AZUCENA,  
14 Defendant,

CASE NO. C-17-321044-1  
DEPT. NO. II  
DATE: April 4, 2017  
TIME: 9:00 a.m.

15 **EX PARTE APPLICATION FOR AN ORDER SHORTENING TIME**

16 COMES NOW Defendant JOSE AZUCENA, by and through Chief Deputy Public  
17 Defender, P. DAVID WESTBROOK, and files pursuant to EDCR 3.60 his Ex Parte Application  
18 for Order Shortening Time. This Motion is made and based upon the attached Declaration of  
19 Counsel, and the entire court file herein.

20 DATED this 27<sup>th</sup> day of March, 2017.

21  
22 PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

23  
24 By:   
25 P. DAVID WESTBROOK, #9278  
26 Chief Deputy Public Defender  
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DECLARATION OF COUNSEL

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P. DAVID WESTBROOK makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am a Deputy Public Defender assigned to represent Defendant Jose Azucena in the instant matter, and am familiar with the facts and circumstances of this case.

2. On March 27, 2017, I completed and ordered the filing of "MOTION TO RECONSIDER DEFENDANT'S MOTION TO COMPEL PRODUCTION OF DISCOVERY & BRADY MATERIALS". As the Court is aware, Mr. Azucena has chosen to exercise his right, pursuant to Nevada statute, to a trial within 60 days. I am requesting that his "Motion to Reconsider" be heard on **April 4, 2017** to allow the parties time to act upon whatever decision the Court makes, while still preserving Mr. Azucena's right to a trial within 60 days.

3. Pursuant to **EDCR 3.20 (b)**, motion hearings are to be set "not less than 10 days from the date the motion is served and filed." Under this rule, the motion hearing would normally be set April 6, 2017. However, the defense is requesting that this deadline be shortened by **two (2) days**, and the hearing set on **April 4, 2017**. This need not affect the State's deadline for a written opposition which, under **EDCR 3.20 (c)**, is "within 7 days after the service of the motion," unless the Court wishes to expedite the State's opposition *sua sponte*. The defense has no objection to retaining the April 3, 2017 deadline for the filing of the State's opposition, per **EDCR 3.20 (c)**.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief (NRS 53.045).

EXECUTED this 27<sup>th</sup> day of March, 2017.

  
P. DAVID WESTBROOK

CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
NEVADA BAR NO. 0556  
2 P. DAVID WESTBROOK, DEPUTY PUBLIC DEFENDER  
NEVADA BAR NO. 9278  
3 **PUBLIC DEFENDERS OFFICE**  
309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
Telephone: (702) 455-4685  
5 Facsimile: (702) 455-5112  
westbrpd@ClarkCountyNV.gov  
6 *Attorneys for Defendant*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9	THE STATE OF NEVADA,	)	
		)	
10	Plaintiff,	)	CASE NO. C-17-321044-1
		)	
11	v.	)	DEPT. NO. II
		)	
12	JOSE AZUCENA,	)	
		)	
13	Defendant,	)	DATE: April 4, 2017
		)	TIME: 9:00 a.m.

14  
15 **ORDER SHORTENING TIME**

16 GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the time for the  
17 hearing on Defendant's "MOTION TO RECONSIDER DEFENDANT'S MOTION TO COMPEL  
18 PRODUCTION OF DISCOVERY & BRADY MATERIALS" is hereby shortened to April 4,  
19 2017 at 9:00 a.m..

20  
21 DATED this 27th day of March, 2017.

22  
23   
24 District Court Judge

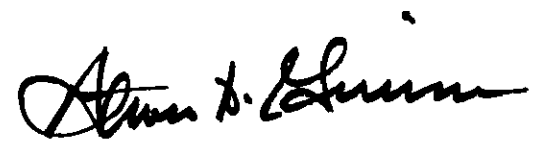
25 SUBMITTED BY:

26 CLARK COUNTY PUBLIC DEFENDER

27 BY

28 P. DAVID WESTBROOK, #9278

Chief Deputy Public Defender



CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
NEVADA BAR NO. 0556  
2 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
NEVADA BAR NO. 12010  
3 **PUBLIC DEFENDERS OFFICE**  
309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
Telephone: (702) 455-4685  
5 Facsimile: (702) 455-5112  
Attorneys for Defendant

6  
7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 Plaintiff, ) CASE NO. C-17-321044-1  
11 v. ) DEPT. NO. II  
12 JOSE AZUCENA, )  
13 Defendant, ) DATE: April 11, 2017  
TIME: 9:00 a.m.

14  
15 **DEFENDANT'S MOTION IN LIMINE TO PRECLUDE USE OF**  
16 **THE PREJUDICIAL TERM "VICTIM"**

17 COMES NOW, the Defendant, JOSE AZUCENA, by and through CARLI  
18 KIERNY and P. DAVID WESTBROOK, Chief Deputy Public Defenders, and hereby requests an  
19 order in limine that the parties and witnesses not refer to the complaining witness with the  
20 prejudicial term "victim" because the term presupposes that a crime has been committed and that  
21 the defendant is guilty.

22 This Motion is made and based upon all the papers and pleadings on file herein, the  
23 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

24 DATED this 30<sup>th</sup> day of March, 2017.

25 PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

26  
27 By: /s/ P David Westbrook  
28 P. DAVID WESTBROOK  
Chief Deputy Public Defender

**DECLARATION**

P. DAVID WESTBROOK makes the following declaration:

1. I am an attorney duly licensed to practice law in the State of Nevada; I am the Deputy Public Defender assigned to represent the Defendant in the instant matter.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. (NRS 53.045).

EXECUTED this 30<sup>th</sup> day of March, 2017

By: /s/ P David Westbrook  
P. DAVID WESTBROOK  
Chief Deputy Public Defender

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1 **FACTUAL ALLEGATIONS**

2 Jose Azucena is charged with multiple counts of the following crimes: Lewdness with a  
3 Child under the Age of 14; Child Abuse, Neglect or Endangerment; Indecent Exposure, Sexual  
4 Assault with a Minor under 14 Years of Age; Attempt Lewdness with a Child under the Age of 14;  
5 and First Degree Kidnapping. On February 1, 2017, a grand jury was convened, and returned a true  
6 bill on these charges. The following summary is based on testimony at this hearing, and does not  
7 constitute an adoption of these facts by the defense.

8 **Yezline Barajas**

9 Maria Navarro is the mother to Yezline Barajas and Nicole Barajas. She met Mr. Azucena  
10 through his wife, Elena Azucena, who all live in the same apartment complex. Grand Jury  
11 Transcript (GJT). Pg. 9, lines 11-19. Yezline Barajas is the 8-year-old older sister to Nicole. GJT  
12 at 14:1,13-14. She is friends with many of the complaining witnesses. GJT at 17:15-25.

13 The first incident happened at the apartment of Jose Azucena, where he used his hands to  
14 touch Yezline on her stomach, butt, and vagina. GJT at 18:18-25 and 19:10-11;23-24. Another  
15 incident occurred when Mr. Azucena allegedly pulled Yezline into his apartment and taped her  
16 mouth, arms, and feet. GJT at 20:14-21:6. He proceeded to touch her vagina, butt, and breasts on  
17 his bed. GJT at 21:23-22:20. While digitally penetrating her, Mr. Azucena was showing Yezline  
18 porn on his phone. GJT at 23:15-25. He proceeded to remove the tape, told her to go home, and  
19 threatened to kill her parents if she told anyone. A third incident happened when Yezline was  
20 outside with her friends Maridel, Mirabel, and Jatziri by Mr. Azucena's car. GJT at 27:6-16. Mr.  
21 Azucena allegedly showed them all his penis behind the car. GJT at 29:7-25. After that, he enticed  
22 the girls, except for Yezline, to grab Kit-Kats from his pants. GJT at 28:8-25. A fourth incident  
23 occurred when Yezline and her friends were inside the car with Mr. Azucena. GJT at 30: 16-25.  
24 While in the front seat, Mr. Azucena digitally penetrated Yezline. GJT at 32:7-20. Finally, Mr.  
25 Azucena expressed to Yezline that he wanted to take the girls to Chuck-E-Cheese without the  
26 moms, and afterwards they were going to go somewhere "far away". GJT at 34: 7-12. Yezline also  
27 noted that on one of these days, Mr. Azucena kissed her on the mouth. GJT at 39:12-19.

28

1           **Nicole Barajas**

2           Yezline was sent to find her younger sister Nicole after she went out playing with her  
3 friends. GJT at 35:3-9. She was found in Mr. Azucena's house, and Mr. Azucena was seen  
4 touching her with his body. GJT at 37:17-20. This was around September 2016. GJT at 43:3-5.

5           **Mirabel Moiza**

6           Mirabel Moreno is a friend to both Yezline and Nicole, and she has two sisters: Maridel  
7 and Jatziri Moiza. GJT at 50:7-22. All three of them lived in the same apartment at Mr. Azucena.  
8 GJT at 53:4-14.

9           Throughout the testimony, Mirabel described multiple incidents. She stated that outside  
10 Mr. Azucena's apartment with Yezline and her sisters, Mr. Azucena used his "thing" to touch  
11 Mirabel's "la cosa", which can mean either butt or vagina. GJT at 55:7-18 and 56:15-22. She  
12 describes another incident where he showed Mirabel, her sisters, and Yezline his penis outside his  
13 apartment. GJT at 55:7-15. She describes another incident where Mr. Azucena showed her,  
14 Yezline, and her sisters porn on his phone. GJT 57:19-58:8. Mirabel continued to testify that Mr.  
15 Azucena did offer Yezline, Mirabel, and her sisters Kit-Kats from his pants, but Mirabel states that  
16 none of them grabbed any. GJT 58:9-59:22. Finally, Mirabel states that Mr. Azucena told Yezline,  
17 her, and her sisters that he wanted to take them all to Chuck-E-Cheese's and then to somewhere far  
18 away. GJT 59:22-60:4. He also threatened to hurt Mirabel's parents if she said anything. GJT  
19 60:20-61:1.

20           **Jatziri Moiza**

21           Jatziri Moiza is older sister to Mirabel and Maridel Moiza, who are twins. GJT at 78:18-  
22 79:5. They all lived in the same apartment complex as Mr. Azucena. GJT 75:5-76:13.

23           Jatziri testified that Mr. Azucena touched her private parts more than once both outside and  
24 inside his apartment. GJT at 77:2-79:15. She also described a particular incident when Mr.  
25 Azucena showed her his private parts outside his apartment while Yezline, the sisters, and two  
26 other boys were present. GJT at 80:13-81:8. Jatziri also described the incident where Mr. Azucena  
27 put the Kit-Kats in his pants; Jatziri stated that he pulled them out of his pants for them and they  
28



1 grabbed them with their sleeves over their hands. GJT at 81:12-82:19. Finally, Jatziri described an  
2 incident where she was shown porn by Mr. Azucena on his phone. GJT at 82:21-83:11.

3 **Maridel Moiza**

4 Maridel Moiza is sister to both Mirabel and Jatziri Moiza. GJT at 91:23-92:4. They lived  
5 in the same apartment complex as Mr. Azucena. GJT 93:15-18.

6 Maridel described many incidents with Mr. Azucena. She testified that Mr. Azucena  
7 touched her breasts many times. GJT at 8-16. He touched her vagina many times. GJT at 97:20-  
8 23. He touched her butt many times. GJT at 98:12-17. Finally, he kissed her on the mouth once.  
9 GJT at 99:10-13. Maridel went on to describe the incident regarding the porn on Mr. Azucena's  
10 phone, but couldn't remember anything about it, only that it made her uncomfortable. GJT at  
11 100:1-21. Maridel also testified that he showed her his penis multiple times. GJT at 100:23-  
12 101:15. Maridel went on to testify about the Kit-Kat incident, saying he would put them near his  
13 "thing" and asking if they wanted any. GJT at 101:24-102:23. She was told that if she told her  
14 Mom anything, he would kill her. GJT at 103:7-14. Finally, Maridel testified about telling her  
15 Mom about Mr. Azucena wanting to take them to Chuck-E-Cheese, and that it made her sad. GJT  
16 at 104:13-105:7.

17 **Scarlett Rangel**

18 Scarlett Rangel is a seven-year-old who lives in the same apartment complex as Mr.  
19 Azucena. GJT at 124:10-126:18. Scarlett testified that one time, Mr. Azucena, while standing by  
20 his bed in his apartment, showed her his penis through the doorway while she was standing outside  
21 the apartment. GJT at 126:17-128:1. Mr. Azucena also touched in on her hands and her back. GJT  
22 at 128: 2-14.

23 **ARGUMENT**

24 The Defendant requests that during trial, when not referring to the accusers in this case by  
25 their proper names, that the Court refer to them as, "complaining witness;" that the Court order  
26 that all prosecuting attorneys and prosecution witnesses are precluded from referring to the  
27 accusers as a "victims;" and that no jury instructions refer to the accusers as a "victims."  
28

1 **I. The Defendant is presumed innocent, and use of the term “victim” throughout trial**  
2 **presumes otherwise.**

3 The Defendant is presumed innocent. This pronouncement of innocence cannot be  
4 dismissed as merely a “defense position” or “trial tactic”. It is the undisputed legal truth under  
5 Nevada law and the state and federal constitutions. U.S. Const., amend. XIV; Nev. Const. art. I, §  
6 VII, See Application of Wheeler, 81 Nev. 495, 499, 406 P.2d 713, 715 (words in this provision  
7 favor bail as a matter of right, including capital cases, consonant with the presumption of  
8 innocence the central thought being punishment should follow conviction); Nev. Const. art. I, §  
9 VIII (all accused are entitled to due process of law); See also Haywood v. State, 107 Nev. 285,  
10 288, 809 P.2d 1272, 1273 (1991) citing Illinois v. Allen, 397 U.S. 334 (1970) (The rule that one is  
11 innocent until proven guilty means that a defendant is entitled to not only the presumption of  
12 innocence, but also to indicia of innocence.). Informing the jury that a complaining witness is a  
13 “victim” raises an inference of guilt, and could have the same prejudicial effect as bringing a  
14 shackled defendant into the courtroom. State v. Baugh, 571 P.2d 779, 782 (Mont. 1977).

15 The presumption of innocence has deep historical roots and is a core tenet of criminal law.  
16 “The principle that there is a presumption of innocence in favor of the accused is the undoubted  
17 law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of  
18 our criminal law.” Coffin v. United States, 156 U.S. 432, 453 (1895) (looking to Deuteronomy and  
19 the law of Athens, Sparta, and Rome for early versions of the presumption of innocence);  
20 Koerschner v. State, 116 Nev. 1111, 1122, 13 P.3d 451, 459 (2002) (“the criminal process begins  
21 with a presumption of innocence; procedural fairness must always be our primary focus.”).

22 Our Anglo-American system of criminal jurisprudence demands that proof of guilt be  
23 established by evidence at trial. The United States Supreme Court declared in Taylor v. Kentucky,  
24 436 U.S. 478, 485, 98 S.Ct. 1930, 1934-1135 (1978) that:

25 This Court has declared that one accused of a crime is entitled to have his  
26 guilt or innocence determined solely on the basis of the evidence  
27 introduced at trial, and not on grounds of official suspicion, indictment,  
28 continued custody, or other circumstances not adduced as proof at trial.  
See, e.g., Estelle v. Williams, 425 U.S. 50 (1976). And it long has been  
recognized that an instruction on the presumption is one way of  
impressing upon the jury the importance of that right. [citations omitted]  
While use of the particular phrase “presumption of innocence” -- or any

1 other form of words -- may not be constitutionally mandated, the Due  
2 Process Clause of the Fourteenth Amendment must be held to safeguard  
3 "against dilution of the principle that guilt is to be established by probative  
evidence and beyond a reasonable doubt." Estelle v. Williams, *supra*, at  
503.

4 Further, failure to instruct on the presumption of innocence has been found to be plain  
5 error. See State v. Nelson, 1998 S.D. 124, 587 N.W.2d 439 (S.D. 1998); State v. Hakeos, 1974  
6 Ohio.App.LEXIS 3442 (Ohio 1974); People v. Aragon, 665 P.2d 137, 138 (Colo.App. 1982).

7 Nevada law is in accord with the presumption of innocence noting, "A defendant in a  
8 criminal action is presumed to be innocent until the contrary is proved..." NRS § 175.191.  
9 Clearly, the Defendant is entitled to a trial that protects his presumption of innocence.

10 **II. When the commission of a crime is in dispute, there is no conclusive, "victim."**

11 In many criminal cases – for example, in most homicide cases – there is no dispute about  
12 whether a crime was committed or whether the alleged victim was, in fact, a "victim." In the case  
13 of murder, the "victim" is the corpse. The disputed issues in such cases are generally the degree of  
14 homicide committed (e.g., manslaughter or murder) or the identity of the perpetrator (e.g., whether  
15 the defendant was the person who committed the homicide that undisputedly occurred).

16 By contrast, in a sexual assault case, references to an accuser as the, "victim," necessarily  
17 conveys the speaker's opinion that a crime in fact occurred, thereby evincing a bias against the  
18 defendant and violating the presumption of innocence. See State v. Wright, 2003 Ohio 3511;  
19 02CA008179 (Ohio App. 2003) ("[T]he trial court should refrain from using the term 'victim,' as  
20 it suggests a bias against the defendant before the State has proven a 'victim' truly exists."); Allen  
21 v. State, 664 A.2d 982, 983, fn.1 (Del. 1994) ("We recognize . . . that when, as here, consent is the  
22 sole defense in a rape case, the use of the term 'victim' by a prosecutor at trial is improper and to  
23 be avoided."); Jackson v. State, 600 A.2d 21, 24 (Del. 1991) ("We agree with the defendant that  
24 the word 'victim' should not be used in a case where the commission of a crime is in dispute.")

25 In this case, the complaining witnesses have accused the Defendant of criminal acts.  
26 Whether or not crimes were actually committed is an issue for the jury's determination. It would  
27 be improper for the prosecutors, the Court, or any State witnesses to refer to the complaining  
28 witnesses as "victims" of criminal conduct when the Defendant is presumed innocent and the State  
bears the burden of proving each element of the charged offenses beyond a reasonable doubt.

1 **III. The neutral term, “complaining witness,” has been repeatedly used by the Nevada**  
2 **Supreme Court and is preferable to, “alleged victim”.**

3 The defense recognizes that in several written orders, the Nevada Supreme Court has made  
4 a conscious effort to refer to accusers as the, “alleged victims,” rather than as the “victims.” While  
5 the defense lauds these efforts, it respectfully suggests that the term, “complaining witness,” is  
6 preferable, because it poses significantly less risk of inadvertent error between now and the time of  
7 trial. The term “complaining witness” is a neutral term that the Nevada Supreme Court has  
8 repeatedly used when referring to accusers in sexual assault cases. See Crawford v. State, 107 Nev.  
9 345, 811 P.2d 67 (1991); Lane v. Second Judicial Dist.Ct. 104 Nev. 427, 760 P.2d 1245 (1988);  
10 Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985).

11 **IV. At trial, references to the accusers as, “victims,” would improperly express a**  
12 **personal belief that the complaining witnesses are telling the truth, that crimes were**  
13 **committed, and that the Defendant is guilty.**

14 Nevada law recognizes that it is improper for the prosecutor or the court to express a  
15 personal belief in a criminal defendant’s guilt. See Barron v. State, 105 Nev. 767, 780, 783 P.2d  
16 444, 452 (1989) (“A prosecutor may not offer his personal opinion of the guilt or character of the  
17 accused.”) citing Emerson v. State, 98 Nev. 158, 643 P.2d 1212 (1982) and Pacheco v. State, 98  
18 Nev. 158, 643 P.2d 1212 (1982); Santillanes v. State, 104 Nev. 699, 702, 765 P.2d 1147, 1149  
19 (1988) (“It is a prosecutor's right to ‘state fully his views as to what the evidence shows.’” [citation  
20 omitted]. Statements of personal opinion as to the defendant's guilt, however, are improper.”  
21 [citation omitted]). As the Nevada Supreme Court best explained in Owens v. State, 96 Nev. 880,  
22 620 P.2d 1236 (1980), “A prosecutor must not express personal opinions as to a defendant's  
23 guilt because jurors might interpret such opinion as being based on information other than  
24 evidence admitted at trial.”

25 **V. Jury instructions in this case should not invade the province of the jury by using the**  
26 **term, “victim.”**

27 It is vital for the Court to ensure that its jury instructions “...are couched in neutral terms to  
28 avoid any implication that it regards certain facts to be established.” People v. Williams, 916 P.2d  
624, 627-628 (Colo.App. 1996). Thus, an instruction should not direct the jury to accept any part  
of a witness’ testimony as fact. At trial, the State will present evidence in an attempt to convince

1 the jury beyond a reasonable doubt that the complaining witnesses are, in fact, “victims” of the  
2 alleged crimes. It is the jury’s province to evaluate and determine the evidence. Id.; See also Jolly  
3 v. People, 742 P.2d 891, 899 (Colo. 1987) (instruction that jury could have reasonably – but  
4 erroneously – construed to create a conclusive presumption or a mandatory rebuttable presumption  
5 of knowledge element violated due process and was not cured by issuance of other general  
6 instructions regarding the presumption of innocence and the prosecution’s burden of proof);  
7 Peterson v. People, 65 Colo. 106, 108, 173 P. 876 (1918) (in theft case where the defense was  
8 ownership by the defendant, instruction characterizing the alleged victim as “the owner” of the  
9 property in question held erroneous).

10 As the Supreme Court of Colorado stated in Leonard v. People, 149 Colo. 360, 376, 369  
11 P.2d 54, 63 (1962), “Any instruction, whatever its language, which in effect imposes upon the  
12 defendant the burden of affirmatively showing that no crime has been committed constitutes  
13 reversible error, since it clearly deprives him of the benefit of a reasonable doubt as to his guilt  
14 which may arise from all the evidence.”

15 These general principles prohibit the use of the term, “victim,” in a jury instruction under  
16 certain circumstances, such as those present here. For example, in a sexual assault case where “the  
17 controversy [is] whether the complainant was truly a ‘victim’ or a willing participant,” it is  
18 reversible error for the trial court to issue a jury instruction referring to the complainant as a  
19 “victim”:

20 If the complainant consented to the sexual intercourse, . . . she was not the  
21 object of a crime, and she was not a “victim.”

22 We hold that to refer in the court’s charge to the complainant as the  
23 “victim” when the issue is whether or not she consented to the sexual  
24 intercourse, constitutes reversible error.

25 Talkington v. State, 682 S.W.2d 674, 675 (Tex.Ct.App. 1984) (reversing rape conviction); See also  
26 Veteto v. State, 8 S.W.3d 805, 816 (Tex.Ct.App. 2000) (“The sole issue of Veteto’s case was  
27 whether he committed the various assaults on A.L. Referring to A.L. as the victim instead of the  
28 alleged victim lends credence to her testimony that the assaults occurred and that she was, indeed,  
a victim.”) Thus, “the term ‘victim’ is conclusive in nature and connotes a predetermination that

1 the person referred to had in fact been wronged.” State v. Nomura, 903 P.2d 718, 721 (Haw.App.  
2 1995).

3 In State v. Nomura, the court held that the use of the term “victim” in a jury instruction  
4 violated a state evidentiary rule precluding the court from commenting on the evidence. Id. at 721-  
5 722. The Nomura court reasoned that the witness’ status as a, “victim,” was the precise issue to be  
6 determined by the jury:

7 [W]e hold that the reference to a complaining witness as “the victim” in  
8 criminal jury instructions is inaccurate and misleading where the jury must  
9 yet determine from the evidence whether the complaining witness was the  
10 object of the offense and whether the complaining witness was acted upon  
11 in a manner required under the statute to prove the offense charged. Here,  
12 the question of whether Witness was the object of the crime and whether  
13 she suffered physical “abuse” were elements required to be proven under  
14 the statute and, hence, matters for the jury to evaluate and not for the court  
15 to comment upon. Thus, we disapprove of the reference to the  
16 complaining witness as a “victim” in Instruction No. 01. Id. at 722.

17 These principles are so well established that more than a century ago, the Supreme Court of  
18 California recognized that an instruction using the term “victim” may be tantamount to an  
19 instruction referring to the defendant as a “criminal”:

20 The word victim, in the connection in which it appears, is an unguarded  
21 expression, calculated, though doubtless unintentionally, to create  
22 prejudice against the accused. It seems to assume that the deceased was  
23 wrongfully killed, when the very issue was as to the character of the  
24 killing . . . . When the deceased is referred to as “a victim,” the  
25 impression is naturally created that some unlawful power or dominion has  
26 been exerted over his person. And it was nearly equivalent, in effect to an  
27 expression characterizing the defendant as a criminal. The Court should  
28 not, directly or indirectly, assume the guilt of the accused, nor employ  
equivocal phrases which may lease such an impression. People v.  
Williams, 17 Cal. 142, 147 (1860).

