IN THE SUPREME COURT OF THE STATE OF NEVADA

Ferrellgas, Inc., a foreign corporation, **Mario Gonzalez and Carl Kleisner**, Petitioners, vs. **The Eighth Judicial District Court of the State of Nevada ex rel the County of Clark and the Honorable Joanna S. Kishner**, Respondents.	Supreme Court No.: 82670 District Court No.: A-19-793381-C
Joshua Green, an individual Real Party in Interest.	

REAL PARTY IN INTEREST'S ANSWER TO PETITIONERS' WRIT FOR MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Real Party in Interest, Joshua Green, is an individual who is represented in district court by H&P Law.

DATED this 17th day of June 2021.

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REAL PARTY IN INTEREST'S ANSWER TO PETITIONERS' WRIT OF MANADMUS

As directed by the Supreme Court of Nevada, Real Party in Interest Joshua Green ("Josh") hereby submits his Answering Brief in response under NRAP 27(e) to Petitioners' Writ of Mandamus. This Answering Brief is based upon the points and authorities contained herein, the Appendix to Josh's Answer, all papers, documents, and exhibits already on file with this Court, and any oral argument the Court sees fit to allow.

I.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in ruling good cause exists for Plaintiff, Josh, to audio record and have an observer during his Rule 35 Psychological Examination. 2. Whether NRS 52.380 reads harmoniously with NRCP 35 or supersedes to create an inherent right to audio record and have an observer during a NRCP 35 Psychological Examination.

II.
STATEMENT OF THE CASE

On June 13, 2018, Defendant, Mario Gonzalez noticed his outdoor barbeque—fueled and maintained by Defendant, Ferrellgas, Inc.—was abnormally hot to the touch. (2 ANS BRIEF 448). Upon closer examination, Mr. Gonzalez observed flames shooting out of the line, and as a result, he contacted Ferrellgas' emergency customer service line. (2 ANS BRIEF 449). The next day, a Ferrellgas sent technician, Robert Vicory to the Gonzalez property. After a very short inspection, he stated the propane system was not leaking. (3 ANS BRIEF 501). Without any substantiated proof, Ferrellgas determined the source of the heat was an "electrical problem." (3 ANS BRIEF 501). Mr. Vicory is not an electrician, nor has he ever received any training as an electrician. (3 ANS BRIEF 514). Mr. Vicory then left, without performing a proper inspection, about twenty minutes later. (3 ANS BRIEF 520). Even if the system had been an "electrical" problem, under Ferrellgas policy, it should have been marked unsafe for use or "red tagged." (1

ANS BRIEF 131, 2 ANS BRIEF 399, 3 ANS BRIEF 535). Although it is Ferrellgas policy to do so, Mr. Vicory did not document this inspection. (2 ANS BRIEF 389).

Mr. Vicory then returned the next day, but again did not document his inspection nor did he "red tag" the system. (2 ANS BRIEF 391). Rather, and without substantiating his "electrical problem theory" or performing a leak test, Mr. Vicory deemed the grill "safe for use" and went on his way. (3 ANS BRIEF 509).

Despite being aware that his grill was experiencing issues, Mr. Gonzalez elected to host a barbeque at his house. Mr. Gonzalez invited his friend, Joshua Green, over to grill and watch a hockey game. Mr. Gonzalez placed a few steaks on the barbeque and asked Josh to monitor the steaks while he went inside his house for a moment. (2 ANS BRIEF 334). As a professional chef, Josh decided to check the steaks about four minutes later. When Josh opened the lid, his body was suddenly engulfed in flames. Josh, at 5'8", remembers these flames surpassing the height of his entire body. (2 ANS BRIEF 335). His shoes,

pants, and shirt were scorched from blaze, rendering them useless. (2 ANS BRIEF 335). The explosion replicated a bomb—reverberating through the neighborhood like a warzone. (2 ANS BRIEF 335).

Since this horrific experience, Josh has suffered debilitating PTSD symptoms, depression, stress, and exhaustion. (2 ANS BRIEF 317). Often, these symptoms materialize when Josh—a professional chef—sees a propane grills or flames. (2 ANS BRIEF 478). Due to this, the parties agreed good cause existed for a Rule 35 Psychological Examination. Furter, after substantial motion practice, Judge Joanna Kishner ordered good cause existed to audio record and have an observer present during Josh's Psychological Rule 35 Exam. (3 ANS BRIEF 560–561).

Now, Petitioners seek a writ ordering the District Court to reverse their decision and deny Josh an audio recording and observer during his Psychological Rule 35 Examination. Judge Kishner did not err; she correctly applied the law; good cause is inherent during an adversarial Rule 35 Examination.

III.

STANDARD OF REVIEW

The Nevada Supreme Court is tasked with determining whether the lower court clearly errored in allowing an audio recording and observer during a Rule 35 Psychological Examination based on the facts reviewed by the lower court in making her determination in conjunction of the application of applicable Nevada statutes.

