

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

Court of Appeals No. 29,227
District Court No. CR 2008-0025

WAYNE BENT,

Defendant-Appellant.

MEMORANDUM IN SUPPORT OF MOTION FOR APPEAL BOND

COMES NOW DEFENDANT-APPELLANT, Wayne Bent, to file his Memorandum in Support of His Motion for Appeal Bond pursuant to NMSA 2008, § 30-11-1, NMRA 2008, Rules 5-401, 5-403, 12-205 and 12-309(E). As grounds Defendant states:

I. INTRODUCTION -

Defendant Wayne Bent was charged with two counts of Second Degree Criminal Sexual Contact of a Minor (CSCM) pursuant to NMSA 2008, § 30-9-13; and two counts of Contributing to the Delinquency of a Minor (CDM) in violation of NMSA 2008, § 30-6-3. 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. He was also found guilty of two counts of CDM. Mr. Bent was sentenced to a fifteen (15) year sentence on the CSCM; ten

years incarceration and the remaining five (5) years suspended, and 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 Second Amended Judgment and Sentence, filed December 30, 2008. (RP 619). Defendant's trial counsel, Sarah Montoya did not request an appeal bond after sentencing by Judge Baca. She filed a Notice of Appeal on January 5, 2009 (RP 637) and the Docketing Statement was filed on February 10, 2009. (RP 666). Counsel was recently informed that the District Court clerk filed the recordings of proceedings on June 26, 2009, and therefore, it appears the Brief in Chief is due on August 10, 2009.

Mr. Bent was charged with CSCM and CDM for conduct that involved religious healing ceremonies with two young women (A.S. and L.S.) in his Church. Mr. Bent was ordained as a minister by the Seventh Day Adventist Church in 1970 and has worked with a Church he helped to found after he split from the Seventh Day Adventist Congregation in 1987. *See* Affidavit of Jeffrey W. Bent at ¶ 4, (Exhibit 1); *see also* Direct of John Gordon Melton, Dec. 10, 2008 Tr 151, (Exhibit 2). The new Church is called The Lord Our Righteousness Church (LOR). *Id.* at 152; *see also* Direct examination of Elsa Sayer, Dec. 9, Tr 10-11, (Exhibit 3). The two incidents involving alleged CSCM 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 entered his room and requested his consent to lay next to him and for the incident that he was convicted he was clothed. Direct of L.S., Dec. 10, Tr 54, 65 (Exhibit 4); Direct of A.S., Dec. 10, Tr 80 (Exhibit 5). The only other significant difference was the demeanor and testimony of the two young women. L.S. was clear and unambiguous in her belief in the ritual and its healing effects. Dec. 10, Tr 50-51, 56. A.S. believed this was a spiritual or religious event, but was troubled and could not define what her issue was. A.S. Dec. 10, Tr at 83, 88. She did *not* say that the event transgressed her personal space. A.S. embraced a different lifestyle and different morays than the community after she and her family moved away. *see* Myspace page (RP 50-54, 106-110).

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. Direct of State’s witness, John Sayer, Dec. 9, 2008, Tr 37-38. (Exhibit 6). 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 (member of LOR church 16 years); (LOR church moved to Clayton, NM, in 2000); *see also* Direct of State witness Elsa Sayer, Dec. 9, Tr 10-11 (Exhibit 3) (involved in LOR church 16 years).

In 2006 the church community undertook a religiously motivated ceremonial “pouring out of the plagues,” Cross examination of L.S. (Healed), Dec. 10, Tr 50-51; 56 (Exhibit 4); Direct of John Sayer, Dec. 9, Tr 40 (Exhibit 6). Originally eight females and one male stepped forward for this ceremony. Wayne Bent Cross, Dec. 11, Tr 115-16 (Exhibit 7). In the end 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 Revelations. Direct of L.S., Dec. 10, Tr 17-18 (Exhibit 4); Direct of A.S., Dec. 10, Tr 76 (Exhibit 5). The seven females were commonly referred to as the Seven Virgins or Messengers. Cross of L.S., Dec. 10, Tr 50 (Exhibit 4); Direct of A.S., Dec. 10, Tr 76 (Exhibit 5). During the time of the pouring out of the plagues, the Defendant placed his hand over the heart of each of the Seven Virgins while praying. Direct testimony of A.S., Dec. 10, Tr 82 (Exhibit 5). This was a religious healing experience akin to being close to God and the individuals who participated were inspired from within to do what they did when they went to Mr. Bent. Direct of L.S. (“Healed”) Dec. 10, Tr 19 (Exhibit 4) (“I just did what was on my heart.”), Cross at 50-53; Direct of A.S., Dec. 10, Tr 83, 88 (Exhibit 5) (Q. “Did you feel this was a religious experience?” A. “Yes”); Direct of Allasso Michael Travesser, Dec. 11, Tr 79-80, (Exhibit 8).