29 In the context of this case, a jury instruction cannot refer to the accusers as “victims”  
30 without necessarily – and unlawfully – implying that the Defendant has committed a crime. In  
31 Nevada, a jury instruction on malice aforethought is improper in certain cases if it relieves the  
32 State of the burden to prove elements beyond a reasonable doubt, thereby implying that the

1 defendant is the guilty principal. See Wegner v. State, 116 Nev. 1149, 14 P.3d 25 (2000).  
2 Similarly, a jury instruction which references the complainant as “the victim” would be highly  
3 improper and reversible error, because such inferences would be the functional equivalent of  
4 instructing the jury that the Defendant is guilty.

5 It should go without saying that “[t]he State’s main instruction should be drawn in such a  
6 manner as to eliminate the possibility that it may be construed as assuming that the evidence shows  
7 the guilt of the defendant.” See State v. Kinard, 245 S.W.2d 890, 895 (Mo. 1952). Here, the State  
8 should be precluded from using the term “victim” throughout the elemental instructions because  
9 that would suggest a court-endorsed assumption of guilt.

10 Additionally, the use of the term “victim” to describe an accuser in a jury instruction would  
11 be improper because it would wrongly suggest to the jury that the Court holds a favorable view of  
12 the accuser’s credibility. Any such “assumption of the credibility of government witnesses dilutes  
13 the presumption of innocence.” United States v. Safley, 408 F.2d 603, 605 (4<sup>th</sup> Cir. 1969); See also  
14 United States v. Johnson, 371 F.2d 800, 804-805 (3<sup>rd</sup> Cir. 1967) (instruction affording presumption  
15 of truthfulness to witnesses held erroneous; characterizing witness credibility as “peculiarly a  
16 question for the jury”); United State v. Meisch, 370 F.2d 768, 773-774 (3<sup>rd</sup> Cir. 1966) (instruction  
17 affording presumption of truthfulness to witnesses held erroneous because it takes away “the jury’s  
18 sole right to determine the credibility of witnesses [and] conflicts with the presumption of  
19 innocence of a defendant.”).

20 **VI. Use of the term, “victim,” is neither legally required, nor legally accurate.**

21 The use of the term, “victim,” is not legally required or legally accurate. First, Nevada  
22 legislative history will reveal that nowhere has the legislature required the Court or parties to refer  
23 to a sexual assault accuser/complainant as a “victim.” **NRS 217.070** defines the term victim and  
24 all definitions in that Statute require that a crime or abuse to have actually occurred. The term  
25 “victim” is defined in relevant part as:

- 26 1. A person who is physically injured or killed as the direct result of a criminal act;
- 27 2. A minor who was involved in the production of production of pornography . . .
- 28 3. A minor who was sexually abused . . .

1 **NRS 217.070.** These definitions require that (1) there has been a criminal act; (2) a minor was  
2 actually involved in the production of pornography; or, (3) that a minor was in fact sexually  
3 abused. At trial all of these things are disputed, unproved, and presumed not to have occurred at  
4 this stage.

5 Second, the legislature cannot mandate such action without violating the state and federal  
6 constitutional presumption of innocence.

7 Third, both the United States Supreme Court and Nevada courts have consistently  
8 construed the Sixth Amendment to the U.S. Constitution – which grants a criminal defendant “the  
9 right . . . to be confronted with the witnesses against him” – as enshrining “[t]he right to confront  
10 one’s **accusers.**” Crawford v. Washington, 124 S.Ct. 1354, 1359 (2004)(emphasis added). Indeed,  
11 as the Supreme Court stated, “An **accuser** who makes a formal statement to government officers  
12 bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”  
13 125 S.Ct. at 1364 (emphasis added). Thus, when defense attorneys use the term, “accuser,” they  
14 are referring to the complaining witnesses and not the prosecution. It is entirely appropriate for the  
15 defense to continue to refer to State witnesses as, “accusers.”

### 16 CONCLUSION

17 For the foregoing reasons, the Defendant respectfully requests that this Honorable Court  
18 avoid referring to the accusers in this case as “victims,” and instead refer to them as either, “  
19 complaining witnesses,” or by their names, throughout the trial in this case. The Defense further  
20 requests that the Court order that the State and the State’s witnesses shall not refer to the accusers  
21 as “victims” at trial. Finally, the Defense requests that no jury instructions in this Court refer to  
22 the accusers as “victims.”

23 DATED this 30<sup>th</sup> day of March, 2017.

24 PHILIP J. KOHN  
25 CLARK COUNTY PUBLIC DEFENDER

26  
27 By: /s/ P David Westbrook  
28 P. DAVID WESTBROOK, #9278  
Chief Deputy Public Defender



1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

3 YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the  
4 above and foregoing Motion on for hearing before the Court on the 11<sup>th</sup> day of April, 2017, at 9:00  
5 a.m.

6 DATED this 30<sup>th</sup> day of March, 2017,

7 PHILIP J. KOHN  
8 CLARK COUNTY PUBLIC DEFENDER

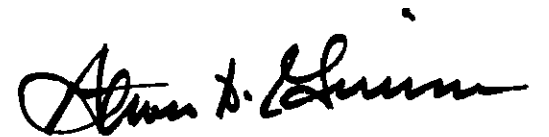
9 By: /s/ P David Westbrook  
10 P. DAVID WESTBROOK, #9278  
11 Chief Deputy Public Defender

12 **CERTIFICATE OF ELECTRONIC FILING**

13 I hereby certify that service of the above and foregoing was served via electronic e-  
14 filing to the Clark County District Attorney's Office on the 30<sup>th</sup> day of March, 2017 by Electronic  
15 Filing to:

16  
17 District Attorneys Office  
18 E-Mail Address:  
[Jaelyn.Motl@clarkcountyda.com](mailto:Jaelyn.Motl@clarkcountyda.com)

19  
20 /s/ Anita H Harrold  
21 Secretary for the Public Defender's Office



CLERK OF THE COURT

1 **OPPS**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 STACEY KOLLINS  
6 Chief Deputy District Attorney  
7 Nevada Bar #005391  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,  
11  
12 Plaintiff,

13 -vs-

14 **JOSE AZUCENA,**  
15 **#7037259**

16 Defendant.

CASE NO: **C-17-321044-1**

DEPT NO: **II**

17 **STATE'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* TO**  
18 **PRECLUDE USE OF THE TERM "VICTIM"**

19 DATE OF HEARING: **APRIL 11, 2017**  
20 TIME OF HEARING: **9:00 A.M.**

21 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
22 District Attorney, through STACEY KOLLINS, Chief Deputy District Attorney, and hereby  
23 submits the attached Points and Authorities in Opposition to Defendant's Motion to Preclude  
24 the Prejudicial Term "Victim."

25 This opposition is made and based upon all the papers and pleadings on file herein, the  
26 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
27 deemed necessary by this Honorable Court.

28 //

//

1                                    **STATEMENT OF THE CASE PERTINENT TO THIS OPPOSITION**

2    **LEGAL ARGUMENT**

3                    **I.        USE OF THE TERM VICTIM**

4                    The State of Nevada has made specific statutory provisions to define the term “victim.”  
5                    NRS 217.070 defines “Victim” as follows:

6                                    “Victim” means:

- 7                                    1. A person who is physically injured or killed as the direct result  
8                                    of a criminal act;
- 9                                    2. A minor who was involved in the production of pornography in  
10                                    violation of NRS 200.710, 200.720, 200.725 or 200.730;
- 11                                    3. A minor who was sexually abused, as "sexual abuse" is defined  
12                                    in NRS 432B.100;
- 13                                    4. A person who is physically injured or killed as the direct result  
14                                    of a violation of NRS 484.379 or any act or neglect of duty  
15                                    punishable pursuant to NRS 484.3795;
- 16                                    5. A pedestrian who is physically injured or killed as the direct  
17                                    result of a driver of a motor vehicle who failed to stop at the scene  
18                                    of an accident involving the driver and the pedestrian in violation  
19                                    of NRS 484.219; or
- 20                                    6. A resident who is physically injured or killed as the direct result  
21                                    of an act of international terrorism as defined in 18 U.S.C. §  
22                                    2331(1).

23                                    The term includes a person who was harmed by any of these acts  
24                                    whether the act was committed by an adult or a minor.

25                    The crimes that Defendant is accused of committing are listed in NRS Chapter 200,  
26                    Crimes Against the Person, a human being; hence there must be a victim, to even charge the  
27                    crime. Following Defendant’s logic that the use of the term “raises an inference of guilt” in  
28                    the jury’s mind, the State could argue that by granting Defendant’s motion, this Court would  
be prejudicing the people of the State of Nevada by not allowing identification of the victim  
as the victim, and thereby insinuating that the victim is not telling the truth. Per Defendant’s  
logic, the State and the court should be precluded from even informing the jury of what  
Defendant is charged with as this certainly would be prejudicial to the presumption of  
innocence.

1 Obviously, there has been no specific legislation or case law in Nevada which indicates  
2 when the term “victim” is inappropriate in a courtroom, during a criminal case. Throughout  
3 the years, defense attorneys have made this request with absolutely no authority or logic  
4 behind it. Should the defense wish to argue that a reference to the victim does not mean  
5 defendant is guilty; that is certainly fair. However, for a Court to start limiting vernacular does  
6 not afford the same sense of fairness to the State. Moreover, calling a victim the accuser does  
7 nothing to shed light on the evidence that the jury ultimately must evaluate

8 Defendant next contends that references to the victim as “the victim” at trial expresses  
9 a personal belief that the complaining witness is telling the truth or that Defendant is guilty.  
10 He further states that the use of the term by either the court or the prosecutor is tantamount to  
11 what he calls “witness vouching.”

12 In Browning v. State, 91 P.3d 39 (2004), the Nevada Supreme Court defined witness  
13 vouching:

14 During closing argument, the prosecutor stated that her  
15 identification was "as good as you could ask for." Browning  
16 claims that in its answer below the State conceded that Mrs. Elsen  
17 never positively identified Browning. He asserts that the  
18 prosecutor's statements were severely prejudicial because Mrs.  
19 Elsen was the only person who placed Browning in the jewelry  
20 store at the time of the murder. This claim is without merit. The  
21 prosecution may not vouch for a witness; such vouching occurs  
22 when the prosecution places "'the prestige of the government  
23 behind the witness' " by providing " 'personal assurances of [the]  
24 witness's veracity.'"<sup>1</sup> The remarks here did not amount to  
25 improper vouching. The prosecution did not place the prestige of  
26 the government behind Mrs. Elsen or provide personal assurances  
27 of her veracity. Id. at 48

22 The prosecutor during trial will not offer any personal opinions; however, the jury will  
23 draw an inference that the prosecutor believes that the victims in the instant case are telling  
24 the truth because the State is proceeding with the case based on their accusations. As noted  
25 above, this has absolutely nothing to do with vouching. Calling the victim, a “victim,” is not  
26 an opinion or vouching for the credibility of a witness. In order to have a prosecution for  
27 sexual assault there must be a victim otherwise Defendant could not be accused of the crime.

28 \_\_\_\_\_  
<sup>1</sup> *U.S. v. Kerr*, 981 F.2d 1050, 1053 (9th Cir.1992) (quoting *U.S. v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980)).

1 Next, Defendant argues that the State should be precluded from using a jury instruction  
2 that correctly states Nevada law. It has long been recognized that the offense of sexual assault  
3 is rarely perpetrated in the presence of witnesses other than the victim. Consequently, the  
4 Nevada Supreme Court recognizes that testimony from sexual assault victims, and especially  
5 victims who are children, poses special concerns within the judicial system and as such  
6 requires special consideration to assure integrity for these victims. *See e.g.*: Cunningham v.  
7 State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984); La Pierre v. State, 108 Nev. 528, 530,  
8 836 P.2d 56 (1992) (noting that the Supreme Court of Nevada is cognizant that child victims  
9 are often unable to articulate specific times of abusive events and reluctant to report the abuse,  
10 especially when it is perpetrated by a family member).

11 Because the nature of the offense is inherently secretive and typically there are no other  
12 witnesses to the abuse, it is a well-settled rule in Nevada that there is no requirement that the  
13 testimony of a victim of sexual assault be corroborated. *See e.g.*, May v. State, 89 Nev. 277,  
14 279, 510 P.2d 1368 (1973)(holding that giving two instructions, both informing the jury it  
15 could convict in sexual assault case based upon the victim's uncorroborated testimony was not  
16 error)(overruled on other grounds); *See also*, Henderson v. State, 95 Nev. 324, 326, 594 P.2d  
17 712, 713 (1979); Nordine v. State, 95 Nev. 425, 426, 596 P.2d 245 (1979); Deeds v. State, 97  
18 Nev. 216, 217, 626 P.2d 271, 272 (1981); Rembert v. State, 104 Nev. 680, 681, 766 P.2d 890  
19 (1988); Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136 (1994) stating that the  
20 uncorroborated testimony of a victim, without more, is sufficient to uphold a rape conviction,  
21 citing to *May*, supra; State v. Gomes, 112 Nev. 1473, 930 P.2d 701 (1996); Washington v.  
22 State, 112 Nev. 1067, 1073, 922 P.2d 547 (1996).

23 Recently in Gaxiola v. State, 119 P.3d 1255 (2005), the Court reaffirmed the *May*  
24 decision on this issue by stating:

25 This court has repeatedly stated that the uncorroborated testimony  
26 of a victim, without more, is sufficient to uphold a rape conviction.  
27 Furthermore, other courts have approved jury instructions to that  
28 effect. Moreover, we conclude that the instruction is significantly  
different from a "Lord Hale" instruction. "Lord Hale" instructions  
amount to a commentary on the evidence, by telling a jury that a  
category of witness testimony should be given greater scrutiny. A  
"no corroboration" instruction does not tell the jury to give a

1 victim's testimony greater weight, it simply informs the jury that  
2 corroboration is not required by law.

3 *Id.* at 1232 (footnotes omitted)

4 Gaxiola argues that we approved the combined use of a "Lord  
5 Hale" instruction and two "no corroboration" instructions in *May*  
6 *v. State*<sup>2</sup> However, *May* only states that the instructions  
7 concerning corroboration correctly stated the law and that it was  
8 not error to give them to the jury.<sup>3</sup> *May* does not suggest that the  
9 use of combined instructions is required or approved of in sexual  
10 assault cases, and *Turner* subsequently disapproved of the "Lord  
11 Hale" instruction.

12 We conclude that the district court did not err by giving the "no  
13 corroboration" instruction. The instruction is a correct statement  
14 of Nevada law. Further, we agree with the Supreme Court of  
15 California in that the instruction does not unduly focus the jury's  
16 attention on the victim's testimony. Jurors mistakenly assume that  
17 they cannot base their decision on one witness's testimony even if  
18 the testimony establishes every material element of the crime.  
19 Therefore, it is appropriate for the district court to instruct the  
20 jurors that it is sufficient to base their decision on the alleged  
21 victim's uncorroborated testimony as long as the testimony  
22 establishes all of the material elements of the crime.

23 *Id.* at 1233

24 The bottom line is that the State has no intention of "overusing" the term victim. It  
25 becomes an exercise in futility for the parties and this Court to spend inordinate amounts of  
26 time carving out exceptions to which words can and cannot be used and which semantics are  
27 prejudicial or "correct" or "incorrect." Motions and blanket rulings such as these should be  
28 discouraged.

29 Defendant's motion should be denied with the understanding that any problems in  
30 overuse of terminology can be addressed as the trial unfolds. Defendant should be required to  
31 object contemporaneously to any one "word" that is used which may allegedly violate  
32 Defendant's due process rights. Further, the opposed jury instruction properly states the law  
33 of the State of Nevada and if proffered by the State, is appropriate.

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35 //

36 <sup>2</sup> 89 Nev. 277, 278-79, 510 P.2d 1368, 1369 (1973), *overruled by Turner*, 111 Nev. at 404, 892 P.2d at 580.

37 <sup>3</sup> *Id.* at 279, 510 P.2d at 1369

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**CONCLUSION**

Based upon the above and foregoing Points and Authorities, Defendant’s Motion *in Limine* to Preclude Use of the Prejudicial Term “Victim” must be DENIED.

DATED this 7th day of April, 2017.

Respectfully submitted,

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565

BY /s/ STACEY KOLLINS  
STACEY KOLLINS  
Chief Deputy District Attorney  
Nevada Bar #005391

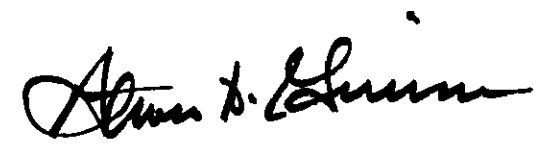
**CERTIFICATE OF SERVICE**

I hereby certify that service of the above and foregoing was made this 7th day of APRIL 2017, to:

JENNIFER SCHWARTZ, DPD  
harrolah@ClarkCountyNV.gov

BY /s/ HOWARD CONRAD  
Secretary for the District Attorney's Office  
Special Victims Unit

hjc/SVU



CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
5 (702) 455-4685  
6 Attorney for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 v. )

12 JOSE AZUCENA, )

13 Defendant. )

CASE NO. C-17-321044-1

DEPT. NO. II

DATE: April 11, 2017

TIME: 9:00 a.m.

14 **MOTION IN LIMINE TO ADMIT SCHOLARLY TREATISE ON IMMIGRATION LAW**

15 COMES NOW, the Defendant, JOSE AZUCENA, by and through his counsel of record,  
16 CARLI L. KIERNY, Chief Deputy Public Defender, and hereby sets forth his motion to admit the  
17 scholarly treatise on immigration law titled "Kurzban's Immigration Law Sourcebook," authored by  
18 Ira J. Kurzban, 2014.

19 This Motion is made and based upon all the papers and pleadings on file herein, the  
20 following Memorandum of Points and Authorities, and any oral argument that may be allowed at  
21 the time set for hearing this Motion.

22 DATED this 30<sup>th</sup> day of March, 2017.

23 PHILIP J. KOHN  
24 CLARK COUNTY PUBLIC DEFENDER

25  
26 By: /s/ Carli L. Kierny  
27 CARLI L. KIERNY  
28 Chief Deputy Public Defender



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 BRIEF OVERVIEW

4 Mr. Azucena is currently charged with multiple counts of Lewdness with a Minor, Sexual  
5 Assault on a Minor, and other related crimes. Calendar Call is currently set for April 11, 2017, and  
6 trial is scheduled to commence on April 17, 2017.

7  
8 There are six named victims in this case: Jatziri Moreno, Maridel Moreno, Mirabel Moreno,  
9 Yezlene Estrella, Nicole Estrella, and Scarlett Rangel. Jatziri, Maridel, and Mirabel are all sisters,  
10 and their mother's name is Amanda Moiza. Yezlene and Nicole are also sisters, and their mother's  
11 name is Maria Estrella-Barajas. Maria and Amanda are friends and their children often play  
12 together. Scarlett is not related to either group of sisters, but Amanda occasionally babysits Scarlett.

13  
14 Ultimately, this case relies on the statements of the children, and their parents. The incidents  
15 were reported after a significant delay, and there is no physical evidence backing up their claims.  
16 Amanda and Maria were the people who reported the incidents to police, by walking into a police  
17 substation and filing a report. Per the defense's investigation, Amanda and Maria both immigrated  
18 to this country from Mexico and are presently residing in the United States illegally. The defense  
19 does not know the legal status of the named victims in this case.

20  
21 Under 8 U.S.C. § 1101 (a)(15)(U), survivors of certain crimes (including sexual assault and  
22 "abusive sexual contact") who are willing to help governmental official prosecute crimes may be  
23 eligible for what's called a "U Visa" wherein they are granted temporary immunity for up to 3  
24 years. Under 8 U.S.C. § 245.24, a person who is granted a U Visa is automatically authorized to  
25 work in the U.S., and after 3 years in U Visa status may apply for permanent residence. If the  
26 victim of these crimes is under 21, the victim's parents and siblings would also qualify for U Visa  
27 immigrant status. **See Ex. "A" (Excerpt from Treatise).**

1 Motive, credibility, and bias are always relevant to a witness' testimony. *Davis v. Alaska*,  
2 415 U.S. 308 (1974). The law with regard to "U Visas" gives the main witnesses in this case a  
3 motive to lie about the alleged incidents because they can potentially gain permanent citizenship.  
4 Defendant respectfully requests this material be admitted into evidence at trial to explain the law  
5 with regard to "U Visas" in support of Defendant's theory of the case.  
6

7 **II.**

8 **LEGAL ARGUMENT**

9 As this Court is aware, hearsay is generally defined as a statement offered in evidence to  
10 prove the truth of the matter asserted. **NRS 51.035**. In general, hearsay is inadmissible because it  
11 is unreliable. However, as this Court is also aware, there are a plethora of exceptions. One of these  
12 is the "Learned Treatise" exception.

13 According to **NRS 51.255**, a statement contained in a published treatise is admissible if  
14 established as a reliable authority by an expert or by judicial notice. Per **NRS 47.140(1)**, laws  
15 subject to judicial notice include statutes of the United States.  
16

17 Kurzban's Immigration Law Sourcebook is renowned as the seminal work on immigration  
18 law and, as mentioned above, is indexed to **8 U.S.C. § 1101 (a)(15)(U) and 8 U.S.C. § 245.24**.  
19 This resource is universally considered, "The Bible of Immigration Law." As such, it is not hearsay,  
20 and the Court can take judicial notice that it is a reliable authority.  
21

22 Admitting the treatise as evidence will not only conform to Nevada law, it will also make  
23 the trial more efficient. If the relevant sections of the treatise are admitted, there will be no need for  
24 the defense to call an expert witness to cover the same ground. Admitting the treatise in lieu of live,  
25 expert testimony will save the County significant time and money, while still preserving  
26 Defendant's constitutional right to present his theory of defense. Unless the State has a legitimate  
27  
28

1 challenge to the substance of this treatise, backed by legal authority, the treatise should be admitted  
2 under NRS 51.255, et. seq.

3 **III.**

4 **CONCLUSION**

5 Therefore, and based on the foregoing, Defendant respectfully requests that the excerpt  
6 attached as Ex. "A" be allowed into evidence at the upcoming trial.  
7

8 DATED this 30<sup>th</sup> day of March, 2017.

9 PHILIP J. KOHN  
10 CLARK COUNTY PUBLIC DEFENDER

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12 By:  /s/ Carli L. Kierny  
13 CARLI L. KIERNY  
14 Chief Deputy Public Defender  
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1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

3 YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the  
4 above and foregoing Motion on for hearing before the Court on April 11, 2017 in District Court  
5 Department II.

6 DATED this 30<sup>th</sup> day of March, 2017.

7 PHILIP J. KOHN  
8 CLARK COUNTY PUBLIC DEFENDER

9  
10 By: /s/ Carli L. Kierny  
11 CARLI L. KIERNY  
12 Chief Deputy Public Defender

13 **CERTIFICATE OF ELECTRONIC FILING**

14  
15 I hereby certify that service of the above and foregoing was served via electronic  
16 e-filing to the Clark County District Attorney's Office on the 30<sup>th</sup> day of March, 2017 by  
17  
18 Electronic Filing to:

19  
20 District Attorneys Office  
21 E-Mail Address:  
Jaclyn.Motl@clarkcountyda.com

22  
23 /s/ Anita H Harrold  
24 Secretary for the Public Defender's Office

# **Exhibit A**

strate continuous physical presence; if departed the U.S. must show evidence of departure and lawful reentry; evidence of GMC under 8 C.F.R. §245.23(g); evidence of compliance with any reasonable request for assistance in the investigation or prosecution of trafficking; or evidence under 8 C.F.R. §245.23(f)(2) that he would suffer extreme hardship involving unusual and severe harm if removed; evidence relating to discretion to overcome adverse factors by showing exceptional and extremely unusual hardship. The procedures set forth in 8 C.F.R. §245.1 and §245.2 do not apply to T adjustments. 8 C.F.R. §245.23(k).

