IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD MICHAEL ADAMS, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 55494

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

A. Statute which grants jurisdiction to review the judgment: NRS 177.015.
B. Judgment of Conviction filed 02/02/10; Notice of Appeal filed 02/24/10.
C. This appeal is from a final judgment entered 02/02/10.

ISSUES PRESENTED FOR REVIEW

I. DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES PRECLUDE APPELLANT'S MULTIPLE CONVICTIONS FOR SEXUAL ASSAULT, BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT AND OPEN OR GROSS LEWDNESS.

II. THE PROSECUTOR COMMITTED REPEATED ACTS OF MISCONDUCT IN CLOSING ARGUMENT, THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL AND VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND THE NEVADA CONSTITUTION.

PROCEDURAL HISTORY

The State of Nevada filed its initial Criminal Complaint against Appellant, Edward Adams (Adams) on January 15, 2008. (AA 1-4). A preliminary hearing was held on January 30, 2008. (AA 10-55). On February 12, 2008, Adams was charged by way of Information with 12 counts, including first degree kidnapping with use of a

deadly weapon, battery with intent to commit a crime with use of a deadly weapon, open or gross lewdness, and numerous counts of sexual assault with a minor under 14 years of age with use of a deadly weapon. (AA 57-61). The State filed its Amended Information on October 28, 2009. (AA 96-101).

Trial commenced on November 2, 2009. (AA 176-891). Adams was found guilty of **seven** counts of sexual assault, one count of first degree kidnapping, one count of battery with intent to commit a crime (sexual assault) and one count of open or gross lewdness. (AA 137-140). Adams was acquitted of the deadly weapon enhancements and counts nine and ten of the Amended Information.[1] Adams was sentenced on January 13, 2010. The court ran every felony count **consecutively**. Adams was sentenced to life in prison with a minimum parole eligibility of eighty (80) years. (AA 141-144).

Adams filed his notice of appeal on February 22, 2010. (AA 145-147). The instant brief follows.

STATEMENT OF FACTS

The following facts are derived primarily from the trial testimony of State witness, Amber Valles (Valles). On December 14, 2007 at about 2:30 p.m., Valles was walking home from school when she encountered Edward Adams. (AA 435, 439, 442). She saw Adams across the street from her, sitting on a wall smoking a cigarette. (AA 443). Adams was a stranger; Valles had never met him before. (AA 488). As she approached the intersection, Adams crossed the street and walked towards her. (AA

[1] The State conceded that there was no evidence to support counts nine and ten and directed the jury to acquit. (AA 842).

444). Valles became scared as Adams approached her. *Id.* Valles continued to walk towards her house with Adams close behind. (AA 446).

Adams eventually made contact with Valles. He put his arm on her shoulder and turned her around. *Id.* According to Valles, Adams "said don't scream, not to yell, that he had a gun." *Id.* Amber never saw a gun, but she believed that Adams may have had one in the pocket of his hooded sweatshirt. (AA 447). Adams also said that he needed Valles to come with him to help babysit his "son or niece or something." (AA 488).

Adams turned Valles around and began walking her back toward her school. (AA 449). Valles testified that she was crying and shaking as she walked. (AA 450). As she approached the school, Valles saw a classmate named Jonathan. *Id.* Jonathan was with their mutual friend, Angela and another boy named Aaron. (AA 529). Valles testified that she was crying and that she mouthed the words, "help me" to Jonathan. (AA 450). However, Jonathan did not call 9-11 or attempt to intervene in any way.

At trial, Jonathan testified that he saw Valles with "a guy." She was being held by the right wrist and "sort of dragged, pulled, led up the street." (AA 532). Jonathan said that Valles had "sort of scared look on her face, but that was it." (AA 533). Jonathan did not see her crying or asking for help.

Angela also testified that she saw Valles with "a guy." (AA 560). The guy was "holding her by her hand or her arm." It appeared to Angela that they were trying, "to avoid us." *Id.* Angela did not see Valles crying or asking for help. After Valles passed by, she asked Jonathan whether the guy was Valles' father. Jonathan said, "no." They even joked that the guy "could be a rapist or something." Angela had a mobile phone

with her, but neither she nor Jonathan felt it was necessary to call for help. (AA 532, 570).

