

XIV. Appendices

**THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO**

FILED
13th JUDICIAL DISTRICT COURT
Sandoval County
10/9/2024 4:14 PM
AUDREY GARCIA
CLERK OF THE COURT
Dominique Sanchez



MARTIN GONZALES,
Petitioner - Defendant,
vs.
STATE OF NEW MEXICO
and HECTOR RIOS, Warden
Respondent - Plaintiff.

Case No: D-1329-CR-2003-00057
Hon. George Eichwald

FINAL ORDER PARTIALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

THIS MATTER came before the Court on a successive Petition for Writ of Habeas Corpus and on the New Mexico Supreme Court's order remanding Petitioner's Issue 5, which asserted that the Petitioner's kidnapping convictions were based on restraint that was incidental to the sexual offenses. Having considered that issue, the Court finds and concludes:

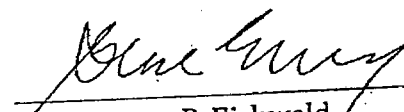
FINDINGS OF FACT

1. A jury found the Petitioner guilty of thirty six (36) counts of Criminal Sexual Penetration in the First Degree; twenty five (25) counts of Criminal Sexual Penetration in the Second Degree; and sixty one (61) counts of Kidnapping.
2. At sentencing on March 18, 2005, the court recognized that the restraint supporting the kidnapping counts was incidental to the sexual offenses and merged those convictions with the convictions for the sexual offenses.
3. The court finds that the kidnapping convictions were based on incidental restraint.

CONCLUSIONS OF LAW

1. The sixty one (61) convictions for Kidnapping are hereby VACATED and DISMISSED.
2. This order does not affect the convictions for Criminal Sexual Penetration in the First Degree and Criminal Sexual Penetration in the Second Degree, and therefore does not reduce the Petitioner's total sentence.
3. The Judgment and Sentence as to the sexual offenses remains in full force and effect.

IT IS SO ORDERED.



Hon. George P. Eichwald
District Court Judge.

Submitted by:

/s/ Susan McLean

Susan S. McLean
Special Counsel for the State



E. J. [Signature]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 12, 2024

NO. S-1-SC-40317

MARTIN GONZALES,

Petitioner,

v.

STATE OF NEW MEXICO, and
HECTOR RIOS, Warden,

Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari filed under Rule 12-501 NMRA, and response to Issue 5 in the petition, and the Court having considered the foregoing and being sufficiently advised, Chief Justice David K. Thomson, Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

NOW, THEREFORE, IT IS ORDERED that the petition is DENIED as to all issues, except Issue 5, as presented in the petition;

IT IS FURTHER ORDERED that Issue 5 of the petition is REMANDED to the district court for the entry of factual findings as to whether Petitioner's 61 kidnapping convictions were based on incidental restraint and therefore violate

1 double jeopardy, *see State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238; and

2 IT IS FURTHER ORDERED that if the district court finds any of the
3 aforementioned kidnapping convictions were based on incidental restraint, the
4 district court shall vacate those convictions that violate double jeopardy as required
5 by *State v. Schoonmaker*, 2008-NMSC-010, ¶ 50, 143 N.M. 373, 176 P.3d 1105, and
6 *State v. Sisneros*, 2013-NMSC-049, ¶ 38, 314 P.3d 665.

7 IT IS SO ORDERED.



WITNESS, the Honorable David K. Thomson, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 12th day of July, 2024.

Elizabeth A. Garcia, Clerk of Court
Supreme Court of New Mexico

8 I CERTIFY AND ATTEST:
A true copy was served on all parties
or their counsel of record on date filed.
Kristen R. Edwards
Deputy Clerk of the Supreme Court
of the State of New Mexico

By _____

Kristen R. Edwards
Deputy Clerk

App. C.

9-702. Petition for writ of certiorari to the district court from denial of habeas corpus.

[For use with Appellate Rule 12-501 NMRA]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MARTIN GONZALES

Defendant-Petitioner,

S.Ct. No. S-1-SC-40317
(leave blank; court will assign)

vs.

STATE OF NEW MEXICO, AND
(Name of Warden) HECTOR RIOS

District Ct. No. D-1329-CR-2003-057

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE 13TH DISTRICT COURT OF NEW MEXICO

SUPREME COURT OF NEW MEXICO
FILED

MAR 28 2024

MARTIN GONZALES
Defendant-Petitioner pro se

10 MCGREGOR RANGE ROAD

CHAPARRAL, NM 88001
(address information)

Elizabeth A. Garcia
Elizabeth A. Garcia, Chief Clerk of the Supreme Court
of the State of New Mexico

PETITION FOR WRIT OF CERTIORARI
TO THE 13TH DISTRICT COURT OF NEW MEXICO

Defendant-Petitioner, appearing pro se and pursuant to the provisions of the New Mexico Constitution, Rule 5-802, and Rule 12-501 NMRA; petitions this Court to issue its Writ of Certiorari to review the order in:

MARTIN GONZALES V. HECTOR RIOS (your name v. Warden's name),

District Court No. 1329-CR-2003-00057 filed on JANUARY 30, 2024

QUESTIONS PRESENTED FOR REVIEW

Whether the district court erred in:

DENYING PETITIONER APPOINTMENT OF COUNSEL; DENYING
PETITIONER'S REQUEST TO HAVE THE STATE RESPOND TO THE PETITION
FOR WRIT OF HABEAS CORPUS; DENYING AN EVIDENTIARY HEARING
ON THE ISSUES RAISED; AND DENYING THE REQUESTED RELIEF.

(Complete only for issues relevant to the petition. Attach additional sheets if necessary.)

DESCRIPTION OF THE PROCEEDINGS

1. Please list the conviction being challenged:

ALL COUNTS STEMMING FROM CASE NUMBER D-1329-CR-2003-057
(183 CNTS) I.E., CSPM, CSEM, AND KIDNAPPING.

2. Please list any other petitions you have filed in the New Mexico Supreme Court challenging this conviction (please include docket numbers and dates):

S-2-SC-30954

3. Tell the story of what happened in your court case:

AT TRIAL, PETITIONER WAS UNCONSTITUTIONALLY CONVICTED OF MOST,
IF NOT ALL CHARGES FOR WHICH HE WAS FOUND GUILTY, SEE ATTACHED
DOCUMENTATION.

**BASIS FOR GRANTING THIS PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT**

The decision of the district court on my petition for writ of habeas corpus, filed pro se, raises significant questions of law under state and federal constitutions: whether the errors below deprived petitioner's rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments and by New Mexico Constitution, art. II, §§ 13, 14, 15, and 18.

ARGUMENT

(Describe your legal claim and cite the law (cases, statutes, constitutional sections) that supports your position. Use plain language.)

POINT 1:

SEE ATTACHED NARRATIVE FOR ISSUES 1 THROUGH 6. ARGUMENT

POINT 2:

SEE ATTACHED NARRATIVE FOR ISSUE 1 THROUGH 6 ARGUMENT

POINT 3:

SEE ATTACHED NARRATIVE FOR ISSUE 1 THROUGH 6 ARGUMENT

(Attach additional sheets, if necessary.)

REQUEST FOR RELIEF

Defendant-petitioner requests that this Court issue its writ of certiorari to the district court, and:

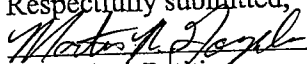
- ☒ remand to the district court for a full hearing on the petition, OR
- ☒ reverse the conviction, OR
- ☐ remand to the district court to correct the sentence, OR
- ☒ (other) ORDER APPOINTMENT OF COUNSEL.

Petitioner asks this Court to grant such relief as may be appropriate. As required by Rule 12-501 NMRA, I am filing **only the original copy** of this petition and I have attached the following:

- ☒ a copy of my petition for writ of habeas corpus filed in district court, **AND**
- ☐ a copy of the state's response, if one was filed, **AND**
- ☒ a copy of the district court's order.
- ☐ I have not attached the required documents because

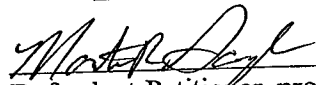
and ask the Supreme Court to accept this petition without the attachments.

Respectfully submitted,


Defendant-Petitioner, pro se

I hereby certify that a copy of this petition was mailed to the Attorney General's Office, P.O. Box 1508, Santa Fe, New Mexico 87504-1508 on this 26th day of

MARCH 2024.


Defendant-Petitioner, pro se

[Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

ISSUE/CLAIM-1

1

THE PETITION FOR WRIT OF HABEAS CORPUS RAISE ISSUE-1 AS:
DEPUTY DISTRICT ATTORNEY JOSEPH F. ARITE'S MISSTAMENT OF LAW DURING CLOSING ARGUMENT RESULTED IN FUNDAMENTAL ERROR THAT REQUIRES ALL OF MR. GONZALES' CONVICTION TO BE VACATED.

THIS CLAIM CONCERNS VIOLATIONS OF THE V, VI, AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 14 OF THE NEW MEXICO CONSTITUTION.

THE STATE DISTRICT COURT'S DENIAL OF MR. GONZALES' PETITION FOR WRIT OF HABEAS CORPUS INJUDICIOUSLY PARROTED THE LOPD-HABEAS UNIT'S ASSESMENT, MS. GALLEGOS, OF THE HABEAS UNIT, WROTE REGARDING ISSUE-1:

"... , THE INDICTMENT IN THIS CASE DID NOT INCLUDE CARBON COPY COUNTS. THE VICTIM TESTIFIED THAT THE ABUSE OCCURRED AT LEAST ONCE A MONTH, EVERYDAY, OR EVERY FEW DAYS THROUGHOUT THE CHARGING PERIODS FOR EACH COUNT WERE DIFFERENTIATED BY DATE. "THE PROSECUTION DID NOT MISFORM THE JURY BECAUSE PETITIONER WAS CHARGED WITH SEPRATE, DISTINGUISHABLE ACTS." SEE, STATE V. LENTE, 2019-NMSC-020, 453 P.3d 416 (NOTICE, AT; PROCEDURAL ORDER, AT p. 5) (EMPHASIS ADDED).

THIS RESPONSE ERRONEOUSLY INTERPRETS PETITIONER'S ISSUE. PETITIONER DID NOT RAISE A BALDONADO CLAIM. (CHALLENGES OF INSUFFICIENT NOTICE-CARBON COPY COUNTS-UNDER THE FOURTEENTH

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AMENDMENT OF THE U.S. CONSTITUTION). STATE V. BALDONADO, 1998-NMCA-040, 124 N.M. 745, 955 P.2d 214. (NOTICE, AT P16). PETITIONER HAS NOT RAISED A CLAIM ARGUING CONSTITUTIONAL ERRORS RELATING TO "CARBON COPY CHARGES" THEREFORE, THE STATE DISTRICT COURT'S DENIAL IS BASED ON A FALSE UNDERSTANDING OF THE TRIAL RECORD AND THE CLAIMED ERROR.

PETITIONER'S FIRST CLAIM CONTENDS THAT THE STATE CANNOT CHARGE PETITIONER WITH A COURSE-OF- CONDUCT AND THEN INSTRUCT THE JURY THAT A SINGLE ACT OF ABUSE IS SUFFICIENT TO SUPPORT A GUILTY VERDICT. A SINGLE-ACT CRIME IS WRITTEN WITHIN A CHARGING INSTRUMENT AS HAVING OCCURRED, FOR EXAMPLE, ON OR ABOUT JANUARY 05, 2024. THIS, FORMULATION INDICATES THAT A DEFENDANT HAS BEEN "CHARGED WITH SEPERATE, DISTINGUISHABLE ACTS[,]" AS MS. GALLEGOS REFERENCED IN HER NOTICE. MR. GONZALES WAS NOT CHARGED WITH ANY CRIME IN THIS MANNER; ALL OF HIS CHARGES WERE WRITTEN AS A COURSE OF CONDUCT. FOR EXAMPLE, "ON OR BETWEEN JANUARY 01, 2024 AND JANUARY 31, 2024, A COUNT ALLEGING A GENERAL COURSE OF CONDUCT CHARGES MULTIPLE VIOLATIVE ACTS OF A SINGLE STATUTE DURING A WELL-DEFINED CHARGING PERIOD DEMARCATED BETWEEN TWO SPECIFIC DATES.

IMPORTANTLY, THE NATURE OF THE COURSE OF CONDUCT CHARGING SCHEME PRECLUDES JURY UNANIMITY. THIS IS NECESSARY BECAUSE ANY TWO OR MORE ACTS CONSTITUTE A COURSE OF CONDUCT. THE JURY DOES NOT HAVE TO UNANIMOUSLY AGREE ON WHICH OF THE SPECIFIC ACTS MAKE-UP THE COURSE OF CONDUCT AS LONG AS THE JURORS DETERMINE THAT AT LEAST

TWO OR MORE OF THE STATUTORY VIOLATIONS OCCURRED WITHIN THE CHARGING PERIOD.

IF, AS THE STATE DISTRICT COURT DECLARES, MR. GONZALES WAS CONVICTED OF "SEPERATE, DISTINGUISHABLE ACTS," ASSOCIATED WITH EACH COUNT, HOW DOES THE COURT ACCOUNT FOR JURY UNANIMITY? THE STATE DISTRICT COURT FOUND THAT MS. LABO "TESTIFIED THAT THE ABUSE OCCURRED AT LEAST ONCE A MONTH, EVERYDAY, OR EVERY FEW DAYS THROUGHOUT THE CHARGING PERIOD"? WHICH DISCRETE ACT OF MULTITUDE OF ACTS DID THE JURY UNANIMOUSLY FIND MR. GONZALES GUILTY? MOST CRITICALLY, THE STATE DISTRICT COURT FAILED TO IDENTIFY WHAT SPECIFIC ACT WITHIN EACH OF THE SIXTY-ONE (61) CHARGING PERIODS FORMULATED THE BASIS OF ITS OWN CONCLUSION.

THE SAME DISTRICT COURT SOMEHOW FINDS THE FACT THAT THE CHARGING PERIODS ARE DIFFERENTIATED BY DATE DISPOSITIVE. YET, THE COURT FAILS TO EXPLAIN HOW THE CHARGING PERIODS RECTIFY MR. ARITE'S MISSTATEMENT OF LAW. THE JURY HEARD COPSIOUS TESTIMONY REGARDING AN ON-GOING COURSE OF SEXUAL ABUSE THAT SPANNED MANY YEARS. PETITIONER'S CONVICTIONS, HOWEVER, WERE OBTAIN UNDER MR. ARITE'S UNCONSTITUTIONAL CAVEAT ALLOWING THE JURY TO FIND MR. GONZALES GUILTY IF THE JURY FOUND THE ABUSE OCCURRED "AT LEAST ONCE" DURING EACH OF THE CHARGING PERIODS. THE QUANTUM OF EVIDENCE REQUIRED TO SUPPORT A CONVICTION FOR AN ACT THAT HAS OCCURRED AT LEAST ONCE IS INSUFFICIENT TO SUPPORT CONVICTIONS FOR AN ON-GOING COURSE-OF-CONDUCT DURING

CHARGING PERIODS DIFFERENTIATED BY SPECIFIC DATES.

THE STATE DISTRICT COURT AND MS. GALLEGOS RELIED ON STATE V. LENTE, IN REACHING THEIR CONCLUSIONS 2019-NMSC-020, 453 P.3d 416. LENTE IS FACTUALLY AND LEGALLY DISTINGUISHABLE FROM THE CASE AT BAR. LENTE ARGUED THAT THE STATE COULD NOT, OR SHOULD NOT, BE ALLOWED TO ARBITRARILY SEGMENT A CHARGING PERIOD. HOWEVER, STATE V. ALTGILBERS, QUICKLY DISCREDITS LENTE'S CLAIM. MR. GONZALES' PETITION DOES NOT RAISE AN ARGUMENT PERTAINING TO THE LENGTH OF HIS CHARGING PERIODS. SINCE THE STATE COURT BROUGHT UP THE ISSUE, PETITIONER CONTENDS THAT RELATIVELY BRIEF AND UNREASONABLY DIVIDED CHARGING PERIODS SPREAD OVER A NUMBER OF YEARS IS QUITE EXCESSIVELY OVERKILL WHEN A FEW LONG CHARGING PERIODS ADEQUATELY ACCOMPLISHES THE STATE'S ULTIMATE GOAL OF HAVING A DEFENDANT SERVE A LENGTHY TERM OF INCARCERATION.

IN LENTE'S CASE, EACH COUNT IS A SEPERATE CHARGE FOR A COURSE OF CONDUCT, OR AS THE NAKAMURA COURT EXPLAINED, "A DIFFERENT OFFENSE." FOR EXAMPLE, LENTE WAS CONVICTED OF A COURSE OF CONDUCT FOR CSCM X 3 FOR TOUCHING HIS STEPDAUGHTER'S BUTTOCKS, BREAST, AND VAGINA ON NUMEROUS OCCASSIONS "ON OR BETWEEN 8/1/97 - 1/31/98," IN NEW MEXICO. LENTE, LIKE MR. GONZALES, WAS NOT CHARGED WITH SINGLE, DISCRETE ACTS. LENTE'S VICTIM, LIKE THE VICTIM IN THE PRESENT CASE, TESTIFIED EXPLICITLY THAT HER ABUSER ENGAGED IN AN ONGOING COURSE OF CONDUCT. FOR EXAMPLE:

PROSECUTOR: ARE YOU ABLE TO TALK ABOUT LIKE HOW MANY TIMES

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A MONTH IT WOULD HAPPEN, OR WOULD IT BE DIFFERENT?

MC: MAYBE TWO OR THREE TIMES A WEEK.

PROSECUTOR: WAS THAT THE WHOLE TIME OR JUST SOMETIMES?

MC: MOST OF THE TIME, YEAH.

LENTE, AT 76.

AT PETITIONER'S TRIAL NICOLE LABO TESTIFIED WITH TWO EXCEPTIONS TO AN ONGOING, NONDESCRIPT COURSE OF CONDUCT THAT ALLEGEDLY TOOK PLACE IN SANDOVAL COUNTY. THESE TWO INCIDENTS ARE EASILY IDENTIFIED AS THE FIRST TIME IN THE MASTER BEDROOM, AND THE WATERTOWER INCIDENT. THE REMAINDER OF MS. LABO'S TESTIMONY REGARDING SANDOVAL COUNTY DESCRIBED ABUSE WITHOUT PARTICULARITY.

FOR EXAMPLE:

(VOL. 1, TR-36,37)

Q. (ADA ARITE): AND HOW OFTEN WOULD IT (CSM, CSPM, KIDNAPPING) HAPPEN DURING THAT PARTICULAR YEAR?

A. (NICOLE LABO): IT WOULD GET A LITTLE BIT MORE, LIKE A FEW TIMES A MONTH.

Q. OKAY. WHEN YOU SAY A FEW--

A. THREE OR (SIC) FOUR TIMES, MAYBE.

(VOL. 1 TR-38)

Q. OKAY. DID IT (CSCM, CSPM, KIDNAPPING) INCREASE IN FREQUENCY OR WAS IT ABOUT THE SAME?

A. ABOUT THE SAME.

Q. ONCE A WEEK OR SO?

A. YEAH

(VOL. 1, TR-55)

Q. DURING THE TIME WHEN YOU WERE 14... [H]OW OFTEN WAS HE DOING THIS
(CSCM, CSPM, KIDNAPPING) TO YOU?

A. A LOT. IT SEEMED EVERY NIGHT, MAYBE TWO TIMES-- MAYBE EVERY OTHER
NIGHT.

(VOL. 1, TR-56).

Q. WHEN YOU TURNED 15, ..., IS IT (CSCM, CSPM, KIDNAPPING) STILL HAPPENING?

A. YES.

Q. HOW OFTEN?

A. A LOT.

Q. THE SAME FREQUENCY AS WHEN YOU WERE 14?

A. YES.

THIS TESTIMONY IS EVIDENCE OF A COURSE OF CONDUCT, AND IS ONLY
SUFFICIENT TO SUPPORT A COURSE OF CONDUCT. IT IS WELL ESTABLISHED LAW
THAT UNDIFFERENTIATED COURTS GIVE RISE TO DOUBLE JEOPARDY VIOLATIONS.
STATE V. DOMINGUEZ, 2008-NMCA-029, 143 N.M. 549, 178 P.3d 834; STATE V.
HUERTA-CASTRO, 2017-NMCA-026; STATE V. COSTILLO, A-1-CA-36032 (2019).
THUS, CONVICTING MR. GONZALES OF AN ACT THAT OCCURRED "AT LEAST ONCE"
DURING A SPREE OF ABUSE WITHOUT PARTICULARITY AND JURY UNANIMITY

VIOLATES DUE PROCESS. ADDITIONALLY, SINCE THE TWO TESTIFIED TO INCIDENTS
WERE NOT LINKED TO SPECIFIC CHARGING PERIODS, MR. GONZALES MAY HAVE BEEN
CONVICTED MULTIPLE TIMES FOR EACH OF THE TWO DISCRETE ACTS. THE JURY

WAS NOT INSTRUCTED TO DETERMINE WITHIN WHICH CHARGING PERIODS THE TWO
DESCRETE ACTS OCCURRED. SIGNIFICALLY, THE JURY WAS NOT INSTRUCTED
THAT IT COULD NOT CONSIDER THE TESTIMONY OF THE NON-JURISDICTIONAL
ABUSE AS SUFFICIENT EVIDENCE OF "AT LEAST ONE" ACT OF ABUSE FOR THE
CHARGING PERIODS WHEN MS. LABO WAS BETWEEN THE AGES OF 13 AND 15,
OR, BEFORE SHE TURNED 10.

THE JURY WAS MISGUIDED, UNINFORMED, CONFUSED, AND ERRONEOUSLY
INSTRUCTED. MR. ARITE'S TRIAL STRATEGY AND CLOSING ARGUMENTS CAUSED
THE JURY TO CONVICT MR. GONZALES OF A COURSE OF CONDUCT BASED ON THE
EVIDENCE OF AN ACT OF ABUSE THAT OCCURRED "AT LEAST ONCE IN EACH OF
THOSE (61) MONTHLY PERIODS." THE PROSECUTOR'S VERY NEXT SENTENCE
FORCLOSES ANY DOUBT AS TO WHETHER OR NOT MR. GONZALES' DUE PROCESS
RIGHTS WERE VIOLATED; "MANY OF THOSE (61) MONTHS IT (CSCM, CSPM,
KIDNAPPING) OCCURRED MORE THAN ONCE, BUT IT OCCURRED AT LEAST EACH
-- ONE TIME EACH OF THOSE MONTHS." (VOL. III, TR-17) (SEE, PETITION, AT 18).
THE QUALITY OF MS. LABO'S TESTIMONY REASONABLY REQUIRED THE STATE
TO PURSUE CONVICTIONS UNDER THE COURSE OF CONDUCT DOCTRINE, NOT
FOR A DISCRETE, NONSPECIFIED ACT THAT OCCURRED AT LEAST ONCE DURING
EACH CHARGING PERIOD. MR. ARITE'S MISCONDUCT SO INFECTED MR. GONZALES'
TRIAL THAT THE ONLY APPROPRIATE RELIEF AVAILABLE IS THE DISMISSAL OF ALL
OF THE PETITIONER'S CONVICTIONS AND REMAND FOR RETRIAL. PETITIONER
ASSERTS THAT THE STATE DISTRICT COURT'S DENIAL OF RELIEF IS CONTRARY
TO: DONNELLY V. DECHRISTOFORD, 416 U.S. 637 (1974); U.S. V. AGURS, 427

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U.S. 97(1976); DARDEN V. WAINWRIGHT, 477 U.S. 168(1986); DAVIS V. AYALA, 576 U.S. 257(2015); U.S. V. HOLLIS, 971 F.2d 1441 (10TH CIR. 1992); LE V. MULLIN, 311 F.2d 1002 (10TH CIR. 2002); STATE V. DIAZ, 1982-NMCA-091; STATE V. MASCARENAS, 2000-NMSC-17; STATE V. SOSA, 2009-NMSC-056; AND STATE V. TORRES, 2012-NMSC-016. (CITATIONS OMITTE). SEE PETITION FOR WRIT OF HABEAS CORPUS FOR COMPLETE CITATIONS AND REFERENCES.

ISSUE/CLAIM-2.

THE PETITION FOR WRIT OF HABEAS CORPUS RAISE ISSUE-2, AS:

THE TRIAL COURT VIOLATED ART. II, SECTIONS 14 AND 18 OF THE NEW MEXICO CONSTITUTION, AND THE V, VI, AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION BY (A) NOT ALLOWING MR. GONZALES THE OPPORTUNITY TO REPRESENT HIMSELF AT TRIAL; AND (B) DENYING HIS REQUEST TO BE HEARD.

THE STATE DISTRICT COURT SUMMARILY REJECTED THIS CLAIM, STATING THAT IT HAD BEEN RAISED PREVIOUSLY IN A PRIOR PETITION. IN THE CURRENT PETITION MR. GONZALES RAISES UNDER THIS CLAIM ADDITIONAL CONCERNS RELATING TO THE DENIAL OF HIS RIGHT TO BE HEARD AND TO PRESENT A COMPLETE DEFENSE. THIS CLAIM STRIKES AT THE CORE OF THE STATE DISTRICT COURT'S IMPALPABLE SUPPRESSION OF PETITIONER'S RIGHT TO A FUNDAMENTALLY FAIR TRIAL.

~~PRIOR TO TRIAL PETITIONER FILED A NUMBER OF PRO SE MOTIONS SEEKING TO REPRESENT HIMSELF. WHATSMORE, DEFENSE COUNSEL FILED A MOTION TO WITHDRAW AS MR. GONZALES' COUNSEL AT HIS REQUEST, THE STATE DISTRICT~~

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COURT IGNORED BOTH COUNSEL'S REQUEST AND MR. GONZALES' MOTIONS. AT TRIAL, AFTER DEFENSE RESTED WITHOUT PRESENTING A CASE IN CHIEF BUT BEFORE CLOSING ARGUMENTS, PETITIONER REQUESTED TO TESTIFY IN HIS DEFENSE. THE STATE DISTRICT COURT DENIED MR. GONZALES OF THIS FUNDAMENTAL AND ESSENTIAL CONSTITUTIONAL RIGHT.

THE STATE DISTRICT COURT'S DENIAL OF MR. GONZALES' PETITION FOR WRIT OF HABEAS CORPUS WAS WRITTEN AND REVIEWED BY THE TRIAL COURT JUDGE GEORGE P. EICHWALD. PETITIONER REQUEST THIS COURT TAKE JUDICIAL NOTICE OF THE STATE DISTRICT COURT RECORD. JUDGE EICHWALD RECUSED HIMSELF FROM PETITIONER'S POST CONVICTION PROCEEDINGS ON 17, APRIL, 2013 (D-1329-CV-200900024). THIS CAUSE NUMBER WAS ORIGINALLY ASSIGNED TO MR. GONZALES' POST CONVICTION PETITION FOR WRIT OF HABEAS CORPUS. THE PETITIONER AT ISSUE (D-1329-CR-200300057) IS EFFECTIVELY THE SAME CAUSE AND CASE. BOTH CASE NUMBERS SEEK RELIEF FROM THE SAME PROSECUTION AND CONVICTIONS WHERE JUDGE EICHWALD PRESIDED OVER PETITIONER'S TRIAL, WHEREFORE, PETITIONER CONTENTS THAT JUDGE EICHWALD WAS DISQUALIFIED AND SHOULD NOT HAVE MADE ANY JUDICIAL DECISIONS REGARDING THE CURRENT PETITION. JUDGE EICHWALD ABUSED HIS DISCRETION BY PRESIDING OVER THE CURRENT PETITION.

PETITIONER ASSERTS THAT THE STATE DISTRICT COURT'S DENIAL WAS CONTRARY TO: FARETTA V. CALIFORNIA, 422 U.S. 806 (1975); U.S. V. MACKOVICH, 2309 F.3d 1227 (10TH CIR. 2000); STATE V. CHAPMAN, 1986 - NMSC - 037. AS WELL AS, WESTBROOK V. ARIZONA, 384 U.S. 150 (____); MEKACKLE V. WIGGINS, 465 U.S. 168

(1984); CALIFORNIA V. TROUBETTA, 467 U.S. 479 (1984); ZENITH RADIO CORP.¹⁰
V. HAZELTINE RESEARCH, INC., 401 U.S. 321 (1971); DELONO V. KITCH, 633
F.2d 990 (10th CIR. 1981). CERT DENIED, 456 U.S. 946 (1982); STATE V. HARRISON,
2000-NMSC-022 (CITATION OMITTED). SEE PETITION FOR WRIT OF HABEAS
CORPUS FOR COMPLETE CITATIONS AND REFERENCES.

ISSUE / CLAIM - 3

PETITIONER'S THIRD CLAIM INVOLVES THE ADMISSION OF EVIDENCE CONTRARY
TO NMRA 11-402, 403, AND 404. THE PETITION FOR WRIT OF HABEAS CORPUS
RAISED ISSUE - 3, AS:

AT TRIAL THE JURY HEARD TESTIMONIAL EVIDENCE AND ARGUMENT FROM
THE STATE PERTAINING TO UNCHARGED AND UNSUBSTANTIATED ALLEGATIONS OF
MR. GONZALES' PRIOR BAD ACTS. THE ALLEGATIONS WERE IRRELEVANT TO A
MATERIAL ISSUE, MORE PREJUDICIAL THAN PROBATIVE, SERVED ONLY AS PROPENSITY
EVIDENCE, AND WAS IMPROPERLY ADMITTED CONTRARY TO RULE 11-402, 403, AND
404 NMRA. INTRODUCTION OF PRIOR BAD ACTS EVIDENCE RENDERED PETITIONER'S
TRIAL FUNDAMENTALLY UNFAIR UNDER BOTH STATE AND FEDERAL CONSTITUTIONS.

THIS CLAIM CONCERNS VIOLATIONS OF THE XIV AMENDMENT OF THE UNITED
STATES CONSTITUTION AND ART. II, SEC(S) 14 AND 15 OF THE NEW MEXICO
STATE CONSTITUTION.

THE DISTRICT COURT (i.e., MS. GALLEGOS) CONCLUDED THAT, "IT DOES NOT APPEAR
THAT PETITIONER CAN ESTABLISH A REASONABLE PROBABILITY THAT THE INAD-
MISSIBLE EVIDENCE CONTRIBUTED TO HIS CONVICTIONS." FIRST, THE STATE DISTRICT

COURT AGREES THAT THE EVIDENCE COMPLAINED OF WAS, IN FACT, INADMISSIBLE. HOWEVER, THE CONCLUSION THAT THE EVIDENCE DID NOT PRESENT A "REASONABLE PROBABILITY" OF "CONTRIBUT(ING) TO HIS CONVICTIONS" IS AN ABSURDITY BEYOND COMPREHENSION. A CURSORY REVIEW OF THE RECORD IS SUFFICIENT TO RAISE SERIOUS CONCERNS OF A CONSTITUTIONAL MAGNITUDE

THE LODD IN ITS INITIAL REVIEW CITES TO STATE V. HERNANDEZ, 2017-NMCA-020, P.20, 388 P.3d 1016. "[] (REVIEWING) COURTS ARE TO EVALUATE ALL OF THE CIRCUMSTANCES SURROUNDING THE ERROR, INCLUDING EXAMINING THE ERROR ITSELF, THE SOURCE OF THE ERROR, THE EMPHASIS ON THE ERROR, AND WHETHER, THE ERROR WAS CUMULATIVE OR INTRODUCED NEW FACTS," (NOTICE, AT P.23; PROCEDURAL ORDER, AT P.6). THE QUOTE SPEAKS DIRECTLY TO A COURT'S OBLIGATION WHEN INADMISSIBLE AND POTENTIALLY PREJUDICIAL EVIDENCE HAS REACHED THE JURY. THIS STANDARD REQUIRES MORE FROM REVIEWING COURT THAN FORMULATING AN UNCITICAL OR SUPERFICIAL REVIEW BASED ON A MERE APPEARANCE. THE STATE DISTRICT COURT CANNOT SUPPLANT ITS OPINION IN PLACE OF A LEGAL STANDARD. IN OTHER WORDS, THE STATE DISTRICT COURT DID NOT PERFORM THE REQUISITE ANALYSIS.

THE REMARKABLY PREJUDICIAL PROPENSITY EVIDENCE CONTAINED BOTH PRIOR BAD ACTS AND CONTEMPORARY CONTENT THAT WAS NON-JURISDICTIONAL; THE STATE PROSECUTOR INTRODUCED THE EVIDENCE THROUGH THE ALLEGED VICTIM; THE TRIAL BEGAN AND ENDED WITH THE PROSECUTOR EMPHASIZING THE PROPENSITY EVIDENCE; THE VASTNESS OF THE EVIDENCE WAS CUMULATIVELY HARMFUL, AND INTRODUCED DAMAGING IMMATERIAL ALLEGATIONS THAT DID NOTHING MORE THAN

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GARNER SYMPATHY FOR, AND BOLSTER THE CREDIBILITY OF THE PROSECUTRY. THERE WAS NO OBJECTION, NO INTERVENTION FROM THE COURT, AND NO CURATIVE INSTRUCTION GIVEN TO THE JURY. WHEREFORE, CONTRARY TO THE STATE DISTRICT COURT'S CONCLUSION, PETITIONER DECLARES THAT THERE IS NO COGNITABLE INTELLIGENCE THAT DISPELS THE LEGAL PRESUMPTION THAT INADMISSABLE PROPENSITY EVIDENCE IS PREJUDICIAL EVIDENCE.

THE LOPD'S NOTICE CITE'S STATE V. KERBY 2005-NMCA-106, P25, 138 N.M. 8 232 (SIC), 118, P3d 740, (NOTICE, AT P22). KERBY ADVISES THAT A JURY, "NOT WITHSTANDING ANY LIMITING INSTRUCTION," WILL OFTEN DISREGARD THE COURT'S INSTRUCTIONS AND CONVICT AN ACCUSED, NOT FOR THE CRIMES CURRENTLY BEFORE THE COURT, BUT RATHER BECAUSE THE ACCUSE HAS A HISTORY OR A "PROPENSITY FOR CRIMINAL CONDUCT," AS NOTED, THERE WAS NO CURATIVE INSTRUCTION GIVEN DURING MR. GONZALES' TRIAL. THE JURY WAS UNBRIDLED IN ITS APPLICATION OF THE STATE'S PROPENSITY EVIDENCE. THE STATE DISTRICT COURT'S DENIAL IS CONSPICUOUSLY UNREASONABLE.

MS. GALLEGOS OF THE LOPD WROTE, "AS DESCRIBED IN THE PLEADINGS FROM PETITIONER'S PRIOR PETITION. THE ABUSE WAS APPARENTLY CORROBORATED BY THE VICTIM'S TESTIMONY, VICTIM'S MOTHER'S TESTIMONY, AND DEAN KARCH (SIC) WHO TESTIFIED TO PETITIONER'S CONFESSIONS." (NOTICE, AT P25). THIS IS A MISLEADING CONCLUSIONARY STATEMENT THAT LACKS ANY AND ALL SUPPORT FROM THE RECORD.

WHATSMORE, THIS STATEMENT IS QUITE REMARKABLE FOR SEVERAL REASONS.

FIRST, IT IS AXIOMATIC THAT A WITNESS MAY NOT CORROBORATE HIS OR HER PRIOR STATEMENTS AND TESTIMONY ARE CONSISTENT. SECOND, THE VICTIM'S

MOTHER TESTIFIED THAT SHE WORKED FROM HOME BETWEEN 1997 AND 2001. (VOL. 1, TR-107 (JANUARY 24, 2005)). MORE TO THE POINT, THE MOST RELEVANT DIRECT-EXAMINATION TESTIMONY SHOWS THAT MS. SAAVEDRA NEVER SUSPECTED THAT MR. GONZALES AND MS. LABO WERE POSSIBLY ENGAGED IN A SEXUAL RELATIONSHIP.

Q. (MR. ARITE): OKAY. YOU KNOW PRIOR TO JANUARY 21, 2003, PRIOR TO THAT, DID
INKLING THAT SOMETHING WAS AMISS BETWEEN YOUR HUSBAND AND
NICOLE?

A. (MS. SAAVEDRA): HUH-UH

Q. DID YOU HAVE ANY SUSPICIOUS WHATSOEVER?

A. NO. I WAS TOTALLY SHOCKED BY THE WHOLE THING. I JUST COULDN'T
BELIEVE IT.

(VOL. 1, TR-128 (JANUARY 24, 2005)).

MS. SAAVEDRA DID NOT HAVE ANY DIRECT KNOWLEDGE OF ANY ABUSE AND
THEREFORE DID NOT CORROBORATE NICOLE'S TESTIMONY. MS. SAAVEDRA'S
TESTIMONY DID NOT IMBUE PETITIONER WITH GUILT. WHEN MS. GALLEGOS REFERS
TO THE "VICTIM'S MOTHER'S TESTIMONY" AS CORROBORATING, SHE DIRECTLY
MISLEADS THE COURT

LASTLY, MR. KARCH TESTIFIED THAT HE NEVER WOULD HAVE THOUGHT THAT THESE
TYPE OF THINGS WERE GOING ON WITHIN THE GONZALES FAMILY. HE DID, HOWEVER,
TESTIFIED THAT MR. GONZALES HAD ADMITTED TO SOME NONSPECIFIC FORM OF
ABUSE HAVING OCCURRED A "FEW TIMES".

Q. (MR. ARITE): DID HE TELL YOU HOW OFTEN HE WAS HAVING SEX WITH HER?

A. (MR. KARCH): I ASKED HIM HOW OFTEN, MARTIN REPLIED THAT HE HAS DONE IT

A FEW TIMES.

(VOL. III, TR-42 (JANUARY 25, 2005)).

MR. KARCH'S TESTIMONY DOES NOT PURPORTLY CONVEY THAT MR. GONZALES MADE A FULL CONFESSION TO EVERY COUNT OF ABUSE. INQUISITIVELY, MR. KARCH'S TESTIMONY HAS NOTHING TO DO WITH THE INADMISSIBLE PROPENSITY EVIDENCE COMPLAINED OF HERE. AT BEST, IT CAN ONLY BE SAID THAT MR. GONZALES INTAMATED THAT HE HAD ENGAGED IN A FEW NONSPECIFIC ACTS OF SEXUAL ABUSE WITH NICOLE LABO.

THE INADMISSIBLE EVIDENCE WAS CRITICAL TO THE STATE'S PROSECUTION. THE STATE INTRODUCED THE PROPENSITY EVIDENCE IN IT'S OPENING STATEMENT, EXTENSIVELY QUESTIONED MS. LABO ABOUT THE NON-JURISDICTIONAL ABUSE DURING ITS CASE IN CHIEF AND EMPHASIZED THE PROPENSITY EVIDENCE DURING CLOSING ARGUMENTS. THE INADMISSIBLE EVIDENCE INTRODUCED TO THE JURY ABHORENT ACT OF NON-JURISDICTIONAL ABUSE AGAINST A YOUNG CHILD OF TENDER YEARS. THERE IS INARGUABLY NO DOUBT THAT THIS EVIDENCE INFLUENCED THE JURY'S DELIBERATIONS AND AS A CONSEQUENCE, REASONABLY CONTRIBUTED TO MR. GONZALES' CONVICTIONS. SEE, STATE V. MONTOYA 2015-NMSC-010. THE PROPENSITY EVIDENCE, TO THE VAST EXTENT IN WHICH IT WAS UTILIZED BY THE STATE, PROHIBITED MR. GONZALES FROM RECEIVING A FUNDAMENTALLY FAIR TRIAL DUE TO THE ABROGATION OF CONSTITUTIONAL DUE PROCESS.

PETITIONER ASSERTS THAT THE STATE DISTRICT COURT'S DENIAL WAS CONTRARY TO: HUDDLESTON V. U.S., 485 U.S. 681 (1988); OLD CHIEF V. U.S.,

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519 U.S. 172 (1997); U.S. V. RIVERA, 837 F.2d 906 (10TH CIR. 1988); U.S. V. MUNIZ, 504 F.2d 1203 (10TH CIR. 1984); STATE V. KIRBY, 2005-NMCA-106, CERT-GRANTED, 2005-NMCERT-008. AS WELL AS, U.S. V. ATKINSON, 287 U.S. 157 (____); U.S. V. OLANDO, 507 U.S. 725 (1993); YARBOROUGH V. ALVARADO, 541 U.S. 652 (2004). (CITATION OMITTED). SEE PETITION FOR WRIT OF HABEAS CORPUS FOR COMPLETE CITATIONS AND REFERENCES.

ISSUE/CLAIM-4

PETITIONER'S FOURTH CLAIM FURTHER ADDRESSES THE STATE'S USE OF HIGHLY PREJUDICIAL AND NON-JURISDICTIONAL ABUSE. THE PETITIONER FOR WRIT OF HABEAS CORPUS RAISED ISSUE-4, AS:

THE THIRTEENTH JUDICIAL DISTRICT COURT LACKED JURISDICTION TO CONVICT PETITIONER OF CRIMES THAT ALLEGEDLY OCCURRED IN BERNALILLO COUNTY (SECOND JUDICIAL DISTRICT), AND OTERO COUNTY (TWELFTH JUDICIAL DISTRICT). PETITIONER RAISES THIS CLAIM UNDER THE PROTECTION OF ARTICLE II, SECTION 14 OF THE NEW MEXICO CONSTITUTION, AND THE V, VI, AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION.