Discovery matters are within the district court's sound discretion, and unless the court has clearly abused its discretion can this Court disturb the district court's ruling.[1] A review of the findings of fact of the lower court are reviewed under a "clear error" standard, whereas questions of law are reviewed "de novo."[2] Petitioners bear the burden to demonstrate that this Court's intervention by way of extraordinary relief is warranted.[3]

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[1] *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246 (2012) and NRS 34.320.
[2] *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013).
[3] *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

Further, the Nevada Supreme Court must consider the "construction of a statue," NRS 52.380.[4] Specifically, if NRS 52.380 reads harmoniously with NRCP 35 or supersedes to create an inherent right to audio record and have an observer during a NRCP 35 Psychological Examination. (APP -1177).

IV.
ANSWERING BRIEF ARGUMENT

A. The District Court did not err in determining good cause exists for an audio recording and observer because good cause is inherent in Rule 35 Examinations.

Petitioners assert they have met their burden because "no evidence" exists to support a finding for good cause for Josh to have an observer present at and have an audio recording of his psychological examination. The district court correctly disagreed. There is no doctor-patient relationship between Josh and Dr. Etcoff. In fact, Dr. Etcoff

[4] *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

routinely concedes this deficiency in his "clinical" versus "forensic" or med-legal practice:

> MR. PARRY: Sure. So, in fact, I want to clarify the difference between clinical and forensic because I may not have the same understanding you do. The way I understand it, clinical work is where you are actually providing treatment to patients, is that right?
>
> DR. ETCOFF: Or evaluations for patients. Where there is a doctor-patient relationship, confidentiality, the privilege is theirs, yes.
>
> MR. PARRY: And the forensic work would be more like in this case where you're hired not by the patient, but you still do an evaluation but there's not this doctor-patient relationship?
>
> DR. ETCOFF: Yes. (1 ANS BRIEF 202).
>
> MR. BENSON: And what kind of practice do you primarily run? I know you've been hired as an expert in this case, but what do you primarily do?

DR. ETCOFF: I do two different types of practices: a clinical practice and forensic practice…And now I've sort of really cut back on the clinical and see fewer clinical cases. The other part of my practice is doing these types of evaluations for plaintiff or defense attorneys, essentially just in the area of personal injury, to see whether someone has emotional or cognitive changes as a result of an accident or incident.

MR. BENSON: Fair enough. Just for the record, forensic in your view means what?

DR. ETCOFF: Working as a consultant or an expert for an insurance company or an attorney who retains me to take a look at a case they have. (1 ANS BRIEF 141).

A doctor-patient relationship is a special relationship, characterized with "trust, knowledge, regard and loyalty." (2 ANS BRIEF 277). The doctor-patient "remains a keystone of care: the medium in which data are gathered, diagnoses and plans are made, compliance is accomplished, and healing, patient activation, and support are

provided." (ANS BRIEF 01). The absence of a doctor-patient relationship or a flawed one can alter patient health outcomes. (2 ANS BRIEF 279).

Dr. Etcoff is hired by the Defense to undermine diagnoses—to the point he confesses there is no doctor-patient relationship in his "forensic" or med-legal practices. Dr. Etcoff admits he always assumes plaintiffs are malingering or exaggerating their injuries. (1 ANS BRIEF 17). That is not often physician-based thinking; however, it is defense-attorney philosophy. If Dr. Etcoff and Josh do not have a doctor-patient relationship, Dr. Etcoff will evaluate Josh presuming he is a malingerer, and the Defense is literally paying Dr. Etcoff to support their case—the Rule 35 examination is adversarial. The lower court did not error in determining that good cause exists to protect Josh from this adversarial process by allowing an audio recording and observer to be present based on these facts weighed by the court.

B. Petitioners' reliance on *Flack* is moot since there is no dispute that a good cause exists to conduct a Rule 35 Examination in any of the moving papers before the lower court.

A California District Court case, *Flack v. Nurtibullet, LLC*, offers factors for determining if good cause exists for a Rule 35 Examination.[5] But, notably, it does not address the issues of recording or observation of the examination.[6] That court found that "a plaintiff who 'asserts mental or physical injury…places that mental or physical injury clearly in controversy and provides the defendants with **good cause for an examination** to determine the *existence* of such asserted injury."[7]

This Court cannot find that the lower court was in clear error under the *Flack* factors because good cause to conduct a psychological Rule 35 Examination was never disputed. Josh has already agreed to a Rule 35 examination on multiple occasions, and Petitioners even acknowledge as much. So, any reliance on *Flack* by the Petitioners becomes moot.

