No. _____

In The
Supreme Court of the United States

SELVIN EDUARDO ZECENA-VALDEZ,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On November 18, 2015, Mr. Zecena was charged in the District Court with five counts of sexual assault on a child (Counts I – V), five counts of lewdness with a child under the age of fourteen years (Counts VI – X), and one count of attempted sexual assault on a child (Count XI). All charges involved allegations of misconduct with Mr. Zecena's niece Nicole. Mr. Zecena pled not guilty.

On July 25, 2016, Mr. Zecena filed a Motion in Limine to Admit Evidence of States Witnesses Prior Bad Acts. The State opposed the motion, and the District Court held an evidentiary hearing. On September 30, 2016, the District Court issued an Order Denying Defendant's Motion in Limine and precluded Mr. Zecena from presenting evidence in support of his defense. Trial took place from October 17, 2016, to October 21, 2016. The jury found Mr. Zecena not guilty on Count I and Guilty on Counts II through XI. On appeal, the Nevada Supreme Court affirmed the conviction based on NRS 48.045(2).

Mr. Zecena presents the following question to this Court:

Whether the Supreme Court of Nevada's interpretation and application of Nevada Revised Statute ("NRS") 48.045(2) deprived Mr. Zecena of his right to a fair trial pursuant to the Due Process and Confrontation Clauses of the United States Constitution.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

State of Nevada v. Selvin Eduardo Zecena-Valdez, No. CR15-1738, Second Judicial District Court of the State of Nevada. Judgment entered January 24, 2019.

Selvin Eduardo Zecena-Valdez v. State of Nevada, No. 78220, Nevada Supreme Court. Judgment entered October 23, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Selvin Eduardo Zecena-Valdez respectfully requests that a writ of certiorari issue to review the judgment and decision of the Supreme Court of the State of Nevada.

OPINIONS BELOW

The Supreme Court's Order of Affirmance was not published, but is included in the Appendix at App. 1-App. 8.

JURISDICTION

A panel of the Supreme Court of Nevada entered its Order of Affirmance on May 15, 2020, denied rehearing on July 1, 2020, and denied en banc reconsideration on October 23, 2020. (App. 1; App. 28; App. 29). This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The provisions of federal law pertinent to this Petition are Section 1 of the Fourteenth Amendment to the United States Constitution and the Sixth Amendment to the United States Constitution.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Because the Supreme Court of Nevada's interpretation and application of NRS 48.045(2) runs afoul of the United States Constitution, NRS 48.045(2) is also pertinent to resolving this case's federal questions. NRS 48.045(2) provides: "Evidence of other crimes,

wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

STATEMENT OF THE CASE

This Petition challenges the Supreme Court of Nevada's decision affirming the District Court's conclusion, and concluding that Mr. Zecena's constitutional rights were not violated when the District Court denied Mr. Zecena's Motion in Limine, and refused to allow Mr. Zecena to introduce prior bad acts evidence related to a State's witness.

A. Proceedings at the District Court

1. Background of the Charges

Mr. Zecena moved from Guatemala to the United States in 1999. VAA0870.[1] Over the years, Mr. Zecena assisted various family members from Guatemala with immigrating to the United States. VAA0873.

In mid-2010, Mr. Zecena's sister, Silvia, moved to the United States with her husband, Ruben, and their

[1] This citation refers to Volume V of Appellant's Appendix at page 870, which was filed in the Nevada Supreme Court.

children, Nicole, Bryan and Catherine.[2] IIIAA0363-64. Upon arriving, the family moved in with Mr. Zecena at his house on Glen Molly Drive (the "Glen Molly house") in Sparks, Nevada. IIIAA0365. At that time, there were numerous people living at the Glen Molly house: Mr. Zecena; Mr. Zecena's parents (Irma and Quinn); Mr. Zecena's brother (Sergio); Sergio's wife (Lisseth); Mr. Zecena's other sister (Marisella); and Marisella's husband (Diego). IIIAA0365. The house was crowded and there was not a lot of privacy. VAA0810.

Over time, Sergio and his wife moved out of the house; Marisella and Diego also moved out of the house. There was conflicting testimony on when these moves occurred, but the details are not relevant to this Petition. *See*, *e.g.*, IIIAA0366-67 (Silvia testifying that Sergio moved out after three months); IVAA0542 (Ruben testifying that Sergio "probably" moved out after a year.).

Silvia, Ruben, and their children lived at the Glen Molly house until July 2013. IIIAA0356-66. They subsequently moved into a house on Greenbrae Drive (the "Greenbrae house") in Sparks, Nevada. IIIAA0381.

In January of 2015, Bryan told his parents about an incident that had allegedly happened during the summer of 2014 where he witnessed Mr. Zecena touching Nicole between her legs. IVAA0627, 0634. As a result, Silvia made a doctor's appointment for Nicole for

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[2] This case involves the alleged sexual assault of a minor victim. As such, this brief uses first names in order to protect the identity of the alleged victim.

a general health check. IIAA0392; IIAA0295-96. At the appointment, Silvia told the nurse practitioner that she wanted to see if Nicole was a virgin. IIAA0296. Silvia and Nicole further informed the nurse practitioner that they were concerned because Nicole recently disclosed sexual abuse by Mr. Zecena. IIAA0296. The nurse practitioner conducted an examination and notified the police. IIAA0296-97.

2. Mr. Zecena's Theory of Defense

Mr. Zecena vehemently denied the alleged criminal conduct. In furtherance of his defense, Mr. Zecena contended that Silvia and Ruben had a financial motive to fabricate their testimony, and to manipulate their children into doing the same. IAA0039-41. Mr. Zecena contended that Ruben and Silvia were indebted to him for $147,000 and that this created great tension with the family. VAA0873-74. Mr. Zecena intended to demonstrate that Ruben offered to make the allegations go away in exchange for discharging the debt. IAA0091.

Moreover, Mr. Zecena sought to introduce evidence that, if Nicole had been sexually abused, it was Ruben, not Mr. Zecena, who had abused Nicole. IAA0068-72. This evidence included testimony from Nicole's family members that Ruben had sexually abused Nicole, and that other family members would refrain from leaving their children with Ruben for fear that he would engage in acts of sexual misconduct with their minor children. In particular, one witness would have testified

that Silvia observed Ruben touching Nicole's breasts and buttocks. IAA0071. Another witness would have testified that, when she was a child, Ruben would come into her room at night and, on one occasion, rubbed her legs while she pretended to be asleep. IAA0085.

3. Mr. Zecena's Motion in Limine

On July 25, 2016, Mr. Zecena filed his Motion in Limine to Admit Evidence of States Witnesses Prior Bad Acts. (App. 9). Mr. Zecena sought to introduce evidence, *inter alia*, that Nicole's father, Ruben: (1) failed to pay an outstanding debt owed to Mr. Zecena; and (2) in the event Nicole was sexually abused, Ruben is the person who actually abused her. IAA0038-42. In support of the later theory, Mr. Zecena also sought to introduce evidence that Nicole's mother, Silvia, observed Ruben sexually abusing Nicole. IAA0039. Mr. Zecena argued that the evidence was admissible pursuant to NRS 48.045(2) for the purpose of establishing Ruben's and Silvia's bias against Mr. Zecena and their motive to manipulate Nicole into fabricating the allegations in this case. IAA0039-41.

The District Court held a *Petrocelli*[3] hearing on the Motion in Limine. IIAA0241-46. On September 30, 2016, the District Court entered its Order Denying Defendant's Motion in Limine. (App. 10-App. 27).

The District Court believed that "Nevada law is clear in criminal actions, for prior bad act evidence to

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[3] *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

be admissible under NRS 48.045, the Court must determine, outside the presence of the jury, '(1) the incident is relevant to the crime charged and for a purpose other than to prove propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.'" (App. 11-App. 12) (*quoting Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997)).

