

I. SUMMARY OF PROCEEDINGS

A. COURSE OF PROCEEDINGS

Defendant Wayne Bent (a/k/a Michael Travesser) was charged with two counts of Second Degree Criminal Sexual Contact of a Minor (unclothed) (CSCM) pursuant to NMSA 2008, § 30-9-13(A)(B)(2)(a); and two counts of Contributing to the Delinquency of a Minor (CDM) in violation of NMSA 2008, §30-6-3, by the Union County Grand Jury on May 20, 2009. [RP 1] After a jury trial ending on December 15, 2008, Mr. Bent was found not guilty of one count of Second Degree CSCM and convicted of one count of Second Degree CSCM. [RP 507,508] He was also found guilty of two counts of CDM. Mr. Bent was sentenced to a fifteen (15) year sentence for CSCM; ten years incarceration and the remaining five (5) years suspended. He was also given Eighteen (18) Months on each of the two CDM convictions to be served consecutively to the CSCM for a total of Eight (8) years suspended, pursuant to a Judgment and Sentence, filed December 30, 2008. [RP 619]. Trial Counsel, Sarah Montoya, filed a Notice of Appeal on January 5, 2009 [RP 637], and the Docketing Statement was filed on February 10, 2009. [RP 666]. The Brief in Chief is due on November 2, 2009 after the belated entry of the transcripts submitted to assist the Court and the Parties in preparing this appeal.

Specific Procedural Issues Raised in the Docketing Statement

1. *The Grand Jury Process and Objections*

Defendant's case was presented to the Grand Jury on May 20, 2008. [RP 1-2]. Counsel for the Defendant filed an Emergency Motion to Compel Production of Available Discovery and Memorandum in Support on the 16th day of May 2008. [RP 84, ¶4, 87, 96]. The Assistant District Attorney questioned the Grand Jurors regarding prior connections to the Defendant and one Grand Juror who was a CYFD employee indicated the Defendant and where he lived (Strong City) had been investigated by CYFD. [RP 80-81]; GJTr 8. Defendant objected to this in his Motion to Quash the Grand Jury Indictment and his Amended Motion to Quash. [RP 25-54, 79-111] *Id.* Defendant had requested that the alleged victims be called before the Grand Jury to testify and went so far as to attempt to subpoena the girls in question to appear before the Grand Jury. [RP 88-89, 98-99]. The district attorney stated that only the Grand Jury had subpoena power for the proceedings, but the DA did not inform the Grand Jury that the Defendant wished to have the girls called in to testify. [RP 88-89]. Defendant filed a Motion to Quash Grand Jury Indictment [RP 25-54] followed by an Amended Motion to Quash Grand Jury Indictment on the 12th day of August, 2008. [RP 79-110].

Defendant alleged that the Grand Jury was not selected in accordance with NMSA 2008, §31-6-3(A) because it was convened by the Honorable John M. Paternoster on October 3, 2007¹ and its term *ended* on January 4, 2008, four

¹By Order filed for record in Union County District Court cause number GJ-2007-1 on October 3, 2007.

months prior to the date of Mr. Bent's indictment. The Honorable Sam B Sanchez² extended the Grand Jury time frame by an oral Order in 2008. The Motion to Quash also raised the issue of violation of NMSA 2008, 31-6-1, which requires the district judge convening the Grand Jury to determine the qualifications and eligibility of persons called to serve as grand jurors, not the prosecutor, who interviewed some of the Grand Jurors regarding their qualification to serve. GJ Tr 8; [RP 80-81].

The Motion to Quash further raised objections based on the failure to notify the Grand Jury of who the Defendant wished to call as witnesses, that the Grand Jury had a right to subpoena witnesses, that the Defendant requested the two alleged victims testify to the Grand Jury [RP 81-84], and that the Grand Jury receive evidence about Defendant's religious practices. *Id.* Defendant also objected to being denied requested discovery prior to the Grand Jury proceeding. [RP 86-89]. A hearing was held on the Motion to Quash on August 12, 2008 and the Court denied the Motion and later Defendant's Request for Interlocutory appeal. [RP 138-39]; *see* August 26, Tr 12.

2. *Pre-trial Motions*

The Defense filed a Motion in Limine with respect to the use of the term victim on August 25, 2008 [RP 135], the State noted in Its response [RP 140] that

²The Docketing statement erroneously noted that John Paternoster had extended this Grand Jury. According to the ADA, the Grand Jury was extended by oral Order of Judge Sam Sanchez, ADA Benavidez, Aug. 12, 2008, Tr 36.

the Defendant admitted to touching the young women in this case and the Defendant's October 15, 2008, Reply [RP 162], asserted that the State was not following the definition of "intimate parts" as defined by statute and that L.S. did not consider herself a victim; rather she believed she was being persecuted for her religious beliefs. The Defense requested a Guardian ad Litem (GAL) be appointed on her behalf and asked for Dismissal in Its Reply which the State answered in two separate Responses. Attached to the Motion was a letter to the District Attorney by L.S. that stated she was not a victim and she did not want the Defendant prosecuted. [RP 165-67]. The State opposed the appointment of a GAL [RP 170] on September 16, 2008, and asserted that religion is not a defense to criminal prosecution in a separate response to defendant's request to dismiss as to L.S. [RP 175]. The Court denied the Motion for GAL [RP 189] and the Motion to Dismiss [RP 209].

The Defense filed a *Foulenfont* Motion requesting an emergency evidentiary hearing and dismissal on October 16, 2008 [RP 192], and the Court denied the request for an emergency hearing and denied the *Foulenfont* Motion. [RP 208-09]. The Court entered Its Order Changing Venue on November 20, 2008, and moved the trial location to Taos County on Motion of the Defendant and after review of Jury Questionnaires answered by Jurors in Union County. The Court found that the Defendant could not have a fair and impartial jury in Union County. [RP 320]. On

December 4, 2008 the State filed a Motion to exclude any and all of Defendant's witness testimony as irrelevant, character testimony, that was a waste of time and cumulative. [RP 366]. The Court granted the Motion with respect to all but four of the Defense witnesses. 1Tr 29. The State also filed a Motion to exclude 72 photos submitted as proposed exhibits in this matter. The 72 submitted Photos should be in the Record of the proceedings and counsel is attempting to locate them. [RP 372-382]. The Court also granted this Motion with respect to most of the exhibits except photos 8, 10, 15-17, 19, 22, 25, 26, 28, 30, 38-43, 47, 50, 68, 70-72; *See* 2Tr 8-9, 66, 3Tr 62, 4Tr 89-131.

The State identified two experts it was going to call to testify about the Defendant's religion on October 24, 2008 and November 13, 2008, Dr. Elizabeth Dinsmore and John Gordon Melton Ph.D. [RP 200, 289]. The State also filed additional Motions in Limine to exclude the Defendant's expert testimony [RP 383] and to exclude evidence concerning past or post sexual conduct or activity of A.S. [RP 386]. The first one was denied. 1Tr 21-22, and the second was granted. *Id.* at 12. The Defense filed a consolidated response [RP 392] to the six Motions the State had filed eight days before trial. In his Response, Defendant argued that he had a State and Federal right to present a defense. [RP 393]. Defendant filed his final Amended Exhibit list on December 5, 2008 and It added the Barbie Doll as a proposed exhibit. The Barbie Doll was shown to the jury at trial and used during

the questioning of A.S. and during the closing argument of Defendant's Counsel. 3Tr 87, 5Tr 30-31. The trial took place over portions of five days and the jury deliberated for parts of 2 days. The Jury asked to see the Barbie Doll during deliberations [RP 591-2] and also asked whether it was legal for an adult to lay naked with a minor. [RP 594]. The jury rendered Its verdicts on December 15, 2008 and the Defendant was sentenced on December 30, 2008 to 10 years incarceration followed by sex offender probation. [RP 619-624]. This appeal is timely if filed by November 2, 2009.