The Petitioners may be attempting to use the *Flack* factors as parameters for establishing good cause for an audio recording and

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[5] *Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508 (C.D. Cal. 2019).
[6] *Id.* at 514.
[7] *Id.*

observer for Josh's psychological Rule 35 exam. This motive appears to be the only logical explanation for mentioning *Flack* (and because their petition follows the *Flack* argument by mentioning *Freteluco*)[8], Even when applied to an obsever and recording, Real Party in Interest maintains he met the good cause standards set forth in *Flack*: (1) the possibility of obtaining desired information by other means (2) whether plaintiff plans to prove [their] claim through testimony of expert witnesses (3) whether the desired materials are relevant and (4) whether plaintiff claims ongoing emotional distress.[9]

1. An audio recording and observer are the only means to obtain actual data for Josh's Defense Medical Examination.

While Petitioners may argue Josh will obtain information regarding Dr. Etcoff's examination in his expert report, the absence of doctor-patient relationship and Dr. Etcoff's defense-driven tactics raise serious

[8] *See* Writ of Mandamus at page 12: "In Freteluco, Plaintiff failed to meet her burden. 336 F.R.D. at 203. The Court determined there was nothing extraordinary or out of the ordinary that suggested a third-party observer was appropriate..."

[9] *Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508, 514 (C.D. Cal. 2019).

concern regarding the objectivity of his findings.

This concept was explored with Dr. Etcoff's colleague, Derek Duke, MD. In 2015, a defense counsel hired Dr. Duke for a Defense Medical Examination of a plaintiff. When the plaintiff's counsel opposed the request, this Court ultimately got involved and determined Dr. Duke was *not* objective, as most of his reports concluded similar theories about plaintiffs malingering. (1 ANS BRIEF 183–187). More importantly to this case, then-commissioner Bonnie Bulla expressed her deep concerns regarding the defense using Rule 35 examinations as litigation bullying:

> COMMISSIONER BULLA: The issue is whether or not there's bias or prejudice, and these are -- and I will tell you this is what I looked at. I looked at whether or not in that report, somewhere in that report, there was an indication of secondary gain. That's one thing I looked for. And then the next thing I looked for is whether or not there was some suggestion that the Plaintiff had some psychological issue or psychiatric explanation for the injures, and

the reason I looked at those things in particular, and, again, is because that's what I would consider to be inflammatory under the Federal Court case, and this is why -- because what -- and to Dr. Duke's credit, many times, not every time, but many times he says it could conscious or subconscious, but that's not really -- it's not about the person being examined. It's about his point of view. It's what he's looking for because we're trying to figure out what his objectivity is.

So it is no wonder that on Rule 35 exams you see the same defense examiners over and over and over again. You know, when I get the time, maybe I'll rewrite Rule 35. I think it is being used as a litigation tool and it's not being used for the purpose it is supposed to be, which is really trying to figure out if something's wrong with the Plaintiff and what's related and what is unrelated, and right now, it's just -- it's a tool. It's no more than litigation bullying is what it is, with all due respect to my defense friends out there. That's what it is. **It's using a rule to bully in litigation** and,

frankly, I don't think Dr. Duke deserves to used that way or any other physicians, and I think it's the Bar's responsibility to get hold of the Rule and figure out how it should be used because, frankly, it's very distressing to me. (1 ANS BRIEF 181–183).

This Discovery Commissioner's hearing eventually led to a hearing before the Honorable Judge Timothy Williams. There, this Court revealed Dr. Duke "disagrees with the treating doctor approximately 95% of the time," "finds symptom magnification to be a factor in approximately 108 cases or 29% of the time," "finds pending litigation to be a factor in approximately 178 cases or 48% of the time," and "suggests the patient is not being truthful or giving inconsistent information in 149 cases or 40% of the time." (2 ANS BRIEF 248–249). Judge Williams ultimately found Dr. Duke has "a history of personal bias as to some treating physicians and extreme bias resulting in prejudice against personal injury plaintiffs." (2 ANS BRIEF 275–276).

Additionally, Dr. Duke was recorded giving questionable (at best) medical advice to a plaintiff during a Rule 35 Examination. The plaintiff,

Mr. Ribera, recorded Dr. Duke without his knowledge. Again, this is a plaintiff—so **no doctor-patient relationship exists** between Dr. Duke and Mr. Ribera; Dr. Duke unequivocally should *not* be giving medical advice at all during Rule 35 Examinations, but what he is recorded saying is *disturbing*. Dr. Duke is heard essentially telling Mr. Ribera that is uncommon for car crash victims to require back surgery—even if they got hit at 60 mph. (1 ANS BRIEF 122–123). Dr. Duke asked Mr. Ribera improper liability questions, including "has anyone told you that any of the imaging studies shows evidence of injury to -- from the car wreck." (1 ANS BRIEF 122). Dr. Duke also criticizes Mr. Ribera's treating physician, Dr. Erkulwater, and advises Mr. Ribera stop taking his pain medication cold turkey[10]

> DR. DUKE: And -- and pretty much use of long-term, high-dose, you know, morphine, it's just been completely abandoned. And it's shocking that -- that you're being managed that way because I can

[10] *Id.* at 19:18–21:15.

-- I would bet any amount of money that no matter what is done, you will not get better as long as you have the drugs onboard.

MR. RIBERA: So what's the plan of attack? I mean what would you do with me?

