

11. INTRODUCTION AND RESPONSE TO THE STATE'S STATEMENT OF THE CASE

The most important question to ask in this case is: If you take the Religion out of this case, why would anyone do this? The State agreed the touching in this case was not for sexual gratification. There was no evidence of a plan or motive to violate the girls' bodily integrity or to corrupt their morals. One of the sisters changed her name to healed after the event.

The State's Brief wanders into a misunderstanding of this modern day religious group called the Lord Our Righteousness Church and Wayne Bent. The State relies on facts not found by the Jury or put forward by the Defendant to create a prejudiced and parochial view of the Defendant and his Church, one that may have been the cause of so much misunderstanding during the trial and which is used to support the rather comical image of the Defendant as one who would groom the girls for sex, a notion discredited during the trial and ultimately abandoned by the State in Its closing arguments before the jury. 5TR15, 25. The State does not acknowledge the leadership in the Defendant's community developed from the heart and soul of each individual member, in touch with God's voice on the inside, all coming together around their revelations, not the revelations of one man, but all of the people together. Efforts to express divine

revelation often bring religious minorities in conflict with the majority religious society, thus, the First Amendment to the United States Constitution and Article II Section 11 of the New Mexico Constitution protect minority religious interests.

II. ARGUMENT

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

1. *Jurisdiction and the term of service* -

The State argues that the Grand Jury was only impaneled for two days because it only met for two days during the seven months after it had been impaneled by the Judge. The State does not cite any authority for this proposition. It is clear the statute intends the Grand Jury to be impaneled for three consecutive months and not for intermittent days. NMSA 2008, §31-6-1. Under the State's interpretation that same Grand Jury will still be sitting for a "term of service" of 45 years. The purpose behind limiting the Grand Jury term is to eliminate inherent judicial authority to grant further extensions beyond those set by law. *See United States v. Fein*, 504 F.2d 1170, 1175-1176 (2d Cir. N.Y. 1974) (discussing the origination and legislative history behind the three-term Grand Jury statute of limitations).

Blacks definition of "shall" does not control New Mexico law. This Court

and the Supreme Court have defined “shall” as mandatory: “The use of the word “shall” in statutes means the requirement is mandatory.” *State v. Wyman*, 2008-NMCA-113, ¶7, 144 N.M. 701, 703-04, 191 P.3d 559, 561-62, *citing State v. Guerra*, 2001-NMCA-31, ¶14, 130 N.M. 302, 24 P.3d 334; *See also Cobb v. State Canvassing Bd*, 2006-NMSC-34, ¶53, 140 N.M. 77, 92, 140 P.3d 498, 513 (defining “shall” in the election code as mandatory) *See* Judge Sanchez’s Oral Order, [RP 79-80]; ADA Benavidez, Aug. 12, Tr 36. Thus, the State has not explained how the trial court could override the mandatory term of service, the definition of term of service, or the remedy of quashing the Grand Jury Indictment when the “grand jury is not selected in accordance with law.”

The State fails to counter argument that the oath and statutory time frames are mandatory requirements and that the district court “shall” properly convene a Grand Jury or the indictment issued therefrom is void.

2. *Duty to disclose exculpatory evidence*

The State fails to substantively address the failure to call the alleged victims to testify at Grand Jury. (AB 23). The State notes that “[t]he target will have to meet a higher burden to secure post-indictment relief because a request for post-indictment relief would necessarily challenge the sufficiency of the evidence upon which the grand jury’s indictment is based. . . .” (AB 31) *citing Jones v. Murdoch*,

2009-NMSC-2, ¶19, 145 N.M. 473, 200 P.3d 523. The sufficiency of the grand jury evidence was subject to a proper challenge because Defendant was found not guilty of CSC of Lakeisha based on her testimony. Prejudicial testimony regarding Lakeisha was presented to the Grand Jury hearing the charges related to Ashley and this followed the Defendant throughout the proceedings. This Court has noted the importance of exculpatory evidence withheld from the Grand Jury:

First and foremost, even if a target could successfully pursue the remedies suggested by the Attorney General, they would all be post-indictment remedies and, as such, could not remedy the harm flowing from an unjustified indictment itself. To suggest otherwise would be:

an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. . . .