B. STATEMENT OF FACTS

Mr. Bent was ordained as a minister by the Seventh Day Adventist Church in 1970. He helped to found a new church that split off from the Seventh Day Adventist Congregation in 1987. *See* John Gordon Melton, 3Tr 151. The new Church is called The Lord Our Righteousness Church (LOR). *Id.* at 152; *see also* Direct examination of Elsa Sayer, 2Tr 10-11. The two incidents involving alleged CSCM occurred in the summer of 2006 and were almost identical rituals related to the LOR Church with the exception that during the incident for which Mr. Bent was acquitted he was naked under a sheet when the alleged victim (the younger of the two sisters: L.S.) entered his room and requested his consent to lay next to him. During the incident for which he was convicted (A.S.) he was clothed. Direct of L.S., 3Tr 54, 65; Direct of A.S., 3Tr 80. L.S. was clear and unambiguous in her

belief in the ritual and its healing effects. 3Tr 50-51, 56. A.S. clearly believed this was a spiritual and religious event for her. She later felt angry but was not sure why and said she could not “explain it.” A.S. 3Tr at 83, 84, 85, 88. She did not say that the event transgressed her personal space. *Id.* A.S. later left the community and she embraced a different lifestyle and different morays. 1Tr 8, 10; 3Tr 73, 86; *see also* Sentencing, Dec. 30 Tr 69, 70; *See e.g.* Myspace page [RP 50-54, 106-110]. At the time of the trial she was no longer a part of the community which was besieged by news media and subjected to rampant rumor mongering.

The LOR Church members collectively purchased a tract of land (called “The Land”) in Northeastern New Mexico, which has been placed in trust for the members and upon which they built their Church. Many of the LOR Church members live on the land. John Sayer, 2Tr 37-38. The Church members, including Defendant, follow scripture and interpret it to apply to their lives and living arrangements on the land. *Id.* at 36-37 (John Sayer, member of LOR church 16 years); (LOR church moved to Clayton, NM, in 2000); *see also* Elsa Sayer, 2Tr 10-11.

In 2006 the church community undertook a religiously motivated ceremonial “pouring out of the plagues,” Cross examination of L.S. (Healed), 3Tr 18, 50-51, 56; Direct of John Sayer, 2Tr 40. Originally, eight females and one male stepped forward for this ceremony. Wayne Bent Cross, 4Tr 115-16; L.S. 3Tr 18. As the

event went forward, Seven females chose to participate in the pouring out of the plagues, including the two alleged victims, to fulfill the LOR interpretation of the Book of Revelation. Direct of L.S., 3Tr 17-18; Direct of A.S., 3Tr 76. Each of them was unequivocal that they made this choice themselves and of their own free will. Elsa Sayer, 2Tr 17, 76-77, L.S. 3Tr 19, 42, 50-53; A.S. 3Tr 74, 81, 88. The seven females were referred to as the Seven Virgins or Messengers. Cross of L.S., 3Tr 50; Direct of A.S., 3Tr 76. During the time of the pouring out of the plagues, the Defendant placed his hand over the heart (or Sternum) of each of the Seven Virgins while praying. Direct testimony of A.S., 3Tr 82; Agent Martinez 1Tr 89-90; John Sayer 2Tr53-4, 59 (photos limited). This was a religious healing experience akin to being close to God and the individuals who participated were inspired from within to go to Mr. Bent and do what they did. Direct of L.S. (“Healed”) 3Tr 19 (“I just did what was on my heart.”), Cross at 50-53; Direct of A.S., 3Tr 74 (rule to follow on The Land? “your heart,”), 83, 88(Q. “Did you feel this was a religious experience?” A. “Yes”); Direct of Allasso Michael Travesser, 4Tr 79-80; *See also* 3Tr 42, 48-49 (L.S. discussing God’s voice on the inside); Agent Martinez, 1Tr 86-87 (one of the girls had a dream sent from God). L.S. and A.S. did talk about the event beforehand.

L.S. preferred to be called “Healed”, after this religious healing experience with Defendant:

- Q. (by Mr. Chavez) Ms. Sayer, what's your first name?
A. Lakeisha.
Q. Is it all right if I call you Lakeisha?
A. `Well, yeah, that's okay.
Q. What do you prefer for me to call you?
A. I prefer Healed.

Direct of L.S., 3Tr 9. After the healing both A.S. and L.S. were allowed by their parents (who had left the community earlier) to continue living on The Land. L.S. at 48.

The Docketing Statement asserts that this case arose after the community posted about these issues to Its website,³ however, it appears the storm of legal activity may have erupted as a result of a National Geographic documentary that was allowed so the World would hear the Revelation of the pouring out of the plagues. John Gordon Melton, 3Tr. 149; statements of District Attorney Gallegos, Dec. 30, 2008, Tr. 12.

Expert Testimony

The State introduced the testimony of Dr. Elizabeth Dinsmore a psychologist working with children in her private practice, 3Tr 107-8, who testified that L.S. was very happy to inform her she was not going to undergo an evaluation. *Id.* at 115-16. She also testified that behind Mr. Bent's message is the threat of either being saved or going to hell and that the girls were "possibly groomed" by Mr.

³The assertion that the investigation stemmed from the website instead of the National Geographic Special and the assertion that Judge Paternoster illegally extended the time for the Grand Jury when the record should show that Judge Sam Sanchez, *see* ADA Benavidez, Aug. 12, 2008 Tr 36 did, appear to be the only inaccurate factual recitations made in the Docketing Statement.

Bent so that he could “have sexual relations with them.” 3Tr 121. *But see* DDA disclaiming any assertion of sexual gratification in this case. 5Tr 15, 23-25. She further testified that A.S. had depression and low self confidence. 3Tr 124. She also testified that she believed A.S. felt she had not received as much attention from the Defendant as other people in the community had and that she was more uncomfortable about the ceremony with Mr. Bent and more awkward and troubled by it. *Id.* at 125. She believed A.S. had decided that she wanted to be one of the Seven Virgins because of peer pressure and her fear of spiritual consequences. *But see* testimony of A.S. 3Tr 76, 81, 88. On Cross she admitted that she lacked a lot of information about the girls and the group. 3Tr 136, ln 18-20, Tr 138, ln 5-7, Tr 140, ln 22-25.

Dr. John Gordon Melton was qualified for the State as an expert on religious studies, 3Tr 147, and testified he had studied the community during the last three weeks, sat in on six witness interviews, he had watched two videos and he believed the community was a messianic millennial and separatist communal group and that Mr. Bent had declared himself the leader. 3Tr 148-52. He did not realize, initially, that the community had restructured It’s governance (to create the New Government) in April 2005 prior to the events alleged in this matter. 3Tr 170-71, *See* Gabriel Travesser 4Tr 29, ln 15-17.

Defendant also called two experts, one was Ned Siegel Ph.D. Psychologist,

the other was Dr. Steven O'Leary. Dr. Siegel reviewed Dr. Dinsmore's report and rejected her conclusions. 3Tr 192, 199, 202-05, 4Tr 15, 20, 22. Dr. O'Leary testified regarding religion and the practice of bramacharya (or "*sinus actism?*") in Christian and Hindu (Mahatma Ghandi) history. 4Tr 139-44.