DR. DUKE: You get rid of the drugs first, and then, you get through that. And you know, on opiates for four years, that's a major problem, 'cause your body gets used to it. You get addicted to it so sometimes you have to see an addiction specialist.

MR. RIBERA: Really? I bet I could quit tomorrow.

DR. DUKE: Boy, I tell you, that would be the best thing you ever did.

MR. RIBERA: I -- I would just be in pain, that would be the part that sucks.

DR. DUKE: So I would -- before I committed myself to having my back sliced open again, that's -- that's the route I would go.

MR. RIBERA: Okay.

DR. DUKE: You know, **that's my advice.** (1 ANS BRIEF 120).

Finally, Dr. Duke—who is not a lawyer—tells Mr. Ribera his case has "many red flags" and that "litigating is going to be very, very difficult." (1 ANS BRIEF 120–121). He then snidely remarks he hopes Mr. Ribera has medical insurance to cover future treatment, presumably because Dr. Duke believes Mr. Ribera will lose his lawsuit. (1 ANS BRIEF 121). This disconcerting transcript, and other incidents like this, shed light on the specific need for Nevada plaintiffs to record their Rule 35 Examinations and drove the changes to the rules and statues.

Josh recognizes Dr. Duke is not Etcoff, but the parallels between them are apparent. Dr. Etcoff, like Dr. Duke, is a popular Defense Rule 35 examiner. Dr. Etcoff estimates his forensic practice is "90 percent for defense, 10 percent for plaintiffs." (1 ANS BRIEF 202). This estimate is a *bit* off. A review of Dr. Etcoff's testimony history provided by Ferrellgas in their initial expert disclosures shows Dr. Etcoff has been retained by defense firms 32 out of 33 cases in which he testified over the last 5

years—equating to 97% of the time. Plaintiff's counsel is also aware of several instances of Dr. Etcoff citing secondary gain, untruthfulness, or malingering in his reports:

POST SUBJECT ACCIDENT CONDITIONS: Regarding her subject accident physical injury claims, two things impress me as a psychologist. First, with the passing of time and despite excellent medical treatment, she has developed ever-worsening and serious physical disabilities to the point of being almost an invalid. Equally impressive is how she appears emotionally well adjusted, interpersonally outgoing, and euthymic in mood. It is not normal for a person who appears nearly blind and has lost use of her right upper extremity to be vivacious, upbeat, and ebullient.

Regarding her behavior during this evaluation, unlike adults malingering a Pain Disorder, [redacted] did not behave as if she was experiencing significant physical discomfort. Rather, she appeared comfortable; but, when questioned directly about how much pain she was experiencing, she answered that she was in moderate to severe pain in several sites. Her depiction of being in much more pain than she appeared is consistent with behavior typical of adults who have a Pain Disorder Associated with Both Psychological Factors and a General Medical Condition. Also consistent were her brittle and labile emotions, moodiness and irritability. The only topics of conversation that caused [redacted] to appear depressed were her son's heroin addiction, her marital relationship, and the affair that her husband and sister had. Otherwise, even when she spoke about the subject accident and her subsequent medical treatments, she seemed euthymic in mood.

There were numerous instances that, in my professional opinion, [redacted] purposely did not tell me the truth by omitting pertinent case-related information, e.g., claiming not to remember medical tests and doctors' visits that were pain-symptom driven prior to the subject accident in 2003-2005. She twice misinformed me that prior to the subject accident she had never had a chronic pain condition, musculoskeletal or otherwise. She denied having had previous medical treatment for chronic neck, upper back, lower back, and right shoulder pain complaints. She misinformed me that she couldn't remember getting shoulder x-rays and MRIs of the cervical and lumbar spine for significant pre-subject accident pain complaints. She told me that she didn't recall the EMG/NCVs provided by John Schaeffer, M.D., the neurologist she claimed she couldn't recall ever seeing. All of these answers were, in my professional opinion, disingenuous and typical of the answers that people who are malingering tend to give to examining doctors.

rape. [redacted]'s denial of any pre-subject accident depressive incidents suggests that she is either consciously or unconsciously embellishing the psychological injuries she claims are subject accident related.

It is highly unlikely *every* plaintiff Dr. Etcoff examines is exaggerating their condition. Because of the implicated bias, an audio recording and observer are the only objective means of obtaining data from Josh's Defense Medical Examination.

The district court did not err in determining, this factor weighs in favor of good cause.

2. Josh intends to support his case with expert witness testimony.

Josh identified Michael Elliott, Ph.D of as his treating physician. Dr. Elliott is expected to testify regarding his opinions on Josh's treatment, the authenticity of his records, the necessity of the treatment and the causation of necessary treatment. Dr. Elliott will further testify about the cost of Josh's psychological treatment, the cost of any future treatment recommended, and if this treatment is standard and customary within the psychological field.

Because Josh intends to introduce this testimony at trial, The district court did not err in determining this factor weighs in favor of good cause.