In analyzing the outstanding debt, the District Court determined that Mr. Zecena offered no documentary evidence to support the loans. (App. 13). The District Court relied on testimony from Ruben and Silvia, and stated that both had consistently testified that the balance on the personal loans was approximately $7,040, and that Ruben had never told Mr. Zecena the instant charges would "go away if the debts were forgiven." (App. 13-App. 14).

With respect to evidence that Ruben is the person who committed the sexual abuse against Nicole, the District Court determined that witness testimony offered in support of this evidence was not credible, and Mr. Zecena had failed to prove his defense by clear and convincing evidence that Ruben is the person responsible for the crimes at issue in this case. (App. 21-App. 23).

In an attempt to mitigate the District Court's erroneous rulings, Mr. Zecena entered into a stipulation at trial regarding the loans. IIIAA0354-58. The Stipulation provided as follows:

> The parties stipulate to the following facts. Selvin Zecena loaned Silvia [] and Ruben [], mother and father to Nicole, the sum of $38,000 while Silvia [] and Ruben [] were living in Guatemala in 2008. Silvia [] and Ruben [] made numerous payments on the $38,000 loan; however, the date of the last payment is in dispute. The remaining balance due on the loan is $7,040.

IIIAA0408.

4. Summary of Evidence Presented at Trial

At trial, the State presented evidence that the allegations came to light following an incident that Bryan observed. IVAA0611. Bryan[4] testified that Mr. Zecena came to the Greenbrae house when Bryan was home alone with Nicole and their younger sister Cathy. IVAA0611-12. Nicole, who was thirteen years old at the time, IVAA0680-81, was in their parents' room looking for a movie to watch, IVAA0612. Upon arrival at the house, Mr. Zecena told Bryan to go look for the family dog in the backyard. IVAA0613.

Bryan testified that he looked for the dog, but he was suspicious because Mr. Zecena was trying to get close to Nicole. IVAA0612. Bryan then snuck up to his

[4] Bryan was eleven years old at the time of the alleged incident. *See* IVAA0603.

parents' room and saw Mr. Zecena touching Nicole between her legs.[5] IVAA0612, 0615-16.

After Mr. Zecena left, Bryan talked to Nicole about what happened. IVAA0619. She told Bryan this had been occurring for several years. 4 AA0675-76. Nicole asked Bryan not to tell their parents. IVAA0627. Several months later, in January of 2015, Bryan told his parents about this incident. IVAA0549-53.

Aside from Bryan's testimony regarding this one incident, no other witness saw any inappropriate contact between Nicole and Mr. Zecena. *E.g.*, IVAA0447; VAA0812, 0853, 0862. Indeed, no witness ever saw Mr. Zecena alone in a room with Nicole. VAA0812, 0853, 0862.

Nicole testified that Mr. Zecena began touching her inappropriately when she was ten or eleven years old. IVAA0676-77, 0693. The incident Bryan witnessed was the last incident to occur. IVAA0705-06; IIAA0297. In general, Nicole testified regarding misconduct that allegedly occurred.

With respect to the sexual assault charges, Nicole described several instances where Mr. Zecena digitally penetrated her vagina. *See*, *e.g.*, IVAA0683, 0688-89,

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[5] The record is unclear and contradictory as to what Bryan allegedly saw. Bryan testified that he did not see Nicole's "body parts" because Mr. Zecena "covered it with a pillow." IVAA0617. However, he also testified that he saw Mr. Zecena's hand in Nicole's vagina, IVAA0617, 0625, and that he could not see Mr. Zecena's hand. IVAA0651-53. Regardless, Bryan testified that he saw Mr. Zecena touching Nicole. IVAA0612.

0691, 0700-01, 0706. With respect to the lewdness charges, Nicole testified that Mr. Zecena touched her vagina, IVAA0685, 0707, touched her breasts, IVAA0693-94, licked and bit her nipple, IVAA0693-94, tried to put his penis in her mouth, IVAA0695, and had her touch his penis, IVAA0698-99; VAA0741. Finally, with respect to the attempted sexual assault charge, Nicole testified that Mr. Zecena tried unsuccessfully to penetrate her vagina with his penis. IVAA0690.

Silvia and Ruben testified that Mr. Zecena called Ruben from Guatemala[6] on February 2, 2015. IVAA0561; IIIAA0424. Ruben testified that Mr. Zecena said: "please don't hang up the phone on me. Forgive me. Nicole's gonna be okay. She's gonna be fine." IVAA0561. Ruben then claims to have handed the phone to Silvia. IVAA0561; IIIAA0424.

According to Silvia, Mr. Zecena said, "not to believe him, but to believe [her] daughter." IIIAA0425. Mr. Zecena allegedly asked Silvia to "help him" and stated that "he would be able to take care of [her] daughter's education, that she would be fine, and [asked] if [Silvia] would allow him to speak with [Nicole]." IIIAA0426.

Mr. Zecena testified as the final defense witness and emphatically denied all allegations:

> No. I would never, ever do that to a family member. And being a kid, being a minor, I would never, ever do that. I love my family. My

[6] Mr. Zecena was on his annual trip to Guatemala at the time. VAA0895-96.

> family's the most – I have helped them so much. My family is the most important thing in my life, you know, and I would never do that.

VAA0900-01. He specifically denied the incident that Bryan allegedly witnessed and, in fact, testified that he had never even been in that room. VAA0902. Mr. Zecena also denied having any communication with Silvia or Ruben while he was in Guatemala. VAA0898.

B. Mr. Zecena is Convicted and Sentenced

The jury found Mr. Zecena not guilty on Count I and Guilty on Counts II through XI. IXAA01616-26.

On February 11, 2019, Mr. Zecena was sentenced to a maximum aggregate term of imprisonment of life and a minimum aggregate term of imprisonment of one hundred ninety-eight (198) years. IXAA01649-53. Mr. Zecena is currently in custody and serving his sentence at Lovelock Correctional Center.

C. Proceedings at the Supreme Court of Nevada

On appeal, Mr. Zecena argued, *inter alia*, "that the district court used the wrong standard to exclude his proffered prior bad acts evidence regarding the victim's parents' motive to have the victim fabricate charges against him." (App. 1). Specifically, Mr. Zecena argued that the test for admissibility of prior bad acts evidence pursuant to NRS 48.045(2), espoused by the Supreme Court of Nevada in *Tinch v. State*, 113 Nev.

1170, 1176, 946 P.2d 1061, 1064-65 (1997), constitutes a violation of a criminal defendant's rights under the Nevada and United States constitutions when the prior bad acts are offered by a criminal defendant against a state witness. (AOB 28-33). The violation occurs in this context because the *Tinch* standard would require a criminal defendant to prove a defense based on prior bad act evidence by clear and convincing evidence before he could ever even present his defense to the jury at trial. *Tinch*, 113 Nev. at 1176, 946 P.2d at 1065.

Mr. Zecena urged the Supreme Court of Nevada to adopt the test applied by federal courts when prior bad act evidence is offered by a criminal defendant against a state witness. Federal courts commonly refer to this as "reverse 404(b)" evidence.[7] (*Id*. at 19). The prevailing federal rule was articulated in the seminal case *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991). The *Stevens* test provides as follows: "the admissibility of 'reverse 404(b)' evidence depends on a straightforward balancing of the evidence's probative value against considerations such as undue waste of time and confusion of the issues." *Stevens*, 935 F.2d at 1405 (footnote omitted).

The Panel ultimately concluded that there was no "plain error where the district court used the [*Tinch*] test approved by this court." (App. 2) (*citing Collman v.*

[7] Federal Rule of Evidence 404(b) is the federal corollary to NRS 48.045(2). In fact, NRS 48.045 was modeled after Federal Rule of Evidence 404(b). *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012).

State, 116 Nev. 687, 701-02, 7 P.3d 426, 435-36 (2000)). The Panel further "decline[d] to adopt the federal test" as articulated in *Stevens*. However, in doing so, the Panel effectively approved an unconstitutional application of NRS 48.045(2), as recognized by numerous state and federal courts that have considered the issue.

On June 2, 2020, Mr. Zecena filed a Petition for Rehearing, which was summarily denied on July 1, 2020. Mr. Zecena subsequently filed a Petition for En Banc Reconsideration on July 14, 2020, which was also summarily denied on October 23, 2020.