- 10.h. *Employment Authorization and Advance Parole*—Applicants for AOS under T may obtain employment authorization pursuant to 8 C.F.R. §274a.12(c)(9); 73 FR 75551, and advance parole. 8 C.F.R. §245.23(j); 73 FR at 75545-46, 75551.
- 10.i. *Denial* [8 C.F.R. §245.23(i)]—A denial of AOS may be appealed to the AAO. If principal is denied family members are automatically denied.

11. *Prohibition Against Petitioning for Traffickers*—A person who had T status cannot file a nonimmigrant or immigrant visa petition on behalf of the person who trafficked her or her child. INA §204(a)(1)(L).
12. *DHS Assistance to Other Agencies*—Under 28 C.F.R. §1100.35, DHS is authorized to determine the appropriate status to give a person who DHS or an LEA encounters who it believes is a noncitizen victim of severe forms of trafficking who is a potential witness. DHS is empowered to use a “variety of statutory and administrative mechanisms” to ensure the person’s presence in the U.S. including parole, VD, stay of final order, and applicable NIVs.
13. *Agency Assistance To Person Granted T Status*—The DOL will provide employment services and training services to a person granted T status. TEGE No. 9-12, *Human Trafficking*, (Oct. 24, 2012), published on AILA InfoNet at Doc. No. 12102454; ICE has also established a Victim Assistance Program, ICE, Morton, Directive 10071.1, Victim Assistance Program (Aug. 25, 2011), 17 *Bender’s Immigr. Bull.* 1617, 1659-72 (Sept. 15, 2012); The Legal Services Corporation is also authorized by regulation to assist victims of trafficking. 79 FR 21861-74 (Apr. 18, 2014); 45 C.F.R. §1626.

### C. U Visas (Crime Victims)

[INA §§101(a)(15)(U), 212(d)(14), 214(p), 245(m), 8 U.S.C. §§1101(a)(15)(U), 1182(d)(14), 1184(p), 1255(m); Trafficking Victims Protection Act of 2000, Div. A of PL 106-386 §1513(a)(2), 114 Stat. 1464, 1533-34 (Oct. 28, 2000), Victims of Trafficking and Violence Protection Act; H.R. Conf. Report No. 106-939; 8 C.F.R. §§214.11; 67 FR 4784 (Jan. 31, 2002); Trafficking Victims Protection Reauthorization Act of 2003, PL 108-193, 117 Stat. 2875 (Dec. 19, 2003), H.R. 2620; Violence Against Women Reauthorization Act of 2005, PL 109-162 §862, 119 Stat. 2960, 3066 (Jan. 5, 2006), Title VIII, Sec. 802 H.R. Rep. 109-233 amended by Violence Against Women and DOJ Reauthorization Act—Technical Corrections, PL 109-271, 120 Stat. 750 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), PL 110-457, 122 Stat. 5044 (Dec. 23, 2008) §201-34; Violence Against Women Reauthorization Act of 2013, PL 113-4, Title VIII, 127 Stat. 54 (Mar. 7, 2013); 8 C.F.R. §§212.17, 214.14; 72 FR 53014 (Sept. 17, 2007); 8 C.F.R. §245.24, 73 FR 75540-64 (Dec. 12, 2008); AFM 23.5(o), 39.1; 9 FAM 41.85; Policy Memo, USCIS, PM-602-0004 (July 21, 2010), published on AILA InfoNet at Doc. No. 10072930; Cable, DOS, “T and U Visa Changes,” 00090518 (June 13, 2013), published on AILA InfoNet at Doc. No. 13070340.

1. *Eligibility*—Provides 10,000 visas per year to persons who: (a) have suffered substantial physical or mental abuse as a result of having been a victim of “qualifying criminal activity;” (b) possess credible and reliable information establishing that he or she has knowledge of the details concerning the criminal activity; (c) have been helpful, are being helpful, or are likely to be helpful to a certifying agency in the investigation or prosecution of the criminal activity; and (d) the criminal activity occurred in the U.S. (including Indian country and U.S. military installations), in U.S. territories or possessions, or violated a U.S. federal law that provides for extraterritorial jurisdiction. INA §101(a)(15)(U), 8 C.F.R. §214.14(b). A class action challenge to the U regulations and the implementation of the program as contrary to the Victims of Trafficking and Violence Protection Act has been rejected. *Catholic Charities CYO v. Chertoff*, 622 F.Supp.2d 865 (N.D. Cal. 2008) [dismissing case on standing, mootness, ripeness, lack of private right of action, and lack of subject matter jurisdiction].
- 1.a. *Qualifying Criminal Activity*—Includes one or more of the following or any similar activities in violation of federal, state, or local criminal laws: abduction; blackmail; domestic violence;

extortion; false imprisonment; felonious assault; female genital mutilation; fraud in foreign labor contracting, hostage (being held as a); incest; involuntary servitude; kidnapping; manslaughter; murder; obstruction of justice; peonage; perjury; prostitution; rape; sexual assault; sexual contact (abusive); sexual exploitation; slave trade; stalking, torture; trafficking; unlawful criminal restraint; witness tampering; or attempt, conspiracy, or solicitation to commit any of these crimes. INA §101(a)(15)(U)(iii); 8 C.F.R. §214.14(a)(9). Any “similar activity” refers to the statutorily enumerated list of criminal activities.” 8 C.F.R. §214.14(a)(9); 72 FR 53014, 53018 (Sept. 17, 2007).

- 1.b. *Victim of Qualifying Criminal Activity*—Means: (i) a person who has suffered direct and proximate harm as a result of the commission of one of the criminal acts named in the statute [A riage or heart attack, *see* 72 FR 53014, 53017 (Sept. 17, 2007)] or (ii) “indirect victim” family members where the direct victim is deceased due to murder or manslaughter or is incompetent or incapacitated and where the family is the spouse and children under 21, and if the direct victim was under 21, his or her siblings under 18 and parents as well as spouse and children; or (iii) where the person is the victim of witness tampering, obstruction of justice or perjury, including attempt, solicitation or conspiracy to commit one or more of those offenses if he or she has been directly and proximately harmed by the perpetrator of those crimes and the perpetrator committed them as a means to avoid or frustrate efforts to investigate, arrest, prosecute or otherwise bring to justice the perpetrator for other criminal activity or to further the perpetrator’s abuse or exploitation of or undue control over the petitioner. 8 C.F.R. §214.14(a)(14). *See also* 72 FR 53014, 53017 (Sept. 17, 2007). A person is not a victim if he or she is culpable for the criminal activity. 8 C.F.R. §212.14(a)(14)(iii); 72 FR at 53017–18.
- 1.c. *Substantial Physical or Mental Abuse Defined*—Physical or mental abuse means injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim. 8 C.F.R. §214.14(a)(8); 72 FR at 53018. Factors considered include: the nature of the injury; the severity of the perpetrator’s conduct; the severity of the harm; the duration of the infliction of harm; any permanent or serious harm to appearance, health and physical or mental soundness, and any aggravation of a victim’s preexisting conditions. No single factor is required and a series of acts may suffice, even where no single act meets the standard. 8 C.F.R. §214.14(b)(1).
- (1) *Documentation to Prove Abuse*—Evidence may include “reports and affidavits from police, judges, other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel.” If petitioner has obtained a protective order he should provide it. “A combination of documents such as a photograph of the visibly injured applicants supported by affidavits of individuals who have personal knowledge of the facts regarding the criminal activity may be relevant as well.” Ombudsman, USCIS Teleconference, “U Visa: One Year After the Interim Final Rule, #9 (Aug. 26, 2008), published on AILA InfoNet at Doc. No. 08090567 (citing to 72 FR).
- (2) *Totality of the Circumstances/Aggregate Abuse*—The applicant may be able to demonstrate the physical and mental abuse in the aggregate even if individual events might not be sufficient. *Matter of* \_\_\_\_\_ (AAO Apr. 7, 2011), published in 17 *Bender’s Immigr. Bull.* 1907, 1924 (Dec. 1, 2012).

## 2. Procedure/Application Process [8 C.F.R. §214.14(c)]

- 2.a. *What Petition is Filed?*—File Form I-918 with USCIS.
- 2.b. *When May the Petition Be Filed?*—May file I-918 if petitioner is in removal proceedings, has a final order of removal, deportation or exclusion, or seeks NIV status outside any proceeding. If in proceedings or has a final order, ICE may agree to a joint motion to terminate or reopen as appropriate. The filing of a U-1 petition has no effect on a final order of removal and the person may file a request for a stay of removal. 8 C.F.R. §214.14(c)(1)(ii). USCIS, not the IJ, has “sole jurisdiction over all petitions for U nonimmigrant status.” 8 C.F.R. §214.14(c)(1). *See also* *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 442 n.5 (7th Cir. 2007) [no jurisdiction to review of U visa denial because denial was not part of a final order of removal]. However,

an IJ may have jurisdiction pursuant to INA §212(d)(3)(A) to grant a waiver that may be necessary as a predicate to obtaining an U visa]. *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014) [finding that neither the statute, nor the regulations pertaining to DHS bar a separate inquiry into and grant of a 212(d)(3)(A) waiver by the IJ].

2.c. *What Is Included in the Petition?* –The I-918 must contain: (1) a signed statement by the petitioner describing the facts of the victimization; (2) any additional evidence demonstrating victimization including proof of physical or mental abuse; (3) an I-192 waiver pursuant to INA §212(d)(14) and 8 C.F.R. §212.17 if the petitioner is inadmissible and (4) a Supplement B signed by a certifying official within 6 months of filing the petition. Supplement B must contain: (1) how the person qualifies as a certifying official; (2) that the petitioner has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; (3) that the petitioner possesses information concerning the activity; (4) that the petitioner has been, is being, or is likely to be helpful; and (5) that the criminal activity violated U.S. law or occurred in the U.S. or its possessions and territories including but not limited to Indian country or on a military installation. 8 C.F.R. §214.14(c)(2). A petitioner who previously received interim relief may submit Form I-918 without supporting evidence, 8 C.F.R. §214.14(c)(1), but USCIS is not bound by its previous determination. 8 C.F.R. §214.14(c)(4). The burden is on the petitioner to demonstrate eligibility. 8 C.F.R. §214.14(c)(4). USCIS shall consider any credible evidence submitted to support the claim. INA §214(p)(4); 8 C.F.R. §214.14(c)(4).

(1) A certifying official is defined as: (a) the head of a certifying agency (*i.e.*, a federal, state, or local LEA or prosecutor, judge, or other authority involved in the investigation or prosecution of the criminal activity); (b) supervisor who has been designated by the head of the agency to issue U status certifications; or (c) a federal, state, or local judge. The regulations also mention child protective services, DOL and the EEOC as agencies that may certify. 8 C.F.R. §§214.14(a)(2). *See* EEOC Memorandum, EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008), published on AILA InfoNet at Doc. No. 08070341. Administrator of the Wage and Hour Division may exercise its authority as a certifying agency in the course of doing workplace investigations because the Sec. of Labor delegated this authority by regulation. 75 FR 55352, 55354 (Sept. 10, 2010); DOL, News Release, U.S. Labor Department to Exercise Authority to Certify Applications for U Visas, published on AILA InfoNet at Doc. No. 10031661. The DOL, through the Wage and Hour Division, will consider U visas where there is involuntary servitude, peonage, trafficking, obstruction of justice and witness tampering. DOL, New Release, U.S. Labor Department Announces Protocols for Certifying U Visa Applications, 11-619-NAT (Apr. 28, 2011), published on AILA InfoNet at Doc. No. 11042960; Questions-Answers, DOL, *U Visa Process and Protocols*, (Apr. 28, 2011), reprinted in 88 No. 18 *Interpreter Releases* 1169, 1212-15 (May 2, 2011). The General Counsel's Office in the Division of Operations Management of the NLRB may also entertain U and T visa applications. Memo, Gen. Counsel, Division of Operations Management, Updating Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings, OM 11-62 (June 7, 2011), published on AILA InfoNet at Doc. No. 11060860. The Division of Labor Standards Enforcement of the Department of Industrial Relations of the State of California also accepts applications. Su, California Labor Commissioner, DSLF, *U Visa Certification by the Division of Labor Standards Enforcement, Information for Immigrant Crime Victims*, (May 3, 2013). USCIS provides instructions on completing the I-918B to LEAs. DHS, *U Visa Law Enforcement Certification Resource Guide* Dec. 2011, published on AILA InfoNet at Doc. No. 11122835.

(2) A law enforcement certification (LEC) is discretionary, in the view of one circuit, and an agency cannot be compelled to grant a certificate on the grounds it is mandatory. *Ordonez Oroasco v. Napolitano*, 598 F.3d 222, 225–27 (5th Cir. 2010).

3. *Cap on U-1 Status*—10,000 visas/status may be issued annually and the limit only applies to principal aliens. It does not apply to spouses or other dependents. AFM at 39(d). If the 10,000 cap has been reached, U-1 applicants who are approved will be given a Notice of Conditional Approval and will be given deferred action or parole. 8 C.F.R. §214.14(d)(2); USCIS, Questions and An-



- swers, USCIS Reaches Milestone: 10,000 U Visas Approved in Fiscal Year 2010 (July 15, 2010), published on AILA InfoNet at Doc. No. 10071530. During the time of deferred action or parole, the grantee awaiting a visa/status will not accrue unlawful presence for purposes of INA §212(a)(9)(B), INA §214(p)(2); 8 C.F.R. §214.14(d)(3) and will be eligible for employment authorization.
6. **Approval of the Petition**—If approved, an outstanding administrative order of removal, deportation or exclusion, "will be deemed cancelled by operation of law as of the date of USCIS's approval." Orders issued in proceedings may be cancelled by filing with the IJ or the BIA, a motion to reopen and terminate removal proceedings which ICE "may agree, as a matter of discretion" to overcome time and numerical bars. 8 C.F.R. §214.14(c)(5)(i).
7. **Employment Authorization**—Employment is authorized incident to status and USCIS will automatically issue an EAD when U status is granted. However, to extend or replace an EAD, must file Form I-765, INA §214(p)(3)(B); 8 C.F.R. §214.14(c)(7). Section 201 of the Wilberforce Act, *supra*, states that: "The Secretary may grant work authorization to any alien who has a pending bona fide application for" U status. See also INA §214(p)(6).
8. **Admission and Duration of Status**—Approved for 4 years. 8 C.F.R. §214.14(g). Status may be revoked but notice is required unless the U notifies USCIS that she will not seek admission to the U.S. 8 C.F.R. §214.14(h). The 4 years may be extended if the certifying official attests that the U-1's presence in the U.S. is necessary to assist in the investigation or prosecution of qualifying criminal activity, 8 C.F.R. §214.14(g), or DHS determines that there are exceptional circumstances. INA §214(p)(6). USCIS will extend the U beyond the four years where: (i) petitioner's presence continues to be necessary to assist in the investigation or prosecution of the qualifying criminal activity when submitted with an I-539 and a newly executed I-918, Supplement B; or (ii) an AOS is pending under INA §245(m), AFM 39.1(g)(2)(B); AFM 39.1(g)(3). Extension is valid for one year. USCIS has discretion to grant the I-539 even if the applicant is O/S. Policy Memo, USCIS, Extension of Status for T and U Nonimmigrants, PM 602-0032.1 (Apr.19, 2011), published on AILA InfoNet at Doc. No. 11042934 at 8-9. A family member's extension of stay may be granted beyond the expiration of the principal's U-1 status where the family member is unable to enter the U.S. due to consular delays and extension is necessary to obtain the 3 years needed for AOS. 8 C.F.R. §214.14(g)(2)(i); Policy Memo, USCIS, Extension of Status for T and U Nonimmigrants, PM 602-0032.1 (Apr.19, 2011), published on AILA InfoNet at Doc. No. 11042934 at 3. An employment authorization will be issued under (a)(19) for principal and (a)(20) for derivatives. *Id.* at 9.
9. **Visa Processing Abroad**—Cable, DOS, 10-State-017736 (Feb. 2010), published on AILA InfoNet at Doc. No. 10040830. Procedures at 9 FAM 41.85. U should have approved petition verifiable by PIMS. If persons are abroad seeking U status in U.S. (including approval of petition) must do biometrics at consulate or U.S. military installation. Cable, *supra* at ¶7. If there is an ineligibility issue, waiver is not processed through consulate but at VSC on an I-192.
10. **Death of Principal U**—If the principal U dies *after* the surviving U relative was admitted as a U he or she may maintain his U status. However, USCIS may not approve derivative status for a surviving relative whose qualifying relative died *prior* to the approval of the derivative U application. If he qualifies he may apply for AOS. Policy Memo, USCIS, *Approval of Petitions and Applications after the Death of the Qualifying Relative Under New Section 204(l) of the Immigration and Nationality Act*, PM 602-0017 (Dec. 16, 2010), published on AILA InfoNet at Doc. No. 11011061; AFM 10.21(c)(4).
11. **Family Members**—Family members are the spouse and children (under 21) of the U-1 where the U-1 is 21 or over. Where the U-1 is under 21 then family members include, spouse, children, parents and unmarried siblings (under 18). Family members are eligible for U-2 (spouse), U-3(child), U-4 (parent) and U-5 (unmarried sibling). INA §101(a)(15)(U)(ii); 8 C.F.R. §214.14(a)(10), (f). The I-918, Supplement A is filed for family members. Evidence of the relationship and a waiver if necessary must accompany the petition. 8 C.F.R. §214.14(f)(3). If the family petition—Form I-918, Supplement A—is filed *after* the principal has filed her I-918, the family member must file a copy of the principal's I-918 (or I-94 with a "U" stamp) along with the appropriate evidence and fees. 8 C.F.R. §214.14(f)(2). Parents and unmarried siblings will qualify as long as the U-1 was under 21

at the time the I-918 and Supplement A was filed. 8 C.F.R. §214.14(f)(4)(ii). For those granted interim relief, USCIS has determined that the "family member's age on the date of the U interim relief filing shall be controlling for the age eligibility requirement..." Memo, Aytes, Assoc. Dir. Domestic Operations, USCIS (Mar. 27, 2008), published on AILA InfoNet at Doc. No. 08040256. Visas issued to family members do not count toward the annual 10,000 cap. INA §214(p)(2)(B). For the procedures regarding consular processing, see FAQs, USCIS, *Consular Processing for Overseas Derivative T and U Nonimmigrant Status Family Members* (Apr. 2012), published on AILA InfoNet at Doc. No. 12040653.

- 9.a. **Age Out**—U derivatives do not "age-out" if the principal filed before the child turned 21. INA §214(p)(7)(A). Children who file as U principals remain "children" (for purposes of including family member derivatives) until their principal U application is approved. INA §214(p)(7)(B). Congress backdated this fix to U age-out problems to the date the U visa became law. Violence Against Women Reauthorization Act of 2013, *supra* at 805(b) [The amendment made by (this section) shall take effect as if enacted as part of the Victims of Trafficking and Violence Protection Act of 2000].
- 9.b. **Family Member in Removal**—If the family member is in removal proceedings, the I-918, Supplement A must be filed with USCIS and the applicant must seek joint agreement with ICE to terminate removal proceedings without prejudice while the petition is being adjudicated by USCIS. 8 C.F.R. §214.14(f)(2)(i). If family member has a final order, he or she may still file directly with USCIS. However, the filing of the I-918, Supplement A does not prevent ICE from initiating removal and the applicant must seek a stay. 8 C.F.R. §214.14(f)(2)(ii).
- 9.c. **Employment Authorization**—A family member granted U-2 to U-5 status is employment authorized incident to status. If he or she wants to obtain an EAD, she must file an I-765 with the USCIS which she may file when filing the I-918, Supplement A. 8 C.F.R. §214.14(f)(7)
10. **Nondisclosure and Prohibited Use**—DHS, DOJ and DOS officers may not use or disclose (other than legitimate law enforcement purposes) any information relating to the beneficiary of a pending or approved U petition. 8 U.S.C. §1367(a)(1)(E); 8 C.F.R. §214.14(e).
11. **Grounds of Inadmissibility**—Applicants for a U visa/status must be admissible, except public charge. INA §212(a)(4)(E). However, all grounds of inadmissibility except INA §212(a)(3)(E) are waivable by DHS if in the "public or national interest." INA §212(d)(14); 8 C.F.R. §212.17(b)(1). Inadmissibility is not waived for Nazis, genocide, or torture or extrajudicial killings under INA §212(a)(3)(E). If the applicant is inadmissible on criminal or related grounds, USCIS will consider the number and severity of the offenses. In cases involving violent or dangerous crimes or inadmissibility based on security or related grounds under INA §212(a)(3), USCIS will only exercise discretion in "extraordinary circumstances." 8 C.F.R. §212.17(b)(2). No appeal from the denial of the waiver. 72 FR 53014, 53021–22 (Sept. 17, 2007) [discussing waivers for violent crimes in the context of *Matter of Jean*]; INA §212(d)(14); 8 C.F.R. §212.17. But an IJ may independently grant a INA §212(d)(3)(A) waiver to waive the predicate inadmissibility for the U visa. *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014) [finding that neither the statute, nor the regulations pertaining to DHS bar a separate inquiry into and grant of a 212(d)(3)(A) waiver by the IJ]. Waivers are filed on Form I-192. But if I-192 is denied U visa may not issue. *Matter of \_\_\_* (AAO, VSC), reported in 18 *Bender's Immigr. Bull.* 845, 871 (July 15, 2013) [U visa denied because EWI was not waived]. Waiver may not be reviewable as part of a final order of removal. *Torres-Tristan v. Holder*, 656 F.3d 653, 658–59 (7th Cir. 2011)
12. **Revocation of Petition**—8 C.F.R. §214.14(h). Petition automatically revoked if U-1 informs USCIS that approved petition will not be used. Petition may be revoked on notice if: (i) certifying official withdraws the certification or disavows contents in writing; (ii) approval was in error; (iii) fraud; (iv) in case of U-2 through U-5 their relationship to U-1 has terminated; or (v) in the case of U-2 through U-5, U-1's status is revoked.
13. **Removal Proceedings**—ICE may not rely solely on information obtained from the perpetrators of the crime against the respondent to initiate removal proceedings and must place a certificate on the NTA indicating that it has complied with 8 U.S.C. §1367. INA §239(e), 8 C.F.R. §214.14(e)(3). See Chapter 3, ¶ X.T.4.s (p.438), *supra*. A person who may be *prima facie* eligible for a U visa can seek a joint motion with DHS to continue, stay, or terminate proceedings, to allow for the ad-

- judication of U status. 8 C.F.R. §214.14(c)(1); 72 FR 53022 at n.10 (Sept. 17, 2007); AFM 39.1(c)(1)(B); Policy Memo, USCIS, PM-602-0004 (July 21, 2010), published on AILA InfoNet at Doc. No. 10072930. Where DHS does not agree or while awaiting USCIS adjudication of the U visa, it may grant a continuance. *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012) [for discussion, see Chapter 3, ¶ X.T.5.g(3) (p.450), *supra*]; *Ramirez Sanchez v. Mukasey*, 508 F.3d 1254 (9th Cir. 2007) [remanding to BIA to consider petitioner's request for a continuance or motion to stay or terminate proceedings to permit U adjudication]. A person subject to a final order of removal may request a stay of removal pending a determination of U status. 8 C.F.R. §214.14(c)(1)(ii). A stay may be granted by DHS when a *prima facie* U status/visa request is filed. INA §237(d)(1); AFM 39.1(c)(1)(B). A stay should be favorably considered when the applicant has established *prima facie* eligibility for a U visa and/or when there are favorable humanitarian factors related to the applicant or his or her close relatives who rely on the applicant for support. Memo. Venturella, Acting Director, ICE, Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants (Sept. 24, 2009), published on AILA InfoNet at Doc. No. 10050768. However, a stay is not appropriate where: (1) the applicant is not *prima facie* eligible; (2) the U petition has been denied; or (3) there are serious adverse factors weighing against a stay including (a) national security concerns; (b) evidence that applicant is a human rights violator; (c) evidence that applicant has engaged in significant immigration fraud; (d) applicant has a significant criminal history; and (e) any significant public safety concerns. *Id.*
4. **Change of Status/Extension of Status**—The INA §248 C/S prohibitions do not apply to a C/S to U classification. INA §248(b). Derivative U may request E/S to obtain the full four years in the U.S. The issue arises when s/he enters the U.S. after the principal and may need additional time, including the three years of physical presence necessary to AOS. Policy Memo, Extension of U Nonimmigrant Status for Derivative Family Members, PM-602-0001 (Jun 22, 2010), published on AILA InfoNet at Doc. No. 10062830; AFM 39.1(g)(2)(B); Policy Memo, USCIS, PM-602-0004 (July 21, 2010), published on AILA InfoNet at Doc. No. 10072930;
15. **AOS Generally**—INA §245(m); 8 C.F.R. §245.24. Unless it is determined, based on affirmative evidence that the U unreasonably refused to provide assistance in a criminal investigation or prosecution, a U may AOS if: (1) he or she has been physically present in the U.S. for a continuous period of 3 years; and (2) the U's continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. Physical presence is broken if the person is outside the U.S. in excess of 90 days or an aggregate of 180 days unless the absence is to assist in an investigation or prosecution, or a person involved in the investigation certifies that the absence was otherwise justified.
- 15.a. **Criteria**—A U-1 through U-5 is eligible to AOS if he or she: (1) was lawfully admitted in U status; (2) continues to hold U status at the time of filing AOS [or accrued at least 4 years in U interim status (*i.e.*, deferred action and employment authorization) and files AOS within 120 days of I-918 approval]; (3) has continuous physical presence for 3 years; (4) is not inadmissible under INA §212(a)(3)(E) [Nazis, genocide, torture, extrajudicial killings]; (5) has not unreasonably refused to provide assistance to LEA in regard to criminal activity that led to U status; and (6) establishes that presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or it is in the public interest. 8 C.F.R. §245.24(b).
- 15.b. **Grounds of Ineligibility**—A U is ineligible if: (1) U status is revoked, 8 C.F.R. §245.24(c); (2) departed the U.S. for any single period in excess of 90 days or 180 days in the aggregate, unless the agency that signed the I-918 certifies that the absences were "necessary to assist in the criminal investigation or prosecution or were otherwise justified." 8 C.F.R. §245.24(a)(1). Neither the regular grounds of inadmissibility, except, INA §212(a)(3)(E), nor INA §245(a) or INA §245(c) apply. 8 C.F.R. §245.24(d) However, AOS is discretionary and the applicant has "the burden of showing that discretion should be exercised in his or her favor." 8 C.F.R. §245.24(d)(11). USCIS may take into account "all factors, including acts that would otherwise render the applicant inadmissible..." USCIS will generally not exercise its discretion favorably where the applicant has *committed* or been convicted of a serious violent crime, sexual abuse of a child, multiple drug related crimes, or security or terrorism related concerns. *Id.*; 73 FR at 75549.