L.S. preferred to be called “Healed”, after her 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., Dec. 10, Tr 9, Ln 5-10, (Exhibit 4).

The Docketing Statement asserts that this case arose after the community posted about these issues to Its' website.¹ Actually, the storm of legal activity in this case took place after the Church became the subject of a National Geographic documentary that was allowed so that the World would hear of the pouring out of the plagues and Revelations. Direct examination of "expert" John Gordon Melton, December 10 Tr. 149 (Exhibit 2); Argument of Assistant District Attorney Donald Gallegos, Dec. 30, 2008, Tr. 12 (Exhibit 9), ("I didn't even know he was living in the north part of my county, not until someone told me about the National Geographic special"). This case took place during the time the Texas Department of Children Youth and Families was raiding the Fundamentalist Latter Day Saints Church Yearning for Zion Ranch near Eldorado Texas and with the backdrop of that case pending in the appellate courts of Texas. *See* New York Times article, May 30, 2008, annexed hereto as Exhibit 10 (May 22, 2008 Texas Court of

¹ The 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.

Appeals Order directing return of children affirmed by May 29, 2008 Texas Supreme Court Order).

LEGAL STANDARDS GOVERNING APPEAL BOND

NMRA 2009, Rule 12-205(B) provides this Court with authority to hear this Motion and to grant the relief requested. The purpose of the statute governing this issue, NMSA 2009, § 31-11-1(A) is to protect “a defendant who is appealing a conviction from a potentially undeserved sentence.” *State v. Rivera*, 2003 NMCA 059, ¶ 11, 133 N.M. 571, 574, 66 P.3d 344, 347.

According to NMSA 2009, § 31-11-1, Defendant’s Appeal serves to stay execution of the sentence imposed and Defendant is entitled to the setting of a reasonable appeal bond. Mr. Bent has not been convicted of a serious violent offense for purposes of NMSA 2009, § 31-11-1(D); and therefore he is eligible for release pending appeal under NMSA 2009, § 31-11-1(C), which provides:

If a defendant is convicted of a noncapital offense other than a violent offense and is sentenced to a term of imprisonment not suspended in whole, he shall not be entitled to release pending appeal unless the court finds:

- (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and
- (2) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

NMRA 2009, Rule 5-402(C), of the District Court Rules of Criminal

Procedure also states in pertinent part:

Release after sentencing. After imposition of a judgment and sentence, the court, upon motion of the defendant, may establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Paragraph B of Rule 5-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. The defendant shall be detained unless the district court after a hearing determines that the defendant is not likely to flee and does not pose a danger to the safety of any other person or the community if released.

This Court further defined the standard governing appeal bonds in *State v. House*, 1996 NMCA 052, 121 N.M. 784, 918 P.2d 370, *cert. denied*, 121 N.M. 676, 916 P. 2d 1343 (1996), *cert. denied*, 528 U.S. 894, 120 S. Ct. 222, 145 L. Ed. 2d 186 (1999), which sets forth the guidelines to be followed based on NMSA 1996, § 31-11-1(C). *House* at ¶ 2 (citing NMSA 1996 , § 31-11-1(C)),. *House* cites NMSA 1996, § 31-11-1(C) which states:

If the Defendant is convicted of a non-capital offense other than a violent offense . . . he shall not be entitled to release pending appeal unless the Court finds:

1)by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if he is released pending appeal;

2)that Defendant's appeal is not for the purpose of delay; and that the appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