In re Fried, 161 F.2d 453, 458-59 (2d Cir. 1947) (footnotes omitted); accord *United States v. Briggs*, 514 F.2d 794, 798-99 (5th Cir. 1975)

Murdoch at ¶18.

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." NMSA 2008 §31-6-11(B); *Buzbee v. Donnelly*, 96 N.M. 692, 698, 634 P.2d 1244, 1250. *Jones* does not eliminate the remedy for failure to submit such evidence. If

the prosecutor withholds *victim*-witness testimony he is aware is directly exculpatory, [RP 82-3, 93, 101] and fails to present that evidence, the Defendant is entitled to a post-indictment remedy. The Defendant argued that withholding exculpatory evidence was in bad faith, (Motion to Quash [RP 82-3], Aug. 12, Tr 30, 32, 35), noted such in the Docketing Statement (DS at 6-8, 38-9, 41) and never abandoned this argument on appeal. *Jones* requires a remedy for the failure to present “truly exculpatory” evidence. (AB 32). “[T]he target has always been able to bring exculpatory evidence to the attention of the prosecutor, and the prosecutor could always simply ignore it *unless it directly negated guilt.*” *Jones* at ¶28 (emphasis added). The trend is to provide a real remedy for this type of error or dispute regarding the presentation of exculpatory witness testimony. *Jones* at ¶31 (collecting cases).

The State also argues that *State v. Augustin M.*, 2003-NMCA-65, 133 N.M. 636, 68 P.3d 182, stands for the principle that a prosecutor had no duty to instruct the grand jury on Defendant’s religious justification. (AB 33). *Augustin M.* specifically excludes the CSCM charges in this case because justification or lawfulness is an element of CSCM and therefore, the State had to prove that element to convict the Defendant. Thus there was every indication that directly exculpatory evidence regarding the religious practice was admissible at bar, unlike

Mr. Chavez' situation in *Augustin M.*:

Further, nothing about the religious-use defense requires any aspect of it to be *proven by the State* at trial as an element of the crimes charged. It is purely a defense. Thus, the State is not required to prove lack of *justification as an element* of possession in the sense that the prosecutor must do so under *Parish*. 118 N.M. at 42, 878 P.2d at 991. Even were such an element involved, just as with self-defense the prosecutor is not required to instruct when the evidence supporting the defense is circumstantial evidence, rather than *evidence directly negating guilt*.

Augustin M. at ¶ 65 (emphasis added). The distinction between this case and *Augustin M.* should be interpreted to require quashing the Grand Jury indictment for failure to present directly exculpatory evidence to the Grand Jury.

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. Argument

The State does not dispute the proffered standard of review. (AB 45). Instead the State attacks the trial attorney's proffers of evidence. *Id.*

The State's first error is asserting that the Defendant never argued that his rejected witnesses could have explained why the girls approached the rituals (of the Seven Virgins) the way they did and to address the lawfulness element of the charges. (AB 45). The trial court was made aware of the ritual and the Seven Virgins issue in the community; experts on religion had been called to testify. July

28, Tr9-10, Aug.12 Tr30-43, Oct.30 Tr33-34, 1Tr34 (Judge viewing photos including ritual photos.) Furthermore, the “healings” that “took place” that the rejected church member-witnesses could testify to were also in the context of the “Seven Virgins.” (2Tr40) John Sayer; (4Tr56) Gabriel Travessor. The State’s argument that all the witnesses proffered were adults who were clothed when touched does not diminish the importance of each person’s testimony about the healing touch and the pouring out of the Seven Plagues. The ritual of touching the hearts of the Seven Virgins moved the community to a new level of spiritual intensity. (4Tr 56-7) (GT “They received the unction from God, the Father, that they were to take part in this symbolical act. And they did so. And it was acted out.”) The Defense identified who the witnesses were who could testify about the “rituals” and their importance. The testimony that was limited and excluded was crucial because it would have explained the ritual touching of Ashley’s heart and Lakeisha’s heart from the perspective of Church members whose individualized concepts would form a combined picture of the Seven Plagues and Seven Virgins. (4Tr56-7; 2Tr40).