Later, Angela was interviewed by a police detective. According to the detective's report, Angela said that Valles was chasing after the man, trying to keep up with him because he was walking too fast. At trial, Angela denied saying that to the detective. (AA 570).

Adams took Valles to a vacant apartment near the intersection of Charleston and Buffalo. (AA 453). A man named Andre Randle saw them just before they entered the unit. (AA 737). Andre knew the apartment was vacant because it had recently been damaged in a fire. Andre thought it was a little strange that they were entering an abandoned apartment, but he saw no sign that Valles was in danger. Andre testified that Adams was not touching Valles; they were "walking side by side." Andre noted, "She didn't even look mad or nothing[.]" (AA 739-742). Andre said that he would have called the police if he had seen a girl who was crying and shaking being dragged into a vacant apartment by an older man. (AA 743). However, Valles did not appear to be in any distress.

Adams opened the unlocked door, and the two went inside. *Id.* The apartment had no running water or electricity. *See* (AA 459, 697). The apartment was lit by candles. (AA 455). Adams removed the battery from Valles' mobile phone and told her to sit on the couch. (AA 457).

Adams then instructed Valles to remove her clothing; he did the same. (AA 459-60). Adams rubbed a lubricant on his penis and directed Valles to lie down on the floor

in front of the couch. (AA 460, 486-87). Adams got on top of Valles. He first inserted his fingers into her vagina, then his penis. Adams then moved Valles up to the couch. He again inserted his fingers into her vagina, followed by his penis. (AA 462). Adams moved Valles back to the floor and continued the act, inserting his fingers into her vagina, followed by his penis. *Id.* Valles told him "to stop, that it hurt," but the act continued. Finally, Adams stood Valles up and bent her over the side of the couch. He inserted "something" into her anus; Valles was unsure whether it was his fingers, his penis or both. (AA 464).

After he ejaculated, Adams told Valles to get dressed. (AA 465, 718-720). He gave Valles a towel to "wipe [her]self down." (AA 467). Adams returned Valles' phone and battery and told her to leave. He said she, "better not call the cops or anything." (AA 473-474). Valles walked to a nearby McDonalds restaurant. As she was walking, Valles' phone rang; it was her mother. (AA 475). Valles told her mother to meet her at the McDonalds.

When she arrived at McDonalds, Valles told her mother, "[H]e put his thing in me." Valles' mother called the police and Valles was taken to the hospital for an examination. (AA 477). Amber was examined by a Sexual Assault Nurse Examiner who performed a standard "rape kit." Samples taken from Valles' vagina and rectum later tested positive for the presence of Adams' semen. (AA 718-720). Adams was arrested on or about January 13, 2008. (AA 635).

At trial, Adams admitted through his attorney that he and Amber Valles had sex, but that the sex was consensual. (AA 864). The jury was instructed on the crime of

statutory sexual seduction and defense counsel asked the jury to find him guilty of that charge. *Id.*

ARGUMENT

I. DOUBLE JEOPARDY AND REDUNDANCY PRINCIPLES PRECLUDE APPELLANT'S MULTIPLE CONVICTIONS FOR SEXUAL ASSAULT, BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, AND OPEN OR GROSS LEWDNESS.

A. Overview of the law concerning Double Jeopardy, Redundancy and Multiplicious Convictions.

The Double Jeopardy Clause of the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." **U.S. Const. Amend. V**. This protection applies to the states through the Fourteenth Amendment and **Benton v. Maryland**, 395 U.S. 784, 794 (1969) *rev'd on other grounds,* **Payne v. Tennessee**, 501 U.S. 808 (1991). Nevada incorporated this protection into the Nevada Constitution at Article 1, Section 8. **State v. Combs**, 116 Nev. 1178, 1179, 14 P.3d 520 (2000). The Fifth Amendment protects not only against a second trial for the same offense, but also against **multiple punishments** for the same offense. **Whalen v. United States**, 445 U.S. 684, 688 (1980)(emphasis added).