House, at ¶ 2, 121 N.M. at 787, 918 P.2d at 373. *House* defined “substantial question” as “one of more substance than would be necessary to a finding that it

was not frivolous.” *State v. House, supra*, 1996 NMCA 052, ¶ 14, 121 NM at 787, 918 P.2d at 373. This follows the Tenth Circuit interpretation of “substantial question” in *United States v. Affleck*, 765 F.2d 944, 952-53 (10th Cir. 1985), and also adopts language from *Affleck* to hold that A "substantial question" is a “‘close question' or one that very well could be decided the other way." *Id. But see Affleck* at 957, Dissent of Justice McKay complaining of the harsh nature of the amended Federal Act, 18 USC § 3143 (“Thus, in my view, the Bail Reform Act violates the *eighth amendment* by allowing the denial of bail on grounds unrelated to the defendant's likelihood of flight.”)

The *Affleck* standard is met in the case at bar because the legal and factual issues related to sufficiency of evidence of CSCM, the issue of lawfulness, and the definitions of the CSCM terms at issue, are close questions that could likely result in a decision in Defendant’s favor that would require reversal or an order for a new trial on the charge for which he was incarcerated.

LEGAL ARGUMENT

Defendant can demonstrate by clear and convincing evidence that: (a) He is not likely to flee or pose a danger to the safety of any other person or the community if released because he is the Pastor of a Church in a remote location in New Mexico and is dedicated to his home there. His congregation is also dedicated to ensuring he will be cared for as he is in his elder years (age 68); and

(b) he also acknowledges the authority of the Court and he has agreed to maintain strict adherence to Court imposed restrictions, having previously been meticulous in notifying friends and community members of restrictions regarding his contact with children pending his district court trial and having followed all legal requirements related to his prior release with vigor. During the trial his own lawyer wrote an arrest warrant and presented it to the judge when it became apparent he could not be driven to court because he had become too weak from a Jubilee fast. The Sheriff was able to then transport Mr. Bent by ambulance. *See* Arrest and Pickup Order, filed October 31, 2008 (RP 234-235). Finally, Defendant meets the second prong of the test because, as he outlines below how he is likely to succeed on a substantial question that would result in reversal of the charge that is holding him.

ISSUE ONE -

NMSA § 31-11-1(C)(1): Defendant Has Established by Clear and Convincing Evidence that He is Not Likely to Flee or Pose a Danger to the Safety of Any Other Person or the Community

On April 9, 2009, Defendant moved for an appeal bond in the district court, with fourteen (14) affidavits attached. *See* Exhibit 11 (affidavits referred to herein as Exhibits 11(A) to 11(N), respectively). The affidavits established that Mr. Bent is not a flight risk and he is a ‘Man of his Word’ who takes his commitments seriously: Affidavit of Jeffery Bent at ¶7, Exhibit 11-A; Affidavit of Vicky L.

Thompson at ¶20, Exhibit 11-B; Affidavit of Deborah Morrison at ¶8, Exhibit 11-C; Affidavit of Jonathan Thompson at ¶ 8, Exhibit 11-D; Affidavit of William Easton at ¶12, Exhibit 11-E; Affidavit of Timothy Benjamin at ¶7, Exhibit 11-F; Affidavit of Richard D. Bergman at ¶ 5,8, Exhibit 11-G; Affidavit of Aquinnah O’Keefe at ¶5, 14, Exhibit 11-H; Affidavit of Betty J. Bent at ¶6, Exhibit 11-I; Affidavit of Cristi Crews at ¶10, Exhibit 11-J; Affidavit of Nancy J. Delaney at ¶11, Exhibit 11-K; Affidavit of David Thompson at ¶4,14, Exhibit 11-L; Affidavit of John Morrison at ¶14, Exhibit 11-M; Affidavit of Susan Haines, ¶ 10, Exhibit 11-N. The affidavits also established Mr. Bent was not a threat to anyone or