The Defense chose only six of the 45-60 community members (2Tr37, 4Tr32, 4Tr51) to discuss the rituals and related matters, yet the trial court only allowed two. (1Tr29) The Docketing Statement avers that the trial court set the

case for one week despite Defense Counsel's request for two weeks. [RP 677] *State v. Ibarra*, 116 N.M. 486, 489, 864 P.2d 302, 305 (Ct. App. 1993) ("The facts contained in the docketing statement are accepted as the facts of the case unless challenged.") Contrary to the State's position, the trial court was pushing the trial date at the expense of time to present a defense. Defendant is not required to sacrifice his constitutional rights to effective assistance, or, to present a defense, for his right to a speedy trial. *State v. Stefani*, 2006-NMCA-73, ¶¶8-20 139 N.M. 719, 723-26, 137 P.3d 639, 663-66; *See State v. Salazar*, 2007-NMSC-4, ¶¶13-20, 152 P.3d 135.

Furthermore, the State fails to note that the grandmother and the aunt were *prohibited* from testifying by the trial court, eliminating testimony from two women who were familiar with the ritual and the healing effects the girls experienced (as opposed to the delinquency it was alleged to have caused). (1Tr25) (Elijah Eden Travessor, grandmother re: healing and difference before and after); (1Tr 26) (Misty Renee Sayer, aunt to testify about family dynamics). The BIC citation (BIC19) should have been (1Tr22-28), where the pre-trial argument was made to have witnesses testify about the rituals of the church and the spiritual healing ritual. Defendant also needed them to give context for the somewhat negative dynamics manifesting from other family member-witnesses toward

Defendant and the Church. (2Tr18, 2Tr21, 2Tr42; *see also* 3Tr166-7).

The State asserts: “Defendant never argued the issues raised in the BIC below (AB 45). However, the Defense did clearly state on December 8 (1Tr27) that the proffered witnesses testimony would address the lawfulness issue. Trial counsel also clearly stated, (*Id.* 25, 27), that the grandmother could address the demeanor/attitude of the girls before and after going into the ceremony. The aunt would address family dynamics; that alerted the judge to relevant evidence.

Only four of the twelve were proffered solely for “Church rituals.” (1Tr25 Alfreda Dale, 1Tr27 Amana, 1Tr27 K.LeFabre, 1Tr24 Webb). Out of the *circa* sixty members this was a small number to discuss such an esoteric religion.

The State’s reliance on *State v. Hargrove*, 109 N.M. 233, 239, 771 P.2d 166, 171-72 (1989), is misplaced. In that case a sole individual sought to introduce evidence of his belief system by reading from a book he wrote that had already been provided to the jury. *Id.* In the case at bar, the members of the Church were proffered to introduce unique evidence regarding the reason why rituals and one particular ritual, were important to the Church members. *Hargrove* supports Defendant’s case because it notes that Defendant had a right to present a Defense that properly outlined his “religious tenets.” *Id.* at 238-39, 771 P.2d at 171-72. Defendant’s religion is personal, internal and esoteric as opposed to exoteric.

1Tr27, 3Tr19-20, 4Tr 22, 56-7. Denial of Defendant's other witnesses prevented him from properly explaining the tenets of his faith, not a rote recitation, but an explanation of how leadership, authority and revelation came from within each individual Soul in the Church.