REASONS FOR GRANTING THE PETITION

This Petition raises an important question concerning whether the Supreme Court of Nevada's interpretation and application of NRS 48.045(2) runs afoul of the Due Process and Confrontation Clauses of the United States Constitution.

This Petition also presents this Court with an opportunity to address a circuit split among the federal courts of appeals with respect to the correct standard to apply in the context of "reverse 404(b)" evidence. *See United States v. Lucas*, 357 F.3d 599, 612 (6th Cir. 2004) (Rosen, J., concurring) (recognizing the circuit split, and stating that "the First, Second, Third, Fifth and Eleventh Circuits have . . . determined that Rule 404(b) is not applicable to evidence of acts of third parties.").

A. The Judgment of Conviction Should Have Been Reversed due to the Erroneous Exclusion of Evidence Relevant to the Theory of Defense

The District Court's denial of the Motion in Limine was premised on a misapplication of the law when prior bad act evidence is proffered by a defendant against a State witness. Specifically, the District Court applied the same "clear and convincing" standard that courts apply when considering prior bad act evidence offered against a defendant. The erroneous exclusion of relevant and highly probative evidence resulted in a violation of Mr. Zecena's right to present a defense pursuant to the Due Process Clause of the United States Constitution, and violated Mr. Zecena's rights under the Confrontation Clause of the Sixth Amendment.

1. Admissibility of Prior Bad Acts Evidence Under NRS 48.045(2)

In *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), the Supreme Court of Nevada, addressing bad acts offered *against a defendant*, directed that, "[t]o be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Id*. Years later, in *Bigpond v. State*, 128 Nev. 108, 116, 270 P.3d 1244, 1249 (2012), the Supreme Court of Nevada "clarif[ied] that evidence of 'other

crimes, wrongs or acts' may be admitted under NRS 48.045(2) for a relevant nonpropensity purpose other than those listed in the statute."

The Supreme Court of Nevada has held that NRS 48.045(2) applies to prior bad act evidence offered by a defendant against a State's witness. *Mortensen v. State*, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999). However, before issuing its Order of Affirmance, the Supreme Court of Nevada had not addressed the standard to apply when it is the defendant who offers the prior bad act evidence, rather than the State.

2. Reverse 404(b) Evidence

As with NRS 48.045(2), "Rule 404(b) of the Federal Rules of Evidence is typically used by prosecutors seeking to introduce evidence of a criminal defendant's prior misconduct as proof of motive or plan to commit the crime at issue." *United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005). However, a defendant can seek to admit evidence of other crimes under this rule if it tends to negate the defendant's guilt of the crime charged against him. *United States v. Della Rose*, 403 F.3d 891, 901 (7th Cir. 2005). In a seminal case, the Third Circuit distinguished between the standards that govern admissibility of "standard 404(b)" evidence, where the prosecution seeks to introduce evidence of a defendant's prior misconduct, and "reverse 404(b)" evidence, where the evidence is proffered by the defendant to show a third party's misconduct. *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991).

In *Stevens*, the Third Circuit followed an approach the New Jersey Supreme Court previously took in *State v. Garfole*, 388 A.2d 587 (1978).

In *Garfole*, the New Jersey Supreme Court stated that:

> [A] fairly rigid standard of similarity may be required of the State if its effort is to establish the existence of a common offender by the mere similarity of the offenses. But when the defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made. . . . The application of a modified requirement of relevancy to the proffer by a defendant is additionally justified by the consideration that the defendant need only engender reasonable doubt of his guilt whereas the State must prove guilt beyond a reasonable doubt.

388 A.2d at 590. The Third Circuit subsequently applied the same approach and balancing test:

> We agree with the reasoning of *Garfole* and with its holding that the admissibility of "reverse 404(b)" evidence depends on a straightforward balancing of the evidence's probative

> value against considerations such as undue waste of time and confusion of the issues.

Stevens, 935 F.2d at 1405 (footnote omitted).

Since *Stevens*, a majority of the federal circuits have employed a similar approach to reverse bad act evidence. *See United States v. Seals*, 419 F.3d 600, 606 (7th Cir. 2005); *United States v. Montelongo,* 420 F.3d 1169, 1174 (10th Cir. 2005); *United States v. Myers*, 589 F.3d 117, 124 (4th Cir. 2009); *United States v. South*, 295 F. App'x 959, 969-70 (11th Cir. 2008). Additionally, several state high courts have similarly adopted the *Stevens* approach to reverse bad act evidence. *See Ferry v. Com.*, 234 S.W.3d 358, 361 (Ky. Ct. App. 2007); *State v. Hedge*, 297 Conn. 621, 650, 1 A.3d 1051, 1071 (2010); *State v. Clifford*, 328 Mont. 300, 311, 121 P.3d 489 (2005).

Finally, commentators who have written on the issue are nearly uniform in their assessment that "given the highly probative nature of reverse 404(b) evidence, as well as little in the way of downside coming from the use of this evidence, reverse 404(b) evidence should be admissible. This is especially true when the primary concern with reverse 404(b) evidence, that of undue delay and confusion of the jury, is already covered under Federal Rule of Evidence 403.[8] As such, the more liberal approach is the appropriate option for courts to use regarding reverse 404(b) evidence." Zachary El-Sawaf, *Incomplete Justice: Plugging the Hole Left by the*

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[8] Nevada's version of Federal Rule 403 is codified at NRS 48.035.

Reverse 404(b) Problem, 80 U. Cin. L. Rev. 1049, 1066 (2012); *see also* Bourgon B. Reynolds, *Constitutional Law-It Wasn't Me! Zinger v. State and Arkansas's Unconstitutional Approach to Third-Party Exculpatory Evidence. Zinger v. State, 313 Ark. 70, 852 S.W.2d 320 (1993)*, 34 U. Ark. Little Rock L. Rev. 191, 217 (2011) ("By evaluating exculpatory evidence just like every other piece of evidence, the criminal defendant will no longer be forced to pass an unbearably high evidentiary hurdle in order to exercise his constitutional rights in presenting a complete defense."); Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 Nw. U. L. Rev. 651, 695 (1993) ("The prohibition on the use of specific acts evidence codified in Rule 404(b) was intended to protect the accused from the unduly prejudicial effects of specific acts evidence offered by the prosecution and, therefore, should not be available to bar the accused's introduction of similar, exculpatory evidence.").

3. The Supreme Court of Nevada's Decision Violates Due Process

"Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66, 92 S.Ct. 862 (1972). The notion of fundamental fairness is interpreted as requiring that a defendant be "afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984). Moreover, "[t]he rights to confront and cross-examine

witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045 (1973).

At its base, the Constitution guarantees the defendant the right to have each element of each charge against him proven beyond a reasonable doubt. As this Court stated in *In re Winship*, "it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." 397 U.S. 358 (1970). In *Victor v. Nebraska*, this Court confirmed that "[t]he beyond a reasonable doubt standard is a requirement of due process." 511 U.S. 1 (1994). Under this due process requirement, the government "must prove every ingredient of an offense beyond a reasonable doubt, and . . . it may not shift the burden of proof to the defendant," *Patterson v. New York*, 432 U.S. 197, 215 (1977), on any "fact necessary to constitute the crime with which [the defendant] is charged." *Winship*, 397 U.S. at 364.

The prosecution's burden of proof carries with it the settled principle that is at the heart of this Petition specifically and the treatment of reverse bad act evidence in Nevada generally: the defendant is not required to present evidence. Indeed, the jury is entitled to disbelieve the prosecution's evidence or to determine that the weight of the prosecution's evidence falls short of its persuasion burden, even if the defense does not offer a single witness or cross-examine any prosecution witness. Juries across the country in state and federal courts are thus instructed: defendants need not

present any evidence. *See*, *e.g.*, 1A Kevin F. O'Malley et al., Federal Jury Practices and Instructions 223 (6th ed. 2008) (The prosecution's burden of proof and the presumption of innocence "mean[] that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent."). Because a defendant need not present any evidence in a criminal trial, the Nevada Supreme Court's decision requiring a defendant to prove his defense by the "clear and convincing" standard effectively reverses the burden of proof that rests solely with the prosecution.