the community. *See* Jeff Bent, ¶9, Vicky Thompson Affidavit at ¶¶14, 17-19, Exhibit 11-B ; Deborah Morrison Affidavit at ¶ 8, Exhibit 11-C; Jonathan Thompson Affidavit at ¶ 11, Exhibit 11-D; Aquinnah O’Keefe Affidavit at ¶¶ 6, 9, 15 Exhibit 11-H; Richard Bergman Affidavit at ¶ 9, Exhibit G; Cristi Crews Affidavit at ¶11, Exhibit 11-J; Nancy J. Delaney Affidavit at ¶ 8, Exhibit 11-K; David Thompson Affidavit at ¶¶ 10-11, Exhibit 11-L; John Morrison Affidavit at ¶¶ 10-11, Exhibit 11-M; Susan Haines Affidavit at ¶¶ 9, 11 Exhibit 11-N.

The fourteen affidavits attached to Defendant’s Motion for Appeal Bond are particularly detailed, credible support for the assertions in this Brief that Defendant is law-abiding and not a flight risk. *See generally* affidavits attached, *See also* Jeff Bent, Direct testimony, May 26, 2009, Tr 12 (Exhibit 16) (“It’s against our faith to

run away and so it would be in both of our interests to see that this appeal were to go through and complete its course.”); *also* Jeff Bent, re-direct testimony *Id.* at 16 (God would not tell him to help Wayne Bent escape out of the country); *Id.* at 17 (Defendant believes that “God ordained earthly government and man’s laws to keep order” . . . “I’ve never seen him put himself above the law.”).

In its Response to Defendant’s Motion for Appeal Bond filed on May 15, 2009 (Exhibit 12), the State attempted to argue that Mr. Bent had plans to flee to South America if released on bond, however the State failed to introduce any evidence in support of this assertion. *Id.* at p.4, ¶ 18(a); *see also* May 26, 2009, Tr 35, Exhibit 13 attached. *Compare*, Affidavit of Jaime Urrego (Exhibit 14 at ¶9) (there is no South American sanctuary for Mr. Bent).

On May 26, 2009 the district court held an evidentiary hearing on Defendant’s Motion for Appeal Bond.² At that hearing, Defendant presented overwhelming evidence of his strong ties to the local community, his support from the members of his church in Union County, and his adherence to court orders, schedules and requirements.³

Mr. Bent was unequivocal at the hearing:

² It should be noted that the district judge presiding over the May 26, 2009 hearing was not the trial judge; that judge is no longer sitting, having not been reelected.

³ Undersigned counsel is in the process of requesting the district court Motion for Appeal Bond, the State’s Response, the Order Denying Defendant’s Motion for Appeal Bond be included in the Record Proper and that the transcript of proceedings be forwarded to this Court.

Q. “. . . Can you affirm to this Court that you would follow any conditions of release imposed by the Court, if you were released on an appeal bond in this matter?

A. Yes, sir.

Q. Are there any conditions of your prior release, on the unsecured, signature bond that you had a problem following?

A. No.

Wayne Bent, Direct Examination, May 26, 2009 Tr 20 (Exhibit 15). He was also asked about whether God would tell him to disobey conditions of release:

Q. “If you’re (sic) released. If you’re (sic) released, if God were to suddenly tell you that you should go to South America, is that something that you would do under the circumstances? If you were on an appeal bond, would you attempt to violate and say that God told you to do it?

A. No. God respects and has set up the laws of the State. And I’ve always used as an example with people: when Moses went to release the Israelites from Egypt, he didn’t do it – even though he had God’s command to do it, he didn’t do it without Pharaoh’s permission. And I believe I would have to have the State’s permission for what I do, until they free me to just be on my own.

Q. And I take it when you say “until they free you to be on your own,” that would either be through winning your appeal or finishing your sentence?

A. It would be after it’s all over and I’m free.

Id. at 23-24.

Mr. Bent also testified that he is very clear about the issues at bar and he is able to comply with any issues that could come up if he were released:

A. Now, there’s a new element, and if I had somebody ask me that [to perform a religious healing ceremony similar to the ceremonies triggering the charges in this case], I would have to have them get a court order,

because the State assumes responsibility of these minors. And so they are a parent now. And before, I just had the minor ask the parents. Now I would have to have the minor ask the State. So without a Court order, it wouldn't happen.

Id. at 25.