Finally, the State fails to address the exclusion of relevant photos that showed the healing by Defendant. The most salient photos excluded were Numbers 27, 29, 31, 32, 33, 34, 35, 36, 53, 54, 55, 56, 59. The State fails to rebut *State v. Johnson*, 57 N.M. 716, 263 P.2d 282 (1953). As noted in the State's Motion in Limine [RP 376-380] and in the BIC (19) ten of these photos depicted the Defendant performing the healing ceremony with his hand on the hearts of the people, including the alleged victims. 1Tr54, 58.

The State relies on *Albuquerque v. Westland Development*, 121 N.M. 144, 909 P.2d 35 (Ct.App. 1995), a civil case that does not implicate the Sixth Amendment right to present a Defense. The State's citation to criminal cases does not support the State's position on this issue either. *State v. Boeglin*, 105 N.M. 247, 253, 731 P.2d 943, 949 (1987), allowed the introduction of a photo to address a contested issue just as the location of the touching was contested at bar. In *State v. Gilbert*, 100 N.M. 392, 399, 671 P.2d 640, 647 (1983) *cert. denied*, 465 U.S. 1073 (1984), the Supreme Court admitted photographs because they corroborated

evidence like the proffered photos at bar showing different people being touched and the pattern surrounding this ritual.

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

1. *Argument*

The State asserts the Defendant failed to allege prejudice with regards to this issue. The Defendant articulated prejudice very clearly in his BIC, noting that the disruption of the closing distracted from and weakened Counsel's argument.

(BIC23).

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

1. *Argument*

The State relies on *Krametbauer v. McDonald*, 44 N.M. 473, 479, 104 P.2d 900, 904 (1940), for the proposition that cross-examination of the Defendant should not be limited in a criminal case. This is about more than a "level of formality." (AB 52-53). Only one criminal case has cited *Krametbauer*, overruling limitations on a defendant's cross-examination of a State's expert. *State v. Urioste*, 94 N.M. 767, 769-70, 617 P.2d 156, 158-59 (1980).

The State also attempts to rely on *State v. Gomez*, 2001-NMCA-80, ¶14, 131 N.M. 118, 33 P.3d 669, for the proposition that the Defendant's strategy of limiting

the direct examination was baseless and the idea that the Defendant's right against self incrimination was not relevant to the determination of the scope of cross-examination and the order of presentation of impeachment testimony. *Gomez* did not involve a case wherein the prosecutor was repeatedly cautioned by the trial judge not to improperly attempt to impeach the Defendant. The *Gomez* witness impeached in a "relaxed" manner was not a criminal Defendant. *See Gomez* at ¶17 (identifying all the factors to consider before admitting such impeachment evidence out of order). The *Gomez* factors require exclusion of irrelevant or prejudicial cross-examination beyond the scope.

The trial court insisted on proper impeachment. (4Tr97, 98-100, 113, 115-16, 121-22). The State's argument fails to address this Court's dictates in *State v. Martin*, 101 N.M. 595, 601, 686 P.2d 937, 943 (Ct.App.1984) ("Inquiry into additional matters must, however, be conducted as if on direct examination.") The State also fails to address Rule 611(b) limitations identified in *Martin* at 601, 686 P.2d at 943; *see also State v. Carter*, 21 N.M. 166, 170-71, 153 P.d 271, 272 (1915).