In the context of reverse bad act evidence, the court in *Blackenship v. Commonwealth* succinctly articulated why the lower *Stevens* standard is required as a matter of due process. There, the court recognized that "a lower standard [of admissibility] should govern 'reverse 404(b)' evidence because prejudice to the defendant is not a factor." *Blankenship v. Commonwealth*, No. 2017-CA-000630-MR, 2019 WL 1503960, at *6 (Ky. Ct. App. Apr. 5, 2019) (quoting *Stevens*). In explaining the due process protections encompassed within the *Stevens* standard, the court held:

> [Appellant] should have been permitted to introduce evidence of [state's witnesses'] prior misconduct to support his alternative perpetrator theory. Accordingly, we find that the trial court abused its discretion in denying him the opportunity to do so. Because this error implicated Appellant's constitutional right to Due Process, reversal is required absent evidence rendering the exclusion harmless beyond a reasonable doubt. We cannot find

> that this error meets the harmless beyond a reasonable doubt standard. No matter how credible [the alleged alternative perpetrator] defense, our system of justice guarantees the right to present it and be judged by it.

Id. (internal quotation marks and citations omitted) (third alteration in original).

Therefore, as recognized by the court in *Blankenship*, an application of the *Tinch* standard to reverse bad act evidence divests criminal defendants of their right to due process under the United States Constitution.

The due process implications of applying the *Tinch* standard in the context of reverse bad act evidence were on full display in the proceedings below. Mr. Zecena vehemently denied the alleged criminal conduct. In furtherance of his defense, Mr. Zecena sought to introduce evidence that the alleged victim's parents had a financial motive to fabricate their testimony and to manipulate their children into doing the same. IAA0039-41. Specifically, Mr. Zecena contended that the alleged victim's parents were indebted to him for $147,000, VAA0873-74, and that the alleged victim's father offered to make the allegations go away in exchange for discharging the debt, IAA0091.

Mr. Zecena also sought to introduce evidence that, if the alleged victim had been sexually abused, it was the alleged victim's father, not Mr. Zecena, who was the abuser. IAA0068-72. This evidence included testimony

from the alleged victim's family members that her father was the abuser, and that other family members would refrain from leaving their children with the alleged victim's father for fear that he would engage in acts of sexual misconduct with their minor children. IAA0071, IAA0085.

The District Court only allowed Mr. Zecena to introduce evidence of roughly $7,000 worth of debt, did not allow Mr. Zecena to introduce evidence that the alleged victim's father offered to make the allegations go away if the debt was forgiven, and did not allow Mr. Zecena to introduce evidence that the alleged victim's father was the person responsible for the crimes alleged. IIAA0250-58. The District Court's determination was based on its finding that Mr. Zecena had failed to prove the proffered reverse bad act evidence under the clear and convincing *Tinch* standard. IIAA0249.

The District Court's application of the *Tinch* standard in refusing to admit the proffered reverse bad act evidence effectively precluded Mr. Zecena from offering his full theory of defense to the jury, and therefore deprived Mr. Zecena of due process under the United States Constitution.

4. The Supreme Court of Nevada's Decision Violates the Confrontation Clause

The Panel's Order of Affirmance adopting the *Tinch* standard in the context of reverse bad act evidence represents the adoption of a rule that violates

the Confrontation Clause of the Sixth Amendment to the United States Constitution. While Mr. Zecena recognizes that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), the Nevada Supreme Court places the additional burden upon criminal defendants to prove by clear and convincing evidence prior bad acts of state witnesses.

Indeed, the *Stevens* standard captures the wide latitude that trial judges are afforded in determining whether the probative value of proffered evidence is outweighed by the risk of unfair prejudice. As articulated by the Tenth Circuit Court of Appeals, the additional "clear and convincing" requirement under *Tinch* could, as it did in this case, result in a violation of the Confrontation Clause by prohibiting the defendant "from engaging in otherwise appropriate cross-examination that, as a result, precludes him from eliciting information from which jurors could draw vital inferences in his favor." *United States v. Montelongo*, 420 F.3d 1169, 1175 (10th Cir. 2005) (internal quotation marks omitted).

In this case, Mr. Zecena was unable to effectively cross-examine witnesses based on the limitations imposed by the district court resulting from the exclusion of the evidence that was deemed inadmissible under

Tinch. Mr. Zecena was unable to introduce (1) evidence of the full amount of the debt the alleged victim's parents owed to Mr. Zecena, (2) evidence that the alleged victim's father's offered to make the allegations go away if the debt was forgiven, and (3) evidence that the alleged victim's father, not Mr. Zecena, was the one who committed the alleged crimes. *See* Section III(B), *supra*. This is the exact type of violation that the court found in *Montelongo*, where an erroneous evidentiary ruling excluding reverse bad act evidence led to the defendant being unable to effectively cross-examine witnesses. If the *Tinch* standard applies to reverse bad act evidence, these types of constitutional violations will continue to occur.

Based on the foregoing, the Nevada Supreme Court's requirement that a criminal defendant prove prior bad acts by clear and convincing evidence before being able to offer such evidence in his defense renders NRS 48.045(2) unconstitutional.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 22, 2021

IN THE SUPREME COURT
OF THE STATE OF NEVADA

SELVIN EDUARDO ZECENA-VALDEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 78220

ORDER OF AFFIRMANCE

(Filed May 15, 2020)

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of sexual assault on a child, five counts of lewdness with a child under 14 years of age, and one count of attempted sexual assault on a child.[1] Second Judicial District Court, Washoe County; Lynne K. Simons, Judge. Appellant Selvin Zecena-Valdez raises three main contentions on appeal.

Zecena-Valdez first argues that the district court used the wrong standard to exclude his proffered prior bad acts evidence regarding the victim's parents' motive to have the victim fabricate charges against him. We review for plain error because Zecena-Valdez argued below that the test from *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (providing that to be admissible, bad act evidence must be

[1] Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

relevant for a nonpropensity purpose, proven by clear and convincing evidence, and not unduly prejudicial when weighed against its probative value) applied, but argues on appeal that the federal test should apply, *see United States v. Stevens*, 935 F.2d 1380, 1404-05 (3d Cir. 1991) (weighing "the evidence's probative value against considerations such as undue waste of time and confusion of the issues"). *See LaChance v. State*, 130 Nev. 263, 271, n.1, 321 P.3d 919, 925, n.1 (2014) (reviewing for plain error where the defendant acquiesced to the standard used by the district court but argues for a different standard on appeal). We find no such plain error where the district court used the test approved by this court. *See Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (defining a plain error as one "that is clear under current law from a casual inspection of the record"); *Collman v. State*, 116 Nev. 687, 701-02, 7 P.3d 426, 435-36 (2000) (utilizing the *Tinch* test to evaluate the admissibility of evidence proffered by the defendant of other acts by a state witness). And we decline to adopt the federal test.

We also conclude that the district court did not abuse its discretion in excluding the proffered evidence. *See Daly v. State*, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983) (reviewing the decision to exclude evidence for an abuse of discretion and providing that this court will not overturn that decision absent manifest error). Zecena-Valdez sought to admit evidence that the victim's parents offered to drop the charges if Zecena-Valdez forgave the money they owed him and that the victim's dad was the actual perpetrator. But,

Zecena-Valdez offered no documentary support for the alleged loans and failed to show the evidence was being offered for nonpropensity purposes and we see no abuse of discretion in the district court's conclusions that the probative value of the evidence regarding the debt was outweighed by the jury confusion it would cause[2] and that the clear-and-convincing-evidence standard was not met as to the allegations against the victim's father.[3] *See* NRS 48.045(2) (prohibiting the admission of evidence of other crimes, wrongs, or acts to prove a person's character); *Tinch*, 113 Nev. at 1176, 946 P.2d at 1064-65; *State v. Rincon*, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (reiterating that, at evidentiary hearings, "the district court is in the best position to adjudge the credibility of the witnesses and the evidence"). And while there is no question that Zecena-Valdez has constitutional rights to present a defense and to cross-examine witnesses, *see California v. Trombetta*, 467 U.S. 479, 486 (1984); *Ramirez v. State*, 114 Nev. 550, 557, 958 P.2d 724, 728 (1998), he still

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[2] And, regardless, Zecena-Valdez still questioned witnesses regarding a financial bias against him and informed the jury, via a stipulation, that the victim's parents owed him $7,040. *See Baltazar-Monterrosa v. State*, 122 Nev. 606, 619, 137 P.3d 1137, 1145-46 (2006) (reiterating that the district court's discretion is narrowed where an examiner is attempting to expose witness bias).