Mr. Bent testified that the reason he missed the one court date prior to trial, was that he was too weak to attend, so arrangements were made to transport him by ambulance. *Id. at 20-21; see also* Arrest and Pickup Order, filed October 31, 2008, RP 234-235.

Neither Mr. Bent, or his son, Jeff Bent, were impeached during their testimony in the brief amount of time allocated to the Hearing. Mr. Bent's son testified that he was a former Riverside County California Sheriff's Deputy who had also abided by the law. Jeff Bent, Direct May 26, 2009, Tr 11-12,16 (Exhibit 16). The State did not present any testimony. The trial court's findings did not cite any specific evidence to support a finding that the Defendant might pose a specific flight risk and also did not cite any specific evidence or authority showing that the Defendant might not prevail on his appeal or to show support for any finding that the appeal was for purpose of delay. The District Court ruled that:

Based upon the testimony of the witnesses presented at this hearing, the Courts assessment of the credibility, assessment of the weight of the evidence, both presented and what the Court has read in the file, and all the reasonable inferences and reasonable conclusions drawn from the assessment of the evidence and the credibility, the Court is

going to deny the motion. . . . The Court finds that there is not clear and convincing evidence on either . . . prong.

Honorable Matthew Sandoval, D.J., May 26, 2009 Tr. 40-41, (Exhibit 17); *see also* Order Denying Defendant's Motion to Defendant's Motion [*sic*] for Appeal Bond, (Exhibit 25). The district court did not explain why Mr. Bent had been placed on an unsecured signature bond, even after the jury verdict and before sentencing and what evidence it had reviewed in the record since that time that would support more than the unsecured signature bond. Nor did the Court say why some condition of release was not supported.

The district court also did not make specific findings regarding Mr. Bent's medical evidence that his health was in severe danger from incarceration, or the psychological evaluation prepared for the Courts and the Department of Corrections, after the trial, that indicated Mr. Bent was not a danger to the public, though the Court noted this evidence had been reviewed. *See* Report of Edward Siegel, PhD, (Exhibit 19.)⁴ This Court has the record before it and that record does support a bond pending appeal. The District court erred in finding a lack of clear and convincing evidence in the record that Mr. Bent is not a flight risk or a danger.

ISSUE TWO -

The appeal is not for the purpose of delay and it raises a substantial question of

⁴The Report was filed as Attachment C to Defendant's Sentencing Memorandum and was file stamped by the Court Clerk on December 29, 2008, but was not included in the Record Proper and is likely under seal.

law or fact likely to result in reversal or an order for a new trial

The Defendant has raised several issues likely to result in reversal, however, this Brief focuses on four issues. The Docketing Statement raises Nine issues including the following: 1 - Whether the Grand Jury was legitimate and if the Grand Jury indictment should be quashed for, among other reasons, grounds of Religious Freedom (this is raised herein); 2 - Limitations on the Defense witnesses and the right to present a defense imposed due to time constraints related to the Judge's term ending (also raised in this Brief); 3 - Interference with Defendant's right to present a defense in closing arguments; 4 - Allowing the State to go beyond the scope of cross examination with the Defendant; 5 - Failure to give jury instructions on CSCM regarding the elements including the term "breast" and the "lawfulness" of Defendant's actions and with respect to CDM, instructions regarding what is a delinquent act (this issue is raised herein); 6 - Failure to set aside the jury verdict based on the evidence; 7 - insufficient evidence of CSCM (this issue is raised herein); 8 - Whether the conviction should be reversed for prosecutorial misconduct; 9 - Whether cumulative error deprived Defendant of a Fair Trial. Another issue is whether there was prima facie ineffective assistance of counsel in failing to raise the State RFRA defense in this case. Defendant focuses on some of the most salient issues raised on appeal in this brief.

Sufficiency of the Evidence and the Jury Instruction Issues

Defendant raised the Sufficiency of the evidence issue and the Jury Instruction issues separately in the Docketing Statement. These two issues are addressed below as they compel reversal of the conviction.