II. ARGUMENT

INTRODUCTION

Two sisters, (L.S.) and (A.S.), participated in a religious ritual with Wayne Bent a/k/a Michael Travesser, that was rooted in the physical and spiritual act of touching the heart and kissing the heart. The Jury found one girl's heart connection was legal and the other's was not. In this case, the rush to judgment permeated the Grand Jury Proceedings, the expert evaluations and the Jury Trial. The prosecution attempted to proceed with a Grand Jury that was out of jurisdiction just to avoid the routine preliminary hearing that would have allowed for testimony of the alleged victims. Discovery was withheld from the Defense and the Grand Jury was not given Defendant's evidence or proposed witness list. The experts were

retained a few weeks before trial and all of them failed to examine key documents in preparation. The Defense was limited in its witnesses in part due to the Court's artificial time-line imposed as a result of the sitting Judge's departure from office. The Jury Instructions failed to follow the evidence presented by the Defense and, the trial Judge agreed the evidence was insufficient to support a conviction for CSCM. The State's case was that Mr. Bent was a Person in Position of Authority (as a religious leader) and he used his authority to commit CSCM. However, the State argued that the CSCM was unlawful, not because there was a desire for sexual gratification, but because there was an intrusion on bodily integrity. The State repeatedly said this case was *not* about religion, yet, in order for the State to prove its case it *had* to show that the touching was not legitimate religious contact. The State stipulated that the alleged integrity intrusion was not for sexual gratification in this case, yet the jury was not instructed that a touching for religious

purposes could be lawful. The errors in this case, individually and cumulatively, mandate reversal of the Defendant's convictions.

A. ISSUE ONE - Whether the trial court erred in failing to quash the Grand Jury Indictment

1. *Standard of Review*

Defendants have a right to a Grand Jury “duly impaneled and conducted according to law,” and their rights in this regard should be “rigorously protected.” *State v. Ulibarri*, 1999 NMCA 142, ¶17, 128 N.M. 546, 552, 994 P.2d 1164, 1170 citing *Baird v. State*, 90 N.M. 667, 669, 568 P.2d 193, 195 (1977). Therefore, the failure to follow the legal and jurisdictional requirements governing a Grand Jury presents a matter of law reviewed *de novo* on appeal. *Id.* The denial of a Motion to dismiss an indictment for failure to present exculpatory information to the Grand Jury is a matter of law reviewed *de novo* on appeal. *State v. Armijo*, 118 N.M. 802, 811, 887 P.2d 1269, 1278 (Ct. App. 1994); *see also Jones v. Murdoch*, 2009 NMSC 2, ¶¶24-25, 145 N.M. 473, 200 P.3d 523.

2. *Jurisdiction and the term of service -*

The Constitution governs the formation of Grand Juries for a “term of service.” By statute the Grand Jury must serve for a period of no longer than three months. NMSA 2008, §30-6-1. By Oral Order, Judge Sanchez improperly extended the Grand Jury Panel Service from a 2007 case (GJ 2007-1, *State v.*

Barquist) by an additional three months in violation of the Statute. [RP 79-80]; ADA Benavidez, Aug. 12, Tr 36 The remedy for such an unlawful extension is found in NMSA 2008, §31-6-3, which provides for quashing the Indictment when the “grand jury is not selected in accordance with law.” This simple remedy applies to Defendant “[s]ince he has no right concerning the Grand Jury except that it be duly impaneled and conducted according to law, his right in this respect should be rigorously protected.” *Baird v. State*, 90 N.M. 667, 669, 568 P.2d 193 (1977).

The Uniform Jury Instructions read to the Grand Jurors in this matter were required to state: “Your term as members of the grand jury expires January 2, 2008 unless you are discharged or excused by the court prior to this time.” NMRA 2008, UJI 14-8002; *See also* NMRA 2008, §31-6-6. The oath and the statutory time frames are mandatory requirements ensuring the Defendant’s charges will fall within the jurisdiction of the Court. Unlike directory issues which are within the court’s discretion, jurisdictional issues are mandatory for the trial court. *State v. Chacon*, 62 N.M. 291, 295-96, 309 P.2d 230 (1957) (If there is no proper charge against a defendant, the court lacks jurisdiction.); *Ballard v. United States*, 329 U.S. 187, 195-96, 91 L.Ed. 181, 186, 67 S.Ct. 261, 265; *United States v. Zirpolo*, 450 F.2d 424, 431 (3d Cir. 1971) (A Grand Jury improperly selected has been improperly convened, and any indictment returned therefrom is void); *See also*

Security Trust v. Smith, 96 N.M. 35, 37, 596 P.2d 248, 250 (1979) as it would apply to NMSA §31-6-1, ('will' and 'shall' are mandatory terms and 'may' is a directory term in legislative interpretation.) **3 *Duty to disclose exculpatory evidence***

New Mexico statute requires the State to "present evidence that directly negates the guilt of the target where [the prosecutor] is aware of such evidence." §31-6-11(B); *Buzbee v. Donnelly*, 96 N.M. 692, 698, 634 P.2d 1244, 1250. In this case the Defense requested that the Grand Jury be alerted that the alleged victims could provide exculpatory evidence and the State failed to present that evidence. [RP 88-89, 93]. Defendant was severely prejudiced in this regard. The Defendant was acquitted as to one of the alleged victims, L.S. [RP 507]. Her testimony was identified by the Defense as exculpatory, [RP 93] (" . . .their testimony is clearly exculpatory in nature . . . This testimony must be provided to the grand jury in order to provide all of the facts the grand jury needs . . ."), however, the prosecutor refused to inform the Grand Jury that either of the girls could be called as a potentially exculpatory witness. [RP 88-89]; *See Buzbee*, at 698, 634 P.2d at 1250; *Murdoch*, at ¶33. The record is replete with the continuously exculpatory statements of both girls. L.S. claimed she was healed by her experience and that nothing sexual or untoward happened and that this prosecution was an interference with her religion. A.S. claimed that this was a religious experience and that she was not touched in any place that would be covered by a Bikini. This information

was not presented to the Grand Jury. The Defendant was prejudiced, at minimum, by the indictment for CSCM of L.S.

The Defendant's claims, that his right to practice his religion, and the right of his Church to practice Its religion were violated, were never explored in any depth. [RP 82-84]; *See* p.41 *infra* discussing First Amendment violations. Dec. 30, Tr 72-74. This claim and the religious defense were rejected in the hearing on the Motion to Quash the Grand Jury Indictment, Aug. 12, Tr 49. Yet it was error to deny the presentation of potentially exculpatory evidence to the Grand Jury. The convictions should be reversed based on the failure to Quash the Grand Jury Indictment.

B. ISSUE TWO - Whether the trial court erred in limiting the Defense witnesses and exhibits and therefore inhibited Defendant's right to present a Defense.