[3] Zecena-Valdez' reliance on *Coleman v. State*, is misguided because, in that case, the excluded evidence strongly negated the defendant's guilt. 130 Nev. 229, 238-43, 321 P.3d 901, 908-11 (2014). In contrast, none of the evidence Zecena-Valdez proffered demonstrated that the victim's father perpetrated the crimes charged.

must comply with established rules of evidence, *see Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Brown v. State*, 107 Nev. 164, 167, 807 P.2d 1379, 1381 (1991), which, as stated above, he failed to do in this case.

Second, Zecena-Valdez argues that the State committed reversible prosecutorial misconduct when it accused him of lying in front of the jury, improperly vouched for its witnesses, assured the jury that defense witnesses were incredible, and misrepresented evidence during closing arguments. In reviewing such arguments, we determine "whether the prosecutor's conduct was improper" and, if so, whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). Reversal is not warranted if the error was harmless. *Id.*

The State admits it committed misconduct by telling Zecena-Valdez, in front of the jury, that he lied in his testimony about the amount of money the victim's parents owed him. *See Witherow v. State*, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988) (reiterating that is improper to characterize a witness's testimony as a lie). We conclude, however, that the error was harmless since it was a fleeting moment in the trial; the comment did not involve any of the allegations against Zecena-Valdez; and the court admonished the State and instructed the jury, at the time and at the end of the case, not to consider statements of the attorneys as

evidence and to disregard the parties' exchange.[4] *See Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476 (explaining that this court will not reverse a conviction based on prosecutorial misconduct if it did not substantially affect the jury's verdict); *see also Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (noting the general presumption that "juries follow district court orders and instructions").

We also conclude that the State committed misconduct in misstating evidence during its closing arguments including that Zecena-Valdez digitally penetrated the victim in the kitchen; that he placed his mouth on the victim's vagina; that his biting of the victim's breast hurt and bruised her; and that the victim's brother saw the victim in a state of undress with Zecena-Valdez. *See Rose v. State*, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007) (deeming it prosecutorial misconduct to refer to facts not in evidence); *Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 585 (1992) (recognizing that a prosecutor may not make statements of fact that exceed the scope of the record). Nonetheless, we conclude these errors were harmless where there was testimony that Zecena-Valdez had otherwise digitally

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[4] And we see no error resulting from the district court's statement that "the Court had determined previously that [that amount] was not established pursuant to the applicable law," when the parties previously stipulated to the amount owed and Zecena-Valdez attempted to testify in contradiction to that stipulation. We also find no error in the timing of the court's handling of the misconduct—the court immediately conducted a conference outside the jury's presence and thereafter gave a curative instruction.

penetrated the victim and performed more offensive acts than having his mouth on her vagina that would support the charges; substantial evidence (two eye witnesses, statements from. Zecena-Valdez to the victim's parents that they should believe the victim and that he was sorry, and the victim making consistent statements to her parent and medical personnel regarding the abuse) supported the convictions; and where, of these errors, Zecena-Valdez objected only to the mischaracterization of the brother's testimony. *See Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476; *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (providing that, under plain error review, reversal is only required when the defendant can show that the error affected his substantial rights and "actual prejudice or a miscarriage of justice" occurred).

Reviewing Zecena-Valdez' remaining assignments of prosecutorial misconduct, the record does not show plain error affecting his substantial rights because the challenged statements were fair inferences based on witness demeanor and testimony or responses to Zecena-Valdez' closing argument, and because the prosecutor told the jurors they were solely responsible for judging the witnesses' credibility. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477; *Taylor v. State*, 132 Nev. 309, 324, 371 P.3d 1036, 1046 (2016) (reiterating that a prosecutor's comments expressing opinions or beliefs are not improper when they are reasonable conclusions or fair comments based on the presented evidence); *Rowland v. State*, 118 Nev. 31, 39, 39 P.3d 114, 119 (2002) ("[W]hen a case involves numerous material

witnesses and the outcome depends on which witnesses are telling the truth, reasonable latitude should be given to the prosecutor to argue the credibility of the witness—even if this means occasionally stating in argument that a witness is lying"); *Randolph v. State*, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001) ("The State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence."); *Greene v. State*, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997) (recognizing the appropriateness of rebuttal arguments that directly respond to issues raised by the defense's closing), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

Third, Zecena-Valdez argues that cumulative error warrants reversal. Here the charges are grave, but the issue of guilt was not close. Given the sufficient evidence (as stated above), the identified prosecutorial misconduct did not have a cumulative impact on the jury's verdict or deprive Zecena-Valdez of a fair trial as the errors' character was not significant in light of the entire trial record. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (considering whether guilt was close, the quantity and character of any errors, and the gravity of the crime charged in addressing cumulative error claims). Having considered Zecena-Valdez' contentions and concluded that they do not warrant reversal, we

ORDER the judgment of conviction AFFIRMED.

/s/ Gibbons, J.
Gibbons

/s/ Stiglich, J.
Stiglich

/s/ Silver, J.
Silver

cc: Hon. Lynne K. Simons, District Judge
Dickinson Wright PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

IN THE SECOND JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

THE STATE OF NEVADA,
Plaintiff,

vs.

SELVIN ZECENA-VALDEZ,
Defendant.
/

Case No. CR15-1738
Dept. No. 6

ORDER DENYING DEFENDANT'S MOTION IN LIMINE

(Filed Sep. 30, 2016)

Before this Court is a *Motion in Limine to Admit Evidence of States [sic] Witnesses [sic] Prior Bad Acts*, filed July 25, 2016 ("Motion") by Defendant Selvin Zecena-Valdez ("Mr. Zecena-Valdez") through his counsel Michael L. Becker. The State of Nevada, through its counsel Deputy District Attorney Nicole Hicks, filed its *Opposition to Motion in Limine to Admit Evidence of State's Witnesses' Prior Bad Acts*. No reply was filed.

On September 15, 2016, the parties appeared before this Court for the evidentiary hearing and argument on the instant *Motion*.[1] After hearing the evidence and argument presented by the parties, the

[1] The evidentiary hearing was ultimately heard on September 15, 2016 after rescheduling. The trial is now set for October 17, 2016.

Court enters its Order Denying Defendant's Motion in Limine as set forth in the following.

Mr. Zecena-Valdez is charged with eleven counts including sexual assault, attempted sexual assault, and lewdness upon N.S., a minor under fourteen years of age. *Information*, filed November 18, 2015. He entered a plea of Not Guilty to all counts and the case was set for trial. *Transcript of Proceedings – Arraignment*, filed December 4, 2015.

Mr. Zecena-Valdez filed the instant *Motion*,[2] asserting the following "bad act" evidence is admissible at trial pursuant to NRS 48.045(2): (1) debt(s) owed by N.S.'s parents, Silvia and Ruben[3], to Mr. Zecena-Valdez; (2) Ruben's criminal history [a warrant] for fraud and/or criminal or civil accusations against Ruben in Guatemala; (3) Silvia's belief that Ruben was sexually abusing N.S. and Silvia's failure to report her belief to authorities. *Motion*, pp. 5-7. He asserts this evidence is admissible for the purpose of motive to manipulate N.S. and motive to fabricate. *Motion*, pp. 5 and 7. Mr. Zecena-Valdez also seeks to admit: (4) evidence

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[2] Mr. Zecena-Valdez groups together several different areas of "bad act" evidence of N.S.'s parents, as well as evidence of N.S.'s sexual knowledge. Because admissibility of the evidence requested is governed by different rules of law, and for the purpose of clarity, the Court will identify and address each area of evidence the Defendant seeks to admit.