- 15.c. *Proof of Physical Presence* [8 C.F.R. §245.24(d)(9); 73 FR at 75548]—May submit official government documents, college transcripts or employment records, federal or state income tax returns, installment payments, monthly rent receipts or utility bills. If out more than 90/180 days, must obtain certificate from prosecuting agency certifying that the absences were necessary to assist in the investigation or prosecution or were otherwise justified. 8 C.F.R. §245.24(a)(1).
- 15.d. *Providing Assistance* [8 C.F.R. §245.24(e)]—The applicant may obtain a Supplement B to I-918, signed by an official or LEA that had responsibility for the investigation or prosecution of the qualifying criminal activity, that affirms that the applicant complied with reasonable requests for assistance. 8 C.F.R. §245.24(e)(1). Alternatively, the applicant may submit an affidavit describing his efforts. 8 C.F.R. §245.24(e)(2). The affidavit can be accompanied by “court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of other witnesses or officials.” 73 FR at 75547. The assistance need not be “current” and can be for an investigation or case that is *closed* as there is no statute of limitations regarding the time frame in which the crime must have occurred. DHS, *U Visa Law Enforcement Certification Resource Guide* Dec. 2011, published on AILA InfoNet at Doc. No. 11122835 at 10. Assistance is valid even if no arrest or charges are brought and even if the applicant does not testify against the perpetrator. *Id.* The applicant does not have to be in the U.S. when the LEA completes the application as long as the crime arose in the U.S. *Id.*
- 15.e. *Determining Refusal to Provide Assistance*—If the U refuses to provide assistance, USCIS will determine if it was unreasonable under the “totality of the circumstances based on all available affirmative evidence.” 8 C.F.R. §245.24(a)(5). It is USCIS’s decision although they may consult with the AG. AFM 23.5(o)(1)(C). USCIS may take into account: (i) general law enforcement, prosecutorial, and judicial practices; (ii) the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; (iii) the nature of the request; (iv) the nature of the victimization; (v) existing guidelines for victims and witness assistance; and (vi) specific circumstances of the applicant including fear, severe mental and physical traumatization, age and maturity. 73 FR at 75547. Also, if the party agrees to cooperate but then declines to do so after obtaining the certification, the LEA may withdraw or disavow the I-918B by submitting written notification to USCIS Vermont Service Center. DHS, *U Visa Law Enforcement Certification Resource Guide* Dec. 2011, published on AILA InfoNet at Doc. No. 11122835 at 12.
- 15.f. *Procedure* [8 C.F.R. §245.24(d)]—Applicant must file: (i) I-485; (ii) photocopy of I-797 granting U status; (iii) passport with all pages showing departures and return; (iv) certificate from investigating authority if out more than 90/180 days; (v) I-94; (vi) lawful admission as U; (vii) evidence of LEO request for assistance and response; (viii) evidence, including an affidavit, of 3 years physical presence; (ix) evidence that AOS is warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; (x) evidence relating to discretion to offset adverse factors including the possible necessity of showing exceptional and extremely unusual hardship where applicant has committed or been convicted of a serious violence crime, sexual abuse of a child, multiple drug crimes or terrorism-related concerns; (xi) evidence of continued assistance in investigation or prosecution including a new I-918 or other documentation and an affidavit of applicant’s efforts.
- 15.g. *Family Members* [INA §245(m)(3); 8 C.F.R. §§245.24(a)(2), (g), (h)]—Two forms of adjustment for family members. 8 C.F.R. §245.24(d).
- (1) Family members in lawful U-2, U-3, U-4 or U-5 status may adjust independently of the U-1. 8 C.F.R. §245.24(b)(2). The procedures are the same as the procedures and qualifications for a U-1.
  - (2) A spouse, child or a parent (in the case of a U-1 under 21) may adjust even if he or she did not receive a U-2, U-3 or U-4 visa. Must show extreme hardship to himself or the U principal for the AOS. INA §245(m)(3); 8 C.F.R. §§245.24(g) & (h). The U-1 must file an I-929 petition for the family member, separately or concurrently with the U-1’s I-485. Once the I-929 is approved, the family member can file for an IV or AOS. Family mem-

bers who never held U status must show the family relationship to the U-1 family member and that U-1 or family member would suffer extreme hardship. The family member must provide evidence, including signed statement by family member, establishing why discretion should be favorably exercised and proof to overcome adverse factors including evidence of exceptional and extremely unusual hardship if adverse factors are severe. If the derivative is not in the U.S. and has not been issued a U and the principal's status will expire, the principal should seek and extension and request the extension be applied to the derivative so that when the derivative enters the principal and derivative may all apply for AOS. 8 C.F.R. §245.24(h). Policy Memo, USCIS, Extension of Status for T and U Nonimmigrants, PM-602-32.1 (Apr. 19, 2011), published on AILA InfoNet at Doc. No. 11042934 at p.9. The grounds of inadmissibility do not apply except as they reflect on the USCIS's discretion. 73 FR at 75550. Nor do the restrictions set forth in INA §245(a) or INA §245(c) apply, including the procedures and provisions in 8 C.F.R. §245.1 and 245.2; 8 C.F.R. §245.24(l). The I-929 filed by the U-1 on behalf of the family member may not be approved until the AOS for the U-1 is approved. 8 C.F.R. §245.24(h)(2); 73 FR at 75349. If granted AOS or IV, the classification is SU2 (spouse), SU3 (child), SU5 (parent).

- (3) *Proving Extreme Hardship*—8 C.F.R. §245.24(h)(iv). If the relative is in the U.S., the principal must demonstrate that removal of the family member “would result in a degree of hardship beyond that typically associated with removal.” Factors include: (i) nature and extent of physical or mental abuse suffered by U; (ii) impact of loss of access to the U.S. courts and criminal justice system; (iii) likelihood that perpetrator's family, friends, or others in the home country would harm the applicant or her children; (iv) applicant's needs for social, medical, mental health or other support services for victims of crime that are unavailable or not reasonably accessible in the home country; (v) if involving domestic violence whether home country's laws or social practices would punish applicant or her children because they left an abusive household; (vi) ability to travel to home country and receive protection once there; and (vii) the age of the applicant at time of entry and AOS.
- (4) *Death of the principal*—A family member in derivative status may AOS even if the principal U dies. INA §204(D)(2)(E). The family member must demonstrate that she resided in the U.S. at the time of the principal's death and continues to reside in the U.S. The application “shall” be approved unless DHS, in its *unreviewable* discretion, determines approval would not be in the public interest.
- 15.h. *Employment Authorization and Advance Parole*—U applicants for AOS may obtain employment authorization pursuant to 8 C.F.R. §274a.12(c)(9) and advance parole. 73 FR at 75551.
- 15.i. *Appeal* [8 C.F.R. §245.24(f)(2), (i)(2), (k)]—May appeal principal U-1 denial to AAO. If I-929 is denied without AOS because of visa processing, may appeal to AAO. If principal U-1 is denied, there is no appeal of family members' I-929 or I-485. During the appeal period there is no final decision but the applicant may not obtain or renew employment authorization. DHS has exclusive jurisdiction over the denial of a U adjustment and the IJ has no jurisdiction to review the decision. 8 C.F.R. §245.24(k); 73 FR at 75549.
16. *Judicial Review*—One court has determined there is no judicial review of a denial of a U visa because it is “committed to agency discretion” by law under the APA. *Mondragon v. U.S.*, 839 F.Supp.2d 827 (W.D.N.C. 2012).
17. *Prohibition Against Petitioning for Abusers*—A person who had U status cannot file a nonimmigrant or immigrant visa petition on behalf of the person who abused her or her child. INA §204(a)(1)(L).
18. *U Nonimmigrant Interim Relief Program*—During the period that regulations were being formulated many potential U candidates were given interim relief in the form of deferred action and employment authorization. After publication of the regulation, a deadline was set for such individuals to file Form I-918 and petition for U status. The deadline was extended to Feb. 1, 2010 only. USCIS Update, *U Nonimmigrant Interim Relief Final Filing Date Extended* (Dec. 18, 2009), published on AILA InfoNet at Doc. No. 09221223. In the view of one circuit, only DHS and not the IJ has jurisdiction to grant U interim relief. *Lee v. Holder*, 599 F.3d 973 (9th Cir. 2010).

19. **Resources**—For resources specializing in “U” visas, see [www.asistahelp.org](http://www.asistahelp.org) (ASISTA); [www.NationalImmigrationProject.org](http://www.NationalImmigrationProject.org) (National Immigration Project of the National Lawyers Guild); [www.ilrc.org](http://www.ilrc.org) (Immigrant Legal Resource Center). ICE has also established a Victim Assistance Program. ICE, Morton, Directive 10071.1, Victim Assistance Program (Aug. 25, 2011), 17 *Bender's Immigr. Bull.* 1617, 1659-72 (Sept. 15, 2012). DOL also provided assistance to victims of trafficking. TEGL 9-12, DOL, *Human Trafficking: The Role of the Public Workforce System in the Delivery of Services and Referrals to Victims of Trafficking* (Oct. 24, 2012), 17 *Bender's Immigr. Bull.* 1809, 1834, 1895-1901 (Nov. 15, 2012) See also **Appendix H** (p.1869).

www.asistahelp.org  
www.NationalImmigrationProject.org  
www.ilrc.org  
ICE, Morton, Directive 10071.1, Victim Assistance Program (Aug. 25, 2011), 17 Bender's Immigr. Bull. 1617, 1659-72 (Sept. 15, 2012).  
DOL, Human Trafficking: The Role of the Public Workforce System in the Delivery of Services and Referrals to Victims of Trafficking (Oct. 24, 2012), 17 Bender's Immigr. Bull. 1809, 1834, 1895-1901 (Nov. 15, 2012)

ORIGINAL

FILED IN OPEN COURT  
STEVEN D. GRIERSON  
CLERK OF THE COURT

APR 11 2017

BY: *Shelly Landwehr*  
SHELLY LANDWEHR, DEPUTY

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8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 JOSE AZUCENA,  
14 #7037259,

15 Defendant.  
16

CASE NO. C-17-321044-1

DEPT NO. II

17 **STATE'S OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO ADMIT**  
18 **SCHOLARLY TREATISE ON IMMIGRATION LAW**

19 DATE OF HEARING: APRIL 11, 2017  
20 TIME OF HEARING: 9:00 A.M.

21 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, District Attorney,  
22 through CHRISTOPHER S. HAMNER, Chief Deputy District Attorney, and files this State's  
23 Opposition to Defendant's Motion in Limine to Admit Scholarly Treatise on Immigration  
24 Law.

25 This Opposition is made and based upon all the papers and pleadings on file herein, the  
26 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
27 deemed necessary by this Honorable Court.

28 ///

///

C-17-321044-1  
OPPS  
Opposition  
4639726



1                                    **STATEMENT OF FACTS PERTINENT TO THIS CASE**

2           Defendant, JOSE AZUCENA, is charged by way of Criminal Indictment with the  
3 crimes of LEWDNESS WITH A CHILD UNDER THE AGE OF 14 (Category A Felony -  
4 NRS 201.230), CHILD ABUSE, NEGLECT OR ENDANGERMENT (Category B Felony -  
5 NRS 200.508(1)), INDECENT EXPOSURE (Gross Misdemeanor - NRS 201.220), SEXUAL  
6 ASSAULT WITH A MINOR UNDER FOURTEEN YEARS OF AGE (Category A Felony -  
7 NRS 200.364, 200.366), ATTEMPT LEWDNESS WITH A CHILD UNDER THE AGE OF  
8 14 (Category B Felony - NRS 201.230, 193.330) and FIRST DEGREE KIDNAPPING  
9 (Category A Felony - NRS 200.310, 200.320). The crimes occurred on or between November  
10 1, 2014 and November 30, 2016. There are seven (7) victims in this case, they are J.M.,  
11 (hereinafter "Jatziri"), M.M.1 (hereinafter, "Mirabel"), M.M.2., (hereinafter, Maridel), Y.E.,  
12 (hereinafter, Yezline) N.E., (hereinafter, "Nicole") and S.R., (hereinafter, "Scarlett").

13           On February 1, 2017, the State presented witness testimony to the Grand Jury reference  
14 this matter. The State provides the following grand jury testimony of the witnesses for this  
15 Court's consideration.

16                                    **The Grand Jury Testimony Maria Barajas-Navarro**

17           Maria testified that she lived at 4820 Charleston, Apt. 5, Las Vegas, Nevada 89104,  
18 with her husband, Nicholas, and with Yezline, age 8, (DOB: 09-23-08) and Nicole, nearly age  
19 2, (DOB: 05-30-15). GJT, pp. 8-9. Maria was shown a photograph of Defendant, marked as  
20 State's Exhibit 3, and she testified that she had met him eight years prior, through his wife, at  
21 the apartment complex. GJT, p. 9.

22           Maria testified that there was a day when Mirabel, Maridel and Jatziri came over and  
23 asked if they could take Nicole out to play. Yezline did not want to go play that day and did  
24 not go with them. Eventually, Maria sent Yezline to go and get Nicole. GJT, pp. 41-42.

25           Maria did not learn that Nicole had been inside Defendant's apartment until after the  
26 other girls disclosed what had happened to them; and, that it had happened to Nicole as well.  
27 GJT, p. 42. Maria believe that the incident with Nicole happened in the afternoon, in  
28 September; and, that she found out about everything in October 2016. GJT, p. 42-43.



1 Maria testified that she found out when all of the girls came to her and Jatziri told her  
2 that Defendant wanted to take them all to Chuck E. Cheese and then take them all someplace  
3 far away, with no moms, just the girls. GJT, p. 43.

4 Later that night, Maria spoke to Jatziri's mom, Amanda, and told her what the girls had  
5 repeated to her. Maria spoke to Yezline who told her that she wanted to go to bed but she  
6 would tell her everything that happened early the next morning. Maria further testified that  
7 the girls called Defendant "abuelo" which means grandfather; and, that Defendant also went  
8 by name of Don David. GJT, p. 44.

9 The following morning, Yezline told Maria that Defendant pulls down her clothes and  
10 gives her candy; and, he told her that if she said anything he would harm Maria and Y.E.'s  
11 dad. GJT, p. 45. Maria testified that she took her girls to school that day and then she and  
12 Amanda went and filed a police report. GJT, p. 47.

#### 13 The Grand Jury Testimony of Yezline

14 Yezline testified that she lives with her mom and dad, and her little sister, Nicole.  
15 Yezline testified that she was in the third grade. GJT, pp. 13-14. Y.E. testified that she knew  
16 a man in her apartments named Don David. Yezline was shown Grand Jury Exhibit 3, which  
17 she identified as a photograph of Hosana, who lived next door to her house. GJT, pp. 16-17.  
18 Y.E. testified that she had friends that she plays with where she lives and their names are  
19 Abigail, Yezline's little sister [Nicole], Mirabel, and Jatziri. Yezline testified Mirabel has a  
20 twin, Maridel. GJT, p. 17.

21 Yezline testified that she was there to talk about problems she had with the man she  
22 identified in the picture, touching her. Yezline testified that he would touch her on her  
23 stomach, her thing, and on her butt. GJT, p. 18. Y.E. testified that her "thing" is where she  
24 pees from. The first time Defendant touched Yezline they were in his house and he used his  
25 hands to touch her stomach, thing, and butt, over her clothes. GJT, pp. 19-20.

26 Yezline testified about a "tape day." On that day, Defendant pulled her by the hand,  
27 hard, into his apartment. Yezline testified that it was scary. Yezline further testified that once  
28 she was inside, Defendant got yellow tape and put it on her mouth, her hands, and her feet.

1 Defendant then touched her on the part where she goes pee and her butt. Defendant also  
2 touched her chee chees (boobs). Yezline was on Defendant's bed when he touched her.  
3 Defendant removed Yezline's top and pants, but not her underwear. Defendant touched  
4 Yezline on the inside of where she goes pee. Defendant showed her a movie of a boy's "thing"  
5 on his phone. Yezline testified that Defendant eventually removed the tape from her mouth  
6 which hurt; and, was sticky. Defendant told Yezline that if she told her mom what happened  
7 he would kill her mom and dad. Yezline testified that she put her clothes back on and went  
8 home. Yezline testified that she was sad when she went home. GJT, pp. 20-25.

9 Yezline testified that there were times Defendant would offer her candy. Defendant  
10 would ask her if she wanted Kit Kats. She described Kit Kats coming in a red wrapper.  
11 Defendant would ask Yezline if she wanted Kit Kats while she was outside with Mirabel and  
12 Maridel and Jatziri, at the apartments. GJT, pp. 26-27. Defendant kept the Kit Kats in his  
13 front pocket and would tell the girls to get the Kit Kats out of his pocket. Yezline testified  
14 that she did not do that but Jatziri, Mirabel and Maridel did reach their hands in Defendant's  
15 pocket for the Kit Kats. GJT, p. 28.

16 Yezline testified that on that same day, before chocolate, she saw Defendant's private  
17 part. Yezline explained that she and Jatziri and the twin sisters were in the back of the  
18 Defendant's black car, when he unzipped his pants. Yezline testified there was another time  
19 when she was in the front of Defendant's car and the other girls were in the back. Defendant  
20 touched the place where Yezline goes pee, her boobs, and her butt. Yezline said the other girls  
21 got touched that same day too, but she didn't see it, they just told her about it. Yezline testified  
22 that Defendant took her pants off and touched her on the inside of her "thing" with his hand.  
23 GJT, pp. 29-32.

24 Yezline testified that there was a time that her and the twins and their sister, were  
25 supposed to go to Chuck E. Cheese with Defendant and the moms. Defendant told Yezline  
26 that he wanted to take the girls by themselves, not with the moms. Defendant told Yezline  
27 that when they were done with Chuck E. Cheese he would take the girls far away. GJT, pp.  
28 33-34.

1 Yezline testified that one day, Mirabel, Maridel, and Jatziri came to get Yezline's little  
2 sister to go out and play with them. When Yezline's mom told her to go look for Nicole. She  
3 found her in Defendant's house. Yezline testified that Defendant picked Nicole up off of the  
4 floor and rubbed her body down the front of his body. GJT, pp. 34-37.

5 Yezline testified that everything happened with Defendant when she was seven years  
6 old. She further indicated that Defendant had kissed her on the mouth, with his mouth. GJT,  
7 p. 38-39.

### 8 The Grand Jury Testimony of Mirabel

9 Mirabel testified that she was eight years old and in the third grade. Mirabel further  
10 testified that she has sisters named Maridel and Jatziri. Jatziri is an older sister and Maridel is  
11 the same age as Mirabel because they are twins. GJT, pp. 50-51. Mirabel testified that she  
12 lives with her momma, her dad, her grandparents, her uncle, and her sisters, in an apartment.  
13 GJT, p. 52. Mirabel testified that she sometimes played around the apartment complex with  
14 her sisters. While living in the apartment complex Maribel came to know a man named Don  
15 David, whom she sometimes called grandfather, although he wasn't her real grandfather.  
16 Maribel viewed the photograph marked as State's Exhibit 3 and identified it as a photograph  
17 "Don David", aka Defendant. GJT, p. 53.

18 Mirabel testified that her chee chee's were located on the upper part of her body and  
19 "la cosa", (the thing) is what she uses to go pee and poo. Mirabel testified that Defendant  
20 touched her where she goes pee and poo, many times, using his hands. GJT, p. 55. Mirabel  
21 further testified that Defendant would touch her on those places while Leo, Orlando, Juanito,  
22 her sisters, and Yezline were present. Defendant would touch Mirabel while she was outside  
23 at the apartment complex. Defendant touched Mirabel when she was seven years of age.  
24 Mirabel testified that she had seen Defendant's "thing" because he took it out in front of her  
25 and her sisters and Yezline.<sup>1</sup> One time, Defendant also showed Mirabel a lot of women, girls,  
26 and men that didn't have any clothes on, on his cell phone, while her sisters and Yezline were  
27 also present. GJT, pp. 57-58.

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<sup>1</sup> Mirabel testified Defendant's "thing" was used to go to the bathroom.

1 Defendant would offer Maribel treats like chicklets, gum, and chocolate Kit Kats.  
2 Defendant would put the chocolate and candies in his pants and tell the kids to come and find  
3 them. GJT, p. 58. Defendant would move toward Mirabel and grab her hands with his hands  
4 to get her to take the candies out, but she did not do it. GJT, p. 59.

5 Defendant offered to take Maribel to Chuck E. Cheese but told her not to tell her mom.  
6 Defendant told Maribel that after Chuck E. Cheese he was going to take her far away. Maribel  
7 testified that it made her feel sad when Defendant said that. Maribel further testified that her  
8 sisters and Yezline were present when Defendant said this. GJT, p. 60. Maribel told her mother  
9 what Defendant said to her. Maribel testified that Defendant threatened to kill her mom and  
10 dad if she was to say that he was doing those things to her. GJT, pp. 60-61.

11 Maribel testified that she had seen Defendant touch her sisters on their "thing", over  
12 and underneath their clothes. She also saw Defendant touch Yezline on her front "thing", both  
13 inside and outside his apartment.

#### 14 The Grand Jury Testimony of Amanda Moreno

15 Amanda Moreno testified that she lived at 4810 E. Charleston, Apt. 1, Las Vegas, Clark  
16 County. Amanda further testified that she had a daughter named Jatziri and her birthday is  
17 December 27, 2008. Amanda testified that Jatziri was ten years of age. GJT, p. 64. Amanda  
18 also has a daughter named Maridel, age 8, and Mirabel, who is Maridel's twin. GJT, p. 65.

19 Amanda testified that "Don David" lived in her apartment complex and his last name  
20 was Azucena. He had a wife named Elena. Amanda identified the person in State's Exhibit  
21 3 as "Don David". Amanda testified that she had known defendant for eight years; and, that  
22 spent a lot of time with his wife. GJT, pp. 65-66. Amanda testified that her children sometimes  
23 played outside, around the apartment complex; and, that she recalled seeing Defendant sitting  
24 outside offering the children candy. Defendant would say, "Come here, I've got candy."  
25 Defendant would stand in his doorway and the kids would run to him for the candy. Amanda  
26 also witnessed the children go inside Defendant's apartment when he offered them watermelon  
27 or strawberries. GJT, p. 66. Defendant would offer Yezline and Amanda's children these  
28 things and she witnessed the kids going inside Defendant's apartment at times. GJT, p. 67.