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. *Argument - Definition of the term "Breast."*

The Defense opposed a change to Jury instructions 13 and 14 that included

addition of language stating: “and touched her unclothed intimate parts, to wit breast, with part or parts of his body.” This language was noted in the BIC as part of the objection of the Defense to the use of the term breast; this objection applied to the delinquency instructions. (BIC 25). The Defense tendered a definition of breast with Its Jury instructions and the court noted that this definition was not requested or given to the Jury. [RP 532]. The tender of the instruction to the court in the record was a tendered definition of the term breast. *State v. Munoz*, 2006-NMSC-5 ¶13, 139 N.M. 106, 129 P.3d 142. Defendant asserts the submitted instruction did alert the trial court to the need to define breast. *State v. Diaz*, 121 N.M. 28, 33, 908 P.2d 258, 263 (Ct.App. 1995). Ultimately, the State’s argument incorrectly assumes the term breast is not nebulous. The jury verdict belies this problem. A.S. testified she was not touched anywhere covered by the Bikini on the Barbie doll, and we can determine from the cross examination that she was not touched *or kissed* in that area. (3Tr87). If that is not the case then defense counsel committed *prima facie* ineffective assistance when questioning A.S. on cross, because she had her identify where she was touched and kissed and did not pursue the issue further, deeming her answers sufficient to show there was no contact with the area not covered by the Bikini. *Id.* The State spends less than a page on this issue, yet, it is the penultimate question in the case. (AB 35) Was the spiritual

touch and kiss different from touching or holding the rounded portion of the breast? The state admitted there was no aspect of sexual gratification involved and that nakedness was not indicia of a crime. (5Tr15, 25, 3Tr180).

If the Court were to find that this issue was not preserved Defendant would argue the court may address a claimed error to instruct the jury on an essential element of a crime under both the rules of criminal procedure and the doctrine of fundamental error. *State v. Peterson*, 1998-NMCA-49, ¶6, 125 N.M. 55, 956 P.2d 854. The criminal procedure rules exempt errors involving the essential elements of the offense from normal preservation requirements. *Id.*, *See* NMRA 2008, 5-608(A) & (D). Fundamental error provides an exception to appellate rules and allows an appellate court to review an error in the jury instructions that was not objected to or raised in the district court. *See State v. Traeger*, 2001-NMSC-22, ¶18, 130 N.M. 618, 29 P.3d 518; *see also* NMRA 2009, Rule 12-216 (B). “[This] doctrine . . . allows an appellate court to review a criminal conviction for errors that 'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked.” *Id.*, (*quoting State v. Cunningham*, 2000-NMSC-9, ¶21, 128 N.M. 711, 998 P.2d 176.) Regardless of the defendant's apparent guilt or innocence, fundamental error occurs whenever a defendant is denied a fair trial. *See State v. Barber*, 2004-NMSC-19, ¶17, 135 N.M.

621, 92 P.3d 633 (explaining that ‘shock the conscience’ language describes both "cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair . . . ") *see also State v. Dietrich*, 2009-NMCA-31, ¶33, 145 N.M. 733, 743 (stating that the “proposition that fundamental error occurs whenever a defendant is denied a fair trial . . . as [a] statement[] of law . . . [is] flawless.”). The doctrine of fundamental error is derived from a court's “inherent power to see that [an individual's] fundamental rights are protected in every case.” *Traeger* at ¶25 (*quoting Cunningham* at ¶12). A fundamental error “must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive.” *State v. Chavez*, 2007-NMCA-162, ¶16, 143 N.M. 126, 173 P.3d 48. “Inherent in [this doctrine] is the notion that each case must be decided on its own merits.” *Traeger* at ¶19.

Un-preserved error in jury instructions is "fundamental" when it remains uncorrected, thereby allowing juror confusion to persist. *State v. Benally*, 2001-NMSC-33, ¶16, 131 N.M. 258, 34 P.3d 1134. If error is found then the court must “review the entire record . . . to determine whether the Defendant's conviction was the result of a plain miscarriage of justice.” *State v. Davis*, 2009-NMCA-67, ¶13, 146 N.M. 550, 212 P.3d 438 (*quoting State v. Barber*, 2004-NMSC-19, ¶19, 135

N.M. 621, 92 P.3d 633). The jury must be sufficiently instructed on all the elements of the crime. *See State v. Contreras*, 2007-NMCA-119, ¶16, 142 N.M. 518, 167 P.3d 966. “Failure to instruct a jury on the essential elements of an offense constitutes fundamental error, which may be raised for the first time on appeal.” *Peterson*, at ¶9; *See also* NMRA 2009, 12-216(B)(2).