[3] Silvia is N.S.'s mother. Ruben is N.S.'s father. Silvia's brother, Selvin Zecena-Valdez, is the Defendant in this case. For the purpose of clarity and to respect the confidentiality of N.S.'s last name, the Court refers to N.S.'s parents by their first names in this *Order*.

regarding N.S.'s parents' sexual relationship, asserting Silvia and Ruben engaged in open discussions of sex in front of their children, and had sex in the same room where their children were, thus leading to N.S.'s ability to contrive facts supporting sexual assault type charges against Mr. Zecena-Valdez. *Motion*, pp. 7-8.[4]

APPLICABLE LAW AND ANALYSIS

Section 48.045(2) of the Nevada Revised Statutes provides as follows:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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[4] The evidence Mr. Zecena-Valdez seeks to admit as prior bad acts of the victim's parents is specifically stated in the Motion as "Ruben's failure to pay debt owed to Mr. Zecena; Ruben's criminal history for fraud; Ruben's open and explicit discussion of sex in front of the children; Silvia's belief that Ruben was sexually abusing N.S; and Silvia's failure to report said belief to authorities," but statements are also made in the Motion that, at the hearing, specific facts will be established regarding Ruben entering N.S.'s bedroom, staying there for extended periods of time, and unlocking the door to N.S.'s room with a knife. *Motion*, p. 5, Ins. 17-20, pp. 4-5. The evidence asserted as admissible bad act evidence in the moving papers differed in some regards to that presented at the hearing.

NRS 48.045(2). Prior bad acts carry the presumption of inadmissibility. Tavares v. State, 117 Nev. 725, 730-31, 30 P.3d 1128, 1131 (2001); Bigpond v. State, 128 Nev. Adv. Op. 10, 270 P.3d 1244 (2012). The prohibition of bad act evidence applies not just to the defendant, but also to witnesses. Mortensen v. State, 115 Nev. 273, 280, 986 P.2d 1105, 1110 (1999). Nevada law is clear in criminal actions, for prior bad act evidence to be admissible under NRS 48.045, the Court must determine, outside the presence of the jury, "(1) the incident is relevant to the crime charged and for a purpose other than to prove propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997) *modified by* Bigpond v. State, 128 Nev. Adv. Op. 10, 270 P.3d 1244 (2012).

Mr. Zecena-Valdez asserts the admission of the requested bad act evidence is necessary to present his defense. A defendant does have a constitutional due process right to "introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case." Rose v. State, 123 Nev. 194, 205 n.18, 163 P.3d 408, 416 (2007) *citing* Vipperman v. State, 96 Nev. 592, 614 P.2d 532 (1980). That right, however, is not unfettered. To the contrary, "that right is subject to the rules of evidence," including relevance and admissibility thresholds. Rose, 123 Nev. 194, 205 n.18; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045 (1973) (same); Jackson v.

State, 116 Nev. 334, 335, 997 P.2d 121, 121 (2000) ("A defendant's right to present relevant evidence is not unlimited, being subject to reasonable restrictions.").

Therefore, with the foregoing authority in mind, the Court turns to the evidence Mr. Zecena-Valdez seeks to admit regarding N.S. and her parents, Silvia and Ruben, and analyzes each category of evidence.

1. Debt(s) Owed by Silvia and Ruben to Mr. Zecena-Valdez

Mr. Zecena-Valdez seeks to admit evidence that N.S.'s parents, Silvia and Ruben, owed him a substantial amount of money. He also seeks to offer evidence that Ruben offered to make the charges go away if the debt(s) were forgiven.

At the evidentiary hearing, Mr. Zecena-Valdez ultimately made the following proffer regarding purported loans and equipment he gave to Ruben and Silvia: (1) $32,000 loan[5] [$38,000]; (2) $48,000 advance from a line of credit on a home owned by Mr. Zecena-Valdez's father; (3) a backhoe; (4) an excavator; and (5) property in Guatemala worth $13,000 in Silvia and Ruben's name. Mr. Zecena-Valdez offered no documentary support for these purported loans, with the exception of noting that a credit line statement in the name of Mr. Zecena-Valdez's father evidenced the advance

[5] This loan was referred to throughout the hearing as a $32,000 loan, a $35,000 loan, or a $38,000 loan but was discussed as the same loan. For ease in reference, the loan is referred to as the "$38,000 loan" in the remaining pages of this Order.

and claimed debt. He asserts Ruben offered to make the instant charges "go away" in exchange for discharge of debts.

Ruben and Silvia both testified at the evidentiary hearing. They gave similar testimony indicating they borrowed money from Mr. Zecena-Valdez in the approximate amount of $38,000. In addition, their testimony was consistent that they had made payments and the resulting balance on the $38,000 loan was approximately $7,040. They denied that any other loans were made to them by Mr. Zecena-Valdez, stating the other monies and equipment asserted as loans were, in fact, contributions by or on behalf of Mr. Zecena-Valdez to the family's business in Guatemala, of which he was a part. Ruben and Silvia also denied that Ruben had ever told Mr. Zecena-Valdez the instant charges would go away if the debts were forgiven.

Initially, the State indicated it had previously agreed it would stipulate to "financial circumstances" between the parties. At the hearing, the Court, with concern regarding what actual "financial circumstances" existed, inquired of Ruben and/or Silvia about any loans or financial contributions or other financial benefits Mr. Zecena-Valdez had provided or was involved with as they related to Ruben and Silvia. Mr. Zecena-Valdez's proffer revealed additional financial arrangements or contributions, in addition to the $38,000 loan, including advances on the credit line of Mr. Zecena-Valdez's father, Mr. Zecena-Valdez's purchase and shipping of a backhoe to Guatemala, the purchase of an excavator in Guatemala, as well as

monies provided to purchase the Guatemalan real property. The State was only aware of the $38,000 loan, as a sum-certain of all claimed loans was not stated in the moving papers; rather, they were described as "a substantial debt that Ruben was not paying back" in the papers. *Motion*, p. 4. After the testimony was elicited, Mr. Zecena-Valdez argued that all of the financial contributions constituted unpaid debt[6] that were the *quid pro quo* subject of Ruben's offer to make the charges go away.

The Court expressed its concern that the jury may be confused by the various claimed loans and added that the parties could attempt to reach a stipulation if they still desired to do so. Any stipulated loan would be allowed to be introduced as a stipulated fact and appropriately addressed by a jury instruction. Upon further reflection and consideration of the evidence presented, the arguments made, and the applicable law, the Court has determined it is appropriate to rule without further efforts by the parties to stipulate.

A. The $38,000 debt.

After considering the evidence presented and weighing the credibility of the witnesses, the Court finds the only debt that was proven by clear and convincing evidence was the $38,000 debt. The existence of this loan was established by admissions and

[6] Notably, based on the estimated dates of the financial benefits claimed as loans, other than the $38,000 loan paid in ratifying installments, the claimed loans may be unenforceable.

confirmations of Ruben and Silvia. Further, they testified that payments had been made and the balance remaining is $7,040.

However, the Court finds Mr. Zecena-Valdez has not met his burden to admit this evidence against N.S.'s parents on the first prong of Tinch. As set forth above, this prong requires that the incident is relevant to the crime charged and for a purpose other than to prove propensity.[7] Specifically, during oral argument, Mr. Zecena-Valdez asserted this evidence is admissible to show the "demeanor of the witness" and Ruben's credibility. As such, this is character evidence and is inadmissible under NRS 48.045(2).