Multiplicity, or "charging a single offense in several counts," is analyzed in Nevada under **Blockburger v. United States**, 284 U.S. 299 (1932). The Blockburger test is simple. Multiple convictions will violate the Double Jeopardy Clause "if the elements of one offense are entirely included within the elements of a second offense." **Salazar v. State**, 119 Nev. 224, 227 (2003).

Double jeopardy analysis may begin with Blockburger, but it does not end there.

Like many jurisdictions, the Nevada Supreme Court has found that Blockburger suffers serious shortcomings when applied to the "real world." Blockburger is a far more powerful tool for resolving conflicts on paper than safeguarding justice and fundamental fairness on a case-by-case basis. This is where the concept of "redundancy" comes in.

Nevada chose to expand its traditional double jeopardy analysis in cases like **Salazar**, where the language of Blockburger failed to protect the defendant from receiving "multiple punishments for the same offense," as required by the Fifth Amendment.[2]

> Battery with use of a deadly weapon with substantial bodily harm and mayhem with a deadly weapon are separate offenses under the Blockburger test. However, while the State may bring multiple charges based upon a single incident, **we will reverse redundant convictions that do not comport with legislative intent.**

Salazar v. State, 119 Nev. at 227 (*citing* **State v. Koseck**, 113 Nev. 477, 479, 936 P.2d 836, 837 (1997); **Albitre v. State**, 103 Nev. 281, 283, 738 P.2d 1307, 1309 (1987))(emphasis added).

In essence, the doctrine of "redundancy" was created to pick up where regular Blockburger analysis left off. However, redundancy is still covered under the double jeopardy umbrella because it implicates the fairness concerns of the Double Jeopardy Clause and Fifth Amendment Due Process as a whole.

---

[2] *See* **Williams v. State**, 118 Nev. 536, 50 P.3d 1116, 1124 (2002), *cert. denied*, 537 U.S. 1031 (2002)(stating that Double Jeopardy protects individuals from receiving multiple punishments for the same offense); *See also,* Jacqueline E. Ross, **Damned Under Many Headings: The Problem of Multiple Punishment**, 29 Am. J. Crim. L. 245, 251 (2002).

The precise test for redundancy is currently being addressed by the Court *en banc*. *See, e.g.,* **Jackson v. State**, Case # 53632. In the past, Nevada has utilized several different methods of redundancy analysis, all of which are consistent and fully applicable in the instant case. *See, e.g.,* **Nevada v. District Court**, 116 Nev. 127 (2000), **Wilson v. State**, 121 Nev. 345 (2005), and **Salazar v. State**, *supra*, 119 Nev. 224 (2003). In general, they each require an analysis of legislative intent and a factual analysis of the crime charged.

For example, in **Nevada v. District Court**, the Supreme Court analyzed the "gravamen" test, as set forth in **Albitre v. State**, *supra*:

> The issue under Albitre is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. "[R]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act." The question is whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.

116 Nev. at 136 (*quoting* **Skiba v. State**, 114 Nev. 612, 616 n. 4 (1998)).

In addition, this Court has considered the Eighth Circuit case of **United States v. Chipps**, 410 F.3d 438 (8th Cir. 2005) for guidance in precisely defining our redundancy test. Chipps requires the court to consider two questions:

> **a)** Did the legislature intend the facts underlying each count to make up a separate unit of prosecution; and
>
> **b)** Did the violations arise from that singleness of thought, purpose or action, which may be deemed a single "**impulse**?"

Id. at 447-449 (emphasis added).

In explaining the first prong of its test, the **Chipps** court defined a "unit of prosecution" as, "the aspect of criminal activity that [the Legislature] intended to punish." *Id.* at 448. The relevant inquiry is often whether the legislature intended to punish the charged crime as a "course of conduct." In examining the question of Legislative intent, the Eighth Circuit considers statutory language, legislative history and statutory scheme. If legislative intent cannot be determined "clearly and without ambiguity," all remaining questions are resolved in favor of the defendant. *Id.*

The second prong of the **Chipps** analysis is the "impulse test." This test compliments the "overlapping facts" analysis utilized in Nevada under **Jefferson v. State**, 95 Nev. 577, 599 (1979).[3] Prosecutors often charge multiple crimes for acts that take place within a very short window of time, involving the same victim, and employing largely the same actions. For example, the "impulse" to commit a murder might necessarily include the acts of committing an assault and a battery, but double jeopardy and fundamental fairness should *preclude* multiple or redundant prosecutions for what is essentially **one criminal impulse**.