THE STATE DISTRICT COURT, (I.E., MS. GALLEGOS) COMPLETELY DISMISSES THE WHOLE PURPOSE FOR THE EXISTENCE OF RULE 11-404 NMRA; WRITING, "PURSUANT TO THE INDICTMENT IN THIS CASE, PETITIONER WAS NOT CONVICTED OF CRIMES THAT OCCURRED IN BERNALILLO, AND OTERO COUNTIES." (NOTICE, AT P27;

PROCEDURAL ORDER, AT 4). IT IS CERTAINLY TRUE THAT THE INDICTMENT IN THIS CASE DID NOT CHARGE MR. GONZALES WITH CRIMES THAT MAY HAVE OCCURRED

IN BERNALILLO AND OTERO COUNTIES. MR. GONZALES NEVER MADE SUCH CLAIM. THE CLAIM IS THAT NOCIOUS INTRODUCTION OF NON-JURISDICTIONAL PROPENSITY EVIDENCE, BEING A LARGE PORTION OF THE STATE'S EVIDENCE, REASONABLY LED THE JURY TO CONVICT MR. GONZALES OF UNCHARGED NON-JURISDICTIONAL CRIMES ALONG WITH CRIMES FOR WHICH HE WAS CHARGED.

BASED ON THE TRIAL RECORD THERE IS NO RATIONAL MEANS TO SUPPORT ANY OTHER CONCLUSION. THE JURY'S DELIBERATIONS WERE UNCONSTITUTIONALLY CORRUPTED BY NON-JURISDICTIONAL EVIDENCE. THE JURY INSTRUCTIONS INFORMED THAT IT NEED ONLY TO FIND THAT THE CRIMES OCCURRED IN THE STATE OF NEW MEXICO, THUS, DUE TO THE INTRODUCTION OF MULTIPLE INCIDENCES OF NON-JURISDICTIONAL CRIMES, THE JURY, IN ALL PROBABILITY, ERRONEOUSLY CONVICTED MR. GONZALES OF CRIMES THAT OCCURRED OUTSIDE OF THE THIRTEENTH JUDICIAL DISTRICT. MS. LABO SPECIFICALLY TESTIFIED TO SEXUAL ABUSE ON THE WEST MESA THAT ALLEGEDLY OCCURRED OVER SEVERAL YEARS ENCOMPASSING MANY OF THE CHARGING PERIODS, DURING MUCH OF THIS TIME FRAME THE ONLY TESTIMONY WAS IN REGARDS TO NON-JURISDICTIONAL ABUSE. THE JURY WAS UNABLE TO DETERMINE WHETHER OR NOT MS. LABO'S TESTIMONY WAS GIVEN IN RESPECT TO ALLEGATIONS OF ABUSE THAT OCCURRED IN BERNALILLO COUNTY OR SANDOVAL COUNTY. WHATSMORE, THE STATE DISTRICT COURT NEVER ADDRESSED MR. GONZALES' EXPOSURE TO DOUBLE JEOPARDY IN BERNALILLO COUNTY AND HAD BROUGHT CHARGES AGAINST HIM MUCH OF THE TESTIMONY WOULD HAVE BEEN VERBATIM.

PETITIONER ASSERTS THAT THE DISTRICT COURT'S DENIAL WAS CONTRARY TO:

LOUISVILLE & NASHVILLE R. CO. V. MOTTLEY, 211 U.S. 149 (1908); U.S. V. COTTON, 535 U.S. 625 (2002); CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967). (CITATIONS OMITTED). SEE PETITION FOR WRIT OF HABEAS CORPUS FOR COMPLETE CITATIONS AND REFERENCES.

ISSUE / CLAIM - 5

PETITIONER FIFTH CLAIM ADDRESSES DOUBLE JEOPARDY UNDER THE INCIDENTAL CONDUCT DOCTRINE.

THE PETITION FOR WRIT OF HABEAS CORPUS ISSUE-5, AS:

PETITIONER'S CONVICTIONS FOR SIXTY-ONE (61) COUNTS OF KIDNAPPING VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE PROSECUTED OR SENTENCED FOR SUBSTANTIALLY THE SAME OFFENSE. ADDITIONALLY PETITIONER CONTENDS THAT THE NEW MEXICO LEGISLATORS DID NOT INTEND FOR MULTIPLE -DISCREET- ACTS TO BE CHARGED AS A COURSE OF CONDUCT.

THIS CLAIM CONCERNS VIOLATIONS OF THE V AND XIV AMENDMENTS OF THE UNITED STATE CONSTITUTION, AND ART. 11, SEC. 14 OF THE NEW MEXICO CONSTITUTION.

IN REFERENCE TO THIS CLAIM, THE STATE DISTRICT COURT, (i.e., MS. GALLEGOS) WROTE:

PETITIONER'S CLAIM THAT THE KIDNAPPING CONVICTIONS INVOLVED INCIDENTAL RESTRAINT, AND VIOLATED DOUBLE JEOPARDY IS HOOT, AS PETITIONER WAS SENTENCED ON ONLY THE 36 COUNTS OF CSP 1ST DEGREE, AND 25 COUNTS OF CSP 2ND DEGREE, CONSECUTIVE FOR A TOTAL OF 873 YEARS. THE REMAINING 61 CONVICTIONS OF CSCM, AND 61 CONVICTIONS OF KIDNAPPING MERGED WITH CSP CONVICTIONS (NOTICE, AT

P 28, PROCEDURAL ORDER, AT 7).

ENSURING THE LEGITIMACY OF A CONVICTION INSTILLS AND PROMOTES TRUST IN OUR JUDICIARY, SECURES THE CONTINUED ATTESTATION IN THE VERACITY OF THE PEOPLE'S CONSTITUTIONAL RIGHTS. THE STATE DISTRICT COURT DOES NOT HAVE THE RIGHT AUTHORITY TO RENDER DUE PROCESS MOOT. CONSTITUTIONAL RIGHTS CANNOT BE WHIMSICALLY DISCOUNTED AND DISREGARDED.

THE STATE DISTRICT COURT AGREES THAT THE CONVICTIONS FOR 61 COUNTS OF KIDNAPPING ARE FACTUALLY UNLAWFUL. THIS IS EVIDENSE BY THE COURT'S MOOTNESS CHARACTERIZATION. THE HARM OF SIXTY-ONE (61) COUNTS OF KIDNAPPING MANIFEST ITSELF LONG BEFORE MR. GONZALES WAS CONVICTED. THE JURY MUST HAVE OVERWHELMED BY THE OVERALL NUMBER OF CHARGES. ANY WEIGHT ATTRIBUTED TO THE SHEER VOLUME OF CHARGES BY THE JURY DURING DELIBERATIONS WOULD INEVITABLY BEEN PREJUDICIAL. SIXTY-ONE COUNTS OF UNWARRANTED COUNTS OF KIDNAPPING SENT A CLEAR MESSAGE TO THE JURY: "THE DEFENDANT IS VERY BAD." THE STATE RELIED UPON PUBLIC DISDAIN FOR SEXUAL PREDATORS TO OBTAIN SCORES OF UNCONSTITUTIONAL CONVICTS. THE STATE NEW THE EVIDENSE WAS INSUFFICIENT TO SUPPORT KIDNAPPING CONVICTIONS. THIS IS NOT CONJECTURE, MR. ARITE, AGAIN, PURPOSEFULLY MISSTATED THE LAW DURING CLOSING ARGUMENTS.

"SHE DISCRIBES TO YOU HOW HE IS ON TOP OF HER EVERY SINGLE TIME, AND WHEN HE'S ON TOP OF HER, SHE CAN'T GET AWAY. THAT IS KIDNAPPING. SHE IS BEING RESTRIANED. SHE CAN'T GO. THAT'S KIDNAPPING."

(VOL. III, TR-18, 19 (JANUARY 25, 2005)).

MR. ARITE DESCRIBES UNITARY CONDUCT OF INCIDENTAL RESTRIANT EXERTED

DURING AN ACT OF SEXUAL ABUSE. HE DOES NOT ARGUE THAT THE RESTRAINT WAS SEPERATE AND APART FROM THE ABUSE EITHER PRECEDING OR POSTERIOR TO THE SEXUAL ASSAULT. MORE IMPORTANTLY, MS. LABO'S TESTIMONY WAS INSUFFICIENT TO SUPPORT A SINGLE CONVICTION FOR KIDNAPPING, THE STATE DISTRICT COURT'S DENIAL CONDONES THE PROSECUTOR'S MALFEASANCE.

PETITIONER ASSERTS THAT THE STATE DISTRICT COURT'S DENIAL WAS CONTRARY TO: STATE V. MCGUIRE, 1990-NMSC-067; STATE V. CORNEAE, 1989-NMCA-040; STATE V. CRANE, 1997-NMCA-101; STATE V. TRUJILLO, 2012-NMCA-112; STATE V. SIMMONS, 2018-NMCA-015; U.S. V. HEINTZCH, 124 F.3d 1330 (10TH CIR. 1997). SANABRIA V. U.S., 437 U.S. 54 (1978). (CITATIONS OMITTED). SEE PETITION FOR WRIT OF HABEAS CORPUS FOR COMPLETE CITATIONS AND REFERENCES.

ISSUE / CLAIM - 6

THIS CLAIM CONCERNS VIOLATIONS OF THE XIV AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 11, SEC. 14 OF THE NEW MEXICO STATE CONSTITUTION.

PETITIONER'S FINAL CLAIM CONTENDS THAT CUMULATIVE ERROR EFFECTED THE FUNDAMENTAL FAIRNESS OF HIS TRIAL. THE STATE DISTRICT COURT RECOGNIZED AT LEAST TWO ERRORS, THE INTRODUCTION OF INADMISSIBLE EVIDENCE, AND THE TRIAL COURT ERRORED BY ALLOWING 61 UNCONSTITUTIONAL COUNTS OF KIDNAPPING TO STAND. EVEN WITHOUT AN EVIDENTIARY HEARING THE RECORD DEMONSTRATES A PRIMA FACIE SHOWING OF CONSTITUTIONAL ERROR THAT COLLECTIVELY HAD AN ADVERSE EFFECT ON THE JURY'S DELIBERATIONS CONTRIBUTING TO PETITIONER'S CONVICTIONS.

PETITIONER ASSERT'S THAT THE STATE DISTRICT COURT'S DENIAL WAS CONTRARY TO:

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STATE V. HAMILTON, 98 N.M. 746 (1976); HOOPER V. MULLIN, 314 F.3d 1162 (10th Cir. 2002);
CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967). (CITATIONS OMITTED). SEE PETITION FOR
WRIT OF HABEAS CORPUS FOR COMPLETE CITATIONS AND REFERENCES.

CONCLUSION:

FUNDAMENTAL ERROR IS THE GUIDING LIGHT BY WHICH A COURT CRITIQUES AND ASSERTAINS
MERITORIOUS CLAIMS PRESENTED WITHIN A PETITION FOR WRIT OF HABEAS CORPUS A
REVIEWING COURTS GREATEST CONCERN SHOULD ALWAYS BE CONSTITUTIONAL JUSTICE,
NOT WHETHER OR NOT THE ISSUES ARE BEING RAISED FOR THE FIRST TIME IN A SECOND
OR SUBSEQUENTIAL PETITION. IN THIS CASE, THE CURRENT PETITION RAISES ISSUES
THAT HAVE NOT BEEN PUT BEFORE THE STATE DISTRICT COURT

THIS FACT NOTWITHSTANDING, REASONABLE MINDS DIFFER. HOWEVER, IN THE LEGAL
SENSE, BLACK LETTER LAW IS THE MECHANISM THAT COUNSELS OBJECTIVITY, WHEREAS,
PROFESIONAL INTEGRITY IS THE RUDDER THAT STEERS THE HONEST INTERPETATION AND
APPLICATION OF THE LAW AND FACTS IN EVERY INSTANCE. A REASONABLE, RATIONAL PERSON
OF MORAL CHARACTER WILL CONCLUDE THAT THIS IS NOT A CASE THAT SHOULD BE MINDLESSLY
DISCARDED.

THERE IS NO GREATER ENDEAVOR WORTHY OF THE EXPENDITURE OF JUDICIAL RESOURCES
THAN PRESERVING THE EPISTEMOLOGY OF THE UNITED STATES CONSTITUTION BY VINDICATING
THE CONSTITUTIONAL RIGHTS OF THE WRONGFULLY CONVICTED. JUSTICE PREVAILS ONLY WHEN
OUR COURTS PROTECT THE LAW FROM PERVERSION. JUSTICE IS NOT CHARITY, IT IS AN ABSOLUTE
RIGHT THAT REFLECT THE VIRTUE OF OUR NATION. THE STATE DISTRICT COURT'S FAILURE TO
ACKNOWLEDGE FUNDAMENTAL ERROR WAS AN ATROCIOUS ABUSE DISCRETION IN LIGHT
OF THE PRESENTED PRECEDENTS AND THE STATE DISTRICT COURT RECORD.

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

App. D.

MARTIN GONZALES,

1329-CR-2003-00057

No. D-

Petitioner,

v.

STATE OF NEW MEXICO, and
HECTOR RIOS, Warden,
Respondents.

ORDER ON MOTION FOR RELIEF

This matter having come before the Court on Petitioner's Motion for Relief from Judgment or Order; Rule 1-060 NMRA, the Court having reviewed the record and being otherwise fully advised in the premises, FINDS AND ORDERS THAT:

1. The Court entered an Order on January 30, 2024 denying Petitioner's claims in his Petition for Writ of Habeas Corpus.
2. Petitioner filed a Motion requesting this Court review its denial of the Petition, asserting that the Court had misconstrued the nature of Petitioner's claims and had uncritically accepted the legal analysis of the Law Office of the Public Defender.
3. Petitioner has not set forth a basis that entitles him to relief from this Court's Order under Rule 60.
4. The Court declines to reconsider its Order.

IT IS THEREFORE ORDERED, Petitioner's *Motion for Relief from Judgment or Order; Rule 1-060 NMRA* is DENIED.



George P. Eichwald
District Court Judge

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

FILED
13th JUDICIAL DISTRICT COURT
Sandoval County
1/30/2024 11:41 AM
AUDREY GARCIA
CLERK OF THE COURT
Tara Foster

App. E.

MARTIN GONZALES,

Petitioner,

v.

No. D-1329-CR-2003-0057

STATE OF NEW MEXICO, and
HECTOR RIOS, Warden,
Respondents.

PROCEDURAL ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

THIS MATTER having come before the Court on Petitioner's Petition for Writ of Habeas Corpus or other pleadings pursuant to Rule 5-802 NMRA of the Rules of Criminal

Procedure for the District Courts, and the Court having reviewed the record and being otherwise fully advised in the premises, FINDS and ORDERS:

SUMMARY DISMISSAL

Summary Dismissal of this matter is appropriate because, as a matter of law, Petitioner is not entitled to relief based on review of the files, pleadings, and records.

The Procedural History of this matter is as follows:

1. On February 6, 2003, an Indictment was filed, charging Petitioner with 37 counts of CSP (Child under 13), 37 counts of CSPM, 27 counts of CSP (Child 13-16), 27 counts of CSPM (Person in Position of Authority), Bribery of a Witness, and 64 counts of Kidnapping.
2. Following a jury trial on January 25, 2005, Petitioner was convicted of 36 Counts of CSP 1st degree, 25 counts of CSP 2nd degree, 61 counts of CSCM 3rd degree, and 61 counts of 2nd degree Kidnapping.

3. Petitioner was sentenced on March 18, 2005. Petitioner was sentenced on 36 counts of CSP 1st degree, and 25 counts of CSP 2nd degree, consecutive, for a total sentence of 873 years. The remaining 61 convictions of CSCM and 61 convictions of Kidnapping merged with the CSP convictions.

4. Petitioner appealed his convictions to the Court of Appeals, in *State v. Gonzales*, No. 25, 847 Mem. Op. (N. M. Ct. App. Feb. 5, 2008). The issue addressed on appeal included a speedy trial analysis, ineffective assistance of counsel, and cruel and unusual punishment. The Court of Appeals affirmed the convictions, and the Supreme Court denied Certiorari in *State v. Gonzales*, No. 30,954, Order (N.M. S. Ct. March 14, 2008).

5. Petitioner filed a Petitioner for Writ of Habeas Corpus on January 6, 2009 in case D-1329-CV-2009-024, and in the underlying case number on March 27, 2009. The petitions raised the following claims:

- a. The Magistrate Court issued a search warrant for DNA evidence, and testing of napkin was never produced at trial;
- b. Petitioner was denied the opportunity to call witnesses including eye-witness to support his alibi defense;
- c. Petitioner was never provided full discovery, and did not see pictures or DNA evidence, and this evidence would have proven his innocence;
- d. Petitioner is entitled to a new trial because newly discovered evidence of the SANE exam undermines the Prosecution's theory of the case, and violates Petitioner's right to a fair trial and Due Process;
- e. Police deliberately elicited incriminating statements from Petitioner after he had been charged, in violation of his right to counsel, and Due Process.

6. The State filed a Response on July 14, 2010. A status hearing was held on June 23, 2011, a pretrial conference was held on May 31, 2012, a status hearing was held on January 31, 2103, a motion hearing was held on March 26, 2013, a pretrial conference was held on September 9, 2014, a scheduling conference was held on September March 9, 2015, and a pretrial conference was held on September 15, 2015. An Amended Petition was then filed on both cases on July 22, 2016. The Amended Petition raised the following additional claims:

- a. Ineffective assistance of counsel because counsel was unprepared for trial, did not have discovery, did not present a defense, did not present exculpatory evidence of the napkin, that there was no physical evidence, did not give Petitioner a copy of the plea, did not call witnesses, did not object to serial prosecution at sentencing, did not follow through on the appeal, and did not file a Motion to Reconsider Sentence;
- b. Ineffective assistance of appellate counsel;
- c. Serial prosecution because the State did not distinguish the charges;
- d. Cruel and unusual punishment.

7. The petitions were eventually consolidated in Case D-1329-CV-2009-024. A Supplement to the habeas petition was filed by counsel for Petitioner on May 13, 2017, and raised the additional following claims:

- a. Ineffective assistance of counsel for:
 - i. Not investigating Victim's pregnancy, and failing to have forensic DNA testing performed on the fetal remains;
 - ii. Failing to object to prosecution's comment in opening statement on Petitioner's silence;

iii. Failing to secure Petitioner's right to defend himself pro se, and the Court summarily rejecting Petitioner's request without conducting a *Faretta*

hearing.

8. A Response to the Supplement was filed on October 10, 2017, and a Preliminary Disposition Hearing was held on February 27, 2018. The Court summarily dismissed the habeas proceeding on May 3, 2018, finding that as a matter of law Petitioner was not entitled to relief based on review of the files, pleadings, and records which show that he did not meet the standard for ineffective assistance of counsel as set out by *Strickland*.

Successive Petitions: Rule 5-802 (B)(6) states: The Petition ...shall contain the following required information: "if the Petitioner has previously filed a petition seeking relief under this rule, a brief statement explaining why the petition should not be dismissed under Paragraph H of this rule." Rule 5-802 (1) states: "Second and successive petitions. If the Petitioner has previously filed a petition seeking relief under this rule, the court shall have the discretion to (1) dismiss any claim not raised in a prior petition unless fundamental error has occurred, or unless an adequate record to address the claim properly was not available at the time of the prior petition; and (2) dismiss any claim raised and rejected in a prior petition unless there has been an intervening change of law or fact of the ends of justice would otherwise be served by rehearing the claim.

Claims raised by Petitioner:

Claim 1: The prosecution made a misstatement of law during closing argument which resulted in fundamental error. The prosecutor told the jury that they should convict if it is determined that the crime charged within each instruction occurred at least once during the charging period, but

were charged as a course of conduct, not as single events. The Victim was only able to describe a few individualized incidents with particularity, but most were vague and ambiguous.

The indictment in this case did not include carbon copy counts. The Victim testified that the abuse occurred at least once a month, every day, or every few days, throughout the charging period. The charging periods for each count were differentiated by date. The prosecution did not misinform the jury because Petitioner was charged by separate, distinguishable acts. *See State v. Lente*, 2019-NMSC-020, 453 P.3D 416.

Claim 2: Petitioner's rights were violated by the Court not allowing to represent himself, and denying his request to be heard.

The current petition appears to renew Petitioner's claim regarding his right to defend himself, *pro se*, and the Court summarily rejecting his requests without conducting a *Faretta* hearing. Petitioner has not demonstrated that fundamental error has occurred, that there was an inadequate record to address the claim properly at the time of the prior petition, an intervening change of law or fact, or how the ends of justice would otherwise be served by rehearing this claim. The Court incorporates the prior pleadings and court orders filed in this claim as to this claim.

Claim 3: The jury unlawfully heard evidence of prior bad acts which included evidence of incidents that occurred when the Victim was age 6 through 10. These incidents were not charged in this case, occurred in another jurisdiction, were prejudicial, and caused the jury to convict Petitioner. In addition, defense counsel was ineffective for not objecting to this evidence, and for not requesting a curative remedy.

Petitioner asserts that the prosecution was unable to present any physical evidence or third person witness to substantiate the allegations, and for this reason, the case boiled down to a credibility determination, and it cannot be said that the evidence of guilt was overwhelming.

As described in the pleadings from Petitioner's prior petitions, the abuse was apparently corroborated by Victim's testimony, Victim's mother's testimony, and Dean Koch who testified as to Petitioner's confessions. Therefore, it does not appear that Petitioner can establish a reasonable probability that the inadmissible evidence contributed to his convictions.

"When a non-constitutional evidentiary occurs, the harmless error standard for review only mandates reversal where there is a 'reasonable probability' the inadmissible evidence contributed to the defendant's conviction." *State v. Hernandez*, 2017-NMCA-020, ¶20, 388 P.3d

1016. "Reviewing courts are to evaluate all of the circumstances surrounding the error, the emphasis on the error, and whether the error was cumulative or introduced new facts." *Id.*

Claim 4: The Court lacked jurisdiction to convict Petitioner of crimes that occurred in Bernalillo and Otero Counties. In addition to abuse that occurred at the home in Rio Rancho, the jury heard testimony of abuse that happened in the Ford Explorer on the West Mesa in Bernalillo County, and Petitioner's mother's house in Alamogordo.

This claim seems to be similar and related to Claim 3, regarding jury hearing testimony of abuse that happened in the Ford Explorer on the West Mesa in Bernalillo County, and at Petitioner's mother's house in Alamogordo. Additionally, pursuant to the Indictment in this case, Petitioner was not convicted of crimes that occurred in Bernalillo or Otero Counties.

Claim 5: The kidnapping convictions involved incidental restraint, and violated Double Jeopardy.

Petitioner's claims that the kidnapping convictions involved restraint, and violated

Double Jeopardy is moot, as Petitioner was sentenced only on the 36 counts of CSP 1st degree, and 25 counts of CSP 2nd degree, consecutive for a total sentence of 873 years. The remaining 61 convictions of CSCM, and 61 convictions of Kidnapping merged with the CSP convictions.

Claim 6: Cumulative error.

Based on the analysis above, there was no cumulative error.

For the reasons stated above Petitioner is not entitled to relief on Grounds 1-6.

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus is hereby DISMISSED. The claims listed in the Petition are hereby dismissed with prejudice.


GEORGE P. EICHALD
District Court Judge

9-701. Petition for writ of habeas corpus.

[For use with District Court Criminal Rule 5-802 NMRA]

FILED
13th JUDICIAL DISTRICT COURT
Sandoval County
11/22/2023 8:30 AM
AUDREY GARCIA
CLERK OF THE COURT
Tara Foster

App F.

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT

D-1329-CR-2003-00057

For Official Use Only

No. _____
(To be supplied by the
clerk of the court)

MARTIN GONZALES
(Full name of prisoner)
Petitioner,

v.

HECTOR RIOS
(Name of warden, jailor
or other person having
power to release the
petitioner)
Respondent.

EVIDENTIARY HEARING
REQUESTED

Instructions — Read Carefully

Make sure that all information provided in this form is true and correct. Make sure that all necessary documents are attached, or explain why the documents are not being included. If you are currently incarcerated, you may file the petition without payment of the filing fee. If you are not incarcerated and are seeking free process, complete Form 9-403.

Finally, you must complete the certificate of service and mail or otherwise serve copies of this petition on the respondent and the district attorney in the county in which the petition is filed. You must file the original petition and one copy with the Clerk of the District Court. You should keep a copy for your own records.

PETITION FOR WRIT OF HABEAS CORPUS¹

1. MARTIN GONZALES (name of person in custody) is imprisoned or otherwise restrained at OTERO COUNTY PRISON FACILITY (name of facility and county of detention) by HECTOR RIOS, WARDEN (name and title of person having custody).

2. This petition ☒ seeks to vacate, set aside or correct an illegal sentence or order of confinement (i.e., ineffective assistance of counsel, illegal search and seizure, involuntary confession, or other matters relating to the trial or sentence the confined person received).

[] challenges confinement or conditions of confinement or matters other than the sentence or order of confinement. (This applies only to matters arising after the confined person arrived at the institution, i.e., county jail confinement, mental hospital confinement, detention

facility confinement, good time credit, misconduct report, prison due process violation or parole).

3. State concisely the facts upon which the confined person bases the claim:

PLEASE SEE ATTACHED NARRATIVE, "STATEMENT OF CLAIM."

4. State concisely the grounds and law, or other legal authorities on which the confined person bases the claim:

PETITIONER CONTENDS HIS CONVICTIONS WERE OBTAINED IN VIOLATION 5TH, 6TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION IN ADDITION TO ART. 11, § 14, 15, AND 18 OF THE NEW MEXICO STATE CONSTITUTION.

5. Have the grounds being raised in this petition been raised previously in your direct appeal? If so, explain the result. If not, explain why not:

NO. PETITIONER WAS REPRESENTED BY APPELLANT COUNSEL. COUNSEL DID NOT CONSULT WITH PETITIONER WHEN DETERMINING WHAT GROUNDS TO PRESENT ON APPEAL. WHEREFORE, PETITIONER IS UNABLE TO ADDRESS THIS QUESTION KNOWINGLY.

6. Have the grounds raised in this petition been raised previously in another petition for a writ of habeas corpus? If so, explain the result. If not explain why not:

NO. PETITIONER IS A LAYMAN OF THE LAW, AND UNTIL RECENTLY BEING RETURNED TO NEW MEXICO FROM MINNESOTA, HAD NO ACCESS TO NEW MEXICO RULES OF CRIMINAL PROCEDURE OR NEW MEXICO CASELAW. THUS, ONLY RECENTLY DISCOVERED THE FUNDAMENTAL ERRORS SET FORTH HEREIN.

7. Briefly describe the relief requested:

PETITIONER SEEKS TO VACATE ALL ILLEGAL CONVICTIONS AND EXERCISE HIS RIGHT TO TRIAL FREE OF FUNDAMENTAL ERROR.

8. State the nature of the court proceeding resulting in the confinement (i.e., criminal prosecution, civil commitment, etc.), including:

(a) case name:

STATE OF NEW MEXICO V. MARTIN GONZALES

(b) docket number:

D-1329-CR-2003-00057

(c) name of judge:

GEORGE P. EICHWALD

(d) name and location of the court in which the proceeding was held:

THIRTEENTH JUDICIAL DISTRICT COURT
1500 IDALIA RD BLDG A, P.O. BOX 600, BERNALILLO, NM 87004

9. State the date of the final judgment, order or decree for confinement:

24 MARCH, 2005

10. Attach a copy of the judgment, order or decree. If not, describe your sentence.

SEE ATTACHED.

11. Was the conviction the result of:
____ Guilty plea
____ No Contest plea (*nolo contendere*)
☒ Finding of guilty by judge or jury
12. Was the confined person represented by an attorney during the proceedings resulting in the confinement?
☒ Yes
____ No
13. If you answered "yes" to (12), list the name and address of each attorney who represented the confined person:
ANGELA R. LUTAN
(LKA) 1218 LOMAS BLVD NW, ALBUQUERQUE, NM. 87102
14. Did you appeal your conviction?
☒ Yes (Go to 15)
____ No (Go to 16)
15. If you answered "yes" to (14), list:
(a) The name of each court to which an appeal was taken:
IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO
- (b) The case name and docket number for each appeal:
STATE V. MARTIN GONZALES; A-1-CA-25,847
- (c) The date each appeal was filed and decided: (*Attach a copy of each opinion or order*)
NOTICE OF APPEAL FILED 15 APRIL, 2005 (9 APRIL, 2005 PRO SE NTC).
MEMORANDUM OPINION FILED 05 FEBRUARY, 2008 (AFFIRMED)
- (d) A summary of the grounds upon which each appeal was based:
SPEEDY TRIAL; IAC; CRUEL AND UNUSUAL PUNISHMENT.
- (e) The result of each appeal:
AFFIRMED ON 05 FEBRUARY, 2008
MANDATE ISSUED 24 APRIL, 2008
- (f) The name and address of the attorney on appeal:
LIANE KERR
P.O. BOX 10491
ALBUQUERQUE, NM 87184-0491
16. If you answered "no" to (14), state the reasons for not appealing:
N/A
17. Apart from any appeals listed in (15), have any other post conviction applications, petitions or motions, been filed with regard to this same imprisonment or restraint?

✓ Yes (Go to 18)
 No (Go to 19)

18. If you answered "yes" to (15), list with respect to each such petition or motion:

(a) The type of proceeding: SEE ATTACHED, 1B, CONTINUED.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS IN THE NEW MEXICO SUPREME COURT

(b) The name and date of each case:

MARTIN GONZALES V. STATE OF NEW MEXICO

(c) the docket number:

5-1-SC-30,954

(d) the court, the administrative agency, or institutional grievance committee from which relief was sought:

NEW MEXICO COURT OF APPEAL

(e) the result of each proceeding. (Attach a copy of each decision.)

DENIED, 14 MARCH, 2008

(f) The issues raised in each proceeding:

THE NMCA ERRED IN ITS AFFIRMANCE OF MR. GONZALES'S APPEAL.

(g) State whether a hearing was held in connection with each of these proceedings:

NO.

(h) State whether the confined person was represented by an attorney in each proceeding and, if so, the attorney's name and address:

NO.

19. Do you seek the appointment of counsel to represent you?²

✓ Yes
 No

VERIFICATION

STATE OF NEW MEXICO

COUNTY OF OTERO

I, the undersigned, being first duly sworn upon my oath, state that I am the petitioner in this action. I have read the foregoing petition and know and understand its contents, and the information contained herein is true and correct to the best of my knowledge, information and belief. On _____, _____ (date), I deposited this petition in the internal mail system of the institution in which I am confined, properly addressed with any necessary postage prepaid, for forwarding to the district court at the following address:

THIRTEENTH JUDICIAL DISTRICT Court (name of court)

BERNALILLO (city), New Mexico, 87004 (zip code).

QUESTION 18. CONTINUED, pg 1

a. PETITION FOR WRIT OF HABEAS CORPUS

b. MARTIN GONZALES V. GEORGE TAPIA, 06 JANUARY, 2009

c. 01329-CV-09-024

d. THIRTEENTH JUDICIAL DISTRICT COURT, SANDOVAL COUNTY

e. DENIED, 03 MAY, 2018

f. GROUND ONE: THE MAGISTRATE COURT OF SANDOVAL COUNTY, NEW MEXICO, ISSUED A SEARCH WARRANT, SIGNED BY JUDGE MARY HUMPHREY, TO COLLECT DNA EVIDENCE (NAPKINS) THAT WAS NEVER PRODUCED AT TRIAL.

GROUND TWO: THE PETITIONER WAS DENIED THE OPPORTUNITY TO BRING FORTH ANY WITNESSES, INCLUDING AN EYE-WITNESS TO SUPPORT HIS ALIBI FOR DEFENSE

GROUND THREE: THE PETITIONER WAS DENIED FULL DISCOVERY THRU HIS SUBPEONA DUCES TECUM. THE PETITIONER HAS YET TO RECEIVE FULL DISCOVERY TO THIS DAY. POLICE REPORTS STATE THAT THEY TOOK PICTURES THE PETITIONER HAS NEVER RECEIVED OR SEEN THESE PICTURES. THERE IS ALSO THE CASE WITH THE SEARCH WARRANT FOR DNA EVIDENCE ON NAPKINS. THE PETITIONER HAS NEVER SEEN THESE NAPKINS OR RECEIVED A COPY OF THE DNA RESULTS. PETITIONER BELIEVES THAT THIS AND OTHER EVIDENCE IS VITAL PROOF OF HIS INNOCENCE. THESE SUBPEONA DUCES TECUM REQUESTING DISCOVERY WERE GRANTED BY THE COURT TO NO AVAIL.

g. YES.

h. BRIAN TUCKER, NMLDPD

QUESTION 18. CONTINUED, pg 2

- a. PETITION FOR WRIT OF HABEAS CORPUS (SECOND)
- b. MARTIN GONZALES V. GEORGE TAPIA, 27 MARCH, 2009
- c. D-1329-CR-2003-00057
- d. THIRTEENTH JUDICIAL DISTRICT COURT, SANDOVAL COUNTY
- e. DENIED, 10 AUGUST, 2018
- f. GROUND ONE: PETITIONER IS ENTITLED TO A NEW TRIAL BECAUSE NEWLY DISCOVERED EVIDENCE UNDERMINDS THE PROSECUTION'S THEORY OF THE CASE. THE VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL, AND TO DUE PROCESS OF LAW, AS GUARANTEED BY AMENDMENTS 5 AND 14 TO THE U.S. CONSTITUTION, AND ARTICLE II, SEC 14 AND 18 TO THE NEW MEXICO CONSTITUTION. SEE HOUSE V. BELL, 126 S. CT. 2064 (2006).

GROUND TWO: EVIDENCE USED TO CONVICT PETITIONER WAS OBTAINED FROM THE POLICE BY DELIBERATELY ELICITING INCRIMINATING STATEMENTS FROM PETITIONER AFTER HE HAD BEEN CHARGED, IN VIOLATION OF THE RIGHT TO COUNSEL. THIS VIOLATED THE PETITIONER'S RIGHT TO COUNSEL, AND RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY AMENDMENTS 6, 5, AND 14 TO THE U.S. CONSTITUTION, AND ARTICLE II, SECTION 14, 15, 17, AND 18 OF THE NEW MEXICO CONSTITUTION. SEE U.S. V. MASSIAH, 377 U.S. 201 (1964).

g. No.

h. No.

(Signature)

(Address)

PNM No., if applicable

SUBSCRIBED AND SWORN TO before me this _____ day of

_____, _____, by

(Name of petitioner)

Notary Public

My Commission Expires:

*NOT REQUIRED UNDER
CURRENT REVISION OF
5-802, NMRA.*

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition were served upon the respondent and the district attorney in the county in which the petition is filed by

_____, _____ (describe manner of service), this _____ day of

_____, _____.

(Signature of petitioner)

USE NOTE

1. After this petition is reviewed by the Court, the Court will enter the order granting or denying the writ or ordering a response before further action. The order shall be prepared by the Court.

2. Petitioners who are incarcerated at the time of filing the petition need not file a motion for free process and may file the petition without payment of the applicable filing fee. See Rule 5-802(D)(2) NMRA

[Adopted, effective August 1, 1989; as amended by Supreme Court Order No. 09-8300-008, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

QUESTION 3. STATE CONCISELY THE FACTS UPON WHICH THE
CONFINED PERSON BASES THE CLAIM.

STATEMENT OF CASE

PETITIONER, MARTIN GONZALES, PRO SE, WAS CONVICTED OF
183 COUNTS IN THE THIRTEENTH JUDICIAL DISTRICT IN VIOLATION
OF THE V, VI, AND XIV AMENDMENTS OF THE UNITED STATES
CONSTITUTION, IN ADDITION TO ART. 11, §§ 14, 15, AND 18 OF
THE NEW MEXICO CONSTITUTION.

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INTRODUCTION

MR. GONZALES WAS CHARGED BY GRAND JURY INDICTAMENT FILED IN THE THIRTEENTH JUDICIAL DISTRICT COURT ON FEBRUARY 06, 2003. THE INDICTMENT CONTAINED ONE HUNDRED AND NINETY-THREE COUNTS (193). THE CHARGES, WHEN BROKEN DOWN BY OFFENSE, CONSISTED OF SIXTY-FOUR (64) COUNTS OF CRIMINAL SEXUAL PENETRATION OF A MINOR (CSPM), SIXTY-FOUR (64) COUNTS OF CRIMINAL SEXUAL CONTACT OF A MINOR (CSCM), SIXTY-FOUR (64) COUNTS OF KIDNAPPING, AND ONE (1) COUNT OF BRIBERY OF A WITNESS. EACH COUNT OF CSPM WAS TEMPORALLY ASSOCIATED WITH ONE COUNT OF CSCM AND, ONE COUNT OF KIDNAPPING. FURTHERMORE, EACH COUNT FORMALLY CHARGED A COURSE OF CONDUCT RATHER THAN SEPERATE AND DISTINCT INCIDENTS. THE PROSECUTOR'S CHARGING SCHEME PURPOSEFULLY CONSTRUCTED SIXTY-FOUR (64) TRIADS OF ON-GOING ABUSE SEQUENTIALLY IN INTERVALS OF THIRTY (30) OR THIRTY-ONE (31) DAYS. ALTHOUGH, NOT ALWAYS COINCIDING WITH THE FIRST AND LAST DAYS OF EACH CALENDAR MONTH, THE CHARGING PERIODS ARE MOST EASILY IDENTIFIED AS BEING A "MONTH" IN DURATION. THE OVER-ALL TIME FRAME ENCOMPASSED BY THE ALLEGATIONS IS SECURELY DEMARCATED AS BEGINNING ON JULY 19, 1997 AND ENDING ON JULY 31, 2003; IN TOTO, APPROXIMATELY SIX AND ONE-HALF YEARS.

AT TRIAL, THE PROSECUTION PRESENTED TESTIMONIAL EVIDENCE THROUGH THE ALLEGED VICTIM, NICOLE LABO, THAT MR. GONZALES REPEATEDLY ABUSED HER ON AN INDETERMINATE NUMBER OF OCCASSIONS DURING EACH OF THE MONTH-LONG CHARGING PERIODS. MS. LABO'S TESTIMONY WAS

LIMITED TO A FEW DISCRETE INCIDENCES WITH SUBSTANTIAL PARTICULARITY.

FOR THIS REASON, M.S. LABO'S TESTIMONY IS APPROPRIATELY CHARACTERIZED AS NONDESCRIPT AND VAGUE, ESTABLISHING AT BEST, A GENERAL PATTERN OF CONDUCT. WHEN THE TRIAL CONCLUDED, THE JURY FOUND MR. GONZALES GUILTY ON ONE-HUNDRED AND EIGHTY-THREE (183) COUNTS.

THROUGH THIS PETITION, MR. GONZALES DECLARES, AND WILL DEMONSTRATE, THAT HIS CONVICTIONS WERE OBTAINED IN VIOLATION OF THE UNITED STATES CONSTITUTION AND, THE CONSTITUTION OF THE STATE OF NEW MEXICO.

ACCORDINGLY, HEREIN MR. GONZALES IDENTIFIES MULTIPLE EVENTS AT TRIAL THAT RESULTED IN CONSTITUTIONAL ERROR. EACH ERROR HAS BEEN PLAINLY IDENTIFIED AND IS CLEARLY DEPICTED WITHIN THE DISTRICT COURT RECORD.

MR. GONZALES CONFIDENTLY CONTENDS THAT RELIEF IS WARRANTED AS A MATTER OF CONSTITUTIONAL LAW.

ISSUES RAISED

3

ISSUE 1 DEPUTY DISTRICT ATTORNEY JOSEPH F. ARITE'S MISSTATEMENT OF LAW DURING CLOSING ARGUMENT RESULTED IN FUNDAMENTAL ERROR THAT REQUIRES ALL OF MR. GONZALES' CONVICTIONS TO BE VACATED;

ISSUE 2 THE TRIAL COURT VIOLATED ART. 11, §§ 14 AND 18 OF THE NEW MEXICO STATE CONSTITUTION, AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY (A) NOT ALLOWING MR. GONZALES THE OPPORTUNITY TO REPRESENT HIMSELF AT TRIAL; AND (B) DENYING HIS REQUEST TO BE HEARD;

ISSUE 3 AT TRIAL THE JURY HEARD TESTIMONIAL EVIDENCE AND ARGUMENT FROM THE STATE PERTAINING TO UNCHARGED AND UNSUBSTANTIATED ALLEGATIONS OF MR. GONZALES' PRIOR BAD ACTS. THESE ALLEGATIONS WERE IRRELEVANT TO A MATERIAL ISSUE, MORE PREJUDICIAL THAN PROBATIVE, SERVED ONLY AS PROPENSITY EVIDENCE, AND WAS IMPROPERLY ADMITTED CONTRARY TO RULES 11-402, 403, AND 404 NMRP. INTRODUCTION OF THE PRIOR BAD ACTS EVIDENCE RENDERED PETITIONER'S TRIAL FUNDAMENTALLY UNFAIR UNDER BOTH STATE AND FEDERAL CONSTITUTIONS;

ISSUE 4 THE THIRTEENTH JUDICIAL DISTRICT COURT LACKED JURISDICTION TO CONVICT PETITIONER OF CRIMES THAT ALLEGEDLY OCCURRED IN BERNALILLO COUNTY (SECOND JUDICIAL DISTRICT), AND OTERO COUNTY (TWELFTH JUDICIAL DISTRICT). PETITIONER RAISES THIS CLAIM UNDER THE PROTECTIONS OF ARTICLE II, SECTION 14 OF THE NEW MEXICO CONSTITUTION, AND THE V, VI AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION;

ISSUE 5 PETITIONER'S CONVICTIONS FOR SIXTY-ONE (61) COUNTS OF KIDNAPPING VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE PROSECUTED OR SENTENCED TWICE FOR SUBSTANTIALLY THE SAME OFFENSE. ADDITIONALLY, PETITIONER CONTENDS THAT THE NEW MEXICO LEGISLATURE DID NOT INTEND FOR MULTIPLE-DISCRETE-ACTS OF ALLEGED KIDNAPPING TO BE CHARGED AS A COURSE-OF-CONDUCT;

ISSUE 6 PETITIONER ASSERTS THAT CUMULATIVE ERROR REQUIRES THAT ALL CONVICTIONS BE VACATED AND THE MATTER SET FOR RETRIAL.