1 On October 17, 2016, Amanda stated that her daughter told her Defendant was touching  
2 her. She was also afraid because Defendant was going to take her to Chuck E. Cheese.  
3 Defendant had mentioned it and Amanda told him to let her know when and she would take  
4 the children. Later that afternoon, Defendant told Jatziri to tell her mother that he didn't want  
5 their mother going along, just the children. Amanda testified that Jatziri looked fearful when  
6 she was telling her what Defendant said. Amanda further testified that Mirabel, Maridel, and  
7 Yezline were present when Jatziri was telling her this, along with Estell, Yezline's mother.

8 Jatziri told Amanda that she didn't want to go with Defendant to Chuck E. Cheese  
9 because he said he was going to take her far away to a very beautiful place and she would  
10 never see her mom again. GJT, p. 69. That same day, the four girls indicated that Defendant  
11 had been touching them on their vaginal area. Amanda then contacted the police. GJT, p. 70.

#### 12 The Grand Jury Testimony of Jatziri

13 Jatziri testified that she was ten years of age and in the fourth grade. Jatziri testified  
14 that she liked school and that math was her favorite subject. Jatziri testified that she has sisters,  
15 Mirabel and Maridel. Jatziri testified that her sisters are twins and she is older than they are.  
16 GJT, pp. 73-74. Jatziri testified that she lived in an apartment with her grandma, grandfather,  
17 momma, and two sisters. Jatziri further testified that she sometimes played outside around the  
18 apartment complex with her sisters and other kids. Jatziri testified that she would play with  
19 Johnny, Leo, Orlando and a girl nicknamed "shoofly". Jatziri testified that she knew Yezline  
20 but Yezline didn't want to play with them. Jatziri testified that Yezline lived in the apartment  
21 complex. GJT, pp. 75-76. Jatziri testified that she knew a man called "Don David" whom she  
22 sometimes grandpa, even though he wasn't really her grandpa. Jatziri identified the person in  
23 State's Exhibit 3 as Defendant. GJT, pp. 75-76. Jatziri testified that there are parts of her  
24 body that nobody should touch and they are the chee-chees, the "tail" which is the place where  
25 you go pee, and the place where you go shit. GJT, pp. 77-78.

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1 Jatziri testified that Defendant touched her with his hands on her front part more than  
2 once, and he touched her on her butt. Defendant also gave her candies. GJT, p. 78. Jatziri  
3 testified that Jaunito, Leo, Orlando, Yezline, another little girl named Lexi, and her sisters,  
4 were all there when Defendant touched her. Jatziri testified that Defendant touched her when  
5 they were inside Defendant's apartment and when they were outside as well. Defendant  
6 touched Jatziri on the outside of her clothes. GJT, p. 79.

7 Jatziri testified that she and her sisters, Yezline, and some boys were outside her  
8 girlfriend's house playing and Defendant started showing them his "part". When Defendant  
9 pulled out his "part" all of the girls including Yezline and Leo and Johnny were there. GJT,  
10 p. 81. Jatziri testified that Defendant would keep candies or treats in his pants area and they  
11 would reach in to get the treats or Defendant would reach in and retrieve them. GJT, p. 82.  
12 Jatziri testified that Defendant had a phone and he showed her pictures of people kissing with  
13 their clothes on and off. Jatziri further testified that she witnessed Defendant touching Yezline  
14 and her sisters' front parts, on top of their clothes. GJT, p. 83.

15 Defendant would offer the kids Takis and chocolate Hershey kisses and Kit Kats.  
16 Defendant told Jatziri not to tell anybody about what he was doing or he would kill her mother  
17 and dad, which made Jatziri feel bad. GJT, p. 84. Jatziri testified that Defendant touched her  
18 on her front part, under her underwear, and he would move his fingers desperately. GJT, pp.  
19 85-86. Before touching her front part, Defendant first touched her butt. GJT, p. 86. Defendant  
20 would also reach out and touch Jatziri on her butt, with his hands, in order to pull her closer  
21 to reach into his pants for candy. GJT, p. 87.

### 22 The Grand Jury Testimony of Maridel

23 Maridel testified that she is eight years old and in the third grade. Maridel testified that  
24 she has sisters, Mirabel and Jatziri. Jatziri is the oldest and Mirabel is Maridel's twin. Maridel  
25 testified that she lives in an apartment with her sisters, her mom and dad, and her grandma and  
26 grandpa. GJT, pp. 91-92. Maridel testified that she sometimes played with the other girls in  
27 the playground area of the apartment complex. Maridel further testified that she knew a guy  
28 named "Don David" whom she sometimes call grandpa, who wasn't really her grandpa, but

1 lived in the apartment complex. GJT, pp. 93-94. Maridel was shown State's Exhibit 3 and  
2 identified Defendant as the person in the photograph. GJT, p. 94. Maridel testified Defendant  
3 touched her where she goes pee. Maridel also witnessed Defendant touching her sisters, with  
4 his hand, both over and underneath their clothes. Maridel testified that this happened more  
5 than once. Defendant would touch them both inside his apartment and outside his apartment.  
6 Defendant would touch them on their front parts and their back parts; and, on their chee-chees.  
7 GJT, pp. 95-97.

8 Defendant would touch Maridel's front part and her back part, more than once, both  
9 over and underneath her clothes, with his hand. Maridel's sister were present when Defendant  
10 touched Maridel. Defendant also kissed Maridel's mouth, more than once. Maridel was seven  
11 years of age when Defendant did those things to her. Defendant also showed Maridel pictures  
12 of people on his phone; and, he showed her his private part, at his house, more than once. GJT,  
13 pp. 99-101.

14 Defendant offered Maridel treats and sweets that he put in his "thing" and then asked  
15 if she wanted them. The chocolates were Kit Kats. Defendant would do this inside his  
16 apartment and outside of his apartment. Defendant told Maridel that he would kill her mother  
17 if she told, which made her feel sad. Maridel testified that her sisters and Yezline were present  
18 when Defendant said that. GJT, p. 103. Maridel testified that Defendant talked about going  
19 to Chuck E. Cheese and she did not want to go with him because she was scared. GJT, p. 105.

#### 20 **The Grand Jury Testimony of Detective Matt Campbell**

21 Detective Campbell testified that he is employed by the Las Vegas Metropolitan Police  
22 Department, assigned to the Sexual Assault Detail. In October 2016, Detective Campbell was  
23 assigned to investigate the incidents occurring at 4820 East Charleston, after receiving a report.  
24 Detective Campbell spoke to Amanda Moiza, who had three children, Jatziri, Mirabel, and  
25 Maridel; and, he spoke to Maria Estrella Barajas, who had a daughter, Yezline. The four  
26 children were the four reported victims. GJT, pp. 107-108. Detective Campbell identified the  
27 suspect as David Azucena, the Defendant in this matter. GJT, p. 109.

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1 Detective Campbell had been provided an address and telephone number for the  
2 suspect, as well as a photo of him, as he lived in the same apartment complex of the victims.  
3 While researching the phone number for Defendant, Detective Campbell came across a hit  
4 related to the number, which indicated Defendant had been a victim of a commercial burglary;  
5 however, at the time of that incident Defendant's name was Jose, not David. GJT, pp. 109-  
6 110. Detective Campbell was able to compare photos of the Defendant that he obtained during  
7 his investigation with the photo that the victims' family members provided to him and they  
8 were a match. GJT, p. 111.

9 Detective Campbell testified that on November 17, 2016, it came to his attention that  
10 another child, Scarlett, had been living in the same apartment complex with her father.  
11 Detective Campbell showed Scarlett a photo line-up with Defendant's picture included in it.  
12 Detective Campbell came to learn that Scarlett did not live at the apartments all the time, as  
13 she spent time back and forth with her mother and father. GJT, pp. 113-114. Scarlett was able  
14 to identify Defendant out of the phone line-up right away. GJT, p. 115.

#### 15 **The Grand Jury Testimony of Ricardo Rangel**

16 Ricardo testified that he lived at 4850 East Charleston, Apt. 23, 89104, Clark County,  
17 Nevada. Ricardo further testified that he had a daughter, Scarlett, age 7. Scarlett's birthdate  
18 is August 29, 2009. Ricardo testified that Scarlett lives with him on shared time, as he and her  
19 mother share custody. Ricardo testified that he knew Amanda Moiza, as well as her daughters,  
20 Maridel, Mirabel, and Jatziri. Ricardo further testified that he had seen Defendant. Ricardo  
21 was shown State's Exhibit 3, and identified the Defendant as being the person in the  
22 photograph. GJT, p. 120.

23 Ricardo testified that Amanda had come to him and mentioned that something was  
24 going on with the girls. It concerned him so he asked Scarlett if anyone had touched her and  
25 she told him yes. Scarlett told him that the man that lived downstairs from the lady who takes  
26 care of her, touched her. Scarlett told Ricardo that Defendant showed her his privates and  
27 touched her arm. GJT, p. 121. Ricardo took Scarlett to give a statement to the Detective. GJT,  
28 p. 122.



1 **The Grand Jury Testimony of Scarlett**

2 Scarlett testified that she was seven years of age and she didn't remember when her  
3 birthday was. Scarlett testified that she lived with her dad, and her mom. GJT, p. 124. Scarlett  
4 further testified that she is in the second grade. GJT, p. 125. Scarlett testified that there was a  
5 time when a man showed her his part that he goes pee from. GJT, p. 126. Scarlett was seven  
6 years of age when it happened. The incident happened while the man was in the living room,  
7 on a mattress. GJT, pp. 127-128. The man touched Scarlett on the arm. GJT, p. 128. Scarlett  
8 was shown the photographs from six pack shown to her by Detective Campbell and picked  
9 Defendant from those photos. GJT, p. 129.

10 Trial of this matter is scheduled to commence on April 17, 2017. On March 30, 2017,  
11 Defendant filed a Motion In Limine to Admit Scholarly Treatise on Immigration Law. The  
12 State's Opposition follows.

13 **LEGAL ARGUMENT**

14 NRS 51.135 states:

15 A memorandum, report, record or compilation of data, in any  
16 form, of acts, events, conditions, opinions or diagnoses, made at  
17 or near the time by, or from information transmitted by, a person  
18 with knowledge, all in the course of a regularly conducted activity,  
19 as shown by the testimony or affidavit of the custodian or other  
20 qualified person, is not inadmissible under the hearsay rule unless  
21 the source of information or the method or circumstances of  
22 preparation indicate lack of trustworthiness.

23 NRS 51.255 states:

24 To the extent called to the attention of an expert witness upon  
25 cross-examination or relied upon by the expert witness in direct  
26 examination, a statement contained in a published treatise,  
27 periodical or pamphlet on a subject of history, medicine or other  
28 science or art, is not inadmissible under the hearsay rule if such  
book is established as a reliable authority by the testimony or  
admission of the witness or by other expert testimony or by  
judicial notice.

1 NRS 47.140 Matters of law, defines the laws subject to notice as follows:

- 2 1. The Constitution and statutes of the United States, and the
- 3 contents of the Federal Register.
- 4 2. The Constitution of this State and Nevada Revised Statutes.
- 5 3. Any other statute of this State if brought to the attention of the
- 6 court by its title and the day of its passage.
- 7 4. A county, city or town code which has been filed as required
- 8 by NRS 244.118, 268.014, 269.168 or the city charter and any city
- 9 ordinance which has been filed or recorded as required by the
- 10 applicable law.
- 11 5. The Nevada Administrative Code.
- 12 6. A regulation not included in the Nevada Administrative Code
- 13 if adopted in accordance with law and brought to the attention of
- 14 the court.
- 15 7. The population category and organization of a city
- 16 incorporated pursuant to general law.
- 17 8. The constitution, statutes or other written law of any other
- 18 state or territory of the United States, or of any foreign jurisdiction,
- 19 as contained in a book or pamphlet published by its authority or
- 20 proved to be commonly recognized in its courts

21 In the present case, defense counsel appears to be requesting to have photocopied pages  
22 from a book entitled Kurzban's Immigration Law Sourcebook admitted into evidence, without  
23 providing any testimony from his noticed expert witness on Immigration law regarding the  
24 pages from the book. The State objects to this on the grounds that it is hearsay; and, the lack  
25 of foundation as to its authenticity. As the defense cannot properly provide the foundation for  
26 admission of the portions of the document in which he wishes to have admitted without the  
27 testimony of an expert, the Court must deny its admissibility.

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CONCLUSION

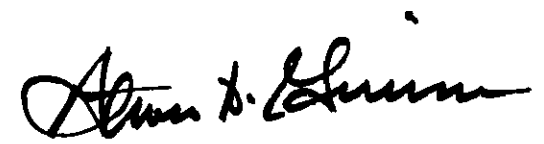
Based upon the above and foregoing Points and Authorities, the State respectfully requests this Defendant's Motion in Limine to Admit Scholarly Treatise on Immigration Law be DENIED.

DATED this 11<sup>th</sup> day of April, 2017.

STEVEN B. WOLFSON  
DISTRICT ATTORNEY  
Nevada Bar #001565

BY   
CHRISTOPHER S. HAMNER  
Chief Deputy District Attorney  
Nevada Bar #11390

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CLERK OF THE COURT

1 PHILIP J. KOHN, PUBLIC DEFENDER  
2 NEVADA BAR NO. 0556  
3 309 South Third Street, Suite 226  
4 Las Vegas, Nevada 89155  
5 (702) 455-4685  
6 Attorney for Defendant

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )

10 Plaintiff, )

11 v. )

12 JOSE AZUCENA, )

13 Defendant, )

CASE NO. C-17-321044-1

DEPT. NO. II

DATE: April 11, 2017

TIME: 9:00 a.m.

14 **DEFENDANT'S MOTION IN LIMINE TO PRECLUDE LAY OPINION TESTIMONY**  
15 **THAT THE ACCUSERS' BEHAVIOR IS CONSISTENT WITH THAT OF A**  
16 **VICTIM OF SEXUAL ABUSE**

17 COMES NOW, the Defendant, JOSE AZUCENA, by and through CARLI L.  
18 KIERNY, Chief Deputy Public Defender and hereby that this Court enter an order in limine  
19 precluding the State from eliciting lay opinion that the behavior of the complaining witnesses in  
20 this case is consistent with the behavior of victims of sexual abuse.

21 This Motion is made and based upon all the papers and pleadings on file herein, the  
22 attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

23 DATED this 30th day of March, 2017.

24 PHILIP J. KOHN  
25 CLARK COUNTY PUBLIC DEFENDER

26 By: /s/ Carli L Kierny  
27 CARLI L. KIERNY, #12010  
28 Chief Deputy Public Defender

1 **STATEMENT OF FACTS**

2 Jose Azucena is charged with multiple counts of the following crimes: Lewdness with a  
3 Child under the Age of 14; Child Abuse, Neglect or Endangerment; Indecent Exposure, Sexual  
4 Assault with a Minor under 14 Years of Age; Attempt Lewdness with a Child under the Age of 14;  
5 and First Degree Kidnapping. On February 1, 2017, a grand jury was convened, and returned a true  
6 bill on these charges. Mr. Azucena pleaded not guilty to all charges and has invoked his right to a  
7 trial within 60 days, pursuant to **NRS 178.556**.

8  
9 **ARGUMENT**

10 Nevada law provides that, in a prosecution for sexual assault, “**expert** testimony is not  
11 inadmissible to show that the victim’s behavior or mental or physical condition is consistent with  
12 the behavior or condition of a victim of sexual assault.” **NRS 50.345** (emphasis added). The  
13 statute expressly identifies this type of evidence as “expert testimony,” which means that a **lay**  
14 **witness** is precluded from testifying that the behavior of an alleged victim is consistent with the  
15 behavior of a typical sexual assault victim. Had the Legislature intended the State to be allowed to  
16 establish behavioral consistency with lay opinion testimony, such language would have been  
17 included in **NRS 50.345**.

18 Nevada case law supports the position that, to establish that an alleged victim’s behavior is  
19 consistent with sexual abuse, the State must rely on the opinion of experts, not mere lay witnesses.  
20 In Townsend v. State, 103 Nev. 113 (1987), the Nevada Supreme Court noted that opinions  
21 regarding whether an alleged victim has reacted in ways consistent with the behavior of other  
22 sexually abused children “...represents both the peculiar expertise and consummate purpose of an  
23 expert’s analysis.” Townsend at 118. According to Townsend, the type of testimony made  
24 admissible by **NRS 50.345** is the exclusive province of experts.

25 The Nevada Supreme Court disapproves of allowing lay witnesses to testify to matters  
26 normally reserved for qualified experts. For example, in Lord v. State, 107 Nev. 28 (1991), the  
27 Court held that it was error for a police officer to provide lay opinion testimony that the  
28 defendant’s injuries indicated that he had recently been involved in a fight. Lay at 33. The Court

1 held that such an opinion should have been rendered by a qualified expert, not a lay witness. Id.  
2 Likewise, an opinion that an alleged victim’s behavior is “consistent with having been sexually  
3 abused,” must also be rendered by a qualified expert, not a lay witness. The opinion cannot be  
4 conveyed by police, parents, investigators, or anyone else not properly noticed and qualified as an  
5 expert. The plain language of **NRS 50.345** expressly restricts this type of testimony to experts.

6 In addition, **NRS 50.345** does not authorize experts to cross the line into “vouching” for  
7 witnesses. An expert witness “may not comment on whether that expert believes that the victim is  
8 telling the truth about the allegations of abuse[.]” Perez v. State, 129 Nev. Adv. Op. 90, 313 P.3d  
9 862, 870 (2013)(internal citation omitted).

10 Finally, the Court should note that **NRS 50.345** does not say that this type of testimony  
11 must be admitted, even if it is presented by an expert. The statute merely says the expert testimony  
12 is “not inadmissible.” Thus, the Court retains its discretion to deny admission of such testimony as  
13 unduly prejudicial, misleading, unsupported, incredible, inflammatory, irrelevant, or for any other  
14 reason consistent with its role as “gatekeeper” to the evidence in this case.

15 **CONCLUSION**

16 Based on the foregoing, the State should not be allowed to elicit lay opinion testimony that  
17 the accusers’ behavior in this case is consistent with the behavior of a victim of sexual abuse and  
18 the Defense requests that this Court enter an order in limine that no such testimony be elicited at  
19 trial.

20 DATED this 30th day of March, 2017.

21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER

23 By: /s/ Carli L Kierny  
24 CARLI L. KIERNY, #12010  
25 Chief Deputy Public Defender  
26  
27  
28

1 **NOTICE OF MOTION**

2 TO: CLARK COUNTY DISTRICT ATTORNEY, Attorney for Plaintiff:

3 YOU WILL PLEASE TAKE NOTICE that the Public Defender's Office will bring the  
4 above and foregoing Motion on for hearing before the Court on the 11<sup>th</sup> day of April, 2017 at 9:00  
5 a.m.

6 DATED this 30th day of March, 2017.

7 PHILIP J. KOHN  
8 CLARK COUNTY PUBLIC DEFENDER

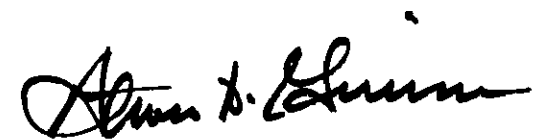
9  
10 By: /s/ Carli L Kierny  
11 CARLI L. KIERNY, #12010  
12 Chief Deputy Public Defender

13  
14 **CERTIFICATE OF ELECTRONIC FILING**

15 I hereby certify that service of the above and foregoing was served via electronic  
16 e-filing to the Clark County District Attorney's Office on the 30<sup>th</sup> day of March, 2017 by  
17 Electronic Filing to:

18 District Attorneys Office  
19 E-Mail Address:  
20 Jaclyn.Motl@clarkcountyda.com

21 /s/ Anita H Harrold  
22 Secretary for the Public Defender's Office



CLERK OF THE COURT

1 **OPPS**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 STACEY KOLLINS  
6 Chief Deputy District Attorney  
7 Nevada Bar #005391  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 **DISTRICT COURT**  
8  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,  
11 Plaintiff,

12 -vs-

13 **JOSE AZUCENA,**  
14 **#7037259**

15 Defendant.

CASE NO: **C-17-321044-1**

DEPT NO: **II**

16  
17 **STATE'S OPPOSITION TO DEFENDANT'S MOTION**  
18 **TO PRECLUDE LAY OPINION**

19 DATE OF HEARING: **APRIL 11, 2017**  
20 TIME OF HEARING: **9:00 AM.**

21 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
22 District Attorney, through STACEY KOLLINS, Chief Deputy District Attorney, and hereby  
23 submits the attached Points and Authorities in Opposition to Defendant's Motion to Preclude  
24 Lay Opinion.

25 This opposition is made and based upon all the papers and pleadings on file herein, the  
26 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
27 deemed necessary by this Honorable Court.

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1 POINTS AND AUTHORITIES

2 LEGAL ARGUMENT

3 Defendant begins by citing NRS 50.345<sup>1</sup> and opining: “Implicit in this statute is the  
4 corollary that lay opinion testimony is an inappropriate method for the State to establish that  
5 the behavior or mental or physical condition of an alleged victim in a particular case is  
6 consistent with the behavior of a typical sexual assault victim.” (Defendant’s Motion, p. 3; 8-  
7 10). No such corollary exists. In fact, this statute implies the opposite: that an opinion that  
8 behavior is consistent with a victim of sexual assault is a perfectly appropriate line of  
9 questioning, whether through a retained, independent expert, or based on a lay person’s  
10 experience.

11 If the defendant’s statement was true, then the legislature would not have enacted NRS  
12 50.265.

13 NRS 50.265 states:

14 If the witness is not testifying as an expert, his testimony in the  
15 form of opinions or inferences is limited to those opinions or  
inferences which are:

- 16 1. Rationally based on the perception of the witness; and  
17 2. Helpful to a clear understanding of his testimony or the  
18 determination of a fact in issue.

19 The statute specifically allows for the lay testimony sought to be excluded and does not  
20 limit certain testimony to only “expert opinions.” Neither the statute nor the case law  
21 specifically precludes the testimony of a lay witness.

22 The defendant states: “Nevada case law supports the position that to establish that an  
23 alleged victim’s behavior is consistent with sexual abuse, the State must rely on the opinion  
24 of experts, not mere lay witnesses.” (Defendant’s Motion, p. 3; 19-20). To support this  
25 supposition, he cites Townsend v. State, 103 Nev. 113 (1987) and further states: “the Nevada

26 \_\_\_\_\_  
27 <sup>1</sup> 50.345. **Expert testimony to show victim's behavior or condition is consistent with behavior or condition of victim**  
28 **of sexual assault:** In any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's  
behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault.

1 Supreme Court noted that opinions regarding whether an alleged victim has reacted in ways  
2 consistent with the behavior of other sexually abused children ‘...represents both the peculiar  
3 expertise and consummate purpose of an expert’s analysis.’ Townsend at 118.” In Townsend,  
4 the Court addresses whether a retained, non-percipient witness can testify to whether in their  
5 opinion the child witness has been sexually abused. This is not analogous to what the  
6 defendant seeks to exclude.

7 This defendant uses a selected part of Townsend, out of context, to support his position  
8 that only an expert can give testimony concerning a victim’s reactions. The paragraph states  
9 in full:

10 ”In the instant case, it is apparent that expert testimony concerning  
11 post-traumatic stress disorder patterns in sexually abused children  
12 satisfied the requirement of the evidence code in providing jury  
13 enlightenment on a critical and relevant subject of an esoteric  
14 nature. Similarly, it was proper for the State's expert to express an  
15 opinion on the issue of whether the child had, in fact, been sexually  
16 assaulted or abused. Such an opinion, although embracing an  
17 ultimate issue, represents both the peculiar expertise and  
18 consummate purpose of an expert's analysis. In both instances, the  
19 testimony was highly probative in this type of secretive crime  
20 where ordinarily the only percipient witness is the child-victim;  
21 the prospect of unfair prejudice thus paled in comparison.”

22 This statement does not mandate that the State is precluded from using lay witness  
23 testimony in its case in chief as asserted by Defendant. Defendant further opines: “According  
24 to Townsend, the type of testimony made admissible by NRS 50.345 is the exclusive province  
25 of experts.” This is also untrue as noted above. (Defendant’s Motion, p. 2; 23-24).

26 The Nevada Supreme Court addresses lay witness testimony. "A lay witness' opinion  
27 is not admissible unless it is (1) rationally based on the perception of the witness and (2)  
28 helpful to a clear understanding of his testimony or the determination of a fact in issue."  
Sterling v. State, 108 Nev. 391 (1992).