Regardless of which test this Court applies, be it "impulse," gravamen," or some combination, the *goal* of redundancy analysis will remain the same: to prevent multiple punishments for what is essentially a single criminal intent. That is exactly what Mr. Adams hopes the Court will do in the instant case.

The law states that, "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." **Larson v. State**, 102 Nev. 448, 449, 725

[3] *See also*, **Wilson**, *supra*, 121 Nev at 355-56.

P.2d 1214 (1986), *quoting* **Brown v. Ohio**, 432 U.S. 161, 169 (1977). However, that is *exactly* what prosecutors did in the instant case.

In this case, the prosecution took a singular, continuous act of sexual assault, and artificially divided it into **seven** separate counts. The prosecution then added counts of "battery with intent to commit a crime" and "open or gross lewdness" for acts that were necessary precedents to the target offenses of first degree kidnapping and sexual assault. At sentencing, Adams received a consecutive life sentence for *each* of these redundant felony counts. Only the gross misdemeanor was run concurrently. These multiplicious and redundant convictions violate the double jeopardy clause and well-established principles of Nevada law. They must be vacated.

B. Adams was improperly charged and punished **six times** for a singular act of sexual assault.

The first step in determining whether the State violated double jeopardy is to analyze whether the same act or transaction constituted a violation of two distinct statutory provisions. This Court must determine whether Adams committed one or multiple offenses by analyzing whether each provision requires proof of a fact which the other does not. **Barton v. State**, 117 Nev. 686, 692, 30 P.3d 1103 (2001). That analysis is very simple as applied to **Counts 3 through 8** of the State's Amended Information. In each count, Adams is accused of the **same act**: sexually assaulting Amber Valles' by penetrating her vagina. There are no "distinct statutory provisions" in play and the facts alleged in each count are virtually identical, right down to the wording of the State's charging document.

The Double Jeopardy Clause prohibits the State from multiplying one crime into many by artificially dividing a continuing action into a series of discrete units. **Larson v. State**, 102 Nev. at 449. In **Counts 3**, **5** and **7**, Adams is accused of "inserting his finger(s) into the genital opening of the said Amber Valles." (AA 97-99). In **Counts 4**, **6** and **8**, Adams is accused of "inserting his penis into the genital opening of the said Amber Valles." *Id.* There is no legal basis for dividing this one act into six counts.

This Honorable Court **rejects** the view that the State can obtain multiple convictions from one continuous sexual encounter where only a brief interruption occurred between the acts. Under **Townsend v. State**, 103 Nev. 113 (1987), when a single act of sexual conduct is interrupted briefly for some reason and then resumed, the continuation cannot form the basis for a separate charge. A "hypertechnical division of what was essentially a single act" cannot sustain a separate charge of sexual assault. *Id.* at 121.

Here, the acts were only "separated" by the time it took to move a few inches from the floor to the couch, and then back to the floor. (AA 460-465). The assault took place in an abandoned apartment that had been damaged in a fire. Given the surroundings, the purpose of this incidental movement was obvious: to facilitate the sex act. This case is similar to **Townsend**, where the defendant was improperly charged with two counts of sexual assault because he paused to apply lubricant to his victim. *See* **Townsend**, 103 Nev. at 116. The lubricant was a necessary predicate to the completion of the sex act, as was the minor movement in the instant case.