1. *Standard of Review*

Rulings admitting or excluding evidence are generally reviewed for an abuse of discretion. *See State v. Armendariz*, 2006 NMSC 36, ¶6, 140 N.M. 182, 141 P.3d 526 (appellate courts review the trial courts admission or exclusion of evidence for abuse of discretion). The Court finds an abuse of discretion when "the trial judge's action was obviously erroneous, arbitrary and unwarranted." *State v. Williams*, 76 N.M. 578, 582, 417 P.2d 62, 65 (1966). Abuse of discretion has also been defined as being clearly against the logic and effect of the facts and circumstances before

the court. *See State v. Bowman*, 104 N.M. 19, 22, 715 P.2d 467, 470 (Ct. App. 1986). “No more prejudice need be shown than that the trial court’s order may have made a potential avenue of defense unavailable to the defendant.” *March v. State*, 105 N.M. 453, 456, 734 P.2d 231, 234 (1987) (*quoting State v. Orona*, 92 N.M. 450, 452, 589 P.2d 1041, 1043 (1979)). “We do not ask whether the evidence was critical but, instead, whether [the defendant] made a ‘plausible showing of how [the witness’s] testimony would have been both material and favorable to his defense.’” *State v. Torres*, 1999 NMSC 10, ¶ 12, 127 N.M. 20, 976 P.2d 20 (*quoting United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)).

2. *Argument*

The Defendant raised this issue during the hearing of October 7, 2008 and just prior to trial on December 8, Tr 18-20, 2008. The Docketing Statement avers that, over counsel’s objections and her requests for a two week trial, Defendant was not allowed to present his evidence at trial due to time constraints imposed by the Judge who, at the time, was scheduled to leave the bench on December 31, 2008, as a result of a primary election defeat. Oct. 7, 2008 Tr 13, [DS 677]. This imposed a prejudicial constraint on Defendant’s Fundamental Constitutional Right to Present a Defense under the Sixth Amendment to the US Constitution and pursuant to Article II, Section 14 of the State Constitution because the Defendant

could not show how the ceremony worked in various contexts, especially with others of the Seven Virgins or Messengers who were otherwise mis-characterized by the State's witnesses and who were specifically prohibited from testifying by the trial court. 2Tr 55, 56, 58.

The Judge made clear his intention to personally preside over this high-profile case at the Final Docket Call on October 7, 2008:

Counsel will be with me at that time, and we're going to reset this case, hopefully within the next 30 days. And at that point in time, the case will not be continued. We'll either seat a jury here, and if we can't, then we're going to be looking at December to seat a jury because this case is going to be dealt with by me before my term of office ends.

Oct. 7, 2008, Tr 13.

The Defense was ordered to shorten its list of witnesses and this allowed for the case to be tried in one weeks time (instead of two). The State was not ordered to limit its witnesses or evidence.⁴ The Defense preparation included witness lists identifying Church participants who could give a description of life on the land for the two girls and Mr. Bent; the religious beliefs of the community, the healing ritual as applied to both men and women, the relationship with the girls *de facto* guardians (their aunt and grandmother) and exhibits that included photos of numerous healing events similar to those that took place with the two alleged victims. Most of the photos were excluded, including exhibits 1-7, 9, 11-14, 18, 20,

⁴The State was given a continuance to secure assistance from an FBI behavior analysis unit out of Quantico, Virginia. Oct. 7 Tr at 3-4.

21, 23, 24, 27, 29, 31-37, 44-46, 48, 49, 51-67 and 69. 1Tr 34. *State v. Sedillo*, 76 N.M. 273, 277, 414 P.2d 500 (1966); *State v. Johnson*, 57 N.M. 716, 263 P.2d 282 (1953) (Photographs are properly admitted if they serve to corroborate other evidence even though they may be cumulative.)

The witness list was limited by the Judge from twelve to two lay witnesses:

The witnesses who are being called by the defense for purposes of demonstrating that they were touched by the defendant (and) as a result received some type of spiritual healing will not be allowed to testify. Actually, what I will permit is one, maybe two, but I don't want to have eight or nine people saying the same thing.

Trial Court ruling, Dec.9, Tr 55, 56, 58, (granting State's Motion in Limine to Exclude Defendant's Witnesses' Testimony). As a result only two males testified and no females testified for Mr. Bent, despite the fact that the excluded witnesses included others who were called to serve as one of the Seven Virgins or Messengers and those who participated in the Ceremony in other ways.

The Judge specifically excluded the testimony of key female witnesses, Hanifa Travesser, Aliah Eden Travesser, the alleged victims' grandmother, and their aunt Misty Renee Sayer (one of the Seven Virgins), who were all present on the land at the time of the alleged incidents. 1Tr at 25-26. The grandmother and aunt were *de facto* guardians of the girls on the Land. 1Tr 25-29, 2Tr 69, 76. This testimony could have been used to explain why the girls approached the ceremony the way they did and to address the lawfulness element of the charges because each

witness could explain how people of different ages and sexes in the small church all had a spiritual healing experience incorporating the touching and they could easily counter many of the incorrect allegations made by Dr. Dinsmore and John Melton (the State's experts). 1Tr 25-27, 3Tr200. The DA argued that the ceremony was a facade because of the limited evidence the Defense presented from male witnesses regarding how it occurred in other settings. Closing, 5Tr 22. This clearly demonstrated that the denial of such a large number of Defendant's witnesses caused prejudice to his ability to present a Defense and to explain the nature of this complex event, given the Defendant was facing over 30 years in prison. Each of these witnesses was involved in the ritual pouring out of the Plagues and the day to day lives of the girls at the time of the alleged incidents. These witnesses from the community could explain how decision making occurred on the Land; how it came from introspection and prayer. The State was trying to show that Wayne Bent was the decision-maker, instigator and controlling force through their witnesses. 4Tr 29-30, 31-32, 33, 38-39, 42, 43-44, 48, 49, 56, 70, 73. This was argued by the Prosecution in closing to show person in position of authority and evidence for a Second Degree Felony conviction. Closing 5Tr 16-17, 21, 24. However, the community members all testified that the basis of their faith was to seek guidance from God within one's heart. *See p.8-9 supra.*

The Defendant's right to present a Defense is rooted in the Due Process

Clause of the Fourteenth Amendment, the Compulsory Process or Confrontation clause of the Sixth Amendment, and Article II, Sections 14 and 18 of the New Mexico Constitution. “[T]he Constitution guarantees criminal defendants' a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 1731 (2006); *State v. Lasner*, 2000 NMSC 38 ¶24, 129 N.M. 806, 814, 14 P.3d 1282, 1290. The trial court’s reduction in non-expert Defense witnesses from eight to two and Its imposition of its election timeline on the proceedings prejudiced the right to present a Defense. The timeline also caused the hasty preparation of expert testimony. This prejudice deprived the jurors of testimony from female members of the church that would have been crucial in defining the way in which this ritual was performed with them. It also eliminated the testimony of at least one of the Seven Virgins who could explain how the process of self selection occurred and It resulted in expert testimonies without the ability to fully review the reports of other experts or the ability to review materials and testimony necessary to form opinions accurately. Without the Defendant’s other witnesses testimony, the jury was deprived of evidence that could have affected the outcome of the trial, therefore the conviction should be reversed. *Lasner* at ¶24, *State v. Torres*, 1999 NMSC 10, ¶10, 127 N.M. 20, 26, 976 P.2d 20, 26.

C. ISSUE THREE - Whether the trial court erred by denying the use of demonstrative aids in closing.

1. *Standard of Review*

The district court's weighing of the possibility of unfair prejudice against the utility of using the video as a demonstrative aid pursuant to Rule 11-403 NMRA 1998 is reviewed for an abuse-of-discretion. *State v. Foster*, 1998 NMCA 163, ¶27, 126 N.M. 177, 184, 967 P.2d 852, 859.