DEPUTY DISTRICT ATTORNEY JOSEPH F. ARITE'S MISSTATEMENT OF LAW DURING CLOSING ARGUMENT RESULTED IN FUNDAMENTAL ERROR THAT REQUIRES ALL OF MR. GONZALES' CONVICTIONS TO BE VACATED.

INTRODUCTION

AT TRIAL, MR. GONZALES' CONSTITUTIONALLY PROTECTED RIGHT TO DUE PROCESS WAS VIOLATED BY THE GOVERNMENT DURING DIRECT EXAMINATION OF NICOLE LARDO WHEN THE PROSECUTION ELICITED AND EMPHASIZED THAT THE ALLEGED SEXUAL ABUSE OCCURRED AT LEAST "ONCE A MONTH," DURING EACH OF THE SIXTY-FOUR ONE-MONTH-LONG CHARGING PERIODS. THEN SUBSEQUENTLY, DURING CLOSING ARGUMENTS, THE PROSECUTOR CONVEYED TO THE JURY THAT IT SHOULD FIND MR. GONZALES GUILTY ON EACH COUNT IF IT DETERMINED THAT THE CRIME CHARGED WITHIN EACH INSTRUCTION OCCURRED AT "LEAST ONCE" DURING THE ASSOCIATED CHARGING PERIOD. HOWEVER, EACH OF MR. GONZALES' 183 CONVICTIONS WERE CHARGED AS A COURSE-OF-CONDUCT, NOT AS SINGLE ACTS. THIS MISSTATEMENT OF LAW SUBSTANTIALLY EFFECTED THE OUTCOME OF PETITIONER'S TRIAL BY LOWERING THE STATE'S BURDEN OF PROOF FROM THE REQUISITE QUANTUM OF EVIDENCE REQUIRED TO OBTAIN A CONVICTION FOR A "COURSE-OF-CONDUCT" TO THE LESSER BURDEN REQUIRED TO PROVE A

DISCRETE ACT.

IT IS ALIENATIC CRIMINAL-LAW JURISPRUDENCE IN THIS COUNTRY THAT A "COURSE-OF-CONDUCT" MAY BE PROVEN ONLY WHEN A JURY DETERMINES THAT THE DEFENDANT COMMITTED MULTIPLE VIOLATIONS OF THE OFFENSED CRIMINAL STATUTE DURING A DELIMITED CHARGING PERIOD; NOT THAT THE DEFENDANT COMMITTED ONLY ONE VIOLATION OF THE STATUTE DURING A CHARGING PERIOD.

IN THE CASE AT BAR, THE PROSECUTION CONTRIVED AND EXECUTED A SINGLE-SIGHTED STRATEGY THAT BLATANTLY ENVIOLATED UPON THE CONSTITUTIONAL PROTECTIONS OF DUE PROCESS; PROTECTIONS THAT HAVE BEEN UNEDQUIVOCALLY UPHOLD BY EVERY JUDICIAL DISTRICT IN THIS COUNTRY FOR MORE THAN TWO HUNDRED YEARS. THE STATE'S UNETHICAL TRIAL STRATEGY COULD NOT POSSIBLY HAVE HAD ANYTHING TO DO WITH SUBSTANTIAL JUSTICE, BUT RATHER, AS IT TURNS OUT HAD EVERYTHING TO DO WITH OBTAINING A CONVICTION AT ANY AND ALL COSTS, INCLUDING THE DEPRIVATION OF MR. GONZALES' RIGHT TO A FAIR TRIAL. THE STATE OF NEW MEXICO MUST NOW LIVE WITH THE EXTREME CONSEQUENCES OF A FUNDAMENTAL ERROR THAT REQUIRES ALL OF MR. GONZALES' CONVICTIONS TO BE VACATED.

MR. GONZALES WAS INDICTED BY A SANDOVAL COUNTY GRAND JURY OF FEBRUARY 06, 2003. THE INDICTMENT NOTIFIED THE DEFENDANT THAT THE FOLLOWING CHARGES HAD BEEN FILED:

CRIMINAL SEXUAL PENETRATION OF A MINOR (CSPM)
(CHILD UNDER 13) (37 COUNTS), WITH ALTERNATIVE
CSPM (CHILD UNDER 13) (37 COUNTS);

CRIMINAL SEXUAL CONTACT OF A MINOR (CSCM)
(37 COUNTS);

CRIMINAL SEXUAL PENETRATION OF A MINOR (CSPM)
(CHILD 13 TO 16 YEARS OLD) (27 COUNTS);

CRIMINAL SEXUAL CONTACT OF A MINOR (CSCM)
(PERSON IN POSITION OF AUTHORITY) (27 COUNTS);

BRIBERY OF A WITNESS (THREATS - REPORTING) (1 COUNT);
KIDNAPPING (64 COUNTS).

THERE WERE A TOTAL OF 193 COUNTS BROUGHT AGAINST MR. GONZALES. FOR EVERY CSPM COUNT, THERE IS CORRESPONDING COUNTS OF CSCM AND KIDNAPPING. AT TRIAL, THREE COUNTS EACH OF CSPM, CSCM, AND KIDNAPPING WERE DISMISSED BY DIRECTED VERDICT. THE BRIBERY OF A WITNESS COUNT WAS VOLUNTARILY WITHDRAWN BY THE PROSECUTION. ULTIMATELY, MR. GONZALES WAS FOUND GUILTY ON 183 COUNTS. THE CONVICTION POTENTIALLY EXPOSED

MR. GONZALES TO AN INCARCERATION TERM OF 1,605 YEARS. AT SENTENCING THE COURT ORDERED ALL COUNTS OF CSCM SUBSUMED INTO THEIR ASSOCIATED CSPM COUNT. FURTHERMORE, THE COURT ORDERED ALL KIDNAPPING COUNTS TO RUN CONCURRENT WITH THEIR ASSOCIATED CSPM COUNT. WHEN IT WAS ALL SAID AND DONE, THE COURT GRACIOUSLY SENTENCED MR. GONZALES TO 873 YEARS.

THE CHARGES ENUNCIATED WITHIN THE GRAND JURY INDICTMENT CORRESPOND PRECISELY WITH THE JURY INSTRUCTIONS PRESENTED AT TRIAL. BOTH THE INDICTMENT AND JURY INSTRUCTIONS CLEARLY INDICATE THAT MR. GONZALES WAS CHARGED UNDER A COURSE-OF-CONDUCT THEORY FOR MULTIPLE ACTS OF CRIMINAL SEXUAL PENETRATION, CRIMINAL SEXUAL CONTACT, AND KIDNAPPING. SEE, E.G., STATE V. ALTENDERS, 109 N.M. 453, 465, 786 P.2d 680, 692 (Ct. App. 1989). EVERY INSTRUCTION, FOR EXAMPLE, STATES THAT THE CRIME CHARGED "HAPPENED IN NEW MEXICO ON OR BETWEEN [M, D, Y] AND [M, D, Y]." THE PHRASE "ON OR BETWEEN" IS APPLIED TO A COURSE-OF-CONDUCT CHARGE TO DEMONSTRATE A SPECIFIC TIME-FRAME WITHIN WHICH THE DEFENDANT IS ALLEGED TO HAVE COMMITTED MULTIPLE VIOLATIONS OF THE SAME STATUTE.

THIS DISCRETIONARY MODE OF PROSECUTION IS ESPECIALLY USEFUL WHEN A YOUTHFUL VICTIM OF ON-GOING OR REPEATED SEXUAL ABUSE IS UNABLE TO SPECIFICALLY RECALL AND

DESCRIBE SEPERATE INCIDENCES OF ABUSE. A VICTIM MAY BE UNABLE TO RECALL THE NUMBER OF ABUSIVE EXPERIENCES, WHETHER THEY WERE CONTACTS, PENETRATIONS, OR BOTH; THE LOCATION(S), OR NARROW THE TIME FRAME TO A DAY, WEEK, MONTH, OR YEAR. THE BEST A VICTIM MAY BE ABLE TO DO, AS WE HAVE HERE, IS ARTICULATE A GENERALIZED NARRATIVE THAT ALLOWS A JURY TO WEIGH THE CREDIBILITY OF THE VICTIM AND THE ACCUSED WITHOUT ANY CORROBORATING EVIDENCE TO SUPPORT GUILT. THIS CONSTRUCTION PROTECTS A DEFENDANT'S DUE PROCESS RIGHTS BY PROHIBITING THE GOVERNMENT FROM DIVIDING THE ALLEGED CONDUCT INTO INDISTINGUISHABLE COUNTS.

A COURSE-OF-CONDUCT CHARGE POSES ITS OWN DIFFICULTIES. FIRST, THE GOVERNMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT COMMITTED THE ALLEGED ACT NOT "AT LEAST ONCE" BUT ON MULTIPLE OCCASIONS WITHIN A WELL DEFINED CHARGING PERIOD. IN SOME INSTANCES THIS MAY BENEFIT THE DEFENSE, ESPECIALLY WHEN THE ALLEGED VICTIM IS MATURE. WHEN THERE IS NO WITNESS TO THE ALLEGED ABUSE, NO SCIENTIFIC, MEDICAL, OR TANGIBLE EVIDENCE INDICATING ABUSE, A JURY MAY REQUIRE MORE SPECIFICITY FROM AN OLDER VICTIM AS A MEASURE OF WEIGHING THE CREDIBILITY OF THE PARTIES. ALTERNATIVELY, A JURY IS TYPICALLY LESS CRITICAL OF THE VICTIM WHEN HE OR SHE IS OF A TENDER AGE. THIS FACTOR OFTEN INCREASES

THE LIKELIHOOD OF A CONVICTION.

THERE IS ANOTHER CRITICAL ADVANTAGE AFFORDED THE GOVERNMENT UNDER THE COURSE-OF-CONDUCT CHARGING SCHEME. THIS PARTICULAR MODE OF PROSECUTION DOES NOT REQUIRE JURY UNANIMITY. IN LAYMAN'S TERMS, JURORS DO NOT HAVE TO AGREE ON WHAT EVIDENCE ESTABLISHES WHAT SPECIFIC ACT(S) BEYOND A REASONABLE DOUBT. RATHER, THE JURORS MAY COME TO A CONSENSUS - BELIEF - THAT THE DEFENDANT COMMITTED MULTIPLE VIOLATIONS OF THE SAME STATUTE WITHIN THE CHARGING PERIOD BEYOND A REASONABLE DOUBT BASE SOLELY ON THE GENERALIZED TESTIMONY PROVIDED BY THE VICTIM. THIS TOO SIGNIFICANTLY INCREASES THE CHANCES FOR A CONVICTION BY ALLOWING CONJECTURE AND SPECULATION TO CREEP INTO THE DETERMINATION ANALYSIS.

ON THE OTHER HAND, THE PHRASE "ON OR ABOUT" INDICATES THAT THE CHARGE IS TIED TO A ONE-TIME-EVENT, OR IN OTHER WORDS, A SINGLE VIOLATION OF A STATUTE. THIS MODE OF PROSECUTION ALSO HAS ITS OWN PROBLEMS. WHERE THE GOVERNMENT CHOOSES TO CHARGE FOR A DISCRETE ACT THE WITNESS MUST BE MORE COMPELLING WHILE TESTIFYING. IN THIS INSTANCE THE STATE NEED ONLY TO PROVE OPPORTUNITY TO SATISFY REASONABLE DOUBT IN THE MINDS OF THE JURY IF AND WHEN THE PROSECUTION IS UNABLE TO PUT ANY CORROBORATING EVIDENCE BEFORE THE JURY. IS IT

EASIER TO CONVINCE A JURY THAT AN ALLEGATION OF ABUSE OCCURRED "AT LEAST ONCE" ON OR ABOUT A SPECIFIC DATE, OR THAT THE ALLEGATIONS OF ABUSE OCCURRED REPEATEDLY WITHIN A LIMITED TIME FRAME? CLEARLY, MULTIPLE VIOLATIONS REQUIRE SIGNIFICANTLY MORE EVIDENCE TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

THE GOVERNMENT HAS A GREAT DEAL OF DISCRETION WHEN DECIDING WHETHER OR NOT TO BRING CHARGES AGAINST A DEFENDANT FOR MULTIPLE DISCRETE ACTS OCCURRING "ON OR ABOUT" A GIVEN DATE, OR TO CHARGE THE DEFENDANT WITH A COURSE-OF-CONDUCT THAT ENCOMPASSES MULTIPLE ACTS HAVING OCCURRED "ON OR BETWEEN" A WELL-DEFINED SPAN OF TIME. THE CHARGING THEORY APPLIED TO A CASE CONSTRAINS THE GOVERNMENT TO A PARTICULARIZED SUFFICIENCY OF THE EVIDENCE OBLIGATION. AT MR. GONZALES' TRIAL THE GOVERNMENT WAS REQUIRED TO PROVIDE EVIDENCE OF A COURSE-OF-CONDUCT. LIKEWISE, THE JURY WAS REQUIRED TO FIND THAT MR. GONZALES WAS GUILTY OF A COURSE-OF-CONDUCT (MULTIPLE ACTS OF ABUSE) DURING EACH CHARGING PERIOD, AND NOT THAT HE HAD COMMITTED AN ACT OF ABUSE "AT LEAST ONCE" DURING EACH CHARGING PERIOD. MR. GONZALES' CONVICTIONS FOR THE CHARGED PATTERN OF CONDUCT DO NOT CARRY THE INDICIA OF RELIABILITY THAT SUBSTANTIAL JUSTICE MUST REQUIRE IN SERIOUS CRIMINAL CASES DUE TO MR. ARITE'S MISSTATEMENT OF LAW.

THUS, THE FACTS SUPPORTING CRIMINAL CONVICTIONS SHOULD NOT BE CAPABLE OF SHIFTING. DID THE JURY FIND MR. GONZALES GUILTY OF 183 COURSE-OF-CONDUCT COUNTS, OR GUILTY OF 183 DISCRETE ACTS OF ABUSE? GIVEN THE FACTS OF THIS CASE, THERE IS NO POSSIBLE WAY TO DETERMINE WHAT THE JURY MAY OR MAY NOT HAVE DECIDED. THIS DEGREE OF UNCERTAINTY DOES NOT COMPLY WITH THE CONSTITUTIONAL STANDARDS REQUIRED UNDER THE DUE PROCESS CLAUSE. A CRIMINAL CONVICTION SHOULD UNAMBIGUOUSLY STAND FIRMLY ON CONSTITUTIONAL FOOTINGS.

THE TRANSCRIPTS OF MR. GONZALES' CRIMINAL TRIAL EXPOSE THE PROSECUTION'S FRAUDULENT SCHEME DEVISED TO CONVICT. ARGUABLY, THE MOST DISCOURAGING COLLAR INFERRED FROM THIS UNFATHOMABLE REVELATION IS THAT MR. ARTE COULD NOT HAVE SO EASILY SUCCEEDED AT HIS MALFEASANCE IF OTHERS HAD NOT BEEN COMPLICIT. UNDERSTANDABLY, ANY REASONABLY MINDED PERSON CONFRONTED WITH THIS PROPOSITION WOULD NATURALLY BALK AT SUCH AN EXTRAORDINARY CLAIM. PETITIONER CONTENTS THAT THE FACTS SPEAK CLEARLY FOR THEMSELVES. THE PROSECUTION BROUGHT FORTH AND EMPHASIZED MISLEADING TESTIMONY THAT BATED THE JURY INTO BELIEVING A LEGAL FALLACY. THEN, DURING CLOSING ARGUMENTS, HE SPRUNG THE TRAP. THE UNWARY JURY FELL PREY TO GOVERNMENT DECEPTION.

RESEARCH HAS FAILED TO IDENTIFY ANOTHER CASE SQUARELY IN ALL FOURS WITH THE FACTS PRESENTED IN THIS CASE. IT

SEEMS THAT RARELY DOES A SEASONED PROSECUTOR INADVERTENTLY MAKE A TRULY ATROCIOUS MISSTATEMENT OF LAW OF THIS MAGNITUDE.

MR. ARITE PRESENTED TO THE JURY THROUGH DIRECT EXAMINATION OF NICOLE LABO THAT UNTIL RECENTLY, MR. GONZALES HAD BEEN ABUSING HIS STEP-DAUGHTER FOR YEARS. THIS ABUSE, ACCORDING TO THE WITNESS, HAPPENED SPORADICALLY AT TIMES, AND QUITE REGULARLY AT OTHERS. SHE STATED DURING HER TESTIMONY THAT THE ABUSE OCCURRED AT LEAST ONCE A MONTH, EVERY DAY, OR EVERY FEW DAYS THROUGHOUT THE CHARGING PERIOD. SHE ALSO CLAIMED TO HAVE REBUFFED MR. GONZALES' ADVANCES AT TIMES. MS. LABO COULD NOT CONCLUSIVELY LINK ANY ABUSE, OR ITS FREQUENCY, TO ANY SPECIFIC CHARGING PERIOD EXCEPT FOR THE LAST INCIDENT, WHICH TOOK PLACE OUTSIDE THE JURISDICTIONAL BOUNDARIES OF THE THIRTEENTH JUDICIAL DISTRICT COURT.

MS. LABO WAS UNABLE TO DISTINGUISH MOST OF THE ABUSIVE ACTS ONE FROM ANOTHER. TESTIMONY PITCHED AT SUCH A LOW LEVEL OF SPECIFICITY MAY SUFFICE TO CONVICT A DEFENDANT FOR A COURSE-OF-CONDUCT CHARGE, BUT AS MR. ARITE MADE CLEAR TO THE JURY, THE ABUSE HAPPENED "AT LEAST ONCE" A MONTH DURING THE CHARGING PERIODS. ONCE A MONTH IS NOT A COURSE-OF-CONDUCT. THE OPPOSITE IS ALSO TRUE. INDISTINGUISHABLE ACTS CANNOT

SERVE AS THE TANGIBLE CORE TO FINDING A DEFENDANT GUILTY OF A SPECIFIC ACT BEYOND A REASONABLE DOUBT.

MS. LABO WAS ABLE TO DESCRIBE A FEW INDIVIDUALIZED INCIDENTS WITH PARTICULARITY. THE STATE, NEVERTHELESS, FAILED TO CHARGE ANY OF THOSE INCIDENTS AS SINGLE VIOLATIONS OF THE STATUTES. FOR THE MOST PART, MS. LABO'S TESTIMONY CAN ONLY BE CHARACTERIZED AS VAGUE AND AMBIGUOUS. EVEN IF IT COULD BE REASONABLY STATED THAT THE JURY FOUND MR. GONZALES GUILTY OF THREE JURISDICTIONAL AND DISTINCT ACTS (I.E., HER BEDROOM, THE MASTER BEDROOM, AND THE WATER TOWER INCIDENT) IT IS IMPOSSIBLE TO IDENTIFY THE CHARGING PERIOD WITHIN WHICH A JURY MAY HAVE ASSOCIATED THESE PARTICULAR ACTS. FOR THE COURT TO MAKE SUCH A SPECULATIVE CONCLUSION WOULD ENCRATCH UPON THE PROVINCE OF THE JURY BY SUBSTITUTING THE COURT'S OPINION FOR JURY UNANIMITY.

TOWARD THE END OF THE PROSECUTOR'S TESTIMONY MR. ARITE NARROWED THE SCOPE OF HIS EXAMINATION TO SPECIFICALLY ILLUMINATE THE FREQUENCY OF THE ABUSE. MS. LABO'S TESTIMONY AT THIS POINT IS HIGHLY DISPOSITIVE OF PETITIONER'S ARGUMENT AND THEREFORE HAS BEEN INCORPORATED VERBATIM HEREIN; ANY DISCREPANCIES ARE UNINTENTIONAL.

FOR THE STATE, MR. ARITE:

Q. NICOLE, DURING EACH MONTH, THE TIME THAT YOU WERE 10,
SO BETWEEN JULY 19 OF '97 AND JULY 19 OF '98, EACH ONE
OF THOSE MONTHS, DID HE HAVE SEX WITH YOU AT LEAST
ONCE?

WITNESS, NICOLE LABO:

A. AT LEAST ONCE.

Q. AND YOU SAID THAT WAS WHEN THE FREQUENCY WAS
ROUGHLY ONCE A MONTH OR SO BECAUSE HE WAS STILL--
HE WAS STILL GETTING INSIDE YOU ALL THE TIME?

A. UH-HUH.

Q. OR ALL THE WAY, I MEAN?

A. YES.

Q. AND DURING EACH MONTH FROM THE 11TH BIRTHDAY
IN JULY OF '98 UNTIL THE 12TH OF JULY OF '99, DID HE
HAVE SEX WITH YOU?

A. UH-HUH.

Q. AT LEAST ONCE A MONTH OR WAS THE FREQUENCY MORE?

A. MAYBE A LITTLE BIT MORE.

Q. BUT IT WAS AT LEAST ONCE A MONTH?

A. YES. ONCE A MONTH.

Q. FOR EACH OF THOSE MONTHS? AND WHEN YOU WERE 12, IN
JULY OF '99 TO JULY OF 2000, DID HE HAVE SEX WITH YOU
AT LEAST ONCE IN EACH OF THOSE MONTHS?

END. [VOL. 1, TR-66]

A. YES.

Q. AND, AGAIN, WHAT WAS THE FREQUENCY THEN?

A. ABOUT THE SAME.

Q. WAS ABOUT THE SAME AS WHAT?

A. AS THE YEAR BEFORE. IT REALLY WASN'T PICKED UP THAT
MARCH, IT WAS STILL MAYBE TWICE A MONTH, BUT AT LEAST
ONCE A MONTH.

Q. AND THEN, THAT'S ABOUT THE TIME HE GOT YOU PREGNANT?

A. UH-HUH.

Q. THIRTEEN?

A. YEAH.

Q. YOUR 13TH BIRTHDAY?

A. UH-HUH.

Q. AND SO FROM THE TIME -- AND YOU SAID YOU DISCOVERED YOU
WERE PREGNANT ABOUT A MONTH OR TWO LATER?

A. YEAH, ABOUT.

Q. AND THE ABORTION WAS AFTER THAT, OKAY. BUT DURING THAT
TIME, HE DIDN'T HAVE SEX WITH YOU?

A. NO.

Q. SO THAT WOULD HAVE BEEN ROUGHLY AUGUST TO DECEMBER?

A. UH-HUH.

END. [VOL. 1, TR-67]

Q. AND HOW OFTEN?

A. IT PICKED --

Q. I HEARD YOU SAY -- WAS IT AT LEAST ONCE A MONTH
IN EACH OF THOSE MONTHS?

A. YEAH.

Q. BUT IT WAS MORE OFTEN THAN THAT?

A. YEAH.

Q. AND THE SAME WHEN YOU WERE 14?

A. IT WAS MORE TIMES A MONTH.

Q. BUT AT LEAST ONCE EVERY SINGLE MONTH WHEN YOU
WERE 14?

A. UH-HUH.

Q. AND WHEN YOU WERE 15, WAS IT AT LEAST ONCE A MONTH
EACH TIME?

A. YES.

Q. EACH ONE OF THOSE MONTHS UNTIL YOU TOLD?

A. YES.

MR. ARITE MADE SURE TO EMPHASIZE "AT LEAST ONCE A MONTH"³⁹ DURING HIS EXAMINATION OF MS. LABD. THIS LINE OF QUESTIONING IS BIZARRE IN A TRIAL WHERE ALL COUNTS WERE CHARGED UNDER A COURSE-OF-CONDUCT THEORY LIMITED TO ONE-MONTH-LONG CHARGING PERIODS. MR. ARITE WOULD, HOWEVER, UNRAIL HIS TRIAL STRATEGY DURING CLOSING ARGUMENTS.

MR. ARITE: CLOSING ARGUMENT

A CRIME IS CHARGED FOR EACH MONTH FROM WHEN
NICOLE IS 10 YEARS OLD UNTIL THE DEFENDANT WAS STOPPED
ON JANUARY 21, 2003. SO FOR EACH MONTHLY PERIOD,
FROM JULY 19TH, 1997 UNTIL JANUARY 21, 2003, THAT IS
A CORRESPONDING CHARGE FOR CRIMINAL SEXUAL PENETRATION[.]

.....

[VOL. 111, TR-17] CLOSING ARGUMENT CONTINUED.

AND SO FOR EACH MONTH WE GO THROUGH AND THAT'S
ONE COUNT FOR EACH ONE OF THOSE MONTHS. NOW, NICOLE IS
VERY, VERY CLEAR TO YOU THAT THIS OCCURRED AT LEAST
ONCE IN EACH ONE OF THOSE MONTHLY PERIODS. MANY OF
THOSE MONTHS IT OCCURRED MORE THAN ONCE, BUT IT
OCCURRED AT LEAST EACH -- ONE TIME EACH OF THOSE
MONTHS.

.....

[VOL. 111, TR-18] CLOSING ARGUMENT CONTINUED.

AND THEN EACH MONTH -- SHE ALSO DESCRIBED HOW

WHEN HE WOULD HAVE INTERCOURSE WITH HER, HE
WOULD TOUCH HER VAGINAL AREA AND HER BREASTS.

.... [7, THERE IS A CHARGE FOR EACH MONTH
BECAUSE SHE DESCRIBED TO YOU HOW THIS OCCURRED
EACH AND EVERY MONTH DURING THIS PERIOD.

SHE DESCRIBES TO YOU HOW HE IS ON TOP OF HER EVERY
SINGLE TIME, AND WHEN HE'S ON TOP OF HER, SHE CAN'T
GET AWAY. THAT IS KIDNAPPING. SHE IS BEING RESTRAINED.

....

[VOL. 111, TR-19] CLOSING ARGUMENT CONTINUED.

SHE CAN'T GO. THAT'S KIDNAPPING. AGAIN, THERE IS A
CHARGE FOR EACH AND EVERY MONTH BECAUSE SHE
DESCRIBES TO YOU HOW THIS OCCURRED AT LEAST ONCE
EACH AND EVERY MONTH DURING THIS TIME PERIOD.

THE RECORD IN THIS CASE IS UNDENIABLY CLEAR. PETITIONER
INCORPORATES THE CHARGING DATA WITH REFERENCES TO
DEMONSTRATE THE MAGNITUDE OF THE PROSECUTOR'S
MISSTATEMENT OF LAW. (SEE, TABLE 1).

PROSECUTORIAL MISCONDUCT CAN CAUSE CONSTITUTIONAL ERROR IN TWO WAYS. FIRST, IT CAN PREJUDICE A SPECIFIC CONSTITUTIONAL RIGHT, AMOUNTING TO A DENIAL OF THE RIGHT. SECOND, ABSENT INFRINGEMENT ON A SPECIFIC CONSTITUTIONAL RIGHT, A PROSECUTOR'S MISCONDUCT MAY IN SOME INSTANCE RENDER A TRIAL SO FUNDAMENTALLY UNFAIR AS TO DENY A DEFENDANT OF DUE PROCESS. FOR EXAMPLE, "IT IS IMPROPER FOR THE PROSECUTION TO MISSTATE THE LAW IN ITS CLOSING ARGUMENTS." UNITED STATES V. HOLLIS, 971 F.2d 1441, 1445 (10TH CIR. 1992); LE V. MULLIN, 311 F.2d 1002, 1006 (10TH CIR. 2002).

SERIOUS PROSECUTORIAL MISCONDUCT HAS BEEN REVIEWED VARIOUSLY AS A CLAIM OF (1) PLAIN ERROR, (2) DEPRIVATION OF THE RIGHT TO A FAIR TRIAL, AND (3) FUNDAMENTAL ERROR. STATE V. ROMERO, 94 N.M. 300, 609 P.2d 1256 (Ct. App. 1980). THE NEW MEXICO SUPREME COURT HAS DECEARNED THREE FACTORS TO CONSIDER IN THE ANALYSIS: (1) WHETHER THE STATEMENT INVADES SOME DISTINCT CONSTITUTIONAL PROTECTION; (2) WHETHER THE STATEMENT IS ISOLATED AND BRIEF, OR REPEATED AND PERVERSE; (3) WHETHER THE STATEMENT WAS INVITED BY THE DEFENSE. STATE V. SOSA, 2009-NMASC-056, P.26, 147 N.M. 351, 223 P.3d 346.

WHEN PROSECUTORIAL MISSTATEMENTS OF LAW OCCUR DURING CLOSING ARGUMENTS ARE THE LAST THING A JURY HEARS BEFORE RETIRING TO DELIBERATE, AND THEREFORE HAVE A CONSIDERABLE

INFLUENCE ON HOW THE JURY WEIGHS THE EVIDENCE. THIS IS NOT A CASE WHERE THE MISCONDUCT OF THE PROSECUTING ATTORNEY WAS SLIGHT OR CONFINED TO A SINGLE INSTANCE, BUT ONE WHERE THE MISCONDUCT INUNDATED THE TRIAL FROM BEGINNING TO END. MOST CRITICALLY, THE PROSECUTOR'S PATTERN OF CONDUCT ADVANCED A THEORY OF LAW THAT LOWERED THE STATE'S BURDEN OF PROOF. BECAUSE THERE WAS NO OBJECTION FROM DEFENSE COUNSEL, AND NO SPADE ADMONISHMENT FROM THE COURT, THE JURY WAS PERMITTED TO ADOPT THE PROSECUTOR'S VERSION OF THE LAW. THUS, DUE TO THE PROSECUTOR'S ERRONEOUS STATEMENT OF LAW, THE JURY'S VERDICT WAS BASED ON AN INSUFFICIENT QUANTITY OF EVIDENCE AS A MATTER OF LAW.

NEW MEXICO RECOGNIZES THAT IT IS IMPROPER FOR A PROSECUTOR TO "MISSTATE THE LAW" TO THE JURY DURING CLOSING ARGUMENTS. STATE V. DIAZ, 1982-NMCA-091, P18, 100 N.M. 210, 668 P.2d 326. HOWEVER, "FUNDAMENTAL ERROR ONLY ARISES WHEN THE PROSECUTOR ENGAGES IN MISCONDUCT THAT COMPROMISES THE DEFENDANT'S RIGHT TO A FAIR TRIAL." STATE V. RUIZ, 1979-NMASC-1, P55, 126 N.M. 438, 971 P.2d 829. WHEN THE MISCONDUCT IS SO FLAGRANT AND PREJUDICIAL AS TO COMPROMISE THE FAIR ADMINISTRATION OF JUSTICE, THE CONCEPTS OF A FAIR TRIAL AND SUBSTANTIAL JUSTICE ARE THE SAME. HERE, THE PROSECUTOR'S COMMENTS RELIEVED THE PROSECUTION OF ITS OBLIGATION TO OVERCOME A SUBSTANTIAL BURDEN OF PROOF AS TO EVERY COURSE-OF-

CONDUCT COURT NOTICED IN THE INDICTMENT. IN ESSENCE, THE PROSECUTOR'S CONDUCT ALLOWED THE JURY TO CONVICT MR. GONZALES FOR DISCRETE ACTS FOR WHICH HE WAS NEVER CHARGED. STATE V. VILLA, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973).

WE CANNOT READ A JUROR'S MIND TO DETERMINE THE EFFECT OR INFLUENCE THE IMPROPER STATEMENTS HAD ON THE JURY'S DETERMINATION. WE CAN SAY THAT "IF THE PROSECUTOR'S CLOSING COMMENTS WERE INAPPROPRIATE, THE DEFENDANT MUST SHOW THAT THE COMMENTS WERE PREJUDICIAL AND PREVENTED HIM FROM RECEIVING A FAIR TRIAL IN ORDER TO PREVAIL ON APPEAL." STATE V. SELLARS, 1994-NMCA-053, P.2d, 117 N.M. 674, 875 P.2d 400. IN THIS CASE, WHEN THE JURY DETERMINED THAT EACH CRIME CHARGED WAS PERPETRATED "AT LEAST ONCE" - AS THE PROSECUTOR STRESSED - DURING EACH CHARGING PERIOD, PREJUDICIAL-FUNDAMENTAL ERROR OF A CONSTITUTIONAL FORCE INFILTRATED THE SANCTUARY OF JUSTICE.

NEW MEXICO HAS HELD THAT A COURT DOES NOT ABUSE ITS DISCRETION IN GRANTING A NEW TRIAL WHERE THE "PROSECUTOR MADE A LEGALLY INCORRECT STATEMENT OF THE LAW" AND "THE EVIDENCE OF GUILT IS NOT OVERWHELMING." STATE V. GONZALES, 105 N.M. 238, 239-41, 731 P.2d 381, 382-84 (Ct. App. 1986). SEE ALSO, E.G., SMITH V. HARN, 129 F.3d 400 (3d Cir. 1997) ("BECAUSE THE PROSECUTOR REPEATEDLY URGED THE JURY TO

BASE ITS VERDICT ON A THEORY PREDICATED ON A FUNDAMENTAL CONSTITUTIONAL ERROR, THE COURT FOUND THAT THE ERROR HAD A 'SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE' ON THE VERDICT THE COURT VACATED THE JUDGMENT AGAINST THE DEFENDANT." (PERSUASIVE CITATION). THIS CLAIM, THEREFORE, DOES NOT LIE ATOP UNFURROWED SOIL. PETITIONER IS NOT BREAKING NEW GROUND; THE LEGAL LANDSCAPE IS FERTILE WITH BINDING AND PERSUASIVE PRECEDENT.

BASED ON THE FACTS OF THIS CASE, EVEN THE PRESUMPTION OF CORRECTNESS GIVES WAY TO NEW MEXICO PRECEDENT. IN OLGUIN, THE COURT STATED THAT "A CONVICTION UNDER A GENERAL VERDICT MUST BE REVERSED IF ONE OF THE ALTERNATIVE BASES OF A CONVICTION IS LEGALLY INADEQUATE. 120 N.M. AT 741, 906 F.2D AT 732. HERE, THE COURT IS FACED WITH THE QUESTION OF WHETHER THE JURY CONVICTED MR. GONZALES FOR A COURSE-OF-CONDUCT OF FOR DISCRETE ACTS THAT OCCURRED "AT LEAST ONCE A MONTH." UNDER EITHER THEORY, THE END RESULT IS UNAVOIDABLY THE SAME. CONSTITUTIONAL CERTITUDE REQUIRES, AND JUSTICE DEMANDS, THAT ALL OF MR. GONZALES CONVICTIONS BE VACATED.

THE TENTH CIRCUIT, MUCH LIKE NEW MEXICO, HAS HELD THAT A DEFENDANT IS ENTITLED TO RELIEF ONLY IF THE ERROR "HAD SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE IN DETERMINING THE JURY'S VERDICT." VIGIL V. ZAVARRA, 298 F.3D 935, 940 (10TH CIR. 2002).

THE UNITED STATES SUPREME COURT HAS ALSO VISITED THIS TOPIC ON MANY OCCASIONS. PRIMARILY, THE COURT HAS MAINTAINED THAT PROSECUTORIAL MISCONDUCT VIOLATES A DEFENDANT'S DUE PROCESS IF IT "INFECTS THE TRIAL WITH UNFAIRNESS AND DENIES THE DEFENDANT'S RIGHT TO A FAIR TRIAL."³¹ DONNELLY V. DECHRISTOFORO, 416 U.S. 637, 647-48, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). HOLDING THAT, "THE RELEVANT QUESTION IS WHETHER THE PROSECUTOR'S COMMENTS SO INFECTED THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS."³² DARDEN V. WAINWRIGHT, 477 U.S. 168, 106 S.Ct. 2464 (1986). THE FOLLOWING YEAR THE HIGH COURT WENT ON TO PROFFER THAT "THE ULTIMATE QUESTION IS WHETHER THE JURY WAS ABLE TO FAIRLY JUDGE THE EVIDENCE IN LIGHT OF THE PROSECUTOR'S CONDUCT."³³ GREER V. MILLER, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); SEE ALSO, WILSON V. SIMMONS, 536 F.3d 1064, 1117 (10TH CIR.2008). (SAME).

THE COURT EXPLAINED IN MILLER THAT IN SOME INSTANCES, PROSECUTORIAL MISCONDUCT MAY SO INFECT THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS. "TO CONSTITUTE A DUE PROCESS VIOLATION, THE PROSECUTORIAL MISCONDUCT MUST BE OF SUFFICIENT SIGNIFICANCE TO RESULT IN THE DENIAL OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL. MILLER, AT 765-766. SEE ALSO, UNITED STATES V. AGURS, 427 U.S. 97, 108, 96 S.Ct. 2372, 49 L.Ed.2d 342 (1976).

IN 2015 THE UNITED STATES SUPREME COURT REITERATED THE SENTIMENTS OF DONNELLY AND DARDEN IN DAVIS V. AYALA, 576 U.S. 257, 135 S.Ct. 1287, 192 L.Ed.2d 323 (2015). WHEREIN, THE COURT FOUND MISSTATEMENTS THAT LOWERED THE PROSECUTOR'S BURDEN OF PROOF RESULTED IN "ACTUAL PREJUDICE." NOTABLY, ON A RELATED MATTER, THE HENDERSON COURT FOUND THAT "AN OMISSIONAL OR INCOMPLETE INSTRUCTION, IS LESS LIKELY TO BE PREJUDICIAL THAN A MISSTATEMENT OF LAW." HENDERSON V. KIBBE, 431 U.S. 145, 155, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). PROSECUTORIAL MISSTATEMENTS OF THE LAW CANNOT BE TAKEN LIGHTLY. THEY ARE AMONG THE MOST EGREGIOUSLY PREJUDICIAL FORMS OF MISCONDUCT TO CORRUPT THE TRIAL PROCESS. SEE GENERALLY, BERGER V. UNITED STATES, 295 U.S. 78, 89, 55 S.Ct. 609, 79 L.Ed. 1314 (1935).

THE NEW MEXICO JUDICIARY DOES NOT TAKE PROSECUTORIAL MISCONDUCT LIGHTLY. THE REMEDY OF AUTOMATIC REVERSAL, REGARDLESS OF DETECTION, IN SIGNIFICANT PART IS A PROPHYLACTIC MEASURE TO DETER PROSECUTORS FROM OBTAINING CONVICTIONS BY UNFAIR TACTICS. STATE V. HENNESSY, 114 N.M. 283, 1992-NMCA-069, 837 P.2d 1366; STATE V. GILLIHAN, 524 P.2d 1335 (N.M. 1974). IF THE NEW MEXICO JUDICIARY IS TO GIVE SUBSTANCE TO CONSTITUTIONAL RIGHTS, IT MUST BE WILLING TO CENSURE OFFICERS OF THE COURT WHO DISREGARD AND DISRESPECT THE LAW - DESPITE THE NATURE OF A CASE. CONTRARY TO POPULAR BELIEF, A JUDGE IS NOT A NEUTRAL ARBITRATOR.

A JUDGE'S LOYALTIES SHOULD ALWAYS LIE FIRST AND FOREMOST IN THE UNITED STATES CONSTITUTION AND THE PROTECTIONS IT AFFORDS US ALL. IT DOES NOT BEHOVE ANY COURT - INCLUDING THIS ONE - TO DECLARE THAT THE GOVERNMENT MAY DISREGARD THE LAW IN ORDER TO SECURE A CONVICTION OF AN ACCUSED. PUT SIMPLY, THE GOVERNMENT CANNOT BREAK THE LAW AS A MEANS OF ENFORCING THE LAW.

AS WITH ANY FUNDAMENTAL ERROR INQUIRY, A COURT WILL UPSET A JURY VERDICT ONLY (1) WHEN ERROR IS SO DOUBTFUL AS TO SHOCK THE CONSCIENCE, OR (2) WHEN THERE HAS BEEN AN ERROR IN THE PROCESS IMPLICATING THE FUNDAMENTAL INTEGRITY OF THE JUDICIAL PROCESS.

STATE V. BARDER, 2004-NMASC-19, ¶6, 135 N.M. 621, 92 P.3d 633. THE INTEGRITY OF A CRIMINAL CONVICTION IN OUR JUDICIAL SYSTEM REQUIRES A JURY VERDICT TO REST "ON A LEGALLY ADEQUATE BASIS," AND WHEN IT DOES NOT, THE INTEGRITY OF THE JUDICIAL SYSTEM IS UNDERMINED, AND FUNDAMENTAL ERROR RESULTS. STATE V. MASCARENAS, 2000-NMASC-17, P21, 129 N.M. 230, 4 P.3d 1221. "WHEN THESE CONSIDERATIONS LEAD TO A CONCLUSION THAT THE [PROSECUTOR'S] COMMENTS MATERIALLY ALTERED THE TRIAL OR LIKELY CONFUSED THE JURY BY DISTORTING THE EVIDENCE, THE STATE HAS DEPRIVED THE DEFENDANT OF A FAIR TRIAL, AND REVERSAL IS WARRANTED." STATE V. TORRES, 2012-NMASC-016, 279 P.2d 740. ADDITIONALLY, "IF A CASE TURNS ON A CRUCIAL FACT THAT

IS IMPROPERLY MANIPULATED IN CLOSING, OR IF COUNSEL PERSIST WHEN ADMONISHED TO DESIST, THE PROBABILITY OF ERROR IS GREATER." STATE V. SOSA, 2009-NMASC-056, P34, 147 N.M. 351, 223 P.3d 348. THE CRITICAL FACTOR TO BE DETERMINED HERE IS WHETHER OR NOT THE JURY FOUND MR. GONZALES GUILTY OF A COURSE-OF-CONDUCT FOR EACH COUNT, OR FOR CRIMINAL ACT THAT OCCURRED "AT LEAST ONCE" DURING EACH OF THE CHARGING PERIODS. IT HAS ALREADY BEEN STATED, BUT IS WELL-WORTH REPEATING, THERE IS NO TALISMANIC OR JUDICIAL SOLUTION.