With regard to the second Tinch prong, although a debt was established, Mr. Zecena-Valdez failed to show by clear and convincing evidence that Ruben told Mr. Zecena-Valdez the charges would go away if he discharged the debt. Ruben and Silvia testified this exchange did not happen. One witness, Lisseth Zecena-Morales testified this exchange did occur. However, this Court did not find her testimony to be credible.

Further, Mr. Zecena-Valdez failed to show that existence of this debt constituted motive to manipulate N.S. to contrive charges against Mr. Zecena-Valdez. The leap from a remaining debt balance of $7,040.00 to motivation for N.S. to contrive allegations, to offer to

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[7] Owing a debt is not a negative or bad act in and of itself. The bad acts appear to be the claimed lack of repayment and the claimed offer to make the charges go away if the charges are asserted.

make the allegations go away if the debt is forgiven, is too great. Rather, the evidence shows N.S.'s parents have repaid a substantial amount of the debt with only a portion remaining.

Finally, considering the third Tinch prong, the Court has grave concerns that admissibility of evidence of debt or financial benefits or allegations that Ruben offered to make the charges go away if the debt was discharged will confuse the jury and change the focus of the trial to sorting through confusing descriptions regarding what financial arrangements were actually debts, whether the debts were paid, and how much was paid. The Court further finds the danger of unfair prejudice is substantially outweighed by any probative value this evidence may possess as it would substantially change the focus from the victims' and other's testimony of the facts on which the charges are based.

Accordingly, the Court concludes evidence of the $38,000 debt and any comment that the charges will go away if the debt is discharged is inadmissible.

B. Other debts

Supplementing the findings above, the Court finds Mr. Zecena-Valdez has failed to meet the Tinch factors required to support admissibility of any other debts, including advances from a third party's line of credit and for backhoes, excavators, and property. Not only did he fail to prove these debts, transactions, or beneficial transfers by clear and convincing evidence, the

Court finds Mr. Zecena-Valdez failed to show how the existence of these alleged debts led to N.S. contriving sexual assault charges against him. It is a giant leap at best. As discussed above with regard to the $38,000 debt, but even more here, admission of this evidence runs the danger of confusing the jury on the issues of this case and shifting the focus from allegations related to the charges at hand to confusing descriptions of a series of undocumented transactions, determinations of whether the transfers were in fact loans and then whether or not they were paid if they were loans. Mr. Zecena-Valdez asks this Court to catapult undocumented, unproven, and in any event, potentially unenforceable debts, to admissible evidence sufficient to assert or establish a basis for contrived sexual assault charges by the daughter of the person who allegedly owed the debts. The Court declines.

Accordingly, the Court concludes Mr. Zecena-Valdez has failed to prove by clear and convincing evidence that these debts exist, let alone their admissibility under NRS 48.045(2). Any probative value of this evidence is questionable and is affirmatively outweighed by the danger of unfair prejudice and confusion of the jury.

Accordingly, the Court concludes any evidence of any actual or purported debts owed or claimed owed by Silvia and/or Ruben to Mr. Zecena-Valdez will not be allowed at trial. In addition, any evidence that Ruben offered to make the charges go away if the debt or claimed debt was forgiven is also precluded.

2. Ruben's alleged criminal and civil history in Guatemala

Mr. Zecena-Valdez seeks to admit evidence of Ruben's alleged criminal and civil history in Guatemala. He introduced three exhibits at the evidentiary hearing,[8] which he asserts are a purported Guatemalan warrant for arrest, a document related to a legal action, and a version of the "Most-Wanted List" with a Mexican flag depicted and downloaded from a website. Strikingly, the documents are written in Spanish and were not translated in advance of the hearing.

Mr. Zecena-Valdez argues he established, by clear and convincing evidence, that Ruben has "problems" abroad, as well as a pattern of suspicious business dealings, and this evidence is admissible to assess the credibility of Ruben, as well as a motive for N.S. to fabricate charges.

To admit this evidence against Ruben, Mr. Zecena-Valdez must again meet the Tinch prongs. The Court finds he has failed to so do. As an initial matter, the exhibits Mr. Zecena-Valdez presented failed to meet threshold admissibility standards.[9] For the warrant, a copy of a copy purporting to have certified or officials seals does not suffice to establish or equate to duly

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[8] Exhibit 1: Ltr: Director General de Ia Policia Nacional Civil; Exhibit 2: Ministerio Publica: Guatemala; and, Exhibit 3: PGR Procuraduria General de la Republica. See Pretrial Motions Exhibits list filed September 22, 2016.

[9] Exhibits 1 through 3 were marked but not admitted at the evidentiary hearing. See Minutes filed September 22, 2016.

certified copies of foreign court documents. The Spanish civil case appears to have a signature of Ruben's as one party and someone else as the other party and may be a validly negotiated and executed agreement, rather than evidence of fraud. The Court is left to guess which does not pass evidentiary muster. With regard to the "Most Wanted" website, no aspects of the requirements for evidentiary foundation or admissibility were met. It is a page downloaded and printed from some internet-accessed source. Mr. Zecena-Valdez has not provided inherently trustworthy documents for this Court's consideration.

At this juncture, then, with regard to the purported warrant, Mr. Zecena-Valdez has clearly failed to meet the threshold for admissibility of a prior conviction under NRS 50.095 for impeachment of a witness by a prior conviction. Moreover, the Court finds evidence of purported financial dealings and "problems" abroad are not relevant to the crimes charged; nor do they reveal any motive behind Ruben to manipulate N.S. to fabricate charges. At the evidentiary hearing, Ruben testified he was unaware of to what the purported Guatemalan warrant referred. He also testified any civil issues were resolved.[10] Finally, he testified he had not visited Mexico since he was thirteen years old

[10] Ruben admitted he spent thirty (30) days in jail arising out of problems with a work project. However, the Defendant did not produce evidence that Exhibits 1 through 3 had any relation to this; and, further produced no evidence of the charge or penalty for which Ruben was jailed.

and was unaware what the purported Mexican "Most-Wanted List" document was.

Mr. Zecena-Valdez may have a theory, but a true examination of the components reveals the components are tenuous, at best, and not admissible evidence. The Court finds Mr. Zecena-Valdez has failed to show how the probative value, if any, of this evidence is outweighed by the danger of unfair prejudice and placing N.S.'s father, Ruben, on trial in this case.

Accordingly, the Court concludes any evidence of criminal accusations or civil proceedings against or involving Ruben, in Guatemala or Mexico, is inadmissible at trial

3. Silvia's Belief that Ruben was Abusing N.S. Sexually and Her Failure to Report Said Belief to the Authorities

Mr. Zecena-Valdez seeks to admit testimony from Vilma Valdez, Silvia's aunt, that Silvia believed Ruben was abusing N.S. sexually and Silvia failed to report this to the authorities. Vilma Valdez testified she was close with Silvia, that Silvia told Vilma she was afraid Ruben was sexually assaulting N.S., and that Silvia warned Vilma to keep her children away from Ruben. She also testified she understood Ruben watched child pornography and, on one occasion, she observed the children were watching pornography on the computer. On cross-examination, Vilma testified she herself

never reported these beliefs to the authorities, either before or after Mr. Zecena-Valdez was charged.

Silvia, on the other hand, testified she never suspected her Ruben of abusing their daughter N.S. sexually and did not make any such statements to Vilma. Rather, Silvia testified that Vilma, as well as other family members, threatened to contrive charges against Ruben if the charges against Mr. Zecena-Valdez were not dropped.[11]

In argument, Mr. Zecena-Valdez retreated from his position Ruben was abusing N.S. sexually; rather, Mr. Zecena-Valdez argued the evidence showed that N.S. may have been sexually active with others. Further, he argued he introduced enough evidence under Tinch to present this theory to the jury.

The Court disagrees. At evidentiary hearings, "the district court is in the best position to adjudge the credibility of the witnesses and the evidence." State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006). In this case, the Court carefully weighed the credibility of Vilma Valdez and her statements regarding what Silvia purportedly told her. These statements were the subject of several hearsay objections by the State, which the Court overruled to allow Mr. Zecena-Valdez to fully address his theory of defense to the extent it

[11] The Court notes this testimony is consistent with Silvia's testimony at the preliminary hearing. *Preliminary Hearing Transcript*, p. 88-92.

was based on this evidence and to allow the Court to give it thorough consideration.