3. Whether the desired materials are relevant.

Josh intends to introduce this evidence for impeachment materials, if necessary. Per NRS 48.015, relevant evidence is "evidence having *any*

tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." [11] Impeachment evidence is permitted to question the credibility of a witness, specifically related to "truthfulness or untruthfulness."[12]

An audio recording and observer of Josh's defense psychological examination are entirely relevant to this matter. The audio recording and observer's notes will be compared to Dr. Etcoff's report to determine if he is accurately recording his findings. While Real Party in Interest does not intend to take the position that Dr. Etcoff is deceitful, the bias discussed at length above establishes concern for the objectivity of his reports.

Specifically, if Dr. Etcoff reports Josh is exaggerating his psychological symptoms, has significant pre-existing psychological or mental ailments (despite no evidence to support this contention), or has

[11] NRS § 48.015.
[12] NRS § 50.085(a).

secondary gain, Real Party in Interest's counsel will cross reference these opinions with the audio recording.

4. Whether plaintiff claims ongoing emotional distress.

Because of the explosion, Josh has become "fearful of using propane." He experiences flashbacks to the event and has become socially withdrawn. While therapy has helped a bit, Josh still suffers from anxiety. He intends to claim ongoing emotional distress.

The district court did not err in determining this factor weighs in favor of good cause.

C. Clear error does not exist since an audio recording and observer can occur discreetly during a psychological Rule 35 Examination and provide an unbiased representation of the examination.

Petitioners rely on *Schlagenhauf*,[13] *Flack,*[14] *Gavin*,[15] and *Franco*[16] to

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[13] *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964).
[14] *Flack v. Nutribullet, L.L.C.*, 333 F.R.D. 508 (C.D. Cal. 2019).
[15] *Gavin v. Hilton Worldwide Inc.*, 291 F.R.D. 161 (N.D. Cal. 2013).
[16] *Franco v. Bos. Sci. Corp.*, No. 05-cv-1774 RS, 2006 U.S. Dist. LEXIS 81425 (N.D. Cal. Oct. 27, 2006).

suggest an audio recording and observer violate the "good cause requirement." Similar to *Flack*, these cases primarily explore the good cause requirement to conduct a Rule 35 Examination—not necessarily the good cause for an audio recording and observer.

Schlagenhauf, however, does offer a few relevant definitions of "good cause," including "sufficiently established," "what may be good cause for one type of examination may not be so for another," "showing may be made by affidavits or other usual methods," and may be established on "the pleadings alone."[17] Essentially, *Schlagenhauf*, says courts recognize good cause when they see or hear it. Despite Petitioners' contention Josh failed to file relevant evidence to constitute good cause, the district court did just as *Schlagenhauf* suggests—it recognized good cause for an audio recording and observer and therefore did not clearly error.

What appears misplaced, however, is Petitioners' argument that an audio recording and observer nullify the truth. They make the following

[17] *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964).

representations:[18]

> The Rules of Civil Procedure are designed to be tools to elicit the truth. To routinely require the presence of an observer and an audio recording during an adverse psychological/neuropsychological examination would thrust the adversary process itself into the psychologist's examining room, which would only institutionalize discovery abuse, covert adverse medical examiners into advocates, and shift the forum of controversy from the courtroom to the physician's examination room.

What the Petitioners don't acknowledge in this statement is that Rule 35 Examination's are inherently adversarial. These examinations permit a **defense-paid doctor** to rebuke a plaintiff's symptomology and in Dr. Etcoff's own words "to take a look at whether someone is exaggerating." (1 ANS BRIEF 16–17).

Courts nationally recognize the adversarial nature of Rule 35 examinations are a *very* real problem caused by the process and not by

[18] *See* Writ of Mandamus at pages 13–14.

the recording or observing of the process. A Florida court ruled Rule 35 exams are less like a "medical patient seeing [their] doctor" and "more akin to a litigant attending a deposition."[19] Former District Court Discovery Commissioner Bulla stated Rule 35 is "not being used for the purpose it is supposed to be, which is really trying to figure out if something's wrong with the Plaintiff and what's related and what's not." (1 ANS BRIEF 181–183). She further opined, "it's a tool. It's not more than a -- it's litigation bulling is what it is." (1 ANS BRIEF 181–183).

Petitioners' argument that an audio recording and an observer "thrust[s] the adversary process itself into the psychologist's examining room" fails because a Rule 35 Examination already is an adversary process. *Everyone* involved with Rule 35 is aware of this. Defense attorneys know they get their pick of an examiner; Doctors examining plaintiffs know the defense is writing their check; Plaintiffs being examined know they are being forced to see a doctor the adverse party

[19] *Davanzo v. Carnival Cruise Lines*, 2014 U.S. Dist. LEXIS 49061, 2014 AMC 1361, 2014 WL 1385729.

hired, etc. Petitioners have not established any further proof how an audio recording and observer make this process "more adversarial." In fact, an audio recording and observer are the only objective evidence that may even exist regarding Rule 35 Examinations. They provide a completely unbiased representation of what occurred during the examination.