There is no question that the convictions constituted multiple punishments for the

same act, in violation of redundancy doctrine. Whether the Court applies a "gravamen" test, an "impulse" test, or adopts something similar to the Eighth Circuit test set forth in **Chipps**, *supra*, the result is the same. Adams was convicted of sexual assault based on vaginal penetration. He cannot receive **six identical convictions** for that **one act and intent**. He *certainly* cannot be forced to serve **6 consecutive life sentences**. Thus, five of the six counts related to vaginal penetration must be vacated.[4]

C. An act cannot constitute a separate offense when it is merely incidental to another charge.

In **Crowly v. State**, the Court vacated a conviction for lewdness because:

> Crowley's act of rubbing the male victim's penis on the outside of his pants was a **prelude** to touching the victim's penis inside his underwear and the fellatio. By touching and rubbing the male victim's penis, Crowley **sought to arouse the victim** and create willingness to engage in sexual conduct. Crowley's actions were **not separate and distinct**; they were a part of the same episode. Because Crowley intended to predispose the victim to the subsequent fellatio, his conduct was **incidental to the sexual assault** and cannot support a separate lewdness conviction. Therefore, we conclude that Crowley's convictions for sexual assault and lewdness with a minor are **redundant**, and we reverse the conviction for lewdness with a minor.

Crowley, 120 Nev. at 34.

Here Adams was charged with open or gross lewdness for "masturbating his penis" in front of Valles. According to trial testimony, the so-called, "masturbation" consisted of Adams rubbing some **lotion** on his penis just prior to engaging in sexual intercourse. (AA 460, 486-87). This was an act of preparation, nothing more. Adams stimulated and lubricated his penis in order to facilitate the vaginal intercourse that took

[4] Though the appellant strongly disagrees with this position, the law in Nevada appears to support a separate conviction for the act of anal penetration alleged in **Count 11**. Despite the current State of the law, Appellant would argue that Count 11 also runs afoul of the Double Jeopardy Clause and Fifth Amendment Due Process because it is redundant and multiplicious.

place just seconds later. Even the State's Sexual Assault Nurse Examiner testified that lotion was used by Adams *as a lubricant.* (AA 783). Thus, Adams' conviction for open or gross lewdness must be vacated. It cannot stand alone as a separate crime.

In fact, the same analysis applies to the digital, vaginal penetration alleged in **Counts 3, 5 and 7**. According to Valles, Adams inserted his penis into her vagina three times. Each time, he briefly inserted one or more fingers first, and then immediately inserted his penis. Thus, as in **Crowly**, the use of his fingers was designed to stimulate and lubricate the vagina so Adams could insert his penis. It was **incidental** to the target act. This is another reason why the six counts of vaginal sexual assault must be reduced to one count. *See also*, **Ebeling v. State**, 120 Nev. 401, 91 P.3d 599, 601 (2004). The digital penetration was incidental to the insertion of the penis.

D. The charge of Battery with Intent to Commit a Crime must be vacated because it is based on precisely the same acts alleged in the First Degree Kidnapping charge.

According to the State, Adams committed the crime of first degree kidnapping when he "did willfully, unlawfully and feloniously, and without authority of law, seize… kidnap, or carry away Amber Valles" with the intent to hold her against her will "for the purpose of sexual assault." (AA 97). Adams was specifically accused of "**taking** the said Amber Valles against her will" when he allegedly grabbed by the arm and forced her to walk with him to the vacant apartment. Adams was charged with battery with intent to commit a crime for "grabbing the said Amber Valles by the neck to restrain her and by grabbing her by the arm [SIC] **forcing her to go with him**." *Id.* (emphasis added). Both counts allege exactly the same thing: physically taking Amber Valles and

moving her somewhere. Once again, Adams was convicted and punished *twice* for the same act.

In **Salazar v. State**, *supra*, 119 Nev. 224, the jury convicted of both battery with use of a deadly weapon with substantial bodily harm and mayhem with use of a deadly weapon. In overturning the conviction for battery with a deadly weapon with substantial bodily harm, this Court noted:

> The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense. This court utilizes the test set forth in **Blockburger v. United States**, to determine whether multiple convictions for the same act or transaction are permissible. "Under this test, 'if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offense.'" (Citations omitted).

Salazar, 119 Nev. at 227.