Our Courts have not defined the term breast as it is used with respect to Criminal Sexual Contact and Counsel has not found a CSC case involving CSC of a minor's breast with facts like those at bar. Most cases generally involve much more focused 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 in this matter regards 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:

- A. 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.
- B. Criminal Sexual Contact of a minor in the second degree consists of all criminal sexual contact of the *unclothed intimate parts* of a minor . . .
- C. 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). 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., Dec. 10. Tr. 87 (Exhibit 5). Neither A.S. or L.S. asserted the fleshy area of her breast was squeezed or touched in any significant way when Mr. Bent placed his hand over their sternum.

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 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. *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, December 11, 2008 Tr. 82-83 (Exhibit 8); Wayne Bent Cross, Dec. 11, Tr 115-16 (Exhibit 7) (originally 8 females and 1 male

were potential candidates for this role)). *See e.g.*, Dec. 9, 2008 Tr 55,56,58, (Exhibit 18) (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 a the same place he touched the alleged victim), Dec. 9 Tr 59 (judge limited the number of photographs to four), Tr 66 (photographs admitted, Defendant's Exhibits 25, 26, 28, and 30).⁵

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 fleshy 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. Direct examination of A.S., Dec. 10, Tr 82 (“over the heart.”), Cross Tr 87 (Exhibit 5),. 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., Dec. 10, Tr at 87 (Exhibit 5).

No trial testimony was presented to indicate Defendant touched the

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 will be subject to a Motion to Dismiss.

“intimate parts” of the girl’s breast as defined by the legislature or by other possible definitions. The state’s argument at closing articulated the confusion in this case: “[t]he State is not saying any of this was for sexual gratification.” Dec. 12 Tr 23, Exhibit 21. However, the State, on the very next page states, “he’s misused that position to coerce these two young girls to come into the bed where he then had a sexual contact with both . . .” *Id.* at 24.

In addition to this issue, raised in the Docketing Statement as sufficiency of the evidence, failure to grant directed verdict and refusal of Jury instructions (RP 701-702), there was no testimony to support any criminal intent required to meet the elements of the charge of CSCM as to A.S. *See* A.S. direct Dec. 10, Tr 76, Exhibit 5) (Defendant had a vision of Seven Virgins); Tr 81 (A.S. participated: “Because I thought I'd get closer to God.”); Tr 83 (it was “a religious experience”); A.S. examined by the court Tr 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; this was something between herself and “A spirit of God.”).

Unlawfulness

In addition to the sufficiency issue and the definition of breast, the element of Unlawfulness was put in issue in discussions of the Jury Instructions and the evidence at directed verdict and at closing. 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 (NMSC 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 (NMSC 1991); *see also State v. Larson*, 94 N.M. 795, 617 P.2d 1310 (NMSC 1980); *see also* UJI 14-132 (providing several examples of lawfulness instructions that could be given).

The Defense submitted Its' definition of 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). 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*, 111 N.M. 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 (NMSC 1992), it is clear that the Defendant was entitled to the proposed instruction delineating whether

contact was legitimately incident to a religious ceremony. The Defendant at bar stated that he did touch 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, Dec. 11, Tr 115, (Exhibit 7). “And we visited that way, and that was pretty much common for me to do.” *Id.* Tr 105, (Exhibit 7); *see also* A.S. Dec. 10, Tr. 83, (Exhibit 5) (it was “a religious experience”); L.S. Dec. 10, Tr. 51 (Exhibit 4); (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”. *State v. Osborne*, 111 N.M. at 657, 808 P.2d at 628. *See also State v. Larson*, 94 N.M. 795, 617 P.2d 1310 (1980). 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 Revelations. This relationship justified the giving of Defendant’s lawfulness instruction.

Defendant can Also Show A Question of Law and Questions of Fact Likely To Result in Reversal or An Order for a new trial with respect to the Evidence supporting the Conviction for Contributing to the Delinquency of a Minor

Defendant asserts the two convictions for Contributing to Delinquency of a Minor (CDM) are also likely to be reversed. Defendant asserts they are not incarcerating the Defendant, however, if the State argues they are, they could 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, her breast, was not touched for CSCM because that is the element common to both offenses. *See* identical jury instructions for CDM (RP 575-76). If 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 breast of L.S. then the same finding should be applicable to A.S. based on the facts describing each laying on of the hand in the record. If CSCM did not occur then CDM is also not appropriate as to A.S. per the jury instructions

Contrary to the State’s closing arguments, there was no testimony that Defendant coerced A.S. into entering his bedroom and disrobing. A.S. direct, Dec. 10, Tr 78 (A.S. suggested they go into the bedroom); A.S. questioning by the Court, Dec. 10, Tr 88 (nobody sent her to Defendant; nobody pressured her; it was

her own decision).