D. Josh did not waive his good cause argument.

Josh acknowledges his original argument before Commissioner Truman focused on his statutory right to audio record and have an observer present during the Defense Medical Examination. Josh maintains he does have the **substantive** right to do so per NRS 52.380.

But Petitioners are misplaced with their reliance on *Achrem*[20] to claim Josh could not make a good cause argument before the District Court during January 26th's hearing on Defendants' Objection to Discovery Commissioner's Report and Recommendations. *Achrem*

[20] *Edward J. Achrem, Chtd. v. Expressway Plaza Ltd. Pshp*., 112 Nev. 737, 917 P.2d 447 (1996).

establishes "points or contentions not raised in the original hearing cannot be maintained or considered on rehearing." This refers to a "motion for reconsideration."[21] Specifically, judges should not consider evidence that is not properly submitted **before the district court** reaches a decision."[22]

As Petitioners are likely aware, Commissioner Truman is *not* a district court judge. Her recommendations are not orders; her decisions are not final until they are affirmed and adopted by the district court. Josh was well within his purview to make good cause arguments before Judge Kishner on January 26th.

E. Clear error does not exist since audio recording and an observer are used in psychotherapy treatment sessions provided the examinee consents.

Petitioners claim requiring an audio recording and observer during Josh's psychological Rule 35 Examination violates the rules and ethics

[21] *Id.*
[22] *Id.*

of Dr. Etcoff's profession. Petitioners further contend psychologists are barred from allowing third party observers to observe, take notes, or audiotape copyrighted psychological and neuropsychological tests. Finally, Petitioners argue neither Dr. Etcoff nor any other licensed psychologist will allow "third party observers or audiotaping." If Dr. Etcoff wants to make the conscious decision to restrict audio recording and observers at his own practice of his own patients, that is his prerogative. The contention it is unethical or prohibited, is simply not true.

Audio recorders are widely used in psychology and psychiatry. The **American Psychological Association** published a study in 2016 regarding patient-comfort and outcomes in audio and videorecorded psychological examinations. (2 ANS BRIEF 292). The APA study utilized 390 patients with varying diagnoses including mood disorder, anxiety disorder,[23] and substance-related disorder.[24] After a brief symptom

[23] Joshua Green's primary diagnosis is anxiety disorder. 3 ANS BRIEF 543.
[24] Exhibit 12.

inventory, the patients were asked to consent to audio and video recording of psychotherapy sessions. The APA determined 71% of patients were willing to consider audio or video recording after a discussion with their clinician. (2 ANS BRIEF 296). Further, the APA established "most patients report feeling relatively comfortable with audio or video recording…in the context of appropriate safeguards for confidentiality" and patients that refused recording "were not significantly more likely to refuse treatment." (2 ANS BRIEF 298).

The results of this APA study are promising; but what is relevant to the instant matter—and personal injury litigants as a whole—is the APA's assertion of the following:

> More recently, audio or video recordings have been used. Audio and video recording have provided a partial solution for the desire for an **objective record** of the psychotherapy process in that they provide permanent, *undistorted*, **unbiased** accounts of therapy sessions. Recording allows therapists to focus entirely on the patient and remain fully present in the room without waving to worry about

taking notes or memorizing the interaction. It also eliminates concerns about the unreliability of memory, perception, and thought, that are inevitable when obtaining data from human memory. (2 ANS BRIEF 293).

Because there is *plenty* evidence to support audio recording psychotherapy sessions, it is peculiar Dr. Etcoff would take such a hard and fast position on refusing audio recording and an observer present. The law in Nevada is clear: recording of in-person oral communication is allowed with the consent of at least one party.[25] Especially because the individual possessing the privilege of confidentiality, Josh, has waived such.

F. Clear error does not exist since audio records and observers during the Rule 35 do not create an unfair advantage to Petitioners —it provides a safeguard to Josh.

Petitioners' final argument claims they are irreparably and unfairly

[25] NRS 200.620; NRS 200.650; *Lane v. Allstate Ins. Co*. 114 Nev. 1175 (1998).

prejudiced if the District Court orders an audio recording and observer present during Josh's Rule 35 Examination. To suggest such completely disregards the prejudice Josh faces in being forced into a Defense Medical Examination in the first place. A doctor—that is paid by the individuals Josh is suing—will examine him under the pretense he is not injured. That doctor will then prepare a report, which will state whatever the doctor observed and heard without neutral confirmation that the observations and recollections were accurate. That is the very definition of prejudicial evidence.

If Dr. Etcoff's examination is above board, there should be nothing to hide nor *any* prejudice to Petitioners; allowing an audio recording and observer protects injury victims in all civil cases where a medical examination is ordered,[26] including cases of battery, negligence, sexual violence, and among other traumas. These victims experience physical and psychological trauma from their experiences and risk

[26] See NRS 52.380(7), (applying to all civil cases in which a physical or mental examination is ordered by the court).

revictimization during an exam performed by the hired agent of the victimizer. Regardless of the specific intent of the examiner, the risk of revictimization is a genuine risk to the injured person. The substantive protections under the statute protect the injured victim and apply to all mental and physical examinations ordered by a court during civil litigation.[27] The audio recording and observer will simply act as a safeguard to ensure Josh is treated fairly during the Rule 35 process.