As the State notes, the UJI has defined, in detail, the beginning and end of the “penis,” “testicles,” and “vulva,” NMRA 2008, UJI 14-981. The State further notes that the term groin was found sufficient in a jury instruction, *State v. Benny E.* 110 N.M. 237, 243, 794 P.2d 380, 386 (Ct.App.1990). Groin encompasses the penis, testicles and vulva. The breast however can be considered the chest or it could be the mammae on the chest. The act of defining the genital parts in detail demands that the breast be defined more specifically like penis or vulva to fulfill the legislative intent evinced by the Statute.

NMSA 2009 §30-9-13 identifies the differences between second and third degree CSCM revolving around the words “unclothed” and “intimate parts.” The issue in this case was whether the jury could identify what the term breast meant in light of the fact that the unclothed breast was the unclothed “intimate part” that had to be touched to meet the language in the statute. [RP 574-75] Thus, the failure to define the breast so that the jury was aware of where the unclothed breast (and its

intimate component) began and ended was a failure to inform the jury of an essential element of the crime. The danger of confusion on the part of the jury was extreme in this case and the fact that the jury found one girl's breast was touched, while the others' was not, shocks the conscience when the 18 year sentence is considered with all the other circumstances. Therefore, the case should be remanded with clarification of the instruction as to what the breast was.

2. *Mistake of Fact Instruction*

With respect to this issue, the Defendant does not agree that he touched anyone's breast as the breast would be defined in interpreting the statutory criminal definition. The Defendant agrees that he touched the girls on the sternum in the manner in which he connects with the person's heart and that he specifically did not touch the "breast" as defined by the legislative intent in outlawing CSCM. Defendant does argue that he acted with intent and intent is crucial to determining lawful justification or excuse.

The State cites *Reynolds v. United States*, 98 U.S. at 167 for the idea that a person cannot excuse their practices because of religious belief. (AB 58). However, the Defendant does not seek to excuse his actions because of his religious belief. Defendant asserts his intent was an element of lawful justification or excuse, however that jury instruction was not given *in toto*. [RP 548-9]. Thus,

Defendant's belief that he was a religious actor and not a secular actor was subject to a mistake of fact instruction because his act was not presented per excuse or justification as religious and justified, but as secular and unjustified. [RP 576-77]

The jury thus needed to determine his intent per mistake of fact. Defendant

believed in a different set of facts that did not allow him to form the *mens rea*.

Was his intent to violate bodily integrity or was his intent based on his knowledge

of permission to place his hand on the sternum because he mistakenly intended to

commit a religious act? The Defendant's belief is just like that of a person accused

of breaking and entering who lacks knowledge of absence of permission to be in

the place they have entered. *State v. Contreras*, 2007-NMSC-119, ¶17-18, 142

N.M. 518, 167 P.2d 966; *See infra*, Footnote 1.

3. Unlawfulness

The State argues the Defendant failed to use the term "reasonable" to define

his religious beliefs in the tendered instruction on lawfulness. (AB 60). While this

was not required under these facts, when sexual gratification was off the table,

allowing the conviction to stand as a result of the failure to add that term would

shock the conscience if it led to the wrongful conviction of someone who was

acting out of a reasonable religious belief.¹ *See Cunningham*, at ¶21.