Whether the testimony of a lay witness is appropriate is within the province of this  
Court. The United States Supreme Court has supported this contention.

“In my judgment, however, it is much more likely that juries will  
be guided by the instructions of the trial judge concerning the  
credibility of expert as well as lay witnesses. The strong  
presumption that juries will follow the court's instructions, see,  
e.g., Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702,

1 1709, 95 L.Ed.2d 176 (1987), applies to exculpatory as well as  
2 inculpatory evidence. Common sense suggests that the testimony  
3 of disinterested third parties that is relevant to the jury's credibility  
4 determination will assist rather than impair the jury's  
5 deliberations. As with the reliance on the potential unreliability of  
6 this type of evidence, the reliance on a fear that the average jury is  
7 not able to assess the weight of this testimony reflects a distressing  
8 lack of confidence in the intelligence of the average American.  
9 U.S. v. Scheffer, 523 U.S. 303 (1998).

6 Defendant also specifically cites to the case of Lord v. State, 107 Nev. 28 (1991),  
7 wherein our Nevada Supreme Court held that it was error for a police officer to provide lay  
8 opinion testimony that the defendant's injuries indicated that he had recently been in a fight.  
9 Id., at 33.

10 In so holding the Court stated:

11 Detective Hatch was allowed to testify that, in his opinion, based  
12 on his law enforcement experience, certain minor injuries on Lord  
13 indicated that Lord had recently been in a fight. Lord contends that  
14 it was error to permit this testimony on a medical issue because  
15 Detective Hatch was not qualified as a medical expert. Without  
16 deprecating Detective Hatch's law enforcement experience, we are  
17 persuaded by Lord's contention. When, as here, the cause of  
18 injuries is not immediately apparent, the opinion as to the cause  
19 should be given by one qualified as a medical expert, not by a law  
20 enforcement officer, pursuant to NRS 50.275. Here, for example,  
21 the physician might have testified on this point. In other cases  
22 where it is apparent that the victim has been in a fight, no opinion  
23 is needed. A photograph of the injuries and counsel's argument  
24 will suffice to inform the jury. In any event, layperson opinion  
25 pursuant to NRS 50.265 is not an appropriate vehicle to illuminate  
26 the cause of these types of injuries. Despite the above, however,  
27 we cannot conclude that this error prejudiced Lord's substantial  
28 rights. There was other strong evidence of guilt. Additionally, on  
cross-examination by defense counsel, Detective Hatch admitted  
that he was uncertain how fresh the wounds were and that the  
wounds could have been caused by simple accident, rather than a  
fight.

23 Id., 107 at 33-34, 806 P.2d 548 at 551.

24 Unlike the facts of Lord, *supra*, the State has no intention of putting a police officer on  
25 the stand in this case, to testify whether the any physical injuries and/or wounds to the victim  
26 in this case are consistent with sexual assault. Obviously, any testimony of *that nature* will  
27 come from qualified medical experts who examined and/or treated the victim in this case.

28 //

1 To preclude the testimony of any witness, prior to trial, based on Defendant's  
2 premonitions concerning the witness' testimony is counterproductive. Defendant will have  
3 ample opportunity to object to the testimony at the time the witness is called, if they should  
4 happen to testify outside the purview of NRS 50.265.

5 **CONCLUSION**

6 Based upon the above and foregoing Points and Authorities, Defendant's Motion in  
7 Limine to Preclude Lay Opinion Testimony must be DENIED.

8 DATED this 28th day of April, 2017.

9 Respectfully submitted,

10 STEVEN B. WOLFSON  
11 Clark County District Attorney  
12 Nevada Bar #001565

13 BY /s/ STACEY KOLLINS  
14 STACEY KOLLINS  
15 Chief Deputy District Attorney  
16 Nevada Bar #005391

17  
18 **CERTIFICATE OF SERVICE**

19 I hereby certify that service of the above and foregoing was made this 7th day of APRIL  
20 2017, to:

21 JENNIFER SCHWARTZ, DPD  
22 harrolah@ClarkCountyNV.gov

23  
24 BY /s/ HOWARD CONRAD  
25 Secretary for the District Attorney's Office  
26 Special Victims Unit

27  
28 hjc/SVU

CLERK OF THE COURT

1 EXPR  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 12010  
6 **PUBLIC DEFENDERS OFFICE**  
7 309 South Third Street, Suite 226  
8 Las Vegas, Nevada 89155  
9 Telephone: (702) 455-4685  
10 Facsimile: (702) 384-1969  
11 Attorneys for Defendant

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 )  
11 Plaintiff, )  
12 )  
13 v. )  
14 )  
15 JOSE AZUCENA, )  
16 Defendant. )

CASE NO. C-17-321044-1  
DEPT. NO. II

14 **EX PARTE ORDER FOR TRANSCRIPT**

15 Upon the ex parte application of the above-named Defendant, JOSE AZUCENA,  
16 by and through, CARLI L. KIERNY, Deputy Public Defender, and good cause appearing  
17 therefor,

18 IT IS HEREBY ORDERED that the certified court reporter/recorder , prepare at  
19 State expense, a transcript of the proceedings for case C-17-321044-1 heard on March 23, 2017  
20 in District court Department II.

21 DATED this 27th day of March, 2017.

22   
23 \_\_\_\_\_  
24 DISTRICT COURT JUDGE

24 Submitted by:  
25 PHILIP J. KOHN  
26 CLARK COUNTY PUBLIC DEFENDER

26 By for  
27 CARLI L. KIERNY, #12010  
28 Deputy Public Defender

ORIGINAL

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03/31/2017 10:00:24 AM

1 **ROC**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
3 STACEY KOLLINS  
Chief Deputy District Attorney  
4 Nevada Bar #05391  
200 Lewis Avenue  
5 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
6 Attorney for Plaintiff

CLERK OF THE COURT

7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 **JOSE AZUCENA,**  
14 **#7037259**

15 Defendant.

CASE NO: **C-17-321044-1**

DEPT NO: **II**

16  
17 **RECEIPT OF COPY**

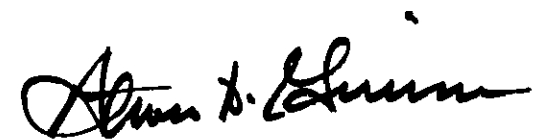
18 **RECEIPT OF COPY of the 51.385 NOTICE and VWAC WITNESS PAYMENT**  
19 **RECIPTS (2) for Witness A.M. is hereby acknowledged this 31 day of**  
20 **MARCH, 2017.**

21 DAVID WESTBROOK, DPD  
22 CARLI KIERNY, DPD  
ATTORNEYS FOR DEFENDANT

23 BY

westbrpd@clarkcountynv.gov  
kiernycl@clarkcountynv.gov, Nevada

24  
25  
26  
27  
28 hjc/SVU



CLERK OF THE COURT

1 **SLOW**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
3 STACEY KOLLINS  
Chief Deputy District Attorney  
4 Nevada Bar #005391  
200 Lewis Avenue  
5 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
6 Attorney for Plaintiff

7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,  
11 Plaintiff,  
12 -vs-  
13 **JOSE AZUCENA,**  
**#7037259**  
14 Defendant.  
15

CASE NO: **C-17-321044-1**  
DEPT NO: **II**

16  
17 **SUPPLEMENTAL NOTICE OF WITNESSES**  
18 **AND/OR EXPERT WITNESSES**  
**[NRS 174.234]**

19 **TO: JOSE AZUCENA, Defendant; and**

20 **TO: DEPUTY PUBLIC DEFENDER, Counsel of Record:**

21 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the STATE OF  
22 NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief:

23 \*indicates additional witness(es) and/or modification(s)

24 \*AMADOR, JANETTE; VAWA/U VISA CASEWORKER, HERMANDAD  
25 MEXICANA TRANSNACIONAL, 2900 STEWART AVE, LVN 89101

26 CETL, DR. SANDRA; Will testify as a medical expert as to the nature, process and  
27 limitations of sexual assault examinations in general, and/or as to the sexual assault  
28 examination, and findings of the victim(s) in the instant case.

1 CLARK COUNTY COURT INTERPRETER

2 COR; UMC RECORDS

3 ESPINOSA, ELIZABETH; SNCAC, Will testify as an expert as to the nature, process  
4 and limitations of forensic interviewing, and/or as the forensic interview(s) conducted in the  
5 instant case.

6 \*ESTRADA, ALICIA; VAWA/U VISA PROGRAM COORDINATOR,  
7 HERMANDAD MEXICANA TRANSNACIONAL, 2900 STEWART AVE, LVN 89101

8 GARCIA-SANCHEZ, MARTHA; 5075 SPYGLASS HILL DR #1031 LVN 89142

9 LARA, MARIA ELENA; 4820 E CHARLESTON BLVD #8 LVN 89104

10 \*LOSADA, WENDY; RAPE CRISIS CENTER OF SO. NEV

11 \*MOSQUERA, LUZ MARINA; DIRECTOR, HERMANDAD MEXICANA  
12 TRANSNACIONAL

13 PACULT, DR. JOHN; Will testify as an expert regarding the grooming techniques used  
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16 who is being sexually abused, including difficulties and issues surrounding the disclosure of  
17 sexual abuse by a minor.

18 \*PRICE, ROGER; LVMPD#05626

19 SCHMIDT, JACOB; LVMPD #15319

20 These witnesses are in addition to those witnesses endorsed on the Information or  
21 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert  
22 Witnesses has been filed.

23 A copy of each expert witness' curriculum vitae, if available, is attached hereto.

24 STEVEN B. WOLFSON  
25 Clark County District Attorney  
26 Nevada Bar #001565

27 BY /s/ STACEY KOLLINS  
28 STACEY KOLLINS  
Chief Deputy District Attorney  
Nevada Bar #005391



**CERTIFICATE OF SERVICE**

I hereby certify that service of the above and foregoing was made this 5th day of APRIL 2017, to:

DAVID WESTBROOK, DPD  
CARLI KIERNY, DPD  
harrolah@ClarkCountyNV.gov

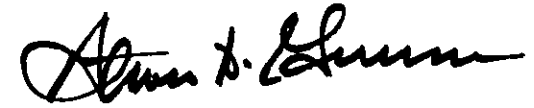
BY /s/ HOWARD CONRAD  
Secretary for the District Attorney's Office  
Special Victims Unit

hjc/SVU

ORIGINAL

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1 **ROC**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 STACEY KOLLINS  
6 Chief Deputy District Attorney  
7 Nevada Bar #005391  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff



CLERK OF THE COURT

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

12 **JOSE AZUCENA,**  
13 **#7037259**

14 Defendant.

CASE NO: C-17-321044-1

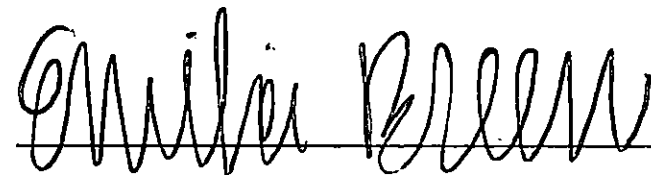
DEPT NO: II

15  
16 **RECEIPT OF COPY**

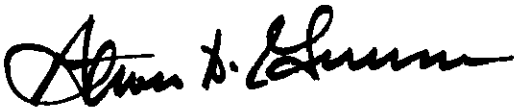
17  
18 RECEIPT OF COPY of the above and foregoing THREE DISCS OF NAMED  
19 VICTIMS (ONE VIDEO, TWO AUDIO), U VISA PAPERWORK FROM HERMANID  
20 MEXICANA, FILE REVIEW PAPERWORK FROM DET. M. CAMPBELL (LVMPD) is  
21 hereby acknowledged this 7TH day of APRIL, 2017.

22 DAVID WESTBROOK, DPD  
23 CARLI KIERNY, DPD  
24 ATTORNEYS FOR DEFENDANT

25 BY



26  
27  
28 hjc/SVU

  
CLERK OF THE COURT

1 NOTC  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 12010  
6 **PUBLIC DEFENDERS OFFICE**  
7 309 South Third Street, Suite 226  
8 Las Vegas, Nevada 89155  
9 Telephone: (702) 455-4685  
10 Facsimile: (702) 455-5112  
11 Attorneys for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 )  
11 Plaintiff, ) CASE NO. C-17-321044-1  
12 )  
13 v. ) DEPT. NO. II  
14 JOSE AZUCENA, )  
15 )  
16 Defendant, )  
17 )  
18 )

14 **DEFENDANT'S NOTICE OF WITNESSES, PURSUANT TO NRS 174.234**

15 TO: CLARK COUNTY DISTRICT ATTORNEY:

16 You, and each of you, will please take notice that the Defendant, JOSE AZUCENA,  
17 intends to call the following witnesses in his case in chief:

- 18
- 19 1. Leonardo de Santiago: Charleston Gardens Apts., Apt. # UNK
  - 20 2. Jane L. Everitt: 330 S. 3<sup>rd</sup> St., Las Vegas, NV 89155
  - 21 3. Maria Elena Lara: 4359 Cy Cliffview, Las Vegas, NV 89121
  - 22 4. Juanito LNU: Charleston Gardens Apts., Apt. # UNK
  - 23 5. Orlando LNU: Charleston Gardens Apts., Apt. # UNK
  - 24 6. Litzzi Paredes: Charleston Gardens Apts., Apt. # UNK
  - 25 7. Carol Partiguan: 330 S. 3<sup>rd</sup> St., Las Vegas, NV 89155
  - 26 8. COR, Sunrise Hospital: 3186 S. Maryland Pkwy., Las Vegas, NV 89109
  - 27 9. Felix Terrazas: 1234 N. Boulder Hwy., Henderson, NV 89011

24 The defense also adopts each and every witness noticed by the State.

25 DATED this 10<sup>th</sup> day of April, 2017.

26 PHILIP J. KOHN  
27 CLARK COUNTY PUBLIC DEFENDER

28 By: /s/ Carli L Kierny  
CARLI L. KIERNY, #12010  
Deputy Public Defender

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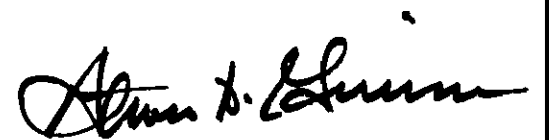
CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of the above and foregoing was served via electronic e-filing to the Clark County District Attorney's Office on the 10<sup>th</sup> day of April, 2017 by Electronic Filing to:

District Attorneys Office  
E-Mail Address:  
Jaclyn.Motl@clarkcountyda.com

/s/ Anita H Harrold  
Secretary for the Public Defender's Office

Case Name: Jose Azucena  
Case No.: C-17-321044-1  
Dept. No.: District Court Department II



CLERK OF THE COURT

1 **SLOW**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
3 CHRISTOPHER HAMNER  
Chief Deputy District Attorney  
4 Nevada Bar #011390  
200 Lewis Avenue  
5 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
6 Attorney for Plaintiff

7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 **JOSE AZUCENA,**  
14 **#7037259**

15 Defendant.

CASE NO: **C-17-321044-1**

DEPT NO: **II**

16  
17 **SECOND SUPPLEMENTAL NOTICE OF WITNESSES**

18 **AND/OR EXPERT WITNESSES**  
19 **[NRS 174.234]**

20 **TO: JOSE AZUCENA, Defendant; and**

21 **TO: DEPUTY PUBLIC DEFENDER, Counsel of Record:**

22 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the STATE OF  
NEVADA intends to call the following witnesses and/or expert witnesses in its case in chief:

23 \*indicates additional witness(es) and/or modification(s)

24 AMADOR, JANETTE; VAWA/U VISA CASEWORKER, HERMANDAD  
25 MEXICANA TRANSNACIONAL, 2900 STEWART AVE, LVN 89101

26 CETL, DR. SANDRA; Will testify as a medical expert as to the nature, process and  
27 limitations of sexual assault examinations in general, and/or as to the sexual assault  
28 examination, and findings of the victim(s) in the instant case.

1 CLARK COUNTY COURT INTERPRETER

2 COR; UMC RECORDS

3 ESPINOSA, ELIZABETH; SNCAC, Will testify as an expert as to the nature, process  
4 and limitations of forensic interviewing, and/or as the forensic interview(s) conducted in the  
5 instant case.

6 ESTRADA, ALICIA; VAWA/U VISA PROGRAM COORDINATOR,  
7 HERMANDAD MEXICANA TRANSNACIONAL, 2900 STEWART AVE, LVN 89101

8 GARCIA-SANCHEZ, MARTHA; 5075 SPYGLASS HILL DR #1031 LVN 89142

9 \*KATOWICH; LVMPD#06360

10 LARA, MARIA ELENA; 4820 E CHARLESTON BLVD #8 LVN 89104

11 LOSADA, WENDY; RAPE CRISIS CENTER OF SO. NEV

12 MOSQUERA, LUZ MARINA; DIRECTOR, HERMANDAD MEXICANA  
13 TRANSNACIONAL

14 PACULT, DR. JOHN; Will testify as an expert regarding the grooming techniques used  
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16 impact of sexual abuse on a minor, as well as anticipated responses and reactions of a minor  
17 who is being sexually abused, including difficulties and issues surrounding the disclosure of  
18 sexual abuse by a minor.

19 PRICE, ROGER; LVMPD#05626

20 \*RUBLE; LVMPD#14982

21 SCHMIDT, JACOB; LVMPD #15319

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 These witnesses are in addition to those witnesses endorsed on the Information or  
2 Indictment and any other witness for which a separate Notice of Witnesses and/or Expert  
3 Witnesses has been filed.

4 A copy of each expert witness' curriculum vitae, if available, is attached hereto.

5 STEVEN B. WOLFSON  
6 Clark County District Attorney  
7 Nevada Bar #001565

8 BY /s/ CHRISTOPHER HAMNER  
9 CHRISTOPHER HAMNER  
10 Chief Deputy District Attorney  
11 Nevada Bar #011390

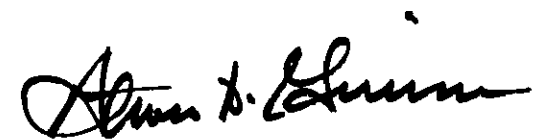
12  
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16  
17  
18 **CERTIFICATE OF SERVICE**

19 I hereby certify that service of the above and foregoing was made this 11th day of  
20 APRIL 2017, to:

21 DAVID WESTBROOK, DPD  
22 CARLI KIERNY, DPD  
23 harrolah@ClarkCountyNV.gov

24 BY /s/ HOWARD CONRAD  
25 Secretary for the District Attorney's Office  
26 Special Victims Unit

27  
28 hjc/SVU



CLERK OF THE COURT

1 **SLOW**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
3 CHRISTOPHER HAMNER  
Chief Deputy District Attorney  
4 Nevada Bar #011390  
200 Lewis Avenue  
5 Las Vegas, Nevada 89155-2212  
(702) 671-2500  
6 Attorney for Plaintiff

7  
8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 **JOSE AZUCENA,**  
14 **#7037259**

15 Defendant.

CASE NO: **C-17-321044-1**

DEPT NO: **II**

16  
17 **THIRD SUPPLEMENTAL NOTICE OF WITNESSES**

18 **AND/OR EXPERT WITNESSES**  
19 **[NRS 174.234]**

20 **TO: JOSE AZUCENA, Defendant; and**

21 **TO: DEPUTY PUBLIC DEFENDER, Counsel of Record:**

22 **YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE** that the STATE OF  
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1 CLARK COUNTY COURT INTERPRETER

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5 instant case.

6 ESTRADA, ALICIA; VAWA/U VISA PROGRAM COORDINATOR,  
7 HERMANDAD MEXICANA TRANSNACIONAL, 2900 STEWART AVE, LVN 89101

8 \*ESTRELLA, NICHOLAS; UNK

9 GARCIA-SANCHEZ, MARTHA; 5075 SPYGLASS HILL DR #1031 LVN 89142

10 KATOWICH; LVMPD#06360

11 LARA, MARIA ELENA; 4820 E CHARLESTON BLVD #8 LVN 89104

12 LOSADA, WENDY; RAPE CRISIS CENTER OF SO. NEV

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20 PRICE, ROGER; LVMPD#05626

21 RUBLE; LVMPD#14982

22 SCHMIDT, JACOB; LVMPD #15319

23 //

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5 STEVEN B. WOLFSON  
6 Clark County District Attorney  
7 Nevada Bar #001565

8 BY /s/ CHRISTOPHER HAMNER  
9 CHRISTOPHER HAMNER  
10 Chief Deputy District Attorney  
11 Nevada Bar #011390

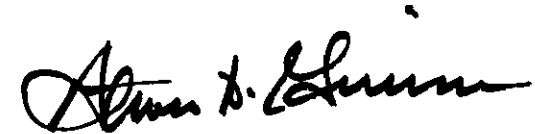
12  
13  
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17  
18 **CERTIFICATE OF SERVICE**

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20 APRIL 2017, to:

21 DAVID WESTBROOK, DPD  
22 CARLI KIERNY, DPD  
23 harrolah@ClarkCountyNV.gov

24 BY /s/ HOWARD CONRAD  
25 Secretary for the District Attorney's Office  
26 Special Victims Unit  
27

28 hjc/SVU



CLERK OF THE COURT

1 NOTC  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 12010  
6 **PUBLIC DEFENDERS OFFICE**  
7 309 South Third Street, Suite 226  
8 Las Vegas, Nevada 89155  
9 Telephone: (702) 455-4685  
10 Facsimile: (702) 455-5112  
11 Attorneys for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 )  
11 Plaintiff, )  
12 )  
13 v. )  
14 )  
15 JOSE AZUCENA, )  
16 )  
17 Defendant, )  
18 )

CASE NO. C-17-321044-1

DEPT. NO. II

14 **DEFENDANT'S SUPPLEMENTAL NOTICE OF WITNESSES,**  
15 **PURSUANT TO NRS 174.234**

16 TO: CLARK COUNTY DISTRICT ATTORNEY:

17 You, and each of you, will please take notice that the Defendant, JOSE  
18 AZUCENA, intends to call the following witness in his case in chief:

19 Bruce McAllister, Clark County Public Defender's Office Investigator

20 DATED this 12th day of April, 2017.

21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER

23 By: /s/ Carli L Kierny  
24 CARLI L. KIERNY, #12010  
25 Deputy Public Defender  
26  
27  
28

1 CERTIFICATE OF ELECTRONIC FILING

2 I hereby certify that service of the above and foregoing was served via electronic  
3 e-filing to the Clark County District Attorney's Office on the 12<sup>th</sup> day of April, 2017 by Electronic

4 Filing to:

5 District Attorneys Office  
6 E-Mail Address:  
Jaclyn.Motl@clarkcountyda.com

7  
8 /s/ Anita H Harrold  
9 Secretary for the Public Defender's Office

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26 Case Name: Jose Azucena  
27 Case No.: C-17-321044-1  
28 Dept. No.: District Court, Department II



A handwritten signature in black ink, appearing to read "Alan D. Quinn".

CLERK OF THE COURT

**EIGHTH JUDICIAL DISTRICT COURT**

**MEMORANDUM**

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**TO:** ALL COUNSEL (via e-service)  
**FROM:** District Court, Department 2  
**SUBJECT:** *State of Nevada vs. Jose Azucena (C-17-321044-1)*  
**DATE:** April 12, 2017

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Counsel,

This trial schedule **supersedes** the schedule given at Calendar Call for the above-referenced matter:

**Week 1:**

Monday, April 17, 2017: 9:00 a.m. to 5:00 p.m.  
Tuesday, April 18, 2017: 11:00 a.m. to 5:00 p.m.  
Wednesday, April 19, 2017: 10:30 a.m. to 5:00 p.m.

**Week 2:**

Monday, April 24, 2017: 9:00 a.m. to 5:00 p.m.  
Tuesday, April 25, 2017: 1:00 p.m. to 5:00 p.m.  
Wednesday, April 26, 2017: 1:00 p.m. to 5:00 p.m.  
Thursday, April 27, 2017: 1:00 p.m. to 5:00 p.m.  
Friday, April 28, 2017: 9:00 a.m. to 5:00 p.m.

THESE DATES AND TIMES ARE SUBJECT TO CHANGE. THIS INFORMATION IS PROVIDED AS A COURTESY TO ASSIST YOU IN PLANNING YOUR BUSINESS. THE COURT WILL ATTEMPT TO ACCOMMODATE EVERYBODY'S SCHEDULING ISSUES AT THE START OF TRIAL.