2. *Argument*

The Court stopped the use of a demonstrative aid in closing and the Defendant was prejudiced by the Court's action. 5Tr 44-45. The aid was an audio track to a video presentation arranged to explain the story heard by the jury, similar to the manikan in *Foster* at ¶27, 967 P.2d at 859. *See also Jurado v. Jurado*, 119 N.M. 522, 528, 892 P.2d 969, 975 (Ct.App. 1995) (acknowledging use of demonstrative exhibits that are not necessarily admissible as evidence.) This prejudiced the Defense in front of the jury and disrupted closing.

D. ISSUE FOUR - Scope of the State's cross examination of Defendant

1. *Standard of Review*

The extent of cross-examination is a matter within the discretion of the trial court. *State v. Smith*, 2001 NMSC 4 ¶19, 130 N.M. 117, 125 19 P.3d 254, 262

2. *Argument*

The Defendant was basically only asked on direct examination if he had committed each of the four crimes alleged in the Grand Jury Indictment and he

denied committing the crimes. 4Tr 92-93. Counsel for the Defense then objected to any cross-examination outside the scope of whether the Defendant committed the crimes or not. 4Tr at 95, 108, 119. The prosecution also failed to properly impeach the Defendant during this entire line of questioning, continuously attempting to impeach him before he made any inconsistent statements and this caused the Court to become impatient with the prosecution and to repeatedly instruct how proper impeachment should be conducted. *Id.* at 97 ln16-25, 98-100, 113, 115-16, 121-22. Defendant asserts the State was allowed to ask prejudicial questions beyond the scope of direct examination on multiple occasions and this was done by the use of continuously erroneous and argumentative impeachment questioning. This was an abuse of discretion that prejudiced the jury and is ground for reversal of the convictions. While it is in the discretion of the trial court to expand the scope of cross, "Inquiry into additional matters must, however, be conducted as if on direct examination." *State v. Martin*, 101 N.M. 595, 601, 686 P.2d 937, 943 (Ct.App. 1984). Rule 611(b) does not allow the trial court discretion to admit evidence which is otherwise inadmissible because it is irrelevant, NMSA 1978, Evid. Rule 402 (Repl.Pamp.1983), or if the probative value is substantially outweighed by the danger of unfair prejudice, NMSA 1978, Evid. Rule 403 (Repl.Pamp.1983). *Martin* at 601, 686 P.2d at 943; *State v. Carter*, 21 N.M. 166, 170-71, 153 P.d 271, 272 (1915). In this case the State attempted to question the Defendant as to his

spiritual authority and statements made during a National Geographic Special on the community that portrayed him as a “cult leader.” 4Tr 120-24. This went beyond the scope of direct examination of Defendant. He had been only asked if he had sexual contact with the girls or if he had done something deleterious to their morals. 4Tr 92-93. The State’s inquiry into details of the religious practice with him was objected to as beyond the scope. This issue reflects on the absence of six of Defendant’s eight witnesses called to explain religious practices and government on The Land, as they were the witnesses Defense counsel had chosen to give in depth explanations instead of the Defendant. 1Tr 25-26, 2Tr 68, 75. *Lasner* at ¶24, (Defendant has a Constitutional right to present a complete defense.) Thus, the allowance of improper argumentative questioning of the Defendant in front of the jury, after he denied the allegations of the indictment, had a strongly prejudicial impact on the Defense; it gave the false impression that the Defendant was hiding something on Direct and is grounds for reversing the conviction.

E. ISSUE FIVE - Whether the trial court erred in failing to give the Defendant’s requested jury instructions and in failing to define the term breast

1. *Standard of Review*

The propriety of jury instructions is a mixed question of law and fact." *State v. Romero*, 2005 NMCA 60, ¶8, 137 N.M. 456, 112 P.3d 1113. "When considering a defendant's requested instructions, we view the evidence in the light most

favorable to the giving of the requested instruction[s]." *Id.* Viewing the facts in that manner, we review the issue *de novo*. *Id.* "When evidence at trial supports the giving of an instruction on a defendant's theory of the case, failure to so instruct is reversible error." *State v. Brown*, 1996 NMSC 73, ¶34, 122 N.M. 724, 931 P.2d 69.

2. *Argument*

Defendant opposed the failure to define the term breast in the jury instructions. 5Tr 3. Our Courts have not defined the term breast as it is used with respect to CSC and Counsel has not found a CSC case involving CSC of a minor's breast with facts like those at bar. The cases involve much more obvious contact with the breast. *See e.g. State v. Haskins*, 2008 NMCA 86, 144 N.M. 247, 186 P.3d 916, (Massage therapist giving breast massage as part of "full body massage"). One key legislative determinant is found in the Statutory definitions of CSC of the breast with respect to Second Degree CSCM and Third Degree CSCM. The Statute governing Second Degree CSCM states:

Criminal sexual contact of a minor is the unlawful and intentional touching of or applying force to the intimate parts of a minor. . . . For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

1. Criminal Sexual Contact of a minor in the second degree consists of all criminal sexual contact of the *unclothed intimate parts* of a minor . . .
 2. Criminal Sexual Contact of a minor in the third degree consists of *all criminal sexual contact* of a minor . . .
- NMSA 2008, 30-9-13 (A-C) (Emphasis Added). In this case repeated reference

was made to the areas a bikini would cover. Cross of A.S., 3Tr. 87. L.S. 3Tr at 53.

The term breast can be defined with respect to the entire frontal section of the body (the breastplate and such). The term breast can refer to the entire area where the female and male breasts are conjoined.

Dictionary definitions of breast are extensive for example, an internet dictionary states in part:

[1.]Anatomy, Zoology. (in bipeds) the outer, front part of the thorax, or the front part of the body from the neck to the abdomen; chest.

[2.]Zoology. the corresponding part in quadrupeds.

[3.]either of the pair of mammae occurring on the chest in humans and having a discrete areola around the nipple, esp. the mammae of the female after puberty, which are enlarged and softened by hormonally influenced mammary-gland development and fat deposition and which secrete milk after the birth of a child: the breasts of males normally remain rudimentary. . . .

<http://dictionary.reference.com/browse/breast>. These definitions are broad and vague with respect to the statute.

During the trial on this matter the term breast was not defined, however, the parties meticulously identified where the Defendant touched A.S. A.S. testified that she was *not* touched anywhere where a Bikini covered the breasts of a Barbie Doll shown to the Jury. Cross of A.S., 3Tr. 87. Neither A.S. or L.S. asserted the fleshy area of her breast was squeezed or touched when Mr. Bent placed his hand over their sternum. A.S. testified and indicated that she was touched and kissed above the intimate part of her breast near her clavicle. 3Tr 82. *See* Gallegos opening 1Tr 51, Montoya opening *Id.* at 53-54; (DS 691) (identifying where A.S.

indicated she was touched as being where one says the pledge of allegiance).

The definition of Second Degree CSCM contains very specific legal language that is different from Third Degree CSCM. Second Degree CSCM states that the “unclothed intimate parts” must be touched as part of an element of the crime. Third Degree CSCM does not have the “intimate parts” language or the “unclothed” requirement. As a result it is clear the legislature was making a distinction with the use of different terms. The definition of the “intimate part” of the female breast in the Second Degree CSCM statute is informed by the legislature’s longstanding definition of the female breast at NMSA 2006, § 30-9-14.1 which provides that:

‘Intimate parts’ means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, ‘**female breast**’ means the areola, and ‘exposing’ does not include any act in which the intimate part is covered by any nontransparent material.”

(Emphasis Added). NMSA 2008, § 30-9-14.2 also provides for the same definition of ‘female breast.’