THE PROSECUTION WAS UNABLE TO PRESENT ANY PHYSICAL EVIDENCE, SCIENTIFIC EVIDENCE, OR THIRD PERSON WITNESS TO SUBSTANTIATE THE ALLEGATIONS OF ABUSE. ALTHOUGH, THE ABUSE SUPPOSEDLY WENT ON FOR NEARLY A DECADE IN THE FAMILY HOME WHILE OTHER FAMILY MEMBERS WERE PRESENT. AND YET, THE CASE ROLLED DOWN TO A CREDIBILITY DETERMINATION BETWEEN THE PROSECUTOR AND MR. GONZALES. FOR THIS REASON, IT CERTAINLY CANNOT BE SAID THAT THE EVIDENCE OF MR. GONZALES' GUILT WAS OVERWHELMING.

TURNING TO THE NEXT CONSIDERATION, THERE IS A BRIGHT CONSTITUTIONAL LINE DEFINING FUNDAMENTAL FAIRNESS PRESCRIBING SUBSTANTIAL AND PROCEDURAL DUE PROCESS THAT A PROSECUTOR SHOULD NOT CROSS. THE TOTALITY OF THE PROSECUTOR'S ACTIONS SEVERELY UNDERMINED THE INTEGRITY OF

THE JUDICIAL PROCESS BY MANIPULATING THE EVIDENCE AND CONFUSING THE JURY. IN FACT, MR. ARITE ENCOURAGED THE JURY TO FIND MR. GONZALES GUILTY ON A LEGALLY INADEQUATE EVIDENTIARY THEORY. THE CHARGES UNQUESTIONABLY REQUIRED THE JURY TO FIND THAT THE CRIME OCCURRED MULTIPLE TIMES IN ORDER TO SUPPORT THE COURSE-OF-CONDUCT CHARGING SCHEME. UNDER MR. ARITE'S DIRECTION, THE JURY WAS REQUIRED TO DETERMINE THAT THE CHARGED CRIME HAPPENED "AT LEAST ONCE IN EACH ONE OF THOSE MONTHLY PERIODS." THUS, THE JURY'S VERDICTS WERE BASED ON AN INSUFFICIENCY OF THE EVIDENCE. AS A RESULT, NO CONFIDENCE CAN BE HAD IN MR. GONZALES' CONVICTIONS. THE FIFTH AND FOURTEENTH AMENDMENT VIOLATIONS REQUIRE THAT THIS COURT VACATE ALL OF MR. GONZALES' CONVICTIONS. CONVICTIONS, THAT CANNOT BE RATIONALLY OR LEGALLY DEFENDED.

TABLE 1

29

COUNT	INSTR	RP	CHARGE	ON OR BETWEEN
1	8,9	640,641	CSPM	JULY 19, 1997 - AUGUST 18, 1997
2	10	642	CSCM	SAME
130	194	826	KIDNAPPING	SAME
3	11,12	643,644	CSPM	AUGUST 19, 1997 - SEPTEMBER 18, 1997
4	13	645	CSCM	SAME
131	195	827	KIDNAPPING	SAME
5	14,15	646,647	CSPM	SEPTEMBER 19, 1997 - OCTOBER 18, 1997
6	16	648	CSCM	SAME
132	196	828	KIDNAPPING	SAME
7	17,18	649,650	CSPM	OCTOBER 19, 1997 - NOVEMBER 18, 1997
8	19	651	CSCM	SAME
133	197	829	KIDNAPPING	SAME
9	20,21	652,653	CSPM	NOVEMBER 19, 1997 - DECEMBER 18, 1997
10	22	654	CSCM	SAME
134	198	830	KIDNAPPING	SAME
11	23,24	655,656	CSPM	DECEMBER 19, 1997 - JANUARY 18, 1998
12	25	657	CSCM	SAME
135	199	831	KIDNAPPING	SAME
13	26,27	658,659	CSPM	JANUARY 19, 1998 - FEBRUARY 18, 1998
14	28	660	CSCM	SAME
136	200	832	KIDNAPPING	SAME
15	29,30	661,662	CSPM	FEBRUARY 19, 1998 - MARCH 18, 1998
16	31	663	CSCM	SAME
137	201	833	KIDNAPPING	SAME

TABLE 1, CONTINUED

30

17	32, 33	664, 665	CSPM	MARCH 19, 1998 - APRIL 18, 1998
18	34	666	CSCM	SAME
138	202	834	KIDNAPPING	SAME
19	35, 36	667, 668	CSPM	APRIL 19, 1998 - MAY 18, 1998
20	37	669	CSCM	SAME
139	203	835	KIDNAPPING	SAME
21	38, 39	670, 671	CSPM	MAY 19, 1998 - JUNE 18, 1998
22	40	672	CSCM	SAME
140	204	836	KIDNAPPING	SAME
23	41, 42	673, 674	CSPM	JUNE 19, 1998 - JULY 18, 1998
24	43	675	CSCM	SAME
141	205	837	KIDNAPPING	SAME
25	44, 45	676, 677	CSPM	JULY 19, 1998 - AUGUST 18, 1998
26	46	678	CSCM	SAME
142	206	838	KIDNAPPING	SAME
27	47, 48	679, 680	CSPM	AUGUST 19, 1998 - SEPTEMBER 18, 1998
28	49	681	CSCM	SAME
143	207	839	KIDNAPPING	SAME
29	50, 51	682, 683	CSPM	SEPTEMBER 19, 1998 - OCTOBER 18, 1998
30	52	684	CSCM	SAME
144	208	840	KIDNAPPING	SAME
31	53, 54	685, 686	CSPM	OCTOBER 19, 1998 - NOVEMBER 18, 1998
32	55	687	CSCM	SAME
145	209	841	KIDNAPPING	SAME
33	56, 57	688, 689	CSPM	NOVEMBER 19, 1998 - DECEMBER 18, 1998
34	58	690	CSCM	SAME
146	210	842	KIDNAPPING	SAME

TABLE 1, CONTINUED

31

35	59, 60	691, 692	CSPM	DECEMBER 19, 1998 - JANUARY 18, 1999
36	61	693	CSCM	SAME
147	211	843	KIDNAPPING	SAME
37	62, 63	694, 695	CSPM	JANUARY 19, 1999 - FEBRUARY 18, 1999
38	64	696	CSCM	SAME
148	212	844	KIDNAPPING	SAME
39	65, 66	697, 698	CSPM	FEBRUARY 19, 1999 - MARCH 18, 1999
40	67	699	CSCM	SAME
149	213	845	KIDNAPPING	SAME
41	68, 69	700, 701	CSPM	MARCH 19, 1999 - APRIL 18, 1999
42	70	702	CSCM	SAME
150	214	846	KIDNAPPING	SAME
43	71, 72	703, 704	CSPM	APRIL 19, 1999 - MAY 18, 1999
44	73	705	CSCM	SAME
151	215	847	KIDNAPPING	SAME
45	74, 75	706, 707	CSPM	MAY 19, 1999 - JUNE 18, 1999
46	76	708	CSCM	SAME
152	216	848	KIDNAPPING	SAME
47	77, 78	709, 710	CSPM	JUNE 19, 1999 - JULY 18, 1999
48	79	711	CSCM	SAME
153	217	849	KIDNAPPING	SAME
49	80, 81	712, 713	CSPM	JULY 19, 1999 - AUGUST 18, 1999
50	82	714	CSCM	SAME
154	218	850	KIDNAPPING	SAME
51	83, 84	715, 716	CSPM	AUGUST 19, 1999 - SEPTEMBER 18, 1999
52	85	717	CSCM	SAME
155	219	851	KIDNAPPING	SAME

TABLE 2, CONTINUED

32

53	86, 87	718, 719	CSPM	SEPTEMBER 19, 1999 - OCTOBER 18, 1999
54	88	720	CSCM	SAME
156	220	852	KIDNAPPING	SAME
55	89, 90	721, 722	CSPM	OCTOBER 19, 1999 - NOVEMBER 18, 1999
56	91	723	CSCM	SAME
157	221	853	KIDNAPPING	SAME
57	92, 93	724, 725	CSPM	NOVEMBER 19, 1999 - DECEMBER 18, 1999
58	94	726	CSCM	SAME
158	222	854	KIDNAPPING	SAME
59	95, 96	727, 728	CSPM	DECEMBER 19, 1999 - JANUARY 18, 2000
60	97	729	CSCM	SAME
159	223	855	KIDNAPPING	SAME
61	98, 99	730, 731	CSPM	JANUARY 19, 2000 - FEBRUARY 18, 2000
62	100	732	CSCM	SAME
160	224	856	KIDNAPPING	SAME
63	101, 102	733, 734	CSPM	FEBRUARY 19, 2000 - MARCH 18, 2000
64	103	735	CSCM	SAME
161	225	857	KIDNAPPING	SAME
65	104, 105	736, 737	CSPM	MARCH 19, 2000 - APRIL 18, 2000
66	106	738	CSCM	SAME
162	226	858	KIDNAPPING	SAME
67	107, 108	739, 740	CSPM	APRIL 19, 2000 - MAY 18, 2000
68	109	741	CSCM	SAME
163	227	859	KIDNAPPING	SAME
69	110, 111	742, 743	CSPM	MAY 19, 2000 - JUNE 18, 2000
70	112	744	CSCM	SAME
164	228	860	KIDNAPPING	SAME

TABLE 1, CONTINUED

71	113, 114	745, 746	CSPM	JUNE 19, 2000 - JULY 18, 2000
72	115	747	CSCM	SAME
165	229	861	KIDNAPPING	SAME
79	116, 117	748, 749	CSPM	JANUARY 1, 2001 - JANUARY 31, 2001
80	118	750	CSCM	SAME
169	MISSING	MISSING	KIDNAPPING	SAME
81	119, 120	751, 752	CSPM	FEBRUARY 1, 2001 - FEBRUARY 28, 2001
82	121	753	CSCM	SAME
170	230	862	KIDNAPPING	SAME
83	122, 123	754, 755	CSPM	MARCH 1, 2001 - MARCH 31, 2001
84	124	756	CSCM	SAME
171	231	863	KIDNAPPING	SAME
85	125, 126	757, 758	CSPM	APRIL 1, 2001 - APRIL 30, 2001
86	127	759	CSCM	SAME
172	232	864	KIDNAPPING	SAME
87	128, 129	760, 761	CSPM	MAY 1, 2001 - MAY 31, 2001
88	130	762	CSCM	SAME
173	233	865	KIDNAPPING	SAME
89	131, 132	763, 764	CSPM	JUNE 1, 2001 - JUNE 30, 2001
90	133	765	CSCM	SAME
174	234	866	KIDNAPPING	SAME
91	134, 135	766, 767	CSPM	JULY 1, 2001 - JULY 31, 2001
92	136	768	CSCM	SAME
175	235	867	KIDNAPPING	SAME
93	137, 138	769, 770	CSPM	AUGUST 1, 2001 - AUGUST 31, 2001
94	139	771	CSCM	SAME
176	236	868	KIDNAPPING	SAME

TABLE 1, CONTINUED

34

95	140, 141	772, 773	CSPM	SEPTEMBER 01, 2001 - SEPTEMBER 30, 2001
96	142	774	CSCM	SAME
177	237	869	KIDNAPPING	SAME
97	143, 144	775, 776	CSPM	OCTOBER 1, 2001 - OCTOBER 31, 2001
98	145	777	CSCM	SAME
178	238	870	KIDNAPPING	SAME
99	146, 147	778, 779	CSPM	NOVEMBER 1, 2001 - NOVEMBER 30, 2001
100	148	780	CSCM	SAME
179	239	871	KIDNAPPING	SAME
101	149, 150	781, 782	CSPM	DECEMBER 1, 2001 - DECEMBER 31, 2001
102	151	783	CSCM	SAME
180	240	872	KIDNAPPING	SAME
103	152, 153	784, 785	CSPM	JANUARY 1, 2002 - JANUARY 31, 2002
104	154	786	CSCM	SAME
181	241	873	KIDNAPPING	SAME
105	155, 156	787, 788	CSPM	FEBRUARY 1, 2002 - FEBRUARY 28, 2002
106	157	789	CSCM	SAME
182	242	874	KIDNAPPING	SAME
107	158, 159	790, 791	CSPM	MARCH 1, 2002 - MARCH 31, 2002
108	160	792	CSCM	SAME
183	243	875	KIDNAPPING	SAME
109	161, 162	793, 794	CSPM	APRIL 1, 2002 - APRIL 30, 2002
110	163	795	CSCM	SAME
184	244	876	KIDNAPPING	SAME
111	164, 165	796, 797	CSPM	MAY 1, 2002 - MAY 31, 2002
112	166	798	CSCM	SAME
185	245	877	KIDNAPPING	SAME

TABLE 1, CONTINUED

113	167, 168	799, 800	CSPM	JUNE 1, 2002 - JUNE 30, 2002
114	169	801	CSCM	SAME
186	246	878	KIDNAPPING	SAME
115	170, 171	802, 803	CSPM	JULY 1, 2002 - JULY 31, 2002
116	172	804	CSCM	SAME
187	247	879	KIDNAPPING	SAME
117	173, 174	805, 806	CSPM	AUGUST 1, 2002 - AUGUST 31, 2002
118	175	807	CSCM	SAME
188	248	880	KIDNAPPING	SAME
119	176, 177	808, 809	CSPM	SEPTEMBER 1, 2002 - SEPTEMBER 30, 2002
120	178	810	CSCM	SAME
189	249	881	KIDNAPPING	SAME
121	179, 180	811, 812	CSPM	OCTOBER 1, 2002 - OCTOBER 31, 2002
122	181	813	CSCM	SAME
190	250	882	KIDNAPPING	SAME
123	182, 183	814, 815	CSPM	NOVEMBER 1, 2002 - NOVEMBER 30, 2002
124	184	816	CSCM	SAME
191	251	883	KIDNAPPING	SAME
125	185, 186	817, 818	CSPM	DECEMBER 1, 2002 - DECEMBER 31, 2002
126	187	819	CSCM	SAME
192	252	884	KIDNAPPING	SAME
127	188, 189	820, 821	CSPM	JANUARY 1, 2003 - JANUARY 31, 2003
128	190	822	CSCM	SAME
193	253	885	KIDNAPPING	SAME

THE TRIAL COURT VIOLATED ART. 11, §§ 14, AND 18 OF THE NEW MEXICO STATE CONSTITUTION, AND THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY (A) NOT ALLOWING MR. GONZALES THE OPPORTUNITY TO REPRESENT HIMSELF AT TRIAL; AND (B) DENYING HIS REQUEST TO BE HEARD.

INTRODUCTION

ON JANUARY 20, 2005, ANGELA R. LUHAN, COUNSEL FOR DEFENDANT, FILED A MOTION TO WITHDRAW. (SEE, APPENDIX A, OF THIS SECTION.). (SEE ALSO, RP 627). THEREIN COUNSEL PROVIDED THE COURT WITH SUFFICIENT PROBABLE CAUSE TO RELIEVE HER OF HER RESPONSIBILITY AND DUTY AS MR. GONZALES' TRIAL ATTORNEY. MS. LUHAN STATED THAT "DUE TO THE DETERIORATED RELATIONSHIP, THE STATEMENTS THAT DEFENDANT HAS [sic] AGAINST UNDERSIGNED COUNSEL [COMPLAINT FILED AFTER TRIAL], COUNSEL CAN NO LONGER ZEALOUSLY REPRESENT THE DEFENDANT AND A CONFLICT OF INTEREST EXISTS." MOTION, P5. AS IT WOULD TURN OUT, COUNSEL'S STATEMENT ACCURATELY PREDICTED A TRIAL PERFORMANCE BELOW THE STANDARD OF A REASONABLY COMPETENT ATTORNEY. AFTER PETITIONER'S TRIAL HAD CONCLUDED, SIX DAYS LATER ON JANUARY 26, 2005, THE DISTRICT COURT ISSUED AN ORDER DENYING MOTION. (SEE, APPENDIX B, OF THIS SECTION.). (SEE ALSO, RP 632).

THIS WAS NOT THE FIRST NOTICE ALERTING THE COURT TO THE CONTENTIOUS RELATIONSHIP BETWEEN MR. GONZALES AND ANIBELA LUHAN. PETITIONER HAD MADE HIS INTENTIONS KNOWN TO THE COURT IN PERSON AND BY FILING NUMEROUS PRO SE MOTIONS. ON OR ABOUT OCTOBER 18, 2004 MR. GONZALES WROTE TO STATE DISTRICT COURT JUDGE GEORGE P. EICHWALD. WHEREIN, PETITIONER STATED, "I DO NOT WANT AN APPOINTED ATTORNEY FROM THE COURT." "FOR NOW I WILL GO PRO SE, WITHOUT QUALIFIED COUNSEL." (SEE, APPENDIX C, OF THIS SECTION; LETTER (EICHWALD)). (SEE ALSO, RP 505). MR. GONZALES' STATEMENTS RAISE TWO CRITICALLY IMPORTANT ISSUES THAT FALL SQUARELY WITHIN THE PROVISIONS OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION. SEE ALSO, U.S. CONST. ART. II, § 14. FIRST, HE CLEARLY ANNOUNCED THAT HE DID NOT WANT TO BE REPRESENTED BY APPOINTED COUNSEL. SECOND, IN LIEU OF APPOINTED COUNSEL, HE WAS PREPARED TO REPRESENT HIMSELF.

ON OR ABOUT OCTOBER 24, 2004 MR. GONZALES WROTE TO MS. LUHAN REITERATING THE SAME SENTIMENTS HE HAD EXPRESSED TO JUDGE EICHWALD. HIS OPENING LINE READS, "I HAVE WRITTEN A LETTER TO THE JUDGE EXPLAINING THAT I WOULD GO PRO SE WITHOUT QUALIFIED COUNSEL, THAT I DO NOT WANT AN APPOINTED COUNSEL FROM THE COURT." (SEE APPENDIX D, OF THIS SECTION; LETTER (LUHAN)). (SEE ALSO, RP 563, 561). DESPITE MR. GONZALES' CLEAR AND UNAMBIGUOUS ASSERTION OF HIS

INTENT TO PROCEED PRO SE, THE STATE DISTRICT COURT NEVER CONDUCTED A FOREPA HEARING OR ANY OTHER HEARING ON THE MATTER, OR ALLOWED MS. LUHAN TO WITHDRAW AS MR. GONZALES' COUNSEL. INTRA.

ON OR ABOUT DECEMBER 2, 2004 MR. GONZALES MAILED TO THE THIRTEENTH JUDICIAL DISTRICT COURT A MOTION ENTITLED, "MOTION FOR DISMISSAL BASED ON THE FOLLOWING CLAIMS THAT ARE PROPERLY ADDRESSED TO THE FACT, LENGTH OR CONDITIONS OF THE ACCUSED, CUSTODY THAT, NONETHELESS ARE PREMISED EXCLUSIVELY ON THE FOLLOWING." MR. GONZALES' RHETORIC IS LARGELY IRRELEVANT AND UNPERSUASIVE, BUT NOT ALL. HE EMPHASIZE, "I, MARTIN R. GONZALES, HAVE CONSISTENTLY ATTEMPTED TO DEFEND MYSELF WITH REGARD TO THIS MATTER AND HAVE BEEN JUST AS CONSISTENTLY IGNORED BY THE COURT." "THIS COURT AND MR. PRITE HAVE SOMEHOW GOTTEN THE IDEA THAT I, MARTIN R. GONZALES, CANNOT OR DO NOT HAVE THE RIGHT TO DEFEND MYSELF. ARTICLE 11, SECTION 14 OF THE NEW MEXICO BILL OF RIGHTS SAYS I DO, IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL HAVE THE RIGHT TO APPEAR AND DEFEND HIMSELF IN PERSON, AND BY COUNSEL ... " (EMPHASIS ADDED). (SEE APPENDIX E, OF THIS SECTION; MOTION (2004 DEC 10)). (SEE ALSO RP 559-601).

MR. GONZALES FILED THIS MOTION WITH THE STATE DISTRICT COURT FORTY-FOUR (44) DAYS BEFORE THE SCHEDULED START OF TRIAL. ALTHOUGH HE IS A LEGAL LAYMAN, MR. GONZALES MAKES HIS ARGUMENTS ON THIS POINT PERFECTLY CLEAR TO THE COURT BY UNEQUIVOCALLY EXPRESSING HIS RIGHT AND DESIRE TO DEFEND (REPRESENT) HIMSELF. JUDGE EICHWALD NEVER CONDUCTED A FARETTA HEARING, OR MADE THE NECESSARY INQUIRY TO DETERMINE THAT MR. GONZALES HAD KNOWINGLY AND INTELLIGENTLY WAIVED HIS SIXTH AMENDMENT RIGHT TO HAVE THE ASSISTANCE OF COUNSEL AT TRIAL. INFRA.

MR. GONZALES' TRIAL BEGAN ON JANUARY 24, 2005 WITH ANGELA LUMAN SEATED AT THE DEFENSE TABLE. DESPITE MR. GONZALES' EXPRESSED SIXTH AMENDMENT RIGHT, HE WAS NOT GIVEN THE OPPORTUNITY TO REPRESENT HIMSELF. A REVIEW OF THE RECORD DEMONSTRATES THAT COUNSEL'S REPRESENTATION DID IN FACT LACK ZEAL. ON THE MORNING OF THE THIRD DAY, IMMEDIATELY AFTER THE STATE RESTED, ANGELA LUMAN INFORMED THE COURT THAT THE DEFENSE ALSO RESTED. SHE MADE NO ATTEMPT TO PRESENT ANY DEFENSE.

AFTER A RECESS, WITH THE JURY SEATED, MR. GONZALES POLITELY INTERRUPTED THE COURT. THE COURT EXCLUDED THE JURY BEFORE ALLOWING MR. GONZALES TO CONTINUE.

MR. GONZALES REQUESTED "TO OFFER [] THREE DOCUMENTS TO THE COURT FOR EVIDENCE." AND, "I WOULD LIKE TO READ THIS BEFORE THE JURY." AFTER A BRIEF COLLOQUY, THE COURT DENIED MR. GONZALES' REQUEST STATING:

COURT: LET ME SAY SOMETHING, MR. GONZALES. BOTH SIDES HAVE RESTED. THE STATE HAS RESTED. DEFENSE HAS RESTED IN THIS MATTER. YOU ARE ENTITLED TO FILE WHATEVER POST-TRIAL MOTIONS YOU WISH TO FILE. I CAN'T STOP YOU FROM DOING THAT, I AM INSTRUCTING YOU, HOWEVER, NOT TO. AND I WILL CERTAINLY ALLOW YOU TO FILE THIS MOTION, FOR THE RECORD, BOTH SIDES HAVE ALREADY RESTED.

MR. GONZALES: AND, BASICALLY SIR, THIS RIGHT HERE (THREE PAGE WRITTEN STATEMENT), LIKE I SAID IS MY DEFENSE. FOR THE RECORD, IF YOU DENY ME MY DEFENSE, YOU DENY ME DUE PROCESS, ACCESS TO THE COURT AND MY CONSTITUTIONAL RIGHTS, AND, AGAIN, I HAVE QUOTED FRANK V. UNITED STATES, 395 U.S.,

MR. GONZALES, KNOWING HE WOULD HAVE HIS DAY IN COURT, CARRIED WITH HIM TO TRIAL THAT MORNING A PREPARED THREE-PAGE STATEMENT CONTAINING HIS

FUNDAMENTAL TRUTHS WITH CONFIDENCE. ASSURED BY THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS AFFORDED ALL UNITED STATES CITIZENS, MR. GONZALES PUT HIS FAITH IN JUSTICE. IT WAS NOT AN ALLOCUTION, IT WAS, AS HE CALLED IT, HIS DEFENSE.

ALTHOUGH THE COURT DENIED MR. GONZALES' REQUEST TO REOPEN THE DEFENSE CASE-IN-CHIEF, IT PLACATED HIM BY ALLOWING THE DOCUMENT TO BE FILED IN OPEN COURT. MR. GONZALES DID NOT UNDERSTAND - AS THE COURT DID - THE DIFFERENCE BETWEEN FILING THE DOCUMENT IN OPEN COURT, AND ENTERING THE DOCUMENT INTO EVIDENCE. THE JURY NEVER HAD AN OPPORTUNITY TO READ MR. GONZALES' STATEMENT, MUCHLESS HEAR FROM HIM. (SEE, APPENDIX F, OF THIS SECTION; STATEMENT (2005 JAN 26)). (SEE ALSO, RP 629-31).

MR. GONZALES OPENED THE SECOND PARAGRAPH WITH A CLEAR CONSTITUTIONAL DECLARATION. "I HAVE BEEN DENIED THE RIGHT TO PERSONALLY DEFEND MYSELF AS GUARANTEED IN ART. 11, SEC. 14 OF THE NEW MEXICO CONSTITUTION."⁹⁹ ... "I HAVE REPEATEDLY DEMANDED THE RIGHT TO DEFEND MYSELF AND HAVE BEEN DENIED THIS RIGHT BY MR. EICHWALD,
...⁹⁹ DEFENDANT GONZALES CONTINUES DOWN THIS SAME ROAD IN THE FIFTH PARAGRAPH, "EVERY ATTEMPT TO DEFEND MYSELF HAS BEEN DENIED. I HAVE BEEN DENIED ANY

MEANINGFUL ACCESS TO THIS TRIBUNAL AND DUE PROCESS AS GUARANTEED BY BOTH THE FEDERAL AND NEW MEXICO CONSTITUTIONS." OVERALL, MR. GONZALES' WRITTEN STATEMENT HAS LITTLE TO DO WITH DEFENSE OF THE CHARGES AGAINST HIM AND MORE TO DO WITH HOW THE VIOLATIONS OF HIS CONSTITUTIONAL RIGHTS IMPERED HIS ABILITY TO CONSTRUCT, PREPARE, AND PRESENT A DEFENSE OF HIS OWN CHOOSING. THE JURY NEVER HEARD FROM MR. GONZALES.

THE RECORD SHINES A BLARING LIGHT ON THE COURT'S REFUSAL TO REOPEN THE DEFENSE CASE-IN-CHIEF. THE UNREASONABLE DISCRETION DENIED DEFENDANT GONZALES THE RIGHT TO TESTIFY AT TRIAL. THERE IS NO JUSTIFICATION FOR THE COURT'S LACK OF CONSTITUTIONAL ADHERENCE.

ARGUMENTS

NEW MEXICO SUPREME COURT JUSTICE VIGIL NOTED, "THE RIGHT TO SELF-REPRESENTATION MUST BE RESPECTED WHEN IT IS CLEARLY INVOKED." STATE V. STALLINGS, 2020-NMASC-019. THIS PRINCIPLE OF CONSTITUTIONAL LAW WAS NOT NOVEL IN 2020 WHEN IT WAS ARTICULATED BY JUSTICE VIGIL, NOR WAS THE RIGHT ANY LESS CONSTITUTIONAL WHEN DEFENDANT GONZALES ASSERTED IT IN 2004.

THE CONSTITUTIONAL RIGHT TO COUNSEL IMPOSES A DUTY ON THE GOVERNMENT TO PROVIDE COUNSEL; IT DOES NOT IMPOSE A DUTY ON THE ACCUSED TO ACCEPT COUNSEL.

ADAMS V. UNITED STATES EX REL. MCCANN, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942). (THE CONSTITUTION DOES NOT FORCE A LAWYER UPON A DEFENDANT). IF A DEFENDANT DOES NOT WANT AN ATTORNEY, HE OR SHE MAY REFUSE THE ASSISTANCE OF COUNSEL AND DEFEND THE CASE PRO SE. N.H. CONSTITUTION ART. 11, § 14 ("IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL HAVE THE RIGHT TO APPEAR AND DEFEND HIMSELF IN PERSON, AND BY COUNSEL[.]"); STATE V. GRACIA, 2011-NMSC-003, P24, 149 N.M. 185, 246 P.3d 1057 (EXPLAINING THAT THE RIGHT TO ASSISTANCE OF COUNSEL INCLUDES THE COROLLARY RIGHT TO REJECT THE IMPOSITION OF COUNSEL."). A DEFENDANT'S CHOICE TO PROCEED PRO SE "MUST BE HONORED OUT OF THAT RESPECT FOR THE INDIVIDUAL WHICH IS THE LIFEblood OF THE LAW." FARETTA V. CALIFORNIA, 422 U.S. 806, 834, 95 S.Ct. 2525, 45 L.Ed. 562 (1975).

IN THIS CIRCUIT IT IS UNDERSTOOD THAT A DEFENDANT CANNOT REPRESENT HIMSELF AND BENEFIT FROM APPOINTMENT OF COUNSEL IN THE SAME INSTANCE. A DEFENDANT MUST CHOOSE BETWEEN THEM. SEE, e.g., UNITED STATES V. MACKOVICH, 2309 F.3d 1227, 1236-37 (10TH CIR. 2000) (RECOGNIZING THAT THE RIGHT TO SELF-REPRESENTATION AND THE RIGHT TO COUNSEL ARE MUTUALLY EXCLUSIVE.). IT APPEARS, HOWEVER,

THAT THIS IS THE IMPOSSIBLE POSITION DEFENDANT GONZALES FOUND HIMSELF IN WHEN THE COURT FAILED TO ACKNOWLEDGE HIS REQUEST TO PROCEED PRO SE.

THE DEFENDANT WHO WISHES TO EXERCISE THE RIGHT OF SELF-REPRESENTATION MUST (1) CLEARLY AND UNEQUIVOCALLY ASSERT HIS OR HER INTENTION TO PROCEED PRO SE, (2) MAKE THE ASSERTION IN A TIMELY MANNER, AND (3) KNOWINGLY AND INTELLIGENTLY WAIVE THE RIGHT TO COUNSEL. GARCIA, 2011-NMJC-003, P25. MR. GONZALES' LETTER TO THE STATE DISTRICT COURT ON OCTOBER 18, 2004 MADE AN ISSUE OF SELF-REPRESENTATION WITHOUT VAGUENESS. "IF [SELF-REPRESENTATION] IS REQUESTED IN ADVANCE OF TRIAL, A DEFENDANT WHO MAKES THE REQUEST 'CLEAR AND UNEQUIVOCALLY' AND 'KNOWINGLY AND INTELLIGENTLY' IS PRESUMPTIVELY ENTITLED TO THE RIGHT." Id. P26. MR. GONZALES REPEATEDLY TOOK THESE VERY STEPS TO NO AVAIL.

ONCE A DEFENDANT MAKES A CLEAR AND UNEQUIVOCAL STATEMENT THAT CAN REASONABLY BE UNDERSTOOD TO INVOKES THE RIGHT TO SELF-REPRESENTATION, THE TRIAL COURT HAS A DUTY TO INQUIRE FURTHER INTO THE DEFENDANT'S WAIVER OF THE RIGHT TO COUNSEL. SEE E.G., STATE V. VINCENT, 2005-NMCA-064, P11, 137 N.M. 462, 112 P.3d 1119 (BECAUSE THE DEFENDANT EXPRESSED A DESIRE TO REPRESENT HIMSELF, THE STATE DISTRICT COURT JUDGE WAS REQUIRED TO DETERMINE IF

DEFENDANT WAS MAKING A 'KNOWING AND INTELLIGENT' WAIVER OF HIS RIGHT TO AN ATTORNEY [.]"; STATE V. ROTIBI, 1994-MNCA-003, P3, 117 N.M. 1008, 869 P.2d 296 ("IN A CASE WHERE A DEFENDANT WISHES TO REPRESENT HIMSELF, THE DISTRICT COURT MUST DETERMINE IF THE DEFENDANT IS MAKING A KNOWING AND INTELLIGENT WAIVER OF COUNSEL [.]") "A DEFENDANT SHOULD BE ACCORDED THE RIGHT OF SELF-REPRESENTATION WHEN HE OR SHE IS ABLE TO MAKE A KNOWING AND INTELLIGENT WAIVER OF COUNSEL."), STATE V. CHAPMAN, 1986-MNCG-037, P9, 104 N.M. 304, 721 P.2d 392 (CITING FARETTA V. CALIFORNIA, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 560 (1975)). IN THIS CASE PETITIONER PERSISTENTLY AND EMPHATICALLY ANNOUNCED HIS DESIRE TO PROCEED PRO SE OVER A PERIOD OF MANY MONTHS IN WRITING AND IN PERSON WITHOUT EQUIVOCATION. THE CONSTITUTION DOES NOT REQUIRE AN ACCUSED TO PERFORM A SING-AND-DANCE ROUTINE AS A PRECURSER TO A COURT'S ACKNOWLEDGMENT OF A RIGHT.

THE STATE DISTRICT COURT NEVER UNDERTOOK THE REQUIRED TASK OF DETERMINING THE CONSTITUTIONALITY OF MR. GONZALES' DECLARATION TO PROCEED WITHOUT THE ASSISTANCE OF COUNSEL. THE STATE DISTRICT COURT CONSCIOUSLY EFFECTUATED ITS UNINFORMED ABRIGATION OF MR. GONZALES' CONSTITUTIONAL RIGHT TO DEFEND HIMSELF BY IGNORING THE ASSERTION OF THAT RIGHT UP TO AND THROUGH TRIAL AS EVIDENCED BY THE COURT'S INTENTIONAL FAILURE TO ADDRESS COUNSEL'S MOTION TO WITHDRAW

UNTIL AFTER TRIAL. "TO FORCE A LAWYER ON A DEFENDANT CAN ONLY LEAD HIM TO BELIEVE THAT THE LAW CONTRIVES AGAINST HIM." 422 U.S. AT 834.

IN WESTBROOK V. ARIZONA, 384 U.S. 150, 16 L.Ed.2d 429, 86 S.Ct. 1320 (PER CURIAM), THE COURT VACATED A LOWER COURT RULING BECAUSE THERE HAD BEEN NO "HEARING OR INQUIRY" INTO THE ISSUE OF [THE PETITIONER'S] COMPETENCE TO WAIVE HIS CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL[.] THE CIRCUMSTANCES HERE ARE AKIN TO THOSE IN WESTBROOK. THE STATE DISTRICT COURT HAD A TWO-FOLD JUDICIAL OBLIGATION TO SAFEGUARD MR. GONZALES' CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION UNDER THE AUTHORITY OF UNITED STATES CONSTITUTION AND THAT OF THE STATE OF NEW MEXICO. STATE DISTRICT COURT JUDGE, GEORGE P. EICHWALD, DID NOT RESPECT OR APPRECIATE MR. GONZALES' EXPRESSED CONSTITUTIONAL CONCERNS. JUDGE EICHWALD'S MALFEASANCE CAN ONLY BE CONSTRUED AS A BLATANT DENIAL OF MR. GONZALES' RIGHT TO SELF-REPRESENTATION; AN ACT THAT ESTABLISHES REVERSIBLE ERROR. MCKASKLE V. WIGGINS, 465 U.S. 168, 177-78, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).

THE STATE COURT'S AMBIVALENT TREATMENT OF JUSTICE EXPONENTIALLY COMPOUNDED THE CONSTITUTIONAL VIOLATIONS WHEN THE COURT REFUSED TO REOPEN THE DEFENSE CASE-IN-CHIEF TO ALLOW MR. GONZALES TO MAKE A STATEMENT BEFORE

THE JURY. THE PROCEDURAL ABNORMALITY, ALTHOUGH UNUSUAL IS NOT OUTSIDE THE COURT'S ACCEPTABLE PRUDENCE. MR. GONZALES' REQUEST WAS JUDICIOUSLY PRACTICAL FOR AT LEAST FIVE REASONS. FIRST, A CHANCE TO BE HEARD IS AMONG THE CONSTITUTIONAL RIGHTS OF EVERY ACCUSED IN A CRIMINAL PROCEEDING IN ALL COURTS, STATE AND FEDERAL. COLE V. ARKANSAS, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948). SECOND, "THE CONSTITUTION GUARANTEES CRIMINAL DEFENDANT'S 'A MEANINGFUL OPPORTUNITY TO PRESENT A COMPLETE DEFENSE.'" CRANE V. KENTUCKY, 475 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (QUOTING, CALIFORNIA V. TRANBETTA, 467 U.S. 478, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). THIRD, THE COURT HAD NOT CHARGED THE JURY WITH THE JURY INSTRUCTIONS. FOURTH, NEITHER THE STATE OR THE DEFENSE HAD MADE CLOSING ARGUMENTS. FIFTH, REOPENING THE CASE WOULD NOT HAVE CAUSED ANY UNREASONABLE DELAY OR PREJUDICED THE GOVERNMENT IN ANY WAY. THE STATE, IN ALL PROBABILITY, MOST LIKELY EXPECTED MR. GONZALES TO TESTIFY. THE IMPOSITION OF THE COURT, HOWEVER MINUTE IT MAY HAVE BEEN, CERTAINLY DID NOT OUTWEIGH MR. GONZALES' CONSTITUTIONAL RIGHTS.

THE RIGHT OF A DEFENDANT TO TESTIFY AT HIS OWN TRIAL IS A BASIC RIGHT, AND THE ULTIMATE DECISION OF WHETHER TO EXERCISE THE RIGHT REPOSES WITH HIM, IRRESPECTIVE OF HIS OWN COUNSEL'S ADVICE. JONES V. BARNES, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 37 (1987). IT SHOULD,

THEREFORE, GO WITHOUT SAYING THAT A STATE DISTRICT COURT JUDGE CANNOT CONSTITUTIONALLY PREVENT A DEFENDANT FROM MAKING A TESTIMONIAL STATEMENT AS LONG AS IT IS PROFFERED IN ACCORDANCE WITH THE PROPER DECORUM. THE RIGHT TO TESTIFY IS A FUNDAMENTAL PRIVILEGE FIRMLY EMBEDDED IN THE PROCESS OF LAW. THIS SIXTH AMENDMENT RIGHT IS MADE APPLICABLE TO THE STATES UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. SEE ALSO, U.S. CONST. ART. II, § 14. DENYING THE ACCUSED OF HIS RIGHT TO BE HEARD DENIES HIM OF A FAIR HEARING WHICH VIOLATES EVEN THE MINIMAL STANDARDS OF DUE PROCESS. IN RE OLIVER, 333 U.S. 257; TUNNEY V. OHIO, 273 U.S. 510. "A FAIR TRIAL IN A FAIR TRIBUNAL IS A BASIC REQUIREMENT OF DUE PROCESS." IN RE MURCHISON, 349 U.S. 133. FROM THE RECORD, ONE COULD ARGUE THAT MR. GONZALES HAD NEITHER A FAIR TRIAL OR A FAIR TRIBUNAL.

THE DECISION WHETHER TO PERMIT A PARTY TO REOPEN ITS CASE IN ORDER TO PRESENT ADDITIONAL EVIDENCE IS A MATTER ENTRUSTED TO THE TRIAL COURT'S SOUND DISCRETION. STATE V. ORTIZ, 1978-NMCA-074, P23, 92 N.M. 166, 584 P.2d 1306. IN THIS INSTANCE, DEFENSE COUNSEL HAD NOT PREVIOUSLY INTRODUCED ANY EVIDENCE. SUGGESTING TO THE JURY THAT MR. GONZALES HAD NO DEFENSE, AND THEREFORE, MUST BE GUILTY. THE COURT SIMPLY REINFORCED THAT INFERENCE BY NOT ALLOWING THE JURY TO HEAR FROM MR. GONZALES.

A COURT'S RULING ON A MOTION TO REOPEN A CASE AFTER THE CLOSE OF EVIDENCE IS REVIEWED FOR AN ABUSE OF DISCRETION. ZENITH RADIO CORP. V. HAZELTINE RESEARCH, INC., 401 U.S. 321, 330-331, 28 L.Ed.2d 77, 91 S.Ct. 759 (1971); DELAND V. KITCH, 633 F.2d 990, 1003 (10TH CIR. 1981), CERT. DENIED, 456 U.S. 946, 72 L.Ed.2d 466, 102 S.Ct. 2012 (1982); STATE V. HARRISON, 2000-NMASC-022, P56, 129 N.M. 328, 7 P.3d 478. "AN ABUSE OF DISCRETION OCCURS WHEN THE RULING IS CLEARLY AGAINST THE LOGIC AND EFFECT OF THE FACTS AND CIRCUMSTANCES OF THE CASE. ONLY WHEN THE COURT'S RULING CAN BE CHARACTERIZED AS CLEARLY UNTENABLE OR NOT JUSTIFIED BY REASON WILL IT BE DETERMINED THAT THE COURT HAS ACTED ABUSIVELY. STATE V. FLORES, 2010-NMASC-002, P25, 147 N.M. 512, 226 P.3d 641. "A MOTION TO REOPEN A CASE... WILL BE REVERSED ONLY FOR AN ABUSE OF DISCRETION." MORESY V. CHEVERON, 94 F.3d 1470, 1477 (10TH CIR. 1996).

THE COURT'S DENIAL OF MR. GONZALES' MOTION TO REOPEN THE CASE WAS NOT PREDICATED UPON ANY, PREJUDICE TO BE SUFFERED BY THE GOVERNMENT. THE TRIAL COURT'S STATED REASONING FOR ITS DENIAL RESTED WHOLLY ON THE FACT THAT THE STATE AND THE DEFENSE HAD ALREADY RESTED. THUS, THE COURT'S DECISION WAS "CLEARLY AGAINST THE LOGIC AND EFFECT OF THE FACTS AND CIRCUMSTANCES OF THE CASE." HARRISON, ID. IN ESSENCE, THE COURT, ALDAM WITH

DEFENSE COUNSEL, DENIED MR. GONZALES OF HIS
CONSTITUTIONAL RIGHTS TO BE HEARD AND PRESENT A
COMPLETE DEFENSE.