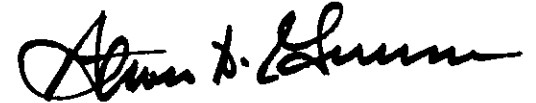
*/s/ Melody Howard*  
Judicial Executive Assistant  
To the Honorable Richard Scotti  
Department II  
702.671.4318

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**ROC**  
STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
STACEY KOLLINS  
Chief Deputy District Attorney  
Nevada Bar #005391  
200 Lewis Avenue  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

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CLERK OF THE COURT

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,  
Plaintiff,

-vs-

**JOSE AZUCENA,**  
**#7037259**

Defendant.

CASE NO: **C-17-321044-1**

DEPT NO: **II**

**RECEIPT OF COPY**

RECEIPT OF COPY of the foregoing names of witnesses:

- 1) LITZI PAREDES, 4828 E CHARLESTON BLVD #7, LVN 89104
- 2) PARENT/GUARDIAN OF LITZI PAREDES, SYLVIA CASTANEDA,  
4828 E CHARLESTON BLVD #7, LVN 89104
- 3) LEONARDO "LEO" DE SANTIAGO, 4820 E CHARLESTON BLVD #10,  
LVN 89104
- 4) PARENT/GUARDIAN OF LEONARDO "LEO" DE SANTIAGO, LORENA  
GARCIA, 4820 E CHARLESTON BLVD #10, LVN 89104

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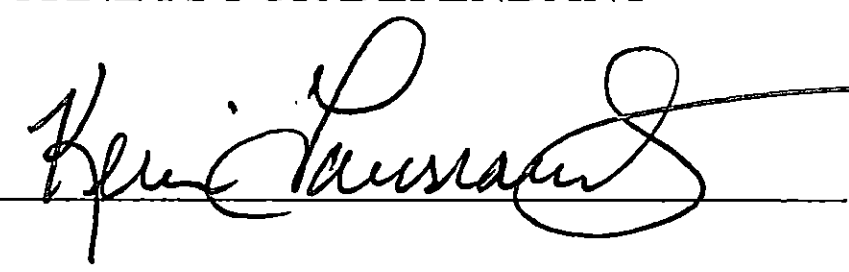
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- 5) ORLANDO LNU / JUANITO LNU, 4820 E CHARLESTON BLVD #10, LVN 89104
- 6) MARIA ESTRELLA BARAJAS, 4701 E SAHARA AVE #257, LVN 89104

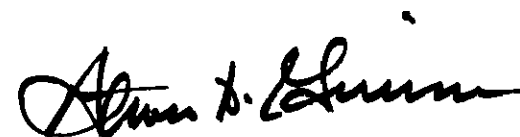
*11<sup>th</sup>*

is hereby acknowledged this ~~7<sup>TH</sup>~~ day of APRIL, 2017.

DAVID WESTBROOK, DPD  
CARLI KIERNY, DPD  
ATTORNEYS FOR DEFENDANT

BY 

hjc/SVU



CLERK OF THE COURT

1 MOT  
2 PHILIP J. KOHN, PUBLIC DEFENDER  
3 NEVADA BAR NO. 0556  
4 CARLI L. KIERNY, DEPUTY PUBLIC DEFENDER  
5 NEVADA BAR NO. 12010  
6 **PUBLIC DEFENDERS OFFICE**  
7 309 South Third Street, Suite 226  
8 Las Vegas, Nevada 89155  
9 Telephone: (702) 455-4685  
10 Facsimile: (702) 455-5112  
11 Attorneys for Defendant

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA, )  
10 Plaintiff, )  
11 v. )  
12 JOSE AZUCENA, )  
13 Defendant, )  
14 \_\_\_\_\_ )

CASE NO. C-17-321044-1  
DEPT. NO. II

15 **MOTION TO RECONSIDER DEFENDANT’S MOTION TO COMPEL PRODUCTION**  
16 **OF DISCOVERY & BRADY MATERIAL—REDACTED**

17 COMES NOW, the Defendant, JOSE AZUCENA, by and through his counsel, P.  
18 DAVID WESTBROOK and CARLI L. KIERNY, Chief Deputy Public Defenders, and hereby  
19 requests that the Court order the State of Nevada to produce the discovery & Brady material  
20 discussed herein **at least 30 days before trial** pursuant to NRS 174.235; NRS 174.285; Kyles v.  
21 Whitley, 514 U.S. 419 (1995); Brady v. Maryland, 373 U.S. 83 (1963) (and their progeny).

22 This Motion is made and based upon all the papers and pleadings on file herein,  
23 the attached Declaration of Counsel, and oral argument at the time set for hearing this Motion.

24 DATED this 27<sup>th</sup> day of March, 2017.

25  
26  
27 PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

28 By: /s/ P David Westbrook  
P. DAVID WESTBROOK, #9278  
Chief Deputy Public Defender



1 **DECLARATION**

2 P. DAVID WESTBROOK makes the following declaration:

3 1. I am an attorney licensed to practice law in the State of Nevada and I am a  
4 Deputy Public Defender for the Clark County Public Defender's Office, counsel of record for  
5 Defendant, JOSE AZUCENA, in the present matter;

6 2. I make this Declaration in support of Defendant's Motion to Reconsider  
7 Defendant's Motion to Compel Production of Discovery & Brady Material;

8 3. I am more than 18 years of age and am competent to testify as to the  
9 matters stated herein. I am familiar with the procedural history of the case and the substantive  
10 allegations made by The State of Nevada. I also have personal knowledge of the facts stated  
11 herein or I have been informed of these facts and believe them to be true.

12 I declare under penalty of perjury that the foregoing is true and correct to the best  
13 of my information and belief. (NRS 53.045).

14 EXECUTED this 27<sup>th</sup> day of March, 2017.

15  
16 /s/ P David Westbrook  
17 P. DAVID WESTBROOK

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **PROCEDURAL HISTORY**

3 A partial hearing on Defendant’s Motion to Compel Production of Discovery and Brady  
4 Material was held on March 23, 2017. The word, “partial,” is accurate because defense counsel  
5 was not permitted to fully argue the motion presented. The Court refused to address the carefully  
6 itemized list of specific discovery requests, much less permit argument on the requests. At the  
7 end of the hearing, the Court stated that the Motion to Compel was “granted in part and denied in  
8 part,” but when defense counsel asked for clarification as to which parts of the extensive motion  
9 were granted and which denied, the Court refused to provide adequate clarification and instead,  
10 ordered counsel removed from the courtroom by the Marshal.

11 Prior to abruptly ending the oral argument, the Court indicated that its decision to deny  
12 portions of the defense motion was “without prejudice,” and that they may be brought back  
13 before the Court. The instant motion is responsive to that ruling.

14 This motion should not be construed as a concession that any part of the defendant’s  
15 original Motion to Compel was legally inaccurate. The original motion was fully authorized by  
16 both State and Federal law. The discovery requests presented on pages 26-39 were sufficiently  
17 specific and should have been granted in full. The Court abused its discretion in denying the  
18 defense motion, especially given that it was denied summarily, without addressing each specific  
19 request or even letting counsel outline the broader legal issues during oral argument. Thus, the  
20 original defense Motion to Compel is incorporated here by reference, in its entirety. The instant  
21 motion will expand on the original motion and present a legal basis as to why the court must  
22 reconsider the Motion and grant all the associated discovery requests.

23 **STATEMENT OF FACTS**

24 Defendant incorporates by reference the Statement of Facts from the previously filed  
25 Motion to Compel Production of Discovery and Brady Material.

26 ///

27 ///

1 **STATEMENT OF ISSUES**

2 1. The law does not require defendants to first prove evidence exists in order for the court to  
3 order its production.

4 2. The State is required to meet with Detectives and other State actors, review their files,  
5 and produce any discovery therein.

6 3. Defendant's specific discovery requests were not overbroad, and denying them was an  
7 abuse of discretion.

8 **ARGUMENT**

9 **I. THE LAW DOES NOT REQUIRE DEFENDANTS TO FIRST PROVE**  
10 **EVIDENCE EXISTS IN ORDER FOR THE COURT TO ORDER ITS**  
11 **PRODUCTION.**

12 During oral argument, the Court suggested that the filing of a motion to compel  
13 production of discovery and Brady materials is inappropriate unless the defense can demonstrate  
14 that a Brady violation has already occurred. There is absolutely no legal basis for such a ruling.  
15 In fact, the law expresses exactly the opposite.

16 The Supreme Court of the United States does not require defense counsel to divine  
17 particular information within the government's files or provide evidence that is being withheld  
18 before filing a motion to compel:

19  
20 We rejected a similar argument in Strickler. There, the State contended  
21 that examination of a witness' trial testimony, alongside a letter the  
22 witness published in a local newspaper, should have alerted the petitioner  
23 to the existence of undisclosed interviews of the witness by the police. We  
24 found this contention insubstantial. In light of the State's open file policy,  
25 we noted, it is especially unlikely that counsel would have suspected that  
26 additional impeaching evidence was being withheld. **Our decisions lend**  
27 **no support to the notion that defendants must scavenge for hints of**  
28 **undisclosed Brady material when the prosecution represents that all**  
**such material has been disclosed.** As we observed in Strickler, defense  
counsel has **no procedural obligation** to assert constitutional error on the

1 basis of mere suspicion that some prosecutorial misstep may have  
2 occurred.

3 Banks v. Dretke, 540 U.S. 668, 695–96, 124 S. Ct. 1256, 1274–75 (2004)(citing Strickler v.  
4 Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)) (internal citations and quotation  
5 marks omitted)(emphasis added).

6 This Court ruled that Brady/Discovery motions are not appropriate unless the defense can  
7 demonstrate the evidence sought exists and is being withheld. This assertion is absolutely  
8 incorrect. The idea that the defense must satisfy some “burden of proof” before the State can be  
9 compelled to turn over discovery was expressly rejected by Banks and Strickler. An active  
10 discovery dispute need not exist in order for this Court to entertain motions to enforce the  
11 government’s discovery obligations. To decide otherwise would violate Mr. Azucena’s due  
12 process rights, impede his right to confrontation and a fair trial, and compromise his right present  
13 a defense. U.S. CONST. AMENDS. V, VI, XIV; see also, NEV. CONST. ART. 1, Sect. 8.

14 The purpose of a discovery motion is to prevent injustice by clearly outlining what  
15 information the State must turn over and resolve any disputes before trial, when there is still time  
16 to avoid the violation of constitutional rights. The law recognizes that defense lawyers are not  
17 mind readers; we cannot possibly know what the State has in its possession. The State is required  
18 to tell us, and the court to compel them. Thus, this Court must consider defendant’s discovery  
19 motion in full and rule on each request.

20 **II. THE STATE IS REQUIRED TO MEET WITH DETECTIVES AND OTHER**  
21 **STATE ACTORS, REVIEW THEIR FILES, AND PRODUCE ANY DISCOVERY**  
22 **THEREIN.**

23 Prior to trial, prosecutors are required to disclose both inculpatory and exculpatory  
24 information of which they are in actual or constructive possession. See **NRS 174.235**, Brady v.  
25 Maryland, 373 U.S. 83 (1963), Kyles v. Whitley, 514 U.S. 419, (1995). In order for prosecutors  
26 to disclose evidence, they have to know about it, and to know about it, they have to actively seek  
27 it out. This is not just common sense, it also happens to be the law. 514 U.S. 419, 437-38  
28

1 The prosecution has an affirmative duty to seek out and produce evidence favorable to  
2 the defense. “The prosecution’s affirmative duty to disclose evidence favorable to a defendant  
3 can trace its origins to early 20th century strictures against misrepresentation and is of course  
4 most prominently associated with this Court’s decision in *Brady v. Maryland*...” *Kyles*, supra,  
5 514 U.S. at 432. The court cautioned that evidence, “cannot be kept out of the hands of the  
6 defense just because the prosecutor does not have it”. *Id.* at 437-38. The danger of allowing  
7 prosecutors to remain willfully ignorant as to the evidence they possess was demonstrated during  
8 the 3/23/17 oral argument.

9 Early in the hearing, the district attorney stated, “It is my belief that all evidence in the  
10 State’s possession has been turned over to the defense.”<sup>1</sup> The Court questioned the district  
11 attorney as to whether this included material in its constructive possession as well, such as  
12 evidence held by police or other State agents. The district attorney assured the Court that it did.  
13 These States assurances were instantly proven to be inaccurate and unreliable.

14 First, the defense noted that the State had not met in person with the detectives in this  
15 case or reviewed their physical files. After some back and forth, the State confirmed that this was  
16 true. Mr. Hamner called the lead detective and looked through a digital file, but had not met with  
17 him in person or reviewed his physical file. So, just a few minutes after the State assured the  
18 Court “everything” had been produced, that statement was exposed as inaccurate.

19 Next, the defense noted that the State had not contacted its own Victim Witness unit  
20 (VWAC) to inquire about whether witnesses had been offered benefits—including U-Visa  
21 assistance—for their testimony. The State could make no representations about the U-Visa  
22 information because they had apparently failed to inquire about it. Ms. Kollins did say that the  
23 defense was “aware” of the payment of witness fees and counseling referrals, but admitted that

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25  
26 <sup>1</sup>As no transcript of the proceeding is currently available, the precise language of this statement  
27 is based on defense counsel’s memory and belief, as is the rest of the record of this proceeding.  
28 The defense reserves the right to supplement the instant brief once a transcripts available, editing  
where necessary.

1 no paperwork had been produced. So despite earlier assurances, there was some discovery of  
2 which the district attorney was personally aware, that had not been produced.

3 Finally, the defense noted that there was a “tip line” set up to gather information in this  
4 case, but that the State had failed to produce the resulting recordings, database entries, reports or  
5 notes. The defense also pointed out that this information was specifically requested in its motion  
6 on p. 27, Ln. 16-20. If this evidence exists, it hasn’t been produced. If it has been destroyed, the  
7 defense has not been informed, and thus, cannot file an appropriate Sanborn motion. Sanborn v.  
8 State, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991). The State has not produced “everything.”

9 At the hearing, the defense was prepared to provide additional examples of evidence that  
10 either has not been produced or that the State cannot reliably claim “does not exist,” however;  
11 the Court had counsel removed before this information could be imparted. Fortunately, these  
12 examples are included in defendant’s original Motion to Compel, which has been incorporated  
13 by reference. See Motion to Compel, at 26-39.

14 Ignorance is not a defense to a discovery violation, whether the subject evidence falls  
15 under Brady, or **NRS 174.235**, which requires the State to produce evidence whether it is  
16 exculpatory or not. This Court appeared to accept the State’s assurances that “everything” had  
17 been produced, even after those assurances were proven to be inaccurate and unreliable. This  
18 was an abuse of discretion and the defendant’s Motion to Compel must be reconsidered in its  
19 entirety.

20 **III. DEFENDANT’S SPECIFIC DISCOVERY REQUESTS WERE NOT**  
21 **OVERBROAD, AND DENYING THEM WAS AN ABUSE OF DISCRETION.**

22 Prior to trial, defendants are required to file Brady and statutory discovery motions and  
23 the failure to do so is punished on appeal. **EDCR 3.24** specifically provides for the discovery  
24 motion brought in the instant matter and the Nevada Supreme Court has held that a discovery  
25 motion (and corresponding order) is a prerequisite to obtaining relief under **NRS 174.295** for  
26 later discovery violations:

1 Although **NRS 174.295** provides relief for a prosecutor's failure to notify  
2 defense counsel of all discoverable material, that statute is only operative  
3 in situations where a previous defense motion has been made and a court  
4 order issued. That provision is not applicable to any informal  
arrangements that are made, as here between counsel without benefit of  
court sanction.

5 Donovan v. State, 94 Nev. 671 (Nev. 1978) (internal citations omitted). See also, **NRS 174.125**  
6 (contemplating written discovery motions prior to trial). The Court cannot refuse to consider and  
7 rule on discovery motions any more than the defense can refuse to file them. This is the law, and  
8 our personal convenience is not a factor.

9 Defense attorneys are also required to file Brady motions that include specific requests  
10 for information, or risk suffering a less favorable standard of review on appeal. See United States  
11 v. Bagley, 473 U.S. 667, 680–81, 105 S. Ct. 3375, 3383 (1985)(standard of materiality  
12 applicable in the absence of a specific Brady request is stricter than the harmless-error standard).  
13 Filing timely and detailed discovery and Brady motions is defense counsel's job, and the  
14 defendant has a constitutional right to an attorney who does his job. When a court prevents a  
15 defense attorney from doing his job, whether by summarily denying a motion, refusing to allow  
16 adequate argument, or failing to consider and grant legally valid requests, the court violates the  
17 defendant's rights to effective assistance of counsel and due process of law.

18 With that in mind, the defense is restating its specific requests below. Included, along  
19 with each request, is a short statement about why each request should be granted. Ideally, the  
20 defense would only include those specific requests that were denied by the court, but the court  
21 refused to elucidate precisely which requests were granted and which were denied, so the  
22 defense has no choice but to address everything.<sup>2</sup> In addition, the defense requests oral argument  
23 on this motion.

24 ///

25 ///

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26  
27 <sup>2</sup> That said, items originally listed as "intentionally blank" will be omitted entirely to save space. These were  
28 originally included to retain the internal number-scheme of an internal database project at the Public Defender's  
Office. However, while the blank spaces will be omitted in this motion, the non-sequential numbers will remain.

**DEFENDANT’S SPECIFIC DISCOVERY REQUESTS**

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16</p>	<p><b>1. <u>Statements of Defendant and Any Potential Co-Defendant(s)</u></b></p> <p>All statements made by the defendant and any co-defendants, regardless of whether the statements were written or recorded, including but not limited to:</p> <ul style="list-style-type: none"><li>a. Comments made at the time of arrest or during transport to the detention center;</li><li>b. Any conversations, telephonic or otherwise, intercepted by any/all law enforcement agencies, including federal authorities; and</li><li>c. The substance of any statements, conversations, or correspondence overheard or intercepted by any jail personnel or other inmates which have not been recorded or memorialized.</li></ul>	<p><b><u>This should be granted because:</u></b></p> <p>1) The State did not claim this request is overbroad. It merely pointed out there are no co-defendants in this case. We are not asking for anything that does not exist.</p> <p>2) If the State does not oppose a request, the court must grant it.</p>
<p>17 18 19 20 21 22 23 24 25 26 27</p>	<p><b>2. <u>Statements of Potential Witnesses</u></b></p> <ul style="list-style-type: none"><li>a. Any and all statements (written or recorded) of witnesses and potential witnesses, including, but not limited to:</li><li>b. Audio and/or video recording of any form collected by investigating officers or any other law enforcement agent as part of the investigation of this matter, as well as any related matters;</li><li>c. Notes of interviews that were not later recorded, such as notes of patrol officers, or notes of phone calls made to potential witnesses, or attempts to</li></ul>	<p>1) The state only objected to the phrase, “all statements” as “vague and overbroad.” It isn’t. If the State has interviewed a potential witness, we are entitled to know that, and to receive any memorialization of that statement. This could not be simpler.</p> <p>2) The State agreed that we are entitled to all audio or video recordings.</p>



<p>1 2 3 4 5 6 7</p>	<p>contact such witnesses;</p> <p>d. Interviews of the following individuals: Maria Barajas, J.M., M.M.1, M.M.2, Amanda Moiza, Ricardo Rangel, S.R., Y.E., N.E., Yusnay Rodriguez-Estrada, and any other witness or investigative official involved in the instant matter and any related matter.</p>	<p>3) The defense provided a list of specific witnesses for whom the State must produce statements. It's impossible to get more specific than that.</p>
<p>8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27</p>	<p><b>3. <u>Records Related to Investigation</u></b></p> <p>Any and all records of the Las Vegas Metropolitan Police Department and any other law enforcement agencies involved in the investigation of this or any related matter, including, but not limited to:</p> <p>a. Copies of notes, whether handwritten or otherwise (see Ex. A, attached, for example);</p> <p>b. Investigative leads that were not followed up on and any other matter bearing on the credibility of any State witness;</p> <p>c. Information pertaining to this case or any witnesses in this case, no matter what the form or title of the report, including:</p> <ol style="list-style-type: none"> <li>1) "Case Monitoring Forms,"</li> <li>2) 911 recordings,</li> <li>3) Dispatch logs, and/or</li> <li>4) Information regarding leads or tips provided to law enforcement or a crime tip organization such as Crime Stoppers, including any reward or benefit received for</li> </ol>	<p>1) The State objects to the production of police notes without valid legal basis. Police notes are vital to the defense. To elucidate this point, please review an example of some actual police notes turned over by the State pursuant to a discovery request in a recent case. See Ex. A (attached).</p> <p>2) The State agrees to production of discovery.</p> <p>3) As to 911 recordings, these item are in the possession of the State and we have asked the State to produce them. It is their obligation under Kyles, supra.</p> <p>4) Finally, the State claims "no knowledge" of any 'tips' being received by Metro in this matter.</p>

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	<p>such tip.</p> <p>a. This case was widely covered in local media and most news stories included a plea for “anyone with information about the incidents, or people who believe their children might be victims, to call Metros’ sexual abuse juvenile section or Crime Stoppers.” The defense requests any information recovered from this media request, whether or not the tip proved fruitful.</p>	<p>They don’t know because they have never sought this information, as required by Strickler and Banks, supra. They must be compelled to do so by the Court.</p>
<p>4.</p>	<p><b><u>Crime Scene Analysis, Evidence Collection, and Forensic Testing</u></b></p> <p>Any and all requests, results, reports, and bench notes pertaining to any and all crime scene analysis, evidence collection and/or forensic testing performed in this case, including, but not limited to:</p> <p>a. <b>Recordings:</b> Photographic, video, and/or audio recordings of evidence collection and/or testing;</p> <p>b. <b>Fingerprint Evidence:</b> Any/all latent prints recovered in the instant matter (regardless of their value for identification) as well as exemplars compiled in connection with the investigation of this matter, including:</p> <p>1) Photographs, reports, and recordings related to collecting and testing of fingerprints;</p> <p>2) Results of fingerprint collection and</p>	<p>1) The State does not oppose this request, so it should be granted.</p>

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	<p>comparison, and;</p> <p>3) AFIS (Automated Fingerprint Identification System) searches and/or results;</p> <p>c. <b>DNA Evidence:</b> DNA testing, raw data and , CODIS (Combined DNA Index System) searches and/or results;</p> <p>d. <b>Scientific Evidence:</b> toxicological, chemical, biochemical, laboratory, and/or other laboratory/forensic analyses, including trace evidence analyses, crime scene reconstruction/blood spatter analysis; and</p> <p>e. <b>Forensic Analysis:</b> reports and notes related to any forensic analysis and/or requests for forensic analysis (regardless of the outcome of such request.</p>	
<p><b>5. <u>Medical Records</u></b></p>	<p>Any and all records, including photos, reports, imaging studies, test results, and notes pertaining to:</p> <p>a. Any alleged victim (including J.M., M.M.1, M.M.2, S.R., Y.E. , and N.E.) generated pursuant to treatment provided in connection with the instant matter; including, without limitation, all emergency medical, fire department, hospital, or other medical care provider records, including any/all relevant prior medical records;</p> <p>b. All pathological, neuropathological, toxicological, or other medical evaluations of J.M., M.M.1,</p>	<p>1) The State does not oppose this request, so it should be granted.</p>

1 2	M.M.2, S.R., Y.E., and N.E., including any/all relevant prior medical records.	
3 4 5 6 7 8 9 10 11 12 13 14 15 16	<p><b>6. <u>Preservation of/Access to Raw Evidence</u></b></p> <p>Access to and preservation of any and all material collected in the investigation of this case to include but not limited to forensic material, raw data, video surveillance, photographic negatives, digital negatives, biological samples and toxicological samples.</p>	<p>1) The State admits that it is under a legal and ethical obligation not to destroy evidence, so they do not oppose half of this request.</p> <p>2) We do not know whether this exists, so opposing the request on the basis that it is “not applicable to the case” is non-responsive. The State provided no authority to suggest that if evidence like “surveillance video” exists, we cannot access it. Thus, the request should be granted.</p>
17 18 19 20 21 22 23 24 25 26 27	<p><b>7. <u>Electronic Communications and Associated Warrants</u></b></p> <p>All intercepted electronic and/or oral communications, as well as communications sent to and from handset and/or telephone and/or computers pursuant to the investigation in this case, including but not limited to: Audio, Push to Talk, Data, Packet Data, electronic messaging encompassing Global System for Mobile Communications (GMS), Short Message Service (SMS), Multimedia Messaging Service (MMS), and Internet Relay Chat, File Transfer Protocol (FTP), Internet Protocol (IP), Voice Over Internet Protocol (VOIP), Transmission Control</p>	<p>1) The State says (without specific authority) that NRS 174.235 does not cover Trap and Trace, Cellular Site, Pen Registers and GPS, but does not oppose the remainder of the request.</p> <p>2) If any of this evidence exists, we must be informed, and if the State still wishes to keep from producing it, then they should file</p>

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1 2 3 4 5	Protocol (TCP) and electronic mail or other internet based communications, obtained by any law enforcement agency (including federal authorities) via subpoena, interception, or other means, pertaining to the instant matter or any related matter.	a motion. Otherwise, this request should be granted.
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	<p><b>8. <u>Law Enforcement Video or Audio Recordings</u></b></p> <p>All video and/or audio recordings obtained by any Las Vegas Metropolitan Police Department recording device, including but not limited to:</p> <ul style="list-style-type: none"> <li>a. Dashboard cameras;</li> <li>b. Body-mounted officer cameras;</li> <li>c. Any other recording equipment operational during the investigation of this case.</li> <li>d. Any video footage captured by body cameras worn by Henderson Police Officer Tschirgi (P#1622), LVMPD Officer S. Narvaez (P#2039), LWMPD Officer Schmidt (P#15319), or any other officer present for Las Vegas Metropolitan Police Department Event numbers 161108-0197 and 161017-2593 and any other related/connected Event Number.</li> </ul>	1) The State does not oppose this request, so it should be granted.
22 23 24 25 26 27	<p><b>9. <u>Non-Activated Body Camera</u></b></p> <p>The first name, last name, and “P#” of any Metro Officer present for Las Vegas Metropolitan Police Department Event numbers 161108-0197 and 161017-2593, and any related/connected Event Number Event Number(s) who is required by department policy to wear, but did not</p>	1) Metro officers are now required to use body cameras. If they switch the body camera off, then testify as to what happened when the camera was not recording, they have violated

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1 2 3	activate his/her body-worn camera.	Metro policy and failed to preserve evidence. This is a Sanborne issue.
4 5 6 7 8 9 10 11	<p><b>10. <u>Monitoring, Tracking, and Associated Warrants</u></b></p> <p>Any and all data, recordings, reports and documentation of the following: voice monitoring devices, geographic tracking devices, pen register, trap and trace device (installed pursuant to interception, warrant or other means), obtained by any law enforcement agency (including federal authorities) pertaining to the instant matter or any related matter.</p>	1) Again, the State must disclose whether this exists then file a motion if they want to preclude its production.
12 13 14 15 16 17	<p><b>11. <u>911 and 311 Calls</u></b></p> <p>a. Any and all 911 and 311 recordings to include, but not limited to:</p> <p>b. Car-to-car audio communications,</p> <p>c. Car-to-dispatch radio communications, and</p> <p>d. Unit Log incident print out related to the event.</p>	1) The State does not oppose this request, so it should be granted.
18 19 20 21	<p><b>12. <u>Chain of Custody</u></b></p> <p>All relevant reports of chain of custody, including reports of any destruction of any evidence in the case.<sup>3</sup></p>	1) The State does not oppose this request, so it should be granted.
22 23 24 25	<p><b>13. <u>Witness Contact Information</u></b></p> <p>All updated witness contact Information, including last known address(es) and phone number(s). This includes the names/contact information for witnesses who may</p>	1) The State does not oppose this request, so it should be granted.