As stated earlier, the Salazar Court also recognized this Court will reverse redundant convictions that do not comport with legislative intent:

> When considering whether convictions are redundant, in **State of Nevada v. District Court**, this court stated: The issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. . . The question is whether the material or significant part of each charge is the same even if the offenses are not the same. **Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant**.

Id. at 227-28 (citations omitted)(emphasis added).

As in **Salazar**, this Court should deem these convictions redundant because "Both arise from and punish the same illegal act... 'The Legislature never intended to permit the State to proliferate charges as to one course of conduct by adorning it with chameleonic attire.'" *Id.* at 228 (citations omitted).

In addition, though it is not always the case, the way the State worded the charge of battery with intent to commit a crime in this case made it a lesser-included offense of first degree kidnapping. Thus, the conviction must be vacated under both redundancy analysis and a straight **Blockburger** analysis.

E. Summary

In **Wilson v. State**, this Court held that the Nevada Legislature did not intend to separately punish multiple acts that occur close in time and make up one course of conduct: "We have declared convictions redundant when the facts forming the basis for two crimes overlap, when the statutory language indicates one rather then multiple criminal violations was contemplated, and when legislative history shows that an ambiguous statute was intended to assess one punishment." **Wilson v. State**, 121 Nev. 345, 114 P.3d 285, 292-93 (2005).

Allowing these redundant and multiplicious convictions to stand would violate Adams' double jeopardy protections. Adams therefore requests that his convictions for Counts **2, 3, 4, 5, 6,** 7 and **12** be vacated, and that his sentence be modified accordingly.

II. THE PROSECUTOR COMMITTED REPEATED ACTS OF MISCONDUCT IN CLOSING ARGUMENT, THEREBY DEPRIVING APPELLANT OF A FAIR TRIAL AND VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS AND THE NEVADA CONSTITUTION.

Although her abduction took place in broad daylight, in a populated, public area, and in full view of at least four witnesses, Valles never screamed, made an audible request for help, attempted to use her cell phone, or tried to run away. Valles testified that she was crying and shaking the entire time she was with Adams. However, none of

the eyewitness saw her crying or felt she was in legitimate danger. In fact, one eyewitness initially informed the police that Valles was following Adams, and not the other way around. (AA 570).

The forensic evidence proved that Adams and Valles had sex, but it did not prove that a sexual *assault* occurred. The State's Sexual Assault Nurse Examiner testified that injuries such as minor lacerations, bruising and swelling can easily occur from consensual sex. (AA 794). The examiner found no tape marks, despite the fact that Valles claimed Adams had taped her hands and mouth briefly. *Id.* She found no injuries on Valles' wrists, arms, or face. In fact, there was no physical evidence to prove Valles was a victim of sexual *assault*.

The allegations in this case are upsetting and emotionally polarizing, but it would be folly to suggest that there were no inconsistencies in Amber Valle's story, or that there was "zero" evidence supporting consent. But that is *exactly* what the District Attorney did.

During closing rebuttal, the prosecutor committed numerous acts of misconduct, despite repeated objections by defense counsel. Adams admitted to having sex with Amber Valles, but he argued to the jury that the sex was consensual. Defense counsel asked the jury to find Adams guilty of Statutory Sexual Seduction. During rebuttal, the prosecutor attacked this defense by **shifting the burden of proof**:

> D.A. Hendricks: Now, I was going to put up a slide in regards to evidence of consent in this case. But there wasn't any. **What piece of evidence did you hear –**
>
> Mr. Maningo: I'm going to object. It's starting to sound a little like burden shifting at this point, judge.

The Court: Objection's noted.

(AA 866)(emphasis added).

The prosecutor continued with his argument, and despite paying lip service to the concept of "proof beyond a reasonable doubt", he immediately shifted the burden of proof *again*.

> D.A. Hendricks: But **what piece of evidence was presented** in this courtroom that said that this was consensual sex? I would submit to you there was nothing. Look through all of these exhibits, hundreds of exhibits, and try to find one piece of evidence that says this was consensual. Go back and think about everyone's that's testified. Did any of those witnesses --
>
> Mr. Maningo: I'm going to object, and I'm sorry Mr. Hendricks. And ask to approach please.
>
> The Court: Approach... Objection's noted. Closing argument, counsel.