CONCLUSION

FOR THE REASONS STATED, THE COURT MUST RECOGNIZE
AND ACKNOWLEDGE STATE AND FEDERAL CONSTITUTIONAL
VIOLATIONS. THE ONLY APPROPRIATE REMEDY AVAILABLE FOR
VIOLATIONS OF THIS ORDER REQUIRES THE COURT TO VACATE
ALL 183 OF MR. GONZALES' ILLEGAL CONVICTIONS.

**THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO**

FILED IN MY OFFICE
STRICT COURT CLERK

05 JAN 20 PM 1:05



STATE OF NEW MEXICO
Plaintiff,

BY TERESA VALENCIA DEPUTY
SANDOVAL COUNTY

vs.

No: D-1329-CR-03-0057

MARTIN GONZALES,
Defendant.

MOTION TO WITHDRAW

COMES NOW the undersigned and hereby moves the Court to withdraw as counsel in the above listed cause. As grounds for the Motion states:

1. Undersigned counsel is currently appointed to represent the above-named Defendant pursuant to the Public Defender contract.
2. Undersigned counsel has been representing Defendant since October of 2004, on a multi-count Indictment alleging over 120 counts of First Degree Criminal Sexual Penetration of a Minor.
3. Undersigned counsel's relationship with the Defendant has become strained and in direct conflict with counsel's duties to represent him. The Defendant continues to prepare and file handwritten motions and other requests related to his defense, and has asked for undersigned counsel to file and argue such motions. Undersigned counsel has asked the Defendant to stop this conduct. However, the Defendant continues to engage in his prose activities.
4. On January 18, 2005, counsel was visiting Defendant to prepare for trial at the Sandoval County Detention Center, Defendant told counsel that he was going to "claim damages" against counsel for her actions/inactions in representing Defendant, as well as the District Attorney's Office and the Honorable Judge Eichwald. Defendant has also issued a subpoena duces tecum for counsel to compel documents that neither counsel of the District Attorney have in their possession. Furthermore, Defendant has alluded to filing a complaint with the Disciplinary Board for counsel's actions in this matter. This puts counsel in a direct adversary relationship with Defendant.
5. Due to the deteriorated relationship, and the statements that Defendant has against undersigned counsel, counsel can no longer zealously represent the Defendant and a conflict of interest exists.
6. Deputy District Attorney, Joseph Arite, has been informed of this motion and opposes such motion.

WHEREFORE, counsel respectfully moves the Court to enter an order removing undersigned

RP 0626

RP 0627

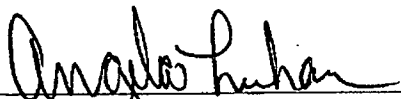
counsel as appointed attorney, and for the above named Defendant to be appointed new counsel.

Respectfully Submitted,



Angela R. Luhan
521 Slate NW
Albuquerque, NM 87102
(505) 848-8382

I hereby certify that a true copy of the
foregoing pleading was presented to
opposing counsel this 20th day of January, 2005.



Angela R. Luhan

RP 0627

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

FILED IN MY OFFICE
DISTRICT COURT CLERK
05 JAN 26 PM 2:36
BY THERESA VALENCIA
SANDOVAL COUNTY DEPUTY
SG

APP.
B

STATE OF NEW MEXICO,

Plaintiff,

vs.

MARTIN GONZALES,

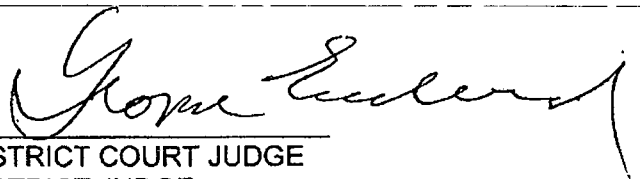
Defendant.

No. D-1314-CR-03-057

ORDER DENYING MOTION

THIS MATTER having come before the Court upon Defendant's Motion to Withdraw filed on January 20, 2005 and the Court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to
Withdraw be and hereby is denied.


DISTRICT COURT JUDGE
DISTRICT JUDGE

cc: Joe Arite
Angela Luhan

RP 0632

October 18, 2004

George P. Eichwald, Judge

100 Avenida de Justicia

Bernalillo, NM 87004

STATE OF NEW MEXICO V. MARTIN GONZALES

Re: D-1329-CR-2003-057

Dear Sir:

At the hearing held on October 14, 2004 at 9:00 a.m. you stated that you would have a new attorney appointed to this case. I do not want an appointed attorney from the court.

In fact I would like funds available made to me so that I may hire a counsel of my choice. For now I will go pro se, without qualified counsel. Legally you can not hold me in custody if I go pro se, so I will hold a copy of this letter as evidence for future reference. I trust that you will respect my choice of counsel. Since I am without counsel please send head notice on any future court dates.

Thank you for your time

Martin R. Gonzales

Martin R. Gonzales

cc.

Theresa Valencia - DISTRICT COURT CLERK

RP 0505

October, 22, 2004

55



Angela Lujan, Counsel

1218 Lomas Blvd. NW

Albuquerque, NM. 87102

STATE OF NEW MEXICO V. MARTIN GONZALES

Re: Case no: D-1329-CR-2003-057

Dear Angela:

I have written a letter to the judge explaining that I would be going Pro se without qualified counsel, that I did not want an appointed counsel from the Court. Obviously he did not respect my decision. I understand that you are an Officer of the Court. Since your appointed to this case I will be needing two things from you;

1. File a dismissal with prejudice of this case based on the violation of my speedy trial rights and the Sixth Amendment; Salandre, 111 NM. at 426, 806 P.2d at 566; State v. Montoya, 119 NM. 95, 97, 888 P.2d 977, 979 (Ct.App.(1994)); Salandre, 111 N.M. at 428, 806 P.2d; Zurla, 109 NM. at 643-44, 789 P.2d at 588-89; State v. LeFebvre, 2001-NMCA-0009, 99, 130, 19 P.3d 825; Lujan, 2003-NMCA-087, 95; Salandre v. State, 111 NM. 422, 427, 806 P.2d 562, 567(1991); Barker v. Wingo, 407 US. 514, 530(1972); State v. Marquez, 2001-NMCA-062, 99, 130, NM. 651, 29 P.3d, 1052; Plouse, 2003-NMCA-048, 955; Zurla, 109 NM. at 648, 789 P.2d at 596; Salandre, 111 NM. at 430, 806 P.2nd at 570; Kilpatrick v. State, 103 NM. 52, 53, 702 P.2d 997, 998(1985);

I am going in 21 months without trial. All these New Mexico Court cases are more than enough reason to dismiss this case with prejudice. If the court has a reason to bring a defendant to trial it must do so no matter what as explained in Zurlo, 109 NM at 643-44, 789 P.2d at 588-89. Time has been ticking and time ran out. This case and I have been violated, you can not fix a violation;

2. You are to respond to my issued and filed 'subpoena duces tecum' with the 'Motion for Discovery and compulsory production of the documents by subpoena duces tecum' requesting discovery;

Thank you for your services

Martin R. Gonzalez

Martin R. Gonzalez

~~4/6~~
~~4/6~~

CC.

Theresa Valencia - DISTRICT COURT CLERK

George P. Eichwald - DISTRICT JUDGE

Joseph Arite - DEPUTY DISTRICT ATTORNEY

THIRTEENTH JUDICIAL DISTRICT COURT

Article no:

57

STATE OF NEW MEXICO

FILED IN MY OFFICE 7004 1160 0002 9268 6633
DISTRICT COURT CLERK

COUNTY OF SANDOVAL

2004 DEC 20 AM 9:20

APP.

E

STATE OF NEW MEXICO

BY THERESA VALENCIA
DEPUTY
SANDOVAL COUNTY

V.

MARTIN GONZALES

Case no:

D-1329-CR-2003-057

MOTION FOR DISMISSAL BASED ON

THE FOLLOWING CLAIMS THAT ARE PROPERLY ADDRESSED TO THE FACT,
LENGTH OR CONDITIONS OF THE ACCUSED, CUSTODY THAT, NONETHELESS
ARE PREMISED EXCLUSIVELY ON THE FOLLOWING

December 2, 2004

Comes now, Martin R. Gonzales, hereinafter the accused, agent for the defendant MARTIN GONZALES, with power of attorney in fact, to represent the defendant MARTIN GONZALES, in all commercial affairs, asks that George P. Eichwald, judge, take judicial notice of the enunciations of the principles as stated in Haines v. Kerner 404, U.S. 519, wherein the Court has directed that those who are unschooled in law making pleadings and/or complaints shall the Court look to the substance of the pleadings rather than the form;

The following are violations of the accused's Constitutional Rights and a violation of the Court not following it's own Rules and Procedures;

RP

0595

claims 1 of 6

SUBPEONIA DUCES TECUM

1. States failure to acknowledge the accused's request for discovery through four subpoena duces tecum. Which are filed and issued with the Court Clerk's Office by the accused. - A violation of due process and denial of access ^{to} to the court as guaranteed by the Federal Constitution and a violation of the New Mexico Bill of Rights Article II, section 4, 14, 18 and 23;
2. On November 10, 2003 at a court hearing, prosecutor Joseph F. Arite, moved to quash the accused's first filed and issued subpoena duces tecum requesting discovery. - A violation of due process under the due process of law and denial of access to the court as guaranteed by the Federal Constitution and a violation of the New Mexico Bill of Rights Article II, section 4, 14, 18 and 23; Love v. Johnson 57 F.3d 1305 (4th Cir. 1995);
3. Three other subpoena duces tecums were filed by the accused with the Court Clerk's Office requesting discovery. Two on January 2004, and one on October 2004, to no avail - A violation of due process under the due process of law and denial of access to the court as guaranteed by the Federal Constitution and a violation of the New Mexico Bill of Rights Article II, section 4, 14, 18 and 23;
4. By not acknowledging these request for discovery the court has shown it's prejudice against the accused and the possibility of a fair trial impossible and renders the impossibility of conviction;

RP0596

COMPETENCE HEARING

Failing to hold a hearing on the accused's competency to stand trial. The Court has violated the accused's right to due process as guaranteed by the Federal Constitution and a violation of the New Mexico Bill of Rights, Article II, sections 4, 14, 18 and 23; Griffin v. Lockhart 935, F.2d 875 (8th Cir. 1991);

VIOLATION OF THE NMRA RULES

The Court has violated it's own rules and procedures, by allowing continuance of this matter without a valid filed petition to extend the case after February 11, 2004 NMRA RULE 604-5(E). Deputy District Attorney Joseph F. Arite, had (10) ten days after the expiration of the last extension to file for an extension or continuance through a valid petition with the Court Clerk, and a valid reason for the request. This is not an option it should be viewed as mandatory. Almost a full year has passed since the last extension expired to no avail. No further extensions have been petitioned for. The accused has been held unlawfully since (10) ten days after the expiration of the last extension set by the Supreme Court. This is a nonreversible error but is consistent with the States action in this matter. This is a violation of due process under the due process of law and denial of access to the court as guaranteed by the Federal Constitution and a violation of the New Mexico Bill of Rights, Article, II section 4, 14, 18 and 23;

RP 0597

claims 3 of 6

SPEEDY TRIAL RIGHTS

The Court is in violation of my guaranteed speedy trial rights as guaranteed by the 6th Amendment of the Federal Constitution and my right to a speedy trial as guaranteed by Article II, section 14 of the New Mexico Bill of Rights. The Court is depriving the accused of his Constitutional Rights to a speedy trial. Braden v. 30th Judicial Cir., Ct. 410 U.S. 484, 492-93 (1973); United States v. Castor, 937 F.2d 293, 296 (7th Cir. 1991);

INDICTMENT

The Court is working on a invalid indictment against Martin R. Gonzales, a living soul. The accused is not a corporate fiction and has never spelled his name in all cap letters. The indictment in this matter is against an artificial person. The Court and the Prosecutor are trying to coerce the accused into believing that he is a corporate fiction. He is NOT. During the Grand Jury the prosecutor failed to instruct the jurors that adding extra charges without reasonable doubt violates due process and a fair trial. Videos on the supposed victim was introduced to the Grand Jury which violated the Confrontation Clause of the Federal Constitution and a violation of Article II section, 14 of the New Mexico Bill of Rights. After all was said and done the Grand Jury deliberated in 16. min. on 250 charges, charges the accused does not understand. Jackson v. Virginia 443, U.S. 307 (1979); Alexander v. McCotter 755 F.2d 595 (5th Cir. 1985); US. v. Harper 901, F.2d 471, 472 (8th Cir. 1990);

RP0598

The Court and the prosecutor are in violation of "FUNDAMENTAL" BEDROCK and watershed rules that have undermined the fundamental fairness of the accused proceedings, Malinright v. Sykes; Engle v. Issac; Brecht v. Abrahamson; Sawyer v. Smith;

The Court has appointed two counsels in the past to work with the accused to no avail. "Constitutional "ERRORS" occurring under circumstances in the absence of effective assistance of counsel that render the proceedings suspect," Coleman v. Thompson; Murray v. Carrier;

FURTHER, deliberate and especially egregious errors of the trial type, that are combined with a pattern of prosecutorial misconduct that so infect the integrity of the proceedings, Greer v. Miller; Reed v. Farley; Brecht v. Abrahamson;

I, Martin R. Gonzales, have consistently, attempted to defend myself with regard to this matter and have been just as consistently ignored by this court. I have mailed documents to Mr. Arite, as required in this matter and he has refused to accept receipt of said documents. No doubt he has refused to accept these documents so he could say he has not seen these documents. This is exactly what Mr. Arite, did in court on December 1, 2004. This court and Mr. Arite have somehow gotten the idea that I, Martin R. Gonzales, cannot or do not have the right to defend myself. Article II section 14 of the New Mexico Bill of Rights says I do, "...In all criminal prosecutions,

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claims 5 of 6

the accused SHALL have the right to appear and defend himself in person, and by counsel,...." (emphasis added);

ON THE RECORD

As stated on the RECORD in court on December 1, 2004 the accused evoked all of his Constitutional Rights as guaranteed by the first 8 Amendments of the Federal Constitution, and he also evoked all of his New Mexico State Constitutional Rights, and he evoked his full Sovereignty under the common law of the Federal Constitution. The accused also stated for the record, That he did not understand the charges, because he does not know how to defend himself against admiralty charges in a criminal setting. The accused would like to add, his time and liberty are his private property and is/has been damaged and violated by the Court and the Prosecutor;

The accused ask that George P. Eichwald, judge, and Prosecutor Deputy District Attorney Joseph F. Arite, be advised that this motion for dismissal will serve and is evidence of thier misconduct and performance against the accused and a denial of his Constitutional Rights. This motion for dismissal will serve and is evidence against the judge and the prosecutor in a complaint form, tort claim and law suite in Federal Court.

I, Martin R. Gonzales, further state that I have been denied all essential rights in this matter and this court has no jurisdiction.

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claims 5 of —

Based on the foregoing the accused respectfully ask that George P. Eichwald, judge, will hear this motion in a timely manner, act responsibly and dismiss this case with prejudice.

Respectfully,

Martin R. Gonzales

"I certify under the pain and penalty of perjury that I am the signer of this document."

Martin R. Gonzales

Martin R. Gonzales, the accused,
sovereign, agent with power of attorney
in fact with the autograph, representative
for the fiction in this case the defendant
MARTIN GONZALES.

This motion for dismissal is self notarized under title 28 section 1746 US. code. Title 18 section 2971 US. Code. Failure of the Court Clerk to file this document is a failure to uphold oath of office punishable by 2,000 fine or 3 years. This motion for dismissal is also sent certified by mail which makes any and all documents sent certified a legal Federal Document.

- CC, Theresa Valencia - DISTRICT COURT CLERK
- George P. Eichwald - DISTRICT JUDGE
- Lemuel Martinez - DEPUTY DISTRICT ATTORNEY
- Joseph F. Arite - DEPUTY DISTRICT ATTORNEY
- PATRICIA Madrid - GENERAL ATTORNEY
- Virginia Ferrara - CHIEF BAR COUNSEL
- Angla Luchen - PUBLIC DEFENDER

RP0601

(1) 64
APP.
F
(S6)

I would like noted for the record ~~and~~ in front of the jury that I have demanded and been denied all essential Constitutionally guaranteed rights in this matter. Therefore this Tribunal has no jurisdiction in this matter. I cite (Frank v. U.S., 395 U.S.) as my authority and I quote, "Whenever denied Constitutional rights the Court (Tribunal) loses all jurisdiction."

I have been denied the ^{right} personal to personally defend myself as guaranteed in Art. II Sec. 14 of the New Mexico Constitution. Mr. Eichwald has stated that I had to file a motion in order to defend myself. If this is a State Rule it is contrary to Art. II Sec. 14 of the New Mexico Const. and is therefore void. One requests privileges, One demands rights. I have repeatedly demanded the right to defend myself and have been denied this right by Mr. Eichwald, Mr. Arite, Mr. Lujan, the Correction officers at SDC, and the State.

All of my motions, subpoenas, and affidavits have been denied by Mr. Eichwald for lacking merit. Yet Mr. Eichwald refuses or is incapable of telling me why they lack merit. I have repeatedly requested and demanded of Mr. Eichwald, Mr. Arite, Mr. Lujan, and the State, show me my liability in this matter, but have been denied. Mr. Eichwald violated the Due Process Clause of the Federal Constitution by quashing my pre-trial subpoena duces tecums... without first conducting an in camera inspection of the subpoenaed records to determine

FILED IN OPEN COURT THIS
DAY OF
2005
George P. Eichwald

DEPT. OF CORRECTIONS
NEW MEXICO
JAN 26 2005

0620

whether portions were material and favorable to the defendant. I cite, Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995) as my authority.

I have repeatedly requested and been denied access to the law library at SCDC. I have repeatedly been denied Notarial Service from Mr. Candelaria who is a Deputy Director at SCDC and is a Notary Public. Every attempt to defend myself has been denied. I have been denied any meaningful access to this Tribunal and due process as guaranteed by both the Federal and New Mexico Constitutions.

The State has violated my right to a speedy trial as protected by the 6th Amendment of the Federal Const. and Art. II Sec. 14 of the N.M. Const. The State has violated its own Rules under NMRA Rule 5-604. Rule 5604 specifically states the manner and time frame in which an extension of time maybe granted past the 6 months required to bring an accused to trial. The last extension in this case expired 1 year ago. A clear and flagrant violation of the State's own Rules. The NMRA Rules are clear and are mandatory as to what is to happen if there is a violation of these Rules. It states the indictment is to BE DISMISSED WITH PREJUDICE. No exceptions. This trial is therefore unlawful and I demand that the indictment ~~be~~ in this matter be dismissed with prejudice.

③

Pursuant to Q.C. v. GE 281 U.S. and Keller v. PE 261 66
U.S., Judges do not preside over cases involving violations
of statutes, Executive Administrators do, in Administrative
Tribunals not Judicial Courts. Therefore, citing the afore
mentioned U.S. Supreme cases, this is not a Judicial
Court but a Tribunal and Mr. Eichwald is not a
judge but is a person acting as an ~~Administrative~~
Executive Administrator. Administrative Tribunals
do not have Criminal Jurisdiction. That means
the matter before this Tribunal today is Civil. All penalty
under ~~is civil~~ statute is civil. Pursuant to Art. II Sec. 21
of the N.M. Const., "No person shall be imprisoned
for debt in any civil action."

In this matter, before this Tribunal today, I plead
Coram Non Judge. I cite (Manufacturing Co v. Holt
51 W. Va.) as my authority and I quote, "In the
presence of a person not a judge. When a suit is
brought and determined in a court which has no
jurisdiction in the matter, then it is said to be
coram non judge, and the judgement is void."

Martín R. Gozales

1-26-05

Martín R. Gozales

D-1329-CR-2003-057

PP 0631

AT TRIAL THE JURY HEARD TESTIMONIAL EVIDENCE AND ARGUMENT FROM THE STATE PERTAINING TO UNCHARGED AND UNSUBSTANTIATED ALLEGATIONS OF MR. GONZALES' PRIOR BAD ACTS. THESE ALLEGATIONS WERE IRRELEVANT TO A MATERIAL ISSUE, MORE PREJUDICIAL THAN PROBATIVE, SERVED ONLY AS PROPENSITY EVIDENCE AND, IMPROPERLY ADMITTED CONTRARY TO RULES 11-402, 403, AND 404 N.M.R.A. INTRODUCTION OF THE PRIOR BAD ACTS EVIDENCE RENDERED PETITIONER'S TRIAL FUNDAMENTALLY UNFAIR UNDER BOTH STATE AND FEDERAL CONSTITUTIONS.

INTRODUCTION

THIS ISSUE IS AN AMALGAMATION OF ERROR THAT IS NOT READILY UNTANGLED. IN ORDER TO COMPREHENSIVELY AND EFFECTIVELY ADDRESS THE CLAIMED ERROR(S), PETITIONER HAS CHOSEN TO ADDRESS THEM INTERTWINED AS THEY OCCURRED AT TRIAL. PETITIONER CONTENDS THAT THE INTRODUCTION OF PRIOR BAD ACTS EVIDENCE WAS THE RESULT OF PROSECUTORIAL MISCONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL, AND AN ABUSE OF JUDICIAL DISCRETION. MOST IMPORTANTLY, THE TRIAL RECORD CLEARLY DEMONSTRATES THAT THE STATE PURPOSEFULLY AND REPEATEDLY MADE EXTENSIVE USE OF THE EXTREMELY PREJUDICIAL PRIOR BAD ACTS EVIDENCE THROUGHOUT THE TRIAL.

THE LION'S SHARE OF THE BLAME FOR THIS ISSUE FALLS PRIMARILY UPON THE PROSECUTION FOR ITS FAILURE TO COMPLY WITH THE RULES OF EVIDENCE, RULE 11-404 NMRA. NONETHELESS, DEFENSE COUNSEL'S OBLIGATION TO PROTECT PETITIONER'S LEGAL INTERESTS AT TRIAL IS NOT DETERMINATE UPON THE STATE'S ADHERENCE TO THE RULES OF EVIDENCE. AT TRIAL, DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE INTRODUCTION OF THE PRIOR BAD-ACTS EVIDENCE, OR REQUEST A CURATIVE/LIMITING INSTRUCTION. THE COURT, IN ITS ROLE, FAILED TO EXERCISE THE REQUISITE DEGREE OF DISCRETIONARY AUTHORITY BY NOT REQUIRING THE STATE TO PROFFER A SPECIFIC PURPOSE FOR WHICH IT SOUGHT TO INTRODUCE THE HIGHLY INFLAMMATORY 404(B) EVIDENCE, OR MAKING A PREJUDICIAL VERSUS PROBATIVE DETERMINATION FOR ADMISSIBILITY.

THE SANDOVAL COUNTY ADA, PHYLLIS DOMINGUEZ, PREVIEWED THE SPECIFIC NATURE OF THE 404(B) EVIDENCE DURING HER OPENING STATEMENTS TO THE JURY. HER NARRATIVE WAS SIMPLE, DIRECT AND TO THE POINT. IN HER MIND, IT WAS IMPERATIVE THAT THE JURY NEEDED TO BE INFORMED THAT MR. GONZALES HAD ALLEGEDLY BEEN ABUSING HIS STEP-DAUGHTER, NICOLE LARO, FOR MANY, MANY YEARS. IT DID NOT MATTER TO MRS. DOMINGUEZ THAT THIS ALLEGED ABUSE HAD NOT BEEN SUBSTANTIATED, CHARGED AND, IF TRUE, OCCURRED BEYOND THE JURISDICTIONAL BOUNDARIES OF SANDOVAL COUNTY. APPARENTLY, THE PROSECUTORIAL VALUE OF THE PRIOR BAD-ACTS EVIDENCE OUTWEIGHED PETITIONER'S CONSTITUTIONAL

RIGHTS TO A FUNDAMENTALLY FAIR TRIAL.

THE ADA'S OPENING STATEMENT, IN RELEVANT PART, EXCLAIMED:

NICOLE WAS ABOUT SIX WHEN THE RELATIONSHIP WITH HER STEP-FATHER CHANGED. NICOLE WENT INTO HER FATHER'S BEDROOM, AS SHE HAD DONE MANY TIMES BEFORE, TO LAY DOWN WITH HIM, BUT THIS TIME WAS DIFFERENT. THIS TIME, MR. MARTINEZ (SIC) PLACED NICOLE ON TOP OF HIM, HE SPREAD HER LEGS, HE STARTED KISSING HER, HE STARTED RUBBING HER BREASTS, HER BUTTOCKS, AND HER VAGINA. NICOLE DIDN'T KNOW WHAT TO DO. SHE CLOSED HER LEGS, SHE TRIED TO GET AWAY FROM HIM, BUT HE PULLED HER BACK ON TOP OF HIM AND CONTINUED THIS BEHAVIOR.

FROM THE AGE OF SIX UNTIL NICOLE WAS 10, MR. GONZALES WOULD GO INTO NICOLE'S BEDROOM AT NIGHT WHEN EVERYONE WAS ASLEEP AND HE WOULD FONDLE HER. AT FIRST, HE STARTED RUBBING HER THROUGH HER CLOTHES, BEHAVIOR THAT BECAME INCREASINGLY WORSE, AND HE WOULD RUB NICOLE'S BREASTS, HER BUTTOCKS AND HER VAGINA UNDERNEATH HER CLOTHING. AND IT PROGRESSSED UNTIL HE WAS PENETRATING NICOLE'S VAGINA WITH HIS FINGERS. AT AROUND THE AGE OF 10, MR. GONZALES HAD SEXUAL INTERCOURSE WITH NICOLE FOR THE FIRST TIME, [VOL. 1, TR-7, 8].

MOST SIGNIFICANT IS THE FACT THAT MR. GONZALES WAS NOT ON TRIAL FOR, OR EVER CHARGED WITH, ANY ALLEGED ABUSE THAT REPORTEDLY OCCURRED PRIOR TO JULY 19, 1997; NICOLE'S TENTH BIRTHDAY. AT NO TIME PRIOR TO MS. DOMINGUEZ'S OPENING STATEMENT HAD THE STATE DISCLOSED TO THE DEFENSE THAT THE PROSECUTION INTENDED TO INTRODUCE EVIDENCE UNDER RULE 11-404(B) NMRA AT TRIAL. THIS PROCEDURAL OMISSION WITHHELD FROM THE DEFENSE A CRITICAL OPPORTUNITY TO ARGUE AGAINST THE ADMISSION OF THE PREJUDICIAL PROPENSITY EVIDENCE. THE COURT, THEREFORE, WAS ALSO ILLEGITIMATELY DENIED AN OCCASION TO WEIGH THE PROBATIVE VALUE OF THE 404(B) EVIDENCE AGAINST ITS CLEARLY PREJUDICIAL EFFECT.

THE PREJUDICIAL EFFECT OF INTRODUCING THE PRIOR BAD-ACTS EVIDENCE WAS EXACERBATED BY THE STATE'S EXTENSIVE EXAMINATION OF THE ALLEGED VICTIM UNCHARGED AND UNSUBSTANTIATED ABUSE DURING ITS CASE IN CHIEF. THE CONSEQUENTIAL MAGNITUDE OF THIS DAMAGING EVIDENCE COMPELS THAT IT BE INCORPORATED HEREIN AS A DIRECT MEANS OF DEMONSTRATING ITS IMPACT ON THE JURY. THE FOLLOWING EXCERPTS HAVE BEEN TRANSCRIBED VERBATIM FROM THE OFFICIAL TRIAL TRANSCRIPTS.

DIRECT EXAMINATION BY THE STATE, MR. ARITE, OF NICOLE LABO.

Q. NOW, DURING THIS TIME IN ALBUQUERQUE RIGHT BEFORE YOU MOVED HERE WHEN YOU WERE ABOUT EIGHT, NINE YEARS OLD, DID THERE BEGIN TO HAPPEN SOME THINGS THAT MADE YOU UNCOMFORTABLE WITH MR. GONZALES?

A. YES.

Q. AND WHAT IS THAT HAPPENED THAT MADE YOU UNCOMFORTABLE?

A. HE WOULD TOUCH ME.

Q. WHEN YOU SAY HE WOULD TOUCH YOU, WHAT'S WRONG WITH BEING TOUCHED?

A. HE WOULD STICK HIS FINGERS IN ME, RUB MY BREASTS, JUST VERY UNCOMFORTABLE.

Q. LET'S TALK ABOUT THE FIRST, FIRST TIME THAT SOMETHING LIKE THIS EVER OCCURRED TO YOU. WERE YOU IN ALBUQUERQUE OR WHERE?

Q. THE VERY FIRST TIME THAT THIS OCCURRED, TELL THE JURY WHAT HAPPENED?

A. I WENT IN HIS ROOM TO LAY DOWN WITH HIM BECAUSE HE CAME HOME FROM WORK, AND I THOUGHT EVERYTHING WAS GOING TO [VOL. 1, END TR-2] BE OKAY, AND HE PUT ME ON TOP OF HIM AND SPREAD MY LEGS AROUND HIS BODY.

Q. WHEN HE DID THAT, WHAT DID YOU FEEL?

A. VERY UNCOMFORTABLE, LIKE I DON'T LIKE IT. I DON'T LIKE IT, SO I CLOSED MY LEGS RIGHT AWAY.

Q. WHAT HAPPENED THEN?

A. AND THEN RIGHT AFTER I CLOSED MY LEGS AGAIN, HE REOPENED MY LEGS AND PUT THEM BACK AROUND HIS BODY.

Q. ANYTHING ELSE HAPPEN THAT VERY FIRST INCIDENT?

A. I DON'T REMEMBER, BUT AFTER THAT, I WAS SITTING ON THE BED, AND HE WAS KISSING ME AND SAYS, "DON'T TELL NOBODY. DON'T SAY -- DON'T TELL NOBODY."

Q. SO THAT'S THE VERY FIRST TIME SOMETHING HAPPENED TO YOU?

A. YES.

Q. AFTER THAT FIRST INCIDENT, DID THESE TOUCHINGS HAPPEN AGAIN?

A. YES.

Q. AND HOW WOULD HE TOUCH YOU AFTER THIS FIRST INCIDENT?

A. HE WOULD JUST LIKE RUB HIS HANDS ON MY VAGINA.

Q. OKAY. HOW OLD WERE YOU AT THIS TIME?

A. AROUND SIX.

Q. AND WHAT THIS OVER YOUR CLOTHES? [VOL. 1, END TA-22].

A. YES. IN THE BEGINNING.

Q. ALWAYS OVER THE CLOTHES?

A. IN THE BEGINNING.

Q. YOU SAID, "IN THE BEGINNING." I TAKE IT THEN, THAT SOMETHING ELSE DEVELOPED LATER ON?

A. YES.

Q. WHAT HAPPENED NEXT THAT --

A. HE WOULD GO INSIDE MY CLOTHES, ON TOP OF MY CLOTHES, ON TOP OF MY UNDERWEAR, AND THEN GRADUALLY IT WOULD BE INSIDE OF MY UNDERWEAR ON MY SKIN.

Q. WHEN HE WAS TOUCHING YOU INSIDE YOUR CLOTHES ON YOUR UNDERWEAR, WHAT AREA WAS HE TOUCHING?

A. MY VAGINA.

Q. AND, NOW, DID THIS HAPPEN LIKE THE SECOND OR THIRD TIME OR WAS IT A LONGER PERIOD THAN THAT THAT THIS OCCURRED?

A. IT WAS A LONGER PERIOD, COUPLE MONTHS, MAYBE.

Q. SO, OVER A PERIOD OF MONTHS, IS THAT RIGHT?

A. YEAH.

Q. AFTER HE WAS TOUCHING YOU BENEATH YOUR CLOTHES BUT OVER YOUR UNDERWEAR, DID IT PROGRESS FROM THERE?

A. YES.

Q. IN WHAT WAY?

A. IN STICKING HIS FINGERS IN ME.

Q. OKAY. STICKING HIS FINGERS WHERE?

A. MY VAGINA. [VOL. 1, END TR-23].

Q. STICKING HIS FINGERS WHERE?

A. MY VAGINA.

Q. OKAY. NOW, WAS THIS OVER THE UNDERWEAR STILL OR --

A. NO. IN MY UNDERWEAR.

Q. OKAY. AGAIN, DID THIS PROGRESS FROM WHERE HE WAS TOUCHING YOU OVER YOUR UNDERWEAR TO WHERE HE WAS TOUCHING YOU SKIN-TO-SKIN, DID THIS PROGRESS OVER LIKE JUST A COUPLE OF DAYS OR WHAT PERIOD OF TIME?

A. MAYBE A COUPLE MONTHS.

Q. SO THAT YOU WERE OLDER WHEN THIS STARTED HAPPENING?

A. YES.

Q. OKAY. NOW, DID IT PROGRESS FROM THIS SKIN-TO-SKIN?

A. IT STAYED LIKE THAT FOR A WHILE UNTIL I GOT OLDER.

Q. OKAY. HOW MUCH OLD?

A. UNTIL I WAS ABOUT 10.

Q. OKAY. WHEN YOU WERE 10, HOW DID IT PROGRESS?

A. HE PENETRATED ME.

Q. OKAY. LET'S TALK ABOUT SOME THINGS -- SO WHEN IT FIRST STARTED, IT STARTED WHEN YOU WERE LIVING IN ALBUQUERQUE?

A. UH-HUH.

A. AND WHEN YOU WERE 10, WHERE ARE YOU LIVING NOW?

[VOL. 1, END TR-24]

A. RIO RANCHO.

....

Q. OKAY. WHEN HE WOULD PUT HIS FINGERS INSIDE OF YOUR VAGINA, WHEN DID THAT BEGIN TO OCCUR, HOW OLD WERE YOU WHEN HE BEGAN TO PUT HIS FINGERS INSIDE OF YOUR VAGINA?

A. MAYBE SEVEN, EIGHT. I REALLY DON'T REMEMBER, BUT AROUND THEN.

Q. BUT ITS QUITE SOME TIME BEFORE HE PENETRATED YOU WITH HIS PENIS?

A. YES.

Q. NOW, LET'S TALK ABOUT THAT VERY FIRST TIME THAT HE PENETRATED YOU WITH HIS PENIS? WHERE DID THAT OCCUR?

A. I BELIEVE IN MY ROOM.

Q. SO IN RIO RANCHO?

A. RIO RANCHO. [VOL. 1, TR-25, END OF TRANSCRIPT REFERENCE]

THE STATE DEDICATED A SIGNIFICANT AMOUNT OF TIME AND ATTENTION TO PUTTING THE 404(B) EVIDENCE COMPLAINED

OF DURING ITS CASE IN CHIEF. IF THE STATE HAD FOLLOWED THE PROCEDURAL REQUIREMENTS UNDER RULE 11-404 NMRP, THE STATE DISTRICT COURT, AT A MINIMUM WOULD HAVE INSTRUCTED THE STATE TO LIMIT THE BREADTH OF ITS DIRECT EXAMINATION OF NICOLE LARO DUE TO THE EXTREMELY PREJUDICIAL NATURE OF THE 404(B) EVIDENCE. FOR EXAMPLE, AFTER HEARING FROM DEFENSE COUNSEL, THE COURT MAY HAVE LIMITED THE STATE'S INTRODUCTION OF THE PRIOR ABUSE TO A CONCISE NARRATIVE; IF THE COURT WOULD HAVE ALLOWED THE 404(B) EVIDENCE TO BE PRESENTED TO THE JURY AT ALL. IF THE TRIAL COURT HAD DECIDED IN FAVOR OF ADMISSION, THE STATE'S INQUIRY INTO THE PRIOR BAD ACTS MOST LIKELY WOULD HAVE RESEMBLED THE FOLLOWING:

Q. WHEN DID MR. GONZALES BEGIN SEXUALLY ABUSING YOU?

A. WHEN I WAS SIX OR SEVEN.

Q. WHERE WERE YOU LIVING WHEN THE ABUSE BEGAN?

A. IN ALBUQUERQUE.

Q. WHERE ARE YOU LIVING NOW?

A. IN RIO RANCHO.

Q. HOW OLD WERE YOU WHEN YOU MOVED TO RIO RANCHO?

A. NINE, JUST BEFORE I TURNED TEN.

Q. DID MR. GONZALES CONTINUALLY ABUSE YOU BETWEEN THE AGES OF SIX AND NINE.

A. YES.

Q. DID MR. GONZALES CONTINUE TO SEXUALLY ABUSE YOU

AFTER YOU MOVED TO RIO RANCHO?

A. YES.

Q. WHAT YEAR DID YOU MOVE TO RIO RANCHO?

A. 1996.

Q. WHY ARE WE HERE IN COURT TODAY?

A. BECAUSE OF WHAT HE DID AFTER WE MOVED TO RIO RANCHO.

Q. WOULD YOU PLEASE TELL THE JURY WHAT MR. GONZALES WAS PHYSICALLY DOING TO YOU AFTER YOU MOVED TO RIO RANCHO IN 1996?

THIS HYPOTHETICAL LINE OF QUESTIONING WOULD HAVE BEEN MORE THAN SUFFICIENT TO CONVEY TO THE JURY THAT MRS. LORD HAD ALLEGED THAT MR. GONZALES HAD ABUSED HER FOR A NUMBER OF YEARS PRIOR TO MOVING TO RIO RANCHO WITHOUT CREATING A DEFACTO TRIAL WITHIN A TRIAL, CIRCUMVENTING THE RULES OF EVIDENCE.

MR. GONZALES' SPURIOUSLY ACCLAIMED PROPENSITY DID NOT GO UNHERALDED BY THE STATE DURING ITS CLOSING ARGUMENT. MR. ARITE ARGUED RESOLUTELY BEFORE THE JURY ON BEHALF OF THE STATE THE FOLLOWING:

HE BEGAN WHEN SHE WAS SIX YEARS OLD AND HE BEGAN VERY SLOWLY, SLEET. AND SHE RELATED TO YOU THE FIRST INCIDENT WHERE HE PUTS HER ON TOP OF HIM, SHE IS A YOUNG CHILD, SIX YEARS OLD, A LITTLE SMALL,

HE PUTS HER ON TOP OF HIM AND STRETCHES HER LEGS OVER HIM TO STRADDLE HIM, AND SHE SAID SHE FELT UNCOMFORTABLE AND DIDN'T LIKE IT AND TRIED NOT TO STRADDLE HIM AND PUT HER LEGS BACK.

AND IT PROGRESSES FROM HIM TOUCHING HER VAGINAL AREA OVER HER CLOTHES AND RUBBING HER VAGINAL AREA OVER HER CLOTHES, AND PROGRESSED AFTER A FEW MONTHS TO HIM RUBBING HER VAGINAL AREA OVER HER UNDERWEAR BUT UNDERNEATH HER PANTS, AND THEN FINALLY RUBBING SKIN TO SKIN HER VAGINAL AREA, AND THIS IS PROGRESSING OVER A SERIES OF MONTHS, STRETCHES INTO YEARS, AND SO WHEN SHE IS ROUGHLY NINE OR TEN, HE BEGINS TO INSERT HIS FINGERS INTO HER VAGINA.

[VOL. III, TR-10, 11].

THIS ARGUMENT HAD NO OTHER PURPOSE THAN TO INFLAME THE PASSIONS OF THE JURY BY CONVINCING THEM THAT MR. GONZALES HAD BEEN ABUSING NICOLE LONG BEFORE THE CURRENT CHARGES WERE FILED. THE INFERENCE BEING THAT SINCE MR. GONZALES HAD ABUSED NICOLE WHEN LIVING IN ALBUQUERQUE, HE UNCOURTEOUSLY MOLESTED HER WHILE LIVING IN RIO RANCHO. THE ARGUMENTS WERE IMMATERIAL OF ANY ELEMENTS REQUIRED TO BE PROVEN FOR THE CHARGES PUT BEFORE THE JURY. THE STATE SIMPLY SOUGHT TO REMIND THE JURY OF THE PRIOR BAD ACTS TESTIMONY THAT IMPLICATED MR. GONZALES' PREDILECTION.

THIS EVIDENCE CAME IN BEREFT OF ANY MOTION; BEREFT OF ANY PRIOR NOTIFICATION OF THE GENERAL NATURE OF THE RULE 404(B) EVIDENCE THE GOVERNMENT INTENDED TO INTRODUCE; AND BEREFT OF ANY EXERCISE OF CONTROL ON THE PART OF THE COURT. INDEED, RULE 404(B) NEVER ONCE CAME UP DURING THE COURSE OF THE TRIAL. IN ORDER TO BE ADMISSIBLE UNDER RULE 404(B), "(1) THE EVIDENCE MUST HAVE A PROPER PURPOSE UNDER RULE 404(B); (2) IT MUST BE RELEVANT UNDER RULE 402; (3) ITS PROBATIVE VALUE MUST OUTWEIGH ITS POTENTIAL FOR UNFAIR PREJUDICIAL EFFECT UNDER RULE 403; AND (4) THE COURT MUST CHARGE THE JURY TO CONSIDER THE EVIDENCE ONLY FOR THE LIMITED PURPOSE FOR WHICH IT WAS ADMITTED." HUDDLESTON V. UNITED STATES, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988); SEE ALSO, NAPUE V. ILLINOIS, 360 U.S. 264, 269, 79 S.Ct. 1177, 3 L.Ed. 1217 (1959).

IN NEW MEXICO, THE PROCEDURE FOR ADMITTING EVIDENCE UNDER RULE 11-404 NMRA IS "VIRTUALLY IDENTICAL TO THE FEDERAL RULES OF EVIDENCE, FRE 404." STATE V. LAMURE, 115 N.M. 61, 69, 846 P.2d 1070, 1072 (Ct. App. 1992). SEE ALSO, STATE V. BEACHUM, 1982-NMCA-089, 96 N.M. 566, 632 P.2d 582. IN RELEVANT PART, RULE 404(B), NMRA STATES:

B. CRIMES, WRONGS, OR OTHER ACTS.

(1) PROHIBITED USES; EVIDENCE OF A CRIME, WRONG, OR OTHER ACT IS NOT ADMISSIBLE TO PROVE A PERSON'S CHARACTER IN ORDER TO SHOW THAT ON A PARTICULAR OCCASION THE PERSON ACTED IN ACCORDANCE WITH THEIR CHARACTER.