Notwithstanding, the Court finds Mr. Zecena-Valdez failed to prove the accusations of sexual abuse by Ruben by clear and convincing evidence. Although potentially relevant, he failed to show that this evidence was admissible for a purpose other than propensity. Accordingly, the Court concludes any evidence of allegations that Ruben was sexually abusing N.S. and/or that Silvia failed to report this belief is inadmissible at trial. For further clarity, any evidence Mr. Zecena-Valdez generally described in his *Motion* at page 5, lines 1-9, and was not borne out in the hearing with specificity, and in some instances, not at all, is also inadmissible at trial.

In addition, as the State pointed out, the evidence that N.S. may have become sexually active is a new theory not previously advanced by the Defendant, and not sufficiently developed at the evidentiary hearing. As such, it will not be allowed based on the papers filed, evidence and arguments made.

4. Evidence of Silvia and Ruben's Sexual Relationship

Mr. Zecena-Valdez seeks to admit evidence of Silvia and Ruben's sexual relationship to establish N.S.'s level of knowledge about sex. He asserts there is testimony from multiple family members who witnessed Silvia and Ruben talking openly and explicitly about their sex life in front of their children. At the

evidentiary hearing, Vilma Valdez testified that Silvia told Vilma she had intercourse with Ruben in a room where their children were sleeping and when the kids woke up, they told them to go back to sleep and continued. Silvia's sister, Irma Marisela Zecena, testified that Silvia would talk about sex in front of her children.[12]

Silvia, however, testified that she spoke with N.S. about sex as a mother would to her daughter. She testified she never talked about Ruben's and her intimate life in front of her children and has never had sex with Ruben with her children in the room.[13]

Mr. Zecena-Valdez relies on Summitt v. State, 101 Nev. 159, 697 P.2d 1374 (1985) for the evidence he posits is admissible. Nevada's Rape Shield Law protects admission at trial of a victim's prior sexual experiences. NRS 50.090. However, "[a] child-victim's prior sexual experiences may be admissible to counteract the jury's perception that a young child would not have

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[12] As set forth in the body, above, there was also some vague testimony regarding the children watching pornographic material on a computer. However, it was not raised in the instant *Motion.* The *Motion* makes a general comment in the Statement of Facts at page 5 that Silvia told Vilma that she saw Ruben viewing pornography. No further support was offered at the evidentiary hearing. Accordingly, the Court declines to consider admissibility of pornography viewing.

[13] The Court notes this testimony is consistent with Silvia's testimony at the preliminary hearing, where Silvia testified she would warn her children about others inappropriately touching them. *Preliminary Hearing Transcript*, p. 78-84. When counsel for Defendant asked Silvia if she discussed adult-related topics or had sex in front of her children, she answered several times in the negative. Id.

the knowledge or experience necessary to describe a sexual assault unless it had actually happened." Chapman v. State, 117 Nev. 1, 5, 16 P.3d 432, 434-35 (2001) (emphasis supplied); Summitt, 101 Nev. at 163-64, 697 P.2d at 1377.

In order to admit a child-victim's prior sexual experiences under the rape shield law, a defendant must file a motion and "demonstrate that due process requires the admission because the probative value of the evidence outweighs its prejudicial effect." Summitt, 101 Nev. at 163. If the Court determines the evidence should be admitted, the defendant may show "by specific incidents of sexual conduct, the [victim] has the experience and ability to contrive a charge against the defendant." Chapman, 117 Nev. at 5.

In Summitt, the defendant sought to admit evidence of a prior sexual assault of the six-year old victim that occurred two years prior and included intercourse, fellatio, and fondling the victim's genitalia. 101 Nev. at 160. The prior sexual assault occurred at the same location, involved the same child victim, the same witness, and the same sexual acts. Id. The Court ruled such evidence was admissible to dispel the jury's presumption that the child victim could not have described the experience due to her youth unless it actually happened. Id. at 163-64.

In comparison, in Chapman, the Court found the district court did not err when it excluded "incidents of supposed sexual conduct and familiarity with the male anatomy," because this evidence was "neither specific

nor indicative of any ability on the part of the victim to contrive the charges against [the defendant]." Chapman, 117 Nev. at 5, 16 P.3d at 435.

Critical to the analysis of the present case under the foregoing authority, is the Court's finding that Mr. Zecena-Valdez does not seek to admit specific evidence of N.S.'s prior sexual experiences, if any. Further, the evidence Mr. Zecena-Valdez presented is neither specific enough nor indicative of N.S.'s ability to contrive charges against him. Evidence about Silvia and Ruben's intimacy and discussions thereof does not constitute "specific acts of sexual conduct" by N.S. that would be admissible in line with Summitt. 101 Nev. at 164 (discussing how defendant must be afforded opportunity to show complainant's ability to contrive based on specific incidents of sexual conduct). Again, in Mr. Zecena-Valdez's theory, the pieces go together; however, under evidentiary scrutiny they do not. The authority cited in Mr. Zecena-Valdez's own *Motion* in support of his request recognizes it is the "child-victim's prior sexual experiences," that may be admissible, not those of the child's parents of which the child may have knowledge. *Motion*, p. 7 (emphasis supplied). Instead, Silvia's discussions with N.S. regarding knowledge of male and female anatomy and admonishments regarding inappropriate touching from others is more analogous to Chapman, is not specific sexual conduct experienced by N.S., and does not indicate an ability to contrive charges against the Defendant. See Chapman, 117 Nev. at 5.

Accordingly, the Court finds Mr. Zecena-Valdez has not met his burden under applicable law and finds that any evidence of Silvia and Ruben's sexual relationship, including assertions they talked openly and explicitly and had sex in the same room where their children were sleeping are inadmissible at trial.

CONCLUSION

A defendant has a constitutional due process right to present his defense. However, "the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). The Court has carefully weighed the evidence and testimony presented and concludes Mr. Zecena-Valdez has failed to meet the standards for admissibility of the requested evidence.

Accordingly, and good cause appearing,

IT IS HEREBY ORDERED *Defendant's Motion in Limine to Admit Evidence of States [sic] Witnesses [sic] Prior Bad Acts* is DENIED.

Dated this 30th day of September, 2016.

/s/ Lynne K. Simons
DISTRICT JUDGE

[Certificate Of Service Omitted]

IN THE SUPREME COURT
OF THE STATE OF NEVADA

SELVIN EDUARDO ZECENA-VALDEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 78220

ORDER DENYING REHEARING

(Filed Jul. 1, 2020)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Gibbons, J.
Gibbons

/s/ Stiglich, J.
Stiglich

/s/ Silver, J.
Silver

cc: Hon. Lynne K. Simons, District Judge
Dickinson Wright PLLC
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

SELVIN EDUARDO ZECENA-VALDEZ, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 78220

ORDER DENYING EN BANC RECONSIDERATION

(Filed Oct. 23, 2020)

Having considered the petition on file herein, we have concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

/s/ Pickering, J.

/s/ Gibbons, J.
Gibbons

/s/ Hardesty, J.
Hardesty

/s/ Parraguirre, J.
Parraguire

/s/ Stiglich, J.
Stiglich

/s/ Cadish, J.
Cadish

/s/ Silver, J.
Silver

cc Hon. Lynne K Simons, District Judge
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No. _____

SELVIN EDUARDO ZECENA-VALDEZ,
Petitioner,
vs.
STATE OF NEVADA,
Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 5431 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 22nd day of March, 2021.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

Renee J. Goss
Notary Public

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No. _____

SELVIN EDUARDO ZECENA-VALDEZ,
Petitioner,
vs.
STATE OF NEVADA,
Respondent.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 22nd day of March, 2021, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Email: jbustos@dickinsonwright.com
Counsel for Petitioner Selvin Eduardo Zecena-Valdez

Subscribed and sworn to before me this 22nd day of March, 2021.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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