¹Without the lawfulness exception a Rabbi's right to circumcise would not exist under CSCM. *See e.g. State v. Robbins*, 2008 Wash. App. Lexis 1572 ¶ 2, Unpub. Op. (noting doctors testimony that "circumcision is a cosmetic procedure"); *Roughlin v. State*, 17 Ga. App. 205, 86 S.E. 452 (1915) (death

The Defendant did proffer evidence in support of the reasonableness of this act. The Defendant's experts discussed somewhat related issues and the historical context of much more dramatic actions than Defendant's ritual in both the Hindu religion (bramacharya as practiced by Gandhi,) and in the person of Christian practitioners who participated in "sinoisaktinism." Dr. O'Leary, 4Tr139-45. The evidence was also that the Defendant did place his hand on the heart of all the Church members. *See e.g.* photos discussed in State's Limine [RP372-82]. This act was reasonable and there was sufficient evidence to support instruction on the lawfulness of the acts with Ashley and Lakiesha. Law and medicine are beginning to accept the concept of the "mature minor doctrine" which allows for a minor to exercise the right to make choices based on religious belief. *In re E.G.*, 133 Ill. 2d 98, 549 N.E.2d 322 (Ill. 1989). The exception must be applied in limited situations, but this case is certainly a much more compelling case than for example when a priest *molests* cooperating young members of his flock. The failure to give an instruction like that proposed by the Defense on the essential element of unlawfulness, was the most salient error in the case.

4. *The element of Intent*

The State's argument on this issue does not conform with the evidence. (AB caused by administration of chloroform to conduct circumcision by a non-medical person was not death caused by an unlawful act, implying that circumcision by a person who was neither a doctor or nurse was also lawful).

62). The State argues that “Defendant fully intended to touch Ashley and Lakeisha, he just believed, purportedly, that his religious belief justified the touch.” The Defendant did not touch the intimate or sexual parts of Lakeisha or Ashley nor did he intend to. The jury found that he did not touch Lakeisha that way and the Defendant testified he touched Lakeisha and Ashley in the same way; on the Sternum and very carefully, so as not to touch their intimate parts. 4Tr 105, 115, 3Tr82. Thus, the State found that Lakeisha did not suffer a violation of bodily integrity. The Court should not have included the language “even though he may not know that it was unlawful” [RP525,578] because Defendant was not trying to have sex with the girls thinking his actions would be lawfully justified if he did in the name of religion. Defendant was having a religious experience with the girls thinking his actions would be lawfully justified because it was a religious experience that did not involve touching of a body part prohibited by law. *Id.*

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

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

The State admitted that the Defendant never touched either girl for a sexual purpose. (5Tr15-25). The AG focuses on the testimony of A.S. that Defendant kissed her on the breast. (AB 35-36); (3Tr80-83, 85). The testimony must be examined carefully. It is clear from the record that the Defendant did not touch *or*

kiss A.S. anywhere covered by the bikini on the Barbie Doll which is in Counsel's possession. (5Tr30, 3Tr87). During cross Defense Counsel had A.S. identify where she was touched and kissed and there was no concern on the part of the Defendant's counsel that she had identified an intimate part or the part of the breast that would qualify as the prohibited breast referred to in the CSCM statute. *Id.*; (5Tr34) New Mexico law specifically defines intimate parts of the breast, yet the State ignores those definitions failing to even explain why they might not be relevant to informing a citizen of prohibited conduct in this case. *C.f.* (AB 36) *with* NMSA 2006, § 30-9-14.1.

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

The State insists that one of the most vague terms in the English lexicon, breast, is easily isolated and indentifiable in order to justify a conviction in a case that was so close two almost identical fact patterns yielded two different results. (AB 36). Both of the girls were seeking the same religious experience and there was no indication the Defendant was seeking to be more physical or intimate with A.S. than L.S.

Every documented New Mexico case has involved much more (and sexual) touching of the breast and the definition was never in issue. *See e.g. State v. Ervin*, 2008-NMCA-16, ¶¶44-46, 143 N.M. 493, 177 P.3d 1067. The State ignores

Defendant's argument regarding the Notice provided by the Statute and the violation of bodily integrity asserted in this case in light of the lawful purpose exception. The Statute is designed to prevent a Priest or religious leader from molesting a child in the church, but it is not designed to prevent a Priest or religious participant from dipping a naked child into a river, to prevent a circumcision or prevent a Shaman from painting a naked child's breasts with sacred paint. The Defendant's practice of touching was common and reasonable and the particular instances in this case involved a particular ritual that was sacred and important to the girls in light of the onset of certain spiritual signs. They initiated the process, the Defendant did not tell them to do it in any way.