(2) PERMITTED USES; NOTICE IN A CRIMINAL CASE. THIS EVIDENCE MAY BE ADMISSIBLE FOR ANOTHER PURPOSE SUCH AS PROVING MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, ABSENCE OF MISTAKE, OR LACK OF ACCIDENT. IN A CRIMINAL CASE, THE PROSECUTION MUST

(a) PROVIDE REASONABLE NOTICE OF THE GENERAL NATURE OF ANY SUCH EVIDENCE THAT THE PROSECUTOR INTENDS TO OFFER AT TRIAL, AND

(b) DO SO BEFORE TRIAL - OR DURING TRIAL IF THE COURT, FOR GOOD CAUSE, EXCUSES LACK OF PRETRIAL NOTICE.

ARGUMENT

RULE 11-404, NMRA IS PRIMARILY A RULE OF EXCLUSION. TO ADMIT EVIDENCE OF CRIMES, WRONGS, OR OTHER ACTS AT TRIAL A PROPONENT MUST FIRST IDENTIFY THE "CONSEQUENTIAL FACT TO WHICH THE PROFFERED EVIDENCE

OF OTHER ACTS IS DIRECTED." STATE V. SEANA, 2013-NMSC-033, 305 P.3d 936. "THE GOVERNMENT MUST ARTICULATE PRECISELY THE EVIDENTIARY HYPOTHESIS BY WHICH A FACT OF CONSEQUENCE MAY BE INFERRED FROM THE EVIDENCE OF OTHER ACTS. IN ADDITION, THE TRIAL COURT MUST SPECIFICALLY IDENTIFY THE PURPOSE FOR WHICH SUCH EVIDENCE IS OFFERED AND A BROAD STATEMENT MERELY INVOKING OR RESTATING RULE 404(B) WILL NOT SUFFICE." SEE, UNITED STATES V. RIVERA, 837 F.2d 906, 912 (10TH CIR. 1988). IN THIS CASE THE STATE NEVER ARTICULATED ANY REASON FOR THE ADMISSION OF THE 404(B) EVIDENCE. THE RULE REQUIRES THAT A DETERMINATION MUST BE MADE WHETHER DANGER OF UNFAIR PREJUDICE OUTWEIGNS THE PROBATIVE VALUE OF EVIDENCE IN VIEW OF AVAILABILITY OF OTHER MEANS OF PROOF. STATE V. MARQUEZ, 1974-NMCA-129, 87 N.M. 57, 529 P.2d 283, CERT. DENIED, 87 N.M. 47, 529 P.2d 273. SEE ALSO, OLD CHIEF V. UNITED STATES, 519 U.S. 172, 180-81 (1997) DISCUSSING "UNFAIR PREJUDICE" IN THE CONTEXT OF FRE RULE 404(B); OBSERVING THAT IT IS IMPROPER TO GENERALIZE A DEFENDANT'S UNCHARGED BAD ACTS INTO BAD CHARACTER AND TO INFER THAT BAD CHARACTER RAISES THE ODDS THAT THE DEFENDANT DID THE LATER BAD ACT NOW CHARGED). THE DEFENSE NEVER RECEIVED NOTICE OF THE STATE'S INTENDED USE OF THE 404(B) EVIDENCE, NOR DID THE STATE DISTRICT COURT EVER MAKE

AN ADMISSIBILITY DETERMINATION. DESPITE THE FACT THAT "THE DISCOVERY RULES WERE ADOPTED IN THE FIRST PLACE TO ELIMINATE SURPRISE AND ALLOW FOR FULL PREPARATION OF A CASE." REDMAN V. Bd. OF REGENTS, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct. App. 1984).

THE STATE DID NOT MEET ITS DISCLOSURE OBLIGATION, AND THEREFORE, THE EVIDENCE SHOULD NOT HAVE COME IN. WHATEVER, HAD THE STATE DISCLOSED PRETRIAL ITS INTENT TO INTRODUCE THE 404(B) EVIDENCE, THE DEFENSE WOULD HAVE ARGUED AGAINST ITS INTRODUCTION. AT THE VERY LEAST, THE DEFENSE WOULD HAVE ARGUED FOR LIMITATIONS ON HOW AND TO WHAT EXTENT THE STATE SHOULD BE ALLOWED TO PRESENT THE INFORMATION TO THE JURY IN ORDER TO MINIMIZE THE RISKS OF "UNDUE PREJUDICE" TO THE DEFENDANT. AS WELL AS, REDUCE THE POSSIBILITY OF "MISLEADING" AND "CONFUSION OF THE ISSUES" FOR THE JURY. STATE V. RUIZ, 2001-NMCA-07, 131 N.M. 241, 34 P.3d 630. BECAUSE DUE PROCESS WAS IGNORED, THE STATE ENJOYED CASTE BLANKHE AN UNRESTRICTED 404(B) FREE-FOR-ALL DURING ALL PHASES OF MR. GONZALES' TRIAL.

THE STATE SHOULD NOT NOW BE ALLOWED TO BENEFIT FROM AN ERR THAT SEVERELY PREJUDICED THE PETITIONER. SINCE PETITIONER'S TRIAL THE NEW MEXICO SUPREME COURT HAS UPHOLD THE DISCLOSURE REQUIREMENT UNDER

RULE 11-404(B)(2)(a), (b). THE COURT NOTED IN STATE V. GALLEGOS, 2007-NMJC-007, 141 N.M. 185, 152 P.3d 828, "PART OF THE PROSECUTOR'S RESPONSIBILITY IS ALSO TO COGENTLY INFORM THE COURT — WHETHER THE TRIAL COURT OR A COURT OF APPEAL — THE RATIONALE FOR ADMITTING THE EVIDENCE TO PROVE SOMETHING OTHER THAN PROPENSITY. IN OTHER WORDS, MORE IS REQUIRED TO SUSTAIN A RULING ADMITTING [OTHER ACTS] EVIDENCE THAN THE INCANTATION OF THE ILLUSTRATIVE EXCEPTIONS CONTAINED IN THE RULE." AT TRIAL, DESPITE THIS CLEARLY ESTABLISHED PROTOCOL, THERE WAS NOT EVEN AN INCANTATION FOR WHICH THE COURT TO BASE A DECISION. THE COURT WAS MUTE; DEFENSE COUNSEL ACQUIESCED AND THE 404(B) EVIDENCE CAME IN FREELY WITHOUT GUIDANCE OR OPPOSITION.

RULE 11-402 NMRA, REQUIRES A DEMONSTRATION OF THE OTHER ACTS "RELEVANCY TO THE CONSEQUENTIAL FACTS, AND THE MATERIAL ISSUE, SUCH AS INTENT, MUST IN FACT BE IN DISPUTE." 99

GERNA, I.b.; BEACHUM, I.b. IRRELEVANT EVIDENCE IS NOT ADMISSIBLE. STATE V. GUERRA, 2012-NMJC-014. TO BE RELEVANT, EVIDENCE MUST HAVE SOME TENDENCY TO MAKE EXISTENCE OF ANY FACT THAT IS OF CONSEQUENCE TO THE DETERMINATION OF THE ACTION MORE PROBABLE OR LESS PROBABLE THAN IT WOULD BE WITHOUT THE EVIDENCE. IMPLICIT IN THAT DEFINITION ARE TWO DISTINCT REQUIREMENTS:

(1) THE EVIDENCE MUST BE PROBATIVE OF THE PROPOSITION IT IS OFFERED TO PROVE, AND (2) THE PROPOSITION TO BE PROVED MUST BE ONE THAT IS OF CONSEQUENCE TO THE DETERMINATION OF THE ACTION.

WHETHER A PROPOSITION IS OF CONSEQUENCE TO THE DETERMINATION OF THE ACTION IS A QUESTION THAT IS GOVERNED BY SUBSTANTIVE LAW. THE PROPOSITION TO BE PROVED MUST BE PART OF THE HYPOTHESIS GOVERNING THE CASE - A MATTER THAT IS IN ISSUE, OR PROBATIVE OF THE MATTER THAT IS IN ISSUE, IN THE LITIGATION.

→ MCCORMICK ON EVIDENCE, § 185, AT 434, 435 (2d. 2d. 1972).

THE PROBATIVE FORCE OF SUCH EVIDENCE MUST BEAR DIRECTLY ON SOME MATERIAL ELEMENT OF THE CRIME WHICH DEFENDANT IS CHARGED. STATE V. LOPEZ, 1969-

NMCA-057, 80 N.M. 599, 458 P.2d 851, CERT. DENIED, 80

N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S.Ct. 1860, 26

L.Ed.2d 273. THE 404(B) EVIDENCE HAD TO TENDANCY TO

PROVE THE EXISTENCE OF ANY PROBATIVE FACT OF CONSEQUENCE IN THE GOVERNMENT'S CASE EITHER MORE OR LESS PROBABLE.

IN OTHER WORDS, THE 404(B) EVIDENCE WAS IMPROPERLY BEFORE THE JURY BECAUSE IT WAS NOT MATERIAL TO ANY

ISSUE IN THE CASE. SEE GENERALLY, UNITED STATES V. RIVERA, 837 F.2d 906, 912 (10TH CIR. 1988). FAR FROM PROVING A

RELEVANT POINT UNDER RULE 11-404(B), THE PRIOR BAD ACTS WENT SOLELY TO PROPENSITY, BEARING NO LEGITIMACY UNDER THE RULE.

THIRD, IF THE EVIDENCE OFFERED IS OF A CRIME OTHER THAN THE ONE CHARGED, THE OTHER CRIME MUST "HAVE A REAL PROBATIVE VALUE, AND NOT JUST POSSIBLE WORTH ON ISSUES OF INTENT, MOTIVE, ABSENCE OF MISTAKE OR ACCIDENT, OR TO ESTABLISH A SCHEME OR PLAN." SEANA, Ib. "THE RATIONALE FOR ADMITTING THE EVIDENCE MUST BE TO PROVE SOMETHING OTHER THAN PROPENSITY." Id. (EMPHASIS ADDED). SEE ALSO, STATE V. MARTINEZ, 1999-NMASC-018, 127 N.M. 207, 979 P.2d 718.

REFERENCE TO OTHER OFFENSES DURING THE COURSE OF TRIAL IS ERROR UNLESS SUCH EVIDENCE IS RECEIVED FOR ONE OF PURPOSES RECOGNIZED AS AN EXCEPTION TO THE GENERAL RULE. STATE V. GUTIERREZ, 1968-NMCA-090, 79 N.M. 732, 449 P.2d 334, CERT. DENIED, 80 N.M. 33, 450 P.2d 433. THE PRIOR BAD ACTS EVIDENCE WAS CLEARLY CHARACTER EVIDENCE AND WAS NOT RELEVANT TO SHOW PROOF OF MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, OR ABSENCE OF MISTAKE OR ACCIDENT.

IN THIS CASE, AS PREVIOUSLY NOTED, THE STATE'S PURPOSE FOR INTRODUCING OTHER BAD ACTS EVIDENCE WAS NEVER ESTABLISHED. WITHOUT HAVING STATED THE INTENDED USE FOR THE STATE'S INTRODUCTION OF THE 404(B) EVIDENCE, ONE CAN ONLY SPECULATE AS TO THE

DISTRICT ATTORNEY'S ACTUAL OBJECTIVE. WHEN A REVIEWING COURT IS NOT ABLE TO DETERMINE WHETHER THE TRIAL COURT PROPERLY BALANCED ADMISSION OF THE TESTIMONY REGARDING PRIOR BAD ACTS WITH ITS PREJUDICIAL EFFECTS DUE TO THE STATE'S FAILURE TO ARTICULATE WHAT THE EVIDENCE WAS PROBATIVE OF, OR WHY A COGNIZABLE EXCEPTION TO THE RATIONALE UNDERLYING PARAGRAPH B OF RULE 11-404, IT WAS PREJUDICIAL ERROR TO ADMIT EVIDENCE OF SUCH PRIOR UNCHARGED CONDUCT. STATE V. AGUAYO, 1992-NMCA-044, 114 N.M. 124, 835 P.2d 633.

RULE 11-403, N.M.R.A., ALLOWS COURTS TO EXCLUDE RELEVANT EVIDENCE IF ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY A DANGER OF ONE OR MORE OF THE FOLLOWING: UNFAIR PREJUDICE, CONFUSING THE ISSUES, MISLEADING THE JURY, UNNECESSARY DELAY, WASTING TIME, OR NEEDLESSLY PRESENTING CUMULATIVE EVIDENCE. STATE V. MARTIN, 1984-NMCA-077, 101 N.M. 394, 632 P.2d 937. THIS RULE REINFORCES THE VERY PURPOSE OF PARAGRAPH (B) OF RULE 11-404 N.M.R.A. STATE V. OTTO, 2005-NMCA-042, 137 N.M. 371, 111 P.3d —, CERT. GRANTED, 2005-NMCAERT-004. THE CRITICAL POINT MADE HERE IS THAT THE RULES OF EVIDENCE DO NOT LEAN TOWARD EXCLUSION, THEY ABSOLUTELY REQUIRE EXCLUSION IN NO UNCERTAIN TERMS WHEN THE PROSCRIBED CONDITIONS ARE MET; THE FIRST BEING "UNFAIR PREJUDICE." IN THIS CASE, DENYING OBVIOUS PREJUDICE WOULD BE TO EMPLIFY

IGNORANCE, IF NOT DELIBERATE INDIFFERENCE, OF THE HIGHEST ORDER.

EVIDENCE IS UNFAIRLY PREJUDICIAL "IF IT IS BEST CHARACTERIZED AS SENSATIONAL OR SHOCKING, PROVOKING ANGER, INFLAMMING PASSIONS, OR AROUSING OVERWHELMING SYMPATHETIC REACTIONS, OR PROVOKING HOSTILITY OR REVULSION OR PUNITIVE IMPULSES, OR APPEALING ENTIRELY TO EMOTION AGAINST REASON." STATE V. STANLEY, 2001-NMSC-037, 131 N.M. 368, 374, 37 P.3d 85. EVEN IF WE COULD REALISTICALLY ARGUE THAT THE 404(B) EVIDENCE, IN AND OF ITSELF IS NOT "UNFAIRLY" PREJUDICIAL, THE SAME CANNOT BE SAID, AND IS NOT TRUE OF, THE QUANTUM OF INFELICITOUS 404(B) EVIDENCE PRESENTED TO THE JURY.

"ERROR IN THE ADMISSION OF EVIDENCE IN A CRIMINAL TRIAL MUST BE DECLARED PREJUDICIAL AND NOT HARMLESS IF THERE IS A REASONABLE POSSIBILITY THAT THE EVIDENCE COMPLAINED OF MIGHT HAVE CONTRIBUTED TO THE CONVICTION." CLARK V. STATE, 112 N.M. 485, 487, 816 P.2d 1107, 1109 (1991). THE UNITED STATES SUPREME COURT DEFINES "PREJUDICE TO MEAN THAT "THERE MUST BE A REASONABLE PROBABILITY THAT THE ERROR AFFECTED THE OUTCOME OF THE TRIAL." UNITED STATES V. MARCUS, U.S. —, 130 S.Ct. 2159, 2164, 176 L.Ed.2d 1012 (2018). IN THIS INSTANCE, THE 404(B) EVIDENCE CAUSED UNFAIR PREJUDICE FOR EVERY CASE STATED ABOVE IN STANLEY. WHATEVER, THE 404(B)

EVIDENCE CONFUSED THE JURY BY REPEATEDLY INTERMIXING CHARGED AND UNCHARGED CRIMES THROUGHOUT THE TRIAL AND, MISLED THE JURORS BY ALLOWING THEM TO USE THE PRIOR BAD ACTS, AS WELL AS THE NON-JURISDICTIONAL ACTS, AS SUBSTANTIAL PROOF OF PETITIONER'S GUILT. THE REASONABLENESS DERIVED FROM THESE FACTS ARE UNAVOIDABLE GIVEN THE CLARITY OF THE RECORD.

WHEN THERE IS ERROR IN ADMITTING 404(B) EVIDENCE, AS WE HAVE HERE, PREJUDICE IS ESTABLISHED WHEN THERE ARE CONVICTIONS. THEREFORE, A COURT SHOULD NOT SPECULATE THAT THE ERRONEOUS ADMISSION OF THE EVIDENCE DID NOT CAUSE A COMPROMISED VERDICT OF GUILTY. SEE GENERALLY, STATE V. BOSCARINO, 204 CONN. 714, 529 A.2d 1260, 1265 (1987). (PERSUASIVE REFERENCE). FROM THE CONVICTIONS WE CAN CONCLUDE THAT THE JURY WAS CONVINCINGLY PERSUADED BY THE PRIOR BAD ACTS EVIDENCE THAT MR. GONZALES HAD AN ESCALATING AFFINITY FOR SEXUALLY ABUSING HIS STEPDAUGHTER, NICOLE LABO; THAT IS WHAT THE PROSECUTION SET OUT TO ESTABLISH BY PRESENTING THE 404(B) EVIDENCE. THIS, THE INADMISSIBLE EVIDENCE ERRONEOUSLY CONTRIBUTED TO THE JURY'S GUILT DETERMINATION.

THE EXISTENCE OF A CONTEMPORANEOUS EXCEPTION FOR "LEWD AND LASCIVIOUS BEHAVIOR" DOES NOT ESCAPE PETITIONER'S ATTENTION. THIS EXCEPTION ALLOWED THE STATE TO INTRODUCE

A DEFENDANT'S PAST SEXUAL MISCONDUCT, IF SIMILAR IN NATURE TO THE CRIME IN WHICH THE DEFENDANT HAS BEEN INDICTED, TO DEMONSTRATE A LEWD AND LASCIVIOUS DISPOSITION TOWARD THE VICTIM. STATE V. SCOTT, 113 N.M. 525, 828 P.2d 958 (Ct. App. 1991). THE INSTANT CASE, HOWEVER, IS DISTINGUISHABLE. HERE, THE STATE NEVER SOUGHT, OR ARGUED ANY EXCEPTION AS TO THE INTENDED PURPOSE FOR INTRODUCING THE 404(B) EVIDENCE. EVEN IF THE STATE WOULD HAVE INTRODUCED THE 404(B) EVIDENCE UNDER THIS EXCEPTION, THE EXCEPTION WAS AT THE TIME, ON ITS WAY OUT THE DOOR; GOAT-A-SPEAK.

THE NEW MEXICO COURT OF APPEALS WASTE EXTENSIVELY IN THE LEWD AND LASCIVIOUS EXCEPTION IN STATE V. KIRBY, 2005-NMCA-106.

WE FIND IT EXCEEDINGLY DIFFICULT TO RECONCILE THE LANDERS EXCEPTION FOR EVIDENCE OF A LEWD AND LASCIVIOUS DISPOSITION TOWARD THE PROSECUTING WITNESS WITH RULE 11-404. IN THE RELATED CONTEXT OF EVIDENCE OF UNCHARGED SEXUAL MISCONDUCT WITH VICTIMS OTHER THAN THE PROSECUTING WITNESS, WE HAVE ACKNOWLEDGED THAT THE "LEWD DISPOSITION" EXCEPTION IS NOTHING MORE THAN A EUPHANISM FOR THE CHARACTER EVIDENCE WHICH FRE 404(B) AND ITS STATE COUNTER PARTS ARE DESIGNED TO EXCLUDE. STATE V. LUCERO, 114 N.M. 489, 492-93, 840 P.2d 1255, 1258-59.

(Ct. App. 1992). NOTHING IN THE EXPRESS LANGUAGE OF RULE 11-404 MANDATES THE PERPETUATION OF A COMMON LAW EXCEPTION TO THE GENERAL PROSCRIPTION OF PROPENSITY EVIDENCE; TO THE CONTRARY, THE LEWD AND LASCIVIOUS DISPOSITION EXCEPTION APPEARS TO FLATLY CONTRADICT THE GENERAL PROSCRIPTION OF PROPENSITY EVIDENCE FOUND IN RULE 11-404(A) AND REPEATED IN THE FIRST SENTENCE OF RULE 11-404(B). *Id.* (REJECTING LEWD AND LASCIVIOUS DISPOSITION EXCEPTION FOR EVIDENCE OF UNCHARGED CONDUCT WITH OTHER VICTIMS).

LOGICAL CONSISTENCY REQUIRES THAT WE EXTEND LUCERO TO THE ADMISSION OF EVIDENCE OF UNCHARGED MISCONDUCT WITH THE PROSECUTING WITNESS. WE AGREE WITH THE LATE CHIEF JUSTICE MONTGOMERY THAT THE LANDERS EXCEPTION IS "INDEFENSIBLE." STATE V. WILLIAMS, 117 N.M. 551, 561-62, 874 P.2d 12, 22-23 (1994). WHILE WE MAY SYMPATHIZE WITH THE STATE'S DESIRE TO IMPROVE ITS POSITION, AND WHILE WE RECOGNIZE THE POTENTIAL DIFFICULTY IN PROSECUTING SUCH CASES INVOLVING SEX CRIMES AGAINST CHILDREN, IT IS EQUALLY TRUE THAT THE APPROPRIATE SOLUTION IS NOT TO WINK AT THE DICTATES OF RULE 11-404(B). WE HEREBY DISAVOW LANDERS AND ITS PROGENY'S INDEFENSIBLE DISTINCTION BETWEEN EVIDENCE OF LEWD AND LASCIVIOUS DISPOSITION TOWARD THE PROSECUTING WITNESS AND EVIDENCE OF A LEWD A LASCIVIOUS DISPOSITION TOWARD OTHER VICTIMS.

AT THIS POINT, PETITIONER REQUESTS THAT THE COURT TAKE JUDICIAL NOTICE OF THE YEAR KIRBY WAS ISSUED - 2005. NOTICE TOO, THAT THE MANIFEST FOR PETITIONER'S DIRECT APPEAL (NO. 25, 847) WAS ISSUED ON APRIL 24, 2008. THEREFORE, KIRBY WAS DECIDED PRIOR TO THE COMPLETION OF PETITIONER'S DIRECT APPEAL AND IS APPROPRIATELY APPLICABLE.

THIS IS WHERE NEW MEXICO'S VERSION OF RULE 404 DEPARTS FROM THE SOUND GUIDANCE OF THE FEDERAL RULES OF EVIDENCE. UNDER THE FEDERAL RULES, "THE COURT **MUST** CHARGE THE JURY TO CONSIDER THE EVIDENCE ONLY FOR THE LIMITED PURPOSE FOR WHICH IT WAS ADMITTED." THIS SAME INSTRUCTION IS NOT REQUIRED IN NEW MEXICO CRIMINAL CASES WHERE 404(B) EVIDENCE HAS BEEN INTRODUCED. RATHER NEW MEXICO REQUIRES A 404(B) INSTRUCTION TO BE GIVEN ONLY IF REQUESTED. THE COURT HAS NO DISCRETION OVER THE MATTER. SEE RULE 14-502B, NMRA (P.2).

PETITIONER CONTENTS THAT ON THE ISSUE OF FAILING TO REQUEST A 404(B) INSTRUCTION BE GIVEN TO THE JURY, DEFENSE COUNSEL'S PERFORMANCE FELL BELOW THAT OF A REASONABLY COMPETENT ATTORNEY. "A CONVICTED DEFENDANT MAKING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST IDENTIFY THE ACTS OR OMISSIONS THAT ARE ALLEGED NOT TO HAVE BEEN THE RESULT OF REASONABLE PROFESSIONAL JUDGMENT. THE COURT MUST THEN DETERMINE WHETHER IN LIGHT OF

ALL THE CIRCUMSTANCES, THE IDENTIFIED ACTS OR OMISSIONS WERE OUTSIDE THE WIDE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE." STRICKLAND V. WASHINGTON, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). TO PREVAIL, A PETITIONER "MUST PROVE [1] THAT COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT AND [2] THAT COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED THE DEFENSE, DEPRIVING THE PETITIONER OF A FAIR TRIAL WITH A RELIABLE RESULT." BOYD V. WARD, 179 F.3d 904, 913 (10TH CIR. 1999) (CITING, STRICKLAND, 466 U.S. AT 687). "THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL IS IDENTICAL UNDER FEDERAL AND STATE CONSTITUTIONS." STATE V. BROZEL, 1990-NMCA-D10, P14, 109 N.M. 752, 790 P.2d 1033, CERT. DENIED, 109 N.M. 631, 788 P.2d 931 (1990). IMPORTANTLY, WHEN "[1] CONSIDERING A CLAIM OF IAC, THE ENTIRE PROCEEDING MUST BE CONSIDERED AS A WHOLE." STATE V. SCOTT, 1991-NMCA-81, P25, 113 N.M. 525, 828 P.2d 958 (Ct. App. 1991), CERT. QUASHED, 113 N.M. 524, 828 P.2d 957 (1992).

WE CANNOT READ THE JUROR'S MINDS TO DETERMINE THE ACTUAL EXTENT OF THE EFFECT OR INFLUENCE CAUSED BY THE PREJUDICIAL PROPENSITY EVIDENCE. IT IS HIGHLY PROBABLE IF NOT FOR CERTAIN, THAT THE JURY UNDERSTOOD THE UNSUBSTANTIATED 944(B) EVIDENCE OF THE PRIOR ABUSE AS SUBSTANTIAL PROOF OF GUILT OF THE ACTS FOR WHICH THE PETITIONER WAS BEING TRIED. AT THE VERY LEAST,

IT CANNOT BE SAID BEYOND A REASONABLE DOUBT THAT THE JURY DID NOT IMPROPERLY RELY UPON THE 404(B) EVIDENCE WHEN FINDING THE PETITIONER GUILTY. THE MOST CONSTITUTIONALLY OFFENSIVE POSSIBILITY IS THAT DUE TO THE LACK OF INSTRUCTION, THE PETITIONER WAS FOUND GUILTY OF CHARGES FOR WHICH HE WAS NOT ON TRIAL DUE TO THE PRESENTATION OF THE PROPENSITY EVIDENCE. SEE, STATE V. KIRBY, 2005-NMCA-105, 138 N.M. 232, 118 P.3d 740, CERT. GRANTED, 2005-NMCA-008.

THE RULES OF EVIDENCE RECOGNIZE THE POTENTIAL HARM OF 404(B) EVIDENCE. THE CERTAINTY OF PREJUDICE IS SO GREAT THAT THE FRE REQUIRE THAT A LIMITING INSTRUCTION BE GIVEN TO THE JURY ANY TIME 404(B) EVIDENCE HAS BEEN PRESENTED DURING TRIAL. THIS FACT STRONGLY SUGGESTS THAT A REASONABLY COMPETENT DEFENSE ATTORNEY WOULD DO EVERYTHING POSSIBLE WITHIN THE RULES OF CRIMINAL PROCEDURE TO EXCLUDE DAMAGING 404(B) EVIDENCE; LIMIT THE USE OF 404(B) EVIDENCE AT TRIAL; AND IN THE MOST DIRE OF SITUATIONS, SEE TO IT THAT THE JURY RECEIVES LIMITING INSTRUCTIONS THAT WOULD PROTECT A DEFENDANT'S CONSTITUTIONAL INTERESTS TO A FUNDAMENTALLY FAIR TRIAL. THESE THREE THINGS ANGELA LUTAN COULD HAVE, AND SHOULD HAVE DONE; BUT SHE DID NOT. THERE IS NO STRATEGIC OR TACTICAL ADVANTAGE TO BE GAINED BY THE DEFENSE FOR NOT ATTEMPTING TO CONSTRAIN THE JURY'S EXPOSURE AND UTILIZATION OF THE

404(B) EVIDENCE. THUS, THE FIRST PRONG OF STRICKLAND HAS BEEN MET.

THE JURY, UNEQUIVOCALLY, SHOULD HAVE BEEN INSTRUCTED IN A MANNER THAT WOULD HAVE PRECLUDED A CONVICTION BASED ON AN INCORRECT LEGAL BASIS. IT IS WELL SETTLED THAT A PROPER JURY INSTRUCTION CAN CURE ERROR IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR BAD ACTS. HORKINSON V. SCHILLINGER, 866 F.2d 1155, 1198 (10TH CIR. 1989). HOWEVER, NO LIMITING OR CURATIVE INSTRUCTION WAS GIVEN IN THIS CASE. THE INESCAPABLE CONCLUSION IS THAT THE JURY MAY HAVE CONVICTED ON AN IMPROPER BASIS. UNITED STATES V. MUNIZ, 564 F.2d 1223, 1268 (10TH CIR. 1984). IN NEW MEXICO, THE LIMITING INSTRUCTION IS MANDATORY WHEN PROPERLY REQUESTED. GONZALES V. SANDOZ, 1984-NMCA-133, 103 N.M. 127, 703 P.2d 904. DEFENSE COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION RENDERED COUNSEL'S PERFORMANCE INEFFECTIVE. THE COURT IN STATE V. SANDERS HELD THAT WHERE "THERE IS A SUFFICIENT SHOWING OF PREJUDICE SO THAT THE FAILURE TO GIVE AN INSTRUCTION LIMITING A JURY'S CONSIDERATION OF PRIOR INCIDENTS OF CHILD ABUSE IS REVERSIBLE ERROR. 93 N.M. 450, 601 P.2d 83 (Ct. App. 1979). PREJUDICE IN THIS CASE IS DEMONSTRATED BY THE JURY'S UNACCOUNTED FOR APPLICATION AND UTILIZATIONS OF THE 404(B) EVIDENCE WHEN FINDING PETITIONER GUILTY OF 192 COUNTS. THE SECOND PRONG OF STRICKLAND IS CONCLUSIVELY ESTABLISHED.

PREJUDICE, IN THIS CASE, IS UNDENIABLE.

A REVIEW OF THE ADMISSION OR EXCLUSION OF EVIDENCE UNDER RULE 11-464(B) IS EVALUATED FOR AN ABUSE OF THE TRIAL COURT'S DISCRETION. STATE V. ALTEIBERS, 109 N.M. 453, 471, 786 P.2d 680, 698 (Ct. App. 1989), CERT. DENIED, 109 N.M. 419, 785 P.2d 1038 (1990); STATE V. WILLIAMS, 117 N.M. 551, 557, 874 P.2d 12, 18 (1994). SEE ALSO, UNITED STATES V. HOWELL, 285 F.3d 1213, 1267 (10TH CIR. 2002). AN ABUSE OF DISCRETION "OCCURS WHEN THE COURT'S 'RULING' IS CLEARLY AGAINST THE LOGIC AND EFFECT OF THE FACTS AND CIRCUMSTANCES OF THE CASE." ALTHOUGH THIS POINT HAS ALREADY BEEN EXPRESSED, IT IS WORTH REPEATING HERE; THE STATE DISTRICT COURT ACQUIESCED TO THE ADMISSION OF THE PRIOR BAD ACTS EVIDENCE. THE OBVIOUS ERROR SHOULD HAVE BEEN READILY APPARENT TO THE STATE DISTRICT COURT JUDGE GIVING HIM A REASONABLE OPPORTUNITY TO CORRECT IT. AT TRIAL, ALL PARTIES, INCLUDING JUDGES, ARE SUMMONED TO SECURE THE PROPER ADMINISTRATION OF JUSTICE. IT IS THE TRIAL COURT'S "DUTY TO SEE THAT NO IMPROPER STATEMENTS ARE MADE LIKELY TO INFLUENCE THE JURY ON THE VERDICT, AND THAT THE CAUSE IS TRIED UPON THE [PROPERLY ADMITTED] SWORN TESTIMONY OF THE WITNESSES." STATE V. CUMMINGS, 57 N.M. 36, 253 P.2d 321 (1953). WHEN A JUDGE, ENTRUSTED WITH THE MOST HIGHLY ESTEEMED RESPONSIBILITY OF OUR REPUBLIC, THAT IS, THE ADMINISTRATION OF OUR LAWS AND PROTECTING THE

CONSTITUTIONAL RIGHTS OF EVERY PERSON, CHOOSES TO SIT COMFORTABLY UPON HIS OR HER LAURELS RATHER THAN FULFILL THEIR JUDICIAL OBLIGATIONS, JUSTICE IS NOT SERVED.

BECAUSE THE COURT FAILED TO MAKE THE REQUISITE RULING ON THE ADMISSION OF THE 404(B) EVIDENCE, IT CANNOT BE SAID THAT THE MUTE COURT'S INACTION AMOUNTED TO A DEFACTO RULING IN FAVOR OF ADMISSION. RATHER, FROM THE SILENT RECORD, IT IS MORE ACCURATE TO SAY THAT THE STATE DISTRICT COURT'S DERELICTION OF ITS DUTY RESULTED IN A CONSTITUTIONALLY FLAWED TRIAL. THUS, THE COURT'S ILLICIT ALLOWANCE OF THE PREJUDICIAL 404(B) EVIDENCE MUST NECESSARILY BE CHARACTERIZED AS CLEARLY UNRELIABLE.

STATE V. SENA, 2008-NMASC-053, 144 N.M. 821, 192 P.3d 1198; STATE V. MASSENGILL, 2003-NMASC-024, 33 N.M. 2603, 62 P.2d 1209.

CASELAW IN NEW MEXICO IS CLEAR AND CONSISTENT IN HOLDING THAT ERRONEOUS ADMISSION OF EVIDENCE OF PRIOR CRIMES OF THE ACCUSED IS ERROR, ABSENT SPECIAL CIRCUMSTANCES. CAUSAS V. STATE, 94 N.M. 58, 607 P.2d 596 (1980); STATE V. MARTINEZ, 94 N.M. 50, 607 P.2d 137 (Ct. App. 1980). A PETITIONER CAN ONLY PREVAIL IF THE TRIAL COURT'S ADMISSION OF THE OTHER-ACT'S EVIDENCE RENDERED THE TRIAL SO FUNDAMENTALLY UNFAIR AS TO CONSTITUTE A DENIAL OF CONSTITUTIONAL RIGHTS. SEE,

ESTELLE V. MCGUIRE, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed. 2d 385 (1991) (AT D.5); SPENCER V. TEXAS, 385 U.S. 554, 563-64, 87 S.Ct. 648, 17 L.Ed. 2d 606 (1967); EIZENBER V. TRAMMEL, 803 F.3d 1129, 1145 (10TH CIR. 2015); MOORE V. MARR, 245 F.3d 1235, 1246 (10TH CIR. 2001).

NOTABLY, A COURT'S "INQUIRY INTO FUNDAMENTAL FAIRNESS REQUIRES EXAMINATION OF THE ENTIRE PROCEEDING."⁹³ LE V. MULLIN, 311 F.3d 1002, 1013 (10TH CIR. 2002). A PROCEEDING IS FUNDAMENTALLY UNFAIR UNDER THE DUE PROCESS CLAUSE IF IT IS "SHOCKING TO THE UNIVERSAL SENSE OF JUSTICE."⁹⁴

UNITED STATES V. RUSSELL, 411 U.S. 423, 432, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973). THE RECORD IN THIS CASE SUFFICIENTLY DEMONSTRATES AN ABUSE OF DISCRETION LED TO A PROCEDURE THAT IS "SHOCKING TO THE UNIVERSAL SENSE OF JUSTICE."⁹⁵

THE 404(B) ISSUE AROSE FROM THE PROSECUTOR'S FAILURE TO COMPLY WITH THE RULES OF EVIDENCE. THEREFORE, IT WOULD BE NEGLECT, IF NOT DISRESPECTFUL, TO NOT MAKE REFERENCE TO THE OFTEN QUOTED BERGER OPINION. "IT IS AS MUCH [A PROSECUTOR'S] DUTY TO REFRAIN FROM IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION AS IT IS TO USE EVERY LEGITIMATE MEANS TO BRING ABOUT A JUST ONE." STATE V. CUMMINGS, 57 HARR. 36, 39, 253 P.2d 301, 323 (1953) (QUOTING BERGER V. UNITED STATES, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1341 (1935)); SEE ALSO,

STATE V. COOPER, 2000-NMCA-41, P15, 129 N.M. 172, 3 P.3d 149

"THE SOLE DUTY OF A PROSECUTOR IS TO SEE THAT JUSTICE IS DONE."

JUSTICE IS NOT CONSTITUTIONALLY VIABLE WHEN A PROSECUTOR'S ACTIONS GO BEYOND THE LIMITATIONS PROSCRIBED UNDER THE RULES OF FUNDAMENTAL FAIRNESS. SUCH IS THE CIRCUMSTANCES FOUND IN THE CASE NOW BEFORE THE COURT.

PETITIONER ALLEGES THAT THE IMPROPER INTRODUCTION OF THE 404(E) EVIDENCE BY THE STATE WAS PREJUDICIAL PROSECUTORIAL MISCONDUCT. TO ESTABLISH A DUE PROCESS VIOLATION, AND THUS REVERSIBLE ERROR, THE DEFENDANT MUST DEMONSTRATE PREJUDICE. STATE V. HENRY, 78 N.M. 573, 574, 434 P.2d 692, 693 (1967); JOHNSON V. COX, 72 N.M. 55, 57, 380 P.2d 199, 201 (1963). PROSECUTORIAL MISCONDUCT OCCURS WHEN PROSECUTORIAL "IMPROPRIETIES HAD SUCH A PERSUASIVE AND PREJUDICIAL EFFECT ON THE JURY'S VERDICT THAT THE DEFENDANT WAS DEPRIVED OF A FAIR TRIAL."

STATE V. DUFFY, 1998-NMCA-014, P46, 126 N.M. 122, 967 P.2d 807, OVERRULED ON OTHER GROUNDS BY TOLLARD, 2012-NMASC - 008, P31 N.L., 275 P.3d. 110.

PROSECUTORIAL MISCONDUCT CANNOT GIVE RISE TO A CONSTITUTIONAL CLAIM UNLESS THE PROSECUTOR ACTS CONSTITUTE "EGREGIOUS MISCONDUCT," DONNELLY V. DE CHRISTOFORD, 416 U.S. 637, 647-48, 94 S.Ct. 1868, 40 L. Ed. 431 (1974). HOWEVER, IN ORDER TO DETERMINE WHETHER RELIEF IS

WARRANTED, PROSECUTORIAL MISCONDUCT MUST BE ASSESSED
 "IN THE CONTEXT OF THE ENTIRE TRIAL." *Id.* THE
 CONSTITUTIONAL QUESTION IS WHETHER A DEFENDANT WAS
 DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL - THAT IS
 "WHETHER THE PROSECUTOR'S COMMENTS [ACTIONS] SO INFECTED
 THE TRIAL WITH UNFAIRNESS AS TO MAKE THE RESULTING
 CONVICTION A DENIAL OF DUE PROCESS." *Id.*, SEE ALSO,
DARDEN V. MAINWRIGHT, 477 U.S. 168, 181, 196 S.Ct. 2464,
 91 L.Ed.2d 144 (1986). "ULTIMATELY, WE CONSIDER THE
 PROBABLE EFFECT THE PROSECUTOR'S REMARKS [ACTIONS]
 HAD ON THE JURY'S ABILITY TO JUDGE THE EVIDENCE FAIRLY."
BATEN V. GIBSON, 245 F.3d 1130, 1142 (10TH CIR. 2001).

IN THIS PARTICULAR INSTANCE OF MISCONDUCT THE FOCUS
 IS ON IRRELEVANT BUT ENORMOUSLY PREJUDICIAL 404(B)
 EVIDENCE THAT CAME BEFORE THE JURY WITHOUT DEFENSE
 COUNSEL'S OBJECTION, WHICH OF COURSE, DID NOT RELIEVE
 THE PROSECUTOR FROM HIS DUTY TO COMPLY WITH THE RULES
 OF EVIDENCE, AND, EVEN MORE IMPORTANTLY, THE RULES
 OF FUNDAMENTAL FAIRNESS. THE JURY IN MR. GONZALES'
 TRIAL WAS ILL EQUIPPED, AND INCAPABLE OF JUDGING
 THE SANDOVAL COUNTY EVIDENCE FAIRLY IN LIGHT OF THE
 PROSECUTOR'S FLAGRANT VIOLATION OF THE RULES. AS A RESULT,
 MR. GONZALES' CONVICTIONS FOR CRIMES WHICH HE WAS NOT
 CHARGED CONSTITUTES A CLEAR DUE PROCESS VIOLATION
 THAT AMOUNTS TO FUNDAMENTAL ERROR.

IT IS EVIDENT THAT THE PROSECUTOR'S MOTIVE WAS A CAREFUL AND METHODOICAL EXERCISE BEGINNING WITH HIS OPENING STATEMENT, CONTINUING THROUGH HIS CASE-IN-CHIEF, AND CULMINATING WITH HIS CLOSING ARGUMENT. THE OPENING STATEMENT PORTRAYED A HEART-WRECKING STORY OF A YOUNG CHILD BEING SEXUALLY ABUSED FOR YEARS BY HER STEP-FATHER; THE ONLY FATHER SHE HAD EVER KNOWN. THE DIRECT EXAMINATION OF THE PROSECUTRIX DETAILED THE VICTIMIZATION SHE ENDURED WHILE FOCUSING THE JURY'S ATTENTION ON THE 404(B) EVIDENCE TO IMPRESS UPON THE JURY MR. GONZALES' RELENTLESS PROPENSITY. THE CLOSING ARGUMENTS PRESENTED THE JURY WITH REITERATED AND UNTREATED PROVOCATION THAT ENCOURAGED AN EMOTIONAL VINDICATION COMMENSURATE WITH THE ATROCITIES SUFFERED BY A YOUNG GIRL AT THE HANDS OF HER STEP-FATHER SINCE THE AGE OF SIX.