<sup>3</sup> Destruction of evidence can result in dismissal of the case or a jury instruction stating such evidence is presumed favorable to the accused. Crockett v. State, 95 Nev. 859, 865 (1979); Sparks v. State, 104 Nev. 316, 319 (1988); Sanborn v. State, 107 Nev. 399, 409 (1991).

1 2 3 4 5	<p>have information tending to exculpate the instant defendant. Presently, the State has not provided any contact information for the following witnesses: Maria Barajas, J.M., M.M.1, M.M.2, Amanda Moiza, Ricardo Rangel, S.R., Y.E., N.E., and Yusnay Rodriguez-Estrada.</p>	
6 7 8 9 10 11 12 13 14 15	<p><b>14. <u>Information Obtained from Confidential Informants</u></b></p> <p>Any and all information obtained by the use of confidential informants for any aspect of the investigation of this case. This includes, but is not limited to, informants who purportedly obtained information about this case while incarcerated, whether the information came from the defendant, a co-defendant, unindicted conspirator, or another source, regardless of whether prosecutors intend to use the informant-related information at the upcoming trial of this matter.</p>	<p>1) The State's 3-page commentary is non-responsive. We have not asked for the "identity" of confidential informants. We have asked whether they exist, and what information they provided. The State did not oppose this, so the request should be granted.</p>
16 17 18 19 20 21 22 23 24 25	<p><b>15. <u>Alternative Suspect(s)</u></b></p> <p>Any and all information which shows that the defendant did not commit the crime(s) alleged, or which shows the possibility of another perpetrator, co-conspirator, aider and abettor, or accessory after the fact, including the name(s) of those individual(s). This includes, but is not limited to, any information concerning the arrest of any other individual for the charged crime and any information suggesting that someone other than the defendant perpetrated one or more of the charged crimes.</p>	<p>1) The State does not oppose this request, so it should be granted.</p>
26 27	<p><b>16. <u>Identification and Misidentification</u></b></p> <p>Any and all statements of identification associated with</p>	<p>1) The State does not oppose this request, so it should be granted.</p>

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1 this case, including any information concerning witnesses  
2 who did not identify the defendant as the perpetrator of  
3 the alleged crime(s). This request includes:

4 a. Statements identifying another person as the  
5 perpetrator of this offense;

6 b. Prior non-identifications by eyewitnesses now  
7 identifying the defendant as the perpetrator;

8 c. Copies of all photographic lineups shown to any  
9 witness (including lineups created without the  
10 defendant) as well as any other identification  
11 procedures used to identify suspects including  
12 show-ups, lineups, photo-array lineups, single  
13 photo show-ups, photo compilations and  
14 composite drawings. This request includes:

15 1) The identification of each witness who was  
16 shown an identification procedure;

17 2) The date and time such procedure(s)  
18 occurred;

19 3) The names of all persons who were present  
20 when the procedure(s) took place;

21 4) Instructions given to the witness(es) prior to  
22 the procedure;

23 5) The results of the procedure, including an  
24 accounting of each witness' statement(s)  
25 before, during and after the identification  
26 procedure; the amount of time taken by each  
27 witness to make an identification; and any



1 2 3 4 5	<p>hesitancy or uncertainty of each witness in making an identification; and</p> <p>6) Whether officers informed any witness that he/she identified the suspect officers believed committed the crime.</p>	
6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p><b>17. <u>General Exculpatory Evidence Request</u></b></p> <p>Any and all information which shows that Amanda Moiza, Maria Estrella-Barajas, Ricardo Rangel, and /or their children may have fabricated their claims against Defendant.</p>	<p>1) The State claims that this request is overbroad, but it also admits to an obligation to provide it under <u>Giglio</u> and the constitution.</p> <p>2) By way of example, this information could include, prior inconsistent statements, evidence of coaching, recantations, evidence of witness intimidation, motive to lie—either possible benefits received or pressure being asserted by outside forces, information that the witnesses (or far more likely, their parents) are engaged in illegal activities, or any other proof the State may have come across that indicates these witness may not be telling the truth.</p>
26 27	<p><b>18. <u>Witness Benefits</u></b></p> <p>Disclosure of any and all compensation, express or</p>	<p>1) The defense believes this was already granted, and for its part,</p>

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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>	<p>implied, promises of favorable treatment or leniency, or any other benefit that any of the State’s witnesses may of have received in exchange for their cooperation with this or any related prosecution. This includes, but is not limited to:</p> <ul style="list-style-type: none"> <li>a. Records and notes from the CCDA victim witness office, including records of any expectation of any benefit or assistance to be received, or already received by any witness in this case;</li> <li>b. Monetary benefits received as well as any express or implied promises made to any witness to provide counseling and/or treatment and/or provide immigration assistance (including, but not limited to, U Visa documentation) as a result of the witness’ participation in this case;</li> <li>c. Names of any and all agencies and workers or other referrals that were given to any witness and/or his/her family member, relative or guardian in connection with this case or any related matter;</li> <li>d. Estimate of future benefits to be received by any witness during or after the trial, including travel expenses.</li> </ul>	<p>the State has already admitted it has documents that have not yet been turned over.</p> <p>2) As the court is aware, if a witness stands to benefit from their testimony, that information must be produced. Of particular importance in this case is the U-Visa question. The defense is prepared to expand on this in camera if necessary.</p>
<p>23 24 25 26 27</p>	<p><b>19. <u>Prior Witness Statements</u></b> Disclosure of any and all statements, tangible or intangible, recorded or unrecorded, made by any witness that are in any manner inconsistent with the written and/or recorded statements previously provided to the defense.</p>	<p>1) This is not “overbroad.” We are asking for prior inconsistent statements by the State’s witnesses. We are not asking for statements “about which the state</p>

1 2 3 4 5	This includes, but is not limited to: any oral statements made to any employee or representative of the District Attorney's office or any other government employee, local or federal, during pre-trial conferences or other investigative meetings.	has no knowledge," but we do expect the State to affirmatively seek this information as required by <u>Kyles</u> , supra.
6 7 8 9 10 11 12 13 14 15 16 17 18 19	<p><b>20. <u>Impeachment Information – Law Enforcement Witness</u></b></p> <p>Any and all impeachment information of which the prosecution is aware located in the personnel files of any police witness called to testify at trial or any pretrial hearing in this matter, including, but not limited to, any Statement of Complaint regarding the witness or this investigation, any Employee Notice of Internal Investigation, any Internal Affairs Investigative Report of Complaint, any witness statement, any Bureau Investigation Supervisory Intervention, and any other document maintained or generated by the Office of Internal Affairs, Critical Incident Review Panel, or other investigative agency.</p>	1) The State's opposition is non-responsive. We are not asking for personnel files, we are asking for impeachment information contained within those files, if it exists. Furthermore, it is incumbent upon the State to vet its witnesses to determine whether the information does exist under Kyles.
20 21 22 23 24 25 26 27	<p><b>21. <u>Criminal History Information</u></b></p> <p>Criminal history information on any witness, actual or potential, relating to specific instances of misconduct or from which untruthfulness may be inferred and/or which could lead to the discovery of admissible evidence, impeachment or otherwise. To this end, the defense requests that, in addition to any other lay witnesses prosecutors intend to call at trial or upon whose testimony</p>	1) It is our understanding that every adult member of the complaining witness's family has committed, or is committing, one or more criminal acts. The State must produce this evidence, whether the acts are charged or uncharged. This includes any

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1 or statements the State will rely during either the guilt or  
2 penalty phases of trial, the District Attorney provide  
3 NCIC reports on the following individuals:

- 4 1. Amanda Moiza
- 5 2. Maria Barajas-Estrella.
- 6 3. Ricardo Rangel
- 7 4. Yusnay Rodriguez-Estrada

8 The defense further requests that the NCIC information be  
9 provided to defense counsel as soon as possible, and that  
10 prosecutors identify those individuals for whom no NCIC  
11 information is found. While the defense is not insisting  
12 that prosecutors run NCICs on expert or law enforcement  
13 witnesses, the defense requests that the State be ordered to  
14 comply with any Brady obligations with respect to these  
15 witnesses. The instant criminal history request includes,  
16 but is not limited to:

- 17 a. Juvenile records,
- 18 b. Misdemeanors,
- 19 c. Out-of-state arrests and convictions,
- 20 d. Outstanding arrest warrants or bench warrants, and
- 21 e. Cases which were dismissed or not pursued by the  
22 prosecuting agency, and
- 23 f. Any other information that would go to the  
24 issue(s) of credibility and/or bias, or lead to the  
25 discovery of information bearing on

misdemeanor convictions, as the  
misdemeanor statutes cover  
crimes of moral turpitude and  
dishonesty, which are always  
valid for the impeachment of  
credibility.

2) If there is a question about the  
admissibility of evidence, that  
issue is properly decided after the  
evidence is produced. A question  
of admissibility does not  
determine whether evidence is  
produced.

1 2	credibility/bias, whether or the information is directly admissible by the rules of evidence. <sup>4</sup>	
3 4 5 6	<p><b>22. <u>Significant Public Benefit Parole</u></b></p> <p>Information indicating whether any witness in the case has been granted Significant Public Benefit Parole (SPBP) in connection with this case.<sup>5</sup></p>	1) The State does not oppose this request, so it should be granted.
7 8 9 10 11 12 13	<p><b>23. <u>U Visas and Related Information</u></b></p> <p>Information indicating whether any family member of the victim, or any other qualifying person,<sup>6</sup> has applied for a U Visa as a result of this case. This request includes information indicating whether any such individual has consulted with a district attorney, district attorney representative or victim advocate, or any other person</p>	1) Again, the defense believes this request has been granted. The State must affirmatively seek and produce this information under <u>Kyles</u> , supra.

<sup>4</sup> The State usually is under the mistaken impression that they only must disclose felony convictions from the last 10 years that can be used as impeachment under NRS 50.095. However, in Davis v. Alaska, supra, the US Supreme Court found that a witness can be attacked by “revealing possible biases, prejudices, or ulterior motives of the witnesses as they may relate directly to the issues or personalities on the case at hand. The partiality of a witness is...always relevant as discrediting the witness and affecting the weight of his testimony.” Id. at 354. The court found that the State’s policy interest in protecting the confidentiality of a juvenile offender’s record must yield to the defendant’s right to cross-examine as to bias. Id. at 356. See also Lobato v. State, 120 Nev. 512 (2004), discussing the “nine basic modes of impeachment.” Therefore, juvenile records, misdemeanors and older criminal records may yield information relevant to many forms of impeachment other than that outlined in NRS 50.095.

<sup>5</sup>SPBP allows a witness, defendant, cooperating source, and immediate family members into the United States for up to one year. “U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement,” Dept. of Homeland Sec. (hereinafter “U Visa Guide”), available at: [http://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visa\\_certification\\_guide.pdf](http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf) at 16.

<sup>6</sup>The U visa is available to an alleged victim; her unmarried children under the age of twenty-one (21); her spouse; her parents, if she is under twenty-one (21); and unmarried siblings under eighteen (18) years old if the alleged victim is under age twenty-one (21). “U Visa Guide” at 5. Furthermore, when the principal alleged victim is under twenty-one (21) years old, her noncitizen parent can apply for a U Visa as an “indirect victim” regardless of whether the principal alleged victim is a U.S. citizen or noncitizen. Id. at 13.

1 2	acting in a representative capacity of the CCDA's Office, regarding obtaining a U Visa as a result of this case. <sup>7</sup>	
3 4 5 6 7 8 9 10 11 12 13 14 15 16	<p><b>38. <u>Child Protective Services Records</u></b></p> <p>Any and all Department of Child and Family Services and/or Child Protective Service (or equivalent department in another State) records relating to the instant case, including:</p> <ul style="list-style-type: none"> <li>a. Notes of caseworkers or their agents/assistants,</li> <li>b. Referrals to therapists by anyone at any of the above mentioned agencies</li> <li>c. Reports prepared for Family Court or any domestic relations proceedings related to the issues or witnesses in the instant matter.</li> </ul> <p>This request includes, without limitation, information pertaining to the following individuals:</p> <ul style="list-style-type: none"> <li>a. J.M.</li> <li>b. M.M.1</li> <li>c. M.M.2</li> <li>d. Y.E.</li> <li>e. N.E.</li> <li>f. S.R.</li> </ul>	1) The State does not oppose this request, so it should be granted.
17 18 19 20 21 22 23 24 25 26	<p><b>39. <u>Social Worker/Case Work Notes</u></b></p> <p>Any/all notes of government social workers or case workers, including employees of Child Haven, or any governmental agency supervising foster care or any other living arrangement made for any alleged victim or witness in the case (even if on a temporary basis), as well as notes on referrals to any physicians, psychologists, psychiatrists, social workers or other mental health workers (including contract providers) pertaining to the following</p>	1) Defense has requested any information that suggests witnesses may have fabricated these charges. This is the most likely place to find such evidence. The defense is comfortable with this information being reviewed in camera, but it must be produced.

<sup>7</sup> “Given the complexity of U Visa petitions, petitioners often work with a legal representative or victim advocate,” and, in fact, “is usually done with the assistance of an advocate.” *Id.* at 2, 5.

<p>1 2 3 4</p>	<p>individuals:  a. J.M.  b. M.M.1  c. M.M.2  d. Y.E.  e. N.E.  f. S.R.</p>	
<p>5 6 7 8 9 10 11 12 13</p>	<p><b>40. <u>Mental Health Worker Records/Notes</u></b>  Any and all records and notes of any mental health workers who have had contact with the alleged victim or any other person related to events in this case. This request includes any records reflecting the mental state/cognitive abilities of the alleged victim or any other government witness, including the individuals listed herein, that are relevant to each individual’s competency as a witness.<sup>8</sup></p>	<p>1) Again, the defense is comfortable with this information being reviewed in camera, but it must be produced as it may contain evidence of fabrication, prior inconsistent statements, coaching, recantations, or general lack of credibility.</p>
<p>14 15 16 17 18 19 20 21 22</p>	<p><b>41. <u>Physical Examinations</u></b>  Any and all notes and records of any physical exams done on the alleged victim or anyone else in connection with this case, including any photographs, videos, colposcopes or recordings taken in conjunction with such exam, and any lab or toxicology reports done in conjunction with such exam. This includes all documents recording what physical evidence was taken in the case, where it was</p>	<p>1) The State does not oppose this request, so it should be granted.</p>

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<sup>8</sup> In addition to the authority outlined above, if such counselors are seeing the alleged victims after being referred by a State or County agency or worker, or are paid by victim witness or through aid especially due to status as a “victim” then there is no provider-patient privilege as the information is being sought with the purpose to disclose to third parties. Further, under general discovery principles, anything disclosed that bears on the credibility of the witness, on the credibility of any other witness or any evidence, that suggests that the defendant did not commit the crime, that someone else may have perpetrated the crime, or anything else relevant to discovery, then such information must be disclosed under case law cited in this brief.

1	stored, and any related chain of custody documents.	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	<p><b>42. <u>Prior Allegations of Sexual Misconduct</u></b></p> <p>Any and all information known (or which could be known by diligent action) of any previous allegations of sexual misconduct or physical abuse made by the alleged victim or any material witness in the case, including, but not limited to the following individuals: Maria Barajas, J.M., M.M.1, M.M.2, Amanda Moiza, Ricardo Rangel, S.R., Y.E., N.E., and Yusnay Rodriguez-Estrada. This includes any and all information or any possible false accusations made by the alleged victim or any material witness in the instant case, including those listed herein.</p>	<p>1) Evidence that a child has accused someone else of sexual misconduct does not implicate rape shield law, so the State’s objection is non-responsive. The focus is credibility: a child who falsely accuses one person might falsely accuse someone else. A child who was once assaulted might be confused about what actually happened in the instant case, or engaged in psychological transference. This is not “rape shield.”</p> <p>2) Again, the State is conflating “admissibility” with “disclosure.” The evidence must be disclosed first, then we can argue about admissibility.</p>
21 22 23 24 25	<p><b>43. <u>Sources of Sexual Knowledge</u></b></p> <p>Any and all information known or obtainable through the exercise of due diligence indicating that J.M., M.M.1, M.M.2, Y.E., or S.R. may have had sources of sexual knowledge outside the events at issue here.</p>	<p>1) The State does not oppose this request, so it should be granted.</p> <p>2) To be clear, the defense is only asking the State to do its own job, as defined by Kyles, not our job.</p>
26 27	<p><b>71. <u>Contacting other agencies, including police, S.A.N.E. examiners, CPS, and any other State actors in order to</u></b></p>	<p>1) The State offers no legal basis to oppose this request. It merely</p>

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<p>1 2 3 4 5 6 7 8 9</p>	<p><b><u>collect discovery and exculpatory evidence:</u></b></p> <p>The defendant requests that the Court order the prosecution to contact other agencies or agents acting on behalf of or working with the prosecution, or in any other way a part of the prosecution team, and initiated to ascertain whether any of those agencies or agents possess or know of any material information that would tend to exculpate the Defendant, impeach a prosecution witness, or mitigate the Defendant’s possible punishment.</p>	<p>says that contacting its own witnesses and review the evidence in this case will take, “limitless hours.” This is hyperbole, of course, but even if it was not, the State would still be required to do it under <u>Kyles</u> and <u>Brady</u>.</p>
<p>10 11 12 13 14 15 16 17 18 19 20 21 22 23</p>	<p><b>72. <u>Media involvement</u></b></p> <p>The State must disclose whether its attorneys, officers or any other witnesses have cooperated with or been interviewed by any media organizations, the extent of the cooperation, and whether the cooperation is ongoing or planned for the future. This includes, but is not limited to, newspapers and periodicals, radio programs, television shows, Internet and interactive media, or any other form of broadcast. This also includes the District Attorney’s “reality” show, Las Vegas Law.</p>	<p>1) The State responds that there is “no statutory requirement” to produce this evidence, but does not provide any legal basis to withhold it.</p> <p>2) This request is particularly important here because the State actively used the media as a tool to gather evidence. Furthermore, the D.A.’s office has starred in a “reality” TV show for the last year or so. If those cameras captured any evidence in this case, we are entitled to it.</p>

**CONCLUSION**

Time is short. Mr. Azucena has invoked his right to a speedy trial and we intend to be ready on April 17, 2017. **NRS 174.285(1)** requires that any discovery request pursuant to **NRS 174.235** be made “... within 30 days after arraignment or at such reasonable later time as the

1 court may permit...” **NRS 174.285(2)** mandates that “A party shall comply with a request made  
2 pursuant to **NRS 174.235**... not less than 30 days before trial or at such reasonable later time as  
3 the court may permit. We cannot permit discovery issues to jeopardize the trial date or derail the  
4 trial in the middle. Mr. Azucena cannot be forced to choose between a fair trial and a speedy  
5 trial. The State must afford both.

6 Accordingly, the Defendant requests that this Honorable Court enter an order directing  
7 prosecutors to provide the discovery sought herein within a reasonable time in advance of trial so  
8 as to enable counsel to effectively prepare. Further, the Defendant requests that this Honorable  
9 Court order that prosecutors be precluded from admitting at trial any discovery/evidence not  
10 timely produced. See **NRS 174.295** (“If at any time during the course of the proceedings it is  
11 brought to the attention of the court that a party has failed to comply with the provisions of **NRS**  
12 **174.235** to **174.295**, inclusive, the court may order the party to permit the discovery or inspection  
13 of materials not previously disclosed, grant a continuance, or prohibit the party from introducing  
14 in evidence the material not disclosed, or it may enter such other order as it deems just under the  
15 circumstances.”)(Emphasis added).

16 Based on the foregoing, the defendant, Jose Azucena, respectfully requests that this  
17 Honorable Court grant the instant motion, and order the timely disclosure of the material sought  
18 herein. **NRS 174.235**; *Brady v. Maryland*, 373 U.S. 83 (1963); U.S.C.A. V, VI, XIV; and Nev.  
19 Const. Art. 1 § 8.

20 DATED this 27<sup>th</sup> day of March, 2017.

21 PHILIP J. KOHN  
22 CLARK COUNTY PUBLIC DEFENDER  
23

24 By:     /s/ P David Westbrook      
25 P. David Westbrook  
26 Chief Deputy Public Defender  
27  
28

1   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2   \_\_\_\_\_  
 3     JOSE AZUCENA                         )         No. 74071  
    )  
 4                             Appellant,             )  
    )  
 5   )  
    )  
 6   v.             )  
    )  
 7     THE STATE OF NEVADA,             )  
    )  
 8                             Respondent.             )  
 9     \_\_\_\_\_)

10   **APPELLANT'S APPENDIX VOLUME II PAGES 217-437**

11     PHILIP J. KOHN	STEVE WOLFSON
12     Clark County Public Defender	Clark County District Attorney
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14     Las Vegas, Nevada 89155-2610	Las Vegas, Nevada 89155
15     Attorney for Appellant	
	ADAM LAXALT
	Attorney General
	100 North Carson Street
	Carson City, Nevada 89701-4717
	(702) 687-3538
	Counsel for Respondent

16   **CERTIFICATE OF SERVICE**

17   I hereby certify that this document was filed electronically with the Nevada  
 18     Supreme Court on the 10 day of April, 2018. Electronic Service of the foregoing  
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28   BY                    /s/ Carrie M. Connolly                     
    Employee, Clark County Public Defender's Office