This Court has further indicated that any interpretation of the breast that limits the access of the female to a right equally enjoyed by a male (such as a right to participate in a religious ritual) would likely be invidious discrimination in violation of the New Mexico Equal Rights Amendment. *City of Albuquerque v. Sachs*, 2004 NMCA 65 ¶13, 135 N.M. 578, 582, 92 P.3d 24, 27. *Sachs* indicates that if placing the hand on the chest of a man or boy in a similar manner is not

CSCM in the instance of this religious ritual then a female is entitled to similar treatment to avoid the presumption of discrimination). *See* Cross Examination of Allasso Travesser, 4Tr. 82-83; Wayne Bent Cross, 4 Tr 115-16 (originally 8 females and 1 male were potential candidates for this role)). *See e.g.*, 2Tr 55,56,58, (admitting Defendant's Exhibits 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, and 36, photographs demonstrating that Defendant typically touched male and female adherents during healing ceremonies in the same place he touched the alleged victim), 2Tr55-59 (judge limited the number of photographs to four to avoid “cluttering” the record), 2Tr 67 (photographs admitted, Defendant's Exhibits 25, 26, 28, and 30).⁵

3. *Mistake of Fact Instruction*

The Court refused Defendant’s Mistake of Fact Instruction. (RP 518, 522-23, 526-27); 4Tr 102-03. The Mistake of Fact was based on evidence presented to the jury that the Defendant believed the touching of L.S. and A.S. was a religious act. The defense had presented sufficient evidence to support a Mistake of Fact theory because the Defendant and the young women called this a religious or spiritual act and the evidence supported Defendant’s alleged belief that the touching was for an appropriate religious purpose. *State v. Contreras*, 2007 NMSC 119, ¶17-18, 142 N.M. 518, 167 P.2d 966. (Breaking and Entering Defendant

⁵The trial exhibits have not been provided to undersigned counsel and it is unclear if they are part of the record proper. Counsel has obtained the Barbie Doll which is the subject of a Motion to supplement.

entitled to mistake of fact instruction if he did not have specific intent because he lacked knowledge of absence of permission to enter). *See* DDA Chavez closing, 5Tr 15, 23-25.

4. *Unlawfulness*

The element of Unlawfulness was put in issue because the Defendant proposed an instruction on unlawfulness that included one sentence, supported by the evidence, that was rejected: "CSC does not include a touching for purposes of religious beliefs." (RP 525). The term "unlawful" has been defined by our Supreme Court as "without excuse or justification," *State v. Benny E.*, 110 N.M. 237, 243, 794 P.2d 380 (Ct. App. 1990) (citing cases). With respect to the CSCM and CSPM statutes "the terms 'unlawful' or 'unlawfully' limit the scope of prohibited conduct to those acts that are without legal justification or excuse." *State v. Pierce*, 110 N.M. 76, 80, 792 P.2d 408, 412 (1990). However, the Supreme Court has been very clear that CSCM requires an unlawful and intentional touching of the intimate parts of the child's breast and it does not include a touching for purposes of reasonable medical treatment or non-abusive parental or custodial child care. *State v. Osborne*, 111 N.M. 654, 661, 808 P.2d 624 (1991); *see also State v. Larson*, 94 N.M. 795, 797, 617 P.2d 1310, 1312 (1980); *see also* UJI 14-132 (providing several examples of lawfulness instructions that could be given).

The Defense submitted Its' instruction on unlawfulness (RP 525), and the

Court denied this instruction which stated: “Criminal Sexual Contact does not include touching for purposes of religious beliefs.” (RP 525); *see* court at 2Tr 58. This definition would have allowed the jury to determine if the touching involved was analogous to “non-abusive parental or custodial child care” as described in *Osborne*, at 658, 808 P.2d at 658. When *Osborne* and the case at bar are compared with *State v. Trevino* and *State v. Orosco*, 113 N.M. 780, 784, it is clear the Defendant was entitled to the proposed instruction delineating whether contact was legitimately incident to a religious ceremony. *See State v. Peterson*, 1998 NMCA 49, ¶ 11, 125 N.M. 55, 58, 956 P.2d 854. The Defendant at bar stated that he touched A.S. as carefully as he could and he asserted that he had a legitimate and lawful explanation or justification (RP 525), for the touching as part of a religious event or practice:

. . . I paid close attention that I never touched any fatty area of the breast area or any other part to be construed sexually. . . . I remembered that because I have a covenant. I paid close attention with both Lakeisha and Ashley not to get anywhere near that. And that I can say for certain . . . for certainty. . . .

Wayne Bent Cross, 4Tr 115. “And we visited that way, and that was pretty much common for me to do.” *Id.* Tr 105; *see also* A.S. 3Tr. 83 (it was “a religious experience”); L.S. 3Tr. 51; (it was “definitely” a “religious experience”). *Osborne* holds that the defendant must have an opportunity to introduce and argue evidence showing that his actions were within the scope of lawful activities.” *Osborne* at

657, 808 P.2d at 628. In this case the relation of the parties was as Church members engaged in a ritual involving healing and exploration of the meaning of the Seven Virgins as related to the Book of Revelation. This sincere relationship justified the giving of Defendant's lawfulness instruction. *See Peterson* at ¶ 11.

6. *The element of Intent*

The Defendant's intent instruction was also refused and modified. [RP 514] The Court included the phrase, "even though he may not know his act is unlawful." [P 578] The giving of that part of the instruction to modify his intentional act also indicates the mistake of fact instruction and the lawfulness instruction would be even more applicable because the Defendant and the girls never described an intentional violation of bodily integrity and the girls sought this healing touch which was understood to be aimed at the soul not the breast. p.8 *supra*. The jury apparently found no criminal intent as to the same touching of L.S. as occurred with A.S. *See Pierce* at 80-81, 792 P.2d at 412-13 (discussing intent and unlawfulness).

F and G. ISSUES SIX AND SEVEN- Sufficiency of the Evidence at trial

1. *Standard of Review*

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *See State v. Baca*, 1997 NMSC 59, ¶14, 124 N.M. 333, 950 P.2d 776. In reviewing the sufficiency of evidence used to

support a conviction, we “resolve all disputed facts in favor of the State. . . .” *Id.* Determining the sufficiency of evidence “does require appellate court scrutiny of the evidence and supervision of the jury's fact-finding function to ensure that, indeed, a rational jury *could* have found beyond a reasonable doubt the essential facts required for a conviction.” *Baca* at ¶13, 950 P.2d at 779. (Emphasis added) (citation omitted)

2. *Argument - No evidence of touching the intimate part or of required intent*

In this case specifically, it is noted that the Defendant placed his hand on the sternum of A.S. as described in various ways and that he did not touch the primary part of her breast or otherwise make contact with the part of the breast that would logically fall within the statute if it were defined narrowly enough to prevent vagueness and other basis’ for misunderstanding. A.S., 3Tr 82 (“over the heart.”), Cross 3Tr 87, Opening by prosecution 1Tr 51, Opening by defense 1Tr 53, Judge Baca 5Tr 38. According to A.S., Mr. Bent did not touch her sexually or on an “intimate part” of the “breast:”

Q. Okay. I want you to be very clear for the jury. When Wayne Bent touched you, did he touch any of the parts that are covered by the bikini on this doll, on your body? Did he touch your body, if (you) had this bikini on your body, did he touch your body in (sic) any of the spots that would have been covered by this bikini?

A. No.

Cross examination of A.S., 3Tr at 87. *See also* [RP 691].