THE IMPROPERLY ADMITTED EVIDENCE AT ISSUE ALLEGED SIMILAR UNCHARGED, UNREPORTED, AND UNPROVEN ACTS DEMONSTRATING PROCLIVITY. EVIDENCE, THAT IF VIEWED THROUGH THE LENS OF FRE 901, WOULD NOT BEAR ANY INDICIA OF RELIABILITY. THE EVIDENCE WAS HIGHLY PREJUDICIAL AND WHOLLY IRRELEVANT TO THE CHARGES RELATING TO THE TRIAL. FOR THESE REASONS, WE CANNOT KNOW WHETHER OR NOT MR. GONZALES WAS CONVICTED BECAUSE THE JURY BELIEVED HIM GUILTY OF THE OTHER

BAD ACTS OR OF THE CHARGES RELATING TO THE TRIAL. IT IS EXTREMELY IMPROBABLE THAT THE JURY BASED ITS VERDICT SOLELY UPON THE CHARGES FILED FOR CRIMES ALLEGED TO HAVE OCCURRED IN SANDOVAL COUNTY DUE TO THE PROSECUTOR'S OVER ZEALOUSNESS. WITHIN THE GIVEN CONTEXT, ANY OTHER APPROACH IS TOO DOMINANTIC TO BE CONSIDERED PLAUSIBLE.

SUCH UNCERTAINTY IN THE FACE OF PLAIN [FUNDAMENTAL] ERROR "SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OR JUDICIAL PROCEEDINGS." UNITED STATES V. ATKINSON, 294 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936). SEE GENERALLY, UNITED STATES V. CLAND, 507 U.S. 725, 734-36, 111 S.Ct. 1770, 123 L.Ed.2d 508 (1993); YARBADUGH V. ALVARADO, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004).

LASTLY, PETITIONER RAISES A NOVEL POINT OF CONSTITUTIONALITY THAT FURTHER EXPOSES THE IMPROPRIETY OF THE TRIAL PROSECUTOR'S ACTIONS. IT IS WIDELY ACCEPTED UNDER 404(B) JURISPRUDENCE THAT THE INTRODUCTION OF OTHER BAD ACTS EVIDENCE MAY RESULT IN A DEFENDANT BEING CONVICTED OF THE OTHER BAD ACTS RATHER THAN THE ACTUAL CHARGES PRESENTED TO THE JURY. IN THIS CASE, THAT VERY WELL MAY HAVE OCCURRED. PETITIONER CONTENTS THE CIRCUMSTANCES AS THEY ARE EXPOSED HIM TO DOUBLE JEOPARDY.

CRITICALLY, HAD BERNALILLO COUNTY CHOSEN TO PROSECUTE MR. GONZALES FOR THE CRIMES RELATED TO EVENTS THAT ALLEGEDLY OCCURRED WITHIN THAT JURISDICTION, HE WOULD HAVE HAD A PREVAILING ARGUMENT AGAINST THE PROHIBITION OF DOUBLE JEOPARDY. SEE, U.S. CONSTITUTIONAL AMENDMENTS V AND XIV; N.M. CONSTITUTION ARTICLE 11, § 15 ("PROTECTING AGAINST BOTH SUCCESSIVE PROSECUTIONS AND MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE" STATE V. ARMIJO, 2005-UNCA-CID, P15, 136 N.M. 723).

THE 404(B) EVIDENCE RELATING TO CRIMINALITY THAT SUPPOSEDLY OCCURRED IN BERNALILLO COUNTY THAT WAS INTRODUCED DURING THE TRIAL IN SANDOVAL COUNTY WAS SO PERVERSE AND SO INFLAMMATORY THAT MR. GONZALES WAS LIKELY CONVICTED OF UNCHARGED AND NON-JURISDICTIONAL CRIMES. THUS, THE PROSECUTOR'S ACTIONS WERE NOT ONLY PREJUDICIAL TOWARD THE DEFENDANT, THEY ALSO HAD A SUBSTANTIAL EFFECT ON THE BERNALILLO COUNTY DISTRICT ATTORNEY'S PROPRIETY TO PROSECUTE THE SAME CRIMES. THE FACT THAT THE BERNALILLO COUNTY DISTRICT ATTORNEY DID NOT PROSECUTE MR. GONZALES CANNOT BE CONSTRUED AS SOMEHOW IRRELEVANT TODAY, TWENTY YEARS LATER.

SUMMATION

MR. GONZALES WAS NOT ON TRIAL FOR ANYTHING OTHER THAN WHAT WAS NOTICED IN THE SANDOVAL COUNTY GRAND JURY INDICTMENT. WE CANNOT KNOW, GIVEN THE EVIDENCE THAT CAME IN, WHETHER MR. GONZALES WAS CONVICTED FOR CRIMES THAT ALLEGEDLY TOOK PLACE IN BERNALILLO COUNTY, OTERO COUNTY, OR SANDOVAL COUNTY. THE SHEER VOLUME OF THE TRULY DAMAGING AND IRRELEVANT 404(B) CONDUCT DIVERTED THE JURY'S ATTENTION AWAY FROM THE RELEVANT ISSUES OF PROOF APPLICABLE TO THE SANDOVAL COUNTY CHARGES. THIS IS A REASONABLE DETERMINATION GIVEN THAT EVIDENCE OF PRIOR SEXUAL ABERRANT ACTS ARE SO HIGHLY PREJUDICIAL THAT A GUILTY VERDICT IS ALMOST A FORMALITY.

THERE WAS NOT JUST ONE ERROR OF 404(B) CONSEQUENCE. THERE ARE PAGES AND PAGES OF PREJUDICIAL TESTIMONY AND IMPROPER STATEMENTS PERTAINING TO INADMISSIBLE EVIDENCE OF NON-JURISDICTIONAL CONDUCT. JURORS HEARING THE EXTENSIVE PAGEANTRY OF THE 404(B) EVIDENCE DETAILING SEXUAL ABUSE THAT OCCURRED YEARS PRIOR IN BERNALILLO COUNTY, AND THE COMMINGLED CONTEMPORARY ABUSE THAT SUPPOSEDLY TOOK PLACE IN OTERO AND BERNALILLO COUNTIES, MAY HAVE READILY ASSUMED THAT THE INADMISSIBLE EXTRINSIC EVIDENCE OF ADDITIONAL

ABUSE SERVED CONCLUSIVELY AS SUBSTANTIAL EVIDENCE OF GUILT FOR THE SANDOVAL COUNTY CHARGES, ESPECIALLY GIVEN THAT THE JURY DID NOT RECEIVE ANY INSTRUCTION ON THE 404(B) EVIDENCE.

THEREFORE, THE MOST SIGNIFICANT DANGER POSED BY THE ADMISSION OF UNREPORTED, UNDISCLOSED AND UNADJUDICATED 404(B) EVIDENCE IS THAT THE JURY WAS CONFUSED AS TO THE PROPER WEIGHT TO BE GIVEN TO SUCH EVIDENCE. FOR SEVERAL REASONS THIS CANNOT BE OVERSTATED OR OVERLOOKED. ONE, THE PROSECUTION DID NOT DISCLOSE PRETRIAL THAT IT INTENDED TO USE 404(B) EVIDENCE AT TRIAL OR, STATE A CONSEQUENTIAL FACT TO BE INFERRED FROM THE EVIDENCE. TWO, THE STATE DISTRICT COURT NEVER MADE AN ADMISSIBILITY DETERMINATION OR, IDENTIFIED THE PURPOSE FOR WHICH THE EVIDENCE COULD BE ADMITTED. THREE, PETITIONER'S TRIAL COUNSEL NEVER ARGUED AGAINST THE ADMISSION OF PREJUDICIAL 404(B) EVIDENCE. FOUR, THE JURY WAS NOT INSTRUCTED ON HOW IT MAY OR MAY NOT CONSIDER AND APPLY THE 404(B) EVIDENCE TO THE CHARGES PUT BEFORE THE JURY FOR THEIR CONSIDERATION. FIVE, THE JURY WAS LIKELY CONFUSED AS TO WHAT EVIDENCE APPLIED TO WHICH CHARGES GIVEN THAT THERE WERE SO MANY INDISTINGUISHABLE COUNTS PRESENTED FOR DELIBERATION.

THE INESCAPABLE RESULT IS THAT THE JURY WAS PERMITTED TO ATTRIBUTE INADMISSIBLE EVIDENCE AS SUBSTANTIAL PROOF OF GUILT, AND IMPROPER PROSECUTORIAL STATEMENTS ARBITRARILY DURING ITS DELIBERATIONS PRODUCING AN UNTRUSTWORTHY AND WHIMSICAL DETERMINATION OF GUILT. SINCE THERE IS NO WAY TO DETERMINE IF MR. GONZALES WAS CONVICTED WITH CONSTITUTIONAL VALIDITY, IN TRUTH, SUBSTANTIAL JUSTICE WAS NOT SERVED DURING MR. GONZALES' TRIAL. THE PROFOUND OUTCOME WAS, THEREFORE, FUNDAMENTAL ERROR.

THE THIRTEENTH JUDICIAL DISTRICT COURT LACKED JURISDICTION TO CONVICT PETITIONER OF CRIMES THAT ALLEGEDLY OCCURRED IN BERNALILLO COUNTY (SECOND JUDICIAL DISTRICT), AND OTERO COUNTY (TWELFTH JUDICIAL DISTRICT). PETITIONER RAISES THIS CLAIM UNDER THE PROTECTIONS OF ARTICLE II, SECTION 14 OF THE NEW MEXICO CONSTITUTION, AND THE V, VI, AND XIV AMENDMENTS OF THE UNITED STATES CONSTITUTION.

AT TRIAL, THE JURY HEARD THE ALLEGED VICTIM, NICOLE LABO, TESTIFY THAT SHE WAS REPEATEDLY ABUSED BY MR. GONZALES IN THE FAMILY HOME LOCATED AT 1696 HALF CIRCLE, RIO RANCHO, SANDOVAL COUNTY, NEW MEXICO. MS. LABO'S TESTIMONY IS BEST CHARACTERIZED AS NONDESCRIPT GENERALITIES. WITHOUT REFERENCE TO SPECIFIC AND DISTINGUISHABLE INCIDENTS, MS. LABO PRIMARILY TESTIFIED TO A REOCCURRING COURSE OF CONDUCT THAT REPORTEDLY TOOK PLACE IN HER BEDROOM AND THE MASTER BEDROOM BETWEEN JULY 1997 AND JANUARY 2003.

THE JURY ALSO HEARD TESTIMONY ALLEGING THAT SIMILAR ABUSE HAPPENED INSIDE THE FAMILY'S 1992 FORD EXPLORER. ACCORDING TO MS. LABO, BETWEEN DECEMBER 2000 AND JANUARY 2003, MR. GONZALES REGULARLY HAD INTERCOURSE WITH HER WHEN THEY WERE ON THE WEST MESA IN BERNALILLO COUNTY.

ADDITIONALLY, THE JURY HEARD TESTIMONY FROM MS. LABO

THAT SOME OF THE ABUSE TOOK PLACE AT MR. GONZALES' MOTHER'S HOUSE. MS. LABO DID NOT ELABORATE ON A TIME FRAME OR THE NUMBER OF INCIDENTS THAT OCCURRED AT THIS LOCATION. THE CRITICAL POINT REGARDING THIS TESTIMONY IS THAT MR. GONZALES' MOTHER LIVED AT 1706 BELLAMAH DR. IN THE CITY OF ALAMOGORDO LOCATED IN OTERO COUNTY, NEW MEXICO THROUGHOUT THE ENTIRETY OF THE CHARGING PERIODS.

THE JURY WAS PERMITTED TO HEAR TESTIMONY OF JURISDICTIONAL AND NONJURISDICTIONAL CRIME WITHOUT DISTINCTION OR INSTRUCTION. AS A RESULT, UNCONSTITUTIONAL CONVICTIONS ARE INEXTRICABLY COMMINGLED AMONGST POTENTIALLY VALID CONVICTIONS. MR. GONZALES CONTENDS THAT THERE IS NO JUDICIOUS MANNER IN WHICH TO IDENTIFY WHAT EVIDENCE THE JURY USED TO SATISFY THE ELEMENTS OF EACH CRIME CHARGED. FURTHERMORE, IT IS UNKNOWABLE HOW THE NONJURISDICTIONAL ALLEGATIONS OF SEXUAL ABUSE FACTORED OVERALL INTO THE JURY'S DELIBERATIONS AND DETERMINATIONS OF GUILT. THEREFORE, ALL OF THE CONVICTIONS ARE TAINTED WITH PREJUDICIAL DUE PROCESS VIOLATIONS. MR. GONZALES DID NOT WAIVE HIS CONSTITUTIONAL RIGHTS TO BE TRIED BY A COURT OF COMPETENT JURISDICTION, NOR COULD HE.

THE STATE OF NEW MEXICO CHOSE TO CHARGE MR. GONZALES WITH 193 FELONY COUNTS UNDER THE COURSE OF CONDUCT DOCTRINE. EACH COUNT ALLEGES MR. GONZALES COMMITTED MULTIPLE ACTS OF THE CHARGED CRIMES DURING EACH MONTH-LONG CHARGING PERIOD BETWEEN

JULY 1997 AND JANUARY 2003. IN SUPPORT OF THE STATE'S THEORY, THE DISTRICT ATTORNEY ELICITED UNBRIDLED TESTIMONY FROM MS. LABO. DURING WHICH, MS. LABO ALLEGED THAT THE SEXUAL ABUSE OCCURRED IN THREE DIFFERENT JUDICIAL DISTRICTS.

THE FOLLOWING EXERPTS REFERENCE ALLEGATIONS OF SEXUAL ABUSE THAT OCCURRED IN BERNALILLO COUNTY. DIRECT QUOTES HAVE BEEN TAKEN FROM THE TRIAL RECORD AND REPRESENT A PRIMA FACIA SHOWING SUPPORTING PETITIONER'S CLAIM THAT THE STATE KNOWINGLY AND INTENTIONALLY INTRODUCED PREJUDICIAL TESTIMONY OF NONJURISDICTIONAL CRIMES DURING ITS CASE-IN-CHIEF.

DIRECT EXAMINATION

MR. ARITE (STATE) Q. I WANT TO TAKE YOU DECEMBER -- THROUGH YOUR BIRTHDAY AGAIN IN JULY, 2001. YOU TURNED 14, SO IT WAS STILL HAPPENING? WHAT WOULD HE DO? [VOL. I, TR-52].

NICOLE LABO (WITNESS) A. THE SAME THING. EITHER GO IN MY ROOM IN THE MIDDLE OF THE NIGHT OR HE WOULD TAKE ME OUT TO THE MESA.

Q. WHY DID HE TAKE YOU OUT TO THE MESA?

A. BECAUSE THAT'S WHEN I WAS LEARNING TO DRIVE.

Q. OKAY. AND WHAT WOULD HE DO OUT ON THE MESA?

A. HE WOULD TAKE ME BEHIND THESE BIG ROCKS AND HE WOULD TELL ME TO GET IN THE BACK SEAT. AND DID THE SAME THING THAT HE DID TO ME AT THE HOUSE, TAKE OFF MY PANTS AND MY UNDERWEAR AND

PENETRATE ME OUT THERE. [VOL. I, TR-53]

Q. YOU TALK ABOUT HIM DOING IT OUT ON THE MESA WHEN HE WAS TEACHING YOU TO DRIVE?

A. UH-HUH. [VOL. I, TR-54]

Q. AND DO YOU REMEMBER WHERE THESE INCIDENTS OCCURRED?

A. UH-HUH.

Q. AND WHERE'S THAT?

A. IN MY ROOM, IN HIS ROOM, AT-- ON -- IN THE MESA, AT HIS MOM'S HOUSE.

WHETHER OR NOT THE JURY HAD ANY COMPREHENSION OF SUBJECT MATTER JURISDICTION IS NOT THE POINT. HOWEVER, THERE IS A STRONG PRESUMPTION THAT THE COURT AND THE DISTRICT ATTORNEY KNEW OR SHOULD HAVE KNOWN THAT MR. GONZALES COULD NOT BE TRIED FOR CRIMES OUTSIDE THE JURISDICTION OF THE THIRTEENTH JUDICIAL DISTRICT. THE DISTRICT ATTORNEY REINFORCED MS. LABO'S TESTIMONY WITH THE CORROBORATING TESTIMONY OF HER MOTHER (LEAH SAAVEDRA).

DIRECT EXAMINATION

MR. ARITE (STATE) Q. WHEN DID NICOLE (MS. LABO) BEGIN TO LEARN TO DRIVE? [VOL. I, TR-123]

LEAH SAAVEDRA (WITNESS) A. PROBABLY ABOUT 14 - AROUND 14, 15.

Q. AND WHO BEGAN TO TEACH HER?

A. MARTIN.

Q. AND HOW WAS IT THAT HE BEGAN TO TEACH HER?

A. HE SAID HE WANTED TO START TEACHING HER HOW TO DRIVE, AND SO I LET HIM.

Q. OKAY. WHERE DID THIS OCCUR?

A. WELL, HE WOULD SAY HE WOULD TAKE HER TO AN OPEN AREA, AND THAT WAS CLOSE TO WHERE HE USE TO WORK, LIKE ON THE WEST SIDE. [VOL. I, TR-124]

THE STATE WAS WELL AWARE OF THE PROBLEMATIC NATURE ASSOCIATED WITH ANY TESTIMONY REGARDING ANY ABUSE ALLEGED TO HAVE TAKEN PLACE DURING THE DRIVING LESSONS ON THE WEST MESA. FURTHERMORE, THIS KNOWLEDGE WAS IN THE STATE'S POSSESSION TWO YEARS PRIOR TO TRIAL ON JANUARY 26, 2005. DETECTIVE KAREN MARTINEZ'S INVESTIGATIVE REPORT, CASE NO. D3000273, DATED JANUARY 21, 2003 CLEARLY STATES, "NICOLE TOLD THE OFFICERS [J. HOHMANN AND Sgt. R. LABBE] THAT THE LAST INCIDENT OCCURRED ON SUNDAY, JANUARY 19, 2003, IN THE WEST MESA OF BERNALILLO COUNTY." (P. 1, PAR. 2). ON PAGE THREE DETECTIVE MARTINEZ DESCRIBES THE LOCATION REFERENCED BY NICOLE LABE AS "THE AREA SOUTH OF PASEO DEL NORTE AND WEST OF UNIVERSE BLVD. NEAR THE SUBDIVISION OF VENTANA RANCH IN NW ALBUQUERQUE."

IN PARAGRAPH 18, ON PAGE 6 OF MARTINEZ'S REPORT SHE

MAKES REFERENCE TO THE S.A.N.E. (SEXUAL ASSAULT NURSE EXAMINER) INTERVIEW CONDUCTED BY MS. ALDANA. MARTINEZ WROTE, "NICOLE ALSO TOLD MS. ALDANA THAT SHE AND MARTIN (PETITIONER) HAD SEX IN THE CAR WHEN HE WOULD TAKE HER OUT DRIVING. NICOLE WAS THEN ASKED HOW MANY TIMES IT HAPPENED IN THE CAR AND SHE SAID MORE THAN FIVE (5) TIMES." MS. ALDANA FOLLOWED UP WITH A RELATED QUESTION TO LEAH (NICOLE'S MOTHER). "I THEN ASKED LEAH HOW LONG NICOLE HAD BEEN DRIVING AND SHE SAID THAT SHE (NICOLE) STARTED LEARNING WHEN SHE WAS AROUND 12 YEARS OF AGE. Id. AT 6.

PETITIONER RECOGNIZES THAT MARTINEZ'S REPORT WAS NOT ENTERED INTO EVIDENCE. THE JURY NEVER SAW THE REPORT OR HEARD TESTIMONY RELATED TO MUCH OF ITS CONTENT. THE REPORT IS CRITICAL EVIDENCE THAT IMPUTES THE DISTRICT ATTORNEY WITH OUTRIGHT MALFEASANCE.

JURISDICTION MEANS "THE COURT'S STATUTORY OR CONSTITUTIONAL POWER TO ADJUDICATE THE CASE." STEEL CO. V. CITIZENS FOR BETTER ENVIRONMENT, 523 U.S. 83, 89 (1998). THE CONCEPT OF SUBJECT MATTER JURISDICTION CAN NEVER BE FORFEITED OR WAIVED. CONSEQUENTLY, DEFECTS IN SUBJECT-MATTER JURISDICTION REQUIRE CORRECTION REGARDLESS OF WHETHER THE ERROR WAS RAISED IN DISTRICT COURT. SEE, e.g., LOUISVILLE & NASHVILLE R. CO. V. MOTTLEY, 211 U.S. 149 (1908); UNITED STATES V. COTTON, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

THE STATE ZEALOUSLY MADE ITS BED, AND NOW IT MUST LIE IN IT. BECAUSE THE JURY CONVICTED MR. GONZALES OF CRIMES IN WHICH IT LACKED JURISDICTION, FUNDAMENTAL ERROR HAS OCCURRED. THE STATE HAS THE IMPOSSIBLE BURDEN OF SHOWING THERE IS NO "REASONABLE POSSIBILITY THAT THE EVIDENCE COMPAINED OF MIGHT HAVE CONTRIBUTED TO THE CONVICTION[S]." JOHNSON, 2004-NMSC-29, 29, 136 N.M. 348, 98 P.3d 998 (QUOTING, CHAPMAN V. CALIFORNIA, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967)).

THE STATE NEED NOT TO HAVE BROUGHT INTO EVIDENCE ANY MENTION OF NONJURISDICTIONAL CRIMES IN ORDER TO OBTAIN CONVICTIONS FOR SEXUAL ABUSE THAT ALLEGEDLY OCCURRED IN SANDOVAL COUNTY. IN NEW MEXICO, MS. LABO'S TESTIMONY WAS SUFFICIENT TO SUPPORT A LAWFUL CONVICTION FOR A COURSE OF CONDUCT CHARGE. THE STATE HAD NOTHING TO GAIN BY THIS STRATEGY. THE ONLY PURPOSE THE STATE HAD FOR BRINGING NONJURISDICTIONAL CRIMES BEFORE THE JURY WAS TO ASSASSINATE MR. GONZALES' CHARACTER. MS. LABO TESTIFIED TO THE OCCURENCE OF THE MOST RECENT AND REMEMBERED ABUSE THAT LED TO THE DISCLOSURE OF THE ABUSE AND MR. GONZALES' ARREST. THESE ALLEGATIONS ARE IMMATERIAL TO THE ABUSE THAT REPEATEDLY TOOK PLACE IN SANDOVAL COUNTY. THIS EVIDENCE WAS USED AS A FORM OF PROPENSITY EVIDENCE TO DEMONSTRATE THAT MR. GONZALES MUST BE GUILTY OF THE EARLIER ABUSE.

UNDER THE CIRCUMSTANCES, THE PORTIONS OF TESTIMONY SPECIFICALLY ACCUSING OR REFERENCING ANY SEXUAL ABUSE THAT ALLEGEDLY

OCCURRED OUTSIDE THE JURISDICTIONAL BOUNDARIES OF THE THIRTEENTH JUDICIAL DISTRICT SHOULD HAVE BEEN EXCLUDED.

THE INADMISSABLE EVIDENCE CORROBORATED AND STRENGTHENED THE STATE'S CASE. THUS, CANNOT BE VIEWED AS HARMLESS ERROR.

PETITIONER'S CONVICTIONS FOR SIXTY-ONE (61) COUNTS OF KIDNAPPING VIOLATED HIS CONSTITUTIONAL RIGHT:

Q. NOT TO BE PROSECUTED OR SENTENCED TWICE FOR SUBSTANTIALLY THE SAME OFFENSE; AND

D. NEW MEXICO LEGISLATURE DID NOT INTEND FOR MULTIPLE ACTS OF ALLEGED KIDNAPPING TO BE CHARGED AS A COURSE OF CONDUCT;

IN NEW MEXICO IT IS COMMON FOR DISTRICT ATTORNEYS TO OVER PROSECUTE CASES ALLEGING SEXUAL ABUSE OF A CHILD. THIS IS OFTEN ACCOMPLISHED BY CHARGING AN EXCESSIVE AND UNSUPPORTED NUMBER OF COUNTS. THIS CASE IS NO DIFFERENT. WE ALL UNDERSTAND THAT SEX OFFENSES ARE PARTICULARLY HEINOUS, ESPECIALLY WHEN CHILDREN ARE INVOLVED. THIS IS WHY PROSECUTIONS OF THESE TYPES OF CASES MUST BE TEMPERED WITH RATIONAL, LEGAL REASONING AND NOT EMOTIONAL RESPONSES DRIVEN BY PERSONAL BIAS OR PUBLIC OPINION.

STATE SANCTIONED ABUSE OF THE CONSTITUTION MUST NOT BE TOLERATED. THE GOVERNMENT IS NOT ALLOWED TO BREAK THE LAW IN ITS EFFORTS TO ENFORCE THE LAW. IN OTHER WORDS, THE END IS NEVER JUSTIFIED BY THE MEANS.

THE FACTS OF THIS CASE UNEQUIVOCALLY DEMONSTRATE A QUENTESSENTIAL DEPICTION OF UNSUFFERABLE VIOLATIONS. MR. GONZALES' RIGHT TO BE FREE OF DOUBLE JEOPARDY WAS VIOLATED WHEN THE GOVERNMENT CHARGED ONE COUNT OF KIDNAPPING WITH EACH PAIR OF CSPM AND CSCM COUNTS. PETITIONER CONTENDS THAT HIS SIXTY-ONE (61) CONVICTIONS FOR KIDNAPPING DO NOT WITHSTAND JUDICIAL SCRUTINY. SIMPLY STATED, THE SIXTY-ONE (61) CONVICTIONS FOR KIDNAPPING ARE NOT SUPPORTED BY THE EVIDENCE PRODUCED AT TRIAL, NOR DO THEY COMPORT WITH DUE PROCESS.

2. THE PROSECUTOR'S THEORY OF THE CASE WAS THAT FOR EVERY ACT OF CSPM OR CSCM A CHARGE OF KIDNAPPING WAS WARRANTED. FURTHERMORE, BECAUSE MS. LABO WAS UNABLE TO ACCOUNT FOR EACH ACT OF ALLEGED ABUSE WITH PARTICULARITY, THE PROSECUTOR CHOSE TO CHARGE KIDNAPPING AS A COURSE OF CONDUCT RATHER THAN FOR EACH DISCREET INCIDENT. CHARGING A COURSE OF CONDUCT ALLEVIATED THE GOVERNMENT FROM HAVING TO PROVE EACH OF THE ESSENTIAL ELEMENTS FOR EACH INTIMATED EPISODE OF KIDNAPPING. THUS, BASED UPON THE PROSECUTOR'S UNDERSTANDING OF NMISA § 30-4-1 KIDNAPPING, AND NMRA 14-403 UJI KIDNAPPING, THE CRIME OF KIDNAPPING, CSCM, AND CSPM COULD ALL BE CHARGED FOR THE SAME CONDUCT WITHOUT OFFENDING THE CONSTITUTIONAL PRINCIPLES OF DOUBLE JEDPARDY. HE WAS WRONG.

MS. LABO TESTIFIED QUITE EXTENSIVELY REGARDING THE METHODOLOGY EMPLOYED DURING THE PURPORTED ABUSE. IN EACH INSTANCE SHE CONSISTENTLY DESCRIBED REOCCURRING BEHAVIOR THAT CAN ONLY BE CHARACTERIZED AS UNITARY CONDUCT. THE FOLLOWING VERBATIM EXCERPTS WERE TRANSPOSED FROM THE TRIAL TRANSCRIPTS IN ORDER TO ILLUSTRATE MS. LABO'S TRIAL TESTIMONY.

HE TOOK MY PANTS OFF AND MY UNDERWEAR AND HE SPREAD MY LEGS WITH HIS LEGS... AND THEN THAT'S WHEN HE STUCK HIS PEUS IN ME. [TT VOL. I, 226];

TO GO INTO MY ROOM IN THE MIDDLE OF THE NIGHT

AND TOUCH ME AND FINGER ME AND TRY TO HAVE
SEX WITH ME. [TT VOL. I, p34];

HE WOULD TAKE OFF MY PANTS, GET ON TOP OF ME,
SPREAD MY LEGS WITH HIS LEGS AND STICK HIS
PENIS INTO ME. [TT VOL. I, p36];

HE WAS TAKING OFF MY CLOTHES, MY PANTS AND MY
UNDERWEAR, SPREADING MY LEGS OPEN WITH HIS
LEGS AND PENETRATING ME WITH HIS PENIS.
[TT VOL. I, p37];

HE GOT ON TOP OF ME AND SPREAD MY LEGS WITH HIS
FEET, THAT'S HOW HE DID IT. [TT VOL. I, p42];

HE WOULD TAKE ME BEHIND THESE BIG ROCKS AND HE
WOULD TELL ME TO GET IN THE BACK SEAT. AND DID
THE SAME THING THAT HE DID TO ME AT THE HOUSE,
TAKE OFF MY PANTS AND MY UNDERWEAR AND PENETRATE
ME OUT THERE. [TT VOL. I, p53];¹

HE GOT ME IN THE BACK SEAT AND TOLD ME -- OR HE
TOOK OFF MY PANTS, PENETRATED ME. [TT VOL. I, p54].

¹ REFERS TO ALLEGED ABUSE IN BERNALILLO COUNTY.

MS. LABO'S TESTIMONY DESCRIBED RESTRAINT INCIDENTAL TO AN ACT OF SEXUAL ABUSE AND NOTHING MORE. TO CONVICT MR. GONZALES OF KIDNAPPING THE PROSECUTOR WAS REQUIRED BY LAW TO PROVE RESTRAINT OR RESTRICTION OF MS. LABO'S MOVEMENT PROCEEDING OR OCCURRING AFTER THE SEXUAL ABUSE DESCRIBED BY MS. LABO. THE JURY INSTRUCTION PRESENTED TO THE JURY STATED:

FOR YOU TO FIND THE DEFENDANT, MARTIN GONZALES, GUILTY OF KIDNAPPING AS CHARGED IN COUNT [#], THE STATE MUST PROVE TO YOUR SATISFACTION BEYOND A REASONABLE DOUBT EACH OF THE FOLLOWING ELEMENTS OF THE CRIME:

1. THE DEFENDANT TOOK, RESTRAINED, CONFINED OR TRANSPORTED NICOLE LABO BY FORCE;
2. THE DEFENDANT TO HOLD NICOLE LABO AGAINST HER WILL TO COMMIT A SEXUAL OFFENSE ON NICOLE LABO;
3. THIS HAPPENED IN NEW MEXICO ON OR BETWEEN [DATE] AND [DATE].

THE COUNT NUMBER AND THE CHARGING PERIOD DATES VARY FROM ONE INSTRUCTION TO THE NEXT. THE OMITTED DATA - INDICATED BY THE BRACKETS - DISTINGUISHES THE SEQUENCE AND TIME FRAME OF EACH CHARGE PRESENTED TO THE JURY. OTHERWISE, THE OVER-ALL STRUCTURE OF THE SIXTY-ONE (61) JURY INSTRUCTIONS FOR THE OFFENSE OF KIDNAPPING REMAINED UNCHANGED. THIS INSTRUCTION SUBSTANTIALLY TRACKS IN FORM AND FUNCTION WITH NMSA § 30-4-1 KIDNAPPING, AS AMENDED THROUGH 2004.

THE WORD "RESTRAINT" HAS HISTORICALLY BEEN PROBLEMATIC FOR PROSECUTORS WHO
 "PIGGYBACK" KIDNAPPING CHARGES BASED PURELY ON GENERIC TESTIMONY. "NEW MEXICO
 COURTS HAVE LONG HELD THAT A CONVICTION OF KIDNAPPING [] REQUIRES PROOF
 OF FORCE OR RESTRAINT BEYOND THAT INHERENT IN ANY OTHER CRIME, SUCH AS
 RAPE OR ROBBERY, OF WHICH THE DEFENDANT IS ALSO CONVICTED." STATE V. MCGUIRE,
 1990-NMSC-067, 110 N.M. 304, 308, 795 P.2d 996, 1000 (1990), AND
STATE V. CORNEAU, 1989-NMCA-040, 109 N.M. 81, 86, 781 P.2d 1159,
 1164 (Ct. App. 1989). "KIDNAPPING CANNOT BE CHARGED OUT OF EVERY
 [CRIMINAL SEXUAL PENETRATION CHARGE] WITHOUT SOME FORCE, RESTRAINT, OR DECEPTION
 OCCURRING EITHER BEFORE OR AFTER THE SEXUAL PENETRATION." STATE V. CRAIN,
 1997-NMCA-101, P.24, 124 N.M. 84, 946 P.2d 1025. THE INSTANT CASE IS
 NOT A CASE THAT DEMONSTRATES "FORCE, RESTRAINT, OR DECEPTION" OCCURRED
 EXTERNAL TO THE ALLEGED ABUSE. "THE KEY TO FINDING THE RESTRAINT ELEMENT
 IN KIDNAPPING, SEPERATE FROM THAT INVOLVED IN CRIMINAL SEXUAL PENETRATION,
 IS TO DETERMINE THE POINT AT WHICH THE PHYSICAL ASSOCIATION BETWEEN THE
 DEFENDANT AND THE VICTIM WAS NO LONGER VOLUNTARY." STATE V. JACOBS, 2000-
 NMSC-026, 129 N.M. 448, 10 P.3d 127. MS. LABO'S TESTIMONY WAS THAT
 SHE WAS RESTRAINED DURING AND ONLY UNTIL THE ACT WAS COMPLETED.

MCGUIRE, CORNEAU, CRAIN, AND JACOBS ALL PREDATE MR. GONZALES' TRIAL.

THUS, THE DOCTRINE OF UNITARY OR INCIDENTAL CONDUCT WAS WELL SETTLED
 PRECEEDING THE STATE'S PROSECUTION OF PETITIONER. IN FACT, THOSE EARLY
 DECISION STILL CONTINUE TO INFLUENCE THE LAW IN NEW MEXICO. SINCE
 PETITIONER'S TRIAL, THE NEW MEXICO COURT OF APPEALS WROTE, "WE
 CONCLUDE... THAT THE LEGISLATURE DID NOT INTEND TO PUNISH AS

KIDNAPPING RESTRAINTS THAT WERE MERELY INCIDENTAL TO ANOTHER CRIME."

STATE V. TRUJILLO, 2012-NMCA-112, 289 P.3d 238. THE EVIDENCE PRESENTED AT TRIAL RESTS SQUARELY UPON THE DOUBLE JEOPARDY PRINCIPLES ARTICULATED IN A NUMBER OF NEW MEXICO CASES PRIOR TO, AND AFTER PETITIONER'S TRIAL. TRUJILLO DID NOT ESTABLISH NEW LAW.

AFTER THE STATE RESTED, MS. LUTAN - COUNSEL FOR THE DEFENDANT - MOTIONED FOR A DIRECTED VERDICT ON ALL COUNTS. AT THIS POINT MR. ARITE MADE HIS OBJECTIONS ON BEHALF OF THE STATE. IN REGARDS TO THE KIDNAPPING CHARGES MR. ARITE STATED TO THE COURT:

YOUR HONOR, WE HAVE SHOWN THAT HE [MR. GONZALES] CONFINED HER [MR. LADON] OR RESTRAINED HER **WHEN** THESE THINGS WOULD OCCUR.

AGAIN, I WAS CAREFUL ABOUT ELICITING FROM THE WITNESS, AND SHE TESTIFIED ABOUT HOW SHE COULDN'T MOVE, HE WAS ALWAYS ON TOP OF **WHEN** THESE THINGS OCCURRED, SHE COULDN'T MOVE, SHE COULDN'T GET AWAY. **WHEN** THESE THINGS -- IT'S

SIGNIFICANT, YOUR HONOR, WHEN THESE THINGS DID NOT OCCUR, IT WASN'T BECAUSE SHE STRUGGLED AND PUSHED HIM AWAY, IT WAS BECAUSE SHE WAS ABLE TO SAY NO, NO, NO, NO, NO, NO. IT WASN'T BECAUSE SHE PHYSICALLY GOT AWAY FROM HIM

AND THAT'S WHAT KIDNAPPING IS ABOUT, IS THAT SHE WAS PHYSICALLY RESTRAINED OR PHYSICALLY CONFINED **DURING** THE INCIDENTS, AND SO WE HAVE SHOWN THOSE, YOUR HONOR.

(EMPHASIS ADDED). [TT VOL. II, P. 73]

THE PROSECUTOR DID NOT ARGUE TO THE COURT THAT ANY OTHER OF THE ELEMENTS OF KIDNAPPING OCCURRED PRIOR TO OR AFTER THE ALLEGED ASSAULTS; NOR COULD HE. MS. LABO'S TESTIMONY DID NOT INCLUDE ANY DESCRIPTION OF EVENTS OR ACTS THAT COULD POSSIBLY EQUATE TO SIXTY-ONE (61) COUNTS OF KIDNAPPING IN THE MIND OF A REASONABLE JURIST. HOW SUCH A JUDICIAL FARCE OF JUSTICE WAS ALLOWED IS BEYOND COMPREHENSION. THE PROSECUTOR'S WHOLE PRESENTATION WAS CENTERED ON THE RESTRAINT ASSOCIATED WITH AND INCIDENTAL TO THE CRIMES OF CSPM AND CSCM. THERE WAS NO CASE MADE FOR KIDNAPPING. DESPITE THE OBVIOUS LACK OF SUPPORTING EVIDENCE, THE COURT ONLY DIRECTED OUT COUNTS 73, 74, 75, 76, 77, 78, 166, 167, AND 168. THE STATE CONCEDED COUNT 129.

MS. LUTAN DID NOT PRESENT A DEFENSE CASE IN CHIEF. FURTHERMORE, THE COURT DENIED MR. GONZALES' REQUEST TO SPEAK ON HIS OWN BEHALF.

WHEN MR. ARITE MAKES HIS CLOSING ARGUMENT TO THE JURY, HE ONCE AGAIN REITERATES HIS ERRONEOUS UNDERSTANDING OF KIDNAPPING UNDER NEW MEXICO LAW. IN DOING SO, HE TELLS THE JURY:

"AND KIDNAPPING, WHICH IS THE LEGAL, STERILE TERM THEY USE FOR SOMEONE WHO'S BEING FORCED UNDERNEATH A HEAVY PARENT AND CAN'T MOVE, CAN'T GET AWAY." [TT VOL. III, 717];

"KIDNAPPING, UNDER THE LAW -- I MEAN, WE ALL HAVE THE IDEA OF KIDNAPPING, OF THAT SNATCHING ON THE STREET, SOMEONE

TAKING THEM AWAY AND CALLING UP AND SAYING, GIVE ME MONEY.

AND THAT'S CERTAINLY KIDNAPPING, BUT UNDER THE LAW, KIDNAPPING

IS ALSO BEING RESTRAINED SO THAT YOU CAN COMMIT AN ACT, A

SEXUAL ACT, AND THAT'S WHAT HAPPENED TO NICOLE EACH AND EVERY

MONTH." [TT VOL. III, P 18];

"SHE DESCRIBES TO YOU HOW HE IS ON TOP OF HER EVERY SINGLE TIME,

AND WHEN HE'S ON TOP OF HER, SHE CAN'T GET AWAY. THAT IS

KIDNAPPING. SHE IS BEING RESTRAINED. SHE CAN'T GO. THAT'S

KIDNAPPING." [TT VOL. III PP 18, 19].

MR. ARITE ARGUES BEFORE THE JURY THAT KIDNAPPING IS NOTHING MORE THAN

UNITARY CONDUCT. IN OTHER WORDS, LYING ON TOP OF A PERSON IS

KIDNAPPING. IF MS. LABO HAD TESTIFIED THAT SHE WAS LYING OR SITTING

ON TOP OF MR. GONZALES, WOULD MR. ARITE THEN HAVE ARGUED THAT

MS. LABO HAD KIDNAPPED MR. GONZALES? MR. ARITE'S REASONING AND

CONCLUSION ARE LEGALLY FLAWED. HOWEVER, TO THE JURY, THE PROSECUTOR'S

ARGUMENTS APPEARED TO BE CONGRUENT WITH THE INSTRUCTION ENUNCIATING

THE ELEMENTS OF KIDNAPPING. THIS POINT UNDERSCORES THE GULLIBILITY OF

A JURY COMPOSED OF LEGAL LAYMEN, AS WELL AS, UNDERMINES THE

PRESUMPTION OF CORRECTNESS ASSOCIATED WITH A GUILTY VERDICT. THINGS

ARE NOT ALWAYS WHAT THEY APPEAR TO BE. UNFORTUNATELY, THE TRUTH

TOO OFTEN REMAINS BURIED FOR YEARS. IN THIS CASE, IT SHOULDN'T HAVE

BEEN BURIED AT ALL. THE PREVAILING PRECEDENTS AT THE TIME OF

MR. GONZALES' TRIAL WERE REMARKABLY UNAMBIGUOUS. TO THIS DAY

THE LAW REMAINS FIRMLY ENTRENCHED WITHIN NEW MEXICO'S CASELAW.