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 (as a matter of law disrobing in private and not for sex was not the issue presented to the jury for CDM, the instruction included required a finding of touching of 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:

In State v. Davis, 97 N.M. 130, 637 P.2d 561 (1981), quoting from *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), this Court said: "[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *Davis*, 97 N.M. at 132, 637 P.2d at 563 (quoting *Winship*, 397 U.S. at 364, 90 S.Ct. at 1073) (emphasis added). In the present case, the Court, applying *Swafford v. State* (cited in the majority opinion) and seeking to avoid the strictures of the Double Jeopardy Clauses of our state and federal constitutions, says: "CDM requires proof of a fact not required to prove CSCM" (italics omitted) and "CDM requires proof that the act of defendant contributed to the 'delinquency' of a minor" and "Contributing to delinquency, therefore, is a fact separate from an unlawful sexual touching"

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 (NMSC 1993) (Justice Montgomery dissenting). The State rested its CDM instruction on the occurrence of the sexual contact, yet there was no sexual contact, nor was there any other evidence that would meet the standard of CDM. Therefore, even though the Defendant was not sentenced to incarceration on these two consecutive counts, they are also subject to reversal if the State somehow argues they would require incarceration if the CSCM conviction is vacated.

Other Issues on Appeal – Right to Present a Defense and Grand Jury Jurisdiction

With respect to the other issues raised on appeal, the Defendant has shown in the Docketing statement that, over counsel's objection, he 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 an election defeat. Oct. 7, 2008 Tr 13 (Exhibit 23). 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.

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.

See Oct. 7, 2008 Tr 13 (Exhibit 22).

The Defense was ordered to shorten its list of witnesses so as to allow for time to try the case prior the Judge's retirement from the Bench. The State was not ordered to limit its witnesses or evidence.⁶ 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 and exhibits that included photos of numerous healing events similar to those that took place with the two alleged victims. Almost all the photos were excluded.

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.

⁶ The State was given a continuance to secure assistance from an FBI behavior analysis unit out of Quantico, Virginia. Oct. 7 Tr at 3-4, Exhibit 22..

Trial Court ruling, Dec.9, Tr 55,56,58, (Exhibit 18) (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.

The ruling excluded the testimony of women, Eden Travesser, Hanifa Travesser and the girls' aunt Misty Renee Sayer (one of the Seven Virgins). This testimony could have been used to explain why the girls approached the ceremony the way they did. Dec. 8, 2008 Tr 27 (Exhibit 20) . The DA argued that the ceremony was a façade because of the limited evidence the Defense presented from male witnesses regarding how it occurred in other settings. Dec 12, Closing, Tr 22 (Exhibit 21).

The Defendant's right to present a Defense is rooted in the Due Process Clause of the Fourteenth Amendment, the Compulsory Process or Confrontation clauses 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 imposition of its election timeline on the proceedings prejudiced the right to present the Defense and the Defendant has shown a substantial likelihood of reversal on this issue.

The Court's Denial of Defendant's Religious Defense at Grand Jury and the

failure of Counsel to invoke a State Religious Freedom Restoration Act Defense during the proceedings invokes a Question of Law and Questions of Fact Likely To Result in Reversal or An Order for a new trial

The Defendant's religious defense was rejected in the hearing on the Motion to Quash the Grand Jury Indictment, Aug. 12, Tr 49, (Exhibit 24), and during the discussion of the Jury Instructions on Lawfulness. Furthermore, Appellate Counsel has determined that, given the continuous efforts of the Defense at trial to argue and present a religious defense (*see* proposed Jury Instruction on lawfulness (RP 525)), there is also a *prima facie* issue of ineffective assistance of counsel related to the failure to assert the State Religious Freedom Restoration Act (RFRA), NMSA 2008, §§ 28221, *et seq.* The Defense provided for in the State RFRA, NMSA § 28-22-4(A), would have provided for presentation of a Religious Defense to the jury and for an instruction on lawfulness under the Act. Defendant Bent's attorney asserted religious freedom at every turn in this matter, however, she failed to request a defense or a jury instruction based on the State RFRA statute, nor did she raise this issue at any point during the trial. For example 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....