No trial testimony was presented to indicate Defendant touched the

“intimate parts” of the girl’s breast as defined by the legislature or by other possible definitions. The state’s argument at closing agreed that there was no sexual intent: [t]he State is not saying any of this was for sexual gratification.” 5Tr 15, 23-26. This issue was raised in the Docketing Statement as sufficiency of the evidence and failure to grant directed verdict (RP 701-702). There was also no testimony to support any version of criminal intent required to meet the elements of the charge of CSCM as to A.S. *See* A.S. Direct 3Tr 76) (Defendant had a vision of Seven Virgins); 3Tr 81 (A.S. participated: “Because I thought I’d get closer to God.”); 3Tr 83 (it was “a religious experience”); A.S. examined by the court, 3Tr 88 (nobody sent her there or pressured her in any way to go there; it was a decision she made on her own; when Defendant kissed her it was “intimate” rather than sexual; and this was something between herself and “a Spirit of God.”). With evidence of the same touching and the same inspiration for going to the Defendant, the jury acquitted him with regard to L.S.

3. The CSC Statute was vague and failed to Adequately Notify the Defendant

In *State v. Pierce*, 110 N.M. 76, 80, (1990), this Court determined that the statute was not vague because it allowed for lawfulness (excuse or legal justification). However, in this case, lawfulness did not inform the religious touching as applied, because the court refused Defendant’s Jury Instruction on lawful purpose. Mr. Bent was clearly not informed that CSCM would find him to

have criminal intent to commit sexual contact and be a sex offender when he did not have sexual intent, but rather a religious one. Thus, the jury instruction on lawfulness, UJI 14-132 *modified* by the trial court [RP 548-9, 576-7], and the State's argument, that the contact was non-sexual and was, instead, somehow a violation of personal space ("bodily integrity"), transformed the Statute into one allowing for intentional contact incidental to custodial care or "*other lawful purposes*," UJI 14-132, that were *not* defined. *See* DDA Chavez, Closing, 5Tr 15, 23-25. Thus applied it was a statute that deprived Defendant of his right to notice as to what the "other lawful purposes" could be. The Statute does not criminalize violations of personal space that are lawful non-sexual contacts with an admitted religious (*and non-sexual*) intent (i.e. circumcision or religious piercing) and "we will not change or limit the wording in a criminal statute in order to construe it against the accused." *State v. Collins*, 80 N.M. 499, 501 (1969); *See State v. Martinez*, 2006 NMCA 68, ¶11, 139 N.M. 741, 137 P.3d 1195; *See also Reese v. State*, 106 N.M. 498, 502 (1987) (Ransom, concurring). The State admitted that the touching in this case was not for sexual gratification and relied solely on the bodily integrity element identified in the UJI. 5Tr 15, 23-26. However, that reliance then invoked the question of religion and lawful purpose because the touching would be lawful if it was not for sexual gratification and it was rooted in the religion. UJI 14-132. Thus, despite repeated avowals that this case was not

about religion, 3Tr 175-76, 5Tr 15-16, 46, the bodily integrity element was completely defined by whether this was lawfully religious or not. Dr. Dinsmore's testimony was used to inappropriately infer the Defendant was grooming the girls for sexual contact. 3Tr 121. The State admitted this was not the intent of the 68 year old minister with no prior history and no mental deterioration. DDA 5Tr 25-26; *See* Siegel 4Tr 17, 23. **4. *The Two Convictions for Contributing to the Delinquency of a Minor***

The two convictions for Contributing to Delinquency of a Minor (CDM) should be reversed because the State based its theory on the jury instruction as follows: "that the Defendant permitted (L.S.) or (A.S.) to take her clothes off and lay naked with him and touched her unclothed intimate part, to wit: breast, with a part or parts of his body . . ." (RP 579, 580). This instruction belies the error of Defendant's convictions because in the case of the acquittal on CSCM as to L.S. the jury had to find that the intimate part, (the prohibited portion of) her breast, was not touched for CSCM (or that it was touched with lawful justification or excuse), because that is the element common to both offenses. *See also* identical jury instructions for CDM [RP 575-76]. If the (prohibited part of the) breast of L.S was not touched then her CDM conviction cannot stand. As to A.S., if the jury did not find a touching of (the prohibited part of) the breast of L.S. then the same finding should be applicable to A.S. (or a finding of lawfulness is appropriate) because her

incident was almost identical to that of L.S. If CSCM did not occur then CDM is also not appropriate as to A.S. per the jury instructions. *See also* 5Tr 26-7 (DA improperly arguing law to jury without Defense objection).

Contrary to the State's closing arguments, 5Tr 24 ln19-20, there was no direct testimony that Defendant coerced A.S. into entering his bedroom and disrobing. A.S. direct, 3Tr 78 (A.S. suggested they go into the bedroom); A.S. questioning by the Court, 3Tr 88 (nobody sent her to Defendant; nobody pressured her; it was her own decision); Judge Baca, 5Tr 5 (no evidence in support of encouraging).

The healing and the ritual were not done in public and they were publicized within the religious community as spiritual acts intended to address the onset of the apocalyptic times described in the Bible and which the community identified as the onset of increased immorality in the world such that each of the Virgin ceremonies would hasten the return of a moral order under the domain of Christ. There was no evidence in the record that the ceremonies caused either of the girls to act in a way that has previously been defined as delinquent (disrobing in private and not for sex was not the issue presented to the jury for CDM, the elements required a finding of touching the breast).

In addition to the lack of evidence to support the elements of CDM, it has been noted that double jeopardy may apply in these circumstances:

The question thus arises: Where is the evidence to prove a fact not required to prove CSCM -- to prove that defendant's acts contributed to either boy's delinquency? The answer: There is none.

State v. Trevino, 116 N.M. 528, 535, 865 P.2d 1172, 1179 (1993) (Justice Montgomery dissenting). The State rested its CDM instruction on the occurrence of a sexual contact, yet there was no sexual contact, nor was there any other evidence that would meet the standard of CDM.

Finally, these Counts are also subject to the problem of vagueness and violation of State and Federal Due Process. "CDM requires a degree of knowledge before conviction for causing or encouraging a minor" to be delinquent. *State v. Romero*, 2000 NMCA 29, ¶27, 128 N.M. 806, 812, 999 P.2d 1038, 1044. In this case the act identified as injurious to morals was "touching the unclothed intimate part, to wit: breast," [See RP 551-2, 579-80] yet, the breast was not defined such that the Defendant would be on notice of when he touched the prohibited part of it and, again, lawful touching is not addressed. See p.29-31, *supra*. Another way to look at this would be to ask if this would be CDM if the Defendant had touched A.S. or L.S. on the forehead instead of the "breast" or if a diagram had been used to show that a touching occurred right on the edge of the breast?

H. ISSUE EIGHT - Whether the conviction should be reversed due to prosecutorial misconduct

I. ISSUE NINE - Whether the failure to raise the New Mexico Religious Freedom Restoration Act as a defense to the charges was *prima facie* ineffective assistance of counsel

1. *Standard of Review*

Claims of ineffective assistance of counsel are mixed questions of law and fact, which are reviewed *de novo*. *State v. Martinez*, 2007 NMCA 160, ¶19, 143 N.M. 96, 173 P.3d 18. Because Defendant raises the issue for the first time on appeal, he must establish a *prima facie* case for ineffective assistance in order for this Court to remand the matter to the trial court for an evidentiary hearing. *See State v. Bernal*, 2006 NMSC 50, ¶ 33, 140 N.M. 644, 146 P.3d 289. "A *prima facie* case is made out when: (1) it appears from the record that counsel acted unreasonably; (2) the appellate court cannot think of a plausible, rational strategy or tactic to explain counsel's conduct; and (3) the actions of counsel are prejudicial." *State v. Herrera*, 2001 NMCA 73, ¶36, 131 N.M. 22, 33 P.3d 22.