MORE RECENTLY, FOLLOWING IN THE LONG LINE OF NEW MEXICO'S

KIDNAPPING JURISPRUDENCE, THE NEW MEXICO COURT OF APPEALS WROTE IN

STATE V. SIMMONS, "IN SPECIFICALLY ANALYZING WHETHER THE CONDUCT UNDERLYING KIDNAPPING AND [SEXUAL OFFENSE] CONVICTIONS IS

UNITARY, THIS COURT HAS HELD THAT UNITARY CONDUCT OCCURS WHEN

THE PROSECUTOR BASES ITS THEORY OF KIDNAPPING ON THE SAME

FORCE USED TO COMMIT [THE SEXUAL OFFENSE]." 2018-NMCA-015,

PAGE, 409 P.3d 1030. THE SIMMONS COURT'S HOLDING IS DIRECTLY ON

POINT WITH THE EVIDENCE IN THIS CASE. NEW MEXICO COURTS HAVE NOT

DEVIATED ON THIS ISSUE. ALL-IN-ALL, SERIOUS DOUBT EXISTS REGARDING

THE CONSTITUTIONALITY OF PETITIONER'S SIXTY-ONE (61) CONVICTIONS FOR

KIDNAPPING. THEREFORE, MR. GONZALES CONTENTS THAT THE FACTS AND LAW

IMPOSE A DUTY AND RESPONSIBILITY INCUMBENT UPON THE THIRTEENTH

JUDICIAL DISTRICT COURT TO VACATE ALL SIXTY-ONE (61) OF HIS CONVICTIONS

FOR KIDNAPPING AS BEING UNITARY/INCIDENTAL CONDUCT TO THE ACTS OF CSPIR.

PETITIONER'S CONVICTIONS FOR SIXTY-ONE (61) COUNTS OF KIDNAPPING VIOLATED

HIS CONSTITUTIONAL RIGHT:

D. NEW MEXICO LEGISLATURE DID NOT INTEND FOR MULTIPLE ACTS

OF ALLEGED KIDNAPPING TO BE CHARGE AS A COURSE OF CONDUCT.

MR. GONZALES CONTENTS THAT THE GOVERNMENT'S CHARGING SCHEME OF

SIXTY-ONE (61) MONTH LONG CHARGING PERIODS FOR AN ALLEGED COURSE

OF CONDUCT VIOLATES DUE PROCESS. FURTHERMORE, THIS CONTENTION

IS BASED UPON THE BELIEF THAT THE NEW MEXICO LEGISLATORS NEVER EXPRESSLY STATED OR INTIMATED A DESIRE FOR MULTIPLE ACTS OF KIDNAPPING TO BE CHARGED AS A SINGLE COUNT FOR A COURSE-OF-CONDUCT. KIDNAPPING IS ITSELF A COURSE-OF-CONDUCT CRIME WITH A DEFINITIVE BEGINNING AND END. THE GOVERNMENT'S SCHEME CHARGED A COURSE-OF-CONDUCT CRIME AS A COURSE-OF-CONDUCT. IF A SINGLE COUNT OF KIDNAPPING IS EVEN VIABLE BASED ON THE EVIDENCE, ALL OTHER COURSE-OF-CONDUCT KIDNAPPING CONVICTIONS WOULD BE RENDERED MULTIPICITOUS. WHICH, AS WE ALL KNOW, "MULTIPICITOUS COUNTS ARE IMPROPER BECAUSE THEY ALLOW MULTIPLE PUNISHMENTS FOR A SINGLE CRIMINAL OFFENSE." UNITED STATE V. MCINTOSH, 124 F.3d 1330, 1336 (10TH CIR. 1997).

THE CIRCUMSTANCES OF THIS CASE, AND THE LEGAL REASONING FOR EACH CHARGE OF KIDNAPPING, PROPOUNDED BY THE PROSECUTOR FORECLOSES ANY TENABLE PROPOSITION THAT WOULD SUBSTANTIATE THE PROPRIETY OF CHARGING MULTIPLE KIDNAPPINGS OF THE SAME VICTIM OVER A FIXED PERIOD OF TIME AS A SINGLE COUNT. THE MULTIPLE CHARGES AND CONVICTIONS IN THIS CASE WERE PLAINLY ERRONEOUS. THE STATUTE AT ISSUE PUNISHES A SINGLE COURSE-OF-CONDUCT AS A SINGLE OFFENSE. NEITHER THE STATUTE NOR THE COMMITTEE COMMENTARY MAKES ANY REFERENCE TO CHARGING MULTIPLE KIDNAPPINGS OF THE SAME VICTIM OVER A DISTINCT PERIOD OF TIME AS A SINGLE COUNT. THE STATUTE, 30-4-1 KIDNAPPING, N.M.S.A. (1997), SIMPLY STATES:

30-4-1 KIDNAPPING.

A. KIDNAPPING IS THE UNLAWFUL TAKING, RESTRAINING, TRANSPORTING OR CONFINING OF A PERSON, BY FORCE, INTIMIDATION OR DECEPTION, WITH INTENT:

- (1) THAT THE VICTIM BE HELD FOR RANSOM;
- (2) THAT THE VICTIM BE HELD AS A HOSTAGE OR SHIELD AND CONFINED AGAINST HIS WILL;
- (3) THAT THE VICTIM BE HELD TO SERVICE AGAINST THE VICTIM'S WILL; OR
- (4) TO INFLECT DEATH, PHYSICAL INJURY OR A SEXUAL OFFENSE ON THE VICTIM.

B. WHOEVER COMMITS KIDNAPPING IS GUILTY OF A FIRST DEGREE FELONY, EXCEPT THAT HE IS GUILTY OF A SECOND DEGREE FELONY WHEN HE VOLUNTARILY FREES THE VICTIM IN A SAFE PLACE AND DOES NO PHYSICAL INJURY OR A SEXUAL OFFENSE UPON THE VICTIM. NMSA 1997.

THE PLAIN LANGUAGE OF STATUTE 30-4-1 KIDNAPPING, IS THE STRONGEST MATERIAL SUPPORT FOR THE PROPOSITION THAT NEW MEXICO LEGISLATORS NEVER INTENDED FOR MULTIPLE ACTS OF KIDNAPPING TO BE CHARGED AS A SINGLE COURSE-OF-CONDUCT. IF THE LEGISLATORS HAD HAD SUCH INTENTIONS, THEY COULD HAVE EASILY INCLUDED THE APPROPRIATE LANGUAGE. BECAUSE THEY DID NOT, PETITIONER CONTENDS § 30-4-1 IS AMBIGUOUS AT WORSE, OR VERY CLEAR AT BEST.

THE NEW MEXICO LEGISLATURE IS CERTAINLY AWARE OF THE RULES REGARDING STATUTORY CONSTRUCTION. FIRST AND FOREMOST, THEIR OBLIGATION TO BE CLEAR AND CONCISE WHEN DRAFTING A PROPOSED LAW. WHEN DRAFTING § 30-3A-3 STALKING, NMSA, THE LEGISLATURE WAS CAREFUL TO INCLUDE THE DEFINITION FOR A "PATTERN OF CONDUCT" AT B.(2). STALKING IS A "PATTERN OF CONDUCT" OR "COURSE OF CONDUCT" CRIME CHARGED IN A MANNER

SIMILAR TO KIDNAPPING. BOTH KIDNAPPING AND STALKING REQUIRE THE ACCUSED TO ENGAGE IN AN ONGOING COURSE OF CONDUCT IN ORDER TO COMPLETE THE CRIMINAL ACT. AND YET, UNLIKE THE STALKING STATUTE, THE LEGISLATURE DID NOT INCLUDE ANY REFERENCE TO A "COURSE" OR "PATTERN" OF CONDUCT WITHIN THE KIDNAPPING STATUTE. MORE IMPORTANTLY THE STATUTE DOES NOT CONTEMPLATE FRAGMENTING A COURSE-OF-CONDUCT INTO CHARGEABLE OFFENSES.

IN A UNIT OF PROSECUTION CASE, "THE RELEVANT INQUIRY IS WHETHER THE LEGISLATURE INTENDED PUNISHMENT FOR THE ENTIRE COURSE OF CONDUCT OR FOR EACH DISCRETE ACT." SWAFFORD V. STATE, 1991-NMSC-043, P 8, 112 N.M.S., 810 P.2d 1223. SEE ALSO, SANABRIA V. UNITED STATES, 437 U.S. 54, 49-70, 98 S.Ct. 2170, 57 L.Ed. 2d 43 (1978) (DESCRIBING THE "UNIT OF PROSECUTION" AS A CONGRESSIONAL CHOICE" DETERMINING "WHETHER A PARTICULAR COURSE OF CONDUCT INVOLVES ONE OR MORE DISTINCT 'OFFENSE' UNDER THE STATUTE."). ACCORDING TO THE PROSECUTOR IN THIS CASE, "EACH DISCRETE ACT" WOULD BE THE INNUMERABLE ACTS OF ABUSE A JUROR WOULD DEDUCE FROM MS. LABO'S GENERIC TESTIMONY. IN NEW MEXICO, THE LEGISLATORS CHOSE TO PUNISH KIDNAPPING FOR EACH DISTINCT OFFENSE. "STATES HAVE THE AUTHORITY TO ENACT CRIMINAL STATUTES REGARDING A 'PATTERN OR A 'CONTINUING COURSE OF ABUSE'" VALENTINE, 395 F.3d AT 364. UNLESS THE LEGISLATURE DOES SO, THE STATE MUST EITHER CHARGE ONGOING CONDUCT AS A SINGLE OFFENSE OR CHARGE A DEFENDANT WITH AND PROVIDE EVIDENCE OF DISTINCT OFFENSES THAT WILL SUPPORT MULTIPLE COUNTS. STATE V. DOMINGUEZ, 143 N.M. 549, 2008-NMCA-029, 178 P.3d 834 (2007).

PETITIONER HAS BEEN UNABLE TO LOCATE A COMPARABLE CASE IN ANY STATE OR FEDERAL JURISDICTION. FOR THIS REASON, IT DOES NOT APPEAR TO BE AN ACCEPTED PRACTICE ANYWHERE TO CHARGE MULTIPLE ALLEGATIONS OF REPEATEDLY KIDNAPPING THE SAME VICTIM AS A SINGLE COURSE-OF-CONDUCT OFFENSE RATHER THAN A COUNT FOR EACH DISTINCT ACT OF ALLEGED KIDNAPPING. IN NEW MEXICO STATE V. DUMBOS STANDS TO SUPPORT PETITIONER'S UNDERSTANDING OF LEGISLATIVE INTENT THAT KIDNAPPING IS CHARGED FOR EACH DISCRETE ACT. 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, CERT. DENIED, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674. DUMBOS WAS CHARGED WITH TWO COUNTS OF KIDNAPPING THE SAME VICTIM. THE CHARGING INSTRUMENT PROVIDED NOTICE THAT EACH OFFENSE OCCURRED ON DIFFERENT DATES. THE POINT HERE IS THAT THE DISTRICT ATTORNEY DID NOT CHARGE ONE COURSE-OF-CONDUCT KIDNAPPING COUNT; HE CHARGED TWO SEPERATE AND DISTINCT COUNTS. ON DIRECT APPEAL, BOTH OF DUMBOS' KIDNAPPING CONVICTIONS WERE UPHOLD. THE COURT FOUND THAT THE EVIDENCE AT TRIAL WAS SUFFICIENT TO SUPPORT BOTH CONVICTIONS. IN THIS CASE NOTHING IN THE RECORD SUPPORTS SIXTY-ONE (61) CONVICTIONS FOR KIDNAPPING AS DISCRETE ACTS OR AS SIXTY-ONE (61) CONVICTIONS FOR KIDNAPPING AS A COURSE-OF-CONDUCT. (EVEN IF IT WERE PERMITTED UNDER NEW MEXICO LAW.).

THE RECORD SUPPORTS AND DEMONSTRATES THE TRUTH OF PETITIONER'S PROTESTATIONS. THE LAW IS UNAMBIGUOUS AND WELL ESTABLISHED. FOR THE REASONS STATED ABOVE, PETITIONER'S SIXTY-ONE (61) CONVICTIONS FOR KIDNAPPING MUST BE VACATED.

PETITIONER ASSERTS THAT CUMULATIVE ERROR REQUIRES THAT ALL OF CONVICTIONS BE VACATED AND THE MATTER SET FOR RETRIAL.

IN NEW MEXICO THE DOCTRINE OF CUMULATIVE ERROR IS TO BE STRICTLY APPLIED. STATE V. HAWLTON, 98 N.M. 746, 557 P.2d 1095 (1976). THE DOCTRINE CANNOT BE INVOKED IF NO IRREGULARITIES OCCURRED, STATE V. STEPHENS, 99 N.M. 52, 653 P.2d 863 (1982), OR IF THE RECORD AS A WHOLE DEMONSTRATES THAT A DEFENDANT RECEIVED A FAIR TRIAL, STATE V. VICTORIAN, 84 N.M. 491, 505 P.2d 436 (1973). A REVIEWING COURT HAS THE RESPONSIBILITY TO INSURE THAT A PERSON CONVICTED OF A CRIME HAS A FAIR TRIAL. STATE V. GOMEZ, 75 N.M. 545, 408 P.2d 48 (1965). AS SUCH, A COURT MUST REVERSE ANY CONVICTION OBTAINED IN A PROCEEDING IN WHICH THE CUMULATIVE IMPACT OF IRREGULARITIES IS SO PREJUDICIAL TO A DEFENDANT THAT HE IS DEPRIVED OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL. SEE, UNITED STATES CONSTITUTIONAL AMENDMENTS VI AND XIV; NEW MEXICO CONSTITUTION, ARTICLE 11, § 14.

THE SAME IS ALSO TRUE OF THE FEDERAL COURTS. "A CUMULATIVE-ERROR ANALYSIS MERELY AGGREGATE ALL THE ERRORS THAT INDIVIDUALLY HAVE BEEN FOUND TO BE HARMLESS, AND THEREFORE NOT REVERSIBLE, AN IT

ANALYZES WHETHER THEIR CUMULATIVE EFFECT ON THE OUTCOME OF THE TRIAL IS SUCH THAT COLLECTIVELY THEY CAN NO LONGER BE DETERMINED TO BE HARMLESS.⁹⁹

HOOVER V. MULLIN, 314 F.3d 1162, 1178 (10TH CIR. 2002);
BROWN V. SIMMONS, 515 F.3d 1072, 1097 (10TH CIR. 2008).

IF ANY OF THE ERRORS BEING AGGREGATED ARE CONSTITUTIONAL IN NATURE, THE CUMULATIVE ERROR MUST BE HARMLESS BEYOND A REASONABLE DOUBT. CHAPMAN V. CALIFORNIA, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

PETITIONER SETS FORTH THAT THE TRIAL RESULTING IN HIS CONVICTIONS IS RIFE WITH ERRORS. FURTHERMORE, EVERY ISSUE RAISED CURRENTLY RESULTED IN THE VIOLATION OF NUMEROUS STATE AND FEDERAL CONSTITUTIONAL PROVISIONS.

SHOULD A REVIEWING COURT DETERMINE THAT THE ERRORS WERE HARMLESS, PETITIONER CONTENTS THAT ANY CUMULATIVE EFFECT WARRANTS A NEW TRIAL.

THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs.

MARTIN GONZALES

DOB: April 2, 196

SSN: [REDACTED]

ADD: 1696 Halo Circle,
Rio Rancho, NM, 87124

Defendant.

FILED IN MY OFFICE
DISTRICT COURT CLERK

05 MAR 24 AM 10:14

THOMAS VALENCIA
DEPUTY
SANDOVAL COUNTY

NO: D-1329-CR-03-0057

DA# SV 03 0025

STATE #:230600 03 0218

JUDGMENT, SENTENCE AND COMMITMENT

On this 18th day of March, 2005, this case came before the Honorable George P. Eichwald, District Court Judge, for sentencing, the State appearing by Joseph F. Arite, Deputy District Attorney, the Defendant appearing personally and by his attorney, Angela R. Luhan, and the Defendant having been found guilty by a jury, accepted and recorded by the Court, of the offenses thirty six (36) counts of Criminal Sexual Penetration in the First Degree first degree felony offenses, contrary to § 30-9-11, NMSA 1978, as amended; twenty-five (25) counts of Criminal Sexual Penetration in the Second Degree, second degree felony offenses contrary to § 30-9-11, NMSA 1978; sixty-one (61) counts of Criminal Sexual Contact of a Minor in the Third Degree, third degree felony offenses contrary to § 30-9-13, NMSA 1978; and sixty-one (61) counts of Kidnapping, second degree felony offenses contrary to § 30-4-1, NMSA 1978.

Adjudication of Guilt. IT IS THE JUDGMENT OF THIS COURT that the Defendant is

guilty of the offenses stated above.

Sentence for each Count. The Defendant's sentence for each count is:

Count 1, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 3, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 5, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 7, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 9, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 11, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 13, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 15, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 17, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 19, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 21, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 23, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 25, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 27, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 29, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 31, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 33, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 35, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 37, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 39, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.

Count 41, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 43, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 45, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 47, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 49, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 51, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 53, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 55, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 57, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 59, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 61, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 63, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 65, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 67, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 69, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 71, Criminal Sexual Penetration First Degree, § 30-9-11: Eighteen (18) years.
Count 79, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 81, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 83, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 85, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 87 Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 89, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.

Count 91, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 93, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 95, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 97, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 99, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 101, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 103, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 105, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 107, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 109, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 111, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 113, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 115, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 117, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 119, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 121, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 123, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 125, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.
Count 127, Criminal Sexual Penetration Second Degree, § 30-9-11: Nine (9) years.

Running of the Sentences.

Each of the above Counts shall run consecutively to the next count listed one after the other.

Merged Counts

Counts 2 and 130 merge into Count 1.

Counts 4 and 131 merge into Count 3

Counts 6 and 132 merge into Count 5.

Counts 8 and 133 merge into Count 7.

Counts 10 and 134 merge into Count 9.

Counts 12 and 135 merge into Count 11.

Counts 14 and 136 merge into Count 13.

Counts 16 and 137 merge into Count 15.

Counts 18 and 138 merge into Count 17.

Counts 20 and 139 merge into Count 19.

Counts 22 and 140 merge into Count 21.

Counts 24 and 141 merge into Count 23.

Counts 26 and 142 merge into Count 25.

Counts 28 and 143 merge into Count 27.

Counts 30 and 144 merge into Count 29.

Counts 32 and 145 merge into Count 31.

Counts 34 and 146 merge into Count 33.

Counts 36 and 147 merge into Count 35.

Counts 38 and 148 merge into Count 37.

Counts 40 and 149 merge into Count 39.

Counts 42 and 150 merge into Count 41.

Counts 44 and 151 merge into Count 43.

Counts 46 and 152 merge into Count 45.
Counts 48 and 153 merge into Count 47.
Counts 50 and 154 merge into Count 49.
Counts 52 and 155 merge into Count 51.
Counts 54 and 156 merge into Count 53.
Counts 56 and 157 merge into Count 55.
Counts 58 and 158 merge into Count 57.
Counts 60 and 159 merge into Count 59.
Counts 62 and 160 merge into Count 61.
Counts 64 and 161 merge into Count 63.
Counts 66 and 162 merge into Count 65.
Counts 68 and 163 merge into Count 67.
Counts 70 and 164 merge into Count 69.
Counts 72 and 165 merge into Count 71.
Counts 80 and 169 merge into Count 79.
Counts 82 and 170 merge into Count 81.
Counts 84 and 171 merge into Count 83.
Counts 86 and 172 merge into Count 85.
Counts 88 and 173 merge into Count 87.
Counts 90 and 174 merge into Count 89.
Counts 92 and 175 merge into Count 91.
Counts 94 and 176 merge into Count 93.

Counts 96 and 177 merge into Count 95.
Counts 98 and 178 merge into Count 97.
Counts 100 and 179 merge into Count 99.
Counts 102 and 180 merge into Count 101.
Counts 104 and 181 merge into Count 103.
Counts 106 and 182 merge into Count 105.
Counts 108 and 183 merge into Count 107.
Counts 110 and 184 merge into Count 109.
Counts 112 and 185 merge into Count 111.
Counts 114 and 186 merge into Count 113.
Counts 116 and 187 merge into Count 115.
Counts 118 and 188 merge into Count 117.
Counts 120 and 189 merge into Count 119.
Counts 122 and 190 merge into Count 121.
Counts 124 and 191 merge into Count 123.
Counts 126 and 192 merge into Count 125.
Counts 128 and 193 merge into Count 127.

Total Sentence. **THEREFORE,** The Defendant is hereby SENTENCED to the custody of the New Mexico Department of Corrections for a period of 873 years. No portion of the above sentence is suspended.

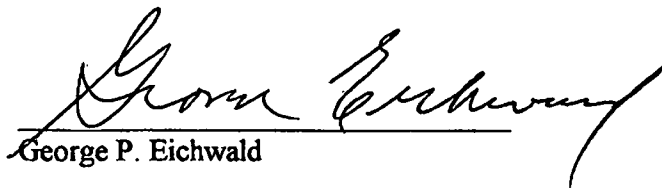
Commitment. YOU, the Sheriff of Sandoval County, are hereby ordered to confine and transport the above-named defendant to the Department of Corrections. Furthermore, YOU, the

Department of Corrections, are hereby ordered to take the above-named Defendant into your custody and confine him for the above term. Counts 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, and 71, Criminal Sexual Penetration in the First Degree; and Counts 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125, and 127, Criminal Sexual Penetration in the Second Degree are all "serious violent offenses," pursuant to NMSA 1978 § 33-2-34.

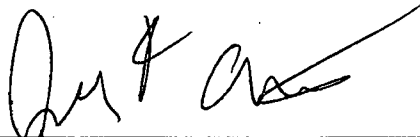
Upon release, the Defendant shall serve a parole period of two (2) years, and shall pay parole costs as determined by the Adult Probation and Parole Department.

IT IS FURTHER ORDERED:

1. **Pre-sentence Confinement.** The Defendant shall be given credit for two (2) years, one (1) month twenty-five (25) days pre-sentence confinement.
2. **Release of Bond.** Any bond posted in this cause may be released forthwith.
3. **DNA.** The Defendant shall provide a sample of biological material sufficient for DNA testing and shall pay a fee of \$100.00 for the combined DNA Index System (CODIS) to the Field Services Division of the New Mexico Corrections Department, pursuant to the DNA Identification Act, NMSA 1978 § 29-16-1, et seq.
4. **No contact with Victim(s).** Defendant shall not contact any victim(s) in this case.
5. **Sex Offender.** Defendant shall register as a Sex Offender for 20 years. Defendant shall not have unsupervised contact with minors.


George P. Eichwald

District Court Judge



Joseph F. Arite
Deputy District Attorney



Angela R. Luhan
Attorney for Defendant

I hereby certify that a true copy of the foregoing
Judgement was mailed to counsel of record this
23 day of March, 2005.



THIRTEENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANDOVAL

STATE OF NEW MEXICO,

Plaintiff,

vs.

MARTIN GONZALES,

DOB: [REDACTED]

SSN: [REDACTED]

ADD: C/O Sandoval County Detention Center
100 Montoya Road
Bernalillo, NM 87004

Defendant.

NO. **D1829 CR 030057**

STN: _____

DA# **SV-03-0025**

M-45-FR-2003-0050

CHARGE: Criminal Sexual Penetration
(Child Under 13)(37 Counts);

Alternative: Criminal Sexual Penetration
(Child Under 13 - Digital)(37 Counts);

Criminal Sexual Contact of a Minor
(37 Counts); Criminal Sexual Penetration
(Child 13 - 16 Years Old)(27 Counts);²⁴

Criminal Sexual Contact of a Minor
(Person in Position of Authority-27 Counts)²⁴

Bribery of a Witness (Threats-Reporting)

Kidnapping (64 Counts)

GRAND JURY INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between July 19, 1997 and August 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and [REDACTED] was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

KENNETH G. BROWN

FILED IN JURY OFFICE
DISTRICT JUDGE T. G. BROWN
03 FEB -6 PM 3:03

MERCEDES VALENCIA
CLERK OF DISTRICT COURT
SANDOVAL COUNTY

ALTERNATIVE TO COUNT 1

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between July 19, 1997 and August 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 2

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between July 19, 1997 and August 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 3

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between August 19, 1997 and September 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 3

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between August 19, 1997 and September 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 4

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between August 19, 1997 and September 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 5

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between September 19, 1997 and October 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 5

CRIMINAL SEXUAL PENETRATION
(Child Under 13)

That on or between September 19, 1997 and October 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 6

CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)

That on or between September 19, 1997 and October 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 7

CRIMINAL SEXUAL PENETRATION
(Child Under 13)

That on or between October 19, 1997 and November 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 7

CRIMINAL SEXUAL PENETRATION
(Child Under 13)

That on or between October 19, 1997 and November 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 8

CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)

That on or between October 19, 1997 and November 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 9

CRIMINAL SEXUAL PENETRATION
(Child Under 13)

That on or between November 19, 1997 and December 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 9

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between November 19, 1997 and December 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 10

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between November 19, 1997 and December 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 11

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between December 19, 1997 and January 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 11

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between December 19, 1997 and January 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 12

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between December 19, 1997 and January 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 13

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between January 19, 1998 and February 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 13

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between January 19, 1998 and February 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 14

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between January 19, 1998 and February 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 15

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between February 19, 1998 and March 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 15

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between February 19, 1998 and March 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 16

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between February 19, 1997 and March 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 17

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between March 19, 1998 and April 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 17

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between March 19, 1998 and April 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 18

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between March 19, 1997 and April 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 19

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between April 19, 1998 and May 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 19

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between April 19, 1998 and May 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 20

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between April 19, 1997 and May 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 21

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between May 19, 1998 and June 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 21

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between May 19, 1998 and June 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 22

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between May 19, 1997 and June 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 23

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between June 19, 1998 and July 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 23

**CRIMINAL SEXUAL PENETRATION
(Child Under 13)**

That on or between June 19, 1998 and July 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo, and Nicole Labo was twelve years of age or younger, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 24

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Child Under 13)**

That on or between June 19, 1997 and July 18, 1998, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and Nicole Labo was twelve years of age or younger, contrary to §30-09-13, NMSA 1978, as amended.

The Elements of Criminal Sexual Penetration of a Minor (Child Under 13), or in the Alternative: Criminal Sexual Penetration of a Minor (Child Under 13) (Digital) as contained and set forth in Count 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, are similarly reflected in Counts 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45 and 47 for the months of July, 1998 through June, 1999; and in Counts 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, and 71, for the months of July 1999, through June, 2000.

The appropriate charge is reflected in each Count as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>CRIMINAL SEXUAL PENETRATION</u> <u>CHILD UNDER 13</u>
25	Between July 19, 1998	and August 18, 1998
27	Between August 19, 1998	and September 18, 1998
29	Between September 19, 1998	and October 18, 1998
31	Between October 19, 1998	and November 18, 1998
33	Between November 19, 1998	and December 18, 1998
35	Between December 19, 1998	and January 18, 1999
37	Between January 19, 1999	and February 18, 1999
39	Between February 19, 1999	and March 18, 1999
41	Between March 19, 1999	and April 18, 1999
43	Between April 19, 1999	and May 18, 1999
45	Between May 19, 1999	and June 18, 1999
47	Between June 19, 1999	and July 18, 1999
49	Between July 19, 1999	and August 18, 1999
51	Between August 19, 1999	and September 18, 1999
53	Between September 19, 1999	and October 18, 1999
55	Between October 19, 1999	and November 18, 1999
57	Between November 19, 1999	and December 18, 1999
59	Between December 19, 1999	and January 18, 2000
61	Between January 19, 2000	and February 18, 2000
63	Between February 19, 2000	and March 18, 2000
65	Between March 19, 2000	and April 18, 2000
67	Between April, 19, 2000	and May 18, 2000
69	Between May 19, 2000	and June 18, 2000
71	Between June 19, 2000	and July 18, 2000

The elements of Criminal Sexual Contact of a Minor, Child under Thirteen, as contained and more fully set forth in Counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, and 24 are similarly reflected in Counts 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70 and 72, for the months from July, 1999 through June, 2000.

The appropriate charge is reflected in each Count as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>CRIMINAL SEXUAL CONTACT OF A MINOR (CHILD UNDER 13)</u>
26	Between July 19, 1998	and August 18, 1998
28	Between August 19, 1998	and September 18, 1998
30	Between September 19, 1998	and October 18, 1998
32	Between October 19, 1998	and November 18, 1998
34	Between November 19, 1998	and December 18, 1998
36	Between December 19, 1998	and January 18, 1999
38	Between January 19, 1999	and February 18, 1999
40	Between February 19, 1999	and March 18, 1999
42	Between March 19, 1999	and April 18, 1999
44	Between April 19, 1999	and May 18, 1999
46	Between May 19, 1999	and June 18, 1999
48	Between June 19, 1999	and July 18, 1999
50	Between July 19, 1999	and August 18, 1999
52	Between August 19, 1999	and September 18, 1999
54	Between September 19, 1999	and October 18, 1999
56	Between October 19, 1999	and November 18, 1999
58	Between November 19, 1999	and December 18, 1999
60	Between December 19, 1999	and January 18, 2000
62	Between January 19, 2000	and February 18, 2000
64	Between February 19, 2000	and March 18, 2000
66	Between March 19, 2000	and April 18, 2000
68	Between April, 19, 2000	and May 18, 2000
70	Between May 19, 2000	and June 18, 2000
72	Between June 19, 2000	and July 18, 2000

COUNT 73

CRIMINAL SEXUAL PENETRATION
(Child 13 to 16 years old)

That on or between July 19, 2000 and August 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was at least thirteen but less than sixteen years old, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to the act, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 73

CRIMINAL SEXUAL PENETRATION
(Child 13 to 16 years Old)

That on or between July 19, 2000 and August 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo and Nicole Labo was at least thirteen, but less than sixteen years old, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to the act, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 74

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Person in Position of Authority)**

That on or between July 19, 2000 and August 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, unlawfully touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to sexual contact, and Nicole Labo was at least thirteen but less than eighteen years old, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 75

**CRIMINAL SEXUAL PENETRATION
(Child 13 to 16 years old)**

That on or between August 19, 2000 and September 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was at least thirteen but less than sixteen years old, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to the act, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 75

**CRIMINAL SEXUAL PENETRATION
(Child 13 to 16 years Old)**

That on or between August 19, 2000 and September 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo and Nicole Labo was at lease thirteen, but less than sixteen years old, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to the act, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 76

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Person in Position of Authority)**

That on or between August 19, 2000 and September 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, unlawfully touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to sexual contact, and Nicole Labo was at least thirteen but less than eighteen years old, contrary to §30-09-13, NMSA 1978, as amended.

COUNT 77

CRIMINAL SEXUAL PENETRATION
(Child 13 to 16 years old)

That on or between September 19, 2000 and October 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, caused Nicole Labo to engage in sexual intercourse, and Nicole Labo was at least thirteen but less than sixteen years old, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to the act, contrary to §30-09-11, NMSA 1978, as amended.

ALTERNATIVE TO COUNT 77

CRIMINAL SEXUAL PENETRATION
(Child 13 to 16 years Old)

That on or between September 19, 2000 and October 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, caused the insertion, to any extent, of a finger in the vagina of Nicole Labo and Nicole Labo was at lease thirteen, but less than sixteen years old, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to the act, contrary to §30-09-11, NMSA 1978, as amended.

COUNT 78

**CRIMINAL SEXUAL CONTACT OF A MINOR
(Person in Position of Authority)**

That on or between September 19, 2000 and October 18, 2000, in Sandoval County, New Mexico, the defendant, Martin Gonzales, unlawfully touched or applied force to the intimate parts of Nicole Labo; to wit: vagina, breasts, buttocks or genital area, and the defendant was a person who by reason of his relationship to Nicole Labo was able to exercise undue influence over Nicole Labo and used this authority to coerce her to submit to sexual contact, and Nicole Labo was at least thirteen but less than eighteen years old, contrary to §30-09-13, NMSA 1978, as amended.

The Elements of Criminal Sexual Penetration of a Minor (Child 13 to 16-Person in Position of Authority), or in the Alternative: Criminal Sexual Penetration of a Minor (Child 13 to 16-Person in Position of Authority) (Digital) as contained and set forth in Counts 73, 75, and 77, are similarly reflected in Counts 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99 and 101 for the months of January, 2001 through December, 2001; and in Counts 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123 and 125, for the months of January, 2002, through December, 2002; and in Count 127 for the month of January, 2003.

The appropriate charge is reflected in each Count as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>CRIMINAL SEXUAL PENETRATION</u> <u>Child 13 to 16 Person in Position of Authority</u>
79	Between January 1, 2001	and January 31, 2001
81	Between February 1, 2001	and February 28, 2001
83	Between March, 1, 2001	and March 31, 2001
85	Between April 1, 2001	and April 30, 2001
87	Between May 1, 2001	and May 31, 2001
89	Between June 1, 2001	and June 30, 2001
91	Between July 1, 2001	and July 31, 2001
93	Between August 1, 2001	and August 31, 2001
95	Between September 1, 2001	and September 30, 2001
97	Between October 1, 2001	and October 31, 2001
99	Between November 1, 2001	and November 30, 2001
101	Between December 1, 2001	and December 31, 2001
103	Between January 1, 2002	and January 31, 2002
105	Between February 1, 2002	and February 28, 2002
107	Between March 1, 2002	and March 31, 2002
109	Between April 1, 2002	and April 30, 2002
111	Between May 1, 2002	and May 31, 2002
113	Between June 1, 2002	and June 30, 2002
115	Between July 1, 2002	and July 31, 2002
117	Between August 1, 2002	and August 31, 2002
119	Between September 1, 2002	and September 30, 2002
121	Between October 1, 2002	and October 31, 2002
123	Between November 1, 2002	and November 30, 2002
125	Between December 1, 2002	and December 31, 2002
127	Between January 1, 2003	and January 21, 2003

The elements of Criminal Sexual Contact of a Minor, Person in Position of Authority, as contained and more fully set forth in Counts 74, 76, and 78 are similarly reflected in Counts 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, and 102, for the months of January, 2001 through December, 2001, and Counts 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, and 126 for the months of January, 2002 through December, 2002 and Count 128 for the month from of January, 2003.

The appropriate charge is reflected in each Count as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>CRIMINAL SEXUAL CONTACT OF A MINOR</u> <u>Person in Position of Authority</u>
80	Between January 1, 2001	and January 31, 2001
82	Between February 1, 2001	and February 28, 2001
84	Between March, 1, 2001	and March 31, 2001
86	Between April 1, 2001	and April 30, 2001
88	Between May 1, 1001	and May 31, 2001
90	Between June 1, 2001	and June 30, 2001
92	Between July 1, 2001	and July 31, 2001
94	Between August 1, 2001	and August 31, 2001
96	Between September 1, 2001	and September 30, 2001
98	Between October 1, 2001	and October 31, 2001
100	Between November 1, 2001	and November 30, 2001
102	Between December 1, 2001	and December 31, 2001

104	Between January 1, 2002	and	January 31, 2002
106	Between February 1, 2002	and	February 28, 2002
108	Between March 1, 2002	and	March 31, 2002
110	Between April 1, 2002	and	April 30, 2002
112	Between May 1, 2002	and	May 31, 2002
114	Between June 1, 2002	and	June 30, 2002
116	Between July 1, 2002	and	July 31, 2002
118	Between August 1, 2002	and	August 31, 2002
120	Between September 1, 2002	and	September 30, 2002
122	Between October 1, 2002	and	October 31, 2002
124	Between November 1, 2002	and	November 30, 2002
126	Between December 1, 2002	and	December 31, 2002
128	Between January 1, 2003	and	January 21, 2003

COUNT 129

**BRIBERY OF A WITNESS
(Threats - Reporting)**

That on or between July 19, 1997 and August 18, 1997, in Sandoval County, New Mexico, the Defendant, Martin Gonzales, did, intimidate or threaten Nicole Labo, with intent to keep Nicole Labo from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense, contrary to §30-24-03, NMSA 1978, as amended.

The Elements of Kidnapping (victim freed in safe place and no great bodily harm inflicted) are added to the indictment as Counts 130 to 193 for a total of 64 additional counts. The dates of each count from 130 to 193 correspond to existing Counts 1 through 128.

The Elements of Kidnapping (victim freed in safe place and no great bodily harm) with the corresponding dates as specified in Counts 130 through 193 are set forth as follows::

(dates as listed in counts 130 to 193)
"That on or about [^]in Sandoval County, New Mexico, the Defendant, Martin Gonzales, took, restrained, confined or transported Nicole Labo by force, intimidation or deception intending to hold Nicole Labo for service against her will, or commit a sexual offense against Nicole Labo, contrary to §30-04-01, NMSA 1978, as amended."

The appropriate charge is reflected in each Count as specified below:

<u>COUNT</u>	<u>DATE</u>	<u>KIDNAPPING (Victim freed in a safe place)</u>
130	Between July 19, 1997	and August 18, 1997
131	Between August 19, 1997	and September 18, 1997
132	Between September 19, 1997	and October 18, 1997
133	Between October 19, 1997	and November 18, 1997
134	Between November 19, 1997	and December 18, 1997
135	Between December 19, 1997	and January 18, 1998
136	Between January 19, 1998	and February 18, 1998
137	Between February 19, 1998	and March 18, 1998

138	Between March 19, 1998	and	April 18, 1998
139	Between April 19, 1998	and	May 18, 1998
140	Between May 19, 1998	and	June 18, 1998
141	Between June 19, 1998	and	July 18, 1998
142	Between July 19, 1998	and	August 18, 1998
143	Between August 19, 1998	and	September 18, 1998
144	Between September 19, 1998	and	October 18, 1998
145	Between October 19, 1998	and	November 18, 1998
146	Between November 19, 1998	and	December 18, 1998
147	Between December 19, 1998	and	January 18, 1999
148	Between January 19, 1999	and	February 18, 1999
149	Between February 19, 1999	and	March 18, 1999
150	Between March 19, 1999	and	April 18, 1999
151	Between April 19, 1999	and	May 18, 1999
152	Between May 19, 1999	and	June 18, 1999
153	Between June 19, 1999	and	July 18, 1999
154	Between July 19, 1999	and	August 18, 1999
155	Between August 19, 1999	and	September 18, 1999
156	Between September 19, 1999	and	October 18, 1999
157	Between October 19, 1999	and	November 18, 1999
158	Between November 19, 1999	and	December 18, 1999
159	Between December 19, 1999	and	January 18, 2000
160	Between January 19, 2000	and	February 18, 2000
161	Between February 19, 2000	and	March 18, 2000
162	Between March 19, 2000	and	April 18, 2000
163	Between April, 19, 2000	and	May 18, 2000
164	Between May 19, 2000	and	June 18, 2000
165	Between June 19, 2000	and	July 18, 2000

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166	Between July 19, 2000	and	August 18, 2000
167	Between August 19, 2000	and	September 18, 2000
168	Between September 19, 2000	and	October 18, 2000
169	Between January 1, 2001	and	January 31, 2001
170	Between February 1, 2001	and	February 28, 2001
171	Between March, 1, 2001	and	March 31, 2001
172	Between April 1, 2001	and	April 30, 2001
173	Between May 1, 1001	and	May 31, 2001
174	Between June 1, 2001	and	June 30, 2001
175	Between July 1, 2001	and	July 31, 2001
176	Between August 1, 2001	and	August 31, 2001
177	Between September 1, 2001	and	September 30, 2001
178	Between October 1, 2001	and	October 31, 2001
179	Between November 1, 2001	and	November 30, 2001
180	Between December 1, 2001	and	December 31, 2001
181	Between January 1, 2002	and	January 31, 2002
182	Between February 1, 2002	and	February 28, 2002
183	Between March 1, 2002	and	March 31, 2002
184	Between April 1, 2002	and	April 30, 2002
185	Between May 1, 2002	and	May 31, 2002
186	Between June 1, 2002	and	June 30, 2002
187	Between July 1, 2002	and	July 31, 2002
188	Between August 1, 2002	and	August 31, 2002
189	Between September 1, 2002	and	September 30, 2002
190	Between October 1, 2002	and	October 31, 2002
191	Between November 1, 2002	and	November 30, 2002
192	Between December 1, 2002	and	December 31, 2002
193	Between January 1, 2003	and	January 21, 2003

The witnesses upon whom this **INDICTMENT** is based are as follows:

Detective Karen Martinez

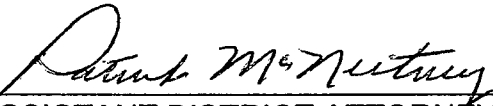
I hereby certify that the foregoing **INDICTMENT** is a True BILL.


FOREPERSON

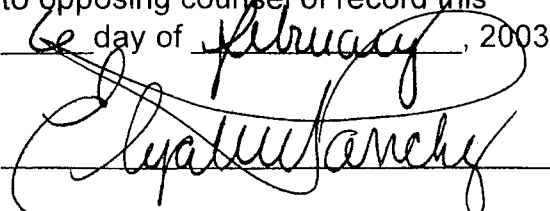
DATED: 2-6-03

RESPECTFULLY SUBMITTED
LEMUEL L. MARTINEZ
DISTRICT ATTORNEY

APPROVED BY:


ASSISTANT DISTRICT ATTORNEY

I hereby certify that a true copy
of the foregoing Indictment was mailed
to opposing counsel of record this
6 day of February, 2003.



PENALTIES

MARTIN GONZALES

SV-03-0025

CSPM - UNDER 13

COUNTS 1,3,5,7,9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71: and Alternative Counts to all above:
FIRST DEGREE FELONY:

A basic sentence of Imprisonment of eighteen years (18) and a fine not to exceed twelve thousand, five hundred dollars \$12, 500.

CSCM - UNDER 13

COUNTS 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72:
THIRD DEGREE FELONY:

A basic sentence of imprisonment of three years (3) and a fine not to exceed five thousand dollars, \$5,000.

CSPM - 13 TO 16

COUNTS 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, 101, 103, 105, 107, 109, 111, 113, 115, 117, 119, 121, 123, 125, 127, 130 through 193:
SECOND DEGREE FELONY:

A basic sentence of imprisonment of nine years (9) and a fine not to exceed ten thousand dollars, \$10,000.

CSCM - PERSON OF AUTHORITY

COUNTS 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100, 102, 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 129:
THIRD DEGREE FELONY:

A basic sentence of imprisonment of three years (3) and a fine not to exceed five thousand dollars, \$5,000.