(AA 866)(emphasis added).

Despite a second objection and a bench conference, the D.A. picked up right where he left off. He states again that "zero" evidence had been presented to support the consent defense. (AA 867-868). He then went on to directly comment on the defendant's constitutional right to present a defense:

> D.A. Hendricks: Now defendant was left with **no option** but to **claim that it was consensual.**
>
> Mr. Maningo: I'm going to object to, as to counsel commenting on my client's right to a defense.
>
> The Court: Sustained.

(AA 876)(emphasis added).

The objection was sustained, but that did not stop the D.A. from *again* commenting on the defense just a few minutes later, in violation of the court's directive.

D.A. Hendricks:	Now what – what was **the only option left to defense counsel** in this particular case?
Mr. Maningo:	I'm going to object. This is – we're getting into the same thing regarding commentary on the defense.
The Court:	No commentary on the defense, counsel.
D.A. Hendricks:	It's a defense they presented, Judge, based on the evidence.
The Court:	No burden shifting.

(AA 878)(emphasis added).

Objection sustained; but then a few minutes later, the D.A. made the same type of comment: "That's the option that was left available to defense counsel." (AA 879). D.A. Hendricks finished his closing argument by *again* flipping the burden of proof, saying, "There is **zero evidence** that this was consensual." (AA 880)(emphasis added).

D.A. Hendricks flipped the burden of proof[5] and improperly commented on the defendant's right to a defense.[6] He injected his personal feelings about the defendant and his defense by showing utter incredulity and disdain throughout his closing argument.[7] He also **misstated the evidence** every time he claimed there was "zero" evidence of consent. As outlined above, there were several inconsistencies in Valles' story and observations by eye witnesses that could rationally be explained by a **consensual** encounter.

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[5] *See* **Washington v. State**, 922 P.2d 547 (1996).
[6] *See* **Murray v. State**, 930 P.2d 121 (1997).
[7] *See* **Pascua v. State**, 145 P.3d 1031 (2006); **Valdez v. State**, 196 P.3d 465 (2008).

This honorable Court has never "condone[d] or promote[d] prosecutorial misconduct in any form or manner." **Washington v. State**, 922 P.2d 547 (1996). Due to the prosecutor's position of authority, "improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." **Berger v. United States**, 295 U.S. 78, 88 (1935). Jurors have an implicit trust of law enforcement. Thus, when a prosecutor makes an improper argument, the impact on the jury can be profound:

> The power and force of the government tends to impart an implicit stamp of believability to what the prosecutor says. That same power and force allows him, with a minimum of words, to impress on the jury that the government's vast investigative network, apart from the ordinary machinery of trial, knows that the accused is guilty or has non-judicially reached conclusions on relevant facts which tend to show he is guilty.

Hall v. United States, 419 F.2d 582, 583 - 84 (5th Cir. 1969).

The fact that the prosecutor continued to commit the same acts of misconduct *after* being admonished by the court makes this case particularly egregious. *See* **Glover v. Eighth Judicial Dist. Court**, 220 P.3d 684 (2009)(*en banc*). In the Glover case, a single, isolated incident of misconduct **by a defense attorney** was deemed adequate to justify a mistrial. Here, we have *numerous* incidents of misconduct by a **seasoned prosecutor** who blatantly disregarded the court's admonishments. This only served to magnify the effect of the misconduct on the jury.

"Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers." **U.S. v. Kojayan**, 8 F.3d 1315, 1323 (9th Cir. 1993). "The prosecutor's job isn't just to win, but to win fairly, staying within the rules." *Id.* The misconduct in

the instant case violated Adam's constitutional right to a fair trial. Adams requests that his case be reversed and remanded for a new trial.

CONCLUSION

For the forgoing reasons, Adams requests that Counts **2, 3, 4, 5, 6, 7** and **12** be **vacated** and that he be remanded to District Court for a new trial on the remaining counts. Adams also requests oral argument in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

DATED this 22nd day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 22nd day of February, 2011. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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