Dec. 10, Tr 177-78. The failure to raise RFRA in support of this 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”).

“A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). When a defendant contends that defense counsel was ineffective for failure to take a particular action, the defendant "must establish 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.

Defendant raised the religious defense through trial counsel in the Docketing statement by citing the First Amendment as to each issue. Trial counsel also raised the First Amendment issue throughout the trial proceedings; most saliently in the Motion to Quash the Grand Jury Indictment (RP 25-35; Aug. 12, Tr 30, Exhibit 24) at Directed Verdict and through the proposed jury instructions (RP 525). The

Defense noted that the First (*sic*) Amendment protected religious healing such as the type at bar. (RP 28-30). The Defense provided information on the ritual for the Grand Jury to review, however, the information was not presented to the Grand Jury. *Id.* The Defense argued that this failure to allow presentation of the religious aspects of the case to the Grand Jury required Quashing of the Grand Jury Indictment. (RP 28-32).

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 § 28-22(B) defines "government agency" as "the state or any of its political subdivisions . . ." § 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. (emphasis added)

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 . . .
(emphasis added)

Religious freedom-based defenses to criminal prosecutions are legitimate defenses, contrary to assertions by the State in this case. 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 (N.M. Ct. App. 2003) (Defendant Chavez admitted possession of marijuana, but testified his use was based on a Rastafarianism religious belief that marijuana is to be consumed at various times, as a religious sacrament). *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 that the State RFRA statute would be interpreted in the same way as the Federal Statute is applied to Federal actions. 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 was ineffective assistance of counsel because of the failure to use RFRA as it was intended to support the Defense given the strategy choice the defense counsel made.

Finally, the Court’s failure to recognize any of the issues the Defense was raising based on religious freedom and the insistence in excluding the State and Federal religious issues, also amounted to Fundamental Error in this matter. *State v. Holly*, 2009 NMSC 4, 40 (N.M. 2009) (When the trial court had no opportunity to rule on a [claimed error] because the defendant did not object in a timely manner, the claim is reviewed on appeal for fundamental error); *State v. Allen*, 2000 NMSC 2, P 95, 128 N.M. 482, 994 P.2d 728. Reversal is appropriate with that respect when this error is determinative of the jury’s verdict.

The Final issue that supports a reversal of the conviction is the Grand Jury issue. By Oral Order, Judge Sanchez improperly extended the Grand Jury Panel Service by an additional three months in violation of NMSA 2008, §31-6-1. 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.” “Since 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).

Defendant has shown several instances where he could prevail on appeal and the result would lead to reversal or a new trial. For these reasons, the Defendant’s argument meets the second prong of the requirement for appeal bond.

Conclusion

The Defendant has demonstrated that he will not, and has never sought to, defy the Orders of the Court, he will not flee and he has a substantial likelihood of reversing his conviction. He is and has been a law abiding citizen and his son, who lives in the community with him, is a former Deputy Sheriff and is also a law-abiding citizen. His community follows a strict vegetarian, non-violent and law-abiding moral code. (RP 29-30). Of all the people incarcerated in this State, this frail and physically at risk 68 year old minister is clearly a person who meets the criteria of a Defendant who is eligible for an appeal bond.

WHEREFORE, Defendant Wayne Bent respectfully requests this Honorable Court Order an Appeal Bond in this Matter and Further respectfully requests the Court Order the Appeal Bond be a \$150,000.00 unsecured bond, as was the Order of the trial court throughout the trial proceedings and after jury conviction, or that a

property bond be allowed or such other bond as is reasonable relative to the charges and facts in this matter.

Respectfully submitted,

LAW WORKS LLC

—
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Entry of Appearance was sent by first class mail on this 21st day of July, 2009; to:

Margaret McLean,
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John McCall,
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