Defendant does not and did not admit at trial, that he used a position of authority to cause the girls to commit this act. (3Tr19-20, 3Tr88). The State's argument that his actions, in the context of this particular situation, were not reasonable is the product of a subjective measure of behavior, and not an objective survey of accepted religious practices in the US.

3. The Two Convictions for Contributing to the Delinquency of a Minor

The State walks right into the logical fallacy of this jury decision at (AB 38). The State argues that "Lakeisha . . . told the jury that she could not remember the defendant ever "touching [her] breasts" (3Tr28)." Then the State argues that the

“Defendant’s hands and/or head on their *chests*” was sufficient evidence to show that a part of his body touched Lakiesha’s breast. (AB 38-39). The State is asserting that chest means breast when it comes to CDM but not when it comes to CSCM in order to support a jury conviction. This fallacy belies the conviction for CDM as to Lakeisha.

The State fails to address the Defendant’s other arguments as to CDM. The State does not explain why the conviction for contact with Ashley would survive if the CSCM conviction in her case was overturned as the area touched is again a gray area susceptible of generating a great injustice by wrongful conviction. This risk is too high to ignore and the case should be remanded on all counts.

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. *Argument*

The law provides for a lawful justification or excuse in the case of CSCM and, arguably in light of that exception, for CDM, that results from “unlawful touching” as alleged in this case. *State v. Osborne*, 111 N.M. 654, 661, 808 P.2d 624 (1991). The State argues as if that exception does not exist. The New Mexico RFRA should have been invoked as part of a religious based criminal defense

because the Act itself codifies earlier Supreme Court rulings in which the compelling interest test was used when religious worshipers faced criminal prosecution. In *Wisconsin v. Yoder*, for example, the Supreme Court ruled that there was no compelling state interest that justified the prosecution and subsequent conviction of Amish and Mennonite faith parents for not sending their children to formal high school. 406 U.S. 205, 92 S. Ct. 1526 (1972); *See State v. Brashear*, 92 N.M. 622; 593 P.2d 63(Ct. App. 1979) (Government must show its regulation “furthers a substantial government interest.”) New Mexico’s RFRA was designed to make all religions equal in this regard and to ensure protections the US Supreme Court has not provided in the case law cited by the State. AB at 19. The Statute does not excuse illegal behavior, but it tests the Government’s interest regarding communion wine, circumcision, Shamanic ritual body painting and other imaginable and reasonable practices like the one involved here, which might stir subjective passions and prejudices against a reasonable right of passage or a self chosen transformative experience that bares the heart and soul.

Defense counsel’s failure to raise RFRA was ineffective assistance of Counsel in light of her “rigorous” attempts to raise religious freedom throughout the trial.

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

fair trial

The State asserts that the Defendant has not shown significant cumulative error. Multiple errors resulted in prejudice to the Defense throughout trial from the Grand Jury Indictment through instruction and argument to the jury.

III. PRAYER FOR RELIEF

WHEREFORE Defendant Respectfully Prays the Relief requested in the BIC.

Respectfully Submitted by:

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CERTIFICATE OF COMPLIANCE WITH NMRA 12-213(G)

I hereby certify that this brief is less than 5900 words pursuant to the Court's Order and that I have certified this with the Word Perfect Word tabulator showing 5980 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

Nicole Beder, Assistant Attorney General at P.O. Drawer 1508, Santa Fe, NM 87504-1508, on April 5, 2010.

John McCall
Attorney for Defendant Wayne Bent