G. Rule 35 and NRS 52.380 can be read harmoniously creating the ability for this Court to interpret NRS 52.380 so that it does not violate the separation of powers doctrine.

NRS 52.380 and NRCP 35 can be read harmoniously as they serve entirely different functions.[28] Rule 35 is a procedurally focused on the process of collecting evidence through medical examinations and the preservation of that evidence through recordings and observers when

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[27] NRS 52.380(7).

[28] *Goldberg v. Eighth Judicial Dist. Court In & For Clark Cty*., 93 Nev. 614, 617, 572 P.2d 521, 523 (1977) (the judiciary and the legislature can have overlapping functions, provided that each branch can trace it actions to a basic source of power.)

deemed appropriate by the district court.[29] NRS 52.380 is focused on the substantive protections of the interests of injured victims by use of an advocate that is not and cannot be appointed under Rule 35.

Although both the Rule and the Statue use the term "observer," a plain text reading shows that the Rule's "observer" and the Statute's "observer" do not have the same defined roles. And each role as defined by the Rule and the Statute cannot be occupied by the same person at the same time. Each "observer" role can exist independently of the other. The Rule does not prohibit the existence of the statutory observer/advocate. The Statute does not prohibit the existence of the rule-based observer/witness.

1. "Observers" under Rule 35 act procedurally; focused on the collection and preservation of evidence process.

In 2019, Rule 35 was amended to include Subsections (a)(3) and (a)(4), dealing with court-ordered recordings and court-appointed

[29] NRCP 35.

observers.[30] By their text, Rule 35(a)(3) and (4) refer to "conditions" set by the court, and thus are reflective of the "conditions" requirement in Rule 35(a)(2).[31] Subsections (a)(3) and (a)(4) set the boundaries and limitations of a court's "conditions" under Rule 35(a)(2)(B).[32]

Under Rule 35(a)(3), the district court may order a recording as a condition of the exam.[33] If the district court orders a recording as a Rule 35(a)(2)(B) condition, the requesting party "must arrange and pay for the recording[,]"[34] The recording has obvious evidentiary value if a dispute arises as to what occurred during the exam.

2. NRS 52.380 is a statute that focuses on the substantive protection of the rights of injury victims and not the procedural collection of evidence.

The law in Nevada is clear: recording of in-person oral

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[30] *Compare* NRCP 35 (2019) to any prior version.
[31] *See* NRCP 35(a)(3), NRCP 35(a)(4).
[32] *See* NRCP 35(a).
[33] *See* NRCP 35(a)(3).
[34] *See* id.

communication is allowed with the consent of at least one party.[35] NRS 52.380 protects this substantive right in the context of civil litigation.

NRS 52.380 has a wholly different purpose than NRCP 35 and, as such, provides different substantive protections than the evidentiary protections in NRCP 35. NRS 52.380 is drafted and designed to provide protections to injury victims who are ordered to be examined by the representative of the injuring party.[36] The statute protects injury victims in all civil cases where a medical examination is ordered,[37] including cases of battery, negligence, sexual violence, cyber bullying, and mental and physical abuse, among other trauma. These victims experience

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[35] NRS 200.620; NRS 200.650; *Lane v. Allstate Ins. Co*. 114 Nev. 1175 (1998).

[36] See e.g. *Zabkowicz v. West Bend Co*., 585 F. Supp. 635, 636 (E.D. Wis. 1984) ("[T]he defendants' expert is being engaged to advance the interests of the defendants; clearly, the doctor cannot be considered a neutral in the case."); see also (3 Def. App. 928-929). (The president of the Association of Defense Counsel of Nevada during the March 27, 2019 Assembly Judiciary Committee Meeting confirming Assemblyman Edwards' question that the Rule 35 examining "doctor is actually serving as a representative of the defendant").

[37] *See* NRS 52.380(7), (applying to all civil cases in which a physical or mental examination is ordered by the court).

physical and psychological trauma from their experiences and risk revictimization during an exam performed by the hired agent of the victimizer. Regardless of the specific intent of the examiner, the risk of revictimization is a genuine risk to the injured person. The substantive protections under the statute protect the injured victim and apply to all mental and physical examinations ordered by a court during the course of civil litigation.[38]

The statutory observer has three characteristics or powers that are unique to the statute. First, the statutory observer may be the attorney or a representative of the attorney.[39] Second, the statutory observer acts as the victim's advocate. The statutory observer may not participate or interfere with the exam generally, but has the express authority to suspend the exam to obtain a protective order if the examiner becomes abusive or exceeds the scope of the examination.[40] Third, the statutory observer may make an audio or stenographic

[38] NRS 52.380(7).
[39] NRS 52.380(2).
[40] NRS 52.380(4).

recording of the examination, thus providing the examinee the right to record what happens to his or her own person.[41] The powers and characteristics of the statutory observer are focused, not on the collection and preservation of evidence, but on the protection of the examinee.