2. *Argument*

Given the continuous efforts of the Defense before and during trial to argue and present a religious defense there is a *prima facie* issue of ineffective assistance of counsel stemming from the failure to assert the State Religious Freedom Restoration Act (RFRA). NMSA 2008, §§ 28-22-1, *et seq.* *See* proposed Jury Instructions [RP 525 and 518, 522-23, 526-27] arguments by Defense Counsel, July 18 Tr 10; Oct. 7 Tr 27; Oct. 7 Tr 31-34; Oct. 30 Tr 28-29; 2Tr 52, 56; 4Tr 67-68; Dec. 30, Tr 72, 73-74, and citations to First Amendment in the Motion to Quash and the Docketing Statement [RP 82-84, 703,707,709,712].

Defense Counsel raised religious freedom and expression repeatedly during the proceedings (*see supra*) and the record provides no tactical or strategic basis for the failure to invoke RFRA. RFRA was critical to defending against the State's theory of the case. *See State v Aragon*, 2009 NMCA 102, ¶9. The language in the State RFRA, NMSA 2008, § 28-22-4(A), provides for presentation of religious defenses to the jury and that would include instructions on lawfulness and mistake of fact. Defendant's attorney failed to request a defense or a jury instruction based on RFRA, nor did she raise this issue at any point during the trial. Yet she asserted the religious defense on argument for directed verdict:

I asked each of the girls, "Was it a religious experience," each of them said yes. So, it [the motion for Directed Verdict] does become about religion because whether or not it's about religion and religious freedom goes to the lawfulness or unlawfulness....

3Tr 176-77.

Federal courts have recognized the First Amendment religious defense in innumerable cases and the State's RFRA provides similar protections and the same or greater protections and remedies as the Federal RFRA; for example: NMSA § 28-22-2(A) defines "free exercise of religion" as "an act or a refusal to act that is substantially motivated by religious belief;" and NMSA 2008, § 28-22-2(B) defines "government agency" as "the state or any of its political subdivisions" Section 28-22-3, provides that a government agency shall not restrict a person's free exercise of religion unless:

A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and

B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

Finally, NMSA § 28-22-4(A) provides, in relevant part:

A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act [28-22-1 NMSA 1978] may assert that violation as “a claim or defense in a judicial proceeding . . .”

Religious freedom-based defenses to criminal prosecutions are legitimate defenses, contrary to assertions by the State in this case. DA 1Tr 52 ln 20-21. This court has assumed without deciding, that a defendant had the right to assert his religious defense at Grand Jury or at trial. *State v. Augustin M.*, 2003 NMCA 65, ¶¶ 64, 133 N.M. 636, 652, 68 P.3d 182 (Defendant’s Rastafarianism and sacramental use of marijuana). *See also United States v. Bauer*, et al., 84 F.3d 1549 (9th Cir. 1995); and *United States v. Manneh*, 2008 U.S. Dist. LEXIS 105209 (D.N.Y. 2008); *United States v. Boyll*, 774 F.Supp. 1333 (D.N.M. 1991).

It is presumed the Federal RFRA is a guideline. The US Supreme Court has defined the burden-shifting analysis in *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 428-29, 126 S. Ct. 1211; 163 L. Ed. 2d 1017 (2006), as follows: Defendant must first demonstrate that the government (1) substantially burdened (2) a sincere (3) exercise of religion. 42 U. S. C. § 2000bb-

1(a),(c). If the defendant satisfies the *prima facie* case, then the burden shifts to the government to demonstrate that the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that government interest.” 42 U.S.C. § 2000bb-1(b). *United States v. Friday*, 525 F.3d 938, 946 (10th Cir. 2008); *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996); *See also Boyll*, at 1339-1341. The failure to invoke this burden shifting at Grand Jury and during the arguments on jury instructions was ineffective assistance of counsel because the least restrictive means of enforcing the law would have allowed the Defendant to have jury instructions describing religious touching as lawful, and to give the Grand Jury descriptions of his religious practices.

The failure to raise RFRA in support of the religious Defense amounts to *prima facie* ineffective assistance of counsel because attorneys are expected to know the laws relevant to issues in the case. *See* NMRA 2008, Rule 16-101 “Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”). *State v. Aragon*, 2009 NMCA 102, ¶9.

In this case counsel’s performance was defective and the deficiency caused Defendant the prejudice described in the two prong test of *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). The Defendant has established “that the facts support the motion or challenge, and that a reasonably competent attorney could not have decided the motion was unwarranted. *State v. Hunter*, 2006 NMSC 43, ¶ 15, 140 N.M. 406, 143 P.3d 168, *cert. quashed*, 139 N.M. 568, 136 P.3d 569. The record is replete with examples of Defense counsel’s efforts to raise a religious defense *see* p. 39-40, *Supra*, and therefore, a reasonably competent attorney would have utilized RFRA at Grand Jury, in support of witnesses about the religion, at directed verdict and for the jury instruction argument. As a result the Defendant has a right to a new trial.

J. ISSUE TEN- Whether cumulative error deprived the Defendant of a fair trial

1. *Standard of Review*

In *State v. Vallejos*, this Court said that the concepts of "fundamental error" and "fair trial" were sufficiently similar so that the Court could review the question of "fair trial" regardless of whether a defendant meets procedural requirements. 86 N.M. 39, 519 P.2d 135 (Ct.App.1974). The question with respect to cumulative error can then be described as whether the errors, taken as a whole, deprived defendant of a fair trial. *State v. Baca*, 120 N.M. 383, 393, 902 P.2d 65, 75 (1995).

2. *Argument*

Each error by itself might not have deprived Defendant of a fair trial, but when taken as a whole the Court must assess whether they deprived Defendant of

his rights under the Fourteenth Amendment to the US Constitution and Article II, Section 14 of the New Mexico Constitution. *Id.* The cumulative impact of the errors did deprive Wayne Bent of a fair trial because the Grand Jury indicted him on a charge without jurisdiction and without hearing the exculpatory evidence requested. Thus he had to defend CSC charges for two alleged victims instead of one, his Defense was limited in closing, his trial setting was inappropriately fixed to accommodate the court's post-election timeline, his witnesses were unreasonably limited, the prosecution was allowed to go beyond the scope with improper impeachment questions that were argumentative and prejudicial, the jury instructions did not reflect the evidence supporting Defense theories, the definitions were vague, the statute was vague as to whether the Defendant's behavior was prohibited, and his Defense did not raise a key legal right (NM RFRA) applicable to his case. For these reasons all of his convictions should be vacated with prejudice.

III. PRAYER FOR RELIEF

WHEREFORE Defendant Respectfully Prays this Court reverse his conviction and remand for dismissal with prejudice or for a new trial.

Respectfully Submitted by:

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CERTIFICATE OF COMPLIANCE WITH NMRA 12-213(G)

I hereby certify that this brief is less than 11,000 words pursuant to the Rule and that I have certified this with the Word Perfect Word tabulator showing 10,996 words.

John McCall
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have caused true copies of this Brief in Chief to be mailed to Margaret McClean, Deputy Attorney General at P.O. Drawer 1508, Santa Fe, NM 87504-1508, on October 28, 2009.

John McCall
Attorney for Defendant Wayne Bent