3. NRS 52.380 and Rule 35 can be read in harmony in favor of the constitutionality of NRS 52.380.

The Nevada Supreme Court has repeatedly held that it will take every presumption in favor of the constitutionality of a statute and make every attempt to interpret a statute so that it does not conflict with the constitution.[42] Moreover, as the Nevada Supreme Court stated in 1991, "this court should avoid construing one of its rules of procedure and a statute in a manner which creates a conflict or inconsistency between them."[43]

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[41] NRS 52.380(3).

[42] E.g. *List*, 99 Nev. at 138; *Mangarella v. State*, 117 Nev. 130, 135, 17 P.3d 989, 992 (2001) ([w]henever possible, we must interpret statutes to avoid conflicts with the federal or state constitution").

[43] *Bowyer v. Taack*, 817 P.2d 1176 (1991).

The Nevada Supreme Court can harmonize the "good cause" requirement of NRCP 35 with permissions established in NRS 52.380 since the "good cause" requirement only applies where the recording will be used as evidentiary support for a claim or defense. If no "good cause" is found by the Court, the NRS 52.380 recording would then be used for cross examination and impeachment material in deposition or at trial.[44]

NRS 52.380 and Rule 35 can further be harmonized since, the Rule 35 witness is appointed by the court as an NRCP 35(a)(2) condition, and the NRS 52.380 advocate appointed by the examinee or her attorney are two wholly separate people with two different roles. A plain reading of the text of Rule 35 and NRS 52.380 demonstrate that the Rule 35 witness and the statutory advocate cannot be the same person at the

[44] NRS 50.085(3) permitting impeachment of a witness on cross-examination with questions about specific acts as long as the impeachment pertains to truthfulness or untruthfulness.

same time.[45]

The Rule 35 witness must be appointed by the court[46] where the statutory advocate is appointed be the examinee or her attorney.[47] The Rule 35 witness cannot be the attorney or the attorney's agent[48] where the statutory advocate expressly can be the attorney or the attorney's appointee.[49] The Rule 35 witness expressly cannot interfere with, participate in or interrupt the exam in any way.[50] The Rule 35 witness is merely an observing witness and cannot be anything more.[51]

The NRS 52.380 advocate is expressly endowed with authority to suspend the exam if the examiner is abusive or exceeds the scope of the examination.[52] The NRS 52.380 advocate is expressly empowered

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[45] *In re 12067 Oakland Hills, Las Vegas, Nevada 89141*, 134 Nev. 799, 801, 435 P.3d 672, 675 (Nev. App. 2018) ("As always, the proper place to begin is with the plain text of the relevant statute.").
[46] *See* NRCP 35(a)(4).
[47] *See* NRS 52.380(1) and (2).
[48] *See* NRCP 35(a)(4)
[49] *See* NRS 52.380(2).
[50] *See* NRCP 35(a)(4)(C).
[51] *See* NRCP 35(a)(4).
[52] NRS 52.380(4).

to represent and protect the interests of the injury victim.[53] The NRS 52.380 advocate is empowered to make an audio or stenographic recording of the exam where it is not clear that Rule 35 intends the Rule 35(a)(4) witness to make any recording.[54]

Nothing in Rule 35 prohibits an NRS 52.380 victim's advocate. Nothing in NRS 52.380 prohibits the Court from appointing a Rule 35(a)(4) witness or ordering a Rule 35(a)(3) recording. The Rule and the Statute can operate harmoniously without conflict. As such, the separation of powers doctrine is not implicated.

[53] *See* NRS 52.380.

[54] *Compare* NRS 52.380(3) to NRCP 35(a).

V.
CONCLUSION

Real Party in Interest hereby requests this Court uphold the decision of the District Court and permit an audio recording and observer during Josh's Rule 35 Psychological Examination.

DATED this 17th day of June 2021.

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CERTIFICATE OF COMPLIANCE

I, Matthew G. Pfau, the undersigned, hereby certify as follows:

1. I have prepared and read this Answering Brief.

2. To the best of my knowledge, information, and belief, the Answering Brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

3. This Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, including Rule 28(e), that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

4. The Answering Brief complies with the formatting requirements of Rule 32(a)(4)-(6) and 32(a)(7), This Answering Brief also complies with NRAP 21(a)(6)(d) because although it exceeds 15 pages, at 6,377 substantive words from argument to conclusion, it is less than 7,000 words.

5. The Answering Brief is written using 14-point proportional-spaced font called "Open Sans."

DATED this 17th day of June 2021. H & P LAW

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June 2021 service of the foregoing REAL PARTY IN INTEREST'S ANSWER TO PETITIONERS' WRIT FOR MANADMUS was made by required electronic service and U.S. Mail to the following individuals:

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